Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions

Kenneth D. Chestek

Available at: https://works.bepress.com/kenneth_chestek/3/
Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions

Kenneth D. Chestek

Abstract:

Within minutes after President Obama signed into law the Patient Protection and Affordable Care Act (derisively referred to by some as the “Obamacare” law), the lawsuits started flying. Literally dozens of suits were filed all across the country. Some were frivolous, but many others raised serious issues of federalism and the reach of Congress’ power under the Commerce Clause.

Of the initial spate of lawsuits, ultimately five were decided by various trial courts on the merits of the Commerce Clause issue. Three judges found the law constitutional, and two others found it unconstitutional. But since the issue is almost purely a question of law (it is the same Commerce Clause and the same body of Supreme Court precedent interpreting it in all five cases), the question arises: why did these cases come out differently?

The mainstream media has seized upon a political explanation: the three judges who found the law constitutional were appointed by Democratic Presidents, while the two judges who found the law unconstitutional were appointed by Republican Presidents. This article challenges that assumption, and suggests a more nuanced explanation: each of the plaintiffs in these cases had different stories to tell. The article explores narrative reasoning (defined as norm-based thinking instead of pure rule-based reasoning) as a possible explanation for the divergent results in these cases.

Article:

Over the past four years, the Applied Legal Storytelling movement has
helped scholars understand the role of stories in the legal system. Unlike the “law in literature” and “law as literature” bodies of scholarship, Applied Legal Storytelling scholarship focuses on the practical: how does storytelling (or “narrative theory”) actually affect what lawyers and judges do in actual cases?

Much, although certainly not all, of this rich body of scholarship examines storytelling from the point of view of the client or the advocate. That is, many scholars are investigating the characteristics of stories, and drawing conclusions about how advocates can best take advantage of those characteristics to tell

---

2To date, there have been three international conferences devoted to the topic of Applied Legal Scholarship. The inaugural conference was held in London, England in July, 2007. It was followed by the “Chapter Two” conference in Portland, Oregon in July 2009, and “Chapter Three” in Denver, Colorado in July, 2011. The conference is scheduled to return to London in July, 2013. Papers originally presented at these conferences have been published in many journals, but three peer-reviewed journals have published “proceedings” issues collecting many of the papers presented at these conferences: Volume 41 of The Law Teacher (published by the Association of Law Teachers based in the UK), Volume 14 of Legal Writing: The Journal of the Legal Writing Institute and Volume 7 of The Journal of the Association of Legal Writing Directors. A more complete bibliography of the scholarship that has grown directly out of these conferences is attached as Appendix A.
effective stories on behalf of their clients.\(^3\)

But what is underdeveloped in this discussion so far is a careful consideration of how stories work for their intended audiences: judges and juries. I broached this subject in 2009 when I conducted a survey of appellate judges and asked them to read a pair of briefs on the same side of a fictional case, one of which limited itself strictly to logos-based reasoning and the second of which made the same logical arguments but included a healthy dose of narrative-based persuasion, principally through providing a great deal more context about how the controversy affected the party filing the brief. I was not surprised to find that a majority of judges and other readers reported that the brief that included the backstory of the case was more persuasive.\(^4\) However, while that finding is interesting, it does not address several deeper questions: (1) exactly how do stories persuade judges, and (2) is it okay that judges like stories?

I believe that it is not only “okay” that judges pay attention to stories; it is imperative that they do so. However, a thorough examination of that normative

---

\(^3\)See, e.g., Appendix A, infra.

Prof. Linda Edwards is one of the exceptions to this trend. She has recently been engaged in a fascinating exploration of how narrative theory informs the law itself, helping to explain how law is created and evolves. See generally Linda H. Edwards, Once Upon a Time in Law: Myth, Metaphor, and Authority, 77 Tenn. L. Rev. 883 (2010); Linda H. Edwards, Battle and Betrayal, Tricksters and Champions: the Stories We Tell about Law, presentation to the Third Applied Legal Storytelling Conference, July 10, 2011 (http://law.du.edu/index.php/storytelling-conference/program).

issue is beyond the scope of this article. Instead, this article begins to explore the first question: how do stories work? In other words, if all parties to any lawsuit follow the advice of the Applied Legal Storytelling scholars and tell effective stories, how might a judge choose between equally effective, but competing, stories?

In keeping with ALS' tradition of focusing on practical applications of storytelling, my method in examining this question will be to examine the recent spate of litigation over the Patient Protection and Affordable Care Act, and to look for evidence in both the briefs of the parties and the opinions of the trial judges as to whether narrative reasoning was at work. Shortly after President Obama signed the law, numerous legal challenges were filed by conservative advocacy groups and a large group of Republican state Attorneys General. Despite the fact that the central legal issue in the case, whether the law’s requirement that individuals

---

5That examination would require an examination of competing legal philosophies, from the legal positivist on one end of the spectrum, to the legal realists on the other, and everything in between. For present purposes I will simply observe that narrative reasoning is both legitimate and essential. It is legitimate in the sense that it connects legal decision-making to common sense, something which is essential for law to retain its legitimacy in society. It is also legitimate in the sense that it is completely normal. People think in stories all the time; it is the principal way humans derive meaning from what they observe. And narrative reasoning is essential because if we deny judges the authority to engage in it, we are asking them to do something unnatural: reason with only half of their brains. Indeed, many rules of law (such as balancing tests) actually require judges to engage in narrative reasoning.

For an interesting examination of the legitimate role of emotions in judicial decisionmaking, see Terry A. Mahoney, The Persistent Cultural Script of Judicial Dispassion, 99 Cal. L. Rev. 629, ??-?? (2011) (arguing that “[i]nsistence on emotionless judging . . . is a cultural script of unusual longevity and potency,” but nevertheless “wrong as a matter of human nature” and not universally shared).

6I am only “beginning” this inquiry in the sense that I am mostly just seeking evidence that narrative reasoning can be observed in the briefs and opinions filed in the case. If, as I claim, the stories told by the parties had an actual impact on how the judges decided the cases, the mechanism through which this persuasion took place involves a deeper examination of cognitive
purchase health insurance or face a tax penalty exceeds Congress’ power under the Commerce Clause, is pretty much a pure question of law and therefore the same in all of the cases, the results at the trial court (and in the four appellate court decisions as of this writing) reached different conclusions. While the popular press seems to have dismissed this as simply a result of different political leanings by the judges involved, I think the issue is far more complex than that. Indeed, since the parties to the lawsuits told different stories in their briefs, it seems to me plausible that the different results might be due at least in part to the different stories told.\footnote{I will not attempt to do an analysis of the legal rules at issue in this case. For my purposes, I am assuming that the merits of the legal rules here (principally the interpretation of the Commerce Clause) are legitimately in dispute, and that both sides have sound arguments to advance. My purpose is to discern, if possible, the role that narrative reasoning might have played in assisting the courts’ decisionmaking in these cases.}

This study is very much like kibitzing a duplicate bridge match: eleven groups are dealt identical hands, but choose different strategies for playing the cards. Some strategies turn out to be more successful than others. Perhaps we can learn some lessons about how the game is played by studying those strategies.

In Part I of this article, I will briefly review some of the foundational principles of narrative theory that are useful in studying the health care litigation. Part II of the article will set the stage for the study by describing generally the broad reach of the litigation across the country. Part III will take look at the briefs filed by the parties to the litigation to determine what story the parties attempted to tell. Part IV will then examine the opinions in the major cases and describe how

\footnote{I will not attempt to do an analysis of the legal rules at issue in this case. For my purposes, I am assuming that the merits of the legal rules here (principally the interpretation of the Commerce Clause) are legitimately in dispute, and that both sides have sound arguments to advance. My purpose is to discern, if possible, the role that narrative reasoning might have played in assisting the courts’ decisionmaking in these cases.}
the cases were decided. Finally, Part V examines the possible role that the different narrative choices might have played in reaching different outcomes.

I. The Rules of the Game: A Brief Introduction to Narrative Reasoning

If you are going to kibbitz at a duplicate bridge match, you need to know the rules of the game. So let’s start with some basic definitions.

I use the term “narrative reasoning” herein to describe the norm-based argument or arguments that motivate a judge to want to rule in a party’s favor.8 Narrative reasoning is client-centered and very fact-oriented. Narrative reasoning does not supplant the rule-based reason (the law) which allows the court to rule in the client’s favor; rather, it provides a reason for the court to want to rule in the client’s favor. Professor Richard Neumann calls rule-based arguments “justifying arguments” and norm-based arguments “motivating arguments.”9 If an advocate has both a strong justifying argument and an appealing motivating argument, she is more likely to prevail than if she had only a justifying argument.10

---


10Id. See also Chestek, *Judging By the Numbers*, supra n. 4, at 4-5. Note that a motivating argument without a complementary justifying argument is doomed to failure; a judge cannot rule in favor of one party because she has a good feeling for that party. The rules of law must also support that party’s position.
One particularly effective type of narrative reasoning is storytelling.\textsuperscript{11} Humans are hard-wired to think in story terms;\textsuperscript{12} much of what we learn about the world is through our own experience of stories.\textsuperscript{13} But this begs the question: what is a “story?” There are many different definitions, of course, but the definition I will use for this exercise is this: “a character-based narration of a character’s struggles over time to overcome obstacles and achieve an important goal.”\textsuperscript{14}

Parsing that definition, one can see that there are three essential elements to any story: characters, goals, and obstacles to overcome.\textsuperscript{15} By comparing how the parties portray their client(s) (the protagonists of the stories they tell), describe the


\textsuperscript{12} Kendall Haven, \textit{Story Proof: the Science Behind the Startling Power of Story} (Libraries Unlimited 2007), at 3-4 (reporting numerous studies that suggest that humans have told stories to each for 100,000 years, and that stories are universal throughout all cultures).

\textsuperscript{13} The philosopher John Locke expressed it this way:

\begin{quote}
Let us then suppose the mind to be, as we say, white paper void of all characters, without any ideas. How comes it to be furnished? Whence comes it by that vast store which the busy and boundless fancy of man has painted on it with an almost endless variety? Whence has it all the materials of reason and knowledge? To this I answer, in one word, from Experience.
\end{quote}


\textsuperscript{14} This definition is derived from one proposed by storyteller Kendall Haven in his book \textit{Story Proof}, supra n. 12, at 79. It has been modified to this formulation by Profs. Ruth Anne Robbins, Steve Johansen and myself for the purpose of a new legal writing text, forthcoming from Aspen Publishers.

\textsuperscript{15} This is, of course, an oversimplification, but for the purpose of analyzing the stories told by the parties to the PPACA cases, this simplified structure provides a sufficient framework to compare the parties’ briefs to each other. For a fuller treatment of how to incorporate a story into a brief, see Chestek, \textit{The Plot Thickens: The Appellate Brief as Story}, 14 J. Legal Writing 127 (2008).
characters’ goals and show how they can overcome the obstacles posed by the opposing party, one can get a useful snapshot of the story that each party chooses to tell.

A. Describing the Protagonist: Heroic Archetypes

Prof. Ruth Anne Robbins has described one useful way of thinking about the protagonist in a client’s story: heroic archetypes. In a groundbreaking article, Prof. Robbins suggests that a brief writer should consciously cast her client into the role of “hero” of the story. Drawing on the work of Carl Jung, Joseph Campbell and others, she summarizes studies that have shown that humans in all cultures (even remote cultures with little or no contact with outsiders), at every time in their history, share archetypal characters. Because these archetypes are so ingrained in each of us, they provide a powerful tool for persuasion.

Heroes, of course, don’t all look like Rambo; they come in all shapes and sizes, with different strengths and weaknesses. They can appear as Lovers, Magicians,
Innocents, and a wide variety of other types.\textsuperscript{19} A careful lawyer will analyze the available choices and make a conscious decision to portray her client as one of these types; by so doing, she can trigger automatic (and unconscious) responses in the judge’s mind by creating a mental image of what a story featuring that particular kind of hero probably looks like, and how it is likely to turn out.\textsuperscript{20}

Prof. Robbins borrows her list of possible heroic archetypes (with some interpretation and expansion from other sources) from Dr. Carol S. Pearson.\textsuperscript{21} Pearson herself describes the archetypes as “inner guides” that are present within each of us.\textsuperscript{22} Each of us is on a quest to find meaning and purpose, and each of these archetypes can be invoked at various stages of our lives to assist us on our journey.\textsuperscript{23} Importantly, since these archetypes are innately human, stories which evoke these archetypes resonate with audiences at a subconscious level. If the story describes how one of the heroic archetypes is likely to behave, it will feel true at a “gut” level. Therefore, choosing a plausible heroic archetype for your client helps the writer tell a credible story, more likely to resonate with the audience.

\textsuperscript{19}\textit{Id.} at 778-79. The twelve archetypes that she identifies are Warrior, Creator, Care giver, Every person/orphan, Outlaw/destroyer, Sage, Explorer/wanderer/seeker, Magician, Ruler, Lover, Jester/fool, and Innocent.

\textsuperscript{20}\textit{Id.} at 769.

\textsuperscript{21}While Prof. Robbins cites several books authored or co-authored by Dr. Pearson, she relies most heavily on Carol S. Pearson, \textit{Awakening the Heroes Within: Twelve Archetypes to Help Us Find Ourselves and Transform Our World} (Harper One 1991).

\textsuperscript{22}\textit{Id.} at 7.

\textsuperscript{23}\textit{Id.}
We will expand on some of these heroic archetypes as they become relevant in Part III, below.

**B. The Hero’s Journey**

While there are many different types of heroes, all heroes share some features. One such shared characteristic is the hero’s quest. Prof. Robbins describes the quest as “a journey we each take to transform ourselves as individuals,” or potentially to transform society. In terms of our definition of story, this equates to the “goal” that each character seeks.

All journeys have three phases: preparation, the journey itself, and the return. This is essentially the same arc as the plot of a story: a pre-existing state of tranquility (preparation), followed by conflict and efforts to resolve the conflict (the journey). The story ends with either a reinstated or a transformed condition of tranquility (the return).

**C. The obstacle**

Finally, the third major part of our definition of a “story” is that the character must struggle to overcome some obstacle. Prof. Robbins sometimes uses the terms “villains” and “dragons” as synonyms to describe the obstacle that the hero must overcome. See, e.g., Robbins, supra n. 17, at 786. I will distinguish between these terms: a “dragon” is a broader term encompassing a variety of potential obstacles,
There are a wide variety of potential obstacles. Commonly, especially in the context of litigation, the “obstacle” can be another person or institution (the opposing party or parties). But there are other possible obstacles: an internal obstacle or failing (such as a personality trait or addiction), or a systemic obstacle (sometimes the law itself).

A person or an institution as an “obstacles” can be thought of as other characters in the story: the antagonist(s). But antagonists come in various forms as well. For example, overzealous counsel may choose to cast the antagonists in the role of the evil Villain. It is very tempting to cast your client’s adversary as a purely (or, at least primarily) evil person or institution, with no redeeming characteristics (think Lord Voldemort); indeed, some clients expect lawyers to demonize the opposition in this manner. But purely evil characters are almost entirely fictional; in the real world, almost all defendants have redeeming qualities. Therefore, a more credible role for a defendant/antagonist would be that of a Threshold Guardian (or Gatekeeper.) These types of antagonists are not evil; they just have their own goals which conflict with those of the protagonist.29

But the obstacle need not be an antagonist at all; the obstacle can also be internal (such as an addiction, a health issue, or emotional struggles)30 or systemic

---

29Id. at 788.

30Id. at 786.
(for example, a legal rule that prevents the protagonist from achieving his or her goal). In short, anything which tends to inhibit the protagonist from achieving his or her goal can be characterized as an obstacle.

All of these concepts will become useful in analyzing the stories told by the various parties to the PPACA litigation.

II. Dealing the Cards: The Major Challenges to PPACA

With those definitions in mind, I examined all of the PPACA cases to date to determine what story(ies) the parties were telling. I chose to study the trial court opinions in the major cases challenging the law, partly because at the trial level the facts of the case are most fluid, and in theory storytelling would seem to have the most room to work. But I also chose to study the trial court opinions in order to have a larger data set, since there are simply more cases at that level than at the appellate level. However, of the 11 cases I ended up studying, as of the time this Article was completed five had been reviewed by different United States Courts of Appeals; I will refer to some of those appellate decisions from time to time throughout the Article.

---

31 Of course, storytelling can be effective at the appellate level as well, as I have argued elsewhere. See Chestek, The Plot Thickens, supra n.; Chestek, Judging By the Numbers, supra n. Many other scholars also focus on appellate briefs and the stories they tell; see, e.g., Edwards, Once Upon a Time, supra n., at 885; Helen A. Anderson, Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice, 11 J. App. Prac. & Process 1 (2010).

The Patient Protection and Affordable Care Act\textsuperscript{33} was adopted by Congress and signed into law by President Obama on March 23, 2010.\textsuperscript{34} The bill is highly complex and very lengthy. It attempts to implement a comprehensive reform of the way health care services are provided to Americans, including specific efforts to provide health care insurance to many currently uninsured citizens. The bill amends numerous previous Acts of Congress, including most notably the Public Service Health Act, the Social Security Act, and the Internal Revenue Code. Among the most important provisions of the act are a prohibition of insurance companies rejecting applicants because of pre-existing medical conditions; creation of “health insurance exchanges” in every state to assist individuals and employers in purchasing insurance and comparing rates; a requirement for certain employers to provide health care insurance to its employees or pay a tax penalty if it chooses not to (the “employer mandate”); and a requirement that most individuals (with limited exceptions for certain people with religious objections or financial hardship) purchase health insurance or pay a tax penalty if they choose not to do so (the “individual mandate”).\textsuperscript{35}

The law was challenged immediately in numerous lawsuits around the

\textsuperscript{33}Pub. L. No. 111-148.

\textsuperscript{34}Critics of the law have used the term “Obamacare” to refer to this law. Since that term is meant to be pejorative, I will not use that term herein.

\textsuperscript{35}[add cites to PPACA]
country. At least one suit was filed before President Obama even signed the law, while several others were filed the day he signed the law.

My initial review of cases involving some form of challenge to PPACA turned up 15 cases that had reported decisions. Of these, I discarded several from the data set as not being serious challenges to the statute. Other cases involved limited challenges to specific parts of the statute and not a facial attack on the entire statute, or have not yet been decided on the merits. I ended up 11 significant cases which made facial challenges to the statute and which had resulted in some significant decision by a trial judge.

The issues raised by these cases vary. In reading the briefs, I counted at least 19 separate issues raised by at least one litigant. Most of these involved different legal theories raised by the plaintiffs, ranging from claims that PPACA exceeded

---

36 Orly Taitz filed an amended complaint in her pending lawsuit challenging President Obama's qualifications for office on March 22, 2010, adding a claim that he would not have authority to sign PPACA into law since he could not prove he was legally entitled to hold the office of President. Plaintiff's First Amended Complaint in Taitz v. Obama, 2010 WL 1859343 (D.D.C. March 22, 2010).


38 For example, the first case to challenge the law was based on a theory that, since President Obama could not prove that he was actually born in the United States, he did not have legitimate authority to sign the bill into law. Taitz v. Obama, 707 F. Supp. 2d 1 (D.D.C. 2010). Also, a group of physicians challenged the law on the basis of alleged ultra vires conduct by President Obama in “coercing” Sen. Ben Nelson to vote in favor of the bill, violating the doctrine of separation of powers. Anderson v. Obama, 2010 WL 3000765 (D. Md. 2010). Both of these cases were quickly dismissed by the courts, and not considered in this study.

the powers of Congress to regulate interstate commerce, to substantive due process issues, separation of powers claims, and several claims of infringement of religious liberty under the First Amendment. For its part, the United States commonly raised at least three defensive issues: (1) that the plaintiffs lacked a particularized, certain injury and therefore lacked standing to sue; (2) that the statute did not go completely into effect until 2014, and the claim was therefore unripe; and (3) that the individual mandate was enforced by a tax provision and therefore the suits were barred by the Anti-Injunction Act.40

In almost every case, the defendants filed motions to dismiss based on the three defenses listed. No trial court ruled in favor of the government on either the ripeness or the Anti-Injunction Act issues.41 However, the courts reached different results on the standing issue, so it became interesting to study the eleven cases to see why this occurred.

In addition, five cases (all of which resolved the standing issue in favor of the plaintiffs) went on to address the substantive Commerce Clause issue. These cases also split, with three cases finding that the statute was a valid exercise of Congress’ power under that clause, and two finding the statute unconstitutional under that clause.42

---

4026 U.S.C. § 7421 [date].

41However, the Fourth Circuit did find the Anti-Injunction Act argument persuasive, and upheld the dismissal of one of the private party lawsuits on that basis (even though the trial court had not ruled on that issue). Liberty University v. Geithner, ___ F.3d ___ (4th Cir. Sept. 8, 2011).

42Since these are the only five cases that reached the substantive Commerce Clause issue, these
Since the standing and Commerce Clause issues were the only issues common to all eleven major cases, I decided to study those cases to see if I could discern any patterns in the stories the parties told, or the rationales used by the courts in deciding the cases. Table 1 (below) is a list of six cases which resolved the question of whether the plaintiffs had standing to bring the action (but did not reach a final decision on the substantive issue relating to the Commerce Clause), while Table 2 lists five cases in which the court held that the plaintiffs had standing and decided the merits of the Commerce Clause issue.

---

are the cases that have gotten all of the mainstream media attention.
<table>
<thead>
<tr>
<th>Case name</th>
<th>Date of trial court disposition</th>
<th>Trial judge and Court</th>
<th>Appointing President</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baldwin v. Sebelius</td>
<td>Aug. 27, 2010</td>
<td>Dana Sabraw (S.D. Cal.)</td>
<td>G.W. Bush</td>
<td>No standing</td>
</tr>
<tr>
<td>Shreeve v. Obama</td>
<td>Nov. 4, 2010</td>
<td>Curtis Collier (E.D. Tenn.)</td>
<td>Clinton</td>
<td>No standing</td>
</tr>
<tr>
<td>Case name</td>
<td>Date of trial court disposition</td>
<td>Trial judge and Court</td>
<td>Appointing President</td>
<td>Result</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>---------------------------------</td>
<td>-------------------------------</td>
<td>----------------------</td>
<td>--------------</td>
</tr>
</tbody>
</table>
Table 2 reveals a pattern that some in the media have latched on to as an “explanation” for why the five cases which reached the constitutional issue had different results: the three cases ruling that the law was constitutional were decided by judges appointed by Democratic Presidents, while the two cases which ruled the law unconstitutional were decided by judges appointed by Republican Presidents. However, as discussed below, this explanation is superficial and almost certainly incomplete.

III. The Bidding: Telling the Clients’ Stories

Since stories require protagonists, the first thing I did in examining the 11 cases was to see whether there were commonalities among the plaintiffs. The plaintiffs could be grouped into three main categories: (1) private individuals (health care consumers) and their employers; (2) physicians and advocacy groups for physicians; and (3) state governments. The defendants varied from case to case.

---

43 See discussion at pp. 41 to 42, infra.


45 The only case in the study group filed by a group of physicians is New Jersey Physicians Association v. Obama, 757 F.Supp.2d 502 (D.N.J. 2010), aff’d, ___ F.3d ____ (3d Cir. Aug. 3, 2011). Another case filed by a group of physicians was excluded from the study since it made an as applied claim against only a portion of the statute relating to billing procedures for physicians: Physician Hospitals of America v. Sebelius, 2011 WL 922675 (E.D.Tex. 2011).

46 This group includes two cases: Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D.Va. 2010), and
case, but generally included the United States Department of Health and Human Services; its Secretary, Kathleen Sebelius; Treasury Secretary Timothy Geithner (because the enforcement mechanism for the individual mandate is a tax penalty); and in a few cases, President Barrack Obama. Yet this group of defendants told a unified story, since in all five of the cases which reached the Commerce Clause issue, and most of the cases which ended with rulings on the standing issue only, a core group of attorneys from the Justice Department collaborated on the briefs.\footnote{47}

Let’s first analyze the stories told by each group of plaintiffs, and then examine the story told by the United States. We will examine each group of cases by identifying the protagonist championed in the briefs; describe that protagonist’s goal; and then identify the obstacles (antagonists, systemic, or other) that the briefs portray as preventing the protagonist from achieving his or its goal. We will also identify the heroic archetype for each protagonist. Ultimately, we will compare the three different plaintiff stories to the defendants’ story to see if that helps explain why the cases reached different results.

\section{Physician Stories}

\footnote{47}In the cases for which briefs are available on Westlaw, three attorneys signed on behalf of the government in all of the cases decided on the Commerce Clause issue, and in most of the briefs decided on standing: Assistant Attorney General Tony West, Deputy Assistant Attorney General Ian Heath Gershengorn, and Sheila Lieber. Attorney Jennifer Rivera also signed most of the briefs. Briefs were not available for all of the cases resolved on the standing issue.

\textit{Florida v. Dept. Of Health and Human Services,} ___ F. Supp. 2d ____, 2011 WL 285683 (N.D.Fla. 2011), aff'd ___ F.3d ___ (11th Cir. Aug. 11, 2011). The latter case includes 26 states, through their Attorneys General (all Republican), as well as a few individuals, as plaintiffs.
There is only one case in the study group filed by physicians. It can be summarized in the sidebar “Physician Stories.”

1. Protagonist

The first task in examining a narrative is to determine who the protagonist is. What character or institution does the author want us to root for? It is not always obvious.

In this case, the caption of the complaint lists, in order, the New Jersey Physicians, Inc. (described in the principal brief as “a physicians’ advocacy organization), Dr. Mario A. Criscito (an individual physician), and “Patient Roe.” Little detail is provided as to Patient Roe's identity, much less his objective. The plaintiffs’ brief says only that “[t]he mandate [of the law] will force him to have qualifying health insurance, even though he does not have it and does not want it. Thus, he will be forced to enter into a transaction he does not want, or face monetary penalties.”\textsuperscript{48} The brief does a better job explaining what the physicians object to: the act “will have a direct,

\begin{center}
\begin{tabular}{|l|p{12cm}|}
\hline
\textbf{Physician Stories} & \textbf{Protagonist(s)} \tabularnewline & Physicians association, an individual physician, and a patient of that physician. \textbf{Heroic type:} Outlaw \tabularnewline \hline
\textbf{Goal(s)} & To preserve the existing business model of patients contracting directly with physicians and not dealing with insurance companies \tabularnewline \hline
\textbf{Obstacle(s)} & (1) Systemic (individual mandate of PPACA) \tabularnewline & (2) Antagonist (Congress as Villain) \tabularnewline \hline
\end{tabular}
\end{center}

\textsuperscript{48}Plaintiffs’ Brief in Opposition to Defendants’ Motion to Dismiss, 2010 WL 4597787 (August 23, 2010), at p. 7.
substantial impact upon Dr. Criscito’s medical practice, the manner in which he may, or may not, seek payment for his professional services and the manner in which he may render treatment to his patients.”49 As for the physician’s organization, it “seeks to protect[] the professional and economic interests of it physician members and, indeed, all of New Jersey’s physicians, are germane to New Jersey Physicians’ purpose as a physician advocacy organization.”50 It also makes the claim that “Dr. Criscito, and many of New Jersey Physicians’ members, accept direct payments from patients, and will not be able to do so once the mandate goes into effect.”51 It does not cite any provision of the act which so holds, however.52

Since the physicians’ organization and Dr. Criscito’s goals are described more fully, one is left with the impression that main protagonists in the case are the physicians; the anonymous plaintiff is probably included as a hedge to insure that somebody in the case has standing. As such, Patient Roe essentially is relegated to the role of a helper, or “companion;”53 the story is really about the physicians’ struggle to preserve the existing business model for the practice of medicine. is fine

49Id.

50Id. at 9.

51Id. at 8.

52Probably because the Act says no such thing; see text accompanying note 99, infra.

53Robbins, supra n. 17, at 790.
just the way it is, and don’t want the government stepping in to change the way in which physicians are compensated for their services.

2. Goal

Having identified the principal protagonist in the story, it is useful to identify the heroic archetype that the advocates choose, since this can help us determine how the stories of the different parties might be viewed by the reader (the court). Identifying the archetype can be tricky, however, since many of the twelve types seem to overlap. One way of distinguishing between heroic archetypes is to examine the protagonist’s quest, or goal.

In the case of the physicians, there are two likely heroic archetypes that might apply: the Warrior and the Outlaw. According to Prof. Robbins, a Warrior’s quest is to “fight . . . for just causes/important issue.” A Warrior’s quest is thus externally oriented; he fights for a principle because it helps others. However, an Outlaw’s quest is more self-interested; he seeks to destroy what he perceives as not working, or which interferes with his personal autonomy.

Given the essentially self-interested nature of the physicians’ quest, the most

---

54 Robbins, supra n. 17, at 802.

55 Pearson’s term for “Outlaw” hero is a “Destroyer” hero. Pearson, supra n. 21, at 136. She says this type of hero is often evoked within each of us “by a sense of powerlessness, the discovery that everything you have counted on, worked toward, or tried to build in life has come to nothing. It can be an encounter with injustice. You have been good, disciplined, hardworking, and loving, and in return you get kicked in the teeth.” Id. at 136-37. It is not hard to imagine the plaintiffs in this case believing themselves to having been “kicked in the teeth” by what they perceive as an unjust intrusion into their private affairs by the government, thus “precipitating” the Destroyer (Outlaw) hero within them.
logical heroic type which describes the physicians is an Outlaw hero. In the protagonists’ eyes, “what is not working” is the law itself, since it allegedly prevents them from pursuing their preferred method of doing business. A quest of allowing physicians to continue to make lots of money by preserving the existing business model may not sound to most audiences like a “just cause;” thus, the Warrior archetype does not seem to fit.

3. Obstacle

There are several potential obstacles in this story. The obvious obstacle is a systemic one: the PPACA itself. And indeed, the physicians’ brief does attack the statute on its face. But the plaintiffs are not content to simply attack the statute. Instead, the brief includes some very broad attacks on Congress itself. The sometimes hyperbolic rhetoric leads one to conclude that Congress is purely evil: a

56For example, in asserting that the PPACA is outside of the reach of Congress’ power under the Commerce Clause, the plaintiffs write:

Of course, the defendants’ reasoning could be used to support any exercise of Congressional power, at all, no matter how far-reaching or attenuated, as long as one could posit a link between a governmental interest and some form of economic activity (or inactivity). For example, Congress could deem the viability of the American automobile industry essential to the economic health of the nation, particularly as the federal government now owns a sixty-one percent interest in General Motors. In order to assure its viability, Congress could mandate that every citizen (other than those who could show some sort of “economic hardship” purchase a new General Motors automobile every five years, and, again employing this “logic,” even mandate which model automobile those individuals had to buy.

Plaintiff's Brief, 2010 WL 4597787, at p. 12 [footnote omitted].

57Plaintiffs claim that individuals who choose not to purchase health insurance are not engaged in “commerce” and therefore Congress has no power to compel them to engage in a commercial transaction. While that position has some logical merit, plaintiffs resort to mockery in defending
quintessential Villain.

**B. The Private Individuals and Employers’ Story**

Since there were eight different cases in this category, it is somewhat difficult to generalize about the stories told by the private individuals and employers. But reading the briefs in the three private individual cases which were decided on the Commerce Clause issue reveals that this group of plaintiffs told a pretty consistent story, which is summarized in the sidebar “Individual and Employer Stories.”

1. **Protagonist**

   In two of the three Commerce Clause cases in this group, the first-named plaintiff is an institution or employer, joined by a number of their position:

   A decision to do nothing does not convert nothing to something. Zero multiplied by any number still equals zero. Under Defendants’ logic, any failure to buy – or sell – particular goods or services is both a regulable prelude to future economic activity and a decision Congress can ready because it impacts the existing marketplace. Indeed, thought, by itself, would be reachable under this tortured logic.

   *Id.* at 14.

<table>
<thead>
<tr>
<th>Individual and Employer Stories</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Protagonist(s)</strong></td>
</tr>
<tr>
<td><strong>Goal(s)</strong></td>
</tr>
</tbody>
</table>
| **Obstacle(s)** | (1) Systemic (individual mandate of PPACA)  
(2) Antagonist (Congress as Villain) |
private individuals; the third case was brought only by private individuals. But even the two cases in which an institution is the lead plaintiff, the briefs filed by the parties focus heavily on the law’s alleged impact on the individual plaintiffs. Thus, the principal protagonists in these cases appear to be individuals who prefer not to purchase health insurance. They are generally portrayed as “rugged individuals,” distrustful of government almost to the point of being hermits, eccentrics, or religious zealots. Their refusal to purchase insurance is not clearly explained in any of the briefs; thus, the protagonists’ goal appears simply to be left alone.

58In Liberty University v. Geithner, 2010 WL 4860299 (W.D. Va. 2010), the lead plaintiff is a private Christian university founded by the Rev. Jerry Falwell Sr. In Thomas More Law Center v. Obama, 720 F.Supp.2d 882 (E.D. Mich 2010), the lead plaintiff describes itself as “a national, public interest law firm based in Ann Arbor, Michigan.” Complaint, 2010 WL 4784409 (E.D.Mich. March 23, 2010), ¶ 10. It also alleges that it provides health care coverage to its employees, and therefore is subject to the provisions of the PPACA. Id. at ¶ 12. These are the only two parties in this group of cases which claim standing as employers affected by PPACA. Both cases also include a number of individuals as co-plaintiffs.


60For example, the government, and several judges writing opinions, noted that President Obama signed an executive order confirming, in conformity with the pre-existing Hyde Amendment, that no federal funding could be used to fund abortions, and that PPACA itself contained provisions that require at least one multi-state health insurance plan that does not provide coverage for abortion services except in cases of rape or incest or where the life of the woman is endangered. See Pub. L. No. 111-148, § 1334(a)(6). In light of the specific provisions of the law protecting against the possible involvement of federal funds with abortion services, and requiring at least one insurance plan for individuals to choose that did not cover those services (other than situations in which courts have held that a woman’s right of access to those services may not be prohibited), plaintiffs’ objections along these lines appear somewhat unreasonable.

61In Liberty University v. Geithner, the Plaintiffs’ brief reports that two of the individual plaintiffs have chosen not to purchase health insurance and do not desire health insurance coverage, but instead take care of health care costs as they arise. They are Christians who believe in living out their sincerely held religious beliefs in everyday life, including in the lifestyle choice they make. [They] have sincerely held religious beliefs that abortions, except where
There are at least three potential heroic archetypes that might fit the individual plaintiffs in this group of cases. They could be viewed as Seekers/Wanderers, whose archetypal task is to seek a better life through exploration of the world.\textsuperscript{62} The chief virtue of such heroes is autonomy; their fear is conformity.\textsuperscript{63} But Wanderers defeat their dragons by walking away from them, not by doing battle with them;\textsuperscript{64} and the briefs filed on behalf of these plaintiffs are full of fight. Thus, much like the physician plaintiffs in the previous group, the more necessary to save the life of the pregnant mother, are murder and morally repugnant, that they should play no part in facilitating, subsidizing, easing, funding, or supporting such abortions because to do so is evil and morally repugnant complicity, and that they should not formally associate with those who would facilitate, subsidize, ease, fund or support such abortions.

Plaintiffs' Brief in Opposition to Motion to Dismiss, 2010 WL 4850338 (W.D. Va. Sept. 3, 2010), at p. 7. How PPACA might “facilitate, subsidize, ease, fund or support” abortions is not explained; \textit{see} fn. ?, \textit{supra.}

Likewise, in \textit{Thomas More Law Center v. Obama},

Plaintiffs do not have private health care insurance. They do not intend to purchase health care coverage. And they object to being forced to purchase health care coverage under the Act. . . . Plaintiffs have arranged their personal affairs such that it will be a hardship for them to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act. . . . [They will have to reorganize their affairs and essentially change the way they presently live to meet the government's demands.

Plaintiff's Motion for a Preliminary Injunction & Brief in Support, 2010 WL 4784264 (E.D. Mich., April 6, 2010), at p. 4. And the plaintiff’s goals are no clearer in \textit{Mead v. Holder}: “Plaintiffs are United States citizens who do not currently have health insurance and do not want or need such insurance.” Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, 2010 WL 5827945 (D. D.C., August 10, 2010), at p. 7.

\textsuperscript{62}Robbins, \textit{supra} n. 17, at 803; Pearson, \textit{supra} n. 21, at 123-125.

\textsuperscript{63}\textit{Id.}

\textsuperscript{64}Pearson, \textit{supra} n. 21, at 123.
likely choices of heroic archetype for the private individuals are Warrior or Outlaw. Choosing the Warrior hero is tempting, because unlike the physicians (whose quest was simply to retain their economic advantage in the practice of medicine), the goal of these plaintiffs (autonomy and self-determination) seems appealing. But ultimately, the Outlaw archetype seems to be the more likely choice, because the briefs are full of “righteous indignation” and claims of “radical freedoms,” (two of the hallmark virtues of Outlaw heros)\(^65\) and because the protagonists’ goals seem highly self-interested (that is, to protect their autonomy).

2. Goal

The goal of this group of plaintiffs is unambiguously identified as simply protection of their right to decline to purchase health insurance. However, rather than set forth a vision of individual freedom, the briefs focus pretty intently on the obstacle: Congress’ assertion of broad powers under the Commerce Clause. Little space is devoted to why individual freedom is important to the protagonist. The overall impression that the briefs leave the reader with is that of stubbornness: Congress cannot force the plaintiffs to behave in ways that pleases Congress. By simply asserting that they prefer not to abide by the law, the plaintiffs overtly don the clothing of the Outlaw, seeking to destroy the law which they perceive as impinging on their freedom.

\(^{65}\text{Id. at 802.}\)
3. Obstacle

The private individuals and employers also seem to share the same obstacles as the physician plaintiffs: the PPACA itself is a systemic obstacle, while Congress is the antagonist. But not all of the plaintiffs seemed to cast Congress in the role of Villain. The plaintiffs’ brief in Mead v. Holder,\(^6^6\) seems a bit more focused on logical reasoning, and is less hyperbolic, suggesting that Congress is merely a Threshold Guardian. However, the briefs in Thomas More Law Center v. Obama\(^6^7\) and Liberty University v. Geithner\(^6^8\) tend to demonize Congress. For example, Thomas More Law Center’s brief contains this parade of horribles argument:

> If the Act is understood to fall within Congress’ Commerce Clause authority, the federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every

\(^6^6\)2010 WL 5827945 (D. D.C., August 10, 2010).

\(^6^7\)2010 WL 4784264 (E.D. Mich., April 6, 2010).

\(^6^8\)2010 WL 4850338 (W.D. Va., Sept. 3, 2010).

I realize that this statement is highly subjective. In an effort to quantify this claim, I engaged in a little experiment, based on the article *Clearly, Using Intensifiers is Very Bad–Or Is It?*, 45 Idaho L. Rev. 171 (2008). In that article, Profs. Lance Long and William Christensen counted the number of times “intensifiers” (words like “clearly,” “plainly,” “very,” “obviously” and the like appeared on the pages of actual briefs filed in the Utah Supreme Court. They then calculated the “intensifiers per page ratio” for each brief, then studied the results in those cases to see if there was any correlation between using intensifiers and success (or failure) in the outcome. I borrowed their methodology and designed a WordPerfect macro to “read” all of the briefs in these cases and count the number of times certain intensifiers appeared in the briefs. I used Long and Christensen’s list of intensifiers, plus a few variations and additions of words that I considered to be hyperbole, then manually checked to be sure that the words flagged by my macro were actually being used as intensifiers. (For example, the word “clear” was often used as part of a legal standard, such as “clear and convincing evidence.”) I then eliminated those words from the count, and calculated an “intensifier per page” ratio for each of the briefs. The Thomas More Center and Liberty University briefs rang up 1.25 and 1.22, respectively, intensifiers per page, while the Mead v. Holder brief scored only 0.65 intensifiers per page. The United States briefs in those three cases scored, respectively, 0.18, 0.73, and 0.45 intensifiers per page.
perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of law, such as taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy, among others. The term “Nanny State” does not even begin to describe what we will have wrought if in fact the Health Care Reform Act falls within any imaginable governmental authority. To be sure, George Orwell’s 1984 will be just the primer for our new civics.69

Liberty University’s brief contains additional examples of name-calling and hyperbolic rhetoric.70

It is therefore safe to say that at least some of these plaintiffs attempted, like the physicians, to cast Congress in the role of Villain: purely evil.

C. The State Government Story

Of the eleven cases in my study, only two were filed by state governments (or their representatives).71 Both cases were resolved on the merits of the Commerce


70 For example, the plaintiffs’ brief argues that the government’s position defies common sense. More importantly, it does not create the necessary nexus between an individual’s economic activity and interstate commerce. This socialist mentality would allow Congress to nationalize anything on the assumption that all must pay in order to make the object of regulation affordable to all.

Plaintiffs' Brief in Opposition to Motion to Dismiss, 2010 WL 4850338 (W.D. Va., Sept. 3, 2010), at 16.

71 It may be a bit misleading to characterize these cases as having been filed on behalf of state governments, of course, since it is often difficult to decide who speaks on behalf of the state. All of the “states” which signed on to one of the two cases in this group were added to the litigation on the authority of the elected Republican state attorney general, even though in some cases the state Governor and one or more of the houses of the state legislature were controlled by Democrats, who may not have agreed with the joinder of their state as a plaintiff in this litigation.
Clause issue, rather than standing.\textsuperscript{72} They are summarized in the sidebar “State Government Stories.” The main case in this group is \textit{Florida v. Department of Health and Human Services},\textsuperscript{73} a case ultimately joined by twenty-six state Attorneys General.\textsuperscript{74} A second case, \textit{Virginia v. Sebelius},\textsuperscript{75} was brought solely on behalf of the Commonwealth of Virginia by its Attorney General. Both cases tell similar stories on behalf of the plaintiffs.

\textbf{1. Protagonist}

The selection of a heroic archetype for the State plaintiffs is fairly straightforward: they take on the role of Ruler heros. The goal of a Ruler is to

\begin{table}[h]
\centering
\begin{tabular}{|l|p{10cm}|}
\hline
\textbf{State Government Stories} &  \\
\hline
\textbf{Protagonist(s)} & State governments. \textbf{Hero type:} Ruler. \\
\hline
\textbf{Goal(s)} & Not to increase spending on health care; protect state police power from federal usurpation \\
\hline
\textbf{Obstacle(s)} & \begin{itemize}
  \item (1) Systemic (act coerces states to behave in ways acceptable to the federal government)
  \item (2) Antagonist (Congress as Threshold Guardian)
\end{itemize} \\
\hline
\end{tabular}
\end{table}


\textsuperscript{73}___ F. Supp. 2d ___, 2011 WL 285683 (N.D. Fla. 2011).

\textsuperscript{74}Two individual plaintiffs and an association representing business interests also joined as plaintiffs, although the brief on behalf of the Plaintiffs barely mentions them at all; they appear to be “fail safe” plaintiffs designed to insure that some plaintiff had standing to bring the lawsuit.

“create a prosperous family or community, and to gain power.” The chief task of a Ruler hero is to take responsibility, for himself or herself or for others. The briefs in both cases are clearly about preserving state power, allegedly to protect the members of their community (state citizens) from the overreaching federal government. The states claim the responsibility for insuring the welfare of the citizens within their borders.

2. Goal

Both of the cases in this group tell essentially a “states rights” story. Both briefs invoke the Framers and the original intent of the Commerce Clause of the United States Constitution. Both briefs argue that the PPACA, if it were allowed to coerce citizens to do purchase insurance, would create an almost unlimited federal police power, correspondingly decreasing the power historically considered to be exclusively exercised by states. The Commonwealth of Virginia’s brief (at least as far as it relates to the Commerce Clause issue) is exclusively devoted to a

---

76Robbins, supra n.17, at 803.

77Pearson, supra n.21, at 183.

78The brief in Florida v. Dept. of Health and Human Services makes a passing reference to the original intent: “If this had been the Framers’ intent, and if this is the Constitution’s meaning, then all of the remaining provisions of Article I, section 8 demarcating Congress’s specific authority would be ‘mere surplusage.’” Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, 2010 WL 4564355 (N.D. Fla., Nov. 4, 2010), at p. 15. The brief in Virginia v. Sebelius is much more expansive, including an entire section devoted to the historical context in which the Commerce Clause was drafted, including a citation to the Federalist Papers. Plaintiff’s Memorandum in Support of Motion for Summary Judgment, 2010 WL 3536788 (E.D. Va., Sept. 3, 2010), at pp. 10-11.
discussion of the boundary between the power of the states and the power of the federal government; its statement of the undisputed facts also points out that the Virginia legislature enacted, and its governor signed, a law which provided that no citizen of the Commonwealth could be compelled to purchase health insurance except in specified, and limited, circumstances.\footnote{Plaintiff's Memorandum in Support of Motion for Summary Judgment, 2010 WL 3536788 (E.D. Va., Sept. 3, 2010), at pp. 7-8. The circumstances under which a person could be compelled to purchase health insurance primarily involve court or administrative proceedings, or situations where college students are required to obtain and maintain health insurance as a condition of enrollment. \textit{Id.} at 7.} The Plaintiffs’ brief in \textit{Florida v. Department of Health and Human Services} is similarly protective of the right of states to decide what is best for their citizens;\footnote{In pointing out that Congress explicitly invoked the example of the health care law adopted in Massachusetts, which also includes an individual mandate, plaintiffs note wryly that Congress's open emulation of a State police-power regulation is telling. In enacting the Individual Mandate, Congress is attempting to exercise the very plenary power that the Constitution forbids it. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, 2010 WL 4564355 (N.D. Fla., Nov. 4, 2010), at p. 16.} it also includes a section claiming that the PPACA would force states to incur “substantial costs and obligations to cover millions more Americans through a fundamentally transformed Medicaid program.”\footnote{\textit{Id.} at p. 20.}

Thus, the goal of the state plaintiffs is simply preservation of their rights as Rulers against the competing claim of a different Ruler (the federal government).

\textit{3. Obstacle}
The obstacle in this story are similar to those in the stories told by the physicians and the private individuals. The principal obstacle is systemic: the PPACA itself. But Congress also appears fairly clearly in the role of antagonist as well. These briefs are not immune from the occasional hyperbolic claim, but they do not sound as histrionic as some of the briefs filed by the private plaintiffs. And because the Florida brief, in particular, acknowledges a legitimate role for Congress in health care funding, it appears that the States have taken a more nuanced, and reasonable, view of Congress as antagonist. Rather than characterizing Congress as a pure Villain, the states appear to cast Congress as a Threshold Guardian: not purely evil, but simply a character with a different objective than that of the protagonist.

D. The United States Government Story

While the stories told by the plaintiffs varied between these three groups of plaintiffs (because there were different protagonists in each story), the United

---

82 For example, the brief in Florida v. Dept. of Health and Human Services claims that the Commerce Clause power that Congress claims in enacting PPACA is “unbridled,” “novel and sweeping;” and that the new Medicaid regime would cause “devastating consequences to [states'] already-strained budgets.” Id. at 8. It further described the new, broader federal program as imposing “crushing new costs” on the states. Id. at 21.

83 The “intensifier ratio” (see footnote , above) for the Virginia v. Sebelius brief was 0.78, and for the Florida v. Dept. of Health and Human Services it was 1.17. Both of these scores were still higher than the corresponding briefs on behalf of the United States: 0.29 and 0.28, respectively.

84 Medicaid was the hallmark of cooperative federalism, a true partnership, when the States joined the program in the 1960’s and 1970’s.” Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, 2010 WL 4564355 (N.D. Fla., Nov. 4, 2010), at p. 20.
States told essentially the same story in all cases, which is summarized in the sidebar “United States Government Story.”

1. Protagonist

The United States tells a more complex and nuanced story than any of the plaintiffs do. It cannot deny its basic persona as a Ruler hero: it is attempting to create a prosperous community for all citizens by creating a new system that provides affordable health care for all. But, no doubt mindful of the attempt by the plaintiffs to paint the federal government as a big, bad bully, the attorneys for the United States also cast all American citizens in the role of co-protagonist (or at least a companion character). After all, a Ruler’s job is to protect his family or community; thus, all of the briefs filed by the United States do a good job of putting the people it protects (the Everyperson hero, all American citizens) into the center of the story.\textsuperscript{85}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{United States Government Story} &  \\
\hline
\textbf{Protagonist(s)} & (1) The United States government, acting benignly on behalf of all citizens. \textbf{Hero type:} Ruler.  \\
& (2) All American citizens. \textbf{Hero type:} Everyperson  \\
\hline
\textbf{Goal(s)} & Affordable health care for all citizens  \\
\hline
\textbf{Obstacle(s)} & (1) Systemic (health care system)  \\
& (2) Antagonists (various Threshold Guardians, including private insurers who cherrypick the healthiest patients and freeloaders who don’t buy insurance and then rely on charity care from health care providers, who then pass the cost of that care back to Everyperson)  \\
\hline
\end{tabular}
\end{table}

\textsuperscript{85}In this regard, the United States’ briefs are more nuanced than those filed by the other contestants for the mantle of Ruler, the state governments. The states’ briefs make infrequent references to their own citizens, and seem to characterize this dispute as a more personal fight.
2. **Goal**

The United States has also chosen a goal that nobody can reasonably argue with. There is little dispute that health care in this country is allocated in ways that favor the wealthy, and which leave many people of modest means with inadequate or no health insurance. Fair-minded people would likely wish that health care be more universally available, and at a lower cost. While this is a worthy goal for a benign Ruler, given the ascendency of anti-government sentiment among a segment of the population, it is not surprising that the government chose to downplay its own role in securing that goal, and to put its companion character, Everyperson, at the center of its story.

3. **Obstacle**

The United States also does a good job of depersonalizing the obstacle it is trying to overcome. Most of the briefs filed by the United States begin by depicting a health care system that is badly broken, in which insurance companies pick and choose who they will cover, and which leaves 45 million Americans without basic health insurance.\(^{86}\) It describes this situation as unfair because “virtually no

---

\(^{86}\)It is interesting to note that, despite the fact that insurance companies have potentially the most at stake in health care reform, none of the cases in the study group were brought by insurance companies. Perhaps because, as some commentators have noted, the bill which actually passed may benefit insurance companies in the long run, by increasing the number of people who purchase insurance. See Ken Terry, *Big Winner in Healthcare Reform? Insurance Companies, Eventually*, http://www.bnet.com/blog/healthcare-business/big-winner-in-healthcare-reform-insurance-companies-eventually/1267 (viewed Sept. 13, 2011).
individuals can make a personal choice to eliminate all current or potential future consumption of health care services.” But it points out that, because federal Medicare law requires hospitals with emergency rooms to treat and stabilize every patient who presents, regardless of their ability to pay, uninsured people don’t go without health care. They simply get free (or “charity”) care at the nearest hospital emergency room. The hospital then recovers the cost of that care by a practice known as “cost shifting,” in which it overcharges insured or self-pay patients in order to generate funds to provide free care to uninsured patients.

In this story, all citizens are depicted as the protagonists, deserving of reasonably priced and universally available health care. The antagonists include the greedy insurance companies who seek to “exclude from coverage those they deem most likely to incur expenses.” The solution to the problem, according to this story, is to require insurance companies to cover everybody, without imposing an

---


88 Id.

89 Id. at p. 14.

90 My word, not the United States’.

91 Id. at p. 13.
exclusion for pre-existing conditions, and to require everybody to share the cost. Thus the so-called “individual mandate” which requires everybody to purchase insurance (on pain of a tax penalty if they do not) creates the largest possible risk pool over which to spread the risk of health-related expenses. By not allowing people to wait until they actually need health care to purchase insurance, premiums for everybody will be lower because more people are sharing the costs.

By telling this complex story, the United States appears to be facing reality. The story rings true. There is no effort to demonize insurance companies; while the briefs generally include a section describing insurance industry practices such as “cherry-pick[ing]” healthy patients while denying coverage to those who are not as healthy, and denying coverage for pre-existing conditions, they do so by reciting facts in a fairly neutral manner. There is an implicit understanding that insurance companies are for-profit enterprises, simply participating in the free market as is their legal right. Indeed, the tone of the government briefs is, on the

---

92Thus, it satisfies the reader’s desire for what Prof. Rideout describes as “narrative fidelity.” See discussion of this concept at 123, infra.


94For example, the brief cites statistics compiled by the non-partisan Congressional Budget Office regarding the number of uninsured Americans (id. at 11); various scholarly articles regarding consumer behavior (id.), and testimony before Congress from various scholars (id. at 12).
whole, much more subdued than that of any of the plaintiffs. Accordingly, it appears that the government has cast the antagonists in its story as Threshold Guardians: simply characters with understandable (and legal) objectives that are at odds with the government’s more important objectives (the protection of Everyperson).

IV. Playing the Hand: The Winners and the Losers

As noted at the outset, while these cases raised a variety of legal issues, the only two issues that resulted in final dispositions of any of the cases were the issues of standing to sue, and whether PPACA is a valid exercise of Congress’ power under the Commerce Clause. Let’s examine how the stories described above might have influenced the court’s decision.

A. The Standing Cases

As noted above, six of the 11 cases in this study were resolved on the issue of whether the plaintiffs had standing to sue. Five of the plaintiffs in that group were private individuals or employers; one was a group of physicians. None of the cases brought by state governments were dismissed at the trial level for lack of standing.

---

95 The average “intensifier ratio” (see footnote 68, above) for all of the United States briefs in the five Commerce Clause cases was 0.36; the average ratio for all of the Plaintiffs’ principal briefs in those same cases was 1.02, or nearly three times higher.

96 See Table 1, supra.

97 However, one of the state cases was reversed on appeal and dismissed on the basis that the
1. Physicians v. United States

The physicians lost. Their story—“we like our business model the way it is”—apparently did not resonate with Judge Wigenton in quite the way that the “we’re all in this together” story of the United States did. As shown in Table 4 above, their story was essentially that the physicians were comfortable with the existing business model for practicing medicine, and did not want anything to change. This case was dismissed by the trial judge on the basis that the plaintiffs lacked standing to sue. 98

It is not hard to imagine why the government’s story of “we’re all in this together” was more effective. In a contest between well-educated and highly-paid physicians and the American Everyperson who is lucky if he has health insurance at all, much less adequate coverage, Everyperson is going to be the more sympathetic protagonist. Moreover, since the physicians did a poor job of explaining what potential negative impact the law would have on them (i.e. they didn’t tell a very good story), it is not surprising that the court found plaintiffs did not have a “concrete and particularized” injury which is “actual or imminent, not conjectural or hypothetical” 99 sufficient to maintain standing. In fact, the court suggested openly

---

98 The trial court’s ruling was affirmed on appeal. New Jersey Physicians, Inc. v. Obama, ___ F.3d ___ (3d Cir. Aug. 11, 2011).

that it simply didn’t believe the physicians’ story:

Plaintiffs allege that Dr. Criscito has standing because the Act will affect “the manner in which he may, or may not seek payment for his professional services and the manner in which he may render treatment to his patients.” (Pls.’ Br. 3.) According to Plaintiffs, Dr. Criscito will be unable to accept direct payments from his patients once the Act is effective. (Id. at 6.) However, this argument has no basis. The Act does not prohibit Dr. Criscito or any physician from accepting direct payments from their patients. . . . Additionally, the Act does not specify how physicians should render treatment to their patients.\(^{100}\)

Thus, one can reasonably attribute the plaintiff’s failure in this case as a failure to tell a good enough story: the protagonist was less appealing, the goal was not sufficiently worthy, and the obstacle was not real.

2. Individuals and Employers v. United States

The five private individual/employer cases had mixed results. In three cases, the courts granted the motion by the United States to dismiss the case due to lack of standing, while in two cases the motion was denied. However, note that the United States also raised the standing issue in the three private-plaintiff cases (as well as the two state-plaintiff cases) where the court did reach the Commerce Clause issue. By definition, the court found standing in all three of those cases (else it could not have decided the Commerce Clause issue). Thus, the final “scorecard” for the standing issue (when litigated in the context of private individuals or employers) was five private-plaintiff cases where standing was found, and three where it was

\(^{100}\)Id. at 510.
Why this occurred is difficult to puzzle out. As noted at the outset, the mainstream media has focused on the fact that, in the five cases decided on the Commerce Clause issue, the three cases where the United States won were decided by judges appointed by a Democratic president, while the two cases won by the plaintiffs were decided by judges appointed by a Republican president. This correlation is assumed to be proof that the decisions were politically motivated.

However, this explanation does not account for the cases which were decided on the standing issue. Of these six cases, plaintiffs were found to lack standing in four, and to have standing in two. Three of the four judges who dismissed the cases due to lack of standing were appointed by Republican presidents, which does not fit the political explanation for how these cases were decided.

Moreover, one of the judges who found standing in this group of six was appointed by a Democratic president. Combined with the three judges appointed by Democratic Presidents who reached the Commerce Clause issue (necessarily finding that the plaintiffs had standing), that makes four judges appointed by Democratic presidents who found that plaintiffs had standing. Thus, of the 11 cases studied, in seven the rulings on standing seem contra-indicated by the metric of which party’s

---

101 See Table 2, supra. Also, see “Round 1 in Appeals of Health Care Overhaul Goes to Obama,” New York Times, June 20, 2011, p. A15 [2011 WLNR 12971762] (“In various cases at the lower District Court level, five judges have divided on the question, with three Democratic appointees backing the law and two Republican appointees rejecting it.”)
President appointed the judge. 102

A better explanation for the results in the standing cases is probably that they are simply much more fact-bound than the cases decided on the merits of the Commerce Clause issue. A particular plaintiff has standing to sue only when he has “suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” 103 Since this standard requires a close examination of the facts peculiar to each plaintiff, it is hard to compare standing cases to each other.

B. The Commerce Clause Cases

The results in the five cases decided on the merits of the Commerce Clause issue were much more consistent. The private plaintiffs all lost. The state attorneys general all won. But this seems completely counter-intuitive: after all, since all of the cases challenged something called the “individual mandate,” wouldn’t the individuals have a more compelling story to tell as to how they have been injured?

What happened here? The Commerce Clause issue is pretty much a pure

102 Although my study was limited to the trial court opinions, it is interesting to note that this pattern also held in the one standing case that has been decided to date on appeal. In New Jersey Physicians, Inc. v. Obama, ___ F.3d ___ (3d Cir. Aug. 11, 2011), a unanimous three-judge panel affirmed the dismissal of the case for lack of standing. Two of the judges on that panel (Chagares and Jordan) were appointed by Pres. George H.W. Bush, which of course would be contra-indicated if party politics really made a difference. This is not to suggest, however, that the political affiliation of the President who appoints a judge is a reliable proxy for the political inclinations of the appointee; I make this observation merely to debunk the metric that most mainstream media commentators have used.

question of law. All of the parties had the same case law and the same arguments available to them, and they all basically cited the same cases and made the same arguments. One significant variable in the Commerce Clause cases is the narrative argument.

There are certainly multiple possible reasons why these cases came out differently. As noted above, these cases do break down neatly along political lines: the three judges appointed by Democratic presidents found the law constitutional, while the two judges appointed by Republican presidents found the law unconstitutional. But given that the standing issue did not break along political lines, and also because the judges themselves most likely would deny that politics had anything to do with their decisions, it is useful to speculate about other possible reasons. One such possibility is that the different stories told by the parties affected the judges in different ways. Since the plaintiffs told different stories (depending on who the client was), and the defendant told essentially the same story in all of the

---

104 See text at pp. 41 to 42, above. Note, however, that this pattern has broken down in two of the three Courts of Appeals decisions based on the Commerce Clause issue. In *Thomas More Law Center v. Obama*, ___ F.3d ___ (6th Cir. June 29, 2011), the panel affirmed by a 2-1 vote the decision by the trial court that the PPACA was constitutional. One of the judges in the majority (Sutton) was appointed by Pres. George H.W. Bush. In *Florida v. Dept. of Health and Human Services*, ___ F.3d ___ (11th Cir. Aug. 11, 2011), the panel affirmed by a 2-1 vote the decision by the trial court that the law was unconstitutional. One of the judges in the majority (Hull) was appointed by Pres. Clinton. In the third case, *Virginia v. Sebelius*, ___ F.3d ___ (4th Cir. Sept. 8, 2011), the Fourth Circuit unanimously reversed the trial court and ruled that the Commonwealth of Virginia lacked standing to sue. All three judges on that panel were appointed by Democratic Presidents.

105 See section IV-A-2, *supra*. 
cases, it may be possible to examine the different plaintiff stories to discern which one(s) were effective and which were not.

1. The private individuals’ stories

As noted every single private individual and employer (whose case has concluded at the trial level, as of this writing) eventually lost. Of the eight cases, three were dismissed for lack of standing\(^\text{106}\) and three others were dismissed on summary judgment when the trial judges found the statute to be constitutional.\(^\text{107}\) (The trial court in the other two cases found that the plaintiffs had standing to sue, thereby retaining jurisdiction of the matter, but no final disposition of those two cases has yet occurred.)

Let’s look at the plaintiffs’ story again.\(^\text{108}\) The private individuals presented themselves as Outlaw heros, railing against the villainous Congress. Theirs was a story of rugged individualism. The protagonists all wanted to be left alone, free from government interference. They were self-reliant individuals who would choose their own method for paying for any health care they might need, thank you very much.

While the United States presented itself as a Ruler hero, the focus of the brief was not on its power to protect, but the needs of its companion, the American citizens (portrayed as an Everyperson hero). The Everyperson story actually works

\(^{106}\)See Table 1, \textit{supra}.  

\(^{107}\)See Table 2, \textit{supra}.  

\(^{108}\)See sidebar “Physicians’ Story,” \textit{supra}.
quite well to counteract the “Rugged Individual” story. In the government’s story, everybody (including the Rugged Individuals) will need health care at some point. The larger the pool of people working together to carry that burden, the lighter the burden will be on everybody. By opting out of that pool, the Rugged Individuals are forcing Everyperson to carry more of the burden, all the while leaving the Rugged Individuals with the option of jumping in to the insurance market at the moment they need care (since the law prohibits insurance companies from denying coverage for pre-existing conditions). This combination of initial refusal to share the burden common to Everyperson, and the ability to reap the benefits of the law, effectively portrays the Rugged Individuals as freeloaders. Thus, the Outlaw story becomes unappealing: the goal of the Rugged Individuals is not worthy (or at least less worthy than the goal of the Ruler and Everyperson: affordable health care for all). The Rugged Individuals turn out to be part of the problem that the government describes.

But note that the government portrays the Rugged Individuals not as villains, but merely as threshold guardians. The briefs do not claim there is anything evil or immoral about the Plaintiffs’ goal; it is simply in conflict with the more important goal shared by so many more people. Thus, the government’s story seems to fit reality: it is plausible and nuanced. The protagonists and antagonists behave in ways that appear to be normal and easily understood. And the outcome has a certain Mr. Spock-like logic to it: the needs of the many outweigh the needs of
the few.  

2. State governments vs. United States

The only two cases which resulted in victories for the plaintiffs were the two cases filed by state governments. When all of the private lawsuits were unsuccessful, it is interesting to consider why all both of the state government cases were successful. Was the fundamentally different story told by the state governments at least part of the reason?

The states told an appealing story of federalism and states’ rights. In our Constitutional form of government, the central government is supposed to be a government of limited power. The Constitution itself enumerates certain powers available to the federal government, but specifically provides that powers not delegated to the United States are retained by the States, or the people. One consequence of that scheme is that, while the states retain a general “police power” to protect the health and safety of their citizens, the federal government does not have such a broad power. This likely results from the Founders’ then-recent (and

---

109In the movie Star Trek II: The Wrath of Khan, Mr. Spock sacrifices his life to effect a repair to the Starship Enterprise. In his dying moments after making the repair, the following exchange takes place between Spock and the ship’s commander:

Spock: Don’t grieve, Admiral. It is logical. The needs of the many outweigh...

Kirk: ...the needs of the few...


110U.S. Const., Amend X.
unpleasant) experiences with strong central governments at great distance from the people.\footnote{While this theme is not quite explicit in the briefs filed by the states, it is fairly inferred from the several (and sometimes extensive) references to the Founding Fathers, the history of the Commerce Clause, and the citations to the Federalist Papers. See text accompanying note \textsuperscript{111}, supra. This almost subliminal reference to the Revolution is far more effective than the private plaintiffs’ overt casting as Outlaws, probably because it works at such an unconscious level.}

In these cases, then, the Everyperson story told by the United States actually plays into the hands of the plaintiffs. The plaintiff-states told a story in which a strong central government is something to be feared; and then along comes the United States and confirms the states’ worst fears by saying “We are here to represent everybody in the country.” The federal government’s story perfectly fits the image of the strong central power that the Founders fought a revolution to overthrow. The plaintiffs’ goal of preserving the police power of the states is portrayed as worthy, and the federal government is successfully cast as the obstacle: a Threshold Guardian whose understandable goal nevertheless conflicts with the higher goal of protecting state autonomy.

V. The Post Mortem: What Does it All Mean?

One of the fun parts of playing duplicate bridge is comparing notes after all of the tables have played the same hand.\footnote{Of course, as Prof. Michael Smith pointed out when I presented these ideas at the Third Storytelling Conference in Denver in July, 2011, the analogy to duplicate bridge breaks down here. In duplicate bridge, all the tables play the same hand essentially simultaneously; they can’t discuss the strategies and results until after all tables have played the hand. In this litigation, however, the cases were happening at different times. It is very likely that the lawyers for} How did different strategies work, and
why? Let me offer a few observations about what we can learn from studying these cases.

A. Story can provide both motivating and justifying arguments

Recall the two distinct strands of argumentation that Prof. Neumann posits: justifying arguments (i.e. the legal rules which permit a court to rule in a particular way) and motivating arguments (the norm-based reason why a judge should want to rule in that way). It is tempting to think of story as providing only a type of a motivating argument; however, depending on the rule, a story can also function to satisfy a test imposed by a rule. In that sense, story becomes part of the justifying argument. For example, a rule that requires a close examination of the facts of the case (for example, to determine whether specified factors are present or not) may require the advocate to tell a compelling story. The standing issue in this case is a good example of that situation, as discussed in the next section.

B. If the issue is fact-sensitive, it is essential to tell a credible story

This observation seems self-evident. If your path to success depends on having good facts, good storytelling is essential. The corollary, of course, is that bad storytelling will be penalized.

different plaintiffs studied the cases which were decided before their own cases, and adjusted their strategies. And certainly the Justice Department, with the same core group of lawyers defending all of the cases, must have learned something as these cases proceeded through the courts.

113See discussion at p. 5, supra.
The standing issue in these cases is an example of an issue that is fact-sensitive: whether any plaintiff has suffered a sufficiently concrete and particularized injury that is actual or imminent obviously depends on the facts. Many of the plaintiffs in this case told plausible stories here; those that did not, lost. The best example of a bad story was the claim by the New Jersey Physicians Association that the PPACA would prevent physicians from billing patients directly. The judge saw no evidence of that requirement in the PPACA, and in all likelihood this was the key flaw in the plaintiff's case that resulted in a finding of no standing.114

Interestingly, the one Court of Appeals decision that reversed the trial court did so on the question of standing. In Virginia v. Sebelius, the trial court ruled that the Commonwealth of Virginia had standing to bring suit, and that the PPACA was unconstitutional.115 Part of the court’s rationale was that the Virginia legislature, like several other states,116 had enacted the Virginia Health Care Freedom Act, which purported to exempt all citizens within the Commonwealth from having to

114See discussion at n. 100, supra.


116One advocacy group has reported that, as of the time this Article was written, twelve states had enacted either statutes or amendments to the state Constitution that purported to guarantee to the state’s citizens the right to refuse to purchase health care insurance. American Legislative Exchange Council website, http://www.alec.org/AM/Template.cfm?Section=FOCA&Template=/CM/HTMLDisplay.cfm&ContentID=15323 (viewed Sept. 11, 2011).
purchase health insurance. The trial court reasoned that this Act, signed by the Virginia governor the day after President Obama signed the PPACA, created a case or controversy between the state and the federal government as to whose law should apply. The Fourth Circuit, however, reversed, holding that the Commonwealth of Virginia is not subject to the individual mandate that it challenged in the lawsuit. Rather, the Commonwealth was seeking to assert claims held by its citizens as \textit{parens patriae}, and therefore lacked a sufficient interest in the case to have standing.\textsuperscript{117}

\textbf{C. If the issue is law-sensitive, storytelling still matters}

This conclusion is a bit counter-intuitive. If the issue is one of pure law, wouldn’t logic-based reasoning be all that is required? And wouldn’t a judge, trained to resist emotional appeals and faithfully pledged to decide impartially upon an even-handed application of neutral principles of law, resent story’s inherent appeal to pathos?

If rule-based reasoning were all that mattered, however, all five of the Commerce Clause cases would likely have been resolved in the same manner.\textsuperscript{118}

\textsuperscript{117}\textit{Virginia v. Sebelius}, ___ F.3d ___ at ??.

\textsuperscript{118}All five judges analyzed the same cases, and the arguments made by the parties on this issue were very similar. One could therefore argue that some of the five judges just got it “wrong” while the others got it “right.” However, lacking any reliable metric for evaluating a judge’s competence, let’s assume that all five judges are equally competent to read and understand the controlling case law. A more satisfying answer would be that this case falls within what Judge Richard Posner calls the “open area” of cases: that category of cases for which a legalistic examination of the applicable rules of law does not yield a “tolerable” answer. Richard Posner, \textit{How Judges Think} 9 (Harvard 2008). Most of the rest of the book reflects Posner’s attempt to
That issue is purely one of law: the same Commerce Clause applies in all five cases, and all cases were brought against the same defendant (ultimately, the United States government). What is different in the five cases is the story told by the two different groups of plaintiffs in these cases. Here, the stories told by the parties serve as a motivating argument to supplement the justifying argument based on the Commerce Clause. The private plaintiffs’ story was effectively countered by the story told by the United States government; the states’ story was not.

Of course, the different stories were not the only way in which these cases differ. As noted above, the private plaintiffs tended to be more strident in their rhetoric, and more aggressive in attempting to portray the defendants (principally Congress) as evil villains. But portraying the protagonists’ obstacle as a villain instead of some lesser antagonist is a storytelling choice. Judges are reasonable persons, and are trained to be highly skeptical readers. Choosing an unrealistic, villainous role for the defendant/antagonist is likely to raise a great deal of skepticism in the judge’s mind, and therefore is probably not an advocate’s best choice.

D. Ethos matters too

describe how judges navigate the “open area.” Some of the tools that may help a judge decide a case in this “open area” include “emotion, personality, policy intuitions, ideology, politics, background, and experience.” Id. at 11. It is within Posner’s “open area,” I submit, that narrative reasoning has something valuable to offer the judicial process, since narrative can appeal to all of the tools that Posner thinks are used to decide such cases.
It is interesting to note that all of the plaintiffs argued that the rationale advanced by the United States in support of PPACA would create a virtually unlimited federal power to regulate anything it wanted to.\textsuperscript{119} When that argument was advanced by private plaintiffs, it was rejected; when advanced by state governments, it was successful.

It is certainly possible that this was a mere coincidence. However, it is equally possible, or perhaps more likely, that ethos played a role in these differing outcomes. The “unlimited federal power” argument is ultimately a states’ rights argument: only the states have a general police power. Such an argument would likely be taken more seriously when advanced by state governments, since the states are protecting their own interests. The private actors could be viewed as simply seizing opportunistically on any argument they can think of to avoid a result they don’t like. In short, the states have the credibility (ethos) to make the argument; the private actors, not so much.

The Fourth Circuit’s decision in \textit{Virginia v. Sebelius}\textsuperscript{120} is further evidence


\textsuperscript{120}See discussion at n.117, \textit{supra}.
ethos matters. In that case, the appellate court reversed the trial court’s decision that the Commonwealth of Virginia had standing to sue on behalf of its citizens for an alleged injury (the individual mandate) that the citizens alone (and not the state) suffered. This presents the converse of the Commerce Clause decisions: only individuals could credibly challenge the individual mandate.

E. The law and the story must fit together seamlessly

Perhaps the most important lesson to draw from these cases is that the story must fit the legal theory.

I have previously compared persuasion to a double helix: one strand of logos wound tightly with a strand of narrative reasoning. But for this technique to create a viable “DNA” molecule, the two strands must complement each other in a natural way. If they don’t fit together well, the persuasion won’t work.

The briefs of the private plaintiffs illustrate this point well. The basic story (the narrative strand of reasoning) was simply this: we want to be left alone, and don’t want the government telling us what to do. The logos strand consisted of an argument that the Commerce Clause did not give Congress the power to compel individuals to purchase insurance. But that logos does not fit the story, since it does not prove that “government” can’t compel individuals to purchase insurance. It only proves that the federal government cannot do so. The plaintiffs’ legal theory leaves

121 Chestek, Judging By the Numbers, supra n. 5, at 3-5.
state governments free to compel individuals to purchase insurance;\textsuperscript{122} thus, the plaintiffs cannot achieve through this theory what their story suggests they really want.

The state governments’ more limited claim, however, does fit the legal theory perfectly. Their story is that they want to protect their own prerogatives in caring for their own citizens.\textsuperscript{123} The Commerce Clause argument matches that goal perfectly. Little wonder then that the states won, and the private individuals did not.

F. The story must sound true

One of the defining features of the stories told by the parties was their complexity. All of the plaintiffs (both private and states) told fairly simple stories: he plaintiffs were pure and worthy protagonists, the defendants were evil antagonists (portrayed as Villains). The United States, however, told a much more nuanced and complex story. For example, the story of the United States included more characters, including the government’s Everyperson companion protagonist (all American citizens), and a multitude of antagonists (insurance companies, health care providers, freeloaders), all drawn as Threshold Guardians. The complex

\textsuperscript{122}As the state of Massachusetts does for health care, Mass. Gen. Laws Ann. ch. 111M (Westlaw through 2011), and every state does for automobile insurance, 7A Lee R. Russ et al., Couch on Insurance 3d § 109:1 (2005).

\textsuperscript{123}There is a certain irony that the states’ method of “protecting its citizens” in the health care arena is to do nothing, but simply allow the private market to do whatever its invisible hands feel is appropriate. Thus, the states’ argument boils down to “protecting its citizens” by leaving
interrelationships between all of these characters was fully explained. The goals of
the protagonists were much more clearly and explicitly laid out than the goals of
any of the plaintiffs in their own briefs.

Perhaps because the audience for these briefs was a judge (as opposed to a
jury), this complexity seems to have paid off for the United States, at least in the
private plaintiff lawsuits. This may be because the judges understood that we live
in a complex world, and that they trusted the United States’ briefs to be more
accurate portrayals of the problem of inequitable distribution of health care services
and the potential solution.

Professor Chris Rideout describes what he calls three features (or
“properties”) of narratives that can be psychologically persuasive: narrative
coherence, narrative correspondence, and narrative fidelity.124 He describes
“narrative fidelity” as a the audience’s perception of whether the story “ring[s] true
with the stories [the audience] know[s] to be true.”125 Stated another way, narrative
fidelity requires the audience to evaluate whether the stories they hear “represents
accurate assertions about social reality and thereby constitutes good reasons for

124Rideout, supra n. 8, at 55.

125Id. at 70, quoting Walter Fisher, Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action 64 (U.S.C. 1989).
belief or action.”126 Because the story told by the United States about the complex health care finance system was well-supported with citation of factual authority, and likely corresponded with judges’ pre-existing knowledge of how the health care system works, it likely “rang true” to the audience’s ears, and thus reflected good “narrative fidelity.”

But why did that only work in the case of the private plaintiffs? The United States told the same complex story in the two cases filed by state governments, but lost those two cases. I suggest it was because the states were able to make the story be about something other than health care finance.

The private plaintiffs played on the same field that the United States did: the case was about health care finance, and the story told by the United States had more narrative fidelity. The states, however, played on a different field: that of federalism. Their story was about power; specifically, which sovereign is permitted, in our federal system, to make decisions about the welfare of its citizens? The case really wasn’t about health care at all; it was just a power struggle, and they (the weaker states) needed the court’s intervention to protect them from a much stronger adversary, the overreaching United States government. That story apparently had more “narrative fidelity” for the judges who heard those cases than the “health care finance” story told by the United States.

126 Id.
G. Audience matters too

Which brings us back to the initial question: isn’t it all about the political leanings of the judges who heard these cases?

As pointed out in the previous section, in the cases brought by the states, the trial judges had competing narratives to choose from. The United States told a story about a dysfunctional health care system, while the states told a story about a runaway federal government. The outcome of the case depends very much on which story the judge chose to listen to.

Let’s suppose the judge decided that the case was about the broken health care system. The states did not really dispute that in their briefs; their “solution” was completely laissez-faire (let individuals make their own choices and the market will decide). In that contest, the United States’ complex and well-supported story about how the health care system really works and how it leaves millions of people at risk for potentially catastrophic expenses is pretty compelling. The court would likely want to protect the weak Everyperson companion and rule in favor of the United States.

But the two judges who heard those cases instead viewed the dispute as one of federalism: should the federal government’s power extend as far as the PPACA seems to push it? In Virginia v. Sebelius, the United States filed a Motion to Dismiss on several grounds, including claims that the Commonwealth of Virginia lacked standing to sue, that the controversy was unripe, and that since the PPACA ...
was enforced through a tax measure, the suit was barred by the Anti-Injunction Act. The trial court rejected all of these claims, and instead decided the matter on competing Motions for Summary Judgment. In framing the issue before it, the trial court first acknowledged the federalism story told by the state by reporting that the Commonwealth was attempting to protect its sovereignty from encroachment by Congress, invoking the Tenth Amendment. But the court began its recitation of the United States’ version of the story (which told of the broken health care system) by saying that “[t]he Secretary prefaces her response with an acknowledgment that the debate over the constitutionality of the [PP]ACA has evolved into a polemic mix of political controversy and legal analysis.” There is little doubt from the way the court framed the competing stories as to which story the court heard most clearly.

127Memorandum in Support of Defendant’s Motion to Dismiss, 2010 WL 2315702 (May 24, 2010).


130Id. at 772.

131Id.

132As noted above, my objective in this project was to study the differing trial court rulings in this nationwide litigation. But it is worth nothing that, while the trial judge in the Commonwealth of Virginia litigation heard the federalism story, the Fourth Circuit heard quite a different story indeed. Since the trial judge’s prior ruling denying the United States’ Motion to Dismiss was an interlocutory order, the issues of standing, ripeness and the applicability of the Anti-Injunction Act were preserved for appeal and were heard along with the appeal on the merits of the Commerce Clause issue. The Fourth Circuit held that the Commonwealth of Virginia lacked standing to sue, and therefore dismissed the action, vacating the trial court’s decision on the merits. Virginia v. Sebelius, ___ F.3d ___ (4th Cir. Sept. 8, 2011). In so doing, the Fourth Circuit
The trial court in *Florida v. Department of Health and Human Services* was even more explicit about saying which story was important to it:

I emphasized once before, but it bears repeating again: this case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

James Madison, the chief architect of our federalist system, once famously observed:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.\(^{133}\)

In the federalism story, it is the state governments who are weak and in need of the judge’s protection; the judges provided that protection. So why did the judges choose to decide the case based on the federalism story told by the state?

---

governments instead of the health care system story told by the United States?

Here is where the effect of the judges’ pre-existing world-views cannot be denied. Since the judge gets to decide which story will provide the battlefield on which the contest is decided, a judge’s inclination to favor one sort of story over another may prove decisive. That is to say, judges who are inclined to favor stories about rules and processes may choose to decide the cases based on the federalism issue; judges who favor stories about humans and their individual struggles may choose to decide the case on the broken health care system issue.

Judges, like other humans, have a variety of world-views. Some are conservatives, resistant to change; others are more liberal, accepting of change. Conservatives and liberals respond very differently to different stimuli. Stories featuring certain types of heros told to somebody with a conservative viewpoint will likely yield a very different reaction than the same story told to somebody with a more liberal viewpoint. Stated another way, conservatives and liberals will understand the case, and choose the heros they empathize with, differently.

But that doesn’t mean that the judges’ decisions are all about politics, and that the outcome of a case is determined as soon as one type of judge or another is assigned to hear the case. What it does mean, however, is that the advocate needs to choose the story she tells carefully. More importantly, once she knows which judge has been assigned to hear a case, she needs to learn as much as she can about that judge’s background and prior rulings, looking for evidence of what kinds of
stories the judge responds to. Then she needs to carefully choose heroic archetypes for her client, and to craft the story in such a way as to appeal to the judge’s favored world view.

I also don’t mean to suggest any of the five trial court judges in this litigation consciously chose which story to listen to in order to decide the case in a way that favored their own political views. In fact, I very much doubt that they did; it is far more likely that the judges, at least consciously, believed that they were applying the law fairly and impartially to an agreed set of facts. But the important thing to remember about heroic archetypes is that they are embedded deep within each of us; they work at the level of the unconscious. We usually cannot control which one gets triggered when we are exposed to different stimuli. It is sufficient to observe that the same stimuli may subconsciously evoke different heroic archetypes in different people, and therefore also in different judges. The advocate’s difficult task is to try to determine which archetype a particular judge is most likely to see and to favor, and then tell a story to evoke that archetype.

VI. Conclusion

I don’t mean to suggest that the story that parties tell in their briefs is the only thing that helps to persuade a judge. Indeed, while I believe that stories are important persuasive tools, I do not even claim that their effect is the most important factor in every case. For example, a case with a very powerful narrative will be ultimately successful if the rules of law don’t support the relief requested.
What I am claiming, however, is that narrative reasoning likely has some effect in every case, and potentially a dispositive effect in cases where the rules of law don’t readily yield a clear answer. Since reasonable minds may easily differ on the interpretation of the Commerce Clause and the precedents which have interpreted it, I contend that narrative reasoning likely played a role in the differing decisions reached by all of the judges who have handled these cases to date.

Now that three different Courts of Appeal have ruled in these cases, and reached divergent results, it seems highly likely that this issue will be addressed (probably in the current term) by the United States Supreme Court. I do not wish to make any prediction here about how that case may turn out; in fact, the way that the Supreme Court hears and responds to stories is likely very different from how trial courts and Courts of Appeal respond to stories.\textsuperscript{134} My only bit of advice to the advocates who will argue that case is this: Stories matter.

\textsuperscript{134}One respected scholar has described the Supreme Court as a “political court,” and therefore attentive to different modes of persuasion than other courts. Posner, \textit{supra} n. 118, Chapter 10, at 269-323.
Appendix A

Scholarship which grew out of presentations at one of the Applied Legal Storytelling Conferences (as of September 2011)

A. Law Review Articles


James Parry Eyster, *Using Significant Moments and Obtuse Objects to Enhance...

---

135Thanks to Ruth Anne Robbins, one of the organizers for all three of the Applied Legal Storytelling conferences to date, for allowing me to reproduce this bibliography which she first created. I have added a few more articles which have been published since she first compiled this listing.
Advocacy, 14 Legal Writing 87 (2008).

Elyse Pepper, The Case for “Thinking Like a Filmmaker”: Using Lars von Trier’s Dogville as a Model for Writing a Statement of Facts, 14 Legal Writing 171 (2008)


Stacy Caplow, Putting the “I” in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story, 14 Legal Writing 249 (2008).


Carolyn Grose, Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom, 7 JALWD 37 (2010).


Derek H. Kiernan-Johnson, Telling Through Type: Typography and Narrative in Legal Briefs, 7 JALWD 87 (2010).


J. Christopher Rideout, Penumbral Thinking Revisited: Metaphor in Legal Argumentation, 7 JALWD 155 (2010).
Deborah A. Schmedemann, Voice: Speaking for a Deaf Boy in Foster Care, 7 JALWD 203 (2010).


Ian Gallacher, Thinking Like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance, 8 J. ALWD 109 (2011).

B. Book Chapters

This section lists chapters of the book The Law & Harry Potter (Carolina Academic Press 2010), all of which all presented at one of the first two Applied Storytelling conferences.

Mary Beth Beazley, Which Spell? Learning to Think Like a Wizard

Eric J. Gouvin, The Magic of Money and Banking

Sue Liemer, Bots and Gringotts: Anglo-Saxon Legal References in Harry Potter

Heidi Mandanis Schooner, Gringotts: The Role of Banks in Harry Potter’s Wizarding World

Aaron Schwabach, Harry Potter and the Unforgiveable Curses