

DID THE LAW PROFESSORS BLOW IT IN THE HEALTH CARE CASE?

*Andrew Koppelman**

*This Essay responds to David Hyman's paper, *Why Did Law Professors Misunderestimate the Lawsuits Against the PPACA?* In his article, Professor Hyman criticized "the epic failure of law professors to accurately predict how Article III judges would handle the case." The culprit, he concludes, was the experts' insularity and arrogance. This Essay offers a different explanation for the professors' surprise at the seriousness with which the challenge was taken. The oral argument caused great consternation precisely because judges who had previously endorsed a broad view of Congressional power now suddenly abandoned principles that had been unquestioned for decades, and embraced limits that they had never before even mentioned and that made no sense as a matter of either constitutional interpretation or political philosophy. The explanation for the near-success of the challenge was a combination of libertarian prepossessions and pure Republican party loyalty. This Essay concludes that because such behavior is so far outside the bounds of normal, responsible judicial action, the law professors did not anticipate it.*

David Hyman's paper, *Why Did Law Professors Misunderestimate the Lawsuits Against the PPACA?*, reflects on what he calls "the epic failure of law professors to accurately predict how Article III judges would handle the case[.]"¹ The culprit, he concludes, was the experts' insularity and arrogance (I'm one of his named targets.).

The following facts are undisputed: (1) many law professors, myself included, declared that the constitutional objections to the Patient Protection and Affordable Care Act ("the ACA") were frivolous, and (2) the Court in the end accepted many of those objections and struck down the law in part (the requirement that states accept the Medicaid expansion or lose all their funds). These facts should be deeply embarrassing to the professors if and only if their jobs consist entirely of making predictions about what the Supreme Court will do.

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Valerie Quinn for comments and to Marcia Lehr for research assistance.

1. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits against PPACA?* 2014 U. ILL. L. REV. 805, 805.

Hyman allows for only one other possibility: “Law professors were not actually making predictions. Instead, they were just pontificating about the state of constitutional law precedent, and/or providing their personal views on what the Constitution authorizes and prohibits.”²

Well, *that* sounds like pointless navel-gazing. If there are just two options, prediction and pontification, then only the first is worth doing. Anything other than prediction is a waste of ink:

With all due respect to those quoted, almost no one (apart from other law professors who do constitutional law, the articles editors at the law reviews that publish their articles, and perhaps the mothers of those law professors, and I’m not so sure about the last category) has the slightest interest whatsoever in the personal views of constitutional law professors on what the Constitution authorizes and prohibits.³

As it happens, not all of us confidently predicted that the Court would uphold the ACA. Here’s the first sentence of my first article on the topic: “The Supreme Court may be headed for its most dramatic intervention in American politics—and most flagrant abuse of its power—since *Bush v. Gore*.”⁴ That sentence presumes that there is a criterion by which one can intelligibly call a decision an abuse of power.

In Hyman’s world, one cannot intelligibly speak of abuse of power. There is only power. It is impossible for a case to be wrongly decided, because law is simply whatever courts say it is. (If you complain—if, say, you read the text of the Constitution and long-settled precedent, and notice that they are inconsistent with what a court said—you’re just pontificating.)

Hyman has a curiously unfocused view of what law is and what lawyers do. His perspective seems to be that of Oliver Wendell Holmes: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁵ The trouble with Holmes’s view is familiar: it provides no guidance at all to a judge who is trying to decide a case. What is she supposed to do? Decide based on a prediction of how she is going to decide? Holmes writes:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.⁶

This led Alexander Meiklejohn to comment: “The mind of Mr. Holmes deals easily, and even merrily, with the ‘bad man.’ But the ‘good man,’

2. *Id.* at 818.

3. *Id.*

4. Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 1 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html>.

5. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

6. *Id.* at 459.

as an object of philosophical inquiry, mystifies and confuses him.”⁷ The good man who disappears in Hyman’s analysis is the man—maybe even the judge—who wants to be faithful to the Constitution, who wants to apply the law rather than inventing it. A good judge does not believe that his will is identical with the law.

In fairness to Hyman, a lot of law professors did confidently make predictions about the case, predictions very different from mine. How can that be accounted for? I have my own hypothesis.

There are two ways of predicting what the Supreme Court will do. One is legal analysis. You read the Court’s decisions, see what broad principles the judges have endorsed, and then apply those principles to the case before you. That is how Holmes thought that you could predict what courts would do. If you use this method, the ACA was an easy case. Hyman, in his only sentence that even approximates legal reasoning, thinks that the professors “failed to notice that a majority of the Supreme Court no longer shared their views on the Commerce clause.”⁸ But the Court, including most of the conservative justices, had just affirmed a broad view of Congressional power—an expansive commerce power, and an equally expansive choice of means for implementing that power—in the *Raich*⁹ and *Comstock*¹⁰ cases. The professors, poor saps, thought that they could believe what the Court had just told them about Congressional power.

If you stipulate that legal analysis exists, then the following explanation for the mistaken predictions becomes available.¹¹

At the time that the ACA was written, the constitutional objections had never been thought of by anyone.¹² The action/inaction distinction, on which so much eventually turned, was invented in July 2009, and even then was so underdeveloped that it could not be taken seriously as a legal argument.¹³ It was elaborated as the year went on, but it never addressed the most obvious basis for the bill’s constitutionality, the Necessary and Proper Clause.¹⁴ That clause was not intelligibly addressed in the lower courts, the oral argument, or the opinions in the Court declaring that the ACA exceeded the commerce power.¹⁵ The first decisions calling the law into question were the result of smart forum-shopping, which brought

7. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 65 (1960).

8. Hyman, *supra* note 1, at 821.

9. *Gonzales v. Raich*, 545 U.S. 1 (2005).

10. *United States v. Comstock*, 560 U.S. 126 (2010).

11. See ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* (2013); Andrew Koppelman, “Necessary,” “Proper,” and *Health Care Reform*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 105 (Nathaniel Persily et al. eds., 2013).

12. To hold hearings on those arguments, as Neal Devins claims Congress should have done, would have taken them more seriously than they deserved. Neal Devins, *Why Congress Did Not Think About the Constitution When Enacting the Affordable Care Act*, 106 NW. U. L. REV. Colloquy 261, 261–62 (2012).

13. KOPPELMAN, *supra* note 11, at 72–76.

14. *Id.* at 76–78, 106–136.

15. Koppelman, *supra* note 11, *passim*.

the question before some of the most conservative judges in the country.¹⁶ Those decisions were so poorly reasoned that they strengthened the argument that the challenge was frivolous.¹⁷ The professors simply did their jobs: they looked at existing case law and concluded that there was no way to claim, on the basis of that law, any constitutional difficulty with the ACA.

The oral argument caused great consternation precisely because judges who had previously endorsed a broad view of Congressional power now suddenly abandoned principles that had been unquestioned for decades, and embraced limits that they had never before even mentioned and that made no sense as a matter of either constitutional interpretation or political philosophy.¹⁸ The explanation for the near-success of the challenge was a combination of libertarian prepossessions and pure Republican party loyalty. Because such behavior is so far outside the bounds of normal, responsible judicial action, the law professors did not anticipate it.

Hyman also conflates two different claims that the professors made, predictive and analytic; further evidence that he uncritically presumes Holmes' view of the law. The predictive claims he quotes, by (for example) Fried, Gluck, Metzger, and Kerr, alleged that the Court would uphold the ACA. The analytic claims, on the other hand—for instance, by Balkin, Amar, Chemerinsky, Lessig, Cole, and me—made no predictions, but merely stated that the ACA was valid under existing doctrine, and that the Court would have to radically revise that doctrine in order to invalidate it.

There is a second approach to understanding the law, which I'll call Kremlinology, after the old practice of analysts trying to guess what the Central Committee of the Soviet Union was up to. This attempts to piece together any evidence one can find of the whims of those in power, in order to intelligently guess how that power will be used.

Law professors aren't Kremlinologists.¹⁹ They tend to presume, and are usually right to presume, that judges will follow the legal precedents that they themselves have laid down. But sometimes this presumption turns out to be false. Perhaps the professors should have taken more account of that (though I am sure that some of them were not as confident as they sounded, and were trying to shame the Court into doing the right thing).²⁰ But then, the reproach against them is like the line from the movie *Animal House*: "You fucked up. You trusted us."²¹

16. KOPPELMAN, *supra* note 11, at 90–91.

17. Koppelman, *supra* note 4, at 6–11.

18. KOPPELMAN *supra* note 11, at 1–16.

19. There are, of course, honorable exceptions, most prominently Lee Epstein. But as Epstein would be the first to acknowledge, when she undertakes her sophisticated statistical analyses of judicial behavior, she is not doing legal reasoning. See e.g., Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 738 (2012).

20. For a prominent, and obviously strategic, effort of this kind, see Laurence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011, <http://www.nytimes.com/2011/02/08/>

For Hyman, the notion that law matters isn't just a mistake. It's a contemptible mistake, evidence of liberal insularity and arrogance. Insularity and arrogance are ubiquitous in the academy, God knows. They are occupational hazards of this job, though they also help to keep tenured faculty productive.²² But Hyman hasn't shown that they help to explain what happened here.

In Hyman's world, courts cannot get the law wrong. This generates a form of Euthyphro problem: is something good because God commands it, or does God command it because it is good? The second option is a problem for theists, because it implies that something is greater than God. Hyman has an analogous problem. Do courts command something because it is the law, or is it the law because courts command it? Is there any difference?

Hyman's judges are simultaneously omnipotent and pathetically vulnerable. You can devastate them by calling them unkind names. The arrogant professors, "[r]ather than admit error" after the oral argument, "participated in an extraordinary campaign threatening the Supreme Court . . . with de-legitimization if they didn't rule the 'right' way."²³ Here, strangely, he does not know a prediction when he sees one. If I tell you that you will get hurt if you stick your finger in that fan, I am not threatening you. (Show Hyman a legal analysis and he will see a prediction. Show him a prediction and he will see a threat.) He is right that the Court faced the prospect of "an explicitly bare-knuckles political campaign . . ."²⁴ Had the Court invalidated the ACA, the Democrats would have responded by portraying the Court as a bunch of political hacks, and the political logic that dictated that response had nothing to do with the legal merits.²⁵ But the notion that the professors could threaten the Court is funny. How many divisions has the Yale Law School?²⁶

opinion/08tribe.html?_r=0. Hyman acknowledges this possibility at n.99, but he immediately forgets it again. See Hyman, *supra* note 1, at n.99.

21. ANIMAL HOUSE (Universal Pictures 1978).

22. Holmes observed, "[V]anity is only a way to get any work out of me" OLIVER WENDELL HOLMES, Letter from Oliver Wendell Holmes, Jr to Patrick Sheehan (Sept. 3, 1910) in THE ESSENTIAL HOLMES 7 (Richard A. Posner ed., 1992).

23. Hyman, *supra* note 1, at 831.

24. *Id.* at 832.

25. I acknowledge that I believe (for reasons that *do* concern the legal merits) that the portrayal would have been accurate, and that if the Court had struck down the ACA, I would have said so. But that still isn't a threat, because a threat attempts and expects to alter the behavior of its target.

26. In a 1935 meeting with Stalin, French foreign minister Pierre Laval asked that Russia adopt a more liberal stance toward Catholicism, which would help France, as Russia's ally, gain the support of the Pope. "Oho!" said Stalin. "The Pope! How many divisions has *he* got?" See WINSTON S. CHURCHILL, THE GATHERING STORM 135 (1948).

