The Post

GOOD SCHOLARSHIP FROM THE INTERNET

VOLUME 3 • NUMBER 2 • SUMMER 2013

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INTRODUCTION

Anna Ivey[†]

I think the *Journal of Law*'s focus on scholarship that appears on blogs is helpful in identifying the kinds of work that is appropriate for blogs – work that is suggestive rather than definitive, quick takes, or in an area that's moving quickly. But I still have the nagging question: are law blogs relevant?

– Alfred Brophy, *Are Law Blogs (Still) Relevant?*, The Faculty Lounge blog, June 19, 2013

//

"Every day I check *SCOTUSblog* and *How Appealing* and *The Volokh Conspiracy*."

– Supreme Court Justice Elena Kagan, Aspen Ideas Festival, June 29, 2013

//

Alfred Brody asks a fair question, and *The Post* is intrigued by Justice Kagan's comments at the Aspen Ideas Festival.

Her remarks are nice evidence of judicial awareness of good blogging, and perhaps even of its influence, but they do not give us much of an idea of how judges view posts: Are they scholarship? Are they journalism? Are they more reliable for a sense of where scholarship is today because they reflect the current thoughts of scholars, while the law reviews reflect the thoughts those scholars had a year or two ago? Are they more reliable than journalism because they are more susceptible to correction and part of a culture that is more

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likely to confess – or at least flag – errors than, say, the *New York Times*? In other words, what do judges think they are reading when they read a blog post? *The Post* will keep its ear to the ground.

Are you inspired to celebrate more legal blog posts that can sometimes get buried in the avalanche of life on the internet? We welcome submissions from astute readers who know good legal blog posts when they see them. (Our parameters: (1) The blog post should be about law or laws; (2) it should be written by legally trained people for legally trained people or aspiring lawyers rather than for a general audience; and (3) it deserves to transcend the 15 nanoseconds of fame that blog posts typically enjoy.) Please send links you'd like to nominate to *post@annaivey.com*. //

FROM: PRAWFSBLAWG

CONSTITUTIONAL AVOIDANCE IN BABY GIRL

Will Baude[†]

After listening to the oral arguments in Adoptive Couple v. Baby Girl,[1] I expected the final opinion or some separate writings to have a lot of discussion of constitutional law (perhaps through the lens of constitutional avoidance). But I expected it to be about equal protection – I expected hints that members of the Supreme Court thought that modern Indian law was highly troubling as a matter of disparate racial treatment, perhaps with further hints that some members of the Court would reconsider (or at least radically narrow) Morton v. Mancari.[2]

So in fact I was surprised to see absolutely none. Justice Alito says of the dissent, in one sentence, "Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context." Justice Thomas's opinion (more on which in a second) contains only a footnote saying he won't reach the issues. ("I need not address this argument because I am satisfied that Congress lacks authority to regulate the child custody proceedings in this case.") Based on where things seemed headed at argument, supporters of modern Indian law ought to regard this case as dodging a bullet.

(For that reason I wholly disagree with Eric Posner's assessment[3]

[†] Assistant Professor of Law (as of 1/1/14), University of Chicago Law School. Original at prawfsblawg.blogs.com/prawfsblawg/2013/06/constitutional-avoidance-in-baby-girl.html (June 29, 2013; vis. Aug. 30, 2013).

[1] www.scotusblog.com/case-files/cases/adoptive-couple-v-baby-girl/.

[2] supreme.justia.com/cases/federal/us/417/535/case.html.

[3] www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme

that "the majority has laid the groundwork for a future equal protection challenge to Indian classifications and fortified its position that the equal protection clause bans racial preferences like affirmative action." Maybe they will do so in a future case, but they haven't done so here, and if they do it, it will be in an opinion joined by Justice Scalia and not one joined by Justice Breyer. Given Breyer's concurrence, why would he join an opinion that lays the "groundwork" that Posner suggests?)

That said, Justice Thomas's concurring opinion is astounding. It's a surprising, radical rethinking of federal enumerated power over Indians, making the (expected) point that Thomas's narrow view of the interstate commerce clause implies a narrow view of the Indian commerce clause. Basically, it's an inversion of the argument that Akhil Amar has made that early perspectives on the Indian commerce clause should demonstrate a broad view of the interstate clause. But more than that, it also has an interesting and narrow reading of "Indian tribes," ultimately concluding that "the ratifiers almost certainly understood the Clause to confer a relatively modest power on Congress – namely, the power to regulate trade with Indian tribes living beyond state borders."

For all of these conclusions, Thomas relies extremely heavily on Robert Natelson's Original Understanding of the Indian Commerce Clause,[4] (and a little on Sai Prakash) although I can't tell for sure if Thomas's conclusions perfectly match theirs. But Jacob Levy argues[5] that Thomas has the original intent entirely backwards:

> Thomas is right that the Indian Commerce Clause should not be read in the Lone Wolf/ Kagama way to grant plenary power over all Indian affairs. But he's so utterly wrong about the jurisdiction to which the clause applies that the conclusion ends up backward: he would grant plenary power *to the states*, and declare the clause a dead letter now that there is no part of Indian Country that lies outside state boundaries. There is

_court_2013/baby_veronica_indian_adoption_and_the_supreme_court_justice_alito_s_ruling.html?utm_source=tw&utm_medium=sm&utm_campaign=button_toolbar.

[4] papers.ssrn.com/sol3/papers.cfm?abstract_id=1092628.

[5] jacobtlevy.blogspot.com/2013/06/quick-reaction-adoptive-couple-vs-baby.html.

> simply no evidence that the Founders envisioned the extinction of Indian Commerce Clause jurisdiction and a complete transfer of power to the states.

I am not sure where I stand on all of this. Levy's paper on Madison's drafting[6] of the Indian Commerce Clause (and the material it contains) is enough to convince me that Thomas is going a little too fast here, and that the extreme version of the argument he seems to be sketching may be wrong as an originalist matter. But I'm not yet sure exactly *where* Thomas or Natelson go wrong, if they do. Thomas is plainly right to reject federal "plenary power" over Indians. But are things like the end of the treaty era,[7] or the Indian Citizenship Act[8] relevant to federal power? There I am less sure.

Maybe it is time to rethink the federal Indian power. Or at least to figure out where it comes from and what it is. //

[6] www.academia.edu/422868/Indians_in_Madisons_Constitutional_Order.
[7] en.wikipedia.org/wiki/Indian_Appropriations_Act#1871_Act.
[8] en.wikipedia.org/wiki/Indian_Citizenship_Act_of_1924.

FROM: IDIBON

JUSTICE KENNEDY'S FAVORITE PHRASES

Tyler Schnoebelen[†]

In the chambers of the United States Supreme Court, nine men and women are deciding what's going to happen with same-sex marriage in America. Will a widow get back taxes from her wife's estate? Will same-sex marriage be reinstated in California? Or if they rule more broadly, will same-sex marriage be made legal across all 50 states, not just 12?

The decisions are likely come down to one single person: Supreme Court Justice Anthony Kennedy. Expert court-watchers agree that it's clear how the other eight justices will vote (four inclined to support same-sex marriage, four disinclined).

If we could predict the outcome of court cases, we would have retired to our own islands long ago. But what we *can* do, is look at the communications of Kennedy in this court case, and see if his patterns of communication significantly differ from how he has communicated in past court proceedings.

First let's look at some of the phrases that Justice Kennedy uses a lot more than all the other justices (relative to how much he's speaking overall). Again, this is relative to all the justices but I'll put in notes for how Scalia and Ginsburg use the phrase for comparison. In the infographic, the way you get "expected" values is to take the total number of times anyone on the Court says a word/phrase and then multiply it by how much a particular justice is speaking overall. If there were 100 uses of "foo" across all the justices and Justice X

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spoke 10% of all the words, we'd expect them to have 10 "foo"s. We want to pay attention to when observed/expected ratios are particularly high or low: those are phrases worth further inquiry.

Kennedy also seems to like *in this case, I take it*, *can you tell, you want us*, *let me ask*, *and so forth*, and *I'm not sure* relative to all the other justices. Compared to all the other justices, he seems to avoid *I don't, you don't, don't know,* and *you're saying*.

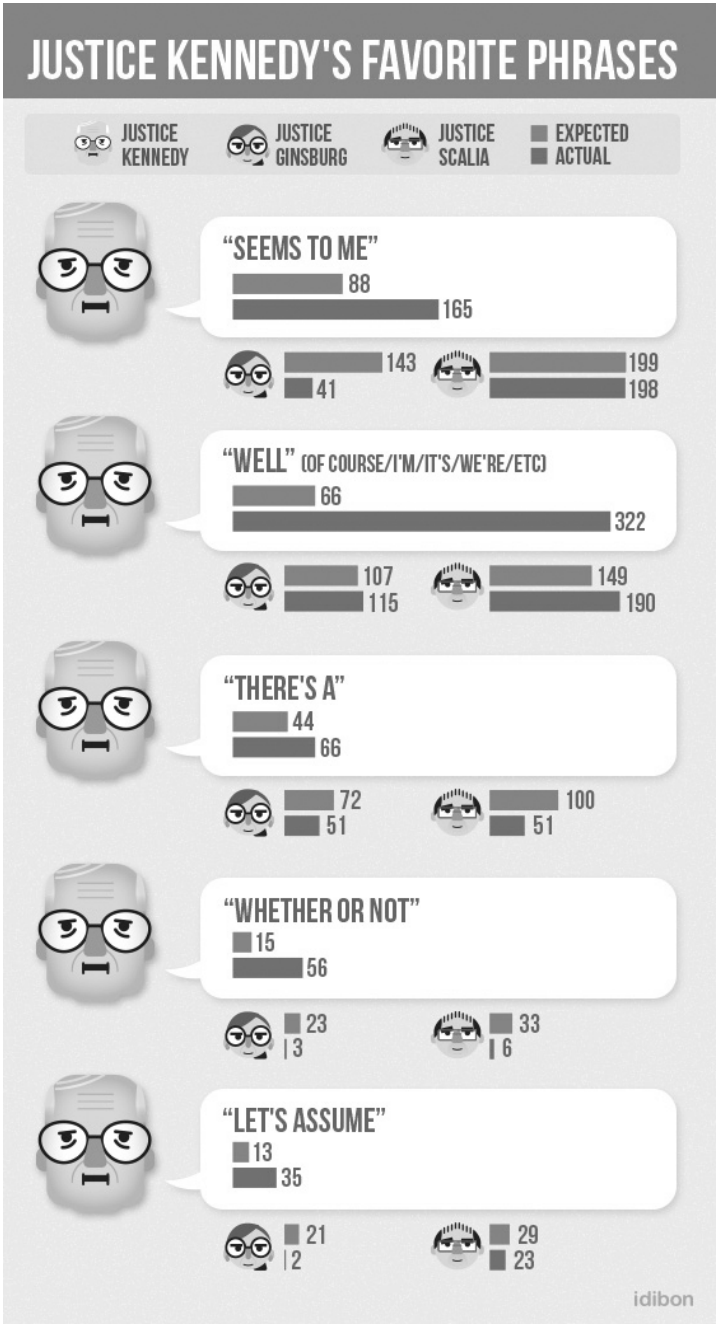
Most of these top phrases are the kinds of things you might be inclined to toss away if you were trying to do "topic detection". But in opinion detection and sentiment analysis, they are much more likely to carry an important signal. Take *well. Well* is one of the most frequent "discourse markers" to pop up in English speech. Certainly it pops up a lot in Kennedy's speech. What's it doing?

Well often indicates a topic change but it can also mark an elaboration or explanation – in that way it's kind of like a *be that as it may* or *that said*. *Well* can mark a kind of insufficiency in what's been said/what's about to be said. It can serve as a pause filler (like *um* or *uh*). It often marks the introduction of reported speech. My own favorite (though wordy) definition is from Andreas Jucker (1993):

> [*Well* is] a signpost that directs the addressees to renegotiate the relevant background assumptions, either because a new set of assumptions becomes relevant or because some of the manifest assumptions are mistaken.

And if we look at how Kennedy is using *well* in the same-sex marriage cases, that seems about right (note that these cases were not included in the data in the chart above). I should probably give you the preceding context since they are so clearly responsive to what's come before. But in the interest of space, I'm just going to give the utterances:

- *Well, that – that assumes the premise. We didn't – the House didn't know it was unconstitutional. I mean –*
- *Well, why not? They're concerned about the argument and you say that the House of Representatives standing alone can come into the court. Why can't the Senate standing alone come into court and intervene on the other side?*


JUSTICE KENNEDY'S FAVORITE PHRASES
JUSTICE KENNEDY
JUSTICE GINSBURG
JUSTICE SCALIA
EXPECTED
ACTUAL
"SEEMS TO ME"
88
165
143
41
199
198
"WELL" (OF COURSE/I'M/IT'S/WE'RE/ETC)
66
322
107
115
149
190
"THERE'S A"
44
66
72
51
100
51
"WHETHER OR NOT"
15
56
23
3
33
6
"LET'S ASSUME"
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idibon

- *Well, it applies to over what, 1,100 Federal laws, I think we're are saying.* {This is a lengthy comment/question by Kennedy that is worth reading – he's grappling with the fact that marriage is clearly a power for the states but the Federal government has all sorts of stuff going on in the citizen's lives regarding marriage.}
- *Well, but it's not really uniformity because it regulates only one aspect of marriage. It doesn't regulate all of marriage.*
- *Well, then are – are you conceding the point that there is no harm or denigration to traditional opposite-sex marriage couples. So you're conceding that.*
- *Well, but, then it – then it seems to me that you should have to address Justice Kagan's question.*
- *Well, the Chief – the Chief Justice and Justice Kagan have given a proper hypothetical to test your theory.* {This quote also goes on as Kennedy lays out test again to think through the issue of "standing" – that is, who has the right to bring a case forward.}

This does seem to signal Kennedy challenging what's been said and it matches Jucker's definition reasonably well.

But of course, we're most curious about how Kennedy speaks in the oral arguments based on how he's ultimately going to vote. When Kennedy is going to end up voting with Ginsburg and against Scalia, he tends to use the phrasing *whether or not* (he uses this phrase over 8 times more often than we'd expect when he's going to vote with Ginsburg). He also tends to use the words *can*, *can't*, *or*, *your*, *I'm*, *is that*, and *argument* when he's ultimately going to end up voting with Ginsburg.

By contrast, when Kennedy is going to vote with Scalia and against Ginsburg, he tends to use *there is*, *that's*, *same*, and *government*. He also uses a lot more of the past tense when voting with Scalia (particularly *has*). Kennedy also uses a lot of *this* when he's going to vote with Scalia against Ginsburg – in particular *this case*. (For more about how interesting demonstratives are, see the overview/links in this post.[1])

[1] corplinguistics.wordpress.com/2011/11/17/who-is-the-sarah-palin-of-the-canterbury-tales/.

But notice that these signals are rather weak. That's because across 192 cases that came before the Court before the same-sex marriage cases, Kennedy, Scalia, and Ginsburg voted together in 108 of them (Kennedy voted with Scalia and against Ginsburg in 43, and with Ginsburg against Scalia in 28. And with neither one of them in 13).

So how is Kennedy going to vote? Well . . .

APPENDIX: OTHER TEXT ANALYSES

Here's a collection of links with legal scholars, journalists and others interpreting Kennedy:

- Erwin Chemerinsky: ABAJournal[2] and SCOTUSblog[3]
- Dana Milbank: Washington Post[4]
- Sahil Kapur: Talking Points Memo here[5] and here[6]
- Nina Totenberg: NPR here[7] and here[8]
- Dylan Scott: Governing[9]
- John Bursch: SCOTUSblog here[10] and here[11]
- Lyle Denniston: SCOTUSblog here[12] and here[13]
- Ilya Somin: The Volokh Conspiracy[14]

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[2] www.abajournal.com/news/article/chemerinsky_another_look_at_same-sex_marriage_cases/.

[3] www.scotusblog.com/2013/03/commentary-what-might-happen/.

[4] www.washingtonpost.com/opinions/the-swing-vote-is-in-so-stop-kissing-up/2013/03/27/87b0803c-9726-11e2-b68f-dc5c4b47e519_story.html.

[5] tpmdc.talkingpointsmemo.com/2013/04/john-roberts-anthony-kennedy-doma-trap.php.

[6] tpmdc.talkingpointsmemo.com/2013/03/anthony-kennedy-gay-marriage-middle-path.php.

[7] www.npr.org/2013/03/30/175765569/gay-marriage-recap-will-justices-rule-on-constitutionality.

[8] www.npr.org/2013/03/27/175476904/justices-cast-doubt-on-federal-defense-of-marriage-act.

[9] www.governing.com/blogs/fedwatch/gov-the-most-important-moment-in-the-supreme-courts-doma-hearing.html.

[10] www.scotusblog.com/2013/03/more-tea-leaves-why-domas-demise-will-support-prop-8-surprise/.

[11] www.scotusblog.com/2013/03/reading-tea-leaves-why-the-court-will-uphold-proposition-8/.

[12] www.scotusblog.com/2013/03/argument-recap-doma-is-in-trouble/.

[13] www.scotusblog.com/2013/03/argument-recap-on-marriage-kennedy-in-control/.

[14] www.volokh.com/2013/03/26/justice-kennedy-on-proposition-8-and-sex-discrimination/.

- Amy Howe: SCOTUSblog[15]
- Marty Lederman: SCOTUSblog[16]
- Adam Liptak: NYTimes[17]
- Jeffrey Rosen: The New Republic[18]
- Peter Dreier: Huffington Post[19]

Notice that one of the things a few of the people comment on is "tone of voice" – Nina Totenberg mentions Kennedy sounding "ticked off". That's a reminder that using transcripts alone wipes out a lot of powerful phonetic cues. //

[15] www.scotusblog.com/2013/03/what-will-the-court-do-with-proposition-8-todays-oral-argument-in-plain-english/.

[16] www.scotusblog.com/2013/03/revisiting-the-courts-several-options-in-the-california-marriage-case/.

[17] www.nytimes.com/2013/03/30/us/supreme-courts-glimpse-at-thinking-on-same-sex-marriage.html?pagewanted=all&_r=0.

[18] www.newrepublic.com/article/112800/supreme-court-doma-case-federalism-comes-back-haunt-conservatives#.

[19] www.huffingtonpost.com/peter-dreier/supreme-court-states-rights_b_3027484.html?utm_hp_ref=politics.

FROM: BRIAN LEITER'S LAW SCHOOL REPORTS

THE ECONOMIC VALUE OF A LAW DEGREE

CORRECTING MISCONCEPTIONS

Michael Simkovic[†]

TOPICS:

- Ability sorting and selection
- Occupation and the versatile law degree
- Long term versus short term
- The broader labor market
- Present value and opportunity costs
- Acknowledgements

ABILITY SORTING AND SELECTION

In *The Economic Value of a Law Degree*,[1] Frank McIntyre and I estimate the increase in annual and lifetime earnings that is attributable to a law degree. To do so, we compare those with law degrees to similar individuals with less education.

Because those who matriculate at law schools may be different from the average bachelor's degree holder, we compare law degree holders to a group of *similar* bachelor's degree holders.

There is a misperception – apparently started by Brian Tamanaha (here[2] and here[3]) and repeated by others[4] – that we simply compare

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[†] Associate Professor, Seton Hall University School of Law. Original at leiterlawschool.typepad.com/leiter/2013/08/the-economic-value-of-a-law-degree-correcting-misconceptions.html (Aug. 1, 2013; vis. Aug. 30, 2013).

[1] papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

law degree holders to all bachelor's degree holders, or that we compare the 25th percentile of law degree holders to the 25th percentile of all bachelor's degree holders. *This is not true*.

At a high level, what we essentially did was to create two subgroups of bachelor's degree holders – all bachelor's degree holders, and a subset of bachelor's degree holders who look like the law degree holders with respect to many observable characteristics that predict earnings – demographics, academic achievement, parental socio-economic status, measures of motivation and values. It is this second group of bachelor's degree holders that we compare to the law degree holders.

To check for ability sorting and selection, we use statistical techniques including:

- Ordinary Least Squares (OLS) regression (at the mean)
- Quantile Regression at the:
  - 25th percentile
  - 50th percentile
  - 75th percentile
- Propensity score matching (for our lifetime earnings premium estimates)
- Heckman Selection (in an appendix)

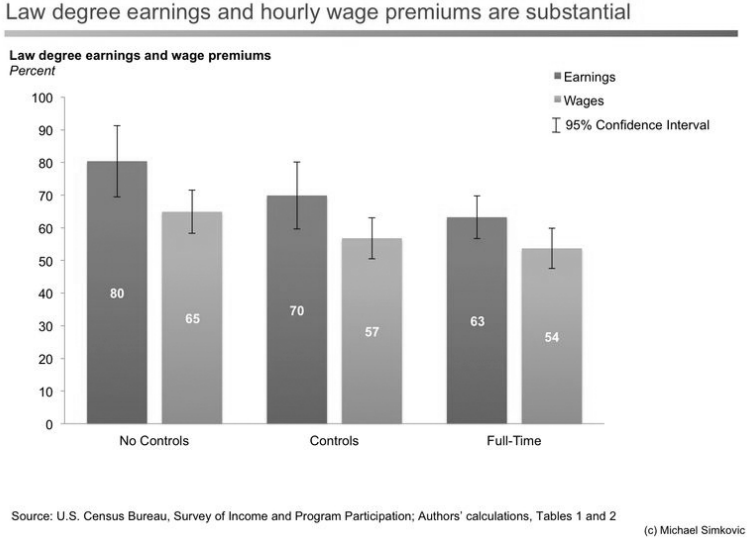
The observable characteristics (pretreatment covariates) that we focus on as controls in the Survey of Income and Program Participation include:

- Race
- Age
- Gender
- Number of years of high school coursework in
  - Math
  - Science
  - Foreign Language
  - English

[2] leiterlawschool.typepad.com/files/balkinization_-how-_the-million-dollar-law-degree_-study-systematically-overstates-value_-three-choices-that-improperly-skewed-the-results-4.pdf.
[3] leiterlawschool.typepad.com/files/balkinization_-leiters-contradictory-conclusion.pdf.
[4] leiterlawschool.typepad.com/leiter/2013/07/repetitive-and-avoidable-mistakes.html.

- Type of High School
  - Private vs. Public
  - College preparatory classes in high school
- College major (divided into five categories based on the International Standard Classification of Education)

These controls bring down our earnings premium estimates by around 10 percent at the mean and around 8 percent at the 25th percentile.



In other words, the data and statistical techniques that we use suggest that the kinds of people who go to law school would probably earn about 10 percent more than the average bachelor's degree holder even if they hadn't gone to law school. But the law school earnings premium is much greater than that, and the earnings premiums we report are *after* controls for ability sorting.

We do an additional check for ability sorting using another data set called the National Education Longitudinal Study (NELS). NELS follows a cohort from 8th grade through their late 20s, and includes additional pretreatment control variables that are not available in SIPP.

Controls that are available in NELS include:

- college quality
- demographics
- standardized test scores
- college GPA and major
- motivation and interest in careers
- subjective expectations about future income
- Parent SES

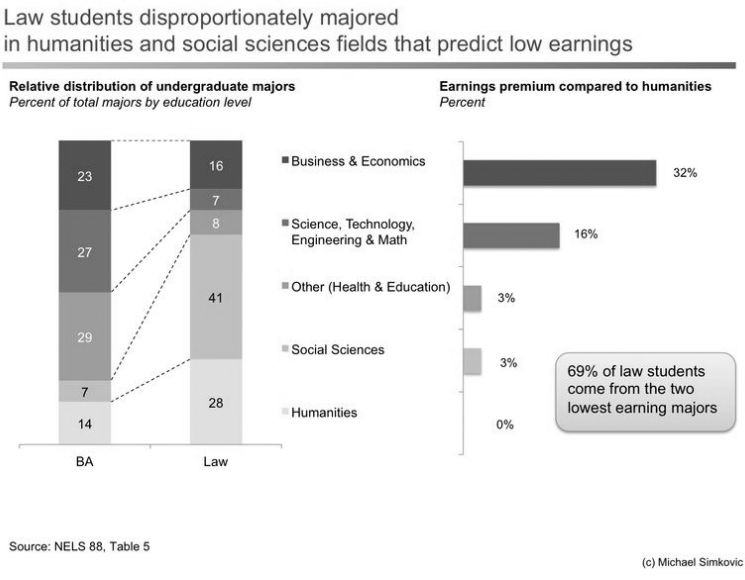
The results of the analysis using NELS are very similar to the results of the analysis in SIPP. The bachelor's degree holders who go on to law school would probably earn about 10 percent more than the average bachelor's degree holder, even if they had not gone to law school.

Because this level of ability sorting was already taken into account in our SIPP analysis, we do not believe that any further adjustment to our SIPP results would be justified based on the analysis in NELS. Because different measures of ability that predict earnings are often correlated with each other, adding more and more control variables that measure essentially the same thing often won't substantially change the estimate of the earnings premium.

Thus we found very little to suggest that law graduates' above average undergraduate academic performance translates into higher earnings other than what we had already accounted for. This may be surprising to people for two reasons. First, law degree holder undergraduate academic performance is better but not fantastically better than the typical BA. Second, that above average performance does not actually translate into much of a boost to earnings. It turns out higher undergraduate grades, for example, do not show a strong correlation with later earnings. We find that this is especially true, by the way, in the majors preferred by law students in the humanities and social sciences.

Eric Rasmusen[5] has an interesting blog post qualitatively describing the "typical" law student.

[5] taxprof.typepad.com/taxprof_blog/2013/07/rasmusen.html.



There are several other issues related to selection on unobservables and offsetting biases that are worth mentioning.

Annual vs. Lifetime and regression to the median:

Annual earnings tend to be much more varied than longer-term lifetime earnings. For one example, job losses or transitions can cause a sharp drop in one year, but tend to be resolved by the next year. People going through such temporary rough spots show up low in the earnings distribution. So the 25th percentile of one year earnings is much lower than the 25th percentile over average lifetime earnings.

Reporting Bias:

When reporting earnings, people tend to not report periods of unemployment and such. The SIPP returns to interview people every four months, so this is not as much of a problem as it could be, but it means that low income people tend to over-report their income relative to those higher up. This typically will bias down estimates of how much more one group earns than another.

Specific Ability:

People tend to pick the career they will succeed at. Thus those who are bad at some jobs but good at jobs available to law degree holders will gravitate towards law. But, in fact, had they not gone in to law they might end up doing very badly. This has several effects – it means that we will tend to underestimate the value of law school to those who choose law because that is their particular advantage but at the same time we may be overestimating it for those who are not choosing law. It is hard to know for sure if this is a large effect or not. It is very difficult to nail down statistically.

The 25th Percentile:

When we look at the 25th percentile earnings lawyer we use quantile regression to make these ability adjustments to the data before comparing them to the 25th percentile earnings BA, thus we're correcting for ability as much as possible. Though not reported in the paper we find the ability gap (that we adjust for in our lifetime value estimates) between BA and law grads is about eight percentage points at the 25th percentile. This is completely in line with what we found at the mean both in the SIPP and in our more refined estimates from the NELS survey. It is possible that the gap is larger (or smaller) at the bottom than our data show, so that would be a great place for future research, but we think this is the best currently available estimate, especially given issues (1) and (2) biasing the premium down.

OCCUPATION AND THE VERSATILE LAW DEGREE

A very large fraction of law degree holders do not end up practicing law. For some, this is a disappointment and for others it is a preferred outcome. We include all these people in our estimates of the value of a law degree. That is because the question we are interested in answering is the value of the law degree, not the earnings of the subset of individuals who practice law. Controlling for occupation would have been methodologically improper because occupation is an outcome variable, not a pretreatment covariate.

As MIT labor economist Joshua Angrist and LSE labor economist Jörn-Steffen Pischke explain in *Mostly Harmless Econometrics*:[6]

> *Some variables are bad controls and should not be included in a regression model* even when their inclusion might be expected to change the short regression coefficients. Bad controls are variables that are themselves outcome variables . . . That is, bad controls might just as well be dependent variables too. The essence of the bad control problem is a version of selection bias . . .
>
> To illustrate, *suppose we are interested in the effects of a college degree on earnings and that people can work in one of two occupations, white collar and blue collar*. A college degree clearly opens the door to higher-paying white collar jobs. *Should occupation therefore be seen as an omitted variable in a regression of wages on schooling?* After all, occupation is highly correlated with both education and pay. Perhaps it's best to look at the effect of college on wages for those within an occupation, say white collar only.
>
> The problem with this argument is that *once we acknowledge the fact that college affects occupation, comparisons of wages by college degree status within an occupation are no longer apples-to-apples*, even if college degree completion is randomly assigned . . . [because of selection bias].
>
> *We would do better to control only for variables that are not themselves caused by education.*

In a recent article,[7] David Neumark and co-authors also include a helpful explanation of the problems with controlling for occupation and "underemployment",[8] or relying on BLS occupational earnings projections[9] when trying to measure education earnings premiums:

> *For nearly every occupational grouping, wage returns are higher for more highly-educated workers even if the BLS says such high levels of education are not necessary*. For example . . . for management occupations, the estimated coefficients for Master's, professional,

[6] www.amazon.com/Mostly-Harmless-Econometrics-Empiricists-Companion/dp/0691120358/ref=sr_1_1?s=books&ie=UTF8&qid=1375308260&sr=1-1.
[7] www.socsci.uci.edu/~dneumark/Neumark%20skill%20shortages.pdf.
[8] centerforcollegeaffordability.org/uploads/Underemployed%20Report%202.pdf.
[9] digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1586&context=wujlp.

> and doctoral degrees are all above the estimated coefficient for a Bachelor's degree, which is the BLS required level. . . .
>
> If the BLS numbers are correct, we might expect to see higher unemployment and greater underemployment of more highly-educated workers in the United States. As noted earlier, we do not find evidence of this kind of underemployment based on earnings data. Similarly, labor force participation rates are higher and unemployment rates are lower for more highly educated workers.

Even economists at the BLS[10] emphasize that educational earnings premiums, and not BLS employment projections, are the key measure of the value of education:

> The general problem with addressing the question whether the U.S. labor market will have a shortage of workers in specific occupations over the next 10 years is the difficulty of projecting, for each detailed occupation, the dynamic labor market responses to shortage conditions. . . .
>
> Since the late 1970s, average premiums paid by the labor markets to those with higher levels of education have increased.
>
> It is the growing distance, on average, between those with more education, compared with those with less, that speaks to a general preference on the part of employers to hire those with skills associated with higher levels of education.

LONG TERM VERSUS SHORT TERM

We value a law degree based on the present value of a lifetime of increased earnings. The valuation literature is unambiguous about the correct time period to value the cash flows generated by an asset: the entire life of the asset. The delay and higher risks of cash flows in the distant future are already taken into account through the application of a discount rate and the present value formula.

Our approach, using the typical span of a working life and discounting back to present value, is the correct one for the majority of

[10] www.bls.gov/opub/mlr/2004/02/art1full.pdf.

potential law students who obtain their degrees relatively early, in their 20s or 30s. A much shorter time period would only be appropriate for individuals who complete their law degrees later in life, closer to retirement, or who anticipated working only a few years during their lifetimes.

In a recent post post,[11] Brian Tamanaha suggests that the difference between his approach and ours is that he focused on the short-term value of a law degree while we focused on the long-term value of a law degree.

Michael Froomkin[12] wonders if law degree holders will experience a cash crunch early in their careers when their incomes are lower and debt levels are higher.

It is unlikely that a debt financed law degree would create a cash crunch. Young bachelor's degree holders also have lower incomes early in their careers. The earnings premium associated with the law degree will typically exceed required debt service payments on law school debt, particularly in light of the availability of extended repayment, deferment, forbearance, and income based repayment plans. Graduate degrees can readily be financed entirely with federal student loans.

The costs of delayed repayment (i.e., higher interest) are already taken into account in our present value calculation, because we discount back at the weighted average interest rate on law school debt. We're pretty conservative in this respect: we ignore the (likely) possibility that students will prepay their highest interest rate debts first. Indeed, *After the JD II*[13] found evidence of rapid pre-payment of law school debt.

Our results suggest that most young law degree holders most of the time likely have more positive cash flow – even after debt service payments – than they would likely have had with only a bachelor's degree.

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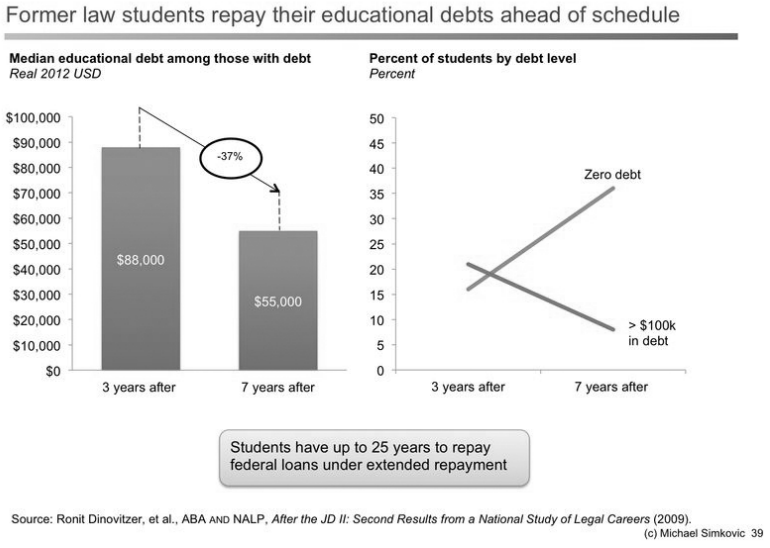
[11] leiterlawschool.typepad.com/files/balkinization_-sort-term-versus-long-term-perspective.pdf.

[12] www.discourse.net/2013/07/you-can-drown-in-a-river-that-is-an-average-of-six-inches-deep-part-1/.

[13] www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.

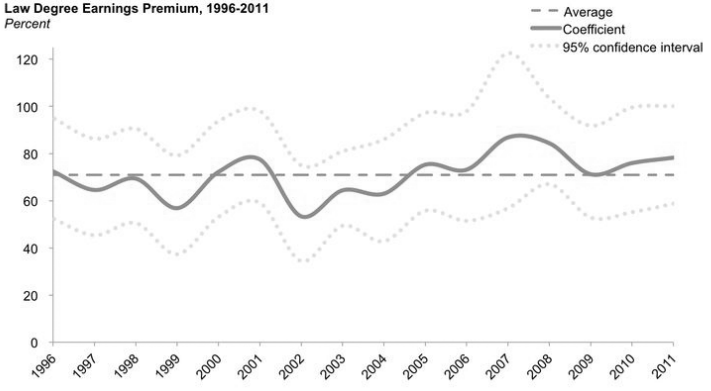


Because the economic value of a given level of education can generally be maximized by completing that level of education early – and thereby maximizing the number of years of subsequent work with the benefit of higher wages from the education earnings premium – delaying graduate school to try to time the market is a high-cost strategy. And timing the market three or four years in advance is difficult.

We recommend long-term historical data on lifetime earnings premiums as a guide rather than short-term fluctuations in starting salaries. Indeed, starting salaries tell us very little – earnings premiums are what matters, and there is no evidence that premiums have compressed, even for the young.

In a supplemental exploratory analysis using ACS data, we find some evidence that post 2008 cohorts of individuals who are probably young law degree holders (professional degree holders excluding those in medical practice) continue to have the same earnings advantage over bachelor's as they had prior to 2008.

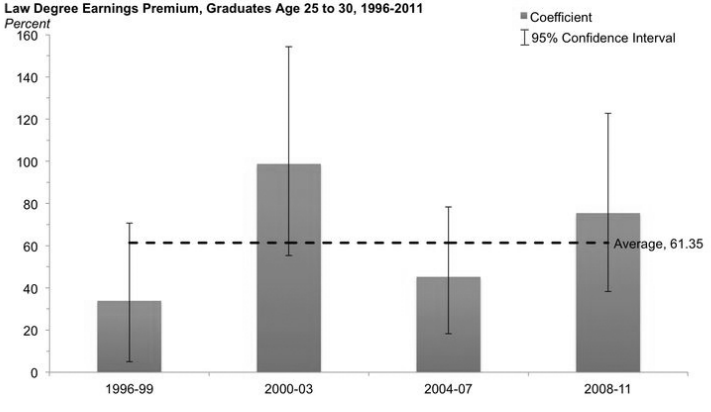
Law degree earnings premium is stable over the long term, with short term cyclical fluctuations



Source: U.S. Census Bureau, Survey of Income and Program Participation; Authors' calculations
Note: Solid line is the coefficient. Dotted lines represent 95 percent confidence interval. Horizontal dashed line represents multi-year average with each year weighted equally

(c) Michael Simkovic 26

Recent premiums for young law graduates are within historical norms



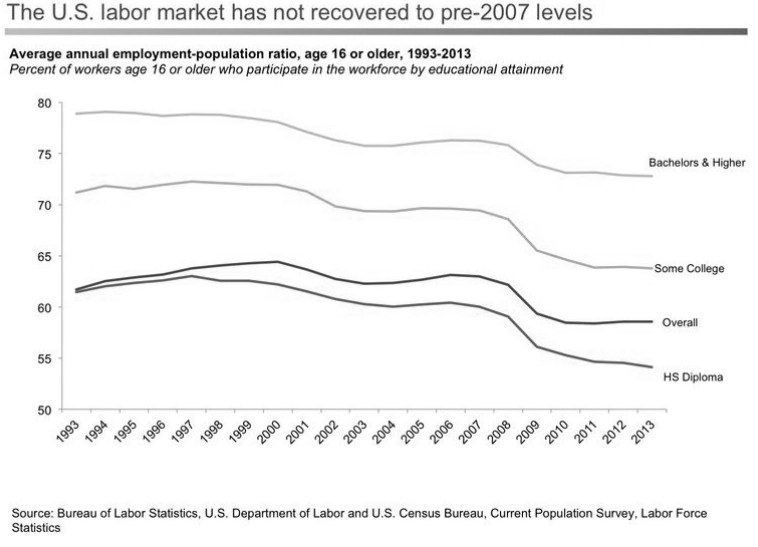
Source: U.S. Census Bureau, Survey of Income and Program Participation; Authors' calculations
Note: Vertical lines represent the 95 percent confidence interval; horizontal line represents the multi-year average, with each four-year interval assigned equal weight.

(c) Michael Simkovic 27

Ben Barros[14] has done some interesting work comparing outcomes 9 months after graduation to subsequent outcomes for recent graduates of Widener Law School.

THE BROADER LABOR MARKET

Tamanaha argues that law continues to be depressed while the rest of the labor market has recovered.[15] The data does not support this view. As can be seen from the chart below, the broader employment population ratio remains below 2007 levels across levels of education, and the more educated continue to be more likely to work than those with less education.



[14] www.thefacultylounge.org/2013/04/reconsidering-the-conventional-wisdom-on-the-legal-job-market-part-i.html.

[15] leiterlawschool.typepad.com/files/balkinization_-sort-term-versus-long-term-perspective-1.pdf.

PRESENT VALUE AND OPPORTUNITY COSTS

Many of our critics have made mistakes relating to net present value, opportunity costs, and direct costs of a law degree. Some general guidelines are provided below.

1. Everything has to be discounted back to the start of law school
2. Costs can't be something that is already taken into account through opportunity cost of lower in school earnings
3. Costs have to be something that the law student would only incur for law school and not matched by any other comparable expense if the student were a working BA; the cost has to be something that is a necessary expense to attend law school
4. The cost can't provide consumption benefits that justify the greater expense
5. The cost has to be what the student actually spends, and not hypothetically what a student might have spent if the student had paid full price

For example, since living expenses would be paid out of higher earnings if law students were working, we have already taken cost of living into account.

Since many students receive scholarships and grants, full-sticker tuition should not be used as a base-case.

Our estimates of in-school earnings are based on data from the SIPP and other Census Bureau Surveys. As we note in footnote 101:[16]

> Footnote 101: We assume that law students earn $5,000 in their first year, $7,000 in their second year and $12,000 in their third year with part time and summer work, for a total of $24,000 during law school. SIPP data suggests typical three-year in-school earnings between $21,800 (median) and $48,000 (mean) for fulltime graduate and professional school

[16] papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

> students. Census data suggests substantial work hours among fulltime graduate and professional students See Jessica Davis, U.S. CENSUS BUREAU, SCHOOL ENROLLMENT AND WORK STATUS: 2011 (Oct. 2012)."

THANKS AND GOODBYE

It's been a fun couple of weeks. We'd like to thank Brian Leiter, Brian Tamanaha, and others for the wonderful opportunity they've given us to explain our research to a wider audience. And I'd like to thank Frank McIntyre for his contributions to this post and previous posts. This will hopefully be our last post about The Economic Value of a Law Degree,[17] at least for a little while. //

[17] papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

FROM: BALKINIZATION

LEGAL SCHOLARSHIP (1)

IN THE LAW REVIEWS

Mark Tushnet[†]

On the plane today I read a terrific article, Brannon Denning and Michael Kent, Anti-Evasion Doctrines in Constitutional Law, 2012 Utah Law Review 1773.[1] (And you should read it too.) Without (I hope) casting aspersions on the Utah Law Review, whose editors had the discernment to see the article's quality, I was struck by its "under"placement relative to its quality. Professor Denning tells me that they did a general submission, and Utah was the only offer they received. What might account for this?

First, as to the article itself: It really is very good. Though it's about the structure of constitutional doctrine, it might have been (mis)read as "merely" about doctrine. And it makes an important contribution to the literature on decision rules and operative rules in constitutional law, but it might have been (mis)read as derivative rather than original. Further, it doesn't present itself in a self-consciously "fancy" way, although it's quite sophisticated. And, finally, as to the article, I suspect it would have gotten more attention if the authors had said, "Hey, you know, there's an anti-evasion doctrine in tax law, and we're going to show you that there are similar doctrines in constitutional law." That would have made it cross doctrinal borders in a way that articles editors might like.

But, frankly, the article's so good that all those things are pretty minor. My view is that the reason for its placement is that the au-

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[†] William Nelson Cromwell Professor of Law, Harvard Law School. Original at balkin.blogspot.com/2013/08/legal-scholarship-1-in-law-reviews.html (Aug. 6, 2013; vis. Aug. 30, 2013).

[1] epubs.utah.edu/index.php/ulr/article/view/950/712.

thors teach at Cumberland Law School and John Marshall (Atlanta) – lower tier schools in (of all places) the South. My guess is that the intake articles editors at top N law reviews looked at the authors' affiliations and read the submission with a prejudiced mind: "If this were any good, the authors would be teaching at higher ranked schools." (I know that some reviews do blind evaluations, but I have a strong sense that most top N reviews don't – and doing a blind review at the first, intake stage is exceptionally difficult for overworked law review editors with little professional support staff.)

The other thing to note is that the star footnote might not signal the article's quality. (In roughly descending order of "heavy-hitter"-ness, from the point of view of articles editors [note that I'm trying to make a judgment about their judgment, not offering one of my own], the acknowledgements go to Eugene Volokh, John Harrison, and either Dan Coenen or Michael Greve.) So, I suppose the advice to scholars writing from second- and third-tier law schools is: Flood the heavy hitters with drafts, on the Nigerian scam e-mail theory that there's some chance that you'll get something back, and then you can put the heavy hitter's name[s] – plural if you're lucky – in the star footnote. (And, if you follow this advice, you'll probably want to push your submission to law reviews back one cycle – you shouldn't send something really incomplete out for comments – if you can.)

(Several disclosures: (1) I don't do many over-the-transom submissions these days, but, as I've blogged about before, my last two were "unsuccessful" – one to the point where I didn't publish the article at all. (2) Two of my own articles that I think are among my best were published in lower ranked law reviews. I won't name the reviews here, though. (3) I read Denning and Kent's article because Denning, who I know, has me on his reprint list – and, though I'm a bit nervous about this disclosure, I read every reprint anyone sends me. They took the effort, and I feel I ought to do something in response, so I read the articles, though I rarely write the authors about the articles. (4) I think I'm not going to make the fourth disclosure.) //