WHAT DO CONSTITUTIONAL LAW PROFESSORS DO?

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This Essay—written for a symposium hosted by the *Wisconsin Law Review* on Andrew Coan's splendid new book—examines the social space that non-clinical, tenure-track American constitutional law professors occupy, and whether that social space is a desirable one. Constitutional law professors are relatively unique among faculty in the current American research university for the degree to which they speak to those inside *and* outside of the university. Constitutional law professors are socialized by and participate in the research community of the university but also the elite legal profession. They aspire to speak truth to power, but they are also part of the power that they seek to evaluate. It is good for a society to have scholarly insights brought to bear on important decisions by powerful people, and law professors are increasingly the ones doing that. It is also good to have a scholarly discipline generated by combining its own original insights with the insights of other disciplines. As the humanities and social sciences produce more technical scholarship, more removed from the comprehension and concerns of daily life, this engaged and interdisciplinary role for constitutional law professors becomes more important because it is more uncommon. However, being such a part of the system that one aspires to evaluate also encourages law professors to be more deferential and defensive of existing power structures.

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* Samuel Tyler Research Professor of Law, George Washington University School of Law. My thanks to the *Wisconsin Law Review* for their invitation to participate in this symposium, and to Andrew Coan for writing a great book and for being a model colleague. Given that this is a symposium essay and given that specific citations could be awkward in some places, footnoting was kept to a (relative) minimum. For comments, thank you to Bruce Ackerman, Charles Barzun, Joseph Blocher, Naomi Cahn, Rosalind Dixon, Tom Ginsburg, Aziz Huq, Orin Kerr, David Pozen, Naomi Schoenbaum, Micah Schwartzman, and Nicholas Stephanopoulos.

INTRODUCTION

Andrew Coan has written a masterful book,[1] building upon equally masterful articles,[2] that assess the limited capacity of the United States Supreme Court. Coan has argued that the Court "is a tiny institution that can resolve only a small fraction of the constitutional issues that arise in any given year."[3] Constitutional law professors are part of the reason for this. Constitutional law professors are consumers of the arguments that the Justices make.[4] But constitutional law professors are also the producers of arguments for the Justices. The Justices are part of the same professional culture as constitutional law professors. Regardless of how much Justices are reading and/or citing specific law review articles,[5] constitutional law professors are shaping the Overton Window for Justices by shaping which constitutional arguments are correct or incorrect, or simply plausible or implausible in the first place.[6]

Given this production role for constitutional law professors[7], this Essay makes two central arguments. First, as a positive matter, to understand the production role that constitutional law professors play

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1. *See generally* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

2. *See generally* Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339; Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765 (2016); Andrew Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012).

3. COAN, *supra* note 1, at 15.

4. *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1542 (2010) ("[A]cademia play[s] an important role in defining the Justices' status and reputation.").

5. Chief Justice John Roberts, Remarks at the Annual Fourth Circuit Court of Appeals Judicial Conference 28:45–32:05 (June 25, 2011), https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts [https://perma.cc/P5X6-SZ88] ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.") [hereinafter Roberts, *Remarks*].

6. *See* Joseph G. Lehman, *An Introduction to the Overton Window of Political Possibility*, MACKINAC CTR. FOR PUB. POL'Y (Apr. 8, 2010), http://www.mackinac.org/12481 [perma.cc/CCD7-LMTD] ("Policies inside the [Overton] window are politically acceptable . . . . If you shift the position or size of the window, you change what is politically possible."); Jack M. Balkin, *"Wrong the Day It Was Decided': Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005) ("[C]onventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is 'off-the-wall' change over time in response to changing social, political, and historical conditions.").

7. I should also be clear that the Essay is meant to focus on non-clinical, tenure-track faculty focused on constitutional law at law schools, and their role relative to those of humanities and social science faculty.

requires understanding the social space[8] they occupy. American constitutional law professors are relatively unique among tenure-track faculty in the current American research university for the different constituencies that they face incentives to convince. Constitutional law professors are socialized by the university *and* by the legal profession—particularly the elite legal profession[9]—and are encouraged to speak to both. Constitutional law professors are paid to critique a system, but they are a part of the system they are paid to critique. They exist between an institution formally devoted to truth (the research university) and institutions substantially characterized by power (legal institutions).

Second, the distinctive social space that constitutional law professors occupy has desirable and undesirable features from a normative perspective. Because constitutional law professors are shaped by the university and by the elite legal profession, the legal academy attracts and cultivates a distinctive type of scholar and a distinctive type of scholarship. This scholarly voice tries to ensure that powerful people are hearing the truth that they have to offer, and can benefit the university, the legal profession—and the world. It is also a scholarly voice that has gradually been disappearing as research universities are increasingly focused on producing more technical knowledge that is harder for lay observers to understand and appreciate.[10] It is good for a society to have scholarly insights brought to bear on important decisions by powerful people, and constitutional law professors are some of the ones doing that.

But it is hard to speak truth to power while one is also part of that power. By benefitting from the attention and legitimation of the elite legal profession, constitutional law professors risk adopting too many of their styles of mind too often. This can make constitutional law professors too concerned with the immediate and practical. It can make constitutional law professors too concerned with studying those at the top of a power

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8. The use of this phrase is purposeful, meant to invoke Pierre Bourdieu's use of the phrase. *See, e.g.*, Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOC. THEORY 14, 16 (1989).

9. Law professors are dominated by the graduates of a few elite law schools. *See* 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, 554 (2016) ("Harvard has contributed 22.6 [percent] of the faculty members with J.D.s at the top thirty-four schools, and Yale 21.7 [percent]—a figure that is especially remarkable for Yale given its dramatically smaller class size."). There are roughly 1.3 million lawyers in the United States. *See* Debra Cassens Weiss, *Lawyer Population 15% Higher Than 10 years Ago, New ABA Data Shows*, ABA JOURNAL, May 3, 2018. Only a small fraction of those most elite of lawyers will find the larger, more systematic issues that law professors tend to address worthy of their time.

10. *See, e.g.*, Claudia Goldin & Lawrence F. Katz, *The Shaping of Higher Education: The Formative Years in the United States, 1890 to 1940*, 13 J. ECON. PERSPECTIVES 37, 38 (1999) ("Universities [have] widened their scope of operations by adding a multitude of highly specialized departments.").

structure, and too convinced that those at the top matter more than the many more below them in our system. It can also make constitutional law professors too sympathetic with the powerful.

This Essay is primarily focused on constitutional law professors. Coan's book is about constitutional law, so addressing scholars writing mostly in that area makes the most sense. Constitutional law is also the subdiscipline of legal scholarship that I know the best and thus can theorize about the best. It is certainly the case that law professors of all specialties have to decide how to balance their commitment to the truth with the fact that those in power are listening to them.[11]

Normative evaluations of what constitutional law professors should do elicit passionate reactions. Some have argued that—because of its attempts to be part of the legal profession—legal scholarship does not have the rigorous methodologies that being a part of a research university requires.[12] The famous economist Thorstein Veblein once said that "[l]aw school[s] belong[] in the modern university no more than a school of fencing or dancing."[13] Others—including the current Chief Justice of the Supreme Court—have argued that in its efforts to be part of the university, legal scholarship has failed in its efforts to serve the legal profession.[14] This Essay does not have a strong normative evaluation of whether what

11. Others have helpfully articulated similar tensions that law professors face. *See, e.g.*, Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968); Richard H. Fallon, *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012); Richard H. Pildes, *The Legal Academy and the Temptations of Power*, *in* DISSENTING VOICES IN AMERICAN SOCIETY: THE ROLE OF JUDGES, LAWYERS, AND CITIZENS (Austin Sarat ed., 2012). The goal of this Essay is to build on their work by identifying the many mechanisms within the modern research university and legal profession generating this tension, and the many positive and negative consequences of that tension.

12. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002) ("[T]he current state of . . . legal scholarship is deeply flawed . . . . [because] [t]he sustained, self-conscious attention to . . . methodology . . . . in the journals in traditional academic . . . . is virtually nonexistent in the nation's law reviews."). For responses, see Frank Cross et al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002); Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002).

13. THORSTEN VEBLEN, THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN 211 (1918).

14. For the most notable prior arguments to this effect, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, VOLKH CONSPIRACY (July 23, 2011, 11:07 AM), http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship [https://perma.cc/U9WU-V4SB]; Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), http:// blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more. *See also* Richard A. Posner, *Legal Scholarship Today,* 115 HARV. L. REV. 1312, 1320 (2001) (discussing a previous and more desirable era when "legal scholarship was not directed at law professors as such; most of it was aimed squarely at the profession at large, particularly judges and lawyers.").

constitutional law professors do is mostly good or mostly bad. Instead the ambition is more modest: to identify what we do and what benefits and costs that generates.

I. BETWEEN THE UNIVERSITY AND THE PROFESSION

Constitutional law professors are part of at least two epistemic communities.[15] In order to be hired as a tenure-track law professor, they are socialized by scholars in their relevant fields, just like other academics in the university. Success in an academic position is shaped by positive evaluations by scholars in one's field, again similar to other academics.

Unlike so many other academics, though, there is a discrete and powerful external constituency for constitutional law professors: elite members of the legal profession. Credentialing by the legal profession helps one secure an academic position and succeed at it. There are analogues in the academy—particularly other professional school academics like business school or medical school professors—but these analogous are likewise exceptions to the normal situation facing academics.

A. The University

Aspiring scholars in academic disciplines are socialized professionally into their academic discipline primarily by tenure-track faculty in these disciplines, as well as by their peers also aspiring to be scholars. Their audience is other faculty in their discipline, either at their university or at other universities. Aspiring scholars complete graduate survey courses that are part of the introduction to the discipline, and then take specialized courses that specialize them even more in that discipline. These courses usually involve readings involving canonical scholarship in the discipline.

Another part of success for many aspiring scholars in most academic disciplines also involves identifying mentors to sponsor their scholarly careers. These mentors edit journals that can accept the articles by their students, advise powerful funding agencies that can fund their research and/or their studies and help place their mentees in temporary or permanent faculty positions by contacting other academic institutions. Mentors use these powers to benefit their mentees through the transmission of social capital about how their disciplines work, and also

15. *See* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (describing epistemic communities as "network[s] of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area").

more directly by obtaining material rewards for their mentees (e.g. research support, employment). This sponsorship usually persists after the completion of graduate school through the completion of a stint in a post-doctoral program.

Aspiring law professors, including constitutional law professors, follow a path to a faculty position that features many of the same structural features as aspiring academics elsewhere in the university. A major audience for an aspiring law professor is also faculty in their discipline (law or a particular area of law) either at their university or at other universities. Their initial coursework is the required first-year curriculum in law school. These courses introduce aspiring scholars to fundamental concepts in different areas of law, although they usually focus on canonical acts by legal actors rather than canonical scholarship by legal scholars.[16] Basic intellectual concepts that define legal scholarship as a field—reasoning by analogy, slippery slopes, efficiency—are introduced through the study of practical materials that put these concepts into action.

The few law schools that tend to dominate the placement of law graduates in law teaching[17] have increasingly created specialized paths more like graduate school for future legal scholars after they complete their general coursework. These schools have workshop series that involve scholars from various law schools discussing the process of producing elite scholarship.[18] Specialized classes are increasingly dedicated to the production of scholarship and its eventual publication. Through these opportunities, aspiring law professors develop relationships with mentors whom transmit social capital and provide material support similar to that provided by aspiring scholars elsewhere in the university. Many law schools also now offer the functional equivalent of post-doctorate positions, alternatively labeled either "Visiting Assistant Professor" programs or fellowship programs.[19]

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16. Consider, for instance, that these first-year classes are not usually taught by reading packets collecting canonical works in a field. Rather, they feature a casebook, with canonical cases (and increasingly regulations and statutes).

17. *See* McCrary et al., *supra* note 9, at 554. For information about the domination by the graduates of a few schools in law teaching in the past, see, for instance, Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action*, 97 COLUM. L. REV. 199 (1997).

18. *See, e.g.*, *The Law Teaching Series*, YALE L. SCH., https://law.yale.edu/studying-law-yale/areas-interest/law-teaching/teaching-series [https://perma.cc/67UW-GARD].

19. The Bigelow Fellows at the University of Chicago Law School are notable examples of participants in a program that has been around for some time. *Bigelow Program*, U. CHI. L. SCHOOL, https://www.law.uchicago.edu/bigelow [https://perma.cc/227N-FE66]. Other law schools have created similar programs—Harvard, for instance, has the Climenko program. *See* Michael Blanding, *How to Grow A Law Professor*, HARV. L. TODAY (Nov. 24, 2014), https://today.law.harvard.edu/feature/how-to-grow-a-law-professor/

The year during which the aspiring law professor goes on the hiring market also involves an evaluation of their scholarly merit. Candidates that go through this market complete the Faculty Appointments Register (FAR) form, and a salient part of that form requires candidates to list scholarly publications.[20] The most competitive candidates increasingly have several publications in top law reviews. When these candidates interview with interested hiring committees at the hiring conference in Washington, these committees will usually ask about the scholarship of the candidate.[21] If the candidate is invited back to campus for a full day evaluation, a part of this evaluation will be the formal presentation of the scholarship to the entire law faculty—the "job talk."[22]

Scholars across the university once hired are evaluated based on their scholarly success. This success is supposed to drive promotion decisions and increases in material compensation, as well as interest from other universities. A similar focus on scholarly success shapes the professional trajectories of law professors, including constitutional law professors. Tenure and promotion include a significant scholarly component, as do increases in material compensation and interest from other universities. It should be no surprise, then, the higher ranked law schools tend to have faculties that are more productive scholars.

The increase in the doctorate as a qualification for law professors has made them even more like their scholarly colleagues across the university.[23] Law professors with doctorates in other disciplines have spent even more years surrounded by students and faculty interested in the scholarly enterprise than those without such a doctorate. Many utilize methodologies that law reviews are not used to publishing but are publishing more frequently, or that legal scholars are using to publish for academic journals in other disciplines.[24]

[https://perma.cc/9C7U-V7TY] (describing the program as one in which "practicing lawyers could return to the academy for two years and begin creating their own body of scholarship").

20. *See Entering the Law Teaching Market* 5, YALE L. SCH. https://law.yale.edu/sites/default/files/area/department/cdo/document/cdo_law_teaching_public.pdf [https://perma.cc/SF4M-Y77D].

21. *Job Talk Paper*, YALE L. SCH. https://law.yale.edu/studying-law-yale/areas-interest/law-teaching/current-candidates/applying-teaching-positions/job-talk-paper [https://perma.cc/RK34-WQMP] ("For academic candidates, the interview process is organized around [a] manuscript. Interviewers will likely read this work and use it as a basis for evaluating your academic preparation and potential.").

22. *See Callback Interviews*, YALE L. SCH., https://law.yale.edu/studying-law-yale/areas-interest/law-teaching/current-candidates/callback-interview [https://perma.cc/4MW6-BE75] ("The job talk is typically a workshop: both academic and clinical candidates present a paper and faculty members (and occasionally students) will comment and ask questions.").

23. *See* McCrary et al., *supra* note 9, at 546.

24. *See* Tom Ginsburg & Thomas J. Miles, *Empiricism and the Rising Incidence of Coauthorship in Law*, 2011 U. ILL. L. REV. 1785, 1785 ("[T]he fraction of articles in the

B. The Profession

The relationship between law professors in general—or constitutional law professors in particular—and the legal profession has been noted, but too often it is somewhat assumed rather than explained.[25] The mechanisms between this connection have to be fully explained so they can be fully evaluated. The essential point is that constitutional law professors face incentives to consider the elite legal profession as an important scholarly audience. These incentives are different in kind—and greater in magnitude—than those facing many scholars elsewhere in the university. This is in substantial part because the external constituency that law professors speak to is coherently organized, thereby lowering the costs of identifying them as an audience and learning how to speak to them. The external constituency that constitutional law professors speak to is also very powerful, thereby increasing the returns to speaking to them effectively.

The difference from many other aspiring scholars first becomes salient through the process of legal education. Scholars have studied how legal education socializes students into the mindset of being powerful elites.[26] Elite graduate programs are socializing students into thinking of themselves as being elite scholars more than powerful elites. First-year law students are mostly reading about actions by elite members of the legal profession, like prominent lawyers and judges. They are only secondarily reading scholarship and are rarely expected to know that scholarship well enough to be evaluated on their knowledge of it on a final examination.

Peer effects also vary between doctoral programs and legal education. At a top doctoral program, most students are thinking of themselves as future scholars while they compete their doctoral educations and aspire to become scholars in research universities once they complete their doctoral educations. Even at the law school that produces the highest proportion of

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top fifteen law reviews that were empirical or coauthored (or both) trended upwards between 2000 and 2010.").

25. And usually it is assumed as a means of engaging in a normative evaluation of it. *See, e.g.*, Edwards, *supra* note 14, at 34 ("I have been deeply concerned about the growing disjunction between legal education and the legal profession."); *id.* ("The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use."); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 325 (1989) (stating that there a "widespread conviction that the gap (perhaps 'chasm' would be more accurate) between the legal academy and the real world of practice and public policy is already alarmingly wide and may be approaching potentially unbridgeable dimensions.").

26. *See generally* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992); LANI GUINIER, JANE BALIN & MICHELLE FIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOLS, AND INSTITUTIONAL CHANGE (1998); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientation to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11 (1978).

law teachers—Yale Law School—it is a small percentage of the class that enters law teaching.[27] A defining moment of professional socialization for future legal scholars is spent building relationships with those who think of themselves as future elite lawyers and judges, not as future elite scholars. These relationships persist for years, placing law professors firmly in personal and professional networks with lawyers and judges.[28]

During summers in law school, even aspiring law professors (or those studying for or already holding doctorates) usually work at legal positions in the public or private sectors. After graduation from law school, aspiring law professors (again, including those with graduate education) clerk for judges at very high rates (particularly constitutional law professors) and practice law at very high rates.[29] A supermajority of aspiring law professors are admitted to the bar.[30]

The process of obtaining a position as a (particularly constitutional) law professor also prioritizes many of the same credentials that are used as metrics in obtaining other elite positions in the legal profession. For instance, if one has clerked for a Supreme Court Justice or a federal judge with a substantial scholarly reputation—Guido Calabresi or Richard Posner being notable examples—this can help on the teaching market. Candidates invited back to campus for final interviews present a "job talk" to the entire faculty that is a rhetorical performance with similarities to an oral argument before an appellate court.

Consider how these features of obtaining a position as a law professor differ from those in other departments across the university. Aspiring political scientists are very rarely sitting next to future members of Congress or political appointees in the executive branch in their introductory classes in their doctoral programs in political science. Their summers are not spent interning on Capitol Hill, and neither Nancy Pelosi

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27. *See* George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123, 180 (2005) (describing Yale law school class size as being close to 200 graduates every year on average). For a thorough list of the number of graduates of each law school placing their graduates in law teaching in a given year, see *Entry Level Hiring: The 2020 Report–Call for Information*, PRAWFSBLAWG (March 2, 2020), https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report/ [https://perma.cc/7VZ3-RGSA].

28. For instance, there are many examples of close relationships between judges and law professors. *See, e.g.*, Robert Siegel, *John Roberts: A Roommate's View*, NAT'L PUB. RADIO, (July 20, 2005), https://www.npr.org/templates/story/story.php?storyId=4763091 [https://perma.cc/26HS-BXH5] ("John Roberts, President Bush's nominee for the Supreme Court, is passionate about law, history and golf. He also has a dry sense of humor, according to Richard Lazarus, who was Robert's roommate at Harvard Law School.").

29. *See* McCrary et al., *supra* note 9, at 546 ("Law schools have traditionally relied on hiring criteria such as high grades, law review membership, and Supreme Court clerkships, which serve as proxies rather than direct indicators of likely scholarly productivity.").

30. *Id.*

nor Mitch McConnell are likely to be a reference for a job market candidate in political science.[31]

Once constitutional law professors obtain their positions, their scholarly success remains connected to the legal profession. Peer-reviewed journals in law have increased in number and significance, but there is still great status attached to placing articles in the top general interest law reviews edited by law students.[32] There are specific law schools playing an outsized role in the move towards interdisciplinary work,[33] but outside of those schools there will be many schools where junior faculty are encouraged to submit only to law reviews. Tenured faculty face subtler incentives to publish in these law reviews.[34]

There are many forms of peer review, and many forms of evaluation besides peer review, but what is notable about this is this that receiving an offer by a law review involves convincing an aspiring member of the legal profession. It is quite sensible, then, for the elite law students that are editing law reviews to focus on the actual or potential impact an article has or could have on a legal profession that they will shortly enter and that they already deeply understand. These law reviews do an incredible job given that they face both a crushing number of submissions and the knowledge that their selection of an article can change the life of an author—while they are also doing things like studying for final examinations that could change *their* lives.[35]

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31. There have been many notable exceptions. David Price received a doctorate in political science and was a member of the political science faculty at Duke University before being elected to the House of Representatives. *See* David E. Price, *Full Biography*, https://price.house.gov/about [https://perma.cc/YK52-VKWD].

32. The numbers could change, but at least in the recent past it was the case that nine of the ten most-cited articles of all time were in law reviews. *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1486–89 Tbl.1, 1504–06, 1512, 1519–20 (2012).

33. *See* McCrary et al., *supra* note 9, at 544–46 ("The proportion of Ph.D.s within each faculty generally rises with USNWR school rank, suggesting that the most elite schools are driving the Ph.D. trend. Certain schools stand out, even against that pattern: Yale, Chicago, Penn, Berkeley, Northwestern, Cornell, Vanderbilt, USC, Illinois, and Emory all had notably higher proportions of Ph.D.s than their similarly ranked peers.").

34. If faculty raises are based on scholarly impact, it could be the case that deans unaware of how to evaluate peer-reviewed journals would overvalue general interest law review publications because they feel more comfortable evaluating the status and success of those. HeinOnline, for instance, excludes many journals that are of great significance for interdisciplinary legal scholarship. *See* Board of Directors of The Society for Empirical Legal Studies, Letter to U.S. News & World Report, (Oct. 28, 2019), https://www.lawschool.cornell.edu/SELS/upload/SELSHeinOnlineOpenLetter10-28.pdf [https://perma.cc/H6H4-C5XA] ("HeinOnline currently omits hundreds of significant venues for interdisciplinary legal scholarship that engage with legal questions, including each of the five leading journals mentioned above.").

35. Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, at 1314 (2018) ("Student editors are both rational and bright. They find themselves in an impossible

It makes sense for a different reason as well: constitutional law professors themselves often evaluate the quality of scholarship by examining its impact on the legal profession. It is common for high-status actors to legitimate scholarship across the research university.[36] What is different for legal scholarship is that some of these high-status actors are outside of the legal academy. Law professors "have relatively low reputational autonomy because it is almost within the definition of professional schools that the reputation of a scholar within the field is partly determined by judgments made by actors in the 'home' field of legal system, medical practice, engineering world, or journalistic or social work practice."[37]

It is common for law schools to reference the number of times their faculty have been cited by the Supreme Court as an example of the value of their legal scholarship.[38] Constitutional theories like originalism have been increasingly legitimated in the eyes of many scholars when lawyers in positions of influence take these perspectives seriously.[39] Defining works of constitutional law scholarship are meant to synthesize the actions of important legal actors like the Supreme Court—consider John Hart Ely's landmark *Democracy and Distrust*,[40] which makes this effort clear.[41] Sometimes they help generate the actions of important legal actors. It is hard to imagine the Supreme Court deciding *Goldberg v. Kelly*[42] the way it did without the earlier article by Charles Reich on *The New Property*,[43] or the Court deciding *District of Columbia v. Heller*[44] the way it did

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situation: they have to pick articles, they lack sufficient knowledge, and they are severely pressed for time.").

36. *See* Scott Frickel & Neil Gross, *A General Theory of Scientific/Intellectual Movements*, 70 AM. SOC. REV. 204, 219 (2005).

37. Neil McLaughlin, Intellectuals, Movements and the Academy: Building on Frickel and Gross 19 (Aug. 11, 2007) (unpublished manuscript) (available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/8/4/3/2/p184325_index.html).

38. *See* Mike Fox, *UVA Law Faculty Lead in U.S. Supreme Court Citations*, U. OF VA. SCH. OF L. (Nov. 1, 2018), https://www.law.virginia.edu/news/201811/uva-law-faculty-lead-us-supreme-court-citations [https://perma.cc/XP5Q-NA9P].

39. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORD. L. REV. 545, 545 ("Drawing on the work of pioneer conservative academics like Robert Bork and Raoul Berger, originalism became a central organizing principle for the Reagan Justice Department's assault on what it regarded as a liberal federal judiciary." (citations omitted)).

40. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

41. *See id.* at v (writing of Chief Justice Earl Warren that "[y]ou don't need many heroes if you choose carefully.").

42. 397 U.S. 254 (1970).

43. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

44. 554 U.S. 570 (2008).

without the generation of Second Amendment scholarship preceding the decision.[45]

Constitutional law scholars themselves—presumably at a greater rate than other academics—not only generate the messages but become the messengers for these messages by assuming positions of legal authority. Robert Bork was at the center of discussions about originalism as well as law and economics, and became a judge using these ideas.[46] Richard Posner was an influential academic who used his writings to establish a reputation that helped him become a federal judge.[47]

The increase in law professors with doctorates in other disciplines may have decreased the interest of law professors in the elite legal profession, but not by as much as many assumed or have stated.[48] Law professors with doctorates in other disciplines still have spent substantial time being socialized into the elite legal profession, both while in law school and through legal employment after graduation.[49] Once on a faculty, they still face strong incentives to publish in law reviews, and law reviews will never be the same (nor would we want them to be) as peer reviewed journals in other disciplines.

Law reviews still are dominated by articles that feature the important and sophisticated doctrinal analysis that has characterized them for their entire history. Alongside these articles for at least the past generation has been the increase in salience of another scholarly form, featuring more "middle-range" theory.[50] Larger theoretical debates in law are identified,

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45. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 224–26 (2008) (examining changing scholarly conceptions of the Second Amendment).

46. *See* John O. McGinnis, *Robert Bork: Intellectual Leader of the Legal Right*, 80 U. CHI. L. REV. DIALOGUE 235, 235 (2013) ("[Bork] was the most important legal scholar on the right in the last fifty years"); *id.* ("There were two important movements in conservative and libertarian legal thought in the latter part of the twentieth century. One was law and economics. The other was originalism. Judge Robert Bork was unique in being at the intellectual center of both of them.").

47. *See* Lawrence Lessig, *Foreword*, 86 U. CHI. L. REV. 1027, 1028 (2019) ("Judge Posner came to the bench after an already extraordinary academic career. His work in the academy was foundational.").

48. *See, e.g.*, Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1315, 1324 (2002) ("The scholars [of previous generations] . . . identified with the legal profession rather than with their colleagues in other department of their university.").

49. *See* McCrary et al., *supra* note 9, at 563 (offering that there is "little evidence of any shift away from . . . traditional credentials overall . . . [N]o major shift away from these credentials appears to have occurred.").

50. A classic and important definition of middle-range theory comes from the late sociologist Robert Merton. *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 39 (1968) ("[T]he minor but necessary working hypotheses that evolve in abundance during day-by-day research and the all-inclusive systematic efforts to develop a unified theory that will explain all the observed uniformities of social behavior, social organization and social change." (citations omitted)).

and these debates are then discussed in the context of specific doctrinal issues. For instance, what does originalism mean for how to understand specific cases raising questions of executive privilege, and what does how originalism manifests in debates about executive privilege mean for originalism?

Now these larger theoretical debates are increasingly interdisciplinary in nature. The legal scholar is the consumer and/or the producer of information derived from using the methodologies of other disciplines. While the ways of answering questions in these articles are different, many of the questions being asked are still those shaped by the elite legal profession.

This can come in different forms. In one version, the law professor is now an informed consumer of information produced in other disciplines. An empirical regularity discovered in another discipline provides new reasons to question a legal rule or legal institution, while also providing insights about how to improve the legal rule or legal institution. Think of Cass Sunstein bringing behavioral economics to bear on questions of institutional design.[51] Less frequently, the legal scholar is both the producer of this empirical information and the normative consumer of it. Think of a scholar like Nicholas Stephanopoulos and his transformative empirical work on the "efficiency gap" being used to critique the Supreme Court's decisions on gerrymandering.[52]

While an orientation towards the elite legal profession has been persistent, it is not necessarily permanent. One could imagine a world in which the elite legal profession is so discredited in the eyes of law professors that they no longer care what elite lawyers think about their work. It is no surprise that it was during the later days of the Rehnquist Court and the earlier days of the Roberts Court that popular constitutionalism enjoyed its greatest fame.[53] Law professors in large

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51. *See, e.g.*, Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–77 (2000) ("My principal purpose in this Essay is to investigate a striking but largely neglected statistical regularity—that of group polarization—and to . . . deal with the implications of group polarization for democracy and law."). Sunstein, to his enormous credit, also produces original and insightful empirical research. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825 (2006) ("The purpose of this Article is to explore the role of judicial convictions in the application of *Chevron*. Two data sets are analyzed.").

52. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015) ("[W]e introduce a new measure of partisan symmetry: the efficiency gap. It represents the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.").

53. *See* Jeffrey Rosen, *Popular Constitutionalism*, N.Y. TIMES (Dec. 12, 2004), https://www.nytimes.com/2004/12/12/magazine/popular-constitutionalism.html [https://perma.cc/C6GS-VJDS] ("Now that it seems clear that Republicans will control the courts for the foreseeable future, canny liberals are beginning to wean themselves of the

numbers aggressively opposed the nomination of Brett Kavanaugh to the Court,[54] and a Court composed of many figures that are strongly opposed by law professors could be an audience that law professors ignore. The Supreme Court in particular has managed to stay connected to mainstream public sentiment for so long[55] that it is hard to imagine it being that disconnected from academic sentiment, but at a moment of ideologically polarized political parties an ideologically extreme Court is more possible.

The significance of the legal profession is greater than the external constituencies for so many other scholars in the modern research university for several reasons. First of all, because the external constituency is easier for legal scholars to understand, it makes this constituency an easier "focal point" to target. The costs of understanding who to speak to outside of the university and how to speak to them are made lower for law professors by the fact that this audience is defined as part of a profession. For instance, a primary audience for legal scholars are judges—particularly nine Justices on the Supreme Court.[56] Nine Justices are an easier target than a legal profession of more than one million lawyers.[57] Those not targeting the Supreme Court or federal courts have a reasonably attentive audience among state courts, or among lawyers serving as federal or state policy leaders.

The costs of accessing this audience are lower not just because this external constituency is more knowable, but because it is actually known. All nine Justices of the Supreme Court spent time as law students at Harvard or Yale law schools, and that is where so many law professors studied.[58] They speak the same language as law professors because they attended the same schools as law professors. Then there are the moot courts, the endowed lectures, the amicus briefs, and the myriad other

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romantic idea that judges inevitably favor liberal values. And now these liberals have a rallying cry—'popular constitutionalism.' . . .").

54. *See* Susan Svulrga, *'Unfathomable': More Than 2,400 Law Professors Sign Letter Opposing Kavanaugh's Confirmation*, WASH. POST (Oct. 4, 2018.), https://www.washingtonpost.com/education/2018/10/04/unprecedented-unfathomable-more-than-law-professors-sign-letter-after-kavanaugh-hearing/ [https://perma.cc/T9X8-SCBV].

55. *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263 (2010) ("When the 'mood of the public' is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions.").

56. *See* Laura Kalman, *Professing Law: Elite Law Professors in the Twentieth Century*, *in* LOOKING BACK AT LAW'S CENTURY 337, 345 (Austin Sarat et al., 2002).

57. *See* Debra Cassens Weiss, *Lawyer Population 15% Higher Than 10 Years Ago, New ABA Data Shows*, ABA J. (May 3, 2018, 2:31 PM), http://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows [https://perma.cc/YSD7-5KNP].

58. *See* 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, 554 (2016).

opportunities for law professors to establish or solidify relationships with elite members of the legal profession.

Second of all, the returns from gaining the attention of the elite legal profession are much greater than for so many other academics. The elite legal profession exercises enormous amounts of power. They are all nine members of the Supreme Court, many members of Congress,[59] and leading members of the executive branch—regardless of the administration in power.[60] Even a small impact on such powerful people makes one powerful.

None of this is to say that the focus on the elite part of the legal profession is purposeful and malicious. Constitutional law scholars are socialized into the world of this audience at an age and in a way that makes that socialization stick. Everyone inevitably changes what they say depending on their actual and perceived audience.[61]

The contrasts with so many other academics around the university are clear. Who would a political scientist writing about Iran policy be targeting that is comparably discrete to an audience of nine on the Supreme Court? The chances that a law professor personally knows or is close enough to knowing a Justice are much greater than the chances that the political scientist knows members of the National Security Council deciding about policy towards Iran. And what would the *scholarly* benefits be if a senator cited one's research on Iran in a committee hearing? It would not have the same effects on legitimating an article in the *American Political Science Review* or in the *American Sociological Review*.

Economists have been the most successful of the social sciences at using their scholarship to shape debates outside of the academy.[62]

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59. See Adam Bonica, Why Are There So Many Lawyers in Congress? 1 (Aug. 20, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2898140 [https://perma.cc/9H2E-FEK]) ("While comprising a mere 0.4 percent of the voting age population, lawyers accounted for [thirty-nine] percent of seats in the House and [fifty-six] percent of seats in the Senate in the 115th Congress.").

60. *See* David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 21 (2012).

61. Erving Goffman would be the classical citation for this. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE xi (1959). Decades of social science has worked to confirm his work. *See, e.g.*, Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 522 (1995).

62. *See generally* Marion Fourcade et al., *The Superiority of Economists*, 29 J. ECON. PERSPS. 89 (2015). *See also id.* at 90 ("Unlike many academics in the theoretical sciences and humanities, many prominent economists have the opportunity to obtain income from consulting fees, private investment and partnerships, and membership on corporate boards."); E. Glen Weyl, *Finance and the Common Good*, *in* APRÈS LE DÉLUGE: FINANCE AND THE COMMON GOOD AFTER THE CRISIS (Edward Glaeser et al. eds., 2016) (suggesting that roughly forty percent of the income of authors in some fields of economics comes from consulting).

Economists run the central banks in many countries, as well as often running organizations such as the World Bank and the International Monetary Fund.[63] Since 1946, the Council of Economic Advisers has been influential in every White House.[64]

But the closest analogies to constitutional law professors are other professional school academics—business school academics, professors at schools of public policy, and most notably medical school academics. Medical school faculty studied their profession at the same schools with practitioners in their profession, and practicing doctors have real reasons to care about the latest findings of medical research. The power of the elite medical profession rivals that of elite legal institutions.

II. EVALUATING LAW PROFESSORS BETWEEN THE UNIVERSITY AND THE PROFESSION

Law schools attract and produce so many talented scholars. Some of these talented scholars would have joined other departments in the university or gone into legal practice but for the unique opportunity that law schools offer to speak truth to power. Ensuring that powerful people know of the great ideas coming from universities is important, and it is increasingly the exclusive province of law professors.

This enormous benefit from being between the university and the profession is also the cause of the greatest risks that legal scholarship faces. A concern for any audience outside of the research university threatens to make any scholar too concerned with the immediate, the practical, and the realistic. A concern for this particular audience outside of the research university makes legal scholars at risk of being too cautious in delegitimating power because they are too deferential to it.

A. Benefits

The social space that constitutional law professors occupy brings many positive things to law schools. Operating in a social space between the university and the elite legal profession provides something that other research positions cannot: relevance. And relevance is a powerful selection effect. Scholars are motivated by many things. There are the significant material returns from having employment for life and meaningful raises as part of that employment. There is the joy of being able to learn about and write about issues that you find fascinating and important.

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63. *See* Daniel Hirschman & Elizabeth Popp Berman, *Do Economists Make Policies? On the Political Effects of Economics*, 12 SOCIO-ECON. REV. 779, 781 (2014).

64. *See Council of Economic Affairs*, WHITEHOUSE.GOV, https://www.whitehouse.gov/cea/ [https://perma.cc/L6AX-2JGD].

But even money and fun have their limitations as motivators and having a larger and more powerful audience than other academics can be a significant attraction. Power attracts talented scholars to law faculties that would not otherwise be interested. They might be interdisciplinary scholars interested in not just empirical findings or historical trends but also the normative implications of those findings or trends. They might be talented lawyers who want to dig a little deeper into the first principles animating the doctrine that they would be using in practice.

Universities also benefit from the social space that constitutional law professors occupy. So many scholars study their topics from a distance and provide the insights that come from observing developments from farther away. Constitutional law professors study their topics from closer. They are constant ethnographers because they either know the subjects they are studying or are close enough to them in social space that they basically know them.

Constitutional law professors—particularly as legal scholarship has become more interdisciplinary—can provide a form of scholarly originality that universities need. Many legal scholars themselves do not recognize legal scholarship as a distinctive academic discipline,[65] or readily argue for reducing its distinctive footprint.[66] But originality so often comes from lumping together disparate developments into a single narrative. Joseph Schumpeter called it the "new combinations of productive means,"[67] and the more technical term in more contemporary scholarship about creativity is "recombinant growth."[68] Scholars that exist on the boundaries of multiple social fields are therefore uniquely positioned to say something new. It is the ability to combine multiple disciplines that gives law professors a comparative scholarly advantage. It is also the ability to combine what scholars care about with what elite lawyers care about that gives law professors a comparative scholarly advantage.

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65. *See, e.g.*, Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1913 (2005) (arguing for "moving legal publishing toward a system of peer review, at least for methodologically sophisticated work"); Shari Seidman Diamond & Pam Mueller, *Empirical Legal Scholarship in Law Reviews*, 6 ANN. REV. L. & SOC. SCI. 581, 595 (2010) ("One possibility is that the increasing number of JD/PhDs in the legal academy will improve the quality of the research submitted for publication.").

66. *See, e.g.*, Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401, 429 (2007) ("Law, however, is regarded not as a discipline in its own right with something of its own to contribute to the interdisciplinary enterprise, but merely as a context for projects from other disciplines.").

67. JOSEPH ALOIS SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE 66 (Redvers Opie trans., 1983) (1934).

68. Martin L. Weitzman, *Recombinant Growth*, 113 Q.J. ECON. 331, 332 (1998) (describing the power of "new knowledge that depends on new recombinations of old knowledge").

Having an elite legal profession connected to scholarship also brings some positive features to the country. We want powerful people to know the latest great ideas circulating, and one great way to ensure they know the latest great ideas is if they know or know of the people producing those ideas and if the ideas are translated for them. As John Maynard Keynes has observed, "[t]here is nothing a Government hates more than to be well-informed."[69] Because the powerful are their friends, or the powerful are reading their work, or the powerful are influenced by their work without reading their work, law professors are informing many of those in government.

These desirable features of what constitutional law professors do for the university and for the country have become more important as they have become more unique in doing it. Efficient labor markets leverage the principle of comparative advantage to produce different forms of labor output. Individuals with different talents will be encouraged to perform tasks that best suit their talents. Part of them being encouraged to utilize their unique talents is the presence of enough opportunities to do so. There must be a deep enough market of a demand for those talents.[70]

These same principles about labor market specialization apply to the academic labor market as well. There must be enough tenure-track positions designed to producing certain forms of scholarship for significant amounts of that scholarship to be produced. With sufficient demand for a form of scholarship, scholars will learn about how to produce that form of scholarship while they are in school and will continue to produce that type of scholarship in order to obtain and succeed at later academic employment.

Without law schools, there might not be sufficient demand for academics producing scholarship that combines many disciplines and/or that aspires to speak to larger audiences. The social sciences were initially consumed in substantial volume by audiences outside of the university. The *American Political Science Review* at first had three categories of subscribers: "professors and teachers" but also "lawyers, businessmen" and "public officials."[71] Think of the great social scientists of the twentieth century, and how much they spoke not just about the world in which they lived, but to the world in which they lived. Seymour Martin Lipset tried to

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69. ROBERT JERVIS, HOW STATESMEN THINK: THE PSYCHOLOGY OF INTERNATIONAL POLITICS 148 (2017) (quoting John Maynard Keynes).

70. *See, e.g.*, David Schleicher, *The City as a Law And Economic Subject*, 2010 ILL. L. REV. 1507, 1521 ("Deep labor markets provide workers [in an industry] with benefits or risk pooling . . . if an employer in a big city goes belly-up, its workers have more options.").

71. *See* William Anderson, *The Teaching Personnel in American Political Science Departments: A Report of the Sub-Committee on Personnel of the Committee on Policy to the American Political Science Association*, 28 AM. POL. SCI. REV. 726, 729, 731 (1934).

understand during the Cold War why the United States remained a capitalist system.[72] Robert Putnam in the last decade of the century informed us about the growing isolation of Americans and was invited to the White House to talk about this.[73]

This public-facing voice of the humanist or the social scientist—not as side employment, but as their primary employment—still exists but in smaller quantities than it did previously. Experts tend to divide themselves into strongly autonomous and sharply divided up "fields."[74] It was no surprise then that the humanities and social sciences became substantially more technical and substantially more isolated from each other over the past century, with a particular shift in the 1960s and 1970s.[75] They also become substantially more isolated from life outside of the university. What they do is crucially important to the world, and very important in understanding it. But more of them are producing their scholarship using a more technical voice that they are not then translating for powerful individuals.[76] Twitter and other technological changes have lowered the costs of communicating more broadly, and disciplines across the university have become more welcoming of speaking to the public. But it is still more to the side than at the middle of what humanists and social scientists do.

Power abhors any vacuum, including an intellectual vacuum. With humanists and social scientists not taking the insight of the university and making it relevant for those in power, others have filled in the gap and would do so more. Think tanks have gradually increased in their influence, particularly in Washington,[77] and their rise is chronologically

72. Note, for instance, that even one of Lipset's least famous titles sold more than 400,000 copies, was translated into dozens of languages, and was a finalist for the National Book Award. *See* Douglas Martin, *Seymour Martin Lipset, Sociologist, Dies at 84*, N.Y. TIMES (Jan. 4, 2007), https://www.nytimes.com/2007/01/04/obituaries/04lipset.html [https://perma.cc/BN8Q-TDTM].

73. *See* Nicholas Lemann, *Kicking in Groups*, ATLANTIC MONTHLY (April 1996), https://www.theatlantic.com/magazine/archive/1996/04/kicking-in-groups/376562 [https://perma.cc/YV9D-A5M5].

74. *See* Lisa Stampnitzky, *Disciplining an Unruly Field: Terrorism Experts and Theories of Scientific/Intellectual Production*, 34 QUALITATIVE SOC. 1, 6 (2011).

75. *See* Fourcade, *supra* note 62, at 102.

76. *See, e.g.*, Lee Sigelman, *The Coevolution of American Political Science and the* American Political Science Review, 100 AM. POL. SCI. REV. 463, 467 (2006) ("If 'speaking truth to power' and contributing directly to public dialogue about the merits and demerits of various courses of action were still numbered among the functions of the profession, one would not have known it from leafing through its leading journal.").

77. Thomas Medvetz, *Murky Power: "Think Tanks" as Boundary Organizations*, *in* 34 RETHINKING POWER IN ORGANIZATIONS, INSTITUTIONS AND MARKETS 113, 118 (David Courpasson et al. eds., 2012) ("By one leading count, the number of American think tanks has more than quadrupled since 1970.").

simultaneous with much of the increase in technical social science scholarship.[78] Journalists have been doing the same.

But there are many positive features to having those who do not have to seek new funding or new employment with great frequency being the ones to tell powerful people how the world does work or should work. It is certainly easier for all academics to be heard because of the Internet, but legal scholars might be the academics who deserve to be heard. Legal scholars are uniquely situated to make the various parts of the university useful to the elite legal profession because of how they are trained and rewarded. Mark Tushnet has referenced the "'lawyer as astrophysicist' assumption."[79] Lawyers "are people who have a generalized intelligence, and can absorb and utilize the products of any other discipline in which we happen to become interested."[80] Just like an appellate litigator can be working on an intellectual property appeal and a First Amendment appeal at the same time, so too can the law review article reference a little economics and a little political science to go along with a lot of law—and have the argument be important to a statute that Congress is considering.

Telling powerful people what they should or should not do—rather than analyzing what they have already done—is another reason for constitutional law professor influence. So many of the social sciences are either not normative at all,[81] or when they are normative are more abstractly normative in a way that is hard for scholars in other disciplines or elite outsiders to understand.[82] Constitutional law scholarship is strongly normative.[83] Even interdisciplinary scholars new to the legal academy these days usually feel comfortable discussing the normative "implications" of their work, even if these implications are more generalized.

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78. *See id.* ("[T]here was no *think tank* category per se, either in public or specialized political discourses, until roughly the 1960s.").

79. Symposium, *Constitutional Scholarship: What's Next?*, 5 CONST. COMMENT. 17, 31 (1988).

80. *Id.*

81. *See* Sigelman, *supra* note 76, at 467 ("Since its inception, the *Review* has served mainly as a forum for reporting empirical findings, a purpose of almost two out of every three articles.").

82. *See, e.g.*, *id.* at 465 (stating that "Plato, Aristotle, and the other ancients did not make their first appearance until 1950, and it was not until the *Review*'s eighth decade that their return engagements became more than occasional").

83. *See, e.g.*, Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847 (1988) ("[T]he most distinctive feature of standard legal scholarship is its prescriptive voice."); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 802 (1991) ("These are the questions that animate virtually all of contemporary legal thought—from the most modest doctrinal reform proposals to the most ambitious utopian speculation. In our classes and in our writings, we speak ceaselessly of ways to improve law.").

B. Costs

Significant attention to any external constituency can complicate the truth-seeking goals of scholarship.[84] Scholars face incentives to orient themselves towards longitudinal goals, because tenure is not granted for several years and a career after tenure is usually several decades. Productivity expectations are such that scholars can focus on depth and breadth because they have the time to pursue both. Others outside of the university have to concern themselves more with the immediate—the case to be argued today, the statute to be drafted tomorrow.

Relatedly, scholars face incentives to be more theoretical, to lump together seemingly unrelated phenomena into a single, coherent whole. Others are encouraged to split items apart—to keep seemingly unrelated phenomena unrelated. Clients are hiring lawyers to resolve a single dispute; courts are deciding single cases; neither exists to produce a larger theory. External constituencies encourage a focus on the trees, not the forest.

Rather than focus on the original understanding of the Second Amendment, the constitutional law scholar can sometimes benefit from focusing on the discrete issue presented by the Second Amendment case being decided by a court. The broader and deeper project examining the original understanding of the Second Amendment is less likely to be read by the lawyer arguing a Second Amendment case, or the judge deciding that case. There are broader projects that get broader attention, to be sure.[85] But more likely to be read is the article discussing an issue percolating through the federal courts on the Second Amendment, because that article will be more helpful to lawyers and judges, more likely to be cited by them, and therefore more likely to generate the reputational returns for the scholar who wrote such an article.

While some of the costs of existing between the university and the elite legal profession have to deal with the significance of *any* constituency outside of the academy, some of the costs have to do with the nature of the elite legal profession in particular. In many of the social sciences, studying the elites is a sub-field of the discipline.[86] In constitutional law

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84. Scholars have noticed this tension previously. *See supra* note 11. This Section is a good occasion to unbundle all of the components of this tension, many of which have gone unremarked.

85. *See, e.g.*, Adam Liptak, *A Proposal to Offset Prosecutors' Power: The 'Defender General,'* N.Y. TIMES (Jan. 27, 2020), https://www.nytimes.com/2020/01/27/us/a-proposal-to-offset-prosecutors-power-the-defender-general.html [https://perma.cc/E4VN-7QTW] (highlighting an academic article calling for an office of "defender general" to represent the interests of criminal defendants).

86. *See, e.g.*, Shamus R. Khan, *The Sociology of Elites*, 38 ANN. REV. SOC. 361, 362 (2012) ("The sociology of elites is, like many areas of sociology, faddish. At times elite studies have been quite popular and some might even say central to our discipline,

scholarship, there is the risk that studying the elites is *the* discipline, partly because those studying the elites are themselves elite. There have been movements to change this, like the interest in popular constitutionalism.[87] But while those movements have not focused on constitutional change as top-down, nor do they often focus on constitutional change as bottom-up—more like middle-up. Constitutional change at the Supreme Court comes from actors outside of official positions, but actors that are still quite powerful, like important social movements.[88] Scholars therefore run the risk of missing the important role that those outside of the elite legal profession play in shaping the law.

The incentives to focus on the elite legal profession can make constitutional law scholarship too ideological. In a polarized country with a polarized legal profession having a team to claim as one's home can provide a scholar with a bigger microphone.

More fundamentally, facing incentives to consider the elite legal profession can make constitutional law professors too preservative. There are moments when these incentives do not interfere with the production of scholarship that significantly questions the status quo—think of critical legal studies,[89] or current movements to radically change the Supreme Court.[90]Focusing on those in positions of power can distort one's scholarly worldview in a traditionalist, small-c conservative direction.[91] Powerful legal actors do not seem potentially suspicious because they are socially distant, but instead as naturally sympathetic because they are socially close. Studying elite behavior closely makes what elites do seem

and at other times such work has been largely abandoned. Today work on elites is experiencing a revival . . . .").

87. *See, e.g.*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 (2009) ("Renouncing the elitism and the court centrism of traditional constitutional theory, a diverse group of scholars has set out to redeem a central role for [the people].").

88. *See* Siegel, *supra* note 45, at 201–02 (discussing role of social movements in generating the *Heller* decision).

89. *See, e.g.*, Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 16 (1986) (labeling any victory for critical legal studies as representing "the death of the law, as we have known it throughout history, and as we have come to admire it").

90. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019) ("[P]reserving the Court's legitimacy as an institution above politics will require a complete rethinking of how the Court works and how the Justices are chosen. To save what is good about the Court, we must reject and rethink much of how the Court has operated for more than two centuries.").

91. The canonical citations for this are ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 48 (1992) (noting that seventy percent of incoming Harvard Law students said they were interested in public interest employment after graduation, but only two percent planned to do so by their third years); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC'Y REV. 851, 853–54 (1996) (finding that more than four times more students were interested in "social reform" employment as incoming students then they were as graduating students).

inevitable. Alternative, more radical paths that these elite actors could have pursued seem implausible because elite actors themselves do not engage with these paths. A supposedly radical actor like the Warren Court is much more conservative once we realize what it could have done—and what people outside of the elite legal profession were talking about it doing.[92]

Scholarship tends to be more technical and less emotional than the language of everyday life, and that is only accentuated in the case of constitutional law scholarship because it is so much about elite lawyers and judges. While the concerns of constitutional law scholars are often with those issues that are on the front page of the newspaper, the way that constitutional law scholars talk about them makes them seem more remote. Legal principles tend to be "neutral principles,"[93] and so legal scholars talk that way if they want to increase the chances that it will shape how lawyers think. It is more professionally acceptable to talk about good ideas as if they are good for everyone and for always. The threats that President Donald J. Trump poses to the Republic are made into concerns about the erosion of presidential "norms."[94] Judicial power should be reduced in favor of the power of popular sentiment not because judicial review is bad for Democrats or Republicans, but because it is bad for democracy. The result of all of these efforts to abstract away from real people and real problems is to make these real people and real problems seem less serious. Injustice is ignored because injustice is made more technical and less troubling.[95]

Precedent plays an enormously important role within the culture of the elite American legal profession. That is what judges are engaging with and lawyers are arguing to them. This is reflected in the role that past practice therefore plays in American legal scholarship. Creativity and

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92. Justin Driver's fantastic article on the Warren Court makes some of these points. *See* Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1112–13 (2012).

93. *See* Herbet Weschler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17–19 (1959).

94. Clare Foran, *'An Erosion of Democratic Norms in America,'* ATLANTIC (Nov. 22, 2016), https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508469 [https://perma.cc/W4YA-GCGM].

95. Elizabeth Mertz's book on the language of law school is particularly helpful on this point. *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 10–11 (2007). *See also* John M. Conley, *Can You Talk Like A Lawyer and Still Think Like A Human Being? Mertz's* The Language of Law School, 34 LAW & SOC. INQUIRY 983, 986 (2009) ("Not only does it strip students of the values many of them bring to law school, it subtly inculcates new ones. And these new values are troubling in that they undermine empathy for people and their problems and ultimately contribute to the maintenance of unjust power structures.") (reviewing MERTZ, *supra*).

originality have a lower ceiling that legal scholars often try not to exceed.[96] The goal is to say something new, but not too new. Just like it is problematic for a lawyer to appear in court and tell a judge that the judge would be the first judge ever to rule a certain way, it can be problematic for a legal scholar to write an article stating that they have an idea about what Congress or the Supreme Court should do that is completely unlike anything ever previously considered. Law review articles are more about hidden gems instead of new discoveries. A common form for a law review article is to identify a really important feature or doctrine or design that has gone unnoticed and is good or bad—but that already exists in the world.

Scholars in general can be more thinkers than doers. Normative theories can be focused not just on concerns that are more abstract, but on changes based on those concerns that are more implausible. An individual constitutional right to an adequate education or a constitutional requirement that the Senate vote on Merrick Garland's nomination to the Supreme Court can be justified as a matter of the way the world should be. Legal scholars—connected to actors actually doing things as they are—are more concerned on what *could* happen. One of the major research design questions that law review articles face is whether to address if their idea is not just desirable, but plausible. And most of them decide to address plausibility. The article that could shape how the Supreme Court decides a case is more influential than the one that discusses how the Court *should* decide a case.

CONCLUSION

John Hart Ely inscribed his landmark book about constitutional theory to Chief Justice Earl Warren—his former boss—and wrote about him that "[y]ou don't need many heroes if you choose carefully."[97] We might never be able to appreciate the heroism of Chief Justice Warren—if you believe he was heroic—without the scholarship of a law professor (and dean) like Ely. It took a scholar who was present for the deeds of Chief Justice Warren truly to understand them and to theorize them. Political scientists might have been dissecting the political leanings of the Justices on the Warren Court, and humanists analyzing their theories of justice. It took a law professor, though, to understand what Chief Justice Warren was doing, and what it meant for our country. Even more

96. *See* Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1986) ("I will argue, however, that 'brilliance' should count heavily against an economic or legal theory. The same traits of novelty, surprise, and unconventionality that are considered marks of distinction in other fields should be considered suspect in economics and law.").

97. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, at v (1980).

dramatically, without the support of legal academics like Ely, could Chief Justice Warren ever have been heroic in the first place (if indeed he was)?

But what about when institutions like the Supreme Court are far from heroic? Does the degree to which law professors are part of the same social space as institutions like the Court make it hard to appreciate when they go astray? Members of a family are the only ones who can ever truly understand that family, but therefore are often the only ones who can ever truly be critical of it.