

CONSTITUTIONAL PROGNOSTICATION: DOES ANYBODY KNOWS ANYTHING?

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Every client knows that his case is a winner, but practicing lawyers know better. Indeed, practicing lawyers are extremely reluctant to make predictions about how a case will come out—and when forced to do so, they will invariably reference the hazards and uncertainties of litigation, and hedge any predictions they make. When it came to the legal challenges against the Patient Protection and Affordable Care Act (“PPACA”), law professors who teach and write about constitutional law at elite schools were far less circumspect. Indeed, they seemingly competed with one another to demonstrate how confident they were that the federal courts would reject the legal challenges to PPACA in their entirety.

How did these confident predictions fare when the cases were actually tried? Not all that well—if by “not all that well” we mean “the complete repudiation of everything that elite law professors believed and espoused.” The University of Illinois Law Review has now published five responses to my article, by Professors Blackman, Blumstein, Koppelman, Mazzone, and Ramseyer. In this short Essay, I summarize each of these responses, and offer a short reply, organized around two P’s (Predictions and Practical Knowledge), and one M (Merits).

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I. INTRODUCTION

Every client knows that his case is a winner, but practicing lawyers know better.¹ Indeed, practicing lawyers are extremely reluctant to make predictions about how a case will come out—and when forced to do so, they will invariably reference the hazards and uncertainties of litigation, and hedge any predictions they make. It is no accident that standard retainer agreements explicitly state that the lawyer has made no promises or guarantees about the outcome.² These dynamics are not limited to predicting ultimate success or failure; as the chief counsel for litigation at Aon noted, practicing lawyers are reluctant to even estimate the fees associated with litigating a particular matter, let alone predict the timing of those fees.³

When it came to the legal challenges against PPACA, law professors who teach and write about constitutional law (most of whom have little or no practical experience) were far less circumspect. Indeed, a fair chunk of my earlier article was simply a collection of over-the-top quotes by elite law professors—each competing with the next to demonstrate how confident they were that the federal courts would reject the legal challenges to PPACA in their entirety. A short sampling gives a feel for the strength and certitude of the predictions: the issue was “open and shut,” and claims to the contrary “had no legal merit.”⁴ The arguments raised by the challengers were “frivolous,” or “if not frivolous, close to it.”⁵ Those promoting the challenges were “beneath contempt,” and anyone who questioned the constitutionality of PPACA was “simply crazy,” and a “wing nut.”⁶

How did these confident predictions fare when the cases were actually tried? Not all that well—if by “not all that well” we mean “the complete repudiation of everything that elite law professors believed and espoused.” As I framed matters in my article:

1. Lawyers may know better than clients, but they can still be optimistically biased. See, e.g., Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010).

2. See, e.g., *Retainer Agreement*, SOUTH CAROLINA BAR, http://www.sctbar.org/public/files/docs/CLE/saunders6_materials.pdf (last visited Mar. 10, 2014); *Sample Written Agreement Forms*, STATE BAR OF CALIFORNIA, <http://www.calbar.ca.gov/Portals/0/documents/mfa/Sample-Fee-Agreement-Forms.pdf> (last visited Mar. 10, 2014).

3. See, e.g., Mark Herrmann, *What Outside Counsel Don't Understand*, ABOVEHELAW (July 1, 2013), <http://abovethelaw.com/2013/07/what-outside-counsel-dont-understand/> (noting that when outside counsel are asked “[H]ow much are we going to pay in the Smith case, and in what quarter,” outside counsel will respond with “the usual spiel: ‘Life is full of surprises. The Lord works in mysterious ways. Litigation is like a black box; you never know what’s inside until you’ve opened it, and by then it’s unstoppable.’ ‘Yeah, yeah, yeah,’ I say. ‘But how much are we going to pay in the Smith case, and in what quarter?’ ‘Well,’ says outside counsel . . . ‘Litigation is like war. Once you attack, you don’t know how the other side will respond. Costs sometimes go up unexpectedly, and arguments evolve in unlikely ways. It’s hard to predict things.’ ‘Right. Got it. But how much are we going to pay in the Smith case, and in what quarter?’ ‘I really don’t want to go out on a limb here. Nothing is written in stone, and we can’t say anything definitive. If I were to give you a guess, I could easily be wrong.’”).

4. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 812 (citations omitted).

5. *Id.* at 808.

6. *Id.* at 807, 810, 822.

[I]n the lower courts, the district courts that ruled on the merits split—with three judges upholding PPACA, and two judges striking down some or all of the statute. When the cases reached the appellate stage, there was a split as well, with two circuits voting to uphold PPACA and one circuit voting to strike down the individual mandate. An additional circuit upheld PPACA on grounds that did not involve a judgment on the merits. Of note, not 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 8-5 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. A more generous score might award partial credit to a few law professors on the tax power issue, if one limits the analysis to the outcome before the Supreme Court. But even there, those few law professors who addressed this issue thought PPACA was constitutional under the tax power as written, and did not suggest that it would have to be substantially modified in order to garner the necessary fifth vote.⁷

The second half of my article was devoted to an exploration of three defenses that law professors might offer to justify why their predictions were so far off from reality—followed by an in-depth discussion of five factors that I hypothesized (but certainly could not prove) helped explain why law professors had been so wrong about how the federal courts would ultimately handle these cases.

The *University of Illinois Law Review* has now published five responses to my article, by Professors Blackman,⁸ Blumstein,⁹ Koppelman,¹⁰ Mazzone,¹¹ and Ramseyer.¹² Part II summarizes each of these five responses. Part III replies to my respondents, and Part IV concludes.

II. SUMMARY OF FIVE RESPONSES TO MY ARTICLE

Each of the five respondents have their own take on the issues. All of the responses are interesting in their own right, and offer a diverse array of insights into my article and the larger issues raised therein. My brief summary is not a substitute for reading each response.

7. *Id.* at 814–15.

8. Josh Blackman, *Obamacare and Man at Yale*, 2014 U. ILL. L. REV. 1241.

9. James F. Blumstein, *Understanding the Faulty Predictions Regarding the Challenges to Health Reform*, 2014 U. ILL. L. REV. 1251.

10. Andrew Koppelman, *Did The Law Professors Blow It in the Health Care Case*, 2104 U. ILL. L. REV. 1273.

11. Jason Mazzone, *Obamacare and Problems of Legal Scholarship*, 2014 U. ILL. L. REV. 1265.

12. Mark Ramseyer, *Biases that Blind: Professor Hyman and the University*, 2014 U. ILL. L. REV. 1229.

Blackman reprises some of the findings and conclusions of his book on the litigation over PPACA, and includes some details that did not make it into the book. Blackman expands on the involvement of law professors in the initial formulation of the government's arguments, and their frustration at being cut out when responsibility for the litigation was transferred from Deputy (and subsequently Acting) Solicitor General Neil Katyal (who was also a law professor at Georgetown) to the Solicitor General (Donald J. Verrilli), after the latter was confirmed by the Senate in June, 2011. Their frustration was heightened by Verrilli's decision to reject the argument, originally formulated by Katyal with the assistance of law professors, that there were "rock-solid" limits of the commerce power that would not be abrogated by accepting the constitutionality of PPACA.¹³ As Blackman recounts:

Katyal formulated the government's appellate strategy, and argued the ACA cases before the Fourth, Sixth, and Eleventh Circuits. Katyal, whose academic bona fides were strong, had offered great access to the professoriate in soliciting advice and helping to devise the government's strategy In the words of one attendee at the Yale conference, Katyal had a "footing with the academy."

After the appointment of Verrilli, however, the access of the academy to the Solicitor General's office was clamped down. In preparing the case before the Supreme Court, Verrilli, after careful consideration, rejected many of the arguments of leading academics. In particular, much to the disappointment of many professors, Verrilli deviated from the limiting principle Katyal had argued in the lower courts.¹⁴

Blackman also expands on his description of what took place at a conference held at Yale Law School on April 27-28, 2012, almost exactly one month after oral argument over the constitutionality of PPACA was heard by the Supreme Court. The focus of the conference was supposed to be Professor Jack Balkin's new book, *Living Originalism*. Many of those attending, however, focused instead on the litigation over PPACA. Previous accounts of the conference noted the "near-clinical obsession with, and hysteria over, the possible invalidation of the ACA's individual mandate."¹⁵ Blackman nicely describes the free-floating miasma of an-

13. Blackman, *supra* note 8, at 1246; see also Josh Blackman, *The Strategy in NFIB v. Sebelius, Part II: The Commerce Clause Limiting Principle*, VOLOKH CONSPIRACY (Sept. 4, 2013, 4:27 PM), <http://www.volokh.com/2013/09/04/strategy-nfib-v-sebelius-part-ii-commerce-clause-limiting-principle/> (noting that Katyal made the following argument to the various Courts of Appeals: "We agree completely with Lopez and Morrison. There are two rock-solid limits on [the] ability of [the] federal government to act on commerce power. First, it can't act in attenuated ways, [as in] Morrison. Second, it can't infringe on areas of traditional state responsibility. There is a distinction between what is truly local and truly national. This is a market that is truly national in scope.") [hereinafter Blackman, *Strategy*].

14. Blackman, *supra* note 8, at 1245.

15. Hyman, *supra* note 4, at 822 n.84 (quoting Michael S. Greve, *Yale and the ACA*, LIBR. L. & LIBERTY (Apr. 30, 2012), <http://www.libertylawsite.org/2012/04/30/yale-and-the-aca/>) ("It is impossible to convey the constitutional establishment's near-clinical obsession with, and hysteria over, the possible invalidation of the ACA's individual mandate. It would, they say, amount to an unconscionable act of aggression on the democratic process. A reversal of the New Deal and a resurrection of the an-

ger, fear, desperation, and sheer panic that prevailed among those attending:

“What went wrong?” they pondered. Was it the recalcitrant Solicitor General, who, unlike his predecessor, shunned academics, and put forth losing arguments in Court? How could everyone else have been led so far astray? Was it the media that gave a “false equivalence” to a rogue gang of libertarian law professors, and made their arguments legitimate? Was it right-wing judges that adopted crazy ideas for purely political reasons? Was it the Tea Party that infected our collective consciousness, and made Americans fear being force-fed broccoli by the President? Certainly, it could not have been the validity of the constitutional arguments against the mandate.¹⁶

In the second half of his response, Blackman focuses on how the news media covered the litigation over PPACA. At a panel discussion at the Yale conference, Linda Greenhouse, the former Supreme Court reporter for the New York Times, argued that the media was engaging in “false equivalence” by covering the challenges as if they had any merit whatsoever.¹⁷ Other reporters at the conference rejected Greenhouse’s argument—but Blackman indicates that view was widely shared among law professors attending the conference.¹⁸

Blumstein focuses on the merits of the underlying litigation, and argues that “preexisting doctrine, while suggestive, was not sufficiently or firmly developed so as to command” any particular outcome.¹⁹ He suggests that in analyzing the dispute, most law professors ignored or discounted the importance of two broad principles: (1) the federal government was one of limited and enumerated powers, and (2) the federal government should not be able to coerce or commandeer the states into participating in federal spending programs.²⁰ Law professors ignored or discounted these broad principles because they agreed (whether for doctrinal or political reasons (or both)) that there were no functional limits on the commerce power, and so they did not appreciate how threatening their arguments were to people who accepted these two broad principles.²¹

cien régime of the Second Republic. A judicial coup d’état. The Constitution in Exile. (Never mind that the plaintiffs’ briefs explicitly affirm that Wickard was rightly decided.) Much handwringing arose over the elite media’s commitment to be fair to both sides even when, as here, there is no reasonable other side. The plaintiffs’ briefs are beneath contempt. Randy Barnett is a creature of *The New York Times* and its addiction to a false neutrality.”)

16. Blackman, *supra* note 8, at 1242.

17. *Id.* at 1248. Coming from Greenhouse, this claim is not surprising; as I noted in my earlier article, Greenhouse was already on record that the “constitutional challenge to the law’s requirement for people to buy health insurance . . . is rhetorically powerful but analytically so weak that it dissolves on close inspection. There’s just no there there.” Hyman, *supra* note 4, at 810. If one begins from this perspective, any favorable (or even neutral) coverage would, in fact be “false equivalence.”

18. Blackman, *supra* note 8, at 1248–49.

19. Blumstein, *supra* note 9, at 1252.

20. *Id.* at 1253, 1256.

21. *Id.* at 1258. In my previous article, I noted that elite law professors responded to a highly salient signal of their failings with “rationalization—focusing on why the law professors had it right,

As it happened, the “people” that accepted these two broad principles included a majority of the Supreme Court, which rejected the government’s commerce power defense of PPACA 5-4 and struck down the Medicaid expansion by 7-2. Blumstein concludes by recounting the story of his conversation with another law professor after the oral argument had taken place before the Supreme Court.²² Despite widespread media coverage indicating that the oral argument had gone disastrously wrong for the government, the other law professor confidently predicted that the Supreme Court would uphold the Medicaid expansion by 8-1!²³

Koppelman unflinchingly defends both the predictions made by law professors (including him) and the analysis that led to those predictions.²⁴ He also provides an alternative explanation to the five factors outlined in my earlier article. More specifically, Koppelman argues that law professors actually got it right—because the legal challenges lacked merit.²⁵

Law professors were simply doing

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 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.²⁶

Taking more direct aim at me, Koppelman asserts that I believe that “courts can’t get the law wrong.”²⁷ Similarly, Koppelman asserts that I believe that “the notion that law matters isn’t just a mistake. It’s a contemptible mistake, evidence of liberal insularity and arrogance.”²⁸ Finally, he dismisses the possible consequences of an organized strategy to

and the Supreme Court was wrong.” Hyman, *supra* note 4, at 816. I failed to acknowledge that Professor Dorf is a clear exception to this pattern:

The conservative Justices really do care about judicially enforceable federalism norms. I agree with Koppelman that, under the best reading of prior case law, the mandate ought to have been sustained as necessary and proper to the exercise of the Commerce power. Moreover, I once shared the view of Koppelman and other liberal scholars who treated the constitutional arguments against the mandate as practically frivolous.

However, I have come to regard my prior view as blinkered. I no longer regard the federalism arguments against the mandate as so weak as to indicate that the Justices who endorsed them cannot really have believed them. Liberal scholars like Koppelman—and like me during the pendency of the Health Care Case—have not taken the federalism project of the Rehnquist and Roberts Courts seriously enough. Thus, I did not, and Koppelman still does not, credit the possibility that the conservative Justices could have sincerely regarded the mandate as a threat to the Constitution’s state–federal balance.

Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEX. L. REV. 133, 136 (2013); see also Michael Dorf, *Dorf on Koppelman on Dorf on Koppelman on the Affordable Care Act Case*, DORF ON LAW (June 3, 2014), <http://www.dorfonlaw.org/2014/06/dorf-on-koppelman-on-dorf-on-koppelman.html>. Unsurprisingly, Koppelman is unpersuaded. Andrew Koppelman, *How the Obamacare Case Defined Deviancy Down*, 92 TEX. L. REV. 1617 (2014).

22. *Id.* at 1262–63.

23. *Id.*

24. Koppelman, *supra* note 10, at 1275–76.

25. *Id.*

26. *Id.* at 1276.

27. *Id.* at 1277.

28. *Id.*

delegitimize the courts: “the notion that the professors could threaten the Court is funny. How many divisions has the Yale Law School?”²⁹

Mazzone offers a personal perspective on the pressures for conformity within the constitutional law hierarchy, and the risks to scholarly quality and integrity that result from the advocacy pose of the modern legal professoriate. As he recounts, after Judge Hudson (E.D. Va.) struck down PPACA, the consensus judgment among legal academics was that Judge Hudson was a “fool or a political hack (or both) and the Supreme Court would decisively reject his ruling.”³⁰ This view was consistent with law professors’ default view that PPACA was readily justified by the commerce power, and arguments to the contrary were “preposterous, frivolous, even meriting sanctions.”³¹

Mazzone believed matters were more complicated (partly because of the novelty of the individual mandate, and partly because of the multiple links in the analytical chain necessary to explain and justify the assertion of power under the commerce clause).³² Mazzone also observed that the “zombie-like” behavior of law professors, with their ritual invocation of sweeping language from *McCulloch v. Maryland*, would not persuade those who did not already share the conclusion that the challenges to PPACA were frivolous.³³

Mazzone subsequently wrote an op-ed that was published in the *New York Times*, setting out his assessment that the challengers might well prevail unless the government was able to explain to the satisfaction of the Supreme Court why “accepting the Commerce Clause justification was consistent with the core constitutional principle of limited congressional authority.”³⁴ After the op-ed appeared, he received responses from law professors—who “[a]lmost without exception . . . expressed bewilderment, disappointment, even anger that in [his] op-ed [he] had ‘endorsed’ the Commerce Clause challenge.”³⁵ The mere suggestion that the challenger’s claims might have more traction than commentators were suggesting and success for the government was far from certain was enough to brand Mazzone as being an advocate for the “wrong team.”³⁶ Mazzone concludes by noting that the collapse of the analysis-advocacy distinction pervades much contemporary legal scholarship (with constitutional law merely the worst of a bad lot)—and that something went wrong—not just on the way to the courthouse, but within the legal academy itself.³⁷

29. *Id.*

30. Mazzone, *supra* note 11, at 1266.

31. *Id.*

32. *Id.* at 1266–68.

33. *Id.* at 1267.

34. *Id.*

35. *Id.* at 1269.

36. *Id.*

37. *Id.*; see also David A. Hyman, *Something Went Wrong on the Way to the Courthouse*, 38 J. HEALTH, POL. POL’Y & L. 243 (2013).

Ramseyer offers a comparative perspective, beginning with the way “morally engaged anthropologists” in the leadership of the professional association (the American Anthropology Association (“AAA”)) did their best to destroy the career of Napoleon Chagnon for the quasi-normative error of accurately reporting the truth about the behavior of the Yanomamo tribe, and for adopting a scientific biological approach in a “field that teetered between a crude Marxist determinism and an anarchic Euro-cool relativism.”³⁸ Worse still, in the words of one commentator, the AAA did so by engaging in “ideologically-driven pseudo-scholarship [while] pretending [the scholarship was] real.”³⁹

Ramseyer frames the next section of his paper with the provocative heading “Is Constitutional Law Any Better,” and reviews an extensive literature on the ideological homogeneity of university faculty.⁴⁰ The quantitative literature he surveys shows that the “leftward loyalties are strongest at the best universities, and in the least scientific disciplines”—a description that maps directly onto the academic affiliations of the elite law professors quoted in my article.⁴¹ And, as a long-time law professor at several elite universities, he neatly observes that “the politics of the constitutional law guild is no secret. 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.”⁴²

Ramseyer goes on to observe that many scholars in the humanities and social sciences compensate for their intellectual insecurity through “boundary-posturing mechanisms.”⁴³ Constitutional law professors protect their academic pose and scholarly identity in the same way—which is unsurprising, since constitutional law proceeds “not by logic but by rhetoric, not by empirical tests but by narrative. Among legal scholars, they lie at the ‘least scientific’ and intellectually least secure end of the methodological spectrum.”⁴⁴ I noted a similar phenomenon in my article, although I did not highlight the deep psychological roots that Ramseyer suggests explain its prevalence.⁴⁵

38. Ramseyer, *supra* note 12, at 1229–30.

39. Alice Dreger, *Darkness's Descent on the American Anthropological Association: A Cautionary Tale*, 22 HUM. NATURE, 222, 240 (2011).

40. Ramseyer, *supra* note 12, at 1230.

41. *Id.* at 1233 (internal numbering deleted).

42. *Id.* at 1232.

43. *Id.* at 1238 (citing Robert Wuthnow, *Science and the Sacred*, in THE SACRED IN A SECULAR AGE: TOWARD REVISION IN THE SCIENTIFIC STUDY OF RELIGION 187 (Phillip E. Hammond ed., 1985)).

44. *Id.* at 1239–40.

45. Hyman, *supra* note 4, at 829 (“I have been unable to identify any peer-reviewed literature assessing whether those who do constitutional law are bigger egomaniacs than other law professors—let alone whether the field attracts egomaniacs, or otherwise modest law professors become egomaniacs after a short amount of time spent doing constitutional law.”).

III. REPLY TO MY INTERLOCUTORS

All law professors have had the experience of writing something, having it published, and then hearing absolutely nothing about it from anyone. Ever. Although SSRN downloads provide a limited form of feedback about the size of the audience for one's ideas, it is much better to get substantive feedback from real, live human beings, who have taken the time to engage with one's work. As such, I appreciate the willingness of Professors Blackman, Blumstein, Koppelman, Mazzone, and Ramseyer to read and respond to my article.⁴⁶

There is much to be said in reply to these responses. In the interests of focusing on the areas of greatest dispute, I organize my reply around two P's (Predictions and Practical Knowledge), and one M (Merits).⁴⁷

A. *Predictions?*

The focus of my earlier article was the predictions made by elite law professors about how the federal courts (and not just the Supreme Court) would handle the litigation over the constitutionality of PPACA.⁴⁸ Alone among the respondents, Koppelman suggests that many of the law professors that I quoted were engaged in an analytical (rather than predictive) exercise. As he puts it, “[t]he analytic claims . . . 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.”⁴⁹ Koppelman does concede that “a lot of law professors did confidently make predictions about the case”—but he suggests that these erroneous predictions would be embarrassing “if and only if their jobs consist entirely of making predictions about what the Supreme Court will do.”⁵⁰

It is irrefutable that many elite law professors made explicit predictions—and “the overwhelmingly dominant position was an extremely

46. I am particularly grateful to Professor Koppelman for submitting a response—and not just because he compares me to Oliver Wendell Holmes. Koppelman was the only law professor that was quoted in my original article that was willing to submit a response.

47. Of course, there is more to be said on various other topics, including the politics of constitutional law professors; whether law professors were trying to predict or make the weather (or both); and the willingness of constitutional law professors to create the academic equivalent of a vigilance committee. On the last subject, Koppelman seems to want to have it both ways—on the one hand arguing that law professors were correct to threaten to delegitimize the Supreme Court if it did not agree with them, but simultaneously arguing that law professors had no power to threaten the Supreme Court. Compare Koppelman, *supra* note 10, at 1276 (arguing that professors “were trying to shame the Court into doing the right thing”) with *id.* at 1277 (“the notion that the professors could threaten the Court is funny. How many divisions has the Yale Law School?”). One sees a similar dynamic when liberal constitutional law professors evaluate free-wheeling Supreme Court decisions (and applications of the Spending Power) that go their way versus those that go the other way. Sauce for the goose, anyone?

48. There is an important difference between all law professors lining up on one side of a case (which is what happened in the litigation over the Solomon Amendment) and all law professors predicting that the federal courts could and would decide the case only one way. The former may or may not be problematic, but only the latter is a falsifiable prediction.

49. Koppelman, *supra* note 10, at 1276.

50. *Id.* at 1273.

confident prediction that the federal courts (and when that did not work out, the Supreme Court) would make short work of these challenges.”⁵¹ Some law professors were somewhat more circumspect—but “[e]ven those quotes that might not appear to be explicitly predictive employed language that implied a confident prediction as to the expected outcome.”⁵² Context is also important in analyzing these statements. Many of the statements collected in my article were published in newspaper articles or were broadcast through other media sources—and were given in response to a call from a reporter, who was calling to obtain insight into how the federal courts would handle the challenge to the constitutionality of PPACA. Law professors also made similar observations and claims, using similar language, in their more formal (and presumably more carefully considered) published work on the subject.⁵³

Readers must draw their own conclusions on whether the elite law professors quoted in my earlier article were, in fact, making predictions. But those who disagree with my formulation must still deal with the following statement from the second paragraph of Koppelman’s response: “The following facts are undisputed: (1) many law professors, myself included, declared that the constitutional objections to the Patient Protection and Affordable Care Act . . . were frivolous, and (2) the Court in the end accepted many of those objections and struck down the law in part”⁵⁴ Anyone who has taken civil procedure knows that presenting a frivolous argument to a court means that you lose—and are also subject to sanctions under Rule 11 for presenting that argument. So, calling an argument frivolous, as many elite law professors did, *is itself a prediction* about how the federal courts will handle the dispute.

I also disagree with Koppelman’s suggestion that law professors should be embarrassed by this sorry episode “if and only if their jobs consist entirely of making predictions about what the Supreme Court will do.”⁵⁵ For what its worth, I did not use the word “embarrassed” in my article. I do quantitative empirical research; when my hypotheses (i.e., predictions) turn out to be wrong, I am not embarrassed. But when my hypotheses are disproven by what has happened in the real world, I do not double-down on my original predictions, insisting that the real world has it wrong and I am right. Maybe that strategy actually works for constitutional law scholars—which would explain a lot about that field.

In addition, I do not understand the “if and only if” limitation in the quoted sentence from Koppelman’s response. The law professors who made these predictions were wrong. Not right. Not right with an asterisk. Wrong. Their ex-post rationalizations (that they had it right and the courts were wrong) may allow them to pretend that they were not mistaken about an area that was central to their claims of expertise (and

51. Hyman, *supra* note 4, at 814.

52. *Id.* at 818.

53. *Id.*

54. Koppelman, *supra* note 10, at 1273

55. *Id.*

deference from the rest of us based on the same). But apart from that, there is nothing else to recommend it.⁵⁶ Denial is not just a river in Egypt.

B. *Practical Knowledge (and the Theory Class)*

With few exceptions, constitutional law professors are members of the theory class. Lacking practical knowledge, they develop theories that explain life, the universe, and everything (that is constitutional).⁵⁷ But the process for arriving at constitutional law typically involves litigation—and litigation is as much or more about practice as it is about theory. Ignoring that dynamic is a recipe for overstated (if not outright erroneous) predictions.

Law professors at our nation's elite institutions were unanimous that the Commerce Clause challenge was completely frivolous and beyond the pale—but the people who actually had to defend the statute viewed matters rather differently. As Professor Blackman notes in his book, “the attorneys in the Solicitor General’s office were ‘under no illusion from the outset that the Commerce Clause argument was not going to be challenging.’ Internally, the government conceded that there ‘wasn’t anything quite like the individual mandate.’”⁵⁸ Similarly, as I noted in my earlier article, it is not an accident that “although almost all law professors focused exclusively on the Commerce Power, the lawyers who actually had to defend PPACA in court also argued that the individual mandate was justified by the taxing power”—even though doing so “was the cause of considerable embarrassment for the [Obama] Administration, since President Obama had flatly denied that claim in an interview less than a year earlier.”⁵⁹

Given this dynamic, it is unsurprising that law professors were frustrated that Solicitor General Verilli ignored their brilliant insights into the best way to win the case.⁶⁰ To understand the disconnect between the arguments that were appealing to the theory class, and the arguments that had a real chance of success in an actual court before actual judges,

56. Cf. Blackman, *supra* note 8, at 1250 (“I think it is sometimes awkward for legal academics, who are professional theoreticians, to confront the theory-destroying realpolitik at the heart of constitutional law: if there are five votes for a proposition on the Supreme Court, the proposition is ‘true.’”) (quoting Charles Savage, *New York Times*).

57. Cf. DOUGLAS ADAMS, *LIFE, THE UNIVERSE & EVERYTHING* (1982).

58. Blackman, *Strategy*, *supra* note 13. In fairness, one should not discount the possibility that those interviewed by Blackman were engaging in some degree of post-hoc self-justification—particularly if they were being interviewed after oral argument before the Supreme Court took place. If the attorneys in the Solicitor General’s office had taken the Commerce Clause challenge as seriously as they say, they might have developed a more plausible limiting principle, and done so far earlier in the course of the litigation. Similarly, if they took the Tax Power argument more seriously, they might have devoted more pages to it in their briefs before the lower courts. To assess this issue, it would be helpful to know when these interviews actually took place.

59. Hyman, *supra* note 4, at 822–23.

60. Blackman, *supra* note 8, at 1246 (“One participant said that Verrilli was leaving the best possible arguments ‘on the table,’ while the conservatives brought their ‘A-game.’ The narrative quickly became, ‘it was Don’s fault. If someone decent had argued the case,’ it would have been much better. Or more precisely, ‘If Don would have just listened to us, he wouldn’t have messed up.’”).

one need only compare Professor Akhil Amar's version of the oral argument he would have made had the Solicitor General been so foolish as to allow him to argue the case with the arguments that were, in fact, made by the Solicitor General.⁶¹

C. *The Merits*

I expressly excluded the merits of the underlying litigation from my earlier article.⁶² However, Professors Blumstein, Koppelman and Mazzone address the merits of the underlying litigation, and two of the three (Blumstein & Koppelman) chide me for failing to do so. I do not do constitutional law, but I do believe in comparative advantage. I do not know enough about constitutional law to labor under the delusion that I should spend any of my time writing about the subject. But I am able to count—and so I counted up the elite law professors that had made falsifiable predictions about the outcome of the litigation over PPACA. I then evaluated whether those predictions matched up with what courts actually did. It is not rocket science. According to Koppelman, it may not even be legal reasoning.⁶³ But it is revealing.

Even if I was willing to disregard the principle of comparative advantage, three distinguished scholars of constitutional law (Professors Blumstein, Koppelman, and Mazzone) obviously disagree on the merits of the lawsuit. The disagreement among these three scholars is itself further evidence that the confident predictions made by elite law professors were off base.

A discussion of the merits raises one additional consideration. Koppelman suggests that “[i]n Hyman’s world, courts cannot get the law wrong.”⁶⁴ This is a very odd thing to accuse me of. I spend most of my time studying medical malpractice—where expert professionals (far better trained and far more expert than the average elite law professor who does constitutional law) getting things (allegedly) wrong is what starts

61. See Akhil Reed Amar, *How to Defend Obamacare*, SLATE (Mar. 29, 2012, 4:07 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/supreme_court_and_obamacare_what_donald_verrilli_should_have_said_to_the_court_s_conservative_justices_.html.

62. Hyman, *supra* note 4, at 807 (“[T]his Article does not examine whether or not the Supreme Court and lower courts ‘got it right,’ nor does it examine the implications of the Supreme Court’s opinion for future cases. Those inclined to argue that the nation’s elite law professors were right and the Supreme Court was wrong should find someone else to argue with.”).

63. Koppelman, *supra* note 10, at 1275. (“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.’”) For reasons that lie beyond the scope of this short response, my view is that Koppelman’s position (that there is only one sentence in the earlier article “that even approximates legal reasoning”) is descriptively inaccurate, and irrelevant to boot. But set both those issues aside. If “legal reasoning” of the sort valorized by Koppelman results in predictions like those made by con law professors about PPACA—predictions that utterly fail to reflect what happens in the real world that we actually live in—then should one really be bragging about being able to do “legal reasoning”?

Koppelman also claims that I “have a curiously unfocused view of what law is and what lawyers do.” *Id.* at 1274. It is hard to know how to respond to this, other than to refer Koppelman to MATTHEW 7:1-5.

64. Koppelman, *supra* note 10, at 1277.

the entire process running. But leaving that difficulty aside, the more fundamental problem with Koppelman's claim is that it is wrong. Of course courts can get the law wrong. Or they can get it right. Or they can get it somewhere in between. In making predictions about what courts will do, one must take account of the likelihood that courts will get it right, get it wrong, or end up somewhere in between. And, one should also consider whether one's theoretical framework actually takes account of the factors that will matter to the judge charged with deciding the case—including whether the precedents are as clear-cut as optimistically biased proponents for each side will insist.

Koppelman does not attempt to do either of these things. Instead, he blandly asserts that law professors “tend to presume, and are usually right to presume, that judges will follow the legal precedents that they themselves have laid down.”⁶⁵ To see the problem with this approach, consider a simple hypothetical. A civil engineer is asked to determine whether a particular bridge will hold the weight of a particular truck. A civil engineer that adopts Koppelman's approach will begin and end with the assumption that bridges normally stay up, and that this truck is the same as all other trucks. If the bridge stayed up before, it will stay up again. *Q.E.D.*

A competent civil engineer, on the other hand, would be familiar with the problems associated with making such assumptions. In the real world, bridges stay up until they do not. Maybe the truck weighs a lot more than the bridge was designed for. Maybe the bridge has been weakened by age, or defective steel was used, or an accident on the bridge damaged some of the supports. Maybe the conventional wisdom among engineers about how much the bridge can hold has changed over time. A competent civil engineer would know that a valid prediction should take account of these factors—and she would not assume much of anything about whether this particular bridge could hold the weight of this particular truck. Instead, she would investigate the structural integrity of the bridge, the weight of the truck, and any other facts that might cast light on the issue. And she would also build in an appropriate margin of safety, to deal with the uncertainties of life. Only then would she be willing to make any prediction whatsoever.

If you were asked to drive the truck over the bridge—let alone stake the future of President Obama's major domestic initiative on the arrival of the cargo—which engineer would you rather have vouching for its structural integrity? The Koppelman-style “if it worked before it will work now, and anyone who says otherwise is stupid” approach?⁶⁶ Or a competent civil engineer, who is appropriately modest about the com-

65. *Id.* at 1276.

66. See David Kopel, *Andy Koppelman Wonders: Are People Who Disagree With Him Just Stupid, or Are They Insane?*, VOLOKH CONSPIRACY (Apr. 1, 2012, 4:48 PM), <http://www.volokh.com/2012/04/01/andy-koppelman-wonders-are-people-who-disagree-with-him-just-stupid-or-are-are-they-insane/> (“Andy Koppelman has spent two years penning variations of his thesis: ‘Everyone who doesn’t agree with me is stupid.’”).

plexities and uncertainties of a world in which bridges actually do fall down? To ask the question is to answer it.

One final point. Lower courts are constrained by existing precedent, while the Supreme Court has more flexibility. When thirteen federal judges who are constrained by existing precedent split 8-5 on the constitutionality of PPACA under the Commerce Power, it is hard to argue with a straight face that the predictions of the theory class (on the self-evident constitutionality of PPACA) hold any water whatsoever.

IV. CONCLUSION

In my earlier article, I noted that William Goldman, a famous Hollywood screenwriter, spent years watching highly paid, extremely motivated and well-informed movie executives fail miserably in predicting which movies would be successful. His simple conclusion was that “nobody knows anything.”⁶⁷ That insight may go too far when it comes to constitutional law—but then again, if this episode is any illustration, maybe it does not go far enough. We will not know for sure until a large enough number of constitutional law professors make a large enough number of predictions about a large enough number of cases for us to determine whether their theories actually reflect much more than their own political preferences.⁶⁸

As Clint Eastwood memorably observed in *Magnum Force*, “a man’s got to know his limitations.”⁶⁹ Perhaps the law professors that teach and write about constitutional law should reacquaint themselves with that fundamental insight.

67. Hyman, *supra* note 4, at 806 n.4 (quoting WILLIAM GOLDMAN, *ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD* 39 (1983)).

68. I address the political preferences of constitutional law professors and the likely impact of those preferences in my earlier article. Professor Ramseyer covers some of the same ground. It is difficult to be certain how large an impact these preferences have on the theories espoused by the con law professoriate. But if elite con law professors don’t want to be dismissed as political hacks, maybe they shouldn’t sound so much like political hacks. See Jeffrey Toobin, *Our Broken Constitution*, *THE NEW YORKER*, Dec. 9, 2013, at 72 (“‘One half of one of our two great political parties has gone bonkers,’ he said. ‘That’s the problem. Not the Constitution.’”) (quoting Professor Akhil Amar, Sterling Professor of Law and Political Science at Yale University).

69. *MAGNUM FORCE* (Warner Bros. 1973). For those who prefer David Mamet, there is *SPARTAN* (Warner Bros. 2004) (“You had your whole life to prepare for this moment. Why aren’t you ready?”).