

BIASES THAT BLIND: PROFESSOR HYMAN AND THE UNIVERSITY

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This Essay is a response to Professor Hyman's piece, Why Did Law Professors Misunderestimate the Lawsuits Against PPACA. In this Essay, Ramseyer argues that the statements made by law professors about the constitutionality of the PPACA often reflected partisan loyalty more than thoughtful legal analysis.

I. PROFESSOR CHAGNON AND THE ANTHROPOLOGISTS

As the anthropologist remembered it, the posse had stopped him at the entrance to the village. They had made a fearsome crew—"a dozen burly, naked, sweaty, hideous men nervously staring at us down the shafts of their drawn arrows!"¹ They were armed. They were dirty. And they were sick:

Immense wads of green tobacco were stuck between their lower teeth and lips, making them look even more hideous. Strands of dark green snot dripped or hung from their nostrils—strands so long that they drizzled from their chins down to their pectoral muscles and oozed lazily across their bellies, blending into their red paint and sweat.²

This is not the usual antiseptic and politically correct anthropological prose, of course, but then Napoleon Chagnon was not an antiseptic and politically correct anthropologist. Chagnon pushed a relentlessly biological approach in a field that teetered between a crude Marxist determinism and an anarchic Euro-cool relativism. He advocated science to a discipline that smothered scholarship under sanctimonious pronouncements about saving hermetic villages (think Rousseau's noble savages) from rapacious industrialists.

To Chagnon, the "hideous" Yanomami men killed each other over women rather than food, and were not the slightest bit noble.³ They at-

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1. NAPOLEON A. CHAGNON, NOBLE SAVAGES: MY LIFE AMONG TWO DANGEROUS TRIBES—THE YANOMAMÖ AND THE ANTHROPOLOGISTS 19 (2013).

2. *Id.*

3. *Id.* at 218–22.

tacked. They murdered. And they attacked and murdered because of genetics. The more men they killed, the higher their status. The higher their status, the wider their access to women. And the more women, the more offspring.⁴ His colleagues thought it bad enough that he described the Yanomami in all their brutal violence—at a time when they claimed to rescue the villages from capitalist oppression in the name of a “morally engaged anthropology.”⁵ They found it beyond the pale that he endorsed E.O. Wilson’s sociobiology—at a time when their morally engaged students rallied against Wilson over his “racist” methodology.⁶

Duly enraged, Chagnon’s colleagues did their best to destroy his career.⁷ He faked his data, they said. He bribed the Yanomami to slaughter each other. He kept medicine from dying villagers.⁸ And he deliberately helped start a measles epidemic that killed thousands of Yanomamö.⁹ The Brazilian Anthropological Association claimed a “powerful lobby of mining interests” used his work to justify stealing Yanomami land.¹⁰ The American Anthropological Association turned the inaccurate attacks into an official (and equally unfair) investigation.¹¹

It set back the field for decades. Chagnon had tried to move anthropology toward science. But the discipline refused to budge. It fought back, and continues to fight back. It has yet even to consider ideas—like sociobiology—that scholars elsewhere have taken for granted for decades.

II. PROFESSOR HYMAN AND THE CONSTITUTIONAL LAW SCHOLARS

Is constitutional law any better?

Our colleagues in the field have not ruined any Chagnons, but perhaps only because they have kept any Chagnons from joining the guild. Not only was the Patient Protection and Affordable Care Act (PPACA; Obamacare) constitutional, they declared, but to suggest otherwise was

4. Napoleon A. Chagnon, *Life Histories, Blood Revenge, and Warfare in a Tribal Population*, 239 SCI. 985, 986 (1988).

5. Nancy Scheper-Hughes, *The Primacy of the Ethical: Propositions for a Militant Anthropology*, 36 CURRENT ANTHROPOLOGY 409, 411, 434 (1995).

6. Miriam D. Rosenthal, *Sociobiology: Laying the Foundation for a Racist Synthesis*, HARVARD CRIMSON (Feb. 8, 1977), <http://www.thecrimson.com/article/1977/2/8/sociobiology-laying-the-foundation-for-a/>. And, Chagnon reports, anthropologists similarly accused Wilson of “racism, fascism and Nazism.” See CHAGNON, *supra* note 1, at 384.

7. See generally CHAGNON, *supra* note 1, at 423–57 (discussing the various attacks on himself and his career).

8. Alice Dreger, *Darkness's Descent on the American Anthropological Association: A Cautionary Tale*, 22 HUM. NATURE 225, 228, 243 (2011).

9. As claimed most sensationally by the journalist Patrick Tierney. See generally Patrick Tierney, DARKNESS IN EL DORADO: HOW SCIENTISTS AND JOURNALISTS DEVASTATED THE AMAZON 53–82 (2000) (describing the measles epidemic among the Yanomamö and Chagnon’s alleged role).

10. Emily Eakin, *How Napoleon Chagnon Became Our Most Controversial Anthropologist*, N.Y. TIMES (Feb. 13, 2013), <http://www.nytimes.com/2013/02/17/magazine/napoleon-chagnon-americas-most-controversial-anthropologist.html?pagewanted=all> (internal quotation marks omitted).

11. He was in fact exonerated several years later. See *id.* On the unfair nature of the claims, see Dreger, *supra* note 8, at 225–27.

foolish—at best.¹² As David Hyman meticulously details, they declared the issue “obvious,” “open and shut.”¹³ Any claim to the contrary had “no legal merit.”¹⁴ It was “silly,” a “non-starter,” “if not frivolous, close to it,” “completely bogus,” and “beneath contempt.” Anyone who questioned the Act’s constitutionality was “simply crazy,” a “wing nut[,],” “deeply ignorant,” “grandstanding in a preposterous way,” a “proponent[] of slavery and segregation”—or maybe even a bit akin to Lee Harvey Oswald.¹⁵

Our constitutional law colleagues (with very few exceptions)¹⁶ described the PPACA as a valid exercise of the Commerce Power, and in this they were wrong. The statute straightforwardly violated the Commerce Clause, the Supreme Court explained. It could stand only in modified form and only as an exercise of the government’s taxing power—the taxing power of a President who had adamantly assured voters that the statute was not a tax. As Hyman carefully tallied the score:

[N]ot one of the thirteen federal judges that ruled on the merits, at either the district or appellate level accepted the government’s taxing power argument, and they split 7-6 on the merits of the Commerce clause challenge. Finally, the Supreme Court ultimately struck down the commerce clause justification for the individual mandate by 5-4, held the Medicaid expansion to be coercive by 7-2, and then upheld by 5-4 on taxing power grounds a substantially rewritten version of the individual mandate.

For those who are keeping track at home, this means that law professors effectively blew the call on all three of the issues at stake, at every stage of the proceedings.¹⁷

Our colleagues obviously let their wish lists get ahead of their brains. From the start, the White House introduced the PPACA as a step toward national health insurance, and its supporters backed the bill on that basis. The left end of the Democratic Party had lobbied for national health insurance for decades, and had kept the plea central to its platform. It pushed the PPACA precisely because it saw it as a step toward that long-cherished dream.

12. See, e.g., Aziz Huq, *Bad Law, Smart Politics in Constitutional Challenges to Healthcare Reform*, NATION (Apr. 15, 2010), <http://www.thenation.com/article/bad-law-smart-politics-constitutional-challenges-healthcare-reform> (“Among constitutional scholars, the puzzle is not how the federal government can defend the new law, but why anyone thinks a constitutional challenge is even worth making.”).

13. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA*, 2014 U. ILL. L. REV. 805, 808 (internal quotation marks omitted).

14. *Id.* at 807–822 (internal quotation marks omitted).

15. Hyman, *supra* note 13, at 812 (internal quotation marks omitted); see also Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013); Michael W. McConnell, *The Liberal Legal Meltdown Over ObamaCare*, WALL ST. J. (May 24, 2012), <http://online.wsj.com/news/articles/SB10001424052702304707604577422923531419782>. For an excellent essay about the intellectual hostility toward nonconformity in the constitutional law field, see Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. 1 (2012).

16. See e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 NYU J. L. & LIBERTY 581 (2010); McConnell, *supra* note 15.

17. Hyman, *supra* note 13, at 815.

The bill split the public down the middle. By the time the Congress passed it through an arcane set of procedural maneuvers (to avoid a threatened filibuster), a majority of Americans opposed it.¹⁸ But not a majority of our constitutional law colleagues.¹⁹ Opposition on any principled basis, they announced, was simply beyond the pale.

III. GAMBLING IN THE CAFE

A. *The Political Tilt*

Is dear reader shocked that our colleagues could so uniformly “misunderestimate” the constitutional problems in the Act? Is he shocked that the 130 signers of an amicus brief supporting this hyperpartisan Democratic statute included no one who had donated to a Republican campaign? Is he shocked that the twenty-two constitutional law scholars surveyed gave ninety-eight percent of their political contributions to Democratic campaigns?

Is dear reader shocked? Captain Renault may have been “shocked, shocked to find that gambling is going on” at the Cafe Americain, but the politics of the constitutional law guild is no secret.²⁰ One need not down many drinks to learn Ilsa Lund’s politics, and one need not eat many faculty-club sandwiches to learn the politics of the constitutional law crowd. Of intellectual diversity, only feminist jurisprudence and critical race theory have less.

In this political monochromaticism, constitutional law straightforwardly reflects several facets of the university community more generally. American universities have been left for a long time. Already in 1949, F.A. Hayek had noted that “the more active, intelligent and original men among [U.S.] intellectuals . . . most frequently incline toward socialism, while its opponents are often of an inferior caliber.”²¹ In 1982, Seymour Martin Lipset could write that:

A number of surveys of American professorial opinion, taken since World War II, have shown that, as a group, academics are more likely than any other occupational group, including manual workers, to identify their views as left or liberal, to support a wide variety of egalitarian social and economic policies, and to back small leftist third parties and/or vote Democratic.²²

Political polls reflect the phenomenon. A 1999 Harris poll found that eighteen percent of the general public considered itself “left/liberal,”

18. See, e.g., Jennifer Pinto, *Public Opinion of the Health Care Law*, CBS NEWS (June 28, 2012, 10:36 AM), www.cbsnews.com/news/public-opinion-of-the-health-care-law (“[S]upport for it [PPACA] has never reached 50 percent in CBS News Polls.”).

19. See Hyman, *supra* note 13, at 812.

20. *Casablanca (1942): Quotes*, IMDB, www.imdb.com/title/tt0034583/quotes.

21. F.A. Hayek, *The Intellectuals and Socialism*, 16 U. CHI. L. REV. 417, 426 (1949).

22. Seymour Martin Lipset, *The Academic Mind at the Top: The Political Behavior and Values of Faculty Elites*, 46 PUB. OPINION Q. 143, 144 (1982).

while thirty-seven percent considered itself “right/conservative.”²³ The same year, a survey of 1600 faculty members (the North American Academic Study Survey) found that seventy-two percent considered themselves left/liberal, and only fifteen percent right/conservative.²⁴

Campaign contributions capture the same political dynamic. Although constitutional law professors gave overwhelmingly to Democratic causes (as Hyman carefully details), so did their colleagues in other university departments. The bar is heavily Democratic too, of course, but constitutional law professors give more like other professors than like other lawyers. Lawyers and law firms in 2012 gave Obama approximately \$27,500,000 and Romney around \$14,300,000: a 1.93: 1 Democratic advantage.²⁵ Those in the education industry gave Obama about \$21,600,000 but Romney only near \$3,800,000: a 5.74: 1 advantage.²⁶

B. *Politics and School Quality*

The partisan patterns that Hyman nicely identifies among constitutional law scholars track university politics in two other ways as well—the leftward loyalties are strongest (1) at the best universities, and (2) in the least scientific disciplines. Consider how these loyalties correlate with university quality. Hyman focuses on the highest-ranked law faculties, and the highest-ranked universities are the farthest left. Lipset, for example, observes: “Whatever indicator of academic position is employed—position of one’s school in the pecking order of higher education, receipt of honors or research grants, or the number of publications to the academic’s credit—the higher the achievement, the more liberal faculty members are politically.”²⁷

More recently, two political scientists divided a sample of 2800 professors in half by university selectivity. The political difference between the two groups is modest but tangible: the better the school, the farther left its faculty.²⁸

Economists Christopher Cardiff and Daniel Klein investigate party loyalty (from voter registration rolls) among professors at eleven California schools.²⁹ Forty-five percent do not register with either party,

23. Stanley S. Rothman et al., *Politics and Professional Advancement Among College Faculty*, 3 FORUM 1, 4 (2005).

24. *Id.*

25. Ctr. for Responsive Politics, *Presidential Election Contributions by Lawyers/Law Firms*, OPEN SECRETS (Mar. 25, 2013) <http://www.opensecrets.org/industries/contrib.php?cycle=2012&ind=W04>.

26. Ctr. for Responsive Politics, *Education: Top Contributors to Federal Candidates, Parties, and Outside Groups*, OPEN SECRETS (Mar. 25, 2013), <http://www.opensecrets.org/pres12/select.php?ind=W04>.

27. Lipset, *supra* note 22, at 145.

28. Mack D. Mariani & Gordon J. Hewitt, *Indoctrination U.? Faculty Ideology and Changes in Student Political Orientation*, 41 PS: POL. SCI. & POL. 773, 775, 777 (2008). The survey is by the Higher Education Research Institute, at the UCLA Graduate School of Education and Information Studies.

29. Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237, 243 (2005). Cardiff and Klein investigate all mem-

but, among those who do register, Democrats dominate at nine of the eleven schools.³⁰ Cardiff and Klein find the highest ratio of Democrats to Republicans at the very selective Berkeley, UCLA, UCSD, and Stanford campuses.³¹ They find lower ratios at religious schools like the University of San Diego, Point Loma Nazarene University, and Pepperdine, and at the niche-market conservative school Claremont McKenna.³² The relatively low Democrat/Republican ratio (4.2: 1) at the high-status California Institute of Technology follows from its focus on science, math and engineering (STEM)—as discussed below.

TABLE 1³³

	Dem.	Rep.	D/R Ratio
UC Berkeley	445	45	8.7
UCLA	857	119	7.2
UC San Diego	467	71	6.6
Stanford	275	36	6.7
Santa Clara U.	174	29	6.0
Caltech	131	31	4.2
San Diego State	317	77	4.1
U. San Diego	141	39	3.6
Claremont McKenna	45	25	1.8
Pt. Loma Nazarene	40	41	1.0
Pepperdine	68	77	0.9

Campaign contributions similarly reflect the correlation between university status and political commitment. During the 2012 election cycle, members of the education industry gave \$64,900,000—seventy-seven percent of it to Democrats.³⁴ At the most elite universities, professors skewed their giving much more heavily to the left—at some schools over ninety percent:³⁵

bers of the faculty for nine of the schools but only sample Berkeley and Stanford. They adjust the Dem/Rep ratios at those schools to reflect the departments sampled.

30. *Id.* at 242–43.

31. *Id.* at 243.

32. *Id.* at 243–44.

33. *Id.*

34. Ctr. for Responsive Politics, *Top Contributors to Federal Candidates, Parties, and Outside Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/contrib.php?cycle=2012&ind=W04> (last visited Apr. 1, 2014).

35. *Id.*

TABLE 2³⁶

	Total	Democrat %
Yale	\$567,789	97%
U. Chicago	\$686,253	96%
Cornell	\$646,121	95%
UC Berkeley	\$3,144,466	93%
Columbia	\$1,109,513	90%
U. Pennsylvania	\$693,455	89%
Harvard	\$2,488,429	85%
U. Michigan	\$649,822	85%
MIT	\$649,097	85%

C. *Politics and Academic Discipline*

Imagine a simple methodological scale. At one end, place the humanities departments with their focus on metaphor, analogy, rhetorical elegance—and simple Euro-coolness. At the other end place the STEM fields, with their single-minded obsession with classical logic, testability, and replicability. As the engineers like to put it, a machine either works or does not. Metaphor schmetaphor, rhetoric schmeteric. A computer program either runs or crashes. Within law schools, constitutional law would lie near the humanities on this spectrum; perhaps law and economics would lie near STEM.

Professors at the humanities end of this methodological spectrum relentlessly talk liberal, while those at the STEM end sometimes talk conservative. This correlation between discipline and politics is not new. Readers old enough will remember the jokes after the collapse of the Berlin wall—to the effect that “the only Communists left are in the English departments of American universities.” Yet already in 1982, Lipset noted that faculty in humanities and social science departments tilted farther left than those in science or engineering.³⁷ According to a 5500 faculty member survey from the Carnegie Foundation for the Advancement of Teaching in 1989 (the numbers are percentages):³⁸

36. *Id.*

37. Lipset, *supra* note 22, at 144–45.

38. John F. Zipp & Rudy Fenwick, *Is the Academy a Liberal Hegemony? The Political Orientations and Educational Values of Professors*, 70 PUB. OPINION Q. 304, 310 (2006). The same phenomenon appears in Mariani & Hewitt, *supra* note 28, at 775. For the equivalent numbers a decade later, see Daniel B. Klein & Charlotta Stern, *Political Diversity in Six Disciplines*, 18 ACAD. QUESTIONS 40 (2005); Daniel B. Klein & Charlotta Stern, *Professors and Their Politics: The Policy Views of Social Scientists*, 17 CRITICAL REV. 257, 264 (2005); Rothman, et al., *supra* note 23, at 6; Zipp & Fenwick, *supra*, at 310.

TABLE 3³⁹

	Liberal	Moderately Liberal	Center	Conservative
Engineering	11.4%	27.0	23.2	38.4
Physical Science	20.7%	33.8	18.9	26.5
Math	18.8%	28.5	19.2	33.5
Social Science	37.7%	31.0	15.9	15.3
Humanities	40.3%	33.1	10.2	16.4

Voter registration patterns illustrate this phenomenon as well: professors in the humanities departments (methodologically closest to constitutional law) register most heavily Democrat, while those in STEM include more Republicans. Consider again Cardiff & Klein's study of eleven California schools. They find:

TABLE 4⁴⁰

	Dem.	Rep.	D/R Ratio
Sociology	88	2	44.0
Ethnic Studies	49	3	16.3
Languages & Literature	262	22	11.9
History	164	15	10.9
Anthropology	63	6	10.5
Religious Studies	40	5	8.0
Psychology	169	21	8.0
Political Science	124	19	6.5
Math	136	24	5.7
Philosophy	55	11	5.0
Earth Sciences	40	8	5.0
Physics	140	33	4.2
Chemistry	124	30	4.1
Economics	85	30	2.8
Electrical Engineering	83	33	2.5
Computer Science	35	15	2.3
Mechanical Engineering	35	16	2.2

Daniel Klein and Andrew Western focus on voter registration patterns among UC Berkeley and Stanford faculties. In addition to an overwhelming loyalty to the Democratic Party, they identify the same correlation between academic discipline and political allegiance:

39. Zipp & Fenwick, *supra* note 38, at 310.

40. Cardiff & Klein, *supra* note 29, at 246–47.

TABLE 5⁴¹

	Berkeley			Stanford		
	Dem.	Rep.	D/R Ratio	Dem.	Rep.	D/R Ratio
Anthropology	12	0	Undefined	6	0	Undefined
French & Italian	12	0	Undefined	1	0	Undefined
Sociology	17	0	Undefined	10	0	Undefined
History	31	1	31.0	22	0	Undefined
English	29	1	29.0	22	1	22.0
Religious Studies	2	1	2.0	7	0	Undefined
Philosophy	9	1	9.0	10	1	10.0
Psychology	26	1	26.0	20	0	Undefined
Linguistics	7	1	7.0	6	0	Undefined
Political Science	28	2	14.0	18	2	9.0
Economics	22	2	11.0	14	6	2.3
Math	23	6	3.8	12	3	4.0
Chemistry	32	4	8.0	10	5	2.0
Physics	28	2	14.0	14	3	4.7
Civil Engineering	14	2	3.5	10	3	3.3
Electrical Engineering	22	7	3.1	18	6	3.0

The point is simple: not only do professors in constitutional law share a methodology with our colleagues in the humanities, they share a political loyalty as well.⁴²

IV. EXPLAINING THE POLITICAL ALLEGIANCES

To explore the cause of the political patterns that Hyman so elegantly identifies, consider sociologist Robert Wuthnow's work on professorial religious affiliation. University faculty tend to shun religious commitments. As Elaine Howard Ecklund and Christopher P. Scheitle put it, professors "are much less religious than the general public."⁴³ Where "about 52 percent of the scientists see themselves as having no religious affiliation," only fourteen percent of the general population see themselves as without those ties.⁴⁴

Like political affiliation, religious commitment correlates with academic discipline: scholars in the humanities (and anthropology and sociology) overwhelmingly identify themselves as secular; many of those in STEM describe themselves as religious. In Wuthnow's words: "[T]he more scientific disciplines, such as physics and chemistry, usually turn out

41. Daniel B. Klein & Andrew Western, *Voter Registration of Berkeley & Stanford Faculty*, 18 ACAD. QUESTIONS 53, 60 (2005).

42. Chagnon describes cultural anthropology has having been "hijacked by radicals who constituted the 'Academic Left.'" CHAGNON, *supra* note 1, at 400. Scholars interested in scientific research have in some cases simply split the departments in two: "the scientific anthropologists remaining in one, the postmodernists and political activists in the other, as happened at Stanford." CHAGNON, *supra* note 1, at 400-01.

43. Elaine Howard Ecklund & Christopher P. Scheitle, *Religion Among Academic Scientists: Distinctions, Disciplines, and Demographics*, 54 SOC. PROBS. 289, 290 (2007).

44. *Id.* at 297.

to have higher rates of religiosity among their practitioners than do the less scientific specialties, such as the social sciences or the humanities.”⁴⁵

Laurence Iannaccone, Rodney Stark, and Roger Finke illustrate the phenomenon with data from a 1969 Carnegie Commission study (numbers are percentages):⁴⁶

TABLE 6⁴⁷

	Is Religious	Attends Regularly	Opposes Religion
Math & Statistics	60%	47%	11%
Physical Science	55%	43%	11%
Life Sciences	55%	42%	11%
Economics	50%	38%	10%
Political Science	51%	32%	10%
Sociology	49%	38%	12%
Psychology	33%	20%	21%
Anthropology	29%	15%	19%

Why would it be, asks Wuthnow, that “the most irreligious persons should be found in the least scientific disciplines, rather than in the most scientific disciplines”?⁴⁸ The answer, he suggests, lies in the extent to which a scholar’s discipline is “codified.”⁴⁹ In STEM, research proceeds through clear and well-established “paradigms”—through widely accepted rules of logic, falsifiability, testing, and replicability; by contrast, in the humanities and many of the social sciences, research paradigms are “codified” only at “low levels.”⁵⁰ In STEM, a scientist understands how he must proceed—and the general public appreciates that this is how he must proceed (and respects him for it); in the humanities and much of the social sciences, scholars do not agree about how to proceed—and even less does the general public understand.

Faced with the resulting intellectual insecurity, Wuthnow continues, scholars in the humanities and social sciences protect themselves through “boundary-posturing mechanisms such as irreligiosity.”⁵¹ They preserve their self-image as intellectuals by differentiating themselves from the general public. If members of that public integrate themselves into society through basic institutions like religion, scholars in these “less codified” fields maintain their intellectual self-identity, self-respect, and self-

45. Robert Wuthnow, *Science and the Sacred*, in *THE SACRED IN A SECULAR AGE: TOWARD REVISION IN THE SCIENTIFIC STUDY OF RELIGION* 187, 190 (Phillip E. Hammond ed., 1985) (emphasis omitted); see Edward C. Lehman, Jr., *Academic Discipline and Faculty Religiosity in Secular and Church-Related Colleges*, 13 *J. SCI. STUDY RELIGION* 205 (1974) (making same observation); but see Ecklund & Scheitle, *supra* note 43, at 292 (questioning whether this distinction between the natural sciences on the one hand and social science and humanities on the other still exists).

46. Laurence Iannaccone, Rodney Stark & Roger Finke, *Rationality and the “Religious Mind,”* 36 *ECON. INQUIRY* 373, 385 (1998) (authors do not report numbers for the humanities); see also Rodney Stark, Laurence R. Iannaccone & Roger Finke, *Religion, Science & Rationality*, 86 *AM. ECON. REV. PAPERS & PROC.* 433, 436 (1996).

47. Stark, Iannaccone & Finke, *Rationality and the “Religious Mind,”* *supra* note 46, at 385.

48. Wuthnow, *supra* note 45, at 197 (emphasis omitted).

49. *Id.* at 195–96.

50. *Id.* at 197 (emphasis omitted).

51. *Id.*

confidence by deliberately shunning such institutions. They “rely on values, attitudes, and life-styles to maintain the reality of science by setting up external boundaries between themselves and the general public or those who represent the realm of everyday reality.”⁵² Lacking “clearly codified paradigms,” they turn instead “to symbolic modes of differentiating themselves from everyday reality in order to maintain the plausibility of their scientific orientations—orientations that are inevitably precarious in relation to the paramount reality of everyday life.”⁵³

Intellectually insecure, in short, scholars in the humanities and social sciences deliberately remove themselves from the social mainstream. To define themselves as intellectuals, they shun institutions that integrate everyone else into the community. They use, as Wuthnow put it, their “irreligiosity . . . to maintain the plausibility of the scientific province by differentiating [themselves] (in their own minds) from the larger public who represent everyday reality.”⁵⁴

The ties to fringe-left politics reflect exactly this phenomenon. Members of the general public do not just integrate themselves into society by adopting common religious allegiances. They also adopt common political commitments. In turn, scholars in fields with “uncodified” research programs respond to both integrative institutions in parallel: they deliberately reject common religious commitments, and they deliberately reject common political loyalties. Precisely because others find these religious and political commitments so crucial, scholars in the intellectually most insecure fields protect their self-identification as “intellectuals” by flatly rejecting them.

The fringe-left bias among constitutional law scholars follows. Methodologically, they resemble no one so much as their colleagues in the humanities. They proceed not by logic but by rhetoric, not by empirical tests but by narrative. Among legal scholars, they lie at the “least

52. *Id.* at 195–96 (emphasis omitted).

53. *Id.* at 196.

54. *Id.* José Casanova takes the same approach: “[T]he reason for the widespread irreligion one finds among social scientists may derive from the social science discipline’s own insecurity and from their related need to maintain a clear and rigid separation between the two cognitive fields.” José Casanova, *PUBLIC RELIGIONS IN THE MODERN WORLD* 300 n.26 (1994) (citation omitted). Thus, “the more precarious the cognitive status of any scientific discipline, the greater the need to maintain an irreligious attitude.” *Id.*

By contrast, although Iannaccone, Stark & Finke cite Wuthnow for their analysis, in fact they offer a different explanation: “social sciences lean toward irreligion precisely because they are ‘the least scientific disciplines.’ Their semi-religious reliance on non-testable claims puts them in direct competition with traditional religions.” Stark, Iannaccone & Finke, *Religion, Science & Rationality*, *supra* note 46, at 436. One colleague put it perhaps a bit less tactfully (private communication):

I perceive the leftism of my colleagues . . . AS their religion[;] . . . they manifest all the traits of religious zealots including their shunning of heretics and remaining cloistered. For them, their leftism teaches that the state can provide the path to ‘heaven on earth’ in the absence of an interventionist deity, if only one ‘believes’ in it faithfully. Holding this belief is essential to being a good person . . . Those with the desire to be in this priestly class join the monasteries that are our universities.

Similarly, Chagnon describes the anthropological hostility to biological research as a result of the way that “anthropology has become more like a religion—where major truths are established by faith, not facts.” CHAGNON, *supra* note 1, at 232.

scientific” and intellectually least secure end of the methodological spectrum. Like their colleagues in the humanities, they protect the “plausibility of their scientific orientations” through fringe politics.⁵⁵

V. CONCLUSIONS

Hyman brilliantly details the way constitutional law scholars missed the unconstitutionality of the PPACA. They missed it because they so badly wanted the Act—because they so badly wanted to believe a national health insurance program was possible. They missed it because they let political loyalties trump their judgment—because they let their “moral engagement”⁵⁶ block analysis.

In indulging their commitments to the Democratic Party, constitutional law scholars follow their methodologically closest colleagues: professors in the humanities. Scholars in the humanities work through rhetoric and metaphor and analogy, and so do those in constitutional law. Scholars in the humanities overwhelmingly support the political left, and so do those in constitutional law.

Unfortunately, on the PPACA, constitutional law scholars apparently let their politics fog their thought.

55. Wuthnow, *supra* note 45, at 196.

56. See Hyman, *supra* note 13, at 821.