

# WHY DID LAW PROFESSORS MISUNDERESTIMATE THE LAWSUITS AGAINST PPACA?

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*Almost without exception, elite law professors dismissed the possibility that the Patient Protection and Affordable Care Act (variously called “PPACA,” “Obamacare,” and the “Affordable Care Act,”) might be unconstitutional—but something went wrong on the way to the courthouse. What explains the epic failure of elite law professors to accurately predict how Article III judges would handle the case? After considering three possible defenses/justifications, this Article identifies five factors that help explain the erroneous predictions of our nation’s elite law professors, who were badly wrong, but never in doubt.*

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I. “HOW COULD A BUNCH OF SMART LAW PROFESSORS HAVE BEEN SO WRONG ABOUT THE LAW?”<sup>1</sup>

Law professors love hypothetical questions. So, let’s try a few. What if, in the highest profile case to hit the Supreme Court in the last generation, involving an issue of central importance to the scope of federal power, virtually every constitutional law scholar was wrong about how the Court would decide the case? And not just a little wrong, but “not remotely in the ballpark” wrong (i.e., declaring that an argument the other way was “frivolous, and deserving of sanctions”)?<sup>2</sup> Worse still, what if, when it became apparent that they might be wrong, these law professors threatened that the Supreme Court would lose its legitimacy if it decided the case the “wrong” way? And, when it finally became irrefutable that these scholars were completely wrong, what if they did not do what any rational person would do (apologize, and try to figure out how and why they got it so wrong), but instead condemned the Supreme Court for failing to adhere to their view of what the law required? Finally, what if this behavior was not limited to law professors who actually do constitutional law? What if law professors with no obvious expertise in constitutional law signed petitions and made public statements declaring that the arguments of those challenging the constitutionality of the law in question were frivolous?

Of course, these are not hypothetical questions, but instead reflect the performance of the nation’s elite law professors before, during, and after the Supreme Court resolved the constitutional challenges to PPACA. This essay explores how and why the nation’s elite law professors underestimated the merits of the legal challenge to PPACA,<sup>3</sup> and demonstrates that in predicting the outcome in high-profile constitutional law cases, as in predicting which films will be successful, we may not be wrong in concluding that “nobody knows anything.”<sup>4</sup>

In the public sector, high-profile failures of this sort predictably result in blue-ribbon investigative commissions, resignations by those in positions of authority, reorganizations of the involved governmental agencies, and occasional criminal or civil prosecutions. Think Hurricane Katrina, 9/11, the S&L crisis, the Bay of Pigs, and Pearl Harbor. In the private sector, comparable high-profile failures predictably result in fir-

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1. DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 16 (2010).

2. *See infra* Part III.

3. Philip Hensher, *Sarah Palin’s Struggle with English Language*, TELEGRAPH (July 21, 2010), <http://www.telegraph.co.uk/news/worldnews/sarah-palin/7901926/Sarah-Palins-struggle-with-English-language.html> (“‘Misunderestimate’ is a portmanteau word with a touch of the malapropism, named after the Sheridan character who says ‘she might reprehend the true meaning of what she is saying. It is one of George W Bush’s most memorable additions to the language, and an incidentally expressive one: it may be that we rather needed a word for ‘to underestimate by mistake.’”).

4. William Goldman 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.” WILLIAM GOLDMAN, *ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD AND SCREENWRITING* 39 (1983).

ings, bankruptcy, and public shaming. Think Bear Stearns, Enron, Arthur Andersen and New Coke.

Of course, none of these were plausible responses to the failure of our nation's elite law professors when it came to predicting how the federal courts would approach the constitutional merits of PPACA. But law professors, who devote their careers to second-guessing other people's decisions, should not be allowed to skate away from their own failures. Before the entire episode disappears down the collective memory hole, it is worth examining how and why this failure came about.

One important preliminary note: this 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.

## II. WHAT DID ELITE LAW PROFESSORS THINK ABOUT THE CHALLENGE TO PPACA?

Although the lawsuits challenging PPACA involved multiple complex issues, the most important constitutional issue can be simply stated: was the individual mandate authorized by the Commerce Power?<sup>5</sup> There were also two other important constitutional issues—whether the individual mandate was authorized by the Taxing Power,<sup>6</sup> and whether the Medicaid expansion was unduly coercive under the Spending Power.<sup>7</sup>

Virtually all law professors who opined on these issues agreed that *all* of the constitutional challenges to PPACA were meritless—and the federal courts would make short work of the litigation.<sup>8</sup> Indeed, as Professor Aziz Huq (University of Chicago) observed, "[a]mong 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."<sup>9</sup> In 2009, Professor Jack Balkin (Yale University) similarly observed that "the idea that the Act's mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy."<sup>10</sup> Professor Akhil Amar (Yale

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5. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584 (2012).

6. *Id.*

7. *Id.* at 2601.

8. I focus on the predictions made with regard to the Commerce Power in this essay. Similar predictions were also made with regard to the Taxing Power and the Spending Power. See *infra* notes 62–63 and accompanying text. To show the prevalence of these views, I list the institutional affiliation of each law professor the first time they are referenced. All institutional affiliations in the text are as of the date of the Supreme Court's opinion in PPACA.

9. 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>.

10. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (Jun 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

University) declared that based on his three decades of studying the Constitution, PPACA “easily passes constitutional muster.”<sup>11</sup>

After it became clear that “something went wrong on the way to the courthouse,” law professors intensified their criticism, rather than revisit their original assessment.<sup>12</sup> After the first district court struck down the individual mandate, Professor Amar wrote an op-ed that asserted his students understood the constitution better than the judge in question (Roger Vinson), and then unfavorably compared Vinson to the Supreme Court justice with the same first name who wrote *Dred Scott v. Sanford* (Roger Taney).<sup>13</sup> Professor Laurence Tribe (Harvard University) dismissed the lawsuits as “a political objection in legal garb,” and confidently asserted that PPACA’s “constitutionality is open and shut.”<sup>14</sup> Professor Sandy Levinson (University of Texas) stated “[t]he argument about constitutionality is, if not frivolous, close to it.”<sup>15</sup> Professor Balkin stated it would take a “constitutional revolution” for PPACA to be struck down.<sup>16</sup>

Professor Walter Dellinger (Duke University) argued [t]he assertion that the national Congress lacks the constitutional authority to adopt these regulations of the national commercial markets in health care and health insurance is a truly astonishing proposition. When these lawsuits reach their final conclusion, that novel claim will be rejected. . . . There are so many ways that the minimum coverage requirement is an appropriate exercise of Congress’s power to regulate the national economy that it is difficult to know where to begin.<sup>17</sup>

Professor Andrew Koppelman (Northwestern University) asserted that the constitutionality of PPACA was “obvious,” and arguments suggesting otherwise were “silly.”<sup>18</sup> Professor Fred Schauer (University of Virginia) stated “[t]wenty years ago, I would have said that the Commerce Clause challenge was either preposterous or frivolous . . . . Now, I think it

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11. Akhil Reed Amar, *Constitutional Objections to Obamacare Don't Hold Up*, L.A. TIMES (Jan. 20, 2010), <http://articles.latimes.com/2010/jan/20/opinion/la-oe-amar20-2010jan20>.

12. Mark A. Hall, *Health Care Reform—What Went Wrong on the Way to the Courthouse*, 364 NEW ENG. J. MED. 295, 296 (2011). See also Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825 (2011); David A. Hyman, *Something Went Wrong on the Way to the Courthouse*, 38 J. HEALTH POL. POL'Y & L. 243 (2013).

13. Akhil Reed Amar, *Constitutional Showdown*, L.A. TIMES (Feb. 6, 2011), <http://articles.latimes.com/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206>.

14. Laurence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES (Feb. 7, 2011), [http://www.nytimes.com/2011/02/08/opinion/08tribe.html?\\_r=0](http://www.nytimes.com/2011/02/08/opinion/08tribe.html?_r=0).

15. James Rosen, *Experts Say States' Health Care Lawsuits don't Stand a Chance*, MCCLATCHY DC (Mar. 23, 2010), <http://www.mcclatchydc.com/2010/03/23/90934/states-lawsuits-not-likely-to.html>.

16. Jack M. Balkin, *The Constitutionality of the Individual Mandate For Health Insurance*, 362 NEW ENG. J. MED. 482, 483 (2010).

17. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1-2, (2011), <http://www.judiciary.senate.gov/pdf/11-02-02%20Dellinger%20Testimony.pdf> (quoting Walter Dellinger, Professor, Duke University).

18. Andrew Koppelman, *Bad News For Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2 (2011), <http://www.yalelawjournal.org/2011/04/26/Koppelman.html>.

is a very, very, very long shot.”<sup>19</sup> Professor David Cole (Georgetown University) stated that “[a]bsent a return to a constitutional jurisprudence that has been rejected for more than seventy years, and, even more radically, an upending of Chief Justice Marshall’s long-accepted view of the Necessary and Proper Clause, the individual mandate is plainly constitutional.”<sup>20</sup> Professors Abbe Gluck (Yale University) and Gillian Metzger (Columbia University) stated that “three key facts ‘two empirical, one doctrinal’ make clear that if the Supreme Court takes one of the challenges to the Affordable Care Act, as we believe it will, it will sustain the Act’s ‘insurance mandate’ [on Commerce Clause grounds].”<sup>21</sup> Professor Orin Kerr (George Washington University) stated “there is a less than one-per-cent chance that the courts will invalidate the individual mandate.”<sup>22</sup>

Law professors also offered a parade of horrors that would result if the Supreme Court struck down PPACA. For example, Professor Patricia Williams (Georgetown University) claimed that

[l]imiting the commerce clause in the fashion pressed by these appellants would also undo the legal grounding for . . . well, everything: the Social Security Act, unemployment insurance benefits, Medicare, the National Labor Relations Act, the Occupational and Safety Health Act, the Clean Air Act, all federal disaster relief, the Anti-Trust Act, the Equal Pay Act, and all jurisprudence related to public accommodations, including the Civil Rights Act of 1964.<sup>23</sup>

Professor Dan Hamilton (University of Illinois) similarly argued that limitations on the Commerce Power would undermine food safety regulations and child labor laws.<sup>24</sup>

Professor Charles Fried (Harvard University) dismissed the Commerce Clause challenge to PPACA as “completely bogus”<sup>25</sup> and “beneath contempt,”<sup>26</sup> and observed that “[f]or objective observers on all

19. Keith L. Martin, *Law Professor: Health Reform Lawsuits in Va. Other States ‘a Loser.’* IFA WEB NEWS (May 18, 2010), <http://ifawebnews.com/2010/05/18/law-professor-health-reform-lawsuits-in-va-other-states-a-loser/>.

20. David Cole, *Is Health Care Reform Unconstitutional*, N.Y. REV. BOOKS (Feb. 24, 2011), <http://www.nybooks.com/articles/archives/2011/feb/24/health-care-reform-unconstitutional/?pagination=false>.

21. Abbe R. Gluck & Gillian Metzger, *Just the Facts: Health Economics and Constitutional Law*, SCOTUSBLOG (Aug. 4, 2011, 9:37 AM), <http://www.scotusblog.com/2011/08/just-the-facts-health-economics-and-constitutional-doctrine>.

22. Ezra Klein, *Unpopular Mandate*, NEW YORKER (June 25, 2012), [http://www.newyorker.com/reporting/2012/06/25/120625fa\\_fact\\_klein#ixzz24tiuhYPK](http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein#ixzz24tiuhYPK).

23. Patricia J. Williams, *Judges with a Clear Agenda*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/roomfordebate/2012/03/25/on-the-health-care-law-is-the-court-beingthoughtful-or-partisan/activist-judges-with-a-clear-agenda>.

24. Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FIU L. REV. 29, 44 (2010).

25. Bob Drummond, *Obama Health Law Seen Valid, Scholars Expect Rejection*, BLOOMBERG (June 22, 2012, 11:15 AM), <http://www.bloomberg.com/news/2012-06-22/law-experts-say-health-measure-legal-as-some-doubt-court-agrees.html>.

26. Greg Sargent, *How Did Legal Observers and Obamacare Backers Get It So Wrong?*, WASH. POST PLUMB LINE (Mar. 29, 2012, 11:10 AM), [http://www.washingtonpost.com/blogs/plumb-line/post/how-did-obamacares-backers-get-it-so-wrong/2012/03/29/gIQArH5wiS\\_blog.html](http://www.washingtonpost.com/blogs/plumb-line/post/how-did-obamacares-backers-get-it-so-wrong/2012/03/29/gIQArH5wiS_blog.html).

sides, this was thought to be a lousy argument and the only people who were making it were sort of the wing nuts.”<sup>27</sup> Professor Fried had earlier stated that the constitutional challenges were “simply a political ploy and a pathetic one at that,” and “[a]nybody who proposes something like this is either ignorant—I mean, deeply ignorant—or just grandstanding in a preposterous way.”<sup>28</sup> Seemingly concerned that viewers doubted how confident he actually was in the correctness of his opinions, Professor Fried promised to “eat a hat which [he] bought in Australia last month made of kangaroo skin” if his predictions turned out to be wrong.<sup>29</sup>

In an NPR-hosted forum in January, 2011, Professors Amar and Fried again dismissed the possibility that PPACA raised any serious constitutional issues.<sup>30</sup> Professor Fried described the argument to the contrary as a “non-starter,”<sup>31</sup> and Professor Amar indicated he had “no basis for thinking this [was] a close constitutional question,” and he could see at most “two, possibly three justices” on the Supreme Court in favor of that position.<sup>32</sup> Dahlia Lithwick noted at the same forum the strength and breadth of the academic consensus:

I think that the most interesting thing that you can pull out of this conversation is the same thing you would have pulled out of this conversation six months ago. If we were going to talk to a bunch of legal academics about whether the individual mandate in the health insurance—the health care—bill was constitutional you would have heard almost all of them say what you’re hearing Professor Fried say which is “under no plausible reading could this be unconstitutional.”<sup>33</sup>

Two years later, the consensus had hardened; Linda Greenhouse wrote in the *New York Times* that “[t]he 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.”<sup>34</sup> A week before oral argument, Jeffrey Toobin stated on CNN that the case against the mandate was “really weak.”<sup>35</sup> Professor Douglas Laycock (University of Virginia) stated that

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27. Drummond, *supra* note 25.

28. *This Week Transcript: WH Sr Adviser Valerie Jarrett*, ABC NEWS (March 28, 2010), <http://abcnews.go.com/ThisWeek/week-transcript-wh-sr-adviser-valerie-jarrett/story?id=10210079&page=5#.UK5J0qVkgmk>.

29. Igor Volsky, *Reagan’s Solicitor General Promises To ‘Eat A Hat Made Of Kangaroo Skin’ If Courts Repeal Health Law*, THINKPROGRESS (Apr. 15, 2010, 4:40 PM), <http://thinkprogress.org/health/2010/04/15/171390/fried-unconstitutional/?mobile=nc>.

30. *Congress and Constitutional Arguments*, 90.0 WBUR (Jan 5, 2011, 10:00 AM), <http://onpoint.wbur.org/2011/01/05/congress-constitution> (at 20 minutes).

31. *Id.* at 19 minutes.

32. *Id.* at 25–26 minutes.

33. *Id.* at 21 minutes.

34. Linda Greenhouse, *Never Before*, N.Y. TIMES OPINIONATOR (Mar. 21, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/03/21/never-before/>.

35. Matt Hadro, *Surprise! CNN Legal Analyst Whacks Conservative Case Against ObamaCare Mandate as ‘Really Weak.’* NEWSBUSTERS (Mar. 19, 2012, 5:20 PM), <http://newsbusters.org/blogs/matt-hadro/2012/03/19/surprise-cnn-legal-analyst-whacks-argument-against-obamacare-mandate-rea>.

“[u]nder existing case law this is a very easy case; this is obviously constitutional. I think [the challengers are] going to lose eight to one.”<sup>36</sup>

Petitions and surveys made it clear that these views were widely shared. A 2011 petition signed by 130 law professors flatly asserted that PPACA “rests on sound, long-established constitutional footing. The current challenges to the constitutionality of this legislation seek to jettison nearly two centuries of settled constitutional law. . . . [T]here can be no serious doubt about the constitutionality of the minimum coverage provision.”<sup>37</sup> A 2012 survey of 131 constitutional law scholars (to which only twenty-one responded) found that ninety percent of those responding believed that if the Supreme Court followed legal precedent, it would uphold PPACA.<sup>38</sup>

Some professors were slightly more circumspect, and framed their predictions in terms of whether existing precedent authorized the individual mandate. Professor Lawrence Lessig (Harvard University) stated “Obamacare is plainly constitutional under the Court’s existing precedents.”<sup>39</sup> In blog postings, Professors Dawn Johnsen (Indiana University), Gluck & Metzger, and Dean Robert Schapiro (Emory University) made similar observations, along with the obligatory references to the evils of *Lochnerism*.<sup>40</sup> Dean Erwin Chemerinsky (University of California, Irvine) stated “[t]here is no case law, post 1937, that would support

36. Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (March 26, 2012), <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html>.

37. *Over 100 Law Professors Agree on Affordable Care Act’s Constitutionality*, FCAN, [http://www.fcan.org/Health\\_care/law\\_professors\\_ACA.pdf](http://www.fcan.org/Health_care/law_professors_ACA.pdf) (last visited Mar. 20, 2014). A complete list of those who signed the petition is attached as Appendix A. A breakdown of the schools these law professors attended, and where they taught (as indicated in the petition) is attached as Appendix B.

38. Drummond, *supra* note 25 (reporting results of a survey of “professors at the top law schools in U.S. News’s ranking who have taught or written about constitutional law or have professional experience with constitutional litigation, according to school biographies”).

39. Lawrence Lessig, *Why Scalia Could Uphold Obamacare*, ATLANTIC (Apr. 13, 2012, 11:38 AM), <http://www.theatlantic.com/national/archive/12/04/why-scalia-might-uphold-obamacare/255791/>.

40. Gluck & Metzger, *supra* note 21 (“[S]ince the New Deal, the Court has always deferred to the specifics of congressional regulatory choices when it has perceived that the overall context that Congress is regulating is an economic or commercial one.”); Dawn Johnsen, *The Simple Case for the Affordable Care Act’s Constitutionality*, SCOTUSBLOG (Aug. 3, 2011, 9:22 AM), <http://www.scotusblog.com/2011/08/the-simple-case-for-the-affordable-care-acts-constitutionality/> (“Since 1937, following an infamous stretch of now-discredited opinions narrowly interpreting ‘commerce among the several states’ to invalidate progressive legislation, the Court nearly always has upheld federal statutes against challenges that they exceeded Congress’s authority. . . . The question for the Supreme Court thus will be whether it should create a new, unprecedented exception here to Congress’s power. . . . As I am sure is clear from that formulation, my view is no. And I believe the Supreme Court will agree.”); Robert Schapiro, *Following Judge Sutton’s Rejection of the “Inactivity” Argument, the Supreme Court Can Take Its Time*, SCOTUSBLOG (Aug. 5, 2011, 3:00 PM), <http://www.scotusblog.com/2011/08/following-judge-sutton-s-rejection-of-the-inactivity-argument-the-supreme-court-can-take-its-time/> (“[I]nvalidating the law would require the Court to strike out into new territory. The Court would have to create a new limitation on congressional power, a limitation that appears ungrounded, unclear, and unnecessary.”). For additional references to *Lochner*, see Randy E. Barnett, *No Small Feat: Who Won the Obamacare Case (and Why Did So Many Law Professors Miss the Boat)*, 65 FLA. L. REV. 1331, 1347 n.55 (2013) (collecting explicit or implicit references to *Lochner* by Professors Vikram Amar (University of California, Davis), Mark Hall (Wake Forest University), Peter Smith (George Washington University), Jeffrey Rosen (George Washington University), Andrew Koppelman (Northwestern University), Trevor Morrison (Columbia University), Steven Schwinn (John Marshall Law School), Patricia Williams (Columbia University) and Ronald Dworkin (New York University)).

an individual's right not to buy health care if the government wants to mandate it."<sup>41</sup> However, three years earlier, Dean Chemerinsky was less guarded, asserting that "there is no doubt that bills passed by House and Senate committees are constitutional," and arguments to the contrary had "no legal merit."<sup>42</sup> Professor Christina Whitman (University of Michigan) similarly declared "[t]he precedent makes this a very easy case."<sup>43</sup>

As the foregoing makes clear, law professors were openly contemptuous of the suggestion that PPACA raised serious constitutional issues.<sup>44</sup> Several flatly stated that arguments to the contrary were objectively frivolous, and predicted that the lawyers who had signed briefs challenging the constitutionality of PPACA would be subjected to Rule 11 sanctions.<sup>45</sup> A few went further. Professor Cole compared PPACA's challengers to "[p]roponents of slavery and segregation, and opponents of progressive labor and consumer laws."<sup>46</sup> Professor Koppelman compared PPACA's challengers to Lee Harvey Oswald.<sup>47</sup>

The status consciousness and narcissism of our nation's law professors was also on full display. In a public debate before the Supreme Court held oral argument, Professor Amar emphasized the fact that only one law professor at the top ten U.S News-ranked law schools agreed that the challenges to PPACA had merit.<sup>48</sup> A year earlier, Professor Amar made a broader claim: that there was only one "constitutional scholar that I know at a top twenty law school (there are hundreds of them, they're left, right and center) that thinks this is constitutionally

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41. Klein, *supra* note 22.

42. Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO (Oct. 23, 2009, 4:59 AM), <http://www.politico.com/news/stories/1009/28620.html>.

43. Drummond, *supra* note 25.

44. See generally Shapiro, *supra* note 24, at 60–61 (noting that various constitutional law professors believed that the PPACA was clearly within Congress's Commerce Clause powers, and arguments to the contrary were ridiculous).

45. Brian D. Galle, *Why Tax Cheats Love the AG Suits Challenging Health Care Reform*, PRAWFSBLAWG (Apr. 3, 2010, 11:43 AM), <http://prawfsblawg.blogspot.com/2010/04/why-tax-cheats-love-the-ag-suits-challenging-health-care-reform.html> ("I fully expect the lawyers who sign the briefs to face a motion for Rule 11 sanctions and, if they appeal to a federal court of appeals, for costs. (Suggestion for hapless first-year DAG's working on the draft briefs: buy some professional insurance coverage this year.)"); Simon Lazarus & Alan Morrison, *Lawsuit Abuse, GOP Style*, SLATE (May 5, 2010, 9:35 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/05/lawsuit\\_abuse\\_gop\\_style.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/05/lawsuit_abuse_gop_style.html). Galle is a professor at Florida State University. Morrison is a professor at George Washington University School of Law. Lazarus is not an academic.

46. See Cole, *supra* note 20 ("In this respect, Judge Hudson and the Virginia attorney-general are situated squarely within a tradition—but it's an ugly tradition. Proponents of slavery and segregation, and opponents of progressive labor and consumer laws, similarly invoked states' rights not because they cared about the rights of states, but as an instrumental legal cover for what they really sought to defend—the rights to own slaves, to subordinate African-Americans, and to exploit workers and consumers.").

47. See Andrew Koppelman, *Origins of a Healthcare Lie*, SALON (May 31, 2012, 11:38 AM), [http://www.salon.com/2012/05/31/origins\\_of\\_a\\_healthcare\\_lie/](http://www.salon.com/2012/05/31/origins_of_a_healthcare_lie/) ("To say that the Democrats have only themselves to blame for not anticipating these newly minted constitutional claims is like saying John F. Kennedy had only himself to blame for not getting a second term as president because he should have anticipated Lee Harvey Oswald.").

48. Shapiro, *supra* note 24, at 65.

problematic.”<sup>49</sup> Immediately before the opinion was issued, Professor Amar stated that if the Supreme Court struck down PPACA, it would demonstrate that his “life was a fraud.”<sup>50</sup> After the opinion was issued, Professor Michael Dorf (Cornell University) scored the opinion based on whether it restored his faith in the Supreme Court.<sup>51</sup> Professor Geoffrey Stone (University of Chicago) confessed that, up to that point, the performance of Chief Justice Roberts had been a “great disappointment—at least to me,” but his personal judgment about Roberts had been “vindicated” by the Supreme Court’s decision in *NFIB*.<sup>52</sup>

Prominent health law scholars joined the chorus. In 2010, Professor Tim Jost (Washington & Lee University) stated “courts will defer to the reasonable judgment of Congress, *as they must under current law*, and not try to impose their own will on the American people.”<sup>53</sup> Professor Mark Hall (Wake Forest University) observed that “[m]any legal scholars (including me) believed that this would be an easy case . . . .”<sup>54</sup>

To be sure, not all law professors who opined on PPACA made such explicit predictions, and several made it clear the likely outcome

49. *Congress and Constitutional Arguments*, *supra* note 30, at 25 minutes.

50. Ezra Klein, *Of Course the Supreme Court is Political*, WASH. POST WONKBLOG (June 21, 2012, 12:42 PM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/21/of-course-the-supreme-court-is-political/> (“If they decide this by 5-4, then yes, it’s disheartening to me, because my life was a fraud. Here I was, in my silly little office, thinking law mattered, and it really didn’t. What mattered was politics, money, party, and party loyalty.”) (quoting Professor Amar).

51. Mike Dorf, *Obamacare Upheld Thanks to CJ Roberts: I’m Back to Thirty Percent*, DORF ON L. (June 28, 2012), <http://www.dorfonlaw.org/2012/06/obamacare-upheld-thanks-to-cj-roberts.html> (“I have been saying some variation of the following since the oral argument: ‘When I started as a constitutional lawyer, I was about 70% legal realist. I thought that in the ideologically identifiable cases in the Supreme Court, law accounted for roughly 30% of the outcomes one saw. After *Bush v. Gore*, I was at 99-1. That last one percent is on the line in the ACA case.’ Now thanks to John Roberts, I’m back to 30%.”)

52. Geoffrey R. Stone, *Savaging Roberts: Conservatives Run Amok*, HUFFINGTON POST (July 3, 2012, 7:59 PM), [http://www.huffingtonpost.com/geoffrey-r-stone/savaging-roberts-conserva\\_b\\_1647980.html](http://www.huffingtonpost.com/geoffrey-r-stone/savaging-roberts-conserva_b_1647980.html). There is no substitute for reading the entire essay, but the following gives a sense of the tone:

In an op-ed published seven years ago, shortly after President George W. Bush nominated John Roberts to serve on the Supreme Court, I chided my fellow liberals for threatening to oppose Roberts. . . . I conceded that Roberts would not have been “my choice for the Court.” He was, after all, “a dyed-in-the-wool conservative” whose confirmation would clearly “move the Court even further to the “right.”” But I opined that everything about Roberts suggests “a principled, pragmatic justice who will act cautiously and with a healthy respect for precedent.” I predicted that he will decide cases “in an open-minded, rigorous, intellectually honest manner, rather than as an ideologue whose constitutional principles derive more from fiction and faith than from legal reason.”

For the past seven years I have pretty much eaten those words. Almost without exception, Chief Justice Roberts has adhered to a rigid and generally extreme conservative line. Moreover, in so doing, he has often acted in complete disregard of precedent and of the much-celebrated conservative principle of judicial restraint. . . . Like Justices Scalia, Kennedy, Thomas and Alito, Roberts has consistently interpreted the Constitution in ways that mimic conservative political ideology. He has, in short, been a great disappointment—at least to me.

Now, finally, with his vote in the Affordable Care Act case, I have suddenly been... *vindicated!*

53. Timothy Jost, *A Victory for Health Reform and Good Law*, HEALTH AFF. BLOG (Oct. 8, 2010), <http://healthaffairs.org/blog/2010/10/08/a-victory-for-health-reform-and-good-law/> (emphasis added).

54. Mark A. Hall, *Supreme Court Arguments on the ACA—A Clash of Two World Views*, 366 NEW ENG. J. MED. 1462, 1462 (2012).

was far from clear-cut.<sup>55</sup> And as time went on (particularly after oral argument went badly), some of the predictions became significantly less optimistic about the prospects for PPACA.<sup>56</sup> But the overwhelmingly dominant position was an extremely confident prediction that the federal courts (and when that did not work out, the Supreme Court) would make short work of these challenges.

How well did these confident predictions match what courts (and not just the Supreme Court) actually did when confronted with the challenges to PPACA? The short answer is not well at all. In the lower courts, the district courts that ruled on the merits split—with three judges upholding PPACA in its entirety, and two judges striking down some or all of the law.<sup>57</sup> 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.<sup>58</sup> An additional circuit up-

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55. See Wendy K. Mariner et al., *Can Congress Make You Buy Broccoli? And Why That's a Hard Question*, 364 *NEW ENG. J. MED.* 201 (2011); Bill Rankin, *Atlanta Court Becomes Health Care Battleground*, *ATLANTA J. CONST.* (June 8, 2011, 11:11 AM), <http://www.ajc.com/news/news/local/atlanta-court-becomes-health-care-battleground/nQwDM/> (“Supreme Court precedents addressing the Commerce Clause ‘are ambiguous enough and opaque enough, so a judge acting in good faith could rule either way on the validity of the individual mandate,’ Eric Segall, a Georgia State University law professor, said. ‘What’s going to decide these cases are personal values, politics, subjectivity and taste—not logic.’”); 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?\\_r=0](http://www.nytimes.com/2010/12/17/opinion/17mazzone.html?_r=0) (“When the health care law makes it to the Supreme Court, 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? . . . While nobody knows for sure what the Supreme Court will do in any particular case, there is now a serious question as to whether the individual mandate will ultimately survive.”).

56. See, e.g., Scott Bomboy, *What Happens After the Supreme Court Rules on Health Care?* *CONST. DAILY* (June 8, 2012), <http://blog.constitutioncenter.org/2012/06/what-happens-after-the-court-rules-on-health-care/> (collecting predictions); Matthew DeLuca, *7 Experts Try to Read Supreme Court Health-Care Tea Leaves*, *DAILY BEAST*, (Mar. 29, 2012), <http://www.thedailybeast.com/articles/2012/03/29/7-experts-try-to-read-supreme-court-health-care-tea-leaves.html> (collecting predictions); Drummond, *supra* note 25 (“The U.S. Supreme Court should uphold a law requiring most Americans to have health insurance if the justices follow legal precedent, according to 19 of 21 constitutional law professors who ventured an opinion on the most-anticipated ruling in years. Only eight of them predicted the court would do so.”); Lisa Esposito, *Legal Experts Offer Predictions on Fate of Health-Reform Legislation*, *U.S. NEWS* (Mar. 29, 2012), <http://health.usnews.com/health-news/news/articles/2012/03/29/legal-experts-offer-predictions-on-fate-of-health-reform-legislation> (collecting predictions); Maya Jonas-Silver & Petey E. Menz, *Professors Unsure about Fate of Obamacare in Supreme Court*, *HARVARD CRIMSON* (June 27, 2012), <http://www.thecrimson.com/article/2012/6/27/professors-healthcare-supreme-court/> (collecting predictions); Klein, *supra* note 22.

57. *Mead v. Holder*, 766 F. Supp. 2d 16, 34, 41 (D.D.C. 2011) (upholding individual mandate under the Commerce Clause while rejecting Taxing and Spending Clause as a constitutional basis to uphold the mandate); *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1265 n.4, 1295 (N.D. Fla. 2011) (striking down the individual mandate under the Commerce Clause, having previously rejected Tax and Spending Clause arguments); *Virginia ex rel. Cuccinell v. Sebelius*, 728 F. Supp. 2d 768, 787–88 (E.D. Va. 2010) (striking down the individual mandate under the Commerce Clause and rejecting Taxing and Spending Clause as a constitutional basis for the mandate); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 635 (W.D. Va. 2010) (upholding individual mandate under the Commerce Clause); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 895 (E.D. Mich. 2010) (upholding individual mandate under the Commerce Clause).

58. *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011) (upholding individual mandate under the Commerce Clause and not reaching the basis of the provision in the Taxing and Spending Clause); *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1311, 1320 (11th Cir. 2011) (overturning the individual mandate under the Commerce Clause and rejecting the Taxing and Spending Clause as a constitutional basis for the provision); *Thomas More Law Ctr. v. Obama*, 651 F.3d 539, 544, 554 (6th Cir. 2011) (upholding individual mandate under the Commerce Clause and, in a concurring opin-

held PPACA on grounds that did not involve a judgment on the merits.<sup>59</sup> 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 upholding PPACA on the basis of the Commerce Power.<sup>60</sup> 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 a substantially rewritten version of the individual mandate on taxing power grounds by 5-4.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup>

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ion for two of the three panelists, holding that the Taxing and Spending Power could not sustain the mandate).

59. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011) (vacating judgment below for lack of standing).

60. See Hyman, *supra* note 12, at 244.

61. *Nat'l Fed'n Indep. Buss. v. Sebelius*, 132 S. Ct. 2566, 2572–75 (2012).

62. There were few predictions on the Medicaid challenge, but those who made predictions made it clear they thought the challenges were meritless, and would be dismissed out of hand by the federal courts, even after the Supreme Court had granted cert on the issue. See J. Lester Feder, *Medicaid Ruling Could Be the Sleeper of Challenge*, J. LESTER FEDER (Mar. 27, 2012), <http://lesterfeder.wordpress.com/2012/03/27/medicaid-ruling-could-be-the-sleeper-of-challenge/> (“Most legal experts—including conservative legal analysts critical of the law—are skeptical of the states’ argument.”); *Health Reform Before the U.S. Supreme Court*, GW TODAY (Mar. 23, 2012), <http://gwtoday.gwu.edu/health-reform-us-supreme-court> (“Q: How do you think this decision will come down? A: I think it will be a decisive ruling in favor of the law.”) (Q&A with Sara Rosenbaum, George Washington University); Ralph Lindeman, *Medicaid Ruling Could Roll Back Law to Pre-New Deal* (Mar. 16, 2012, 9:58 AM), <http://go.bloomberg.com/health-care-supreme-court/2012-03-16/medicaid-ruling-could-roll-back-law-to-pre-new-deal/> (“[W]hile most legal experts contacted by Bloomberg BNA believe the states face an uphill battle in persuading the Supreme Court to invalidate the Medicaid expansion, they are hard pressed to explain why the court agreed to review the question in the first place. . . . According to Mark Hall, a health law professor at Wake Forest University School of Law, ‘I think it’s going to be a lot more interesting to see the way in which they go about rejecting the argument, instead of whether or not they’ll reject it.’”).

63. See Balkin, *supra* note 16, at 482–83; Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE 27, 36 (2010), <http://yalelawjournal.org/2010/5/31/galle.html>. See also Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1196 (2012) (developing an effects theory of the taxing power). Balkin and Galle believed that the individual mandate was constitutional under both the Commerce Power and the Taxing Power. Cooter & Siegel did not predict how the Supreme Court would decide the challenges to the individual mandate, but laid out the framework for a saving construction that would recast the penalty as a tax. Elsewhere, Siegel is clear that he believes the individual mandate is constitutional under the Commerce Power. Neil Siegel, *Making the Case on Health Care Reform*, DUKE L. MAG., Winter 2012 at 26, 26–29, [http://law.duke.edu/sites/default/files/migrated\\_files/1340203309dl\\_file-news-pdf-lawmagwinter12.pdf](http://law.duke.edu/sites/default/files/migrated_files/1340203309dl_file-news-pdf-lawmagwinter12.pdf). I have been unable to identify any law professor who thought the individual mandate was constitutional under the Spending Power, but not under the Commerce Power.

Akhil Amar is a special case. Apart from the predictions noted already, in a 2011 piece, he argued that the PPACA was clearly constitutional under six different theories, including the Com-

What was the response of elite law professors to this highly salient signal of their failure to predict how the Supreme Court would handle the dispute? Instead of dining on humble pie, the routine response was rationalization—focusing on why the law professors had it right, and the Supreme Court had it wrong. Professor Fried stated he was “appalled at this radically reactionary new doctrine,”<sup>64</sup> and that the justices who voted to strike down the individual mandate on Commerce Clause grounds were “unhinged.”<sup>65</sup> Professor Tribe stated that the position of a majority of the Supreme Court was “entirely lacking in precedential, textual and historical support . . . .”<sup>66</sup> Professor Stone declared that “a radical group of five [J]ustices” had “run amok.”<sup>67</sup> Professor Huq dismissed Chief Justice Roberts’ opinion as “plainly wrong,” and attributable to the “off-the-wall libertarian maxims of [the] Tea Party fringe” of the Republican party.<sup>68</sup> Professor Balkin suggested that the constitutional arguments in the case had moved from “off-the-wall” to “on-the-wall” because they had

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merce Power, the Tax Power, and the “central meaning and deep spirit of the Thirteenth Amendment and the first sentence of the Fourteenth Amendment . . . .” Akhil Amar, *The Lawfulness of Health Care Reform* 28 (Yale Law Sch., Pub. Law Working Paper No. 228, 2011) available at <http://ssrn.com/abstract=1856506>. Subsequently, in a piece in *Slate* written after oral argument, Amar also offered the following: “One possibility [for upholding the constitutionality of PPACA], perhaps, might build on various comments by Chief Justice Roberts and Justices Sotomayor, Kagan, Breyer, and others, at oral argument. The ‘mandate’ should not be understood as [a] free-floating requirement but simply as connected to the tax-penalty. In turn, the penalty can be upheld as a genuine revenue measure designed to bend down the cost curve. If the relevant statutory section needs in effect to be ‘reworded’ to achieve this result, a judicial re-writing/re-reading of this section would be in keeping with various earlier cases . . . .” Akhil Reed Amar, *How to Defend Obamacare*, *SLATE* (March 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\\_single.html](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_single.html) [hereinafter Amar, *How to Defend Obamacare*].

In both pieces, Amar was clear that he thought the individual mandate was constitutional under the Commerce Power, and arguments to the contrary were facially absurd. There is also an important difference between the statement “the Supreme Court can uphold the individual mandate under the tax power” (let alone the observation that there was a “possibility” that the Supreme Court “perhaps, might” uphold the individual mandate on that basis) and an actual bona fide prediction “the Supreme Court will uphold the individual mandate under the tax power.”

Even if one implausibly credits the “one possibility. . . perhaps might” language as a falsifiable prediction that the Supreme Court, would, in fact uphold PPACA on the basis of the taxing power, it still remains the case that it came after oral argument, and only after Amar repeatedly went all-in on the same losing hand as the rest of the law professors quoted in this article (i.e., that Courts would uphold PPACA based on the Commerce Power).

Perhaps one who bets on all of the horses in a race can be said to have predicted the winner, but that is, to say the least, an unusual understanding of the word “predicted.” *Cf.* *THE PRINCESS BRIDE* (20th Century Fox, 1987) (“You keep using that word. I do not think it means what you think it means.”).

64. Charles Fried, Online Symposium: *Radical Opinions, Modest Result*, SCOTUSBLOG (July 2, 2012, 12:41 PM), <http://www.scotusblog.com/2012/07/online-symposium-radical-opinions-modest-result/>.

65. Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, 38 J. HEALTH, POL., POL’Y & L. 225, 237 (2013).

66. Laurence Tribe, *Chief Justice Roberts Comes into His Own and Saves the Court While Preventing a Constitutional Debacle*, SCOTUSBLOG (June 28, 2012, 3:41 PM), <http://www.scotusblog.com/2012/06/chief-justice-roberts-comes-into-his-own-and-saves-the-court-while-preventing-a-constitutional-debacle/>.

67. John Flynn Rooney, *Professor Criticizes Justices*, CHI. DAILY L. BULL., July 11, 2012, at 1.

68. Aziz Huq, *In the Healthcare Decision, a Hidden Threat?*, NATION (June 29, 2012), <http://www.thenation.com/article/168677/healthcare-decision-hidden-threat#>.

been embraced by the Republican party.<sup>69</sup> Professor Pam Karlan (Stanford University) wrote that the five justices who had voted to strike down PPACA on Commerce Clause grounds had shown “disdain” for Congress and for the democratic process.<sup>70</sup> Professor Einer Elhauge wrote a book arguing that the Supreme Court had overlooked long-standing precedent explicitly authorizing an individual mandate—and had the book “blurbed” by several of the law professors who had made erroneous predictions about how the federal courts would handle the dispute.<sup>71</sup> Professor Koppelman wrote a book claiming that a majority of the Supreme Court was giving aid and comfort to a “fringe libertarian legal movement bent on eviscerating the modern social welfare state”<sup>72</sup> by embracing a “Tough Luck Constitution.”<sup>73</sup>

The news media was equally unrepentant. In a piece published the day after the opinion in PPACA was issued, Greenhouse described the position of the four conservative justices as “breathtaking radicalism,” and an “astonishing act of judicial activism” that would have driven “the Supreme Court over the cliff and into the abyss.”<sup>74</sup> At a conference six months later, when asked to address why law professors and the news media had gotten the case so badly wrong, Greenhouse laughed and simply ignored the question.<sup>75</sup>

69. Balkin, *supra* note 10 (“The changing perception of the individual mandate is an example of one of the most important features of American constitutional law -- the movement of constitutional claims from ‘off the wall’ to ‘on the wall.’ Off-the-wall arguments are those most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them.”).

In fairness, Balkin adopted this position well before the Supreme Court ever got near the case. Jack M. Balkin, *Randy Barnett Wants Us to Know that His Commerce Clause Argument Is not Frivolous*, BALKINIZATION (July 19, 2010, 1:48 PM), <http://balkin.blogspot.com/2010/07/randy-barnett-wants-us-to-know-that-his.html>. One obvious difficulty: Balkin offers no evidence that the constitutional claim at stake was, in fact “off the wall” apart from the academic consensus on that point—making the “argument” completely circular.

70. Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 51–53 (2012). For responses, see Randy E. Barnett, *The Disdain Campaign*, HARV. L. REV. ONLINE F., [http://www.harvardlawreview.org/issues/126/november12/forum\\_975.php](http://www.harvardlawreview.org/issues/126/november12/forum_975.php) (last visited Mar. 20, 2014) (noting that the Left had long engaged in a campaign of disdain against conservative justices); Steven G. Calabresi, *The Constitution and Disdain*, HARVARD L. REV. ONLINE F., [http://www.harvardlawreview.org/issues/126/november12/forum\\_976.php](http://www.harvardlawreview.org/issues/126/november12/forum_976.php) (last visited Mar. 20, 2014) (“It is a puzzle that Professor Pamela Karlan could fault the Roberts Court for its disdain for Congress in a case where the Court upheld an act of Congress that a popular majority hates.”).

71. EINER ELHAUGE, *OBAMACARE ON TRIAL* (2013). The book was “blurbed” by Professors Laurence Tribe (Harvard University), Lawrence Lessig (Harvard University), and David Strauss (University of Chicago).

72. Andrew Koppelman, *The Tough Luck Constitution and the Assault on Health Care Reform*, BALKINIZATION (Mar. 15, 2013, 5:18 PM), <http://balkin.blogspot.com/2013/03/the-tough-luck-constitution-and-assault.html>.

73. ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* 16 (2013).

74. Linda Greenhouse, *The Mystery of John Roberts*, N.Y. TIMES OPINIONATOR (July 11, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/07/11/the-mystery-of-john-roberts/>.

75. See IIT Chicago-Kent College of Law, *Supreme Court Journalists Roundtable*, YOUTUBE (Dec. 5 2012), <http://www.youtube.com/watch?v=hiMOgPkcXvE> (at 1:08:03).

## III. THE CASE FOR THE DEFENSE

Is there anything to be said in defense of the predictions made by our nations' law professors? I address three possible defenses.

1. 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.

Every law professor quoted above has their own personal view of what the Constitution authorizes and prohibits—and like most law professors, each is happy to share their opinion with all and sundry. Had law professors limited themselves to such statements, it would be unfair to suggest they had made inaccurate predictions (or predictions of any sort). But the law professors quoted in this article made explicit predictions *about how the federal courts would handle these cases*. Even those quotes that might not appear to be explicitly predictive employed language that implied a confident prediction as to the expected outcome.

Context is also important in analyzing these statements. Most of the statements collected above were published in newspaper articles and broadcast through other media sources. 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 am 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. Instead, readers and viewers wanted to know what was likely to happen in the litigation over the constitutionality of PPACA. That was why reporters, who were preparing an article on the dispute, called law professors for quotes in the first place.

2. The predictions were wrong, but making predictions about the Supreme Court is hard. The kind of case that ends up before the Supreme Court can go either way, and that is particularly true of intensely political cases like the challenge to PPACA. Plus, the Supreme Court is made up of judges that do not have enough political experience, making the Supreme Court even less predictable. So, even though law professors were wrong, their mistake was understandable.

There is a lot to be said for this set of excuses. Those who study and teach constitutional law assuredly know that almost anything can happen when a high-profile case makes it to the Supreme Court.<sup>76</sup> Indeed, law

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76. See, e.g., Barry Friedman & Dahlia Lithwick, *Was John Roberts Being Political?*, SLATE (July 2, 2012, 6:40 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/07/john\\_roberts\\_probably\\_weighed\\_legal\\_and\\_political\\_concerns\\_in\\_reaching\\_his\\_decision\\_on\\_the\\_aca\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/john_roberts_probably_weighed_legal_and_political_concerns_in_reaching_his_decision_on_the_aca_.html) (“Candor compels conceding that a decision in either direction would have been plausible as a matter of law. That’s almost invariably true in big-ticket cases that reach the top of our judicial pyramid. Contrary to the popular assumption that every single case has an easy answer (one that invariably tracks the speaker’s ideological preferences), these cases get to the Supreme Court precisely because smart people on both sides have come to conflicting results in the lower courts.”); Charles Silver, Book Review, NOTRE DAME PHIL. REV. (June 2008), <http://ndpr.nd.edu/news/23589-legal-ethics-and-human-dignity/>

professors routinely complain or celebrate this fact, depending on whether they are on the winning or losing side of any given dispute. Since they had to have known about this feature of Supreme Court decision making, the failure of law professors to either refuse to make predictions, or appropriately hedge or limit the predictions they made makes things worse, not better.

3. The predictions were right. The Supreme Court upheld PPACA, just as law professors predicted. They have nothing to apologize for and should in fact be celebrated for their insight.

The final defense adopts the maxim “the best defense is a good offense.” After all, if their predictions were correct, law professors should be congratulated, rather than criticized. Naturally, this defense does not work nearly as well for the outcomes before the case landed before the Supreme Court—but who cares about the lower courts? The bottom line, when the case was decided by the Supreme Court, was that PPACA was constitutional, and that is that.

Had law professors limited themselves to a simple prediction that “the Supreme Court will uphold PPACA,” they would have a more plausible argument on this point—but even here, the Supreme Court striking down the Medicaid expansion on Spending Clause grounds by a vote of 7-2 should cause considerable discomfort for those inclined to adopt this defense. More importantly, the predictions made by law professors were not limited in this fashion.

Instead, law professors repeatedly and emphatically explained that the case was an exceptionally easy one *because of the broad reach of the Commerce Power*. Viewed from this vantage point, law professors accurately predicted the substantive content of Justice Ginsburg’s concurrence/dissent (joined by Justices Breyer, Sotomayor, and Kagan); but her concurrence/dissent was not the holding of the Supreme Court, *which is what law professors were predicting*.<sup>77</sup> The fact that the Supreme Court ultimately upheld a modified version of the individual mandate on Taxing Power grounds (and did so in a way that made it an option rather than a mandate) does not change the fact that law professors’ predictions were explicitly tied to the individual mandate being upheld on the basis of the Commerce Power.

Of course, one might respond that doctrine does not really matter when the Supreme Court has to decide constitutional cases—but then

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(“The U.S. Supreme Court is a court of law, but law constrains the Court only when the Court wants it to. No one can reverse the Court when it gets the law wrong or exceeds its lawful powers. You may rightly think the Court got the law wrong hundreds of times, but the Court has the final say on what the law is, and it disagrees. You may rightly think the Court lacked jurisdiction to decide a particular matter, but the Court wanted to decide it, so it did.”).

77. See Randy E. Barnett, *Who Won the Obamacare Case*, in *THE HEALTH CARE CASE* 17, 20 (Nathaniel Persily et al. eds., 2013) (noting that Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Part III.C of Justice Roberts’ opinion, which states “[t]he Court today *holds* that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”). Although Justices Scalia, Thomas, Kennedy and Alito dissented, their joint dissent clearly adopted a similar view of the scope of the Commerce Power.

why did law professors frame their predictions around the Commerce Power to begin with? Certainly, Justice Ginsburg did not write her concurrence/dissent on the basis that doctrine does not matter. And, it is hard to know how one would structure an argument that doctrine does not matter in a brief for the Supreme Court, let alone for the lower courts.

Law professors acted throughout the litigation over PPACA as if doctrine did matter. They framed their predictions and their claims to expertise around doctrine. They wrote and signed amicus briefs based on doctrine. They quoted from doctrine in their media appearances. They were being called by the media because of their claimed expertise in doctrine. And last but not least, they ridiculed those who read the doctrine differently than they did.

To be sure, if elite law professors are willing to abandon doctrine so readily in order not to be proven wrong on PPACA, maybe we should let them do just that. After all, if doctrine really does not matter in constitutional law, we can drop the subject from the law school curriculum, and use the power of the purse to encourage (but certainly not mandate) those engaged in teaching and writing constitutional law to turn their skills to other areas.<sup>78</sup> Doing so might also dissuade some aspiring law students with unrealistic expectations about what their legal careers will actually involve.<sup>79</sup>

Having addressed these three possible defenses, I now turn to five factors that might explain why our nation's constitutional law professors were so off base.

#### IV. FIVE FACTORS THAT MIGHT EXPLAIN HOW THIS HAPPENED

What might explain the epic failure of the nation's most elite experts on constitutional law to predict how the federal courts would decide the challenge to PPACA? I suspect (but certainly can not prove) that five complementary factors help explain the observed results.<sup>80</sup> First, most law professors do not have the practical experience necessary to accurately assess the probabilities of high-stakes litigation like the constitu-

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78. That is certainly Judge Richard Posner's recommendation. RICHARD POSNER, REFLECTIONS ON JUDGING 347-48 (2013) ("If room needs to be made in the curriculum by cutting or shortening other courses, there is a good place to start: it is called constitutional law. Dominated as it is by the most political court in the land, constitutional law occupies far too large a role in legal education.").

79. As one of my colleagues who prefers to remain anonymous wryly observed, law students may dream about arguing a case before the Supreme Court, but most end up spending their legal careers dealing with mechanic's liens. See also David Kazzie, *So You Want to Go to Law School*, YOUTUBE (Oct. 14, 2010), <http://www.youtube.com/watch?v=nMvARy0IBLE> ("Listen, there are like three lawyers in America who argue constitutional issues. They all went to Harvard and graduated in the 1970's.").

80. I am not the first to identify some of these factors. See Jonathan H. Adler, *Why Did Legal Elites Underestimate the Case Against the Mandate?*, VOLOKH CONSPIRACY (Mar. 30, 2012, 11:53 AM), <http://www.volokh.com/2012/03/30/why-did-legal-elites-underestimate-the-case-against-the-mandate/>; Peter Suderman, *The Liberal Legal Bubble*, REASON.COM (Mar. 30, 2012), <http://reason.com/archives/2012/03/30/the-liberal-legal-bubble>.

tional challenge to PPACA. Second, instead of conducting a neutral assessment of the actual probabilities, most law professors engaged in motivated reasoning, based on their preexisting political and policy preferences. Third, the psychology of constitutional law professors, coupled with the status hierarchy of the legal academy, led law professors to massively overestimate the probability of success, and suppress any misgivings or hedging. Fourth, because law professors are bad at math, they do not understand the law of small numbers. For this reason, they assumed the outcome of any individual case was necessarily dictated by their understanding (skewed as it was, at least in retrospect) of the larger doctrinal framework. Finally, once it became clear that PPACA was in serious danger of being struck down, law professors decided to pursue politics through other means, by threatening to delegitimize the Supreme Court if it decided the “wrong” way. The balance of this essay considers each of these factors in turn.

#### A. *Law Professors Have Insufficient Practical Experience*

Most law professors have little practical experience. Indeed, based on my experience as a member (and one-time chair) of the appointments committee at the University of Illinois, extensive practical experience is a distinct negative in the academic hiring market. Once one becomes a full-time academic, it is difficult to maintain substantial practical experience, barring a significant consulting practice—which few constitutional law professors are able to do, since supply far outstrips demand. Further, as has long been apparent, there is substantial disjunction between the scholarly and academic concerns of most law professors and the concerns of judges and the practicing bar.<sup>81</sup>

Thus, law professors unduly discounted the practical difficulties associated with defending PPACA, in no small part because they failed to notice that a majority of the Supreme Court no longer shared their views on the Commerce Clause. Instead, law professors simply relied on the “consensus academic gestalt” that there were no court-enforced limits on Congress’ power under the Commerce Clause.<sup>82</sup>

One result was that law professors either ignored or dramatically downplayed the importance of identifying a coherent limiting principle on the scope of the Commerce Power. As Professor Michael McConnell (Stanford University) aptly noted,

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81. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). See also *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), available at <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> (“Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”).

82. Lawrence Solum, *The Decision to Uphold the Mandate as Tax Represents a Gestalt Shift in Constitutional Law*, LEGAL THEORY BLOG (June 28, 2012, 10:32 AM), <http://lsolum.typepad.com/legaltheory/2012/06/the-decision-to-uphold-the-mandate-as-a-gestalt-shift-in-constitutional-law.html>. See also Barnett, *supra* notes 40 & 77.

the oral arguments made before the Supreme Court in March revealed that the defenders of the health-care mandate are unable to identify any line between what they say Congress can do and what it cannot. The solicitor general offered various reasons why health care is unique, but none of them are grounded in any principle based in constitutional text, history or theory.<sup>83</sup>

Indeed, oral argument went so poorly for those defending PPACA it prompted a complete melt-down of the nation's elite law professors.<sup>84</sup>

Of course, law professors blamed politically-motivated reasoning on the part of the conservative justices for their expected refusal to adhere to the consensus academic gestalt.<sup>85</sup> Whether this assertion had any factual foundation, it seems not to have occurred to the nation's law professors that liberal justices (and their cheering section of law professors) might also be engaged in politically-motivated reasoning. In retrospect, both arguments are harder to make, given the fact that Justice Roberts voted to uphold the mandate, and Justices Breyer and Kagan voted to hold the Medicaid expansion to be unduly coercive—as well as the fact that in the lower courts, two judges appointed by a Republican president voted to uphold PPACA and one judge appointed by a Democratic president voted to strike down PPACA.<sup>86</sup>

Further, it is worth noting that although almost all law professors focused exclusively on the Commerce Power, the lawyers who actually

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83. Michael W. McConnell, *The Liberal Legal Meltdown Over Obamacare*, WALL ST. J. (May 24, 2012), <http://online.wsj.com/article/SB10001424052702304707604577422923531419782.html>. But see Vikram David Amar, *Obamacare and the Misguided Criticism of "Liberal Law Professors" Who Defend It*, VERDICT (June 7, 2012), <http://verdict.justia.com/2012/06/07/obamacare-and-the-misguided-criticism-of-liberal-law-professors-who-defend-it> ("I and many others who have written scholarship and other commentary on the case have done so because we do take the matters raised therein seriously.") (responding to Professor McConnell's op-ed).

84. See Randy Barnett, *Academic Reaction to Oral Argument on the ACA Challenge*, VOLOKH CONSPIRACY (Apr. 30, 2012), <http://www.volokh.com/2012/04/30/academic-reaction-to-oral-argument-on-the-aca-challenge/> ("A ruling invalidating the mandate would strike at the constitutional 'world view' of established legal academics on the left and many on the right too. That it why the traction of the challenge has taken them by surprise, as well as their visceral reaction to oral argument."); McConnell, *supra* note 83 ("In apparent panic at the tenor of the Supreme Court argument . . . liberal law professors have exploded with anticipatory denunciations of the court's conservative justices . . ."); Michael S. Greve, *Yale and the ACA*, LIBR. L. AND LIBERTY (Apr. 30, 2012), <http://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 ancien 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."); For a particularly clear example of this dynamic, see Klein, *supra* note 50. Or watch some of the video from Panel 6 of this conference at Yale Law School on Constitutional Interpretation and Change: *Constitutional Interpretation and Change Conference*, YALE L. SCH. (Apr. 27, 2012), <http://www.law.yale.edu/intellectuallife/constinterp12.htm>.

85. See, e.g., Klein, *supra* note 50.

86. Sarah Kliff, *Laurence Silberman: The Conservative Judge who Upheld Health Reform*, WASH. POST WONKBLOG (Nov. 8, 2011, 12:33 PM), [http://www.washingtonpost.com/blogs/wonkblog/post/laurence-silberman-the-conservative-judge-who-upheld-health-reform/2011/11/08/gIQA8tWM1M\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/laurence-silberman-the-conservative-judge-who-upheld-health-reform/2011/11/08/gIQA8tWM1M_blog.html).

had to defend PPACA in court also argued that the individual mandate was justified by the taxing power. This argument was the cause of considerable embarrassment for the Administration, since President Obama had flatly denied that claim in an interview less than a year earlier.<sup>87</sup> The few law professors who paid attention to the taxing power issue were mostly in agreement that PPACA should be upheld on that basis, although there were some who disagreed.<sup>88</sup> However, this argument was rejected by every judge who heard it before the dispute got to the Supreme Court, where the taxing power ultimately provided the basis on which PPACA was upheld—although even then, the relevant provision had to be rewritten in order to attract the necessary fifth vote.

The best discussion of this problem is found in a remarkably revealing essay by Professor Lessig, writing about an entirely different case. Professor Lessig was lead counsel in a high-profile case over the constitutionality of extending the term for copyrights.<sup>89</sup> As Professor Lessig stated, the “case could have been won. It should have been won. And no matter how hard I try to retell this story to myself, I can’t help believing that my own mistake lost it.”<sup>90</sup> What was the mistake? As the subtitle of the piece reflects, it was that the plaintiff “needed the help of a lawyer, not a scholar.”<sup>91</sup> Several highly regarded lawyers who make their living doing appellate litigation advised Professor Lessig that his argument had to focus on the substantial harm to free speech and culture that would result from upholding the extension.<sup>92</sup> Otherwise, the Supreme Court would not be inclined to act in the face of opposition from major media companies, Congress, and copyright owners.

Professor Lessig confessed that he “hate[d] this view of the law,” and did not want “to sell [the] case like soap.”<sup>93</sup> So he instead focused on the kind of argument that law professors live and breath (i.e., whether the extension fell within the enumerated powers given to Congress by the Constitution). Predictably enough, he lost 7-2, because he had “*let a view of the law that I liked interfere with my view of the law as it is.*”<sup>94</sup>

Similar dynamics help explain why law professors so badly misjudged how federal judges would approach the merits of the PPACA. Practicing lawyers know better, but most law professors lack the necessary experience to think about such hazards—let alone take account of them in making predictive assessments.

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87. Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES (July 17, 2010), <http://www.nytimes.com/2010/07/18/health/policy/18health.html>.

88. *Id.*

89. Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS (Mar./Apr. 2004), [http://www.legalaffairs.org/issues/March-April-2004/story\\_lessig\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* (emphasis added).

*B. Motivated Reasoning in an Echo Chamber*

When people have a strong emotional stake in the outcome of a dispute, they have a hard-wired tendency to ignore evidence suggesting their prior views are incorrect, and they tend to focus on information confirming their prior view. Such “motivated reasoning” creates obvious difficulties for those interested in making accurate predictive assessments about the kind of high-profile disputes that end up before the Supreme Court. Worse still, people can readily “see” the exact same facts differently, depending on their cultural/political outlook on the issue in question.<sup>95</sup>

Did constitutional law professors have a strong emotional stake in the outcome of the litigation over PPACA, sufficient to trigger motivated reasoning on the part of those opining? There is good reason to think so. The law represented the signature domestic policy achievement of the Obama Administration—and the culmination of decades of effort by the Democratic Party. Previous research has demonstrated that law professors skew heavily Democratic, with massive underrepresentation of Republicans, conservatives, and evangelical or fundamentalist Christians.<sup>96</sup> In a previously unpublished survey I conducted at the University of Maryland School of Law in October and November 2001, I found that most of my colleagues voted like “yellow dog Democrats” in the Presidential elections from 1980–2000, with eighty percent consistently voting for the Democrat over the Republican, regardless of who was on the

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95. Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853–55 (2012).

96. John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1177 (2005) (finding that twenty-one percent of faculty at top law schools made campaign contributions, with eighty-one percent going to Democrats, with the Democratic bias higher at more elite schools). See also Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 163, 171 (1999) (citing studies that show that legal academy is overwhelmingly “left-liberal” with about eighty percent self-identifying as Democrats and only ten percent as conservatives); James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL’Y REV. 5, 8 (2005); Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI. KENT L. REV. 765, 780 n.54 (1998) (reporting that a large majority of (law professors) characterized themselves as “moderately” or “strongly liberal or left” in recent survey of the academy); Adam Liptak, *If the Law Is an Ass, the Law Professor Is a Donkey*, N.Y. TIMES (Aug. 28, 2005), <http://www.nytimes.com/2005/08/28/weekinreview/28liptak.html>; Jennifer Pohlman, *Law Schools Hiring Liberal Educators*, NATIONAL JURIST (Nov. 2010), <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist1110/index.php#14>; Peter Schuck, *Leftward Leaning*, YALE L. SCH. (Dec. 20, 2005), <http://www.law.yale.edu/news/1885.htm> (“[N]one of this will really surprise anyone who has spent any time in a faculty dining room at an elite school. Nor will it be news to anyone who has managed to plow through recent law review articles, especially on constitutional and public international law topics. (The data indicates that the Democratic bias is particularly great for teachers of these subjects, which lend themselves to politically inflected interpretations.)”); Jim Lindgren, *Political Diversity on Law School Faculties*, VOLOKH CONSPIRACY (Aug. 28, 2005, 2:12 PM), <http://www.volokh.com/posts/1125252745.shtml>. Strikingly, some people seem to believe that this ideological distribution is the sensible, natural, and inevitable order of things. See, e.g., Peter H. Schuck & Brian Leiter, *Do Law Schools Need Ideological Diversity?*, LEGAL AFFAIRS (Jan. 23, 2006), [http://legalaffairs.org/webexclusive/debateclub\\_diversity0106.msp](http://legalaffairs.org/webexclusive/debateclub_diversity0106.msp); KC Johnson, *Proving the Critics’ Case*, INSIDE HIGHER ED (Aug. 26, 2005), <http://www.insidehighered.com/views/2005/08/26/johnson> (collecting such views).

ticket.<sup>97</sup> Strikingly, when I presented the results, one of my former colleagues looked at the voting breakdown for the Maryland faculty in the 1984 Presidential election (in which Reagan received 58.8% of the popular vote, and the highest ever total in the Electoral College) and responded “who are the other assholes who voted for Reagan?”<sup>98</sup> Finally, although the University of Maryland School of Law was located approximately fifty miles from the Pentagon, where 184 Americans had died on 9/11—just over a month before the survey was fielded—I found more support among my colleagues for allowing gays to serve in the military and for abortion rights than for military action in Afghanistan.<sup>99</sup>

Of course, more direct evidence on the point would be helpful. Accordingly, I obtained information on the campaign contributions of the 130 law professors who signed the 2011 petition and the twenty-two law professors who responded to the 2012 survey referenced previously.<sup>100</sup> I also examined how many of the 130 law professors who signed the 2011 petition listed constitutional law as an area in which they taught in the AALS Directory. Table 1 presents the results of the analysis.

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97. A yellow dog Democrat would vote for a little yellow dog, as long as it was running on the Democratic ticket. *Yellow Dog Democrat*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Yellow\\_dog\\_Democrat](http://en.wikipedia.org/wiki/Yellow_dog_Democrat) (last visited Mar. 20, 2014).

I surveyed fifty-seven faculty members, and received thirty-one responses. To simplify the analysis, I excluded those who didn't vote or voted for a third party candidate from the calculation. After excluding those two groups, the actual percentages who voted for the Democratic candidate ranged from seventy-six percent (Dukakis-Bush) to eighty-six percent (Clinton-Bush). By way of comparison, the mean Democratic candidate received approximately forty-eight percent of the national vote (exclusive of third-party candidates) during this period.

98. See *Historical Election Results*, NATIONAL ARCHIVES, <http://www.archives.gov/federal-register/electoral-college/scores.html#1984> (last visited Mar. 20, 2014).

99. The survey asked respondents to select their position on a one to five scale, where one was strongly oppose, and five was strongly support. Military action in Afghanistan (which had just commenced when the survey was taken) had a mean score of 3.7. Allowing gay individuals to openly serve in the military had a mean score of 4.2. Abortion rights had a mean score of 4.4. The difference in mean scores was statistically significant for military action in Afghanistan versus abortion rights, but not for military action in Afghanistan versus allowing gays to serve openly in the military.

100. Information on campaign contributions is available from [opensecrets.org](http://www.opensecrets.org). OPEN SECRETS, <http://www.opensecrets.org> (last visited Mar. 20, 2014). I evaluated contributions in a series of searches done in July and August, 2012. I counted as “Democratic” all contributions to candidates designated as Democrats, contributions to the DNC, and contributions to organizations affiliated with progressive causes (e.g., [Moveon.org](http://www.moveon.org)). A similar approach was used for the vanishingly small number of contributions to Republicans. I used the employer as the basis for identifying which contributions were attributable to those who signed the petition. Thus, if individuals contributed before they became law faculty, or did not identify themselves as a university employee, My figures do not reflect such contributions. Overall, contributions totaled roughly \$510,000.

TABLE 1: CAMPAIGN CONTRIBUTIONS BY PETITION/SURVEY PARTICIPANTS

	No.	Teach Con Law?	Donated?	Contributions	
				Mean	% Democrat
Petition	130	55%	49%	\$6,400	100.0%
Survey	22	100%	64%	\$10,000	98.7%
All	146	65%	51%	\$6,900	99.6%

“Teach Con Law” was determined based on whether the subject was listed in the profile for each respondent in the 2011–2012 AALS Directory. In three instances, the AALS directory did not include sufficient detail to determine appropriate classification, so the information on the individual faculty webpages for those three was consulted.

As Table 1 makes clear, essentially all of the campaign contributions made by those who signed the 2011 petition or participated in the 2012 survey, totaling roughly \$10,000, went to Democrats and their affiliated entities.<sup>101</sup> Participants in the 2012 survey, which was limited to teachers and scholars of constitutional law, were more likely to contribute, and contributed greater amounts than those who participated in the 2011 survey, but the pattern of political ideology reflected by those contributions is indistinguishable.

Table 1 could be offered to suggest that law professors made predictions based solely on their political preferences, or that law professors’ ideological/theoretical framework was driven by preexisting partisan

101. This pattern is not limited to law schools. The top donors to President Obama’s 2008 campaign were, in order, employed by the University of California, Goldman Sachs, and Harvard University. See *Top Contributors to Barack Obama, 2008 Presidential Election*, OPEN SECRETS, <http://www.opensecrets.org/pres08/contrib.php?cid=N00009638> (lasted visited Mar. 20, 2014). Stanford was tenth on the list, and Columbia was thirteenth. By way of comparison, no university appeared in the list of the top twenty donors to Senator McCain. See *Top Contributors to John McCain, 2008 Presidential Election*, OPEN SECRETS, <http://www.opensecrets.org/pres08/contrib.php?cid=N00006424> (lasted visited Mar. 20, 2014).

During the 2012 election cycle, employees of the University of California were again first, but Harvard had slipped to fourth, while Stanford was seventh, Columbia was eleventh, and the University of Chicago was fourteenth. *Top Contributors to Barack Obama, 2012 Presidential Election*, OPEN SECRETS, <https://www.opensecrets.org/pres12/contrib.php?id=N00009638&cycle=2012> (last visited Mar. 20, 2014). Microsoft and Google were number two and three, respectively. Goldman Sachs, which was number two for Obama in 2008 was number one for Romney in 2012. No other university appeared in the top twenty for Romney. *Top Contributors to Mitt Romney 2012 Presidential Election*, OPEN SECRETS, <https://www.opensecrets.org/pres12/contrib.php?id=N00000286> (last visited Mar. 20, 2014). See generally Eric Owens, *Contributors Affiliated with University of California, Harvard are Obama’s No. 1, No. 4 Donor Groups*, DAILY CALLER (Oct. 23, 2012, 3:53 PM), <http://dailycaller.com/2012/10/23/contributors-affiliated-with-university-of-california-harvard-are-obamas-no-1-no-4-donor-groups/#ixzz2ADyuLiyh> (“Everyone knows American college campuses are teeming with hippies, tree-huggers and Democrats. That’s a dog-bites-man story. But a look at presidential campaign contributions makes the politically lopsided culture of academia stand out in stark relief.”).

commitments. But I offer Table 1 for a more limited purpose—to provide empirical evidence with which to assess the possibility that motivated reasoning might have played a role in the predictions made by those who signed the 2011 petition, participated in the 2012 survey, or offered predictions about the constitutionality of PPACA.

The status hierarchy of legal academics may have also played a role. To a person, law professors at highly-ranked law schools had declared the challenges to PPACA were frivolous, and then continually sought to one-up each other on how frivolous the challenges actually were. It would take considerable chutzpah for a professor at a lower-ranked law school to assert that the consensus judgment was wrong, and those who taught at fancy-schmancy law schools simply did not know what they were talking about.<sup>102</sup>

Table 1 also highlights an interesting (but so far overlooked) point. Forty-five percent of the law professors (59 of the 130) who signed the 2011 petition do not appear to teach constitutional law, at least based on the 2011–2012 AALS directory. What might possess a law professor who does not teach constitutional law to sign a petition on the constitutionality of PPACA? There are several obvious possibilities. The AALS directory may not actually reflect those who teach constitutional law, and/or one may be an expert on constitutional law without teaching it. But there are other possibilities; these individuals may have deferred to the judgment of those more expert than themselves, or thought taking constitutional law in law school qualified them to opine on these matters.<sup>103</sup> Or, they might have been engaging in expressive conduct, designed to show that they also believed in the “right” things, just like their colleagues who actually teach and/or write about constitutional law. Table 1 provides some suggestive evidence: the same ideological skew that prevails among those who teach constitutional law is replicated among those who teach other subjects, but to an even higher degree (which is almost impossible to achieve, given the 98.7% of contributions to Democrats among those who responded to the 2012 survey).

Regardless of which explanation is the right one, opining on matters on which one has no real expertise is, to say the least, problematic. As I

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102. See Alex Kozinski & Eugene Volokh, Essay, *Lawsuit, Shmawsuit*, 103 YALE L.J. 463 (1993). One person with sufficient chutzpah was Professor Eric Segall. See Eric Segall, *Health Care, the Commerce Clause and Broccoli: What the Obama Administration Must Do to Prevail in the Supreme Court*, HUFFINGTON POST (Dec. 12, 2011, 11:01 AM), [http://www.huffingtonpost.com/eric-segall/supreme-court-health-care-law\\_b\\_1143446.html](http://www.huffingtonpost.com/eric-segall/supreme-court-health-care-law_b_1143446.html) (arguing that PPACA could well be held unconstitutional if the Obama Administration did not change its litigation strategy and clearly articulate a limiting principle on the scope of the Commerce Power).

103. For those inclined to the last explanation, the 130 petition signers went to forty different law schools, with five schools (Chicago, Harvard, Michigan, Stanford and Yale) accounting for fifty-seven percent of total signatories. Of these, thirty-eight percent of Stanford graduate-signers, forty-four percent of Michigan-graduate signers, fifty percent of Harvard-graduate signers, seventy-eight percent of Chicago-graduate signers, and eighty-one percent of Yale-graduate signers are listed in the AALS directory as teachers of constitutional law. Appendix A provides detail on the law school attended by each of the signatories of the 2011 petition, along with their institutional affiliation, as listed in the 2011 petition.

have noted elsewhere, “[s]pecialties exist because there are gains from specialization—no sensible person picks a pathologist or convenience store clerk to perform neurosurgery.”<sup>104</sup> If you have migraines, whose advice would you rely on? A neurologist who specializes in migraines, or a pathologist, whose only experience with migraines is a thirty minute lecture from a decade or earlier, when they were in medical school? A rationally ignorant patient would be very unhappy to discover that a pathologist was holding himself out to the public as an expert on the treatment of migraines. Maybe law is different, and everyone can be an expert on constitutional law. Alternatively, maybe law professors should be less promiscuous in their claims of expertise, if only to keep from watering down the currency they are all trafficking in.

Of course, campaign contributions may not signal partisan loyalty/commitment of the intensity necessary to result in motivated reasoning. And, roughly half of the law professors in Table 1 did not donate at all, or if they donated it was less than the \$250 threshold for reporting. Some donations may have been the result of friendship rather than signaling political partisanship. Notwithstanding all these limitations, the results provide some insight into the self-reinforcing echo-chamber in which law professors made the predictions detailed above.<sup>105</sup>

Those who are inclined to discount or ignore the findings in Table 1 should at least consider whether they would be quite so dismissive if the ideological/campaign contribution distribution went the opposite way. Or, try the thought experiment suggested by Professor Jim Lindgren at a conference on Intellectual Diversity and the Legal Academy held at Harvard Law School in April 2013:

Imagine that the Harvard Law School for twenty years hired no entry level Democrats. Only Republicans. Don't you think that the school would look very different? I suspect American government, American society would look very different. It think it absolutely does matter. The American Constitution Society would be holding this conference and howling louder than the concerns being raised here if the situation were reversed.<sup>106</sup>

### C. *The Problem with Life is the Personnel*

Law professors are not known for their modesty. But even among this group, those who teach and write about constitutional law stand out.

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104. David A. Hyman, *An Outsider Perspective on Intellectual Property Discourse*, in *PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT* 275, 276 (F. Scott Kieff, ed., 2003).

105. Such circumstances are particularly likely to lead to group polarization, accompanied by the belief that one's views are not just morally justified, but morally required. See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) (exploring these dynamics); CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009) (same).

106. Comments of Harvard Federalist Society Intellectual Diversity Conference, *Panel I: Problem: Is There a Lack of Intellectual Diversity in Law School Faculties?*, HARVARD L. SCH. (Apr. 5, 2013), <http://www3.law.harvard.edu/orgs/fedsoc/intellectual-diversity-conference/> (comments of Professor James Lindgren (at 42:07 minutes)).

And why not? It is the Supreme Court. It is the Supreme Law of the Land. The Constitution is the ultimate trump card, allowing one to sweep one's opponents' chess pieces from the board. If self-doubt ever had the temerity to rear its ugly head, constitutional law professors just have to consult their very own Supremacy Clause.

Legal scholarship in this area reflects these traits: grand theory rules, and the dominant strategy of constitutional law scholarship generated by those educated at one elite law school (which need not be named for everyone to know where I am talking about) is to explain why the author's preferred policies are constitutionally required, while policies the author dislikes are constitutionally prohibited. Law students enable these dynamics by publishing a heavily disproportionate number of constitutional law-related articles relative to any plausible baseline. These are not the kind of circumstances that are likely to lead to cautious and limited predictive judgments; to admit doubt or hedge is to signal that one is not ready to play in the show.

Admittedly, 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. And anecdotal identification of exemplars is thoroughly unscientific, no matter how much fun it is.<sup>107</sup>

In the absence of direct evidence on this point, I offer instead a short summary of an extensive body of research on how personality and preferred mode of reasoning can lead experts astray when they make predictions. Do the italicized sentences, drawn from an interview of Professor Philip Tetlock, sound like anyone you know?

Like all of us, experts go wrong when they try to fit simple models to complex situations. (“It’s the Great Depression all over again!”) They go wrong when they leap to judgment or are too slow to change their minds in the face of contrary evidence. . . .

The most important factor [for successful forecasting] was not how much education or experience the experts had but how they thought. You know the famous line that [philosopher] Isaiah Berlin borrowed from a Greek poet, “The fox knows many things, but the hedgehog knows one big thing?” The better forecasters were like Berlin’s foxes: self-critical, eclectic thinkers who were willing to update their beliefs when faced with contrary evidence, were doubtful of grand schemes and were rather modest about their predictive ability. *The less successful forecasters were like hedgehogs: They tended to have one big, beautiful idea that they loved to stretch, some-*

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107. See, e.g., Charlie Savage, *For an Obama Mentor, A Nebulous Legal Niche*, N.Y. TIMES (Apr. 7, 2010), <http://www.nytimes.com/2010/04/08/us/politics/08tribe.html?pagewanted=all> (Professor Laurence Tribe’s friends describe him as “having a big intellect and a healthy ego”).

*times to the breaking point. They tended to be articulate and very persuasive as to why their idea explained everything.*<sup>108</sup>

To summarize:

1. Constitutional law attracts hedgehogs;
2. Doing constitutional law aggravates incipient hedgehog tendencies;
3. Hedgehogs suck at predictions;
4. Q.E.D.

#### *D. The Law of Small Numbers*

Making predictions is hard.<sup>109</sup> And making predictions about the outcome in a single case before any given judge or set of judges based solely on an understanding of the applicable doctrinal framework is harder still. In part, this is because of the hazards of litigation.<sup>110</sup> However, incorrect intuitions about probability also contribute to the problem. Extensive research has shown that people believe that small samples mirror the population from which they are drawn.<sup>111</sup> It is this belief that is the source of the “gambler’s fallacy,” but it also helps explain why law professors were so willing to make sweeping predictions, not just about how the challenges to PPACA would fare in the Supreme Court, but also in the lower courts.

Unfortunately for those making predictions, the law of small numbers means that the outcome in any given case can deviate from expert expectations (even far better informed expert expectations than was the instance in this case) without undermining the validity of the general framework. That simple fact should have made elite law professors extremely reluctant to make definitive predictions—but instead it seemingly empowered them to make over-the-top predictions.

#### *E. Making the Weather/The Pursuit of Politics By Other Means*

The preceding factors may help explain how elite constitutional law professors got it so wrong prior to oral argument before the Supreme Court. But, what explains their conduct after oral argument, when it became clear that the constitutionality of PPACA was in serious jeopardy?

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108. Eric Schurenberg, *Why the Experts Missed the Crash*, MONEY MAG. (Feb. 18, 2009, 4:10 PM), [http://money.cnn.com/2009/02/17/pf/experts\\_Tetlock.moneymag/index.htm](http://money.cnn.com/2009/02/17/pf/experts_Tetlock.moneymag/index.htm) (emphasis added). See also PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (2009) (summarizing research on expert political judgment).

109. Hence the saying, “It’s tough to make predictions, especially about the future.” The aphorism has been attributed to Neils Bohr, Mark Twain, and Yogi Berra. See Quote Investigator, <http://quoteinvestigator.com/2013/10/20/no-predict/> (last visited Apr. 14, 2014).

110. See, e.g., Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 103 (1984) (“Whenever contract parties choose to litigate, they necessarily expose themselves to the uncertainties inherent in the litigation process. These uncertainties often frustrate attempts to predict exactly how the courts will arrive at a decision and what that decision will be.”).

111. Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105, 105 (1971).

Rather than admit error, or rethink their original assessment of the probabilities, many of the nation's elite law professors participated in an extraordinary campaign threatening the Supreme Court (more specifically, threatening Justices Kennedy and Roberts, the plausible swing justices), with de-legitimization if they didn't rule the "right" way.<sup>112</sup>

A few examples make the point. Professor Tribe soothingly assured readers of the *New York Times* in February 2010 that the Supreme Court would easily resolve the challenges, and it was "distressing that many assume that its fate will be decided by a partisan, closely divided Supreme Court."<sup>113</sup> By June 2012 the gloves were off, and Professor Tribe warned that striking down PPACA would result in substantial costs "for the Court as an institution and for its credibility in carrying out its vital national role going forward."<sup>114</sup> Professor Amar contributed a Q&A of the oral argument he would have given if the Solicitor General had only allowed him to argue the case.<sup>115</sup> In language that is immune to parody, he earnestly observed that PPACA should be upheld because he would be unable to explain an adverse decision to his students.<sup>116</sup> Professor Lessig made almost exactly the same point, using similar language.<sup>117</sup> Professor Ronald Dworkin (New York University) wrote a lengthy piece for the *New York Review of Books* that closes with the observation that PPACA is "plainly constitutional," and a decision holding otherwise

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112. The campaign was not limited to academics. See Randy E. Barnett, *Foreword, in UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE*, x, xi (2013) ("After this case was submitted to the Supreme Court, many on the left—from President Obama to Patrick Leahy, the chairman of the Senate Judiciary Committee, to journalists such as Maureen Dowd, E. J. Dionne, and Jeffrey Rosen—vociferously waged what I called a 'campaign of disdain' against the conservative justices in general, and Chief Justice Roberts in particular, in an effort to influence and even intimidate one or more of the justices to capitulate.").

113. Tribe, *supra* note 14.

114. David Gergen & Michael Zuckerman, *Supreme Court in No-Win Position on Obamacare?*, CNN (June 12, 2012, 2:32 PM), <http://www.cnn.com/2012/06/12/opinion/gergen-supreme-court/index.html>.

115. See Amar, *How to Defend Obamacare*, *supra* note 63.

116. *Id.* ("I have to teach the stuff that Your Honors write year in and year out to my students. And if a judicial opinion simply fails tests of text, history, structure, and logic—and if it comes down by a 5-4 vote; and if the vote seems to track the party-alignment of appointing presidents; and if the four dissenters are emphatic that the majority's arguments simply don't wash; and if the vast majority of us who study constitutional law professionally, including most conservative scholars, agree that these arguments simply don't wash; and if I already have to do a lot of work to explain *Bush v. Gore*, in context—well, what will I tell my students when they say to me, cynically, that 'it's all politics'? What will I say, when they ask me (as I have already been asked by one former student): 'Just how many presidential elections are five conservative justices allowed to undo?'").

117. Lessig, *supra* note 39 ("I and many others want the ability to present the work of the Court in a way that belies the common but (we believe) uninformed view that all law, especially constitutional law, is just politics. If the Court strikes this law, then that hope fades. The Court has been asked to limit the scope of Congress's authority in a wide range of cases. Some of these have been for liberal causes, some for conservative. . . . [W]ith . . . liberal cases, limits were not enforced. But when the cause is conservative, the willingness to limit Congress' power comes alive. . . . With that score sheet, I fear the cynics win. When the Frieds, or Tribes (or Lessigs) of the world want to insist that 'it's not all just politics,' the cynics (including most forcefully, our students) will insist the facts just don't support the theory. Even I would have to concede the appearance that it's just politics, even if I don't believe I could ever believe it.").

would “soil” the Supreme Court’s reputation.<sup>118</sup> Other law professors made it clear that they would view an adverse decision as completely delegitimizing.<sup>119</sup> These views were picked up, repeated, and amplified by like-minded politicians, reporters, and bloggers—all using tactics that had been road-tested in the earlier campaign waged by the same groups against the Supreme Court’s decision in *Citizens United*.

This strategy substantially raised the political stakes of the dispute, which were high to begin with. For elite constitutional law professors, already inclined to view the Supreme Court as both a political and legal institution, and, as a group, generally committed to an expansive view of federal power, such measures were perfectly reasonable. This was an explicitly bare-knuckles political campaign, waged by a group of elite law professors convinced that they were right and the Supreme Court was about to be wrong. By pursuing politics through other means, the campaign was effectively a declaration of war on those who did not share the academic consensus on the scope of federal power.<sup>120</sup>

To summarize, our nation’s elite law professors organized the academic equivalent of a vigilance committee to enforce what they had defined for themselves as the range of acceptable, mainstream views when it came to the Constitution—just as they had done several decades previously when Robert Bork was nominated to the Supreme Court.<sup>121</sup> The

118. Ronald Dworkin, *Why The Mandate is Constitutional: The Real Argument*, N.Y. REV. BOOKS (May 10, 2012), <http://www.nybooks.com/articles/archives/2012/may/10/why-mandate-constitutional-real-argument/#fn-1> (“[T]he act is plainly constitutional and it will be shaming if, as so many commentators now expect, those [J]ustices do what Obama’s enemies hope they will. Our recent history is marred by a number of very badly reasoned Supreme Court decisions that, deliberately or not, had a distinct partisan flavor: *Citizens United*, for example, which, most critics agree, has already had a profound and destructive impact on our democratic process. These decisions soiled the Supreme Court’s reputation and they harmed the nation. We must hope, though perhaps against the evidence, that the Court will not now add to that unfortunate list.”).

119. See, e.g., Richard L. Hasen, *A Court of Radicals*, SLATE (Mar. 30, 2012, 4:36 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/supreme\\_court\\_and\\_obamacare\\_will\\_the\\_court\\_s\\_conservatives\\_strike\\_down\\_the\\_affordable\\_care\\_act\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/supreme_court_and_obamacare_will_the_court_s_conservatives_strike_down_the_affordable_care_act_.html) (arguing that an adverse decision could cause the Court’s legitimacy to “suffer in ways which we have never seen”); Bradley Joondeph, *Is the Supreme Court Playing with Fire?*, CNN (Apr. 3, 2012, 4:38 PM), <http://www.cnn.com/2012/04/03/opinion/joondeph-supreme-court-risk/index.html> (“A decision to wash away the most important federal statute in a generation, rendered in the heat of a presidential campaign, would likely unleash a political firestorm—one that could significantly threaten the stature of the Supreme Court.”); Jeffrey Rosen, *The Scariest Recent Judicial Opinion You Haven’t Heard About*, NEW REPUBLIC (May 4, 2012), <http://www.newrepublic.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama#> (“Of course, if the Roberts Court strikes down health care reform by a 5-4 vote, then the [C]hief [J]ustice’s stated goal of presiding over a less divisive Court will be viewed as an irredeemable failure. But, by voting to strike down Obamacare, Roberts would also be abandoning the association of legal conservatism with restraint—and resurrecting the pre-New Deal era of economic judicial activism with a vengeance. . . . We’ve seen this script play out before, and it didn’t end well for the Court.”); Jeffrey Rosen, *Are Liberals Trying to Intimidate John Roberts*, NEW REPUBLIC (May 28, 2012), <http://www.newrepublic.com/article/politics/103656/obamacare-affordable-care-act-critics-response> (denying that he was trying to intimidate or bend Justice Roberts, but suggesting PPACA presented a “moment of truth” for Robert’s vision of bipartisanship that Roberts articulated when he became Chief Justice).

120. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. & trans., Princeton University Press 1976) (1832) (“War is merely the continuation of policy by other means.”).

121. See, e.g., Martin Tolchin, *After Warning, Bork Witness Fell Silent*, N.Y. TIMES (Oct. 18, 1987), <http://www.nytimes.com/1987/10/18/us/after-warning-bork-witness-fell-silent.html?pagewanted=all&>

erroneous predictions might be dismissed as an attempt to “make the weather,” but the de-legitimization campaign was something else altogether.<sup>122</sup> And the perception that these tactics are effective ensures we will see similar campaigns in the future.<sup>123</sup>

## V. CONCLUSION

When something went wrong on the way to the courthouse, elite constitutional law scholars opted for a variety of strategies (and sometimes vacillated among them), including anger, despair, pious assurances that no thinking justice would/should/could ever disagree with the academic consensus, and overt threats of de-legitimization.

What are the implications of this sorry episode for the future? Perhaps law professors should only sign petitions and amicus briefs if they have some actual expertise in the subject area.<sup>124</sup> Perhaps law professors should temper their public statements, instead of speaking *ex cathedra*—particularly if they have insufficient practical experience in the area. Perhaps we should take steps to de-bias consumers, including mandatory disclosure of the political affiliation of law professors.<sup>125</sup> Alternatively, we could require law professors to provide a mandatory disclaimer, that research convincingly indicates that “[t]he accuracy of an expert’s predictions actually has an inverse relationship to his or her self-confidence, renown, and, beyond a certain point, depth of knowledge.”<sup>126</sup> Of course, this means that you should not be listening to predictions by law professors on any issue—but that is a subject for another essay.<sup>127</sup> Perhaps we should develop computer programs to predict the outcome of Supreme

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src=pm (citing a petition of two thousand law professors in opposition to Bork’s nomination, and suggesting supporters were intimidated from testifying in support of Bork).

122. See, e.g., Orin Kerr, *Law Professor Predictions and Disguised Advocacy*, VOLOKH CONSPIRACY (Apr. 22, 2013, 2:34 AM), <http://www.volokh.com/2013/04/22/law-professor-predictions-and-disguised-advocacy/> (“In my view, the problem with such public predictions is that the people making them often were trying to create reality as much as predict it. As many have noted, courts are widely thought to be influenced by perceptions as to what is deemed crazy and what is deemed mainstream in the broader legal community. As Jack Balkin puts it, judges tend to stick to arguments that are deemed ‘on the wall’ rather than ‘off the wall.’ Whether or not this is true, the belief is widely shared among legal academics. And as a result, a lot of prominent law professors who were purporting to be making predictions about the challenges on blogs and in news reports were also trying to influence the crazy/mainstream line in order to impact what the courts might do. Not all, certainly, but many.”).

123. See Friedman & Lithwick, *supra* note 76.

124. See Richard H. Fallon, Jr., *Scholars’ Briefs and the Vocation of a Law Professor*, 4 J. LEG. ANALYSIS 223, 260 (2012).

125. I leave the drafting of an appropriate disclaimer for another day. Unfortunately, there is considerable evidence that such disclaimers have no real impact. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011) (cataloging empirical evidence that mandatory disclosures are often not effective in improving decision making).

126. Louis Menand, *Everybody’s An Expert*, NEW YORKER (Dec. 5, 2005), [http://www.newyorker.com/archive/2005/12/05/051205crbo\\_books1?currentPage=all](http://www.newyorker.com/archive/2005/12/05/051205crbo_books1?currentPage=all) (reviewing TETLOCK, *supra* note 110.).

127. See David A. Hyman, *Medicine in the Next Millennium: A Self-Help Guide For The Perplexed*, 26 AM. J.L. & MED. 143, 144 (2000) (“[I]f law professors had any particular skill at predicting the future, their time would be monopolized by bookies and arbitrageurs, instead of by law students.”).

Court cases, instead of relying on the current crop of constitutional law professors, at least when it comes to high profile cases like the battle over PPACA.<sup>128</sup>

More ambitiously, perhaps we need some new constitutional law professors, with a wider distribution of viewpoints than the orthodoxy that currently prevails. Legal academics routinely wax poetic about the virtues of diversity, but it is viewpoint diversity that maps onto the claimed virtues—and it is precisely on viewpoint diversity grounds that the legal academy in general, and the nation’s constitutional law professors in particular, fall abysmally short.<sup>129</sup> Maybe constitutional law professors should adopt an affirmative action program for foxes, instead of slavishly replicating their hedgehog based culture.

Finally, it is ironic that constitutional law professors, who as a group had enthusiastically embraced a “living constitution” and prided themselves on their ability to count to five (votes on the Supreme Court) simply did not notice that a majority of the Court had a radically different view of the merits on the highest profile case of the last generation. Had elite constitutional law professors spent less time on their grand theories, and more time counting to five, they would have given far different predictions—and not have quite so much egg on their faces.

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128. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (reporting that a statistical model was more accurate at forecasting Supreme Court decisions than legal experts were).

129. See *supra* note 96; see also Comments of Harvard Federalist Society Intellectual Diversity Conference, *supra* note 106, at 22 minutes (“Most of my public law colleagues think that originalism and textualism and natural law are bunk, and they exalt the virtues of progressivism and living constitutionalism in the Supreme Court. To a less certain degree, I think there is a little bit more range of opinion on this, they tend to hold progressive views on the virtues of regulation, but on that I’m less sure about that.”) (remarks of Professor Jack Goldsmith).

## APPENDIX A:

## Law Professors Who Signed the 2011 Petition

Libby Adler, Vikram Amar, Frank Askin, Reuven Avi-Yonah, Ashutosh Baghwat, Jack Balkin, Ian Bartrum, Joseph Bauer, Theresa Beiner, Eric Berger, Micah Berman, Vincent Blasi, Eric Blumenson, Alfred Blumrosen, Linda Bosniak, John Britain, Karen Brown, Mark Brown, Rebecca Brown, Harold Bruff, Neil Buchanan, Kim Buchanan, Patricia Cain, Emily Calhoun, Alexander Capron, Guy-Uriel Charles, Erwin Chemerinsky, Steven Cohen, Michael Curtis, Richard Daynard, Walter Dellinger III, John DiPippa, Michael Dorf, Erica Eisinger, Peter Enrich, Susan Estrich, Dan Farber, Barbara Fick, Howard Friedman, Lawrence Friedman, Brian Galle, Lee Goldman, Robert Goldstein, Risa Goluboff, Laura Gomez, Craig Green, Abner Greene, Jamal Greene, Edwin Greenebaum, Kent Greenfield, Dan Greenwood, Ariela Gross, Paul Hardin, Melissa Hart, Rick Hills, Michael Hoffheimer, Barbara Hoffman, Nicole Huberfeld, Jonathan Hyman, Dawn Johnsen, Calvin Johnson, Vincent Johnson, Tim Jost, David Kairys, Kenneth Karst, Kenneth Katkin, Mark Kaufman, Gregory Keating, Fazal Khan, Neil Kinkopf, Heidi Kitrosser, Edward Kleinbard, Carlton Larson, Laurie Levenson, Hope Lewis, Ethan Lieb, Rory Little, Christine Littleton, Gregory Magarian, William Marshall, Jerry Marshaw, Stephen McJohn, Mark McKenna, Ajay Mehrotra, Michael Meltsner, Saul Mendlovitz, Frances Miller, Alan Morrison, Scott Moss, Eric Muller, Gene Nichol, Christina Ochoa, Aviva Orenstein, Kevin Outterson, Wendy Parmet, Richard Primus, David Ritchie, Daria Roithmayr, Kermit Roosevelt, Mark Rosen, Sara Rosenbaum, Thomas D. Rowe, Jr., James Rowen, Theodore Ruger, Richard Schragger, Steve Schwinn, Paul Secunda, Ilene Seidman, Ted Seto, Jeffrey Shaman, Darien Shanske, Neil Siegel, Jessica Silbey, Joshua Silverstein, Joseph Slater, Jessica Slavin, Carla Spivak, Ralph Michael Stein, Geoffrey Stone, Jay Tidmarsh, Daniel Tokaji, Franita Tolson, Paul Tractenberg, Laurence Tribe, Jonathan Varat, Deborah Weissman, Judith Welch Wegner, Norman Williams, Lauren E. Willis, Adam Winkler

Appendix B:  
Faculty Affiliation and Law School  
Attended for Signers of the 2011 Petition

School	Faculty Affiliation	Law School Attended
American	0	2
Arkansas - Little Rock	3	0
Berkeley	1	1
Boston College	2	1
Boston University	2	2
Case Western	0	1
Capitol University	1	0
Chicago	1	8
Chicago-Kent	1	0
Colorado	4	0
Columbia	2	3
Concord	1	0
Cornell	1	1
Davis	2	0
DePaul	1	0
Detroit Mercy	1	0
Drake University	1	0
Duke	4	2
Florida State	1	0
Fordham	1	0
George Washington	4	0
Georgetown	1	4
Georgia	1	1
Georgia State	1	0
Harvard	1	28
Hastings	4	0
Hofstra	1	1
Howard	0	2
Illinois	0	2
Indiana	5	0
Iowa	1	0
Irvine	1	0

*Continued on next page*

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## PPACA AND LAW PROFESSORS

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John Marshall	1	0
Kentucky	1	0
Louisville	0	1
Loyola-L.A.	3	0
Marquette	2	0
Maryland	0	1
Mercer University	1	0
Michigan	2	9
Minnesota	1	1
Mississippi	1	0
Nebraska	1	0
New England	2	1
New Mexico	1	0
North Carolina	6	1
Northeastern	7	1
Northern Kentucky	1	0
Northwestern	0	4
Notre Dame	4	1
NYU	1	5
Ohio State	1	0
Oklahoma City	1	0
Pace	1	0
Penn	2	2
Rutgers - Newark	8	1
Seton Hall	0	1
St. Mary's	1	0
Stanford	0	8
Suffolk	4	0
Syracuse	0	1
Temple	2	0
Texas	1	2
Toledo	2	0
Toronto	0	1
Tulane	0	1
UCLA	5	2
UDC	1	0
USC	8	1

*Continued on next page*

Vermont	0	1
Villanova	0	1
Virginia	2	1
Wake Forest University	1	0
Washington & Lee	1	1
Washington University	1	0
Williamette	1	0
Wisconsin	0	1
Yale	2	21

Faculty affiliation is as listed on the 2011 petition. Education is as listed in the 2011–2012 AALS Faculty Directory for the J.D. degree.