SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 10 | Issue 3

3-3-2023

A Modern Defense of Simple Rules for a Complex World

Richard A. Epstein

Follow this and additional works at: https://scholarship.law.tamu.edu/lawreview

 Part of the Labor and Employment Law Commons, and the Law and Economics Commons

Recommended Citation

Richard A. Epstein, *A Modern Defense of Simple Rules for a Complex World*, 10 Tex. A&M L. Rev. 581 (2023).
Available at: https://doi.org/10.37419/LR.V10.I3.6

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

A MODERN DEFENSE OF SIMPLE RULES FOR A COMPLEX WORLD

*by: Richard A. Epstein**

Abstract

My 1995 book Simple Rules for a Complex World *articulated a general proposition that, in most situations, simple legal rules perform better in two key dimensions: (1) they are simpler to interpret and enforce, and (2) they generate efficient incentives on the parties to whom they apply. I then applied that view to matters of general legal theory, to matters of environmental law, and to disputes over labor. These principles apply to all forms of legal regulation, but in this Article, I shall limit my analysis to the five articles in this Collection. These are by Richard Revesz on global warming, Cynthia Estlund on the contract at will, Lior Strahilevitz and Rebecca Hansen on labor organization efforts on company property, Lee Anne Fennell on price discrimination, and Franita Tolson on the independent state legislature theory. The Revesz Article takes an extreme position on responses to global warming that misses the inherent cyclical nature of the underlying determinants of global warming, and thus calls for prompt intervention in energy markets that is likely to prove far more costly and socially destructive than the current energy markets dominated by fossil fuels. The Estlund Article imposes unworkable restrictions on the ability to hire and fire that cannot work especially in two key contexts: both start-ups with high turnover rates as well as mass layoffs. Hansen and Strahilevitz defend an unduly aggressive application of statutes of limitations that would, if adopted, make it vastly more difficult to mount any challenge against virtually any regulation. I then offer a brief and sympathetic comment on Lee Ann Fennell's price discrimination analysis, which demonstrates the ability of standard contractual forms to facilitate beneficial cooperation in a wide variety of market situations. Finally, the Tolson Article on the independent state legislature theory does not present challenges to the Simple Rules issue, but it does illustrate the perils often inherent in overly clever approaches to constitutional interpretation. A close examination of these articles shows how the dangers of complex legal rules, and the corresponding benefits of simple legal rules, are as relevant today as they were some 28 years ago.*

Table of Contents

DOI: https://doi.org/10.37419/LR.V10.I3.6

* Laurence A. Tisch Professor of Law, The New York University School of Law; and Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; and James Parker Hall Distinguished Service Professor and Senior Lecturer, The University of Chicago. My thanks to Joseph Kiernan, Matt Rittman, Stephen Vukovits, and Elle Rogers for their excellent research assistance.

I. INTRODUCTION

I have been asked by the editors of the *Texas A&M Law Review* to respond to the five papers in this Issue, which engage with my own scholarship to some greater or lesser extent. The papers were not planned as part of a unified thematic effort, so they move off in different directions. Nonetheless, four of these five papers are addressed explicitly to my positions on a range of substantive issues that do have some thematic unity. In 1995, the Harvard University Press published my book *Simple Rules for a Complex World*,[1] which set out my worldview on a wide range of substantive issues related to, on the private side, the law of property, contract, tort, and restitution; and on the public side, to the law of eminent domain and taxation. The framework that I developed in that book relies on key private law baselines to assess, among other things, the efficiency and desirability of various forms of legislation that play off these common law rules dealing with environmental law, land use regulation, and labor law.[2] Three of the articles relate to that theme.

None of the three following articles written by Richard Revesz,[3] Cynthia Estlund,[4] and Lior Strahilevitz (with his former student Rebecca Hansen)[5] count as friendly critiques of my views. Indeed, all three take positions deeply opposed to the views that I have long held with respect to their respective issues. I believe, moreover, that these three articles all suffer from a common vice—namely, the effort to displace my Simple Rules framework with complex legislative schemes that quite literally fall of their own weight. To be sure, any defense of simple rules should not be construed as a categorical rejection of statutory intervention. Quite the opposite is the case, especially with laws like the statute of frauds and recordation statutes, which stabilize commercial relationships.

As I have written more recently, the key intellectual move is to make sure that there are no sharp discontinuities between the substantive principles at common law and those of the statutes.[6] In the environmental area, this allows the rules that define pollution and the rules that outline the choice of remedies, both by way of damages and

1. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

2. *See id.*

3. Richard L. Revesz, *Fallacies in the Design of Climate Change Policies: A Response to Richard Epstein*, 10 TEX. A&M L. REV. 385 (2023), https://doi.org/10.37419/LR.V10.I3.1.

4. Cynthia Estlund, *Employment at Will: Too Simple for a Complex World*, 10 TEX. A&M L. REV. 403 (2023), https://doi.org/10.37419/LR.V10.I3.2.

5. Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427 (2023), https://doi.org/10.37419/LR.V10.I3.3.

6. Richard A. Epstein, *The Plasticity of Property: Legal Transitions Between Property Rights Regimes for Different Resources*, *in* THE CHANGING ROLE OF PROPERTY LAW: RIGHTS, VALUES AND CONCEPTS 14, 44–52 (Ernst Nordtveit ed., 2023).

injunctive relief, to move seamlessly from the private to the public arena. This eliminates any sharp private/public divide, which is likely to prove especially awkward when public and private nuisance claims are joined in a single action.[7] Similarly, in the labor law area, the *grundnorm* is one of freedom of contract between parties, which, in many instances, translates into the basic practice that contracts are at-will, such that either side can terminate an arrangement for good reason, bad reason, or no reason at all.[8] The article by Richard Revesz takes dead aim at my view of environmental regulations, and the transition from private lawsuits,[9] but it fails to consider both kinds of errors (over- *and* under-regulation) in fashioning remedies for the alleged perils associated with increased concentrations of carbon dioxide. For its part, the Estlund article wrongly rejects the norm of freedom of contract and its most powerful variation—the at-will contract in the employment context.[10] The article by Lee Ann Fennell[11] is of a more independent spirit, and I briefly address it here because, among its contributions, it shows the adaptability of standard contractual forms to aid in the level of charitable giving. Lastly, I shall examine the article by Franita Tolson[12] because it raises fundamentally different issues. It hits on a major theme in the 2022–2023 Supreme Court term, with its novel approach to *Moore v. Harper*,[13] the case from the North Carolina Supreme Court which has generated an enormous number of views about the independent state legislature problem associated with the U.S. Constitution's Elections Clause.[14]

II. REVESZ: CLIMATE CHANGE POLICY

In this essay, my friend and former dean Richard Revesz takes me to task for the "wrongheadedness" of my skeptical position of extensive government regulation to meet today the problems that climate change poses for the future.[15] Revesz strikes a somewhat dismissive

7. For a devastating critique of the new proposals, see *Left Holding the Bag: The Cost of Oil Dependence in a Low-Carbon World: Hearing Before the S. Comm. on Budget*, 118th Cong. 23–25 (2023) [hereinafter *Hearing*] (statement of Benjamin Zycher, Senior Fellow, American Enterprise Institute) (detailing the insuperable obstacles of a systematic movement to renewables).

8. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 966 (1984).

9. Revesz, *supra* note 3, at 385–87.

10. Estlund, *supra* note 4, at 403–05.

11. Lee Anne Fennell, *Optional Price Discrimination*, 10 TEX. A&M L. REV. 485 (2023), https://doi.org/10.37419/LR.V10.I3.4.

12. Franita Tolson, *The "Independent" State Legislature in Republican Theory*, 10 TEX. A&M L. REV. 549 (2023), https://doi.org/10.37419/LR.V10.I3.5.

13. Moore v. Harper, 143 S. Ct. 2065 (2023).

14. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

15. Revesz, *supra* note 3, at 385–87.

pose when he notes that I am writing outside the area of my core expertise, which he regards as work in contract, property, and tort.[16] But in that initial judgment, he makes a false claim for academic dominance. The law of tort includes among its areas the law of nuisance, which in turn, often rests as the foundation for the development of public law principles, where the critical question in all cases is how to integrate a system of public and private remedies. That is a subject to which I have devoted extensive attention, from 1979 in my article, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*,[17] to my most recent article on the relationship between public and private nuisances, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*.[18] Along the way, I expressed skepticism about the global warming trend in 2010[19] and commented on financial regulation as it related to global warming.[20] I have also written extensively about pipeline regulation, one of the topics referred to here, noting my deep opposition to efforts to shut down energy transportation in order to cope, ostensibly, with global warming.[21] I also discussed pipelines in my recent Hoover Institution *Defining Ideas* essay that Revesz makes the centerpiece of his attack.[22] This is by no means my only critique against the case on climate control made by the Intergovernmental Panel on Climate Change (IPCC) and others.[23] In one recent Hoover column, *Green*

16. *Id.*

17. Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979). This article includes a discussion on the "Disintegration of the Private Model," which covers public nuisance in both highway and air pollution cases. *Id.* at 98–102.

18. Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J.L. ECON. & POL'Y 282 (2022).

19. *See* Richard A. Epstein, *Carbon Dioxide: Our Newest Pollutant*, 43 SUFFOLK L. REV. 797 (2010).

20. *See* Richard A. Epstein, *Regulatory Enforcement Under New York's Martin Act: From Financial Fraud to Global Warming*, 14 N.Y.U. J.L. & BUS. 805 (2018).

21. *See, e.g.*, Richard A. Epstein, *Our Precarious Pipeline Infrastructure*, HOOVER INST. (Dec. 2, 2019), https://www.hoover.org/research/our-precarious-pipeline-infrastructure [https://perma.cc/ZA8J-PHUT]; Richard A. Epstein, *New York's Pipeline Fiasco*, HOOVER INST. (Oct. 28, 2019), https://www.hoover.org/research/new-yorks-pipeline-fiasco [https://perma.cc/PJ2V-C7SU]; Richard Epstein, *The Fifth Circuit Is Correct in Overturning Preliminary Injunction Against the Bayou Bridge Pipeline*, FORBES (March 16, 2018, 6:10 PM), https://www.forbes.com/sites/richardepstein/2018/03/16/the-fifth-circuit-is-correct-in-overturning-preliminary-injunction-against-the-bayou-bridge-pipeline/#58ceaffac6b9 [https://perma.cc/2AY4-RP62].

22. *See* Richard A. Epstein, *Global Warming: How Not to Respond*, HOOVER INST. (Aug. 17, 2021), https://www.hoover.org/research/global-warming-how-not-respond?utm_source=Defining+Ideas+Subscribers&utm_campaign=9dfa81c0b8-Defining_Ideas_01_26_17_1_26_2017_COPY_01&utm_medium=email&utm_term=0_31433b2ef9-9dfa81c0b8-72878837 [https://perma.cc/49AL-96UB].

23. Richard A. Epstein, *A Climate Change Emergency?*, HOOVER INST. (Oct. 7, 2019), https://www.hoover.org/research/life-planet-thunberg [https://perma.cc/GTQ8-7EQ6].

Delusions, Cold Realities,[24] I outline the disastrous social consequences that flow from decisions to ban fracking and otherwise impose strict restrictions on carbon dioxide emissions in an effort to control against global warming.[25] All these contributions work in the Simple Rules tradition because they question the broad remedies promoting systematic strangulation of fossil fuels and not recognizing the futility of massive investments in wind and solar.[26]

In his critique, Revesz concentrates on my Hoover column that calls for gradualism in responding to the perceived crisis.[27] He insists that we lack the tools today to make precise measurements of the danger of global warming until it will be too late to act, making it unwise to act like a marathon runner who constantly adjusts his pace to changing circumstances.[28] The problem, as he sees it, is that this approach could well doom our entire ecosystem when prompt actions taken now could avoid that disaster.[29] He perceives this difficulty is compounded because many environmental risks are latent, so that precautions must be taken *before* harm manifests.[30] So, Revesz claims that the climate tipping point is so well known that incrementalism becomes a risky strategy to deal with these harms.[31]

To support his conclusion, he cites to the IPCC reports that speak of (some chance) of the irreversible destruction of the Antarctic Ice Sheet and the like,[32] which is itself subject to major criticisms.[33] But why should anyone believe this supposedly scientific report when there is surely much evidence, wholly ignored, that points in the opposite direction. There is one recent article from the University of Cambridge, entitled *Sea Ice Can Control Antarctic Ice Sheet Stability, New Research Finds*, which explains in great detail how it is possible to have both "rapid melting of ice in many parts of Antarctica during the

24. Richard A. Epstein, *Green Delusions, Cold Realities*, HOOVER INST. (Nov. 1, 2022), https://www.hoover.org/research/green-delusions-cold-realities [https://perma.cc/2V8Z-RHKE].

25. *See id.*

26. *See, e.g.*, Mario Loyola, *How Progressives Enrich Oil Companies*, WALL ST. J. (Dec. 8, 2022, 5:59 PM), https://www.wsj.com/articles/how-green-extremists-enrich-oil-companies-fossil-fuels-permitting-manchin-wind-solar-grid-blackout-11670534536 ("[T]o achieve a clean grid by 2050, experts believe that more than one million miles of high-voltage transmission lines will have to be added to the grid."). Additionally, permit reform, which is needed everywhere, will not make a dent in the effort to go full-bore to solar and wind energy. *See generally* Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407 (1995) (discussing the permit power and its limitations).

27. Revesz, *supra* note 3, at 387–90.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.* at 390–91.

33. For a sharp critique of the IPCC, see generally JAVIER VINÓS ET AL., THE FROZEN CLIMATE VIEWS OF THE IPCC: AN ANALYSIS OF AR6 (Marcel Crok & Andy May eds., 2023).

second half of the 20th century," and a "sustained advance" of ice in the Eastern Antarctic Peninsula over the past two decades, with a neat map that shows the area of ice growth.[34]

There is always some residual uncertainty that follows from these reports, but by the same token there are some clear lessons to be learned. If global warming exists (whether or not caused by carbon dioxide), the temperature changes should be uniform and not subject to local influences, which must be operative in these cases, whether or not it is possible to identify them. It thus becomes paramount to check local influences that can account for particular changes before writing newspaper stories that point out some adverse weather event that "scientists" attribute to climate change. But note that the only relevant policy solution to Revesz, namely some control over fossil fuel emissions coupled with a hard shift to wind and solar energy, is a defensible form of social action.

But why the crisis? It is instructive to note that one can see two stories on the same web page of a climate review site, with clashing headlines. The first article starts with the headline *'Sick' Planet: Earth Is Past Almost All of Its Safe Limits for Humans, Scientists Say*, which does not mention carbon dioxide even once, but then points to eight limits—"climate, air pollution, phosphorus and nitrogen contamination of water from fertilizer overuse, groundwater supplies, fresh surface water, the unbuilt natural environment and the overall natural and human-built environment."[35] The second article starts with the headline *Were Italy's Devastating Floods Really Caused by Climate Change? This New Study Suggests Not*.[36] The article is less definitive than its title. Thus, "[a] rare, triple-whammy of cyclones caused the exceptionally heavy rainfall which claimed 17 lives and displaced 50,000 people in northern Italy last month."[37] But the headline notes that "climate-driven drought made them worse,"[38] again with no reference to carbon dioxide.

34. Sarah Collins, *Sea Ice Can Control Antarctic Ice Sheet Stability, New Research Finds*, U. CAMBRIDGE (May 13, 2022), https://www.cam.ac.uk/stories/sea-ice-controls-ice-sheet-stability [https://perma.cc/3DVZ-Q47X]; *see also* Emily Lewis, *What's Behind the Surprising Growth of One Antarctic Ice Sheet?*, EURONEWS.GREEN (Nov. 5, 2022), https://www.euronews.com/green/2022/05/13/what-s-behind-the-surprising-growth-of-one-antarctic-ice-sheet [https://perma.cc/WGP6-E353]. Note that it is instructive that if all the sheets do not move in the same direction, some local factors must cut against the view that only global forces matter.

35. *'Sick' Planet: Earth Is Past Almost All of Its Safe Limits for Humans, Scientists Say*, EURONEWS.GREEN (Jan. 6, 2023), https://www.euronews.com/green/2023/06/01/sick-planet-earth-is-past-almost-all-of-its-safe-limits-for-humans-scientists-say [https://perma.cc/5V38-LABV] [hereinafter *Earth Is Past*].

36. *Were Italy's Devastating Floods Really Caused by Climate Change? This New Study Suggests Not*, EURONEWS.GREEN (Jan. 6, 2023), https://www.euronews.com/green/2023/06/01/were-italys-devastating-floods-really-caused-by-climate-change-this-new-study-suggests-not [https://perma.cc/2QP8-89XM].

37. *Id.*

38. *Id.*

The first article does point to the important role of nitrogen and phosphorus in the studies, which has a good deal of relevance to what goes on in the United States.[39] The recent Supreme Court decision in *Sackett v. EPA*[40] was chastised by the White House in these harsh terms:

> The Supreme Court's disappointing decision in *Sackett v. EPA* will take our country backwards. It puts our Nation's wetlands—and the rivers, streams, lakes, and ponds connected to them—at risk of pollution and destruction, jeopardizing the sources of clean water that millions of American families, farmers, and businesses rely on.[41]

The EPA issued a similarly empty statement, which again points to the progress made since Ohio's Cuyahoga River had burst into flames in 1969.[42] But as I have argued elsewhere,[43] the EPA is not engaged in a fire-fighting enterprise when their supposed wetland looks like this. Yet neither the President nor the EPA is prepared to say that the *Sackett* decision (Chantell and Michael Sackett, plaintiffs, pictured below) itself was a mistake.

39. *Earth Is Past*, *supra* note 35.

40. Sackett v. EPA, 143 S. Ct. 1322 (2023).

41. Statement on the Supreme Court Decision in Sackett v. Environmental Protection Agency, 2023 DAILY COMP. PRES. DOC. 466 (May 25, 2023).

42. *Statement on Supreme Court Decision in* Sackett v. EPA, EPA (May 25, 2023), https://www.epa.gov/newsreleases/statement-supreme-court-decision-sackett-v-epa [https://perma.cc/49Q7-MU6R].

43. *See* Richard A. Epstein, *Environmental Panic Over the Protection of Wetlands*, HOOVER INST.: LIBERTARIAN (June 1, 2023), https://www.hoover.org/research/environmental-panic-over-protection-wetlands [https://perma.cc/L3NH-RRMH]; Richard A. Epstein, *In* Sackett *Case, a Shallow Dive into "Wetlands,"* HOOVER INST.: DEFINING IDEAS (Oct. 11, 2022), https://www.hoover.org/research/sackett-case-shallow-dive-wetlands [https://perma.cc/Y5CA-C9H4].

Even more to the point, it is worth asking how the United States deals with the admitted peril of phosphorus that runs off farmlands straight into navigable waters. The short answer is that the Clean Water Act covers phosphorus discharged from point sources but not from nonpoint sources[44] (e.g., farming), all of which pose serious threats to wetlands, but which cannot be touched under the statutory framework that gives them a flat-out exemption.[45] Interest group politics, not sound environmental programs, is what accounts for this huge gap. But where is the outrage about that issue which is far more urgent than keeping the Sacketts from building for the next twenty years? It is important never to forget how environment statutes often insulate polluters from liability.[46]

The situation is no better when a closer look is taken at other evidence, which again shows that it is very difficult to make the leap to a

44. *Basic Information about Nonpoint Source (NPS) Pollution*, EPA, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution [https://perma.cc/2F76-E94R].

45. *See* Cloé Garnache et al., *Solving the Phosphorus Pollution Puzzle: Synthesis and Directions for Future Research*, 19 AM. J. AGRIC. ECON. 1334 (2016), https://doi.org/10.1093/ajae/aaw027 ("Under the current U.S. legal framework, point sources are heavily regulated, while nonpoint sources such as residential runoffs, septic systems, and crop agriculture remain largely unregulated. Federally-sponsored voluntary conservation programs compensate agricultural nonpoint sources for the adoption of so-called best management practices (BMPs). Yet, despite annual budgets exceeding billions of dollars, these programs have had limited impacts on reducing agricultural nonpoint source pollution.").

46. For discussion, see Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141 (2015).

climate crisis when one worries about climate change. There are two problems. First, is there some dramatic change? And second, if there is, is it attributable not to climate change but to changes in the levels of greenhouse gases? Here are some examples.

It appears that forest fires were very high in the beginning of the twentieth century, dropped in the mid-century, and then rose again from the mid-1900s to the present, with huge variations in the acreage burned after 1987.[47] These fluctuations in turn are tracked by the insurance claims data, which show wide variations year to year in the face of only tiny variations in temperature.[48] But the key point to note is that roughly speaking, from about 1945 to about 1984, fire levels were far lower than they are today, leading to a U-shape curve which suggests that land use management practices, not carbon dioxide levels or temperature changes, are responsible.[49] This is further complicated because many of the lands, both state and federal, that burn down are destroyed, to the tune of 85%, by fires started by humans.[50]

To make matters more complex, the variation in property-casualty losses has trended up in recent years, but there are huge fluctuations between years, which stand in stark contrast to the slow rate of annual changes in temperatures.[51] Thus consider three consecutive years from 2004 to 2006. First there is an increase about double from about $70 billion losses in the first year, to $140 billion the next year, followed by a decline to $15 billion thereafter.[52] From 2010 to 2012, the numbers were $50 billion, $140 billion, and $75 billion; and from 2016 to 2018, the numbers were $50 billion, $155 billion, then back down to $90 billion.[53]

That high level of variability means that many natural events are necessarily part of the mix. It is also likely that CO_2 has little or no place in this analysis, which means that we have to look elsewhere for explanations. It is thus hard to correlate future changes in global warming with changes in CO_2 levels. Any projection made today must

47. *See* Jon Greenburg, *No, Wildfires Weren't Bigger in the 1920s and '30s than Today*, POLITIFACT (Oct. 15, 2021), https://www.politifact.com/factchecks/2021/oct/15/heartland-institute/no-wildfires-werent-bigger-1920s-and-30s-today/ [https://perma.cc/6ZHB-U7GV].

48. Jennifer Rudden, *Insured Losses Caused by Natural Disasters Worldwide 1970-2021*, STATISTA (May 2, 2022), https://www.statista.com/statistics/281052/insured-losses-from-natural-disasters-worldwide/ [https://perma.cc/BL96-UBV5].

49. James Temple, *Suppressing Fires Has Failed. Here's What California Needs to Do Instead.*, MIT TECH. REV. (Sept. 17, 2020), https://www.technologyreview.com/2020/09/17/1008473/wildfires-california-prescribed-burns-climate-change-forests/ [https://perma.cc/58XJ-2JND].

50. *Wildfire Causes and Evaluations*, NAT'L PARK SERV., https://www.nps.gov/articles/wildfire-causes-and-evaluation.htm#:~:text=nearly%2085%20percent*%20of%20wildland,States%20are%20caused%20by%20humans [https://perma.cc/Q4H6-DX3R].

51. Rudden, *supra* note 47.

52. *Id.*

53. *Id.*

take into account not only the uncertainties associated with natural events, but changes in population levels with time and technological developments that could lead to incremental improvements in some instances and to major institutional changes in others.[54]

Another source of concern has been the condition of coral reefs, which varies across the globe in patterns that are difficult to identify.[55] An article that speaks about climate change and the loss of some coral reefs found there is "no relationship between human influence and resistance to disturbance and some evidence that areas with greater human development may recover from disturbance faster than their more isolated counterparts."[56] The article does not mention carbon dioxide once.[57] In a sense, therefore, it is better to look for local variations before thinking of global ones, as with wildfires.[58]

There are, moreover, good theoretical reasons to believe that the global situation is far more stable than Revesz allows. My recent critique of the IPCC rested on the view that the pronounced *cyclical* nature of various climate events makes it highly unlikely that there will be a relentless and irreversible move in one direction. Thus, look at the latest temperature graph below to get a first cut into the problem:

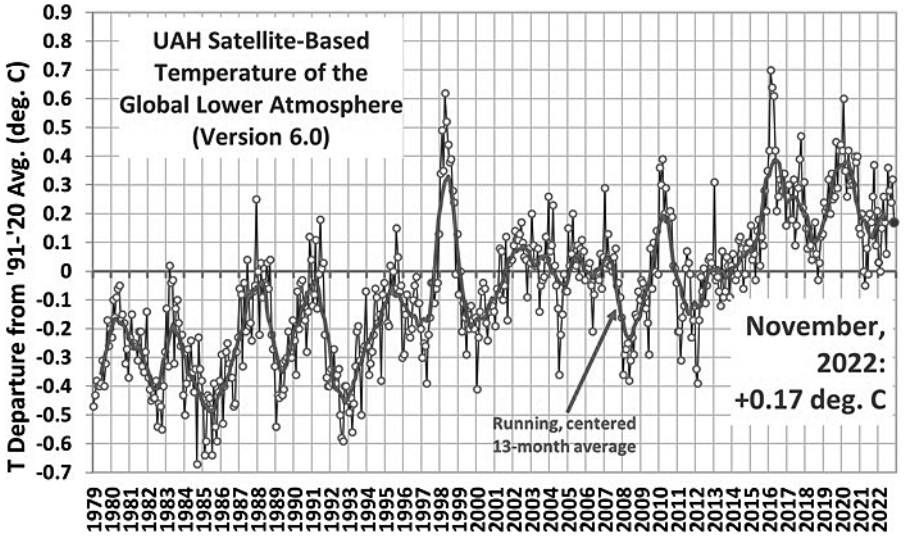
54. For its part, crop production is stable, with more acreage planted and higher yields. *See Crop Production 2021 Summary*, USDA 3 (Jan. 12, 2022), https://downloads.usda.library.cornell.edu/usda-esmis/files/k3569432s/sn00c1252/g158cj98r/cropan22.pdf [https://perma.cc/PY2B-8XL6].

55. *Remoteness Not Helping Coral Reef Health*, OCEANOGRAPHIC, https://oceanographicmagazine.com/news/remoteness-not-helping-coral-reef-health/ [https://perma.cc/A6J4-LQXJ].

56. *Id.*

57. *Id.* Contrast this with Bill McKibben, *The Coral Die-Off Crisis Is a Climate Crime and Exxon Fired the Gun*, GUARDIAN (Aug. 17, 2016), https://www.theguardian.com/environment/2016/aug/17/the-coral-die-off-crisis-is-a-climate-and-exxon-fired-the-gun [https://perma.cc/SG5G-GVCQ]. His review of the Exxon papers is wildly oversimplified. For my critique, see Richard A. Epstein, *Regulatory Enforcement Under New York's Martin Act: From Financial Fraud to Global Warming*, 14 N.Y.U. J.L. & BUS. 805 (2018).

58. Indeed, it appears that ordinary suntan lotion poses a serious risk to coral. Djordje Vuckovic et al., *Conversion of Oxybenzone Sunscreen to Phototoxic Glucoside Conjugates by Sea Anemones and Corals*, 376 SCI. 6593 (2022), https://doi.org/10.1126/science.abn2600.



This graph lends no support for Revesz's doomsday account. First, note that the temperatures right after the dramatic peak in 1998 are roughly the same as those just before, which hardly suggests some irreversible trend. Next, note that pre-1998 increases took place when the levels of carbon dioxide concentration were below 350 parts per million[59]—a level the noted environmentalist Bill McKibben takes as appropriate for sound global warming policies.[60] The increase in temperature since that time has been small, but most crucially, it has not been monotonic, which is the case with the carbon dioxide changes that we have seen over the past 43 years, including the last two peaks and valleys since 2015.[61] Not only are the increases small, but the source remains obscure.

Ben Zycher of the American Enterprise Institute prepared written testimony to the Senate that offers extensive evidence that the number of hot days were far greater before 1960—especially in the 1930s when CO_2 levels were far lower than today.[62] The standard pattern remains that the period of highest temperatures was the 1930s, at the time of the dust bowl when temperatures peaked: 100° days were recorded 15 and 18 times in mid-1930s, with five and seven days of temperatures over 105°. Once a decade thereafter, there are more modest

59. *Atmospheric CO_2 at Mauna Loa Observatory*, SCRIPPS INST. OCEANOGRAPHY & NOAA EARTH SYS. RSCH. LAB'Y tbl.1, https://climate.nasa.gov/internal_resources/1914/ [https://perma.cc/U289-9MMA].

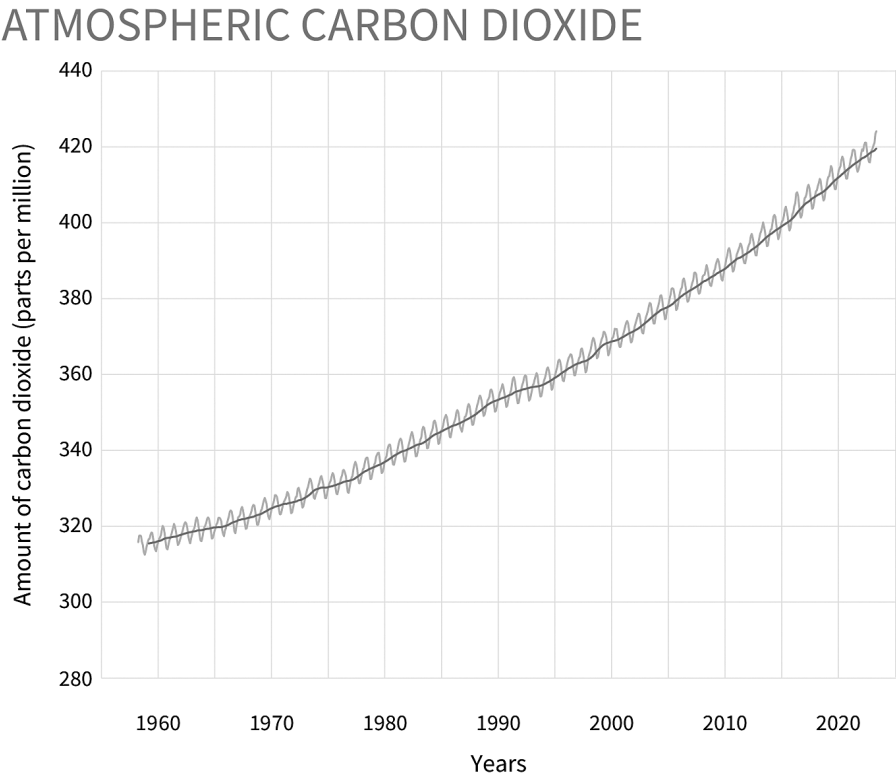
60. *See Bill McKibben*, 350.ORG, https://350.org/bill/ [https://perma.cc/L72D-VES9].

61. Epstein, *supra* note 24, at tbl.2.

62. *See Hearing*, *supra* note 7 (statement of Benjamin Zycher, Senior Fellow, American Enterprise Institute) (detailing the insuperable obstacles of a systematic movement to renewables).

peaks (e.g., 12 and 11 days over 100° in the 1950s and early 1980s; three days over 105°). But from 1985 to 2015, the numbers are lower than the earlier period with no trend, either up or down.

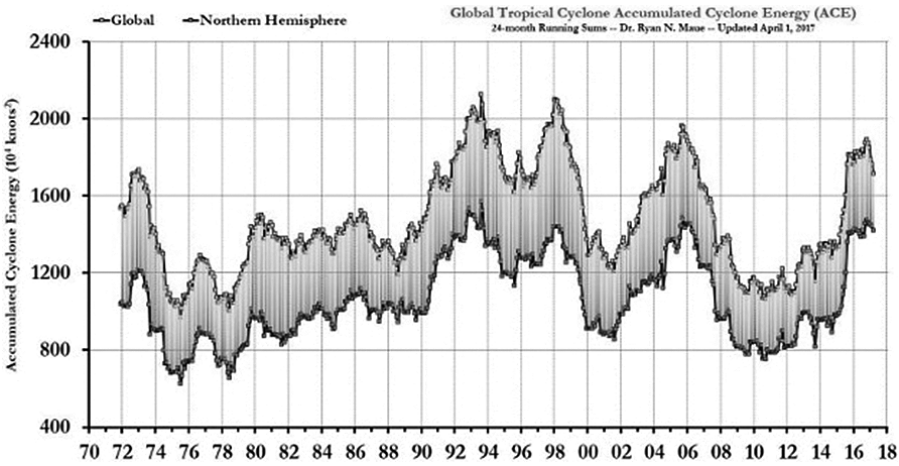
These numbers are critical because the real damage comes from the super-hot days, so that the variance in temperatures is at least as important as any shifts in the mean, and they took place when CO_2 concentrations were under 300 ppm, compared to today's figure of about 420 ppm. Here is the NOAA Graph:[63]



A full theory has to deal with the downs as well as the ups, and the monotonic increase in carbon dioxide cannot explain the temperature movements in both directions. But a better understanding of the clashing forces may help determine whether the current weak positive trend is likely to turn dramatically stronger in the future, so much so that Revesz's extreme measures should be taken now. The monotonic movement in carbon dioxide levels makes it highly likely that some other driving force or forces must be put on the right side of the equation to cover the downs (and likely the ups as well). The cyclical na-

63. Rebecca Lindsey, *Climate Change: Atmospheric Carbon Dioxide*, NOAA (May 12, 2023), https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide [https://perma.cc/4JNW-5YN8].

ture of the phenomenon is not confined to temperature gradients, but also covers other key measures.



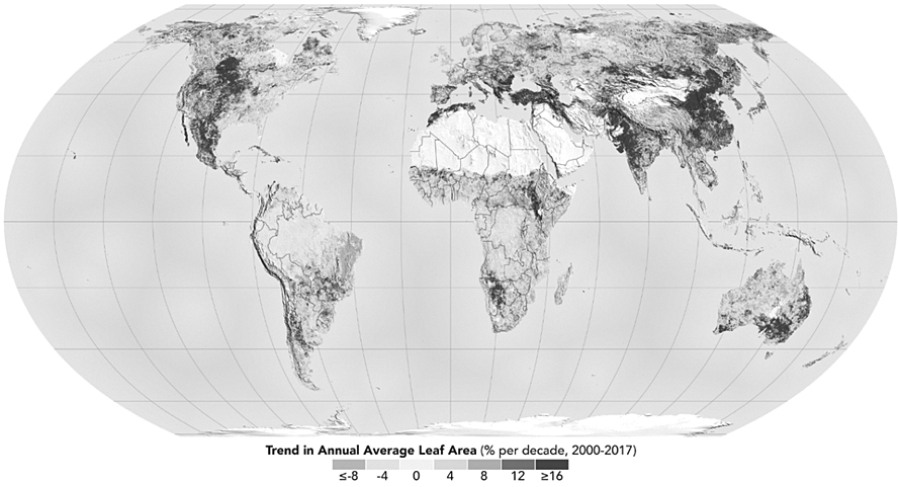
Thus, the cyclical behavior of tropical cyclones is evident from the above graph, both for the globe and the Northern Hemisphere.[64] Furthermore, it cannot be explained by looking solely to the increase in carbon dioxide concentrations, which again makes it ever harder to credit the doomsday hypothesis that is floated about so often.

In addition, both carbon dioxide and water are greenhouse gases. Indeed, water vapor is a much more powerful greenhouse gas than carbon dioxide, which is why temperature drops when cloud cover increases. Also, both are critical for photosynthesis, which tends to increase green coverage and thus reduce temperature variations. Although Revesz does not mention the issue, the long-term findings show that increased levels of carbon dioxide are associated with both increases in green covering on the earth and a moderation of extreme temperatures.[65] Thus, in 2016, NASA offered this map,[66] with the caveat that greening was "for now":

64. *See* Ryan N. Maue, *Recent Historically Low Global Tropical Cyclone Activity*, 38 GEOPHYSICAL RSCH. LETTERS., no. 14, at 2 (2011).

65. Samson Reiny, *CO_2 Is Making Earth Greener—For Now*, NASA: GLOBAL CLIMATE CHANGE (Apr. 16, 2016), https://climate.nasa.gov/news/2436/co2-is-making-earth-greenerfor-now/ [https://perma.cc/V594-Y3A4].

66. *Id.*



But four years later the story was the same.[67] Of course, it is not known when the current trends will end. Yet, even if matters stay just as they are, the power of photosynthesis will continue to operate as a brake on temperature increases, once again making carbon dioxide levels an imperfect predictor of long-term climate change. The key question, therefore, addresses the relative power of the two trends, and here again, the answer seems clear. CO_2 is a huge determinant of the rate of photosynthesis and only one relatively small component in the creation of global warming. The first effect swamps the second.[68]

There is at least one other piece of evidence that points the same way—the level of property casualty damage in successive years. If carbon dioxide were the key determinant of all sorts of adverse events as is commonly alleged, we should expect those to rise in rough proportion to the increase in carbon dioxide levels. But, as previously discussed, that proposition is not remotely true.[69]

It is very unwise to put all your eggs in one basket, especially in the face of conflicting data. Nonetheless, that is exactly what Revesz proposes to do. He is skeptical about the conversion of energy from coal to natural gas because, while that might eliminate dirty coal, it will slow down the shift to renewables.[70] But his implicit assumption is that these renewables can increase from about 2% or 3% of energy sources today to replace the large number of hydrocarbons, including

67. *See Greening of the Earth Mitigates Surface Warming*, NASA (Dec. 15, 2020), https://www.nasa.gov/feature/greening-of-the-earth-mitigates-surface-warming [https://perma.cc/J227-CZMM].

68. Kathryn Hansen, *Global Green Up Slows Warming*, NASA: EARTH OBSERVATORY, https://earthobservatory.nasa.gov/images/146296/global-green-up-slows-warming [https://perma.cc/V3EE-LCRR].

69. *See supra* text accompanying notes 50–52.

70. *See* Revesz, *supra* note 3, at 397–98.

fossil fuels, which now stand at about 84% of the total energy mix.[71] As Mark P. Mills has argued, the case for a major shift to renewables rests on "magical thinking," which is just not possible.[72] Thus, Revesz does not trouble himself with the obvious disadvantages or limitations of renewables. Wind does not work when the air is calm, and solar does not work when it is dark. Storage is very expensive, and the negative externalities from noise and covering large portions of the earth mean that these two "clean" energy sources are not without their environmental objections, and their manufacture is hardly "clean," as well. In turn, these objections have led to an increased unwillingness of communities to accept these projects on faith, making it highly unlikely that the national government under President Biden could implement its aggressive targets for renewable fuels over fierce local opposition.[73]

In addition, it is now becoming fatally clear that the short-term resistance to fracking and shipment-by-pipeline is producing serious dislocations. The situation in New England is already dire. New England state governments' insistence on cracking down on natural gas has led to higher prices and increased reliance on relatively dirtier oil.[74] In turn, New England grid emissions spiked 44% from January 2021 to January 2022 to 8.8 billion pounds of CO_2.[75] In addition, here is a recent graph showing the costs of residential heating prices per gallon,[76] which based on early figures for October and November look to be about 65% higher than last year:

71. *See* Mark P. Mills, *The "New Energy Economy": An Exercise in Magical Thinking*, MANHATTAN INST. (Mar. 26, 2019), https://www.manhattan-institute.org/green-energy-revolution-near-impossible [https://perma.cc/89FH-92FZ].

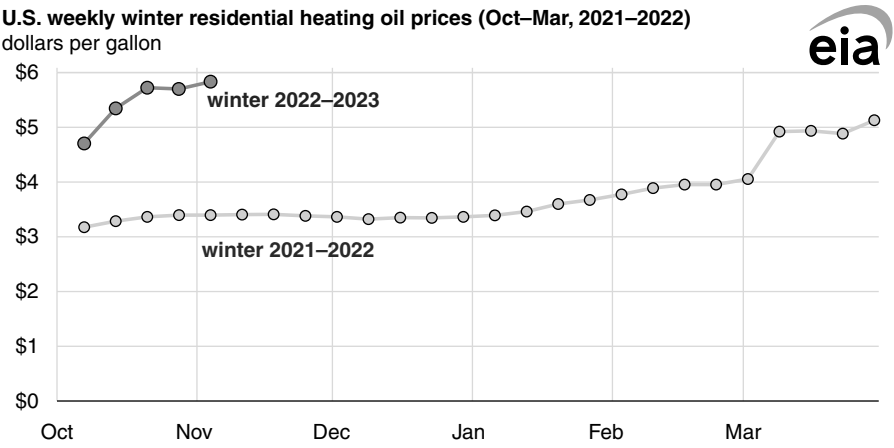
72. *Id.*

73. Robert Bryce, *Voters Veto Big Wind in Ohio and Michigan: Rejections Now Total 375 Since 2015*, REALCLEARENERGY (Nov. 11, 2022), https://www.realclearenergy.org/articles/2022/11/11/voters_veto_big_wind_in_ohio_and_michigan_rejections_now_total_375_since_2015_864316.html (describing how voters in Michigan defeated wind projects via local ordinances) [https://perma.cc/D9MV-FYEB].

74. Therese Robinson, *New England Natural Gas Prices Soared in 2022 Amid Stiffer Global LNG Competition*, NGI (Jan. 20, 2023), https://www.naturalgasintel.com/haynesville-output-to-top-16-bcf-d-as-total-lower-48-production-continues-to-climb/ [https://perma.cc/2H46-WPZL].

75. Tom Mclaughlin & Scott Disavino, *New England Carbon Emissions Spike as Power Plants Turn to Dirtier Coal*, REUTERS (Feb. 11, 2022, 2:53 PM), https://www.reuters.com/world/us/new-england-carbon-emissions-spike-power-plants-turn-dirtier-fuel-2022-02-11/ [https://perma.cc/6MCK-UDAJ].

76. *Residential Heating Oil Prices Start Winter Heating Season Higher than Last Year*, U.S. ENERGY INFO. ADMIN. (Nov. 17, 2022), https://www.eia.gov/todayinenergy/detail.php?id=54699&src=email# [https://perma.cc/S2EA-DJJN].



It is the classic illustration of the law of unintended consequences given that solar and wind are not ready for prime time with their intermittent services.[77] Revesz justifies this short-term state of affairs by noting that allowing the long-term construction of new pipelines and extending fracking will embed them into the culture, making the transition to renewable all the more difficult, given the heavy front-end costs for these long-term investments.[78] But there is, of course, the parallel risk that front-end investments in wind and solar could prove unstable because their low output requires extensive subsidies to put them in place. Revesz never once asks whether the costs of production for fossil fuels goes down, or whether the pollution associated with the creation and use goes down as well, which they will. Improvements in solar and wind energy must be measured against parallel gains in other areas. The issue is the differential in relative rates, taking out of the mix the set of government subsidies showered on all types of energy. No doubt some regulation of fracking may well make sense, but the simple fact that these options are always available makes the case for a ban on fossil fuels weaker than it would otherwise be.

In sum, the complexity of the situation calls for a more nuanced approach. The incremental revaluation of the sort I champion far outperforms the single-minded commitment to an overly aggressive transformation to renewables. Fossil fuels' hasty demise is likely to lead to vast and unnecessary human suffering and economic dislocation. The correct formula requires the balancing of two (or more) forms of error. The approach Revesz champions is exactly the wrong position.

77. Robert Bradley Jr., *Winter Warning to Biden Administration (New England Energy Shortages Ahead?)*, MASTERRESOURCE (Nov. 15, 2022), https://www.masterresource.org/new-england-energy-policy/72348/ [https://perma.cc/7FM9-5FFA].

78. *See* Revesz, *supra* note 3, at 398–400.

III. ESTLUND: LABOR RELATIONSHIPS

Let me now turn to the critique of Cynthia Estlund's essay, *Employment-at-Will: Too Simple for a Complex World*,[79] that takes me to task for my persistent, if lonely, defense of the contract at will since my first article on that subject in 1984.[80] Her title is a direct attack on the Simple Rules framework, and I think that this latest assault fails as did all the earlier ones. I was unapologetic about that position at that time, and I remain so to this very day. And why? Because I think that the contract at will, as against its many "for cause variations," not only creates better incentives for both sides of the employment relationship, but is also easier to administer. Estlund disputes this in part, noting that a wide range of left-leaning scholars have taken strong issue with that position from the time I first defended it at the Yale Law School in the Spring of 1983 in my paper *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*.[81] There, I argued that a common law system of rules was far superior to the current system of unionized labor relations, which has led to the decline and fall of so many firms—think General Motors— and has ultimately been reduced to a pale shadow of itself.[82] That paper was denounced by professors Julius Getman and Thomas Kohler,[83] and by Dean Paul Verkuil,[84] who rehearsed all the standard arguments about how unions equalize bargaining power between management and labor without once dealing with the problems that arise from strikes, lockouts, rigid work rules, and the cartelization of labor markets, all of which show that the costs of unionization are not just borne by the employers, but also in large extent by the public at large.

Ironically, it was Getman and Kohler's pointed article that prompted my somewhat indignant response that "it takes a theory to beat a theory,"[85] which in turn has provoked (so I just learned) a long exposition from Professor Lawrence Solum as to its origins and subsequent applications.[86] But in my case there is no great mystery as to why I put the position forward: the bedrock economic proposition that

79. Estlund, *supra* note 4.

80. Epstein, *supra* note 8.

81. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357–58 (1983).

82. *See id.*

83. Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983).

84. Paul R. Verkuil, *Whose Common Law for Labor Relations?*, 92 YALE L.J. 1409 (1983).

85. Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983).

86. *See* Lawrence Solum, *Legal Theory Lexicon: It Takes a Theory to Beat a Theory*, LEGAL THEORY BLOG (Oct. 21, 2012), https://lsolum.typepad.com/legaltheory/2012/10/introduction-it-takes-a-theory-to-beat-a-theory-this-is-surely-one-of-the-top-ten-all-time-comments-uttered-by-law-professo.html [https://perma.cc/R9QU-DXNP].

competition beats monopoly, which is why the antitrust law has set its preference for the former against the latter. The contract at will is perhaps the most common outcome of competitive markets, which is why I remain so strongly opposed to state imposition of some version of the for-cause doctrine, whether through labor regulation or antidiscrimination laws.[87]

Estlund's article does not explain the relative efficiencies of these two legal regimes.[88] Instead, she veers off onto another track, which is to insist that unregulated labor markets are not competitive at all.[89] Estlund quotes with approval the work of Professor Eric Posner that purports to show that labor markets are rife with monopoly power, a position that I regard as utterly indefensible, given some simple indisputable facts about the operation of these markets.[90] Here are two such problems. First, the dimensions of product markets are relatively well-defined; think of the market for gasoline. But the clerks, salesmen, and computer programmers can and do move across industry categories, often as they move across the country. Second, it is easier to rig prices in a product market than it is to rig compensation in a labor market, where it is necessary to take into account all elements of the contract, including fringe benefits and not just the wages. Both Estlund and Posner are, however, grimly determined to ignore all the information from recent years, including that associated with the "great resignation," which indicates workers have strong market power when there are more unfulfilled positions in labor markets begging for jobs.[91] As the demand for workers goes up, the terms get better, and to Estlund and Posner, it must be an enduring mystery why these everyday occurrences could take place in a market where "employer dominance" is regarded as an article of faith.

Indeed, Estlund continues to argue with similar blinkers today, but she offers no explanation for the fierce resistance that all employers show toward any unionization efforts—including, for what it is worth, unions in their role as employers, and *The New York Times*, that strong defender of union causes—elsewhere.[92] Instead, she develops the theme of firing as a capital offense that could result in lost income

87. *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing against the for-cause doctrine and in favor of the common law model).

88. *See* Estlund, *supra* note 4.

89. *Id.*

90. *See* Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389, 389 (2022). Estlund does not cite my reply, Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 J.L. & LIBERTY 407 (2022). For a recent article taking my position, see Diana Furchgott-Roth, *Antitrust and Modern U.S. Labor Markets: An Economics Perspective*, 19 HARV. J.L. & PUB. POL'Y PER CURIAM 1 (2022).

91. I address some of this evidence in Epstein, *supra* note 88, 412–15.

92. Danielle Letenyei, *Why Is There a* New York Times *Union Strike? Contract Issues, Explained*, MKT. REALIST (Dec. 8, 2022), https://www.msn.com/en-us/news/us/

to workers with catastrophic consequences.[93] No doubt some cases like this can take place, but given the high rate of voluntary quits, the incidence of these cases is likely to be low. Indeed, today the real peril to worker security comes from mass layoffs of the type that occur in a downward market.[94]

In this case, the kind of for-cause protection that Estlund wishes to build into every labor contract is wholly destructive insofar as it could force a firm that engages in mass layoffs to process hundreds of individual claims or flirt with bankruptcy by being forced to keep on employees when the market conditions have turned sour. Should that be done with the recent mass layoffs at Amazon,[95] whose stock price has tumbled from a high of $186.57 on July 8, 2021, to $86.77 as of December 21, 2022?[96] Consider these numbers as of April 4: "Amazon has laid off 27,000, Meta has laid off 21,000, Microsoft has laid off 10,000, and Google has laid off 10,000 workers in recent months . . . ."[97] Estlund nonetheless argues that the needed cure is to impose as a matter of positive law a set of job-security provisions to protect incumbent workers against either dismissal when the labor market has collapsed, or when it makes more sense for the firm to hire replacement workers in need of a job.[98] Thus she writes: "The alternative to EAW is 'for-cause' termination—a requirement that employers justify dismissals on the basis of legitimate business needs and a solid factual record."[99] So now every case becomes a drawn-out proceeding with the burden of proof on the employer under an unspecified set of procedures before some kind of neutral arbitrator—all, one guesses, at the employer's expense. In the interim, it becomes difficult or impossible to hire replacement workers, or to honor contracts with customers and suppliers because of the loss of control over the firm's resources.

In order to justify legislative protection against improper dismissal, Estlund writes: "Nothing on employers' side of the ledger is remotely comparable to the freedom from involuntary servitude—from compelled performance of personal services and submission to employer

why-is-there-a-new-york-times-union-strike-contract-issues-explained/ar-AA153Wxl [https://perma.cc/8UFW-3ZY2].

93. Estlund, *supra* note 4, at 416–20.

94. Ashley Capoot, *Amazon Reportedly Plans to Lay Off About 10,000 Employees Starting This Week*, CNBC: TECH, https://www.cnbc.com/2022/11/14/amazon-reportedly-plans-to-lay-off-about-10000-employees-starting-this-week.html (Nov. 14, 2022, 10:16 PM) [https://perma.cc/CHX2-UM54].

95. *Id.*

96. *Amazon—25 Year Stock Price History*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/AMZN/amazon/stock-price-history [https://perma.cc/GR2F-WXTZ].

97. Samuel Axon, *Apple Joins Amazon, Google, and Microsoft in Tech Industry Layoffs*, TECHNICA (Apr. 4, 2023), https://arstechnica.com/gadgets/2023/04/apple-joins-amazon-google-and-microsoft-in-tech-industry-layoffs/ [https://perma.cc/3Y7V-JHC4].

98. Estlund, *supra* note 4, at 420–21.

99. *Id.* at 421.

control—that underlies workers' right to quit."[100] Not so. Her implicit model employer is a unionized shop with assembly line employees for which a grievance procedure is strictly necessary to deal with the requirement of the labor law that no dismissal be driven by anti-union animus. It may well be that nonunionized firms develop grievance procedures, but it is hardly a given that nonunionized firms will adopt the same practices.

But everywhere else, this model is a dead loser. Consider the predicament of a fledgling employer who has maxed out her credit cards and worked 80-hour weeks in order to start a new business that is now beset with work-related issues of morale and workplace efficiency. As working capital shrinks, must she be forced to retain a worker with subpar performance whose poor work drags down his fellow employees? Or whose surly demeanor makes the workplace environment so miserable that productive employees quit (with major dislocations) just to avoid those unpleasant relationships. Or do looming risks of financial ruin count for nothing for employers who also have families, mortgages, and social commitments?

Unfortunately, at no point does Estlund ever address the common situation where a responsive employer protects good workers from fellow employees who seek to freeload off their efforts.[101] It is not possible in this short comment to speak about all the other rigidities and disadvantages of these protected relationships. It should be enough to state that if the new-found nirvana was what Estlund thinks it is, employers would be falling over each other to adopt the mechanisms that she proposes. But in general, most firms stick with at-will contracts as a legal matter, even as they seek to deal with internal workplace grievances on a proactive basis. The daily practice is not caught by looking at extreme hypothetical cases, as Professor Estlund does, noting Elizabeth Anderson's recent observation that "most workers still have no legal recourse if they are fired 'for being too attractive, for failing to show up at a political rally in support of the boss's favored political candidate, [or] because their daughter was raped by a friend of the boss.'"[102] Idle and improbable hypotheticals are not the proper source of systematic legal analysis. Nor were they the focus of my 1984 article that sought to guard against these extremes:

> To be sure, freedom of contract is not an absolute in the employment context, any more than it is elsewhere. Thus the principle must be understood against a backdrop that prohibits the use of private contracts to trench upon third-party rights, including uses that inter-

100. *Id.* at 417.

101. *See id.*

102. *Id.* at 408 (alteration in original) (citing ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 53 (2017)).

> fere with some clear mandate of public policy, as in cases of contracts to commit murder or perjury.[103]

In addition, I discuss cases where some exception has to be made to the contract at will to take into account those situations where parties do not perform in "lockstep progression," where it is necessary to make sure that a worker is compensated for work performed before he or she is fired, or where a personal injury occurs on the job.[104] Each of these situations requires a somewhat different treatment, even within the general at-will framework. But what none of the situations do is threaten the importance of the at-will doctrine in connection with dismissals based on perceived lack of performance on the job.

Indeed, it is Estlund's dewy-eyed optimism that causes her to insist that these "job-security protections should themselves encourage employers to invest in incumbent workers' skills, and to cultivate their ability to switch to new tasks, rather than treating them as disposable. That could boost both workers' productivity and their labor market power."[105] But again, this statement is, at best, a partial truth. In dealing with the social calculus, the sole focus should never be solely on the welfare of the dismissed worker. The gains to the newly hired worker, as well as those to the employer (and its shareholders, customers, and suppliers), have to be taken into account as well. There is no reason to believe as a general proposition that it is always, or even commonly, cheaper and more sensible for a firm to retrain current employees in order to fill new positions that require different skills. In fact, it is often easier to hire workers with the right qualifications so that the firm can promptly put in place a team already capable of dealing with some novel set of issues. And remember, hiring that new worker can relieve massive economic and social insecurity for someone who has been out of work.

Granted, in a complex labor market, including those involving startups, sound employment practices might well be radically different employment practices. But all of these are usually better accommodated under the contract at will, which allows for quicker adjustments to newfound information than any administrative process. Indeed, it is just the complexity of labor markets that condemns the Estlund proposal for a universal for-cause statute as a great step backwards in labor relationships.

The big difference between me and Professor Estlund is that she has enough confidence in her generalizations that she is quite willing to impose her proposals on an entire economy based on her judg-

103. Epstein, *supra* note 8, at 954–55; *see also id.* at 952 n.11 (giving extensive examples contracts to commit perjury).

104. *Id.* at 979–80. For situations where a worker hired for the season quits before the end of the term, see *id.* at 980 n.53. *See also* Britton v. Turner, 6 N.H. 481, 486 (1834).

105. Estlund, *supra* note 4, at 414.

ments of the relative merits of the two employment schemes. But what is needed here is a dose of humility that recognizes that persons on the playing field may have a better sense of the rules than those who observe it from afar. My approach recognizes that the contract at will is often the dominant form of contractual relationship. It then seeks to explain why that is the case as part of the effort to avoid such dangerous labor market regulations as forced unionization, antidiscrimination law, and lots more. If firms and workplaces want to choose other arrangements, they can do so. But that is not true with the law's "for-cause" noose that Estlund wants to put around the neck of all employers, be they large or small. Regressive proposals of this sort help no group in the long run, and they should be stoutly resisted.

IV. HANSEN AND STRAHILEVITZ: TAKINGS IN LABOR LAW CASES

The same hostility to simple rules that was all too evident in Professor Estlund's critique of contract at will is equally evident in Rebecca Hansen and Lior Jacob Strahilevitz's article, entitled *Toward Principled Background Principles in Takings Law*.[106] The object of their joint wrath is the recent Supreme Court opinion in *Cedar Point Nursery v. Hassid*[107] where, without question, the Court cut back the right of union organizers to enter onto company property during prescribed times, explicitly authorized since 1975 under the California Agricultural Labor Relations Act. Under those regulations, union representatives had the right to gain access to the work premises of an agricultural employee for up to three hours a day—one before work, one during lunch breaks, and one after lunch—where "employees congregate before and after working" or where "employees eat their lunch" for up to 30 days a year.[108]

The Simple Rules approach cannot overturn a statute in and of itself, but it can address key questions on how best to determine whether that regulation is constitutional. And by this measure, Hansen and Strahilevitz's article fails on two grounds. The first is how to determine the background principles of nuisance and property law announced by Justice Antonin Scalia in *Lucas v. South Carolina Coastal Council.*[109] The second is how to determine when the statute of limitations starts to run in these cases.

In 1988, the South Carolina Legislature passed the Beachfront Management Act,[110] which had the direct effect of barring the petitioner from erecting any permanent habitable structures on two par-

106. Hansen & Strahilevitz, *supra* note 5.

107. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

108. Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 692, & n.4, 699, 703–04 (Cal. 1976); *Cedar Point*, 141 S. Ct. at 2069, 2082 (citing CAL. LAB. CODE §§ 1152, 1153(a)).

109. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

110. S.C. CODE ANN. § 48-39-250 et seq. (1990).

cels covered by the Act—new buildings intended to replace prior structures on those two lots that had been blown away in a storm. Justice Scalia accepted the (dubious) finding below that the two lots were now "valueless."[111] Scalia then asked what kind of evidence the state could proffer to defeat Lucas's claim for compensation for the total loss of his use of the property.[112] In this context, Justice Scalia insisted that the state could not simply:

> proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.[113]

How then to identify the background principle of nuisance or property? For the former, it should be evident that the term nuisance must embody some extrinsic, standard understanding of the term. The *Lucas* dissent of Justice Harry Blackmun denied that this was possible when it posited that the term nuisance was infinitely pliable so that it afforded no protection against government action.[114] Thus, Blackmun insisted that the term was infinitely pliable when he quoted Justice Holmes as follows from *Commonwealth v. Parks*: "The legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances . . . "[115] But context is everything and, in this instance, Holmes upheld a state's "power, when deemed necessary for public safety, to prohibit blasting rocks with gunpowder without written consent is among the powers given by the [Massachusetts statute]."[116] And that same principle was also broad enough in the other direction to allow for the ringing of bells and whistles to warn of arriving trains.[117] These decisions confine that discretion within a narrow compass, and they do nothing to undercut what has to be regarded as the key distinction under the police power. It is one thing to prevent tortious activity by a defendant without compensation; and quite another to ask him to devote his resources to advance some function championed by the government, i.e., to clean up a nuisance created by others.

111. *Lucas*, 505 U.S at 1007. Note that the properties could still be used for other daily purposes, and more importantly, could be sold off to neighbors as side lots for a substantial portion of their original values. *See id.* 1044 (Blackmun, J., dissenting).

112. *Id.* at 1015–20 (majority opinion).

113. *Id.* at 1031.

114. *Id*. at 1036 (Blackmun, J., dissenting).

115. *See id.* at 1060 (alteration in original) (quoting Commonwealth v. Parks, 30 N.E. 174, 174 (Mass. 1892)).

116. Commonwealth v. Parks, 30 N.E. 174, 174 (Mass. 1892).

117. Sawyer v. Davis, 136 Mass. 239, 239–40 (1884).

Accordingly, the most that Justice Scalia could dredge out of the earlier precedents is that the law of nuisance sets background conditions.[118] And even here, he tumbles and struggles because of his own linguistic fantasies when he insists that "the distinction between 'harm preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[119] In one sentence, he purports to undo the centuries-old distinction between tort and restitution. But the simple fact is that at virtually all times ordinary people neither confer benefits nor inflict harms. They stand idly aside doing neither. The conventional distinction thus involves ripping out your neighbor's flowers on the one hand or watering them when they are about to die, with their owner unreachable out of town.

In the end therefore, Justice Scalia abandons his ill-considered riff in favor of the Restatement (Second) definition of nuisance, which makes it perfectly clear that the state of South Carolina is not engaged in nuisance prevention when it prohibits the construction of an ordinary beachfront home, part of which might someday be ripped apart in a storm, to the detriment of someone walking on the beach.[120]

Justice Scalia made matters worse when he identified as an illustration of the applicable rule of property the navigation easement that was given a broad reading in *Scranton v. Wheeler*.[121] *Scranton* is a most dubious decision granting the United States "paramount authority" to construct a pier on submerged lands, blocking the guaranteed access of a private riparian to the river.[122] That decision is intellectually vulnerable to the counterclaim that the Commerce Clause only offers the United States jurisdiction of the navigable river, not ousting the general protection offered under the Takings Clause.[123] In the end, he offers no example of an off-the-rack property rule other than an ad hoc and illicit judicial extension of federal powers.[124] But in any event, Justice Scalia's unfortunate formulation of the principle[125] makes it clear that the ad hoc compromise adopted by the California regulation could not qualify as a background principle of common

118. *See Lucas*, 505 U.S. at 1030.

119. *Id.* at 1024.

120. *Id.* at 1030–31.

121. *See id.* at 1028–29 (majority opinion) (citing Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

122. *Scranton*, 179 U.S. at 164–65.

123. For discussion, see Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, *in* PROPERTY IN LAND AND OTHER RESOURCES 317 (Daniel H. Cole & Elinor Ostrom eds., 2012); *see also* Cress v. United States, 243 U.S. 316 (1917) (criticizing the decision); Eva H. Morreale, *Federal Powers in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 2, 2 n.6 (1963) (stressing the distinction between the navigation power and the navigation servitude).

124. *Lucas*, 505 U.S. at 1031–32.

125. *See, e.g.*, Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

law. It is well understood that riparian rights are protected against interference by private parties, who cannot erect a barrier that keeps a riparian from gaining access to a river. The so-called "background principle" of *Scranton* is *not* acceptable when it rests on the proposition that "the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should [not] be crippled by compelling the government to make compensation for the injury to a riparian owner's right of access to navigability, that might incidentally result from an improvement ordered by Congress."[126] There is no way that the jurisdiction of Congress establishes a federal property right of its own force.

More to the point here, it becomes painfully clear that an administrative regulation that sets the times and circumstances under which union representatives may enter private property is not a rule of either nuisance or property. Instead, it operates as the negation of the common law rule that stresses that any entry to land, no matter how modest, constitutes a trespass that has to be either justified or excused.[127] The efforts of Hansen and Strahilevitz stall out at the opening gun by treating a government regulation as an applicable background norm.

The situation gets far worse when they turn to what they regard as the showstopper of the piece, namely that the statute of limitations in cases of this sort runs from the time of the promulgation of the regulation, or 1975, and not from the confrontation that arose when the California Labor Board backed the union's demand for access to the property against the employer. The simplest way to look at this is that this quarrel arose when the union appealed to the California Labor Board, that then was under a statutory duty to decide the claim one way or another. It was that decision that triggered the dispute and not the promulgation of a regulation decades before. Nor would it make any sense to say that the limitation period starts anew with each modification of the regulation on the one hand or by some change in policy ushered in by a change in personnel on the other. Why force thousands of people to bring suits when they had no real grievance, which is why no nobody involved in the case ever thought it wise to precipitate hundreds of potential actions?

But Hansen and Strahilevitz state:

> Real estate values are based on the highest and best permitted use of land, not merely their current uses. And if there is any probability of a re-zone that enables a shift away from land's cur-

126. *Scranton*, 179 U.S. at 164–65.

127. *See* Dougherty v. Stepp, 18 N.C. 371, 372 (1835) ("[E]very unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage . . . ."). Notably, the statement does not cover cases of necessity, i.e., efforts to save life and property from imminent peril, which are not involved here. *See generally id.*

> rent use to a more lucrative one, that potential change should drive up the value of land. By affecting the economic value of the highest and best use of property, newly enacted restrictions thus have immediate impacts on land values.[128]

A simple change in value of some indeterminate amount in either direction, no less, should *never* trigger a statute of limitations until the conflict arises between the landowner and the regulator. To avoid this conclusion, Hansen and Strahilevitz refer to *Fallini v. United States*,[129] under the Wild-Free Roaming Horses and Burros Act, where the takings claim was said to accrue with the passage of the statute, even if prior to the entry of any horse. They write:

> "What the [ranchers] may challenge under the Fifth Amendment is what the government has done, not what the horses have done." The only governmental action involved was the enactment of the statute "forbidding the [ranchers] from shooing the horses away from the water," so that "action cannot be regarded as recurring with every new drink taken by every wild horse, even though the consumption of water by the wild horses imposes a continuing economic burden on the [ranchers]." As the *Fallini* court put it, "it is the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking."[130]

But it is perfectly sensible to argue that a single cause of action began when the first horse drank the plaintiff's water, which here happened hard on the heels of the statute. In this case, the choice of starting point does not matter, but it would surely do so if the actual conflict of the horses' entering only arose far into the future. Thus, when the two dates diverge, it makes no sense to ask not only the Fallinis but hundreds of other ranchers to sue the government to protect water that has not yet been taken. Many people will choose not to incur present huge expenditures to protect rights that at that time have only minimal value. Indeed, it is an iffy proposition whether they could sue the government long before the actual conflict arises, putting the government to idle expenses. Nonetheless, there is surely no reason to require them to do so when it is perfectly possible to toll the statute of limitations in the absence of a lawsuit.

The situation here is similar to common law cases of "coming to the nuisance," such as *Sturges v. Bridgman*,[131] in which the plaintiff ran a medical office whose operations were compromised once a neighboring confectioner continued to operate the same loud equipment that he had done for years, now for the first time interfering with his prac-

128. Hansen & Strahilevitz, *supra* note 5, at 463.

129. Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995).

130. Hansen & Strahilevitz, *supra* note 5, at 450 (alteration in original) (footnotes omitted).

131. Sturges v. Bridgman [1879] 11 Ch. D. 852 (UK).

tice. Sir George Jessel MR took the position that the statute of limitations was tolled by operation of law, so the physician's right of action was proper once there was an actual conflict.[132] The decision makes eminently good sense because there is no reason to force premature litigation when the two parties are not making incompatible uses of their respective properties. And there is no reason why the tolling of the statute is inappropriate if a comprehensive ordinance authorized incompatible uses on both sides of the line. On this matter, it does not matter whether we call the takings claim physical or regulatory, or even some mixture of both. What matters is that it is foolish to force a premature resolution of a potential legal claim that in practice may never arise. To be sure, an aggressive plaintiff may demand an immediate injunction against that incompatible use. But here too the correct response is to postpone the injunction until the conflict actually arises because the preemptive lawsuit would not only be costly but useless.

It is important to recognize the enormous dislocation from the proposed revision of the statute of limitation. It will, in effect, allow the government to escape most systematic challenges of regulation by forcing ordinary people to raise these claims far too early in the cycle. The situation could only get even more confused if a new party brings his fresh cause of action long after the statute has run on anyone else. If the claim is allowed, does it revive all the other claims that were blocked on the ground that they were untimely? Or do those claims remain locked up forever? It is best to avoid, not answer, questions of this sort. Claims like the plaintiff's action in *Cedar Point* should be decided straight up on their merits.

V. FENNELL: OPTIONAL PRICE DISCRIMINATION

In her paper, *Optional Price Discrimination*,[133] Professor Lee Ann Fennell asks how the law should respond to that form of price discrimination that its customers willingly adopt. The answer from the classical liberal in this situation is, why not? Rules that allow for voluntary gifts in other commercial or charitable contexts—more likely the latter—are among the simplest and best that one can find, and that conclusion holds even in this novel context. The usual difficulties with price discrimination strategies arise, as Fennell details in the first half of her paper, when firms decide to offer the same good at different prices to different customers. Most commonly, this arises in the exercise of monopoly power, but there are many situations where, in response to different cost configurations, price discrimination is adopted even in the absence of market power, as in the complex protocols now

132. *Id.*

133. Fennell, *supra* note 11.

in common use for airlines, hotels, and even restaurants.[134] There are, of course, cases where price discrimination is used by firms with monopoly power, where there is again a split verdict. In many cases, price discrimination is thought to help bring to market those products that could not be sold if every customer were charged the identical price where marginal revenue equals marginal cost. The larger charges against higher demanders enable the recovery of fixed costs that are needed to bring the project to market—a position that I have long supported.[135] Yet at the same time, there is a keen awareness that sellers with monopoly power can use pricing strategies that operate as a form of wealth extraction from consumers, which in Fennell's terms, explains why price discrimination often receives a "bad rap."[136]

It is, of course, abundantly clear that her version of optimal price discrimination has nothing to condemn it: if people want to use this device to increase their support to various charities that they support, there is no reason not to let them have their way. Rather, the question here is whether the device has enough to *commend* it when other forms of charitable support are available. The answer to that question is a limited yes. At this point, I do not rely on any abstract conviction, but rather on the ways that the practice is done today. In most fundraisers, there is commonly a ticket price of, say, $200, which contains two components: $150 for the meal and $50 for the charitable contribution, the latter of which is deductible for federal income tax purposes. The purpose of this simple arrangement is to tease out the two separate components in advance, which simplifies IRS enforcement.

The method therefore has its place, but it is also important to note its real limitations, given that the paired prices are typically only a fraction of the ticket price. Hence the real charitable money in these events tends to come from two other sources. First, it is often common to have auction items donated by large donors, who may well get to deduct the fair market value of the good, while the charity reaps the benefit of selling donations at a substantial price that could, depending on the item, sell for either more or less than the market price. High bids come from people with either a charitable inclination or an absence of knowledge of the market price. Even more charitable money comes from the donors who simply sort themselves into price tiers to announce that they are donors at certain levels, with evident distinction, and in some cases, collateral benefits (free showings to art exhibits or invitations to banquets). The system seems to work pretty

134. *See* Michael E. Levine, *Price Discrimination Without Market Power*, 19 YALE J. ON REG. 1, 17–19 (2002), *cited in* Fennell, *supra* note 11, at 494.

135. *See* Richard A. Epstein & F. Scott Kieff, *Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents*, 78 U. CHI. L. REV. 71, 79 (2011) ("[E]fforts to eliminate price discrimination could prevent the patentee from recovering the fixed costs of the original patented invention, with deleterious effects of invention . . . ."), *cited in* Fennell, *supra* note 11, at 504.

136. Fennell, *supra* note 11, at 486.

well, and it limits abuse. The same cannot be said of donations of artworks to charities, where donors often claim inflated market prices by making reference to a single sale at an artificially high price. These situations call for some control of potential abuses, including the submission of appraisals where donations involve expensive works.[137] The balance seems about right, and may the system flourish.

VI. TOLSON: INDEPENDENT STATE LEGISLATURE THEORY

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

—Elections Clause, U.S. Constitution[138]

In December 2022, the Supreme Court heard oral argument in the hotly contested case of *Moore v. Harper*,[139] which puts into sharp focus the theory that under Article I, Section 4, Clause 1, the legislature of each state, acting alone, has sufficient power, without the participation of any other branch of state government, to impose a state gerrymander that increases the power of the incumbent party relative to its actual electoral strength.[140] The Supreme Court of North Carolina held that its legislature did not have the power to rig the redistricting when it enforced a map drawn *not* by the state legislature but by an independent commission acting under the authority of the state trial court.[141]

The entire matter has attracted huge academic commentary, most of which has been sharply critical of this independent state legislature theory, which allows the legislature to act on its own for whatever reason it sees fit.[142] Professors Akhil Amar, Vik Amar, and Stephen

137. Jason Felch & Doug Smith, *Inflated Art Appraisals Cost U.S. Government Untold Millions*, L.A. TIMES (Mar. 2, 2008), https://www.latimes.com/local/la-me-irs2mar02-story.html [https://perma.cc/ZPL4-LLKE]. For the current requirements of proof, see *Navigating the Taxes of Donating Art to Charity*, (Oct. 5, 2021), https://www.ssacpa.com/navigating-the-taxes-of-donating-art-to-charity/ [https://perma.cc/Q26B-83DE].

138. U.S. CONST. art. I, § 4, cl. 1. There is a parallel provision. Article II, Section 1, Clause 2 reads: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. CONST. art. II, § 1, cl. 2.

139. Moore v. Harper, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/moore-v-harper-2/ [https://perma.cc/B9WW-L6RX] [hereinafter Moore Case Summary].

140. *Id.*

141. Harper v. Hall, 868 S.E.3d 499, 559 (N.C. 2022).

142. For briefs containing academic commentary regarding the independent state legislature theory, see Moore Case Summary, *supra* note 137. *See also* J. Michael Luttig, *There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory*, THE ATLANTIC (Oct. 3, 2021), https://www.theatlantic.com/ideas/archive/2022/10/

Calabresi have taken what I regard as a hopelessly idiosyncratic position in their Supreme Court Amicus Curiae Brief, arguing that what branch of government constitutes the "state legislature" is determined by the state itself, which has the power to treat, if need be, either the courts or some administrative power as the legislature *du jour* for reapportionment purposes.[143] The difficulty with this position is its elementary confusion between the definition of a state legislature in making laws and the larger lawmaking framework. Giving the governor a veto over legislation does not make him part of the legislature, any more than the veto power of the President of the United States makes him part of the legislature. It is wrong to conceive of this definitional and structural issue, as they do, as a political question for the state to decide on an ad hoc basis, when in fact it is a technical question about the distribution of powers within the overall system. In a more measured position, Professors Michael McConnell and William Baude take the view that, even though the courts may set aside improper maps, they cannot bypass the state legislatures in deciding how to choose the electors in any given election.[144]

In her article, Professor Tolson gives an added twist by claiming that the case against the independent state legislature theory is bolstered by the Guarantee Clause of Article IV, Section 4 which states:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[145]

---

moore-v-harper-independent-legislature-theory-supreme-court/671625/ [https://perma.cc/NP2V-75GS]; Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571 (2022); Michael Morley, *The Independent State Legislature Doctrine*, 55 GA. L. REV. 1, 10 (2021).

143. Brief of Amici Curiae Professor Akhil Reed Amar, Vikram David Amar & Steven Gow Calabresi in support of Respondents, Moore v. Harper, Docket No. 21-1271 (N.C. Oct. 24, 2022); *see also* Steven Calabresi, *Can the Supreme Court Define a State's "Legislature,"* WALL ST. J. (Dec. 5, 2022), https://www.wsj.com/articles/who-defines-a-states-legislature-electors-clause-moore-v-harper-supreme-court-north-carolina-map-11670209274 [https://perma.cc/M9LE-JEPV]:

> The North Carolina lawmakers' theory conceives of "state legislatures" as referring to state houses and senates alone. But no modern state legislature comprises only those two bodies. Twenty-six states allow for lawmaking by initiative or referendum, and all 50 states give the governor a veto. If the North Carolina Constitution allows for judicial review of congressional maps or of the selection of presidential electors, federal courts have no business saying otherwise. All of these matters are political questions . . . .

144. William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, ATLANTIC (Oct. 11, 2022), https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/ [https://perma.cc/AC9N-CKAK] ("There is no reason to think that the Framers of the federal Constitution intended to liberate state legislatures from the ordinary constraints of state constitutional law.").

145. U.S. CONST. art. IV, § 4.

The gist of Professor Tolson's argument is that

> the "state" referenced in this provision is its citizens, whose preferences are conveyed through the voting public to the state legislature. As this Article will show, within a decade of the founding, the selection of elected officials by the state's electorate became central to the theory of republicanism underlying the Guarantee Clause of Article IV, which predicated the legitimacy of government on majority support. This was a drastic departure from Founding-era beliefs that the state legislatures—and indeed, presidential electors—would exercise independent judgment to act on behalf of the voters with respect to federal elections.[146]

She then insists that the concept of the "state" has not been a "static concept" in part because of the passage of the Twelfth Amendment, adopted after the chaos of the 1800 presidential election "in which the legitimacy of the presidency was tied to a decisive electoral college win, sanctioned by a majority of the voters in the state either directly through popular election or indirectly through its state legislature."[147] So it is the people who constitute the state. Two words used in opposition to each other now become synonyms of a sort.

I confess that I do not understand the force of this argument. First, as a general matter of constitutional interpretation, it is dangerous business to infer from political disputes a major revision in a constitutional provision. Under the standard political theory at the time, the notion of a Republican form of government stood in opposition to two other forms of government. The first of these was some form of monarchical or aristocratic form of government that denied to the people at large any role in the operation of government or the selection of government officials. The other was the opposition to popular democracy as represented by the will of the majority which, untrammeled by other limitations, could run roughshod over the property and liberty of groups outside the constitutional majorities.[148] The solution to this problem was thought to be the participation of the people in an indirect system of representative government that gave them only a role in the process, but not the dominant political hand. The indirect selection of the Senators "chosen by the Legislature thereof,"[149] as part of the original constitutional design, was one part of this system of indirect popular control. It seems, clear, moreover, that in the original conception, the legislature in this selection is not acting in its lawmaking capacity, but in pursuance of a discrete power given to it by the

146. Tolson, *supra* note 12, at 551 (footnotes omitted).

147. *Id.* at 553.

148. *See, e.g.*, *Republic vs Democracy: What Is the Difference?*, THOUGHTCO (June 10, 2022), https://www.thoughtco.com/republic-vs-democracy-4169936 [https://perma.cc/FDZ6-RNY5].

149. U.S. CONST. art. I, § 3, cl. 1. This was changed by the Seventeenth Amendment to call for the two senators from each State, to be "elected by the people thereof, for six years . . . ." U.S. CONST. amend. XVII.

Federal Constitution, which, in contrast to legislation, is *not* subject to the veto power by the state governor, even if that power does apply to ordinary legislation within the state. It is also evident that from the beginning the entire system of an electoral college was consistent with only this indirect form of influence.[150]

The Twelfth Amendment changed how these deliberative bodies were supposed to operate, but it did not put the people in charge by any form of direct election. Indeed, after its passage, the entire notion of a deliberative body was scrapped, and the practice of having bound electors was introduced in order to make sure that the electors did not deviate from the instructions that they had received from their electoral state.[151] To be sure, a "College" makes reference to deliberative bodies, but these electors were not like the cardinals who met in the College of Cardinals, responsible only to themselves; but they had political obligations that they were not supposed to trade away in some dark room. Yet, neither does this change signal a retreat from republican principles—which, in my view, do not imply a single, mandatory distribution of powers but rather accommodate a wide range of indirect mechanisms intended to control the perceived excesses of democratic rule. Indeed, the expectation that a Bill of Rights would be adopted conditional upon the ratification of the Constitution is consistent with the Hamilton view "that the Constitution is itself, in every rational sense, and to every useful purpose, [a bill of rights]."[152]

The case either for or against the independent-state-legislature doctrine does not turn on any subtle revision of the Republican form of government. It does, however, depend on the weight given to the legislature relative to the other branches of government. In *Smiley v. Holm*[153] at the United States Supreme Court, the question was whether Article I, Section 4, Clause 2 of the Federal Constitution permitted the Minnesota Legislature to redistrict the state, after it had lost one electoral vote, over the governor's veto applicable to ordinary legislation. The Minnesota Supreme Court in *State ex rel. Smiley v. Holm*[154] had held quite explicitly that the state legislature in this instance had sole power to deal with matters delegated to it under Article I, Section 4:

150. In *Chiafalo v. Washington*, the Supreme Court, through Justice Elena Kagan, upheld on originalist grounds the power of the states to regulate, but her argument is forced and incorrect. 140 S. Ct. 2316 (2020). Article II has to impose some limitation on what the state legislature wants—including a direct order to vote for candidate X. Her stronger argument by far is that "long settled and established practice," allowed this deviation from originalism, which in this case, is surely the right approach. *Id. see* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT, ch. 2, esp. 68–71 (2014) (addressing the prescriptive constitution as an enduring limitation on originalist theories of interpretation).

151. Ray v. Blair, 343 U.S. 214, 231 (1952).

152. THE FEDERALIST NO. 84 (Alexander Hamilton).

153. Smiley v. Holm, 285 U.S. 355 (1932).

154. State *ex rel.* Smiley v. Holm, 238 N.W. 494 (Minn. 1931).

> The power of the state Legislature to prescribe congressional districts rests exclusively and solely in the language of article 1, § 4, of the United States Constitution. The provisions of the state Constitution control and operate when the ordinary affairs of the state are involved. They cannot of course prevail as against the provisions of the superior fundamental law of our nation.
>
> * * *
>
> The ordinary meaning of the word "legislature" is that it refers to the [S]enate and [H]ouse of [R]epresentatives which our state Constitution (article 4, § 1) says constitutes the "legislature." Within this meaning it indicates the representative body which makes the laws of the state and of which the chief executive is not a part, although he has a limited restraint upon the enactment of state laws. Perhaps the veto power is a legislative power. The word "'legislature" has also been used to indicate "the lawmaking power of the state." . . . Under our state Constitution the Legislature consists of the [S]enate and the [H]ouse of [R]epresentatives. We believe the word is ordinarily so understood. The frequent expression that our state, like the nation, has three branches of government, executive, legislative, and judicial, is seldom, if ever, understood as meaning that the governor is a part of the legislative.[155]

In the United States Supreme Court, Chief Justice Charles Evans Hughes took a very different view of the clause.[156] He first notes quite correctly that the legislature does not always pass legislation.[157] That is surely the case, as noted above, in its unlimited discretion in choosing Senators in the original version of Article I, Section 3, Clause 1; it acts as ratifying body in dealing with constitutional amendments under Article V; and it confirms various individuals nominated for executive or judicial positions. But the Chief Justice then proceeds with the following nonsequitur:

> The primary question now before the Court is whether the function contemplated by article 1, section 4, is that of making laws.
>
> Consideration of the subject-matter and of the terms of the provision requires affirmative answer. The subject-matter is the "times, places and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the

155. *Id.* at 497–98 (citations omitted).
156. *Smiley*, 285 U.S. at 365.
157. *Id.*

> definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.[158]

The most obvious objection to the point is that legislative functions under the Federal Constitution are not handled under Article I, Section 4, but under Article I, Section 7, which has this structure. The section first refers to "bills" for legislation, which then succeed in passage only with the concurrence of the two houses, subject to a presidential veto, which can be overridden by a two-thirds vote in each house. But equally important for this purpose is that Article I, Section 7, Clause 3 covers not bills, but instead "[o]rder[s], [r]esolution[s], or [v]ote[s]."[159] Here the concurrence of both houses subject to the veto does not apply categorically to all three, *but only to the extent* that the concurrence of the two houses is necessary, which means that there are at least some matters that do not qualify. The same logic, as the Minnesota Supreme Court concluded, also applies at the state level. That the word "prescribed" was used in Article I, Section 4, Clause 1, instead of the word "enacted," presupposes some kind of order or resolution not subject to veto power by the governor, and leaves open the question of whether other forms of constitutional challenges can be raised against the legislation. Nor is the choice of the word prescribed inadvertent: the parallel provision on presidential electors uses the term "appointed," not "enacted," which appears to hold that the legislature is also performing one of its specifically conferred non-legislative functions. Hence, it seems that Hughes moved too quickly when he reached this conclusion: "All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect."[160]

The passage in *Smiley* is suspect also for the broad account that both the Minnesota Supreme Court and Chief Justice Hughes give to the phrase, "times, places and manner of holding elections."[161] Elsewhere, I have ventured the unconventional view that this phrase was narrower than Hughes thought.[162] The time of an election is relatively bounded; so, too, is its place. The manner of holding an election surely covers all the run-up to the election and its subsequent administration, or everything on the explicit Hughes list. But he is cagey insofar as he never mentions redistricting, which was at stake in this case, and which is not part of holding an election, but in setting up the particular

158. *Id.* at 366.

159. U.S. CONST. art. I, § 7, cl. 3.

160. *Smiley*, 285 U.S. at 366.

161. *E.g.*, *id.* at 367.

162. *See* Richard A. Epstein, *Seeking a Way Out of Redistricting Chaos*, HOOVER INST. (May 24, 2022), https://www.hoover.org/research/seeking-way-out-redistricting-chaos [https://perma.cc/MFW2-ZNUH].

districts in which future elections will be held. By way of analogy, in the context of the First Amendment, "a times, places and manner" regulation has generally been construed to allow for content-neutral regulation that is closely tied to the activity in question: thus, the government can limit the use of sound trucks,[163] loud noises next to a school building while in session,[164] or the places where members of Hare Krishnas could distribute their literature in airports.[165] None of these regulations are remotely close to the analogous question of redistricting, which might be the case if the government sought to regulate the internal organization of these groups in order to reduce the likelihood that they might engage in noisy or offensive activities down the line.

Now if this turns out to be the case, then the federal government has no handle over the entire matter, so that redistricting becomes an inherent part of the state's sovereign powers to regulate their internal affairs, at which point what is at stake in *Moore* is garden variety legislation, subject to the usual set of constitutional safeguards and restrictions. On this view, Arizona was well within its rights to delegate its redistricting program to a bipartisan committee in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[166] without a need for the Court to engage in the linguistic doubletalk of calling a commission a legislature. By ignoring the interpretive question in Article I, Section 4, Clause 1, Justice Ginsburg embarked on a madcap linguistic word game to conclude that the term legislature allowed the state to adopt by ballot initiative an independent commission to discharge this task. Professor Tolson invents the convenient term "institutional legislature" to allow for Ginsburg's legal transformation of our tripartite government structure.[167] But the semantic hijinks are of no purport if redistricting is not included in the term "times, places and manner" as against the ingrained but uncritical consensus that Article I, Section 4, Clause 1 does not apply to redistricting.

This clause would have application to the decision to extend the time for ballot receipt for three days after election day when the state legislature's decision to do so (with the governor's concurrence) was approved by the Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar*.[168] The state law allowing the extension was passed by the ordinary legislative process, thus setting aside any *Smiley*-like problem. Article I, Section 4, Clause 1 only became relevant as a reason to block judicial interference with that legislative de-

163. Kovacs v. Cooper, 336 U.S. 77 (1949).

164. Grayned v. Rockford, 408 U.S. 104 (1972).

165. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

166. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).

167. Tolson, *supra* note 12, at 556.

168. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 356 (Pa. 2020).

cision. I regard *Boockvar* as pure politics when it invoked the state's "Free and Equal Election" provision to strike down a law intended to preserve electoral integrity. The risk of "extensive disenfranchisement" to which Professor Tolson refers[169] was already considered when the legislature adopted its legislative package for the 2020 elections, and the supposed risks in *Boockvar* are far removed from any form of abuse that the Court itself creates because its odd interpretation of the state constitution necessarily impacts the conduct of a federal election, which should, in this unchartered territory, allow the Supreme Court under Article I, Section 4, Clause 1 to override what was done.

At last, I shall make a few remarks about *Moore v. Harper*, which may well please no one. At the root of the difficulty is that in *Rucho v. Common Cause*,[170] the Supreme Court created a huge void in its reapportionment jurisprudence by insisting that only one-person, one-vote had any constitutional legs. This decision has allowed unscrupulous state legislatures, both Democratic (New York, Illinois, California) and Republican (Texas, Wisconsin, and North Carolina), to engage in political gerrymandering. Surely some compactness requirement should be imposed to prevent illicit swings of votes, and the matter won't be cured if state legislatures are left to their own devices, which is why Arizona resorted to a public referendum to introduce its reform. So, it looks, therefore, as if the North Carolina court was right to attack the overtly partisan gerrymandering in its state. And it also looks as though the independent commission that handled reapportionment in New York state was a successful innovation, allowing an administrative expert to align districts to counter the massive gerrymander by the Democratic party.[171]

Yet that does leave open the question of whether the North Carolina judiciary has the power to redraw the map or only to reject the map previously drawn. If my reading of "times, places and manner" is correct, then it is for North Carolina to decide the role of its courts in redistricting cases. But if Article I, Section 4, Clause 1 applies, it is a bit of a stretch to say that the courts can completely bypass the legislature by redrawing the map by themselves. Thus, there is some good sense to Baude and McConnell's view that the courts cannot just cut the state legislature out of the process. While the legislature is still subject to traditional constraints, its power cannot be delegated to anyone else, e.g., a court, to shape the map. There is, alas, no good response to the question of what should be done if the state legislature flunks the gerrymandering test more than once, so that there is *no*

169. Tolson, *supra* note 12, at 562.

170. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

171. Daniel Marans, *New York Democrats May Have Cost Their Party the House, What Happened?*, YAHOO NEWS (Nov. 18, 2022), https://news.yahoo.com/york-democrats-may-cost-party-181929819.html [https://perma.cc/U3T5-7PU5].

map available for the election. So, in the end, I think that the only way out of the box for parties who reject the independent-state-legislature test is to rest their position on the simple view that reapportionment is an inherent state power not subject to federal oversight under Article I, Section 4, Clause 1, but subject to both state constitutional limitations and those of the federal Equal Protection Clause.

VII. Conclusion

I wrote *Simple Rules for a Complex Word* years ago, when it was in many ways a distillation of the work that I had done in multiple guises since I entered legal academics in 1968. One general test of a sound theory is its durability. One measure of that durability is the extent to which it can withstand the attacks that are lodged against it, both at the time of its formation and years later when a set of novel problems crops up, which could not have been anticipated at an earlier age. In my view, the four critiques of the system pose both familiar and novel challenges to the Simple Rules approach. And the good news is that the initial formulation, as modified in a few places, survives very well. The key point of the approach is to get the easy cases right, and in this context that means that the adoption of firm boundary lines, customary and at-will standards. These principles work in many key cases to achieve the critical double: simpler legal rules with more desirable incentive effects. By that standard, the book is durable. *Simple Rules* should, I expect, survive for at least another 28 years.