

ESSAYS

COMPLEXITY AND SIMPLICITY IN LAW: A REVIEW ESSAY (CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013))

BY

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This Essay discusses Cass Sunstein's book, Simpler: The Future of Government, in order to advance our understanding of the concepts of complex and simple law. Many writers identify complexity with uncertainty and high cost. This Essay argues that complexity bears no fixed relationship to costs or benefits. It also shows that complexity's relationship to uncertainty is so ambiguous that it is profitable to treat complexity and uncertainty as separate concepts. It develops useful separate concepts of legal and compliance complexity that will aid efforts to simplify law, like the effort Sunstein claims to have embarked upon. It also argues that complexity is a hallmark of moderation, since it often arises from compromises reconciling competing interests and values. These basic points constitute important advances in the theory of complexity, which implicitly suggests something like this, but has not cleanly distinguished complex rules from costly or uncertain rules and has not explicitly identified complexity with moderation.

Sunstein's book, while quite valuable in many ways, does not greatly advance discussion of how to simplify law, because he assumes that whatever happens to coincide with his political philosophy must be simpler. He is not alone in assuming a happy coincidence between his values and the simplification ideal, but this Essay shows there is little overlap between Sunstein's endorsement of nudges and cost-

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benefit analysis and serious efforts to simplify the law. The theory I articulate leads to a keener appreciation of the need to accept some tradeoffs between simplicity and other values if we truly wish to make law “simpler.” The Essay closes with some thoughts about addressing these difficult tradeoffs.

I.	INTRODUCTION.....	182
II.	PARKING REGULATIONS: SIMPLE AND COMPLEX.....	184
	<i>A. More Conditions = More Complexity</i>	184
	<i>B. Simple Rules Can Be Costly</i>	185
	<i>C. Compromise and Moderation Generate Complexity</i>	185
	<i>D. Separating Uncertainty from Legal Complexity</i>	186
	<i>E. Separating Legal Complexity from Complex Compliance</i>	188
	<i>F. Needless Complexity</i>	189
III.	INVOKING SIMPLICITY WHILE CONDUCTING BUSINESS AS USUAL.....	191
	<i>A. What Sunstein Aims to Simplify</i>	191
	<i>B. Cost–Benefit Analysis</i>	192
	<i>C. Behavioral Economics and Nudges</i>	194
	1. <i>Presentation of Information</i>	195
	2. <i>Default Rules</i>	199
	3. <i>Paternalism and Nudges</i>	200
	<i>D. Minor Simplification</i>	201
IV.	TOWARD A DEBATE ABOUT TRADEOFFS BETWEEN SIMPLICITY AND OTHER VALUES	201
	<i>A. Legal Complexity and the Problem of Audience</i>	202
	<i>B. Legal Complexity and Compliance Complexity</i>	202
	<i>C. Legitimacy</i>	203
	<i>D. Toward Accepting Some Tradeoffs in Order to Simplify Law</i> ...204	
V.	CONCLUSION	206

I. INTRODUCTION

Law students sometimes wish that law were simpler, and they are not alone. Clients, lawyers, and commentators also often complain about law’s complexity.¹ In many areas of law—tax comes to mind—we should make simplification a priority; after all, a lot of people without expert training may find it impossible to comply if the law is too complex. But increased simplicity has proven an elusive goal for law, in part because it often

¹ See, e.g., PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 48–49 (1994) (arguing that lawyers and the general public are losing respect for the law because of its excessive complexity); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 762 (2003) (noting that complaints that we have “too much law” ring true to practitioners and regulated parties).

conflicts with other goals. Tax experts, for example, frequently argue that tax simplification conflicts with the goal of equity.²

Cass Sunstein, in a new book entitled *Simpler: The Future of Government*, argues that we should make government regulation simpler.³ His book, however, uses Sunstein's recent experience as administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget (OIRA) to argue that nudges—the employment of information and framing to influence peoples' decisions—and cost-benefit analysis (CBA) prove useful as legal reforms.⁴ Reviewers writing in more popular venues than law reviews have broadly discussed *Simpler's* agenda for legal reforms.⁵ My main goal here is to pave the way for a better debate about simplification. In this sense, I primarily use Sunstein's work to illustrate a pervasive problem with the debate over legal complexity. Many actors who decry complexity and invoke simplicity do so to make a very different reform agenda appear more attractive, rather than to seriously address the tradeoffs involved in taking simplification seriously. The tendency to associate complexity with a wide array of evils, and simplicity with a wide array of virtues, tends to obscure fundamental questions about the meaning of simplicity and complexity. This tendency, which is rather pronounced in *Simpler* but also present in earlier legal scholarship, threatens to deprive the terms simplicity and complexity of any clear meaning.⁶ In other words, the terms “simple” and “complex” become too complicated and uncertain if they are thought to embody too wide an array of vices and virtues. A clear theory of legal complexity and simplicity would aid legal reform. This Essay aims to provide the beginnings of such a theory, building upon previous scholarship along these lines and using Sunstein's book to show how difficult simplification can be even for those who profess to make it their chief aim.⁷

I begin by developing a model of simplicity and complexity based on a very simple example of parking regulation. Although the model is simple, it provides a basis for distinguishing simplicity and complexity from other concepts, such as uncertainty and costliness, with which complexity is

² See, e.g., Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 650 (2003) (arguing a tradeoff exists between simplicity on the one hand and fairness and efficiency on the other making simplification undesirable); Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 164–69 (1997) (explaining that a commitment to equity complicates taxation).

³ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 1 (2013).

⁴ *Id.* at 2.

⁵ See, e.g., David Cole, *Our Nudge in Chief: How, and Why, Cass Sunstein Believes Law and Public Policies Should Help Save Us from Our Irrational Impulses*, ATLANTIC, May 2014, at 36; William H. Simon, *The Republic of Choosing: A Behaviorist Goes to Washington*, BOSTON REV., July 8, 2013, <http://www.bostonreview.net/us-books-ideas/cass-sunstein-simpler-future-government-republic-choosing> (last visited Feb. 14, 2015).

⁶ See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 27 (1995) (associating complexity with the creation of “public regulatory obstacles” to realizing private objectives, thereby harnessing simplicity to the goals of libertarianism).

⁷ See, e.g., EPSTEIN, *supra* note 6, at 36; Peter H. Schuck, *Legal Complexity: Some Causes, Consequence, and Cures*, 42 DUKE L.J. 1, 7–9 (1992).

sometimes confused.⁸ I then use this theory as a lens through which to examine Sunstein's book. My main conclusion is that his book has little to offer as a project for simplifying law, but may have some merit on other grounds. In the final Part, I focus on a question suggested by Sunstein's use of the concept of simplicity to advocate his own preconceived agenda: Should we have a serious interest in making things simpler, when doing so conflicts with a lot of other goals?

II. PARKING REGULATIONS: SIMPLE AND COMPLEX

We intuitively have some shared sense of the difference between simple and complex rules.⁹ Let's take a very familiar example. In my home city, we have two posted rules regarding parking. In some areas, one can see a sign stating "No Parking Any Time," a very simple rule.¹⁰ In other places we have signs that say "No parking from 6 p.m. on Even Days to 6 p.m. on Odd Days." This Odd-Even Rule is more complicated than a simple No Parking Rule. But why exactly is this Odd-Even Rule more complicated than the No Parking Rule? And what does this example teach us about complexity and simplicity?

A. *More Conditions = More Complexity*

The Odd-Even Rule is more complicated because it has more conditions. An outright prohibition of parking—or any other activity—is quite simple. A rule that allows parking on some days and not others is inherently more complex. We frequently refer to the tax code as complex because it subjects any particular question to numerous conditions, often stated in different sections of the Internal Revenue Code.¹¹ A large number of conditions is the hallmark of complexity as ordinary people understand it.¹²

⁸ See Schuck, *supra* note 7, at 2 (mentioning the frequent association of complexity and uncertainty as concepts).

⁹ I agree with Peter Schuck that simplicity and complexity are relative concepts and that rules occupy a continuum of complexity and simplicity. See *id.* at 4–5. I still find it useful to discuss concepts of simple and complex rules as a dichotomy to develop a concept of complexity. Cf. *id.* at 5 (claiming that a legal rule is "neither simple nor complex," but then stating that the minimum age rule for running for President is simple and the rule against perpetuities is complex).

¹⁰ Cf. EPSTEIN, *supra* note 6, at 28 (characterizing a rule prohibiting marriage or work as simple).

¹¹ See *id.* (pointing out that a code providing 25 different tax treatments for various forms of interest is more complex than a regime that takes a blanket position on interest's deductibility); Paul, *supra* note 2, at 158 (defining "complicated regime" as consisting of "numerous detailed authorities"); Schuck, *supra* note 7, at 3 (treating "density and technicality" as defining features of complex law).

¹² Lawrence G. Baxter, *Betting Big: Value, Caution and Accountability in an Era of Large Banks and Complex Finance*, 31 REV. BANKING & FIN. L. 765, 863–64 (2012) (identifying a large volume of regulations as a feature creating complexity); cf. J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 565–66 (2014) (pointing out that complexity science defines systems with many elements as complicated, but not necessarily complex).

B. Simple Rules Can Be Costly

Simple as this observation is, it immediately leads to an observation that may seem counterintuitive to some: Complexity has no fixed relationship to a rule's costs or benefits. The parking example can help illustrate this observation. Notice that the more restrictive No Parking Rule is easier to understand and hence simpler than the less restrictive Odd-Even Rule. In economic jargon, the simpler rule generates larger compliance costs than the more complex rule, because the simple No Parking Rule may necessitate parking on a distant street and walking farther more often.¹³

Lax rules can also, however, prove simple. Suppose that we had a different rule: Parking OK All the Time. (This is the default rule in places where no sign is posted.) This Parking OK Rule is as simple as the No Parking Rule, but generates no compliance costs. Hence, two equally simple rules generate widely varying costs. Simplicity and complexity do not correlate with costs and therefore have no particular relationship to cost-benefit ratios.¹⁴

C. Compromise and Moderation Generate Complexity

Law frequently becomes complex because it embodies compromises between competing needs and values.¹⁵ In other words, complexity is often the hallmark of moderate law. This desire for compromise among competing values probably explains my parking example of complex law. In some places, a parked car would obscure visibility and create a hazard at any time, leading the municipal government to prohibit parking outright. In other words, the municipal government carries out no balancing of needs and values, because safety is involved.¹⁶ There are other places where no such hazard exists and the municipal government freely permits parking, giving the value of drivers' parking convenience absolute priority. These absolutist rules are quite simple. The complex Odd-Even Rule on many streets reflects an effort to balance drivers' desire to have a convenient place to park with the need of city plows to access the street during frequent snowstorms. This principle—that complexity is the hallmark of moderation and simplicity can be the hallmark of absolutism—has wider applicability than may be immediately apparent. For example, an extreme libertarian society might

¹³ *But cf.* EPSTEIN, *supra* note 6, at 25–27 (erroneously associating complexity with cost and therefore oddly concluding that the law of perpetuities is not complex because it can easily be evaded).

¹⁴ *See* Ruhl & Salzman, *supra* note 1, at 771 (finding a lack of correlation between compliance costs and the accretion of rules).

¹⁵ *See* EPSTEIN, *supra* note 6, at 152 (associating “mind-numbing complexity” with “elaborate legislative compromises”). I am not arguing that compromise is the sole cause of complexity—just a major one. *Cf.* Schuck, *supra* note 7, at 26 (arguing that complexity arises in order to address a new condition or accommodate a hard case, but also because decision makers benefit from complexity in various ways).

¹⁶ *See* Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. REV. 114, 127 (2001).

have no pollution control laws, a very simple form of environmental law. A society committed to making us completely safe from pollution might very well ban certain polluting activities outright (e.g., a rule prohibiting coal-fired power plants from operating), again, a very simple rule.¹⁷ Although one can find examples of both types of absolutism in our law, the more typical response is to have a rule requiring compliance with some sort of pollution limit, which is a more complex rule.

D. Separating Uncertainty from Legal Complexity

None of my three parking rules exhibits significant uncertainty. The No Parking and Parking OK rules are extremely certain. The Odd–Even Rule might raise questions about whether parking is illegal or not precisely at 6 p.m. Most rules generate some sort of uncertainty at the margins. But in any given 24-hour period this rule operates uncertainly for only a minute or two.

Most commentators associate complexity with uncertainty.¹⁸ Separating those two concepts, however, would aid legal analysis, even though there is some relationship between them. To see why, let us posit a different rule—or more precisely, a principle: Parking Permitted When Reasonable. This Reasonable Parking Rule greatly exacerbates uncertainty. The driver now must determine for herself how close to an intersection she can park without creating a hazard or what parking times and locations would inconvenience the snow plows too much. And doing so would require judgment under conditions of uncertain information. The Reasonable Parking Rule's generality creates uncertainty.

Now most complexity commentators associate uncertainty with the proliferation of very specific rules, not a high level of generality.¹⁹ But the above example shows that a simply stated rule can generate uncertainty because of its generality.²⁰ Indeed, proliferation of very specific rules can *sometimes* reduce uncertainty.²¹ The complexity literature recognizes that a desire for more specificity to limit uncertainty often leads to a proliferation of specific rules.²²

¹⁷ See, e.g., MINN. STAT. ANN. § 216H.03, subd. 3 (West 2010) (forbidding construction of new large energy facilities that would add carbon dioxide emissions).

¹⁸ See, e.g., EPSTEIN, *supra* note 6, at 28 (finding a rule only allowing “just cause” discharge complex because a large number of considerations are relevant); Schuck, *supra* note 7, at 4 (treating indeterminacy as a defining feature of complexity).

¹⁹ Cf. EPSTEIN, *supra* note 6, at 28 (associating a highly general rule with multiple relevant considerations generating extensive fact finding and litigation).

²⁰ See Donaldson, *supra* note 2, at 691 (“[S]imple laws are probably more ambiguous than complex ones.”).

²¹ See, e.g., Donaldson, *supra* note 2, at 661 (arguing that certainty requires “lengthy, technical statutes”).

²² See Ruhl & Salzman, *supra* note 1, at 785, 836 (suggesting EPA writes extremely detailed, specific rules in order to make them enforceable, and that regulated parties demand more rule specificity to reduce uncertainty); Steven A. Bank, *Codifying Judicial Doctrines: No Cure for Rules but More Rules?*, 54 SMU L. REV. 37, 44 (2001) (suggesting the IRS promulgates additional rules to limit tax avoidance).

At other times, increased complexity can have little or no effect on uncertainty. For example, imagine a rule combining the Odd–Even Rule with an exception permitting parking on every Thursday, “notwithstanding any other provision of law.” This combination of the Odd–Even Rule with the Free Thursday Rule adds complexity because it requires the assimilation of several conditions in order to figure out whether one can park. But this combination does not create additional uncertainty. This rule would make it absolutely clear that parking is permitted every Thursday. On non-Thursdays the Odd–Even Rule would dictate clear results.

Still, an array of rules can sometimes increase uncertainty even when the rules are properly understood. Suppose that the municipality omitted the “notwithstanding” clause above so that the rule simply combined an Odd–Even Rule with a Free Thursday Rule. It might be difficult to know what to do if the Odd–Even Rule prohibited parking on Thursday while the Free Thursday rule permitted it. Thus, very specific rules can create uncertainty when they conflict.

This analysis shows that an array of legally complex requirements may generate or not generate uncertainty, depending on whether they create conflicts among the rules in the array. It also suggests that regulators can frequently avoid conflicts by adding specificity in areas where conflicts might arise. On the other hand, regulators may not properly anticipate all potential conflicts in order to do this successfully.

The conflation of legal complexity with uncertainty makes analysis of legal reforms difficult. It makes it hard to tell which of the different problems I have highlighted is at issue in any simplification effort. For example, an array of legal requirements may successfully embody a legal compromise, but need some clarifying rules to address conflicts. Or the array may have become so complex that notwithstanding the lack of uncertainty in all of the specific rules (if properly understood), it has become too hard for relevant audiences to understand and assimilate the full array of rules.²³ The Reasonable Parking example though suggests that backing away from specific rules can increase ambiguity. Hence, a tension can arise between limiting actual ambiguity and simplifying rules to make them easier to assimilate.

Instead of thinking about complexity in the form of uncertainty generating complexity in the form of many specific rules, it is less confusing to separate uncertainty and complexity into different categories. This separation permits us to speak of uncertainty being reduced through added complexity, or conversely, of uncertainty increasing because of simplification. Furthermore, for lay people, legal complexity corresponds with multiple conditions. It takes experience or training to see that rules that look simple—like the Reasonable Parking Rule—can produce a lot of uncertainty.

²³ See Paul, *supra* note 2, at 158–59 (discussing the problem of numerous detailed requirements causing errors among laypersons and experts).

The legal process can create uncertainty even when the rules it produces are simple enough.²⁴ For example, governments must revise rules periodically, thereby creating uncertainty as to what the new rule will be during the period when revisions are being considered. Hence, we can discuss issues of uncertainty more clearly by separating the legal complexity of rules from uncertainties created by a legal process or an ambiguous rule. Embedding both uncertainty and multiple conditions in an expansive concept of complexity may work well as a strategy for trashing government regulation, but is not likely to lead to cogent analysis of complexity or wise, simplifying reforms.

E. Separating Legal Complexity from Complex Compliance

My explanation of legal complexity focuses on an array of conditions making it hard for relevant audiences to understand what the law requires. Of course, clients are sometimes more concerned with the complexity of what they must do. Let us call this compliance complexity.

Compliance complexity can arise even when the law itself is simple and therefore not difficult for a relevant audience to understand. It can arise even though the law creates no uncertainty at all. Suppose that the Internal Revenue Service (IRS) passed a law requiring taxpayers to document all expenditures generating tax deductions with appropriate receipts. This, at least viewed in isolation, is not a *legally* complex rule. But for many taxpayers, it would create a significant recordkeeping burden. It would require some people to save every medical receipt, every local tax bill, receipts from business-related lunches, and records of mortgage payments. Most clients have this sort of hassle in mind when they complain about the law's complexity.

One might object to my effort to separate compliance from legal complexity by pointing out that the cost of figuring out what a complex rule means is a compliance cost. In a sense, I have already answered this objection. Even when there is no legal complexity generating any substantial cost in figuring out what it means, there may be a large compliance burden stemming from following the rule.²⁵ The converse is also true: very complex rules generating huge legal bills for those trying to figure out what they mean, may, in the end, generate little burden when it actually comes time to comply. Accordingly, we could well use the term "complexity" to include compliance complexity. But separating legal complexity from compliance complexity better aids the analysis of proposals to simplify law.

Often though, legal and compliance complexity may be related in another sense. Although they are not tightly correlated in this tax deduction example, sometimes a long list of tasks results not from a simple

²⁴ See, e.g., EPSTEIN, *supra* note 6, at 28 (discussing the uncertainty involved in figuring out whether a firing is for "just cause").

²⁵ See, e.g., Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 5-6 (1974) (discussing a rule requiring monthly reporting of deductible dependency care expenses on an accrual basis and how this creates difficult burdens for individual taxpayers).

requirement—like my deduction documentation rule—but from numerous requirements acting on the same set of activities.²⁶

Perhaps counterintuitively, compliance complexity and high compliance cost need not coincide. For example, the Clean Air Act's²⁷ acid rain provisions required utilities to install very expensive continuous emissions monitors that electronically report emissions.²⁸ Monitoring regimes that use various parameters as a basis for estimating emissions and reporting the results are far more complex to comply with, but are less costly than continuous monitoring.²⁹ The parameter monitoring typically requires more tasks, often including selection from an array of methodologies, and therefore hassles plant operators.³⁰ Even if the cost of continuous monitors dwarfs the cost of engineering time in parameter monitoring regimes, it may not require a huge number of tasks by the plant operators.

Legal complexity can make understanding the law's requirements difficult, leading to litigation and sometimes misunderstandings, even if the rules bearing on a given question yield clear, unambiguous requirements. Compliance complexity, on the other hand, stems from a simple or complex law generating a host of tasks that are difficult to perform.

F. Needless Complexity

Sunstein, to his credit, decries *needless* complexity, recognizing at various junctures that law sometimes cannot be very simple when it addresses more complex problems than parking.³¹ How can we tell if complexity is needless?

Let us go back to our parking example and ask whether our Odd–Even Rule is needlessly complex. To determine whether a particular complication is needless, one must ask whether it serves a legitimate and reasonably important purpose. The Odd–Even rule's utility in facilitating snow plowing

²⁶ See Ruhl & Salzman, *supra* note 1, at 801 (pointing out that more rules can mean more compliance burdens).

²⁷ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

²⁸ *Id.* § 7651k; Michael Roth & Paul Lawrence, *A Cost-Effective Alternative to Continuous Emission Monitoring Systems*, ENVTL. SCI. & ENG'G MAG., May–June 2010, at 56, 56, available at http://ese.dgtpub.com/2010/2010-06-30/pdf/A_cost_effective_solution_for_continuous_emission_monitoring_systems.pdf.

²⁹ See THOMAS EISENMANN, ROLAND BIANCHIN & DAVID TRIEBEL, PREDICTIVE EMISSION MONITORING (PEM): SUITABILITY AND APPLICATION IN VIEW OF U.S. EPA AND EUROPEAN REGULATORY FRAMEWORKS 3, 7–10, 13 (2014), available at http://www.mcilvaineconomy.com/Decision_Tree/subscriber/Tree/DescriptionTextLinks/TEisenmann%20-%20DURAG%20data%20systems_Paper%20CEM%202014.pdf.

³⁰ See *id.* at 7, 11 (listing various methods for building an appropriate noncontinuous monitoring system, as well as various tasks that must be performed on such systems for quality assurance purposes).

³¹ SUNSTEIN, *supra* note 3, at 1, 207; see, e.g., Donaldson, *supra* note 2, at 660 (arguing that the Internal Revenue Code is complex because the U.S. economy is complex). *But cf.* Schuck, *supra* note 7, at 18 (recognizing that increased “social complexity” may make a more complex legal system inevitable, but expressing concern about complexity's cost).

suggests that the Odd–Even Rule serves a purpose and therefore is needed. But one can go further by asking a second question: Would a simpler requirement serve this purpose equally well, without slighting other legitimate and important purposes? In New York City, one often finds parking permitted on Mondays, Wednesdays, and Fridays, but forbidden on Tuesdays and Thursdays, or vice versa. This Alternate Days Rule is arguably simpler than the Odd–Even Rule, because it diminishes legal complexity and perhaps compliance complexity. That is, there is something non-intuitive about the Odd–Even Rule that makes it hard to understand at first. Furthermore, it involves a slight amount of compliance complexity for some people, as not everybody knows what day of the month it is when they decide to park. They may have to glance at an iPhone or a newspaper to figure it out. By contrast, more people know—without any extra effort—what day of the week it is. Now it would seem that the Alternate Days Rule would leave one side of the street clear for snow plowing every other day just as the Odd–Even Rule does. If so, then it is unnecessarily complex because one could obtain the same objective with a simpler rule. Hence, a rule is needlessly complex if it serves no purpose, or if the same purpose could be served with a simpler rule, without disserving some other purpose. This point about the nature of needless complexity suggests that uninformed (or even moderately informed) observers will often see needless complexity when some purpose justifies the complexity. One must understand the varied purposes of a law quite well in order to distinguish needless from necessary complexity.

Now, the fact that complications often serve some purpose does not mean that we should eliminate only needless complexity. If complexity becomes too great a problem, we may wish to eliminate some complexities even if they do serve some legitimate legal purpose. But doing that requires an evaluation of tradeoffs.³²

For example, maybe we want to simplify parking rules by having a Parking OK Rule supplant the Odd–Even Rule. But then we have to live with snow plowing that may not reach the edges of the street very often. This tradeoff may help explain why reform efforts aimed at simplifying law seldom succeed. Although everybody longs for simpler law, often when we examine the reforms needed to make it simpler, we find that simplification requires giving up something else. And we may have difficulty agreeing about what to give up. The tax law debate exemplifies this problem. The tax code would be simpler without deductions, but these deductions serve purposes that make some of them quite popular.³³

³² See EPSTEIN, *supra* note 6, at 28 (recognizing that simple rules are not always desirable, citing prohibitions of marriage or work as examples); Schuck, *supra* note 7, at 8 (recognizing that “simpler law is not always better law”).

³³ See Jane G. Gravelle, *Practical Tax Reform for a More Efficient Income Tax*, 30 VA. TAX. REV. 389, 394–95 (2010) (listing individual tax exemptions and deductions and noting which are popular and which have some justification); see, e.g., Nicholas W. Norvell, *Transition Relief for Tax Reform’s Third Rail: Reforming the Home Mortgage Interest Deduction After the Housing Market Crash*, 49 SAN DIEGO L. REV. 1333, 1334 (2012) (characterizing the mortgage interest

My effort to carefully distinguish complexity from uncertainty, and legal complexity from compliance complexity, will help evaluate the tradeoffs involved in efforts to simplify law. We cannot sensibly simplify law if we are not aware that simplification can increase costs and complicate compliance. This approach does not identify all the tradeoffs involved in simplifying or complicating law, but it does at least alert us to tradeoffs that may be missed if we use a vague concept of complexity when we consider simplifying reforms.

III. INVOKING SIMPLICITY WHILE CONDUCTING BUSINESS AS USUAL

Simpler reflects on Sunstein's recent experience as head of OIRA, which reviews regulations from a variety of agencies under an executive order focused fairly heavily on CBA.³⁴ The first line of his book states: "This is a book about making things simpler."³⁵ It isn't. This is a book largely about CBA and behavioral economics, two of Sunstein's central commitments prior to joining OIRA.³⁶ The book's invocation of simplicity teaches us that we need a model of complexity and simplicity if we want to have a clear discussion about complexity and make law substantially "simpler." Furthermore, Sunstein's use of simplicity as an organizing theme for everything that is already on his agenda (as well as other ideas) raises questions about whether anybody has a serious enough interest in making things simpler to give up anything in order to get it.

A. What Sunstein Aims to Simplify

Sunstein's claim that his book is about making "things" simpler raises the question of what exactly Sunstein wants to simplify. In terms of the theory I have articulated, it raises questions about whether he wishes to address legal complexity or compliance complexity. It turns out that he has nothing so limited in mind. Rather, he wants government to "make people's lives easier."³⁷ This goal is a bit of a problem because it is not limited to those who must comply with the law. He wants to simplify the lives of regulatory beneficiaries as well.³⁸ Trying to simplify regulated parties' lives may conflict with simplifying regulatory beneficiaries' lives. For example, a pollution control law complicates the lives of people manufacturing products, because it requires changes in their operations to control pollution, and usually monitoring, record keeping, and reporting to verify that the changes achieved the law's specific requirements. The same law simplifies the lives of beneficiaries, as it spares them hospital visits, medical bills, and problems

deduction as "America's favorite tax break" and noting that reform would make "tax compliance simpler").

³⁴ SUNSTEIN, *supra* note 3, at 2, 26–27.

³⁵ *Id.* at 1.

³⁶ *Id.* at 29, 70.

³⁷ *Id.* at 1.

³⁸ *Id.*

with insurance companies, because they did not contract a pollution-related illness.

But he quickly leaves these two ambitious and conflicting goals behind and states that he wants to make government simpler in the sense of easy to use (like a good computer or tablet, he says).³⁹ He does not clarify what he means by “using” government. People who benefit or suffer from regulation do not necessarily use government, unless they participated in shaping the regulation. Although this goal of simplifying government could signal a desire to make public involvement in government policymaking easier (something I will come back to), later chapters suggest he is more focused on making access to government data and filing of forms easier.⁴⁰

B. Cost–Benefit Analysis

Sunstein’s focus quickly shifts to CBA, which takes up several chapters.⁴¹ CBA complicates the analysis preceding government decision making. If one wants to design a rule to protect public health, one must evaluate data about pollution’s effects and make a judgment about what level of pollution is tolerable without endangering people. Although the judgment involved is difficult, the analysis focuses only on understanding health effects. On the other hand, if one wishes to maximize feasible emission reductions, one needs to focus on compliance costs, but need not consider pollution’s effects (although governments must at some point consider those effects, at least qualitatively, to choose which pollutants to regulate).⁴² CBA requires both a consideration of health effects and cost, thereby combining the complexities of cost analysis with the complexities of an analysis of health effects.⁴³ It then adds a significant further complication by requiring monetization of the health effects: the conversion of consequences like suffering from cancer and then dying into dollar amounts.⁴⁴ Although Sunstein has spent a career positing various virtues for CBA, it constitutes perhaps the most complex form of analysis used in government decision making.⁴⁵ So, it is odd to see CBA emphasized—

³⁹ *Id.*

⁴⁰ *Id.* at 122–23, 185.

⁴¹ *Id.* at 8, 187–88.

⁴² See David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost–Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 11, 26–34 (2005) (explaining that the feasibility principle requires consideration of costs, and discussing how risk is considered prior to setting standards based on feasibility).

⁴³ See David M. Driesen, *Getting Our Priorities Straight: One Strand of the Regulatory Reform Debate*, 31 ENVTL. L. REP. 10003, 10019 n.204 (2001) (explaining in detail why CBA is more complicated than alternative forms of analysis).

⁴⁴ See FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 91–98 (2004) (discussing—in the context of arsenic regulation—the role of science in CBA and the difficulties of putting a price on suffering and death from cancer).

⁴⁵ See, e.g., CASS R. SUNSTEIN, THE COST–BENEFIT STATE (2002) (analyzing the cost–benefit state and discussing the implications of CBA for the future of regulatory laws).

without noting this paradox—in a book that purports to be about making government simpler.⁴⁶

Nor does focusing on CBA make government more user-friendly, at least not to the general public. CBA depends heavily upon assumptions embedded deep in quantitative risk assessments and in monetization methodologies.⁴⁷ Unless one can understand and critique these assumptions, which are often quite arcane and difficult to even locate, one cannot participate very effectively in a debate about the outcome of CBA. Indeed, Sunstein characterizes CBA as a “foreign language,” apparently recognizing that ordinary people have some difficulty understanding it.⁴⁸ One could defend CBA as user-friendly in the sense that it helps regulated firms achieve their objectives of slowing down and weakening regulatory requirements because they can hire all the experts they need to influence the arcane analysis and the debates that CBA leads to between OIRA and regulatory agencies.⁴⁹ But it hardly makes government simpler in the sense that Sunstein seems to endorse when he suggests that government should be simple in the sense that an iPad is simple to use.

Nor does CBA have any particular relationship to simpler legal rules, as I have shown above.⁵⁰ The institutional setting in which CBA takes place uses CBA as a justification for wide-ranging debates between OIRA and regulatory agencies about regulations. Such debates are more likely to produce complex compromises than simpler rules. Cancelling a regulation because of CBA or OIRA oversight simplifies law. But Sunstein disclaims any allegiance to deregulation and less government as the means of simplification.⁵¹ Sunstein makes a lot of claims about why CBA informs good regulatory decisions.⁵² But he does not make a serious effort to explain why CBA makes government or law simpler.

He does mention a related reform: an executive summary of costs and benefits.⁵³ This reform seems aimed at transparency, rather than legal or compliance simplicity. But an executive summary would aid understanding, even if the reasons for a rule had nothing to do with CBA. For example, the Clean Air Act forbids consideration of cost in setting national ambient air quality standards (NAAQS), requiring standards requisite to protect public health.⁵⁴ A short executive summary of health effects and why the agency concluded that its rule adequately protected public health would aid

⁴⁶ Cf. Ruhl, *supra* note 12, at 572 (noting that even if CBA promotes efficient resource allocation in regulated systems it “might be a costly and potentially inefficient legal decision-making method”).

⁴⁷ See ACKERMAN & HEINZERLING, *supra* note 44, at 66 (critiquing assumptions in the valuation of health benefits).

⁴⁸ SUNSTEIN, *supra* note 3, at 172.

⁴⁹ See Ruhl & Salzman, *supra* note 1, at 781 (noting that CBA slows the promulgation of rules).

⁵⁰ See *supra* notes 41–46 and accompanying text.

⁵¹ SUNSTEIN, *supra* note 3, at 1, 11.

⁵² *Id.* at 152–53.

⁵³ *Id.* at 171.

⁵⁴ *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001).

understanding of that rule. A summary of costs and benefits would only help explain the reasons for a NAAQS if the Environmental Protection Agency (EPA) did not intend to follow the law. In fact, most agencies have mandates that do not require or (at times) even permit rules to be based on an optimal balance between costs and benefits.⁵⁵ As a result, an executive summary focused on costs and benefits may do more to help people understand why OIRA found the rule acceptable than to understand its legal basis or perhaps the basis for an agency's decision.

Similarly, he defends a favorite tool of CBA advocates and regulated companies, the regulatory lookback (retrospective evaluation of existing rules).⁵⁶ Here he makes a more convincing claim for simplification, but it is based on the kind of simplification he disclaims at the beginning of the book, deregulation.⁵⁷ This is because the Obama Administration did not use the lookback to identify gaps in the regulatory framework, but instead to reduce regulatory burdens.⁵⁸ This strongly suggests that the regulatory lookback produced compliance simplification, because it did away with rules.

My point here is quite limited. I have elsewhere debated CBA's merits,⁵⁹ which is a hotly contested issue that Sunstein addresses at length in *Simpler*. But even if Sunstein is right that CBA aids sound government decision making, it does not follow that CBA simplifies either law or government, except to the extent that it simply gets rid of rules.

C. Behavioral Economics and Nudges

Sunstein has become one of the academy's foremost champions of behavioral law and economics. His recent books, including one with a pioneer of behavioral economics, Richard Thaler, advocate the use of "nudges," signals based on framing or presentation of information that gently push consumers in the right direction.⁶⁰ These are good ideas, and many people think they have a place in thinking about government regulation.⁶¹

⁵⁵ See, e.g., *Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208, 223 (2009) (holding that EPA may, but need not, consider CBA in drafting standards for intake of water under the Clean Water Act); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (stating that consideration of CBA would be inconsistent with the feasibility principle in the Occupational Safety and Health Act).

⁵⁶ SUNSTEIN, *supra* note 3, at 184–86.

⁵⁷ *Id.* at 185–86.

⁵⁸ *Id.* at 186.

⁵⁹ See, e.g., David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006) (arguing that CBA is not neutral in theory or in practice); David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 *ECOLOGICAL L.Q.* 545 (1997) (arguing that CBA does not track society's concerns about costs very well).

⁶⁰ See, e.g., CASS R. SUNSTEIN, *WHY NUDGE?: THE POLITICS OF LIBERAL PATERNALISM* (2014); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁶¹ See, e.g., Cole, *supra* note 5, at 38; cf. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 57 (2014) (arguing that mandatory disclosure may not influence behavior); Lauren E. Willis, *When Nudges Fail: Slippery*

Sunstein devotes entire chapters to two types of nudges, presentation of information in a way that might encourage desirable behavioral change and offering of default rules that favor the option likely to serve the needs of the person subject to the default rule.

1. Presentation of Information

Informational “nudges” can be complex or simple. Sunstein gives a convincing example of nudge simplification realized when the Department of Agriculture moved from a confusing food pyramid to presentation of basic nutritional information in a representation of a plate, which showed more clearly that one should include vegetables, fruit, grains, protein, and dairy in a well-balanced diet.⁶²

Another example, however, reveals how easily government officials can abandon or compromise simplicity when competing interests and values come into play. This example involves the choice between labels designed to convey information about vehicle fuel economy.⁶³ In this case, the Obama Administration chose the most complex of several potential options in response to the regulated industry’s concerns.⁶⁴ And it illustrates how the tradeoffs and philosophical questions that simplification efforts raise can make law complex.

Sunstein barely mentions the simplest label involved in the debate he discusses, a label that featured city and highway miles per gallon (MPG) numbers, which was in place prior to Sunstein’s time in office.⁶⁵

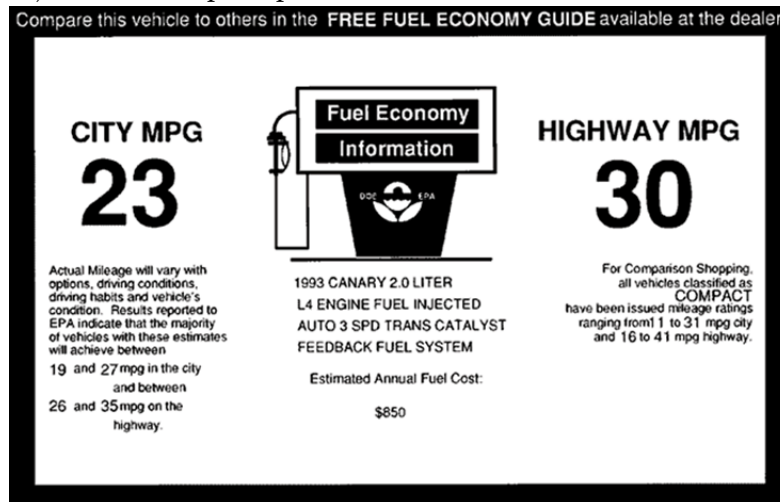


Figure 1. Pre-Obama Administration Fuel Economy Label

Defaults, 80 U. CHI. L. REV. 1155, 1174 (2013) (finding policy defaults ineffective when contrary to the interests of the firms employing them).

⁶² SUNSTEIN, *supra* note 3, at 75–78.

⁶³ *Id.* at 81–89.

⁶⁴ *Id.* at 84, 87–88.

⁶⁵ *Id.* at 81–82.

Sunstein explains that the administration decided to ditch this simple label because it did not convey enough information to adequately inform consumers.⁶⁶ The conclusion that it did not adequately inform consumers was based on a value choice, the decision to put more emphasis on the fuel cost savings than on MPG alone.⁶⁷ This is a defensible decision, but it does tend to emphasize cost savings over efficiency per se. More importantly, this example illustrates a very frequent tradeoff arising in designing nudges (or more simply, informational strategies): Frequently the goal of conveying a lot of good information conflicts with the goal of a simple presentation, as Sunstein acknowledges.⁶⁸ In other words, complexity has value in the context of nudges.

Given the choice to abandon this very simple design, the Obama Administration considered two labels: One emphasized an annual fuel cost number and an average miles-per-gallon number.⁶⁹

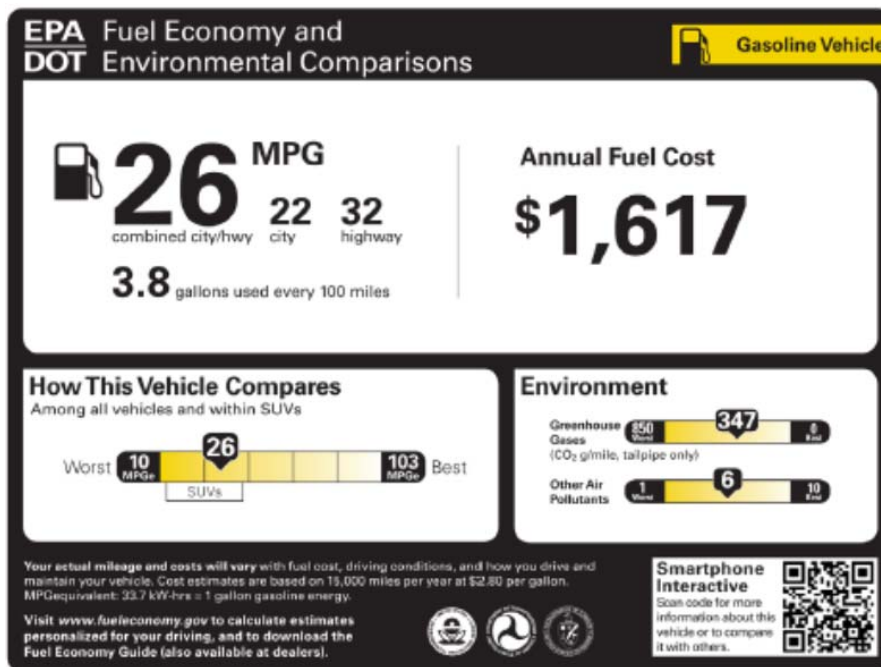


Figure 2. Proposed Fuel Economy Label Emphasizing Cost Savings

⁶⁶ See *id.* at 84.

⁶⁷ See *id.*

⁶⁸ See *id.* at 93 (noting that accurate information disclosure can be ineffective if it is too complex to be useful).

⁶⁹ *Id.* at 84, 86; see also U.S. ENVTL. PROT. AGENCY, PROPOSED FUEL ECONOMY LABELS IN EPA AND DOT NOTICE OF PROPOSED RULEMAKING: “REVISIONS AND ADDITIONS TO MOTOR VEHICLE FUEL ECONOMY LABEL” 10–15 (2010), available at <http://www.epa.gov/fueleconomy/label/label-designs.pdf>.

The other proposed label, developed by communications and marketing experts, emphasized a letter grade based on ranking vehicles' MPGs.⁷⁰



Figure 3. Proposed Fuel Economy Label Featuring Letter Grades

⁷⁰ SUNSTEIN, *supra* note 3, at 85–86; *see also* U.S. ENVTL. PROT. AGENCY, *supra* note 69, at 2–9.

Sunstein seems to accept that the letter grade made the labels simpler.⁷¹ But the administration ultimately chose a more complex label than either of these two, designed to convey more information.⁷²

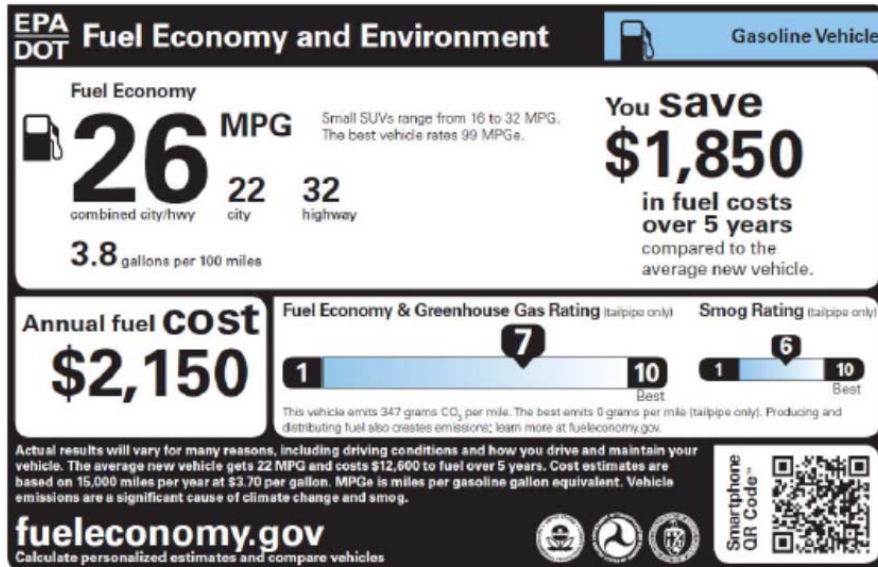


Figure 4. Adopted Fuel Economy Label

Why did the Obama Administration not choose the simple letter grade label? Sunstein explains that the auto industry feared that consumers would misunderstand the letter grades as giving a federal government view of the “overall merits of cars” when they were in fact only conveying information about relative fuel efficiency.⁷³ Also, Sunstein mentions that the industry considered these labels “too evaluative and prescriptive.”⁷⁴ Often simplicity loses out, even when it presents reasonably minor problems, because complexity serves some interests and philosophical values.

But having rejected letter grades, why did the administration choose a yet more complicated label than the one emphasizing a simple MPG and annual fuel cost number? Sunstein does not say. But he does mention that this choice was a joint decision of EPA and the U.S. Department of Transportation in response to public comments and it does reflect the

⁷¹ See SUNSTEIN, *supra* note 3, at 87 (“By itself, a letter grade helps to overcome comparison friction. Everyone knows that ‘A’ is better than ‘C.’”).

⁷² See *id.* at 88–89; U.S. ENVTL. PROT. AGENCY, NEW FUEL ECONOMY AND ENVIRONMENT LABELS FOR A NEW GENERATION OF VEHICLES 2–3 (2011), available at <http://www.epa.gov/otaq/carlabel/documents/420f11017a.pdf>.

⁷³ SUNSTEIN, *supra* note 3, at 88.

⁷⁴ *Id.* at 87.

concerns lying behind all of the proposals,⁷⁵ so it is a fair bet that this is an example of compromises among competing considerations generating added complexity.⁷⁶ In this case, the Obama Administration abandoned the goal of nudging consumers toward higher fuel efficiency in the simplest most effective manner possible in favor of added complexity.

2. Default Rules

Sunstein explains that default rules have a big influence on people's choices.⁷⁷ The classic example involves retirement accounts. Traditionally, employees do not contribute to their own retirement accounts unless they affirmatively opt-in—actively choose to contribute through payroll deduction.⁷⁸ Many employees stick with the default option of contributing nothing through payroll deduction and therefore do not save enough money to ensure a comfortable retirement, even when they earn enough to do so.⁷⁹ Reversing the default option by automatically deducting employee contributions to their retirement plans from their paychecks, absent an affirmative decision to opt-out of a voluntary retirement plan, increases retirement savings.⁸⁰

This use of information about framing effects to design default rules represents an extremely useful contribution from behavioral economics. Sunstein shows that both government and private parties can productively influence choices by careful selection of default rules.⁸¹ Accordingly, selection of good default options can be, in some situations, an effective policy choice.

The selection of default rules, however, has no particular relationship to legal complexity or simplicity. Opt-in and opt-out rules for retirement plans are equally simple. It's just that one default rule is more desirable than the other because it produces better behavior. Sunstein creates the illusion that there is some relationship between default rules and simplicity through

⁷⁵ *Id.* at 88.

⁷⁶ The adopted label reflects compromises among different virtues in the proposed labels. The letter grade proposal offered comparative information. The part of the chosen label that compares a vehicle's fuel savings to that of the average vehicle likewise communicates comparative information. At the same time, the label features all the information highlighted in the other label considered, namely the annual fuel cost and the miles per gallon. Hence, it maximizes complexity through the accommodation of all interests, at least to some degree, in lieu of making hard choices that would produce simpler results. *See id.* at 84, 85, 88 figs. 4.5, 4.6 & 4.7.

⁷⁷ *Id.* at 101.

⁷⁸ *Id.* at 104; *see also* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 *YALE L.J.* 451, 461–62 (2004) (discussing “funding risk” allocated to the employee by the defined benefit format, including the danger that the funds necessary to finance adequate retirement benefits will not be contributed to the plan).

⁷⁹ SUNSTEIN, *supra* note 3, at 104; *see also* Zelinsky, *supra* note 79, at 461–62.

⁸⁰ SUNSTEIN, *supra* note 3, at 58–59, 104.

⁸¹ *See id.* at 112 (“[I]nstitutions can achieve important goals . . . by selecting good default rules . . .”).

a digression about simplifying government forms.⁸² But these simplifications do not involve changing default rules.

Now one might object that a good default rule simplifies the life of the person subject to a default rule by reducing the number of times that the person must change the default. In other words, the good default rule reduces “compliance complexity,” redefined in the nudges context as denoting the complexity of the task the person subject to the rule will undertake, even though a default rule does not specifically require any behavioral change. This compliance simplification would occur if we designed default rules by polls asking what most people wanted. But Sunstein specifically rejects that approach. Instead, he favors selecting the default rule that most people would choose if they were well-informed.⁸³ This is a defensible position combining technocratic paternalism with regard for individual autonomy. But it compromises simplicity in order to include the technological paternalist element, thereby showing that this is about Sunstein’s vision of good government, with simplicity being largely beside the point.

Sunstein concludes his chapter on default rules by pointing out, correctly, that creating a default rule where there is none does make people’s lives simpler.⁸⁴ Default rules simplify lives because the defaults can induce the person to make a choice without actively considering information. This is true, however, whether the default rule is good, bad, or neutral.

But Sunstein does not advocate always choosing a default rule. He admits that there are situations where one wants to avoid default rules entirely in order to make people go through the complex exercise of gathering all the information needed to make an informed choice.⁸⁵ In other words, we should prefer complexity in some situations.

Sunstein’s book creates an illusion that what is better must be simpler. That assumption is not correct. Sometimes, as in selecting among simple default rules, better has almost nothing to do with simplicity or complexity. In other cases, such as in choosing between using a default rule and forcing an active choice, there is a tradeoff between simplicity and other values.

3. Paternalism and Nudges

Sunstein defends nudges as a softer form of paternalism than actual mandates and articulates a number of reasons why, in some circumstances, nudges might prove attractive.⁸⁶ He nowhere addresses the question of whether mandates might be simpler than nudges. Is a ban on cigarette smoking more complex than a warning label seeking to nudge people to kick the habit? Sunstein does not care. Rather, he defends nudges as enhancing

⁸² *Id.* at 122–24.

⁸³ *Id.* at 112.

⁸⁴ *Id.* at 126.

⁸⁵ *Id.* at 119–20.

⁸⁶ *Id.* at 193–94, 198–99.

individual autonomy, more likely to increase human welfare, and affording greater flexibility.⁸⁷ If he is correct, then this might be yet another instance where he sacrifices simplicity for some other value. There is nothing inherently wrong with making such choices, but it would be nice if he would acknowledge the tradeoff.

D. Minor Simplification

Sunstein at several junctures discusses examples of clear simplification that do make government more user-friendly. These involve simplifying government forms, reducing recordkeeping and reporting burdens, and improving the ease of accessing government information.⁸⁸ These seem like fairly small beer, but nevertheless desirable and welcome efforts to make government more user-friendly.

We have to take Sunstein's word for his implicit claim that the rules reducing reporting burdens eliminated "needless" complexity because he nowhere undertakes an analysis of why the burdens were put in place or why they failed to serve some purpose. Perhaps Sunstein's examples show that government produces needless complexity and that some opportunities for noncontroversial simplification exist.

IV. TOWARD A DEBATE ABOUT TRADEOFFS BETWEEN SIMPLICITY AND OTHER VALUES

In spite of the existence of some opportunities for noncontroversial simplification, the law generally remains quite complex. This suggests that in many instances we have been unwilling to compromise other values in order to simplify the law. Furthermore, the MPG example suggests that we often choose complex law when simpler options would have very minor downsides.

This raises some questions though. Should we care about complexity enough to choose simpler law when doing so would involve some consequences we do not like? Can we say something useful about the tradeoffs involved? Or is simplicity something we tend to value in the abstract but, for very good reasons, readily abandon once it becomes apparent that we must give up something to obtain it? Although a theory of complexity cannot tell us how to evaluate tradeoffs between simplicity and numerous competing values, it can help us understand the tradeoffs and help us make some progress on the question of how to evaluate tradeoffs. It also enables us to say something concrete about the tradeoffs involved in nudges and CBA that Sunstein glosses over.

⁸⁷ See *id.* at 14, 197–98.

⁸⁸ See, e.g., *id.* at 185, 209 (suggesting a number of strategies to "eliminate reporting and paperwork burdens," and listing various ways to streamline government).

A. Legal Complexity and the Problem of Audience

Perhaps legal complexity (as distinguished from uncertainty and compliance complexity) only matters when regulated parties lack the resources to hire lawyers to enable them to understand a complex array of requirements. Perhaps we should care about complexity for tax law, which regulates many individuals without the resources to hire professional help, and not care about regulation of large businesses that routinely hire sophisticated lawyers to figure out their legal obligations.⁸⁹

James Salzman and J.B. Ruhl, however, suggest otherwise. They argue, based in part on a survey of lawyers involved in regulatory compliance efforts, that the accretion of too many legal requirements may account for a significant amount of noncompliance with environmental law.⁹⁰ Many experienced lawyers believe that complexity threatens compliance with legal rules in a variety of fields.

Still, audience may matter. Perhaps we need a greater degree of simplicity for rules that apply to the average individual or small business than we do for laws that apply to sophisticated institutions and wealthy individuals. Even if audience matters, we have to consider the likelihood that some law (or bodies of law) has become too complex even for sophisticated audiences.

Sunstein's inclusion of the idea of simplifying regulatory beneficiaries' lives, however, suggests another insight regarding audience. We should not view the regulated as the sole audience for rules. Government enforcement attorneys (local, state, and federal), who may be less experienced and well paid than their private sector counterparts, need to understand legal requirements as well. And ordinary citizens may need to understand rules that apply to others, either to participate in enforcing them (through efforts to get the government to do so or citizen suits) or to help evaluate their adequacy in deciding what goals to pursue in lobbying or choosing political candidates. Hence, there may be some value in simple rules even for rules regulating sophisticated entities.

B. Legal Complexity and Compliance Complexity

Although I have tried to separate legal complexity from compliance complexity for the sake of clarity, I have also observed that legal complexity can sometimes generate compliance complexity. J.B. Ruhl and Jim Salzman point to a distinct compliance problem that stems from legal complexity (in the form of an array of rules). They point out that a complex set of rules may

⁸⁹ See Bittker, *supra* note 25, at 5 (arguing that simplification is especially important for "mass" provisions that apply to millions of taxpayers); *cf.* Donaldson, *supra* note 2, at 693–95 (arguing that complexity has little impact on individual compliance with the Internal Revenue Code).

⁹⁰ See Ruhl & Salzman, *supra* note 1, at 767, 794 (finding the sheer number of regulations the most important factor explaining noncompliance).

contain interrelated requirements.⁹¹ The result may be that an error in complying with one rule creates problems in complying with several different rules.⁹² This implies that even when the burdens rules impose are reasonable, the complexity of the tasks they cumulatively create can hinder compliance.⁹³

The key insight for my purposes, however, involves just the notion that complexity can induce error. Legal complexity may create legal errors, where counsel or managers interpret the law incorrectly. Obviously, legal error is most likely where the complexity generates uncertainty about what the law means. But legal error can arise simply from misunderstandings, even when an extremely skilled attorney devoting sufficient time to the task would understand exactly what the law means. It is perhaps for this reason that EPA produces plain English translations of its rules and the IRS provides various forms of taxpayer assistance.⁹⁴ Compliance complexity (whether arising from legal complexity or not) can also induce error. For example, pollution control regulations often include cutoff points, often designed to exempt pollution sources facilities that emit too little pollution to be of concern. The methodologies for determining which sources qualify for these exemptions can be quite data-intensive and technical.⁹⁵ Errors in data collection, measurement, communication, or analysis can produce erroneous compliance determinations. EPA also offers outreach and hotlines to overcome limits in technical capacity necessary for compliance, an implicit acknowledgment that compliance complexity can lead to unintentional noncompliance.⁹⁶

C. Legitimacy

A feeling that law is too complex undermines the law's legitimacy.⁹⁷ It gives rise to resentment from regulated parties, who feel harassed. And it can create doubts in regulatory beneficiaries' minds about whether the law actually delivers the benefits it promises.

This may matter a great deal. We live in a time of sharp political division about the value of regulation, where many elected officials oppose practically all regulation.⁹⁸ I have argued elsewhere that contemporary law

⁹¹ See *id.* at 804.

⁹² See *id.* at 805.

⁹³ See *id.* at 798–806 (distinguishing the system burdens stemming from an array of regulatory requirements from the standard effort and informational burdens).

⁹⁴ See *id.* at 839.

⁹⁵ See, e.g., Ruth Mead, *Insight: The Hazardous Organic NESHAP (HON) as a Prototype for Future MACT Standards*, in I CLEAN AIR ACT PERMITS: MANAGER'S GUIDE TO THE 1990 CLEAN AIR ACT AMENDMENTS ¶ 590, tbl. I (Richard Bistrup et al. eds. 2013) (setting out the applicability criteria for various pollution sources at chemical plants).

⁹⁶ See Ruhl & Salzman, *supra* note 1, at 839.

⁹⁷ See Schuck, *supra* note 7, at 22–25 (discussing complexity's "delegitimation costs").

⁹⁸ See, e.g., Regulations from the Executive in Need of Scrutiny Act of 2013, H.R. 367, 113th Cong. (2013) (attempting to require approval of both houses of Congress before major regulation went into effect, crippling the ability of the executive branch to create new

and economics together with strong antigovernment political leadership from the time of Ronald Reagan have tended to glorify markets and create a disdain for government.⁹⁹ But perhaps experience with overly complex regulation has played a role in creating extreme hostility to government standard setting, even though we obviously need standards to deal with many kinds of social problems.

Hence, too much complexity may, in the long run, help make untenable the entire enterprise of governments playing a sensible role in protecting the environment, keeping food safe, avoiding severe economic depression, and meeting other important goals. Indeed, many argue that the lack of political support for effective regulation has already greatly impaired governments' capacity to protect us from very serious threats.¹⁰⁰

D. Toward Accepting Some Tradeoffs in Order to Simplify Law

We should accept a modest minimal principle in evaluating apparent tradeoffs between simplicity and other values. If we are in doubt about the significance of the tradeoff, we should prefer simplicity.¹⁰¹ That is, if there is reason to doubt that the tradeoff exists or that the competing interests on the side of complexity are substantial, we should simplify.

This principle may not get us far when we are pretty confident that complexity serves some important values, but it can prove helpful in other cases. This principle would have helped in the fuel economy labeling case. Although it is of course possible that some consumers would misinterpret a letter grade label as expressing a government view on a vehicle's overall merits, and would allow those views to heavily influence their buying decisions, it seems at least equally likely that this would not occur or would occur too infrequently to constitute an important enough concern to outweigh a desire for simpler nudges. Surely most consumers (perhaps all) would understand that a fuel economy label is a fuel economy label. Even the few who might misunderstand a letter grade label might not give the government's view on a car's overall merit substantial weight in making a decision. Furthermore, if manufacturers are very concerned about this problem, they could mount advertising campaigns to inform consumers about the label's limited purpose and encourage salespeople to explain that

administrative rules); John McArdle & Jean Chemnick, *Rep. Issa Airs Industry Grievances on Federal Regs*, N.Y. TIMES, Feb. 7, 2011, <http://www.nytimes.com/gwire/2011/02/07/07greenwire-rep-issa-air-industry-grievances-on-federal-r-75729.html> (last visited Feb. 14, 2015) (discussing the efforts of House Oversight and Government Reform Chairman to eliminate regulations that industry groups particularly disfavored).

⁹⁹ See DAVID M. DRIESEN, *THE ECONOMIC DYNAMICS OF LAW* 19–31 (2012) (describing neoclassical law and economics in detail, and how politicians interpreted it as justifying deregulatory ideology).

¹⁰⁰ See, e.g., THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013) (arguing that antigovernment ideology and business lobbying has created a freedom to harm health and the environment by weakening regulatory systems).

¹⁰¹ See EPSTEIN, *supra* note 6, at 33 (proposing that, when in doubt, we should choose simplicity).

limited purpose to confused car buyers. In this sort of situation, this principle, limited though it may be, can provide useful guidance.

Beyond that, however, the question of how to balance our desire for simplicity against other matters becomes quite a difficult subject. I cannot here establish a comprehensive theory about how to make these tradeoffs when something more substantial is involved.

I can suggest, however, a change of attitude that might help simplicity to gain a little more of the weight that it probably deserves. Government officials frequently speak of wanting to make the “right” regulatory decision.¹⁰² Yet, one does not sense in their speech or in the documents they issue anything like a coherent view of what principles determine whether a regulation is right or wrong. Certainly, no clear principles for determining the right answers to regulatory problems emerge from former OIRA chief Sunstein’s latest work. (And that is not an insult; such principles are very hard to develop and probably not the same for all areas of regulation, as Sunstein’s work shows.)¹⁰³ Government officials tend to define a right answer as being first of all moderate. They frequently express the view that if they issue a decision that is stricter than the regulated parties want and laxer than the regulatory beneficiaries wanted, they “must be doing something right.”¹⁰⁴ My argument that complexity flows from moderation suggests that this instinct for the middle makes government officials into unconscious advocates of complexity quite often.

Yet, such knee-jerk moderation has no principled justification. There may be times when the government should be laxer than the industry suggests: Some alleged dangers and problems just do not merit regulation at all. There may be other problems that merit stricter regulation than most organizations representing regulatory beneficiaries dare advocate. Perhaps climate disruption should produce a phase-out of coal-fired power, not just a set of emission limits for power plants, as advocated by environmental organizations.¹⁰⁵ And at other times, maybe one side is right and the other side is wrong. There is something deeply unprincipled but politically pragmatic in identifying the right answer reflexively with the middle. Different principles point in different directions of course, but any principle, whether one of cost–benefit balance, feasibility, or full protection of safety

¹⁰² See, e.g., Cindy Zimmerman, *EPA Chief Hopes RFS Rule Coming “Soon,”* CORN COMMENTARY, July 9, 2014, <http://corncommentary.com/2014/07/09/epa-chief-hopes-rfs-rule-coming-soon/> (last visited Feb. 14, 2015) (quoting EPA Administrator Gina McCarthy as saying, “My goal is always to make sure we get it right.”).

¹⁰³ See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost–Benefit State*, 48 STAN. L. REV. 247, 291 (1996) (recognizing that regulatory statutes have varying purposes).

¹⁰⁴ See, e.g., Thomas P. Dunne, Remarks at the Air and Waste Management Association Minneapolis, Minnesota 2 (June 21, 2005), available at http://www.epa.gov/oswer/docs/2005_0623_dunne_awma.pdf (describing the belief that “[i]f everyone sues us, we must be doing something right” as “widely accepted” at EPA).

¹⁰⁵ See, e.g., Letter from Michael A. Livermore et al., Institute for Policy Integrity, N.Y. Univ. Sch. of Law, to Bob Perciasepe, Acting Admin’r, U.S. Env’tl. Prot. Agency 18 (Feb. 19, 2013), available at http://www2.epa.gov/sites/production/files/documents/policy_integrity_omnibus_ghg_petition_under_caa.pdf (urging EPA, inter alia, to promptly finalize performance standards for new and existing power plants).

and health, will not always (or even often) coincide with the middle-ground between competing stakeholders. Thus, government officials should be aware that when they craft a solution that seems to strike a balance between the competing forces bearing down upon them, it is very unlikely that they are providing the right answer to a public policy problem in any principled sense of the word. They are simply effectuating a political compromise, and likely creating complexity that disserves the government's and the public's long-term interests in the process.

Perhaps an understanding that right answers exist only relative to some clearly defined principle (which will likely prove controversial), and an understanding that the middle has no logical relationship to questions of right and wrong, may open up some space for resisting pressures in order to make things a little simpler. Making regulation a little stricter or a little laxer for simplicity's sake is usually right under some principles and wrong under others. Even if the agencies agree to be bound, not by their own sense of right and wrong, but rather by the values in the statutes they implement (which is what I believe they should do), there usually is enough wiggle room to make things simpler without being clearly wrong. But confusing political compromise, whether among special interests or between competing government agencies, with the "right answer" is a recipe for making things much more complex than they need to be.

V. CONCLUSION

Unfortunately, simplicity does not neatly coincide with Cass Sunstein's political philosophy or anybody else's. If we really wish to make laws simpler, we must first understand complexity, and not confuse complexity with costly regulation or even uncertainty. CBA does nothing to simplify regulation and nudges can be complex or simple depending upon design choice. Complexity usually arises from an effort to forge compromises and constitutes a hallmark of moderate regulation. It is not usually some alien force or a mark of stupidity, but an unfortunate byproduct of democratic governance addressing complex problems. This does not mean that we should refrain from making things simpler. But we must recognize that if we seriously wish to simplify law, we will have to give simplicity added weight even when competing interests favor complexity. The analysis above shows that the framework I have developed can at least help us cogently analyze the tradeoffs that Sunstein glosses over.