

OBAMACARE AND PROBLEMS OF LEGAL SCHOLARSHIP

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In his recent article on the Patient Protection and Affordable Care Act, David Hyman explores why law professors failed to accurately predict the Supreme Court's decision about the constitutionality of the Act. The article is important in its own right, but it also exposes broader problems in legal scholarship. Too often, legal scholars perform their work backwards: they set out with a conclusion in mind, then do the research to support that predetermined outcome.

This distortion of the research process is not intentional. Law professors are rarely trained in how to design a proper research methodology, and the different hats that law professors are forced to wear necessarily generate confusion. But the consequences of this distortion are real: law professors may lose their objectivity; they may lose sight of contradictory positions; and in the case of public predictions—like those on Obamacare—they may lose a good bit of face as well.

David Hyman's article on the recent failure of constitutional law professors to predict how constitutional challenges to the individual mandate provision of the Patient Protection and Affordable Care Act ("PPACA") would fare in the courts is characteristically provocative. Professor Hyman's catalog of professorial blunders, his explanations for why legal academics widely missed the mark, and his suggestions for improvement deserve broad dissemination, close attention, and careful reflection. As a case study in how not to succeed as a law professor, the article has particular relevance to the newest members of the legal academy.

While Professor Hyman's central focus is the role of academics in predicting case outcomes, my comments in this brief response focus on a different issue, albeit one on which Professor Hyman's own analysis also sheds light. My concern is with the problems within legal scholarship that the Obamacare episode highlights. To set the stage for my comments, I begin by reporting on an experience I had during the course of the litigation over the PPACA. That experience, which comports with

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much of what Professor Hyman tells us in his article, tees up the problem of legal scholarship that is the focus of the remainder of my Essay.

To begin, a little background: On December 13, 2010, Judge Henry E. Hudson of the U.S. District Court for the Eastern District of Virginia issued the first federal court decision that the individual mandate provision of the PPACA—requiring almost all Americans to maintain a minimum level of health insurance coverage—was unconstitutional as beyond the scope of Congress’ enumerated powers.¹ The government’s principal defense of the mandate at that time was that the provision was justifiable under the Constitution’s Commerce Clause; Judge Hudson’s opinion therefore dealt mainly with that specific issue.² As Professor Hyman reports, the near-uniform view of legal academics—virtually from the moment the PPACA was enacted—was that the individual mandate was easily sustained under the Commerce Clause and that any contrary arguments were preposterous, frivolous, even meriting sanctions. In the eyes of academics, then, in rejecting the Commerce Clause justification, Judge Hudson was a fool or a political hack (or both) and the Supreme Court would decisively reject his ruling.

At the time of Judge Hudson’s decision, I saw things somewhat differently. I thought the Commerce Clause question was more complicated than my friends in the academy recognized and I feared that they were making a grave error in failing to take seriously the constitutional challenge to the individual mandate.

In particular, I recognized that the plaintiffs in the Obamacare litigation had cleverly teed up a novel Commerce Clause issue. No prior case that I knew held that Congress’ power to “regulate commerce”³ among the states included the power to force people, in the name of regulation, to actually engage in commercial activity. Indeed, no previous congressional statute I could find required Americans to undertake a commercial transaction by purchasing insurance (or anything else) from a private vendor. Novelty, I knew, does not doom a federal law, but as the Supreme Court has often indicated, the fact that Congress has never done something before does raise a red flag as to whether Congress can do that thing now.⁴ A key question then in assessing the constitutionality of the individual mandate provision was: what exactly is the “commerce” that Congress is regulating?

1. Virginia *ex rel.* Cuccinell v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).

2. See *id.* at 775–82. Judge Hudson also rejected the government’s secondary argument that the individual mandate was a proper exercise of Congress’s taxing power. *Id.* at 787–88.

3. U.S. CONST. art. I, § 8.

4. For example, in *Printz v. United States*, 521 U.S. 898 (1997), the Court invoked the absence of historical precedent in concluding that Congress lacked power to commandeer state governments to carry out federal programs. “Because there is no constitutional text speaking to this precise question,” the Court explained, “the answer to the . . . challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.” *Id.* at 905. After finding no similar federal statute in the nation’s past, the Court concluded that the lack of precedent “tend[ed] to negate the existence of the congressional power asserted . . .” *Id.* at 918. While the “structure of the Constitution” and the “jurisprudence of this Court” could overcome the problem that absent precedent posed and sustain a use of federal power, neither was sufficient in *Printz*. *Id.* at 905.

There were some possible answers to that question. Arguably, the commerce at issue was the insurance market or the healthcare market—and so perhaps in regulating those markets Congress could (via the Necessary and Proper Clause) sweep in the small class of unwilling market participants. Arguably too, it could be that Congress was regulating commerce because it was responding to the impact uninsured Americans have on the insurance and healthcare markets (and perhaps the economy more generally) when they obtain medical care via expensive emergency room procedures. The trouble, though, as anyone who has closely read Supreme Court cases on the Commerce Clause would have recognized, is that once an explanation for federal power takes these kinds of detours, once it proceeds via links in a chain, the constitutional justification becomes less solid.⁵

It also seemed to me, as I observed the arguments about the individual mandate unfold, that the strategy of academics to invoke, almost zombie-like, general language from the 1812 case of *McCulloch v. Maryland*⁶ as proof of the mandate's constitutionality was likely to fall flat. *McCulloch* addressed Congress' power to create a national bank.⁷ The case said nothing at all about national health care, much less about mandated healthcare policies. While language from *McCulloch* could be useful for dressing up a conclusion about the constitutionality of the individual mandate, the case itself did not supply the analysis courts needed to answer the particular question before them.

Because I believed that law professors were misunderestimating (to borrow Professor Hyman's term) the strength of the Commerce Clause challenge, I concluded a correction was needed. One week after Judge Hudson's ruling, I therefore wrote an op-ed in *The New York Times* setting out my own sense of how things could play out as the case worked its way to the Supreme Court.⁸ The gist of my op-ed was that the Commerce Clause challenge had a stronger chance of success at the Supreme Court than legal academics were predicting and that it was time to take the arguments against the healthcare mandate seriously. Among other things, I suggested that the government's defense of the law would be in trouble if it could not explain to the satisfaction of the courts why accepting the Commerce Clause justification was consistent with the core constitutional principle of limited congressional authority. "When the health

5. See, e.g., *United States v. Morrison*, 529 U.S. 598, 615 (2000) ("The reasoning that petitioners advance [in support of Congress's power to create a federal civil remedy for gender-motivated crimes] seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce.") (invalidating federal civil remedy provision of the Violence Against Women Act of 1994); *United States v. Lopez*, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions . . . we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.") (invalidating the Gun-Free School Zone Act).

6. 17 U.S. 316 (1819).

7. *Id.* at 324-25.

8. Jason Mazzone, *Can Congress Force You to be Healthy?*, N.Y. TIMES, Dec. 16, 2010, <http://www.nytimes.com/2010/12/17/opinion/17mazzone.html>.

care law makes it to the Supreme Court,” I wrote, “the justices will ask, with varying degrees of concern, this age-old question: How do we define the limits, because limits there must be, on this federal power?”⁹ The government had not answered this basic question to Judge Hudson’s satisfaction when he ruled in 2010. Astonishingly, not even at the Supreme Court was the government able to articulate any dependable limits to its theory of federal authority beyond vague assurances that the healthcare and health insurance markets were unique and so mandates would likely not appear elsewhere in the U.S. Code.¹⁰

In my op-ed, I suggested also that the plaintiffs’ claim that there was a constitutionally significant difference between economic activity (which Congress could regulate) and inactivity (which it could not) might well have traction at the Supreme Court. Academics ridiculed that distinction as lacking theoretical grounding. It seemed to me, however, that in so doing the professors were misjudging the juristic and popular climates. Economic and philosophical accounts aside, ordinary Americans, I suspected, would view a governmental directive to do something (in this case purchase insurance) as an unusual exercise of power. In addition, I explained, in the criminal code and a variety of other legal contexts the “law . . . already treats actions differently from inaction” and so the Supreme Court might follow that preexisting distinction in evaluating the Commerce Clause argument.¹¹ On that point, we know how things turned out. In his opinion, Chief Justice Roberts waved away high theory because, he said, “the distinction between doing something and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.”¹²

More generally, it seemed to me that academic commentators who thought the Commerce Clause question an easy one misconceived a fundamental aspect of our constitutional design: the relationship between federalism and individual liberty. Throughout the litigation over the healthcare law, a common criticism of arguments that the individual mandate was beyond Congress’ power was that those arguments were “really” concerned with individual liberty.¹³ The implication of this criticism was that the plaintiffs challenging the mandate were improperly using a federalism argument to conceal a liberty claim. That constitutional scholars, often focused in their own work on select clauses of the Constitution, would fail to see the grander design is not terribly surprising. But such narrowness virtually guarantees an incomplete analysis. In my experience, courts were keenly attuned to the relationship (one with deep historical and popular roots) between federalism and individual liberty. The more the academics sought to separate the two, I suspected,

9. *Id.*

10. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

11. Mazzone, *supra* note 8.

12. *Sebelius*, 132 S. Ct. at 2589.

13. See Jason Mazzone, *Individual Mandate: Federalism and Rights*, BALKINIZATION BLOG (Aug. 15, 2011, 8:05 PM), <http://balkin.blogspot.com/2011/08/individual-mandate-federalism-and.html>.

the greater the appearance that something about the individual mandate was amiss. Again, things turned out quite differently from how the (clause-bound) academics imagined: a majority of the Justices emphasized, up front, the tight connection between federalism and freedom.¹⁴

For each of these reasons, I thought the Supreme Court might well reject the Commerce Clause justification for the individual mandate. “While nobody knows for sure what the Supreme Court will do in any particular case,” I concluded in my op-ed, “there is now a serious question as to whether the individual mandate will ultimately survive.”¹⁵

I report this mini-history not in order to say to my friends in the academy that “I told you so.”¹⁶ Rather, it sets the scene for what happened next and brings us to the lessons I draw from the episode of the professors and the PPACA. After my op-ed was published, many readers contacted me to share their reactions. Aside from the occasional unhinged e-mailer (the one, for example, who told me to go live in Guatemala), the reactions I found most curious came from fellow law professors. Almost without exception, the professors who contacted me (or who wrote responses in other settings) expressed bewilderment, disappointment, even anger that in my op-ed I had “endorsed” the Commerce Clause challenge the plaintiffs were making to the individual mandate. I had, of course, done no such thing. All the op-ed did was explain why I thought the plaintiffs’ Commerce Clause arguments would have greater traction than other commentators were predicting and that a success for the government at the Supreme Court was far from certain. No matter. To the academics who responded to my op-ed, my analysis was actually advocacy. That meant I was on the wrong team.

The lessons Professor Hyman draws from the PPACA episode go to the future role (or not) of professors in predicting case outcomes. I offer a different conclusion, one that concerns professors not as predictors but as scholars—the role we are actually meant to be playing. The failure of constitutional law professors to distinguish between advocacy and analysis is not confined to the PPACA episode I have described. Rather, this failure is commonplace.

A collapsing of the analysis-advocacy distinction pervades much contemporary scholarship on the Constitution. Many—perhaps most—articles on constitutional law topics published in American student-

14. *Sebelius*, 132 S. Ct. at 2578 (opinion of Roberts, C.J.) (“‘State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)); *id.* at 2646 (opinion of Scalia, Thomas, Kennedy & Alito, JJ., dissenting) (“If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, ‘the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.’”) (quoting *The Federalist* No. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

15. *Mazzone*, *supra* note 8.

16. The brag would only be partially justifiable in any event. In my op-ed I did not take up the taxing power issue, the basis on which the Supreme Court ultimately upheld the individual mandate. In addition, my discussion of the Commerce Clause arguments was presented as a possible outcome rather than one of which I was certain.

edited journals are principally advocacy pieces. That is, they are works in which the author has settled early on upon a conclusion to be advanced and then proceeds by setting forth the reasons (derived from whatever sources are most helpful) that support that conclusion. This is not scholarship in any meaningful sense of the word. Nor, for that matter, is it even sound advocacy. An advocate, after all, writes a brief and argues before a judge. As a result, the advocate operates in a world far removed from that of the scholar penning the law review article. The advocate has a client with particular interests; a factual record constrains the issues that can be raised; precedents must be squarely confronted; and procedural rules set sharp limits on what can be achieved and advanced (no judge in the country, for example, would accept a brief with 30,000 words and 400-odd footnotes).

It is similarly wrong to see the law review author advocating some conclusion as somehow playing the role of judge. For starters, advocacy-style scholarship is usually wrongly timed: law review articles tend either to advance arguments that do not bear on any pending case or criticize outcomes long ago determined. Further, just as real-world advocates face significant constraints, so do judges. For example, issues come to judges in a form that is beyond the judge's own control; a member of a multijudge court must persuade a majority of colleagues to sign onto opinions if they are to carry any weight; and judges must think also about how a decision today could play out in cases down the road. Comparable neither to a brief nor to the work of the judiciary, academic advocacy risks seeming little more than a statement of how the world would look were the author (via some miracle) omnipotent. When scholarship takes this path, it has lost its bearings.

Another example demonstrates the problem. In recent years it has become standard procedure for candidates for faculty positions at law schools to submit as part of their application packets a detailed research agenda.¹⁷ The purpose is to show the faculty what the candidate will work on during the first few years of his or her career. Yet with few exceptions, these research agendas promise more agenda than research. The topic descriptions frequently identify a predetermined outcome and then explain how the author will go about proving that outcome to be true or desirable. Like law review writings, the whole approach is backwards. A research agenda, properly crafted, poses a question to be answered and explains the methodology for going about the task. One might have a hypothesis to test or a theory to examine but the conclusion should be the ending not starting point. If the conclusion is known before work even begins then something other than scholarship is afoot.

17. See, e.g., *Law Teaching Program at Yale Law School: Scholarly Agenda*, YALE L. SCH., http://www.law.yale.edu/teaching/application_agenda.htm (last visited Mar. 18, 2014); see also *Visiting Scholars Program*, STANFORD L. SCH., <http://www.law.stanford.edu/scholarlylife/visiting> (last visited Mar. 18, 2014).

Professor Hyman is skeptical that law professors will ever become good forecasters. He suggests that we turn instead to computers for generating predictions about how cases will come out. Rooting out of the academy work that conflates advocacy and analysis is at least an equal challenge.¹⁸ A first step would be to identify why legal scholars are so susceptible to the failure. Two explanations seem possible.

First, there is the simple fact that American law professors are forced to wear two hats. They are lawyers, trained in advocacy, and (in most law schools at least) they are required to teach advocacy skills to their students. At the same time, law professors are also scholars, expected to take off their lawyer hat at the end of class and retreat to an office or an archive to engage in the same kind of research and writing conducted by scholars in other university departments. Wearing multiple hats can easily generate confusion. The problem is compounded when, as with law professors, the expected roles are in tension. It might well be time to rethink the almost universal assumption that law professors must hold a J.D. degree, and occasion also to push back on the now trendy notion that legal practice is grounding for teaching.

A second explanation for current deficiencies of legal scholarship is that many law professors (especially those without advanced degrees) lack rigorous training in research methodologies.¹⁹ In virtually every academic discipline besides the law a student on the path to becoming a professor is taught how to select topics, frame problems, design an appropriate method, execute the research, and report the results. Proper methodology is also constantly reinforced through peer review, discussions with colleagues, conference presentations, and other professional activities. Law professors can easily travel the path to tenure without ever obtaining this kind of grounding in methodology.

The consequences are many. For example, researchers trained in methods know that it is hazardous to work on a topic in which the researcher has a personal stake or to investigate a phenomenon in which the researcher plays a part. Outside of the legal academy, the attendant risk is obvious: the researcher with a stake in or an attachment to the topic loses the objectivity necessary to carry out the project. Absent very careful precautions, therefore, a researcher should avoid topics of close personal relevance. Legal scholars not only fail to heed this maxim: they turn it inside out. One sees, therefore, regular examples of law review writing by professors with a personal history with or attachment to the topic that has been selected: first-generation Americans writing about immigration law; members of racial minority groups writing about race discrimination; gay and lesbian professors writing about same-sex mar-

18. It might also necessarily remain incomplete. Legal scholars (there are indeed some) who have persuaded themselves that the Constitution aligns perfectly with their own political and personal preferences—an exceedingly improbable result for a document first drafted in 1787 and reflecting multiple compromises—might well be beyond redemption.

19. Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing A Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 362 (1995).

riage; divorced dads writing about custody issues; professors advancing electoral reforms that happen to favor their own candidates. In much of this kind of work, the personal attachment seems to be understood not as an impediment to first-rate scholarship but as an asset, the basis for unique insights or cogent analysis. When method takes this unfortunate turn, it is no surprise that analysis and advocacy become one. None of this is to say that some issues should be off the scholarly table for some people. But much greater attention is needed to understand and head off the risks that lie in investigating a topic close to heart.

Professor Hyman's article produces, then, a larger conclusion than he recognizes. It is not just that something went wrong on the way to the courthouse. It is that something may be wrong—very wrong—within the academy itself.