



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 10 | Issue 3

3-3-2023

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Recommended Citation

Seth A. Montandon, *Foreword: The Epstein Distinguished Speakers Collection*, 10 Tex. A&M L. Rev. xi (2023).

Available at: <https://doi.org/10.37419/LR.V10.I3.introduction>

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FOREWORD: THE EPSTEIN DISTINGUISHED SPEAKERS COLLECTION

by: Seth A. Montandon*

The *Texas A&M Law Review* is immensely honored and privileged to feature the scholarship of Professor Richard A. Epstein—one of America’s preeminent authorities on constitutional law,¹ property rights,² and the intersection between law and economics.³ Professor Epstein ranks among the top five most-cited legal scholars of all time,⁴ and his scholarship has not only spurred and shaped academic debates but also heavily influenced American jurisprudence.⁵ So it is no wonder Northwestern University Professor Steven G. Calabresi wrote, almost one decade ago, that Professor Epstein “is a legend in his own time.”⁶

Since 2010, Professor Epstein has served as the Laurence A. Tisch Professor of Law, and the Director of the Classical Liberal Institute at the New York University School of Law.⁷ Prior to receiving the appointment at N.Y.U., Professor Epstein spent 38 years as a faculty member at the University of Chicago Law School, where he is now the James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer.⁸ And before working at the University of Chicago Law School, Professor Epstein was on the University of Southern California Gould School of Law’s faculty.⁹ Professor Epstein also has experience serving as an editor on the *Journal of Legal Studies* from 1981 to 1991, an editor on the *Journal of Law and Economics* from 1991 to 2001, and as the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution from 2000 to the present.¹⁰

DOI: <https://doi.org/10.37419/LR.V10.I3.introduction>

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1. Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein’s the Classical Liberal Constitution*, 8 N.Y.U. J.L. & LIBERTY 839, 840 (2014).

2. Eduardo M. Penalver, *Reconstructing Richard Epstein*, 15 WM. & MARY BILL RTS. J. 429, 429 (2006).

3. Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1609 (2021).

4. *Id.* at 1602.

5. Calabresi, *supra* note 1.

6. *Id.*

7. Richard Epstein, N.Y.U. L., <https://law.nyu.edu//cfm?fuseaction=profile.&personid=26355> [<https://perma.cc/L6YP-WA6U>] (faculty page).

8. Richard A. Epstein, U. CHI. L. SCH., <https://www.law.uchicago.edu/faculty/epstein> [<https://perma.cc/P5BH-HRQ6>] (faculty page).

9. *Id.*

10. *Id.*

Over his 55-year academic career, Professor Epstein has published more than 25 books, 150 scholarly articles, and 146 shorter works.¹¹ These works include the book *Simple Rules for a Complex World*,¹² published in 1995 by the Harvard University Press, in which Professor Epstein lays out his worldview on a wide range of substantive legal and policy issues.¹³ In *Simple Rules*, Professor Epstein, influenced by the classical liberal, Austrian philosopher and economist, F. A. Hayek, delivers a “small-state, libertarian” perspective on the role of government.¹⁴ The rather *laissez-faire* framework underlying *Simple Rules* constitutes the basis for most of the academic discussions between the esteemed authors featured in this Issue of the *Texas A&M Law Review*.¹⁵

One venerated author, Professor Richard L. Revesz, is the AnBryce Professor of Law and Dean Emeritus at the New York University School of Law.¹⁶ Professor Revesz is a long-time member of the prestigious American Law Institute, for which he served as director from 2014 to 2023.¹⁷ Having published 10 books and approximately 80 scholarly articles, Professor Revesz is one of America’s premier scholars on environmental and regulatory law and policy.¹⁸ Indeed, on September 2, 2022, President Joseph Biden nominated Professor Revesz to serve as the Administrator for the Office of Information and Regulatory Affairs, and on December 21, 2022, the U.S. Senate unanimously confirmed Professor Revesz’s nomination.¹⁹

In his essay, *Fallacies in the Design of Climate Change Policies: A Response to Richard Epstein*,²⁰ Professor Revesz criticizes the application of Professor Epstein’s *Simple Rules* to global warming policy.²¹ Specifically, Professor Revesz argues that Professor Epstein’s approach might undermine global warming initiatives by incentivizing private investment in fossil fuel industries, preventing a large-scale economic shift toward renewable energy, and inhibiting the government’s ability to implement necessary environmental regulation.²²

11. *Id.*

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

13. Richard A. Epstein, *A Modern Defense of Simple Rules for a Complex World*, 10 TEX. A&M L. REV. 581, 582 (2023).

14. EPSTEIN, *supra* note 12, at 29–30.

15. See Epstein, *supra* note 13, at 581.

16. Richard Revesz, N.Y.U. L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228> [https://perma.cc/A793-PNVG] (faculty page).

17. *Id.*

18. *Id.*

19. Richard Revesz Confirmed as Head of the White House OMB’s Office of Information and Regulatory Affairs, N.Y.U. L. (Dec. 29, 2022), <https://www.law.nyu.edu/news/richard-revesz-oir-a-confirmation> [https://perma.cc/Z26D-XS48].

20. Richard L. Revesz, *Fallacies in the Design of Climate Change Policies: A Response to Richard Epstein*, 10 TEX. A&M L. REV. 581 (2023).

21. See generally *id.*; Epstein, *supra* note 13, at 581.

22. See Revesz, *supra* note 20, at 385–87.

Professor Revesz acknowledges that Professor Epstein’s *Simple Rules* might be desirable when applied to certain non-climate-related problems.²³ However, given the nature of global warming, Professor Revesz concludes that Professor Epstein’s proposed “small steps approach” is an implausible solution.²⁴

Another revered author, Professor Cynthia L. Estlund, is the Catherine A. Rein Professor of Law at the New York University School of Law.²⁵ Professor Estlund began her legal career in 1983, clerking for the Honorable Judge Patricia M. Wald of the D.C. Circuit.²⁶ And after four years in private practice—during which she specialized in labor and employment law—Professor Estlund received her first academic appointment at the University of Texas School of Law, where she taught for 10 years.²⁷ From there, Professor Estlund spent 7 years at Columbia Law School before ultimately accepting her current position at N.Y.U. in 2006.²⁸ During her academic career, Professor Estlund has established herself as an oft-cited authority in the field of labor and employment law, having contributed to the publication of 6 books and 80 other scholarly works.²⁹

In her article, *Employment-at-Will: Too Simple for a Complex World*,³⁰ Professor Estlund challenges Professor Epstein’s longstanding, adamant support “for an especially stringent version of [employment at-will].”³¹ Specifically, Professor Estlund asserts that, while the simplicity of at-will employment might be virtuous, too much simplicity gives rise to asymmetrical information and power imbalance in business negotiations and employment relationships.³² The result, Professor Estlund suggests, is an increased opportunity for class-based discrimination and retaliation in the workplace.³³ So, rather than advocating a return to the more *laissez faire* economy that Professor Epstein favors, Professor Estlund’s article proposes enacting supplemental statutory protections for workers in the form of “good cause” laws that Professor Estlund proffers would provide victims of “wrongful discharge” a forum for relief short of expensive litigation.³⁴

23. *Id.* at 386–87.

24. *Id.* at 387.

25. Cynthia Estlund, N.Y.U. L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=25449> [<https://perma.cc/D9CD-XSMY>].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; Curriculum Vitae, Cynthia L. Estlund, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.full_cv&personid=25449 [<https://perma.cc/QV6K-F4UV>] (Feb. 23, 2023 update).

30. Cynthia L. Estlund, *Employment-at-Will: Too Simple for a Complex World*, 10 TEX. A&M L. REV. 403 (2023).

31. *Id.* at 404; *see also* Epstein, *supra* note 13, at 581.

32. Estlund, *supra* note 30, at 416–20.

33. *Id.* at 387.

34. *Id.* at 407, 409.

This Issue's third article was written by a pair of brilliant legal scholars. Professor Lior J. Strahilevitz is the Sidley Austin Professor of Law at the University of Chicago Law School.³⁵ Professor Strahilevitz began his legal career in 1999, clerking for the Honorable Judge Cynthia H. Hall of the Ninth Circuit.³⁶ Following his clerkship, Professor Strahilevitz worked in private practice for two years before accepting an academic appointment at the University of Chicago Law School.³⁷ Throughout his academic career, Professor Strahilevitz has been credited with writing 8 books, publishing 39 scholarly articles, and having contributed to the publication of numerous other works.³⁸ He is a frequently-cited scholar, especially in the fields of property rights, contracts, and constitutional law.³⁹ Professor Strahilevitz's co-author, Rebecca Hansen, is a recent law school graduate.⁴⁰ Ms. Hansen is an incumbent law clerk for the Honorable Judge Vincent Chhabria of the United States District Court for the Northern District of California.⁴¹

In their article, *Toward Principled Background Principles in Takings Law*,⁴² Professor Strahilevitz and Ms. Hansen criticize the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*,⁴³ which held that state access regulations allowing union organizers to encroach on private company property constitute *per se* physical takings under the Fifth Amendment.⁴⁴ Specifically, the authors contend that the regulations at issue in *Cedar Point* were "background principles" of property law that should have been immune to takings challenges, given that the applicable statutes of limitations and any associated tolling provisions lapsed before plaintiffs brought the suit.⁴⁵ Thus, the authors advance two arguments with which Professor Epstein takes issue⁴⁶: (1) statutes and regulations become "background principles" of property law, and are therefore immune to takings suits, upon any applicable statutes of limitations and the associated tolling provisions lapsing;⁴⁷ and (2) that physical takings claims accrue upon the enactment or promulgation of the authorizing statute or regula-

35. Lior Jacob Strahilevitz, U. CHI. L. SCH., <https://www.law.uchicago.edu/faculty/strahilevitz> [<https://perma.cc/K82N-SK8S>] (faculty page).

36. *Id.*

37. *Id.*

38. See Professor Strahilevitz's CV, available for download on his University of Chicago faculty page, for a list of all his publications. Lior Jacob Strahilevitz, *supra* note 35.

39. *See id.*

40. See Rebecca Hansen & Lior J. Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427, 427 (2023).

41. *Id.*

42. *Id.*

43. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

44. *Id.* at 2080; see Hansen & Strahilevitz, *supra* note 41, at 448–65.

45. Hansen & Strahilevitz, *supra* note 40.

46. See Epstein, *supra* note 14, at 602–07.

47. Hansen & Strahilevitz, *supra* note 40, at 448–65; see Epstein, *supra* note 13, at 602–07.

tion.⁴⁸ However, despite Professor Epstein’s objections, Professor Strahilevitz and Ms. Hansen insist that these concepts are necessary to prevent long-standing “civil rights” statutes from being deemed *per se* takings, which might allow property owners to bring takings challenges in response to those laws.⁴⁹

The Issue next features the work of Professor Lee Anne Fennell. Professor Fennell is the Max Pam Professor of Law at the University of Chicago Law School.⁵⁰ After spending the first nine years of her legal career working in private practice and public interest, Professor Fennell entered the legal academy in 1999 as a legal writing instructor at the University of Chicago.⁵¹ From there, Professor Fennell briefly held academic appointments at the University of Texas School of Law and the University of Illinois College of Law before returning to the University of Chicago as a chaired professor.⁵² Professor Fennell’s scholarship primarily focuses on property, law and economics, and public interest.⁵³ Her 11 books, 50 scholarly articles, and 13 commentaries for, and reviews of, other scholarly works are regularly cited by other academics in those fields.⁵⁴

In her article, *Optional Price Discrimination*,⁵⁵ Professor Fennell surveys the causes and effects of price discrimination in American markets.⁵⁶ Professor Fennell warns that advancements in personal information-gathering technology and techniques move America’s markets closer to the “ominous threat” of “personalized pricing.”⁵⁷ The solution, Professor Fennell proffers, includes the government creating an economic structure that allows consumers to opt into price discrimination.⁵⁸ According to Professor Fennell, such a plan would make markets “fairer and more inclusive” by making goods and services more accessible to a wider range of consumers.⁵⁹ In support of her proposal, Professor Fennell points to economic models, like “Pay-What-You-Want,” that simultaneously allow consumers to set pricing for goods and services while also incentivizing and increasing charita-

48. Hansen & Strahilevitz, *supra* note 40, at 448–65; see Epstein, *supra* note 13, at 602–07.

49. Hansen & Strahilevitz, *supra* note 40, at 443, 446–47.

50. Lee Fennell, U. CHI. L. SCH., <https://www.law.uchicago.edu/faculty/fennell> [<https://perma.cc/PDA7-68NW>] (faculty page).

51. *Id.*

52. *Id.*

53. *Id.*

54. See Professor Fennell’s CV, available for download on her University of Chicago faculty page, for a list of all her publications. Lee Fennell, *supra* note 50.

55. Lee Anne Fennell, *Optional Price Discrimination*, 10 TEX. A&M L. REV. 485 (2023).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

ble giving.⁶⁰ For his part, Professor Epstein characterizes Professor Fennell’s article as an “independent spirit” that proposes some of the “simplest and best” rules one can find.⁶¹ But while Professor Epstein has no pressing objections to Professor Fennell’s proposal, Professor Epstein ponders whether the proposal is commendable enough to implement.⁶²

Lastly, this Issue presents the work of Professor Franita Tolson. Professor Tolson is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Gould School of Law.⁶³ Professor Tolson began her legal career clerking for the Honorable Judge Ruben Castillo of the Northern District of Illinois from 2005 to 2007, and then for the Honorable Judge Ann Claire Williams of the Seventh Circuit from 2007 to 2008.⁶⁴ After completing her clerkships, Professor Tolson joined the Florida State University College of Law Faculty, where she remained until accepting her current academic appointment.⁶⁵ Professor Tolson has contributed to the publication of more than 20 scholarly works, pushing the outer limits of legal knowledge in the field of voting rights.⁶⁶ She has also shared her knowledge on television, having worked as an election law analyst for CNN.⁶⁷

In her article, *The “Independent” State Legislature in Republican Theory*,⁶⁸ Professor Tolson surveys the history of the constitutional provisions underlying the so-called “independent state legislature theory.”⁶⁹ The theory garnered national attention when the Supreme Court agreed to hear *Moore v. Harper*,⁷⁰ in which the North Carolina State Legislature argues it has the final authority to draw and implement congressional districts without regard to constraints imposed by the state constitution or state courts.⁷¹ Professor Tolson, however, argues that the nation’s history and tradition foreclose such a theory.⁷² Specifically, Professor Tolson cites the concerns of several founding fathers,⁷³ the nation’s historical practices with respect to elections,⁷⁴

60. *Id.* at 520–21.

61. Epstein, *supra* note 14, at 583, 607.

62. *Id.* at 607–09.

63. Franita Tolson, U.S. CAL. GOULD SCH. L., <https://gould.usc.edu/faculty/?id=73521> [<https://perma.cc/8FEW-BV8P>] (faculty page).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Franita Tolson, *The “Independent” State Legislature in Republican Theory*, 10 TEX. A&M L. REV. 549 (2023).

69. *Id.*

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

71. See *Harper v. Hall*, 868 S.E.2d 499, 533 (N.C. 2022) (“Legislative Defendants contend that ‘a delegation of a political task to a single political branch of government impliedly forecloses the other branches of government from undertaking that task.’”).

72. Tolson, *supra* note 68, at 550–55.

73. *Id.* at 564–70.

74. *Id.*

and the nation's constitutional structure, particularly post-Twelfth Amendment.⁷⁵ This evidence leads Professor Tolson to conclude that because state legislatures are beholden to the people, rather than themselves, the independent state legislature theory, especially in its most extreme form, is incompatible with the constitutional principles underlying the American Republic.⁷⁶

While Professor Tolson's article does not address, or concern, Professor Epstein's *Simple Rules*, for those who may be interested, Professor Epstein has expressed a desire to address Professor Tolson's article on the independent state legislature theory in another scholarly work.⁷⁷

The *Texas A&M Law Review* is grateful to each of the well-respected scholars featured in this Issue for their contributions to the body of legal knowledge as well as for their dedication to sharing that knowledge with the greater legal community. Over the past year, several scholars presented, and engaged in discussions about, their work at the Texas A&M University School of Law. Some of the Publication's editors were privileged to participate in these discussions, and on behalf of the editorial board, I would like to thank each of the scholars for their collegiality and professionalism throughout these captivating discussions. Finally, the *Texas A&M Law Review* would like to express its sincerest gratitude to Professor Vanessa Casado Perez for inviting these revered scholars and for organizing the corresponding presentations.

"Knowledge is like money: to be of value it must circulate, and in circulating it can increase in quantity and, hopefully, in value."⁷⁸ By publishing the works of these scholars, the *Texas A&M Law Review* seeks to circulate original legal knowledge. And regardless of whether one agrees or disagrees with any particular author's theories, arguments, or propositions, it is my hope that in having these scholarly discussions, the greater body of legal knowledge will grow, resulting in novel, and valuable, solutions to the plethora of legal problems facing the world today.

75. *Id.*

76. *Id.* at 555.

77. See generally Epstein, *supra* note 14, at 609–17.

78. LOUIS L'AMOUR, EDUCATION OF A WANDERING MAN 191 (1989).

