

1994

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## Recommended Citation

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## WHO TEACHES CONSTITUTIONAL LAW?

*Deborah Jones Merritt\**

Constitutional Law is a plum teaching assignment. William L. Prosser, then Dean of the University of California School of Law at Berkeley, complained more than forty years ago that "[t]he overwhelming majority" of teaching applicants "have wanted to teach Constitutional Law."<sup>1</sup> More recently, a survey of constitutional law professors established that 130 of 134 professors taught the course by their own choice; only four professors had succumbed to institutional pressure to teach constitutional law.<sup>2</sup>

There are a variety of reasons for the appeal of constitutional law. The subject raises provocative, highly publicized issues that are basic to our legal system. Topics for scholarly articles abound, and some professors believe that law review editors favor articles on constitutional topics.<sup>3</sup> Professors of constitutional law also have opportunities to enhance their reputations by arguing high profile cases before state and federal courts or by testifying before government bodies. Even if they do not participate actively in litigation, their words and theories often penetrate judicial opinions.

But who gets to teach this popular, influential course? Do academic credentials or work experience make some professors

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1. William L. Prosser, *Advice to the Lovelorn*, 3 J. Legal Educ. 505, 508 (1951). Prosser also fingered administrative law as a popular teaching assignment in that heyday of post-war regulation. These two courses, Prosser complained, were "a drug on the law school market" that "skimmed the cream of the crop, the pick of the younger generation," leaving courses like criminal law, evidence, and civil procedure without distinguished scholars. *Id.*

2. George D. Haimbaugh, Jr., *The Teaching of Constitutional Law in American Law Schools*, 31 J. Legal Educ. 38, 56 (1981).

3. To the best of my knowledge, no empirical study has tested this speculation. At the very least, however, teachers of constitutional law have an edge in publishing articles in the esteemed journal, *Constitutional Commentary*.

more likely to teach constitutional law than others? Is constitutional law the exclusive province of professors who have clerked for Supreme Court Justices? Do race and sex affect teaching assignments in constitutional law?

As part of a larger empirical study of law school hiring, I analyzed variables such as these to determine what factors increased the odds that a recently hired professor would teach constitutional law. The study included 1046 professors who began tenure-track positions at accredited U.S. law schools between the fall of 1986 and the spring of 1991.<sup>4</sup> In this essay, I briefly describe the study's methodology and principal findings related to the teaching of constitutional law. I then offer some comments about the implications of these findings for the way scholars teach constitutional law and contribute to constitutional jurisprudence.

### I. STUDY DESIGN

Using five successive editions of the *AALS Directory of Law Professors*,<sup>5</sup> I identified 1094 professors who began tenure-track positions at accredited U.S. law schools between the fall of 1986 and spring of 1991.<sup>6</sup> These 1094 professors comprised the entire population of professors who started tenure-track positions during that period. I focused on this group of recent tenure-track entrants in order to analyze contemporary trends in law school

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4. The total population of professors beginning tenure-track positions during that period numbered 1094. I excluded 48 professors from the analyses described in this paper, because I lacked information about the courses they taught. See *infra* note 8 and accompanying text.

5. The *Directory*, published annually by the Association of American Law Schools, contains a comprehensive list of all full-time faculty members at accredited U.S. law schools. Several other empirical studies have relied upon the *Directory* to identify faculty members at accredited law schools. See, e.g., Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 Am. B. Found. Res. J. 501; Robert J. Borthwick and Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. Mich. J.L. Ref. 191 (1991).

6. There were 178 accredited law schools between 1986 and 1991. I excluded four of these schools from my analysis: three Puerto Rican schools that are not part of the U.S. law teaching labor market and one school (the Judge Advocate General's School of the U.S. Army) that draws its faculty exclusively from military officers. In both of these cases, the applicant pool for faculty positions differs considerably from the pool for other accredited schools.

I defined "tenure track" professors as those with the titles assistant professor, associate professor, acting professor (at University of California law schools), or professor. I excluded visiting or adjunct professors, librarians, clinical professors, and professors of legal writing from the population because their status and/or credentials differ significantly from those of the other professors in the population. For a more detailed discussion of how I defined the research population, see Deborah J. Merritt and Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. Cal. L. Rev. 2299, 2302-05 (1992).

hiring and teaching assignments. After identifying the relevant population, I obtained biographical data for each of the professors from the *Directory*, other published sources, and resumes I solicited from the professors.<sup>7</sup>

For the analyses described in this paper, I excluded from the research population forty-eight professors for whom I lacked information about teaching assignments. The remaining 1046 professors listed at least one teaching assignment on their resume, in the *Directory*, or in some other published source.<sup>8</sup> From these listings, I determined whether each professor had any experience teaching constitutional law. If a professor had ever taught a course in this field, I coded the professor as positive for my dichotomous dependent variable, teaching constitutional law.<sup>9</sup>

In searching for the factors that would predict whether recently hired faculty members taught constitutional law, I tested twenty-eight independent variables. These variables included most of the academic credentials and work experiences thought to affect law school hiring: prestige of the J.D. school;<sup>10</sup> law re-

7. I also obtained survey responses from more than seventy percent of the population. These responses identified both the professors' family ties and the geographic constraints they imposed on their academic job searches. Analysis of these variables, however, revealed that they bore no significant relationship to whether faculty members taught constitutional law; thus I do not discuss the survey responses in this article. For further discussion of family ties, geographic constraints, and their relationship to law school hiring, see Deborah J. Merritt, Barbara F. Reskin and Michelle Fondell, *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 Wis. L. Rev. 395 (1993).

8. I gathered the vast majority of teaching assignments from the 1990-91 edition of the *AALS Directory*. If a professor had left teaching before 1990-91, I noted teaching assignments from the most current *Directory* in which the professor's name appeared.

Some professors reportedly do not keep current the teaching assignments they list in the *Directory*. Other professors may change their entries from year to year, omitting some courses and adding others. The potential impact of these differences on my analyses was relatively slight because members of the research population had only one to five years of teaching assignments to report. More important, there is no reason to suspect that any failure to report teaching assignments correlates with any of the independent variables I studied in my analyses. The possible random error generated by a faculty member's failure to report courses accurately is accounted for by the statistical significance tests I employed. See *infra* note 20.

9. I counted courses with the word "constitutional" in the title (including courses on state constitutional law) as constitutional law courses. I also counted courses focusing on specific parts of the Constitution, such as courses on the First Amendment, Fourteenth Amendment, Freedom of Speech, Equal Protection, or Religion Clauses. I excluded courses on civil rights statutes and criminal procedure from the tally of constitutional law courses; most academics consider these distinct fields.

10. I measured prestige of the J.D. school by combining two independent measures of institutional prestige: The 1992 academic reputation rank reported by *U.S. News and World Report (The Best Graduate Schools)*, *U.S. News & World Rep.*, Mar. 23, 1992, at 78) and the median LSAT of first-year students enrolled at each law school during the 1991-92 school year. I combined these highly correlated scores into a single prestige scale that ranges from a low of -4.81 (for Texas Southern University) to a high of 4.03 (for both Yale

view membership and editorial positions;<sup>11</sup> possession of a master's degree in law; possession of a master's degree in a field other than law; possession of a doctoral degree in a field other than law; experience as a law clerk for a state appellate court (including both state supreme courts and intermediate appellate courts), federal district court, federal court of appeals, or the United States Supreme Court;<sup>12</sup> and experience in nine types of law practice.<sup>13</sup> I also controlled for the professor's age at the time of the first tenure-track appointment; the year of the first tenure-track appointment;<sup>14</sup> the professor's sex;<sup>15</sup> the professor's

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University and the University of Chicago). For a more extensive discussion of how I created this prestige scale, see Merritt, Reskin and Fondell, 1993 Wis. L. Rev. at 409-10 (cited in note 7).

11. I created four dummy variables to measure law review memberships and editorial positions. One variable indicated whether the professor had served as a named editor (i.e., "articles editor," "notes editor," or "editor-in-chief") on the main law review at his or her school; a second variable distinguished professors who had served as a staff member or general editor, but not a named editor, on the main review; a third variable indicated whether the professor had been a named editor of a secondary review; and a fourth variable designated professors who had been a staff member or general editor on a secondary review. A professor with more than one of these experiences received a positive code for the most prestigious experience (i.e., the one appearing first in the above list). Creating dummy variables in this manner allowed me to measure the effect of each variable with reference to a fifth group, faculty members with no law review experience.

12. As with law review experience, I created a dummy variable for each of these clerkship experiences. A faculty member with more than one clerkship received a positive code for the most prestigious clerkship (i.e., the last one named in the list given in text).

13. The nine types of legal experience included in my analyses were solo practice, law firm practice, legal aid work, public defender positions, prosecutorial positions, other types of government practice, in-house work for a corporation, public interest practice other than legal aid or public defender jobs, and nonteaching positions (usually research jobs) at foundations or academic institutions other than law schools. Faculty members with more than one type of legal experience were coded positive for each type of experience they listed.

14. This variable allowed me to control for seniority within the population of relatively junior professors I studied.

15. Professors may designate their sex in the *AALS Directory*. If the professor did not designate sex, and sex was not apparent from the professor's first name, I called the professor's school to determine sex.

race,<sup>16</sup> and a sex-race interaction.<sup>17</sup> Finally, I controlled for the prestige of the school at which the professor obtained his or her first tenure-track appointment,<sup>18</sup> and for whether the professor was "inbred" (employed at the same school from which he or she obtained a J.D.).<sup>19</sup>

In the section that follows, I describe some of the statistically significant differences between professors of constitutional law and professors of other subjects.<sup>20</sup> I also report the results of

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16. The *AALS Directory* allows professors to designate themselves as members of a minority racial group. The survey I mailed to population members, see *supra* note 7, also requested information about race and ethnicity. Because the *AALS Directory* does not distinguish minority professors by specific racial or ethnic groups, and because the number of professors in most of those groups was quite small, I coded professors as either white or minority for this study. According to the survey results, approximately 11.4% of the recently hired professors were African-American; 2.6% were Latino or Latina; 1.2% were Asian-American; and 0.3% were Native American.

Different minority groups may have widely divergent experiences in law school teaching. In a future study, when members of some minority groups are more widely represented on law faculties, I hope to separate the experiences of these minority groups.

17. A sex-race interaction term allows analysts to determine whether the effects of sex and race operate in combination to influence the dependent variable (here, teaching constitutional law) differently than the sum of their separate independent effects. Thus, the sex-race interaction reveals whether the effect of sex differs for minorities and nonminorities (or whether the effect of minority status differs for men and women). With all three variables (sex, race, and the sex-race interaction) in the regression equation, I could distinguish the experiences of minority women, white women, minority men, and white men.

18. To measure prestige of the hiring institution, I used the same prestige scale designed for measuring prestige of the J.D. school. See *supra* note 10. I controlled for prestige of the employing institution because of a concern that some professors might accept a position at a less prestigious school in order to garner an assignment teaching constitutional law.

19. Previous analyses have suggested that inbred professors are treated somewhat differently than professors hired from outside a school's own graduates. See Donna Fossum, *Women Law Professors*, 1980 Am. B. Found. Res. J. 903, 907-11; Lowell L. Hargens and Grant M. Farr, *An Examination of Recent Hypotheses about Institutional Inbreeding*, 78 Am. J. Soc. 1381 (1973).

My preliminary analyses also tested for one other variable: election to Order of the Coif during law school. This variable did not correlate significantly with teaching constitutional law, either when analyzed independently or when subjected to multiple regression analysis. I omitted the variable from my subsequent analyses because the large number of cases with a missing value for this variable hampered some of the statistical analyses. The large number of missing values arose because many law schools, including several of the most prestigious schools, do not participate in Coif.

After eliminating Coif from the analyses, I lacked any direct measure of law school grades, a factor thought to affect law school hiring (and, perhaps, assignments teaching constitutional law). I did, however, control for several factors (especially law review membership and judicial clerkships) strongly correlated with law school grades. See Merritt and Reskin, 65 S. Cal. L. Rev. at 2350 (cited in note 6). If law school grades affect the likelihood that a professor will teach constitutional law, that relationship should be reflected in the regression coefficients for law review membership and judicial clerkships.

20. Social scientists use tests of statistical significance to gauge the likelihood that results observed in their data (such as differences between professors of constitutional law and professors of other subjects) reflect real patterns in the underlying population

several regression analyses using constitutional law as the dependent variable. As I explain further below, multiple regression allowed me to probe the relationship between each independent variable and my outcome (teaching constitutional law) while simultaneously holding other independent variables constant.

## II. RESULTS

One hundred sixty-one of the professors who began tenure-track teaching jobs between 1986 and 1991 taught a constitutional law course during that period. This group constituted fifteen percent (15.4%) of the total number of professors who entered the tenure track and reported course assignments during those years. The constitutional law professors in my population were significantly more likely than other members of the research population to be male, to have served as the editor of a main law review, to have graduated from a prestigious law school, to have clerked for a U.S. Supreme Court Justice or federal court of appeals judge, and to have worked for a public interest employer. Professors of constitutional law also appeared to have more seniority than other professors.<sup>21</sup> Conversely, these professors of constitutional law were significantly *less* likely than other professors to have worked for private law firms. Table 1 summarizes most of these differences.<sup>22</sup>

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rather than random errors in sampling, measurement, or coding. Rarely, if ever, do social scientists have complete information on the universe they are studying and absolute confidence that no random process affected their data. As a result, any inference from one's data to the underlying universe involves the risk that the results in the data do not hold for the underlying population. The theory of statistical significance allows social scientists to decide on the level of risk they are willing to take in making an incorrect inference from their data to the underlying universe. By convention, social scientists treat relationships that have a probability of resulting from chance that is five percent or less ( $\alpha \leq .05$ ); as "statistically significant" or "statistically reliable." In other words, they tolerate no more than a five percent probability that random processes in sampling, measurement, or coding could have produced the observed result. See generally Hubert M. Blalock, Jr., *Social Statistics* 115 (McGraw Hill, 2d ed. 1979).

I follow the same convention, designating significant results as those meeting the .05 significance level. I also note when a result approaches the conventional significance level ( $\alpha \leq .10$ ). Such results are not as reliable as results meeting the conventional .05 test, but they indicate possible differences in the population. When sample size is small, coefficients must be large to attain the conventional significance level, so a result that approaches significance ( $\alpha \leq .10$ )—especially one that is consistent with other significant results—is worth noting.

21. This difference merely approached significance ( $\alpha \leq .10$ ). See *supra* note 20 for a discussion of results that approach significance at the conventional .05 level.

22. The table does not include the difference between these two groups of professors in seniority or in the prestige of the J.D. school, because those differences cannot be expressed in percentages. Professors teaching constitutional law began teaching, on average, in a slightly earlier year (87.9) than other recent hires (88.1). Professors of constitutional law graduated from law schools with a mean score of 2.83 on the law school

Table 1  
 Percentages of Constitutional Law Professors and Other  
 Professors With Selected Characteristics\*

Characteristic	Constitutional Law Professors	Other Professors
Male	72.7%	59.8%
Editor of Main Law Review	36.0%	24.4%
Supreme Court Clerk	9.4%	3.4%
Court of Appeals Clerk	33.3%	19.0%
Public Interest Experience	9.6%	5.5%
Law Firm Experience	52.9%	64.7%
Number in Category	161	885

\* All differences statistically significant ( $\alpha \leq .05$ )

These comparisons are instructive, but they do not control for interrelations among the variables. For example, are men more likely than women to teach constitutional law because they have better credentials than the women? Or does sex itself, after controlling for credentials, affect a professor's likelihood of teaching constitutional law?

In order to answer questions like these, I used logistic regression analysis. Logistic regression is a type of multiple regression, a tool that allows researchers to estimate the independent (or "partial") effect of each of several independent variables (such as being female or clerking for a Supreme Court Justice) on a dependent variable (in this case, teaching constitutional law).<sup>23</sup> A partial regression coefficient estimates the effect of a variable on the outcome when all other variables are held constant. Multiple regression thus is an effective means of determining whether variables such as sex affect the opportunity to teach constitutional law, regardless of other variables (such as academic credentials or work experience).

My regression analysis, reported in Table 2, reveals that five variables enjoyed a significant relationship with teaching constitutional law—after controlling for other variables in the equa-

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prestige scale, while other professors graduated from schools with a mean score of only 2.41. See *supra* note 10 for a description of the prestige scale.

23. For the analyses reported in this paper, I used logistic regression rather than the more common ordinary least squares method. The dichotomous outcome analyzed here—whether or not a professor taught constitutional law—violates some of the assumptions of ordinary least squares regression. For a dichotomous outcome, logistic regression is the appropriate tool. See John H. Aldrich and Forrest D. Nelson, *Linear Probability, Logit, and Probit Models* 13-14, 24-30 (Sage Publications 1984).

tion.<sup>24</sup> Clerking for a Supreme Court Justice or federal court of appeals judge significantly enhanced the likelihood that a professor would teach constitutional law. Likewise, graduation from a prestigious law school was significantly associated with teaching this subject. Law firm experience significantly depressed the chances that a faculty member would teach constitutional law, and being female also had a significant negative effect on teaching constitutional law. Even after controlling for credentials, experience, and other personal factors, women were significantly less likely than men to teach this popular course.<sup>25</sup>

Two other variables displayed a positive association to teaching constitutional law that approached the conventional significance level.<sup>26</sup> Professors who had been a named editor of the main law review at their J.D. school were more likely to teach constitutional law than professors with no law review experience. And faculty members with experience clerking for state appellate court judges, on either the state's highest court or an intermediate appellate court, also appeared more likely to garner assignments teaching constitutional law.

One variable, finally, had a negative relationship with teaching constitutional law that approached significance: professors who entered the tenure track more recently were less likely to teach this course. Seniority, in other words, may have increased the likelihood that a professor taught constitutional law.

Twenty other variables showed no significant relationship to teaching constitutional law. Age and race were not significant. Nor did the effect of sex differ significantly between minorities and nonminorities.<sup>27</sup> District court clerks were no more likely to

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24. This regression analysis included only 985 professors, rather than the full 1046 professors for whom I had information about teaching assignments, because I lacked data on one or more variables for the other 61 professors. Excluding the latter professors from the analysis is consistent with recommended techniques for logistic regression. See *SPSS Advanced Statistics User's Guide* 68 (SPSS, 1990).

25. The negative relationship between being female and teaching constitutional law may represent a recent change in the teaching assignments of women on law faculties. When Donna Fossum analyzed law professors teaching during the 1975-76 academic year, she found that women were proportionately *more* likely than men to teach constitutional law. Fossum, 1980 Am. B. Found. Res. J. at 912 (cited in note 19). Fossum's study, however, did not use regression analysis to control for possible differences in the credentials of men and women. Fossum also included both civil rights and discrimination law within "constitutional law." *Id.* It is difficult to tell, therefore, whether Fossum's results reveal a true historical difference in the opportunities for women to teach constitutional law or a difference in reporting and analytic methods.

26. For an explanation of results that approach the conventional significance level, see *supra* note 20.

27. The sex-race interaction, in other words, was not significant. See *supra* note 17 for an explanation of this variable.

Table 2  
 Logistic Regression for Teaching Constitutional Law

<u>Variable</u>	<u>Coefficient</u>
JD Prestige	.16*
Main Law Review Staff	.19
Main Law Review Editor	.51**
Secondary Law Review Staff	.16
Secondary Law Review Editor	.10
LLM	.13
MA	-.22
PhD	.25
Supreme Court Clerkship	1.34*
Court of Appeals Clerkship	.80*
District Court Clerkship	.06
State Appellate Clerkship	.68**
Law Firm Experience	-.66*
Solo Practice	-.54
Public Defender	-1.05
Prosecutor	.20
Government Work	-.04
Public Interest Work	.41
Research Job	.28
Corporate Counsel	-.62
Legal Aid	-.23
Prestige of Tenure-Track Institution	-.10
Inbred	-.42
Tenure-Track Year	-.11**
Age	-.00
Female	-.52*
Minority	.35
Female-Minority Interaction	.03
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N	985

\* Statistically significant ( $\alpha \leq .05$ ).

\*\* Approaches significance ( $\alpha \leq .10$ ).

teach constitutional law than professors without clerkships, and practice experiences outside of private law firms had no appreciable effect on teaching constitutional law. The correlation between public interest experience and teaching constitutional law, evident in my initial analyses, disappeared when I controlled for other variables. Educational credentials apart from the J.D.—including master's degrees in law, master's degrees in other fields, and doctoral degrees—also failed to exert any significant influence on teaching constitutional law.

## III. DISCUSSION

My empirical analysis supports the assumption that constitutional law is a desirable course awarded to highly qualified teaching applicants. Three top credentials (prestige of the J.D. school, experience as a court of appeals clerk, and experience as a Supreme Court clerk) showed a significant, positive partial correlation with teaching constitutional law. A fourth such credential (service as a named editor of a main law review) displayed a positive relationship that approached significance. These results suggest that the most academically qualified applicants are able to bargain for and obtain assignments teaching constitutional law.

I also found evidence that the opportunity to teach constitutional law increases as a faculty member gains seniority. This relationship is consistent with the theory that constitutional law is a desirable subject; professors may have to wait their turn to teach this course. Alternatively, the relationship between seniority and teaching constitutional law may simply reflect the fact that, as professors spend more years on a faculty, they add more courses to their repertoire.<sup>28</sup>

The regression equation also suggests that appellate clerkships have a special relationship to teaching constitutional law. In part, this relationship reflects the elite nature of those clerkships and the premium credentials they represent. The beneficial effect of appellate clerkships on teaching constitutional law, however, went beyond the most prestigious clerkships with U.S. Supreme Court Justices and court of appeals judges. Clerkships for state appellate judges also had a positive impact on teaching constitutional law that approached significance—while clerkships for federal district court judges showed no significant relationship to teaching this course. Since state appellate clerkships as a class do not appear to carry more prestige than federal district court clerkships, appellate clerks may enjoy an edge in teaching constitutional law that extends beyond the bargaining power their elite clerkships confer.<sup>29</sup>

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28. Seniority, in other words, might also show a significant association with teaching corporations, trusts and estates, or any other course in the law school curriculum.

29. The possible preference for state appellate clerks is also intriguing in light of a recent critique of constitutional law courses focusing on the almost exclusively federal nature of those courses. Daniel R. Gordon, *The Demise of American Constitutionalism: Death by Legal Education*, 16 S. Ill. U. L.J. 39 (1991).

I can cite no empirical support for the speculation that state appellate clerkships are no more prestigious, as a class, than federal district court clerkships. The observation accords with my personal experience both in law school appointments and in providing

Several mechanisms could explain this relationship. The type of law student who seeks an appellate clerkship may be the same type of graduate who prefers to teach constitutional law. Alternatively, appellate clerkships may draw clerks into the intricacies of constitutional law and impress them with the importance of that subject. Or hiring schools may believe that appellate clerks are particularly well suited to teaching constitutional law.

Whatever the mechanisms contributing to the positive association between appellate clerkships and teaching constitutional law, it is worth speculating about the possible effects of that relationship on the ways in which constitutional law is taught. Appellate clerks work in a relatively rarefied, theoretical arena. They help analyze cases in which the facts have already been thoroughly sorted and the issues sharply defined.<sup>30</sup> Appellate clerks rarely meet litigants or their lawyers; appellate decision-making takes place in chambers and conference rooms, well insulated from the hurly-burly of trials, record making, and clients.

With this background, it may be no accident that constitutional law is among the most theoretical, appellate-oriented of the basic subjects taught in law school. In part, the predominance of appellate opinions in constitutional law courses is due to the Supreme Court's dominant role in deciding issues of constitutional law. But all of those Supreme Court decisions had to start somewhere—in some office and some trial court. Do constitutional law professors focus so heavily on the appellate outcome of these cases, not only because the Supreme Court provides so many opinions to analyze, but because of their own inclination to think like appellate lawyers or clerks?<sup>31</sup>

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letters of recommendation to students interested in judicial clerkships. If state appellate clerkships are more prestigious than federal district court clerkships, then the relationship between the former clerkships and the teaching of constitutional law further confirms the desirability of that teaching assignment.

30. Some appellate records, of course, are hopelessly muddled. As cases move from the law office through the courts, however, the issues they raise tend to become more clearly, and abstractly, defined.

31. For similar critiques of constitutional law teaching, see Paul R. Baier, *What Is the Use of a Law Book Without Pictures or Conversations?*, 34 J. Legal Educ. 619 (1984); J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 Stan. L. Rev. 1271 (1976) (book review); Christopher D. Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 S. Cal. L. Rev. 1 (1968).

A few constitutional professors have begun to incorporate non-appellate materials, problem solving, and simulations into their courses. See, e.g., Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. Legal Educ. 527 (1984). Even when professors use these nontraditional approaches, however, they often focus on the appellate process. See, e.g., David S. Day, *Teaching*

In this connection, it is also noteworthy that law firm experience had a significant negative impact on the likelihood that a professor would teach constitutional law. Other practice experiences (including government work, legal aid work, experience as a prosecutor or public defender, and work for any type of public interest organization) showed no significant relationship to teaching constitutional law when I controlled for other credentials and personal characteristics.<sup>32</sup> Why is law firm experience so uncongenial to professors of constitutional law?

The question is particularly troubling because practice with a private law firm is by far the most common experience for law school graduates.<sup>33</sup> The relative lack of law firm experience among constitutional law professors, therefore, tends to set them apart from both their colleagues and their students. Is there something about constitutional law that justifies this special status? More important, does a lack of law firm experience affect the manner in which constitutional law is taught or analyzed by experts in that field? Would professors with law firm experience think differently about constitutional law than professors with other types of practice experience?

The most startling and disturbing result of my regression analysis, however, is the significant negative relationship between being female and teaching constitutional law. Being female cut the odds that a recently hired professor would teach constitutional law in half—even after controlling for credentials and work experience.<sup>34</sup> No other personal characteristic—including race, age, or the sex-race interaction—significantly affected the likelihood of teaching constitutional law.<sup>35</sup> Why are

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*Constitutional Law: Role-Playing the Supreme Court*, 36 J. Legal Educ. 268 (1986) (describing course in which students play roles as Supreme Court Justices).

32. But see *infra* note 38 and accompanying text, noting that experience working for a public interest employer had a positive impact on teaching constitutional law that approached significance for men.

33. Fifty-nine percent of 1992 law school graduates took their first job with a private law firm. National Association for Law Placement, *Class of 1992: Employment Report and Salary Survey* 15 (1993). Over time, of course, an even larger percentage of law school graduates experience law firm practice as they leave judicial clerkships and other early work experiences.

34. For the regression analysis reported in Table 2, the Exp(B) for being female was .59. The Exp(B) is "a multiplicative adjustment of the logistic regression coefficient" that is required to produce the odds that a woman would teach constitutional law compared to the odds that a man would teach the same course. S. Philip Morgan and Jay D. Teachman, *Logistic Regression: Description, Examples, and Comparisons*, 50 J. Marriage & Fam. 929, 932 (1988).

35. The failure of the sex-race interaction to reach significance means that both women of color and white women were equally disadvantaged in obtaining assignments teaching constitutional law. Neither women of color nor men of color suffered any addi-

women less likely than similarly qualified men to teach constitutional law?

There seems no reason to suspect that women dislike teaching constitutional law or shy away from the course. Indeed, constitutional law embraces many subjects (such as sex equality, abortion, and pornography) of clear interest to many female scholars. The apparent prestige of the subject, together with its opportunities for scholarship, prominent appellate advocacy, and public speaking, should make constitutional law attractive to both female and male professors. If women and men are equally interested in teaching constitutional law, then the sex discrepancy may arise from the manner in which law schools assign this course; schools may be more likely to offer this popular course to new male professors than to comparably qualified female ones.<sup>36</sup>

In an effort to analyze this sex discrepancy further, I repeated my regression analysis for the two separate populations of male and female professors. The results of those analyses appear in Table 3. From these results, it is possible to discern whether particular credentials or experiences had a different impact on the teaching assignments of women and men. Such differences can then provide clues to possible explanations for the sex inequality.

As Table 3 shows, only one credential affected the likelihood of teaching constitutional law in a comparable manner for men and women: Supreme Court clerkships enhanced the likelihood that both women and men would teach constitutional law.<sup>37</sup> Other credentials and experiences seemed to affect women and men differently. Male professors were more likely to teach constitutional law if they had clerked for a federal appellate judge or served as a named editor of a main law review. They also seemed more likely to teach constitutional law if they possessed seniority in law teaching or had worked for a public interest employer.<sup>38</sup> Experience in a private law firm, conversely, signifi-

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tional disadvantage (or offsetting advantage) because of their race, relative to same-sex peers. See also *supra* note 17.

36. The greater seniority, on average, of men on law school faculties does not explain the sex discrepancy. Although seniority appears to enhance the likelihood of teaching constitutional law, the sex difference emerged even after controlling for seniority. Within the relatively junior population I studied, moreover, the men were not significantly more senior than the women.

37. This coefficient merely approached significance for men, but it attained significance at the conventional .05 level for women.

38. The coefficients for both of these variables approached significance at the conventional level. The latter credential, working for a public interest employer, had no significant effect on teaching constitutional law when I analyzed the combined population of

Table 3  
 Logistic Regression for Teaching Constitutional Law  
 (Separating Male and Female Populations)

<u>Variable</u>	<u>Coefficient for Women</u>	<u>Coefficient for Men</u>
JD Prestige	.33**	.12
Main Law Review Staff	.28	.17
Main Law Review Editor	.34	.61*
Secondary Law Review Staff	- .67	.50
Secondary Law Review Editor	.45	- .08
LLM	- .32	.32
MA	- .32	- .24
PhD	.53	.17
Supreme Court Clerkship	1.83*	.95**
Court of Appeals Clerkship	.48	.84*
District Court Clerkship	.40	- .35
State Appellate Clerkship	.88	.57
Law Firm Experience	- .59	- .71*
Solo Practice	.22	-1.43
Public Defender	- .44	-1.43
Prosecutor	- .23	.38
Government Work	.22	- .28
Public Interest Work	- .83	.75**
Research Job	.35	.26
Corporate Counsel	-5.74	- .29
Legal Aid	- .97	.14
Prestige of Tenure-Track Institution	- .07	- .09
Inbred	.19	- .59
Tenure-Track Year	- .07	- .14**
Age	.03	- .01
Minority	.62	.35
<hr/>		
N	379	606

\* Statistically significant ( $\alpha \leq .05$ ).

\*\* Approaches significance ( $\alpha \leq .10$ ).

cantly decreased the likelihood that a man would teach constitutional law.

Women were not able to capitalize on either their court of appeals clerkships or law review editorships to obtain assignments teaching constitutional law; neither of these factors even approached statistical significance for women. Nor did women

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women and men. For men alone, however, there appeared to be some relationship between public interest employment and teaching constitutional law.

enhance their opportunities to teach constitutional law by gaining seniority on law faculties. On the other hand, prestige of the J.D. school approached significance for women but not for men; this factor seemed to increase the likelihood that a woman would teach constitutional law. Finally, practice experiences bore no significant relationship to teaching constitutional law for women. Experience in a law firm did not hurt women's chances in obtaining this assignment; nor did experience as a public interest lawyer help their opportunities.

This pattern suggests that, for women, top credentials are the key to teaching constitutional law. If a woman possesses the two strongest credentials in the teaching market—a Supreme Court clerkship and graduation from an elite law school—she can bargain to teach constitutional law.<sup>39</sup> Without those credentials, her odds of being shut out of the course are high.

For men, the picture is more complex. Slightly less exalted credentials—such as a court of appeals clerkship or editorship on the main law review (even at a non-elite school)—may be enough to secure a berth teaching constitutional law. Gaining seniority on a law faculty also seems to yield opportunities for men to teach constitutional law.<sup>40</sup> Practice experience, moreover, appears to have some role in sorting men either into those who desire to teach constitutional law or those whom law schools believe are suitable to teach the course. This sorting process is less likely to occur with women; unless women have the very best credentials, they appear to lose out simply because they are women.

Whatever more detailed explanations can be offered to account for the male/female discrepancy in teaching constitutional law, the bottom line remains disturbing. Teaching constitutional law offers myriad opportunities for scholarship, high profile ad-

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39. Previous empirical studies have demonstrated that graduation from an elite law school is by far the most important factor in determining the prestige of the school at which a professor obtains a teaching position. See Borthwick and Schau, 25 *U. Mich. J.L. Ref.* at 226-32 (cited in note 5); Fossum, 1980 *Am. B. Found. Res. J.* at 516-17, 521 (cited in note 5). Empirical studies also support "the conventional wisdom that experience as a Supreme Court clerk is one of the most highly valued credentials for a professor." Borthwick and Schau, 25 *U. Mich. J.L. Ref.* at 217 (cited in note 5) (reporting that although only 5% of the law professors they studied had clerked for a Supreme Court Justice, 37% of the professors teaching at one of the top seven schools had this clerkship credential).

40. Both the men and women in my population were relatively junior faculty members; no professor had more than five years experience on the tenure track. Seniority, moreover, showed no correlation to being male in this population of recent tenure-track hires. The effect of seniority for men, but not women, therefore, is not due to the fact that men possessed more seniority.

vocacy, and public visibility. The very relationship between top academic credentials and assignments teaching constitutional law suggests that the subject is a prized one, enjoying considerable prestige among academics. By not having the same opportunity as men to teach constitutional law, women lose an opportunity for professional advancement that is extended to men with comparable credentials and experience.

Equally troubling, diminished opportunities for women to teach constitutional law may affect both the substance of constitutional scholarship and the decisions courts render in this field. Suzanna Sherry has argued that female judges approach issues—especially constitutional ones—from a different perspective than men.<sup>41</sup> If this is true, then the bias against women teaching constitutional law may distort both the type of constitutional scholarship faculties produce and the judicial decisions influenced by that scholarship.

Even if further studies do not bear out Sherry's thesis that women think differently than men about constitutional law, it is at least plausible that female scholars stress different constitutional topics than their male colleagues. It is probably not coincidence, for example, that Ruth Bader Ginsburg (rather than one of her male colleagues) developed a constitutional framework for attacking sex discrimination and pressed that theory on the Supreme Court. If women and men enjoyed equal opportunities to teach constitutional law, the focus of constitutional theory might change further.

The apparent bias against women teaching constitutional law, therefore, threatens the fabric of constitutional law itself. Unless both women and men—together with scholars representing a diversity of other backgrounds—have equal opportunities to teach and study constitutional law, we cannot be sure that the Constitution achieves its end of representing all people in our society.

#### IV. CONCLUSION

Empirical analysis suggests that professors of constitutional law are not randomly drawn from a larger pool of new tenure-track hires. Instead, constitutional law professors are more likely

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41. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543 (1986); Suzanna Sherry, *The Gender of Judges*, 4 J.L. & Ineq. 159 (1986). Other writers have also speculated about differences between female and male judges. See, e.g., Gretchen H. Schoff, *Women, Justice, and Judgment*, 4 J.L. & Ineq. 137 (1986).

than other new professors to be male, to have graduated from a prestigious law school, to have clerked for a Supreme Court Justice or court of appeals judge, and to have avoided private law firm practice. There is also some evidence that professors of constitutional law are more likely to have served as a named editor of a main law review, to have clerked for a state appellate court, and to have served more years in tenure-track teaching.

These patterns raise questions about the way in which law schools assign professors to teach constitutional law. Is the strong link between appellate clerkships and constitutional law justified? Should law schools make a greater effort to assign constitutional law courses to professors with experience practicing with a private law firm? And why have law schools been less willing to assign constitutional law courses to women than to comparably qualified men? The people who teach constitutional law define the constitutional law that is taught;<sup>42</sup> law schools must now make more deliberative decisions about who teaches this influential course.

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42. See Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comm. 101 (1994).