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Obamacare's Single Most Relentless Antagonist

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It's been widely noted that one of the biggest challenges for the Obama administration in setting up the new federal exchange for health insurance was that the project was much bigger than anticipated. Why? Because far fewer states than expected decided to set up their own exchanges—36 of them left the task to the federal government. This meant the feds were left having to pull a huge web of databases, regulations and insurance offerings into healthcare.gov, and that the site was also hit with a greater rate of traffic than it would have been if more customers had gone to exchanges set up by their own states. Meanwhile, some of the states that did set up exchanges (though not all) have been faring far better.

Why did this happen? Why did so many states that fiercely guard their prerogative to handle their own affairs cede control of their health insurance markets to Washington?

Well, a disproportionate share of the credit or blame—depending on how you're looking at it—goes to a person you've probably never heard of: Michael Cannon.

Cannon is a health care policy expert at the libertarian Cato Institute. He is engaging and sharp-witted. He is also an avowed opponent of the Affordable Care Act, and has for several years now been embarked on a legal crusade that, while a ways from triumphing, may have inadvertently played an outsized role in suppressing the number of states setting up their own exchanges, thereby greatly confounding the law's implementation.

Cannon's crusade, which has been joined by Case Western Reserve University law professor Jonathan Adler, is driven by the conviction that there is a debilitating hole in the law: as written, they argue, it provides subsidies to help people buy individual health insurance plans only in exchanges set up by the states, not by the federal government. Cannon maintains that this was deliberate, as an incentive to get the states to set up exchanges, and that the federal government is violating the law by offering subsidies on the federal exchange. Defenders of the law say this is hogwash, that the wording flaw he has identified is a semantic oversight, and that it was plainly understood at every step of the law's drafting—to Democrats, Republicans, and budget analysts tallying the law's costs—that the subsidies would be available on the federal exchange. After all, the exchange would collapse without subsidies to help lower and middle-income people afford coverage. For more, see my colleague Jonathan Cohn's summary a year ago.

Cannon's argument has made its way into several lawsuits against the Affordable Care Act, two of which recently surmounted their first hurdle in the courts. But his crusade may have done damage regardless of whether those long-shot lawsuits prevail. To build the legal case, Cannon spent a lot of time traveling around the country during the past few years—with visits to more than a dozen states and calls to far more—explaining to state officials opposed to the law that, if they simply refused to set up exchanges of their own and thereby shunted their citizens onto the federal exchange, they would greatly raise the odds of the law's total collapse if and when the courts agreed with him that the federal exchange couldn't award subsidies.

Cannon was hardly the only activist making the rounds urging states against cooperating with the law—the American Legislative Exchange Council and Koch Brothers-backed Americans for Prosperity were doing so as well. But Cannon's argument undoubtedly helped some states overcome their natural states' rights inclination to handle their business on their own. As he put it in May 2012 in an online symposium organized by Tea Party-affiliated FreedomWorks, "The biggest challenge in convincing states not to create Exchanges is this. Lots of state officials, including conservative ones, have been sold on the idea that 'if we don't create an Exchange, the feds will IMPOSE one on us.'" Among those whom he helped to dissuade were New Hampshire and Maine, where Politico reported in April 2012 that Cannon's argument was having an impact:

[Cannon] argues that if states don't act, employers will be better positioned to legally challenge penalties they would have to pay if their employees end up getting subsidized coverage in the exchanges. Cannon contends that the legislation as drafted only allows the subsidies to be given through a state exchange - not a federal one. Most legal experts think this is a drafting error that the Obama administration can fix through regulation, but Cannon believes the courts will strike down any workaround.

One state where his message resonated was New Hampshire, which he visited at the invitation of the Josiah Bartlett Center for Public Policy, a free-market think tank. The New Hampshire Legislature not only allowed a Republican-sponsored exchange bill to die this winter, but the House went a step further and passed a bill prohibiting the state from enacting an exchange shortly after his visit.

And according to Maine Democratic state Rep. Sharon Treat, Cannon's New Hampshire visit had a chilling effect across the state line. She had been in talks with some of her Republican colleagues about an exchange bill. That stopped. "Now, they're advancing the idea of don't do anything, because we don't want to help President Obama," the Maine Democrat said. This is exactly what the national conservative organizations had hoped for.

A few weeks later, in May 2012, Cannon celebrated when Chris Christie rejected an exchange for New Jersey, despite having accepted another part of the law, the expansion of Medicaid. "He has used the most powerful tool available to states to block Obamacare, and so he has done the best thing for the state's residents," Cannon said. (Christie on Sunday cited the troubles of the federal exchange as vindicating his decision to send the state's residents into that troubled program rather than setting up a state exchange for them. This logic went unchallenged by his questioner, George Stephanopoulos.)

Tim Jost, a Washington and Lee University professor and one of the leading authorities on the law's implementation, warned against overstating Cannon's role in limiting the number of state exchanges. The biggest factor in states' deciding to leave the task to the federal government, he said, was the 2010 midterm election, which elected Republican majorities in many state capitols and was taken to affirm a general rejectionist attitude toward the law. It was doubtful, Jost said, that states were persuaded to send their citizens into the federal exchange specifically to deny them the opportunity to receive insurance subsidies, under Cannon's reasoning. "I don't know you'll find any indication that states were saying, 'this is a way of screwing citizens out of tax relief,'" Jost said.

Cannon himself is not one to toot his own horn for his role in limiting the state exchanges. "When I was going to the states I got the sense that there were a lot of state officials who knew they wanted to stop this law and didn't know how," he said. "When people like me would go to the states and say they were better off not creating the exchanges, it gave them the information they needed and they didn't." Still, he made clear that he was often the only person on the barricades against the insurance companies, who wanted state-based exchanges because, Cannon said, they'd exert more influence over them than the federal one. "It was very lonely out there," he said. In some states, "I'd be only person testifying against it."

While his focus is still on the lawsuits, Cannon resists open celebration over the early woes of healthcare.gov, though some schadenfreude slips through. "I don't take any satisfaction in any of this," he said. "It was wise for many states not to set up their own exchanges, because now it's clear who's responsible for the problem: the federal government…States that refused to create exchanges should be patting themselves on the back for making the right move and keeping the lines of accountability clear."

But Cannon bristles at the notion that what he or anyone else did to argue against the state exchanges or otherwise encourage states to resist the law amounts to sabotage that reduced the law's chances for success. As he tweeted Tuesday morning: "Claims of **#ObamaCare** 'sabotage' imply that to work, the **#ACA** requires a level of public support it does not have. What's left to discuss?"

Left unsaid, of course, is the chicken and egg aspect to this defense. No, the law does not have much public support. But its early stumbles are not helping in that regard; and to the extent that the efforts to undermine a law that was duly passed by one branch of government, signed by a second, and upheld by a third have contributed to those stumbles, they have most certainly also fed the disenchantment. Regardless of how the lawsuits turn out, Cannon's mission may already be accomplished.