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Legal case against Obamacare a fiction

BY SIMON MALOY

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Any avid reader of comic books is familiar with the concept of retroactive continuity. Comic book writers who want to explore new concepts and storylines for existing characters often find themselves constrained by the character's established history. The way they get around this is to go back into a character's past and insert or change certain key facts. The most well-known use (or abuse) of retroactive continuity is the surprise resurrection of popular characters who "died." Sometimes "retconning," as the process is commonly known, can be used to create absurdly elaborate backstories for new characters. The whole purpose of retconning is to manufacture a narrative and graft it onto the established history, making it seem like the writer's surprising new twist isn't just plausible, but justified.

That's fine when all you have in mind is selling a few more Captain America comics. It gets a bit dicier when you try and retcon the Affordable Care Act's insurance subsidies out of existence.

That's precisely what Michael Cannon is trying to do. Cannon, of the libertarian Cato Institute, is the legal mastermind behind the Halbig and King cases that challenge the legality of the tax credits made available through the federal health exchanges. He argues that the drafters of the legislation intended for those subsidies to be withheld from states that didn't set up their own exchanges, and wrote the bill in such a way to reflect that intention.

Vox's Sarah Kliff interviewed Cannon and asked him how he can believe this, given that no one who covered the law's drafting has any recollection of ever hearing this argument, and the people who drafted the law say it was never their intention to deny subsidies to any state. Cannon argued that his position is "perfectly reasonable," and tried to explain why:

"What was happening here was, the senators and staff who wrote this language were just trying to put something together that would get 60 votes, so that they could go to conference with the House. To get 60 votes, they needed to create the expectation that states would be running the exchanges. That was crucial to get to 60 votes.

It seems perfectly reasonable to me that some senators or staffers would then say, 'Well, we'll offer the subsidies only in exchanges established by the state. That will create the necessary incentive for states to do it.' And there are lots of reasons why they wouldn't even discuss it. They may have believed it's not worth mentioning because all states would establish exchanges even without the incentive. Or it's not worth mentioning because they figured this provision isn't going survive conference."

Cannon and I seem to have different ideas of what falls under the “reasonable” umbrella. His “reasonable” scenario is that the staffers who drafted the bill had in mind the “necessary incentive” to offer subsidies only through state-run exchanges, but then opted never to mention that “incentive” because they figured the states wouldn’t need it. Even though it was “necessary.” Also: what good is an “incentive” if you never explain to state governments the benefit to them? An incentive that is kept secret is, by definition, not an incentive.

If the lawmakers had indeed telegraphed an intention to withhold subsidies from certain states, that would have been a huge and controversial story. But somehow everyone — reporters, policy wonks, the Congressional Budget Office — missed it. That leaves Cannon to dream up a scenario in which that damning silence actually proves his point.

And the scenario he came up with is not “reasonable.” It’s self-contradictory and isn’t based on anything that actually happened, but it conveniently supports everything Michael Cannon says is true of the ACA. He’s manufacturing a situation that alters the existing history in such a way that it gives his own contemporary twist on the Affordable Care Act a thin veneer of plausibility. It’s a classic retcon, and it’s being offered in obvious bad faith.