

The National Health Care Reform Litigation: A Case Study in Narrative Reasoning

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Background

Judging By the Numbers: An Empirical Study of the Power of Story, 7 J. ALWD 1 (2010)

- Stories matter
- ...is that okay?

Background

- Pub. L. No. 111-148 (codified in various titles of United States Code)
- Primary target of litigation: the “individual mandate” which requires individuals to purchase health insurance or face a tax penalty
 - Limited exemption for religious objectors
 - Those unable to afford coverage also exempt from penalty
- Plaintiffs
 - Republican state attorneys general
 - Conservative advocacy groups
 - Individuals

Background

- 15 cases filed nationwide (with reported decisions of some sort)
- 11 of these are “serious” cases
- All plaintiffs dealt the same cards: the PPACA
- Some plaintiffs succeed, others don't; why?
- Mainstream media: its politics!
- But is it really.....?

Background

- Like observing a duplicate bridge match



The Rules of the Game

- Definition of story:

"A character-based narration of a character's struggles over time to overcome obstacles and achieve an important goal."

- Key elements to analyze:

- Character
- Goals
- Objectives

The Rules of the Game

- Character
 - Protagonist (the client)
 - Should be cast as the “hero” of the story
- Goal
 - The protagonist/hero’s “quest”
 - Goal can be altruistic or selfish; but must be something the law recognizes as legitimate
- Obstacle
 - Might be the antagonist (villain, threshold guardian, etc.)
 - Might be internal (addiction, poor health, etc.)
 - Might be systemic (unfavorable law, etc.)

Heroic Archetypes

- Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle L. Rev. 767 (2006)
- Possible heroic types presented in PPACA litigation:
 - Every Person
 - Outlaw
 - Ruler

Heroic Archetypes

- Every Person hero
 - Quest: to connect with others in society for mutual benefit/happiness
 - Chief virtue: empathy
 - Allows others to help



- Outlaw hero
 - Quest: destroy what is evil in society
 - Chief virtues: righteous indignation; radical freedoms
 - Allows dragon to destroy itself

Heroic Archetypes

- Ruler hero
 - Quest: to create a prosperous family or community
 - Chief virtues: responsibility and leadership
 - Slays dragon by overcoming it in battle



The Players

- Eleven significant cases
- Plaintiffs fall into three broad categories:
 - Physician groups
 - Private individuals and employers
 - State governments
- Defendants vary from case to case but all are officers or departments of the United States, and all are defended by the same core attorneys in the Attorney General's office

The Deal

- Cases raise a wide variety of issues
- Two key issues raised in almost every case:
 - Government challenges standing of most plaintiffs to sue
 - Every plaintiff challenges PPACA as beyond Congress' power under the Commerce Clause
- These are the only two issues which disposed of any case; so study focuses on these two issues

The Tables

Table I: Cases Decided on Standing Issue

Case Name	Judge and Appointing Pres.	Result
<i>Baldwin v. Sebelius</i>	Sabraw (G.W. Bush)	No standing
<i>Shreeve v. Obama</i>	Collier (Clinton)	No standing
<i>New Jersey Physicians Association v. Obama</i>	Wigenton (G.W. Bush)	No standing
<i>Goudy-Bachman v. D.H.H.S.</i>	Conner (G.W. Bush)	Standing
<i>Bryant v. Holder</i>	Starrett (G.W. Bush)	No standing
<i>U.S. Citizens Assoc. v. Sebelius</i>	Dowd (Reagan)	Standing

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The Tables

Table II: Cases Decided on Commerce Clause Issue

Case Name	Judge and Appointing Pres.	Result
<i>Thomas More Center v. Obama</i>	Steeh (Clinton)	Constitutional
<i>Liberty University v. Geithner</i>	Moon (Clinton)	Constitutional
<i>Virginia v. Sebelius</i>	Hudson (G.W. Bush)	Unconstitutional
<i>Florida v. Sebelius</i>	Vinson (Reagan)	Unconstitutional
<i>Mead v. Holder</i>	Kessler (Clinton)	Constitutional

The Bidding: Telling the Stories

Table III: Physician Stories

Protagonists/ Hero type	Protagonists: Physicians association, an individual physician, and a patient of that physician Hero type: Outlaw
Goals	To preserve the existing business model of patients contracting directly with physicians and not dealing with insurance companies
Obstacles/ Antagonist type	Individual mandate (PPACA forces patient to buy insurance and allegedly forces physician to seek payment from insurance company rather than from patient); Congress is Villain

The Bidding: Telling the Stories

Table IV: Private Individual and Employer Stories

Protagonists/ Hero type	Protagonists: Mostly private individuals, plus a few private employers and a public interest law firm Hero type: Outlaw
Goals	Individual plaintiffs don't have insurance and don't want to buy insurance. Some plaintiffs express religious objections. Private employers don't want to have to provide insurance benefits, or to change their current benefit plans to meet the as-yet-undefined federal standard.
Obstacles/ Antagonist type	Individual mandate; Congress is Villain

The Bidding: Telling the Stories

Table V: State Government Stories

Protagonists/ Hero type	Protagonists: State governments (as represented by attorneys general) Hero type: Ruler
Goals	Not to increase spending on health care; protect state police power from federal usurpation
Obstacles/ Antagonist type	Act coerces individuals to behave in ways acceptable to the federal government. Usurps state police power, coerces states into playing a larger role in providing health care for indigent citizens; Congress is Villain

The Bidding: Telling the Stories

Table VI: United States Government Story

Protagonists/ Hero type	Protagonists: U.S. government acting benignly on behalf of all citizens (main character); all citizens (side characters) Hero type: Ruler (U.S. government); Every Person (all citizens)
Goals	Affordable health care for all citizens.
Obstacles/ Antagonist type	Private insurers who cherrypick healthiest patients and deny coverage for pre-existing conditions; freeloaders who don't buy insurance and then rely on charity care from providers; health care system. Antagonists are Threshold Guardians (insurance companies and freeloaders), or systemic villains (health care system)

The Play: Winners and Losers

- Losers:

- All physicians

- All private individuals and employers

(note that some lost on standing issue, others lost on merits)

- Winners:

- All state governments

(United States ultimately conceded standing to the state governments; states won on merits)

The Post Mortem: Why Did Some Stories Fail?

- Standing cases
 - Very fact-bound; hard to discern any trend
 - Turns out these “hands” were all different; the players weren’t playing the same cards
- Commerce Clause cases
 - Very law-bound; facts don’t really make any difference as to whether Congress exceeded its authority or not
 - Here the hands are identical
- Examination of different match-ups:
 - Private Individuals/employers vs. United States
 - State governments vs. United States

Hero vs. Hero

- Private entities vs. United States
 - Outlaw heroes vs. Ruler (who is protecting Every Person)
 - Outlaw rails against unfair rules (PPACA), but Ruler shows how rules protect other characters (Every Person heroes)
 - Outlaw harms Every Person, so Every Person needs protection from Outlaw
 - Law favors Ruler (maker of law); by definition Outlaw resists law. Law wins.
- States vs. United States (Ruler vs. Ruler)
 - States also claim to be protecting Every Person
 - States have equal claim to United States as law-maker
 - States claim to be more benevolent Rulers (closer to people vs. distant, out-of-touch Rulers inside the Beltway)
 - Smaller, more benevolent Ruler wins

Hero vs. Hero

- ...but is this just another way of saying the trial judges' political predisposition matters?
- Is "government protects citizens" a Democratic story, while "states rights" is a Republican story?
- What do we make of all of this?