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Recommended Citation

Richard A. Epstein, "Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet," 3 *Chicago Journal of International Law* 455 (2002).

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Classical Liberalism Meets the New Constitutional Order:
A Comment on Mark Tushnet
Richard A. Epstein*

Mark Tushnet's provocative paper, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*¹ offers a typology of judicial review that throws into high relief some of the key elements of any system of constitutional law. One key component of the mix is substantive: just what rights should, or does, a particular constitution protect? A second is structural: what payoff comes from assigning any particular level of constitutional protection to any particular right? The differences can matter. The United States Constitution simply invalidates the offending law. In contrast, the Canadian Charter of Rights and Freedoms provides that any such law can be reenacted for a five year period by a simple provincial majority.²

These two questions—of content and potency—are interdependent. Many modern constitutions reject the baseline of the United States Constitution, with its system of strong rights in property and liberty and strong judicial review. In contrast, newer constitutions offer weak protection to private property and often contain an impressive list of positive rights, such as the right to a decent job or decent housing. How does content influence potency?

Tushnet begins his analysis of these knotty questions by looking at a number of Canadian cases.³ Historically, constitutions did not regulate relations between private individuals, but instead limited regulations to state actors. Yet as Tushnet notes,

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1. Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 *Chi J Int'l L* 435 (2002).
2. Canadian Charter of Rights and Freedoms, § 33, Part I of Constitution Act of 1982, Schedule B to Canada Act of 1982 (hereinafter Canadian Charter).
3. *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573 (secondary boycotts); *Vriend v Alberta*, [1998] 1 SCR 493 (gay rights); *Eldridge v British Columbia (Attorney General)*, 1997 Can Sup Ct LEXIS 24896, *86 (1997) (medical care); *Dummore v Ontario (Attorney General)*, 2001 Can Sup Ct LEXIS 27216, *94 (2001) (farm workers).

much new legislation calls into question this neat historical distinction. For example, the normal (i.e., classical liberal) rules of contract allow individuals and firms to choose their trading partners on whatever terms they see fit. Is that response still appropriate in contiguous areas once the state prohibits private discrimination based on grounds of race or sex? May the state then refuse to prevent discrimination on grounds of sexual orientation? Or obesity? Does a private hospital that refuses to supply a sign language interpreter to a deaf person violate the constitutional norm of equality? Finally, must a labor statute that allows for collective bargaining for industrial workers extend the same right to farm workers?

The Canadian courts have held that the state cannot enter the world of discrimination or collective bargaining by half-measures. The state's generalized guarantee of equality requires it to jump in with both feet once it has begun its journey. Likewise the state may not have to provide for anyone's medical care, but once it does, the norm of equality requires it to defray the costs of the deaf person. Tushnet argues that the Canadian Charter necessarily displaces the background rules of property and contract so central to the system of *laissez-faire*, which, in fact, they do.⁴ Indeed these Canadian cases seem to go beyond the usual American decisions on underinclusion. Underinclusion occurs when a statute that gives some benefit to members of one race declines to give it to members of another. It has never been read to require a state to prohibit discrimination on one ground because it has done so on another, which the Canadian cases do require.

In many ways Tushnet welcomes this rejection of the classical liberal synthesis that I, for one, have long defended.⁵ His basic challenge asks whether the classical liberal tradition is coherent. If not, then what becomes the status of the judicial enforcement of constitutional liberties?

I. THE COHERENCE OF THE CLASSICAL LIBERAL SYNTHESIS

Tushnet correctly notes that the traditional synthesis combines broad readings to property and contract with a narrow definition to fraud or coercion, so that the latter categories do not swamp the former.⁶ Tushnet claims that this line is untenable because "coercion, as the courts had defined it, was not a category sharply distinguished from freedom but simply a particular location on a continuum of varying degrees of freedom."⁷ Tushnet offers no illustrations or account of this slippage. However, the usual examples used to attack the classical model only confirm

4. Tushnet, 3 Chi J Intl L at 435–38 (cited in note 1).

5. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard 1985).

6. Tushnet, 3 Chi J Intl L at 438–39 (cited in note 1).

7. *Id.* at 440. See also Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Harvard 1998), which I criticize in Richard A. Epstein, *The Assault that Failed: The Progressive Critique of Laissez Faire*, 97 Mich L Rev 1697 (1999).

its tenacity. The rubrics of force and fraud require explication, but they are not infinitely malleable. The prohibition on force covers using one's hands to strike another. It cannot be evaded by throwing a stone, using a knife, or firing a gun. Nor do the evasions stop with the direct application of force: setting traps and spring guns have to be prohibited as well. Likewise, if one cannot force poison down the throat of his neighbor, then he cannot lie to induce the neighbor to swallow the poison by saying it is medicine. Similarly, fraud has to cover cases of concealment, and certain cases of nondisclosure, such as those involving incomplete utterances or fiduciary duties.

Yet even these emendations leave many easy cases on the opposite side of the line. Thus, the party who sets a trap is not responsible after it is dismantled. The party who drinks the poison with full knowledge of its contents has not been deceived. Most critically, no matter how one tries to manipulate the ideas of force, duress, coercion, concealment, and mistake, they never make it illegal for one person to offer goods and services at a lower cost than his rival. The idea of "unfair" competition (which involves either force or misrepresentation) does not bleed into competition. Whether one likes or dislikes competitive markets, they cannot be conflated with forced exchanges at gunpoint. The continuum hypothesis on the relationship of force to freedom must be rejected.

These lines have constitutional significance. As Tushnet notes, the scope of the police power to limit speech or property depends on the clarity of the term "nuisance."⁸ The watershed case of *Euclid v. Ambler Realty Co.*⁹ used a broad definition of nuisance to justify an extensive system of zoning laws, indirectly referring to low-income apartment houses in the neighborhood as nuisances, instead of confining the term to noise, sewage, and smells. But when the Supreme Court began its modest reinvigoration of the takings clause, it promptly reverted to the common-law definition of nuisance as embodied in the Restatement of Torts.¹⁰ That tough-mindedness in First Amendment cases never extended public nuisances to cover trashy films shown at drive-in theaters,¹¹ even though the Supreme Court is prepared to give some, perhaps too much, sway to the nuisance rationale in the case of adult entertainment.¹² Tushnet inverts the relationship between clarity and conviction. The classical synthesis does not fall because its boundaries are hopelessly blurred. Rather the boundaries become blurred because courts (or commentators) don't care about the underlying political edifice.

8. For discussion, see Richard A. Epstein, *Torts* §§ 14.1–14.4 (Aspen 1999).

9. 272 US 365 (1926).

10. See *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1029–31 (1992).

11. *Erznoznik v. City of Jacksonville*, 422 US 205, 216–18 (1975).

12. See, for example, *Young v. American Mini Theatres, Inc.*, 427 US 50, 69–71 (1976) (upholding ordinance requiring dispersal of adult entertainment); *City of Renton v. Playtime Theatres, Inc.*, 475 US 41, 47–49 (1986) (upholding ordinance requiring concentration of such theaters).

Tushnet makes, I think, a similar mistake¹³ in chiding Cass Sunstein for his early reticence to endorse constitutional mandates for social welfare—or what has been traditionally termed positive—rights.¹⁴ Sunstein attacked a constitutional provision guaranteeing a “right to an income conforming with the quantity and quality of work performed.”¹⁵ His basic point is familiar and unexceptionable: neither legislatures nor courts have the competence “to oversee labor markets very closely”¹⁶ and thus should not start down this perilous path. Tushnet impatiently responds:

Of course, courts “oversee the labor market” through their development of background rules of property and contract. There can be no *distinctive* incapacity of courts that allows them to develop those background rules in an acceptable manner but makes them unable to develop social welfare rights—or, equivalently, unable to work out the contours of the state action/horizontal effect doctrine. Put another way, we think we know that courts can develop background rules of property and contract acceptably; we know that courts *must* develop some doctrine of state action or horizontal effect; we may believe that courts cannot develop social welfare rights acceptably. The difficulty is that those three views are incompatible, because each of these areas of judicial power is but a means to achieve the same goal.¹⁷

Why? Of course, everyone recognizes the judicial origins of the law of property, contract and tort. The principles of liberty and property supply the baseline entitlements from which parties bargain. That baseline stipulates that each person (who else?) owns his own labor and may sell it on whatever terms and conditions he may see fit. When no deal is reached, each person may seek another transaction. I know of no alternative workable baseline that facilitates voluntary coordination of labor and capital across millions of separate persons. Just who is bound to work for whom, and under what terms? Once a deal is made, it is much easier for a court to interpret an employment contract than to invent one out of whole cloth on such matters as wages, leave, promotion, discipline, benefits, and retirement. It is one thing for a judge to find out what parties have stipulated for themselves and quite another to decree what those terms should be.

It is of course possible to regulate isolated terms to reach some “social minimum,” such as a minimum wage law. But these regulatory interventions start from the common-law framework and impose limited deviations from it. The purpose is to correct market failure, not to eliminate voluntary labor relationships. Even then these restraints are far more complex than the basic contract, as a quick look at the minimum wage or antidiscrimination regulations makes clear. These rules also impose

13. Tushnet, 3 Chi J Intl L at 443–44 (cited in note 1).

14. Cass R. Sunstein, *Against Positive Rights*, in András Sajó, ed, *Western Rights? Post-Communist Application* 225 (Kluwer 1996).

15. *Id.* at 228.

16. *Id.*

17. Tushnet, 3 Chi J Intl L at 443–44 (cited in note 1) (emphasis in original).

heavy allocative and administrative costs, without advancing any intelligible social objective. I am utterly baffled why any constitutional system should enshrine this quixotic end, or—more controversially—even tolerate legislation that purports to achieve it. The invention of contracts is far more complex than the invention of contract law.

II. JUDICIAL ENFORCEMENT OF THE CLASSICAL SYSTEM

The next piece of the puzzle addresses the distinction between state and private action. Tushnet writes: “The [Canadian] Supreme Court’s intuition, though, is sensible enough in an active state, where—having entered a field—the state displaces the common law and converts all actions by private entities into actions authorized by the state.”¹⁸ Once the state decides to prohibit discrimination on the grounds of race, it must do so on the grounds of sexual orientation as well. To one working in the common-law tradition, this expansionist account of state action makes Manifest Destiny look like small potatoes. Even if some limitations on individual choice may be justified, it is frightening to think that the initial step of legislative action must necessarily be a giant step that covers the entire field.

Tushnet’s overall orientation not only makes him sympathetic to this move, but it also informs his defense of one of the most controversial and troublesome American constitutional law cases: *Shelley v. Kraemer*.¹⁹ *Shelley* arose when the plaintiff sued to enforce a private racially restrictive covenant to prevent the transfer of land from white to black owners. Missouri law was neutral with respect to the content of the covenant. The state would have enforced any recorded covenant, including one that forbade the transfer of land from black to white individuals. As such the legal position is distinguishable from the earlier case of *Buchanan v. Warley*,²⁰ where a state zoning ordinance was struck down because it sought to segregate Louisville by public means. A decade after *Buchanan*, *Corrigan v. Buckley*²¹ summarily rejected any constitutional challenge to the judicial enforcement of private covenants, repeatedly stressing the sharp contrast between judicial enforcement of private rights and state action. For Tushnet, “*Shelley*’s holding on the merits makes sense only on a theory of equality that condemns some distributions of important goods like housing.”²²

I disagree with this analysis. Most obviously, the last sentence is a nonsequitur. *Shelley*’s refusal to enforce the covenant is not tantamount to a system of public

18. Id at 441.

19. 334 US 1 (1948).

20. 245 US 60 (1917). For recent discussion of the case, see David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 Vand L Rev 797 (1998), and Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 Vand L Rev 881, 934–44 (1998).

21. 271 US 323 (1926).

22. Tushnet, 3 Chi J Intl L at 441 (cited in note 1).

housing. But the threshold question of what counts as state action remains critical to the classical theory. The line between public and private action need not be gutted simply because the equal protection clause applies to some actions of the judiciary. *Strauder v. West Virginia*,²³ for example, struck down a statute that barred blacks from service on the jury. But if the legislature had remained silent and the same position had been adopted as a rule of the court, the equal protection clause should still apply. Judicial administration is surely state action caught by both the due process and equal protection guarantees.

The enforcement of private rights of action, however, raises very different issues. Under the classical liberal theory of John Locke, property rights were well-defined in the state of nature.²⁴ The need for government stemmed from the imperfect enforcement of these rights when each individual enjoyed the “executive” capacity to enforce the laws on his own behalf. Bias and self-interest were sure to undermine the system of legal enforcement. The great trade-off required each individual to surrender his right of self-help in exchange for public enforcement of his private property rights. The impartial judicial forum is the critical part of the social deal, which simply falls apart if the forum has wholesale discretion in deciding whether or not to enforce private rights. Moreover, these private rights are widely decentralized, so that the content of these covenants could differ from case to case. The system is a far cry from the judicial enforcement of a zoning code imposed by a monopoly sovereign.

The point has constitutional resonance. The due process clause holds that the state may not “deprive any person of life, liberty, or property, without due process of law”; nor may the state “deny to any person ... the equal protection of the laws.”²⁵ That denial of property rights, or deprivation of equal protection, is precisely what the state does when, across the board, it refuses to enforce a covenant valid in all other respects (for example, formation and registration). Accordingly, I believe the correct legal position takes one of two forms. Either (1), the state does not deprive or deny any person of his rights under either the due process or equal protection clause when it makes no independent decision but only enforces private rights on request. A constitutional denial or deprivation requires some state initiative that is missing when the state acts in lieu of individual self-help. Or (2), the state, by refusing to enforce these covenants, has, in fact, denied these covenantees the equal protection of the law or has deprived them of their property without just compensation.

Oddly enough, the Supreme Court in *Shelley* did not see the tension between its decision and the institution of private property. Quite the opposite, it viewed its decision as defending “the rights to acquire, enjoy, own and dispose of property.”²⁶ But

23. 100 US 303 (1880).

24. John Locke, *The Second Treatise of Government* chs 2 & 3 (Bobbs-Merrill 1952).

25. US Const amend XIV, § 1.

26. *Shelley*, 334 US at 10 (cited in note 19).

that conclusion cannot be right, for the denial of the restrictive covenant necessarily hampers the initial owner from disposing of his property on the terms and conditions he sees fit, including the use of restrictive covenants,²⁷ which always limit (by private power only) the subsequent disposition or use of the property in question. But the second owner has not lost any property rights because he purchases with notice of the grantor's restriction, and adjusts his price accordingly. It hardly matters whether the covenant involves leaving land unbuilt or barring sales to members of a particular race.

Nor can *Shelley* be saved by noting that courts often refuse to enforce contracts contrary to public policy. That abstract formulation is hopelessly vague, but it gets specific content by noting that this category includes contracts to kill a third person or to fix prices—the core classical liberal prohibitions. Both cases are clearly tied to some overall conception of social loss. No one believes that the gains to A and B from killing C exceed C's losses. Likewise the standard theory of monopoly and competition states that cartels are outperformed by competitive markets. It is this last observation that makes it hard to lump the race cases with the monopoly cases, at least where there is no explicit showing of monopoly.

One corollary of this last point is that any legislation that removes the power to enforce restrictive covenants presumptively takes private property without just compensation, so that private discrimination cannot be attacked by legislation, as is universally held today.²⁸ That position would have shocked virtually all lawyers in 1948 when the temper of the times only asked one question: what could be done to rid this nation of racially restrictive covenants? But here again the sense of moral outrage is misdirected. The only possible way to attack *Shelley* (undeveloped on its facts) was that this racial covenant, when (and if) coupled with racially restrictive zoning ordinances, amounted to a monopoly practice inconsistent with classical liberal principles, as sometimes happens with shopping center covenants.²⁹

Unfortunately, modern liberals like Tushnet find it so critical to defend *Shelley v. Kraemer* because they forget that the greatest danger to individuals in discrete and insular minorities comes from state barriers to entry. The supply of housing is

27. See *Tulk v Moxhay*, 41 Eng Rep 1143 (Ch 1848).

28. On this view, the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 USC §§ 3601–31 (1968), is unconstitutional insofar as it makes it unlawful to refuse to sell or rent, or otherwise make unavailable, a dwelling to any person because of race, color, religion, sex, national origin, familial status, or handicap. The current law is of course totally antithetical. See, for example, *Reitman v Mulkey*, 387 US 369 (1967), striking down a California referendum that sought to repeal a state fair housing law.

29. See, for example, *Whitinsville Plaza, Inc v Kotseas*, 390 NE2d 243, 247 (Mass 1979), dealing with covenants not to compete running with the land, where the court concluded in rejecting the earlier decision in *Norcross v James*, 2 NE 946 (Mass 1885): "If free-competition policies were indeed the basis for the *Norcross* decision, it would now seem preferable for us to deal with them explicitly rather than to condemn all anticompetitive covenants [on the ground that they did not 'touch and concern' the land] regardless of reasonableness."

frequently reduced by all sorts of restrictions on land use, of which zoning and rent control are the most notable. Removal of these barriers to entry would increase the overall stock of housing, thereby reducing the dangers of discrimination. Indeed, sometimes racial covenants might be used to assure racial balance by preventing neighborhood developments from “tipping” too far in one direction. The classical legal synthesis survives Tushnet’s attack quite well.

III. JUDICIAL REVIEW AND THE CLASSICAL POSITION

The classical legal position invites a strong system of judicial review. Its rights and duties are reasonably well spelled out, so that courts do not face enormous intellectual or interpretive difficulties in implementing their programs. This power of judicial review, moreover, is not limited to the power of the court not to enforce legislation that they find inconsistent with the constitutional command. It also embraces the ability of the courts to instruct the legislative and executive branches of government that they must conform with the law in question.³⁰

This system will not work, however, once ambitious constitutions seek to initiate a regime of positive rights. One stark illustration comes from South Africa, whose constitutional court recently held in *Republic of South Africa v. Grootboom* that South Africa’s constitutional guarantee of access to public housing imposed on the state an affirmative duty to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”³¹ In response to a petition brought by evicted squatters who lived under (as I can testify) the most unspeakable housing conditions imaginable, the South African court held that state housing programs failed to meet the “minimum core obligation” to secure housing for all, because they did not contain “a component catering for those in desperate need.”³² Clearly, the Court could neither build houses nor appropriate funds. But it did engage in a weak form of judicial review that required the state to undertake some program, whether it be construction, subsidy, or voucher, to remediate the situation.

I shall assume here that *Grootboom* counts as a faithful interpretation of the South African constitution. Does it make sense to encourage a dialogue between the legislature and the courts, where the latter get to pass on the efforts of the former to correct the underlying problem? Can some combination of moral suasion and weak

30. See *Cooper v Aaron*, 358 US 1, 18 (1958), noting, in the context of an integration dispute, that every federal and state official has to follow the Supreme Court’s interpretation of the Constitution as the supreme law of the land.

31. Case No CCT 11/00, ¶ 19 (Con Ct S Africa, Oct 4, 2000), available online at <<http://www.concourt.gov.za/judgments/2000/grootboom1.pdf>> (visited Sept 9, 2002) (discussed in Tushnet, 3 Chi J Intl L at 448–49 (cited in note 1)).

32. Id at ¶ 63.

judicial power nudge the entire system into an improved social position?³³ Would that it were so.

South Africa's tragic history of state-dominated race relations makes it foolish to pretend that the past has no claims on the future; history there can never be written on a blank slate. But just what is the best way to deal with the past? I think that the future success of South Africa depends on the ability to separate rectification of past wrongs from the design of future policy. Ideally, South Africa should forge a once and for all settlement of past wrongs,³⁴ and then move forward to create a classical liberal state. No planned economy today can undo the massive system of state controls under apartheid. One does not compensate for past errors by creating future dislocations. A nationwide minimum wage law, for example, will block the advance of poor laborers in South Africa, even after apartheid is abolished.

This lesson carries over to constitutional matters. *Grootboom* makes no sense going forward. The current order is too vague to constrain the political process. Yet the situation would hardly improve if the court required a certain fraction of the annual budget be allocated to housing. Clever bureaucrats are equal to the challenge of reclassifying expenses. Nor would higher taxes be effective if, as a result, they reduced economic activity. Worse still, positive constitutional guarantees could cripple the South African economy. Three related points bear general comment. The first has to do with the logic of positive rights. The second has to do with the misdirection of economic resources. The last has to do with the erosion of other constitutional rights.

First, *Grootboom* should remind us of the enduring importance of the distinction between negative and positive constitutional rights. The South African constitution did not state that all individuals should be free to buy and sell real estate; it put an affirmative obligation on the state to provide housing with tax revenues. To its credit the South African constitution tailors that command to the state's "available resources." But that concession to good sense is not enough. How many resources are available? Should these go to housing, to AIDS prevention, to education, or to family planning? Ultimately, this constitutional guarantee could prove illusory, which could demoralize the public at large.

Second, the *Grootboom* remedy embodies two very specific vices that no future legislative action can guard against. First, *Grootboom* is blind to the source of the massive dislocation in South African housing markets, which lies outside the housing sphere, with the ruinous national and provincial policies in other sectors of the economy. A collapse in the agricultural sector has led to wholesale migration from the countryside into shanty towns, which could be reversed, or at least slowed, at very

33. See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267 (1998).

34. See Richard A. Epstein, *Drafting a Constitution: A Friendly Warning to South Africa*, 8 Am U J Intl L & Pol 567 (1993).

little expense by eliminating any and all price controls on farm produce. Firming up the classical liberal rights of property and contract could do much to stanch the flow of defeated human beings into the shantytowns from the countryside, reducing the problem before it occurs. Unfortunately, *Grootboom's* guarantee is likely to retard any serious reexamination of these policies because of the illusion that the social solution lies elsewhere. The first-best solution limits the size of state power to nip the problem in the bud. *Grootboom's* nth-best solution creates a vast bureaucracy to manage housing markets—a bad trade indeed.

Third, this exercise in democratic experimentalism may have bad spillover effects if it leads courts to rethink the strength of negative liberties guaranteed in the American and other constitutions. Take the simplest question of whether ordinary citizens have the right to criticize the incumbent government, which goes to the core of American First Amendment liberties. I regard this guarantee as essential to the well-being of any political state. But this guarantee is reduced to rubble if the court merely instructs the legislature (or dictator) to recognize the role of critics in a democratic society before locking up all political dissidents. But under *Grootboom*, the path lies open for a court to issue weak commands for a tinpot dictator to reexamine his policies after critics are locked up in dark cells. That precatory program could not work. For the old-fashioned liberties of speech, religion, and, I will add, contract, the old set of firm American guarantees work best. All this is not to say that the current set of American legal rules counts as perfection. Quite the contrary, much needs to be done to mend it and make it whole. But it is better, by far, that we seek to improve our current model than to import (or even endorse) the dubious constitutional schemes of positive rights that seem to be making so much headway in the rest of the world today.