

WHY ARE THERE SO FEW CONSERVATIVES AND LIBERTARIANS IN LEGAL ACADEMIA? AN EMPIRICAL EXPLORATION OF THREE HYPOTHESES

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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.¹ 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

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1. 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.

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.”² 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.’”³

A journalist personally described a similar trend:

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.⁴

2. 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>].

3. *Id.*

4. 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>].

This Article explores one of these hypotheses: the Brainpower Hypothesis. This is explored using a unique dataset on publishing patterns amongst law professors at the top sixteen law schools in the country.⁵ Findings from this data call into question the seemingly glib justifications that conservatives and libertarians are not able to compete with their peers.

This Article 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.⁶ 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.⁷ 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.”⁸ The American Bar Association commented when Fossum’s work was released that “[w]ere we biologists studying inbreeding, we

5. 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.

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

7. *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.*

8. *Id.* at 547.

might predict that successive generations of imbeciles would be produced by such a system."⁹ Fossum also noted that women made up just 13% of law school faculties at the time.¹⁰

Eleven years later Borthwick and Schau's study concluded that the "path to legal academia continues to be a narrow one,"¹¹ 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.¹² However, women fared slightly better, comprising 20% of their sample.¹³ 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."¹⁴ 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.¹⁵

Richard Redding's 2003 study sampled tenure-track new hires from 1996–2000.¹⁶ 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.¹⁷ 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."¹⁸ 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

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

10. Fossum, *supra* note 6, at 532.

11. 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).

12. *Id.* at 226.

13. *Id.* at 194.

14. *Id.* at 216–17.

15. *Id.* at 212–13.

16. 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).

17. *Id.* at 600.

18. *Id.* at 607.

minorities.¹⁹ Also, the importance of clerking continued to grow, with 57% of new hires having had such an experience.²⁰ 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%.²¹ 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%).²²

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."²³ 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 . . ."²⁴ Thus George and Yoon determined that for the 2007–2008 hiring cycle, what mattered was 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.²⁵

Finally, McCrary et al. recently looked at the pool of law professors at the top thirty-four law schools in the country as of 2011.²⁶ They found faculties to be overwhelming male and white, with 41% holding J.D.s from Harvard or Yale.²⁷ Over a quarter had Ph.D.s, and more than half had clerked and served

19. *Id.* at 600.

20. *Id.*

21. *Id.*

22. *Id.* at 601.

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

24. 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.").

25. George & Yoon, *supra* note 24, at 33.

26. 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).

27. *Id.* at 13.

on law reviews.²⁸ 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.²⁹

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.³⁰ 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.³¹ 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."³² 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."³³

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 students³⁴ and to break the current "monopoly on resources

28. *Id.*

29. 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).

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

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

32. 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).

33. 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).

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

and opportunity” that has created a “de facto industry standard” favoring certain groups.³⁵ 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 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.³⁶

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.³⁷

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.³⁸ Nelson et al. posit that “[l]iberals, in large part, still remain in control of the institutions and processes of legal education.”³⁹ Klein and Stern likewise contend that American “liberalism” dominates the ranks of professors in the humanities and social sciences.⁴⁰

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

36. 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).

37. See, e.g., Zenoff & Barron, *supra* note 30, 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.”).

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

39. 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).

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

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.⁴¹ 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.⁴² 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."⁴³ 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,⁴⁴ and shape those who are still malleable into their own likeness.⁴⁵ More specifically from an educational institution's perspective, the tradition of majoritarianism in hiring and tenure decisions leads, over time, to ideological homogeneity.⁴⁶ These characteristics of individual, group, and institutional behavior have caused some to argue that the defects of the phenomenon of groupthink apply to academia.⁴⁷ In short, Nelson et al. write:

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

42. 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).

43. Klein & Stern, *supra* note 40, at 589.

44. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954); Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOCIAL ISSUES 429 (1999).

45. See Klein & Stern, *supra* note 40, at 589–90.

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

47. See Klein & Stern, *supra* note 40, at 595–96.

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.⁴⁸

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).⁴⁹ 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,⁵⁰ noting a gap with 75% of new hires being liberal and 10% being conservative.⁵¹ 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.⁵² 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).⁵³ Interestingly, the authors did

48. Nelson et al., *supra* note 39, at 1802–03.

49. 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).

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

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

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

53. 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.*

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,⁵⁴ 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.⁵⁵ He also imputed that in 2013 among all law school faculties, 11% of professors were Republicans and 82% were Democrats.⁵⁶ 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.⁵⁷

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

54. *Id.* at 240.

55. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89 (2016); see also Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 947 n.79 (2001) (citing Lindgren study); James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y REV. 5, 8–9 (2005).

56. See Lindgren, *Measuring Diversity*, *supra* note 55, at 145.

57. See Adam Bonica et al., *The Political Ideologies of American Lawyers* 21, 45 (HKS Working Paper No. 15-049, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652706 [<http://perma.cc/SB6R-Z2LE>].

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.⁵⁸

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.⁵⁹

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.⁶⁰ 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, such that the right tail—the high performers—overlaps with a lower performing group of liberals. Thus, whatever the intelligence or ability cutoff to

58. 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).

59. *Id.* at 20-21.

60. 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>].

become a law professor, many more liberals can clear that hurdle than can conservatives/libertarians.⁶¹

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

61. 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.

disfavored trait worthwhile for their employers.⁶² 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.

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.⁶³ 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.⁶⁴

These scholars are clearly exploring a different question than this Article, 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

62. 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).

63. Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship* (Coase-Sandor Institute for Law and Economics Working Paper No. 696, Aug. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478908 [<http://perma.cc/R94D-UKG7>].

64. *Id.* at 14–15, 18–19.

Democratic law professors.⁶⁵ Posner noted that, at a statistically significant level, Republican law professors are cited more than Democratic law professors.⁶⁶ He lays out four possible explanations: (1) “Republicans who are hired are better scholars than Democrats” because “[l]iberal 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.⁶⁷ Posner laments that his data does not allow for these various explanations to be explored.⁶⁸

This Article, 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

65. 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>].

66. *Id.*

67. *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.

68. *Id.*

Shapiro's pioneering study of the most-cited law review articles.⁶⁹ Shapiro revised his work in 1996 as "cytology" became, for better or worse, a part of the law school landscape.⁷⁰ Overcoming one of the weaknesses of his previous two studies, in 2012 Shapiro and a coauthor published an updated version,⁷¹ this time including citations in non-law peer reviewed articles.⁷² 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 . . ."⁷³ 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."⁷⁴ 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).⁷⁵ The most well-known continuation of this type of scholarly impact study has been periodically done by Professor Brian Leiter.⁷⁶ 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.⁷⁷ Scholarly

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

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

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

72. *Id.* at 1488.

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

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

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

76. *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).

77. 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),

impact studies have been defended as remarkably “egalitarian and democratic.”⁷⁸ 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.⁷⁹

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,⁸⁰ 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.⁸¹ And just as Westlaw’s KeyCite notes gradations of positive and negative treatment of cases, not all citations are equal,⁸² 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 other responsibilities within and outside of law schools, and citation studies can never measure these important professional functions.⁸³

Of course, attempts to operationalize qualities difficult to measure have strengths and weaknesses, but citation studies do

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642056
[<http://perma.cc/D3TP-A2U3>].

78. *Id.* at 13.

79. *Id.* at 12–14.

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

81. 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).

82. See Posner, *supra* note 80, at 387–88.

83. 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).

not and should not come with the disclaimer: “this is for entertainment purposes only.”⁸⁴ Social science seeks two attributes in measurement: validity and reliability.⁸⁵ 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.⁸⁶ 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.”⁸⁷

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.⁸⁸ In a nutshell, using the Westlaw JLR database, searches using an

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

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

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

87. 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>].

88. 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).

author's name are run to determine how many times that author shows up in the database.⁸⁹ 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.⁹⁰ Thus, someone with 1000⁹¹ "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 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 Article 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

89. 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>].

90. *Id.*

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

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.”⁹² 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.⁹³ Leiter only claims to mitigate one of the above six concerns—bias against younger scholars—by just looking at citations in a recent timeframe.⁹⁴ And he freely confesses that “for all these reasons, one would expect scholarly impact to be an imperfect measure of scholarly quality.”⁹⁵ This study likewise agrees that “citation studies are but one measure of scholarly distinction of faculties.”⁹⁶

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 Westlaw database, which will mean that

92. 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).

93. 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>].

94. *Id.*

95. *Id.*

96. Leiter, *supra* note 92.

schools with more faculty producing such scholarship will be hurt in the Leiter rankings.⁹⁷ 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.⁹⁸

Even Leiter himself notes that legal scholarship is likely to increasingly become interdisciplinary and end up more in peer-reviewed journals.⁹⁹ To overcome this bias against peer-reviewed disciplinary scholarship, this study incorporates these citations into the impact metric.¹⁰⁰

97. Professor 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 87.

98. 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>].

99. Shapiro & Pearse, *supra* note 71, 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 EDT)).

100. 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

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 done with the Leiter methodology.¹⁰¹ 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 on[e] 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

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].

101. 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).

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. . . .

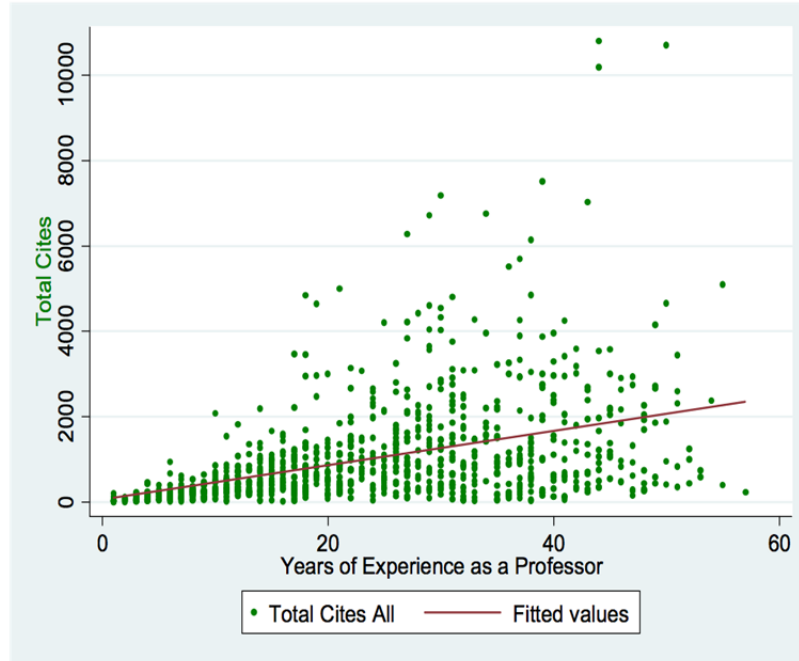
They usually rely on one database, typically a legally oriented one, which limits measurement of interdisciplinary impact.¹⁰²

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.¹⁰³ 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.

102. Bainbridge, *Ranking Faculty Quality*, *supra* note 100.

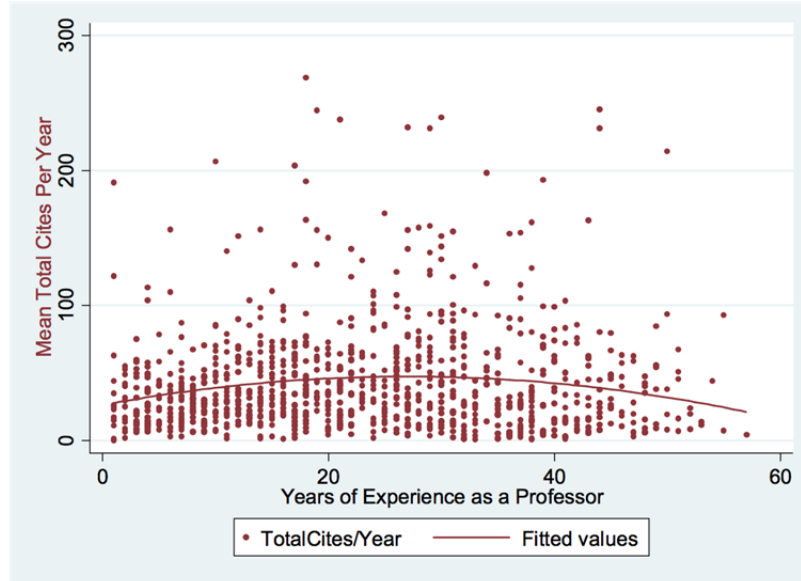
103. This method, arguably, will create measures for some younger faculty that may appear inflated since their citation counts, accrued prior to becoming a professor, will be averaged over only one or two years.

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.¹⁰⁴ 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),

104. THOMPSON REUTERS, WEB OF SCIENCE, [http://apps.webofknowledge.com/WOS_GeneralSearch_input.do?product=WOS&search_mode=GeneralSearch&SID=1EelIEGoMhp5cDallie&preferencesSaved=\[http://perma.cc/UF4B-25CA\]](http://apps.webofknowledge.com/WOS_GeneralSearch_input.do?product=WOS&search_mode=GeneralSearch&SID=1EelIEGoMhp5cDallie&preferencesSaved=[http://perma.cc/UF4B-25CA]).

the number of times an article has been cited is listed, and these must be summed for each author.¹⁰⁵

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.¹⁰⁶

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.¹⁰⁷

105. 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.

106. 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.

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

2. Independent Variables

Independent variables included:

- The rank of the law school where the professor earned his or her J.D.;¹⁰⁸
- 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;¹⁰⁹
- Number of books, treatises and casebooks published;¹¹⁰

108. 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.

109. 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.

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

- Gender (whether or not female);
- Minority status;¹¹¹
- Interaction variable of gender and minority status; and
- Political orientation.

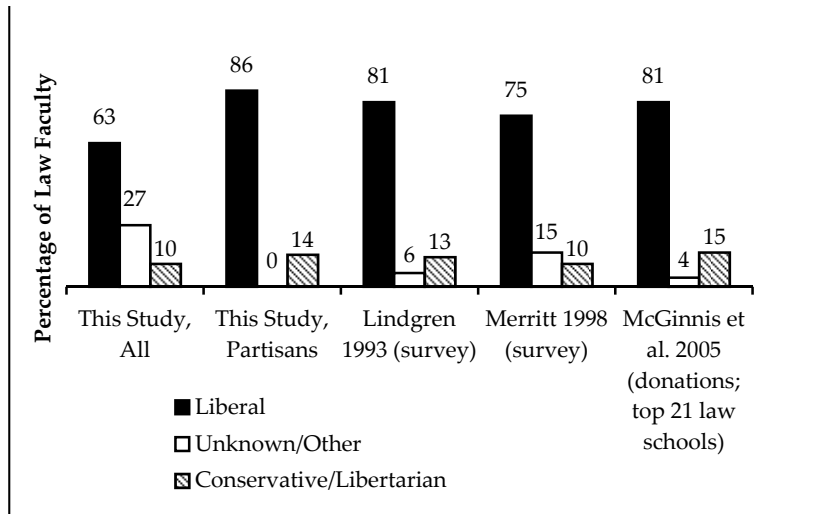
The independent variable of most interest is the political orientation of law professors. Using a combination of the sources used by previous studies, this study looked at campaign donations, voter registration records, organizational affiliation, work experience on resumes, and, to a limited degree, scholarship to classify professors as conservative/libertarian, liberal, or unknown.¹¹² The percentage

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

112. The Author initially coded every professor in the study. Fortuitously, 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 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).

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.¹¹³

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,¹¹⁴ and McGinnis et al. could only classify those who actually made a campaign donation.¹¹⁵ Thus, earlier studies were only classifying a subset of the population—those easiest to identify—and would naturally have fewer unknowns.¹¹⁶

Of course, a snapshot of the current situation can mask long-trends. Maybe older cohorts still in the legal academy have

113. 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.

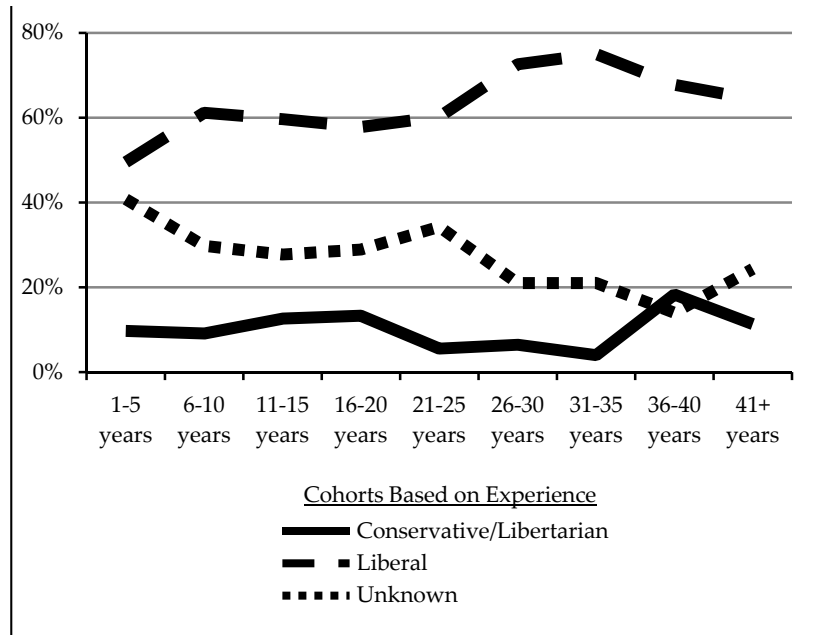
114. Lindgren, *supra* note 55, at 20; Merritt, *supra* note 50, at 815.

115. McGinnis et al., *supra* note 52, at 1186–87.

116. 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.

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.¹¹⁷ As Graph 4 shows, the make-up of the legal academy does not differ much based on when law professors entered.

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



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

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.¹¹⁸ 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*

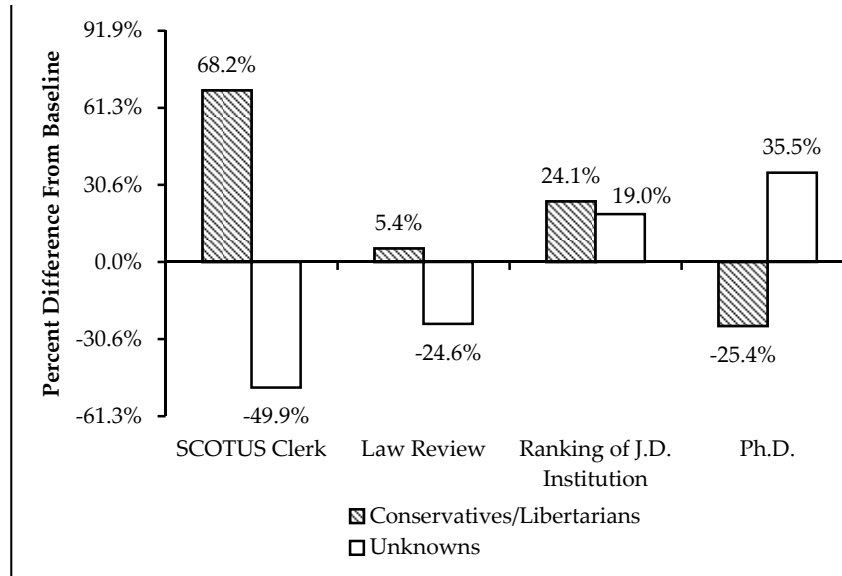
1. *Qualifications*

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.

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

<i>Cohort</i>	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.¹¹⁹ 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.¹²⁰ 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.¹²¹ Finally, conservatives and libertarians are more likely to hold a J.D. and have a federal appellate clerkship as

119. 35.6% of conservative/libertarian law professors had Supreme Court clerkships, compared to 21.1% of liberals and 10.6% of unknowns.

120. 58.4% of conservatives/libertarians made law review, whereas 55.4% of liberals and 41.8% of unknowns made law review in law school.

121. 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.

their highest clerkship,¹²² but less likely to have their highest clerkship be with a federal district court, state court, or foreign court, these being less prestigious.¹²³ 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.¹²⁴ 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

122. 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.

123. For details, see James C. Phillips, *Appendix to: ‘Why Are There so Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses,’* at Section II (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695634 [<http://perma.cc/TE8P-PZCM>] [hereinafter *Appendix*].

124. 21.8% of conservatives/libertarians had Ph.D.s, compared to 29.2% of liberals and 39.6% of unknowns.

only the more qualified conservatives and libertarians are interested and actually seek law professor jobs is unclear.¹²⁵

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*.¹²⁶

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.¹²⁷ 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 treatment¹²⁸ 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.

125. For more detailed information on the differences between conservatives/libertarians and others on the various covariates, see *Appendix, supra* note 123, at Section II.

126. 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).

127. 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).

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

This far from ideal situation requires careful thinking about the potential outcomes (or counterfactual) framework, specifically the Stable Unit Treatment Value Assumption (SUTVA),¹²⁹ and the ignorable treatment assignment assumption.¹³⁰

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.”¹³¹ It has two basic principles. First, that treatment of one individual does not affect the treatment of another individual.¹³² Second, that treatment is homogenous.¹³³ 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).¹³⁴ 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 here¹³⁵— 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

129. IMBENS & RUBIN, *supra* note 126, at 9–12.

130. 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 127, 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 126, at 29–33.

131. Rubin, *supra* note 130, at 961.

132. IMBENS & RUBIN, *supra* note 126, at 10–11.

133. *Id.* at 11–12.

134. See Pan & Bai, *supra* note 130, at 6.

135. 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).

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.¹³⁶

The ignorable treatment assignment assumption, alternatively referred to as unconfoundedness,¹³⁷ selection on observables,¹³⁸ conditional independence,¹³⁹ and exogeneity,¹⁴⁰ channels the principle of random assignment in an experimental design.¹⁴¹ 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

136. MORGAN & WINSHIP, *supra* note 127, at 38–39.

137. IMBENS & RUBIN, *supra* note 126, at 20.

138. 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).

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

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

141. See also GUO & FRASER, *supra* note 126, at 29–33.

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.”¹⁴²

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.”¹⁴³ 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.”¹⁴⁴

142. IMBENS & RUBIN, *supra* note 126, at 277.

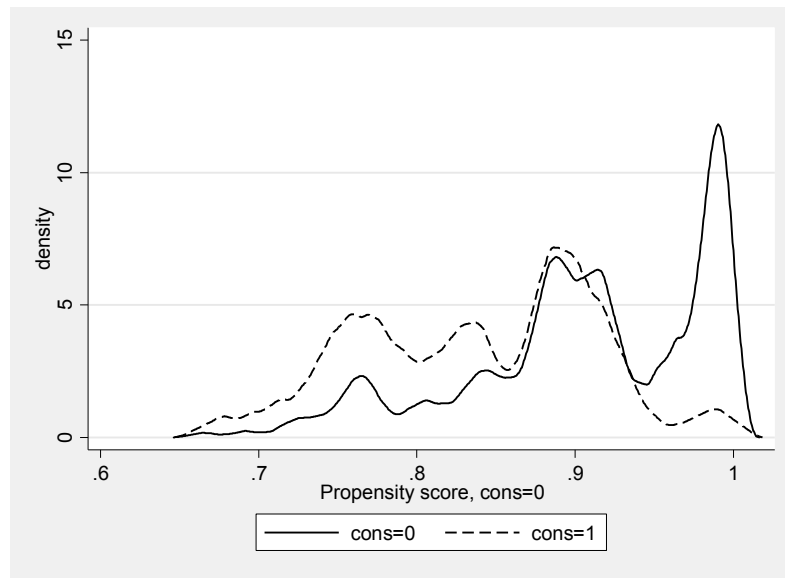
143. *Id.* at 309, 311.

144. *Id.* at 336.

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 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).¹⁴⁵ All seek to either compare apples to apples, or to weight observations to achieve the same effect.

145. For an explanation of these methods, see *Appendix, supra* note 123, at Section III.

And to be done correctly, all must ignore the outcome variable when determining covariate balance.¹⁴⁶ 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.”¹⁴⁷

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 means¹⁴⁸ 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).¹⁴⁹

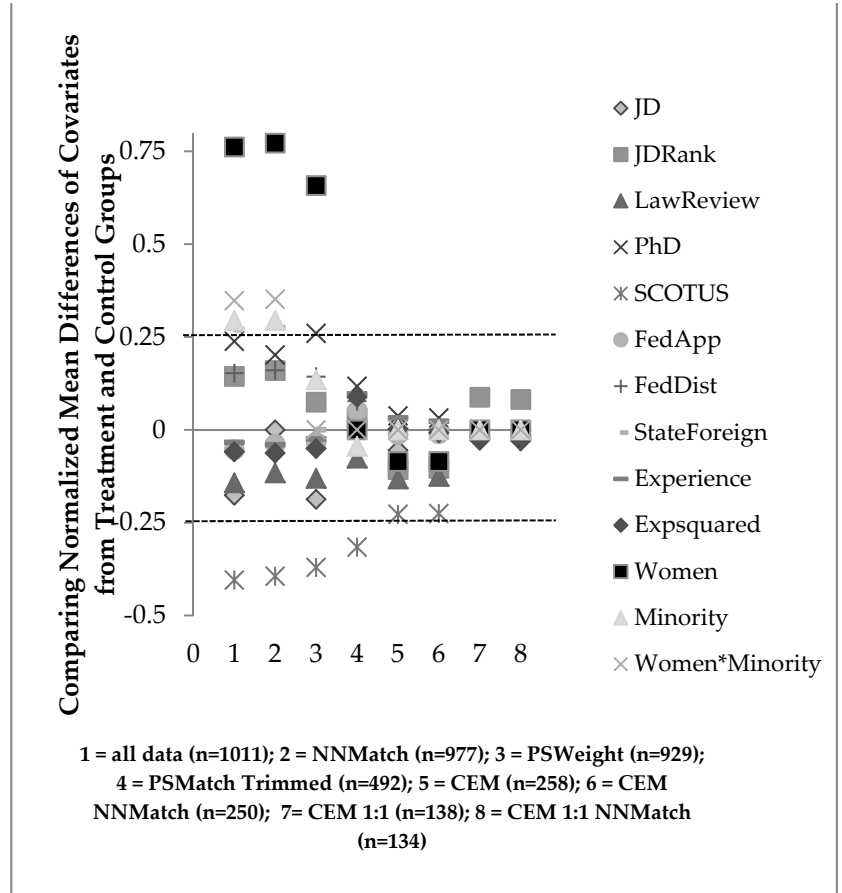
146. Cassandra W. Pattanayak, *Evaluating Covariate Balance*, in PROPENSITY SCORE ANALYSIS: FUNDAMENTALS AND DEVELOPMENTS 92 (Wei Pan & Haiyan Bai eds., 2015).

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

148. 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 146, at 103. See also IMBENS & RUBIN, *supra* note 126, at 310–11. However, actual means, differences, and *t*-statistics are reported in *Appendix*, *supra* note 123, at Section II, for those who disagree. Normalized differences were calculated using the formula provide by Imbens and Rubin. See *id.* at 311.

149. 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).

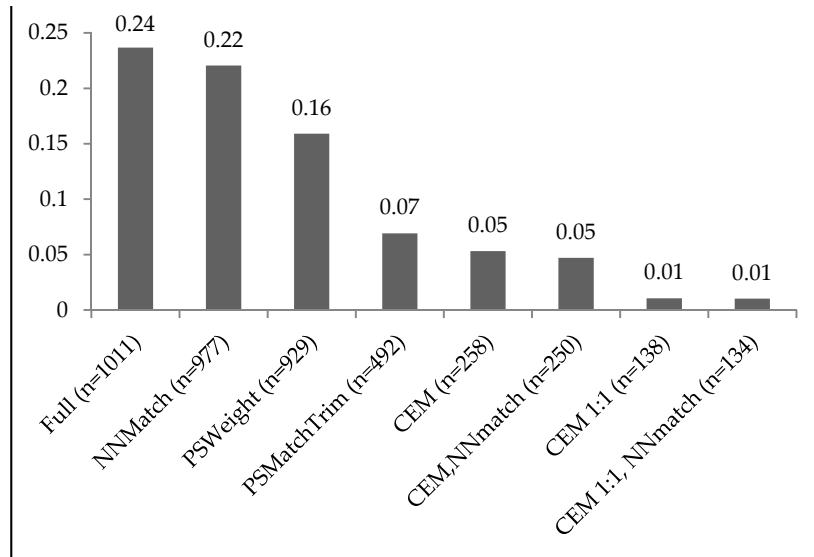
Graph 7: Normalized Difference of Means of Covariates Between Treatment and Control Groups Across Selected Models



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.¹⁵⁰ This is also shown in the graph below that displays the overall average normalized difference of means based on the various models.

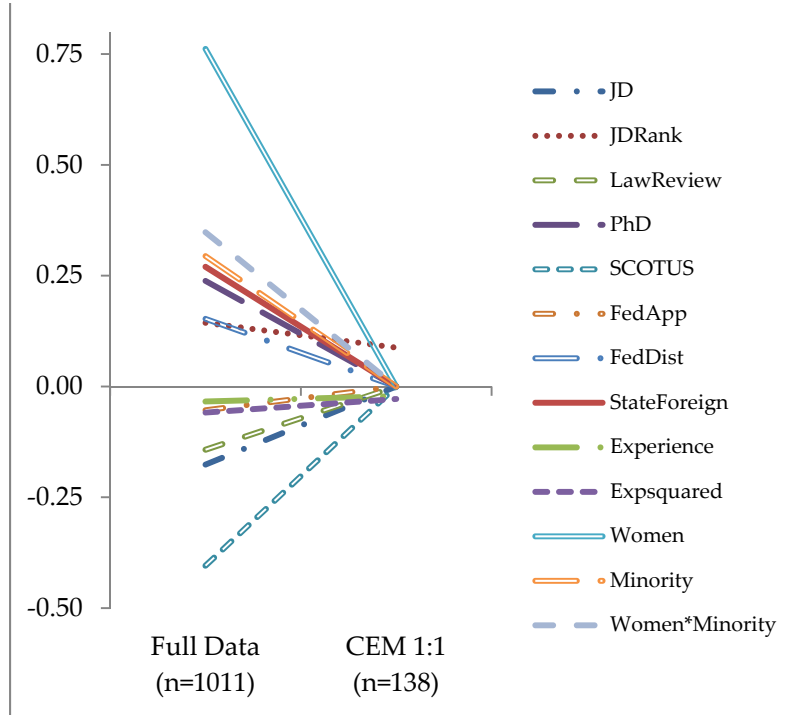
Graph 8: Overall Average Covariate Normalized Mean Differences between Treatment & Control Groups



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.

150. For detailed information on the effectiveness of all of the models in balancing the covariates, see *Appendix, supra* note 123, at Section IV.

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.¹⁵¹

3. *Publications (Productivity)*¹⁵²

Table 1 reports the difference in annual publications between treatment and control groups using the various models noted

151. Pattanayak, *supra* note 146, at 108.
 152. Analysis of just legal publications produced nearly identical results.

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)
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	.38** (.12) n = 929	.52*** (.15) n = 682	.57*** (.14) n = 348

Propensity Score Weighting	(cons = 101)	(cons = 101)	(cons = 101)
Propensity Score Matching (ATE with 1 match) trimmed (ps ≤.9 & ≥.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 = 104 (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 the Appendix, Section V. * (p≤.05); ** (p≤.01); *** (p≤.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).¹⁵³

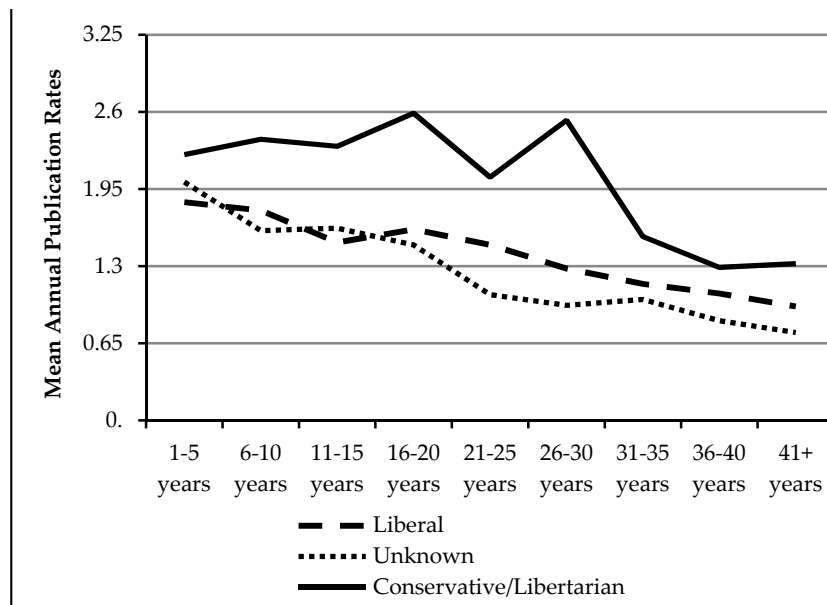
These results undermine the Brainpower Hypothesis to the extent that publication quantities are reflective of intelligence or ability. It also lends support to Hypothesis #3 since it may be that only the best conservatives and libertarians are making it

153. For a graph of these differences, see *Appendix, supra* note 123, at Section IV.

into the legal academy. However, it could be consistent with Hypothesis #2, as well, if the only conservatives and libertarians seeking legal 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.¹⁵⁴ 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 their peers, is unclear. However, both explanations are consistent with a discrimination or bias explanation.

4. Citations (Relevance)¹⁵⁵

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.

154. 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.

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

**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	13.3* (6.0) n = 977 (cons = 100)	13.6* (6.5) n = 714 (cons = 100)	15.3 (5.4) n = 363 (cons = 100)

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

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 41.7.¹⁵⁶

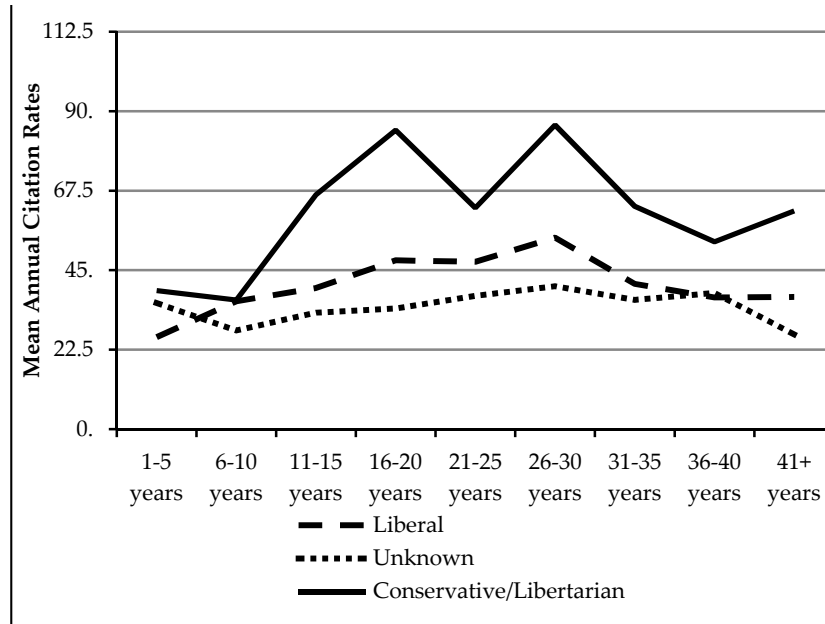
Similar to publication rates, the difference is a bit larger between conservatives/libertarians and unknowns (15.3 to 31.9 citations per year) than between conservatives/libertarians and liberals (13.6 to 30.2 citations per year).¹⁵⁷

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. 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.

156. 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, *Conceptualizing Diversity*, *supra* note 55, at 20–21.

157. For a graph of these differences, see *Appendix*, *supra* note 123, at Section IV.

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,¹⁵⁸ 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,¹⁵⁹ 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.¹⁶⁰

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

158. See Posner, *supra* note 65.

159. 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.

160. 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].

limited, indirect influence, if any, on a school's ranking via the "peer assessment score," which accounts for 25% of the overall rank.¹⁶¹ 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.¹⁶²

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.

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."¹⁶³ As Cass Sunstein has

161. *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>].

162. 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.

163. 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,

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.”¹⁶⁴ 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.”¹⁶⁵ 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.¹⁶⁶ Hyman argues that this erroneous prognostication by the nation’s legal experts could have been due to “motivated reasoning in an echo chamber.”¹⁶⁷ The dominance of one worldview in the legal academy not only impacts the content of legal scholarship¹⁶⁸ 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.”¹⁶⁹ 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

Intellectual Diversity in the Legal Academy, 37 HARV. J.L. & PUB. POL’Y 137, 138 (2014).

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

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

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

167. Hyman, *supra* note 163, at 824.

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

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

of law, the legal process, and the legal system broadly defined.”¹⁷⁰ 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 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.¹⁷¹

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.¹⁷² 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,¹⁷³ and graduates of elite

170. *Id.*

171. 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>].

172. 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.

173. See Bonica et al., *supra* note 57, at 27–30.

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.¹⁷⁴ 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 the

174. See John O. McGinnis, *Should Law Schools Pursue “Social Justice”?*, ONLINE LIBRARY OF LAW AND LIBERTY (Jan. 6, 2016), <http://www.libertylawsite.org/2016/01/06/should-law-schools-pursue-social-justice/> [http://perma.cc/WH2C-NQQJ] (arguing that law school “clinics are enterprises of political action,” and that “[f]ew, if any clinics however, are devoted to defending [conservative positions]”).

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.