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An Empirical Study of Political Bias in Legal Scholarship

Adam S. Chilton
dangelolawlib+adamchilton@gmail.com

Eric A. Posner
dangelolawlib+ericposner1@gmail.com

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Adam S. Chilton and Eric A. Posner

THE LAW SCHOOL
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AN EMPIRICAL STUDY OF POLITICAL BIAS IN LEGAL SCHOLARSHIP

*Adam S. Chilton** & *Eric A. Posner†*

Abstract

Law professors routinely accuse each other of making politically biased arguments in their scholarship. They have also helped produce a large empirical literature on judicial behavior that has found that judicial opinions sometimes reflect the ideological biases of the judges who join them. Yet no one has used statistical methods to test the parallel hypothesis that legal scholarship reflects the political biases of law professors. This paper provides the results of such a test. We find that, at a statistically significant level, law professors at elite law schools who make donations to Democratic political candidates write liberal scholarship, and law professors who make donations to Republican political candidates write conservative scholarship. These findings raise questions about standards of objectivity in legal scholarship.

* Assistant Professor of Law, University of Chicago Law School. Email: adamchilton@uchicago.edu.

† Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School. Email: eposner@uchicago.edu.

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INTRODUCTION

Law professors have frequently accused each other of writing legal scholarship that claims to be objective but is in fact tainted with political bias. Conservative law professors argue that liberal constitutional scholars say that the Constitution protects abortion rights and same-sex marriage but not gun rights because of their ideological commitments to abortion, same-sex marriage, and gun control, rather than because of a good-faith analysis of the relevant legal materials.¹ Liberal law professors argue that conservative law professors have thrown their lot in with originalism because the original understanding lines up with the ideological goals of those professors or can be manipulated to do so.² Critics of law and economics argue that this methodology appeals to conservatives who believe in free markets.³ Defenders of law and economics have not been shy about accusing their critics of left-wing ideological bias.⁴ In countless other debates, charges of ideological bias are common.⁵ A full account of the charges and counter-charges of ideological bias in

¹ See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 199-219 (1997) (accusing mainstream constitutional law professors of liberal bias).

² Robert Post & Reva Siegal, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006) (arguing that conservatives prefer originalism for ideological reasons). See generally Keith E. Whittington, *Is Originalism Too Conservative?*, 34 *HARV. J.L. & PUB. POL'Y* 29, 30 (2011) ("The association of conservative politics with originalism is not accidental, however, and conservatives are generally more likely than liberals to find originalism a normatively attractive approach to constitutional interpretation.").

³ MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 151 (1987) (law and economics is "biased ... because the people doing this work explicitly and substantively favor certain traditional right-wing positions").

⁴ Richard A. Posner, *The Economic Approach to Law*, 53 *TEX. L. REV.* 757 (1975) ("The law and economics scholars have been scrupulous—more scrupulous I would argue than their critics—in respecting the line between positive and normative analysis.").

⁵ See, e.g., Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 *U. PA. L. REV.* 1245, 1294 (1997) (claiming ideological bias motivated professor's criticisms of pro bono lawyers); Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 *B.C. L. REV.* 1, n 163 (2008) (claiming ideological bias motivated argument that the Justice Department should reduce investigations of corporations); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 *B.Y.U. L. REV.* 177, 244 (1999) (claiming ideological bias motivated argument that better health insurance is the solution to the problem of bankruptcy); Lynne Marie Kohm & Lynn D. Wardle, *The "Echo-Chamber Effect" in Legal Education: Considering Family Law Casebooks*, 6 *U. ST. THOMAS J.L. & PUB. POL'Y* 104 (2011) (arguing that family law casebooks reflect ideological bias in favor of abortion rights).

law reviews could easily fill up the Internet, leaving no room for cat videos.

Conservative scholars have also complained that law school faculties are left-wing. A study by John L. McGinnis, Matthew Schwartz, and Benjamin Tisdell found that law professors at the top law schools who made political contributions overwhelmingly contributed to Democratic candidates for political office.⁶ One commentator laments that lack of ideological diversity among law professors leads to an “echo chamber” that prevents “an accurate understanding of contemporary reality.”⁷ If 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.

Nor are these accusations restricted to academic work. Professor David Hyman complains that the liberal bias of law professors was reflected in their comments to journalists about the constitutionality of the individual mandate of the Affordable Care Act.⁸ The law professors argued, in the strongest possible terms, that the legal argument that the individual mandate violated the Commerce Clause was not only wrong but “frivolous,” “silly,” “deserving of sanctions,” “completely bogus,” and “beneath contempt.”⁹ Yet that challenge was received favorably by some district and circuit courts, and prevailed in the Supreme Court in *NFIB v. Sebelius*¹⁰ by a 5-4 vote. Hyman believes that their ideological priors led the law professors astray and thus that the legal academy, because of its overwhelming liberal slant, misled journalists and the public.

The political scientist Steven Teles places recent developments in legal scholarship in an ideological framework.¹¹ In his telling, an alliance of liberal law professors, liberal public-interest groups like the ACLU, and liberal foundations like the Ford Foundation formed a

⁶ John L. McGinnis, Matthew Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1169 (2005).

⁷ George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J. L. & PUB. POL’Y 165 (2013). See also Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 HARV. J.L. & PUB. POL’Y 137 (2013).

⁸ David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits against PPACA?*, 2014 U. ILL. L. REV. 805.

⁹ *Id.* at 809-10.

¹⁰ 132 S.Ct. 2566 (2012).

¹¹ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

“liberal legal network” in the 1970s that supported liberal legal scholarship committed to defending Warren Court decisions:

The near-absence of conservative voices in law schools meant that this interpretation of constitutional law was nearly hegemonic. This was a “dominance so complete that every casebook, treatise, and handbook used to teach constitutional law in American law schools is the product of Democrats writing from Democratic perspectives.”¹²

The liberal legal network eventually provoked a backlash among conservatives. Legal scholars with a conservative or libertarian bent organized their own institutions to nurture their scholarship—above all, The Federalist Society. And they received significant financial support for their research from right-leaning foundations.¹³

In this paper, we attempt to test the link between ideology and research using statistical methods. We have collected data on the political propensities of a random sample of 156 tenured law professors from elite law schools, and on the political slant of papers that they have written in the last several years. We do in fact find that the ideology of a tenured professor at an elite law school—as measured by his or her contributions to candidates for political office—is correlated at a statistically significant level with the ideological valence of the professor’s research.

We are writing on a clean slate. As far as we know, no one has conducted a statistical study of political bias among law professors. There is also no comparable research in other fields. However, there is some related work. In political science, we found one study that shows that scholars who use different paradigms in international relations (realist, liberal, etc.) tend to have different ideological views based on responses to a survey.¹⁴ Economists have produced several studies of the ideological views of economists. In these studies, authors use surveys to gauge economists’ political views and their views about certain economic parameters, and then investigate the relationships between them (typically finding a statistically

¹² *Id.* at 45, quoting Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NORTHWESTERN U.L. REV. 935, 955 (1990). For further discussion, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

¹³ Teles, *supra* note 11, at 265-74.

¹⁴ Brian Rathbun, *Politics and Paradigm Preferences: The Implicit Ideology of International Relations Scholars*, 56 INT’L STUD. Q. 607 (2012) (finding a relationship between international relations scholars’ choice of paradigm and political beliefs).

significant relationship).¹⁵ But they have not tested whether political views affect published articles. Psychologists have written extensively about whether the lack of ideological diversity in their profession has biased research.¹⁶ Historians routinely argue that earlier generations of historical scholarship reflect the ideological assumptions of the age.¹⁷

The absence of similar research on legal scholarship reflects

¹⁵ Jessica Carrick-Hagenbarth & Gerald A. Epstein, *Dangerous interconnectedness: economists' conflicts of interest, ideology and financial crisis*, 36 CAMBRIDGE J. ECON. 43 (2012) (finding that economists proposing financial reform measures frequently had, but only infrequently and inconsistently disclosed, private financial affiliations); Victor R. Fuchs, Alan B. Krueger, & James M. Poterba, *Why do Economists Disagree About Policy?*, NBER Working Paper No. 6151 (1997) (finding a relationship between economists' values and their best estimates of economic parameters as well as their policy preferences); Thomas Mayer, *The Role of Ideology in Disagreements Among Economists: A Quantitative Analysis*, 8 J. ECON. METH. 253 (2001) (finding a relationship between economists' political ideology and their estimates of economic parameters); Bryan Caplan, *Systematically Biased Beliefs About Economics: Robust Evidence of Judgmental Anomalies from the Survey of Americans and Economists on the Economy*, 112 THE ECON. J. 433 (2002) (rejecting the view that self-serving or ideological biases among economists explain the differences of opinion between economists and laypeople on economic questions); Roger Gordon & Gordon B. Dahl, *Views Among Economists: Professional Consensus or Point-Counterpoint?*, 10 AM. ECON. REV: PAPERS & PROCEEDINGS 629 (2013) (finding consensus among economists on many economic questions and no evidence that ideological divisions explain disagreement on the others).

¹⁶ Yoel Inbar & Jorri Lammers, *Political Diversity in Social and Personality Psychology*, 7 PERSPECTIVES ON PSYCHOLOGICAL SCI. 496 (2012) (finding that social and personality psychologists overwhelmingly have liberal political beliefs and some would discriminate against conservatives in professional decisions); Lee Jussim, *Liberal Privilege in Academic Psychology and the Social Sciences: Commentary on Inbar & Lammers (2012)*, 7 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 504 (2012) (arguing that the liberal political beliefs of social psychologists distort research in the field); Linda J. Skitka, *Multifaceted Problems: Liberal Bias and the Need for Scientific Rigor in Self-Critical Research*, 7 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 508 (2012) (critiquing the methodology of the Inbar & Lammers study); Richard E. Redding, *Likes Attract: The Sociopolitical Groupthink of (Social) Psychologists*, 7 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 512 (2012) (arguing that ideological diversity in the field of psychology is important to research and teaching); Deborah A. Prentice, *Liberal Norms and Their Discontents*, 7 PERSPECTIVES ON SOCIAL PSYCHOLOGY 516 (2012) (arguing that liberal norms in the field of social psychology constrain the direction of research); Philip E. Tetlock, *Rational Versus Irrational Prejudices: How Problematic Is the Ideological Lopsidedness of Social Psychology?*, 7 PERSPECTIVES ON SOCIAL PSYCHOLOGY 519 (2012) (arguing that liberal ideological biases may have influenced research).

¹⁷ See, e.g., C. Behan McCullagh, *Bias in Historical Description, Interpretation, and Explanation*, 39 HISTORY & THEORY 39 (2000).

poorly on our field. And it is surprising in light of the massive literature on judicial behavior, which uses statistical methods to predict case outcomes from the ideologies of judges.¹⁸ Indeed, we use a methodology similar to that of the authors in that literature. So, based on the principle that what is sauce for the goose is sauce for the gander, we turn now to legal academia.

I. RESEARCH DESIGN

A. *Empirical Strategy*

We use a simple empirical strategy modeled on the general approach used in the judicial behavior literature. That literature tests the hypothesis that case outcomes or votes are affected by the ideology of judges. Authors have developed an elaborate coding scheme for classifying a case outcome as “liberal” or “conservative.”¹⁹ The ideology of a judge is usually based on the party affiliation of the president who nominated her.²⁰ Thus, findings that judges nominated by Democratic presidents vote more frequently for liberal case outcomes than judges nominated by Republican presidents are consistent with the hypothesis.²¹

As explained in greater detail below, we use the same coding

¹⁸ See, e.g., LEE EPSTEIN, ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* (2013).

¹⁹ See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993). The “U.S. Supreme Court Database,” initially created by Harold Spaeth, is widely used in law and social science. Cf. Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 272 n.10 (2006) (noting that the database was cited 161 times between 2002 to 2006 alone). For a criticism of the coding system developed and used by this widely cited database, see Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009).

²⁰ See, e.g., Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Court of Appeals*, 73 J. POL. 345 (2011); Cass R. Sunstein & Thomas J. Miles, Symposium, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2197 (2009); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 303 (2004).

²¹ See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals*, 107 YALE L.J. 2155, 2168 (1998). See also Kastellec, *supra* note 20; Sunstein et al., *supra* note 20; Richard L. Revesz, *Environmental Regulation, Ideology and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

system for classifying articles written by professors. Because professors are not appointed by political officials, we instead rely on their campaign contributions to infer their ideology. Although it is possible that an individual's political donations do not reflect his or her true ideological commitments, they do have the advantage of providing an objective and observable measure of preferences. Moreover, donations are a widely used proxy for ideology in empirical research.²² Our hypothesis is that professors who contribute to Democratic politicians are more likely to write liberal articles than are professors who contribute to Republican politicians.

B. Data

1. The Sample

Each observation in our dataset is a professor. To choose our professors, we drew our sample from the top 14 law schools in the 2015 U.S. News & World Report Rankings.²³ We then randomly selected ten professors from each law school.²⁴ To ensure that the

²² See generally Adam Bonica, *Ideology and Interests in the Political Marketplace*, 57 AM. J. POL. SCIENCE 294 (2013). See *infra* note 38.

²³ The 2015 edition of the rankings were released in the spring of 2014. The top 14 law schools in those rankings are: (1) Yale Law School; (2) Harvard Law School; (3) Stanford Law School; (4) Columbia Law School; (4) University of Chicago Law School; (6) NYU School of Law; (7) University of Pennsylvania Law School; (8) University of Virginia School of Law; (9) University of California, Berkeley, Boalt Hall School of Law; (10) Duke University School of Law; (10) University of Michigan Law School; (12) Northwestern University School of Law; (13) Cornell Law School; and (13) Georgetown University Law Center. We focus on elite law schools because other scholarship does as well. See, e.g., McGinnis et al., *supra* note 6. Moreover, we decided to define elite law schools as the Top-14 law schools in the U.S. News and World Report Rankings because it is the definition common used in both academic scholarship and discourse more widely. See e.g., Maya Sen, *Is Justice Really Blind? Race and Appellate Review in US Courts*, Working Paper (2013), available at <http://scholar.harvard.edu/files/msen/files/jpm_v13.pdf> (last visited August 7, 2014). See also Wikipedia Entry on Law School Rankings, available at <http://en.wikipedia.org/wiki/Law_school_rankings_in_the_United_States#Schools_that_rank_in_the_top_14_.28aka_.22T14.22.29> (last visited August 7, 2014). We of course acknowledge that the decision to focus on elite law schools does mean that our findings may not be generalizable to the population of all law professors. See *infra* Part III.A.

²⁴ We used a five-step process to conduct our random draw of professors. First, we downloaded a list of the current faculty from the website of each of the 14 law schools in our sample. Second, we counted the number of professors at each school. Third, we used a random number simulator to create a random list of

professors included in our sample had sufficient time to develop a body of scholarship to evaluate, we elected to include only tenured academic faculty.²⁵ In six cases the professors we initially drew had written fewer than five journal articles—which we believed to be too few articles to allow for a confident assessment of the ideological valence of their research—so we discarded them and replaced them with an additional professor, chosen at random, from the same schools. Thus, our initial dataset had 140 observations.

In the initial sample of 140 professors, however, only 8 had donated more money to Republicans than Democrats (which is our principle measure of ideology).²⁶ This is perhaps unsurprising given prior research that has suggested that academics are skewed far to the left,²⁷ that lawyers skew to the left as a profession,²⁸ and even that legal academics skew to the left.²⁹ That said, we still believed that 8 Republicans was too small a sample for drawing reliable inferences, so we proceeded to oversample Republicans. To do so, we used the Database on Ideology, Money in Politics, and Elections (DIME) developed by the political scientist, Adam Bonica.³⁰ Using the DIME database, we searched for employees of the 14 law schools in our sample who were net conservative donors, and who met our criteria of being tenured academic scholars. This resulted in the identification of an additional 16 Republican donors who were not already in our sample. We added these 16 professors to our initial

numbers based on the number of professors each school. For example, Harvard had 119 professors listed on their website, so we had a computer put the numbers 1 to 119 in random order (i.e. 47, 10, 91, 2, etc.). Fourth, we then took the professor from our list that was listed in the place determined by the first ten randomly generated numbers (i.e. if the first number was 47, we'd count down the published faculty list to the 47th spot, then include that professor in our sample). Fifth, if a professor was not a tenured doctrinal faculty member, we drew continued down our randomly ordered list until we had 10 professors from each school.

²⁵ We excluded Assistant Professors, Associate Professors, Emeritus Professors, Clinical Professors, Visiting Assistant Professors, and Professors of the Practice.

²⁶ See *infra* Part I.B.3.

²⁷ See Adam Bonica, *Mapping The Ideological Marketplace*, 58 AM. J. POL. SCI. 367 (2014).

²⁸ See Adam Bonica & Maya Sen, *Whom Does the Judiciary Represent?* Working Paper (2014) (on file with authors).

²⁹ See McGinnis et al., *supra* note 6.

³⁰ Adam Bonica, *Database on Ideology, Money in Politics, and Elections: Public version 1.0*, available at <<http://data.stanford.edu/dime>> (last visited July 31, 2014). The DIME database provides data on over 100 million political donations between 1979 to 2012 based on FEC filings. The reason that we were able to find additional donations using this database is that it includes donations from earlier years than opensecrets.com does.

sample of 140 professors, resulting in a sample of 156 total observations.³¹

2. The Dependent Variable

We first selected the five most recent articles published by those professors, as of July 2014.³² We selected articles published in law reviews or peer-reviewed journals, and excluded book reviews and popular writing. With a small number of exceptions where we used our judgment, this process was straightforward.

We hired research assistants—five second-year law students—to classify the articles. We instructed the research assistants to use the coding system that has been developed by Spaeth et al.,³³ and has been used in numerous judicial behavior articles.³⁴ This coding system matches case outcomes with plausible political indicators. For example, criminal law cases in which the defendant prevails are classified as liberal; if the government prevails, they are classified as conservative. In civil rights cases, when women, gays and lesbians, and African Americans prevail, the outcome is liberal; otherwise it is conservative. When workers or consumers prevail over employers and merchants, the case outcome is liberal; when businesses win, it is conservative. The coding instructions are reproduced in Appendix 4.

³¹ All of the results reported in this paper use the sample of 156 professors. Our results are robust, however, to only using the initial sample of 140 professors.

³² Although five articles is a small number compared to the body of work of many scholars, we do not believe that sampling only a handful of articles substantively biases our results. It is reasonable to assume that for every legal academic, the political valiance of the articles she writes falls along some distribution. If enough articles were sampled from each professor, it would be possible to know the true distribution. By only sampling five articles, however, it is possible that we are coding articles that are not representative of that individual's true distribution. That said, it is likely the case that these errors are randomly distributed. In other words, for some professors we will have coded five articles that are more conservative than their overall body of work, and for other professors we may have coded five articles that are more liberal than their overall body of work. As long as there is not reason to think that there is systematic bias in one direction—which we do not have reason to believe exists—this will not bias our results.

³³ See Harold J. Spaeth, Sara Benesh, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, & Theodore J. Ruger. 2013. *Supreme Court Database, Version 2013 Release 01*. URL: <http://supremecourtdatabase.org>. Last accessed: July 17, 2014. For the relevant page of the codebook describing the coding of cases, see <<http://scdb.wustl.edu/documentation.php?var=decisionDirection>> (last visited August 7, 2014).

³⁴ See, e.g., Joseph Daniel Ura, *Backlash and Legitimization: Macro Political Response to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110 (2014).

We also instructed the research assistants to state whether they had high confidence or low confidence about any specific coding decision.³⁵ Although we spot-checked the coders' judgments,³⁶ and did not always agree with them, we did not correct any of their coding decisions. There is a significant risk of unconscious bias on our part because we, unlike the coders, know the political views of many of the authors. Thus, our dataset no doubt contains many errors. As long as the errors in the coding are not correlated with our treatment variables, the direction of our results will not be affected. We do not believe that there is such a correlation because the coders were not provided with data on the political donations of the authors, and did not know the political views of the authors (perhaps aside from one or two of the most prominent professors in the sample). Accordingly, coding error will not bias our results but instead only produce noise (that is, reduce the level of statistical significance).³⁷

Of the 780 articles in our dataset, 512 are liberal and 237 are conservative. The research assistants were unable to code 31 articles because they had no political valence. (We call these articles "neutral.") We encouraged the coders to classify the articles even if they were unsure; these articles were also coded as low-confidence so that they are treated as neutral in some of our regressions. Of the 780 articles in the sample, the political valence of 458 articles was coded with high confidence and the political valence of 322 articles was coded with low confidence.

We constructed our main dependent variable, which we call "net conservative bias," by taking the number of conservative articles and subtracting the number of liberal articles. A professor who wrote five liberal articles received a score of -5, while a professor who wrote five conservative articles received a score of 5. A professor who wrote 3 liberal articles, 1 conservative article, and one unclassifiable article received a score of -2.

Note that under this measure of bias, a professor who receives a 0 score might be one who has written two liberal papers, two

³⁵ Although the dependent variable for our primary analysis was calculated as the net of all conservative articles (whether they were coded with high or low confidence) minus all liberal articles (whether they were coded with high or low confidence), during robustness checks we also use a measure of the dependent variable that counts articles as neutral unless they were coded as conservative or liberal with high confidence. *See* Part II.B.

³⁶ We also asked some researchers to code the same articles to see if their views matched (which they did to a considerable degree). For more on this test of inter-coder reliability, *see infra* Part III.A.

³⁷ For a discussion of possible sources of bias from our coding system, *see infra* Part III.A.

conservative papers, and one neutral paper, or one who has written five neutral papers. We think it is reasonable to classify both of these professors as unbiased. A paper that argues that the individual mandate violates the Commerce Clause is not necessarily biased—it may well be right. Thus, a professor who writes such a paper is not necessarily biased. Our focus is on professors who consistently produce liberal or conservative articles. An unbiased professor may sometimes produce liberal articles, sometimes conservative articles, and sometimes neutral articles.

3. The Independent Variables

Our major independent variable is the political ideology of the professors in our sample. We gathered information about campaign contributions made by each of the professors in our dataset from the opensecrets.org website.³⁸ The variable (“net donations”) is equal to political contributions to Republicans minus political contributions to Democrats. We also use dummy and logged versions of this variable.

The first of these variables assumes that someone who gives \$10,000 to Republican candidates on net is ten times more conservative than someone who gives \$1,000 to Republican candidates. The other variables weaken this assumption. The dummy variable assumes that the intensity of ideology does not vary with the size of the donation; the log variable assumes that the intensity of ideology increases with the size of the donation but at a declining rate. It is important to recognize a possible ambiguity here. A person who makes no campaign donations is given a middle score of 0 regardless of whether she is apolitical or an ideologue who cannot spare money for campaign contributions or is ideologically opposed to making campaign contributions. We will address this issue when we discuss our results.

³⁸ The website is run by the Center for Responsive Politics, and makes the data collected by the Federal Elections Commission on all political donations available to the public. See *OpenSecrets.org Donor Lookup*, available at <<https://www.opensecrets.org/indivs/>> (last visited July 17, 2014). *Opensecrets.org* has also been widely used as a source for political donation data in academic research. See, e.g., Rachel Brewster & Adam Chilton, *Supplying Compliance: When and Why the United States Complies with WTO Decisions*, 39 *YALE J. INT’L L.* (forthcoming 2014); Michael S. Rocca & Stacy B. Gordon, *Earmarks as a Means and an End: The Link Between Earmarks and Campaign Contributions in The US House of Representatives*, 75 *J. POLITICS* 241 (2013); Nikhar Gaikwad, *Presidential prospects, political Support, and Stock Market Performance*, 8 *Q. J. POL. SCI.* 451 (2013).

Seventy-five of the professors in our dataset were net Democratic donors. Only 24 professors were net Republican donors, while 57 made no donation. The average net donation of a net Democratic donor was \$6,258, while the average net donation of a net Republican donor was \$6,200.

Finally, we use a number of control variables, several of which are of interest. First, bias in research may reflect generational norms. As more and more social scientists join the legal academy, academic standards from other disciplines may increasingly influence legal scholarship. To account for this, we collected the year that each professor received his or her JD as a measure of age.³⁹ Second, and related, it may be the case that scholars with PhDs write less politically biased articles because their training encourages objectivity and empiricism. To account for this, we coded whether each scholar had a PhD and whether that PhD was in the social sciences. Third, a wide range of research has revealed differences in the political views of men and women. As a result, we coded the sex of each professor in our sample.

II. RESULTS

A. Main Results

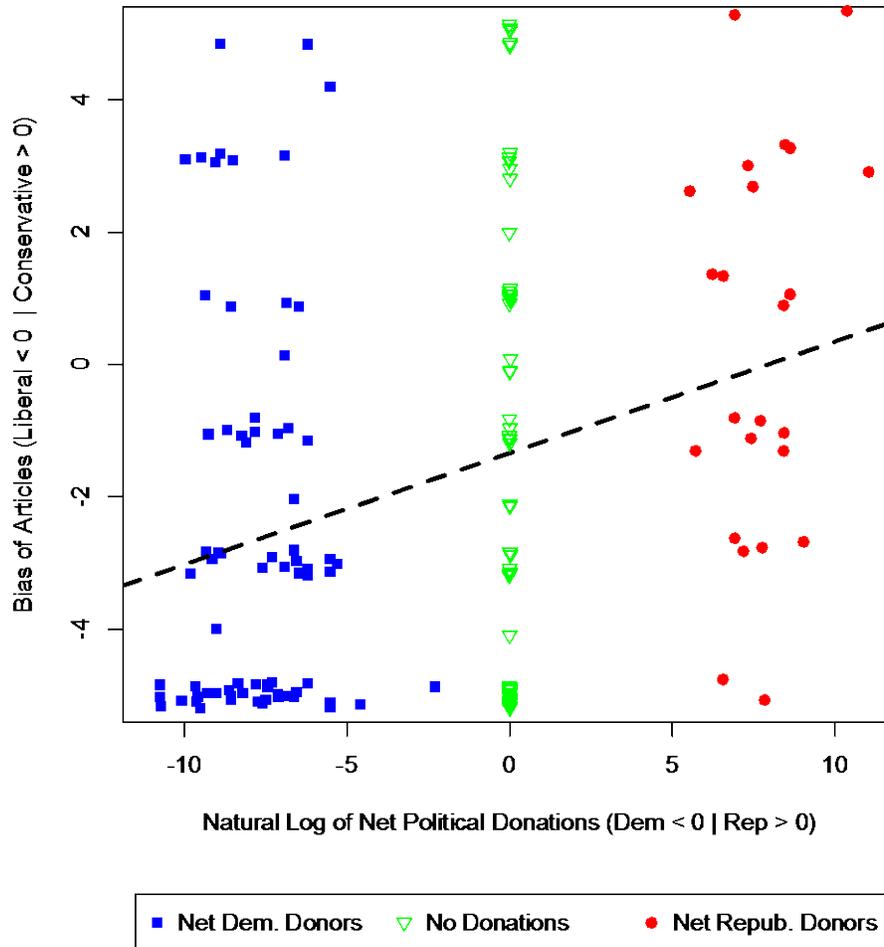
Figure 1 provides a graphical depiction of our data.⁴⁰ The x-axis shows the natural log of net Republican donations (Republican donations minus Democratic donations), so the negative values are net Democratic donors. The y-axis shows the net conservative valence of articles—positive numbers are net conservative articles and the negative numbers are net liberal articles. The regression line shows a clear slope upward, indicating that professors who make greater contributions to Republicans also write more conservative articles. Specifically, a net Democratic donor on average writes -2.63

³⁹ For two sets of professors this information was unavailable and we were forced to use a proxy. First, in a handful of cases, the law professors in our sample did not have a J.D. or equivalent law degree. All of these professors, however, have a Ph.D. For these professors, we used the year they received their Ph.D. for the *JD Year* variable. Second, for one professor, despite extensive searching we were unable to find the year that he or she received his or her JD degree. For this professor, we used the year the bar was passed as a proxy for the *JD Year* variable.

⁴⁰ Note that the regression line shown in the graph is a fit line that across the entire data set. The regressions presented in Table 1 instead have coefficients separately for net Democratic donors and net Republican donors. Also note that we violate the laws of mathematics by treating $\ln(0)$ as if it equals zero.

conservative articles (that is, +2.63 liberal articles), while a net Republican donor on average writes 0.17 conservative articles. Non-donors write on average 1.44 liberal articles.⁴¹

Figure 1: Net Conservative Articles by Political Donations



In addition to analyzing our data graphically, we also analyzed it formally with multivariate regression. Table 1 provides our primary regression results. For these regressions, the dependent variable is once again the total number of net conservative articles (from -5, which means all liberal articles, to +5, which means all conservative articles). Recall that a score of -3 could mean that the author wrote 3

⁴¹ This information is also presented in a table in Appendix A.3.

liberal articles and 2 neutral articles, or 5 liberal articles and 2 conservative articles. Our main treatment variables are the natural log of net Democratic donations (*Net Dem. Donations (ln)*), and the natural log of net Republican donations (*Net Repub. Donations (ln)*). The first two models include these treatment variables alone; the last three add various controls. All of the regressions presented in Table 1 use a linear probability model.⁴²

Table 1: Net Conservative Articles as a Function of Donations

| | (1) | (2) | (3) | (4) | (5) |
|--------------------------------|----------------------|---------------------|----------------------|---------------------|--------------------|
| Net Dem. Donations (ln) | -0.194*** (0.063) | | -0.174*** (0.063) | | -0.115* (0.069) |
| Net Repub. Donations (ln) | | 0.303*** (0.088) | | 0.274*** (0.090) | 0.204** (0.099) |
| JD Year | | | 0.029 (0.024) | 0.044* (0.024) | 0.037 (0.024) |
| PhD | | | -0.964 (0.681) | -0.662 (0.684) | -0.750 (0.682) |
| PhD in Social Sciences | | | 0.385 (0.884) | 0.425 (0.878) | 0.344 (0.874) |
| Male | | | 1.614*** (0.601) | 1.531** (0.601) | 1.467** (0.599) |
| Observations | 156 | 156 | 156 | 156 | 156 |
| Standard errors in parentheses | | | | | |
| *** p<0.01, ** p<0.05, * p<0.1 | | | | | |

The results in Table 1 show that, regardless of the specification, professors who make net donations to Democrats on average write more liberal articles on net than the remaining non-donor and Republican professors do. Similarly, they show that net Republican donors on average write more conservative articles than non-donor and Democratic professors do. These results are all

⁴² Although our dependent variable is categorical, for our primary results we have chosen to analyze the data using a linear model. This is simply because linear probability models provide a fairly similar estimation to categorical models—like ordered logit models—but the coefficients are dramatically easier to interpret. All of the models presented in the body of the paper, however, were also estimated using an ordered logit model (“o-logit”). These results are presented in Appendix 2.

statistically significant. They are also substantively large. As noted above, the average net Democratic donor writes 2.63 liberal articles on net, while the average net Republican donor writes 0.17 conservative articles on net. One can also get a sense of magnitudes by looking at marginal effects.⁴³ Model 5 indicates that the maximal donor to Democrats writes 1.2 more liberal articles than the least generous Democratic donor. The maximal donor to Republicans writes 2.25 more conservative articles than the least generous Republican donor. The only other independent variable that achieves statistical significance is the sex variable. Male professors write fewer liberal articles on net. Indeed, 23 of the 24 Republican donors in our dataset are men.

The findings in Table 1 are robust to a range of additional model specifications. In Table 2, we present regressions that use both an alternative dependent variable and alternative treatment variables. Model 1 reproduces Model 5 from Table 1 for the purpose of comparison. But Model 2 uses an alternative dependent variable. For this regression, the dependent variable was calculated based on the articles for which our coders had “high” confidence in their coding decisions (and counting all “low” confidence decisions as neutral).⁴⁴ As the results show, changing the dependent variable in this way had essentially no effect on our results.

As a further robustness check, Models 3 and 4 use an alternative treatment variable. For these models the treatment variable is a dummy variable (coded as 0 or 1) for whether a professor was a *Net Democratic Donor* or a *Net Republican Donor*. For Model 3, the dependent variable was calculated using all of the coded articles in our sample, and for Model 4 was based on the articles that were coded with high confidence. Once again, our results remained statistically significant and nearly identical to the primary results presented in Table 1.⁴⁵

⁴³ The marginal effects were calculated by moving one variable from its minimum to maximum value while holding all other covariates at their means.

⁴⁴ For this dependent variable, all articles that were coded with low confidence were counted as “neutral.” For example, if our coders determined that a professor wrote 5 liberal articles, but only 2 of these articles were coded with high confidence, under this coding the professor would have a score of -2.

⁴⁵ Appendix B reports the results of all of the regressions reported in Table 2 while using an ordered logit model instead of a linear probability model.

Table 2: Robustness Checks of Net Conservative Articles as a Function of Donations

| | (1) All Coded Articles | (2) "High" Confidence Articles | (3) All Coded Articles | (4) "High" Confidence Articles | (5) All Coded Articles | (6) "High" Confidence Articles |
|---------------------------|---------------------------------|-----------------------------------------|---------------------------------|-----------------------------------------|---------------------------------|-----------------------------------------|
| Net Dem. Donations (ln) | -0.115* (0.069) | -0.116** (0.054) | | | | |
| Net Repub. Donations (ln) | 0.204** (0.099) | 0.148* (0.079) | | | | |
| Net Dem. Donor (dummy) | | | -1.081* (0.550) | -0.990** (0.439) | | |
| Net Repub. Donor (dummy) | | | 1.395* (0.781) | 0.944 (0.624) | | |
| Liberal CF Score | | | | | -0.924** (0.381) | -0.702** (0.306) |
| Conservative CF Score | | | | | 2.265*** (0.807) | 1.721*** (0.649) |
| JD Year | 0.037 (0.024) | -0.003 (0.019) | 0.039 (0.024) | -0.002 (0.019) | 0.043* (0.023) | 0.003 (0.019) |
| PhD | -0.750 (0.682) | -0.134 (0.541) | -0.725 (0.679) | -0.112 (0.542) | -0.622 (0.664) | -0.025 (0.533) |
| PhD in Social Sciences | 0.344 (0.874) | 0.004 (0.694) | 0.246 (0.876) | -0.066 (0.699) | 0.165 (0.871) | -0.106 (0.700) |
| Male | 1.467** (0.599) | 1.001** (0.476) | 1.496** (0.598) | 1.044** (0.477) | 1.650*** (0.587) | 1.167** (0.472) |
| Observations | 156 | 156 | 156 | 156 | 156 | 156 |

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Finally, as a further robustness check, in Models 5 and 6 we use yet another treatment variable. For these models, the treatment variable is whether the professor had a liberal or conservative *CF Score*. A *CF Score* is a measure of ideology created by Adam Bonica that uses political donations data to determine the intensity of the liberal or conservative views of donors based on the voting record of the candidates they donated to.⁴⁶ Under Bonica's system, a

⁴⁶ See Bonica, *supra* note 22; Bonica, *supra* note 27; Bonica & Sen, *supra* note

Democratic donor who donated \$1,000 to Dennis Kucinich receives a more liberal score than a Democratic donor who donated \$1,000 to Hillary Clinton. Using this alternative treatment variable, our results remain substantively the same. Having a more liberal *CF Score* is associated with writing more liberal articles, and having a more conservative *CF Score* is associated with writing more conservative articles.

B. Using Additional Data to Determine Political Affiliation

One shortcoming of using political donations as a proxy for ideology is that not everyone makes campaign contributions. In fact, 37% of the professors in our sample have not made a campaign contribution (or one that was reported to the Federal Elections Commission). It is likely that most non-donors have political commitments. Moreover, our initial coding revealed only eight Republican net donors, which weakened the statistical significance of our net Republican variables in the previous regressions.

To address this concern, we decided to code the ideology of the remaining 57 non-donor professors based on information available on their CVs. We coded professors who had previously held a political appointment as being a member of that political party (i.e., Bush appointees as Republicans, and Clinton or Obama appointees as Democrats). Additionally, professors who had held an official position with the Federalist Society were coded as Republicans, and professors who have held an official position with the American Constitution Society were coded as Democrats.⁴⁷ Finally, we coded professors who had worked for right leaning think tanks—like CATO or the American Enterprise Institute—as Republicans, and professors who had worked for an international organization like the United Nations as Democrats. Using this approach, we were able to code an additional 28 professors as Democrats and an additional 12 professors as Republicans. Seventeen professors remained unclassifiable.

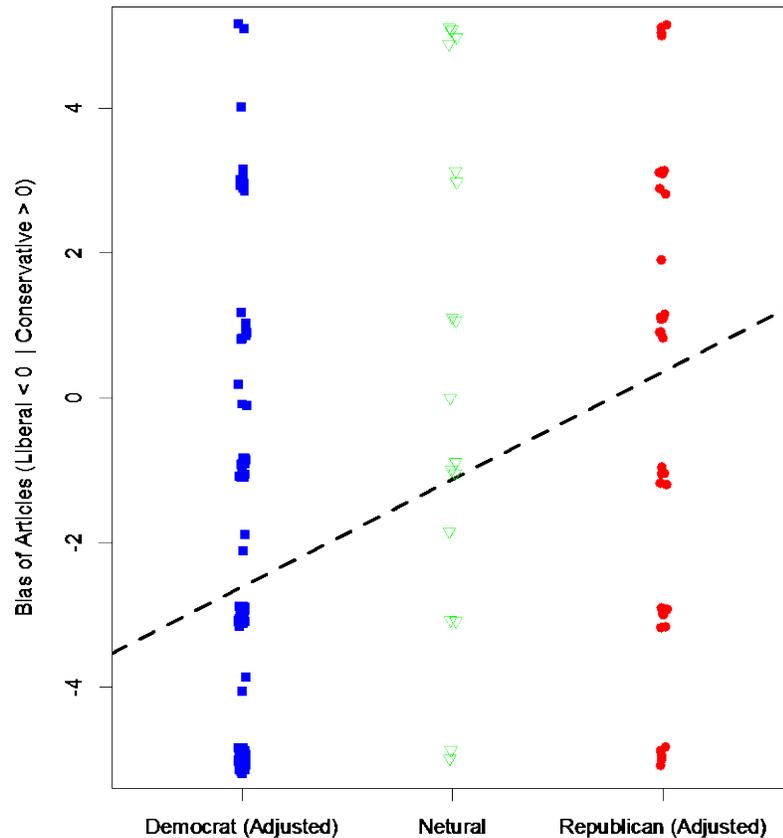
We combined this new coding with our initial coding of whether a professor was a Net Democratic Donor or a Net Republican Donor to produce the new variables *Democrat (Adjusted)* and *Republican (Adjusted)*. To graphically depict this

28, Bonica, *supra* note 30.

⁴⁷ We did not code anyone as a Democrat or Republican based on his or her affiliation with these organizations if they had merely attended a conference or spoken at an event.

relationship, Figure 2 uses the same approach as Figure 1, and plots the relationship between these variables and our key dependent variable: net conservative articles. As Figure 2 shows, there is a strong relationship between (adjusted) political affiliation and the political leanings of academic articles. In fact, the effect is only stronger when using this approach.

Figure 2: Net Conservative Articles by Adjusted Political Affiliation



Once again, we used multivariate regressions to analyze the relationship between adjusted political ideology and the bias of each author's scholarship. To do so, we recreated Table 1 but used these new treatment variables. The results from this analysis—which are presented in Table 3—reveal that there is a statistically significant relationship between ideology and the leanings of each authors' scholarship. Moreover, the magnitudes of the effects are larger than the results presented in Table 1. These results are additionally robust

to all of the alternative specifications we presented in Table 2.⁴⁸

Table 3: Net Conservative Articles as a Function of Adjusted Political Affiliation

| | (1) | (2) | (3) | (4) | (5) |
|------------------------|----------------------|---------------------|----------------------|---------------------|---------------------|
| Democrat (Adjusted) | -2.670*** (0.503) | | -2.419*** (0.517) | | -2.092** (0.804) |
| Republican (Adjusted) | | 2.544*** (0.580) | | 2.253*** (0.588) | 0.476 (0.894) |
| JD Year | | | 0.026 (0.023) | 0.036 (0.023) | 0.027 (0.023) |
| PhD | | | -0.823 (0.653) | -0.650 (0.670) | -0.777 (0.660) |
| PhD in Social Sciences | | | 0.193 (0.848) | 0.340 (0.864) | 0.196 (0.850) |
| Male | | | 1.207** (0.586) | 1.424** (0.593) | 1.206** (0.588) |
| Observations | 156 | 156 | 156 | 156 | 156 |

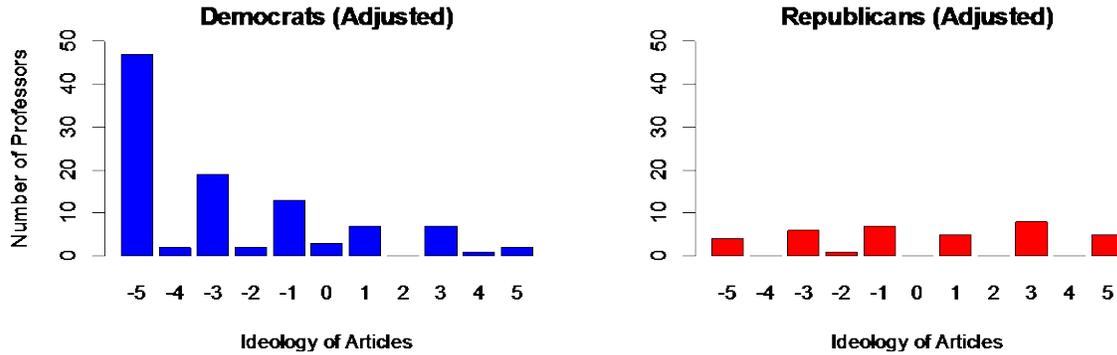
Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

C. Do Republican Donors Write Less Ideologically Biased Scholarship Than Democratic Donors Do?

According to our coding system, net Democratic donors write highly ideological articles, whereas net Republican donors write articles that are distributed widely across the spectrum. The average net Democratic donor writes 2.63 liberal articles on net, while the average article of a net Republican donor writes 0.17 conservative articles on net, which is even closer to 0 than the number of article written by non-donors, who on average write 1.44 liberal articles on net. Figure 3 shows the distribution for Republicans and Democrats. The modal net Democratic donor writes five out of five liberal articles. Does this mean that Republican donors write less ideologically biased scholarship than Democratic donors do?

⁴⁸ The results of these robustness tests are presented in Appendix C.

Figure 3: Ideological Valence of Articles Written by Democratic and Republicans



Professors who are *Democrats (adjusted)*—shown in the left panel—have an average article ideology of -2.67 with a 90% confidence interval of -3.13 to -2.21. Using a t-test, we can say that this is statistically different from zero (p-value < 0.00). Professors who are *Republicans (adjusted)*—shown in the right panel—have an average article ideology of 0.17 with a 90% confidence interval of -0.72 to 1.10. For these professors, we cannot reject the possibility that the true net ideology of their articles is zero (p-value = 0.72). In other words, our data suggest that Democrats in our sample do not write articles that are on balance neutral, but that Republicans in our sample may write articles that are on balance neutral.⁴⁹

These results, however, must be interpreted with caution for several reasons. First, we have many fewer net Republican donors in our dataset than Democrats and non-donors, and accordingly the ideological distribution of the articles Republicans write may not represent the entire population of Republican law professors. Second, it is possible that the coding scheme encouraged our coders to interpret articles to be more liberal than they in fact are. That might explain why non-donors skew liberal. If we take the non-donor scholarship as the neutral baseline, then the Republicans are almost exactly as ideological as the Democrats are—the two groups are close

⁴⁹ Forty percent of the articles written by Democrats (adjusted) could not be classified with high confidence, 51 percent of articles written by Republicans (adjusted) could not be classified with high confidence. If such articles are “neutral,” then Republicans wrote substantially more neutral articles.

to equidistant from the neutral score. Third, the distributions may reflect the influence of constitutional law scholarship. Just by chance, none of the net Republican donors in our dataset are constitutional law scholars, and only one of the adjusted Republicans is. If constitutional law scholarship is more ideological than other forms of scholarship,⁵⁰ the different distributions may show that Democrats are more likely to write constitutional law scholarship but not that they are otherwise more likely to write ideologically than Republicans. Fourth, it is in principle possible that background legal and political circumstances justify what appears to be an ideological tilt in scholarship. If Hitler were elected, and replaced the judiciary with Nazi judges, while leaving the law schools alone, we suspect that nearly all professors would write papers criticizing the judges' right-wing jurisprudence, and rightly so.

With those caveats in mind, if it is in fact the case that Republicans write less ideologically biased scholarship than Democrats do, then one would naturally ask why. The most plausible explanation is that if the dominant ethos in the top law schools is liberal or left-wing,⁵¹ 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 that they don't believe.

D. Differences Across Fields

Some readers may be interested in whether the research of faculty at different law schools or working in different fields displays different levels of ideological bias. Data limitations prevent us from providing firm conclusions on these issues. Because we select only ten law professors from each law school, and code the professor based on only five articles, we are hesitant about drawing

⁵⁰ A possibility that we explore in Section D, below.

⁵¹ As suggested by McGinnis et al., *supra* note 6. See also Adam Bonica & Maya Sen, *Whom Does the Judiciary Represent?*, Working Paper (2014), at 16 (on file with authors) (providing data that show that lawyers skew left and academics skew left). The Bonica & Sen paper does not isolate legal academics.

conclusions about whether specific law schools produce more ideologically biased scholarship than other law schools. Such an investigation would require more data.

However, we can shed some light on the question of whether ideological bias differs in different areas of scholarship. The coding categories in the judicial behavior literature do not track the fields of legal scholarship perfectly, but there is a rough correspondence. Under the Spaeth et al. coding scheme, legal opinions are divided into one of six categories. We asked our coders to determine which of these six categories was the closest fit for each article. If three of the five articles a professor wrote were in the same category, we coded that professor as writing in that category.

Table 4: Ideologically Biased Research by Field

| Cat. | Description | # Dem Donors | # Rep Donors | # Non-Donors | Mean Net Dem Donation | Mean Net Rep Donation | Mean Conserv. Articles by Dem Donors | Mean Conserv. Articles by Rep Donors |
|------|----------------------------|--------------|--------------|--------------|-----------------------|-----------------------|--------------------------------------|--------------------------------------|
| 1 | Constitutional Rights | 20 | 1 | 5 | 8,095 | 1,650 | -4.00 | -1.00 |
| 2 | Economic Activity & Unions | 8 | 6 | 16 | 8,306 | 2,500 | -2.25 | 1.00 |
| 3 | Judicial Power | 3 | 1 | 0 | 4,183 | 4,550 | -1.67 | -1.00 |
| 4 | Federalism | 1 | 0 | 0 | 2,300 | -- | -5.00 | -- |
| 5 | Federal Taxation | 2 | 0 | 0 | 5,100 | -- | -1.00 | -- |
| 6 | Miscellaneous | 28 | 13 | 26 | 4,942 | 4,690 | -2.18 | -0.08 |

As Table 4 shows, category 1 corresponds roughly to constitutional law scholarship that focuses on individual rights. Most private law scholarship falls into category 2, which includes economic activity, and category 6, which covers miscellaneous fields. The data presented in Table 4 suggest that constitutional rights scholars are less ideologically diverse than other legal scholars. Among constitutional rights scholars, 77% are net Democratic donors, and 4% are net Republican donors. In the rest of the sample, 40% are net Democratic donors, and 20% are net Republican donors. It also shows that constitutional rights scholars are more likely to produce biased research (mean of -3.85 conservative articles) than Republican and Democratic scholars in other fields (mean of -1.35 conservative articles).

III. DISCUSSION

A. *Qualifications*

Before discussing the implications of our results, we should acknowledge some possible statistical limitations of our study. First, the generalizability of our results may be limited because our sample is not representative in several ways. Our sample was drawn entirely from professors at top-14 law schools, and it might be the case that professors at other schools write scholarship that is less—or more—biased. Additionally, our sample consists entirely of tenured, academic faculty. Repeating our analysis on a sample of other types of legal academics—like assistant professors—might produce different results. Finally, we coded the five articles that professors wrote most recently. It is possible that articles coded from different periods would have different ideological slants.

Second, there are a number of possible problems with our method of coding the bias of articles. One possible problem is that the decisions made by our coders might skew liberal or conservative. For example, a liberal coder might interpret “neutral” articles as conservative because they are conservative from her perspective; or a liberal coder might interpret “neutral” articles as liberal, because they appear reasonable and she assumes that reasonable arguments are liberal. Moreover, because our coders coded different groups of articles, there may be inconsistencies in the coding across articles. We are skeptical that this is a problem because coders were given random samples of the articles, but we nonetheless took two steps to address the issue: (a) we ran regressions that accounted for differences between coders and found largely the same results;⁵² and (b) we asked multiple people to code the same article and found high rates of consistency.⁵³

A further concern is that our coders’ judgments may have been biased based on prior knowledge of the authors’ political leanings. As previously noted, we do not believe that this is likely to

⁵² To do so, we estimated all of the regressions in Table 2 while including “coder” fixed effects. This allowed for the possibility that there were systematic differences between coders. This produced largely the same results as our baseline regressions reported in Table 2 that did not include coder fixed effects.

⁵³ We specifically asked a second coder to code a sample of 180 the 780 articles in our dataset. Doing so revealed a high rate of inter-coder reliability. Our coders made the same decisions 73% of the time, and when we relied exclusively on decisions where both coders had high confidence in their decisions, the coders made the same decision 92% of the time.

be a significant problem because the coders were unlikely to have previously heard of all but a few of the most prominent professors in our sample. The exception, however, is that our coders are students at the University of Chicago Law School and they are likely familiar with a number of professors in the sample from the University of Chicago. To account for that possibility, we replicated our analysis while dropping Chicago faculty from our sample. After doing so, the results were substantively the same.⁵⁴

Finally, the Spaeth et al. coding system was not designed with law review articles in mind and is not a perfect fit.⁵⁵ Law review articles are not judicial opinions, after all. We readily acknowledge the possibility that coders were misled by the Spaeth et al. system, but we do not think this problem is a serious one. Most law review articles, like most cases, can be easily classified along ideological lines—as favoring the government or criminal defendants, for example, or as advocating an expansion of liability or a reduction of it. Many law review articles are technical and hard to code; but that is true for many cases as well, which can turn on complex questions of jurisdiction that have no clear ideological valence. Our main effort to address this problem was to ask our coders to code decisions with either “low” or “high” confidence.” As Models 2, 4, and 6 demonstrated, our results are robust to treating all articles where our coders had low confidence as neutral. Beyond this empirical test, however, we would argue that the use of the Spaeth et al. coding system has an advantage *because* it was not designed with law review articles in mind: it reduces the risk that a coding system that we produced for our purposes might reflect our own unconscious biases. In sum, these problems are real but their main effect should be to add noise to our results—to reduce statistical significance—and not to bias them.

Third, another concern is reverse causation, which in our context would mean that professors (perhaps with an open mind) write a number of articles about legal topics and discover pervasive

⁵⁴ There are 11 professors from the University of Chicago Law School in our sample. Of those 11, 10 were from our initial random sample and 1 was from our attempt to oversample Republicans. *See supra* text accompanying notes 27 - 31. After dropping these professors from our sample we estimated the regressions reported in Table 2 with the remaining sample of 145 professors, which produced results that were substantively similar.

⁵⁵ It is important to note that it has been argued that the Spaeth et al. coding system is not a perfect classification for legal cases. *See Shapiro, supra* note 19. That said, despite these criticisms, the Spaeth coding system is the dominant method used to study the ideological leanings of judicial decisions in the United States.

error in one ideological direction or another. Suppose, for example, a professor decides to write about same-sex marriage and discovers that courts repeatedly err, based on the professor's best view of the legal sources, by recognizing rights to same-sex marriage. Accordingly, he comes to the view that too many ideologically liberal judges sit on the bench, and starts making donations to Republican political candidates in the hope that they will be elected and appoint less ideologically biased judges. This story seems implausible. By the time someone is old enough to receive tenure at a law school, that person will almost certainly have well-defined if not rigid political views.⁵⁶ Casual empiricism on our part indicates that law professors' political views are established long before they start writing articles.

B. Interpretation of the Results

With those qualifications in mind, we turn to the interpretation of our results. To reiterate, we find that law professors who donate to Democrats write articles that are net liberal, and law professors who donate to Republicans write articles that are net conservative. Non-donors write articles that fall between these two extremes. Numerous robustness checks confirm these results.

This could mean one (or both) of two things. First, a (say) liberal professor might offer an interpretation of a legal text that advances liberal values but is not the best interpretation of that text. Let's call this phenomenon "substantive bias." Substantive bias could be of two types. A professor may deliberately make arguments that she knows to be wrong because she hopes to advance a political agenda. Probably more common, a professor may sincerely believe her biased argument because she has strong ideological priors that influence how she interprets legal sources. In legal scholarship, unlike the sciences, there are few, perhaps no, objective ways for resolving disagreement; thus, there is much room for priors to influence people's sincere views about legal issues.

Second, the professor might search out research problems where it happens to be the case that the correct outcome is liberal. We call this phenomenon "selection bias." Imagine, for example, that

⁵⁶ Yair Ghitza & Andrew Gelman, *The Great Society, Reagan's Revolution, and Generations of Presidential Voting*, Working Paper (2014), available at <http://www.stat.columbia.edu/~gelman/research/unpublished/cohort_voting_20140605.pdf> (last visited July 17, 2014) (finding that the presidents that people vote for is to a significant extent determined by the political events they witness as teenagers and young adults).

court #1 has wrongly interpreted statute A in a liberal direction, and court #2 has wrongly interpreted unrelated statute B in a conservative direction. A liberal professor might exercise selection bias without engaging in substantive bias by writing an article criticizing court #2 while ignoring court #1.

Another version of the selection bias story is that when applicants for legal academic positions go on the job market, they select a field in which they believe that they could make the most important contributions, from a moral or ideological standpoint. For example, a liberal applicant who believes that courts have failed to provide adequate protection to criminal defendants may select constitutional law or criminal procedure. This person would then write left-leaning articles over the course of her career.

Our results are consistent with both types of bias—substantive and selection. There is a parallel ambiguity in the judicial behavior literature. The results in that literature are consistent with both a substantive bias hypothesis that judges choose outcomes that advance their ideological preferences (whether consciously or unconsciously), and a selection bias hypothesis that politicians appoint judges whose good-faith legal views happen to coincide with the ideological preferences of the politicians.

The implications of each interpretation are different. As we discuss in Section C, substantive bias is more troubling than selection bias, which can be corrected if law schools hire faculty members with diverse ideological views. It is less clear how substantive bias can be corrected.

C. Implications

The purpose of our study is not to condemn law professors but to provoke reflection about the role of ideology in legal scholarship. We can imagine a few reactions to our findings.

1. They don't matter

Ever since legal realism, we have understood that legal reasoning is not divorced from politics. It is natural and inevitable that liberals and conservatives interpret legal sources differently. It is a legitimate feature of legal scholarship that moral standpoints affect legal conclusions. Consider, as a point of comparison, moral philosophy or political theory. Liberals argue in favor of liberal institutions because liberal institutions advance liberal values.

Libertarians extol individual freedom; it is hardly surprising that they are skeptical of government programs. Social conservatives criticize abortion, secular education, and gay marriage because they believe that these practices violate important moral values and erode social solidarity. Legal scholarship is itself just a form of moral and political debate that is focused on law rather than public policy generally.

This may well be true. Ronald Dworkin famously argued that the right judicial outcome must integrate legal sources and moral principles.⁵⁷ But Dworkin never argued that the right legal answer must conform to the (possibly mistaken) moral views of the judge or academic. Even on Dworkin's approach, the quality of a legal argument is independent of the ideological bias of the person who makes the argument.

Our view is that while some legal scholarship is openly committed to advancing a specific political or ideological agenda,⁵⁸ most is not. Even in the most clearly normative articles, scholars appeal to common values, constitutional norms, precedents, and other sources that are "neutral" in the sense that everyone in principle accepts them as sources of authority. If this were not the case, then the frequent charge of ideological bias that law professors fling at each other would make no sense.

2. They cast doubt on the value of legal scholarship

Law professors are paid to do research, not to publish their political opinions. Most legal research is presented as an objective account of the law. When law professors criticize judicial opinions, they almost always say or at least imply that the judges committed a legal error. The claim that an error in legal reasoning exists should be independent of the politics of the person who makes that claim. Just as we criticize judges who allow their political opinions to influence their interpretations of legal texts, we should criticize law professors who allow their political opinions to influence their interpretations of legal texts. In fact, we do this all the time.⁵⁹ Our findings suggest that law professors often fail to satisfy a basic criterion of good scholarship.

This argument raises difficult questions about what exactly

⁵⁷ See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

⁵⁸ See, e.g., *THE CONSTITUTION IN 2020* (JACK M. BALKIN & REVA B. SIEGEL EDS. 2009) (discussing ways in advancing progressive values in constitutional law).

⁵⁹ See *supra* notes 1 - 5.

legal scholarship is supposed to accomplish. One possibility is that it is supposed to improve our understanding of the law. If legal scholarship were purely empirical or analytical, the charge of ideological bias is troubling. Another possibility is that legal scholarship is supposed to improve the world. As noted above, it would not be surprising if normative scholarship reflects certain ideological biases, but it is also the case that most normative scholarship does not present itself as ideological argument but as based on authoritative legal sources. A more appropriate interpretation of our findings is that they raise questions about the value of *some* legal scholarship, but certainly not all.

3. Law faculties need “balance.”

Political bias in scholarship is inevitable; it is human nature. Indeed, biases of various sorts infect all kinds of scholarship, even the sciences. Consider for example, the ideologically tinged debates about the role of genes in behavior.⁶⁰ Interaction and debate among people with different views ensures that in the long run research results will be objective. The appropriate response to our results is to ensure that people with different political views are represented in law schools. The lament that there are too few conservatives in the law schools⁶¹ (or at least too few conservatives who are ideologically passionate enough to make donations and write conservative articles) turns out to be a reasonable one, and we should correct this problem by hiring more conservatives even if this means lowering academic standards. For many people, however, this may be too high a price to pay.

As noted earlier, a balanced faculty will be particularly helpful if the selection bias hypothesis is correct. Balance would ensure that law professors ferret out liberal biases in judicial opinions as well as conservative biases in judicial opinions.

4. Institutional fixes are available.

Most legal scholarship (including nearly all the articles in our sample) is published in law reviews. It is possible that for many law review editors, who are not experienced academics, the persuasiveness of an article depends, at least in part, on its

⁶⁰ See, e.g., Richard Dawkins, *Sociobiology: The Debate Continues*, NEW SCIENTIST (Jan. 24, 1985).

⁶¹ See Dent, *supra* note 7

consistency with their ideological priors. Imagine, for example, an article that argues that same-sex marriage should receive constitutional protection and an article that makes the contrary argument. From a scholarly perspective, the first article should not be published if it simply repeats arguments that have been made before, while the second article should be published if it makes novel and interesting arguments. Students with little knowledge of the underlying literature might accept the first article and reject the second because they find the ultimate conclusion of the first article more persuasive than that of the second, based on their ideological priors. Anticipating bias in the selection process, authors might write articles with an ideological tilt that they believe that students will be receptive to.

Peer review might help address the problem of political bias in the selection of articles for publication. Authors might hesitate about making ideological claims if they know that experts in the field rather than law students will evaluate their work. And while it is true that many referees may share the author's political biases, referees who share authors' ideological predispositions are likely to reject papers that reflect a shared ideological bias if those papers are unoriginal, fail to give credit to previous work, or are analytically flawed. For these reasons, law reviews that do not already use peer review might consider doing so.

CONCLUSION

Many law professors derive professional pride from their influence on the development of the law. Law professors, unlike other types of academics, directly influence the law by writing articles that judges read and occasionally cite in judicial opinions. However, if their articles are seen as "rationalizations of their authors' political ideology,"⁶² they may well lose whatever influence they have. Indeed, one court has expressed skepticism about international law scholarship, noting that the "practice of relying on international law scholars for summaries and evidence of customary international law—that is, as secondary or 'subsidiary' sources of international law—makes less sense today because much contemporary international law scholarship is 'characterized by normative rather than positive argument, and by idealism and

⁶² See Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 *GEO. L.J.* 845, 853 (2009).

advocacy.”⁶³ We suspect that other judges take the same line on constitutional law scholarship, and if such skepticism spreads, law professors will lose influence on the development of the law.⁶⁴

It is important not to misinterpret our findings. Our empirical results do not prove that all of legal scholarship is biased. Our coders were unable to classify numerous articles with high confidence. Nor do our results prove that law professors self-consciously generate biased scholarship. Selection-effect mechanisms and reliance on priors seem more plausible. Our findings raise rather than answer questions about the relationship between ideology and scholarship, and whether law faculties should be more ideologically diverse. But we believe that our findings are strong enough results to justify further research in this area.

We can see several directions in which research may proceed. Our main concern is that the coding of the law review articles for ideological valence may be inaccurate; there are no doubt other approaches that could be used, including, for example, coding by scholars rather than by students. Using a larger database, one could determine whether ideological bias is more common in some areas of legal scholarship than others—for example, normative versus empirical scholarship, or public law versus private law. One might also find (contrary to our results) that different types of training and background lend themselves to different levels of ideological bias. Other types of bias might be investigated—for example, bias introduced into the work of law professors who consult and have a financial interest in a specific outcome. Medical researchers have attempted to determine whether financial interests have influenced medical research.⁶⁵ Researchers should use our methodology—which relies on coding of research rather than on surveys of academics’ beliefs—to investigate ideological bias in other areas of scholarship, such as economics, history, and political science.

⁶³ *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 251 n.26 (2003) (quoting Remarks of Jack L. Goldsmith, Panel Discussion, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC’Y INT’L L. PROC. 317, 318 (2000)).

⁶⁴ See, e.g., Posner, *supra* 62.

⁶⁵ Justin E. Bekelman, Yan Li, & Cary P. Gross, *Scope and Impact of Financial Conflicts of Interest in Biomedical Research*, 289 J. AM. MED. ASSOC. 454 (2003) (finding evidence of financial relationships between researchers and industry and that those relationships can influence research results); Joel Lexchin, Lisa A Bero, Benjamin Djulbegovic, & Otavio Clark, *Pharmaceutical industry sponsorship and research outcome and quality: systematic review*, 326 BMJ 1167 (2003) (finding that research on drugs sponsored by the drug’s maker was more likely to reach a favorable result).

APPENDIX

A. Summary Statistics

1. Breakdown of the Sample

| Democratic Donors (net) | No Donations | Republican Donors (net) |
|-------------------------|--------------|-------------------------|
| 75 | 57 | 24 |

2. Summary Of Independent Variables

| | Mean | Std. Dev. | Min | Max |
|---------------------------|------|-----------|------|-------|
| Net Dem. Donations (ln) | 3.71 | 4.02 | 0 | 10.75 |
| Net Repub. Donations (ln) | 1.19 | 2.84 | 0 | 11.02 |
| Net Dem. Donor (dummy) | 0.48 | 0.50 | 0 | 1 |
| Net Repub. Donor (dummy) | 0.15 | 0.36 | 0 | 1 |
| Liberal CF Score | 0.45 | 0.67 | 0 | 3.95 |
| Conservative CF Score | 0.12 | 0.32 | 0 | 1.16 |
| JD Year | 1984 | 11.52 | 1960 | 2007 |
| PhD | 0.33 | 0.47 | 0 | 1 |
| PhD in Social Sciences | 0.16 | 0.37 | 0 | 1 |
| Male | 0.74 | 0.45 | 0 | 1 |

3. Summary of the Dependent Variable by Donor Type
(All Coded Articles)

| | Mean | Std. Dev. | Min | Max |
|------------------|-------|-----------|-----|-----|
| Net Dem. Donor | -2.63 | 2.92 | -5 | 5 |
| No Donations | -1.44 | 3.36 | -5 | 5 |
| Net Repub. Donor | 0.17 | 2.94 | -5 | 5 |
| Overall | -1.76 | 3.23 | -5 | 5 |

**4. Summary of the Dependent Variable by Donor Type
("High Confidence" Articles)**

| | Mean | Std. Dev. | Min | Max |
|------------------|-------|-----------|-----|-----|
| Net Dem. Donor | -2.11 | 2.31 | -5 | 5 |
| No Donations | -1.14 | 2.68 | -5 | 5 |
| Net Repub. Donor | 0.13 | 2.25 | -5 | 5 |
| Overall | -1.41 | 2.55 | -5 | 5 |

5. Coding of Articles

| | Liberal | Don't Know | Conservative | Total |
|---------------------------|-----------|------------|--------------|-------|
| All Coding Decisions | 512 (66%) | 31 (4%) | 237 (30%) | 780 |
| High-Confidence Decisions | 330 (42%) | 340 (44%) | 110 (14%) | 780 |

B. Robustness Checks Using Ordinal Logit (“O-Logit”) Model

| | (1) All Coded Articles | (2) “High” Confidenc e Articles | (3) All Coded Articles | (4) “High” Confidenc e Articles | (5) All Coded Articles | (6) “High” Confidenc e Articles |
|---------------------------|---------------------------------|------------------------------------------|---------------------------------|------------------------------------------|---------------------------------|------------------------------------------|
| Net Dem. Donations (ln) | -0.068 (0.042) | -0.088** (0.042) | | | | |
| Net Repub. Donations (ln) | 0.119** (0.057) | 0.110* (0.059) | | | | |
| Net Dem. Donor (dummy) | | | -0.616* (0.333) | -0.737** (0.332) | | |
| Net Repub. Donor (dummy) | | | 0.823* (0.448) | 0.668 (0.460) | | |
| Liberal CF Score | | | | | -0.559** (0.242) | -0.495** (0.231) |
| Conservative CF Score | | | | | 1.247*** (0.468) | 1.225*** (0.473) |
| JD Year | 0.024* (0.014) | 0.001 (0.014) | 0.025* (0.014) | 0.002 (0.014) | 0.026* (0.014) | 0.005 (0.013) |
| PhD | -0.135 (0.398) | 0.058 (0.396) | -0.124 (0.398) | 0.075 (0.396) | -0.093 (0.387) | 0.149 (0.385) |
| PhD in Social Sciences | -0.102 (0.509) | -0.150 (0.501) | -0.160 (0.512) | -0.217 (0.504) | -0.091 (0.508) | -0.177 (0.502) |
| Male | 0.916** (0.375) | 0.775** (0.355) | 0.933** (0.374) | 0.814** (0.354) | 0.986*** (0.373) | 0.903** (0.353) |
| Observations | 156 | 156 | 156 | 156 | 156 | 156 |
| Model | O-Logit | O-Logit | O-Logit | O-Logit | O-Logit | O-Logit |

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

C. Robustness Checks Using Adjusted Political Affiliation

| | (1) All Coded Articles | (2) “High” Confidenc e Articles | (3) All Coded Articles | (4) “High” Confidenc e Articles |
|-----------------------------------|---------------------------------|------------------------------------------|---------------------------------|------------------------------------------|
| Democrat (Adjusted) | -2.092** (0.804) | -1.500** (0.631) | -1.172** (0.484) | -1.200** (0.496) |
| Republican (Adjusted) | 0.476 (0.894) | 0.880 (0.701) | 0.335 (0.530) | 0.583 (0.546) |
| JD Year | 0.027 (0.023) | -0.009 (0.018) | 0.021 (0.014) | -0.002 (0.014) |
| PhD | -0.777 (0.660) | -0.082 (0.517) | -0.179 (0.401) | 0.068 (0.395) |
| PhD in Social Sciences | 0.196 (0.850) | -0.119 (0.667) | -0.199 (0.521) | -0.243 (0.511) |
| Male | 1.206** (0.588) | 0.760 (0.461) | 0.766** (0.379) | 0.630* (0.357) |
| Observations | 156 | 156 | 156 | 156 |
| Model | OLS | OLS | 0-Logit | 0-Logit |
| -- Standard errors in parentheses | | | | |
| -- *** p<0.01, ** p<0.05, * p<0.1 | | | | |

Readers with comments should address them to:

Professor Adam S. Chilton
adamchilton@uchicago.edu

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