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Political Diversity and the Legal Academy: Three Empirical Studies

By

James Cleith Phillips

A dissertation submitted in partial satisfaction of the

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of the

University of California, Berkeley

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Abstract

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Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

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Law and politics are inseparably connected, with numerous studies showing that politics plays an influential role in legal decision-making. And law schools primarily exist to transmit and produce knowledge. So the political demographics of the legal academia has the potential to significantly influence the production of legal knowledge in the United States. Yet while previous studies have shown that the political demographics of the legal academy tilt strongly in one direction, no one has yet sought to understand what some of the mechanisms might be that cause this disparity. Further, no one has attempted to document the production of knowledge in an increasingly partisan area of the law: religion.

This dissertation aims to begin filling those gaps. It does so through three empirical studies. The first tests several hypotheses as to why there are so few conservative or libertarian law professors: the Brain Hypothesis (lack of intellectual ability), the Greed Hypothesis (a desire for better paying jobs than academia), the Interest Hypotheses (a lack of interest in academic pursuits), and the Discrimination Hypothesis (discrimination based on political orientation). It does so by examining the publication and citation rates of law professors at the 16 highest-ranked law schools in the country. Using statistical matching techniques, the study examines a unique dataset to find that conservative/libertarian professors publish and are cited at nearly double the rate as their peers, a statistically significant difference. These findings are more consistent with a story of discrimination than the other potential hypotheses.

The second study leverages models of discrimination developed by Gary Becker and Kenneth Arrow to measure the “rank gap” in law school hiring based on political orientation discrimination. The study draws on a unique of all newly-hired law professors from 2001-2010, and finds, using statistical matching techniques, that conservative/libertarian law professors are hired law schools averaging 12-13 ranks lower (i.e., less prestigious) than their liberal peers, after controlling for other predictors of the ranking of the law school one is initially hired at.

Finally, the third study examines in a type of quantitative intellectual history the portrayal, or treatment, of religion in legal scholarship over a watershed 15-year period as relates to religion in American law, politics and society: 1998-2012. The study finds that religion is increasingly treated as something that is problematic, as compared to something positive, that not all religions are treated the same with some getting more favorable treatment in legal scholarship than others.

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INTRODUCTION

Law schools primarily exist to transmit and produce knowledge. This occurs in multiple ways. Law professors convey knowledge through teaching students, publishing articles, writing legal briefs, speaking at conferences, and testifying before government bodies. And law professors produce knowledge primarily through research, writing, and publishing academic articles. There are many factors that influence this production of knowledge. One such factor is politics. Since the Legal Realists first raised the argument in the first half of the 20th Century that law is merely politics in disguise,¹ scholarship has shown that at the very least, politics plays a heavy role in legal decision-making, and thus the formation of the law.² So it would make sense, for example, that people view the political make-up of the federal judiciary as influential on the development of case law in the United States. And no one would doubt that the political demographics of Congress will play a large role in which laws get enacted and which never see the light of day.

But what about the legal professoriate, who only indirectly influence the law, but who produce and convey the bulk of the nation's legal knowledge? Would it make any difference to the development of law in this country if the political ideology of the legal professoriate were largely skewed in one direction? A simple thought experiment can provide some superficial traction on that question. Imagine the entire legal professoriate were made up of law professors who had the exact same legal philosophy as Justice Sonia Sotomayor. Now imagine instead that the same scenario with a legal academy full of professors in the mold of Justice Clarence Thomas. Would the legal academy produce different scholarship, teach differently in the classroom, testify differently before Congress, and file different briefs in U.S. Courts? To ask the question is to answer it. Therefore, the production of legal knowledge will likely differ based on the political orientation of those producing that legal knowledge.

Few have examined this directly. Perhaps the only known study found that law professors' political ideology was statistically-significantly correlated with the ideological direction of the professors' research.³ And countless studies have found that the legal academy consists of an overwhelming majority of professors belonging to one general political perspective (obviously there is variation at the margins within political schools of thought, such as liberalism or conservatism).⁴

¹ See Robert A. Shiner, "Legal Realism," in Robert Audi, ed. *The Cambridge Dictionary of Philosophy* 425 (1995).

² See, e.g., J.A. SEGAL & H.J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (measuring the impact of political ideology on Supreme Court justices' votes); T. Miles & C. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823 (2007) (documenting the impact of political ideology on federal circuit court judges); Andrew Martin, Kevin Quinn, T. Ruger & P. Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 Perspectives on Politics 761 (2004); T. Ruger, P. Kim, Andrew Martin & Kevin Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Columbia L. Rev. 1140 (2004).

³ Adam Chilton & Eric Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. Legal Studies 277 (2015).

⁴ See Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.4 (1998); John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1186 (2005); Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237, 247 (2005); James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89 (2016); Adam Bonica, et al., *The Legal Academy's Ideological Uniformity*, SSRN, Feb. 22, 2018.

How might the titled political demographics of the U.S. legal academy impact the production of knowledge? It may magnify motivated reasoning and confirmation bias, resulting in less vetted legal scholarship.⁵ It may lead those who hold orthodox views to ignore or give short shrift to those with heterodox views, thus perhaps failing to incorporate the strengths or critiques of heterodox views.⁶ It may lead to errors in judgment because of a less than accurate understanding of particular issues or perspectives.⁷ It may result in the advancement of particular political views rather than an understanding of the state of the law.⁸ It may cause the legal academia to poorly predict how courts will deal with particular legal arguments.⁹ It could cause the legal academy to lose credibility with the public.¹⁰ And it could cause law professors to try and make their research appear less heterodox or avoid certain topics altogether.¹¹

Thus, correcting the legal academy's borderline political homogeneity could have important ramifications for the production of knowledge in legal academia. But the cause of the political disparity needs to be determined to know what the best solution might be. And while the relationship between political and legal trends may be common sense, more work needs to be done to document the trends in the production of legal knowledge. This dissertation takes a few modest steps towards addressing both of these issues.

First, two of the dissertation's three studies empirically examine potential causal mechanisms behind the lopsided political valence of the legal academy. The first examines this by seeing if, based on professors' political orientation, patterns in the production of legal scholarship, namely the number of articles law professors produce and how often those articles are cited, support possible explanations for the political demographics of the legal academy. The second study attempts to see if discrimination could at least partially explain the political lopsidedness of the academy by exploring if political orientation is related to the prestige of the law school one is hired at. As such, these two studies are the first known ones to explore causal mechanisms behind the political demographics of the U.S. legal academy. Second, the third study documents the trends of the treatment of religion in legal scholarship over a recent 15-year period to see if it tracks changes in the political world in a quasi-quantitative intellectual history, something no other scholarship has attempted on this scale in this particular area of law. Much more work is needed in this realm, but these three studies provide a small start. In short, this dissertation examines processes that contribute to—or pressures that come to bear on—the composition of law faculties and legal scholarship, as well as trends in the production of legal knowledge itself.

⁵ CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 8 (2009).

⁶ John Etchemendy, John Etchemendy: 'The threat from within', *Stanford News*, Feb. 21, 2017.

⁷ George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 *HARV. J.L. & PUB. POL'Y* 165, 166 (2014).

⁸ Chilton & Posner, *supra* note 3.

⁹ David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 *U. ILL. L. REV.* 805, 807–10.

¹⁰ Bonica et al., *The Legal Academy's Ideological Uniformity*, *supra* note 4.

¹¹ Shima Baradaran Baughman, *Liberal Bias in Legal Academia?*, *PrawfsBlawg*, Aug. 4, 2016.

STUDY #1—WHY ARE THERE SO FEW CONSERVATIVES AND LIBERTARIANS IN LEGAL ACADEMIA? AN EMPIRICAL EXPLORATION OF FOUR HYPOTHESES

INTRODUCTION

Imagine arriving in the United States in the 1950s. You know nothing about this country's past or present. You fall in love with baseball and attend numerous major league games, observing that there are very few black players. You hypothesize it could be for one of several reasons. Maybe black players are generally not as good as white players, so very few can make it to the elite levels of the game. But you would soon realize that the few black players on each team are talented—far better than the average white player. In fact, you would not know it at the time, but most of these black players would become Hall of Famers. A lack of ability does not explain their scarcity.

So maybe they are good enough but are interested in other sports or in doing something else entirely, so very few try to make it to the big leagues. But then you would see the hundreds of professional black players in the all-black leagues and would come to learn that baseball is the dominant sport in America for all segments of the population, with black children playing it much more than football or basketball. So it does not appear to be a lack of desire. That leaves one other explanation. Black players appear to be good enough, and appear to want to play in the major leagues, but very few do. It must be discrimination, you might think.¹² And you would have been correct.

Now, change eras and professions. There are very few conservative or libertarian law professors. They are the snail darter or great horned owl of the legal academy. But their numbers, while low, are stable, due in part to outliers like George Mason or Pepperdine where they are a majority of the faculty. Outside of such places, however, their numbers at any given faculty can usually be counted on one hand. Why? Maybe they are not good enough. Or maybe they are not interested in the life of the mind or are more interested in making money. These three explanations—what I call the Brainpower, Interest, and Greed Hypotheses—are not unique to law schools. Similar explanations are put forth for the scarcity of conservatives and libertarians in the social sciences. In attempting to explain the phenomena in the social sciences, one Harvard psychologist summarized these three hypotheses in one succinct sentence: “Liberals may be more interested in new ideas, more willing to work for peanuts, or just more intelligent.”¹³ Interestingly, women and racial and ethnic minorities also seem to be underrepresented on American law faculties. The reason must be the same, right? Paul Bloom, a Yale psychologist, notes: “There’s often a lot of irony in this area. The same people who are exquisitely sensitive to discrimination in other areas are often violently antagonistic when it comes to political orientation, bringing up clichéd arguments that they wouldn’t accept in other domains: ‘They aren’t smart enough.’ ‘They don’t want to be in the field.’”¹⁴

A journalist personally described a similar trend:

12. Even if this disparity were somewhat innocuously described as the costs of having black players on a team outweighed the benefits due to fan reactions or team cohesiveness, it would still be based on discrimination by someone, even if it was not the team management.

13. Maria Konnikova, *Is Social Psychology Biased Against Republicans?*, THE NEW YORKER (Oct. 30, 2014), <http://www.newyorker.com/science/maria-konnikova/social-psychology-biased-republicans> [<http://perma.cc/86RP-CTH7>].

14. *Id.*

I have had the following experience more than once: I am speaking with a professional academic who is a liberal. The subject of the underrepresentation of conservatives in academia comes up. My interlocutor admits that this is indeed a reality, but says the reason why conservatives are underrepresented in academia is because they don't want to be there, or they're just not smart enough to cut it. I say: "That's interesting. For which other underrepresented groups do you think that's true." An uncomfortable silence follows.¹⁵

This study explores these hypotheses. It does so using a unique dataset on publishing patterns amongst law professors at the top sixteen law schools in the country.¹⁶ Findings from this data call into question the seemingly glib justifications that conservatives and libertarians are not able to compete with their peers.

This study will proceed as follows: Part I lays out the background. Part II explains the dataset and methodology. Part III provides analysis, commentary, and caveats. Part IV discusses potential negative side effects of the low numbers of conservatives and libertarians in legal academia.

I. BACKGROUND

For some time now, scholars have documented not only the dearth of conservatives and libertarians on law school faculties but also the overall lack of diversity on many dimensions.

A. *Studies of the General Lack of Diversity in the Legal Academy*

The first major empirical study of the American law professoriate was done in 1980 by Donna Fossum.¹⁷ Fossum found that nearly a third of all law professors had received their J.D. degrees from one of five schools—Harvard, Yale, Columbia, Michigan, and Chicago—and that another quarter came from just fifteen other schools.¹⁸ Including professors with LL.M. degrees from one of these twenty institutions, Fossum found that a full 74% of law professors were produced by these feeder institutions, leading her to question whether “it is wise that the power to produce the legal profession’s ‘gatekeepers’ rests so completely in the hands of a few elite law schools.”¹⁹ The American Bar Association commented when Fossum’s work was released that “[w]ere we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system.”²⁰ Fossum also noted that women made up just 13% of law school faculties at the time.²¹

15. Pascal-Emmanuel Gobry, *How academia’s liberal bias is killing social science*, THE WEEK (Dec. 17, 2014), <http://theweek.com/article/index/273736/how-academias-liberal-bias-is-killing-social-science> [<http://perma.cc/L5K5-YS4K>].

16. To “test” a hypothesis implies statements regarding causality, and given the nature of this observational data and the study’s underlying research design, causality cannot be inferred here; hence, this study merely explores.

17. Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 5 AM. B. FOUND. RES. J. 501 (1980).

18. *Id.* at 507. The other schools were NYU, Georgetown, Texas, Virginia, Berkeley, Pennsylvania, Wisconsin, Northwestern, Stanford, Iowa, Illinois, Minnesota, Cornell, Duke, and George Washington. *Id.*

19. *Id.* at 547.

20. AM. BAR ASS’N, SPECIAL COMM. FOR A STUDY OF LEGAL EDUC., LAW SCHOOLS AND PROFESSIONAL EDUCATION 82 (1980).

21. Fossum, *supra* note 17, at 532.

Eleven years later Borthwick and Schau's study concluded that the "path to legal academia continues to be a narrow one,"²² and their findings were quite similar to Fossum's: one-third of professors in their sample received law degrees from Harvard, Yale, Columbia, Michigan, or Chicago, and 60% of their sample had J.D.s from one of the top twenty law schools.²³ However, women fared slightly better, comprising 20% of their sample.²⁴ Borthwick and Schau also identified two important hiring effects: clerkships and graduate degrees. Finding that almost 30% of new professors had clerked, the authors concluded that "judicial clerkships have emerged as a major way station on the path to a career in the legal teaching profession."²⁵ Furthermore, advanced degrees became more prevalent with 23% of professors holding LL.M.s, 17% having Master's degrees in non-law areas, and 5% having obtained Ph.D.s.²⁶

Richard Redding's 2003 study sampled tenure-track new hires from 1996–2000.²⁷ He found that inbreeding had become more severe, with 33% of professors obtaining their law degrees from either Harvard or Yale, 66% from the top twelve schools, and 86% from the top twenty-five schools.²⁸ This led Redding to conclude that "[i]t may be a de facto prerequisite for a faculty appointment to have graduated from a top law school, for almost all law professors have done so."²⁹ Gender and racial equality had increased, with 43% of the new hires being women, and 30% of new law professors coming from ethnic or racial minorities.³⁰ Also, the importance of clerking continued to grow, with 57% of new hires having had such an experience.³¹ Redding also noted a change in trends regarding advanced degrees, with LL.M.s and Master's degrees being held by only 13% and 16% of the sample respectively, but the percentage of Ph.D.-holding new hires having doubled from Borthwick and Schau's study to 10%.³² Emerging as a trend in new law professor backgrounds was prior teaching experience (37%), including time as a visiting assistant professor of law (or VAP, 16%).³³

More recently, Katz et al.'s 2010 social network analysis of the American law professoriate similarly finds a pattern of inbreeding characterized by "an extremely skewed distribution of social authority—even more than is present in other intellectual disciplines in the social sciences."³⁴ Additionally, George and Yoon have found that law schools have "continu[ed] to hire tenure-track professors who share the same credentials and experiences as tenured faculty"³⁵ Thus George and Yoon determined that for the 2007–2008 hiring cycle, what mattered was

22. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 236 (1999).

23. *Id.* at 226.

24. *Id.* at 194.

25. *Id.* at 216–17.

26. *Id.* at 212–13.

27. Richard E. Redding, "Where Did You Go to Law School?" *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594 (2003).

28. *Id.* at 600.

29. *Id.* at 607.

30. *Id.* at 600.

31. *Id.*

32. *Id.*

33. *Id.* at 601.

34. Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76, 78 (2011).

35. Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 38 (2014). See also Jeffrey M. Lipshaw, *Memo to Lawyers: How Not to "Retire and Teach,"* 30 N.C. CENT. L. REV. 151, 164 (2008) (observing that newly hired tenure-track professors are "almost uniformly, among the elite law schools' elite former students.").

attending Yale, Harvard, or Stanford; having publication in top law journals; having a clerkship; having a post-JD teaching fellowship; and not having been out of law school for a decade or more.³⁶

Finally, McCrary et al. recently looked at the pool of law professors at the top thirty-four law schools in the country as of 2011.³⁷ They found faculties to be overwhelming male and white, with 41% holding J.D.s from Harvard or Yale.³⁸ Over a quarter had Ph.D.s, and more than half had clerked and served on law reviews.³⁹ While these studies thoroughly focused on gender, racial, and intellectual diversity (the latter dealing with the area of law professors' Ph.D.s), political diversity was not explored. Other new studies bemoaning the lack of diversity in the legal academy have likewise only focused on more traditional conceptions of diversity, such as race or gender.⁴⁰

All of these studies suggest that the institutional, gender, and racial or ethnic demographics of the legal profession do not indicate high levels of diversity. Zenoff and Barron complain that law school “faculties merely reproduce narrow versions of themselves,” leading to a pernicious impact in legal education.⁴¹ Schneider et al. put forth the homogeneity of personality hypothesis, finding that hiring committees tend to hire candidates who are most similar to the members of the committee.⁴² This has implications for the curriculum, teaching styles, hiring practices, and ultimately the culture of law schools as “teachers tend to recreate the system they know best—the one that produced them.”⁴³ While “[m]embers of search committees insist that they seek the most qualified individuals,” they are also “understandably reluctant to admit to considering an applicant’s qualifications or characteristics that are not job-related.”⁴⁴

This mirror-image phenomenon of law school hiring has led to a deluge of criticism, with calls for increasing diversity in order to have higher quality educational experiences for students⁴⁵ and to break the current “monopoly on resources and opportunity” that has created a “de facto industry standard” favoring certain groups.⁴⁶ Such changes, critics contend, will be beneficial to all:

A truly dynamic law school would try not to replicate its own faculty, but to diversify it in order to improve its standards. Certainly, a faculty rich in experience

36. George & Yoon, *supra* note 35, at 33.

37. Justin McCrary et al., *The Ph.D Rises in American Law Schools, 1960–2011: What Does It Mean for Legal Education?*, J. LEGAL EDUC. (forthcoming).

38. *Id.* at 13.

39. *Id.*

40. See, e.g., Meera E. Deo, *The Ugly Truth about Legal Academia*, 80 BROOKLYN L. REV. 943, 961 (2015) (finding that only 37% of law professors are women and 15% are people of color).

41. Elyce H. Zenoff & Jerome A. Barron, *So You Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 493 (1983).

42. Benjamin Schneider et al., *Personality and Organizations: A Test of the Homogeneity of Personality Hypothesis*, 83 J. APPLIED PSYCHOL. 462 (1998).

43. Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 541 (1995).

44. Ethan S. Burger & Douglas R. Richmond, *The Future of Law School Faculty Hiring in Light of Smith v. City of Jackson*, 13 VA. J. SOC. POL’Y & L. 1, 17 (2005); see also Derrick A. Bell, *Diversity and Academic Freedom*, 43 J. LEGAL EDUC. 371 (1993) (arguing that there is an academic axiom that ideology and politics should not matter in hiring and tenure decisions, but that in reality they do matter).

45. See, e.g., Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L. J. 445 (2000).

46. Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 736 (2000).

is one that is rich in ideas. Different experiences and a diversity of ideas should lead to a better law school: better teaching, better scholarship, and better service.⁴⁷

With very few exceptions, however, the clamor for more diversity in law school faculties has not gone beyond gender, racial, and ethnic diversity. This seems odd given that even if gender, racial, and ethnic equality were achieved, a lack of meaningful *intellectual* diversity would still largely stifle law schools seeking to improve their standards by promoting a diversity of ideas.⁴⁸

B. *Studies of the Lack of Political & Ideological Diversity on Law School Faculties*

What do we know about the intellectual, political, and ideological diversity at American law schools? Steven Teles argues that despite attempts to increase the number of political conservatives on law school faculties, conservative-minded legal academics are still a small minority.⁴⁹ Nelson et al. posit that “[l]iberals, in large part, still remain in control of the institutions and processes of legal education.”⁵⁰ Klein and Stern likewise contend that American “liberalism” dominates the ranks of professors in the humanities and social sciences.⁵¹

That one side of the American ideological spectrum has gained and maintains ascendancy in legal education is not particularly surprising. Political psychologists believe that the majority of intellectuals have fully developed their ideological leanings by their late 20s, seldom modifying them much later in life.⁵² This perhaps means both that professors are unlikely to change their beliefs and that their students likely have not yet cemented their personal ideologies and are therefore open to persuasion and change. Social psychologists have found that generally once ideologies are locked in, intellectual satisfaction comes not from rethinking prior beliefs and decisions but from furthering and improving theories already accepted.⁵³ Furthermore, in an academic environment, “beliefs are deep seated and connected to selfhood and identify. For that reason, protecting and preserving them have high personal stakes.”⁵⁴ Additionally, social dynamic and group formation theories indicate that social groups are strongly inclined to search for as well as draw new members that are similar to the groups’ existing members, filter out and deter those who are different,⁵⁵ and shape those who are still malleable into their own likeness.⁵⁶ More

47. Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1039 (1997).

48. See, e.g., Zenoff & Barron, *supra* note 41, at 498 (“One type of diversity is intellectual. A law-school faculty should include people with divergent views on politics, economics, social policy, constitutional construction, states’ rights, etc.”).

49. STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 175, 273 (2008).

50. William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1798 (2009).

51. Daniel B. Klein & Charlotta Stern, *Groupthink in Academia: Majoritarian Departmental Politics and the Professional Pyramid*, 13 THE INDEPENDENT REV. 585, 586 (2009).

52. David O. Sears & Carolyn L. Funk, *Evidence of the Long-Term Persistence of Adults’ Political Predispositions*, 61 J. POLITICS 1, 1 (1999).

53. Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOCIAL PSYCHOL. 568 (1992); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998); Robert J. MacCoun & Susannah Paletz, *Citizens’ Perceptions of Ideological Bias in Research on Public Policy Controversies*, 30 POL. PSYCHOL. 43 (2009).

54. Klein & Stern, *supra* note 51, at 589.

55. Gordon W. Allport, *The Nature of Prejudice* (Reading, Mass.: Addison-Wesley, 1954); Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOCIAL ISSUES 429 (1999).

56. See Klein & Stern, *supra* note 51, at 589–90.

specifically from an educational institution's perspective, the tradition of majoritarianism in hiring and tenure decisions leads, over time, to ideological homogeneity.⁵⁷ These characteristics of individual, group, and institutional behavior have caused some to argue that the defects of the phenomenon of groupthink apply to academia.⁵⁸ In short, Nelson et al. write:

While liberal academics seem willing to tolerate a conservative minority in their midst . . . their relationships with liberal arts colleagues and overseas professionals, and their loyalty to donors who share their values all counsel in favor of their retention of command. Thus, we predict that liberals will continue to set the agenda and dominate the teaching and scholarship of the American legal academy.⁵⁹

Also, Stewart and Tolley found that more conservative law schools, were given lower academic assessments by peers in the *U.S. News and World Report* Law School Rankings despite no difference in scholarly activity (per school and per faculty measure of annually published articles).⁶⁰ It is possible that what is happening regarding the evaluation of institutions may similarly be happening when hiring committees evaluate individuals.

Five studies have directly or indirectly attempted to gauge the ideological gap in American law schools. First, Deborah Jones Merritt released the results of a survey of entry-level hires from 1986 to 1991 in her 1998 article,⁶¹ noting a gap with 75% of new hires being liberal and 10% being conservative.⁶² A 2005 study by John McGinnis and others looked at the campaign contributions of professors from the top twenty-one law schools in the country from 1992 to 2002 and found an ideological division of 81% of donations going to Democrats and 15% going to Republicans, though only professors who donated were included in the study.⁶³ Cardiff and Klein looked at the voter registration records of law professors in California schools, finding that 80% of professors were Democrats and 20% were Republicans (of those who identified a particular party).⁶⁴ Interestingly, the authors did not look at all California law professors—instead of a random sample, they purposely sampled from some schools they thought would be more likely to have Republican professors,⁶⁵ making their findings difficult to generalize to the California law professoriate more generally. Thus, their findings are likely an overestimate of the percentage of conservative professors at California institutions.

Looking at 1997 data on top hundred law schools, James Lindgren found that among the law professoriate, 80% considered themselves to be Democrats, and 13% viewed themselves as Republicans.⁶⁶ He also imputed that in 2013 among all law school faculties, 11% of professors

57. Stephen H. Balch, *Toward a Reconstitution of Academic Governance*, 17 ACADEMIC QUESTIONS 67, 69 (2004).

58. See Klein & Stern, *supra* note 51, at 595–96.

59. Nelson et al., *supra* note 50, at 1802–03.

60. Monte N. Stewart & H. Dennis Tolley, *Investigating Possible Bias: The American Legal Academy's View of Religiously Affiliated Law Schools*, 54 J. LEGAL EDUC. 136, 137 (2004).

61. Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765 (1998).

62. See *id.* at 780 n.54.

63. John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1186 (2005).

64. Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237, 247 (2005). These findings of a 4:1 ratio of Democrats to Republicans were determined after filtering out those who could not be identified or who belonged to a third party. *Id.*

65. *Id.* at 240.

66. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 39 (2016); see also Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV.

were Republicans and 82% were Democrats.⁶⁷ Finally, Bonica et al. looked at campaign donations and found in statistical models that the characteristic most associated with a lawyer being liberal (in this case, giving money to more liberal Democrats and in higher amounts) was not a person's gender or years since joining the bar, but being a law professor, more so than being a civil rights or environmental lawyer.⁶⁸

Furthermore, not all areas of law teaching are necessarily equal. In particular, some argue that public law slots—constitutional law, federal courts, anything related to the Supreme Court, and so on—are positions that are more prestigious and difficult to obtain. This perception and its relationship to political orientation is illustrated by an e-mail the author received from a recent Yale Law School graduate:

In my own case, I've had several people tell me that as a conservative I should aim for law & economics. If I aim for con law or fed courts, I'll simply never be competitive for a job at a top school If you're a smart conservative with a gift for public law, if you go to the academy, you are likely to face a glass ceiling. . . . So, even though I'd probably rather write in fed courts and con law, I'm probably going to have to go back to an econ PhD program in a year or two, so that I can aim for a law & econ gig. But as they tell us . . . bias is real, get over it.⁶⁹

Hence, not only might conservatives be having a more difficult time than liberals in breaking into the legal academy, they might be further excluded from certain areas of law and channeled into other areas, such as law and economics. While there is little data on this possible trend, a 2011 paper examined a random sample of 300 entry-level hires at American law schools from 2005-2009. The study found that while the ratio of liberal to conservative or libertarian law professors was 4.1 to 1 in non-public law teaching areas, that ratio increased to 6.9 to 1 for public law teaching areas.⁷⁰

C. Hypotheses

1. *If the Brainpower Hypothesis is the sole explanation, then conservative and libertarian law professors should exhibit below average measures of productivity and relevance, as well as below average qualifications*

If conservatives and libertarians do not measure up in ability or intelligence, then they should just be squeaking in the door of the academy and thus would not be very competitive compared to their peers. In other words, they would generally be in over their heads.⁷¹ Hence, since intelligence and ability tend to be normally distributed, the difference between conservatives/libertarians and liberals would merely be that the mean is shifted to a lower value for the conservatives/libertarians,

923, 947 n.79 (2001) (citing Lingren study); James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y REV. 5, 8–9 (2005).

67. See Lindgren, *Measuring Diversity*, supra note 66, at 145.

68. See Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. Legal Analysis 277, 292 (2016).

69. James C. Phillips, *How Politically Diverse is American Law School Entry-level Hiring? An Empirical Examination, 2005–2009*, at 9, American Law and Economics Association Annual Conference (May 2011).

70. *Id.* at 20–21.

71. This is akin to mismatching that goes on when students barely get into an undergraduate institution, where they are generally overmatched compared to their better-qualified peers. See, e.g., Eleanor Wiske Dillon & Jeffrey Andrew Smith, *The Determinants of Mismatch Between Students and Colleges* (Nat'l Bureau of Econ. Research, Working Paper No. 19286, Aug. 2013), available at <http://www.nber.org/papers/w19286.pdf> [<http://perma.cc/EY5P-8V8U>].

such that the right tail—the high performers—overlaps with a lower performing group of liberals. Thus, whatever the intelligence or ability cutoff to become a law professor, many more liberals can clear that hurdle than can conservatives/libertarians.⁷²

2. *If some sort of self-selection hypothesis (Interest or Greed) is the sole explanation, then there should be no differences between conservative and libertarian professors and other professors on measures of productivity, relevance, or qualifications*

If conservatives and libertarians are just as able and qualified as their non-conservative and libertarian counterparts, and there is nothing such as discrimination working to create a higher bar for their entrance into the academy than for others, then those who come into the legal academy should look like the other professors—a mix of stars, average performers, and those barely surviving. This would hold, at least, unless the reason for not seeking an academic job (here, greed or interest) is correlated with ability, intelligence, or qualifications. For example, the more qualified can make more outside of academia, so only the less qualified seek academic positions, in which case the pattern would look similar to Hypothesis #1—conservatives/libertarians would be below average on productivity, relevance, and qualifications. Or, if interest is correlated with ability or qualifications, with those more interested in academia the more able or qualified, then the resulting pattern would look more like Hypothesis #3—conservatives and libertarians would be above average on measures of productivity, relevance, and qualifications.

3. *If the Discrimination Hypothesis is the sole explanation, then conservatives and libertarians should be above average compared to their peers on measures of productivity, relevance, or qualifications.*

Like the black baseball players circa the 1950s, if discrimination is the reason for low numbers of conservatives and libertarians in legal academia, then those who make it through the gauntlet will be better than the average professor, since only those higher in “quality” make enduring their disfavored trait worthwhile for their employers.⁷³ Thus, while conservatives and libertarians are not inherently more productive, more relevant, or more qualified than others, those high on these desired measures are the only ones making it through the door. In other words, the distributions of “ability” for liberal and conservative/libertarian professors would perfectly overlap, but the cut-off for making it into the legal academy would be shifted higher (or, ironically, to the right) for conservatives/libertarians, compared to the lower cut-off for liberal candidates. And, once in the door, conservatives and libertarians may feel pressure to over-perform to ensure tenure since they feel they have a handicap in their political orientation for which they must compensate.

72. One could imagine a bimodal distribution of ability or intelligence amongst conservatives and libertarians that would explain the reason few make it into the legal academy, but such a distribution would fly in the face of how intelligence and ability are generally found in populations.

73. Apparently, it used to be some time ago in New York City that people said that one wants one’s doctor to be Jewish. The reason was not because someone who was Jewish was inherently a better doctor, but because New York City medical schools discriminated against Jewish applicants, so only the best and brightest were accepted and graduated. See THOMAS H. LEE, EUGENE BRAUNWALD AND THE RISE OF MODERN MEDICINE 32–33 (2013) (noting discrimination against Jewish applicants to New York City medical schools in the form of Jewish quotas in the 1930s and 1940s); KENNETH M. LUDMERER, TIME TO HEAL: AMERICAN MEDICAL EDUCATION FROM THE TURN OF THE CENTURY TO THE ERA OF MANAGED CARE 64 (1999) (same); Alan M. Kraut, “No Matter How Poor and Small the Building”: Health Care Institutions and the Jewish Immigrant Community, in RELIGION AND IMMIGRATION: CHRISTIAN, JEWISH, AND MUSLIM EXPERIENCES IN THE UNITED STATES 145–46 (Yvonne Yazbeck Haddad et al. eds., 2003) (same).

D. *The Lone Study of Legal Scholarship & Political Affiliation*

Chilton and Posner provide the only study somewhat related to this one, looking at political bias in legal scholarship.⁷⁴ They find, not surprisingly, that law professors that donate to Democratic political candidates are more likely to write liberal scholarship, and law professors who donate to Republican candidates are more likely to produce conservative scholarship, with these differences achieving statistical significance.⁷⁵

These scholars are clearly exploring a different question than this study, but in a follow-up blog post, Posner notes that the data collected for his study does allow one to explore whether Republican law professors are cited more often than Democratic law professors.⁷⁶ Posner noted that, at a statistically significant level, Republican law professors are cited more than Democratic law professors.⁷⁷ He lays out four possible explanations: (1) “Republicans who are hired are better scholars than Democrats” because “[I]beral law faculties discriminate against Republicans by implicitly imposing a higher standard for hiring them;” (2) since there are fewer Republican as compared to Democratic law professors, and because one must cite the opposition to have a target of criticism in one’s legal scholarship, Republican law professors will naturally be cited more; (3) “Republicans . . . are better able to resist pressures to conform and repeat conventional wisdom,” so they produce novel scholarship that is more likely to be cited than papers that merely echo the status quo; and (4) “Republicans, feeling beleaguered in the liberal academy, have a greater sense of solidarity, and help each other out” through excessive citation.⁷⁸ Posner laments that his data does not allow for these various explanations to be explored.⁷⁹

This study, then, can go further, and it is the first to collect data with the intent of exploring whether there are statistical differences between production (number of articles per year) and relevance (number of citations per year) of conservative and libertarian and non-conservative and libertarian law professors.

II. DATA & METHODOLOGY

A. *Citation Studies*

Citation-count studies (sometimes called scholarly-impact studies) first emerged in legal academia in 1985 with Fred Shapiro’s pioneering study of the most-cited law review articles.⁸⁰ Shapiro revised his work in 1996 as “cytology” became, for better or worse, a part of the law school landscape.⁸¹ Overcoming one of the weaknesses of his previous two studies, in 2012 Shapiro and a coauthor published an updated version,⁸² this time including citations in non-law peer reviewed

74. Chilton & Posner, *supra* note 3.

75. *Id.* at 14–15, 18–19.

76. Eric Posner, *Are Republican law professors cited more often than Democratic law professors?*, ERICPOSNER.COM (Aug. 25, 2014), <http://ericposner.com/are-republican-law-professors-cited-more-often-than-democratic-law-professors/> [<http://perma.cc/H5YW-TGKG>].

77. *Id.*

78. *Id.* A possible variation on the fourth explanation is more of an innocuous network effect in that given their smaller numbers, Republican (or conservative/libertarian) scholars tend to know each other more so than Democratic (liberal) scholars know other Democratic scholars, and friends (or at least acquaintances) tend to cite each other’s work because they are more familiar with it.

79. *Id.*

80. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985).

81. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996).

82. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012).

articles.⁸³ Shapiro contended that these studies “are attractive as relatively objective tools for assessing scholarly impact [and] can be used . . . to gauge the impact of a given author”⁸⁴ As former Berkeley Law School Dean Herma Hill Kay noted, “If you’re cited, that means you’re identified as a player in the game: a scholar of significance.”⁸⁵ These studies, while able to tell us which articles were well-cited (and who wrote them), were less helpful in gauging individual faculty influence.

These shortcomings led other scholars to look at citations differently. Theodore Eisenberg and Martin Well’s 1998 study used Westlaw to find the number of times a professor was cited and then compiled scores and rankings for thirty-two law schools using per capita citation rates (the authors also looked at other patterns in citations).⁸⁶ The most well-known continuation of this type of scholarly impact study has been periodically done by Professor Brian Leiter.⁸⁷ Just recently, a study done by faculty at the University of St. Thomas (Minnesota), led by Gregory Sisk, applied the Leiter method to the top third of ABA-accredited law schools.⁸⁸ Scholarly impact studies have been defended as remarkably “egalitarian and democratic.”⁸⁹ Citations are blind to the prestige of a law professor’s school (or where she earned her J.D.); they are blind to where the article was originally published—be it a prestigious or “lowly” journal; and citations are theoretically blind to the area of law in which the article was written.⁹⁰

Scholarly-impact or faculty-quality studies are limited in what they describe. Even ascribing influence or quality to the number of times someone is cited has problems. Law professors that write to narrower but important scholarly audiences will not do as well in citation count studies,⁹¹ though this should be somewhat mitigated by only comparing scholars to others who write within the same legal area. Additionally, scholars who are often cited in foreign law journals because they write for an international audience will not fare as well in these types of studies as they are now implemented. Furthermore, academic citation counts do not measure how often an article is cited by judges or used by legislators and practitioners.⁹² And just as Westlaw’s KeyCite notes gradations of positive and negative treatment of cases, not all citations are equal,⁹³ but they are treated as such in citation count measures. Hence, there is much to do with faculty quality and faculty scholarship that is not measured in citation studies. Finally, faculty also teach and have

⁸³ *Id.* at 1488.

⁸⁴ Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1454 (1991).

⁸⁵ Herma Hill Kay, *In Defense of Footnotes*, 32 ARIZ. L. REV. 419, 426 (1990).

⁸⁶ Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 378–79, 393 (1998).

⁸⁷ *Faculty Quality*, BRIAN LEITER’S LAW SCHOOL RANKINGS, <http://www.leiterrankings.com/faculty/index.shtml> [<http://perma.cc/2Y5X-ZVRA>] (last visited Oct. 4, 2015).

⁸⁸ Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties in 2015: Updating the Leiter Score Ranking for the Top Third*, 6 (U. of St. Thomas (Minnesota) Legal Studies Research Paper No. 15-12, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642056 [<http://perma.cc/D3TP-A2U3>].

⁸⁹ *Id.* at 13.

⁹⁰ *Id.* at 12–14.

⁹¹ Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 388 (2000).

⁹² See Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 885 (1996).

⁹³ See Posner, *supra* note 91, at 387–88.

other responsibilities within and outside of law schools, and citation studies can never measure these important professional functions.⁹⁴

Of course, attempts to operationalize qualities difficult to measure have strengths and weaknesses, but citation studies do not and should not come with the disclaimer: “this is for entertainment purposes only.”⁹⁵ Social science seeks two attributes in measurement: validity and reliability.⁹⁶ Validity means one is measuring what they claim to be measuring. Reliability is equivalent to consistency in reproducibility—every time the measurement is taken of the exact same phenomena, it will return the same value. Citation studies are high in reliability—others can reproduce them fairly easily.⁹⁷ The debate, then, is over validity. To claim that citations measure quality is to claim too much, but to argue that they measure one aspect of quality—relevance—is valid and important in a profession that seeks not to collect knowledge for future generations like medieval monks but desires to have an impact on the world now. Citation counts are similar to money: Money is not the only indicator of the quality or value of something, but it is an easily understandable, easily comparable, and relatively strong indicator of value. Focusing on relevance as the quality measured by citation-based studies rather than quality itself weakens the critique that “a citation, it bears remembering, is a mention, not an endorsement” because “sometimes an article or book is cited in legal journals frequently because so many people find it a good example of wrong-headed thinking.”⁹⁸

B. Methodology

For more than a decade, the Leiter rankings have looked at faculty teaching quality or scholarly impact in American law schools by ranking faculties based on their citation counts.⁹⁹ In a nutshell, using the Westlaw JLR database, searches using an author’s name are run to determine how many times that author shows up in the database.¹⁰⁰ This study takes no issue with Leiter’s basic procedure and, in fact, duplicates it, except in one important way. Leiter looks at the ten to twenty “hits,” counts up the number of “legitimate” ones, and multiplies that percentage by the total number of cites to get his initial raw value.¹⁰¹ Thus, someone with 1000¹⁰² “cites” in Westlaw’s JLR, who had sixteen legitimate cites of the first and last ten, would have a raw value of 800. This has major problems from both measurement theory and sampling methodology perspectives. First, Leiter is using a non-random sample to represent the underlying population. That is improper

94. Cf. Benjamin H. Barton, *Is There a Correlation between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. EMPIRICAL LEGAL STUD. 619, 619 (2008) (finding no correlation between teaching evaluations and total or annual citation counts).

95. *But see* J.M. Balkin and Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843, 843–44 (1996).

96. *See, e.g.*, Ellen A. Drost, *Validity and Reliability in Social Science Research*, 38 EDU. RESEARCH & PERSPECTIVES 105, 105 (2011).

97. *See* Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829, 829–30 (1993).

98. Vikram David Amar, *What a Recently Released Study Ranking Law School Faculties by Scholarly Impact Reveals, and Why Both Would-Be Students and Current/Prospective Professors Should Care*, VERDICT (Aug. 3, 2012), <http://verdict.justia.com/2012/08/03/what-a-recently-released-study-ranking-law-school-faculties-by-scholarly-impact-reveals-and-why-both-would-be-students-and-currentprospective-professors-should-care> [<http://perma.cc/56EV-CW48>].

99. Brian Leiter, *Faculty Quality*, BRIAN LEITER’S LAW SCHOOL RANKINGS, <http://www.leiterrankings.com/faculty/index.shtml> [<http://perma.cc/H22Y-5MVY>] (last visited Oct. 9, 2015).

100. The procedure is a bit more complex than this over-simplified description. Leiter’s full methodology can be found at http://www.leiterrankings.com/faculty/2007faculty_impact.shtml [<http://perma.cc/9KKR-78DL>].

¹⁰¹. *Id.*

102. The average number of cites a professor had in this study was 976.

unless there is some kind of sophisticated statistical “correction.” Second, even if the sample was randomly drawn, it is too small to make useful inferences. The hypothetical professor listed above with a *random* sample of twenty (with sixteen legitimate), and 1000 total cites, would have a 95% confidence interval of 626–974, meaning the “true” number of legitimate cites is most likely somewhere in that range. This is not very useful, for the interval is too large. Finally, sometimes scholars’ scores will be biased high and sometimes low due to the non-random nature of the sampling, negating the value of the Leiter scores as a comparative metric, which is the only real value such scores have.

This study’s methodology simply counts everything in the JLR database, biasing the scores higher than the “truth” but treating everyone the same—equality of inflation—so that comparisons can be made. This method is also very easily reproduced; anyone can just run a search on his or her name (the number he or she finds will be slightly higher due to the lapse of time). And this study is not claiming its method (or any citation-based measure) is a measure of quality, but of relevance (and given that many citations are added to articles by student editors, citation studies are far from perfect).

Generally, the Leiter rankings only cover citations during a recent time period, such as the last five years. Finally, a raw score is generated by taking the average faculty citation count for a particular school, multiplying it by two, and adding the median faculty citation count at that school. These raw scores can then be normalized.

Professor Leiter himself notes that this methodology has some weaknesses, such as “favor[ing] smaller faculties over larger faculties.”¹⁰³ Additionally, Leiter notes six further ways that citation studies can be skewed: (1) by the prolific but uninspired scholar who by sheer volume of work increases his citation count; (2) by the treatise writer whose work is “a recognized reference point in the literature”; (3) by the academic ambulance chaser who flits from one hot-topic to the next; (4) by really bad work that is frequently cited as an example of poor scholarship; (5) by the fact that the longer one has been around, the more citations he or she is likely to have, thus leading to a bias against younger scholars; and (6) by the fact that law reviews tend to publish articles in certain fields more than other fields, such as constitutional law versus trusts and estates.¹⁰⁴ Leiter only claims to mitigate one of the above six concerns—bias against younger scholars—by just looking at citations in a recent timeframe.¹⁰⁵ And he freely confesses that “for all these reasons, one would expect scholarly impact to be an imperfect measure of scholarly quality.”¹⁰⁶ This study likewise agrees that “citation studies are but one measure of scholarly distinction of faculties.”¹⁰⁷

Much of the above-mentioned flaws cannot be easily fixed, if at all, in a citation-based study. However, the bias against young scholars can be mitigated more so than the Leiter rankings were able to do. Also, there is an important flaw in previous law-citation studies, including the Leiter methodology, which can be corrected: an increasing number of law professors—many of whom have Ph.D.s—actually publish in peer-reviewed disciplinary journals that do not show up in the

103. Brian Leiter, *Top 25 Law Faculties in Scholarly Impact, 2005-2009*, BRIAN LEITER’S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/new/2010_scholarlyimpact.shtml [http://perma.cc/SR5F-E4SG] (last visited Oct. 9, 2015).

104. Brian Leiter, *Top 35 Law Faculties Based on Scholarly Impact, 2007*, BRIAN LEITER’S LAW SCHOOL RANKINGS (Sept. 1, 2007), http://www.leiterrankings.com/faculty/2007faculty_impact.shtml [http://perma.cc/9KKR-78DL].

¹⁰⁵. *Id.*

¹⁰⁶. *Id.*

¹⁰⁷. Leiter, *supra* note 103.

Westlaw database, which will mean that schools with more faculty producing such scholarship will be hurt in the Leiter rankings.¹⁰⁸ As Professor David Zaring notes in regards to a recent study using the Leiter methodology:

I do wonder, however, how long law review citation studies like this one will capture aspirations that law school faculties actually have. A lot of the younger JD-PhDs, who do careful work that isn't very accessible to very many law professors, will never do well on law review citation metrics. As I think a comparison of your own mental list of whom the best quantitative social science business law professors are with a list of the most cited business law professors would reveal. But at the same time, my sense is that many faculties are pushing hard in a social science direction. What will happen if these trends continue? We could see the building of a professional elite whose work can't get arrested in student notes and survey articles.¹⁰⁹

Even Leiter himself notes that legal scholarship is likely to increasingly become interdisciplinary and end up more in peer-reviewed journals.¹¹⁰ To overcome this bias against peer-reviewed disciplinary scholarship, this study incorporates these citations into the impact metric.¹¹¹

C. This Study

This study follows in part the Leiter methodology for finding citation counts in law reviews. Thus, this study is limited to full-time tenure-track faculty who are not clinical faculty and is also limited to those professors on the faculty for the 2011–2012 school year. It only looks at the top sixteen law schools according to *U.S. News and World Report's* academic peer rankings.

This study differs from the Leiter methodology in three key ways. First, once the raw citation counts for each professor were gathered, they were divided by the number of years each person had been a professor. This citation metric was not limited to a recent five year period as is often

108. Prof. Amar points out that “some faculty members who are included in the tally serve only part-time on a law faculty, and therefore may not tend to be cited in—or may not aim to be cited in—legal journals, as distinguished from journals catering to other disciplines, and yet these faculty members are counted as law faculty for purposes of a law school's mean/median citation counts.” Amar, *supra* note 98.

109. David Zaring, *Measuring Faculty Quality by Citations*, THE CONGLOMERATE (July 17, 2012), http://www.theconglomerate.org/2012/07/measuring-faculty-quality-by-citations.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+theconglomerate%2Ffeed+%28Conglomerate%29&utm_content=Google+Reader [http://perma.cc/4VMB-6R9H].

110. Shapiro & Pearse, *supra* note 82, at 1519 (citing email from Brian Leiter, Professor of Law, U. of Chi. Law Sch., to Fred Shapiro, Assoc. Librarian, Yale Law Sch. (Jan. 2, 2012, 16:22 EST)).

111. Not all see this potential bias against J.D./Ph.D. law professors as a problem. Professor Stephen Bainbridge contends that such interdisciplinary scholars “are producing work that is even less accessible to practicing lawyers, judges, legislators, and regulators. Their work would do even worse on a survey of citations by judicial opinions or Congressional committee reports than they do on surveys of law review citations.” Stephen Bainbridge, *Social science law professor and citation counts; yes, it's time for yet another anti Jd/PhD rant*, PROFESSORBAINBRIDGE.COM (July 17, 2012), <http://www.professorbainbridge.com/professorbainbridgecom/2012/07/social-science-law-professor-and-citation-counts-yes-its-time-for-yet-another-anti-jd-phd-rant.html> [http://perma.cc/79HW-5D4N]. That may or may not be true—the Author is unaware of any study that empirically explores Bainbridge's claim. It would seem that some scholarship, though not published in a law review, could be very relevant to judges or legislators—good work in empirical legal studies or history perhaps. And Bainbridge himself has previously criticized citation studies because “[t]hey usually rely on one database, typically a legally oriented one, which limits measurement of interdisciplinary impact.” Stephen Bainbridge, *Ranking Faculty Quality*, PROFESSORBAINBRIDGE.COM (May 24, 2010), <http://www.professorbainbridge.com/professorbainbridgecom/2010/05/ranking-faculty-quality.html> [http://perma.cc/9PST-4L8F].

done with the Leiter methodology.¹¹² The reason for this twist was to minimize bias against young scholars. Imagine a law professor who has been in a tenure-track position for twenty years. She has 200 citations. Compare her to a new professor who, after just two years, has 150 citations. While it is likely that the Leiter method, in only looking at the past five years, will show the newer professor to have a higher citation count, arguably the difference between the two will not be as stark as with this new methodology, where the older professor has a rate of twenty citations/year, and the new professor a rate of seventy-five citations/year—a 275% increase. This study thus reduces some of the problems in citation studies as identified by Professor Bainbridge:

They reward longevity and prolificacy. An older author with 100 articles that have each been cited 10 times will have a higher count than an author who has published 1 article that has been cited 900 times. Yet, might one not fairly argue that the latter is the more influential?

They disregard immediacy: An article that is being [cited] 500 times in the first year of its publication is probably more influential than an article that's been [cited] 500 times over 20 years.

They disregard the half-life of article citation rates, which might be a very useful proxy for influence. . . .

They usually rely on one database, typically a legally oriented one, which limits measurement of interdisciplinary impact.¹¹³

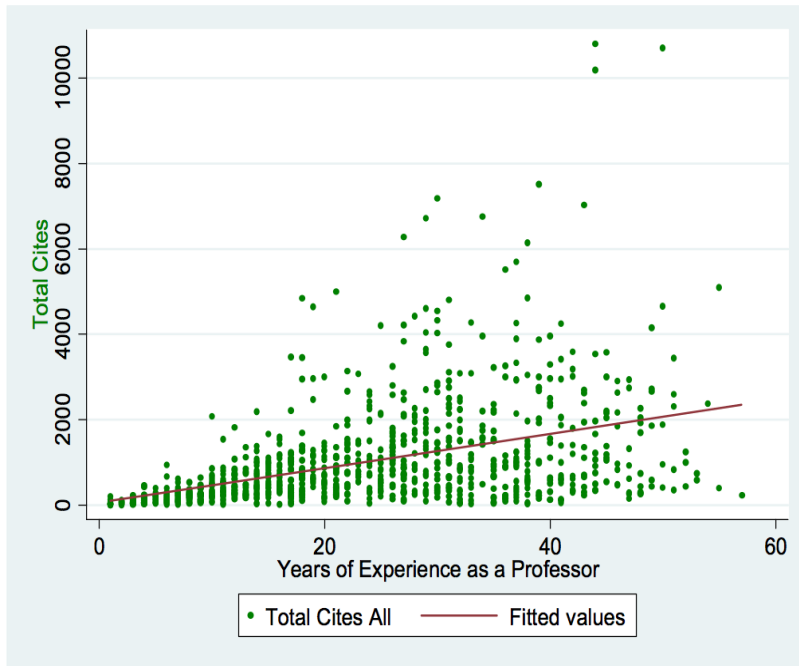
By using annual average citation rates, this study diminishes bias in favor of longevity and prolificacy, bias against immediacy, the disregarding of citation rate half-lives, and ignoring interdisciplinary impacts.¹¹⁴ Thus, for example, a young scholar who is cited 100 times in her first year as a professor is arguably more relevant than a professor who has been cited 150 times over the past five years, but the Leiter method would rank the more experienced scholar higher. And, in fact, while the relationship between the Leiter scores and experience is linear, the relationship between this study's citation scores and experience is not. This can be most clearly seen in the following graphics. Raw citation counts exhibit an almost linear trend ($r = .44$, $n = 1011$), increasing significantly with time (Graph 1), whereas this study's citations per year measure shows a non-linear trend, increasing, peaking, and then decreasing, explaining the low correlation ($r = .05$) (Graph 2). These graphs are based on professor-level observations rather than school-level data.

112. See Gregory Sisk et al., *Scholarly Impact of Law School Faculties in 2012: Applying Leiter Scores to Rank the Top Third*, 9 U. ST. THOMAS L.J. 838, 843 (2012).

113. Bainbridge, *Ranking Faculty Quality*, *supra* note 111.

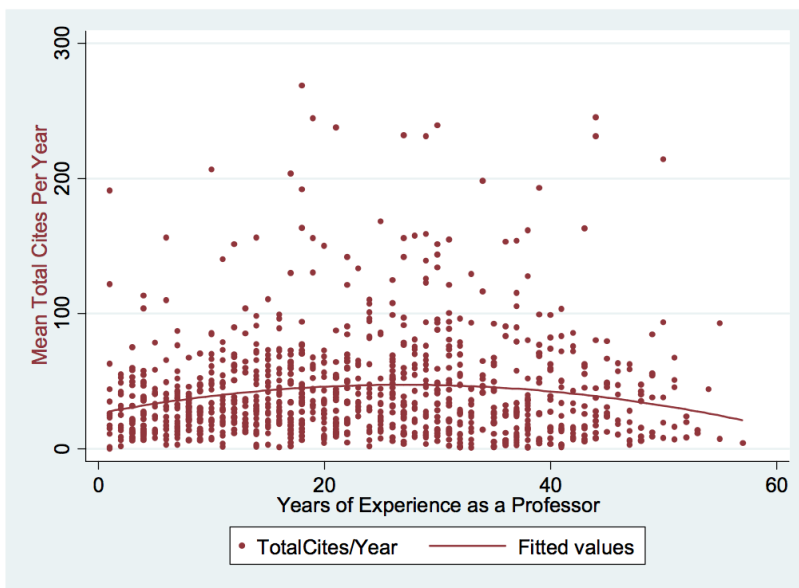
114. This method, arguably, will create measures for some younger faculty that may appear inflated since their citation counts, accrued prior to becoming a professor, will be averaged over only one or two years.

Graph 1: Scatterplot of Raw Citation Counts on Years as a Professor with Fitted Line



Not surprisingly, the longer one has been a professor, the more raw citations he or she has, in general.

Graph 2: Scatterplot of Mean Citation Counts per Year on Years as a Professor with Quadratic Fitted Line



However, when we look at cites per year, we see professors rise as they make a name for themselves and produce more scholarship that can be cited, peak, and then decline as their production and relevance wanes.

The second main way this study differs from the Leiter methodology is by including citation counts from non-law journals. This was done by using the Web of Science, which includes the Science Citation Index Expanded, the Social Sciences Citation Index, and the Arts & Humanities Citation Index.¹¹⁵ This process requires a bit more work than the JLR database in Westlaw because each article an author has written that appears in the database is listed when an author search is performed. After ignoring authors with the same name, and ignoring law journals (as some do show up in these results), the number of times an article has been cited is listed, and these must be summed for each author.¹¹⁶

The third way this study differs is that, in addition to citation counts, it measures productivity by counting publications in both legal and non-law journals.

D. Variables

1. Dependent Variables

Total Citations per Year. The total number of times the professor's name appeared in Westlaw's JLR database and the total number of citations listed for each publication of that author in the Social Science Citation Index (SSCI) (not counting law journal articles), divided by the number of years he or she has been a tenure-track professor.¹¹⁷

Total Publications per Year. The total number of articles of any kind listed after doing an author search in Westlaw's JLR database as well as the total number of publications (not counting law journal articles) in the SSCI, divided by the number of years the individual has been a tenure-track professor.¹¹⁸

2. Independent Variables

Independent variables included:

115. THOMPSON REUTERS, WEB OF SCIENCE, [http://apps.webofknowledge.com/WOS_GeneralSearch_input.do?product=WOS&search_mode=GeneralSearch&SID=1Ee1IEGoMhp5cDallie&preferencesSaved=\[http://perma.cc/UF4B-25CA\]](http://apps.webofknowledge.com/WOS_GeneralSearch_input.do?product=WOS&search_mode=GeneralSearch&SID=1Ee1IEGoMhp5cDallie&preferencesSaved=[http://perma.cc/UF4B-25CA]).

116. There could be some duplication. For example, an article in the *American Economic Review* could be cited by the *Harvard Law Review*, which is also in the Web of Science database, so that it was counted as a citation in both the Web of Science and Westlaw's JLR. This study, however, contends that the minimal double-counting does not outweigh the benefits of including non-law citations. The only reason why double-counting would matter is if the appearance in both databases were correlated with political ideology. As noted below, conservatives and libertarians are less likely to hold Ph.D.'s, and law professors with Ph.D.'s are more likely to publish non-legal articles in the SSCI, and thus benefit from any double counting. Thus, the estimates for citations per year for non-conservative and non-libertarian professors may be slightly biased higher by this minimal double-counting.

117. For those law professors who were professors in other disciplines prior to entering the legal academy, the starting point was their previous tenure-track professorships.

118. For example, au(James /2 Phillips) would be a Westlaw search for publications by the author of this dissertation. For authors with more common names, the publications were reviewed to glean institutional affiliation in order to filter out publications from other authors.

- The rank of the law school where the professor earned his or her J.D.;¹¹⁹
- Whether or not the professor had a Ph.D.;
- Whether or not the professor had been a law review editor;
- Whether or not the professor's highest level of clerking was the U.S. Supreme Court;
- Whether or not the professor's highest level of clerking was a federal appellate court;
- Whether or not the professor's highest level of clerking was a federal district court;
- Whether or not the professor's highest level of clerking was a state or foreign court;
- The total number of years as a professor and the total number of years as a professor squared;¹²⁰
- Number of books, treatises and casebooks published;¹²¹
- Gender (whether or not female);
- Minority status;¹²²
- Interaction variable of gender and minority status; and
- Political orientation.

The independent variable of most interest is the political orientation of law professors. Using a combination of the sources used by previous studies, this study looked at campaign donations, voter registration records, organizational affiliation, work experience on resumes, and, to a limited degree, scholarship to classify professors as conservative/libertarian, liberal, or unknown.¹²³ The

119. Professors who earned foreign J.D. degrees were given the mean ranking—6—of the professors who had earned J.D. degrees at American law schools. The rankings come from *U.S. News's* school rank. Lower numbers signify a “higher” or more prestigious ranking, with 1 being the best. The 2013 rankings were used since some professors earned J.D. degrees prior to the first *U.S. News* rankings, and for the elite institutions, the rankings have not changed much over the years.

120. This was calculated by subtracting the year of the professor's first tenure-track, non-clinical position from 2012. A squared value was included as the relationship between years as a professor and total citations per year is non-linear.

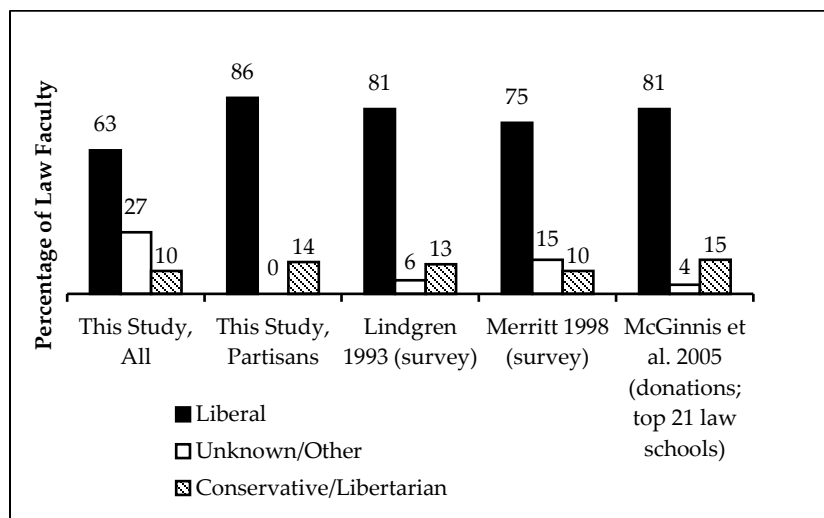
121. This will likely influence citation rates upward, and publication rates downward.

122. This was based on the Association of American Law Schools Directory's list of minority law professors.

123. The Author initially coded every professor in the study. Fortunately, 135 (or 12.2%) of these professors—most of those starting between 2001–10—were also independently coded by two law student coders. One of this coders is a self-identified liberal and the other is a self-identified conservative/libertarian to enable the calculation of inter-coder reliability. The student coders rated each professor as liberal, conservative/libertarian, or unknown. The student coders also indicated their confidence in their determinations: slightly, somewhat, or very. These coding determinations were then quantified, with a conservative/libertarian being a -1, an unknown a 0, and a liberal a 1, and the confidence scale ranging from 1 (slightly) to 3 (very). Multiplying these values together meant any professor could range from a -3 (very confident the professor is conservative/libertarian) to a 3 (very confident the professor is a liberal). The two independent student coders' scores for each professor were added to create an overall score, ranging from -6 to 6. Thus, for example, if one student coded a professor as -1, and another student coded the professor as a 1, then the professor's political orientation value would be a 0. Given the subjective nature of the endeavor, to eliminate as many false positives as possible, any professor coded between -2 and 2 was treated as an unknown and given a value of 0. Hence, if one student coded a professor as a -3, and the other as a 1, the professor would be treated as a 0. Likewise, if both students coded a professor as a 1, or one coded a professor as a 2 and the other as a 0, the professor

percentage of conservatives and libertarians this study found was similar to what previous studies have found, providing at least facial validity to this study’s construct of political orientation.¹²⁴

Graph 3: Comparing the Political/Ideological Make-up of the Legal Academy Across Studies



One reason this study may have somewhat lower percentages of liberals and higher percentages of unknowns is because it classified everyone, whereas Lindgren and Merritt only classified those who responded to their surveys,¹²⁵ and McGinnis et al. could only classify those who actually made a campaign donation.¹²⁶ Thus, earlier studies were only classifying a subset of the population—those easiest to identify—and would naturally have fewer unknowns.¹²⁷

Of course, a snapshot of the current situation can mask long-trends. Maybe older cohorts still in the legal academy have higher percentages of conservatives and libertarians; or perhaps the opposite is true and new cohorts are more conservative and libertarian. While this study cannot show changes over time, it can show differences between cohorts that can stand for a rough proxy for changes over time.¹²⁸ As Graph 4 shows, the make-up of the legal academy does not differ much based on when law professors entered.

would be coded as a 0. However, comparing the Author’s coding to these other coders is a bit like comparing apples to oranges, since the student coders did not look at voter registrations records. This will bias the inter-coder reliability downwards, and not surprisingly, inter-coder reliability was modest (Cronbach’s alpha = .70). There is a debate whether .70 is a minimum threshold or not. See Charles E. Lance, et al., *The Sources of Four Commonly Reported Cutoff Criteria: What Did They Really Say?*, 9 ORG. RES. METHODS 202, 205–07 (2006) (cataloguing the debate as to whether .70 is an acceptable cutoff for statistics such as Cronbach’s alpha that estimate reliability).

124. The fact that conservatives and libertarians are lumped together in this study—they are often difficult to distinguish—means that conservatives are even more underrepresented; likely more so than libertarians.

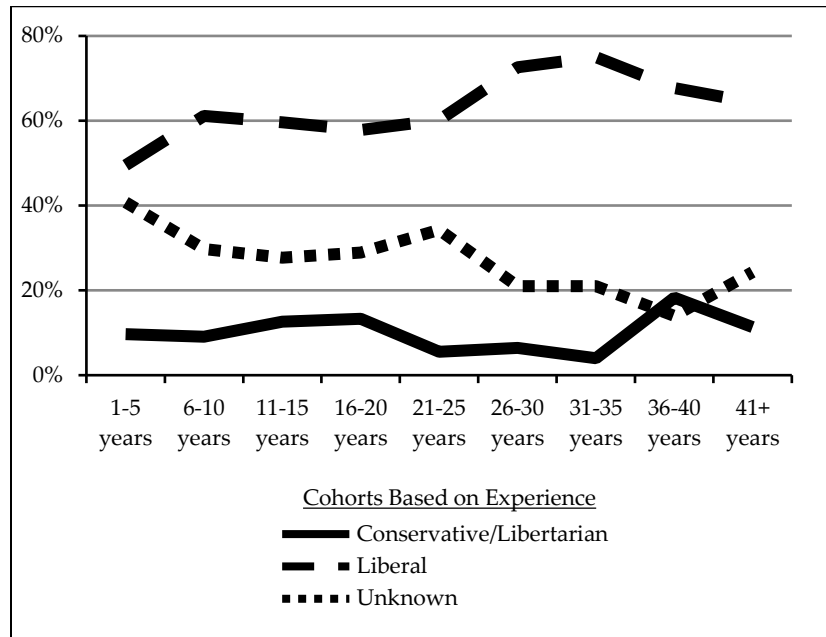
125. Lindgren, *supra* note 66, at 20; Merritt, *supra* note 61, at 815.

126. McGinnis et al., *supra* note 63, at 1186–87.

127. Because earlier studies were only classifying a subset of the population, their ability to make generalizations about all law professors at the schools the studies covered is limited.

128. This assumes a similar rate of dropout amongst conservative/libertarian, liberal, and unknown law professors.

Graph 4: Political Orientation Percentages by Five-Year Cohort in the Top Sixteen Law Schools



While more recent cohorts (on the left Graph 4) have lower percentages of identifiable liberals and higher percentages of “unknowns,” the percentage of conservatives/libertarians is about the same as the average across the older cohorts.¹²⁹ Thus, either the reason for why there are so few conservatives/libertarians has been consistent, or the reasons have varied, but the results have stayed relatively stable. The former is more believable, but the data cannot rule out the latter.

III. ANALYSIS, COMMENTARY AND CAVEATS

A. Analysis and Commentary

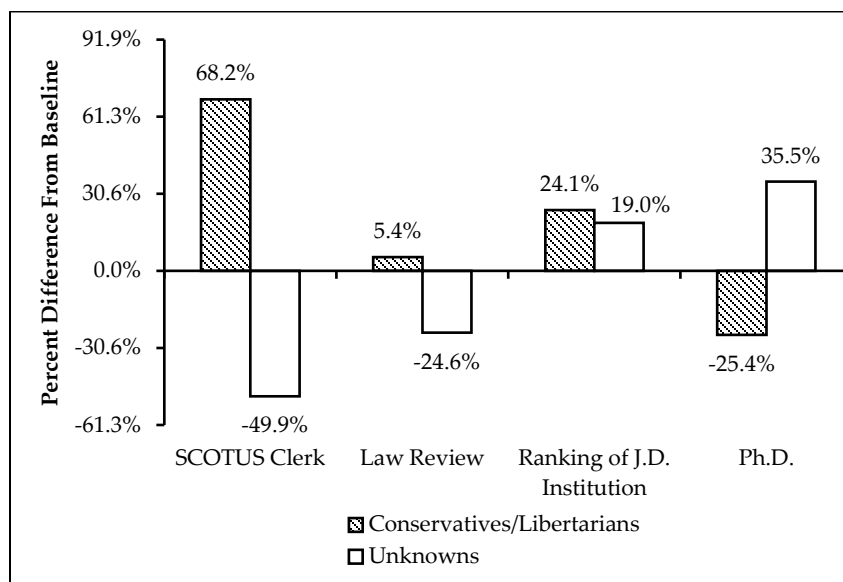
1. Qualifications

As can be seen in Graph 5, conservatives and libertarians tend to be more qualified than their peers of unknown or liberal political orientation. The Graph treats the qualifications of liberal law professors as the baseline with which to compare conservatives/libertarians and unknowns, since liberals are the largest group.

¹²⁹ The number of observations for conservatives/libertarians is rather low but relatively consistent across cohorts:

Cohort	Number of Observations		
	Conservatives/Libertarians	Liberals	Unknowns
1–5 years	10	51	42
6–10 years	11	74	36
11–15 years	15	71	33
16–20 years	17	74	37
21–25 years	6	65	37
26–30 years	8	90	26
31–35 years	4	75	21
36–40 years	17	63	13
41+ years	13	74	28

Graph 5: Percent Difference in Qualifications Compared to Liberals' Baseline



Conservatives and libertarians are easily the most likely to have had Supreme Court clerkships: They are 235.5% more likely to have clerked on the Supreme Court than their peers with unknown political orientation and 68.2% more likely than liberal peers.¹³⁰ Likewise, conservatives and libertarians are more likely to have made law review in law school—39.9% more likely than unknowns and 5.4% more likely than liberals.¹³¹ Conservatives and libertarians also on average graduated from higher-ranked law schools—6.8% more highly ranked than unknowns and 24.1% more highly ranked than liberals.¹³² Finally, conservatives and libertarians are more likely to hold a J.D. and have a federal appellate clerkship as their highest clerkship,¹³³ but less likely to have their highest clerkship be with a federal district court, state court, or foreign court, these being less

130. 35.6% of conservative/libertarian law professors had Supreme Court clerkships, compared to 21.1% of liberals and 10.6% of unknowns.

131. 58.4% of conservatives/libertarians made law review, whereas 55.4% of liberals and 41.8% of unknowns made law review in law school.

132. The average *U.S. News* rank of a conservative/libertarian's J.D.-granting institution was 4.4, while the average rank for liberals was 5.8, and the average rank for unknowns was 4.7.

133. A possible alternative explanation for the gap between conservatives and libertarians and others when it comes to clerkships is that conservatives and libertarians just have better odds of getting a clerkship. If fewer law students are conservative or libertarian, and if federal judges place sufficient value on hiring law clerks with a similar political orientation, given that the federal judiciary is about evenly split between Democratic and Republican-appointed judges, conservative and libertarian law students may have better odds of getting a clerkship than their peers despite marginally inferior qualifications. But there are several reasons to reject that explanation. First, it looks at the wrong group—the population of law students and the population of plausible law professor candidates are not the same, with the latter an elite subset of the former. Thus, those who are qualified enough to be a competitive law professor candidate are likely to get a clerkship on their own merits regardless of any benefit their political orientation may bring. Second, this pattern of conservatives and libertarians should be found at all levels of clerkships in the dataset if this theory is accurate, and it is not—conservative and libertarian law professors are only more likely than their peers to have the most prestigious clerkships, while the reverse is true for the less prestigious clerkships. Third, on other traditional measures of qualification—those that directly figure into the odds of getting a federal appellate clerkship (for example, law review membership and grade honors)—conservatives and libertarians are more likely to possess the qualification. Hence, they do not appear to be less qualified than their peers but benefiting from some bump due to their political orientation. Finally, if it was true that conservatives and libertarians getting federal clerkships were less capable, then the empirical methods used in this paper would have shown that when matched in some way, conservatives and libertarians would have fared less well than their peers—a classic mismatch scenario. But just the opposite was true.

prestigious.¹³⁴ In one less traditional but increasingly more relevant aspect, though, conservatives and libertarians appeared less “qualified”—having a Ph.D.—as conservatives and libertarians were 44.9% less likely to have Ph.D.s compared to unknowns, and 25.4% less likely compared to liberals.¹³⁵ Overall, however, the data are more consistent with Hypothesis #3 (and maybe a version of Hypothesis #2) as conservatives and libertarians are, on average, somewhat significantly more “qualified” than their peers in the legal academy. Whether this is because of discrimination or because only the more qualified conservatives and libertarians are interested and actually seek law professor jobs is unclear.¹³⁶

2. Causality

a. *The Potential Outcomes Framework*

Questions of causal inference can be thought of as the task of determining counterfactuals. This is often referred to as the potential outcomes framework: what would the potential outcome have been under the alternative scenario where the unit of observation did not (or did) receive the treatment, *ceteris paribus*.¹³⁷

Of course, this is impossible outside of science fiction and creates a problem of missing data—we can never see the outcome in the alternative universe for any one individual.¹³⁸ Instead, researchers attempt to create two groups that appear to be essentially equal on factors that matter for the outcome being studied, giving one group the treatment (or intervention) and withholding it from the other. By measuring the difference between these two otherwise identical groups on the outcome being studied, one can infer that the treatment caused the difference. This is why random assignment of subjects to either a treatment¹³⁹ or control group in experimental designs is the gold standard for determining causality.

But like our alternative universe scenario above, even this is often not fully possible since some of the most interesting or important causal questions cannot be examined under the conditions of a controlled experiment. This leaves us with the task of inferring causality from the messy data generated by the real world. And this is the scenario here.

This far from ideal situation requires careful thinking about the potential outcomes (or counterfactual) framework, specifically the Stable Unit Treatment Value Assumption (SUTVA),¹⁴⁰ and the ignorable treatment assignment assumption.¹⁴¹

134. See Appendix I, Section II for details.

135. 21.8% of conservatives/libertarians had Ph.D.s, compared to 29.2% of liberals and 39.6% of unknowns.

136. For more detailed information on the differences between conservatives/libertarians and others on the various covariates, see Appendix I, Section II.

137. See GUIDO W. IMBENS & DONALD B. RUBIN, *CAUSAL INFERENCE FOR STATISTICS, SOCIAL, AND BIOMEDICAL SCIENCES: AN INTRODUCTION* 3–5 (2015); see also SHENYANG GUO & MARK W. FRASER, *PROPENSITY SCORE ANALYSIS: STATISTICAL METHODS AND APPLICATIONS* 23–29 (2d ed. 2015).

138. The only exception to this is the rare instance where the causal effects go away quickly enough that the treatment and control groups could be reversed. See STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, *COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH* 5 n.2 (2007).

139. When there is more than one treatment the term “alternative treatments” is used. See *id.* at 31.

140. IMBENS & RUBIN, *supra* note 137, at 9–12.

141. See generally Paul R. Rosenbaum & Donald B. Rubin, *The Central Role of the Propensity Score in Observational for Causal Effects*, 70 *BIOMETRIKA* 41 (1983); see also MORGAN & WINSHIP, *supra* note 138, at 40–41; Wei Pan & Haiyan Bai, *Propensity Score Analysis: Concepts and Issues*, in *PROPENSITY SCORE ANALYSIS: FUNDAMENTALS AND DEVELOPMENTS* 5 (Wei Pan & Haiyan Bai eds., 2015). Some treat the ignorable treatment

SUTVA “is simply the a priori assumption that the value of [an outcome] for [a] unit [] when exposed to treatment [] will be the same no matter what mechanism is used to assign treatment [] to [the] unit [] and no matter what treatments the other units receive.”¹⁴² It has two basic principles. First, that treatment of one individual does not affect the treatment of another individual.¹⁴³ Second, that treatment is homogenous.¹⁴⁴ Thus, the first principle could be violated if, for example, subjects in an experiment discussed the positive effects of their treatment with those in the control group and convinced them to start taking the treatment (such as exercise).¹⁴⁵ The second principle would be violated if something caused the treatment to be stronger or weaker for differing individuals or under different conditions, such as more or fewer people assigned the treatment or control groups.

Applying SUTVA to the study at hand, for it to hold, the perception of the political orientation of candidates by law schools—the treatment here¹⁴⁶— cannot be dependent on such things as the pool of current candidates, the order of looking at candidates, or current composition of the legal academy’s collective political orientation. Given that we are dealing with perception, which is potentially influenced by anchoring and ordering effects, this could be problematic. Thus, a candidate may appear more or less conservative (or liberal) depending on the candidates whose FAR forms or meat-market interviews came just before or after her, or the other candidates who also were called out for a job talk. Likewise, a candidate may appear more or less conservative (or liberal) when collectively viewed by a more or less conservative (or liberal) faculty or hiring committee, the latter of which serves as a gatekeeper and given its smaller size, is both more likely to fluctuate as to its collective political/ideological orientation and more likely to be subject to groupthink. Further, if one year the majority of candidates were conservative to some degree or another (a farfetched scenario, admittedly), and the next year the majority of candidates were more or less liberal, a slightly conservative candidate in the first year might appear to be in the middle or even to the left of center ideologically/politically, whereas he may appear quite conservative the next year. However, SUTVA is not necessarily problematic here just because an individual member of a hiring committee or faculty may have her perception altered through discussions with other members since it is the committee or the faculty overall that is making the collective decision to hire or not hire a candidate, not the individual. Thus, because SUTVA does not completely hold with the scenario being studied here, the ability to generalize to years outside of those being studied is limited.¹⁴⁷

assignment assumption as part of SUTVA. See, e.g., Donald B. Rubin, *Which Ifs Have Causal Answers?*, 81 J. AM. STATISTICAL ASS’N 961 (1986). Others considered it sufficiently important to separate it. See, e.g., GUO & FRASER, *supra* note 137, at 29–33.

142. Rubin, *supra* note 141, at 961.

143. IMBENS & RUBIN, *supra* note 137, at 10–11.

144. *Id.* at 11–12.

145. See Pan & Bai, *supra* note 141, at 6.

146. See D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 REV. ECON. & STATISTICS 775 (2011) (arguing that for an immutable trait to be considered a treatment only works if it is the perception of the immutable trait, which can be manipulated, is deemed the treatment).

147. MORGAN & WINSHIP, *supra* note 138, at 38–39.

The ignorable treatment assignment assumption, alternatively referred to as unconfoundedness,¹⁴⁸ selection on observables,¹⁴⁹ conditional independence,¹⁵⁰ and exogeneity,¹⁵¹ channels the principle of random assignment in an experimental design.¹⁵² It stands for the proposition that whether or not someone received the treatment is unrelated to the outcome being measured after taking into account the other characteristics they possess that could influence the outcome (or controlling for these other factors). Thus, overt and hidden biases are not a problem if this assumption holds. But if this assumption is violated, it is impossible to eliminate alternative, confounding explanations for the measured outcome. In the real world this assumption is violated all the time as people self-select into various “treatments,” or others select to apply “treatment” outside of the neutrality of random assignment. A good research design is the best cure for this inferential ill, but statistical corrections can sometimes be a suitable fallback.

Certainly this study, as with most observational studies that are not some kind of fortuitous natural experiment, violates this assumption and requires statistical correction since we cannot randomly assign the perception of political/ideological orientation given that is driven by (1) the actual underlying political/ideological orientation of a candidate; (2) the degree an individual chooses to publically signal such orientation; (3) the degree faculties evaluating candidates pick up on these signals; (4) the degree faculties’ underlying actual political/ideological orientation colors their reading of the candidates’ signals. Thus, statistical correction is necessary.

Regression. Regression modeling, matching and propensity score analysis are all attempting to do the same thing—break the link between treatment assignment and treatment outcome. But they are not interchangeable. When “treatment groups have important covariates that are more than one-quarter or one-half of a standard deviation apart, simple regression methods are unreliable for removing biases associated with differences in covariates, a message that goes back to the early 1970s but is often ignored.”¹⁵³

Thus, when trying to adjust for covariate imbalance, regression “is adequate in simple situations,” but inadequate when “the differences between the two distributions are [too] large.”¹⁵⁴ This is because regression estimates are sensitive to the lack of covariate overlap, often making it “impossible to arrive at a credible estimator based on simple regression methods.”¹⁵⁵

b. Covariate Balance

As noted above, conservatives/libertarian law professors and law professors with either a liberal or unknown political/ideological orientation are not similarly qualified. This is a problem since these qualifications are covariates in statistical models seeking to tease out causal effects. Without some correction so that apples are being compared to apples, any estimated causal effect will be

148. IMBENS & RUBIN, *supra* note 137, at 20.

149. Burt S. Barnow, G.G. Cain & Arthur S. Goldberger, *Issues in the Analysis of Selectivity Bias*, in 5 EVALUATION STUDIES (E. Stromsdorfer & G. Farkas eds., 1980).

150. Michael Lechner, *Earnings and Employment Effects of Continuous Off-the-Job Training in East Germany After Unification*, 17 J. BUS. & ECON. STATISTICS 74 (1999).

151. Guido W. Imbens, *Nonparametric Estimation of Average Treatment Effects Under Exogeneity; A Review*, 86 REV. ECON. & STATISTICS 4 (2004).

152. See also GUO & FRASER, *supra* note 137, at 29–33.

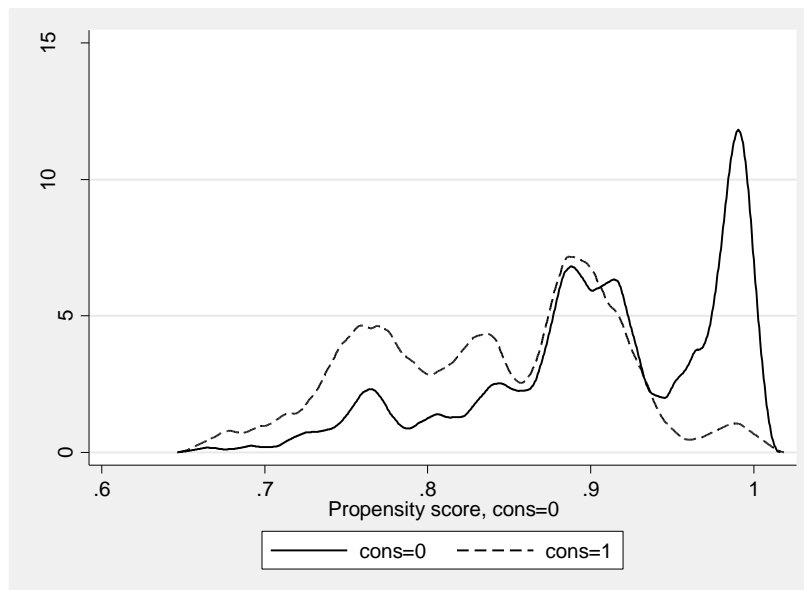
153. IMBENS & RUBIN, *supra* note 137, at 277.

154. *Id.* at 309, 311.

155. *Id.* at 336.

biased. As noted in the graph below of the propensity scores for all of the data, the overlap is particularly poor when the propensity scores approach 1.

Graph 6: Overlap of Propensity Scores of Conservative/Libertarian Professors and Other Professors



There are several techniques to correct this that will be applied here: propensity score matching, propensity score weighting, nearest neighbor matching (NNM), and coarsened exact matching (CEM).¹⁵⁶ All seek to either compare apples to apples, or to weight observations to achieve the same effect. And to be done correctly, all must ignore the outcome variable when determining covariate balance.¹⁵⁷ While utilizing so many methods may be dizzying, “[b]ecause the relative performance of estimators hinges so powerfully on features of the [data generating process], [it is] suggest[ed] that researchers estimate average treatment effects using a variety of approaches.”¹⁵⁸

As can be seen from the table in the appendix and the graph below, as the number of observations is reduced by these methods, the normalized difference of means¹⁵⁹ between the treatment and control groups is significantly lowered (as a general rule of thumb, one wants these standardized differences in means to be between 0 and positive or negative 0.25).¹⁶⁰

156. For an explanation of these methods, see Appendix I, Section III.

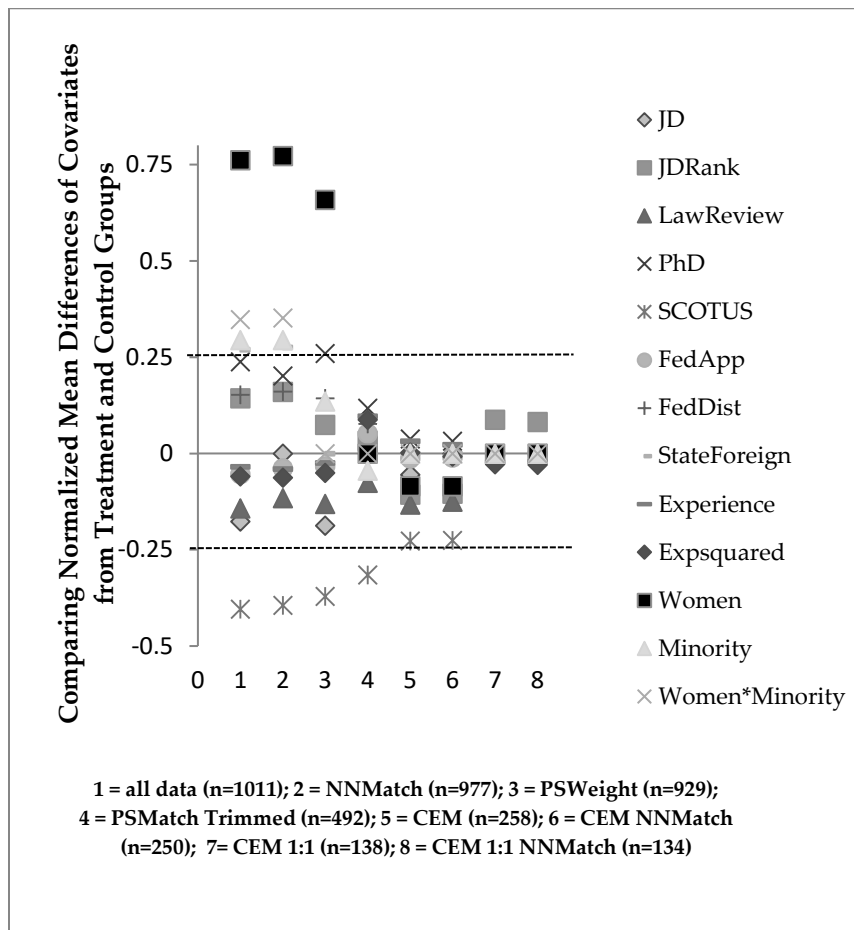
157. Cassandra W. Pattanayak, *Evaluating Covariate Balance*, in PROPENSITY SCORE ANALYSIS: FUNDAMENTALS AND DEVELOPMENTS 92 (Wei Pan & Haiyan Bai eds., 2015).

158. Matias Busso et al., *New Evidence on the Finite Sample Properties of Propensity Score Reweighting and Matching Estimators*, 96 REV. ECON. & STATISTICS 885 (2014).

159. T-statistics are not recommended for assessing covariate balance since “[c]omparing *t*-statistics for a particular covariate before and after matching can be misleading because any improvement in the covariate means is confounded by changes in the sample size.” Pattanayak, *supra* note 157, at 103. See also IMBENS & RUBIN, *supra* note 137, at 310–11. However, actual means, differences, and *t*-statistics are reported in Appendix I, Section II, for those who disagree. Normalized differences were calculated using the formula provide by Imbens and Rubin. See *id.* at 311.

160. See Donald B. Rubin, *Using Propensity Scores to Help Design Observational Studies: Application to the Tobacco Litigation*, 2 HEALTH SERVICES & OUTCOMES RESEARCH METHODOLOGY 169 (2001); Elizabeth A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, 25 STATISTICAL SCIENCE 1 (2010).

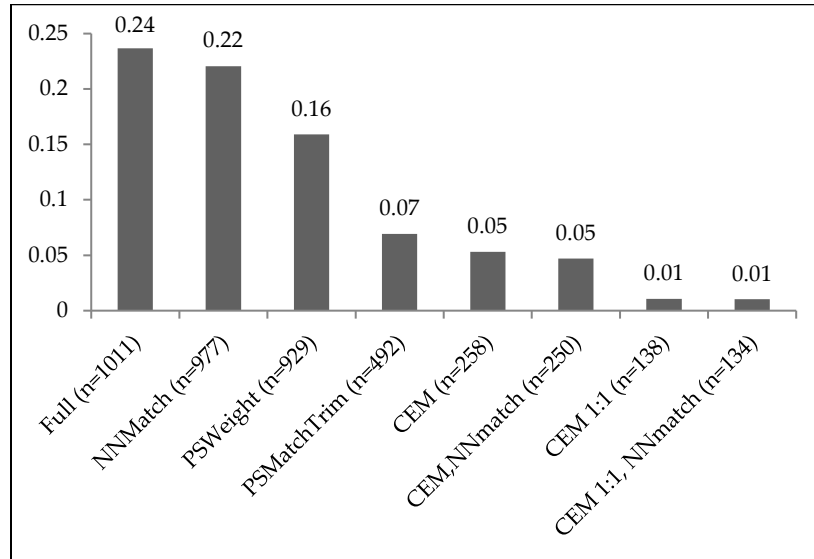
GRAPH 7: Normalized Difference of Means of Covariates Between Treatment and Control Groups Across Selected Models



Certain covariates, such as the percentage of women or U.S. Supreme Court clerkships are very poorly balanced in the full data, as well as the nearest neighbor matching and propensity score weighting models. Not until we get to the models using CEM do all of the covariates' standardized difference of means fall within the desired boundary of plus or minus 0.25. And the CEM models that use one-to-one matching do the best job of balancing the covariates in the treatment and control groups.¹⁶¹ This is also shown in the graph below that displays the overall average normalized difference of means based on the various models.

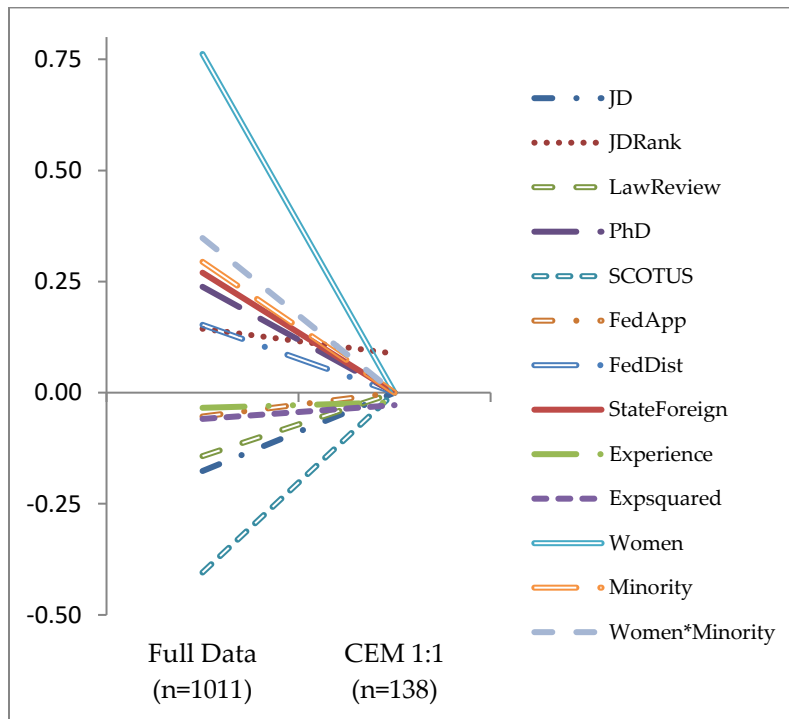
161. For detailed information on the effectiveness of all of the models in balancing the covariates, see Appendix I, Section IV.

Graph 8: Overall Average Covariate Normalized Mean Differences between Treatment & Control Groups



The graph below also shows how effective the one-to-one CEM model is in reducing differences between the covariates in the control and treatment groups.

Graph 9: Comparing Normalized Mean Differences of Covariates from Treatment and Control Groups



Thus, for the better-balanced models, the estimates of the differences on the dependent variable of interest between the treatment and control groups will have the least bias (i.e., be the most

accurate). The downside is that these more accurate models have fewer observations, resulting in greater variance (i.e., larger standard errors) which reduces the possibility of statistical significance. Also, when the models trim observations they reduce the ability to generalize since the observations that are left are but a subset of the overall data.¹⁶²

3. *Publications (Productivity)*¹⁶³

Table 1 reports the difference in annual publications between treatment and control groups using the various models noted above. Three different treatment-control scenarios are displayed: conservatives/libertarians (treatment) and all others (control); conservatives/libertarians (treatment) and liberals (control); and conservatives/libertarians (treatment) and unknowns (control).

Table 1: “Treatment Effect” Across All Models for Annual Publication Rates

<i>Outcome Var. = Yearly Avg. All Publications</i>	Treatment= Cons; Control=All Other	Treatment= Cons Control=Liberal	Treatment=Cons Control=Unknown
OLS Regression (robust standard errors)	.53*** (.14) n = 1011 (cons = 101)	.49*** (.15) n = 738 (cons = 101)	.66*** (.16) n = 374 (cons = 101)
Regression (r.s.e.) with Coarsened Exact Matching weights & control variables	.61** (.19) n = 258 (cons = 71)	.53* (.22) n = 177 (cons = 63)	.70*** (.20) n = 104 (cons = 49)
Regression (r.s.e.) with CEM weights (1:1 match) & control variables	.71*** (.20) n = 138 (cons = 69)	.61** (.23) n = 118 (cons = 59)	.73** (.26) n = 84 (cons = 42)
Nearest Neighbor Matching (1 match)—Average Treatment Effect	.52** (.19) n = 977 (cons = 100)	.50* (.20) n = 714 (cons = 100)	.57** (.18) n = 363 (cons = 100)
NNM (1 match) with CEM—ATE	.77** (.26) n = 250 (cons = 69)	.75** (.26) n = 171 (cons = 61)	.79*** (.24) n = 102 (cons = 48)

162. Pattanayak, *supra* note 157, at 108.

163. Analysis of just legal publications produced nearly identical results.

NNM (1 match) with CEM (1:1 match)—ATE	.85*** (.25) n = 134 (cons = 67)	.66* (.27) n = 114 (cons = 57)	.80** (.31) n = 82 (cons = 41)
OLS Regression (r. s. e.) with Propensity Score Weighting	.38** (.12) n = 929 (cons = 101)	.52*** (.15) n = 682 (cons = 101)	.57*** (.14) n = 348 (cons = 101)
Propensity Score Matching (ATE with 1 match) trimmed ($p_s \leq .9$ & $\geq .1$)	.86** (.28) n = 492 (cons = 83)	.45* (.20) n = 479 (cons = 96)	.49** (.18) n = 278 (cons = 97)
Propensity Score Matching with CEM (ATE with 1 match)	.84*** (.22) n = 258 (cons = 71)	.56* (.28) n = 177 (cons = 63)	.60* (.24) n = 102 (cons = 49)
Propensity Score Matching with CEM (1:1) (ATE with 1 match)	.83*** (.20) n = 138 (cons = 71)	.66* (.28) n = 118 (cons = 59)	.61* (.26) n = 84 (cons = 42)

Notes: for full details of these models, see Appendix I, Section V. * ($p \leq .05$); ** ($p \leq .01$); *** ($p \leq .001$)

For every model in every treatment-control scenario, the results are positive and statistically significant. When comparing conservatives/libertarians to all other professors, they average .38-.86 more publications per year, with the models with the least bias ranging from .71-.85. Substantively, this is rather large. Over a ten year period, a conservative/libertarian professor would publish, on average, four to eight more articles than her peers.

When looking at just liberals or unknowns in the control groups, the numbers are similar, though the statistically significant gap is slightly smaller between conservatives/libertarians and liberals (.45-.75 publications per year) than between the conservatives/libertarians and unknowns (.49-.80).¹⁶⁴

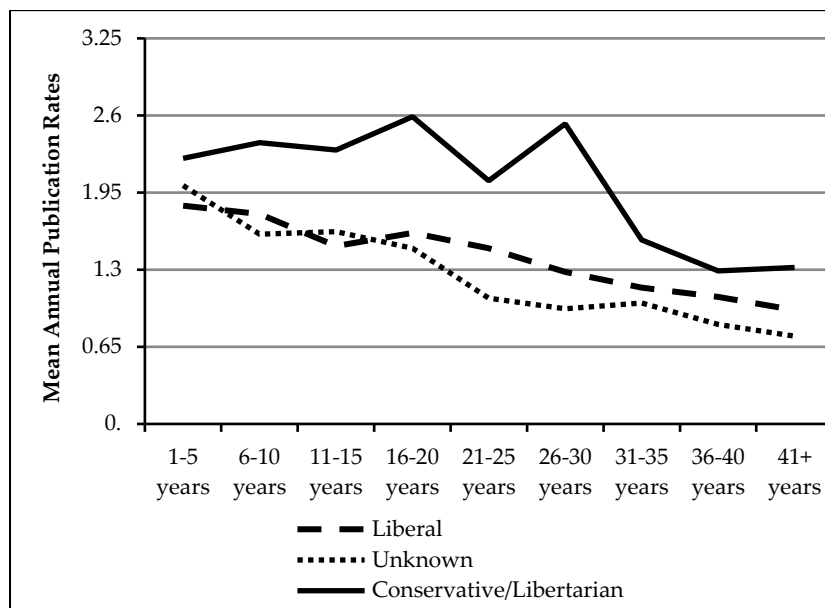
These results undermine the Brainpower Hypothesis to the extent that publication quantities are reflective of intelligence or ability. It also lends support to Hypothesis #3 since it may be that only the best conservatives and libertarians are making it into the legal academy. However, it could be consistent with Hypothesis #2, as well, if the only conservatives and libertarians seeking legal

¹⁶⁴ For a graph of these differences, see Section VI of Appendix I.

academic jobs are those with the greatest propensity to publish (though absent a simultaneous discrimination story, it is unclear why only the best would be interested in academia).

Although, if conservatives and libertarians tend to fall off dramatically in publication rates after getting tenure, then law schools aware of this tendency may very well be less likely to hire those conservatives and libertarians. While these data cannot look at longitudinal trends, they can look at different cohorts as a proxy. As a matter of descriptive data, older conservative and libertarian cohorts still publish more than their peers.

Graph 10: Comparison Among Cohorts of Mean Annual Publication Rates by Political Orientation



As the data show, not only do conservatives and libertarians not exhibit a massive drop-off in publication rates in older, post-tenure cohorts through the first thirty years, they actually have higher publication rates than pre-tenure liberal or unknown cohorts until after their third decades of experience. In contrast, liberal and unknown cohorts show slightly lower publication rates after tenure, and as the cohorts get older, on average the publication rates correspondingly drop.¹⁶⁵ In other words, liberals’ and unknowns’ highest publication rates are in the pre-tenure cohort, whereas conservatives and libertarians have higher publication rates in post-tenure cohorts (except for the 21–25 year range) until after 30 years of experience. And as a matter of causal inference, the models above either controlled for experience, or matched on it. Thus, conservative/libertarian law professors in this dataset do not dramatically fall off in production compared to their peers. Whether conservatives and libertarians are being held to a higher standard with only the very best—far better than, on average, their peers—getting in, or they are more motivated to outperform

165. One could argue that law schools have figured out which conservatives and libertarians are likely to drop off after tenure and have filtered them out, either at the hiring or tenure-granting stage, leaving only the high performers left. That is granting an ability to hiring or tenure committees that is beyond mere mortal ken and is contradicted by the data, which appear to show that law schools have not figured out which liberals and unknowns are likely to drop off after tenure. Otherwise, they would look more like conservative/libertarian rates.

their peers, is unclear. However, both explanations are consistent with a discrimination or bias explanation.

4. Citations (Relevance)¹⁶⁶

Of course, producing more articles than one's peers is less important if those articles are not very relevant, operationalized here by frequency of citation. The table below reports the results from the various models as to the difference between conservatives/libertarians and their peers when it comes to citations per year.

Table 2: “Treatment Effect” Across All Models for Annual Citation Rates

<i>Outcome Variable= Yearly Avg. All Citations</i>	Treatment= Cons/Libert. Control=All Other	Treatment= Cons/Libert. Control= Liberal	Treatment= Cons/Libert. Control= Unknown
OLS Regression (robust standard errors)	18.5*** (5.0) n = 1011	16.9*** (5.2) n = 738	23.3*** (5.4) n = 374
Regression (r.s.e.) with Coarsened Exact Matching weights & control variables	31.9*** (6.5) n = 258 (cons = 71)	24.5*** (7.4) n = 177 (cons = 63)	31.9*** (7.3) n = 104 (cons = 49)
Regression (r.s.e.) with CEM weights (1:1 match) & control variables	31.9*** (6.8) n = 138 (cons = 69)	17.9* (8.7) n = 118 (cons = 59)	22.1* (9.5) n = 84 (cons = 42)
Nearest Neighbor Matching (1 match)—Average Treatment Effect	13.3* (6.0) n = 977 (cons = 100)	13.6* (6.5) n = 714 (cons = 100)	15.3 (5.4) n = 363 (cons = 100)
NNM (1 match) with CEM—ATE	32.0*** (9.0) n = 250 (cons = 69)	28.8** (9.2) n = 171 (cons = 61)	28.8*** (7.5) n = 102 (cons = 48)

166. Analysis performed on just legal citations produced nearly identical results.

NNM (1 match) with CEM (1:1 match)—ATE	37.1*** (8.0) n = 134 (cons = 67)	26.7** (8.5) n = 114 (cons = 57)	24.5* (10.8) n = 82 (cons = 41)
OLS Regression (r. s. e.) with Propensity Score Weighting	15.9** (5.4) n = 929 (cons = 101)	15.8** (5.5) n = 682 (cons = 101)	20.7*** (5.2) n = 348 (cons = 101)
Propensity Score Matching (ATE with 1 match) trimmed (ps ≤.9 & ≥.1)	32.4*** (9.7) n = 492 (cons = 83)	13.6* (6.7) n = 479 (cons = 96)	18.3** (6.2) n = 278 (cons = 97)
Propensity Score Matching with CEM (ATE with 1 match)	32.5*** (7.6) n = 258 (cons = 71)	30.2*** (9.2) n = 177 (cons = 63)	25.7*** (7.9) n = 104 (cons = 49)
Propensity Score Matching with CEM (1:1) (ATE with 1 match)	36.4*** (8.3) n = 138 (cons = 69)	22.5** (7.4) n = 118 (cons = 59)	19.3* (7.9) n = 84 (cons = 42)

Notes: for full details of these models, see Appendix I, Section V. * (p≤.05); ** (p≤.01); *** (p≤.001)

The results here are also very strong. Again, for every model and every treatment-control scenario, the "effect" is positive and statistically significant. Conservative and libertarian law professors will be individually cited 13.3-37.1 more times a year than other law professors. To put this in perspective, though it is admittedly a less than perfect comparison, the average number of cites per year for a professor in this dataset is 41.7.¹⁶⁷

Similar to publication rates, the difference is a bit larger between conservatives/libertarians and unknowns (15.3 to 31.9 citations per year) than between conservatives/libertarians and liberals (13.6 to 30.2 citations per year).¹⁶⁸

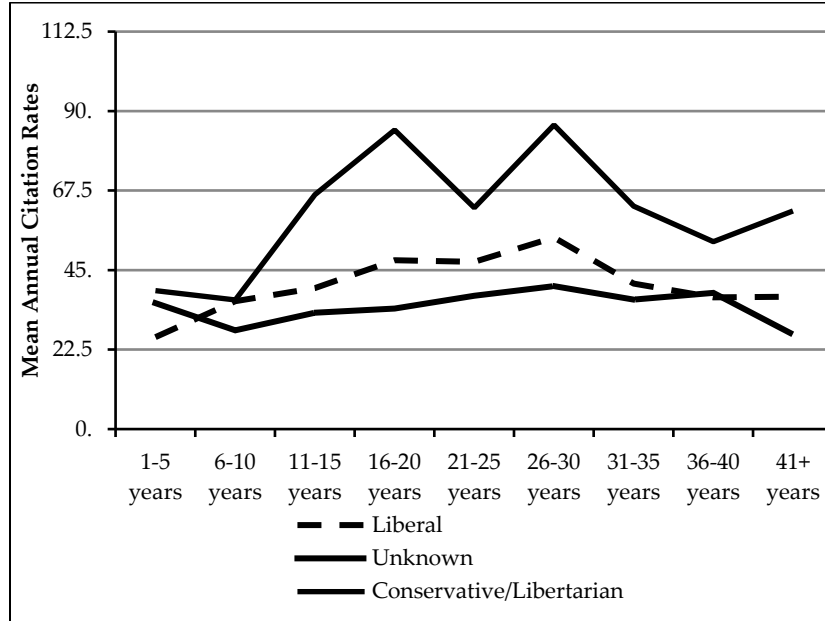
As previously noted with regard to publication rates, perhaps conservatives and libertarians start with a bang and then collapse, making them less attractive to hire for very legitimate reasons.

167. An alternative explanation for why conservatives and libertarians are cited more than their peers is that, in this dataset at least, they are more likely to be writing in a public law area, which tends to be cited more often. Given that the only study to examine political orientation and area of law teaching found just the opposite—that conservative and libertarians make up an even smaller proportion of public law positions than non-public law positions—this alternative explanation is unlikely, though not impossible. See Lindgren, *supra* note 66, at 20–21.

¹⁶⁸ For a graph of these differences, see Part VI of Appendix I.

Looking at the mean annual citation rates by five-year cohort, however, refutes such a theory, as seen in Graph 11. And in the causal effects models, experience was incorporated as well.

Graph 11: Comparison Among Cohorts of Mean Annual Citation Rates by Political Orientation



Conservatives/libertarians have significantly higher mean annual citation rates for every post-tenure cohort compared to the pre-tenure cohort. Liberals and unknowns, on the other hand, have slightly higher post-tenure rates (or even occasionally lower rates). Thus, citation rates among scholars of varying experience do not provide a rationale for not hiring conservatives and libertarians.

B. Caveats

While this study operationalized productivity (publications per year) and relevance (citations per year), quality is arguably an even more important indicator. That is difficult to measure, and there is no attempt to do so here. Thus, while conservative and libertarian law professors at the top sixteen law schools are more productive and more relevant, this study does not tell us if they produce scholarship of higher quality.

Additionally, given the nature of this observational data, this study can only describe correlation, not causation. This means that the type of rigorous testing of hypotheses one could conduct in an experiment cannot be done here. Thus, while the findings undermine the Intelligence/Ability Hypothesis and are consistent with the Discrimination Hypothesis, they can neither disprove the former nor prove the latter. And the self-selection hypothesis is also potentially consistent with the data, though it requires a less believable explanation—unlike non-conservatives and libertarians, an interest in academia and the ability to excel are very highly correlated in conservatives and libertarians.

While there could be other explanations for conservatives and libertarians being cited more than their peers,¹⁶⁹ when viewed in combination with the number of articles published per year (which was controlled for in the citation analysis), as well as the qualification gap,¹⁷⁰ a discrimination-bias explanation makes more sense. This does not mean that the discrimination or bias is explicit, however—it may be implicit bias. Still, this study's data do not definitively settle the debate; they just tip the scales further in one direction.¹⁷¹

C. *A Flaw in the Market?*

Unlike law schools and lunch counters, major league baseball did not need a court order to desegregate. The market took care of that. Baseball had a very simple measure of success—winning—and team management was rewarded for that success with increased profits (and glory). And baseball players' measurable performance, such as batting averages and home runs hit, was highly correlated with winning. Once one team began to look beyond skin color to pursue the best athlete, other teams had to do the same or fall behind.

The law school market lacks such a simple mechanism for defining success, and thus for purging itself of types of discrimination that are not clearly illegal. And to the extent it does have such a mechanism—the annual *U.S. News* rankings—law faculties' scholarly production and influence have only a limited, indirect influence, if any, on a school's ranking via the "peer assessment score," which accounts for 25% of the overall rank.¹⁷² However, given that the peer assessment score is just an overall rating of a law school's program, it is unclear what portion of this score is influenced by faculty production and influence. Thus, law schools have only a weak incentive to hire the professors who will publish and be cited the most. They're just not sufficiently rewarded for it.¹⁷³

IV. POTENTIAL IMPACT ON THE LEGAL ACADEMY

So what? What does it matter if there are fewer conservatives and libertarians in the legal academy, even if this is due to discrimination? Imagine if the reverse were true. What if, instead, there were very few liberals in the legal academy—would law schools, legal scholarship, and law students be any different under this counterfactual scenario? I think it would be difficult to argue there would be no difference. More specifically, there are at least three potential negative impacts due to the dearth of conservative and libertarian law professors; each is discussed in turn.

169. See Posner, *supra* note 76.

170. The suggestion that conservatives and libertarians are more ideological and thus are driven to publish more does not explain why they are more qualified and why they are cited more.

171. This is an abductive inference since I am latching on to the best explanation for the observed data. See *Abduction*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/abduction/> [<http://perma.cc/K6LW-ATHT>].

172. *Methodology: 2016 Best Law Schools Rankings*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology?int=9d0608> [<http://perma.cc/Z5FV-K3KZ>].

173. One could imagine incorporating such objective measures into the U.S. News rankings; and arguably the quality assessment measures, which make up 40% of a school's ranking, are incongruent with the other measures that are objective. Understandably there would be pushback to such a change since law professors, and a law school's quality, are about more than numbers, but we reduce law students to mere numbers to calculate the rankings (LSAT scores, GPA, bar passage rates, placement success), and incorporating such a measure into the quality assessments would make rankings more objective and transparent.

A. *The Echo Chamber in Liberal Legal Scholarship*

One party injured by the lack of conservatives and libertarians on law faculties is liberal law professors. A lack of intellectual diversity across political ideologies in law schools creates, as one commentator observed, an atmosphere that inhibits “an accurate understanding of contemporary reality.”¹⁷⁴ As Cass Sunstein has observed, “When people talk to like-minded others, they tend to amplify their preexisting views, and do so in a way that reduces their internal diversity.”¹⁷⁵ In addition to impacting scholarship, this tendency can influence the media and the public since journalists often turn to law professors when covering legal issues. David Hyman notes that groupthink led the academy to totally underestimate the significance of the legal arguments against the Affordable Care Act, referring to the legal challenges as “puzzl[ing],” “if not frivolous, close to it,” and “simply crazy.”¹⁷⁶ But the Commerce Clause challenge that law professors dismissed so easily not only sometimes won in the lower courts, it received five votes at the Supreme Court.¹⁷⁷ Hyman argues that this erroneous prognostication by the nation’s legal experts could have been due to “motivated reasoning in an echo chamber.”¹⁷⁸ The dominance of one worldview in the legal academy not only impacts the content of legal scholarship¹⁷⁹ but also what is actually considered by legal scholars.

B. *Liberal Law Students and Groupthink*

One-sidedness in an intellectual debate is anathema to quality legal education, according to David Vernon, with law schools striving for quality needing “an attitude or ambience that affirmatively encourages a full and free exchange of ideas.”¹⁸⁰ A law school’s educational product is negatively affected if the institution’s explicit or implicit “goals, or the means used to achieve them” lead to the inhibition of “the free expression of ideas by faculty and students in the classroom, in the selection of research areas and the publication of research results, or in the discussion of law, the legal process, and the legal system broadly defined.”¹⁸¹ In the end, the students suffer the most. As one former American Constitution Society chapter president at UC Berkeley Law School observed:

Attending a law school that is not ideologically diverse substantially undermines the value of the education. There are myriad divides in the law over very important issues that we as lawyers will face when we enter the legal field as professionals. When we only bring up one side to caricature and deride it, a few things happen. First, the very few students who are ideologically predisposed to those sides feel marginalized, thereby undermining their education. More importantly, by treating those opinions as such, we are not seriously evaluating them and will be extremely ill-equipped to grapple with them in the real world. I am liberal but hoped to be

174. George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL’Y 165, 166 (2014); see also Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 HARV. J.L. & PUB. POL’Y 137, 138 (2014).

175. CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 8 (2009).

176. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 807–08.

177. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593, 2648 (2012).

178. Hyman, *supra* note 176, at 824.

179. See, e.g., James C. Phillips, *Law and Religion in U.S. Legal Scholarship: An Empirical Examination, 2008–2012*, 2014 BYU L. REV. 635.

180. David H. Vernon, *The Importance of Intellectual Diversity to Educational Quality*, 32 J. LEGAL EDUC. 189, 189 (1982).

181. *Id.*

able to engage with conservative ideas in law school and have been deeply disappointed with the perfunctory and cavalier attitude with which we assess conservative ideas at my law school. I think we will be much worse as practitioners, and ironically, will be much less capable of advocating for liberal ideas because of our failure to seriously grapple with conservatism in our law school climate.¹⁸²

A lawyer who has not been trained to sincerely grapple with the strengths of his opponent's arguments and the weaknesses of his own, will not serve his clients well.¹⁸³ Given that at least some issues implicate political orientation, and many judges have a more conservative worldview, a law school education that only reinforces the correctness of liberal views appears rather deficient from a professional perspective. Diversity of law faculty along the dimension of political orientation may be even more important at elite law schools given that the student populations at those schools are much more liberal than law school student populations in general,¹⁸⁴ and graduates of elite law schools may be more likely to be litigating "political" issues or working in the policy arena.

C. *Limited Mentoring and Clinical Opportunities*

For conservative and libertarian law students, there are significantly fewer likeminded law professors that can provide mentoring or research opportunities in areas that implicate political orientation. This is especially problematic if there are very few clinical opportunities with a conservative and libertarian bent.¹⁸⁵ Thus, such students must either find a mentor, a clinic, or a research project they are less than enthused about—or at least identify less with—or forgo such opportunities altogether. For example, a friend of the Author's who taught full-time for two years in a non-tenure track position at an elite law school decided to move on to a different professional opportunity. Upon informing the conservative students he had been supervising in a pro-life project concerning abortion of his pending departure, they dejectedly asked who else in the law school would possibly oversee their project in his absence. There was no one, and the project was prematurely ended.

CONCLUSION

In legal academia, conservatives and libertarians are a rare breed. It is unclear why. It could be because they cannot handle the work, and thus do not get hired. It could be because they are not interested, and do not even try to get hired. Or it could be because the academy is not very interested in hiring them. This study finds that the few who do make it are, on average, more qualified, publish at statistically significant higher levels, and are cited at statistically significant higher levels than their peers. In other words, conservative and libertarian law professors are less common, more qualified, and more productive and influential. These findings call into question

182. Roger Clegg, *Toward Intellectual Diversity in Law School*, MINDING THE CAMPUS (Nov. 7, 2014), <http://www.mindingthecampus.com/2014/11/toward-intellectual-diversity-in-law-school/> [<http://perma.cc/6KC6-967N>].

183. Michael McConnell once noted that every liberal student at Stanford should be required to take his constitutional law class, and every conservative or libertarian student should be required to take constitutional law from Pam Karlan.

184. See Bonica et al., *supra* note 68.

185. See John O. McGinnis, *Should Law Schools Pursue "Social Justice"?*, Online Library of Law and Liberty, January 6, 2016, available at <http://www.libertylawsite.org/2016/01/06/should-law-schools-pursue-social-justice/> (arguing that law school "clinics are enterprises of political action," and that "[f]ew, if any clinics however, are devoted to defending [conservative positions]").

the explanation that they cannot cut it, makes the explanation that they are not interested less believable, and supports the explanation that some form of bias against them exists, whether deliberate or unconscious. Indeed, this explanation is the only theory that explains all three of this study's findings. Future research will have to explore this from different angles to more confidently explain the political orientation disparity of the legal academy.

* * *

STUDY #2—TESTING A BECKERIAN-ARROWIAN MODEL OF POLITICAL
ORIENTATION DISCRIMINATION ON THE U.S. LAW PROFESSOR LABOR MARKET:
MEASURING THE “RANK GAP”, 2001-2010

INTRODUCTION

At the 2014 Harvard Commencement, graduates received a bit of a surprise from their famous speaker, former New York Mayor Michael Bloomberg. Hardly one viewed as a knee-jerk conservative, or even a conservative at all, the billionaire turned politician left the Republican Party to become an Independent, and his tenure atop the Big Apple was littered with policies few would confuse with conservatism or libertarianism. In his remarks he also noted that he had donated to President Obama’s 2012 presidential campaign.

But Bloomberg spent the bulk of his speech lambasting the lack of political diversity among Harvard’s faculty (and American universities in general), likening the idea “that scholars should be funded only if their work conforms to a particular view of justice” as “a modern-day form of McCarthyism.”¹⁸⁶ Noting the irony of the 1950s being an environment where “the right wing was attempting to repress left wing ideas,” Bloomberg observed that today “it is liberals trying to repress conservative ideas, even as conservative faculty members are at risk of becoming an endangered species.”¹⁸⁷ And he noted a recent study by the Harvard’s daily student newspaper—hardly a right wing rag—that found that 98% of Harvard Law faculty donations in the 2012 presidential election (which pitted two former Harvard Law alumni against each other) went to the Democrat, President Obama, with the newspaper’s study finding that the “data supports the commonly held belief that Harvard’s professoriate is largely liberal, raising questions about the ideological diversity of the faculty and what impact that may have on teaching and research.”¹⁸⁸ Based on this lopsided pattern of donations, Bloomberg wondered “whether students are being exposed to the diversity of views that a great university should offer,” arguing that “a university cannot be great if its faculty is politically homogenous.”¹⁸⁹

But it’s not just Harvard. Last year Stanford University’s outgoing provost, John Etchemendy, raised a similar warning, referring to “a kind of intellectual intolerance, a political one-sidedness,” as “the threat from within” “that will, in the long run, be more damaging to universities than cuts in federal funding or ill-conceived constraints on immigration.”¹⁹⁰ He called for the “need to encourage real diversity of thought in the professoriate” so as “to stem or dial back our academic parochialism” to avoid this wholly internal threat.¹⁹¹ Nor is it only Harvard and Stanford which may suffer from the “threat” of political one-sidedness. One scholar noted in 2015 that “[o]f the fourteen honorary degrees bestowed by Ivy League institutions to living Supreme Court justices twelve went to those on the left the Court,” and the other two went “to Sandra Day O’Connor, the

¹⁸⁶ Valerie Strauss, Bloomberg, at Harvard, blasts Ivy League ‘liberals’ for ‘trying to repress conservative ideas’, Washington Post, May 31, 2014.

¹⁸⁷ *Id.*

¹⁸⁸ Karl M. Aspelund & Meg P. Bernhard, Harvard Faculty Donate to Democrats by Wide Margin, The Harvard Crimson, May 1, 2015.

¹⁸⁹ Strauss, *supra* note 186.

¹⁹⁰ John Etchemendy, John Etchemendy: ‘The threat from within’, Stanford News, Feb. 21, 2017.

¹⁹¹ *Id.*

swing justice of her day and a moderate conservative.”¹⁹² And, he observed, “no Ivy League University has ever awarded such a degree to anyone sitting now on the right of the Court,” and what “makes this performance even more obviously ideologically driven is that these academic institutions have neglected the one who has [arguably] had the most academic influence—Antonin Scalia.”¹⁹³

New York Times Pulitzer Prize-winning columnist Nicholas Kristof, a self-described progressive, sounded a similar alarm in 2016. He observed that “[w]e progressives believe in diversity, and we want women, blacks, Latinos, gays and Muslims at the table—er, so long as they aren’t conservatives.”¹⁹⁴ He further noted that “the one kind of diversity that universities disregard is ideological and religious”: “We’re fine with people who don’t look like us, as long as they think like us.”¹⁹⁵

Nor is it just universities generally. Law Professor Shima Baradaran Baughman, began her PrawfsBlawg post by informing her readers that as “a minority, a first generation immigrant, a New Yorker, and a woman” she didn’t see the “need to build my liberal cred,” but did so anyway noting her consistently Democratic voting record and her campaigning for and donating to President Obama. She then argued that there was “potential liberal bias in the legal academy.”¹⁹⁶ She noted the impact such had on colleagues (and herself):

I’ve had colleagues who have been nervous about their job talks seeming too “conservative”, being ashamed that having clerked for a conservative judge (who they may not have agreed with) has created a scarlet letter for them in academia, going through lengths to hide their religious affiliation, and most depressing of all, having not all written about topics they have researched about for fear that they didn’t fit with the liberal norms of their faculty.¹⁹⁷

Nor is it just elite law schools. The University of Louisville’s Law School proclaims via promotional materials that it is committed to “progressive values,” and incoming students and professors are informed that on the important issues, the school joins the “progressive” side.¹⁹⁸ By giving this public law school an “ideological brand,” the hope is that it will increase fundraising and student recruitment.¹⁹⁹ As a result, one professor there observed, “classroom discussions have grown one-sided” as “[s]tudents find it hard to square [arguments “defend[ing]” federalism, standing limits, or qualified immunity” or “criminalizing drugs”] . . . with the law school’s institutional commitment to ‘social justice’ and ‘progressive values.’”²⁰⁰

But the fact that conservative and libertarian law professors are a rare bird in academia,

¹⁹² John O. McGinnis, *Ivy Honors and the Justices*, Law and Liberty Blog, July 20, 2015.

¹⁹³ *Id.*

¹⁹⁴ Nicholas Kristof, *A Confession of Liberal Intolerance*, The New York Times, May 7, 2016.

¹⁹⁵ *Id.*

¹⁹⁶ Shima Baradaran Baughman, *Liberal Bias in Legal Academia?*, PrawfsBlawg, Aug. 4, 2016.

¹⁹⁷ *Id.*

¹⁹⁸ Luke Milligan, *Commentary*, UofL law school is no longer neutral, Courier Journal, Jan. 13, 2016 (updated on Jan. 17, 2016).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

including law schools, and the fact that such may harm legal education and scholarship, as well as the greater legal world, does not answer the question of why are there so few conservative and libertarian law professors? If it's due to self-selection, then the remedy would be quite different than if this dearth is due to discrimination. This study seeks to answer the question of why by using a unique dataset of all tenure-track non-clinical teaching law professors hired in the United States from 2001-2010. And it does so leveraging a hybrid model of discrimination based on the work of Nobel Prize-winning economists Gary Becker and Kenneth Arrow. The paper proceeds as follows. Part I explains why a scarcity of conservative and libertarian law professors matters. Part II looks at previous studies into the political make-up of the legal academy. Part III lays out the study's data and methodology. Part IV provides the findings and analysis. And part V notes caveats and limitations to the study, before concluding.

I. WHY THE IMBALANCE MATTERS

A. *The Harm Regardless of the Cause*

Regardless of why there are few conservative and libertarian law professors, that very fact produces numerous harms to legal scholarship, legal education, the legal profession, and the law, not to mention the society governed by that law. Thus, whatever this study may find is the cause, the problem is just as real.

1. The Echo Chamber, Poor Judgment, and Lost Credibility

One party harmed by few conservative and libertarian law professors is actually liberal law professors and the scholarship they produce. As former Obama Administration member and current law professor Cass Sunstein has observed, “When people talk to like-minded others, they tend to amplify their preexisting views, and do so in a way that reduces their internal diversity.”²⁰¹ Such is not peculiar to liberal law professors, but simply a phenomenon of human psychology, taking on the form of motivated reasoning, confirmation bias, and the like. And so it can be hard to spot in oneself. As a Stanford Provost observed about universities: “We decry certain news outlets as echo chambers, while we fail to notice the echo chamber we’ve built around ourselves.”²⁰² This intellectual blind spot will lead to professors “writ[ing] off those with opposing views as evil or ignorant or stupid, rather than as interlocutors worthy of consideration,” and “succumb[ing] to the all-purpose *ad hominem* because it is easier and more comforting than rational argument.”²⁰³

And this can particularly damage law professors’ “accurate understanding of contemporary reality,”²⁰⁴ leading to errors in judgment. As two law professors mused, “[i]f liberals predominate on the faculty, and scholarship reflects ideological biases, then legal research may advance a liberal

²⁰¹ CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 8 (2009).

²⁰² Etchemendy, *supra* note 190.

²⁰³ *Id.*

²⁰⁴ George W. Dent, Jr., Toward Improved Intellectual Diversity in Law Schools, 37 HARV. J.L. & PUB. POL’Y 165, 166 (2014); see also Nicholas Quinn Rosenkranz, Intellectual Diversity in the Legal Academy, 37 HARV. J.L. & PUB. POL’Y 137, 138 (2014).

world view rather than understanding of the law.”²⁰⁵ For instance, one scholar argues that groupthink lead the legal academy to view the legal challenges against the Affordable Care Act (“Obamacare”) as “puzzl[ing],” “silly,” “if not frivolous, close to it,” “deserving of sanctions,” “completely bogus,” and “simply crazy.”²⁰⁶ And yet the Commerce Clause challenge dismissed by the legal academy won a majority at the Supreme Court (as well as sometimes winning in the lower courts). This failure to seriously consider an argument that ended up being persuasive to judges was, in the eyes of some, because of “motivated reasoning in an echo chamber.”²⁰⁷

The one-sidedness of the legal academy may also cause it, or the scholarship it produces, to have less credibility than if it were more politically homogenous.²⁰⁸ As one study put it, “the relative scarcity of conservatives could limit the legal academy’s influence.”²⁰⁹ Given that more Americans identify as conservative than liberal, and conservatives control more state and federal branches of government than liberals, “[t]hese realities put the legal academy out of step with not only lawyers, but with both political decision makers and the general public,” “rais[ing] the possibility that the intellectual and public contributions of the legal academy could be dismissed as partisan.”²¹⁰

Another harm to law professors, both liberal and conservative (but more to the former), is self-censorship, whether in which research topics one pursues or in presenting one’s findings. As noted earlier, Professor Baughman observed anecdotal evidence of colleagues trying to make papers appear less conservative or avoiding researching topics “that didn’t fit with the liberal norms of their faculty.”²¹¹ She also confessed to it a bit herself, burying or massaging some of her empirical findings that went against the liberal academy’s orthodox views.²¹²

2. Liberal Law Students and Learning to Think Like a Lawyer

Groupthink among a law school’s professors could be magnified with law students who share the same world view, undermining legal education which requires “an attitude or ambience that affirmatively encourages a full and free exchange of ideas.”²¹³ As one self-described “progressive” law professor declared, “[i]f we pride ourselves in being open to all ideas, examining principles

²⁰⁵ Chilton & Posner, *supra* note 3.

²⁰⁶ David A. Hyman, Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?, 2014 U. ILL. L. REV. 805, 807–10.

²⁰⁷ *Id.*

²⁰⁸ See Bonica et al., The Legal Academy’s Ideological Uniformity, SSRN, Feb. 22, 2018, at 1, 21.

²⁰⁹ *Id.* at 21.

²¹⁰ *Id.*

²¹¹ Baughman, *supra* note 196.

²¹² *Id.* (refusing to highlight empirical findings in one study that “when released on bail young black men commit more violent crime than any other age group, race, or gender, and preventatively detaining them before trial would cut down on a lot of violent crime,” and likewise in another study when investigating “whether judges were ‘racist’ in their bail determinations,” “massag[ing] and explain[ing] in a way that would not make me seem like a racist or *conservative* or someone speaking out of the norm” her findings that judges “actually weren’t detaining enough black people if their focus was on preventing violent crime”) (emphasis added). See also Aspelund and Bernhard, *supra* note 188 (quoting the dean of Harvard’s Faculty of Arts and Sciences as stating that the political discrepancy in academia “might have an effect on how people choose the problems that they work on in their own scholarship”).

²¹³ David H. Vernon, The Importance of Intellectual Diversity to Educational Quality, 32 J. LEGAL EDUC. 189, 189 (1982).

carefully and trying to come to the ‘right answer,’ it would be more fitting if we were open to a broader range of ideas, rather than the ones that were approved as a majority view.”²¹⁴ For a profession that must not be deaf to the country’s political tones—and, in fact, often believes that politics drives the law—it would be a dangerous pedagogically for “faculty’s liberal leanings [to] narrow the scope of . . . the academic conversation in the classroom to a point that does not reflect the political atmosphere in the country.”²¹⁵ A solid legal education requires professors “not to teach students what to think but to teach students how to think”—“[a]nd that requires listening to the other side, weighing arguments without prejudging them, and determining whether the other side might actually make some fair points.”²¹⁶ If “[t]he only debate [on campus and in the classrooms] . . . is between the far-left . . . and the liberals,” “[i]t gives students a view that a very narrow spectrum of opinion is the only way to think.”²¹⁷ And if law “students graduate with ears and minds closed, the [law school] has failed both the student and society.”²¹⁸

While perhaps graduates in some academic disciplines are less harmed if they have not learned to candidly and accurately access the weaknesses in their own views and the strengths in opposing views, for law school graduates, the lack of such a skill is professional suicide. As John Stuart Mill once declared, “He who knows only his own side of the case, knows little of that.” Or, turning to a more recent voice—the past dean of the Harvard Law School—“[O]ne cannot truly understand a legal argument on behalf of one client or side without thoroughly understanding and addressing competing arguments and objections.”²¹⁹ Law school graduates who are ill-equipped to make persuasive arguments in front of half of the judiciary are ill-equipped to be lawyers. Likewise, an environment that is subtly or openly hostile to or ridicules conservative or libertarian perspectives will have a chilling effect in the classroom, harming students of all political views. If the first time a lawyer confronts a conservative argument is in an opposing brief or out of the mouth of a judge in court, it is unlikely they will be able to persuasively address it.²²⁰

This liberal bias can even impact law students before they enter law school, creating a sort of “liberal privilege,” as Nicholas Kristof reports that a friend of his was “studying for the Law School Admission Test, and the test preparation company she is using offers test-takers a tip: Reading comprehension questions will typically have a liberal slant and a liberal answer.”²²¹ Though unlike a legal education where liberal students are harmed, this liberal privilege (though there is only anecdotal evidence of it) arguably helps progressive-minded students do better than conservative ones on what is arguably the most important factor for getting into a top law school: the LSAT score.²²²

²¹⁴ Baughman, *supra* note 196.

²¹⁵ Aspelund & Bernhard, *supra* note 188.

²¹⁶ Strauss, *supra* note 186.

²¹⁷ Aspelund & Bernhard, *supra* note 188 (quoting Professor Harvey Mansfield).

²¹⁸ *Id.*

²¹⁹ Dean Martha Minnow, “Intellectual Diversity Statement,” Remarks made at Harvard Law School conference on intellectual diversity, April 2, 2013.

²²⁰ See Roger Clegg, Toward Intellectual Diversity in Law School, *Minding the Campus*, Nov. 7, 2014 (“[W]hat you do as a lawyer is try to persuade people of one thing or another, and you will do a better job persuading people if you understand them. You need to understand how the other side thinks, and how your clients think—and of course how the judge or justices think.”).

²²¹ Kristof, *supra* note 194.

²²² To the extent one could see the LSAT scores of conservative and liberals, it would be interesting, after controlling for the test score on other aspects of the test (logic games and logical reason), if a “liberal privilege” manifested itself

3. Harm to the Law and Society

Law professors play an important role in society: “Law professors frequently weigh in on important political, policy, and legal issues—including delivering oral arguments, testifying before lawmakers, writing op-eds, and lobbying.”²²³ Additionally, law schools are the initial gatekeeper (the state bar being the final gatekeeper) on who practices law in nearly every state in the Union since a JD is required. From the ranks of law school graduates come nearly every future judge, as well as many lawmakers in state and federal legislatures and agencies.²²⁴ As the impact first of legal realism, and then law and economics has shown, what people learn in law school does influence their real-world views and decisions, particularly in shaping domestic and foreign policy. And many legal doctrines or policy prescriptions have had their genesis in a law review article promulgated by a legal academic.

The law cannot work itself pure, so to speak, if legal theories and policies ideas are not put through the crucible of opposition: “[w]hen perspectives are unrepresented in discussions, when some kinds of thinkers aren’t at the table, classrooms become echo chambers rather than sounding boards—and we all lose.”²²⁵ Or, as social psychologist Jonathan Haidt has observed in a broader context, “[u]niversities are unlike other institutions in that they absolutely require that people challenge each other so that the truth can emerge from limited, biased, flawed individuals.”²²⁶ One professor of law and religion noted this in the ideas and scholarship that gets discussed versus ignored:

Successful academics in the fields I read in most tend to be heavily networked, and fairly conventionalist in their views. They do a good job of discussing and promoting decent books in their field that come from roughly within their circles and are not too heterodox for that circle, including political heterodoxy of a generally liberal or left-of-center kind. . . . But it is certainly true that given the academy’s conventionalism and given the politics of my sector of the academy, a

with liberal students achieving statistically significantly higher reading comprehension scores than their conservative peers.

²²³ Bonica et al., *supra* note 208, at 21.

²²⁴ See Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, National Conference of State Legislatures, 12/1/2015, <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> (finding that 39% of members of Congress have a law degree, and 19% of members of state legislatures); Bonica et al., *Political Ideologies of American Lawyers*, *supra* note 68, at 277-78 (noting that over one-third of the House of Representatives and one-half of the Senate were lawyers, over half of U.S. Presidents have been lawyers, about half of the current state governors are lawyers, “[a]ll state high court justices are former lawyers,” and “[a]ll judges currently serving on the federal courts are lawyers”); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 *Stan. L. Rev.* 999, 1016-17 (2016) (finding that of 128 federal agency rule drafters surveyed for the paper, all but 11 attended law school).

²²⁵ Kristof, *supra* note 194. For a similar perspective on another academic discipline, see Jose L. Duarte et al., *Political Diversity will Improve Social Psychological Science*, 38 *Behavioral and Brain Sciences* 1, 1 (2015) (arguing that a lack of political diversity in academic psychology, particularly social psychology, “can undermine the validity of social psychological science via mechanisms such as the embedding of liberal values into research questions and methods, steering researchers away from important but politically unpalatable research topics, and producing conclusions that mischaracterize liberals and conservatives alike,” and that “[i]ncreased political diversity would improve social psychological science by reducing the impact of bias mechanisms such as confirmation bias, and by empowering dissenting minorities to improve the quality of the majority’s thinking”).

²²⁶ Kristof, *supra* note 194 (quoting Haidt).

lot of conservative and/or religious writers and books end up hidden from notice, out of the loop, out of the algorithms, not part of “the discussion.”²²⁷

And it’s not just that liberal professors are ignoring topics and perspectives that conservatives would be more prone to explore or espouse—conservative and libertarian professors are also engaging in “preference falsification,”²²⁸ wherein they “hide unpopular views to avoid ostracism or punishment.”²²⁹ (This creates a scenario, ironically, where conservative professors see themselves as “the equivalent of someone who was gay in Mississippi in 1950.”)²³⁰ Our law and policy are poorer without robust debate and a myriad of ideas from which the best can emerge.²³¹

And in the minds of some, this phenomenon gets at something even deeper: “the basis of our democratic society,” which is formed by “[t]olerance for other people’s ideas, and the freedom to express your own.”²³² In other words, “[i]ntolerance of ideas—whether liberal or conservative—is antithetical to individual rights and free societies, and it is no less antithetical to great universities and first-rate scholarship.”²³³ Yet the trust formed from tolerance and free expression “is perpetually vulnerable to the tyrannical tendencies of . . . majorities.”²³⁴ This is not surprising, observes Mayor Bloomberg, because “[r]epressing free expression is a natural human weakness.” But, he argues, while we may expect this in Washington where “the two parties decide [“every major question facing our country”] not by engaging with one another, but by trying to shout each other down, and by trying to repress and undermine research that runs counter to their ideology,” the “more our [law schools] emulate that model, the worse off we will be as a society.”²³⁵ Bloomberg laments that “in politics—as it is on too many college campuses—people don’t listen to facts that run counter to their ideology. They fear them. And nothing is more frightening to them than scientific evidence.”²³⁶ So, he concludes, “[t]he more we embrace a free exchange of ideas, and the more we accept that political diversity is healthy, the stronger our society will be.”²³⁷ To the extent that law schools—the producers of tomorrow’s shapers of the law and government—can model and instill the best of this, the better off the nation will be.

²²⁷ Paul Horwitz, Coming: A “Tilted” List of Recommended New Titles in Law and Religion [WITH UPDATE], PrawfsBlawg, Aug. 18, 2015.

²²⁸ See generally Timur Kuran, Private Truths, Public Lies: The Social Consequences of Preference Falsification (1997).

²²⁹ Glenn Harlan Reynolds, Kanye West’s Politics 101: It’s OK to support Trump, even if you’re black or famous, USA Today, April 30, 2018.

²³⁰ Kristof, *supra* note 194 (quoting from Jon A. Shields & Joshua M. Dunn Sr., *Passing on Right: Conservative Professors in the Progressive University* (2016)) (Kristof points out that this the analogy to being gay in earlier America is “a metaphor that conservative scholars often use, with talk of remaining in the closet early in one’s career and then ‘coming out’ after receiving tenure”).

²³¹ This isn’t a phenomenon peculiar to law professors: “In a recent exercise, [The World Bank] presented identical data sets to employees under two different pretexts. Some employees were told the data were measuring the effectiveness of a skin rash cream, while others were told the same data measured the effects of minimum wage laws on poverty. The politicized context of the second question led to more erroneous analysis, and the accuracy of left-leaning respondents plummeted when the data conflicted with their worldview.” Arthur C. Brooks, *Academia’s Rejection of Diversity*, The New York Times, Oct. 30, 2015.

²³² Strauss, *supra* note 186 (quoting Michael Bloomberg).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

B. *Not All Discrimination is Created Equal*

If discrimination is the cause of the lack of conservative and libertarian law professors, then separate from the independent harms caused by a lack of conservative and libertarian law professors, our society generally views certain types of discrimination as a harm in and of itself. However, that additional harm is limited more to the person (and class) discriminated against. But the harm of discrimination to the individual (and class) depends on the type of discrimination.

That's because while *discrimination* has a negative connotation, it is a necessary feature of labor markets because not every aspiring laborer can be hired. This is particularly true in specialized, elite labor markets where aspirants must suffer high entrance costs, such as years of additional schooling, experience, and other difficult and selective markers. Such is the nature of the U.S. labor market of law professors. To be competitive, potential law professors often have to graduate from elite law schools, obtain prestigious post-graduate jobs, such as clerkships with judges or at big law firms, sometimes obtain other graduate degrees, and publish scholarship in prestigious and highly competitive law journals. To the extent law schools are discriminating among applicants on these criteria, such discrimination is defensible. After all, not every applicant can be hired, so some criteria have to be used to determine who to hire and who to not.

But what if law schools were also discriminating on additional factors, such as age, gender, race, sexual orientation, or political orientation? Is such discrimination also defensible? Perhaps less so. That all depends on three different dichotomous dimensions I consider the trifecta of discriminatory choices: invidious vs. innocuous; intentional vs. unintentional; and relevant vs. irrelevant. All three of dimensions are present at once. I explain each of these three dimensions below.

I define invidious discrimination as that which is socially (and usually legally) taboo. Classic types of discrimination, such as on the color of one's skin or one's gender, would fall under this category. Discrimination on non-taboo characteristics, such as GPA, would be the opposite: innocuous discrimination. For labor markets to function optimally, invidious discrimination, which generally is also unrelated to labor market performance or needs, would need to be minimized and innocuous discrimination be uninhibited.

Intentional discrimination in the hiring context is self-explanatory: purposeful distinguishing of candidates based on a particular characteristic. In other words, this is disparate treatment based on some quality. Thus, intentional discrimination can be either invidious or innocuous. And unintentional discrimination occurs when a trait that hirers are ignorant of or uninterested in is correlated with a trait hirers are discriminating on (this is sometimes referred to as disparate impact). So, if in a mid-career labor market, those making hiring decisions were intentionally discriminating on the basis of years of experience, they may also be unintentionally discriminating on the basis of applicants' age, gender (women are more likely to take a break from the work force for family reasons) or even number of children (if the candidate is a woman).

Finally, relevant discrimination is discriminating on the basis of a characteristic that has relevance to the labor market. For example, in hiring elementary school teachers, if schools

discriminate on the basis of a candidate's ability to teach children, then the schools would be engaging in relevant discrimination. Obviously, irrelevant discrimination would be discriminating based on a trait that has no relationship with the labor market, such as the number of letters in someone's last name.

Now, some examples in the context of legal academia. Imagine law schools purposefully discriminated on the basis of which month of the year someone was born in—those born in odd months were given preference over those born in even months. This would be intentional, innocuous, irrelevant discrimination. (It would also be silly, but that doesn't mean law school couldn't do it.) But what if law schools decided to discriminate on the basis of one's hair color: discriminating against those with black hair. On the trait of hair color, the discrimination would be intentional, irrelevant, and arguably innocuous. But that specific discrimination might also be unintentional and invidious when it comes to race and ethnicity, since African-Americans, Latinos, Native Americans and Asian-Americans have a much higher proportion of naturally black-haired members than those who are White/Caucasian. And whether discriminating on the basis race/ethnicity is relevant or not may be a matter of debate. On the one hand, arguably there is no difference between races and ethnicities when it comes to the ability to perform one's job duties as a law professor. On the other hand, perhaps students connect better with a professor of their own race/ethnicity, or professors of differing races/ethnicities are more likely to engage in certain types of scholarship or arguments. Then perhaps race/ethnicity is relevant to the law professor labor market. Similar discussions can be had regarding gender and sexual orientation.

That brings us to the subject of this paper: potential discrimination on the basis of political orientation. Assume, for the sake of argument, that law schools discriminate against conservative and libertarian law professor candidates. What kind of discrimination is that? As to the first dimension, while some may not view discrimination against conservatives and libertarians as invidious, arguably many people would find discrimination against someone because of their political orientation to be invidious rather than innocuous. And there are plausible arguments that such discrimination (if done by a public university) violates the First Amendment rights of expression and association.²³⁸ Whether or not the discrimination is intentional or not is unclear.²³⁹ One can easily imagine intentional or "taste-based" discrimination.²⁴⁰ But one can also imagine unintentional "information-based" discrimination, wherein law professors are better able to judge quality in those of their own political stripe, and thus favor them.²⁴¹ The result—few conservative or libertarian law professors, and the problems that scarcity brings for legal education, scholarship,

²³⁸ A federal jury believed the Iowa Law School discriminated against a faculty candidate on the basis of her conservative political orientation, but the jury was hung on whether to hold the dean accountable. *See* Peter Berkowitz, A Case of Faculty Discrimination Based on Politics, *Wall Street Journal*, Feb. 7, 2014; Jason Clayworth, Jurors in political bias case blame university, *The Des Moines Register*, Nov. 20, 2012. ("I will say that everyone in the jury room believed that she had been discriminated against," said Davenport resident Carol Tracy, the jury forewoman"; "Jurors interviewed by the Register said they didn't accept the university's explanation and they believed Wagner, . . . had been discriminated against"; "She was discriminated against but you don't go against the dean," said juror Don Mayes, a registered Democrat from Davenport").

²³⁹ For intentional political discrimination in another academic discipline, *see* Y. Inbar & J. Lammers, *Political Diversity in Social and Personality Psychology*, 7 *Perspectives on Psychological Science* 496 (2012) (surveying social psychologists to ask if they would discriminate against a conservative in hiring, publication, and grant evaluation, and finding that 35% admitted they would).

²⁴⁰ Chilton, et al., *Political Discrimination in the Law Review Selection Process*, SSRN, Feb. 12, 2018, at 3.

²⁴¹ *Id.*

and the law more generally—would be the same. As for whether such discrimination is relevant or irrelevant, if being conservative or libertarian means one is less able to successfully perform the job of being a law professor, then discrimination against that class would be relevant. But if having that trait makes one no better or worse as a law professor, then such discrimination is irrelevant (though that would beg the question as to why the discrimination is occurring).

II. A MODEL OF DISCRIMINATION

This study, loosely relying on work on employment discrimination by Gary Becker²⁴² and Kenneth Arrow,²⁴³ leverages a simple model of discrimination. It also draws on the concept of signaling. Some traits, such as gender or race, are hard to conceal. Others, such as sexual or political orientation, can be concealed or revealed based on the individual's desire to do such. Thus, these concealable traits are harder to measure and any measure of such is not the same as the trait itself. For example, if race or ethnicity is the focus of discrimination, and it cannot be identified by any means other than by one's name, then discrimination effects would be seen related not to the actual underlying race or ethnicity, but by the signaling of that race or ethnicity in the name. Several studies have demonstrated this name signaling effect (whether or not the signaling was intended).²⁴⁴

This study will not claim to measure the true political orientation of individuals, but rather that which is being signaled. This means that two individuals could be equally conservative, but the one who signals conservativeness will be labeled as a signaling conservative and the other will be labeled as an unknown. That being said, there is probably a correlation between the strength of one's political ideology and the degree one signals or is able to conceal it. Further, the propensity to signal doesn't cut equally in both directions, as it usually the case in a labor market dominated by one group. Conservatives and libertarians, as the viewpoint minority in the law professor labor market—a viewpoint minority, rightly or wrongly, that may perceive hostility towards their views—are more likely to conceal their political orientation than are liberals, the viewpoint majority. Thus, the study may underestimate the percentage of conservatives and libertarians in legal academia because they are more likely to conceal their political orientation for professional reasons. As will be seen later based off of voter registration records, though, it does not appear that conservatives/libertarians conceal their political orientation any more than liberals do.

Drawing first on Becker's work, he posited the following model: If two workers are hired that are equivalently qualified, but one is paid substantially more than the other, the likelihood of discrimination being the cause increases. Similarly, if two workers are hired and paid based on qualifications, and they are paid approximately the same rate despite one worker being substantially more qualified than the other (and no pay ceiling comes into play), then discrimination as an explanation increases in plausibility. More formally, this leads to two potential manifestations of discrimination. Where Q_C and Q_L represent the qualifications of signaling

²⁴² Gary Becker, *The Economics of Discrimination* (1957).

²⁴³ Kenneth Arrow, *The Theory of Discrimination* (1973).

²⁴⁴ Yona Rubinstein & Dror Brenner, *Pride and Prejudice: Using Ethnic-Sounding Names and Inter-Ethnic Marriages to Identify Labor Market Discrimination*, working paper, available at http://www.econ.brown.edu/fac/yona_rubinstein/Research/Working%20Papers/PPRB%2007_FEB_2010.pdf; Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lekisha and Jamal? A Field Experiment Evidence on Labor Market Discrimination*, 94 *American Economic Rev.* 991 (2004).

conservatives and signaling liberals, respectively, and W_C and W_L equals the wages of signaling conservatives and signaling liberals respectively, then the possibility of discrimination explaining a labor market pattern increase:

- (1) If $Q_C = Q_L$, then $W_C < W_L$
or
- (2) If $W_C = W_L$, then $Q_C > Q_L$

Per Kenneth Arrow's definition of discrimination, a two-tiered effect could also be at work, wherein there is not merely a favored *or* disfavored group, but a favored group *and* a disfavored group, with everyone else neither suffering the harm of the disfavored group, nor reaping the benefit of the favored group. Thus, for example, holding pay equal, signaling conservatives could be the most qualified, non-signaling conservatives and liberals, unknowns, and moderates (Q_U) in the middle, and signaling liberals as the least qualified:

- (1) If $W_C = W_L$, then $Q_C > Q_U > Q_L$

Or, holding qualifications equal, signaling conservatives and libertarians could be paid the least, signaling liberals the most, and non-signalers, unknowns and moderates somewhere in between:

- (2) If $Q_C = Q_L$, then $W_C < W_U < W_L$

As a point of clarification, wages in this study will be measured by the rank of the law school one is hired at rather than in salary dollars for three reasons: (1) salaries are hard to find for many law professors; (2) salaries are highly correlated with law school ranking (after controlling for geography); and (3) the prestige of one's school is arguably more important than one's salary, especially since salaries are much more distributed around the mean than are law school rankings. Thus, this study will measure the "rank gap" of conservatives vis-à-vis liberals and unknowns/moderates.

III. PREVIOUS STUDIES

While perhaps not yet rising to the level of a scientific law, study after study over the past four decades, drawing on various methodologies, has found the same thing: there are few conservatives in legal academia. The earliest study surveyed entry-level hires of all law schools from 1986-1991, finding 10% were conservative (and 75% were liberal).²⁴⁵ An exploration of campaign donations from 1992-2002 from law professors at the twenty-one highest-ranked law schools in the country found just 15% of donations going to Republicans (and 81% going to Democrats), of the professors who had donated.²⁴⁶ A study published in 2005 looked just at law professors at some California law schools, finding, among those registered to one of the two major parties, 20% were Republicans (and 80% Democrats).²⁴⁷ Because the study's authors purposely tried to sample

²⁴⁵ Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.4 (1998).

²⁴⁶ John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1186 (2005).

²⁴⁷ Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All*

California law schools where Republican law professors would be more likely, and because the authors did not include those who were not registered to one of the major parties, their findings potentially overestimate the percentage of such law professors in California at the time.²⁴⁸ Examining both 1997 and 2013 data on the top 100 law schools, another study found 13% (1997) or 11% (2013) of law professors considered themselves Republican (with 80% and 82%, respectively, labeling themselves Democrats).²⁴⁹ And a previous study by this author looking at the top 16 ranked law schools for the 2011-2012 academic year, found just 10% to be conservative or libertarian (with 63% liberal and 27% unknown).²⁵⁰

Perhaps the most extensive study to date is Bonica et al.'s 2018 examination of American law professors using the Database on Ideology, Money in Politics, and Elections (DIME).²⁵¹ This database not only includes donations made in from 1979-2016 in local, state, and federal elections, but it weights donations based on the ideological extremeness of the candidate donated to, creating a Campaign Finance (CF) score, with a negative value indicating liberalness and a positive value indicating conservatism. Thus, someone who donates entirely to Bernie Sanders would have a more liberal CF score than someone who donated entirely to Bill Clinton. Data from DIME was matched with the 2012 American Association of Law Schools Directory of Law Teachers, resulting in a CF score for 64% of the legal academy.²⁵² (This indicates law professors may be more politically inclined than the general public, with only a 5% donation rate, and even other lawyers with a 41% donation rate).²⁵³

The study found that on average, law professors, with a CF score of -0.86, were more liberal than Bill Clinton (-0.68).²⁵⁴ This also makes the legal academy, on average, more liberal than the legal profession with its mean CF score of -0.31.²⁵⁵ Of the nearly 6500 law professors who made donations, only 15 percent had a conservative CF score.²⁵⁶ What is more, whereas 54 percent of conservative law professors were “moderately conservative,” only 27% of liberal law professors were “moderately” so, meaning conservative law professors were twice as likely to be moderate in their “partisan-ness” than liberal law professors.²⁵⁷

Other of the study's findings are also of relevance. For example, the authors looked at law professors by subject matters, “find[ing] that a key difference between the ideologies of law professors by subject is not a noticeable shift from liberal professors to moderately liberal professors, but the presence, if any, of conservative professors in the field”: “the mere presence of some conservatives is sufficient to differentiate average ideological differences among law

Disciplines: A Voter-Registration Study, 17 CRITICAL REV. 237, 247 (2005).

²⁴⁸ *Id.* at 240.

²⁴⁹ James Lindgren, Measuring Diversity: Law Faculties in 1997 and 2013, 39 HARV. J.L. & PUB. POL'Y 89 (2016).

²⁵⁰ James C. Phillips, Why are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses, 39 Harv. J.L. & Pub. Pol'y 153 (2016).

²⁵¹ Adam Bonica, et al., The Legal Academy's Ideological Uniformity, SSRN, Feb. 22, 2018.

²⁵² *Id.* at 7.

²⁵³ *Id.*

²⁵⁴ *Id.* at 8; Adam Bonica et al., The Political Ideologies of American Lawyers, 8 J. Legal Analysis 277, 292 (2016).

²⁵⁵ Bonica et al., The Political Ideologies of American Lawyers, at 292.

²⁵⁶ Bonica et al., The Ideology of the Legal Academy, at 8.

²⁵⁷ *Id.*

professors between subject areas.”²⁵⁸ Similarly, when looking at the average CF score for law schools, the authors found “that differences in ideology appear to be driven by the presence of conservatives at several programs rather than a shift of liberals in the moderate direction.”²⁵⁹ Likewise, when looking at law school rankings and finding the more elite the law school, the more liberal the faculty, the study found “evidence that the relationship between professor ideology and law school rank is driven through the presence of fewer conservative professors at higher-ranked schools rather than a shift of liberal or conservative law professors in a more liberal direction.”²⁶⁰

Of course, the reason conservatives (and libertarians) make up just 10-20% of the legal academy could be due to the pool of potential law professors. If that pool reflected similar, or even smaller numbers, the make-up of the legal academy would make sense (though the problems created by a dearth of conservative or libertarian law professors would not go away). There are different ways to define the pool, and the Bonica study explored them all. At its broadest, the pool is all lawyers.²⁶¹ But the legal academy does not look like the legal profession, with a CF score of -0.86 compared to American lawyers in general at -0.31, a statistically significant difference.²⁶² In fact, in regression analysis of what drives the CF scores of lawyers, the largest “effect” was seen by whether a lawyer was a law professor—more so than being a woman, attending a top 14 law school, or being a public defender.²⁶³ Likewise, Bonica et al. found “there are relatively fewer conservative law professors than conservative lawyers.”²⁶⁴ So the pool of American lawyers cannot explain the political demographics of the legal academy.

But a pool of all lawyers is arguably not the right population since many lawyers have no realistic chance of cracking into the academy. It is elite lawyers, those with prestigious academic and professional backgrounds, from which the ranks of law school faculty are drawn. So Bonica et al. compared law professors to the group of lawyers who graduated from the 14 highest-ranked law schools, the group of lawyers working at the 100 highest-ranked “big law” firms, and the group of lawyers that had been federal law clerks. The authors found:

The average CFscore for alumni from Top-14 law schools is -0.55 and is -0.42 for lawyers in Biglaw (compared to -0.86 for law professors). Additionally, 25 percent of alumni from Top-14 law schools and 30 percent of lawyers from Biglaw are conservative (compared to 15 percent of law professors). In short, alumni from Top-14 law schools and lawyers in Biglaw are more liberal than lawyers overall, but law professors are more liberal still. All of these differences are statistically significant ($p < 0.01$).²⁶⁵

For federal law clerks, the authors separated former U.S. Supreme Court clerks from federal district and court of appeals clerks. The study found that the CF score for the 72% of former

²⁵⁸ *Id.* at 9.

²⁵⁹ *Id.* at 10.

²⁶⁰ *Id.* at 11.

²⁶¹ Rarely will a law professor be someone who has not gone to law school, though at elite law schools there are a handful of PhD only law professors.

²⁶² *Id.* at 13.

²⁶³ Bonica et al., *The Political Ideologies of American Lawyers*, at 295.

²⁶⁴ Bonica et al., *The Ideology of the Legal Academy*, at 13.

²⁶⁵ *Id.* at 14.

Supreme Court clerks who had donated was -0.49, and for the 40% of former federal district and court of appeals clerks the CF score was -0.63.²⁶⁶ Additionally, there was a higher percentage of conservative former clerks compared to conservative law professors, with 24% of lower federal court clerks being conservative and 30% of Supreme Court clerks being conservative (with law professors only at 15 percent).²⁶⁷ In sum, the pool of elite lawyers, however measured, is more conservative and has a higher percentage of conservatives than the legal academy. Thus, the percentage of elite lawyers with the potential to become law professors can't explain the dearth of conservative law professors.

Two other recent studies are of relevance, though not directly on point. In one, the Chilton and Posner randomly sampled ten tenured law professors from the top 14 law schools (per rankings), finding only 8 who had donated more money to Republicans than Democrats, or 5.7%.²⁶⁸ The authors then added 16 more "Republican" law professors to have a sufficient number for statistical analysis. The study then coded the five most recent articles for each professor as conservative, liberal, or unclassifiable. The authors found that "Democratic" donors write, on average, 2.63 liberal articles, while "Republican" donors write, on average, 0.17 conservative articles. Non-donors wrote, on average, 1.44 liberal articles. Looking at the distribution of articles, the authors conclude that "net Democratic donors write highly ideological articles, whereas net Republican donors write articles that are distributed widely across the spectrum." Further, when looking at areas of the law, the study found "that constitutional rights scholars are less ideologically diverse than other legal scholars," and they "are more likely to produce biased research" with an average of 3.85 liberal articles. To explain their results, the authors hypothesize that:

The most plausible explanation is that if the dominant ethos in the top law schools is liberal or left-wing, then Republicans are likely to conceal their ideological views in their writings. Republican professors might fear that scholarship that appears conservative may be rejected by left-leaning law review editors, and disparaged or ignored by their colleagues, which will damage their chances for promotions, research money, and lateral appointments. This would explain why even non-donors tilt left. Republicans could suppress their ideological views by avoiding controversial topics, taking refuge in fields that have little ideological valence, focusing on empirical or analytical work, or simply writing things they don't believe.

The authors' overall finding is that, at least for the elite law school professors they studied, political ideology "is correlated at a statistically significant level with the ideological valence of the professor's research." The study argues that this could be due to "substantive bias"—whether purposefully make incorrect arguments to advance a political agenda or "strong ideological priors" that bias the interpretation of legal sources—or to "selection bias," where professors select a research agenda where the correct outcome is very likely to be consistent with their political ideology. The authors surmise that "a balanced faculty will be particularly helpful if the selection bias hypothesis is correct," but are uncertain what to do if the problem is substantive bias.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 14-15. The differences were statistically significant.

²⁶⁸ Chilton & Posner, *supra* note 3.

The other study of relevance sought to determine whether political discrimination occurs in the law review article selection process.²⁶⁹ The study determined the political valence of both authors and student law review editors at 15 top law reviews from 1990-2010, using the DIME data, with 51 percent of editors and 57 percent of law professor authors having made campaign donations.²⁷⁰ The authors found that 22% of editors and 15% of authors were conservative, and that the average law review editorial board has 21% conservative editors and 16% of articles have at least one conservative authors.²⁷¹ The study determined that there is “strong evidence that the article selection process is driven in part by the relationship between the authors’ and editors’ political ideologies,” with editors more likely to select an article that shared his or her political views.²⁷² The study also found that “the quality of articles from liberal authors is decreasing in the conservativeness of the board and that the quality of articles from conservative authors is increasing in the conservativeness of the board,” measuring quality by citation rates.²⁷³ The conclude that their “findings are consistent with statistical discrimination and inconsistent with bias as the causal mechanism for editors selecting more articles by authors of similar ideology.”²⁷⁴

In short, conservatives (and libertarians, when measured) make up 5.7-20% of the legal academy, a much smaller portion than of the legal profession generally, or elite lawyers. Additionally, elite law professors tend to write liberal articles, and elite law journal editorial boards tend to be dominated by liberal editors, with student editors preferring to select articles that match their political ideology.

IV. DATA COLLECTION, VARIABLES, AND METHODOLOGY

A. *Data and Variables*

Data was collected using undergraduate volunteers at UC-Berkeley who participated in the project for research credit.²⁷⁵ For each year from 2001-2010,²⁷⁶ the previous year’s AALS faculty directory was compared to create a list of new hires for that academic year (sometimes a new hire would not show up until their second year, but they were placed in whatever year was their first).²⁷⁷ For each year, at least two (and sometimes more) undergraduates independently gathered data to avoid missing any professors.

²⁶⁹ Adam Chilton, Jonathan Masur & Kyle Rozema, Political Discrimination in the Law Review Selection Process, SSRN, Feb. 12, 2018.

²⁷⁰ *Id.* at 6-7, 10.

²⁷¹ *Id.* at 10-11.

²⁷² *Id.* at 2.

²⁷³ *Id.* at 4.

²⁷⁴ *Id.*

²⁷⁵ Technically, 53 undergrads from UC-Berkeley and 2 from Brigham Young University.

²⁷⁶ A ten-year period was selected to provide enough data to do the matching statistical analysis given how few new conservative and libertarian law professors there are each year. The specific range of years was selected to find the most recent time period that was unaffected by the drastic drop in hiring that began a few years after the Great Recession of 2008-2009. Based on self-reported data, the 2011 hiring cycle began the decline (with hiring numbers in 2018 approximately half of what they were in 2011). See *Who Stopped Hiring?*, PrawfsBlawg, May 24, 2018, <http://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report/>.

²⁷⁷ Thus, for 2010, the 2011 directory was also consulted to see if there were any professors who started in 2010, but didn’t show up until the 2011 directory.

Next, the undergraduate researchers collected demographic data on each of the newly-hired law professors. Again, at least two (and sometimes more) undergraduates independently gathered the data. When discrepancies arose, an additional undergraduate independently was asked to gather data on that professor and acted as the tiebreaker. Data on law professors were gathered from the AALS faculty directory, as well as law professors' webpages and resumes. The following variables were gathered:

- professor's name
- year of birth
- year of bachelor's degree
- title²⁷⁸
- hiring law school
- U.S. News rank of hiring law school
- hiring year (first year as tenure-track law professor)
- gender
- racial minority (per the AALS directory list of "Minority Law Teachers")
- racial minority perception (based off of picture and name)²⁷⁹
- LGBT (per the AALS directory list of "Gay, Lesbian and Bisexual Community Law Teachers")
- area of teaching (up to six)
- law school where JD obtained
- U.S. News rank of law school where JD obtained²⁸⁰
- year one obtained a JD
- grade honors for JD²⁸¹
- whether one had been on law review
- clerkships
- whether or not the professor has a PhD
- the subject area of a professor's PhD
- the school from which the PhD was earned
- any law school fellowship or VAP²⁸² positions
- the school one was a fellow or VAP at
- what government legal job one had
- which firms one had worked at
- journal names of any law articles published before being hired²⁸³

²⁷⁸ Only professors who were traditional, tenure-track faculty were counted. Thus, all part-time faculty, visiting faculty or fellows, clinical professors, and legal research and writing professors were excluded.

²⁷⁹ This category technically included anyone listed in the AALS directory as a minority, but added those who looked like they were not white or had a name that indicated being a minority (Native American, Hispanic, etc.) if they appeared white.

²⁸⁰ The ranking was the year one was hired rather than the year one obtained a JD, both because some had obtained a JD before US News rankings started (or before US News ranked the majority of schools), and because of the assumption that the perception of the current standing of the law school one attended would have more weight with hiring committees than whatever the ranking was when one graduated. The reality is that the graduation year and hiring year rankings of one's school are highly correlated, so it may not really matter much which ranking is used.

²⁸¹ This included the cum laude honors, Order of the Coif, and school specific grade honors.

²⁸² Visiting Assistant Professor.

²⁸³ This included any that came out the year they were hired since it would have already been accepted for publication before being hired (and likely known by the committee) even if it was not officially published until later in the year after starting teaching.

- the Washington and Lee law journal ranking of any publications²⁸⁴
- the Washington and Law combined law journal score for any publications

To measure political ideology, law student researchers were hired to independently assess each law professor, with each professor being assessed by at least two different law students.²⁸⁵ This was done to avoid having the author's biases influence the determination of political orientation. The researchers were kept blind to the overall aims of the study to try and come as close as possible to the ideal of a double-blind study. Similar to the methodology used by Chilton and Posner's study,²⁸⁶ researchers looked at the CV of law professors (including their webpage on their school's website), and campaign donations. On the CV, researchers looked for organizations with political leanings, as well as political campaign or experience working in presidential administrations. The Coding Guide in Appendix I, Section I provides examples. If the CV and campaign donations did not provide enough information, then researchers also looked at the professor's publications to see if any were clearly conservative/libertarian or liberal in their views (again see the Coding Guide). For example, an article taking a pro-traditional marriage position would be conservative, whereas an article taking a pro-same-sex marriage position would be liberal or libertarian. Researchers then made a holistic assessment as to whether the professor was conservative/libertarian, liberal or unknown, and also indicated how confident they were in that assessment (slightly, somewhat, very). This allowed for the creation of a seven-point ordinal scale. Professors' political orientation was given a 1 (liberal), 0 (unknown), or -1 (conservative), and then multiplied by the confidence of the coder (slightly = 1, somewhat = 2, very = 3), meaning a professor's political orientation could be anywhere from -3 to 3. The two independent political orientation scores for each professor were then averaged). This was done given the subjective nature of the assessment.²⁸⁷ Researchers were trained on practice materials before beginning to determine political orientation on their own. Their actual results were not checked or monitored by the author.

Further, independent of this CV, donation, and scholarship-based classification, voter registration records were searched. Someone found to have been a registered Democrat or Green Party member was given a value of 2—the equivalent of being moderately confident that person was liberal. The reverse (-2) was assigned to someone registered as a Republican or member of the Libertarian Party. Independents were assigned a value of zero. The party registration value was then averaged with the other score to create an overall political orientation value, with any value that was positive leading to a categorization of that professor as conservative/libertarian, any value that was negative leading to a categorization of that professor as liberal and a zero leading to a categorization of unknown.

This measure for measuring political orientation differs some from previous studies,

²⁸⁴ Any publication prior to 2003, the first year of the W&L rankings and combined scores, was given the 2003 ranking and combined score.

²⁸⁵ A total of 11 law students assisted: 5 JD students from the University of Illinois at Champagne-Urbana, 5 JD students from Brigham Young University, and 1 LLM student at UC-Berkeley. I surveyed the students' political orientation so that I could assign a more liberal and a more conservative student to each professor in hopes of obtaining a more accurate perspective of the professor's political orientation since the independent political orientation values would be averaged. Additionally, each year of data was divided among multiple pairs of researchers.

²⁸⁶ Chilton and Posner looked at campaign donations and professors' CV's.

²⁸⁷ Student coders agreed 67.3% of the time on the political orientation of a professor (i.e., conservative/libertarian, unknown/moderate, or liberal). This resulted in an intercoder reliability measure (Gwet's AC) of 0.58.

combining indicators in a way not done previously. For instance, several studies have looked at just campaign donations. But that results in a much smaller sample since many professors do not contribute to political candidates, especially not earlier in their career. This would potentially result in too few professors for statistical analysis given the small numbers of conservative/libertarian professors. Some studies have looked just at voter registration records, but that presents the same problem of missing data. Posner and Chilton looked at both campaign donations and CV's in measuring political orientation, but not voter registration records. This study looked at all three indicators for several reasons. First, it allowed for a determination of political orientation to be made for the largest number of professors since some will indicate orientation in one but not the other measures. Second, voter registration and campaign donation records provide a more objective check on the more subjective assessment of a CV or scholarship. Third, voter registration records provide a private signaling measure, whereas campaign donations, CV's, and scholarship provide a more public signaling measure, allowing one to see whether there were major differences between private and public signals. And as will be seen later in the paper, the combination of all three measures of political orientation to create one metric resulted in political demographics in line with previous studies that used one or two of the measures.

B. Methodology

1. Causality and the Potential Outcomes Framework

This study is asking a causal question about discrimination based on political orientation. Questions of causal inference can be thought of as the task of determining counterfactuals. This is often referred to as the potential outcomes framework: what would the potential outcome have been under the alternative scenario where the unit of observation did not (or did) receive the treatment, *ceteris paribus*.²⁸⁸

Of course, this is impossible outside of science fiction and creates a problem of missing data—we can never see the outcome in the alternative universe for any one individual.²⁸⁹ Instead, researchers attempt to create two groups that appear to be essentially equal on factors that matter for the outcome being studied, giving one group the treatment (or intervention) and withholding it from the other. By measuring the difference between these two otherwise identical groups on the outcome being studied, one can infer that the treatment caused the difference. This is why random assignment of subjects to either a treatment²⁹⁰ or control group in experimental designs is the gold standard for determining causality.

But like our alternative universe scenario above, even this is often not fully possible since some of the most interesting or important causal questions cannot be examined under the conditions of

²⁸⁸ See GUIDO W. IMBENS & DONALD B. RUBIN, CAUSAL INFERENCE FOR STATISTICS, SOCIAL, AND BIOMEDICAL SCIENCES: AN INTRODUCTION 3–5 (2015); see also SHENYANG GUO & MARK W. FRASER, PROPENSITY SCORE ANALYSIS: STATISTICAL METHODS AND APPLICATIONS 23–29 (2d ed. 2015).

²⁸⁹ The only exception to this is the rare instance where the causal effects go away quickly enough that the treatment and control groups could be reversed. See STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH 5 n.2 (2007).

²⁹⁰ When there is more than one treatment the term “alternative treatments” is used. See *id.* at 31.

a controlled experiment. This leaves us with the task of inferring causality from the messy data generated by the real world. And this is the scenario here.

This far from ideal situation requires careful thinking about the potential outcomes (or counterfactual) framework, specifically the Stable Unit Treatment Value Assumption (SUTVA),²⁹¹ and the ignorable treatment assignment assumption.²⁹²

SUTVA “is simply the a priori assumption that the value of [an outcome] for [a] unit [] when exposed to treatment [] will be the same no matter what mechanism is used to assign treatment [] to [the] unit [] and no matter what treatments the other units receive.”²⁹³ It has two basic principles. First, that treatment of one individual does not affect the treatment of another individual.²⁹⁴ Second, that treatment is homogenous.²⁹⁵ Thus, the first principle could be violated if, for example, subjects in an experiment discussed the positive effects of their treatment with those in the control group and convinced them to start taking the treatment (such as exercise).²⁹⁶ The second principle would be violated if something caused the treatment to be stronger or weaker for differing individuals or under different conditions, such as more or fewer people assigned the treatment or control groups.

Applying SUTVA to the study at hand, for it to hold, the perception of the political orientation of candidates by law schools—the treatment here²⁹⁷—cannot be dependent on such things as the pool of current candidates, the order of looking at candidates, or current composition of the legal academy’s collective political orientation. Given that we are dealing with perception, which is potentially influenced by anchoring and ordering effects, this could be problematic. Thus, a candidate may appear more or less conservative (or liberal) depending on the candidates whose application materials or interview came just before or after her, or the other candidates who also were called out for a job talk. Likewise, a candidate may appear more or less conservative (or liberal) when collectively viewed by a more or less conservative (or liberal) faculty or hiring committee, the latter of which serves as a gatekeeper and given its smaller size, is both more likely to fluctuate as to its collective political/ideological orientation and more likely to be subject to groupthink. Further, if one year the majority of candidates were conservative to some degree or another (a farfetched scenario, admittedly), and the next year the majority of candidates were more or less liberal, a slightly conservative candidate in the first year might appear to be in the middle or even to the left of center ideologically/politically, whereas he may appear quite conservative the

²⁹¹ IMBENS & RUBIN, *supra* note 137, at 9–12.

²⁹² See generally Paul R. Rosenbaum & Donald B. Rubin, *The Central Role of the Propensity Score in Observational for Causal Effects*, 70 BIOMETRIKA 41 (1983); see also MORGAN & WINSHIP, *supra* note 138, at 40–41; Wei Pan & Haiyan Bai, *Propensity Score Analysis: Concepts and Issues*, in PROPENSITY SCORE ANALYSIS: FUNDAMENTALS AND DEVELOPMENTS 5 (Wei Pan & Haiyan Bai eds., 2015). Some treat the ignorable treatment assignment assumption as part of SUTVA. See, e.g., Donald B. Rubin, *Which Ifs Have Causal Answers?*, 81 J. AM. STATISTICAL ASS’N 961 (1986). Others considered it sufficiently important to separate it. See, e.g., GUO & FRASER, *supra* note 137, at 29–33.

²⁹³ Rubin, *supra* note 141, at 961.

²⁹⁴ IMBENS & RUBIN, *supra* note 137, at 10–11.

²⁹⁵ *Id.* at 11–12.

²⁹⁶ See Pan & Bai, *supra* note 141, at 6.

²⁹⁷ See D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 REV. ECON. & STATISTICS 775 (2011) (arguing that for an immutable trait to be considered a treatment only works if it is the perception of the immutable trait, which can be manipulated, is deemed the treatment).

next year. However, SUTVA is not necessarily problematic here just because an individual member of a hiring committee or faculty may have her perception altered through discussions with other members since it is the committee or the faculty overall that is making the collective decision to hire or not hire a candidate, not the individual. Thus, because SUTVA does not completely hold with the scenario being studied here, the ability to generalize to years outside of those being studied is limited.²⁹⁸

The ignorable treatment assignment assumption, alternatively referred to as unconfoundedness,²⁹⁹ selection on observables,³⁰⁰ conditional independence,³⁰¹ and “exogeneity,”³⁰² channels the principle of random assignment in an experimental design.³⁰³ It stands for the proposition that whether or not someone received the treatment is unrelated to the outcome being measured after taking into account the other characteristics they possess that could influence the outcome (or controlling for these other factors). Thus, overt and hidden biases are not a problem if this assumption holds. But if this assumption is violated, it is impossible to eliminate alternative, confounding explanations for the measured outcome. In the real world this assumption is violated all the time as people self-select into various “treatments,” or others select to apply “treatment” outside of the neutrality of random assignment. A good research design is the best cure for this inferential ill, but statistical corrections can sometimes be a suitable fallback.

Certainly this study, as with most observational studies that are not some kind of fortuitous natural experiment, violates this assumption and requires statistical correction since we cannot randomly assign the perception of political/ideological orientation given that is driven by (1) the actual underlying political/ideological orientation of a candidate; (2) the degree an individual chooses to publicly signal such orientation; (3) the degree faculties evaluating candidates pick up on these signals; (4) the degree faculties’ underlying actual political/ideological orientation colors their reading of the candidates’ signals. Thus, statistical correction is necessary.

2. Statistical Models for Estimating Causal Effects

Regression. Regression modeling, matching and propensity score analysis are all attempting to do the same thing—break the link between treatment assignment and treatment outcome. But they are not interchangeable. When “treatment groups have important covariates that are more than one-quarter or one-half of a standard deviation apart, simple regression methods are unreliable for removing biases associated with differences in covariates, a message that goes back to the early 1970s but is often ignored.”³⁰⁴

Thus, when trying to adjust for covariate imbalance, regression “is adequate in simple

²⁹⁸ MORGAN & WINSHIP, *supra* note 138, at 38–39.

²⁹⁹ IMBENS & RUBIN, *supra* note 137, at 20.

³⁰⁰ Burt S. Barnow, G.G. Cain & Arthur S. Goldberger, *Issues in the Analysis of Selectivity Bias*, in 5 EVALUATION STUDIES (E. Stromsdorfer & G. Farkas eds., 1980).

³⁰¹ Michael Lechner, *Earnings and Employment Effects of Continuous Off-the-Job Training in East Germany After Unification*, 17 J. BUS. & ECON. STATISTICS 74 (1999).

³⁰² Guido W. Imbens, *Nonparametric Estimation of Average Treatment Effects Under Exogeneity; A Review*, 86 REV. ECON. & STATISTICS 4 (2004).

³⁰³ See also GUO & FRASER, *supra* note 137, at 29–33.

³⁰⁴ IMBENS & RUBIN, *supra* note 137, at 277.

situations,” but inadequate when “the differences between the two distributions are [too] large.”³⁰⁵ This is because regression estimates are sensitive to the lack of covariate overlap, often making it “impossible to arrive at a credible estimator based on simple regression methods.”³⁰⁶

Propensity Score Matching. Propensity score matching compares units in the treatment and control groups who have similar propensities for treatment (the propensity score).³⁰⁷ The propensity score, I_h ranges from 0 to 1, is calculated using logistic (or probit) regression, with the dependent variable being whether or not the observation is in the treatment group, and the independent variables those variables the researcher thinks are associated with being in the treatment or control groups. In this study, the propensity scores were created using the covariates listed as independent variables in the methodology section.³⁰⁸ Additionally, the data were trimmed to exclude any observations with propensity scores below 0.10 and above 0.90 since “for a wide class of distributions the optimal set is well approximated by the set of observations with propensity scores in the interval [0.1, 0.9].”³⁰⁹

While propensity score matching is an increasingly popular method, it is not without its problems. In fact, King and Nielsen have shown, using real and simulated data, that propensity score matching, unlike Mahalanobis distance matching and coarsened exact matching, “can and usually does increase imbalance, inefficiency, model dependence, research discretion, and bias. . . . In fact, the more balanced the data, or the more balanced it becomes by pruning some observations through matching, the more likely [propensity score matching] will degrade inferences.”³¹⁰

Propensity Score Weighting. While “[propensity score] weighting can be considered a submodel of those developed by Rosenbaum and Rubin . . . it is important to treat the propensity score weighting estimator . . . as a special case, a method that is categorically different from other propensity score models.”³¹¹ That is, “[t]he method directly exploits the inverse of estimate propensity scores as weights in outcome analysis, and to a large extent, it shares similarities with weighted analysis using unequal sampling weights.”³¹² One of the advantages of propensity score weighting over propensity score matching is that less data is lost. “[I]n finite samples, an appropriate reweighting estimator nearly always outperforms pair matching and is often competitive

³⁰⁵ *Id.* at 309, 311.

³⁰⁶ *Id.* at 336.

³⁰⁷ See generally SHENYANG GUO & MARK W. FRASER, *PROPENSITY SCORE ANALYSIS: STATISTICAL METHODS AND APPLICATIONS* 130-40 (2d ed. 2015).

³⁰⁸ “As a way of guarding against the consequences of misspecification, researching using estimators built around the propensity score should include in the propensity score model covariates believed to influence the treatment selection process as well as any covariates believed to influence the outcome variable. Doing so provides a type of insurance against bad bias, but this may come at the expense of added variance.” Matias Busso, John DiNardo & Justin McCrary, *New Evidence on the Finite Sample Properties of Propensity Score Reweighting and Matching Estimators*, 96 *Rev. of Economics & Statistics* 885, 896-97 (2014).

³⁰⁹ Richard K. Crump, V. Joseph Hotz, Guido W. Imbens & Oscar A. Mitnik, *Moving the Goalposts: Addressing Limited Overlap in the Estimation of Treatment Effects by Changing the Estimand*, National Bureau of Economic Research, Technical Working Paper 330, Sept. 2006, available at <http://www.nber.org/papers/T0330>, at 5.

³¹⁰ Gary King & Richard Nielsen, *Why Propensity Scores Should Not Be Used for Matching*, Aug. 17, 2015, available at <http://gking.harvard.edu/files/gking/files/psnot.pdf?m=1439838506>, at 1.

³¹¹ GUO & FRASER, *supra* note 307, at 240.

³¹² *Id.*

with the more sophisticated matching estimators in [data generating processes] where overlap is good."³¹³ But in data generating processes "where overlap is poor, [] reweighting tends not to perform as well as some of the more effective matching estimators."³¹⁴

Nearest Neighbor Matching (NNM). In its simplest form, "matching, or more precisely the mechanism for balancing data through matching, involves identifying untreated participants who are similar on covariates to treated participants and using the mean outcome of the nontreated group as a proxy to estimate the counterfactual of the treated group."³¹⁵ Whereas propensity score matching avoids dependency on the functional form of the logit or probit regression model used to calculate the score, matching avoids this. But this comes at a cost--"as the number of matching variables increases, so does the difficulty of using exact matching to find a match for a given treated participant"--the dreaded curse of dimensionality.³¹⁶ Also, one must determine the metric to use in determining the "distance" of the nearest match. Of the various matching estimators, "[o]ne of the most effective . . . is bias-corrected matching with a fixed number of neighbors."³¹⁷

Coursened Exact Matching (CEM). CEM utilizes a "monotonic imbalance reducing matching method" so that "balance between the treated and control groups is chosen by ex ante user choice."³¹⁸ CEM also allows one to adjust balance on one variable without altering the imbalance of other variables. CEM's creators argue that it "strictly bounds through ex ante user choice both the degree of model dependence and the average treatment effect estimation error, eliminates the need for a separate procedure to restrict data to common empirical support, meets the congruence principle, [and] is robust to measurement error."³¹⁹ CEM does not calculate treatment effects on its own, but merely trims the data to ensure sufficient covariate balance, enabling one to use "whatever statistical model they would have applied without matching. . . . [or] to be used to improve other methods of matching."³²⁰ CEM can either be specified to perform one-to-one matching between the treatment and control groups, or one-to-many matching. CEM further allows one to match based on strata of a particular variable.

V. FINDINGS AND ANALYSIS

A. *Political Make-up of New Professors*

I first report the political orientation make-up of the tenure-track, non-clinical, non-legal research and writing law professors hired from 2001-2010. The findings are similar to the half dozen studies noted earlier.

³¹³ Busso et al., *supra* note 308, at 885.

³¹⁴ *Id.*

³¹⁵ GUO & FRASER, *supra* note 307, at 76. *See also id.* at 255-59.

³¹⁶ Guo & Fraser, *supra* note 307, at 256.

³¹⁷ Busso et al., *supra* note 308, at 885.

³¹⁸ Matthew Blackwell et al., *cem: Coursened Exact Matching in Stata*, Feb. 22, 2010, available at <http://gking.harvard.edu/files/cem-stata.pdf>, at 1.

³¹⁹ *Id.*

³²⁰ *Id.*

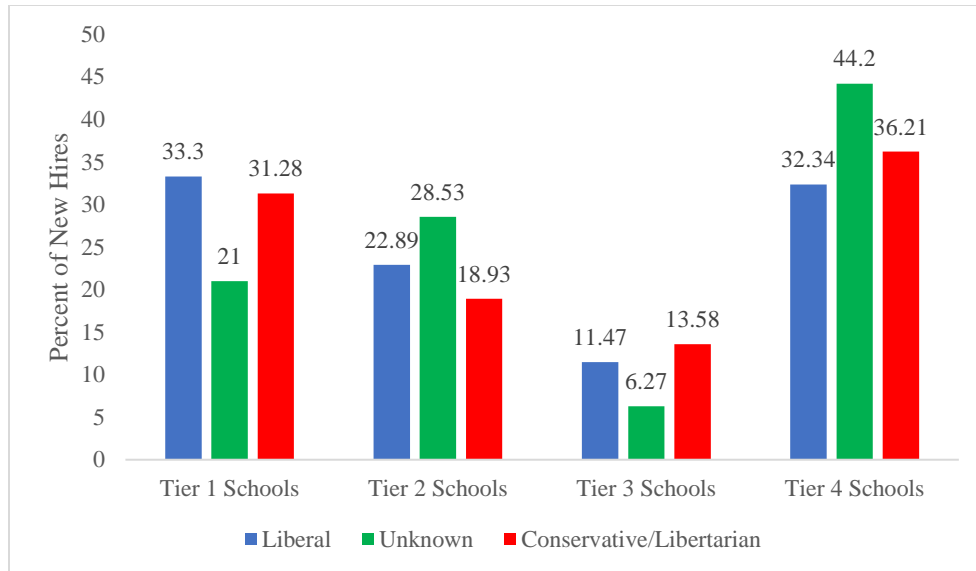
	Conservative/ Libertarian	Unknown/ Moderate	Liberal
Full Political Orientation n = 1766	244 (13.82%)	319 (18.06%)	1203 (68.12%)
Party Registration without signaling n = 128	29 (22.66%)	5 (3.91%)	94 (73.44%)
Signaling only n = 1434	194 (13.53%)	239 (16.04%)	1010 (70.43%)
Signaling with confidence n = 1766	215 (12.17%)	472 (26.73%)	1079 (61.10%)
All Party Registration n = 704	118 (16.76%)	25 (3.55%)	561 (79.69%)

When looking at all signals, public and private (i.e., voter registration), just under 14% of the newly hired professors over the decade studied were classified as conservative or libertarian. Another 18% were either unidentifiable as to political orientation, or appeared to be in the political middle. And just over two of every three new hires were classified as liberal (68%). Thus, the ratio of liberal to conservative/libertarian new law professors was about 5 to 1.

The next row in the table examines just those professors for whom no public signal could be detected, but a private signal—voter registration—was found. The row after it just looks at the public signaling (CV’s, campaign donations, and scholarship), but only simple classification of political orientation. The fourth row shows the political orientation when confidence levels for the classification are factored in. Finally, the last row looks at all party registration-based classification of political orientation (i.e., voter registration records for everyone that had one).

As noted earlier, to the extent conservatives and libertarians view the legal academy as hostile to their views such that they may fare poorly in the hiring process if their political orientation was known, they will be motivated to hide that orientation. The way to measure this is to see if conservatives/libertarians are more detectable from private signals than public ones. And there is slight evidence that is the case. The ratio of liberal to conservative/libertarian shrinks to about 3.2 to 1 for professors who had no discernable public signal of political orientation, but were registered with a political party. This is despite the fact that the unknowns were excluded from this count of party registration (the small number in the unknown/moderate column comes from Independents). On the other hand, when looking at political orientation derived from public signaling, the ratio of liberal to conservative/libertarian is a little over 5 to 1.

Another question of interest is whether conservatives/libertarians are clustered in the higher, lower, or middle rankings of law schools, or are more evenly distributed, at least for those hired in the time period studied. The graph below shows the percentage of each of the three groups of new hires are spread across the four tiers: 1-50, 51-100, 101-149, 150+.



The distribution of all three groups is uneven across the tiers, indicating that law schools were not equally hiring across rankings over the decade studied. But the distribution of conservatives/libertarians and liberals was relatively similar.

B. *Qualifications by Political Orientation*

Next, I report the various qualification variables for each political orientation.³²¹ The three classifications do not look like each other on many of the dimensions, an indication that regression analysis would provide poor results here.

³²¹ These qualification variables are common in studies of law faculties or in publications providing advice to aspiring law professors. See Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. Empirical Legal Stud. 1, 16-20, 38 (2014) (finding that statistically-significant predictors of receiving a tenure-track offer were having graduated from law school less than 10 years ago, having a judicial clerkship, having published in a top 100 ranked law journal, currently teaching law or being a fellow, and having graduated from Yale, Harvard, or Stanford); Justin McCrary et al., *The Ph.D. Rises in American Law Schools, 1960-2011: What Does it Mean for Legal Education?*, 65 J. Legal Education 543 (2016) (finding the percentage of newly hired faculty at the top three dozen law schools who have a Ph.D. has risen significantly over the past half century, and that newly-hired professors had earned their law degree from a handful of elite law schools, with just over half having served on law review while in law school and clerked for a judge after law school); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 Colum. L. Rev. 199, 222 (1997) (in attempting to measure the impact of sex and race on law school hiring, controlling for, among other things, “prestige of his or her J.D. school; election to Order of the Coif during law school; law review membership . . . ; possession of a doctoral degree in a field other than law; experience as a judicial clerk or a state supreme court, federal district court, federal court of appeals, or the United States Supreme Court;” as well as “the professor’s age at the time of the first tenure-track appointment”). Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 Hous. L. Rev. 215, 243-59 (1981); Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 Am. B. Found. Res. J. 501, 504-28; Elyce H. Zenoff & Jerome A. Barron, *So You Want to be a Law Professor?*, 12 J.L. & Educ. 379, 407-09 (1983); Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. Mich. J.L. Reform 191, 212-36 (1991); Richard E. Redding, *Where Did You Go to Law School: Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. Legal Educ. 594 (2003); Gabriel J. Chin & Denise C. Morgan, *Breaking into the Academy: The 1996-97 Michigan Journal of Race & Law Guide for Aspiring Law Professors*, 1 Mich. J. Race & L. 551 (1996).

	Liberal	Unknown	Conservative
Bachelor Year	1989.6	1990.7	1990.3
Female	.483	.382	.238
Minority	.264	.204	.119
JD Rank	21.7	33.4	24.2
Grade Honors	.312	.285	.393
Law Review	.344	.263	.361
PhD	.167	.147	.148
Clerkship Scale	1.53	.92	1.82
# of Articles	2.11	1.76	2.43
Highest Ranking Article	104.6	131.1	107.6

Focusing specifically on comparing liberals to conservatives,³²² on none of the seven qualifications are liberals more qualified in that they have a statistically significant³²³ difference in a “better” direction than conservatives. Instead, the two group’s values are either statistically indistinguishable, or conservatives actually are more qualified (statistically significantly “better”). Thus, liberals and conservatives are equivalently qualified when it comes to the rank of their JD-granting institution ($p = .172$), the percentage holding PhDs ($p = .226$), the percentage who were on law review ($p = .310$), and the highest rank pre-hire publication ($p = .408$). And conservatives were more “qualified” than liberals on having law school grade honors ($p = .007$), the highest clerkship level ($p = .002$),³²⁴ and the number of pre-hire publications ($p = .056$).

Given that conservatives are as qualified in some areas and more qualified in others, one might expect them to be hired at more prestigious law schools. But that is not the case.

	Liberal	Unknown	Conservative
Hiring Law School Rank	87.1	100.8	92.8

Liberals, despite arguably being less qualified, average being hired at a law school about six spots

³²² To save space and minimize awkwardness, I will refer to conservatives and libertarians as just conservatives going forward.

³²³ Testing with a simple two-sample t-test with equal variances.

³²⁴ The higher clerkship level differences is driven in large part by the higher percentages of conservatives who have clerked on the U.S. Courts of Appeal or the U.S. Supreme Court, and the lower percentage who have had no clerkship. For example, conservatives were 22.6% more likely than liberals to have a federal appellate clerkship, and 64.3% more likely to have clerked on the Supreme Court.

Highest Clerkship	Liberal	Unknown	Conservative
None	42.5%	63.0%	35.7%
State/Foreign	5.1%	5.6%	3.7%
Federal District	14.1%	10.3%	11.5%
Federal Appellate	33.4%	18.8%	41.0%
Supreme Court	4.99%	2.2%	8.2%

more prestigious than conservatives. And that difference approaches statistical significance ($p = .066$). Why would that be? One possible explanation is discrimination based on political orientation. Another possibility is discriminating in favor of certain demographics that conservatives are weaker on, such as age, gender, or race. For instance, conservatives are whiter ($p < .001$) and more male ($p < .001$) than liberals at statistically significant levels.³²⁵ But looking at all of these variables in isolation can miss things. A more rigorous statistical analysis is necessary.

C. Treatment Effects

Given the differences between the three groups, regression analysis is less ideal. Instead, the statistical methods noted above that trim data that has no good match in order to create an apples-to-apples comparison will be used. The first method is nearest-neighbor matching, requiring at least one match and no more than two.³²⁶ I first report the standardized differences on the covariates between the treatment and control groups in each pairing. As a general guide, standardized differences should be no more than .25 above or below 0.³²⁷

Observations	Treated (Cons.) N = 217	Control (Liberal) N = 1071	Treated (Cons.) N = 217	Control (Unkn.) N = 263	Treated (Unkn.) N = 263	Control (Liberal) N = 1071
Standardized Differences	Raw	Matched	Raw	Matched	Raw	Matched
Bachelor Year	.016	.024	-.043	-.035	.027	.048
Female	-.541	-.083	-.332	-.013	-.201	-.069
Minority	-.395	-.046	-.256	-.028	-.138	-.014
JD rank	.072	.006	-.204	.003	.267	-.007
Grade Honors	.188	-.032	.213	.009	-.025	-.031
Highest Clerkship	.183	.006	.600	.066	-.418	-.065
Doctorate	-.077	-.008	-.026	.018	-.051	-.006
Law Review	-.0002	-.028	.127	.031	-.127	-.013
Highest Publication	-.006	-.077	-.129	.016	.123	-.032
Number of Publications	.090	-.065	.252	.037	-.153	-.092

In the first model, seven of the ten covariates improved in overlap after matching, ten of ten in the second model, and eight of ten in the third. Further, all ten are now less than .09 above or below 0, well within the recommended range without losing too many observations. Now with a more apples-to-apples comparison, I report the average treatment effects for each treatment scenario, with robust standard errors in parenthesis. Because the hiring rank variable is lower for more prestigious schools, a positive value for the average treatment effect means a less prestigious school.

³²⁵ Using the year one earned their Bachelor's degree as a proxy for age, there was no statistical difference between liberals and conservatives.

³²⁶ I used the default Mahalanobis distance metric.

³²⁷ See Donald B. Rubin, *Using Propensity Scores to Help Design Observational Studies: Application to the Tobacco Litigation*, 2 HEALTH SERVICES & OUTCOMES RESEARCH METHODOLOGY 169 (2001); Elizabeth A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, 25 STATISTICAL SCI. 1 (2010).

	Treatment (Con) Control (Lib) N = 1288	Treatment (Unk) Control (Lib) N = 480	Treatment (Con) Control (Unk)
Average Treatment Effect	11.89 (5.41)	11.91 (4.47)	-1.16 (5.70)

The nearest-neighbor matching shows evidence of discrimination, but not two-tier discrimination. Conservatives are not more disfavored than those whose political orientation is unknown. But both groups suffer a statistically significant hit, so to speak, of about 12 ranks in the school they are hired at for not having a liberal political orientation.

Next I use a different statistical model: propensity score matching. I first report the covariate balance.

Observations	Treated (Cons.) N = 217	Control (Liberal) N = 1071	Treated (Cons.) N = 217	Control (Unkn.) N = 263	Treated (Unkn.) N = 263	Control (Liberal) N = 1071
Standardized Differences	Raw	Matched	Raw	Matched	Raw	Matched
Bachelor Year	.016	-.0001	-.043	-.072	.027	.049
Female	-.541	-.061	-.332	-.018	-.201	-.079
Minority	-.395	.031	-.256	-.028	-.138	.020
JD rank	.072	.080	-.204	.064	.267	.027
Grade Honors	.188	-.011	.213	-.013	-.025	-.078
Highest Clerkship	.183	-.147	.600	-.051	-.418	.037
Doctorate	-.077	.076	-.026	0	-.051	-.040
Law Review	-.0002	-.005	.127	-.031	-.127	.058
Highest Publication	-.006	.106	-.129	-.087	.123	.066
Number of Publications	.090	-.031	.252	.050	-.153	.023

Here, after matching, we find no covariate greater than .15 above or below 0, with most much closer to 0. And we find a similar “effect” as in the nearest-neighbor matching when estimating the average treatment effect.

	Treatment (Con) Control (Lib) N = 1288	Treatment (Unk) Control (Lib) N = 480	Treatment (Con) Control (Unk)
Average Treatment Effect	13.16 (5.02)	13.40 (5.07)	-2.23 (5.57)

Both conservatives and those whose politics is unknown suffer a 13-rank drop in their hiring school for not having a liberal political orientation.

The evidence presented here does support a claim that discrimination occurs in law school hiring. But it appears to be discrimination in favor of liberals, or against anyone who is not liberal,

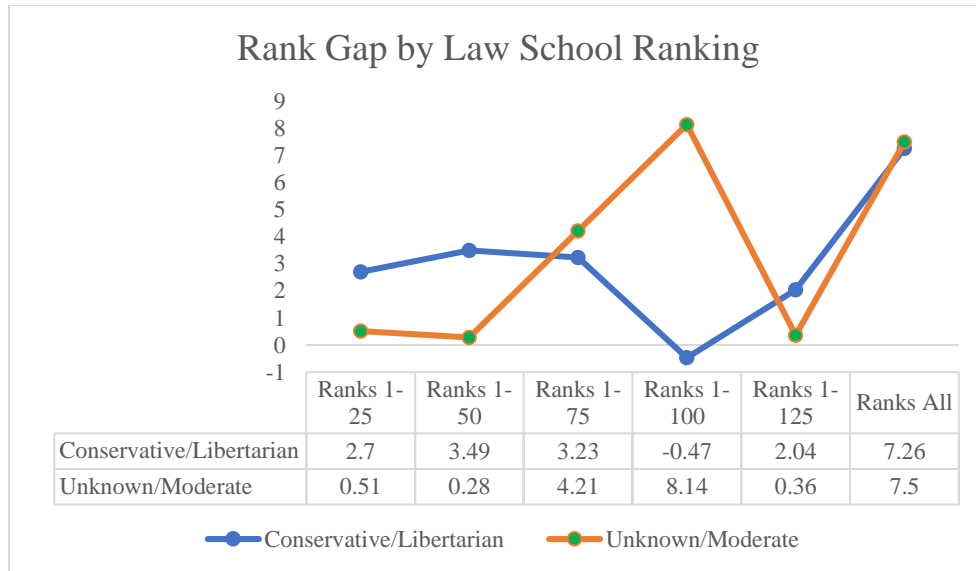
rather than a two-tiered discrimination scenario where liberals are favored and conservatives disfavored, with unknowns (or moderates) neither favored nor disfavored overall.³²⁸

Of course, the effects reported are an average across all law school hiring. But the effects may not be uniform. For instance, perhaps the rank gap between conservatives and liberals is higher for more prestigious schools. Or perhaps its higher for the least prestigious schools. To check this, a standard methodology is to regress the dependent variable (here, the hiring school ranking) on the treatment variable (political orientation) and the other independent variables, starting with one end of the scale of the dependent variable and slowly adding more observations as you advance up the scale of that variable.³²⁹ So, for this study, that would mean first examining the regression model's rank gap for the top 25 law schools, then adding the next 25 to the model so that one is examining the top 50, then adding the next 25 so one is looking at the top 75, and so on. The estimated rank gap will not provide an accurate number with the regression model since regression underestimates the gap given the problems with a lack of overlap between the treatment and control groups, as discussed above.³³⁰ Rather, the point of the exercise is merely to show where along the law school rankings continuum the rank gap is wider or narrower to show which ranked schools may be engaging in more or less discrimination. As is evident in the graph below, the discrimination (rank gap) is not uniform.

³²⁸ A similar study surveyed 1643 faculty members at 183 four-year colleges and universities, and found using regression analysis, after controlling variables measuring professional accomplishments and individual characteristics, that conservatives and Republicans are professors at lower quality schools than liberals and Democrats. Stanley Rothman et al., *Politics and Professional Advancement Among College Faculty*, 3 *The Forum* 1 (2005).

³²⁹ See Justin McCrary & Heather Royer, *The Effect of Female Education on Fertility and Infant Health: Evidence from School Entry Policies Using Exact Date of Birth*, 101 *American Economic Review* 158, 179-80 (2011). See also Joshua D. Angrist & Guido W. Imbens, *Two-Stage Least Squares Estimation of Average Causal Effects in Models with Variable Treatment Intensity*, 90 *J. of the American Statistical Association* 431 (1995).

³³⁰ The regression coefficient for a dummy variable for conservatives was 7.26 (p = .055), and for the dummy variable for unknowns/moderates was 7.50 (p = .028). The positive co-efficient means a school with a higher-numbered rank, or, in other words, a less prestigious school since the lower the value of the rank, the more prestigious the school. The overall regression model's statistics were: n = 1551; F (12, 1538) = 25.77; p < .0001; R-squared = 0.16; SER = 49.47. As for the control variables: Year of Bachelor Degree = -.026 (p = .148); Female = -6.27 (p = .016); Minority = .05 (p = .868); JD Rank = .22 (p < .001); Law School Grade Honors = -1.82 (p = .515); Clerkship Scale = -7.46 (p < .001); Ph.D. = -29.03 (p < .001); Law Review = -6.39 (p = .021); Highest-ranked Publication = .024 (p < .001); Number of Publications = -1.56 (p = .001); constant = 155.17 (p < .001). Thus, for characteristics within a candidate's control, the advice appears to be get a JD from the best-ranked school one can, don't worry so much about grade honors (though that can impact other variables, such as clerkships); obtain the most prestigious clerkship one can, get a Ph.D., be on law review in law school, get a publication in the best-ranked law journal one can, and publish as many articles as one can. As for characteristics outside a candidate's control, don't be seen as a conservative/libertarian or an unknown/moderate and don't be female. Age might matter, though it's not quite statistically significant, so younger is better. Being a minority doesn't appear to matter.



The chart and its data show that the rank gap, how this paper operationalizes discrimination, is not uniform. For conservatives vis-à-vis liberals, discrimination is strongest with the least prestigious schools; weakest and apparently nonexistent for schools ranked from 76-100; and relative equal for the rest of the schools. For unknowns/moderates vis-à-vis liberals, discrimination is strongest for schools ranked 76-100 and the least prestigious schools; seemingly nonexistent for the top 50 schools and those ranked 101-125; and moderate for schools ranked 51-75. Comparing the two patterns, the top 50 schools look similar—moderate discrimination against conservatives, but no discrimination against unknowns/moderates. And the least prestigious schools also look similar—the strongest discrimination against anyone who is not liberal. And again, the measure of how much discrimination is occurring—the rank gap—is not accurate (it underestimates the gap) because of the use of a regression model rather than matching: the point is just to show where the discrimination is stronger or weaker within the law school ranks.

This all still leaves some unexplained questions. For instance, if conservatives and unknowns are equally disfavored, why would any liberal not make their political orientation known in order to avoid the penalty associated with not being perceived as a liberal? Perhaps it's because professor candidates aren't aware that to avoid being discriminated against one must do more than not be seen as a conservative: one must be seen as a liberal. Or perhaps they think it's obvious they are liberal when it is not. Another question is, if unknowns and conservatives are equally disfavored, is why are conservatives so much more qualified than unknowns? What drives the fact that the new conservative professors from 2001-2010 were more qualified than their peers, whereas the unknown professors were less qualified? Unfortunately, this paper cannot answer those questions.

VI. CAVEATS AND LIMITATIONS

This study used observational data, so its claim to “effects” and causality is a weak one as there are many factors in the real world that are difficult to control for when one moves outside of the laboratory. Still, the evidence, while not perfect, is strong. Further, the classification of political orientation includes a subjective element that could impact the validity of the measure. However, the results were in line with previous studies and more objective measures checked and confirmed

the more subjective measures. Additionally, this study was only able to study those who have been hired. It would be far better to study all candidates up for hire in a given year, and then see whether the propensity for getting hired was affected by one's political orientation. Discrimination could be stronger or weaker at these earlier stages—i.e., who to bring in for an initial screening interview or who to bring to campus for a job talk—than among the pool of those who actually get an offer. Also analyzing applicants who don't get hired would potentially yield cleaner results than just seeing whether the rank of one's school was affected by one's political orientation. But that data was not made available despite efforts by the author to obtain it.

What is more, it would also be ideal to study what role self-selection may play in the law-hiring process as it pertains to political orientation. Are conservatives less likely to even attempt to go on the market? If so, do those who do not even try look systematically different from those who do? And why do they self-select out: lack of interest? fear of discrimination? other reasons? However, while self-selection, if it exists, could partially explain lower numbers of conservatives, it wouldn't appear to change the findings of this paper.

What is more, one cannot generalize beyond the time period studied. So whether discrimination existed prior to 2001 or after 2010 in law school hiring, this study cannot say. And post-2010, the law hiring market significantly shrunk to about half of what it was before the Great Recession, due to a delayed reduction in annual hiring that started a few years after the economic downturn. And it's unclear whether the trends found in the first decade of the 21st Century will ever be applicable again. Finally, this paper's data cannot explain the mechanism of discrimination. Is it taste discrimination wherein law faculties just prefer to hire those who see the world the same way? Or is it information discrimination wherein law faculties have a harder time assessing the quality of candidates who do not share their political ideology? This study cannot say. And knowing the type of discrimination would be helpful in understanding how to solve the problem.

CONCLUSION

Conservative and libertarian law professors are underrepresented in the legal academia, whether compared to the American population overall, those who graduate from law school, or elite lawyers who look most like law professors. And it appears at least part of the answer as to that underrepresentation is discrimination, though not discrimination against conservatives and libertarians so much as discrimination against anyone who is not liberal. This discrimination costs non-liberals about 12-13 ranks in the school they are hired at, though this difference is not uniform across school ranks and differs some for conservatives/libertarians as compared to unknowns/moderates.

To the extent the legal academy is concerned about diversity, given the significant role politics plays in the law, few types of diversity could be more beneficial to legal education than increased political diversity among law school faculties. Ironically, liberal students and law professors will arguably benefit the most if the percentage of conservative and libertarian faculty members increases.

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STUDY #3—THE TREATMENT OF RELIGION IN U.S. LEGAL SCHOLARSHIP: A QUANTITATIVE INTELLECTUAL HISTORY, 1998-2012

INTRODUCTION

Something's going on with religion in America. Over the past quarter-century, religion's place in society and its intersection with law and with politics has shifted dramatically, going from being an issue that generally drew bi-partisan support to now resulting in sharp partisan line-drawing. As background for this study's narrower focus on legal scholarship, one example and some data will suffice to illustrate. First, the Supreme Court's decision in *Employment Division v. Smith*,³³¹ where the Court found two Native Americans' religious rights to smoke peyote did not survive a state law preventing drug use under the Free Exercise Clause of the U.S. Constitution, was "nearly universal[ly]" condemned.³³² And as a result, two of the most politically progressive members of the U.S. Senate—Chuck Schumer and Ted Kennedy—proposed the Religious Freedom Restoration Act of 1993 (RFRA).³³³ It was supported by the ACLU, would pass the House by a *unanimous* voice vote, be approved by in the Senate 97-3, and be signed into law by Democratic President Bill Clinton, who spoke of it in glowing terms.³³⁴ Now when states attempt to pass mini-RFRA's applicable at the state level that are nearly identical to similar laws passed in the 1990s, or RFRA is invoked to resist the Affordable Care Act's contraceptive mandate, passionate opposition is raised, including by many who previously voted for or supported RFRA.³³⁵ For example, the Democratic governor of Connecticut in 2015 banned state employees from traveling to Indiana because of Indiana's recently passed state RFRA, which actually provided less protection to religious freedom than did Connecticut's own RFRA passed in the 1990s.³³⁶

Further, survey data show that religion has less importance for Americans. For example, Americans are not only increasingly less likely to have a denominational affiliation—labeled "nones" by religious scholars—but about half of this growing population (the largest group being young adults) has "a genuine antipathy toward organized religion."³³⁷ This, understandably, spills over into the public's view towards religious liberty, particularly the rising generation, which is the segment of the population least concerned about religious freedom.³³⁸ As one legal scholar observed, "fewer people today seem to recognize or care about the immediate need for legal protections rooted in the free exercise of religion."³³⁹

This trend has concerned various religious and thought leaders. For instance, in 2010 while president of the U.S. Conference of Catholic Bishops, Cardinal Francis George warned of "threats

³³¹ 494 U.S. 872 (1990).

³³² Bruce Abramson, *The Decline-and Fall?-of Religious Freedom in America*, Mosaic, Aug. 3, 2015, available at <http://mosaicmagazine.com/essay/2015/08/the-decline-and-fall-of-religious-freedom-in-america/>.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ See David E. Bernstein, *How Anti-Discrimination Became a Religion, and What It Means for Judaism*, Mosaic, Aug. 8, 2016, available at <https://mosaicmagazine.com/response/2016/08/how-anti-discrimination-became-a-religion-and-what-it-means-for-judaism/>.

³³⁷ ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 7, 75-80, 588-61 (2012).

³³⁸ See "Many Americans Worry about Religious Freedom," *Deseret News*, Jan. 3, 2013, A8.

³³⁹ JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 22 (2016).

to religious freedom in American that are new in our history and to our tradition.”³⁴⁰ A Christian publication argued that the 21st Century would be “very secular and religiously antagonistic,” especially towards Christianity, with antagonism toward that faith “ris[ing] to levels many of us have not believed possible in our lifetimes.”³⁴¹ An associate professor of history warned of increasing anti-Semitism and threats to religious liberty, not only of American Jews but of all faiths.³⁴² Leaders of the Church of Jesus Christ of Latter-Day Saints (i.e., the Mormons) have increasingly lately warned of a greater need to protect religious freedom.³⁴³ And one legal commentator went so far as to describe the current climate as revealing “a growing anti-religious bigotry in the United States. . . . For three decades people of faith have watched a systematic and very effective effort wage in the courts and the media to drive them from the public square and to delegitimize their participation in politics as somehow threatening.”³⁴⁴ But are these various the-sky-is-falling warnings accurate, or perspectives born from the tendency of people committed to a position to see otherwise neutral events as hostile?³⁴⁵ Or perhaps are these trends a reflection of religious rights historically dominating other rights, which are now getting equal treatment?

These societal and political trends are beyond the scope of this study. Rather, against this societal and political backdrop comes the underlying question motivating this study: what is going on with religion in legal academia, specifically, legal scholarship? In other words, is religion now a divisive topic in the writings of legal academics? Or has legal scholarship resisted the trends in American society and politics? One could imagine either question being answered yes. On the one hand, law and politics are often closely connected—legal realists might even say synonymous (or at least inseparable). What is more, political views influence legal decision-making,³⁴⁶ perhaps one of its most influential factors, according to some scholars.³⁴⁷ Further, American law schools, which produce the bulk of legal scholarship in this country (be it from law professors or law students), are often seen as tilting to one side of the political spectrum in America. And not only have law professors been more than willing to wade into political issues, including letters opposing politically-appointed administration officials,³⁴⁸ but legal scholars’ political ideology also predicts

³⁴⁰ Cardinal Francis George, “Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom,” Speech at Brigham Young University (Feb. 23, 2010).

³⁴¹ Michael Spencer, “The Coming Evangelical Collapse,” *The Christian Science Monitor*, 10 Mar. 2009.

³⁴² See Abramson, *supra* note 332.

³⁴³ Peggy Fletcher Stack, “LDS Leaders Preach about Religious Freedom, but Utah Mormons don’t See it as Biggest Concern, Poll Shows,” *Salt Lake Tribune*, Sept. 28, 2016, available at <http://www.sltrib.com/home/4404807-155/lds-leaders-warn-of-eroding-religious>.

³⁴⁴ HUGH HEWITT, *A MORMON IN THE WHITE HOUSE?* 242-43 (2007).

³⁴⁵ In the context of the media, this phenomenon is called the hostile media effect.

³⁴⁶ See, e.g., J.A. Segal & H.J. Spaeth, *The Supreme court and the Attitudinal Model Revisited* (2002) (measuring the impact of political ideology on Supreme Court justices’ votes); T. Miles & C. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823 (2007) (documenting the impact of political ideology on federal circuit court judges).

³⁴⁷ See Andrew Martin, Kevin Quinn, T. Ruger & P. Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 Perspectives on Politics 761 (2004); T. Ruger, P. Kim, Andrew Martin & Kevin Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Columbia L. Rev. 1140 (2004).

³⁴⁸ See, e.g., Sari Horwitz, *More than 1,100 Law School Professors Nationwide Oppose Session’s Nomination as Attorney General*, *Wash. Post*, Jan. 3, 2017, https://www.washingtonpost.com/world/national-security/more-than-1100-law-school-professors-nationwide-oppose-sessionss-nomination-as-attorney-general/2017/01/03/dbf55750-d1cc-11e6-a783-cd3fa950f2fd_story.html?noredirect=on&utm_term=.4a0c4b33efb4.

conclusions in their legal scholarship.³⁴⁹ Looking anecdotally at the five most recent major cases on law and religion from the U.S. Supreme Court—*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012); *Burwell v. Hobby Lobby* (2014); *Town of Greece v. Galloway* (2014); *Holt v. Hobbs* (2015); and *Trinity Lutheran Church v. Comer* (2017)—amicus briefs filed by law professors appear on both sides of each case³⁵⁰ except for *Holt*,³⁵¹ a case where seemingly liberal and conservative political interests may have aligned with a Muslim prisoner seeking to protect his religious liberty. On the other hand, there is at least arguably some daylight between law and politics, and the ideals of academic scholarship are objectivity rather than advocacy. Perhaps legal scholars view religion more dispassionately than the public or politicians. But that is an open question—one this study seeks to gain more traction on if it cannot be fully answered here. And this paper’s quantitative intellectual history of what may be a turning point in American legal and political history matters because while it’s unclear whether the legal ivory tower directly influences societal debates, its surely influences the law, both in the courts and in legislatures.

This study thus covers the important time period of 1998-2012. It does so for a couple of reasons. First, more generally, this covers the core of the period between the initial uncontroversial passage of RFRA in 1993 and the recent uproar over similar state-level RFRA’s in 2015, providing a little time before and after these bookend events. Second, more specifically, this study starts in 1998, one year after the Supreme Court rejected RFRA’s application to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997) and before the slew of recent Supreme Court cases on religious issues started in 2012. The reason this study covered those years rather than 1997-2011 is because legal scholarship is generally not published the same year it is written, so a one-year lag is provided on a front end and going until 2012 means it’s unlikely anything occurring in 2012 will show up in legal scholarship that year.

Several theoretical models are relevant to the potentially changing landscape of religion in the United States, and thus the treatment of religion in legal scholarship. Some scholars have long advocated Secularization Theory, the view that society is gradually growing less religious, though

³⁴⁹ See Chilton & Posner, *supra* note 3.

³⁵⁰ Compare (Hosanna-Tabor) Brief of Professor Eugene Volokh et al., https://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-553_profevolokhand5relgrps.authcheckdam.pdf, with Brief of Law and Religion Professors, https://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-553_respondentamculawandrelprofs.authcheckdam.pdf; compare (Hobby Lobby) Brief for Amici Curiae Church-State Scholars, <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/SSRN-id2387895.pdf>, with Brief of Constitutional Law Scholars, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_conlaw.authcheckdam.pdf; compare (Town of Greece) Brief Amicus Curiae of Gerard V. Bradley, et al., https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-696_pet_amcu_gvb-et-al.authcheckdam.pdf, with Brief of Erwin Chemerinsky & Alan Brownstein, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-696_amici_chemerisk_greece.authcheckdam.pdf, and Brief of Law Professors, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-696_pet_amicu_lawprofessors.authcheckdam.pdf; compare (Trinity Lutheran) Amici Brief of Law and Religion Practitioners, <http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranMeritsAmicusLRP.pdf>, with Brief of Legal and Religious Historians, http://www.scotusblog.com/wp-content/uploads/2016/07/15-577_amicus_resp_legal_and_religious_historians.authcheckdam.pdf.

³⁵¹ See Brief of Islamic Law Scholars as *Amici Curiae* in Support of Petitioner, <http://www.scotusblog.com/wp-content/uploads/2017/08/13-6827tsac.pdf>.

there are variations on this theme. In general, the theory argues that “the functions that religion served in the past are in modern times being fulfilled by more rational scientific institutions, which do a superior job at fulfilling these functions.”³⁵² Thus, the theory predicts “religion’s influence will decline or perhaps move from the public sphere to the private sphere.”³⁵³ Modernization Theory, the political science version of Secularization Theory, makes a similar but distinct argument: economic modernization and its processes, such as urbanization, higher literacy rates, science, nationalism, and political ideology, “will inevitably lead to the decline of religion as a relevant social factor.”³⁵⁴ Yet some take a more nuanced view, arguing that because “[r]eligion is a dynamic, diverse, and multifaceted phenomenon . . . exist[ing] in a society that is constantly changing and evolving,” “[b]oth secularization and its opposite, sacralization, are occurring.”³⁵⁵ Finally, an alternative theoretical model is the “supply-side” or “religious economies” model, which “argues that regulations restrict the supply of religion by changing the incentives and opportunities for religious producers (religious leaders and organizations) and the viable options for religious consumers (members of religious organizations).”³⁵⁶ This economics-based perspective posits that religious organizations, due to government restrictions, face “increase[d] entry and operating costs,” whereas for potential members of a faith, “religious choices are reduced and they face inflated costs when joining groups not condoned by the state.”³⁵⁷

Religious freedom is often thought of as occurring on a spectrum of greater to lesser quantities, but that arguably oversimplifies the world. A more complicated and accurate three-dimensional model based on the work of Durham and Scharffs, may provide more traction as to why there are governments (and views) that create environments of more or less religious freedom.³⁵⁸

Imagine three continuums: secularity, hostility towards religion, and neutrality among religions. If we simply view each dimension as having a low or a high value, that provides eight possibilities. The table below explores these.

³⁵² JONATHAN FOX, A WORLD SURVEY OF RELIGION AND THE STATE 15 (2008).

³⁵³ *Id.*

³⁵⁴ *Id.* at 15-16.

³⁵⁵ *Id.* at 20.

³⁵⁶ BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 6-7 (2011).

³⁵⁷ *Id.* at 7.

³⁵⁸ *See* W. COLE DURHAM, JR. AND BRETT G. SCHARFFS, RELIGION AND THE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 117 (2010).

Table 1. Possibilities of Three-Dimensional Religious Liberty Model

Secularity	Hostility	Neutrality	Example/Real-world Manifestation
High	High	High	Communism (all religions bad)
High	High	Low	Some religions worse
High	Low	Low	Low neutrality might be incompatible with low hostility
High	Low	High	Some people’s view of the U.S.
Low	High	High	Perhaps not possible
Low	High	Low	Theocracy where state religion is a sham to control all religion
Low	Low	High	Pluralistic religious government
Low	Low	Low	Benevolent theocracy

Thus, both theocratic and aggressively secular government systems can stifle religious freedom (though such is mediated through the differing dimensions of hostility or neutrality). In other words, as far as picking winners, government is problematic when it either picks one faith or endorses anti-faith and smothers religion. Thus, secularization can facilitate or hinder religious liberty, depending on the baseline, but only to the extent it reduces hostility towards religion or increases neutrality among religions (or both). And the government’s relationship with religion, in the extremes, can be to enforce a monopoly, or to regulate it out of existence (or at least the public square). Between those extremes, are several scenarios where religious liberty flourishes best. So from a theoretical perspective, some, at least those noted above, perceive American society, including politics and law, to be moving further towards hostility to religion, though whether that is “inadvertent insensitivity” or outright hostility may be somewhat in the eye of the beholder. (Ironically, one history professor even described our country as experiencing the “rise of secular theocracy.”)³⁵⁹

And what about the views of the legal intelligentsia?³⁶⁰ Surely few groups in the United States have as large an influence on trends in law and religion as those producing legal scholarship. Legal scholarship influences courts, legislatures, and executive branch policymakers. Those producing legal scholarship often serve in government, advise politicians, work for judges, or become such themselves. If we are to get a glimpse where law and religion in this country are heading, trends in legal scholarship provide as accurate a forecast as any other source—and arguably the most insight. For example, years before courts were generally willing to find a constitutional right to same-sex marriage, legal scholars were debating such with many advocating that position. Eventually those academic arguments influenced the law, even if not directly cited by courts.

Some have argued that “[t]oday, an increasing number of scholars and activists say that religion

³⁵⁹ Wilfred M. McClay, *The Rise of Secular Theocracy*, Mosaic, Aug. 15, 2016, available at <https://mosaicmagazine.com/response/2016/08/the-rise-of-the-secular-theocracy/>.

³⁶⁰ The idea of studying the treatment of religion in a branch of scholarship is not new. A previous study looked at major international relations academic journals from 1980 to 1999 to see the extent that scholars in that field considered religion to be an important influence on international relations, and found that religion was almost never considered. See Daniel Philpott, *The Challenge of September 11 to Secularism in International Relations*, 55 *World Politics* 66, 69 (2002).

is not so special after all.”³⁶¹ And there is anecdotal evidence supporting such a claim. One relatively recent book from Oxford University Press by an American law professor, entitled *Freedom from Religion*, argues that “society is at risk from religious extremism,” and thus “[c]ontemporary religious extremism leaves decision-makers and the public alike with no choice but to re-contour constitutionally granted rights as they pertain to religion and [religious] speech.”³⁶² A 2016 book put out by Princeton University Press book by an American law professor engages in its titular inquiry—*Why Tolerate Religion?*³⁶³ The book’s answer is that religion does not in itself require the special treatment the First Amendment affords it. As another law professor reviewing the book noted, its author “is not a crank, nor, within the academic work, is he out of the mainstream.”³⁶⁴

Of course, these two books are but anecdotal evidence. This paper seeks to add more rigorous evidence of the view of American legal scholars regarding religion and the law by examining scholarship over a fifteen-year time period—specifically, analyzing law journal articles published during the period that touch on law and religion in the U.S. context. No other study has fully undertaken this task.³⁶⁵ But this paper is not an attempt to test any hypotheses or prove any theories, such as secularization. Rather, its aim is much more modest—to describe trends in legal scholarship during a seeming watershed period in American society for the area of law and religion. It will thus explore various questions in a sort of quantitative intellectual history. Given how much we are in the dark about this area—how little is known about how legal scholarship deals with religion—there is value in just answering the various descriptive questions the paper poses. The paper leaves to others any attempts to pick a theoretical winner as to why these trends may be occurring. That said, this paper will proceed as follows: part I will discuss the research questions and the methodology of collecting and coding the relevant data; part II will analyze the data and discuss the results; part III will discuss caveats and consequences; and then the paper will conclude.

I. RESEARCH QUESTIONS, DATA & METHODOLOGY

The overarching question driving this study is how does U.S. legal scholarship portray and treat religion in a legal context? But there are many subsidiary questions related to this broad one:

1. What types of legal contexts (free exercise vs. establishment) comprise religious scholarship and does this change over time?
2. Is religion treated more or less positively over time or depending on the legal context (free exercise vs. establishment)?
3. Is religion portrayed differently depending on the type of author (professor, student, or

³⁶¹ Michael W. McConnell, *Is Religion Special?*, *Deseret News*, Nov. 20, 2011.

³⁶² AMOS N. GUIORA, *FREEDOM FROM RELIGION* 27, 39 (2009).

³⁶³ See BRIAN LEITER, *WHY TOLERATE RELIGION* (2012).

³⁶⁴ Michael W. McConnell, *Why Protect Religion?*, 10 *Christian Law* 15, 15 (2014). For a full review of Leiter’s book, see Michael W. McConnell, *Why Protect Religion Freedom?*, 123 *Yale L. J.* 770 (2013).

³⁶⁵ A previous study did something similar, but it was limited to a five-year period, and suffered from the double methodological deficiency of having the author be the sole coder (there should have been at least two coders, and neither should have been the person familiar with the study’s research questions). See James C. Phillips, *Law and Religion in U.S. Legal Scholarship: An Empirical Examination, 2008-2012*, 2014 *BYU L. Rev.* 635. That study also looked at fewer variables related to the portrayal of religion in legal scholarship.

- practitioner), and does this change over time?
4. What religions are represented in legal scholarship, and are some religions treated more positively than others?
 5. What is associated with arguments for greater (or less) accommodation of religious beliefs and separation of religion and government?
 6. Is religion portrayed different depending on the non-religious legal issue implicated (tax law, children, sexual orientation, etc.)?

Likewise, given that legal scholars, like anyone else, respond to rewards and punishments, legal publications could encourage or discourage particular portrayals of religion based on whether an offer of publication is extended. This could result in overall trends where portraying religion as more or less positive can provide authors with more or less prestigious publication outlets. Thus, one final subsidiary research question is:

7. Is the portrayal of religion related to the ranking of the law journal?

The legal database Westlaw was used to find law journal articles dealing with law and religion in the American context. Westlaw has over 1200 law journals that can be searched, covering almost all if not all law journals published in the United States (as well as a few foreign journals). Additionally, Westlaw is the predominant legal database used by the legal profession, meaning that it's what courts use when doing research. Thus, to the extent one wants to say something about the implications of one's findings, using the same database that courts and lawmakers use makes the most sense. Searches were done in Westlaw's "Law Reviews & Journals" subsection of its "Secondary Sources" database. The search parameters were designed to be especially broad so that results were over inclusive.³⁶⁶ Generally each year returned around 3,000 results.³⁶⁷ These results were ranked by Westlaw according to relevance based on the search parameters.

To test whether the relevance of the search results correlated with the relevance of the types of articles necessary for this study, coders looked at every tenth article until they exhausted the search results. And after getting beyond the first few hundred or so results, few "hits" were useable for the study, indicating the relevance ranking by Westlaw was a good proxy for the relevance of articles for this study.³⁶⁸ Thereafter, due to finite time and resources and the immense amount of time it would take to look at thousands of articles only to find they lacked relevance, coders tended

³⁶⁶ For example, the search for the year 2004 looked like this: ATLEAST3("RELIGIOUS LIBERT!") ATLEAST3("RELIGIOUS FREEDOM") ATLEAST3("FREEDOM #OF RELIGION") ATLEAST3("FREE EXERCISE") ATLEAST3("CHURCH #AND STATE") ATLEAST3("ESTABLISHMENT CLAUSE") ATLEAST3("ESTABLISHMENT #OF RELIGION") ATLEAST3("RELIGIOUS ESTABLISHMENT") ATLEAST4(WORSHIP) ATLEAST5(CHURCH) ATLEAST3(SYNAGOGUE) ATLEAST3(MOSQUE) ATLEAST3(PRAYER) ATLEAST4(FAITH) ATLEAST3("RELIGIOUS BELIEF") ATLEAST5(RELIGIO!) & DA(aft 2003 & bef 2005)

³⁶⁷ Specifically: 1998 (2,946 results); 2000 (2,939); 2002 (2,976); 2004 (3,224); 2006 (3,398); 2008 (3,448); 2010 (3,529); 2012 (3,376).

³⁶⁸ For example, in 1998, looking at every tenth article in the first 500 articles yielded a 66% relevance rate, articles 501-1000 a 12% relevance rate, articles 1001-1500 an 8% relevance rate, articles 1501-2000 a 6% relevance rate, and articles 2001-2946 a 0% relevance rate. Similarly, looking at articles in the year 2000, examining every article from 1-100 yielded a 64% relevance rate, 101-200 a 59% relevance rate, and looking at every tenth article in 201-500 yielded a 27% relevance rate, 501-1000 a 12% relevance rate, 1001-1500 a 6% relevance rate, and 1501-2939 a 0% relevance rate.

to just examine the first few hundred results from a search. Having the coders also preliminarily select the articles also served an important methodological function: it prevented the bias of the author, who had already conducted a pilot study, from unintentionally having his preconceptions formed from the previous study affect the selection process.

Articles were excluded from the study if they were primarily about law and religion outside of the U.S. domestic context, barely mentioned law and religion, or were more descriptive in nature. These exclusions covered mainly articles about law and civil religion in foreign countries, articles about religious law or just religion, publications that were just describing cases or simply reviewing books without doing more, and articles primarily on other topics. The first year studied was 1998. Thereafter, every even year was selected up through 2012 (2000, 2002, 2004, 2006, 2008, and 2010). The reason for skipping odd years was to provide greater coverage to maximize the ability to see a trend given finite resources and the inability to code each year of the fifteen-year period.

Four coders were used for the study. The author did not participate in the coding other than providing initial training so as not to inadvertently bias the results. The coders were law students, and came from two law schools—Brigham Young University and the University of Illinois at Champagne-Urbana. Two were women and two were men. Each year was coded by two coders, who were matched up after taking an initial survey on their views on religion so that coders with differing views were coding the same article rather than coders with similar views. The coders worked independently of each other.

The following characteristics of the article were coded or recorded (see Appendix II for the coding guide):

Citation

Year of publication

Type of article (article, note, comment, symposium, book review, etc.)

*Rank of journal*³⁶⁹

Publishing school (where applicable)

*Author Type*³⁷⁰ (law professor,³⁷¹ non-law academic, law student, non-law student, lawyer,³⁷² other professional).

Author School (if applicable)

Author School Rank (if applicable)

*Legal Sub-area of Article*³⁷³

³⁶⁹ The Washington and Lee University Law Library computes annual rankings for law journals. See <http://lawlib.wlu.edu/LJ/>. Because it only goes back to 2003, this study used 2003 for the previous years included here (1998, 2000, and 2002).

³⁷⁰ When there were multiple authors on an article, the first author's type was used. Initially this study planned on collecting additional information on the authors, including year of bachelor's degree. But the amount of time spent on collecting and coding the data meant this additional information, which seemed less important, had to be dropped from collection.

³⁷¹ This included adjunct faculty, visiting professors, fellows, deans, and any type of full-time law professor, tenure-track or otherwise.

³⁷² This included judges and clerks.

³⁷³ Such as tax, employment, healthcare, etc.

*Religion Article Discusses*³⁷⁴

*Free Exercise*³⁷⁵ *Implicated* (yes or no)

*Establishment of Religion*³⁷⁶ *Implicated* (yes or no)

Treatment of Religion (positive, neutral/mixed, problematic)

Accommodation of Religion was Advocated (yes, uncertain/partially, no)

Separation of Church and State Advocated (yes, uncertain/partially, no)

Coding content analysis can occur in one of two basic ways: manifest content and latent content.³⁷⁷ Manifest content is that which is readily apparent and can be counted, such as the number of times an article on law and religion uses the term *harmful*. But while easily replicable by others given its objective nature, and thus achieving one of the two goals of social science—reliability—it may not adequately measure what it claims to be measuring, and thus lack the other goal of social science—validity. On the other hand, latent analysis looks at underlying meaning and is more holistic and subjective. This type of analysis also has trade-offs—one maybe less likely to miscode if one can take into account all of the information, but there may also be less consistency among coders given the subjective nature.

Determining how religion is being portrayed, whether free exercise or establishment issues are implicated, and whether accommodation or separation was being argued for seemed more appropriate for latent analysis given the admittedly subjective nature of these categories and the nuances of legal arguments. As a result, in order to handle disagreement between coders for categories with answers that could be placed on a continuum—the treatment, accommodation, and separation categories—the answers of the coders were averaged. To try and minimize the potential that two independent coders merely have the same bias, creating a false consensus as to the underlying reality of the coding material, I surveyed coders' views on religion beforehand, and matched those with more positive views to those with less positive views.

A further word of explanation on the treatment of religion category. An article was coded as treating religion as positive if it characterized religion as a benefit, a good, something positive, or something that needed to be protected, defended, or strengthened. On the other hand, an article was coded as treating religion as problematic if it mainly focused on how religion would infringe another right, inflict some harm on others, or have some negative consequence.³⁷⁸ Articles that did

³⁷⁴ This was broken into the following categories: General (which included if multiple distinct religions were being discussed); Christianity (generally, not specific Christian denominations); Catholicism; Judaism (lumping together all types); Native American Religions; Islam (lumping together all types); Other Christian (this included Christian Science, Baptist, Episcopalian, LDS/Mormon, FLDS, Amish, Lutheran, and Jehovah Witness); Other Religions (this included Rastafarian, Buddhist, Santaria, Sikh, and Scientology); and Atheism.

³⁷⁵ The First Amendment of the United States Constitution states, "Congress shall make no law . . . prohibiting the free exercise [of religion]." Free exercise issues involve religious freedom or liberty—the ability of one to not just worship, but live one's religion outside of the confines of a church/synagogue/mosque and the home.

³⁷⁶ The First Amendment of the United States Constitution states, "Congress shall make no law respecting the establishment of religion." Establishment issues are often referred to as the separation of church and state, and in modern jurisprudence usually deal with religious influence on government and government endorsement of or aid to religion.

³⁷⁷ See, e.g., EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 338 (12th ed. 2010).

³⁷⁸ While the determination of whether religion is problematic can often be objectively assessed—or at least, in clear cases, nearly universally agreed upon—whether one views that problematic portrayal as itself problematic is rather subjective and contextual. For instance, few people have any issue with a discussion condemning a religion advocating

not appear to characterize religion in either way, or that roughly characterized religion in both ways, were coded as neutral or mixed, respectively.

Additionally, coders were instructed that if the article deals with the free exercise of religion/religious liberty, code “yes” for the Accommodation category if the article calls for the accommodation of religious beliefs/the strengthening or protection of religious liberty, and a “no” if it does not. Similarly, if the article deals with establishment/the separation of church and state, code “yes” for the Separation category if the article calls for a stricter separation, or not moving towards a looser separation of church and state, and a “no” if the article calls for a looser separation (or what is sometimes call more accommodation of religion by government—which is different than accommodating free exercise claims) or not moving to a stricter separation.

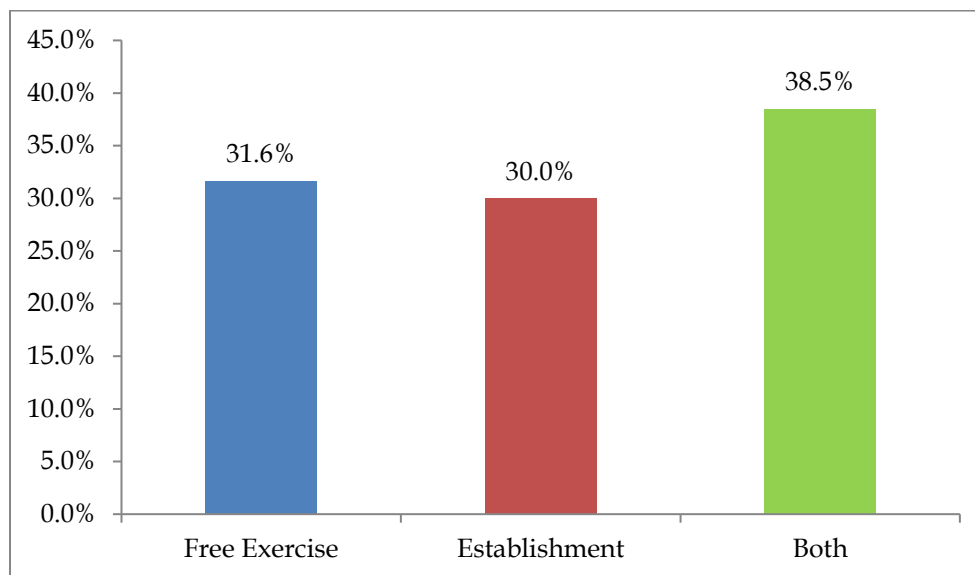
II. RESULTS AND ANALYSIS

A total of 1,292 articles were found to fit the study’s parameters and were coded—approximately 160 per year. This part of the paper will present the relevant results to answer the research questions noted above.

A. *General Area of Law and Religion*

The first research question regards what types of legal contexts (free exercise vs. establishment) comprise religious scholarship and does this change over time. As to the portion dealing with free exercise issues versus establishment issues versus both, the articles broke down accordingly (see *Graph 1*).

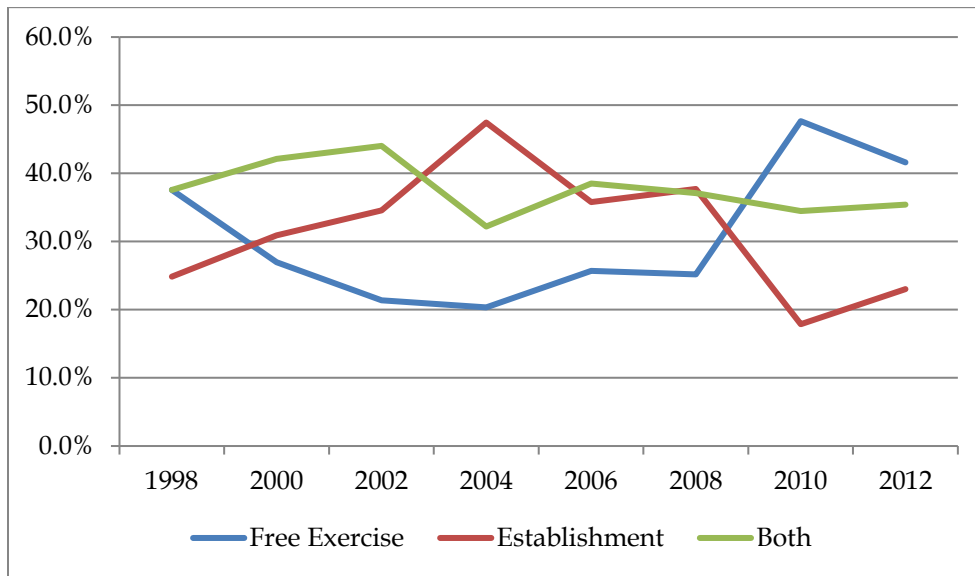
Graph 1. Articles by Type of Religious Context



the killing of one’s neighbor. But that is still treating religion as problematic. On the other hand, a discussion of how a pharmacist’s religion prevents her from dispensing contraceptives to customers, and thus infringes on the reproductive rights of those customers (and possibly also their health) would also be treating religion as problematic, but there the underlying religiously-motivated behavior may be less universally condemned.

As can be seen, about a third of the time articles are focused on free exercise issues, a third of the time they are focused on establishment issues, and a third of the time they are focused on both. The latter usually occurs in articles in one of two scenarios: either “establishment” of one religion threatens the free exercise of other religions, or an issue of free exercise, such as providing a religious exemption to a law, also looks like the establishment of religion. While this is the overall picture, there could be trends. *Graph 2* explores this over the time period studied:

Graph 2. Articles by Type of Religious Issue Over Time



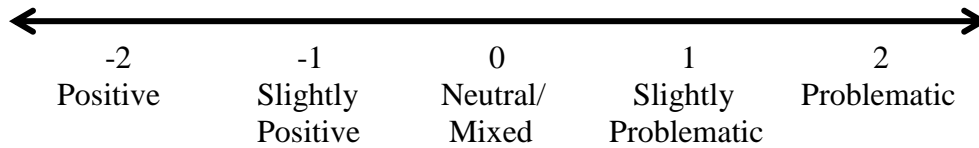
No real pattern emerges. The various ups and downs in percentages likely mean, at least for this time period, that the focus of legal scholarship responds to hot topics, which don’t always implicate the same general type of law and religion issue.

B. Treatment of Religion

Regardless of what general area of law and religion is implicated, of greater import is how religion is treated. The second research question asked whether religion was treated more or less positively over time or depending on the legal religious context (free exercise vs. establishment). This section first reports the results, then reports validation measures to the positivity scale.

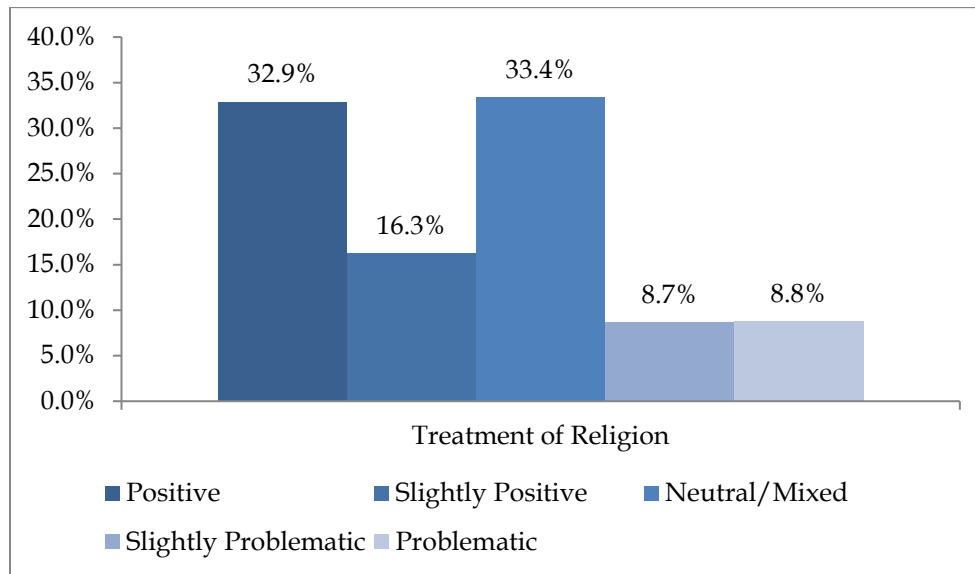
1. Analysis of treatment

To measure the treatment of religion, each article was coded by two independent coders, with each deciding whether the article was treating religion mostly positively (+1), in a neutral or mixed manner (0), or as mostly problematic (-1). Then, the coders’ classifications for each article were added together to create the following five-point ordinal scale:



Based on this scale, across the entire time period study one finds the following:

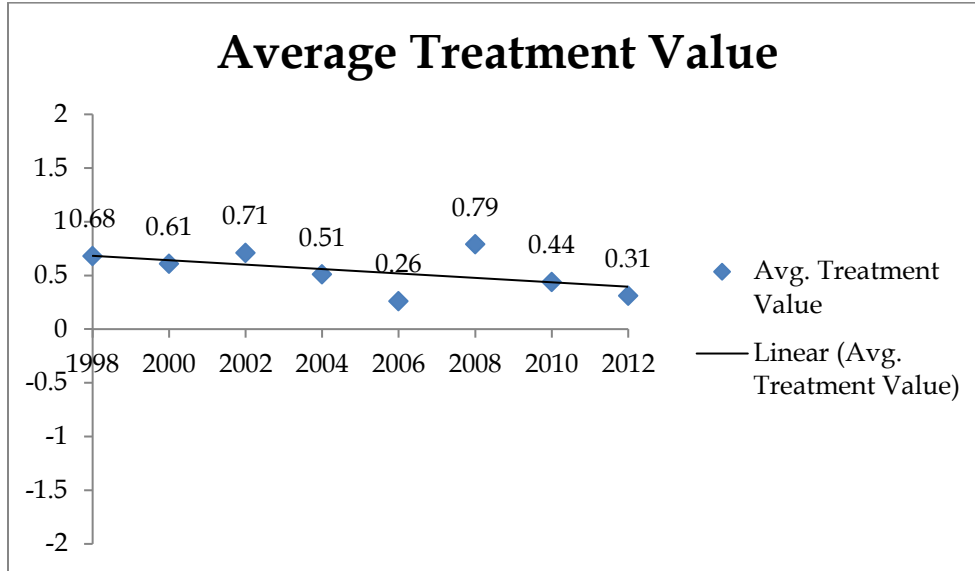
Graph 3. Percentage in Different Categories of Treatment of Religion



Nearly half the time religion is being characterized as positive (49.2%). And less than a fifth of the time (17.5%) is it being portrayed as more problematic. These results could be surprising, depending on one’s priors. On the one hand, religious freedom is a constitutionally-protected right, and legal scholars are generally solicitous of constitutional rights. That might explain the more positive than problematic articles. On the other hand, legal scholarship, while often more prone to advocacy than scholarship in other fields, is still scholarship rather than a brief being filed in a court. Objectivity, or at least the air of it, is a criterion of being an academic, and it also makes one more credible and persuasive. However, that would likely point towards an even bigger portion of articles falling under the neutral/mixed designation. So while a third do, many still fall on the positive side. And perhaps this is reflective of a society that still, on average, views religion more positively than not.

The next question to be answered is whether any trend can be detected over time: Is this portrait of the treatment of religion consistent over the fifteen-year time period studied, or is it moving in a particular direction? As a baseline, the average treatment value on the five-point scale from 1998-2012 was .56, about halfway between neutral/mixed and slightly positive. As the graph below shows, a modest downward trend does emerge.

Graph 4. Treatment of Religion Over Time

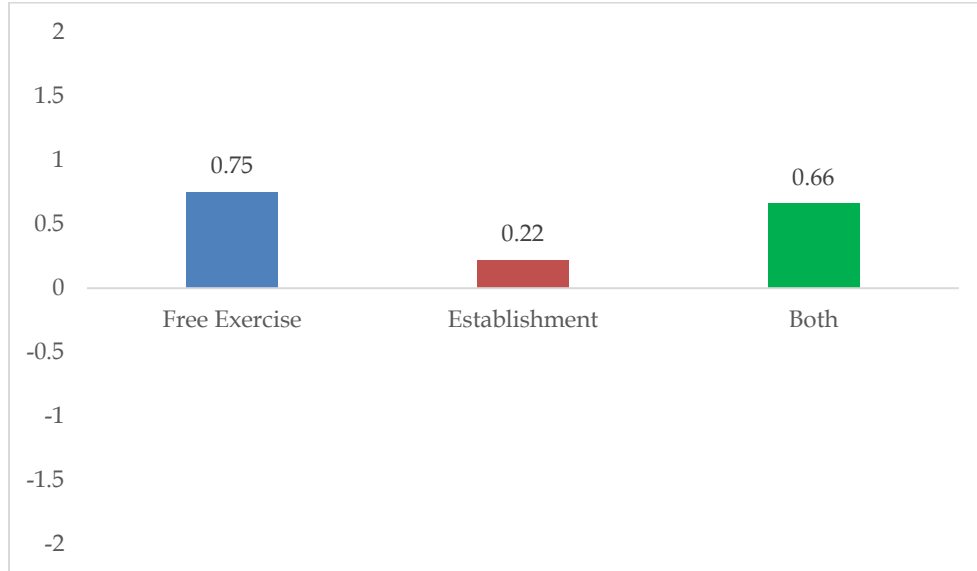


The yearly averages admittedly bump around some, with a couple of outliers, particularly 2008. But there is an unmistakable decline that indicates religion is portrayed less positively in American legal scholarship in more recent as compared to earlier years in the time period studied. And this trend, whole not necessarily substantively large (a decrease of .02 per year), is statistically significant.³⁷⁹ Unfortunately, the data cannot speak to whether this negative slope is consistent with what the trend was before 1998. Nor would it be wise to extrapolate beyond 2012, as the trend could flatten, decline more steeply, or even reverse course. But similar to the way an increasing portion of the politic viewed religion as at least sometimes problematic in the last quarter century, legal scholarship appears to be doing the same.

One can further look at treatment by overlaying the area of law and religion, which taps into the second research question as to whether religion is portrayed differently based on legal context. It would make sense that in the area of free exercise, religion may be treated more positively than in the area of establishment. And when both are implicated, treatment is more likely to be mixed. The graph below explores this:

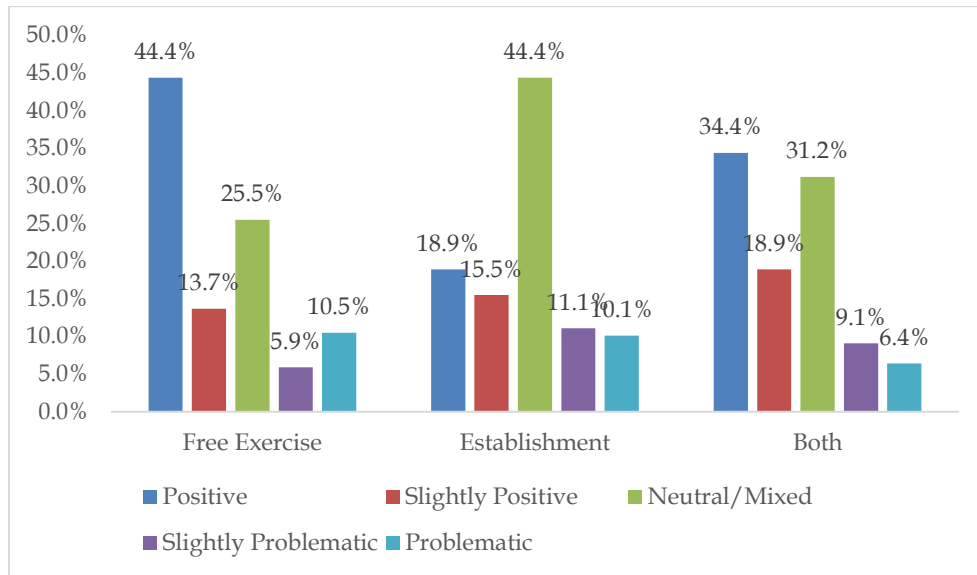
³⁷⁹ I ran a univariate regression, which is nothing more than correlation analysis, with treatment as the dependent variable and year as the independent variable. This is not panel data since each year's articles differ from the next. And year was statistically significant ($p = .007$), with a coefficient of $-.02$ (robust standard error = $.0075$; $F = 7.40$; $SER = 1.27$, $n = 1292$).

Graph 5. Average Treatment Value by Context



Since this is on a scale of 2 to -2, the differences are not insubstantial, at least between free exercise and establishment scholarship where the gap is just over 0.5. Legal scholarship portrays religion most positively when discussing it in the context of free exercise (or religious liberty), and least positively when in the context of establishment issues (or the separation of religion and government). When discussing both issues, understandably, the portrayal of religion is in between, though interestingly, much closer to the portrayal in the pure free exercise context. Another way to look at this is by examining the distribution of treatment values within each area, as the graph below does:

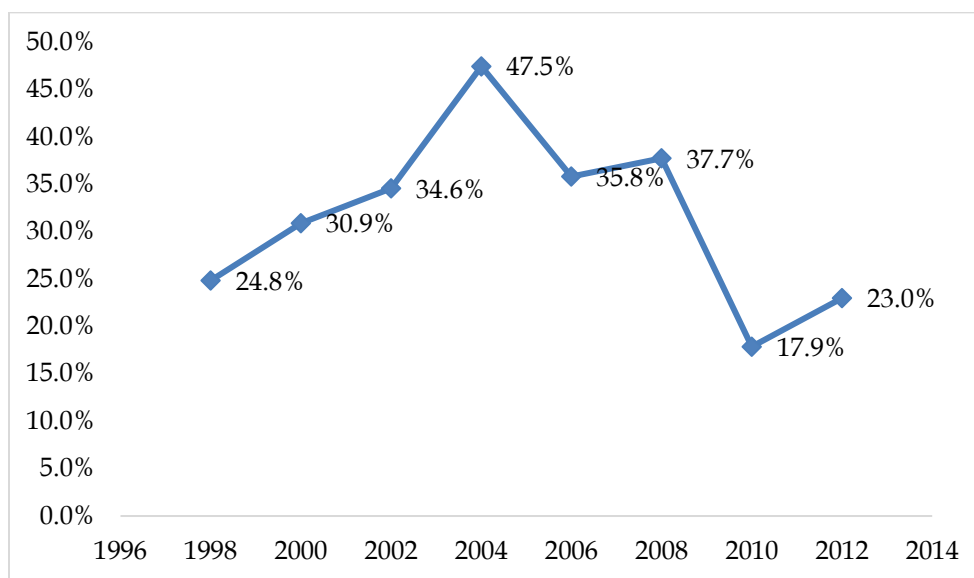
Graph 6. Distribution of Treatment Values by Area



As expected, in a pure free exercise context compared to the other two, religion is most likely to be positively portrayed, whether just looking at the percent of positive values, or the combined positive and slightly positive values. Contrary to expectations, rather than in the context of both free exercise and establishment where one might think religion is most likely to be portrayed in a mixed fashion, it is in a pure establishment setting where religion is more often treated in a mixed or neutral way.

Of course, since religion tends to be treated less positively in a pure establishment context, a trend overall towards treating religion less positively could be related to an increased percentage of articles dealing purely with establishment issues. The graph below explores this.

Graph 7. Percentage of Pure Establishment Articles Over Time



No clear trend of pure establishment articles making up an increasing portion of law journal articles on law and religion emerges. So that cannot explain the trend to treat religion less positively.

2. Validity of measure

Once concern with the law students' coding is the holistic, potentially subjective nature of their determinations. While there was an attempt to mitigate this by pairing coders who had different views on religion and averaging their values, some kind of external check on the validity of their coding would increase confidence in the findings. To accomplish this, a random sample (using a random number generator) of 30 articles from each of two groups was pulled: those articles where the coders agreed the author was treating religion positively (a value of 2 on the scale), and those articles where the coders agreed the author was treating religion as problematic (a value of -2 on the scale).³⁸⁰ These articles were then analyzed using LIWC2015 software. LIWC2015 attempts

³⁸⁰ A random sample of 30 from the purely positive group was 7.1% of the total (425) and 26.3% of the total (114) for the purely problematic group.

to quantify psychometric properties of texts based on word usage.³⁸¹ For example, *crying*, *grief*, and *sad* all belong to the “Sadness” subcategory of the “Negative emotion” category, which is also a part of the broader “Emotional tone” category.³⁸² The LIWC Anger category, for instance, contains “230 anger-related words and word stems.”³⁸³

To the extent authors are promoting or defending religion, one would expect their overall emotional tone to be more positive than authors arguing religion is problematic in some way. And that is what the LIWC2015 analysis found: the sample of religion-is-positive articles was more positive in emotional tone than the sample of religion-is-problematic articles, which difference was statistically significant. This difference appeared to be driven not by the two different types of articles varying on positive emotion words, but on negative emotion words, particularly anger and sadness (no statistically meaningful difference on the anxiety dimension). Interestingly, the overall emotional tone of both types of articles was negative (on the 0-100 scale, 50 is ambivalent emotionally, with anything below that in negative territory).³⁸⁴ These results provide independent validation of the coders’ choices, providing at least some level of validity to this study’s results.³⁸⁵

Table 2. Emotional Tone Difference between Positive & Problematic Sampled Articles

Article Type	Emo- tional Tone	Positive Emotion	Negative Emotion	Anxiety	Anger	Sadness
Positive	45.05 (2.40)	2.33 (.11)	1.31 (.08)	.19 (.03)	.50 (.03)	.21 (.02)
Problematic	37.22 (2.47)	2.31 (.08)	1.75 (.16)	.24 (.02)	.64 (.06)	.29 (.04)
Difference	7.83*	.02	-.44**	-.05 ³⁸⁶	-.15*	-.08*

* = $p \leq .05$ (using difference of means test); ** = $\leq .01$

Additionally, as a further validity check, some basic comparative corpus linguistic analysis was performed on the two different samples. Specifically, collocate analysis was run using AntConc software.³⁸⁷ A collocate is a corpus linguistic term for a word neighbor since words often appear in proximity to other words.³⁸⁸ For example, we expect *dark* to appear more often near the words *night* or *light* than we do near the words *perfume* or *sigh*. A look at the 20 most frequent collocates near *religion*, *religious*, *religiosity*, and *faith* in the two samples showed some

³⁸¹ James W. Pennebaker, et al., *The Development and Psychometric Properties of LIWC2015*, available at http://liwc.wpengine.com/wp-content/uploads/2015/11/LIWC2015_LanguageManual.pdf.

³⁸² See *id.* at 3.

³⁸³ *Id.* at 8.

³⁸⁴ See *Interpreting LIWC Output*, at <https://liwc.wpengine.com/interpreting-liwc-output/>. For comparison, blogs tend to have a slightly positive tone (54.5), expressive writing (38.6) and novels (37.06) tend to have negative tones similar to the religion-is-problematic articles, and the NY Times’ slightly negative emotional tone (43.61) is similar to the religion-is-positive articles. See Pennebaker et al., *supra* note 381, at 10.

³⁸⁵ Also of note, LIWC2015’s measure of the analytic properties of the two types articles showed no statistically significant difference, with both (problematic = 94.6; positive = 95.3) scoring higher than the analytic value of NY Times writing (92.6). See Pennebaker, et al., *supra* note 381, at 10.

³⁸⁶ $p = .115$

³⁸⁷ See Laurence Anthony, *AntConc Homepage*, <http://www.laurenceanthony.net/software/antconc/>.

³⁸⁸ See John Rupert Firth, *Papers in Linguistics*, 1934-1951 11 (1957).

differences.³⁸⁹

Table 3. Top 20 Collocates of Positive & Problematic Sampled Articles

Positive n = 551067				Problematic n = 402505			
	Collocate	Freq.	Per million		Collocate	Freq.	Per million
1.	freedom	374	678.7	1.	government	285	708.1
2.	exercise	366	664.2	2.	exercise	237	588.8
3.	free	273	495.4	3.	freedom	210	521.7
4.	beliefs	252	457.3	4.	<i>organizations</i>	187	464.6
5.	institutions	209	379.3	5.	court	175	434.8
6.	government	207	375.6	6.	free	158	392.5
7.	<i>speech</i>	174	315.8	7.	establishment	137	340.4
8.	liberty	171	310.3	8.	law	136	337.9
9.	belief	165	299.4	9.	schools	114	283.2
10	schools	163	295.8	10	liberty	110	273.3
11	<i>employee</i>	162	294.0	11	state	99	246.0
12	<i>corporate</i>	151	274.0	12	public	90	223.6
13	court	148	268.6	13	belief	89	221.1
14	state	144	261.3	14	institutions	83	206.2
15	establishment	139	252.2	15	beliefs	82	203.7
16	<i>protection</i>	133	241.4	16	<i>school</i>	80	198.8
17	law	121	219.6	17	<i>clause</i>	78	193.8
18	public	114	219.6	18	<i>practice</i>	75	186.3
19	<i>first</i>	108	196.0	19	<i>endorsement</i>	74	183.8
20	<i>land</i>	103	186.9	20	<i>exemption</i>	73	181.4

Note = italicized collocates indicate not shared

There is obviously significant overlap in the top twenty collocates, as the two different types of articles shared 14 collocates. But what is interesting is how some of the shared collocates diverge in frequency, and the collocates that are not shared. For example, *freedom*, *free*, and *liberty* are all more frequent (in frequency per million words) in the positive as compared to the problematic articles. Similarly, *belief* and *beliefs* are also more common in the positive than the problematic articles. And the word *institutions* occurs more frequently in the positive compared to the problematic articles. On the other hand, the problematic articles emphasize *government*, *court*, and *law* more than the positive articles. And problematic articles mention *establishment* more often than positive articles. As for collocates not shared, positive articles use *speech*, *employee*, *corporate*, *protection*, *first*, and *land*, whereas problematic articles use *organizations*, *school*, *clause*, *practice*, *endorsement*, and *exemption*. Thus, while these articles may be talking about the same topics, the angle they approach religion is different based on the collocate analysis. This provides further evidence that the coders' judgment as to how religion was being treated in the articles they analyzed has at least some validity.

³⁸⁹ These top 20 collocate lists ignored "stop" words, common words that generally do not provide any linguistic insights, such as "the" or "an." The word span was five words to the left and right of the four target words.

C. Type of Author

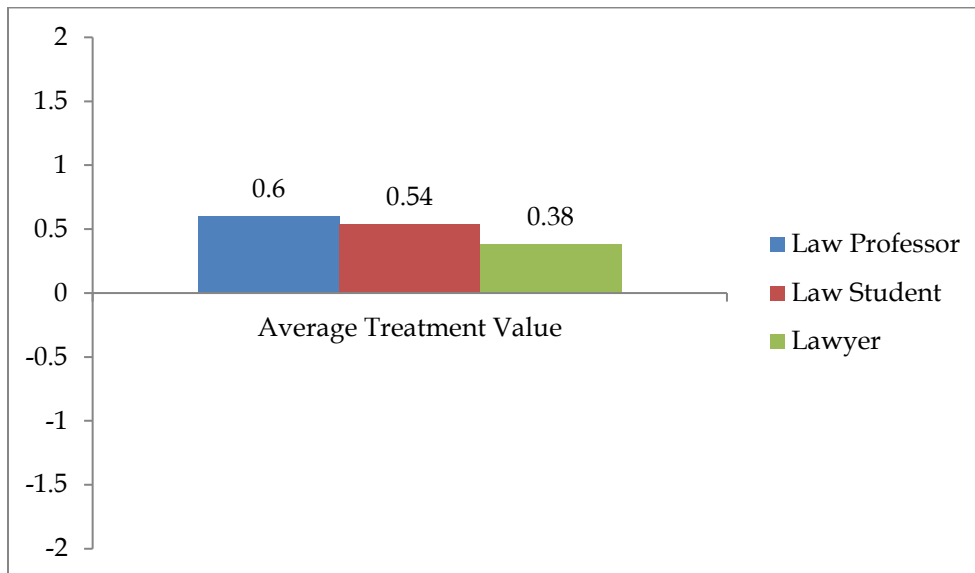
While the trend over time is to portray religion less positively, what about the type of author that is writing legal scholarship (the third research question)? Do law professors tend to treat religion the same as law students or lawyers? Below is a table showing the portion of articles written by each of the six types of authors one was classified under:

Author Type	Frequency	Percent
Law Professor ³⁹⁰	548	42.7%
Other Academic	38	3.0%
Law Student	518	40.3%
Other Student	4	0.3%
Lawyer ³⁹¹	166	12.9%
Other Professional	11	0.9%

As expected, legal scholarship is primarily written by law professors and law students—at least legal scholarship on religion, which is all this data can address. Given how few authors there are writing from outside the law, the analysis that follows on author type will exclude all but the three law-related categories.

Law professors, law students, and lawyers do tend to portray religion differently (*see Graph 8*).

Graph 8. Average Treatment Value by Author Type



The slight difference here between law professors and law students is not statistically

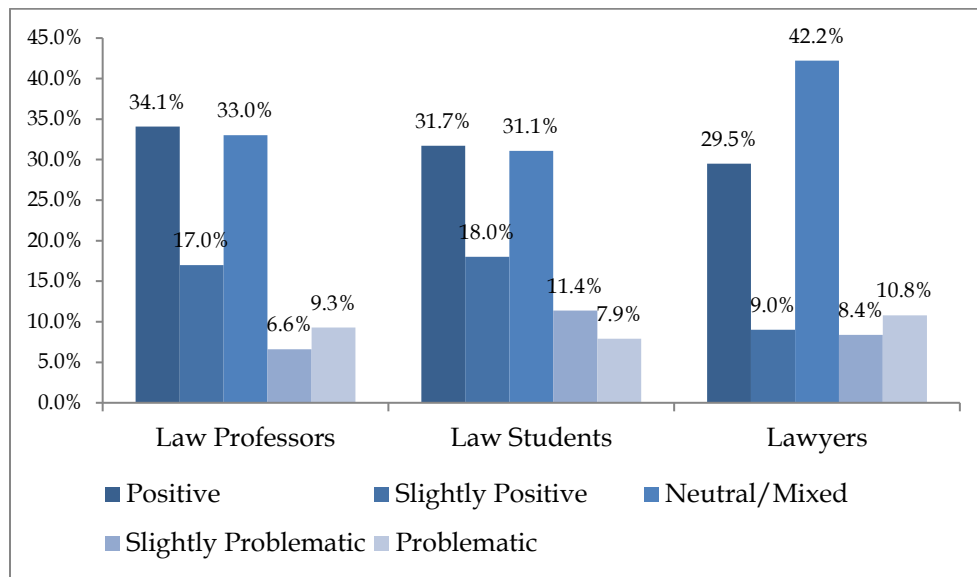
³⁹⁰ This included adjunct faculty, visiting professors, fellows, deans, and any type of law professor, tenure-track or otherwise.

³⁹¹ This included judges and clerks.

significant.³⁹² The difference between law professors and lawyers is,³⁹³ while the difference between law students and lawyers approaches statistical significance.³⁹⁴

If society is changing its view of religion, and this trend is most prominently manifest in young adults, then we would expect law students to treat religion as more problematic than law professors given they are likely, on average, younger. But this intuition is challenged by the average treatment value of lawyers, who arguably are closer to law professor in age than law students. Of course, lawyers writing legal scholarship may have different motivations and norms than law professors and students—they are likely to be even more prone to engaging in advocacy in the guise of scholarship. But it’s not clear which way that actually cuts as far as an average treatment value since a neutral/mixed score is zero, and lawyer’s value is closest to zero. But that could also just be a function of the distribution of values, with more at the extremes that cancel each other out. The next graph explores the distribution of treatment values for each author type.

Graph 9. Distribution of Treatment Values by Author Type



The graph above shows that lawyers have a value closer to zero not because of the balancing out of extreme positions, but because they, more than law professors or law students, tend to portray religion in a neutral or mixed manner. This cuts against the stereotype of lawyers being advocates, and to the extent academia is about being neutral or “balanced” in portraying opposing positions, this data show lawyers to be perhaps the most “academic” of these three groups.

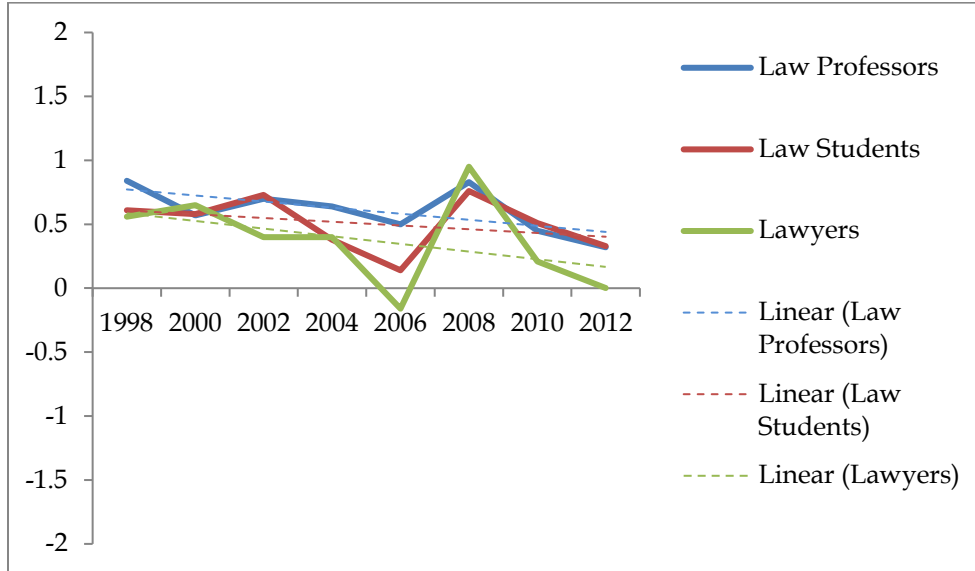
Is there also some kind of trend over time with the way these different types of authors are portraying religion? (see *Graph 10*).

³⁹² Using a two-sample t test with equal variances ($p = .22$).

³⁹³ Using a two-sample t test with equal variances ($p = .03$).

³⁹⁴ Using a two-sample t test with equal variances ($p = .08$).

Graph 10. Average Treatment of Religion Over Time by Author Type



All three author types exhibit a downward trend line, meaning across the time examined year their treatment of religion moved more toward the problematic side of the scale. As far as the steepness of the slope, law professors and lawyers exhibit a rather similar trajectory (lawyers just started with lower values), and law students have a slightly flatter slope, meaning they are decreasing at a slighter lower rate. Still, these trends are largely indistinguishable.

D. Type of Religion

Another area of inquiry would be whether all religions are treated equally, the paper's fourth research question. Maybe the dominant faith—Christianity generally—might be portrayed more positively than minority faiths. Or vice versa. And some faiths may be more acceptable or popular or non-threatening in the way they're viewed or portrayed. Certainly some faiths have a history of being persecuted at times in this country, such as Catholics, Jews, Native Americans, and Mormons, whereas other faiths have only recently either gained sufficient numbers or been connected to important events to gain attention in the public eye, such as Islam. The table below shows the makeup of which religions were focused on by legal scholarship in the dataset.

Religion Type	Frequency	Percent
General Religion	826	63.9%
General Christianity	243	18.8%
Catholicism	66	5.1%
Other Christian ³⁹⁵	47	3.6%
Judaism	20	1.6%
Islam	41	3.2%
Native American	37	2.9%
Other Religion ³⁹⁶	10	0.8%
Atheism	2	0.2%

Religion was discussed in a general matter about two-thirds of the time. Given that the nation is predominantly Christian—much of general religion will implicitly be dealing with Christianity. And the “General Christianity” category does not include instances where specific denominations were focused on. If we reconfigure the categories to reflect this, and compare them to recent polls on the religious make-up of the American population, how does which religions legal scholarship focus on compare to which religions Americans profess?

Religion	ABC News Poll June 2016 ³⁹⁷	Pew Religious Landscape Study ³⁹⁸	Gallup Poll Dec 2015 ³⁹⁹
Christianity	83%	70.6%	75.2%
Other Religion	4%	5.9%	5.1%
No Religion	13%	22.8%	19.6%
Catholic	22%	20.8%	n/a
Other Christian	61%	49.8%	n/a
Judaism	n/a	1.9%	n/a
Islam	n/a	0.9%	n/a

It is not quite an apples-to-apples comparison to look at what legal scholarship is focused on and what Americans profess their religious faith to be. But it does show which religions more capture the attention of legal scholars, or are more likely to be controversial or involved in the intersection of law and religion. Not surprisingly given domestic and foreign events during this time period, Islam is over-represented in legal scholarship compared to the overall population by

³⁹⁵ Christian Science, Baptist, Episcopalian, LDS/Mormon, FLDS, Amish, Lutheran, and Jehovah Witness.

³⁹⁶ Rastafarian, Buddhist, Santaria, Sikh, and Scientology.

³⁹⁷ Gary Langer, Poll: Most Americans Say They’re Christian, ABC News, July 18, 2016, available at <http://abcnews.go.com/US/story?id=90356>.

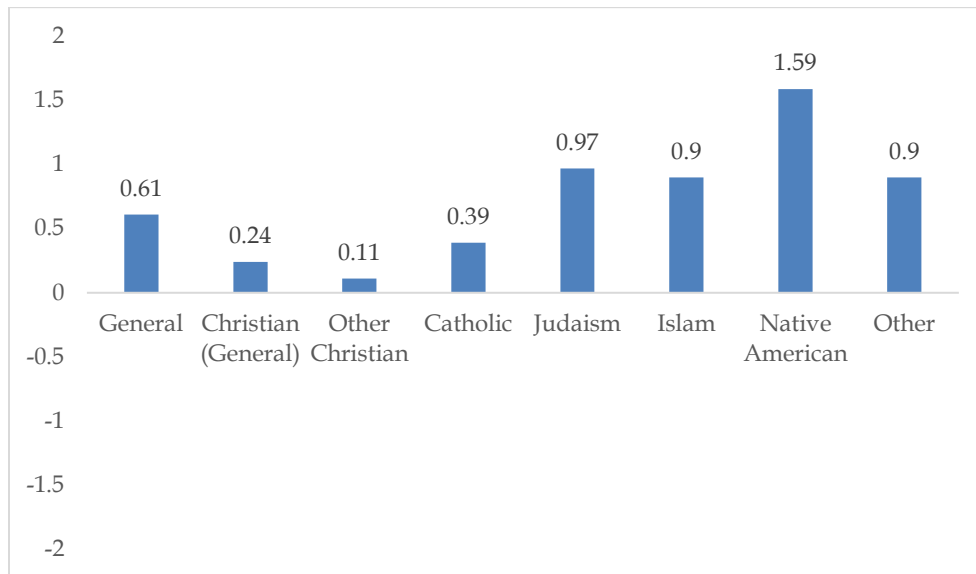
³⁹⁸ The Pew Religious Landscape Study “surveys more than 35,000 Americans from all 50 states.” Available at <http://www.pewforum.org/religious-landscape-study/>.

³⁹⁹ Gallup, “Percentage of Christians in U.S. Drifting Down, but Still High,” Dec. 24, 2015, available at <http://www.gallup.com/poll/187955/percentage-christians-drifting-down-high.aspx>.

about 256%.⁴⁰⁰

Regardless of how often a particular religion is focused on in legal scholarship, are religions treated the same? In other words, when focusing on a particular religion, are some more likely to be treated positively? The graph below shows the average treatment value when broken down by the religious categories noted above (except for atheism, which only had two observations).

Graph 11. Average Treatment Value by Religion



Religions do not appear to be portrayed equally—while all are on the positive side of the scale, some are much more so than others. Christianity, whether generally, or dealing with specific denominations (Catholicism or other Protestant or non-Protestant denominations), is treated the least positively in legal scholarship. But are these differences statistically significant? The grid below shows which differences are statistically significant using a two-sample t-test with equal variances (yellow highlighted cells indicate statistical significance; orange indicates approaching statistical significance).

⁴⁰⁰ This was calculated by subtracting the percentage of the American population identifying from Islam (0.9%) from the percentage of articles in U.S. legal scholarship focusing on Islam (3.2%), and then dividing the difference (2.3) by 0.9.

	<i>Christian (General)</i> mean=.24 n=243	<i>Other Christian</i> mean=.11 n=47	<i>Catholicism</i> mean=.39 n=66	<i>Judaism</i> mean=1 n=20	<i>Islam</i> mean=.9 n=41	<i>Native American</i> mean=1.59 n=37	<i>Other</i> mean=.9 n=10
<i>General</i> mean=.61 n=826	t=-4.05 p<.0001	t=2.67 p<.01	t=-1.34 p=.09	t=1.39 p=.08	t=1.47 p=.07	t=4.77 p<.0001	t=-.73 p=.23
<i>Christian (General)</i>		t=.67 p=.25	t=-.85 p=.20	t=-2.67 p<.01	t=-3.2 p<.001	t=-6.47 p<.0001	t=-.16 p=.053
<i>Other Christian</i>			t=1.06 p=.15	t=2.52 p<.01	t=2.84 p<.01	t=5.71 p<.0001	t=1.53 p=.065
<i>Catholicism</i>				t=-1.80 p=.038	t=-2.0 p=.027	t=-4.85 p<.0001	t=-1.0 p=.15
<i>Judaism</i>					t=.33 p=.37	t=-2.61 p<.01	t=.21 p=.42
<i>Islam</i>						t=3.17 p<.01	t=.01 p=.50
<i>Native American</i>							t=1.98 p=.027

Looking at the chart, the difference between Native American religions and all other religions is statistically significant ($p \leq .05$). Islam and Judaism are higher than any of the three Christian categories by statistically significant levels (and lower than Native American), but not different than other religions and only approaching statistical significance ($p \leq .10$) in relation to religion generally. And the three Christian categories are not different from each other in a statistically significant way, but are lower than all of the other religions at levels that either obtain or approach statistical significance.

Why is unclear, though there are several possibilities. It could be because legal scholars are less likely to be Christian, and thus more likely to view Christianity in a mixed or problematic light. For instance, a 1996-97 survey of law professors showed that only 32.3% considered themselves Protestant, with another 13.7% identifying as Catholic—or just 46% of the law professor population being Christian.⁴⁰¹ And in 2013 the percentage of law professors estimated to be Christian was similar: 46.7%.⁴⁰² Likewise, Americans ages 18-29 (the age range of the overwhelming majority of law students) had the lowest percentage identifying as Christian (62%) in 2015.⁴⁰³ But just because a population is less likely to identify with a specific religion does not necessarily mean it will be more likely to view that religion less positively. For instance, few legal scholars claim a Native American religion (the numbers are so low we don't have specific data on Islam, just "other religion," which is just over 1%). Yet Native American religions are overwhelmingly portrayed more positively than others in legal scholarship in the United States from 1998-2012.

⁴⁰¹ See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 Harv. J. L. & Pub. Pol'y 89, 109 (2016).

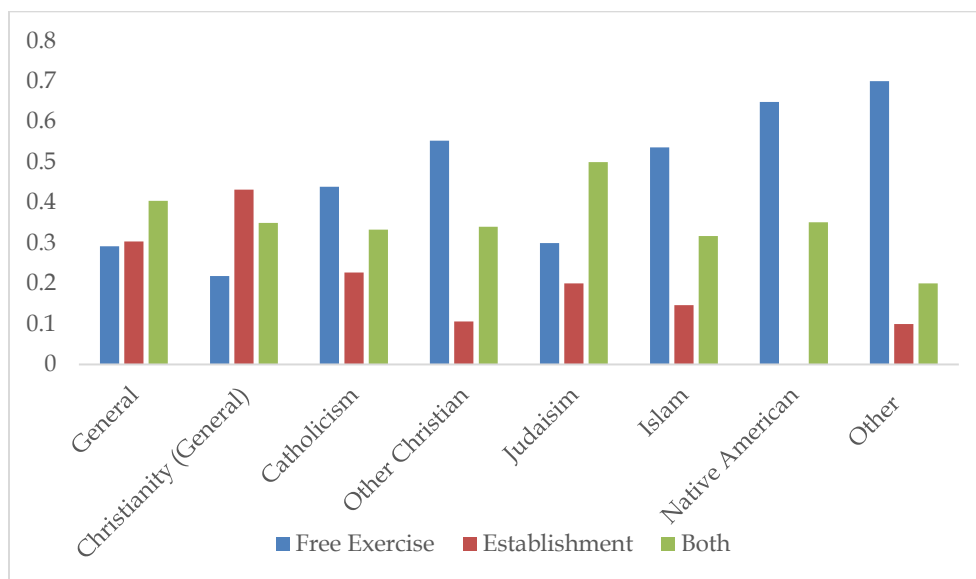
⁴⁰² *Id.* at 145 (Table 13).

⁴⁰³ Gallup, *supra* note 399.

An alternative but related explanation could be political. Law professors are much more likely to identify as liberal than conservative.⁴⁰⁴ Likewise, Christians, as compared to Muslims, Jews, and Native Americans, are more likely to identify as conservatives. If one’s political views lead one to view certain religious faiths more positively (or negatively) than others, than this could explain the different treatment noted above. That would also require law students and lawyers to be more liberal than conservative, which appears to be the case,⁴⁰⁵ as well as require those with liberal views to view Christianity less positively than Judaism, Islam and Native American religions, which is unknown (this could be manifest either in a neutral or mixed view of Christianity and a positive view of these other minority faiths, a neutral or mixed view of these other faiths and a problematic view of Christianity, or some other combination that creates a disparity in how one views Christianity compared to these other faiths).⁴⁰⁶

A third explanation is that Christianity is the dominant religion in the United States, and thus is more likely to be involved in an establishment issue, where religion tends to be viewed less positively. On the other hand, some Christian denominations—Catholics, Jehovah Witnesses, and Mormons, for example—have historically suffered persecution and are often viewed as somewhat distinct from Christianity and therefore as minorities and less likely to be involved in establishment issues. Yet Catholicism fairs only slightly better than Christianity, and “Other Christian” religions are viewed even less positively than Christianity generally. The graph below explores whether some religions are more likely to trigger establishment issues in legal scholarship than others:

Graph 12. Religion Type and Area of Law and Religion



⁴⁰⁴ See, e.g., Lindgren, *supra* note 401. See also James C. Phillips, *Why are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 Harv. J. L. & Pub. Pol’y 153 (2016).

⁴⁰⁵ See generally Adam Bonica et al., *The Political Ideologies of American Lawyers*, Journal of Legal Analysis.

⁴⁰⁶ One prominent legal scholar, Eugene Volokh, has opined that perhaps those on the political left view Islam differently than other faiths, but he relies only on anecdotal evidence. See https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/24/left-wing-radio-station-kpfa-cancels-event-with-noted-atheist-richard-dawkins-because-of-his-harsh-criticism-of-islam/?utm_term=.639a56c6f006.

General Christianity is more likely to be discussed in the context of establishment issues than other religious categories, with Catholicism second. Yet “Other Christian” is the religious category with the lowest average treatment value (i.e., least positive), but is also the second lowest for having pure establishment issues, and looks nearly identical to Islam on the graph above despite Islam’s much higher average treatment value.

The table below explores regression analysis of whether some religions are more likely to be found when establishment issues are discussed in articles compared to the baseline of general religion.

Variable	Coefficient (Robust Standard Error)
Christianity (General)	.073* (.031)
Catholicism	-.148* (.063)
Other Christian	-.262*** (.074)
Judaism	-.009 (.104)
Islam	-.246** (.080)
Native American	-.358*** (.080)
Other Religions	-.409** (.146)
Constant	.709*** (.016)
Observations	1292
F-value	9.02***
Adjusted R-square	0.05
S.E.R.	.454

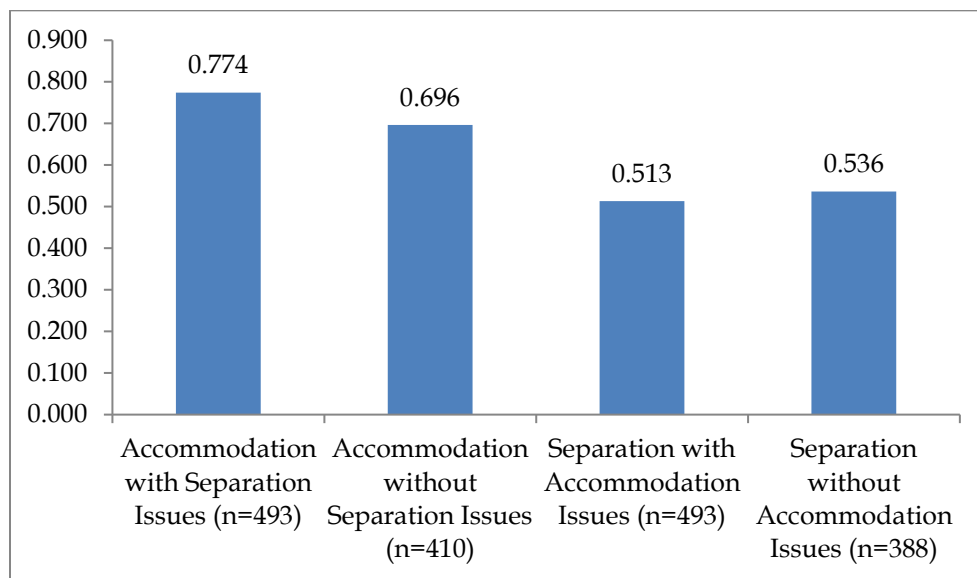
* ($p \leq .05$); ** ($p \leq .01$); *** ($p \leq .001$)

Not surprisingly, when compared to religion generally, Christianity in a general sense is more likely to be discussed with establishment issues. After all, Christianity is the faith a majority of Americans identify with. And also as expected, Islam, Native American, and other minority non-Christian religions (except Judaism) are much less likely to be discussed with establishment issues. Interestingly, other Christian faiths are also about as unlikely to be discussed with establishment issues as Islam. And Catholicism is also less likely to be invoked in establishment discussions than religion generally. This seems to indicate that specific Christian faiths are usually not seen as a threat to the “separation of church and state,” but that Christianity generally is.

E. Accommodation and Separation

Arguably more important than whether religion is treated more positively or not is whether the actual legal issue is resolved in that religion's favor, which implicates the fifth research question: what is associated with arguments for greater (or less) accommodation of religious beliefs and separation of religion and government. And this can be complicated by whether accommodation and separation are both invoked in an issue, such as the historical example of Virginia Baptists not wanting to pay a tax to support the Virginia State Episcopalian Church, or only one of the two is focused on in an article. As can be seen in the graph below, it may actually only make a slight difference.

Graph 12. Percentages of Accommodation and Separation⁴⁰⁷

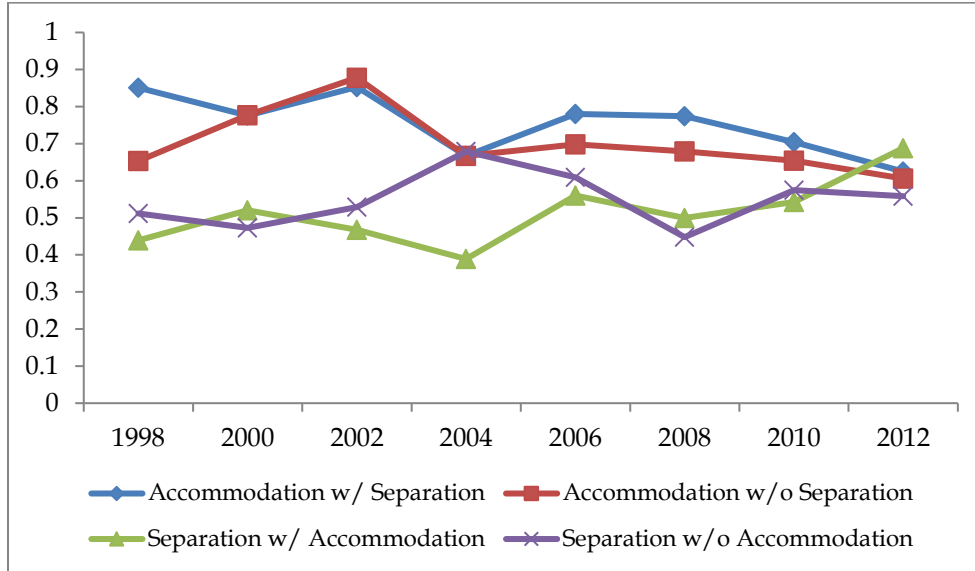


As expected, legal scholars are more likely to call for accommodating religious practices when in the context of establishment issues, probably because the “establishment” of one religion can infringe on the practices of another. However, one would also think that legal scholars would be arguing for separation a higher percentage of the time in the context of accommodation versus when accommodation is not implicated, but instead scholars are arguing for separation less of the time, though the differences are rather minimal. Interestingly, but not surprisingly, while legal scholars argue for accommodating religion two-thirds to three-quarters of the time, they advocate for the separation of government and religion only about half of the time.

Another angle of inquiry is whether the percentage of accommodation and separation arguments is changing over time similar to the way treatment of religion appears to be changing (see graph below).

⁴⁰⁷ As noted previously, whether an article was advocating the accommodation of religious practices, or for further separation of the government and religion, was coded a 1 for accommodation or separation, and 0 if not. If coders disagreed, their values were averaged to 0.5.

Graph 13. Accommodation and Separation Over Time

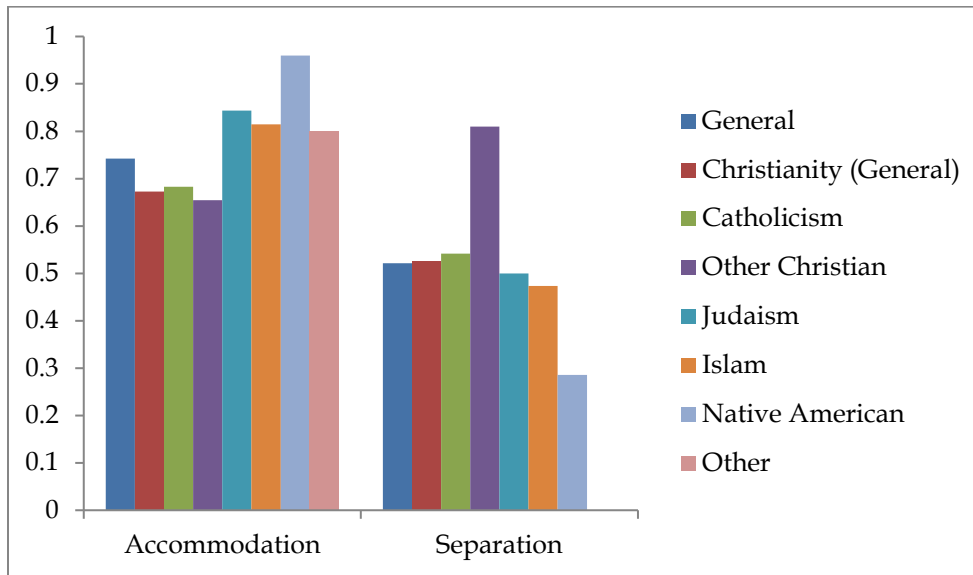


While not without some noise, modest trends emerge. Both accommodation with separation issues (blue diamond) and accommodation without separation issues (red square) decrease over time, indicating scholars are generally less likely to argue for accommodation in the latter part of this time period than its beginning. Likewise, separation with accommodation issues (green triangle) and separation without accommodation issues (purple x) slightly increase over time, meaning scholars are more likely to call for the separation of church and state as time has gone on (at least within this particular time period). Only the accommodation trend is statistically significant when one runs a regression model where accommodation is the outcome variable and separation and year are predictors.⁴⁰⁸

Another area of inquiry is whether some religions are more likely to invoke accommodation or separation arguments. The graph below looks at the accommodation and separation values for each religion type where there is sufficient data.

⁴⁰⁸ Year coefficient = -.009 (robust standard error = .004), $p = .016$. Separation coefficient = -.341 (robust s.e. = .035), $p < .0001$. Constant = 18.55 (robust s.e. = 7.30), $p = .011$. $n = 493$; F-value = 52.59, $p < .0001$; Adjusted R-squared = .177; S.E.R. = .351.

Graph 14. Accommodation and Separation by Religion Type



The patterns in accommodation and separation appear to be highly correlated with those of treatment. First, legal scholars tend to argue for accommodation less for Christianity in general, Catholicism, and specific Christian sects (other than Catholicism) than religion generally, and particularly than other specific religions. Approximately four-fifths of the time scholars advocate accommodating Judaism, Islam, and other non-Christian religions. And 95% of the time the accommodation of Native American religions is advocated. Whereas accommodation is argued for about three-quarters of the time when dealing with religion generally, or about two-thirds of the time when dealing with Christianity generally or specific Christian faiths.

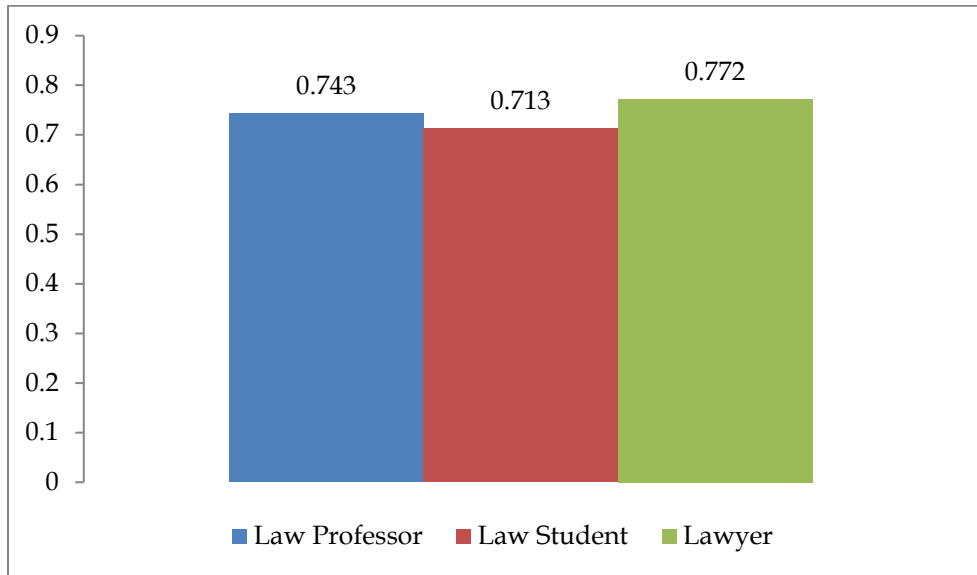
Why this is so is unclear. It could be that Christian accommodation presents more of a threat to other values. For instance, Native Americans are generally not seeking accommodations of their religious practices in the context of LGBT rights or abortion—two very hot button issues. And while orthodox Jews and many Muslims may have views similar to many Christians on controversial issues, as religious minorities they may be less likely to argue for religious accommodation in such contested areas, content to focus on issues more core to their beliefs. Or it could be that because Christians, even outlier sects, still make up a religious majority in the country, and even if a religious majority and a religious minority were advocating for accommodation of the same religious practice, scholars are more open to accommodating a minority than a majority because it is less disruptive or less likely to undermine the law or policy requiring accommodation. But it is a bit troubling if accommodation were to hinge only on such practical concerns rather than principle.

As to separation, most faiths are treated about the same with three exceptions. Other Christians, which category includes mainstream sects like Lutherans, and minority sects like Jehovah Witnesses and Christian Scientists, is the most likely type of religion where separation is called for by scholars—four-fifths of the time. On the other extreme, legal scholars argue for separation less than a third of the time when dealing with Native American religions, and never when the topic was non-Christian religions (other than Judaism, Islam, and Native American).

Why other Christian faiths would be so singled out, especially compared to Catholicism or Christianity generally, is unclear. Also, why some non-Christian faiths would be treated so differently in the separation context as compared to others is also not clear since all non-Christian faiths are a minority in this country.

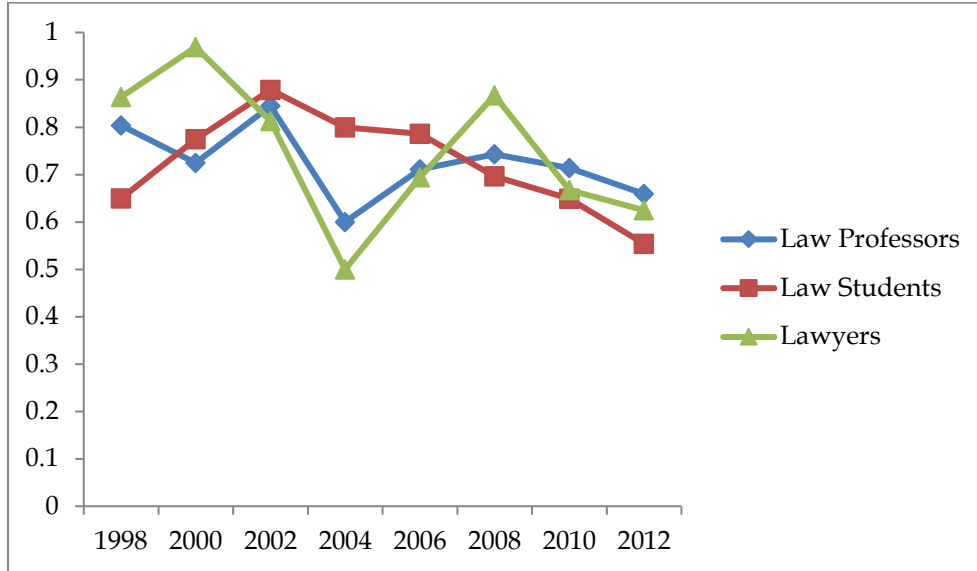
Additionally, one can look to see if different types of legal scholars—law professors, law students, or lawyers—are more or less likely to argue for accommodation or separation generally. The graph below deals just with accommodation.

Graph 15. Accommodation by Author Type



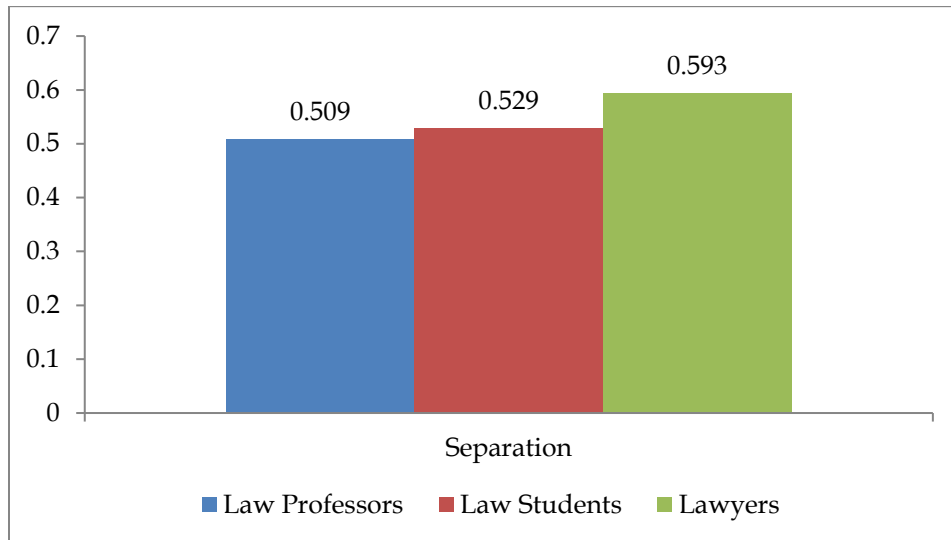
There is little difference overall between the type of legal scholar and whether they advocate for accommodation, certainly no statistically significant one. But does that lack of a real difference hold across time?

Graph 16. Accommodation by Author Type Over Time



While there is some jostling for position, so to speak, there is again little difference based on author type and whether they advocate for accommodation of religion. As for separation, the graph below explores that perspective.

Graph 17. Separation by Author Type

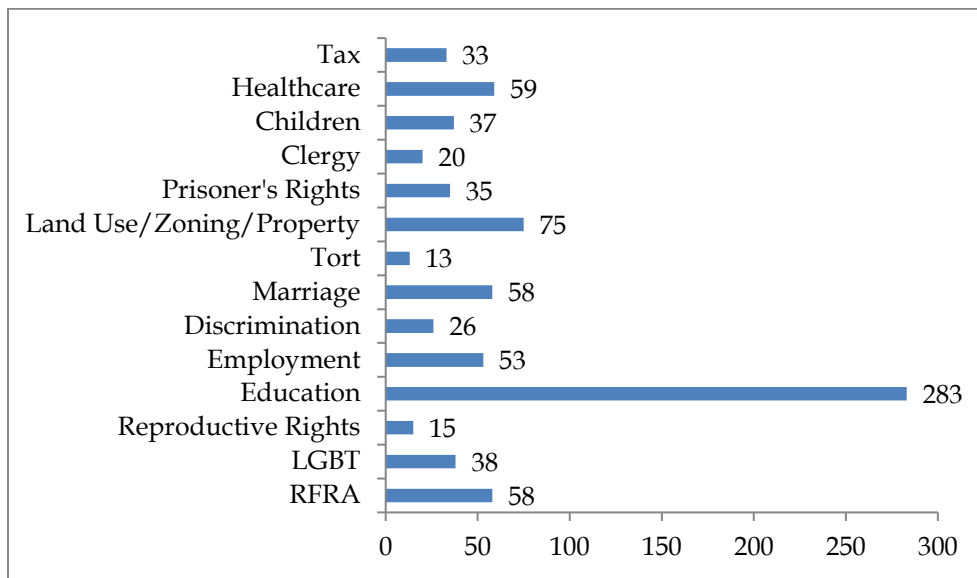


There is here also little difference (no statistically significant one) between the type of author and the propensity to argue for separation.

F. Area of the Law

Next, maybe religion is treated differently, or legal scholars are more likely to advocate for accommodation or separation depending on the area of the law one is dealing with (the sixth research question). For example, maybe accommodation is more likely to be argued in the area of prisoner’s rights than LGBT rights, or separation is more likely to be argued for in education than in land use/zoning. The chart below shows the most common sub-areas of the law implicated by articles in this study, which include 803 of the 1,292 articles coded (or 62%).

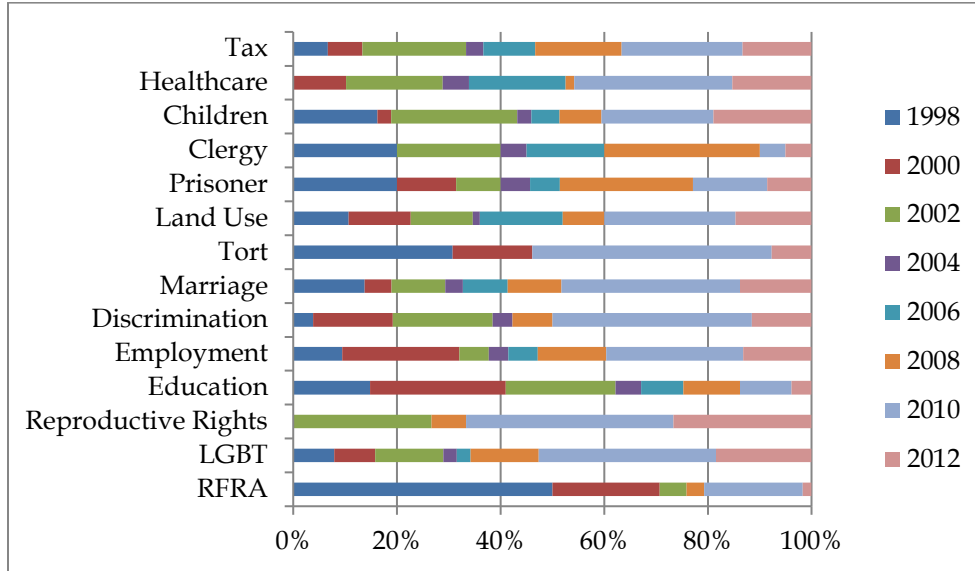
Graph 20. Sub-areas of the Law



Education is clearly the area of the civil law that legal scholars are most interested in discussing religion. Maybe somewhat surprisingly, religion and the intersection of land use/zoning/property is second. And second to last, just barely more than tort law, is the area of reproductive rights. While reproductive rights may be a perennial hot topic in the law, it was not an overly focused on area within law and religion during this time period. Also, women’s rights (not including reproductive rights) were only the subject of four of the articles in this study’s dataset (and so it wasn’t included on the chart above).

But there is more to be explored here. Are some topics becoming “hotter” with time, and others waning in interest for legal scholars when writing on law and religion? The graph below shows each of these fourteen subcategories by year and the percentage of articles within that subcategory.

Graph 21. Sub-areas of Law Over Time



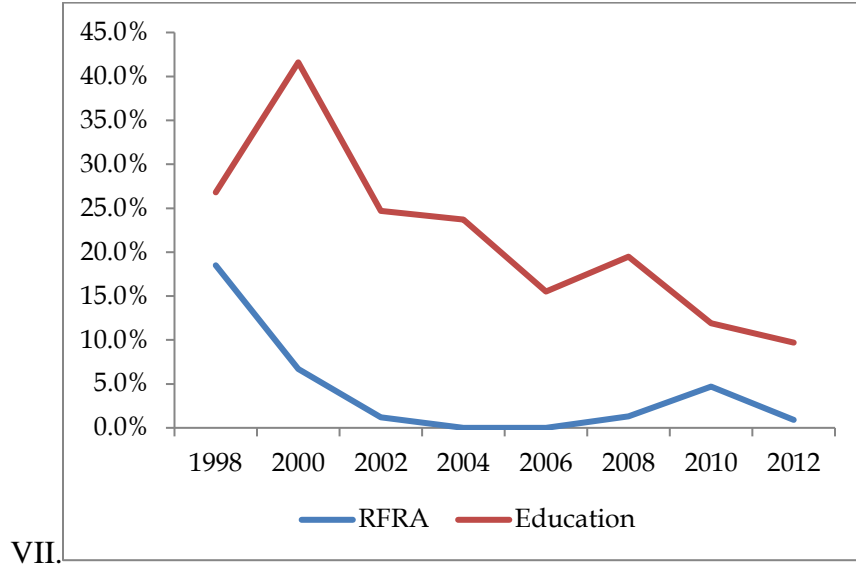
Some interesting patterns emerge. For instance, about 70% of all of the articles in the time period that dealt with RFRA were written between 1998-2000. RFRA was held to be unconstitutional as applied to the states by the Supreme Court in 1997, so this pattern is not surprising.⁴⁰⁹ On the opposite extreme, approximately half of the law and religion articles dealing with marriage, discrimination,⁴¹⁰ and LGBT issues (there’s some obvious overlap here) were not published until the 2010-2012 period. This also isn’t surprising given the increasing prominence of the same-sex marriage debate at this time. Other areas of the law where a large bulk of the articles were written at the end of the time period studied include tax, healthcare, children, torts, clergy and reproductive rights.

Another way to look at this phenomenon is to graph the percentage of all articles that a particular sub-area covers across time. The two most popular areas initially in the dataset were RFRA and education. The graph below tracks changes in those areas.

⁴⁰⁹ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

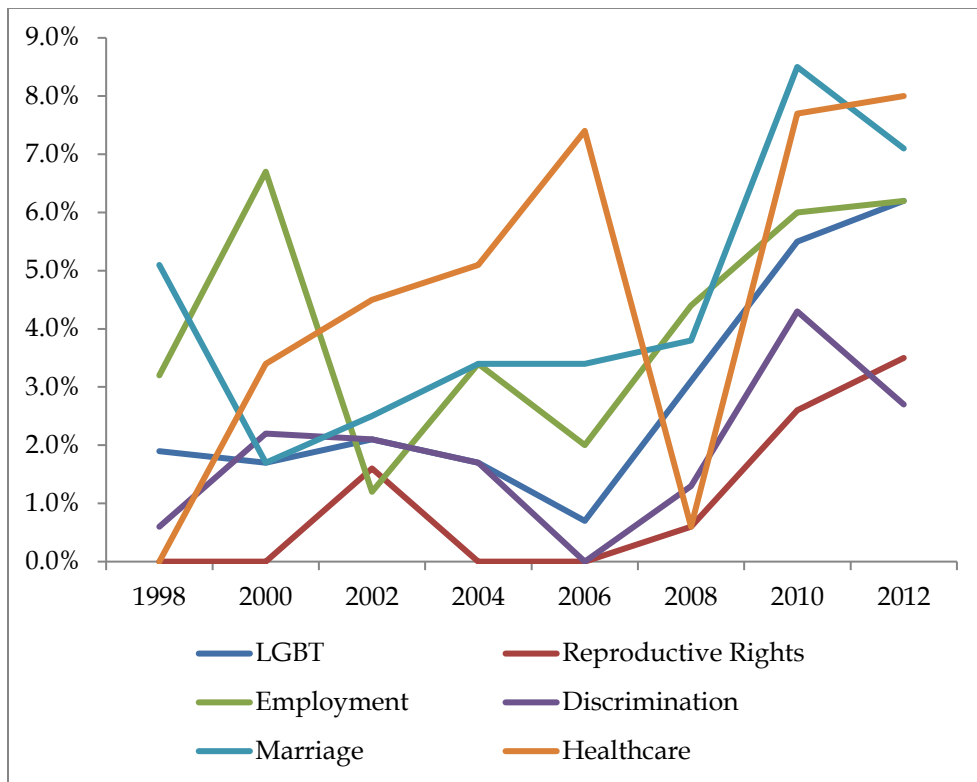
⁴¹⁰ The category of discrimination includes discrimination against religion, and discrimination for religious reasons.

Graph 22. RFRA & Education Over Time



VII. The interest of legal scholars to write about law and religion as it relates to education is still strong compared to other areas, but has dropped dramatically over the this fifteen-year period. Likewise, RFRA completely fell off of the map for a few years, but has had a small resurgence. The next graph looks at what many would consider some of the hottest issues today in law (and politics).

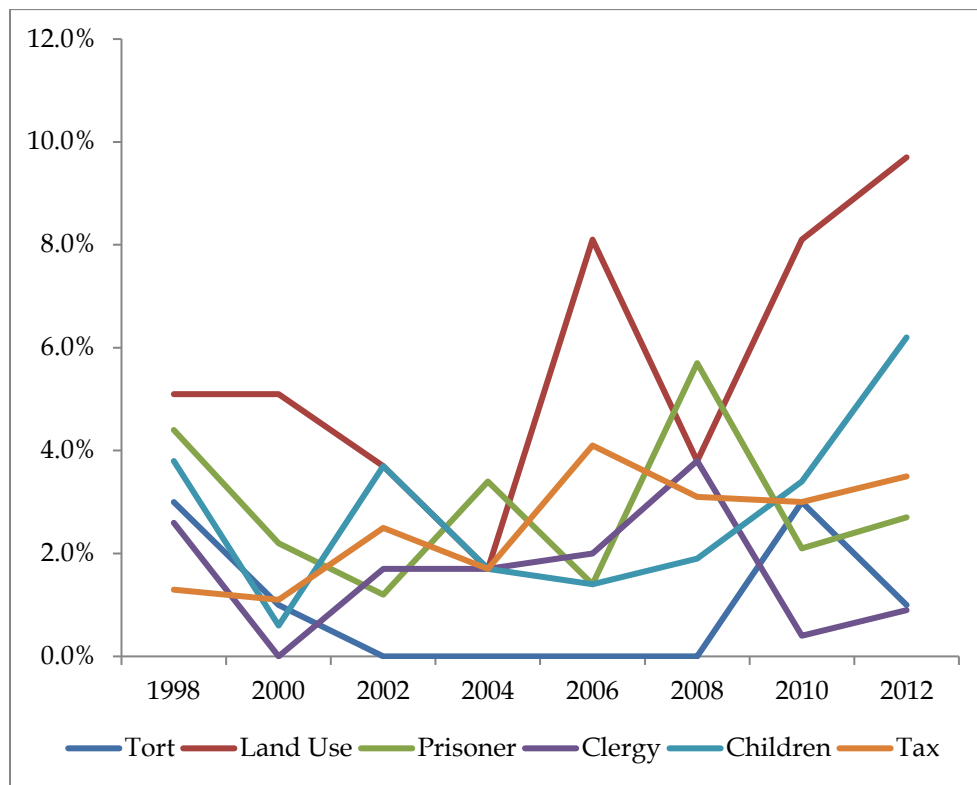
Graph 23. "Hot-button" Sub-areas Over Time



LGBT issues in relation to religion have increased from 1.9% to a high of 6.2% in 2012, more than tripling. And this time period pre-dates some of the most recent debates in the law in this area. Discussion of reproductive rights and religion were non-existent at the beginning of the time period, but have jumped to 3.5% in 2012, which doesn't cover the recent discussion relating to *Burwell v. Hobby Lobby Stores, Inc.* Healthcare and religion also began the time period at zero percent, and has generally increased since then, topping out at 8.0% in 2012. Marriage, employment, and discrimination have increased too, though not quite as dramatically.

Other areas in the law that do not at first glance seem as controversial have increased less over time than the hot-button issues, or even decreased (see graph below).

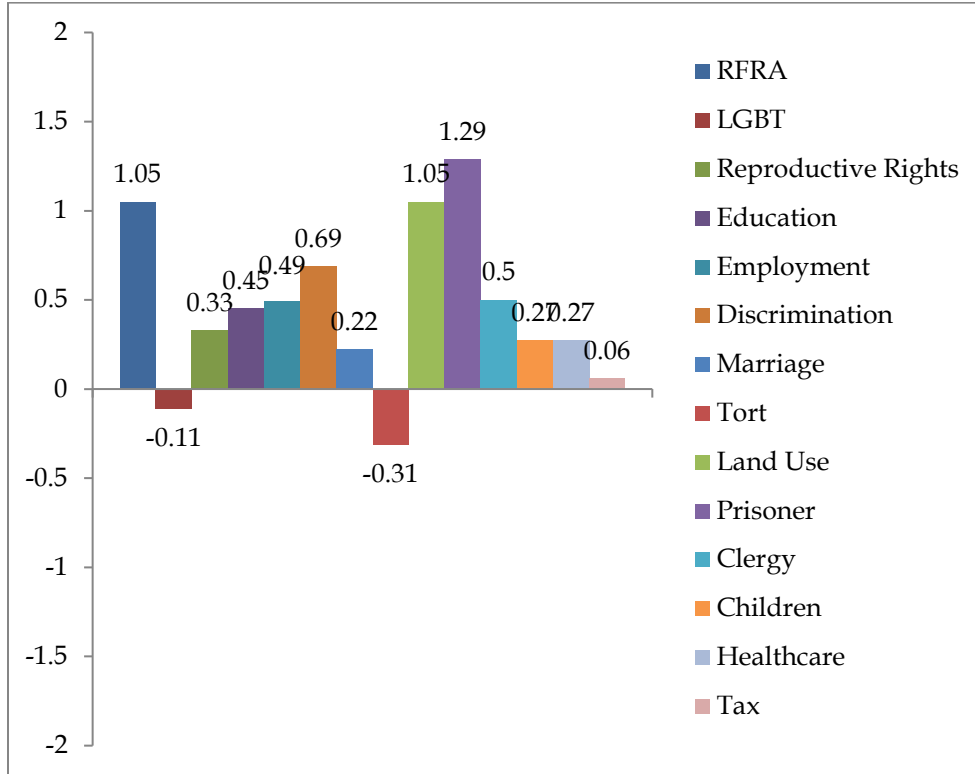
Graph 24. Other Sub-areas Over Time



The sub-areas of land use, children, and tax have all increased across the fifteen-year period, with some variation. And the subareas of clergy, torts, and prisoners have all slightly decreased.

Another way to investigate law and religion as it relates to these sub-areas of the law is to see if the average treatment value differs by sub-area. The graph below provides the average for each for the time period.

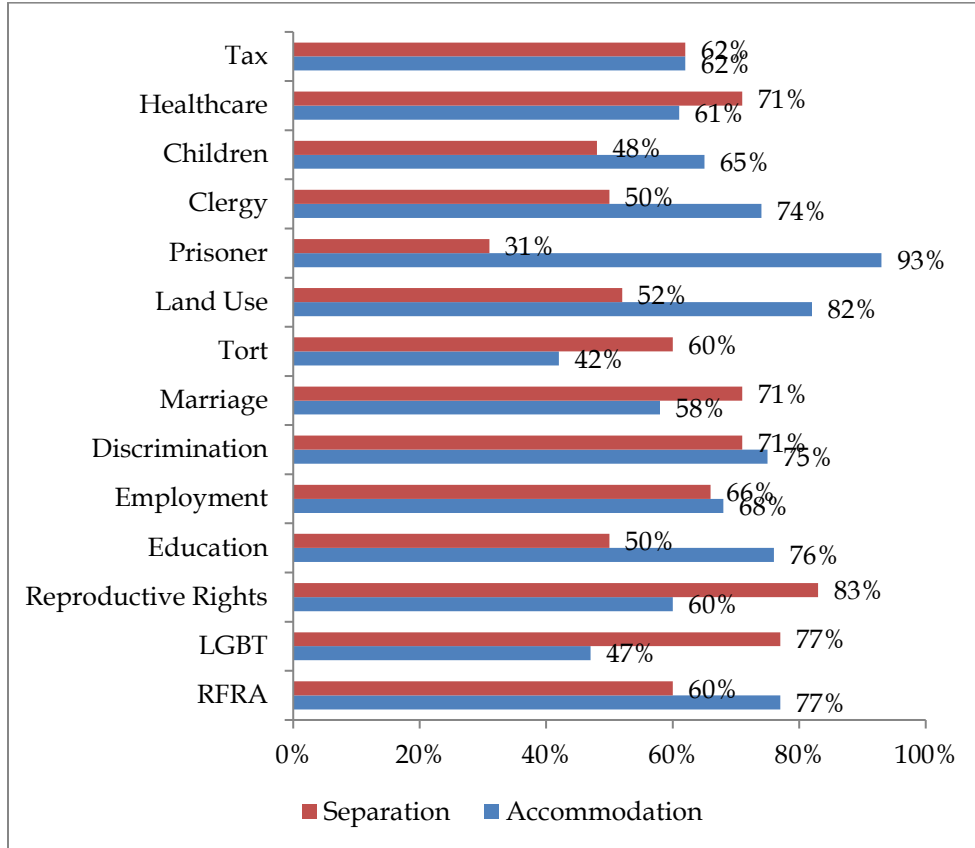
Graph 25. Average Treatment Value for Sub-area



The differences here can be quite stark. Religion is actually portrayed on the problematic side of the scale when LGBT rights or torts are involved, and barely above zero (neutral/mixed) when taxes are implicated. This is not overly shocking. Religion in the context of LGBT issues is usually framed as a clash between religious liberty and LGBT rights. As for torts and religion, such issues are usually characterized as someone claiming religious liberty or the separation of church and state as a defense from being sued, such as if someone was injured during an exorcism.

In contrast, religion is portrayed most positively in the context of RFRA (a law designed to protect religious freedom), land use/zoning/property issues (where again there is a statute designed to protect religious freedom—the Religious Land Use and Institutionalized Persons Act, or RLUIPA), and prisoner’s rights (where RLUIPA is also relevant). Besides portrayal of religion, one can look to see if religious liberty is accommodated more in some sub-areas than others, as well as whether separation is advocated more (see the graph below).

Graph 26. Separation & Accommodation by Sub-area



Both LGBT (47%) and torts (42%) are below 50% accommodation rates, meaning, on average, less than half the time scholars are calling for accommodation of religious exercise in these areas of the law. Marriage is only slightly better at 58%. On the high end of accommodation are prisoner’s rights (93%) and land use (82%). Interestingly, when discussing RFRA, which was passed to facilitate the accommodation of religious beliefs, accommodation is only advocated 77% of the time—still a high number, but lower than maybe one would expect.

As for separation, the areas of children (48%), prisoners (31%) and education (50%) were all below or right at 50%, meaning roughly half or less of the time scholars are advocating for greater separation of government and religion in some way. On the high end are reproductive rights (83%), LGBT (77%), healthcare (71%) and marriage (71%).

G. Journal Rankings

Finally, how do all of the various angles examined above relate to the ranking of the journal that publishes an article (the seventh research question)? Unlike in other academic disciplines, authors submitting an article for publication in a law journal are generally free to submit to as many journals as they would like. Hence dozens, even hundreds, of journals will assess the same article and decide whether or not to extend an offer of publication, with an author potentially having more than one publication offer to choose from. While there are undoubtedly numerous

factors that go into an author choosing which publication offer he or she will accept, the predominant consideration is the prestige of the journal. So while not always the case, most of the time the journal an author chose to publish in among competing offers would also be the most prestigious, here measured by its ranking.⁴¹¹ Additionally, most law journals are not peer-reviewed, meaning that fellow law professors are not making decisions about extending publication offers (though sometimes they are consulted). Instead, law journals are predominantly run by law students, and they make publication decisions. Thus, what a 24-year-old second- or third-year law student might find of interest may differ from what the public or legal profession at large focuses on. And, of course, their views on religion, particularly when it intersects with controversial legal issues, may also diverge from others.

There are several factors that might influence whether more prestigious journals are interested in an article. First, the prestige of the law school of the author of the article—a variable that can only be examined when a law professor is the author since prestige of non-law professors is difficult to measure (and for law student editors to gauge), lawyers and other professionals do not have a current institutional affiliation, and law students are almost always publishing in journals at their own school, so the prestige of their own school is irrelevant. Second, the treatment of religion may be relevant. For example, articles that treat religion in a more neutral or mixed manner may be perceived as more scholarly than articles that portray it as more positive or problematic. Third, the type of religion an article focuses on may be related to the prestige of the journals interested in the article if certain religions are of more interest to law student editors making publication decisions. Finally, the year an article was published could also matter if there is a trend generally in legal scholarship towards viewing religion less positively.

The regression models in the table below explores the relationship between these factors and the rankings of the journals that published the articles in this paper's dataset. The first model includes the author's school rank, and the second omits it to include articles written by those who are not law professors. The third and fourth models are identical to the first and second, respectively, except a different treatment variable is used. Instead of the -2 to 2 scale, the absolute value of this scale is used to see if it doesn't matter which direction the valence is, only that treatment of religion is further from the neutral/mixed ideal of academic writing. Finally, a higher value on a coefficient means that variable is associated with a less prestigious journal since the most prestigious journal is ranked 1, the next most prestigious ranked 2, etc.

⁴¹¹ It is true that the Washington and Lee law journal rankings may not perfectly operationalize the prestige of a journal, but no attempts to measure an abstract construct are perfect, and the only other alternative ranking system would be to impute the prestige of the law school to a journal via the law school's *U.S. News & World Report* annual ranking. That's becomes problematic, though, because the flagship journal at each law school is more prestigious than secondary journals, and even all secondary journals at a school are not necessarily viewed the same. The Washington and Law rankings, despite their flaws, better capture this than any other existing measure.

Variable	Model 1	Model 2	Model 3	Model 4
Author School Rank	.98*** (.18)	--	.98*** (.18)	--
Year	2.35 (2.28)	7.65*** (1.74)	2.55 (2.26)	7.82*** (1.73)
Treatment	-12.02 (8.61)	-8.33 (6.45)	--	--
Treatment (Absolute Value)	--	--	-4.88 (12.02)	5.88 (8.95)
Christianity (General)	54.13+ (29.54)	20.72 (20.88)	56.68+ (29.70)	23.99 (20.76)
Catholicism	47.82 (49.38)	22.10 (30.20)	52.88 (49.12)	23.28 (30.34)
Other Christian	27.48 (58.52)	-6.39 (41.35)	32.06 (60.51)	-3.45 (42.43)
Judaism	-54.03 (56.83)	56.31 (58.00)	-50.41 (58.13)	52.93 (58.11)
Islam	87.04 (71.39)	86.38 (54.11)	84.87 (71.56)	82.23 (54.09)
Native American	-18.94 (35.61)	76.00+ (45.57)	-29.22 (35.30)	64.17 (45.56)
Other Religion	-27.45 (58.52)	86.88 (65.72)	-26.06 (55.85)	80.63 (64.75)
Constant	-4547 (4572)	-15048*** (3488)	-4953 (4530)	-15419*** (3467)
Observations	587	1292	587	1292
F-value	5.55***	3.76***	5.57***	3.52***
Adjusted R-squared	.083	.027	.080	.026
S.E.R.	244.55	274.86	244.98	275.01

+ (p < .10); * (p < .05); ** (p < .01); *** (p < .001)

In the model that included the ranking of an author's law school, that variable was the only statistically significant predictor of the ranking of the journal that published the article. The ranking of an author's law school could be seen by some as a proxy for the quality of the article, and in an environment where it may difficult to parse quality, provides an independent and external signal for those making publication decisions since submissions to law journals do not generally exclude author information from those making these decisions.⁴¹² The coefficient is modest—for every increase of one in the school's rank, the journal rank increases (or becomes less prestigious) by about one rank. And while no other variable reached statistical significance ($p \leq .05$), the dummy variable for Christianity in general approached statistical significance ($p = .067$).⁴¹³ The baseline

⁴¹² This is sometimes referred to as the Letterhead Effect.

⁴¹³ Part of what's driving this lack of statistical significance is the low number of observations for most of the religion types.

the religion dummy variables were being compared to was General Religion, and general Christianity was associated with a journal ranking of 54 positions in the direction of being less prestigious compared to an article that had the same treatment, published the same year, and from an author from the same law school, but that dealt with religion generally.

When one looks at the model that drops the author school rank variable, and so looks at all of the articles in the dataset, the only variable that achieves statistical significance is the year variable. And that variable does not clearly tell us anything—it was placed in the model in part to control for the fact that each year there are more journals being published, and thus ranked, and so the average journal ranking may go lower (become less prestigious) as an artifact of this expansion (some might say explosion) of law journals publishing articles in the United States. While it is possible that the overall topic of law and religion is decreasing in interest to more prestigious law journals, it is also possible the regression results merely reflect the increase in journals and are not related to the nature of the article itself. As for models three and four, where the treatment variable has been converted to its absolute value in order to see whether it's just extreme values that matter, regardless of their direction, there was no substantive difference for both the coefficients and whether statistical significance was obtained.

III. CAVEATS, CONSEQUENCES, AND EXPLANATIONS

A. *Caveats*

The trends unearthed in this study of law and religion in American legal scholarship are cabined to the period covered by the dataset: 1998-2012. While fifteen years in the very recent past provide a good window into where we are today, the study cannot speak to developments in the past few years. Nor can it situate the studied fifteen-year period within a broader picture. Are the trends here part of a longer trend? Are these trends an abrupt break from the past?

B. *Consequences*

Still, given the trends here, one can think about possible implications. While not consistently, the data appear to be in line with secularization theory in several regards. First, over the time period religion is less likely to be treated positively, though it is still on the positive side of the value scale and the downward trajectory, while statistically significant, is not necessarily that large. Second, legal scholarship is less likely to argue for the accommodation of religious practices when they conflict with secular laws, a trend that is also statistically significant.⁴¹⁴

Not necessarily fitting into the secularization thesis is the fact that it appears that not all religions are “created equal” in the eyes of legal scholars. At first glance, adherents in the United States of Native American religions, Judaism, Islam and other non-Christian religions may take heart—certainly legal scholars appear to be characterizing their faiths more positively than those related to Christianity, or religion generally, and scholars are more likely to argue for

⁴¹⁴ For evidence that in the United States, secularization is not occurring because while moderate religions are declining, more intense religions are persisting (unlike in other countries), see Landon Schnabel & Sean Bock, *The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research*, 4 *Sociological Science* 686 (2017).

accommodation for these non-Christian faiths than those that belong to Christianity (or just religion in general). But what may be less comforting is that while a trend away from accommodation and the positive treatment of religion may affect Christian-related faiths first, it's not clear that it won't also impact non-Christian ones eventually as well. Being later in line to a firing squad is not much reason to rejoice. And while one scholar viewed Jews as the "canaries in the coal mine" for human rights in European history, he now argues that Christians have taken over the canary role, becoming a "litmus indicator of whether freedom exists not only for them—but for all others in their societies."⁴¹⁵

So what if legal scholarship is moving in a direction that is less amenable to religious practice and religion in general? What impact might that have? Perhaps a significant one. Courts turn to legal scholarship since scholars often have the time to think through thorny issues. Thus, trends in legal scholarship could wind up persuading judges and ultimately have the force of law. Similarly, policymakers in the legislature or executive branches of states and the federal government could also be persuaded by legal scholarship in enacting various statutes or regulations. The result could be that religion is less protected under American law than it has been in the past.

That would be unfortunate given the correlation between religious freedom and society-level benefits, and religious individuals and individual-level successes. For example, religious individuals tend to have stronger marriages and families, are less involved in substance abuse and crime, obtain higher levels of education, are more likely to volunteer and donate to charities, exhibit better work habits, live longer, enjoy better health, earn more money, and experience higher levels of well-being and happiness.⁴¹⁶ These characteristics understandably have effects on the economy, police forces, schools, the poor, and a host of other aspects of society. Thus it is not surprising that religious freedom strongly correlated with various positive economic, civic, and public health benefits.⁴¹⁷

For instance, Rabbi Jonathan Sacks, the former chief rabbi of the United Hebrew Congregations of the British Commonwealth, has argued that "[religion] remains the most powerful community builder the world has known. . . . Religion is the best antidote to the individualism of the consumer age. The idea that society can do without it flies in the face of history."⁴¹⁸ A Harvard Business School professor, who has been named the world's top "thought leader" two years in a row by Thinkers50, the "Oscars of the 'management guru' world,"⁴¹⁹ has

⁴¹⁵ ALLEN D. HERTZKE, *FREEDOM GOD'S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS* 163-64 (2004) (quoting Michael Horowitz).

⁴¹⁶ See Patrick F. Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, Backgrounder no. 1992, Dec. 18, 2006 (Heritage Foundation); PUTNAM & CAMPBELL, *supra* note 337, at 443-92.

⁴¹⁷ See Brian J. Grim, Greg Clark, and Robert Edward Snyder, *Is Religious Freedom Good for Business? A Conceptual and Empirical Analysis*, 10 *Interdisciplinary Journal of Research on Religion* 1, 4-6 (2014); Paul A. Marshall, *The Range of Religious Freedom* 1-11, in Paul A. Marshall, ed., *Religious Freedom in the World* (2008); Grim & Finke, *supra* note 356, at 205-09.

⁴¹⁸ Jonathan Sacks, *The Moral Animal*, *The New York Times*, Dec. 23, 2012.

⁴¹⁹ Jena McGregor, *The World's Most Influential Management Thinker?*, *Washington Post*, Nov. 12, 2013, available at <https://www.washingtonpost.com/news/on-leadership/wp/2013/11/12/the-worlds-most-influential-management-thinker/>.

written that “religion is the foundation of democracy and prosperity.”⁴²⁰ A New York Times columnist noted that “the social goods associated with faith flow almost exclusively from religious participation, not from affiliation or nominal belief.”⁴²¹

To experience a weakening of these social goods because religion is less valued and less protected would have wide scale harmful effects in our society. Of course, this is as much a cultural and societal issue as a legal one. And such is beyond the scope of this paper. But it is possible the community of legal scholars can outpace or re-direct society’s mores and priorities, and help codify their views in a way that few other communities of scholars can.

C. Explanations

Why might legal scholarship be moving in the direction it is? There numerous potential explanations. Here are two, both of which are related: the growth of the administrative state and an increased legal orientation of anti-discrimination.⁴²² The nation’s historical roots started with what George Washington described as an “enlarged and liberal policy,” wherein “a very limited national government . . . allowed a large sphere of civil society to flourish outside of government regulation.”⁴²³ And as philosopher Leo Strauss would later argue, this relationship between government and civil society “stands or falls by the distinction between the public and the private. In the liberal society there is necessarily a private sphere with which the states legislation must not interfere.”⁴²⁴

Such a paradigm ran into serious headwinds with a recalcitrant South (and to a degree the North as well) that sought to keep African-Americans as second-class citizens if they had to be citizens. And so to kill segregation, “America’s robust civil society has become increasingly subject to government regulation.”⁴²⁵ While the expansion of government has been an effective treatment for the cancer of segregation, like many such invasive treatments, the effects have spilled over to harm that which is nearby but distinct. As one commentator observed, the “new civil rights mentality has changed the American understanding of the job of government vis-à-vis the liberty of citizens”— “[a] large body of American opinion holds that it is the government’s job to prevent any and all discrimination . . . [and] [t]hat belief is pushing government more and more deeply into our daily affairs.”⁴²⁶

Of course, there are likely other reasons for why the administrative state has grown in this country, but the result is a society that increasingly wants government to eradicate discrimination coupled with a bureaucracy that has increasingly invaded the private sphere to do so. And this

⁴²⁰ Clayton Christensen, *Religion is the Foundation of Democracy and Prosperity*, Mormon Perspectives, Feb. 8, 2011, available at <http://www.mormonperspectives.com/2011/02/08/religion-is-the-foundation-of-democracy-and-prosperity/>.

⁴²¹ Ross Douthat, *The Christian Penumbra*, The New York Times, Mar. 29, 2014, available at http://www.nytimes.com/2014/03/30/opinion/sunday/douthat-the-christian-penumbra.html?_r=0.

⁴²² See Bernstein, *supra* note 336.

⁴²³ Richard Samuelson, *Who’s Afraid of Religious Liberty?*, Mosaic, Aug. 1, 2016, available at <https://mosaicmagazine.com/essay/2016/08/whos-afraid-of-religious-liberty/>.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

creates conflicts between religious liberty, on the one hand, and rights based in an anti-discrimination concept on the other (with religion being viewed as the vehicle of discrimination).

For example, one law professor has noted that in the “conflict between the demands of religion and the demands of society,” sometimes, especially in recent history, “religious doctrines changed . . . partly because the larger society insisted that discriminatory behavior change.”⁴²⁷ And he characterizes recent protests in Indiana and Arkansas against state-level Religious Freedom Restoration Acts by pro-LGBT groups as “the birth pangs of a new wave of equality” in “one of those moments in history when pressure from the larger society pushes against religious belief and insists that believers, at least when doing business with the public, not act even on sincere objections.”⁴²⁸ A former law professor and state supreme court justice observed that “[a]s the powerful principle of nondiscrimination has been accommodated in the law, many rank it above the constitutional guarantee of free exercise of religion, contending that religious freedom must be curtailed whenever it conflicts with nondiscrimination.”⁴²⁹ The irony is this has caused some to believe that “religious liberty is going to be the civil rights issue of the next decade.”⁴³⁰

Furthermore, this conflict has led some to re-characterize religious liberty or the right to free exercise as a “right to worship.”⁴³¹ This new, narrower conception of religious freedom seeks to limit free exercise to the private sphere—the home, the church, the synagogue, the mosque. Such a move is not new—this reconceptualization of religious liberty was first flagged in the mid-1980s—but it may be growing more common.⁴³² And thus while free speech rights may be expanding, religious liberty rights may be contracting, literally, in the physical (and societal) space where they may be exercised. This has caused some to warn about circling the wagons too broadly—at the periphery of religious liberty, such as in commercial settings—so as to suffer defeats at the core: in the home and the place of worship.⁴³³ Such “practical priorities” may always be at play in the consideration of constitutional rights, but they still show a right that is less than robust.

As an example of this growing conflict between religious freedom and anti-discrimination, the U.S. Commission on Civil Rights’ recently released report—*Peaceful Coexistence: Reconciling*

⁴²⁷ David A. Strauss, *Religious Freedom Has Often Bowed to Law, Culture*, special to The Washington Post, Salt Lake Tribune, Apr. 14, 2015, A13, available at <http://www.sltrib.com/opinion/2393643-155/washington-post-op-ed-religion-has-often>.

⁴²⁸ *Id.*

⁴²⁹ Dallin H. Oaks, *Transcript: Elder Oaks Remarks at Claremont Graduate University Religious Freedom Conference*, Mar. 25, 2016.

⁴³⁰ Rick Warren, *Church Founder: Religious Liberty the Next Rights Issue*, Deseret News, Dec. 3, 2012, A6.

⁴³¹ See, e.g., Hillary Clinton, *What I have in Common with Utah Leaders*, Deseret News, Aug. 10, 2016, available at <http://www.deseretnews.com/article/865659843/Exclusive-Hillary-Clinton-What-I-have-in-common-with-Utah-leaders-2-religious-freedom-and-the.html?pg=all>.

⁴³² See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

⁴³³ Characterizing the “innermost core” of religious freedoms as those “more closely [] relate[d] to purely private, family, and ecclesiastical matters”; “near the core” as “freedoms that pertain to religiously important nonprofit functions carried on by religious organizations”; and “beyond the core” as those in commercial settings. See Elder Lance B. Wickman, *Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All*, July 7-8, 2016, speech at BYU Religious Freedom Conference, available at <http://www.mormonnewsroom.org/article/promoting-religious-freedom-secular-age-fundamental-principles-practical-priorities-fairness-for-all>. Lance Wickman is the general counsel for the Church of Jesus Christ of Latter-Day Saints.

*Nondiscrimination Principles with Civil Liberties*⁴³⁴—was met with concern by a diverse coalition of seventeen religious faith leaders, which sent a letter to President Barack Obama, President Pro Tempore of the Senate, Senator Orrin Hatch, and the Speaker of the House, Congressman Paul Ryan—who are the “authorities responsible for appointing members of the [] Commission.”⁴³⁵

The report found that “[r]eligious exemptions to the protections of civil rights . . . significantly infringe upon these civil rights.”⁴³⁶ It also found that when religious exemptions are required by the Free Exercise Clause of the First Amendment or RFRA, such “exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis.”⁴³⁷ The report noted that “[o]verly-broad religious exemptions unduly burden nondiscrimination laws and policies,” and so the report determined that “courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.”⁴³⁸ Additionally, the report called for the consideration of federal legislation “to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.”⁴³⁹

The religious leaders expressed “deep concern” that the report “stigmatizes tens of millions of religious Americans, their communities, and their faith-based institutions, and threatens the religious freedom of all our citizens.” The letter noted that the report found that “[religious organizations] use the pretext of religious doctrine to discriminate.”⁴⁴⁰ The leaders felt that the report essentially labeled some religious individuals and institutions as bigoted, pointing to the statement by the Commission’s Chairman, that “[t]he phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”⁴⁴¹

As the report and reaction to it make clear, this clash between anti-discrimination principles and religious liberty is likely to grow in scope and pitch in the coming years. And to the extent it is seen as a zero sum game (i.e., winner take all), it’s not clear that the current trajectories gleaned from legal scholarship favor religious freedom in this fight.

CONCLUSION

Over the fifteen-year period studied here, a few trends regarding religion in legal scholarship emerge. First, while still on the positive side of the positive-problematic scale, at statistically significant levels the average treatment of religion is less positive over time. Second, lawyers tend

⁴³⁴ U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* (2016), available at <http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF>.

⁴³⁵ Letter available at <http://www.mormonnewsroom.org/article/interfaith-coalition-president-congress-biased-religious-liberty-report>.

⁴³⁶ U.S. Commission on Civil Rights, *supra* note 434, at “Letter of Transmittal.”

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 26.

⁴⁴¹ *Id.* at 29.

to portray religion less positively than law students and law professors, and law students portray religion less positively than law professors. Third, not all religions are viewed equally by legal scholars—non-Christian religions are portrayed more positively than religion generally, which is portrayed more positively than Christianity, either generally or specific denominations. The clearest winner (portrayed most positively) is Native American religions, while the clearest loser (portrayed least positively) are specific Christian faiths other than Catholicism (though it doesn't fare much better). Fourth, writing about Christianity generally (as opposed to specific Christian denominations or other faiths) is associated with placement in less prestigious journals, a finding that approaches statistical significance. Finally, when law and religion intersects with another area of the law, religion is portrayed differently and scholars advocate for separation and accommodation at different rates. For example, religion is portrayed on the problematic side of the scale in the LGBT context, where scholars are less likely to advocate the accommodation of religious practice, but religion is portrayed quite positively with a high percentage of pro-accommodation arguments when prisoners' rights are involved. Given that legal scholars often clear the way for the law follow, these trends may portend court decisions, statutes, and regulations in the next few decades. Time will tell.

* * *

CONCLUSION

Given the intimate nature between politics and the law, it's hard to see how the political make-up of the legal academy cannot have an impact on the production of legal knowledge—one of the main purposes of the academy. Further, legal academia is dominated by one school of political views. This dominance could harm scholarship when the ideal environment for the production of such requires constant critique and refinement from numerous perspectives—the market contest of ideas—understanding the mechanisms behind this political dominance could help point towards ways to rectify it. And thus improve the production of legal knowledge.

Two of the dissertation's studies explored possible mechanisms behind the dearth of conservatives and libertarians in legal academia. The first study found that conservatives and libertarians, after controlling for other predictors, publish more often and are cited more often than their liberal or politically unknown/moderate peers. The second study found that, after controlling for other predictors, conservatives/libertarians were hired at less prestigious law schools than their liberal peers, and that political unknowns/moderates suffered a similar fate compared to liberal professors. While observational data certainly does not prove a causal mechanism, the findings of both studies are at least consistent with discrimination based on political orientation as being a reason behind the political imbalance in the legal academy.

The dissertation's third study directly documented the production of knowledge in an increasingly politicized area of law: religion. Over the fifteen-year period analyzed, the study found that religion is increasingly portrayed as something that is problematic, though that treatment depends on the specific religion discussed, the area of the law implicated, and what particular competing rights are discussed. The trends anecdotally correlated with views in American society, though the study did not attempt to connect the two patterns.

In sum, the composition of law faculties influences the production of legal knowledge. And the production of legal knowledge influences the direction of the law. This dissertation sought to fill a void in the literature as to why the legal academy politically looks as it does, as well as how the production of legal knowledge as it relates to religion as changed in recent decades. But more work is needed to understand this little-studied area of American legal society.

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APPENDIX I

I. CODING GUIDE

1. Vita/Resume

- a. Look for organizations/positions that give off a political signal (see table for examples)—if you’re uncertain about an organization/affiliation, then try Google

Conservative	Liberal	Libertarian
Heritage Foundation	American Society	Constitution CATO
Federalist Society	ACLU	Federalist Society
Claremont Institute	NAACP	ACLU
Bush Administration	Obama/Clinton Administration	Institute for Humane Studies
GOP Party/Congressman	La Raza	Tea Party
Intercollegiate Studies Institute	Democratic Party/Congressman	
Clerkship with GOP-appointed SCOTUS Justice	Brookings Institute	
Family Research Council	National Lawyers’ Guild	
National Organization of Marriage (NOM)	Center for Economic and Policy Research	
Freedom Works	Campaign for America’s Future	
John Birch Society	Clerkship with Democratic-appointed SCOTUS Justice	
America Family Association	Open Society Institute	
Club for Growth	NARAL	
Tea Party	Southern Poverty Law Center	

2. Campaign donations

- a. Go to www.opensecrets.org

- b. Under the “Politicians and Elections” tab, click donor lookup
 - c. Enter name of professor
 - i. If you get too many hits, limit by state (**use the vita to tell when a person was in a certain location, and pay attention to the city listed**); occupation can also be helpful
 - d. Determine whether the majority of a person’s donations go Democratic or Republican candidates (or a mix or no info)
3. Publications (**only if can’t make a clear judgment after looking at vita and campaign donations**)
- a. Pull up the professor’s law school page (the link I included for most may nor may not be the most recent)
 - b. Find their vita/resume/cv
 - c. Do an author search in Westlaw’s “Secondary Sources: Law Reviews & Journals”
 - i. Search parameter: au(FIRSTNAME /2 LASTNAME)
 - d. Using both the via and the Westlaw search results, identify any law journal articles written up through the year they were hired
 - e. Scan each article’s abstract/introduction, and, if necessary, conclusion and make a judgment call on whether it leans conservative, liberal, libertarian, or can’t tell (see table)

	Conservative	Liberal	Libertarian
Taxes	Lower (especially on business, rich)	Higher (especially on rich)	Lower
Abortion	Pro-life	Pro-choice	Probably pro-choice
Marriage	Pro-traditional marriage	Pro-same-sex marriage	Pro-same-sex marriage
Budget	No debt	Debt is fine	No debt
Size of government	Small (but large military)	Large (but smaller military)	Small
Foreign Affairs	Military interventionist	Military isolationist, but increased humanitarian aid	Military isolationist
Guns	Pro-gun rights	Pro-gun control	Pro-gun rights

Environment	Leave it to the market	Strong government regulation	Leave it to the market
Economy	Free market	Increased regulation	Free market
Federalism	Stronger states' rights	Stronger central government	Stronger states' rights
Criminal Law	Increased punishment/sentences	Decreased punishment/sentences	Decreased punishment/sentences
Welfare	Reduce funding	Increase funding	Reduce funding
Race	Eliminate affirmative action	Maintain affirmative action	Eliminate affirmative action
Immigration	Stop illegal immigration, illegal aliens, strengthen border	Increase legal immigration, amnesty for undocumented persons (notice the different term)	Uncertain
Constitutional Interpretation	Originalism/textualism	Living Constitution	Originalism/textualism

4. Make a judgment call based on all of the information as to whether a professor is conservative, liberal, libertarian or can't tell (you likely won't be able to tell on many of them)
5. Indicate how confident you are in that assessment (very, somewhat, or slightly)

II. COVARIATE DIFFERENCES BASED ON POLITICAL/IDEOLOGICAL IDENTITY

Variable	Cons/Libert (n=1011)	Other (n=910)	Difference	Liberal (n=637)	Diff.	Unknown (n=273)	Diff.
JD	.990	.964	.026	.964	.026	.963	.027
			p = .082		p=.084		p=.088
JD Rank	4.45	5.86	-1.41	5.88	-1.44	5.80	-1.35
			p=.135		p=.152		p=.088
Law	.584	.513	.071	.554	.030	.418	.167
Review			p=.088		p=.287		p=.002
PhD	.218	.323	-.105	.292	-.074	.396	-.183
			p=.015		p=.062		p=.001
SCOTUS	.356	.180	.176	.212	.145	.106	.257
Clerk			p<.001		p<.001		p<.001
Federal	.267	.244	.023	.264	.004	.198	.070
Appellate			p=.303		p=.470		p=.074
Federal	.030	.062	-.032	.060	-.030	.066	-.036
District			p=.098		p=.111		p=.095
State/	0	.035	-.035	.030	-.030	.048	-.048
Foreign			p=.028		p=.039		p=.013
Experience	23.3	22.8	.46	24.0	-.70	20.1	3.22
			p=.370		p=.312		p=.019
Women	.030	.291	-.262	.309	-.280	.249	-.219
			p<.001		p<.001		p<.001
Minority	.059	.148	-.089	.140	-.080	.168	-.108
			p=.007		p=.013		p=.004

Note: differences may diverge from simply subtracting the two values due to rounding.

Covariate balance summary (full data)

Raw Matched

```
-----
Number of obs =    1,011    2,022
Treated obs  =     101    1,011
Control obs  =     910    1,011
-----
```

```
Means          Variances
Control  Treated   Control  Treated
-----+-----
```

```
jd          .9637363  .990099  .0349871  .009901
phd         .3230769  .2178218  .2189388  .1720792
jdranking4  5.859341  4.445545  161.5622  31.7095
lawreview   .5131868  .5841584  .2501009  .2453465
scotus      .1802198  .3564356  .1479031  .2316832
fedapp      .243956   .2673267  .1846444  .1978218
feddist     .0615385  .029703   .057815   .0291089
stateforeign .0351648    0        .0339656    0
experience  22.8044   23.26733  174.3709  195.8778
exp2        694.2198  735.3069  445165.8  525165.5
women       .2912088  .029703   .2066333  .0291089
minority    .1483516  .0594059  .1264824  .0564356
wom*min     .0571429    0        .0539368    0
-----
```

III. MODEL TYPES FOR ESTIMATING CAUSAL EFFECTS

PROPNESITY SCORE MATCHING

Propensity score matching compares units in the treatment and control groups who have similar propensities for treatment (the propensity score).⁴⁴² The propensity score, I_h ranges from 0 to 1, is calculated using logistic (or probit) regression, with the dependent variable being whether or not the observation is in the treatment group, and the independent variables those variables the researcher thinks are associated with being in the treatment or control groups. In this study, the propensity scores were created using the covariates listed as independent variables in the methodology section.⁴⁴³ Additionally, the data were trimmed to exclude any observations with propensities scores below 0.10 and above 0.90 since "for a wide class of distributions the optimal set is well approximated by the set of observations with propensity scores in the interval [0.1, 0.9]."⁴⁴⁴

While propensity score matching is an increasingly popular method, it is not without its problems. In fact, King and Nielsen have shown, using real and simulated data, that propensity score matching, unlike Mahalanobis distance matching and coarsened exact matching, "can and usually does increase imbalance, inefficiency, model dependence, research discretion, and bias. . . . In fact, the more balanced the data, or the more balanced it becomes by pruning some observations through matching, the more likely [propensity score matching] will degrade inferences."⁴⁴⁵

PROPNESITY SCORE WEIGHTING

While "[propensity score] weighting can be considered a submodel of those developed by Rosenbaum and Rubin . . . it is important to treat the propensity score weighting estimator . . . as a special case, a method that is categorically different from other propensity score models."⁴⁴⁶ That is, "[t]he method directly exploits the inverse of estimated propensity scores as weights in outcome analysis, and to a large extent, it shares similarities with weighted analysis using unequal sampling weights."⁴⁴⁷ One of the advantages of propensity score weighting over propensity score matching is that less data is lost. "[I]n finite samples, an appropriate reweighting estimator nearly always outperforms pair matching and is often competitive with the more sophisticated matching estimators in [data generating processes] where overlap is good."⁴⁴⁸ But in data generating

⁴⁴² See generally SHENYANG GUO & MARK W. FRASER, *PROPNESITY SCORE ANALYSIS: STATISTICAL METHODS AND APPLICATIONS* 130-40 (2d ed. 2015).

⁴⁴³ "As a way of guarding against the consequences of misspecification, researching using estimators built around the propensity score should include in the propensity score model covariates believed to influence the treatment selection process as well as any covariates believed to influence the outcome variable. Doing so provides a type of insurance against bad bias, but this may come at the expense of added variance." Matias Busso, John DiNardo & Justin McCrary, *New Evidence on the Finite Sample Properties of Propensity Score Reweighting and Matching Estimators*, 96 Rev. of Economics & Statistics 885, 896-97 (2014).

⁴⁴⁴ Richard K. Crump, V. Joseph Hotz, Guido W. Imbens & Oscar A. Mitnik, *Moving the Goalposts: Addressing Limited Overlap in the Estimation of Treatment Effects by Changing the Estimand*, National Bureau of Economic Research, Technical Working Paper 330, Sept. 2006, available at <http://www.nber.org/papers/T0330>, at 5.

⁴⁴⁵ Gary King & Richard Nielsen, *Why Propensity Scores Should Not Be Used for Matching*, Aug. 17, 2015, available at <http://gking.harvard.edu/files/gking/files/psnot.pdf?m=1439838506>, at 1.

⁴⁴⁶ GUO & FRASER, *supra* note 442, at 240.

⁴⁴⁷ *Id.*

⁴⁴⁸ Busso et al., *supra* note 443, at 885.

processes "where overlap is poor, [] reweighting tends not to perform as well as some of the more effective matching estimators."⁴⁴⁹

NEAREST NEIGHBOR MATCHING (NNM)

In its simplest form, "matching, or more precisely the mechanism for balancing data through matching, involves identifying untreated participants who are similar on covariates to treated participants and using the mean outcome of the nontreated group as a proxy to estimate the counterfactual of the treated group."⁴⁵⁰ Whereas propensity score matching avoids dependency on the functional form of the logit or probit regression model used to calculate the score, matching avoids this. But this comes at a cost--"as the number of matching variables increases, so does the difficulty of using exact matching to find a match for a given treated participant"--the dreaded curse of dimensionality.⁴⁵¹ Also, one must determine the metric to use in determining the "distance" of the nearest match.

Of the various matching estimators, "[o]ne of the most effective . . . is bias-corrected matching with a fixed number of neighbors."⁴⁵² This paper used NNM (1 match) with the Mahalanobis metric, bias-adjustment for all of the continuous covariates (rank of JD-granting institution, years of *Ie*, and years of *Ie* squared), and exact matching on the PhD, JD, and SCOTUS clerkship variables.

COURSENEDED EXACT MATCHING (CEM)

CEM utilizes a "monotonic imbalance reducing matching method" so that "balance between the treated and control groups is chosen by ex ante user choice."⁴⁵³ CEM also allows one to adjust balance on one variable without altering the imbalance of other variables. CEM's creators argue that it "strictly bounds through ex ante user choice both the degree of model dependence and the average treatment effect estimation error, eliminates the need for a separate procedure to restrict data to common empirical support, meets the congruence principle, [and] is robust to measurement error."⁴⁵⁴ CEM does not calculate treatment effects on its own, but merely trims the data to ensure sufficient covariate balance, enabling one to use "whatever statistical model they would have applied without matching. . . . [or] to be used to improve other methods of matching."⁴⁵⁵ CEM can either be specified to perform one-to-one matching between the treatment and control groups, or one-to-many matching. CEM further allows one to match based on strata of a particular variable.

⁴⁴⁹ *Id.*

⁴⁵⁰ GUO & FRASER, *supra* note 4422, at 76. *See also id.* at 255-59.

⁴⁵¹ Guo & Fraser, *supra* note 442, at 256.

⁴⁵² Busso et al., *supra* note 443, at 885.

⁴⁵³ Matthew Blackwell et al., *cem: Coursened Exact Matching in Stata*, Feb. 22, 2010, available at <http://gking.harvard.edu/files/cem-stata.pdf>, at 1.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

IV. EFFECTIVENESS OF MODELS IN BALANCING COVARIATES

NORMALIZED DIFFERENCE OF MEANS BETWEEN TREATMENT & CONTROL GROUPS

	Full (n=1011)	NNM (n=977)	PSWeight (n=929)	PSMatch Trim (n=492)	CEM (n=258)	CEM NNM (n=250)	CEM 1:1 (n=138)	CEM 1:1 NNM (n=134)
JD	-0.18	0.00	-0.19	0.00	-0.06	0.00	0.00	0.00
JDRank	0.14	0.16	0.07	0.03	-0.11	-0.10	0.09	0.08
LawReview	-0.14	-0.12	-0.13	-0.08	-0.13	-0.13	0.00	0.00
PhD	0.24	0.20	0.26	0.12	0.04	0.03	0.00	0.00
SCOTUS	-0.40	-0.39	-0.37	-0.32	-0.23	-0.23	0.00	0.00
FedApp	-0.05	-0.04	-0.03	0.05	-0.01	-0.01	0.00	0.00
FedDist	0.15	0.16	0.14	0.08	0.00	0.00	0.00	0.00
StateForeign	0.27	0.28	0.00	0.00	0.00	0.00	0.00	0.00
Experience	-0.03	-0.04	-0.02	0.10	0.03	0.02	-0.02	-0.02
Expsquared	-0.06	-0.06	-0.05	0.09	0.00	-0.01	-0.03	-0.03
Women	0.76	0.77	0.66	0.00	-0.09	-0.09	0.00	0.00
Minority	0.29	0.29	0.13	-0.04	0.00	0.00	0.00	0.00
Women*Minority	0.35	0.35	0.00	0.00	0.00	0.00	0.00	0.00

Note: calculated for each variable with the following formula: (control mean-treatment mean)/(square root((control variance +treatment variance)/2)). See Imbens & Rubin, *supra* note XX, at 311.

Covariate balance summary (NNM)

Raw Matched

Number of obs =	977	1,954
Treated obs =	100	977
Control obs =	877	977

Means

Variances

Control Treated Control Treated

jd	1	1	0	0
phd	.2976055	.21	.2092751	.1675758
jdranking4	6.079818	4.49	166.3064	31.82818
lawreview	.5324971	.59	.2492281	.2443434
scotus	.1870011	.36	.1522053	.2327273
fedapp	.2531357	.27	.1892738	.1990909
feddist	.063854	.03	.0598449	.0293939
stateforeign	.036488	0	.0351968	0
experience	22.57925	23.13	175.6276	195.9324
exp2	685.2497	728.97	447913.2	526373.4
women	.2964652	.03	.2088117	.0293939
minority	.1493729	.06	.1272057	.0569697
wom*min	.0581528	0	.0548336	0

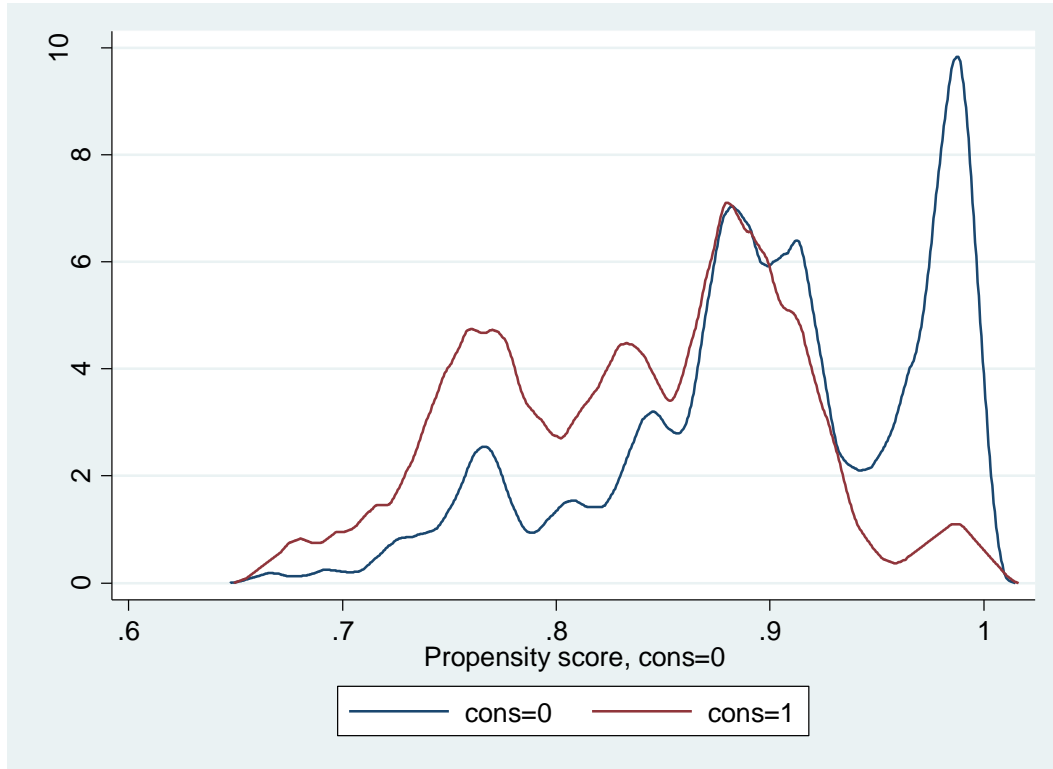
Covariate balance summary (Propensity Score Weighting)

Raw Matched

Number of obs =	929	1,858
Treated obs =	101	929
Control obs =	828	929

	Means		Variances	
	Control	Treated	Control	Treated
jd	.9613527	.990099	.0371987	.009901
phd	.3333333	.2178218	.2224909	.1720792
jdranking4	5.025362	4.445545	88.54954	31.7095
lawreview	.5193237	.5841584	.2499284	.2453465
scotus	.1932367	.3564356	.1560848	.2316832
fedapp	.2524155	.2673267	.1889301	.1978218
feddist	.0591787	.029703	.0557439	.0291089
stateforeign	0	0	0	0
experience	22.92874	23.26733	174.5378	195.8778
exp2	700.0543	735.3069	448088.5	525165.5
women	.2451691	.029703	.185285	.0291089
minority	.0954106	.0594059	.0864118	.0564356
wom*min	0	0	0	0

Propensity Score Weighting Density Graph of Propensity Scores Overlap



Covariate balance summary (Propensity Score Matching Trimmed, $\geq .1$ & $\leq .9$)

Raw Matched

Number of obs =	492	984
Treated obs =	83	492
Control obs =	409	492

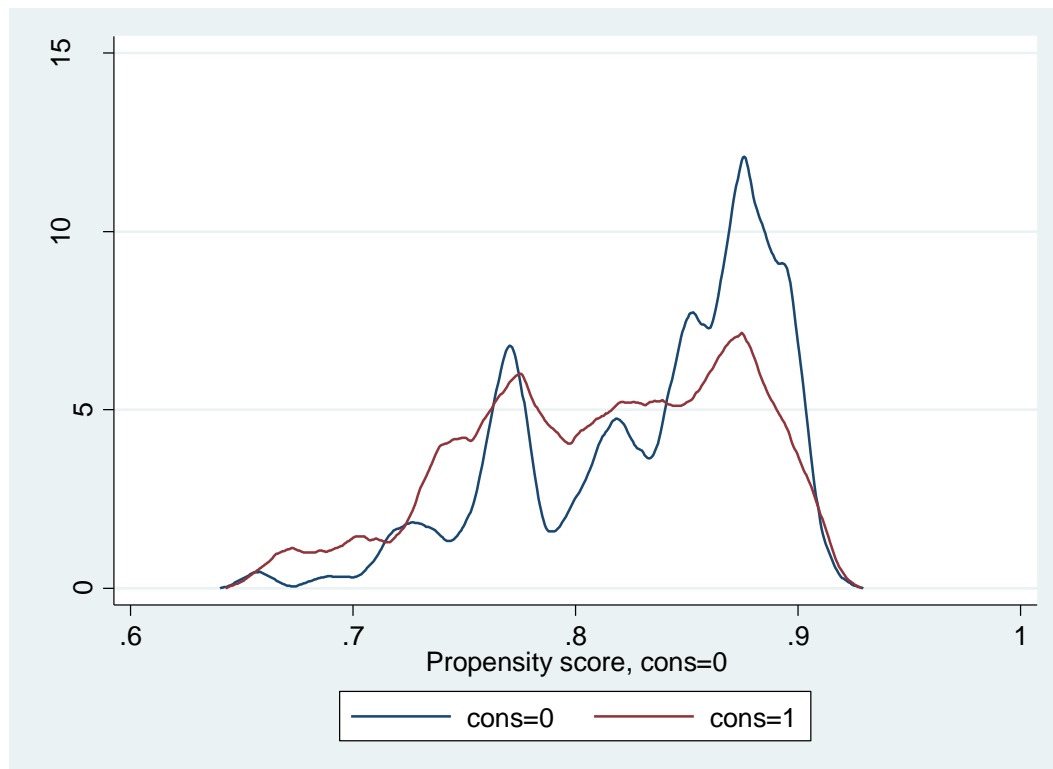
	Means		Variances	
	Control	Treated	Control	Treated

-----+

jd	1	1	0	0
phd	.1613692	.1204819	.1356609	.1072583
jdranking4	4.229829	4.048193	42.93234	19.80253

lawreview	.5892421	.626506	.2426291	.2368498
scotus	.2836186	.4337349	.2036771	.2486042
fedapp	.3129584	.2891566	.2155425	.2080517
feddist	.0220049	.0120482	.0215734	.0120482
stateforeign	0	0	0	0
experience	23.7066	22.33735	201.5559	201.3238
exp2	763.066	697.8554	551838.4	548543
women	0	0	0	0
minority	.0391198	.0481928	.0376816	.0464296
wom*min	0	0	0	0

Propensity Score Match Trimmed Propensity Score Overlap



Covariate balance summary (Coursened Exact Matching, used for Regression & PS Matching)

Raw Matched

 Number of obs = 258 516
 Treated obs = 71 258
 Control obs = 187 258

Means Variances
 Control Treated Control Treated

-----+-----
 jd .9786096 .9859155 .0210454 .0140845
 phd .197861 .1830986 .1595653 .1517103
 jdranking4 3.390374 3.774648 9.615606 16.37706
 lawreview .540107 .6056338 .2497269 .2422535
 scotus .2352941 .3380282 .1808982 .2269618
 fedapp .2620321 .2676056 .1944109 .1987928
 feddist 0 0 0 0
 stateforeign 0 0 0 0
 experience 26.08021 25.66197 159.9129 181.7698
 exp2 839.2353 837.7465 465141.1 540180.3
 women .026738 .0422535 .026163 .0410463
 minority 0 0 0 0
 wom*min 0 0 0 0

Covariate balance summary (NNM with CEM)

Raw Matched

Number of obs = 250 500
Treated obs = 69 250
Control obs = 181 250

	Means		Variances	
	Control	Treated	Control	Treated
jd	1	1	0	0
phd	.1712707	.1594203	.1427256	.1359761
jdranking4	3.436464	3.811594	9.591774	16.62575
lawreview	.5469613	.6086957	.2491713	.241688
scotus	.2320442	.3333333	.1791897	.2254902
fedapp	.2707182	.2753623	.1985267	.2024723
feddist	0	0	0	0
stateforeign	0	0	0	0
experience	26.0221	25.72464	158.8328	181.6142
exp2	835.105	840.7391	466462.7	543904.4
women	.0276243	.0434783	.0270104	.0421995
minority	0	0	0	0
wom*min	0	0	0	0

Covariate balance summary (CEM 1:1 match, used for Regression & PS Matching)

Raw Matched

Number of obs =	138	276
Treated obs =	69	138
Control obs =	69	138

	Means		Variances	
	Control	Treated	Control	Treated
jd	.9855072	.9855072	.0144928	.0144928
phd	.1884058	.1884058	.1551577	.1551577
jdranking4	3.811594	3.492754	13.62575	12.75362
lawreview	.5942029	.5942029	.2446718	.2446718
scotus	.3333333	.3333333	.2254902	.2254902
fedapp	.2753623	.2753623	.2024723	.2024723
feddist	0	0	0	0
stateforeign	0	0	0	0
experience	24.94203	25.23188	173.4084	178.7984
exp2	793	812.8551	479550.2	522894.7
women	.0434783	.0434783	.0421995	.0421995
minority	0	0	0	0
wom*min	0	0	0	0

Covariate balance summary (NNM with CEM 1:1)

Raw Matched

Number of obs = 134 268

Treated obs = 67 134

Control obs = 67 134

Means Variances

Control Treated Control Treated

	Control	Treated	Control	Treated
jd	1	1	0	0
phd	.1641791	.1641791	.1393035	.1393035
jdranking4	3.820896	3.522388	13.66441	12.91995
lawreview	.5970149	.5970149	.2442334	.2442334
scotus	.3283582	.3283582	.2238806	.2238806
fedapp	.2835821	.2835821	.2062415	.2062415
feddist	0	0	0	0
stateforeign	0	0	0	0
experience	25	25.28358	171.7273	178.6002
exp2	794.1642	815.194	479607.3	526348.7
women	.0447761	.0447761	.0434193	.0434193
minority	0	0	0	0
wom*min	0	0	0	0

V. MODEL DETAILS

PUBLICATIONS PER YEAR--Treatment=Conservatives; Control=All Others

OLS Regression

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd, r
```

```
Linear regression                Number of obs   =    1,011
                                F(14, 996)      =    11.96
                                Prob > F            =    0.0000
                                R-squared           =    0.1418
                                Root MSE        =    1.0354
```

totalpubsy-r	Robust					
	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.5280449	.1430261	3.69	0.000	.2473779	.808712
lawreview	-.0590706	.0752834	-0.78	0.433	-.2068029	.0886616
jdranking4	-.0012016	.0021594	-0.56	0.578	-.0054391	.003036
scotus	.1596679	.1020747	1.56	0.118	-.0406382	.359974
fedapp	.1369678	.0936817	1.46	0.144	-.0468684	.320804
feddist	-.0659335	.1054696	-0.63	0.532	-.2729016	.1410346
stateforeign	-.2616109	.1339708	-1.95	0.051	-.5245083	.0012865
phd	.0319236	.0768673	0.42	0.678	-.1189168	.1827641
gender	-.2818652	.0734687	-3.84	0.000	-.4260363	-.1376941
minority	-.1287653	.1287267	-1.00	0.317	-.3813719	.1238413
femmin	-.1409122	.1636743	-0.86	0.389	-.4620983	.1802739
experience	-.0341186	.0105409	-3.24	0.001	-.0548035	-.0134338
exp2	.0001927	.0001967	0.98	0.328	-.0001933	.0005788
jd	.0449557	.1488335	0.30	0.763	-.2471075	.3370189
_cons	2.065649	.2200526	9.39	0.000	1.633829	2.497469

```
. test gender minority femmin
```

```
( 1)  gender = 0
( 2)  minority = 0
( 3)  femmin = 0
```

```
F( 3, 996) = 9.87
```

OLS Regression with Coarsened Exact Matching (CEM) Weights & Control Variables

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 2.5800e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression               Number of obs   =      258
                               F(10, 247)      =       4.70
                               Prob > F              =      0.0000
                               R-squared              =      0.1514
                               Root MSE          =      1.191
```

totalpubsyr	Robust					[95% Conf. Interval]	
	Coef.	Std. Err.	t	P> t			
cons	.6132605	.1917868	3.20	0.002	.2355144	.9910067	
lawreview	-.1063385	.2193723	-0.48	0.628	-.5384174	.3257404	
jdranking4	.0329288	.0320613	1.03	0.305	-.0302196	.0960772	
scotus	.2246726	.2806521	0.80	0.424	-.3281039	.7774492	
fedapp	.1131216	.3164092	0.36	0.721	-.5100826	.7363257	
feddist	0	(omitted)					
stateforeign	0	(omitted)					
phd	.1282223	.2252331	0.57	0.570	-.3154002	.5718448	
gender	-.4175557	.3033203	-1.38	0.170	-1.01498	.1798684	
minority	0	(omitted)					
femmin	0	(omitted)					
experience	.0453738	.0260421	1.74	0.083	-.0059192	.0966667	
exp2	-.0013137	.000508	-2.59	0.010	-.0023142	-.0003131	
jd	-.4673911	.4426857	-1.06	0.292	-1.339312	.4045292	
_cons	1.599059	.6353783	2.52	0.012	.3476087	2.85051	

OLS Regression with CEM Weights (1:1 match) & Control Variables

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.3800e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression                Number of obs   =      138
                                F(10, 127)      =       3.33
                                Prob > F             =      0.0007
                                R-squared            =      0.1835
                                Root MSE         =      1.1712
```

totalpubsyr	Robust		t	P> t	[95% Conf. Interval]	
	Coef.	Std. Err.				
cons	.7102863	.1972399	3.60	0.000	.3199842	1.100588
lawreview	.0778911	.3300238	0.24	0.814	-.5751664	.7309486
jdranking4	.0124677	.0306754	0.41	0.685	-.0482334	.0731689
scotus	.3151685	.3764368	0.84	0.404	-.4297319	1.060069
fedapp	.2098614	.4205158	0.50	0.619	-.6222634	1.041986
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	.0664514	.2832414	0.23	0.815	-.4940322	.626935
gender	-.5625637	.3604824	-1.56	0.121	-1.275893	.1507659
minority	0	(omitted)				
femmin	0	(omitted)				
experience	.030751	.0352127	0.87	0.384	-.0389285	.1004305
exp2	-.0009622	.0006355	-1.51	0.133	-.0022197	.0002954
jd	-.9510046	.7209467	-1.32	0.190	-2.377628	.4756188
_cons	2.022808	.943078	2.14	0.034	.1566267	3.888989

Nearest Neighbor Matching (1 match)--Average Treatment Effect (ATE)

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if ne
> wvar27==0 & newvar28==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar29) gen(stub29)
note: jd omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      977
Estimator      : nearest-neighbor matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Distance metric: Mahalanobis                  max =      3
```

totalpubsyr	AI Robust		z	P> z	[95% Conf. Interval]	
	Coef.	Std. Err.				
ATE						
cons	.5154376	.1883731	2.74	0.006	.1462331	.884642
(1 vs 0)						

Nearest Neighbor Matching (1 match) with CEM--ATE

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if ce
> m_matched==1 & newvar32==0 & newvar33==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar35) gen(stub35)
note: jd omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      250
Estimator      : nearest-neighbor matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Distance metric: Mahalanobis                  max =      3
```

totalpubsyr	AI Robust		z	P> z	[95% Conf. Interval]	
	Coef.	Std. Err.				
ATE						
cons	.772171	.2556247	3.02	0.003	.2711557	1.273186
(1 vs 0)						

Nearest Neighbor Matching (1 match) with CEM (1:1 match)--ATE

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if ne
> vvar27==0 & newvar28==0 & cem_matched==1 & newvar30==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar31) gen(stub31)
note: jd omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity

Treatment-effects estimation      Number of obs   =      134
Estimator      : nearest-neighbor matching      Matches: requested =      1
Outcome model  : matching                        min =      1
Distance metric: Mahalanobis                    max =      2
```

totalpubsy-r	AI Robust					
	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons						
(1 vs 0)	.8074469	.2243666	3.60	0.000	.3676965	1.247197

OLS Regression with Propensity Score Weighting

```
. reg totalpubsyear cons jd jdranking4 phd lawreview experience exp2 scotus fedapp feddist stateforeign gender minority femmin [aw=w2], r
(sum of wgt is 1.8957e+03)
note: stateforeign omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression      Number of obs   =      929
                      F(12, 916)             =      10.43
                      Prob > F                 =      0.0000
                      R-squared                =      0.1915
                      Root MSE              =      1.1038
```

totalpubsy-r	Robust					
	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.3807707	.1203633	3.16	0.002	.1445509	.6169906
jd	-.012163	.1536239	-0.08	0.937	-.3136587	.2893327
jdranking4	-.0014618	.0076605	-0.19	0.849	-.016496	.0135724
phd	.0648399	.1431226	0.45	0.651	-.2160465	.3457262
lawreview	-.0741306	.1406943	-0.53	0.598	-.3502513	.20199
experience	-.0267439	.0163632	-1.63	0.103	-.0588576	.0053699
exp2	-2.18e-06	.0003214	-0.01	0.995	-.0006329	.0006285
scotus	.3145618	.1785715	1.76	0.078	-.035895	.6650186
fedapp	.0661048	.1930017	0.34	0.732	-.3126721	.4448817
feddist	.047798	.2119609	0.23	0.822	-.3681874	.4637834
stateforeign	0	(omitted)				
gender	-.6431524	.1440939	-4.46	0.000	-.925945	-.3603598
minority	-.0066487	.2499011	-0.03	0.979	-.4970939	.4837965
femmin	0	(omitted)				
_cons	2.13525	.3176321	6.72	0.000	1.511879	2.758621

Propensity Score Matching (ATE with 1 match) Trimmed (PS ≤ .9 & ≥ .1)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if px2<=.9 & px2>=.1, vce
> (r) osample(newvar25) gen(stub25)
note: jd omitted because of collinearity
note: gender omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      492
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                        min =      1
Treatment model: logit                        max =      3
```

totalpubsy-r	AI Robust					
	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons						
(1 vs 0)	.8564363	.2817357	3.04	0.002	.3042445	1.408628

Propensity Score Matching with CEM (ATE with 1 match)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> osample(newvar26) gen(stub26)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      258
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                        max =      3
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons	.842894	.2226175	3.79	0.000	.4065718	1.279216
(1 vs 0)						

Propensity Score Matching with CEM (1:1 match) (ATE with 1 match)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> osample(newvar26) gen(stub26)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      138
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                        max =      2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons	.8315217	.1997725	4.16	0.000	.4399748	1.223069
(1 vs 0)						

PUBLICATIONS PER YEAR--Treatment=Conservatives; Control=Liberals

OLS Regression

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd, r
```

```
Linear regression          Number of obs   =       738
                          F(14, 723)         =       11.07
                          Prob > F           =       0.0000
                          R-squared          =       0.1460
                          Root MSE       =       1.0468
```

totalpubsyr	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.485281	.1472068	3.30	0.001	.1962772	.7742849
lawreview	-.2136848	.0871596	-2.45	0.014	-.3848008	-.0425687
jdranking4	-.0005829	.0023371	-0.25	0.803	-.0051713	.0040055
scotus	.2310635	.1187056	1.95	0.052	-.0019853	.4641123
fedapp	.1480285	.1106683	1.34	0.181	-.0692411	.365298
feddist	-.1670764	.1198845	-1.39	0.164	-.4024397	.0682869
stateforeign	-.4185841	.1371642	-3.05	0.002	-.6878718	-.1492965
phd	-.0569666	.0944581	-0.60	0.547	-.2424115	.1284782
gender	-.2321593	.0859126	-2.70	0.007	-.4008272	-.0634915
minority	-.0694859	.1678349	-0.41	0.679	-.3989878	.260016
femmin	-.2886982	.1982255	-1.46	0.146	-.6778645	.100468
experience	-.0248534	.0119995	-2.07	0.039	-.0484115	-.0012954
exp2	.0000413	.0002242	0.18	0.854	-.0003989	.0004815
jd	-.0659792	.1848596	-0.36	0.721	-.4289049	.2969464
_cons	2.190529	.2832383	7.73	0.000	1.634462	2.746597

```
. test gender minority femmin
```

```
( 1)  gender = 0
( 2)  minority = 0
( 3)  femmin = 0

F( 3, 723) = 7.81
Prob > F = 0.0000
```

OLS Regression with Coarsened Exact Matching (CEM) Weights & Control Variables

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.7700e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression          Number of obs   =       177
                          F(10, 166)         =       3.25
                          Prob > F           =       0.0007
                          R-squared          =       0.1237
                          Root MSE       =       1.2511
```

totalpubsyr	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.5255811	.2174652	2.42	0.017	.096227	.9549352
lawreview	-.0535996	.2540288	-0.21	0.833	-.5551433	.4479442
jdranking4	.0702229	.0504597	1.39	0.166	-.0294027	.1698484
scotus	.1920269	.3299818	0.58	0.561	-.4594751	.843529
fedapp	.3127771	.3648625	0.86	0.393	-.4075921	1.033146
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	.3392595	.2875668	1.18	0.240	-.2285002	.9070191
gender	-.5826166	.2940284	-1.98	0.049	-1.163134	-.0020993
minority	0	(omitted)				
femmin	0	(omitted)				
experience	.0185795	.0382048	0.49	0.627	-.0568505	.0940095
exp2	-.0006784	.0007872	-0.86	0.390	-.0022326	.0008759
jd	-.5964158	.4631255	-1.29	0.200	-1.510791	.3179597
_cons	1.787059	.7022054	2.54	0.012	.400654	3.173464

OLS Regression with CEM Weights (1:1 match) & Control Variables

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.1800e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression           Number of obs   =       118
                          F(10, 107)         =         2.66
                          Prob > F           =         0.0062
                          R-squared          =         0.1365
                          Root MSE       =         1.2564
```

totalpubsy-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.6138463	.2279115	2.69	0.008	.1620384	1.065654
lawreview	.1224862	.3239292	0.38	0.706	-.5196656	.764638
jdranking4	.0314225	.0297944	1.05	0.294	-.0276415	.0904865
scotus	.236084	.3850545	0.61	0.541	-.5272417	.9994097
fedapp	.3129807	.4170395	0.75	0.455	-.5137515	1.139713
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	.3837084	.347681	1.10	0.272	-.3055286	1.072945
gender	-.7995392	.3577497	-2.23	0.028	-1.508736	-.0903423
minority	0	(omitted)				
femmin	0	(omitted)				
experience	.0065358	.0479951	0.14	0.892	-.0886088	.1016804
exp2	-.0003462	.0009593	-0.36	0.719	-.0022479	.0015556
jd	-.605771	.7054673	-0.86	0.392	-2.004278	.7927356
_cons	1.771633	.9832691	1.80	0.074	-.177583	3.72085

Nearest Neighbor Matching (1 match)--Average Treatment Effect (ATE)

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if ne
> vvar4==0 & newvar5==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar6)
note: jd omitted because of collinearity
```

```
Treatment-effects estimation           Number of obs   =       714
Estimator       : nearest-neighbor matching   Matches: requested =         1
Outcome model   : matching                   min =         1
Distance metric: Mahalanobis                 max =         2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE cons (1 vs 0)	.503955	.1993824	2.53	0.011	.1131727	.8947373

Nearest Neighbor Matching (1 match) with CEM--ATE

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if ce
> m_matched==1 & newvar22==0 & newvar23==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar24)
note: jd omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
```

```
Treatment-effects estimation           Number of obs   =       171
Estimator       : nearest-neighbor matching   Matches: requested =         1
Outcome model   : matching                   min =         1
Distance metric: Mahalanobis                 max =         2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE cons (1 vs 0)	.7504216	.2631693	2.85	0.004	.2346192	1.266224

Nearest Neighbor Matching (1 match) with CEM (1:1 match)--ATE

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority scotus fedapp feddist stateforeign) (cons) if ce
> m_matched==1 & newvar==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar2) gen(stub2)
note: jd omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      114
Estimator      : nearest-neighbor matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Distance metric: Mahalanobis                  max =      2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons (1 vs 0)	.6640479	.2691304	2.47	0.014	.1365621	1.191534

OLS Regression with Propensity Score Weighting

Propensity Score Matching (ATE with 1 match) Trimmed ($PS \leq .9$ & $\geq .1$)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if px<=.9 & px>=.1, vce(r)
> osample(newvar16) gen(stub16)
note: jd omitted because of collinearity
note: gender omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      479
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                    max =      2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons (1 vs 0)	.4511482	.2045766	2.21	0.027	.0501854	.852111

Propensity Score Matching with CEM (ATE with 1 match)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> osample(newvar20) gen(stub20)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      177
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                    max =      2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons (1 vs 0)	.5646893	.2774686	2.04	0.042	.0208607	1.108518

Propensity Score Matching with CEM (1:1 match) (ATE with 1 match)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> osample(newvar17)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      118
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                    max =      2
```

totalpubsy-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons (1 vs 0)	.663983	.2758228	2.41	0.016	.1233802	1.204586

PUBLICATIONS PER YEAR--Treatment=Conservatives; Control=Unknowns

OLS Regression

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd, r
```

```
Linear regression          Number of obs   =       374
                          F(14, 359)         =         6.78
                          Prob > F           =       0.0000
                          R-squared          =       0.2149
                          Root MSE       =       1.0973
```

totalpubsy-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.6554005	.1583552	4.14	0.000	.3439802	.9668208
lawreview	.2856409	.1455221	1.96	0.050	-.0005419	.5718237
jdranking4	-.0042141	.006285	-0.67	0.503	-.0165742	.0081461
scotus	-.0015241	.1931593	-0.01	0.994	-.38139	.3783417
fedapp	.0100566	.1820579	0.06	0.956	-.3479773	.3680906
feddist	.1648241	.1960667	0.84	0.401	-.2207595	.5504076
stateforeign	.0080126	.2520091	0.03	0.975	-.4875869	.5036122
phd	.2036214	.1252514	1.63	0.105	-.0426973	.4499401
gender	-.4270922	.1307217	-3.27	0.001	-.6841686	-.1700157
minority	-.159466	.1953832	-0.82	0.415	-.5437054	.2247733
femmin	.1165651	.303419	0.38	0.701	-.4801368	.713267
experience	-.0384349	.0184858	-2.08	0.038	-.0747889	-.0020809
exp2	.0001342	.0003512	0.38	0.702	-.0005563	.0008248
jd	.329866	.1892829	1.74	0.082	-.0423766	.7021086
_cons	1.664922	.2965029	5.62	0.000	1.081821	2.248023

```
. test gender minority femmin
```

```
( 1)  gender = 0
( 2)  minority = 0
( 3)  femmin = 0

F( 3, 359) = 3.97
Prob > F = 0.0084
```

OLS Regression with Coarsened Exact Matching (CEM) Weights & Control Variables

```
. reg totalpubsyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.0400e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: gender omitted because of collinearity
note: femmin omitted because of collinearity
note: jd omitted because of collinearity
```

```
Linear regression          Number of obs   =       104
                          F(9, 94)         =         5.08
                          Prob > F           =       0.0000
                          R-squared          =       0.2897
                          Root MSE       =       .9797
```

totalpubsy-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.7039759	.2048868	3.44	0.001	.2971683	1.110784
lawreview	-.0187925	.2383207	-0.08	0.937	-.4919839	.4543989
jdranking4	.0227982	.0277045	0.82	0.413	-.0322097	.0778061
scotus	.2680314	.2708232	0.99	0.325	-.2696944	.8057573
fedapp	-.2804225	.311725	-0.90	0.371	-.8993598	.3385147
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	.1123977	.2514045	0.45	0.656	-.386772	.6115673
gender	0	(omitted)				
minority	1.166029	.8377241	1.39	0.167	-.4972918	2.82935
femmin	0	(omitted)				
experience	.0553	.033241	1.66	0.100	-.0107008	.1213008
exp2	-.0015511	.0005759	-2.69	0.008	-.0026946	-.0004077
jd	0	(omitted)				
_cons	.8367931	.518925	1.61	0.110	-.1935446	1.867131

Nearest Neighbor Matching (1 match) with CEM (1:1 match)—ATE

```
. teffects nnmatch (totalpubsyear jd jdranking4 phd lawreview experience exp2 gender minority
femmin scotus fedapp feddist stateforeign) (cons) if newvar23==0 & newvar24==0 &
cem_matched==1 & newvar27==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r)
osample(newvar28)
```

note: jd omitted because of collinearity

note: femmin omitted because of collinearity

note: feddist omitted because of collinearity

note: stateforeign omitted because of collinearity

```
Treatment-effects estimation      Number of obs   =      82
Estimator   : nearest-neighbor matching  Matches: requested =      1
Outcome model : matching                min =      1
Distance metric: Mahalanobis           max =      2
```

```
-----
|               AI Robust
totalpubsy~r |   Coef.  Std. Err.   z  P>|z|  [95% Conf. Interval]
-----+-----
ATE          |
   cons     |
(1 vs 0)    |  .7993361  .3063611   2.61  0.009   .1988794   1.399793
-----
```

OLS Regression with Propensity Score Weighting

```
. reg totalpubsyear cons jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign [aw=w], r
(sum of wgt is 6.8941e+02)
note: femmin omitted because of collinearity
note: stateforeign omitted because of collinearity
```

```
Linear regression          Number of obs   =       348
                          F(12, 335)       =        7.85
                          Prob > F         =       0.0000
                          R-squared        =       0.2405
                          Root MSE     =       1.1081
```

totalpubsy-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	.5743408	.1395623	4.12	0.000	.299812	.8488696
jd	.1607665	.2182389	0.74	0.462	-.2685248	.5900578
jdranking4	.0042051	.0110741	0.38	0.704	-.0175785	.0259887
phd	.1738709	.1621086	1.07	0.284	-.1450082	.4927499
lawreview	.069528	.1768014	0.39	0.694	-.2782528	.4173088
experience	-.038111	.0203637	-1.87	0.062	-.0781678	.0019457
exp2	.0001067	.0003934	0.27	0.786	-.000667	.0008805
gender	-.6366284	.1419482	-4.48	0.000	-.9158505	-.3574064
minority	-.045136	.2602681	-0.17	0.862	-.5571018	.4668298
femmin	0	(omitted)				
scotus	.1694456	.2292129	0.74	0.460	-.2814325	.6203236
fedapp	.0257589	.2274048	0.11	0.910	-.4215623	.4730801
feddist	.1229938	.3085612	0.40	0.690	-.483968	.7299555
stateforeign	0	(omitted)				
_cons	1.88635	.3682525	5.12	0.000	1.161971	2.610728

Propensity Score Matching (ATE with 1 match) Trimmed (PS ≤ .9 & ≥ .1)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview minority scotus fedapp
feddist experience exp2) if px<=.9 & px>=.1, vce(r) osample(newvar18) gen(stub18)
```

```
Treatment-effects estimation          Number of obs   =       278
```

```
Estimator      : propensity-score matching  Matches: requested =       1
```

```
Outcome model  : matching                  min =       1
```

```
Treatment model: logit                    max =       2
```

```
-----
```

	AI Robust					
totalpubsy~r	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
-----+						
ATE						
cons						
(1 vs 0)	.4902878	.1766461	2.78	0.006	.1440678	.8365077

```
-----
```

Propensity Score Matching with CEM (ATE with 1 match)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview minority scotus fedapp  
feddist experience exp2) if cem_matched==1, vce(r) osample(newvar35) gen(stub35)
```

note: jd omitted because of collinearity

note: feddist omitted because of collinearity

```
Treatment-effects estimation      Number of obs   =    104  
Estimator   : propensity-score matching  Matches: requested =    1  
Outcome model : matching                min =    1  
Treatment model: logit                  max =    2
```

```
-----  
      |      AI Robust  
totalpubsy~r |   Coef.  Std. Err.   z  P>|z|  [95% Conf. Interval]  
-----+-----  
ATE      |  
      cons |  
(1 vs 0) |  .5990384  .2443186   2.45  0.014   .1201827  1.077894  
-----
```

Propensity Score Matching with CEM (1:1 match) (ATE with 1 match)

```
. teffects psmatch (totalpubsyear) (cons jd phd jdranking4 lawreview minority scotus fedapp  
feddist experience exp2) if cem_matched==1, vce(r) osample(newvar21) gen(stub21)
```

note: jd omitted because of collinearity

note: feddist omitted because of collinearity

```
Treatment-effects estimation      Number of obs   =    84  
Estimator   : propensity-score matching  Matches: requested =    1  
Outcome model : matching                min =    1  
Treatment model: logit                  max =    1
```

	AI Robust					
totalpubsy~r	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
-----+-----						
ATE						
cons						
(1 vs 0)	.6059524	.2622695	2.31	0.021	.0919137	1.119991

CITATIONS PER YEAR--Treatment=Conservatives; Control=All Others

OLS Regression

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd, r
```

Linear regression

Number of obs	=	1,011
F(14, 996)	=	5.80
Prob > F	=	0.0000
R-squared	=	0.0867
Root MSE	=	36.689

totalcites-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]
cons	18.47975	5.038579	3.67	0.000	8.592298 28.3672
lawreview	.535387	2.702018	0.20	0.843	-4.766914 5.837688
jdranking4	-.2100534	.0813675	-2.58	0.010	-.3697249 -.050382
scotus	13.27964	4.021251	3.30	0.001	5.388542 21.17073
fedapp	6.548833	3.190393	2.05	0.040	.2881706 12.8095
feddist	1.148117	4.515832	0.25	0.799	-7.713519 10.00975
stateforeign	-3.42963	4.5273	-0.76	0.449	-12.31377 5.45451
phd	1.121851	2.426403	0.46	0.644	-3.639599 5.8833
gender	-4.896749	2.677467	-1.83	0.068	-10.15087 .3573748
minority	-1.443637	4.103277	-0.35	0.725	-9.495696 6.608423
femmin	-3.890142	5.711179	-0.68	0.496	-15.09747 7.317183
experience	1.668882	.3242377	5.15	0.000	1.032615 2.30515
exp2	-.0301438	.0066559	-4.53	0.000	-.0432051 -.0170826
jd	.7998809	8.578915	0.09	0.926	-16.03494 17.6347
_cons	20.02391	9.463603	2.12	0.035	1.453019 38.5948

OLS Regression with Coarsened Exact Matching (CEM) Weights & Control Variables

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights], (sum of wgt is 2.5800e+02)
```

note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity

Linear regression

Number of obs	=	258
F(10, 247)	=	5.37
Prob > F	=	0.0000
R-squared	=	0.1942
Root MSE	=	38.837

totalcites-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]
cons	31.92196	6.50613	4.91	0.000	19.10739 44.73653
lawreview	1.82671	7.130295	0.26	0.798	-12.21722 15.87064
jdranking4	-.1456945	.8497119	-0.17	0.864	-1.8193 1.527911
scotus	15.2613	8.555667	1.78	0.076	-1.590072 32.11266
fedapp	6.151193	9.417137	0.65	0.514	-12.39694 24.69932
feddist	0	(omitted)			
stateforeign	0	(omitted)			
phd	8.864457	6.458846	1.37	0.171	-3.856981 21.5859
gender	-13.62047	9.587765	-1.42	0.157	-32.50467 5.263734
minority	0	(omitted)			
femmin	0	(omitted)			
experience	2.874883	.7337577	3.92	0.000	1.429663 4.320103
exp2	-.0542733	.0142186	-3.82	0.000	-.0822785 -.0262681
jd	-33.81901	22.51423	-1.50	0.134	-78.16338 10.52535
_cons	33.77307	25.5407	1.32	0.187	-16.53227 84.07841

OLS Regression with CEM Weights (1:1 match) & Control Variables

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.3800e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression           Number of obs   =       138
                          F(10, 127)         =       18.02
                          Prob > F           =       0.0000
                          R-squared          =       0.2660
                          Root MSE       =       40.421
```

totalcites-r	Robust		t	P> t	[95% Conf. Interval]	
	Coef.	Std. Err.				
cons	31.94789	6.838667	4.67	0.000	18.4154	45.48038
lawreview	8.482087	11.3008	0.75	0.454	-13.88016	30.84434
jdranking4	-.6050388	1.029121	-0.59	0.558	-2.641484	1.431407
scotus	15.15281	12.7968	1.18	0.239	-10.16974	40.47537
fedapp	4.66773	14.0484	0.33	0.740	-23.13152	32.46698
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	1.211327	8.038243	0.15	0.880	-14.69491	17.11756
gender	-26.64013	12.94657	-2.06	0.042	-52.25905	-1.021206
minority	0	(omitted)				
femmin	0	(omitted)				
experience	3.361836	1.057163	3.18	0.002	1.269902	5.453771
exp2	-.061368	.0192682	-3.18	0.002	-.0994963	-.0232396
jd	-77.17153	10.27564	-7.51	0.000	-97.50516	-56.83789
_cons	70.83478	19.96357	3.55	0.001	31.33048	110.3391

Nearest Neighbor Matching (1 match) with CEM—ATE

```
. teffects nnmatch (totalcitesyear gender minority femmin experience exp2 lawreview phd jd jdranking4 scotus fedapp feddist stateforeign) (cons) if n
> ewvar==0 & newvar2==0 & newvar9==0 & cem_matched==1, e(phd jd scotus) biasadj(gender minority femmin experience exp2 lawreview jd phd jdranking4 sc
> otus fedapp feddist stateforeign) osample(newvar10)
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
note: jd omitted because of collinearity
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: biasadj() variables minority femmin jd feddist stateforeign have been dropped due to collinearity with other variables at treatment level 0
```

```
Treatment-effects estimation           Number of obs   =       134
Estimator       : nearest-neighbor matching   Matches: requested =       1
Outcome model   : matching                   min =       1
Distance metric : Mahalanobis                max =       2
```

totalcites-r	AI Robust		z	P> z	[95% Conf. Interval]	
	Coef.	Std. Err.				
ATE						
cons (1 vs 0)	37.08744	8.006421	4.63	0.000	21.39514	52.77974

OLS Regression with Propensity Score Weighting

```
. reg totalcitesyear cons jd jdranking4 phd lawreview experience exp2 scotus fedapp feddist stateforeign gender minority femmin [aw=w2], r
(sum of wgt is 1.8957e+03)
note: stateforeign omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression      Number of obs   =      929
                      F(12, 916)         =      3.81
                      Prob > F          =     0.0000
                      R-squared         =     0.1341
                      Root MSE       =     40.301
```

totalcites-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	15.8697	5.417716	2.93	0.003	5.237123	26.50228
jd	-41.62649	25.14124	-1.66	0.098	-90.96761	7.714628
jdranking4	-.6430562	.2062369	-3.12	0.002	-1.047808	-.2383045
phd	1.260251	4.823783	0.26	0.794	-8.206699	10.7272
lawreview	7.470057	7.121354	1.05	0.294	-6.506007	21.44612
experience	1.331189	.6316579	2.11	0.035	.0915243	2.570854
exp2	-.0202421	.0136603	-1.48	0.139	-.0470513	.0065671
scotus	12.5709	6.9848	1.80	0.072	-1.137169	26.27897
fedapp	.1132542	7.156331	0.02	0.987	-13.93145	14.15796
feddist	.3746915	7.209043	0.05	0.959	-13.77347	14.52285
stateforeign	0	(omitted)				
gender	-11.28637	9.50916	-1.19	0.236	-29.94864	7.375903
minority	-3.023621	7.763431	-0.39	0.697	-18.2598	12.21256
femmin	0	(omitted)				
_cons	63.64085	25.43698	2.50	0.013	13.71932	113.5624

Propensity Score Matching (ATE with 1 match) Trimmed (PS ≤ .9 & ≥ .1)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if px <=.9 & px >=.1, vc
> e(r) osample(newvar20) gen(stub20)
note: jd omitted because of collinearity
note: gender omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      492
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                        max =      3
```

totalcites-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons (1 vs 0)	32.39854	9.667051	3.35	0.001	13.45147	51.34562

Propensity Score Matching with CEM (ATE with 1 match)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> ) osample(newvar) gen(stubl)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs   =      258
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                        max =      3
```

totalcites-r	Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE						
cons (1 vs 0)	32.47416	7.645167	4.25	0.000	17.48991	47.45841

Propensity Score Matching with CEM (1:1 match) (ATE with 1 match)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> ) osample(newvar16) gen(stub16)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      138
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                      max =      2
```

totalcites-r	AI Robust		z	P> z	[95% Conf. Interval]	
	Coef.	Std. Err.				
ATE						
cons	36.42065	8.326479	4.37	0.000	20.10105	52.74025
(1 vs 0)						

CITATIONS PER YEAR--Treatment=Conservatives; Control=Liberals

OLS Regression with Coarsened Exact Matching (CEM) Weights & Control Variables

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.7700e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression      Number of obs   =      177
                      F(10, 166)      =      3.49
                      Prob > F      =      0.0003
                      R-squared     =      0.1577
                      Root MSE    =      41.127
```

totalcites-r	Robust		t	P> t	[95% Conf. Interval]	
	Coef.	Std. Err.				
cons	24.52232	7.385967	3.32	0.001	9.939783	39.10486
lawreview	-4.103112	8.567546	-0.48	0.633	-21.01851	12.81229
jdranking4	1.010462	1.313374	0.77	0.443	-1.582608	3.603532
scotus	19.89218	11.69026	1.70	0.091	-3.188567	42.97293
fedapp	15.85542	11.9817	1.32	0.188	-7.800741	39.51159
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	-.0335854	7.768144	-0.00	0.997	-15.37068	15.30351
gender	-18.32068	11.256	-1.63	0.105	-40.54406	3.902701
minority	0	(omitted)				
femmin	0	(omitted)				
experience	2.972688	1.158245	2.57	0.011	.6858979	5.259477
exp2	-.0483751	.0245535	-1.97	0.050	-.0968526	.0001023
jd	-53.95946	20.38708	-2.65	0.009	-94.21084	-13.70808
_cons	50.6056	25.58059	1.98	0.050	.1003599	101.1108

OLS Regression with CEM Weights (1:1 match) & Control Variables

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.1800e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
```

```
Linear regression      Number of obs   =      118
                      F(10, 107)    =      1.97
                      Prob > F      =      0.0440
                      R-squared     =      0.1084
                      Root MSE    =      47.847
```

totalcites-r	Robust		t	P> t	[95% Conf. Interval]	
	Coef.	Std. Err.				
cons	17.86968	8.734671	2.05	0.043	.5542175	35.18515
lawreview	-5.967575	12.05949	-0.49	0.622	-29.8741	17.93895
jdranking4	.5956171	2.018421	0.30	0.768	-3.405668	4.596902
scotus	15.03354	15.5252	0.97	0.335	-15.74336	45.81044
fedapp	11.58017	15.64152	0.74	0.461	-19.42733	42.58766
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	-.9506043	9.687924	-0.10	0.922	-20.15578	18.25457
gender	-21.80015	14.79793	-1.47	0.144	-51.13532	7.535015
minority	0	(omitted)				
femmin	0	(omitted)				
experience	3.944976	1.606645	2.46	0.016	.7599909	7.129962
exp2	-.0672598	.034368	-1.96	0.053	-.1353904	.0008707
jd	-33.19793	38.84712	-0.85	0.395	-110.2078	43.81195
_cons	32.3301	43.62245	0.74	0.460	-54.14632	118.8065

Nearest Neighbor Matching (1 match)--Average Treatment Effect (ATE)

```
. teffects nnmatch (totalcitesyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if n
> ewvar4==0 & newvar5==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar7)
note: jd omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      714
Estimator      : nearest-neighbor matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Distance metric: Mahalanobis                  max =      2
```

totalcites-r		Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE							
	cons (1 vs 0)	13.58673	6.453263	2.11	0.035	.9385633	26.23489

Nearest Neighbor Matching (1 match) with CEM--ATE

```
. teffects nnmatch (totalcitesyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if c
> em_matched==1 & newvar22==0 & newvar23==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar25)
note: jd omitted because of collinearity
note: minority omitted because of collinearity
note: femmin omitted because of collinearity
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      171
Estimator      : nearest-neighbor matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Distance metric: Mahalanobis                  max =      2
```

totalcites-r		Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE							
	cons (1 vs 0)	28.7997	9.239662	3.12	0.002	10.69029	46.9091

Propensity Score Matching (ATE with 1 match) Trimmed (PS ≤ .9 & ≥ .1)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if px<=.9 & px>=.1, vce(
> r) osample(newvar17) gen(stub17)
note: jd omitted because of collinearity
note: gender omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      479
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                      max =      2
```

totalcites-r		Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE							
	cons (1 vs 0)	13.63319	6.694334	2.04	0.042	.5125406	26.75385

Propensity Score Matching with CEM (ATE with 1 match)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r
> ) osample(newvar21) gen(stub21)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      177
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                      max =      2
```

totalcites-r		Coef.	AI Robust Std. Err.	z	P> z	[95% Conf. Interval]	
ATE							
	cons (1 vs 0)	30.24181	9.220817	3.28	0.001	12.16934	48.31428

Propensity Score Matching with CEM (1:1 match) (ATE with 1 match)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview gender minority scotus fedapp feddist experience exp2) if cem_matched==1, vce(r)
> ) osample(newvar16)
note: minority omitted because of collinearity
note: feddist omitted because of collinearity
```

```
Treatment-effects estimation      Number of obs      =      118
Estimator      : propensity-score matching      Matches: requested =      1
Outcome model  : matching                      min =      1
Treatment model: logit                       max =      2
```

totalcites-r	AI Robust				
	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]
ATE					
cons					
(1 vs 0)	22.48136	7.405489	3.04	0.002	7.966863 36.99585

CITATIONS PER YEAR--Treatment=Conservatives; Control=Unknowns

OLS Regression

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd, r
```

```
Linear regression                Number of obs   =       374
                                F(14, 359)    =         4.32
                                Prob > F          =       0.0000
                                R-squared         =       0.1613
                                Root MSE      =       35.832
```

totalcites-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	23.31356	5.379699	4.33	0.000	12.73388	33.89324
lawreview	7.783852	4.591398	1.70	0.091	-1.245564	16.81327
jdranking4	-.5740957	.1538884	-3.73	0.000	-.8767318	-.2714596
scotus	4.605234	6.131597	0.75	0.453	-7.453127	16.66359
fedapp	-.9582185	5.369311	-0.18	0.858	-11.51747	9.601036
feddist	13.31047	10.23829	1.30	0.194	-6.824087	33.44503
stateforeign	-2.817302	5.451764	-0.52	0.606	-13.53871	7.904104
phd	1.705914	3.717964	0.46	0.647	-5.605812	9.01764
gender	-5.18904	4.257989	-1.22	0.224	-13.56277	3.184695
minority	-4.203016	5.431346	-0.77	0.440	-14.88427	6.478237
femmin	-3.631108	8.211285	-0.44	0.659	-19.77937	12.51715
experience	1.293989	.5097337	2.54	0.012	.2915495	2.296428
exp2	-.0256665	.0100276	-2.56	0.011	-.0453867	-.0059463
jd	8.956822	11.94025	0.75	0.454	-14.5248	32.43845
_cons	14.71142	12.83304	1.15	0.252	-10.52596	39.9488

```
. test gender minority femmin
```

```
( 1)  gender = 0
( 2)  minority = 0
( 3)  femmin = 0

F( 3, 359) = 1.58
Prob > F = 0.1947
```

OLS Regression with Coarsened Exact Matching (CEM) Weights & Control Variables

```
. reg totalcitesyear cons lawreview jdranking4 scotus fedapp feddist stateforeign phd gender minority femmin experience exp2 jd [iweight=cem_weights],
(sum of wgt is 1.0400e+02)
note: feddist omitted because of collinearity
note: stateforeign omitted because of collinearity
note: gender omitted because of collinearity
note: femmin omitted because of collinearity
note: jd omitted because of collinearity
```

```
Linear regression                Number of obs   =       104
                                F(9, 94)         =         5.04
                                Prob > F          =       0.0000
                                R-squared         =       0.3104
                                Root MSE      =       35.757
```

totalcites-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	31.94317	7.327184	4.36	0.000	17.39487	46.49146
lawreview	-4.866833	8.510336	-0.57	0.569	-21.7643	12.03064
jdranking4	-.4013844	1.029646	-0.39	0.698	-2.445771	1.643002
scotus	28.12879	9.128927	3.08	0.003	10.00309	46.25449
fedapp	-.0649842	9.505341	-0.01	0.995	-18.93806	18.80809
feddist	0	(omitted)				
stateforeign	0	(omitted)				
phd	14.08073	10.87981	1.29	0.199	-7.521385	35.68284
gender	0	(omitted)				
minority	23.73682	29.84652	0.80	0.428	-35.52416	82.99779
femmin	0	(omitted)				
experience	3.035759	.9570629	3.17	0.002	1.135488	4.93603
exp2	-.0570893	.017475	-3.27	0.002	-.0917863	-.0223922
jd	0	(omitted)				
_cons	-6.872108	13.1349	-0.52	0.602	-32.95176	19.20754

Nearest Neighbor Matching (1 match) with CEM—ATE

. teffects nnmatch (totalcitesyear jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign) (cons) if cem_matched==1 & newvar31==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r) osample(newvar33)

note: jd omitted because of collinearity

note: gender omitted because of collinearity

note: femmin omitted because of collinearity

note: feddist omitted because of collinearity

note: stateforeign omitted because of collinearity

Treatment-effects estimation Number of obs = 102

Estimator : nearest-neighbor matching Matches: requested = 1

Outcome model : matching min = 1

Distance metric: Mahalanobis max = 2

	AI Robust					
totalcites~r	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
-----+-----						
ATE						
cons						
(1 vs 0)	28.81333	7.519	3.83	0.000	14.07636	43.5503

Nearest Neighbor Matching (1 match) with CEM (1:1 match)—ATE

```
. teffects nnmatch (totalcitesyear jd jdranking4 phd lawreview experience exp2 gender minority
femmin scotus fedapp feddist stateforeign) (cons) if newvar23==0 & newvar24==0 &
cem_matched==1 & newvar27==0, e(jd phd scotus) biasadj(jdranking4 experience exp2) vce(r)
osample(newvar29)
```

note: jd omitted because of collinearity

note: femmin omitted because of collinearity

note: feddist omitted because of collinearity

note: stateforeign omitted because of collinearity

```
Treatment-effects estimation      Number of obs   =      82
Estimator   : nearest-neighbor matching  Matches: requested =      1
Outcome model : matching                min =      1
Distance metric: Mahalanobis           max =      2
```

```
-----
|               AI Robust
totalcites~r |   Coef.  Std. Err.   z  P>|z|   [95% Conf. Interval]
-----+-----
ATE         |
   cons |
(1 vs 0) | 24.51945  10.76768   2.28  0.023   3.415188   45.6237
-----
```

OLS Regression with Propensity Score Weighting

```
. reg totalcitesyear cons jd jdranking4 phd lawreview experience exp2 gender minority femmin scotus fedapp feddist stateforeign [aw=w], r
(sum of wgt is 6.8941e+02)
note: femmin omitted because of collinearity
note: stateforeign omitted because of collinearity
```

```
Linear regression          Number of obs   =      348
                          F(12, 335)       =      3.21
                          Prob > F         =     0.0002
                          R-squared        =     0.1432
                          Root MSE     =     37.378
```

totalcites-r	Coef.	Robust Std. Err.	t	P> t	[95% Conf. Interval]	
cons	20.65172	5.200269	3.97	0.000	10.42242	30.88101
jd	-29.19318	29.72471	-0.98	0.327	-87.66378	29.27742
jdranking4	-.6702216	.213869	-3.13	0.002	-1.090917	-.2495261
phd	1.696259	4.96009	0.34	0.733	-8.060589	11.45311
lawreview	7.914574	6.277531	1.26	0.208	-4.433773	20.26292
experience	1.174337	.6262911	1.88	0.062	-.0576221	2.406296
exp2	-.0211441	.0129738	-1.63	0.104	-.0466644	.0043763
gender	-7.951107	9.199917	-0.86	0.388	-26.04799	10.14578
minority	-3.691401	7.486731	-0.49	0.622	-18.41833	11.03553
femmin	0	(omitted)				
scotus	6.179187	7.271736	0.85	0.396	-8.12483	20.4832
fedapp	-1.808852	7.016537	-0.26	0.797	-15.61088	11.99317
feddist	5.408863	11.94447	0.45	0.651	-18.08675	28.90448
stateforeign	0	(omitted)				
_cons	51.32579	29.54177	1.74	0.083	-6.784956	109.4365

Propensity Score Matching (ATE with 1 match) Trimmed ($PS \leq .9$ & $\geq .1$)

```
. teffects psmatch (totalcitesyear) (cons jd phd jdranking4 lawreview minority scotus fedapp
feddist experience exp2) if px<=.9 & px>=.1, vce(r) osample(newvar20) gen(stub20)
```

```
Treatment-effects estimation      Number of obs   =      278
```

```
Estimator      : propensity-score matching      Matches: requested =      1
```

```
Outcome model  : matching                      min =      1
```

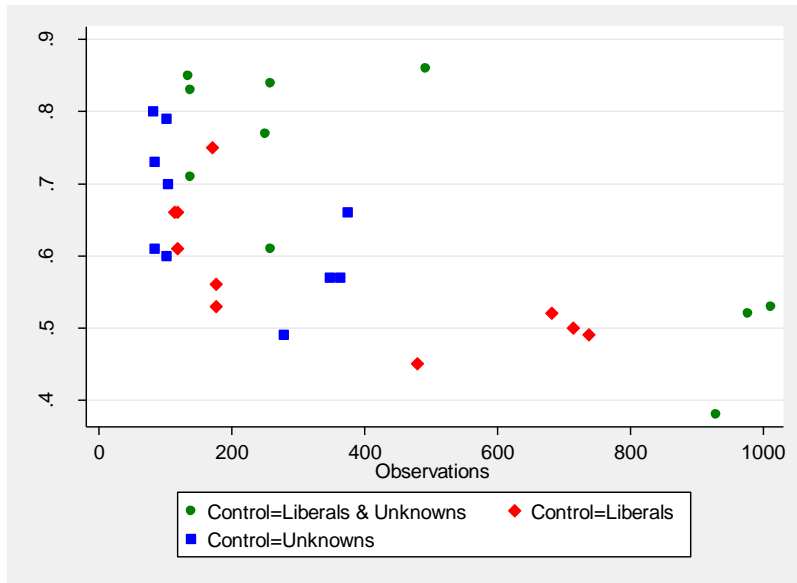
```
Treatment model: logit                      max =      2
```

```
-----
|              AI Robust
totalcites~r |  Coef.  Std. Err.   z  P>|z|  [95% Conf. Interval]
-----+-----
ATE          |
cons        |
(1 vs 0)    | 18.26187  6.175599   2.96  0.003   6.157918  30.36582
-----
```

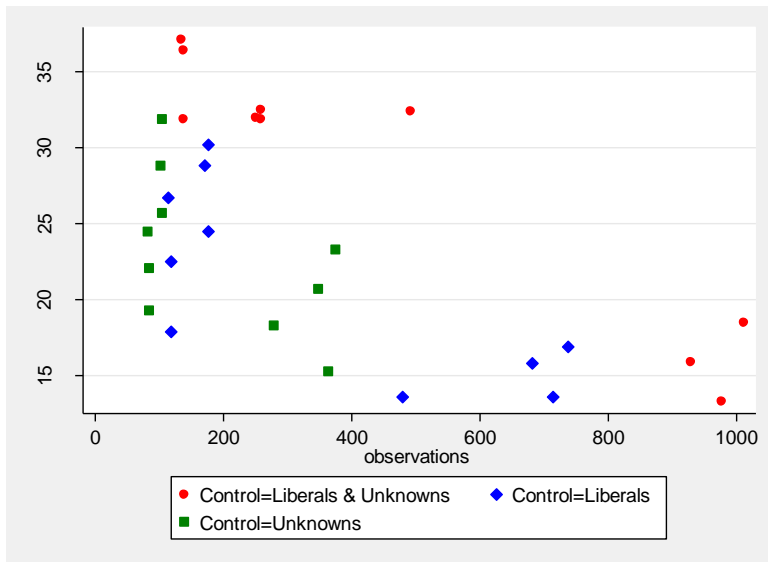
	AI Robust					
totalcites~r	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
<hr/>						
ATE						
cons						
(1 vs 0)	19.28333	7.906011	2.44	0.015	3.787837	34.77883

VI. TREATMENT EFFECT DIFFERENCES BASED ON CONTROL GROUP

Annual Publication Rates



Annual Citation Rates



APPENDIX II

Coding Guide

First you have to determine whether to code the article. If it only in passing deals with religion and American civil law, if it a foreign law journal, or if it is dealing with religion but not the civil law (such as religious law), then we don't code it.

Spreadsheet Categories:

A. Citation: give the citation of the article (no author or title info); e.g., 123 Yale L. J. 456 (2010)

B. Year: year article was published

C. Article Type: list whether it was an article, comment, note, essay, book review, case note, lecture, etc.

D. Publishing School: which school published the journal the article was published in

E. Author Title: professor (of law), visiting (assistant/associate) professor (of law), student, lawyer, judge, law clerk, adjunct faculty, clinical faculty, a professor of some other field (other professor), or some other type of professional or non-academic author

F. Author School: the school the author is affiliated with (if there is one)

G. Journal Ranking: go to <http://lawlib.wlu.edu/LJ/>

Find the appropriate year, click on "Combined Score" and then "Submit"

Record ranking of the journal

H. Subject: the area of the civil law that the article implicates (e.g., tax, bankruptcy, voting rights, reproductive rights, etc.)

I. Religion: list the particular faith(s) the article focuses on, if it does (e.g., Christianity, Islam, Native American, etc.), including specific denominations (LDS, Jehovah Witnesses, etc.)

J. Free Exercise: put a "yes" if the article deals with the free exercise of religion/religious liberty/religious freedom

K. Establishment: put a "yes" if the article deals with the establishment of religion/separation of church and state

L. Treatment

Positive: put "positive" if the article is primarily portraying or treating religion as something positive, something that brings benefits, something that should be protected or strengthened

Mixed: put "mixed" if the article roughly equally portrays religion as something positive and something problematic, or seems to portray it neutrally

Neutral: put “neutral” if the article doesn’t really portray religion in any way at all

Problematic: put “problematic” if the article is primarily portraying or treating religion as problematic in some way, because it can cause harm, or impedes other rights or values

M. Accommodation/Strengthen/Protect: if the article deals with the free exercise of religion/religious liberty, put a “yes” in this column if the article calls for the accommodation of religious beliefs/the strengthening or protection of religious liberty or not, and a “no” if it does not

N. Separation: if the article deals with establishment/the separation of church and state, put a “yes” in this column depending if the article calls for a stricter separation, or not moving towards a looser separation of church and state, and a “no” if the article calls for a looser separation (or what is sometimes call more accommodation of religion by government—this is different than accommodating free exercise claims) or not moving to a stricter separation

O. Notes: mostly recording why you chose not to code an article (entirely foreign focus, not intersecting with the civil law, or not stating an opinion—just summarizing something else)