

wonder whether adopting a rimland containment strategy would likely turn those fears into a self-fulfilling prophecy. As George Kennan, the so-called father of containment, wrote in 1947, “It is an undeniable privilege of every man to prove himself right in the thesis that the world is his enemy; for if he reiterates it frequently enough and makes it the background of his conduct he is bound eventually to be right.”

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Side Effects and Complications: The Economic Consequences of Health-Care Reform

Casey B. Mulligan

Chicago: University of Chicago Press, 2015, 352 pp.

It is a cruel fact of history, but for seven decades and counting, the U.S. government has joined the market for health insurance in unholy matrimony with the market for labor.

It’s cruel to workers. Separation from a job, for whatever reason, means, at a minimum, disruption of one’s health insurance coverage, and often disruption of one’s access to care. Rather than encourage coverage that would stay with workers after they retired, for example, the shotgun marriage of these two markets casts millions of workers out of their health plans the moment they reached retirement age—many of them with suddenly uninsurable preexisting conditions.

It’s cruel to taxpayers, because its impact on retirees fueled the creation of the incredibly expensive and wasteful Medicare program.

It’s cruel to economists, who, if they seek to understand and improve the functioning of one market, must become experts on two.

It’s cruel to policymakers, in that it fosters a misleading picture of trends in worker compensation, along with a network of tripwires and unintended consequences that stymie sensible reform.

And, finally, it’s doubly cruel to workers, because it allows policymakers to hide the cost of insensible reforms in forgone wages—as Congress quite consciously did under the Affordable Care Act of 2010, not to mention previous and equally dubious “affordable-care acts.”

This shotgun marriage could not have survived without some beneficiaries, notably: the health sector, on which it bestows large

implicit subsidies; large employers, to whom it grants a competitive advantage over smaller competitors; and policymakers, on whom it bestows greater importance and a reason to legislate.

And legislate they have. Having conferred an enormous tax preference on a lousy insurance product, Congress is continually struggling to fill in cracks in the health sector that Congress itself created or widened. Medicare, the largest purchaser of medical care in the world, exists to fill just *one* such gap.

Congress also regulates everything from the content to the pricing to the timing of employer-sponsored health insurance. Where not preempted by federal law, states have regulated even further. With the exceptions of Medicare and Medicaid, however, no insensible reform surpasses the Affordable Care Act (ACA), known colloquially as ObamaCare, at bringing together all of the above-mentioned cruelties.

The ACA “builds upon” the employer-based system. That is to say, it leaves in place an insensible tax exclusion for employer-sponsored insurance and creates health insurance subsidies for taxpayers with low or moderate incomes who do not have access to employer-sponsored coverage. Those with very low incomes can, in willing states, enroll in an expanded Medicaid program. Those with incomes between one and four times the federal poverty level (\$24,300 to \$97,200 for a family of four) may receive health insurance subsidies for nominally private coverage purchased through a pseudo-market called an “Exchange.”

These seemingly simple changes set off a chain reaction of perverse incentives and cascading cruelties. To the extent workers would benefit more from the new subsidies than from the old tax exclusion, the ACA creates incentives for employers not to offer coverage and for workers to gravitate to such employers. Since the new subsidies increase as income falls, they create incentives for workers to work less or not at all. Supporters eagerly note the new subsidies can mitigate “job lock” by freeing workers to take a different or lower-paying job because they no longer have to work for the health benefits. It is a curious selling point that Congress replaced the incentives it created to work suboptimally with incentives not to work at all.

To mitigate some of *those* perverse incentives, the ACA penalizes employers with more than 50 employees who fail to offer a minimum level of coverage—which, in turn, creates further perverse incentives for small employers to remain below the 50-employee threshold that

triggers penalties and incentives for large employers to reorganize and/or lay off workers so they fall below it.

Robbing Peter to subsidize Paul always creates incentives for both parties to work less. But the ACA achieves such redistribution in a manner so convoluted, with so many hidden subsidies and penalties, layered atop so much preexisting complexity at this intersection of the health care and labor markets that it might be a Herculean task just to quantify the magnitudes of those incentives, much less to predict how workers and employers will respond. Thankfully, Casey Mulligan has waded into this morass so you won't have to.

A labor economist at the University of Chicago, Professor Mulligan approaches these questions with all the precision of an economist and more. He also brings the dispassion of a true economist, treating the creation of penalties and the withdrawal of subsidies as economically identical—a lesson conservatives would do well to learn.

Motivating Mulligan to think systematically about the ACA's complexity is its enormous potential impact on labor markets and economic performance. He concludes that, when one includes the impact of the ACA's implicit taxes, the law's impact on economic output is "vastly more important than, say, the interest rate on federal funds."

You might think that all economists who attempt to quantify the ACA's effect on labor markets would take its implicit taxes into account. But you'd be wrong. Mulligan notes several studies that fail to do so. He pays particular attention to a 2010 study by economists David Cutler and Neeraj Sood that claimed the ACA would boost employment by up to 400,000 jobs, an estimate later endorsed by nearly 300 economists. In addition to not incorporating the effect of the law's implicit taxes, Cutler and Sood ignored the potential administrative costs employers would face. In practice, those costs alone have left some employers wanting to repeal the employer mandate or even the entire law. "It's not because they don't want to offer coverage," explains the author of one employer survey. "It's because proving that they offer coverage is so much work."

On average, Mulligan finds, the ACA adds 6 percentage points to the average implicit marginal tax rate workers face throughout the economy. That may not sound like much, but it creates a larger disincentive to work than any other piece of legislation Congress

enacted over the prior 70 years. In some cases, the ACA subjects “Paul” to implicit marginal tax rates that exceed 100 percent. Subsidies phase out so rapidly as income changes that many workers will find that working more reduces their income while working less increases it.

All workers will bear the cost of these provisions, Mulligan shows, even those whom these provisions do not touch directly. Even in firms that comply with the ACA’s employer mandate, that mandate will cause wages for high-skilled workers to fall by 1.3 percent and will depress wages for low-income workers by 3 percent.

Broadly speaking, “The ACA will have the nation working fewer hours, and working those hours less productively, so that its non-health spending will be twice diminished: once to pay for more health care and a second time because the economy is smaller and less productive. . . . I predict that the ACA’s impacts—that is, the difference between the economy with the ACA and a hypothetical and otherwise similar economy without the ACA—will include about 3 percent less employment, 3 percent fewer aggregate work hours, 2 percent less GDP, and 2 percent less labor income.” Mulligan further projects some “5 million workers plus roughly 5 million dependents will work part-time schedules as a consequence of the ACA,” there will be 19 million fewer uninsured, and the number of people with employer-sponsored insurance will fall by 13 million.

Mulligan cautions he is merely offering projections, calculated before it was possible to collect actual data on the ACA’s impact on labor markets. He offers them as a benchmark against which we can compare actual experience under the law. One can sense his eagerness—excitement, even—to learn what he got wrong.

With a statute so large and complex, of course, error is practically inevitable. Mulligan claims the IRS may use liens to collect unpaid individual-mandate penalties. In fact, the ACA specifically prohibits it. (The error belongs more to the Congressional Research Service, Mulligan’s source for this claim.)

Avoiding error becomes impossible when the executive branch continually and quietly rewrites such a complex statute on the fly. The ACA’s premium subsidies impose an implicit tax on work. Mulligan quantifies that implicit tax on such a granular level that he incorporates what happens when workers receive more premium subsidy than the law allows and then must repay a statutorily

determined portion of the unauthorized portion of their subsidy at tax time.

Yet Mulligan does not incorporate a twist on that reconciliation process that the IRS developed with neither fanfare nor statutory support. If subsidy recipients later turn out to be totally ineligible for a subsidy because their income was too low (i.e., below the poverty level), Mulligan assumes they will repay the entire subsidy, as the ACA requires. The IRS, however, has deemed such taxpayers will not have to repay a cent. In effect, since subsidies rise as *actual* (as opposed to projected) income falls, the *largest* subsidies therefore go to taxpayers who have incomes below the poverty level—even though they are statutorily ineligible. This administrative rewrite of the ACA both expands the ACA's implicit tax on work (by creating a disincentive to earn more than the poverty level) and imposes an implicit tax on honesty (by penalizing those who accurately project their income will fall below the poverty level). These implicit taxes must have at least some effect on labor markets. If the change escaped Mulligan's notice, perhaps it was because authors of the regulation were not eager to draw attention to their handiwork.

How are Mulligan's projections holding up so far? Some ACA supporters claim that, aside from a reduction in the number of uninsured, there is no evidence the ACA is having the effects Mulligan predicts. The responsible ones note that it is difficult to isolate the ACA's effects, given that it was enacted at the nadir of the Great Recession, that anticipation and implementation of its provisions coincided with the recovery, and that administrative and congressional action have delayed implementation of many of its taxes on labor (the employer mandate, the Cadillac tax). There is ample evidence that, at least beneath the aggregate figures, employers and workers are responding to the ACA's implicit taxes on labor (see, e.g., Michael F. Cannon, "Obamacare Is Destroying Jobs—and Here's the Evidence," *Forbes.com*, February 4, 2016). Only time and careful economic analysis will tell.

As one of its architects infamously admitted, the ACA never could have become law if voters understood what it actually does or saw all the taxes it imposes. *Side Effects and Complications* brings transparency to a law whose authors designed it to be opaque. It is a one-of-its-kind inquiry into *all* of the ACA's effects on jobs,

incomes, and health insurance coverage. One hopes it will not enjoy that distinction for long. Future analyses will have to take into account not only Mulligan's projections, but more important his methodology.

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The Law of the Land: A Grand Tour of Our Constitutional Republic

Akhil Reed Amar

New York: Basic Books, 2015, 376 pp.

Akhil Reed Amar's *The Law of The Land: A Grand Tour of Our Constitutional Republic* seeks to take the reader on a "grand tour" of the various regions of the American Republic and define their contribution to constitutionalism in general. The object was to explicate the "différance," as Derrida might say, between Amar's identified 12 distinct cultural regions and to tie that uniqueness into the present tapestry of our constitutional fabric.

This book is a bit of a mixture. On the one hand, it does a fine job exploring constitutional history of various clauses (such as the Second Amendment qua Wisconsin constitutionalism) and individuals (for example, Justice Robert Jackson). Yet, on the other, it doesn't really provide a regionalized "tour" of the constitutional republic. Instead, it attempts to shoehorn a book on significant moments and aspects of constitutional history into a book on regional constitutionalism.

The author somewhat readily admits this flaw in the conclusion, giving a mea culpa for focusing on 12 constitutional instances rather than performing a 50-state survey. But the flaw is a bit deeper. Consider the chapter on Justice Hugo Black.

Amar's premise is that certain constitutional figures or moments are emblematic of a region's contribution to our constitutional fabric. But his discussion of Hugo Back is almost entirely divorced from Alabama and the larger region of the Deep South. Aside from some references to Justice Black's being from Alabama and ruling on cases that came out of Alabama, there is nothing to tie the Deep South to Justice Black's legacy of textual originalism and total incorporation of the Bill of Rights to the states. Indeed, the chapter—while a