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## *Law school professors out of touch on Obamacare?*



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“It’s pretty universally accepted that the individual mandate [of the Affordable Care Act] is constitutional.”

So said Professor [Tom Baker](#) this past weekend at a health law panel at Penn Law Accepted Students Weekend. He also delighted in showing us this [Marketplace](#) clip in which he and another Penn Law professor confidently defend the constitutionality of the individual mandate.

Is the constitutionality of the individual mandate really as certain as Professor Baker would have us believe? If so, then why did Justices Roberts and Kennedy – not to mention Scalia and Alito – express such skepticism yesterday afternoon? Why did the Northern District of

Florida, the Eastern District of Virginia, and the Eleventh Circuit all rule against the constitutionality of the Affordable Care Act?

Even among the legally educated classes, the issue seems divisive.

But legal academia is a very different world from the legally educated world. As hackneyed as it may sound, the ivory tower of academia is a tower that is increasingly detached from the real world. Walter Olson (Cato Institute) makes this brilliantly clear in his book *Schools for Misrule: Legal Academia and an Overlawyered America*, and some of the statistics in Olson's book merit repeating (from Olson, pp. 240-241):

- 81 percent of law school faculty members who donated to a campaign, gave wholly or mostly to Democrats. 15 percent gave wholly or mostly to Republicans. (Adam Liptak, New York Times)
- 95-5 split in law professor contributions to Obama vs. McCain. (Paul Caron, TaxProf blog, Sept. 10, 2008)
- 74-16 Democratic-Republican split among law professors (Andrew Peyton Thomas, The People Versus Harvard Law)

Compare these statistics to the average American with a college degree: 2004 – 46% Democrat, 52% Republican; 2008 – 50% Democrat, 48% Republican. Or take the average American with post graduate education: 2004 – 55% Democrat, 44% Republican; 2008 – 58% Democrat, 40% Republican. (New York Times)

So while Democrats can claim, at best, a 60% to 40% advantage among Americans with graduate education, Democrats can often get up to 90% of law professors.

This political disparity easily translates into views on the Affordable Care Act. As Ilya Somin, a professor at George Mason School of Law, and author of this amicus brief on the Affordable Care Act, said, “In my experience law professor opinion on this is largely divided along ideological lines. Since the overwhelming majority of law professors are on the political left, it necessarily follows that there are many more professors who think that the law is constitutional than believe it should be struck down.”

Filling law schools with liberal Democrats leads to a dominance of the liberal way of thinking and a dismissal of conservative thought. I won't suggest it goes as far as [Ben Shapiro's Brainwashed](#) or Orwell's *1984*, but do take a look at liberal former law professor (UChicago and Harvard) Cass Sunstein's *Going to Extremes: How Like Minds United and Divide*, which explains that when liked-minded people huddle and insulate themselves, they tend to grow more homogeneous and more confident in the infallibility of their ideas. This leads to the explanation of somebody like Charles Fried – Harvard law professor, then solicitor general for Reagan, and now, again, a Harvard law professor – who, though a right-of-center man, has probably been so steamrolled by his peers in academia that he lost sight of the rest of the legal world and publicly promised to “eat this Kangaroo skin hat if the Supreme Court struck down the law.” ([Politico](#))

So a few comments on this whole situation:

- **To law professors:** Please don't get exasperated with me if my ideas reflect those of educated America rather than academic America.
- **To law professors (2):** Please don't assume that the sentiment of law school professors is necessarily reflective of the sentiment of legal America.
- **To university administrators and presidents:** If we're striving to better match the American public in terms of race and national origin, and if we're trying to create a more racially and religiously diverse academic world, then why are we ignoring political beliefs?