POLITICAL DISCRIMINATION AND LAW PROFESSOR HIRING

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ABSTRACT: There are comparatively few conservative and libertarian law professors on U.S. law school faculties. Why is this? One possible explanation is discrimination based on political orientation. This paper tests this using a model of discrimination based on the work of Nobel Prize-winning economists Gary Becker and Kenneth Arrow in order to measure the "rank gap"—the difference in the ranking of a hiring law school based on one's political orientation after controlling for other predictors of that ranking (clerkships, publications, the law school one graduated from, etc.).

The paper, using matching statistical methods, finds that upon comparing conservative/libertarian law professors hired from 2001-2010 with equally-credentialed liberal law professors, conservatives/libertarians end up, on average, at a law school ranked 12-13 spots lower (i.e., less prestigious). (See pages 36-37.) This rank gap is not uniform, being more moderate with the top 75 schools, non-existent with schools 76-100, and the largest with the lowest-ranked schools. (See page 40.) The paper finds a similar "rank gap" for law professors whose political orientation was unknown or moderate compared to their liberal peers. Thus, while there may be other mechanisms causing the dearth of conservative/libertarian law professors in the legal academy, those who do make it in the door appear to experience discrimination based on political orientation.

The paper also discusses the harms that a lack of conservative/libertarian law professors causes. Namely, legal scholarship suffers from an echo chamber; law students, particularly liberal ones, may not sufficiently learn how to make or counter conservative and libertarian arguments; and law and policy is not as strong as it could be without conservative/libertarian critiques and perspectives. (See part I.A, pages 921–30.)

INTRODUCTION

At the 2014 Harvard Commencement, graduates received a bit of a surprise from their famous speaker, former New York Mayor

Michael Bloomberg. Hardly one viewed as a knee-jerk conservative, or even a conservative at all, the billionaire turned politician left the Republican Party to become an Independent, and his tenure atop the Big Apple was littered with policies few would confuse with conservatism or libertarianism. In his remarks he also noted that he had donated to President Obama's 2012 presidential campaign.

But Bloomberg spent the bulk of his speech lambasting the lack of political diversity among Harvard's faculty (and American universities in general), likening the idea "that scholars should be funded only if their work conforms to a particular view of justice" as "a modern-day form of McCarthyism."[1] Noting the irony of the 1950s being an environment where "the right wing was attempting to repress left wing ideas," Bloomberg observed that today "it is liberals trying to repress conservative ideas, even as conservative faculty members are at risk of becoming an endangered species."[2] And he noted a recent study by the Harvard's daily student newspaper—hardly a right wing rag—that found that 98% of Harvard Law faculty donations in the 2012 presidential election (which pitted two former Harvard Law alumni against each other) went to the Democrat, President Obama, with the newspaper's study finding that the "data supports the commonly held belief that Harvard's professoriate is largely liberal, raising questions about the ideological diversity of the faculty and what impact that may have on teaching and research."[3] Based on this lopsided pattern of

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[1] Valerie Strauss, *Bloomberg, at Harvard, blasts Ivy League 'liberals' for 'trying to repress conservative ideas'* (Washington Post, May 31, 2014), archived at https://perma.cc/6NWC-XTAJ.

[2] Id.

[3] Karl M. Aspelund & Meg P. Bernhard, *Harvard Faculty Donate to Democrats by Wide Margin*, (The Harvard Crimson, May 1, 2015), archived at https://perma.cc/P5UP-EU76.

donations, Bloomberg wondered "whether students are being exposed to the diversity of views that a great university should offer," arguing that "a university cannot be great if its faculty is politically homogenous."[4]

But it's not just Harvard. Last year Stanford University's outgoing provost, John Etchemendy, raised a similar warning, referring to "a kind of intellectual intolerance, a political one-sidedness," as "the threat from within" "that will, in the long run, be more damaging to universities than cuts in federal funding or ill-conceived constraints on immigration."[5] He called for the "need to encourage real diversity of thought in the professoriate" so as "to stem or dial back our academic parochialism" to avoid this wholly internal threat.[6] Nor is it only Harvard and Stanford which may suffer from the "threat" of political one-sidedness. One scholar noted in 2015 that "[o]f the fourteen honorary degrees bestowed by Ivy League institutions to living Supreme Court justices twelve went to those on the left the Court," and the other two went "to Sandra Day O'Connor, the swing justice of her day and a moderate conservative."[7] And, he observed, "no Ivy League University has ever awarded such a degree to anyone sitting now on the right of the Court," and what "makes this performance even more obviously ideologically driven is that these academic institutions have neglected the one who has [arguably] had the most academic influence—Antonin Scalia."[8]

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[4] Strauss, (cited in note 1).

[5] John Etchemendy, *John Etchemendy: 'The threat from within'* (Stanford News, Feb. 21, 2017), archived at https://perma.cc/P756-5LDM.

[6] Id.

[7] John O. McGinnis, *Ivy Honors and the Justices* (Law and Liberty Blog, July 20, 2015), archived at https://perma.cc/4HGS-NZEZ.

[8] Id.

New York Times Pulitzer Prize-winning columnist Nicholas Kristof, a self-described progressive, sounded a similar alarm in 2016. He observed that "[w]e progressives believe in diversity, and we want women, blacks, Latinos, gays and Muslims at the table—er, so long as they aren't conservatives."[9] He further noted that "the one kind of diversity that universities disregard is ideological and religious": "We're fine with people who don't look like us, as long as they think like us."[10]

Nor is it just universities generally. Law Professor Shima Baradaran Baughman began her PrawfsBlawg post by informing her readers that as "a minority, a first generation immigrant, a New Yorker, and a woman" she didn't see the "need to build my liberal cred," but did so anyway noting her consistently Democratic voting record and her campaigning for and donating to President Obama. She then argued that there was "potential liberal bias in the legal academy."[11] She noted the impact such had on colleagues (and herself):

> I've had colleagues who have been nervous about their job talks seeming too "conservative", being ashamed that having clerked for a conservative judge (who they may not have agreed with) has created a scarlet letter for them in academia, going through lengths to hide their religious affiliation, and most depressing of all, having not all written

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[9] Nicholas Kristof, *A Confession of Liberal Intolerance* (The New York Times, May 7, 2016), archived at https://perma.cc/W8BA-W8NB.
[10] Id.
[11] Shima Baradaran Baughman, *Liberal Bias in Legal Academia?* (PrawfsBlawg, Aug. 4, 2016), archived at https://perma.cc/YU8G-2SML.

about topics they have researched about for fear that they didn't fit with the liberal norms of their faculty.[12]

Nor is it just elite law schools. The University of Louisville's Law School proclaims via promotional materials that it is committed to "progressive values," and incoming students and professors are informed that on the important issues, the school joins the "progressive" side.[13] By giving this public law school an "ideological brand," the hope is that it will increase fundraising and student recruitment.[14] As a result, one professor there observed, "classroom discussions have grown one-sided" as "[s]tudents find it hard to square [arguments "defend[ing]" federalism, standing limits, or qualified immunity" or "criminalizing drugs"] . . . with the law school's institutional commitment to 'social justice' and 'progressive values.'"[15]

But the fact that conservative and libertarian law professors are a rare bird in academia, including law schools, and the fact that such may harm legal education and scholarship, as well as the greater legal world, does not answer the question of why are there so few conservative and libertarian law professors? If it's due to self-selection, then the remedy would be quite different than if this dearth is due to discrimination. This study seeks to answer the question of why by using a unique dataset of all tenure-track non-clinical teaching law professors hired in the United States from 2001-2010. And it does so by leveraging a hybrid model of discrimination based on the work of Nobel Prize-winning economists Gary Becker and Kenneth Arrow. The paper proceeds as follows. Part I explains why

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[12] Id.

[13] Luke Milligan, *Commentary | UofL law school is no longer neutral*, (Courier Journal, Jan. 13, 2016|updated on Jan. 17, 2016), archived at https://perma.cc/J3A6-9BN8.

[14] Id.

[15] Id.

a scarcity of conservative and libertarian law professors matters. Part II looks at previous studies into the political make-up of the legal academy. Part III lays out the study's data and methodology. Part IV provides the findings and analysis. And part V notes caveats and limitations to the study, before concluding.

I. WHY THE IMBALANCE MATTERS

A.   THE HARM REGARDLESS OF THE CAUSE

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

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

One party harmed by few conservative and libertarian law professors is actually liberal law professors and the scholarship they produce. As former Obama Administration member and current law professor Cass Sunstein has observed, "When people talk to like-minded others, they tend to amplify their preexisting views, and do so in a way that reduces their internal diversity." [16] Such is not peculiar to liberal law professors, but simply a phenomenon of human psychology, taking on the form of motivated reasoning, confirmation bias, and the like. And so it can be hard to spot in oneself. As a Stanford Provost observed about universities: "We decry certain news outlets as echo chambers, while we fail to notice

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[16] Cass R. Sunstein, Going to Extremes: How Like Minds Unite and Divide 8 (Oxford 2009).

the echo chamber we've built around ourselves."[17] This intellectual blind spot will lead to professors "writ[ing] off those with opposing views as evil or ignorant or stupid, rather than as interlocutors worthy of consideration," and "succumb[ing] to the all-purpose *ad hominem* because it is easier and more comforting than rational argument."[18]

And this can particularly damage law professors' "accurate understanding of contemporary reality," [19] leading to errors in judgment. As two law professors mused, "[i]f liberals predominate on the faculty, and scholarship reflects ideological biases, then legal research may advance a liberal world view rather than understanding of the law."[20] For instance, one scholar argues that groupthink leads the legal academy to view the legal challenges against the Affordable Care Act ("Obamacare") as "puzzl[ing]," "silly," "if not frivolous, close to it," "deserving of sanctions," "completely bogus," and "simply crazy."[21] And yet the Commerce Clause challenge dismissed by the legal academy won a majority at the Supreme Court (as well as sometimes winning in the lower courts). This failure to seriously consider an argument that ended up being persuasive to judges was, in the eyes of some, because of "motivated reasoning in an echo chamber."[22]

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[17] Etchemendy, *John Etchemendy: 'The threat from within'* (cited in note 5).

[18] Id.

[19] George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 Harv J L & Pub Pol, 165, 166 (2014); see also Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 Harv J L & Pub Pol, 137, 138 (2014).

[20] Adam Chilton & Eric Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J Legal Stud 277 (2015).

[21] David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U Ill L Rev 805, 807–10.

[22] Id.

The one-sidedness of the legal academy may also cause it, or the scholarship it produces, to have less credibility than if it were more politically homogenous.[23] As one study put it, "the relative scarcity of conservatives could limit the legal academy's influence."[24] Given that more Americans identify as conservative than liberal, and conservatives control more state and federal branches of government than liberals, "[t]hese realities put the legal academy out of step with not only lawyers, but with both political decision makers and the general public," "rais[ing] the possibility that the intellectual and public contributions of the legal academy could be dismissed as partisan."[25]

Another harm to law professors, both liberal and conservative (but more to the former), is self-censorship, whether in which research topics one pursues or in presenting one's findings. As noted earlier, Professor Baughman observed anecdotal evidence of colleagues trying to make papers appear less conservative or avoiding researching topics "that didn't fit with the liberal norms of their faculty."[26] She also confessed to it a bit herself, burying or massaging some of her empirical findings that went against the liberal academy's orthodox views.[27]

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[23] See Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J Legal Stud 1, 1, 21 (2018)

[24] Id at 21.

[25] Id.

[26] Baughman, *Liberal Bias in Legal Academia?* (cited in note 11).

[27] Id. (refusing to highlight empirical findings in one study that "when released on bail young black men commit more violent crime than any other age group, race, or gender, and preventatively detaining them before trial would cut down on a lot of violent crime," and likewise in another study when investigating "whether judges were 'racist' in their bail determinations," "massag[ing] and explain[ing] in a way that would not make me seem like a racist or *conservative* or someone speaking out of the norm" her findings that judges "actually weren't detaining enough black people if

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

Groupthink among a law school's professors could be magnified with law students who share the same world view, undermining legal education which requires "an attitude or ambience that affirmatively encourages a full and free exchange of ideas."[28] As one self-described "progressive" law professor declared, "[i]f we pride ourselves in being open to all ideas, examining principles carefully and trying to come to the 'right answer,' it would be more fitting if we were open to a broader range of ideas, rather than the ones that were approved as a majority view."[29] For a profession that must not be deaf to the country's political tones—and, in fact, often believes that politics drives the law—it would be dangerous pedagogically for "faculty's liberal leanings [to] narrow the scope of . . . the academic conversation in the classroom to a point that does not reflect the political atmosphere in the country." [30] A solid legal education requires professors "not to teach students what to think but to teach students how to think"—"[a]nd that requires listening to the other side, weighing arguments without prejudging them, and determining whether the other side might actually make some fair points."[31] If "[t]he only debate [on campus and in the classrooms] . .

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their focus was on preventing violent crime") (emphasis added). See also Aspelund and Bernhard, *Harvard Faculty Donate to Democrats by Wide Margin* (cited in note 3) (quoting the dean of Harvard's Faculty of Arts and Sciences as stating that the political discrepancy in academia "might have an effect on how people choose the problems that they work on in their own scholarship").

[28] David H. Vernon, *The Importance of Intellectual Diversity to Educational Quality*, 32 J Legal Educ 189, 189 (1982).

[29] Baughman, *Liberal Bias in Legal Academia?* (cited in note 11).

[30] Aspelund & Bernhard, *Harvard Faculty Donate to Democrats by Wide Margin* (cited in note 3).

[31] Strauss, *Bloomberg, at Harvard, blasts Ivy League 'liberals' for 'trying to repress conservative ideas'* (cited in note 1).

. is between the far-left . . . and the liberals," "[i]t gives students a view that a very narrow spectrum of opinion is the only way to think."[32] And if law "students graduate with ears and minds closed, the [law school] has failed both the student and society."[33]

While perhaps graduates in some academic disciplines are less harmed if they have not learned to candidly and accurately access the weaknesses in their own views and the strengths in opposing views, for law school graduates, the lack of such a skill is professional suicide. As John Stuart Mill once declared, "He who knows only his own side of the case, knows little of that." Or, turning to a more recent voice — the past dean of the Harvard Law School — "one cannot truly understand a legal argument on behalf of one client or side without thoroughly understanding and addressing competing arguments and objections." [34] Law school graduates who are ill-equipped to make persuasive arguments in front of half of the judiciary are ill-equipped to be lawyers. Likewise, an environment that is subtly or openly hostile to or ridicules conservative or libertarian perspectives will have a chilling effect in the classroom, harming students of all political views. If the first time a lawyer confronts a conservative argument is in an opposing brief or out of the mouth of a judge in court, it is unlikely they will be able to persuasively address it.[35]

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[32] Aspelund & Bernhard, *Harvard Faculty Donate to Democrats by Wide Margin* (cited in note 3) (quoting Professor Harvey Mansfield).

[33] Id.

[34] Dean Martha Minnow, "Intellectual Diversity Statement," Remarks made at Harvard Law School conference on intellectual diversity, April 2, 2013, archived at https://perma.cc/N49Y-UV3E.

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

This liberal bias can even impact law students before they enter law school, creating a sort of "liberal privilege," as Nicholas Kristof reports that a friend of his was "studying for the Law School Admission Test, and the test preparation company she is using offers test-takers a tip: Reading comprehension questions will typically have a liberal slant and a liberal answer."[36] Though unlike a legal education where liberal students are harmed, this liberal privilege (though there is only anecdotal evidence of it) arguably helps progressive-minded students do better than conservative ones on what is arguably the most important factor for getting into a top law school: the LSAT score.[37]

3.   *Harm to the Law and Society*

Law professors play an important role in society: "Law professors frequently weigh in on important political, policy, and legal issues—including delivering oral arguments, testifying before lawmakers, writing op-eds, and lobbying."[38] Additionally, law schools are the initial gatekeeper (the state bar being the final gatekeeper) on who practices law in nearly every state in the Union since a JD is required. From the ranks of law school graduates come nearly every future judge, as well as many lawmakers in state and federal legislatures and agencies.[39] As the impact first of legal

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[36] Kristof, *A Confession of Liberal Intolerance* (cited in note 9).

[37] To the extent one could see the LSAT scores of conservative and liberals, it would be interesting, after controlling for the test score on other aspects of the test (logic games and logical reason), if a "liberal privilege" manifested itself with liberal students achieving statistically significantly higher reading comprehension scores than their conservative peers.

[38] Bonica et al., 47 J Legal Stud at 21 (cited in note 23).

[39] See Karl Kurtz, *Who We Elect: The Demographics of State Legislatures* (National Conference of State Legislatures, Dec. 1, 2015), http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx (finding that 39% of members of Congress have

realism, and then law and economics has shown, what people learn in law school does influence their real-world views and decisions, particularly in shaping domestic and foreign policy. And many legal doctrines or policy prescriptions have had their genesis in a law review article promulgated by a legal academic.

The law cannot work itself pure, so to speak, if legal theories and policy ideas are not put through the crucible of opposition: "[w]hen perspectives are unrepresented in discussions, when some kinds of thinkers aren't at the table, classrooms become echo chambers rather than sounding boards—and we all lose."[40] Or, as social psychologist Jonathan Haidt has observed in a broader context, "[u]niversities are unlike other institutions in that they absolutely require that people challenge each other so that the truth can emerge from limited, biased, flawed individuals."[41] One professor of law and religion

a law degree, and 19% of members of state legislatures); Adam Bonica, Adam Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J Legal Anal 277, 277-78 (2015) (noting that over one-third of the House of Representatives and one-half of the Senate were lawyers, over half of U.S. Presidents have been lawyers, about half of the current state governors are lawyers, "[a]ll state high court justices are former lawyers," and "[a]ll judges currently serving on the federal courts are lawyers"); Christopher J. Walker, *Inside Agency Statutory Interpretation,* 67 Stan L Rev 999, 1016-17 (2016) (finding that of 128 federal agency rule drafters surveyed for the paper, all but 11 attended law school).

[40] Kristof, *A Confession of Liberal Intolerance* (cited in note 9). For a similar perspective on another academic discipline, see Jose L. Duarte et al., *Political Diversity will Improve Social Psychological Science*, 38 Behavioral and Brain Sciences 1, 1 (2015) (arguing that a lack of political diversity in academic psychology, particularly social psychology, "can undermine the validity of social psychological science via mechanisms such as the embedding of liberal values into research questions and methods, steering researchers away from important but politically unpalatable research topics, and producing conclusions that mischaracterize liberals and conservatives alike," and that "[i]ncreased political diversity would improve social psychological science by reducing the impact of bias mechanisms such as confirmation bias, and by empowering dissenting minorities to improve the quality of the majority's thinking").

[41] Kristof, *A Confession of Liberal Intolerance* (cited in note 9) (quoting Haidt).

noted this in the ideas and scholarship that gets discussed versus ignored:

> Successful academics in the fields I read in most tend to be heavily networked, and fairly conventionalist in their views. They do a good job of discussing and promoting decent books in their field that come from roughly within their circles and are not too heterodox for that circle, including political heterodoxy of a generally liberal or left-of-center kind. . . But it is certainly true that given the academy's conventionalism and given the politics of my sector of the academy, a lot of conservative and/or religious writers and books end up hidden from notice, out of the loop, out of the algorithms, not part of "the discussion."[42]

And it's not just that liberal professors are ignoring topics and perspectives that conservatives would be more prone to explore or espouse—conservative and libertarian professors are also engaging in "preference falsification,"[43] wherein they "hide unpopular views to avoid ostracism or punishment." [44] (This creates a scenario, ironically, where conservative professors see themselves as "the equivalent of someone who was gay in Mississippi in 1950.")[45] Our

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[42] Paul Horwitz, *Coming: A "Tilted" List of Recommended New Titles in Law and Religion [WITH UPDATE]* (PrawfsBlawg, Aug. 18, 2015), archived at https://perma.cc/C3N2-YM6X.

[43] See generally Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* (Harvard 1997).

[44] Glenn Harlan Reynolds, *Kanye West's Politics 101: It's OK to support Trump, even if you're black or famous* (USA Today, April 30, 2018), archived at https://perma.cc/AS2Y-JPGG.

[45] Kristof, *A Confession of Liberal Intolerance* (cited in note 9) (quoting from Jon A. Shields & Joshua M. Dunn Sr., *Passing on Right: Conservative Professors in the Progressive University* (Oxford 2016)) (Kristof points out that this the analogy to being gay in

law and policy are poorer without robust debate and a myriad of ideas from which the best can emerge.[46]

And in the minds of some, this phenomenon gets at something even deeper: "the basis of our democratic society," which is formed by "[t]olerance for other people's ideas, and the freedom to express your own."[47] In other words, "[i]ntolerance of ideas—whether liberal or conservative—is antithetical to individual rights and free societies, and it is no less antithetical to great universities and first-rate scholarship." [48] Yet the trust formed from tolerance and free expression "is perpetually vulnerable to the tyrannical tendencies of . . . majorities."[49] This is not surprising, observes Mayor Bloomberg, because "[r]epressing free expression is a natural human weakness." But, he argues, while we may expect this in Washington where "the two parties decide ["every major question facing our country"] not by engaging with one another, but by trying to shout each other down, and by trying to repress and undermine research that runs counter to their ideology," the "more our [law schools] emulate that model, the worse off we will be as a society."[50] Bloomberg laments

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earlier America is "a metaphor that conservative scholars often use, with talk of remaining in the closet early in one's career and then 'coming out' after receiving tenure").

[46] This isn't a phenomenon peculiar to law professors: "In a recent exercise, [The World Bank] presented identical data sets to employees under two different pretexts. Some employees were told the data were measuring the effectiveness of a skin rash cream, while others were told the same data measured the effects of minimum wage laws on poverty. The politicized context of the second question let to more erroneous analysis, and the accuracy of left-leaning respondents plummeted when the data conflicted with their worldview." Arthur C. Brooks, *Academia's Rejection of Diversity* (The New York Times, Oct. 30, 2015), archived at https://perma.cc/MC8P-3NX4.

[47] Strauss, *Bloomberg, at Harvard, blasts Ivy League 'liberals' for 'trying to repress conservative ideas'* (cited in note 1) (quoting Michael Bloomberg).

[48] Id.

[49] Id.

[50] Id.

that "in politics—as it is on too many college campuses—people don't listen to facts that run counter to their ideology. They fear them. And nothing is more frightening to them than scientific evidence."[51] So, he concludes, "[t]he more we embrace a free exchange of ideas, and the more we accept that political diversity is healthy, the stronger our society will be."[52] To the extent that law schools—the producers of tomorrow's shapers of the law and government—can model and instill the best of this, the better off the nation will be.

B.   NOT ALL DISCRIMINATION IS CREATED EQUAL

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

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

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[51] Id.
[52] Id.

schools are discriminating among applicants on these criteria, such discrimination is defensible. After all, not every applicant can be hired, so some criteria have to be used to determine who to hire and who to not.

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

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

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

Finally, relevant discrimination is discriminating on the basis of a characteristic that has relevance to the labor market. For example,

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

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

That brings us to the subject of this paper: potential discrimination on the basis of political orientation. Assume, for the sake of argument, that law schools discriminate against conservative and libertarian law professor candidates. What kind of discrimination is that? As to the first dimension, while some may not view discrimination against conservatives and libertarians as

invidious, arguably many people would find discrimination against someone because of their political orientation to be invidious rather than innocuous. And there are plausible arguments that such discrimination (if done by a public university) violates the First Amendment rights of expression and association.[53] Whether or not the discrimination is intentional or not is unclear.[54] One can easily imagine intentional or "taste-based" discrimination.[55] But one can also imagine unintentional "information-based" discrimination, wherein law professors are better able to judge quality in those of their own political stripe, and thus favor them.[56] The result—few conservative or libertarian law professors, and the problems that scarcity brings for legal education, scholarship, and the law more generally—would be the same. As for whether such discrimination is relevant or irrelevant, if being conservative or libertarian means

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[53] A federal jury believed the Iowa Law School discriminated against a faculty candidate on the basis of her conservative political orientation, but the jury was hung on whether to hold the dean accountable. See Peter Berkowitz, *A Case of Faculty Discrimination Based on Politics* (Wall Street Journal, Feb. 7, 2014), archived at https://perma.cc/L4R4-D4K6; Jason Clayworth, *Jurors in political bias case blame university* (The Des Moines Register, Nov. 20, 2012), archived at https://perma.cc/N6ZT-DR8Y ("'I will say that everyone in the jury room believed that she had been discriminated against,' said Davenport resident Carol Tracy, the jury forewoman"; "Jurors interviewed by the Register said they didn't accept the university's explanation and they believed Wagner, . . . had been discriminated against"; "'She was discriminated against but you don't go against the dean,' said juror Don Mayes, a registered Democrat from Davenport").

[54] For intentional political discrimination in another academic discipline, see Y. Inbar & J. Lammers, *Political Diversity in Social and Personality Psychology*, 7 Perspectives on Psychological Science 496 (2012) (surveying social psychologists to ask if they would discriminate against a conservative in hiring, and finding that "[m]ore than one in three would discriminate against [conservatives] when making hiring decisions").

[55] Adam S. Chilton, Jonathan Masur & Kyle Rozema, *Political Discrimination in the Law Review Selection Process*, Coase-Sandor Working Paper Series in Law and Economics, No. 832 at 3 (2018).

[56] Id.

one is less able to successfully perform the job of being a law professor, then discrimination against that class would be relevant. But if having that trait makes one no better or worse as a law professor, then such discrimination is irrelevant (though that would beg the question as to why the discrimination is occurring).

II. A MODEL OF DISCRIMINATION

This study, loosely relying on work on employment discrimination by Gary Becker[57] and Kenneth Arrow,[58] leverages a simple model of discrimination. It also draws on the concept of signaling. Some traits, such as gender or race, are hard to conceal. Others, such as sexual or political orientation, can be concealed or revealed based on the individual's desire to do such. Thus, these concealable traits are harder to measure and any measure of such is not the same as the trait itself. For example, if race or ethnicity is the focus of discrimination, and it cannot be identified by any means other than by one's name, then discrimination effects would be seen related not to the actual underlying race or ethnicity, but by the signaling of that race or ethnicity in the name. Several studies have demonstrated this name signaling effect (whether or not the signaling was intended).[59]

This study will not claim to measure the true political orientation of individuals, but rather that which is being signaled. This means that two individuals could be equally conservative, but the one who signals conservativeness will be labeled as a signaling conservative

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[57] Gary Becker, The Economics of Discrimination (Chicago 1957).

[58] Kenneth Arrow, The Theory of Discrimination (Harvard 1973).

[59] Yona Rubinstein & Dror Brenner, *Pride and Prejudice: Using Ethnic-Sounding Names and Inter-Ethnic Marriages to Identify Labor Market Discrimination*, 81 Rev Econ Stud 389 (2014); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment Evidence on Labor Market Discrimination*, 94 Amer Econ Rev 991 (2004).

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

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

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

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

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

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

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

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

III. PREVIOUS STUDIES

While perhaps not yet rising to the level of a scientific law, study after study over the past four decades, drawing on various methodologies, has found the same thing: there are few conservatives in legal academia. The earliest study surveyed entry-level hires of all law schools from 1986-1991, finding 10% were

conservative (and 75% were liberal).[60] An exploration of campaign donations from 1992-2002 from law professors at the twenty-one highest-ranked law schools in the country found just 15% of donations going to Republicans (and 81% going to Democrats), of the professors who had donated.[61] A study published in 2005 looked just at law professors at some California law schools, finding, among those registered to one of the two major parties, 20% were Republicans (and 80% Democrats).[62] Because the study's authors purposely tried to sample California law schools where Republican law professors would be more likely, and because the authors did not include those who were not registered to one of the major parties, their findings potentially overestimate the percentage of Republican law professors in California at the time.[63] Examining both 1997 and 2013 data on the top 100 law schools, another study found 13% (1997) or 11% (2013) of law professors considered themselves Republican (with 80% and 82%, respectively, labeling themselves Democrats).[64] And a previous study by this author looking at the top 16 ranked law schools for the 2011-2012 academic year, found just 10% to be conservative or libertarian (with 63% liberal and 27% unknown).[65]

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[60] Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 Chi Kent L Rev 765, 780 n 4 (1998).

[61] John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 Georgetown L J 1167, 1186 (2005).

[62] Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 Critical Rev 237, 247 (2005).

[63] Id at 240.

[64] James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 Harv J L & Pub Pol 89 (2016).

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

Perhaps the most extensive study to date is Bonica et al.'s 2018 examination of American law professors using the Database on Ideology, Money in Politics, and Elections (DIME).[66] This database not only includes donations made in from 1979-2016 in local, state, and federal elections, but it weights donations based on the ideological extremeness of the candidate donated to, creating a Campaign Finance (CF) score, with a negative value indicating liberalness and a positive value indicating conservatism. Thus, someone who donates entirely to Bernie Sanders would have a more liberal CF score than someone who donated entirely to Bill Clinton. Data from DIME was matched with the 2012 American Association of Law Schools Directory of Law Teachers, resulting in a CF score for 64% of the legal academy.[67] (This indicates law professors may be more politically inclined than the general public, with only a 5% donation rate, and even other lawyers with a 41% donation rate).[68]

The study found that on average, law professors, with a CF score of -0.86, were more liberal than Bill Clinton (-0.68).[69] This also makes the legal academy, on average, more liberal than the legal profession with its mean CF score of -0.31.[70] Of the nearly 6500 law professors who made donations, only 15 percent had a conservative CF score.[71] What is more, whereas 54 percent of conservative law professors were "moderately conservative," only 27% of liberal law professors were "moderately" so, meaning conservative law professors were

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[66] Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J Legal Stud 1 (2018) (cited in note 23).
[67] Id at 7.
[68] Id.
[69] Id at 8; Adam Bonica, Adam Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J Legal Anal 277, 292 (2016) (cited in note 39).
[70] Bonica et al., *The Political Ideologies of American Lawyers*, at 292.
[71] Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J Legal Stud 1, 8 (2018) .

twice as likely to be moderate in their "partisan-ness" than liberal law professors.[72]

Other of the study's findings are also of relevance. For example, the authors looked at law professors by subject matters, "find[ing] that a key difference between the ideologies of law professors by subject is not a noticeable shift from liberal professors to moderately liberal professors, but the presence, if any, of conservative professors in the field": "the mere presence of some conservatives is sufficient to differentiate average ideological differences among law professors between subject areas."[73] Similarly, when looking at the average CF score for law schools, the authors found "that differences in ideology appear to be driven by the presence of conservatives at several programs rather than a shift of liberals in the moderate direction."[74] Likewise, when looking at law school rankings and finding the more elite the law school, the more liberal the faculty, the study found "evidence that the relationship between professor ideology and law school rank is driven through the presence of fewer conservative professors at higher-ranked schools rather than a shift of liberal or conservative law professors in a more liberal direction."[75]

Of course, the reason conservatives (and libertarians) make up just 10-20% of the legal academy could be due to the pool of potential law professors. If that pool reflected similar, or even smaller numbers, the make-up of the legal academy would make sense (though the problems created by a dearth of conservative or libertarian law professors would not go away). There are different ways to define the pool, and the Bonica study explored them all. At

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[72] Id.
[73] Id at 9.
[74] Id at 10.
[75] Id at 11.

its broadest, the pool is all lawyers.[76] But the legal academy does not look like the legal profession, with a CF score of -0.84 compared to American lawyers in general at -0.31, a statistically significant difference.[77] In fact, in regression analysis of what drives the CF scores of lawyers, the largest "effect" was seen by whether a lawyer was a law professor—more so than being a woman, attending a top 14 law school, or being a public defender.[78] Likewise, Bonica et al. found "there are relatively fewer conservative law professors than conservative lawyers."[79] So the pool of American lawyers cannot explain the political demographics of the legal academy.

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

> The average CFscore for alumni from top-14 law schools is -.55 and is -.42 for Biglaw lawyers (compared to -.86 for law professors). In addition, 25 percent of alumni from top-14 law schools and 30 percent of Biglaw Lawyers are conservative (compared to 15 percent of law professors). In short, alumni from Top-14 law schools and lawyers in

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

[77] Bonica et al., 47 J Legal Stud at 21 (cited in note 23).

[78] Bonica et al., 8 J Legal Anal at 295 (cited in note 39).

[79] Bonica et al., 47 J Legal Stud at 21 (cited in note 23).

>Biglaw are more liberal than lawyers overall, but law professors are more liberal still. All of these differences are statistically significant (p <.01).[80]

For federal law clerks, the authors separated former U.S. Supreme Court clerks from federal district and court of appeals clerks. The study found that the CF score for the 72% of former Supreme Court clerks who had donated was -0.49, and for the 40% of former federal district and court of appeals clerks who donated, the CF score was -0.63.[81] Additionally, there was a higher percentage of conservative former clerks compared to conservative law professors, with 24% of lower federal court clerks being conservative and 30% of Supreme Court clerks being conservative (with law professors only at 15 percent).[82] In sum, the pool of elite lawyers, however measured, is more conservative and has a higher percentage of conservatives than the legal academy. Thus, the percentage of elite lawyers with the potential to become law professors can't explain the dearth of conservative law professors.

Two other recent studies are of relevance, though not directly on point. In one, Chilton and Posner randomly sampled ten tenured law professors from each of the top 14 ranked law schools , finding only 8 who had donated more money to Republicans than Democrats, or 5.7%.[83] The authors then added 16 more "Republican" law professors to have a sufficient number for statistical analysis. The study then coded the five most recent articles for each professor as conservative, liberal, or unclassifiable. The authors found that "Democratic" donors write, on average, 2.63 liberal articles, while "Republican" donors write, on average, 0.17 conservative articles. Non-donors

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[80] Id at 24.
[81] Id at 25.
[82] Id. The differences were statistically significant.
[83] Chilton & Posner, 44 J Legal Stud at 297 (cited in note 20).

wrote, on average, 1.44 liberal articles. Looking at the distribution of articles, the authors conclude that "net Democratic donors write highly ideological articles, whereas net Republican donors write articles that are distributed widely across the spectrum." Further, when looking at areas of the law, the study found "that constitutional rights scholars are less ideologically diverse than other legal scholars," and they "are more likely to produce biased research" with an average of 3.85 liberal articles. To explain their results, the authors hypothesize that:

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

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

helpful if the selection bias hypothesis is correct," but are uncertain what to do if the problem is substantive bias.

The other study of relevance sought to determine whether political discrimination occurs in the law review article selection process.[84] The study determined the political valence of both authors and student law review editors at 15 top law reviews from 1990-2010, using the DIME data, with 51 percent of editors and 57 percent of law professor authors having made campaign donations.[85] The authors found that 22% of editors and 15% of authors were conservative, and that the average law review editorial board has 21% conservative editors and 16% of articles have at least one conservative author.[86] The study determined that there is "strong evidence that the article selection process is driven in part by the relationship between the authors' and editors' political ideologies," with editors more likely to select an article that shared his or her political views.[87] The study also found that "the quality of articles from liberal authors is decreasing in the conservativeness of the board and that the quality of articles from conservative authors is increasing in the conservativeness of the board," measuring quality by citation rates.[88] They conclude that their "findings are consistent with statistical discrimination and inconsistent with bias as the causal mechanism for editors selecting more articles by authors of similar ideology."[89]

In short, conservatives (and libertarians, when measured) make up 5.7-20% of the legal academy, a much smaller portion than of the

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[84] Chilton, Masur & Rozema, Coase-Sandor Working Paper Series in Law and Economics, No. 832 (cited in note 55).

[85] Id at 6-7, 8, 10.

[86] Id at 10-11.

[87] Id at 2.

[88] Chilton, Masur & Rozema, Coase-Sandor Working Paper Series in Law and Economics, No. 832 at 4 (cited in note 55).

[89] Id.

legal profession generally, or elite lawyers. Additionally, elite law professors tend to write liberal articles, and elite law journal editorial boards tend to be dominated by liberal editors, with student editors preferring to select articles that match their political ideology.

IV. DATA COLLECTION, VARIABLES, AND METHODOLOGY

A. DATA AND VARIABLES

Data was collected using undergraduate volunteers at UC-Berkeley who participated in the project for research credit.[90] For each year from 2001-2010,[91] the previous year's AALS faculty directory was compared to create a list of new hires for that academic year (sometimes a new hire would not show up until their second year, but they were placed in whatever year was their first).[92] For each year, at least two (and sometimes more) undergraduates independently gathered data to avoid missing any professors.

Next, the undergraduate researchers collected demographic data on each of the newly-hired law professors. Again, at least two (and sometimes more) undergraduates independently gathered the data. When discrepancies arose, an additional undergraduate independently was asked to gather data on that professor and acted

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[90] Technically, 53 undergrads from UC-Berkeley and 2 from Brigham Young University.

[91] A ten-year period was selected to provide enough data to do the matching statistical analysis given how few new conservative and libertarian law professors there are each year. The specific range of years was selected to find the most recent time period that was unaffected by the drastic drop in hiring that begin a few years after the Great Recession of 2008-2009. Based on self-reported data, the 2011 hiring cycle began the decline (with hiring numbers in 2018 approximately half of what they were in 2011). See *Who Stopped Hiring?* (PrawfsBlawg, May 24, 2018), https://perma.cc/Q2ME-Z7DF.

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

as the tiebreaker. Data on law professors were gathered from the AALS faculty directory, as well as law professors' webpages and resumes. The following variables were gathered:

-professor's name

-year of birth

-year of bachelor's degree

-title[93]

-hiring law school

-U.S. News rank of hiring law school

-hiring year (first year as tenure-track law professor)

-gender

-racial minority (per the AALS directory list of "Minority Law Teachers")

-racial minority perception (based off of picture and name)[94]

-LGBT (per the AALS directory list of "Gay, Lesbian and Bisexual Community Law Teachers")

-area of teaching (up to six)

-law school where JD obtained

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[93] Only professors who were traditional, tenure-track faculty were counted. Thus, all part-time faculty, visiting faculty or fellows, clinical professors, and legal research and writing professors were excluded.
[94] This category technically included anyone listed in the AALS directory as a minority, but added those who looked like they were not white or had a name that indicated being a minority (Native American, Hispanic, etc.) if they appeared white.

-U.S. News rank of law school where JD obtained[95]

-year one obtained a JD

-grade honors for JD[96]

-whether one had been on law review

-clerkships

-whether or not the professor has a PhD

-the subject area of a professor's PhD

-the school from which the PhD was earned

-any law school fellowship or VAP[97] positions

-the school at which one was a fellow or VAP

-any government legal jobs

-which firm(s) one worked for

-journal names of any law articles published before being hired[98]

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

[96] This included the cum laude honors, Order of the Coif, and school specific grade honors.

[97] Visiting Assistant Professor.

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

-the Washington and Lee law journal ranking of any publications[99]

-the Washington and Lee combined law journal score for any publications

To measure political ideology, law student researchers were hired to independently assess each law professor, with each professor being assessed by at least two different law students.[100] This was done to avoid having the author's biases influence the determination of political orientation. The researchers were kept blind to the overall aims of the study to try and come as close as possible to the ideal of a double-blind study. Similar to the methodology used by Chilton and Posner's study,[101] researchers looked at the CV of law professors (including their webpage on their school's website), and campaign donations. On the CV, researchers looked for organizations with political leanings, as well as political campaign or experience working in presidential administrations. The Coding Guide in the Appendix provides examples. If the CV and campaign donations did not provide enough information, then researchers also looked at the professor's publications to see if any were clearly conservative/libertarian or liberal in their views (again see the Coding Guide). For example, an article taking a pro-

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

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

[101] Chilton and Posner looked at campaign donations and professors' CV's. See Chilton & Posner, 44 J Legal Stud at 292 (cited in note 20).

traditional marriage position would be conservative, whereas an article taking a pro-same-sex marriage position would be liberal or libertarian. Researchers then made a holistic assessment as to whether the professor was conservative/libertarian, liberal or unknown, and also indicated how confident they were in that assessment (slightly, somewhat, very). This allowed for the creation of a seven-point ordinal scale. Professors' political orientation was given a 1 (liberal), 0 (unknown), or -1 (conservative), and then multiplied by the confidence of the coder (slightly = 1, somewhat = 2, very = 3), meaning a professor's political orientation could be anywhere from -3 to 3. The two independent political orientation scores for each professor were then averaged. This was done given the subjective nature of the assessment.[102] Researchers were trained on practice materials before beginning to determine political orientation on their own. Their actual results were not checked or monitored by the author.

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

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

as conservative/libertarian, and a zero leading to a categorization of unknown.

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

B.   METHODOLOGY

1.   *Causality and the Potential Outcomes Framework*

This study is asking a causal question about discrimination based on political orientation. Questions of causal inference can be thought of as the task of determining counterfactuals. This is often referred to as the potential outcomes framework: what would the potential

outcome have been under the alternative scenario where the unit of observation did not (or did) receive the treatment, *ceteris paribus*.[103]

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.[104] 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 treatment[105] or control group in experimental designs is the gold standard for determining causality.

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

This far from ideal situation requires careful thinking about the potential outcomes (or counterfactual) framework, specifically the

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[103] 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).

[104] 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).

[105] When there is more than one treatment the term "alternative treatments" is used. See id at 4.

Stable Unit Treatment Value Assumption (SUTVA), [106] and the ignorable treatment assignment assumption.[107]

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."[108] It has two basic principles. First, that treatment of one individual does not affect the treatment of another individual.[109] Second, that treatment is homogenous.[110] 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). [111] 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 to 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—

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[106] Imbens & Rubin, *Causal Inference for Statistics, Social, and Biomedical Sciences* at 9–12 (cited in note 103).

[107] 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, *Counterfactuals and Causal Inference* at 40–41 (cited in Note 104); 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, Propensity Score Analysis at 29–33 (cited in note 103).

[108] Rubin, 81 J. Am. Statistical Ass'n at 961.

[109] Imbens & Rubin, *Causal Inference for Statistics, Social, and Biomedical Sciences* at 10–11 (cited in note 103).

[110] Id at 11–12.

[111] See Pan & Bai, *Propensity Score Analysis* at 6 (cited in note 107).

the treatment here[112]—cannot be dependent on such things as the pool of current candidates, the order of looking at candidates, or current composition of the legal academy's collective political orientation. Given that we are dealing with perception, which is potentially influenced by anchoring and ordering effects, this could be problematic. Thus, a candidate may appear more or less conservative (or liberal) depending on the candidates whose application materials or interview came just before or after her, or the other candidates who also were called out for a job talk. Likewise, a candidate may appear more or less conservative (or liberal) when collectively viewed by a more or less conservative (or liberal) faculty or hiring committee, the latter of which serves as a gatekeeper and given its smaller size, is both more likely to fluctuate as to its collective political/ideological orientation and more likely to be subject to groupthink. Further, if one year the majority of candidates were conservative to some degree or another (a farfetched scenario, admittedly), and the next year the majority of candidates were more or less liberal, a slightly conservative candidate in the first year might appear to be in the middle or even to the left of center ideologically/politically, whereas he may appear quite conservative the 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

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[112] 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).

scenario being studied here, the ability to generalize to years outside of those being studied is limited.[113]

The ignorable treatment assignment assumption, alternatively referred to as unconfoundedness,[114] selection on observables,[115] conditional independence,[116] and "exogeneity,"[117] channels the principle of random assignment in an experimental design.[118] It stands for the proposition that whether or not someone received the treatment is unrelated to the outcome being measured after taking into account the other characteristics they possess that could influence the outcome (or controlling for these other factors). Thus, overt and hidden biases are not a problem if this assumption holds. But if this assumption is violated, it is impossible to eliminate alternative, confounding explanations for the measured outcome. In the real world this assumption is violated all the time as people self-select into various "treatments," or others select to apply "treatment" outside of the neutrality of random assignment. A good research design is the best cure for this inferential ill, but statistical corrections can sometimes be a suitable fallback.

Certainly this study, as with most observational studies that are not some kind of fortuitous natural experiment, violates this assumption and requires statistical correction since we cannot randomly assign the perception of political/ideological orientation

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[113] Morgan & Winship, *Counterfactuals and Causal Inference* at 38–39 (cited in note 104).
[114] Imbens & Rubin, *Causal Inference for Statistics, Social, and Biomedical Sciences* at 20 (cited in note 103).
[115] Burt S. Barnow, G.G. Cain & Arthur S. Goldberger, *Issues in the Analysis of Selectivity Bias,* in *Evaluation Studies Reviews Annual, Vol. 5* (E. Stromsdorfer & G. Farkas eds., 1980).
[116] Michael Lechner, *Earnings and Employment Effects of Continuous Off-the-Job Training in East Germany After Unification*, 17 J Bus & Econ Statistics 74 (1999).
[117] Guido W. Imbens, *Nonparametric Estimation of Average Treatment Effects Under Exogeneity: A Review*, 86 Rev Econ & Statistics 4 (2004).
[118] See also Guo & Fraser, Propensity Score Analysis at 29–33 (cited in note 103).

given that is driven by (1) the actual underlying political/ideological orientation of a candidate; (2) the degree an individual chooses to publicly signal such orientation; (3) the degree faculties evaluating candidates pick up on these signals; and (4) the degree faculties' underlying actual political/ideological orientation colors their reading of the candidates' signals. Thus, statistical correction is necessary.

2.   *Statistical Models for Estimating Causal Effects*

Regression. Regression modeling, matching and propensity score analysis are all attempting to do the same thing—break the link between treatment assignment and treatment outcome. But they are not interchangeable. When "treatment groups have important covariates that are more than one-quarter or one-half of a standard deviation apart, simple regression methods are unreliable for removing biases associated with differences in covariates, a message that goes back to the early 1970s but is often ignored."[119]

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."[120] 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."[121]

Propensity Score Matching. Propensity score matching compares units in the treatment and control groups who have similar

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[119] Imbens & Rubin, *Causal Inference for Statistics, Social, and Biomedical Sciences* at 277 (cited in note 103).
[120] Id at 309, 311.
[121] Id at 336.

propensities for treatment (the propensity score).[122] The propensity score ranges from 0 to 1, is calculated using logistic (or probit) regression, with the dependent variable being whether or not the observation is in the treatment group, and the independent variables those variables the researcher thinks are associated with being in the treatment or control groups. In this study, the propensity scores were created using the covariates listed as independent variables in the methodology section.[123] Additionally, the data were trimmed to exclude any observations with propensities scores below 0.10 and above 0.90 since "for a wide class of distributions the optimal set is well approximated by the set of observations with propensity scores in the interval [0.1, 0.9]."[124]

While propensity score matching is an increasingly popular method, it is not without its problems. In fact, King and Nielsen have shown, using real and simulated data, that propensity score matching, unlike Mahalanobis distance matching and coursened exact matching, "can and usually does increase imbalance, inefficiency, model dependence, research discretion, and bias. . . . In fact, the more balanced the data, or the more balanced it becomes by

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[122] See generally Guo & Fraser, Propensity Score Analysis at 130-40 (cited in note 103).
[123] "As a way of guarding against the consequences of misspecification, researching using estimators built around the propensity score should include in the propensity score model covariates believed to influence the treatment selection process as well as any covariates believed to influence the outcome variable. Doing so provides a type of insurance against bad bias, but this may come at the expense of added variance." Matias Busso, John DiNardo & Justin McCrary, *New Evidence on the Finite Sample Properties of Propensity Score Reweighting and Matching Estimators*, 96 Rev Econ & Statistics 885, 896-97 (2014).
[124] Richard K. Crump, V. Joseph Hotz, Guido W. Imbens & Oscar A. Mitnik, *Moving the Goalposts: Addressing Limited Overlap in the Estimation of Treatment Effects by Changing the Estimand* *5 (NBER Technical Working Paper 330, Sept. 2006), archived at https://perma.cc/72UT-63DS.

pruning some observations through matching, the more likely [propensity score matching] will degrade inferences."[125]

Propensity Score Weighting. While "[propensity score] weighting can be considered a submodel of those developed by Rosenbaum and Rubin . . . it is important to treat the propensity score weighting estimator . . . as a special case, a method that is categorically different from other propensity score models." [126] That is, "[t]he method directly exploits the inverse of estimate propensity scores as weights in outcome analysis, and to a large extent, it shares similarities with weighted analysis using unequal sampling weights."[127] One of the advantages of propensity score weighting over propensity score matching is that less data is lost. "[I]n finite samples, an appropriate reweighting estimator nearly out performs pair matching and is often competitive with the more sophisticated matching estimators in [data generating processes] where overlap is good."[128] But in data generating processes "where overlap is poor, [] reweighting tends not to perform as well as some of the more effective matching estimators."[129]

Nearest Neighbor Matching (NNM). In its simplest form, "matching, or more precisely the mechanism for balancing data through matching, involves identifying untreated participants who are similar on covariates to treated participants and using the mean outcome of the nontreated group as a proxy to estimate the

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[125] Gary King & Richard Nielsen, *Why Propensity Scores Should Not Be Used for Matching* *1 (unpublished manuscript Aug. 17, 2015), archived at https://perma.cc/6WSQ-DWVX.

[126] Guo & Fraser, Propensity Score Analysis at 240 (cited in note 103).

[127] Id.

[128] Busso et al., 96 Rev. of Econ. & Statistics at 885 (cited in note 123).

[129] Id.

counterfactual of the treated group."[130] Whereas propensity score matching suffers from dependency on the functional form of the logit or probit regression model used to calculate the score, matching avoids this. But this comes at a cost--"as the number of matching variables increases, so does the difficulty of using exact matching to find a match for a given treated participant"--the dreaded curse of dimensionality.[131] Also, one must determine the metric to use in determining the "distance" of the nearest match. Of the various matching estimators, "[o]ne of the most effective . . . is bias-corrected matching with a fixed number of neighbors."[132]

Coursened Exact Matching (CEM). CEM utilizes a "monotonoic imbalance reducing matching method" so that "balance between the treated and control groups is chosen by ex ante user choice."[133] CEM also allows one to adjust balance on one variable without altering the imbalance of other variables. CEM's creators argue that it "strictly bounds through ex ante user choice both the degree of model dependence and the average treatment effect estimation error, eliminates the need for a separate procedure to restrict data to common empirical support, meets the congruence principle, [and] is robust to measurement error."[134] CEM does not calculate treatment effects on its own, but merely trims the data to ensure sufficient covariate balance, enabling one to use "whatever statistical model they would have applied without matching . . . [or] to be used to improve other methods of matching."[135] CEM can either be specified to perform one-to-one matching between the treatment and control

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[130] Guo & Fraser, Propensity Score Analysis at 76 (cited in note 103). See also id at 255-59.

[131] Guo & Fraser, Propensity Score Analysis at 256 (cited in note 103).

[132] Busso et al., 96 Rev. of Econ. & Statistics at 885 (cited in note 123).

[133] Matthew Blackwell et al., *cem: Coursened Exact Matching in Stata*, 9 Stata J. 524 (2009), archived at https://perma.cc/FHK2-UWHN.

[134] Id.

[135] Id.

groups, or one-to-many matching. CEM further allows one to match based on strata of a particular variable.

V. FINDINGS AND ANALYSIS

A.   POLITICAL MAKE-UP OF NEW PROFESSORS

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

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

When looking at all signals, public and private (i.e., voter registration), just under 14% of the newly hired professors over the decade studied were classified as conservative or libertarian.

Another 18% were either unidentifiable as to political orientation, or appeared to be in the political middle. And just over two of every three new hires were classified as liberal (68%). Thus, the ratio of liberal to conservative/libertarian new law professors was about 5 to 1.

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

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

Another question of interest is whether conservatives/libertarians are clustered in the higher, lower, or middle rankings of law schools, or are more evenly distributed, at least for those hired in the time period studied. The graph below shows the percentage of each of the three groups of new hires are spread across the four tiers: 1-50, 51-100, 101-149, 150+.
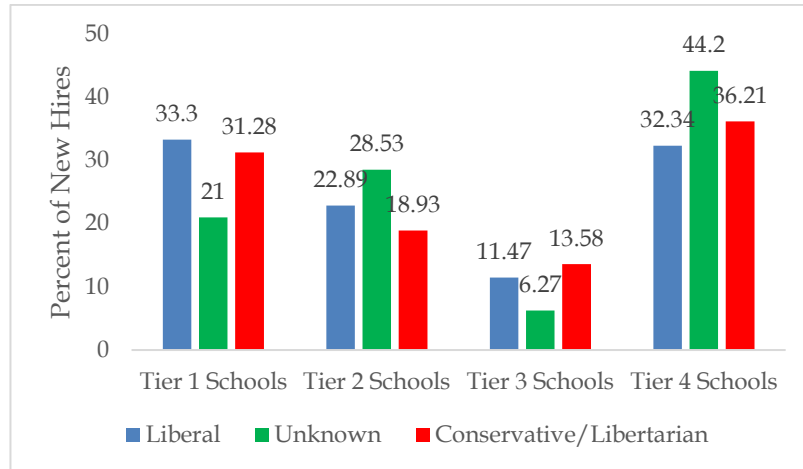
The distribution of all three groups is uneven across the tiers, indicating that law schools were not equally hiring across rankings over the decade studied. But the distribution of conservatives/libertarians and liberals was relatively similar.

B. QUALIFICATIONS BY POLITICAL ORIENTATION

Next, I report the various qualification variables for each political orientation.[136] The three classifications do not look like each other on

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[136] These qualification variables are common in studies of law faculties or in publications providing advice to aspiring law professors. *See* Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J Empirical Legal Stud 1, 16-20, 38 (2014) (finding that statistically-significant predictors of receiving a tenure-track offer were having graduated from law school less than 10 years ago, having a judicial clerkship, having published in a top 100 ranked law journal, currently teaching law or being a fellow, and having graduated from Yale, Harvard, or Stanford); Justin McCrary et al., *The Ph.D. Rises in American Law Schools, 1960-2011: What Does it Mean for Legal Education?*, 65 J Legal Educ 543 (2016) (finding the percentage of newly hired faculty at the top three dozen law schools who have a Ph.D. has risen significantly over the past half century, and that newly-hired professors had earned their law

many of the dimensions, an indication that regression analysis would provide poor results here.

	Liberal	Unknown	Conservative
Bachelor Year	1989.6	1990.7	1990.3
Female	.483	.382	.238
Minority	.264	.204	.119
JD Rank	21.7	33.4	24.2
Grade Honors	.312	.285	.393
Law Review	.344	.263	.361
PhD	.167	.147	.148
Clerkship Scale	1.53	.92	1.82

degree from a handful of elite law schools, with just over half having served on law review while in law school and clerked for a judge after law school); Deborah Jones Merritt & Barbara F. Reskin, *Sex Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 Colum L Rev 199, 222 (1997) (in attempting to measure the impact of sex and race on law school hiring, controlling for, among other things, "prestige of his or her J.D. school; election to Order of the Coif during law school; law review membership . . . ; possession of a doctoral degree in a field other than law; experience as a judicial clerk or a state supreme court, federal district court, federal court of appeals, or the United States Supreme Court;" as well as "the professor's age at the time of the first tenure-track appointment"). Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process,* 18 Hous L Rev 215, 243-59 (1981); Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession,* 5.3 Am B Found Res J 501, 504-28 (1980); Elyce H. Zenoff & Jerome A. Barron, *So You Want to be a Law Professor?,* 12 J L & Educ 379, 407-09 (1983); Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors,* 25 U Mich J L Reform 191, 212-36 (1991); Richard E. Redding, *Where Did You Go to Law School: Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J Legal Educ 594 (2003); Gabriel J. Chin & Denise C. Morgan, *Breaking into the Academy: The 1996-97 Michigan Journal of Race & Law Guide for Aspiring Law Professors,* 1 Mich J Race & L 551 (1996).

# of Articles	2.11	1.76	2.43
Highest Ranking Article	104.6	131.1	107.6

Focusing specifically on comparing liberals to conservatives,[137] on none of the seven qualifications are liberals more qualified in that they have a statistically significant [138] difference in a "better" direction than conservatives. Instead, the two group's values are either statistically indistinguishable, or conservatives actually are more qualified (statistically significantly "better"). Thus, liberals and conservatives are equivalently qualified when it comes to the rank of their JD-granting institution (p = .172), the percentage holding PhDs (p = .226), the percentage who were on law review (p = .310), and the highest rank pre-hire publication (p = .408). And conservatives were more "qualified" than liberals on having law school grade honors (p = .007), the highest clerkship level (p = .002),[139] and the number of pre-hire publications (p = .056).

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

[138] Testing with a simple two-sample t-test with equal variances.

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

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

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

	Liberal	Unknown	Conservative
Hiring Law School Rank	87.1	100.8	92.8

Liberals, despite arguably being less qualified, average being hired at a law school about six spots more prestigious than conservatives. And that difference approaches statistical significance (p = .066). Why would that be? One possible explanation is discrimination based on political orientation. Another possibility is discriminating in favor of certain demographics that conservatives are weaker on, such as age, gender, or race. For instance, conservatives are whiter (p < .001) and more male (p < .001) than liberals at statistically significant levels.[140] But looking at all of these variables in isolation can miss things. A more rigorous statistical analysis is necessary.

C.   TREATMENT EFFECTS

Given the differences between the three groups, regression analysis is less ideal. Instead, the statistical methods noted above that trim data that has no good match in order to create an apples-to-apples comparison will be used. The first method is nearest-neighbor matching, requiring at least one match and no more than two.[141] I first report the standardized differences on the covariates between

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

[141] I used the default Mahalanobis distance metric.

the treatment and control groups in each pairing. As a general guide, standardized differences should be no more than .25 above or below 0.[142]

Observations	Treated (Con.) N = 217	Control (Liberal) N = 1071	Treated (Con.) N = 217	Control (Unk.) N = 263	Treated (Unk.) N = 263	Control (Liberal) N = 1071
Standardized Differences	Raw	Matched	Raw	Matched	Raw	Matched
Bachelor Year	.016	.024	-.043	-.035	.027	.048
Female	-.541	-.083	-.332	-.013	-.201	-.069
Minority	-.395	-.046	-.256	-.028	-.138	-.014
JD rank	.072	.006	-.204	.003	.267	-.007
Grade Honors	.188	-.032	.213	.009	-.025	-.031
Highest Clerkship	.183	.006	.600	.066	-.418	-.065

[142] See Donald B. Rubin, *Using Propensity Scores to Help Design Observational Studies: Application to the Tobacco Litigation*, 2 Health Serv & Outcomes Res Methodology 169 (2001); Elizabeth A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, 25 Statistical Sci 1 (2010).

Doctorate	-.077	-.008	-.026	.018	-.051	-.006
Law Review	-.0002	-.028	.127	.031	-.127	-.013
Highest Publicatio n	-.006	-.077	-.129	.016	.123	-.032
Number of Publicatio ns	.090	-.065	.252	.037	-.153	-.092

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

	Treatment (Con) Control (Lib) N = 1288	Treatment (Unk) Control (Lib) N = 480	Treatment (Con) Control (Unk) N = 1334
Average Treatment Effect	11.89 (5.41)	11.91 (4.47)	-1.16 (5.70)

The nearest-neighbor matching shows evidence of discrimination, but not two-tier discrimination. Conservatives are not more disfavored than those whose political orientation is unknown. But both groups suffer a statistically significant hit, so to speak, of about

12 ranks in the school they are hired at for not having a liberal political orientation.

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

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

Number of Publications	.090	-.031	.252	.050	-.153	.023

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

	Treatment (Con) Control (Lib) N = 1288	Treatment (Unk) Control (Lib) N = 1334	Treatment (Con) Control (Unk) N = 480
Average Treatment Effect	13.16 (5.02)	13.40 (5.07)	-2.23 (5.57)

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

The evidence presented here does support a claim that discrimination occurs in law school hiring. But it appears to be discrimination in favor of liberals, or against anyone who is not liberal, rather than a two-tiered discrimination scenario where liberals are favored and conservatives disfavored, with unknowns (or moderates) neither favored nor disfavored overall.[143]

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[143] A similar study surveyed 1643 faculty members at 183 four-year colleges and universities, and found using regression analysis, after controlling variables measuring professional accomplishments and individual characteristics, that conservatives and Republicans are professors at lower quality schools than liberals
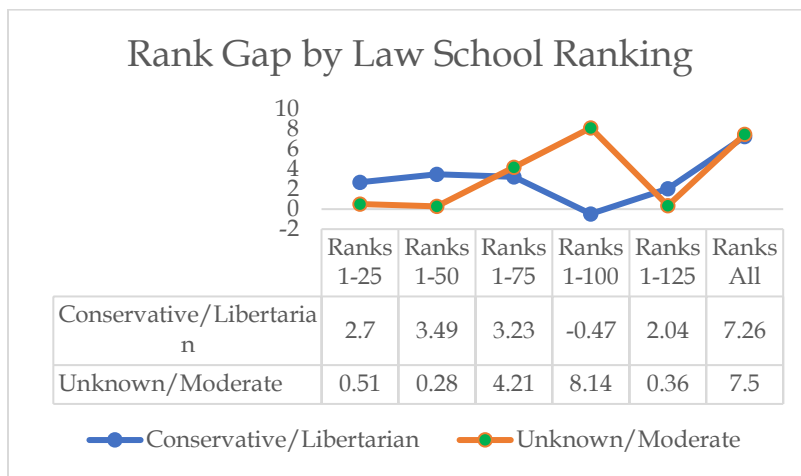
Of course, the effects reported are an average across all law school hiring. But the effects may not be uniform. For instance, perhaps the rank gap between conservatives and liberals is higher for more prestigious schools. Or perhaps its higher for the least prestigious schools. To check this, a standard methodology is to regress the dependent variable (here, the hiring school ranking) on the treatment variable (political orientation) and the other independent variables, starting with one end of the scale of the dependent variable and slowly adding more observations as you advance up the scale of that variable.[144] So, for this study, that would mean first examining the regression model's rank gap for the top 25 law schools, then adding the next 25 to the model so that one is examining the top 50, then adding the next 25 so one is looking at the top 75, and so on. The estimated rank gap will not provide an accurate number with the regression model since regression underestimates the gap given the problems with a lack of overlap between the treatment and control groups, as discussed above.[145]

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and Democrats. Stanley Rothman et al., *Politics and Professional Advancement Among College Faculty*, 3 Forum 1 (2005).

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

[145] The regression coefficient for a dummy variable for conservatives was 7.26 (p = .055), and for the dummy variable for unknowns/moderates was 7.50 (p = .028). The positive co-efficient means a school with a higher-numbered rank, or, in other words, a less prestigious school since the lower the value of the rank, the more prestigious the school. The overall regression model's statistics were: n = 1551; $F_{(12, 1538)}$ = 25.77; p < .0001; R-squared = 0.16; SER = 49.47. As for the control variables: Year of Bachelor Degree = -.026 (p = .148); Female = -6.27 (p = .016); Minority = .05 (p = .868); JD Rank = .22 (p < .001); Law School Grade Honors = -1.82 (p = .515); Clerkship Scale = -7.46 (p < .001); Ph.D. = -29.03 (p < .001); Law Review = -6.39 (p = .021); Highest-ranked Publication = .024 (p < .001); Number of Publications = -1.56 (p = .001); constant =

Rather, the point of the exercise is merely to show where along the law school rankings continuum the rank gap is wider or narrower to show which ranked schools may be engaging in more or less discrimination. As is evident in the graph below, the discrimination (rank gap) is not uniform.

Rank Gap by Law School Ranking

	Ranks 1-25	Ranks 1-50	Ranks 1-75	Ranks 1-100	Ranks 1-125	Ranks All
Conservative/Libertarian	2.7	3.49	3.23	-0.47	2.04	7.26
Unknown/Moderate	0.51	0.28	4.21	8.14	0.36	7.5

—●— Conservative/Libertarian   —●— Unknown/Moderate

The chart and its data show that the rank gap, how this paper operationalizes discrimination, is not uniform. For conservatives vis-à-vis liberals, discrimination is strongest with the least prestigious schools; weakest and apparently nonexistent for schools ranked from

155.17 (p < .001). Thus, for characteristics within a candidate's control, the advice appears to be get a JD from the best-ranked school one can, don't worry so much about grade honors (though that can impact other variables, such as clerkships); obtain the most prestigious clerkship one can, get a Ph.D., be on law review in law school, get a publication in the best-ranked law journal one can, and publish as many articles as one can. As for characteristics outside a candidate's control, don't be seen as a conservative/libertarian or an unknown/moderate and don't be female. Age might matter, though it's not quite statistically significant, so younger is better. Being a minority doesn't appear to matter.

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

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

VI. CAVEATS AND LIMITATIONS

This study used observational data, so it's claim to "effects" and causality is a weak one as there are many factors in the real world that are difficult to control for when one moves outside of the laboratory. Still, the evidence, while not perfect, is strong. Further,

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

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

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

harder time assessing the quality of candidates who do not share their political ideology? This study cannot say. And knowing the type of discrimination would be helpful in understanding how to solve the problem.

CONCLUSION

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

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

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