

## Tushnet's Lawless World

A Response to Mark Tushnet, Book Review, *Epstein's Best of All Possible Worlds: The Rule of Law*, 80 U Chi L Rev 487 (2013).

*Richard A. Epstein*†

I did not pick this unfortunate fight, but it is my regrettable task to have to respond to Professor Mark Tushnet's Review of my book *Design for Liberty: Private Property, Public Administration and the Rule of Law*.<sup>1</sup> Professor Tushnet regards *Design for Liberty* as a quixotic endeavor to reform the world, worthy of Glenn Beck,<sup>2</sup> driven by a political naiveté that reminds him of an improbable cross between *Candide* and Mr. Micawber.<sup>3</sup> Throughout his Review, he uses his not inconsiderable rhetorical skills to mock a book whose message and argument he does not understand.

A grizzled hanger-on from the largely defunct Critical Legal Studies movement, Professor Tushnet's subpar performance stems from a combination of three interrelated defects: his ingrained skepticism of legal rules; his narrow intellectual focus that incorporates nothing outside of constitutional law; and his inveterate intellectual laziness, which makes it impossible for him to stick with a problem long enough to understand it. Professor Tushnet has always played an *enfant terrible* who believes that all efforts to create rule-bound structures are bound to disintegrate in failure. On narrow focus, his bibliography reveals a person who, over his thirty-year academic career, has not written

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† Laurence A. Tisch Professor of Law, New York University School of Law; Peter and Kirsten Bedford Senior Fellow, the Hoover Institution; James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer, The University of Chicago Law School. My thanks to Peter Horn and Benjamin Margo, NYU Law School Class of 2014 for their excellent research decision on an earlier draft of this Response.

<sup>1</sup> Richard A. Epstein, *Design for Liberty: Private Property, Public Administration and the Rule of Law* (Harvard 2011).

<sup>2</sup> Mark Tushnet, *Epstein's Best of All Possible Worlds: The Rule of Law*, 80 U Chi L Rev 487, 510 (2013).

<sup>3</sup> Id at 487–88, 513.

a single book or article on contracts, property, tort, or indeed any common law subject,<sup>4</sup> which are the focus of much of *Design for Liberty*. Finally, Professor Tushnet never cites any book or article, including those cited in the footnotes, that I have written to support the conclusions that I reach on the topics covered in *Design for Liberty*.

Professor Tushnet's crippling weaknesses leave him unable to grasp the mission of the book, which uses the lens of private law to integrate the three elements set out in its subtitle: private property, public administration, and the rule of law. Here, as in my short book, it is not possible to develop in-depth positions that I have written about at length elsewhere. Yet the only way to explain the larger picture is to place some of the particulars that have been examined elsewhere into the background. Nonetheless, in this short response, I hope to give some indications as to how this program can be carried out.

To do so, it is useful to address four issues. The first of these deals with Professor Tushnet's misguided views on the plasticity of language and its relationship to the rule of law. The second explains how best to establish empirically the connection between a content-neutral rule-of-law standard and the classical liberal synthesis of private property, contractual freedom, and limited government. The third addresses the interrelationship between per se rules and reasonableness standards, contrasting the classical liberal approach with the modern realist one, in the context of common law decision making and government regulation. The fourth uses this approach to examine some particular issues on which the folly of Professor Tushnet's views becomes clear. These include his failure to understand the basic structure of intellectual property law; his inability to understand the distinction between health and safety regulation on the one side, and economic regulation on the other; the baleful consequences for judicial administration that this breakdown has in connection with land use development; and his unpardonable constitutional insensitivity to the exercise of religion in public institutions.

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<sup>4</sup> Mark Tushnet, *Bibliography*, online at <http://www.law.harvard.edu/faculty/directory/index.html?id=534&show=bibliography> (visited Mar 25, 2013).

## I. THE CLARITY OF LANGUAGE—THE REALIST CHALLENGE

One of the general preconditions for developing and defending the rule of law is that it must be possible to formulate rules in the first place. Rules must be general enough to cover more than the particular cases that come before them, but specific enough to allow the fair-minded user to determine the vast bulk of cases. Rules are different from the direct orders that a judge may make to a litigant, or a policeman to a citizen, in that their articulation almost always requires the use of presumptions to which it is then possible to craft rule-like exceptions.<sup>5</sup> From very early times, it has been understood that even the exceptions to rules admit of exceptions, which in turn admit of further exceptions. One simple example of this chain of argument is the cycle that starts with the nonperformance of a promise, to which a statute of limitations is interposed, which in turn is overcome in whole or in part by the plaintiff's waiver of the claim or ratification of the earlier promises.<sup>6</sup> It takes hard work to rationalize these sequential qualifications, and many mistakes can be made along the way. My defense of the common law method is not a *positive* description of how most common law judges work today. More often it is a relentless critique of their mistaken approach, for it is precisely the persistent movement away from rules to multifactor balancing tests that generates so much disarray in the legal system. My job here is a *normative* effort to improve by successive approximations the overall efficiency of the system.

One key to this venture is the ability to recognize that we can attach sensible meanings to difficult terms. As I argue in *Design for Liberty*, the sure sign that a legal analysis is going off the rails stems from Professor Tushnet's crude form of legal skepticism that this laudable endeavor is even remotely possible. At one point in *Design for Liberty*, I criticized Professors Robert L. Hale<sup>7</sup> and Frank Michelman,<sup>8</sup> both highly distinguished

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<sup>5</sup> For a discussion, see Richard A. Epstein, *Pleadings and Presumptions*, 40 U Chi Rev 556, 557–61 (1973) (describing law as a system of presumptions). For its early origins, see Gaius, *The Institutes of Gaius*, bk IV, §§ 126–29 at 283–85 (Clarendon 1946) (Francis de Zulueta, ed).

<sup>6</sup> For a discussion, see John P. Dawson, et al, *Contracts: Cases and Comment* 214–15 (West 9th ed 2008).

<sup>7</sup> Epstein, *Design for Liberty* at 14 (cited in note 1), citing Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* 110–14 (Chicago 2003) (criticizing Professor Hale's expansion of the term "coercion").

<sup>8</sup> Epstein, *Design for Liberty* at 14 (cited in note 1) (criticizing Professor Michelman's expansion of the term "nuisance").

scholars, for their willingness to extend the meanings, respectively, of the key terms “coercion” and “nuisance.” These two terms carry enormous weight in the legal literature. If coercion can apply to any refusal to deal, and not just those by a common carrier with monopoly power, there is no space left for voluntary transactions, which is why the rule in general is otherwise.<sup>9</sup> If the tort of nuisance has no clearly delineated lines, the police power can swallow the rights to private property, and for that matter, those of personal liberty as well. It is to forestall that dizzying descent that “the rule of law requires a degree of linguistic clarity that allows for the articulation of any set of comprehensible rules, regardless of their content, which others can choose to obey or disobey.”<sup>10</sup>

I hardly think that this modest point should send any reader into fits of anguish or rage. Professor Tushnet then quotes me as saying, “[T]he global view that all language is so unclear as to preclude the formulation of any rules has this direct consequence: it leads to the disintegration of political and legal discourse.”<sup>11</sup> To which his response runs as follows:

Presented without elaboration as a critique of the “global view,” this is nonsense. As stated, the form of the argument is, “Were X to be true, there would be dire consequences; therefore X is false.” To which the response is, “Tough luck.” Consider an assertion in the same form: “Were it to be true that human actions contribute to worldwide climate change, there would be dire consequences; therefore human actions do not contribute to worldwide climate change.”<sup>12</sup>

There are multiple difficulties with this response. His odd analogy to global warming is off point because my observation is not directed to a hotly disputed scientific proposition beyond the ken of everyday human experience. The ability to communicate effectively in ordinary life is not a fact that is easily controverted. In ordinary conversations, people routinely detect and correct semantic and syntactic mistakes precisely because of their sophisticated powers of communication. Indeed, unlike Professor Tushnet, most people are willing to acknowledge their mistakes

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<sup>9</sup> See Epstein, *Design for Liberty* at 61 n 6 (cited in note 1), citing *Allnut v Inglis*, 104 Eng Rep 206 (KB 1810).

<sup>10</sup> Epstein, *Design for Liberty* at 14–15 (cited in note 1).

<sup>11</sup> *Id.* at 15.

<sup>12</sup> Tushnet, 80 U Chi L Rev at 493 (cited in note 2).

on both factual and moral questions when pointed out to them. No one, for example, routinely will say “so what?” to a charge that they have neglected to perform a promise. As the theory of presumptions makes clear, they would, and on a daily basis do, either apologize or offer some concrete excuse or justification for their behavior. The commonplace would be the miraculous if language were not capable of more precision than Professor Tushnet is ever willing to acknowledge. The argument to the contrary is just false, no matter what one thinks of global warming.

More specifically, it is worth noting how Professor Tushnet caricatures the argument by cutting the quotation, such that the “[T]” replaces the introductory phrase in the sentence which reads: “While it is proper to expose ambiguity in particular instances—especially when it can be clarified by better writing . . . .”<sup>13</sup> This is a caveat that hardly seems like nonsense in light of the enormous consequences of taking just that jaundiced view toward the terms “coercion” and “nuisance.” Ironically, Professor Tushnet falls into exactly this trap later in his Review when he claims that terms like “property” and “nuisance” “have no determinate content, which means that the judges must actually be relying on something else to resolve the dispute.”<sup>14</sup> What that something else is he never mentions because he does not know. Instead, Professor Tushnet launches into a juvenile philosophical riff about rule sets “consisting of rules, subrules, exceptions to the rules, qualifications to the subrules, and more,”<sup>15</sup> without committing himself to the method of interlocking presumptions that affords the only workable way to untangle the conceptual knots. The best response to this jumbled line of thought was written by Professors H.L.A. Hart and Tony Honore years ago in their classic book *Causation in the Law*:

It is fatally easy and has become increasingly common to make the transition from the exhilarating discovery that complex words like “cause” cannot be simply defined and have no “one true meaning” to the mistaken conclusion that they have no meaning worth bothering about at all, but are used as a mere disguise for arbitrary decision or judicial

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<sup>13</sup> Epstein, *Design for Liberty* at 15 (cited in note 1).

<sup>14</sup> *Id.*

<sup>15</sup> Tushnet, 80 U Chi L Rev at 506 (cited in note 2).

policy. This is blinding error, and legal language and reason will never be understood while it persists.<sup>16</sup>

Professor Tushnet falls headlong into this trap by throwing up his hands because he cannot imagine or figure out how different claims fit together in a comprehensive whole. Clearly, he ignores my efforts in that direction, which, for example, offer a unified account of tort liability that finds a place for all three dominant theories—strict liability, negligence, and intentional harms.<sup>17</sup> Instead, he argues incorrectly that at the end of the day, everything boils down to “using the rules as a mask for determining what’s reasonable all things considered,”<sup>18</sup> without having the foggiest idea of what factors go into the mix or how. In order to defend his thin position, he is duty bound to explain the errors in specific proposals that he prefers to reject out of hand. Unfortunately, he does not attempt to do that with even one area, even though he could have offered some views on the relationship of tort law, with its defenses of contributory negligence and assumption of risk, to the system of workers’ compensation laws that largely displaced it in the first two decades of the twentieth century. On that question, he could have looked at my article on the topic of workers’ compensation law,<sup>19</sup> which is cited in the book.<sup>20</sup> But why bother to learn anything about the subject when your mind is already made up that open-ended reasonableness standards dominate any alternative approach?

## II. PRIVATE PROPERTY AND THE RULE OF LAW

The serious difficulties with the project of reclaiming the rule of law are, then, not linguistic. Instead, the chronic weakness within the classical liberal tradition has been its unsubstantiated

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<sup>16</sup> H.L.A. Hart and Tony Honoré, *Causation in the Law* 3 (Oxford 1959). Indeed, I think that Professors Hart and Honoré did make many errors on points of detail in the concept. But it is precisely because they are so careful that these can be identified and corrected. See Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J Tort L art 6, 24–26 (Jan 2010).

<sup>17</sup> See Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J Legal Stud 165, 213–15 (1974); Richard A. Epstein, *Intentional Harms*, 4 J Legal Stud 391, 398–408 (1975) (outlining such a system); Epstein, *Skepticism and Freedom* at 84–107 (cited in note 7).

<sup>18</sup> Tushnet, 80 U Chi L Rev at 507 (cited in note 2).

<sup>19</sup> See generally Richard A. Epstein, *The Historical Origins and Economic Structure of Workers’ Compensation*, 16 Ga L Rev 775 (1982) (examining the development of the modern system of workers’ compensation liability and potential threats to the current system).

<sup>20</sup> Epstein, *Design for Liberty* at 124 n 12 (cited in note 1).

insistence that there is some necessary or logical connection between the standard notions of the rule of law and the dominant institution of private property. Professor Jeremy Waldron, as I noted,<sup>21</sup> rightly challenged assertions of that sort on the ground that there is nothing about the specification of the usual essentials of the rule of law—consistency, publicity, clarity, and the want of retroactivity<sup>22</sup>—that logically entails a legal system of private property and limited government.<sup>23</sup> Rather, the universal appeal of these constraints on the rule of law is that they are devoid of substantive content, which in principle means that they can be married with any set of substantive rules. But by the same token, the burden of my argument is that *in practice* large administrative schemes will tend to break down, often massively, in the modern social democratic state in ways that private property systems will not.

A stable system of property rights requires universal *forbearance* whereby others agree not to enter the land of another or commit nuisances—nontrespassory invasions of land—with some interesting modifications for negative easements, all of which I have examined previously.<sup>24</sup> Professor Tushnet hints at the point in passing<sup>25</sup> but never acknowledges how this simple configuration of rights not only solves the notice problem, but also has three other virtues: First, they are *scalable*, which means that the same account of mutual forbearance prevails whether we deal with a society of 100 thousand people or 100 million.<sup>26</sup> The set of rights is complete among all people at all times, and the content of the rights is invariant to population growth or changes in population composition. The transaction costs savings of this approach should be evident. Second, the simplicity of the rules gives effective public *notice* to the world that allows people to conform their actions to the dictates of the law. Third, the private system is *insensitive* to the wealth of a society as a whole, or of the individuals within it. There is, therefore, no

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<sup>21</sup> Id at 12 n 5.

<sup>22</sup> Lon L. Fuller, *The Morality of Law* 39 (Yale 1964).

<sup>23</sup> Jeremy Waldron, *Legislation and the Rule of Law*, 1 *Legisprudence* 91, 97–108 (2007).

<sup>24</sup> There are further complications with negative reciprocal covenants that I shall not discuss here, but which I examined in Richard A. Epstein, *Simple Rules for a Complex World* 329 (Harvard 1995) (justifying some negative reciprocal easements on the ground that the property owner values the easement more than the diminution of his own property rights).

<sup>25</sup> Tushnet, 80 *U Chi L Rev* at 495 (cited in note 2).

<sup>26</sup> Epstein, *Design for Liberty* at 74 (cited in note 1).

need to recalibrate these basic relations as people get either richer or poorer, which must always be done with any modern system that champions positive rights, be they to health care or to an education.<sup>27</sup> Under the traditional approach, there is no need to ask how to balance the costs of the entitlement against the revenues that must be collected to fund them, as must be done with Social Security, Medicare, or Medicaid. Again, the safeguard against political instability is great.

Once these basic property rights among strangers are well defined, the law of contract allows for every person to enter into cooperative arrangements with those self-selected parties with whom it is most likely to secure gains from trade, subject to an important constraint on practices that promote monopolization. Under this view, it is necessary to preserve a narrow definition of interference unless all competition is regarded as potentially tortious so that the scope of government intervention becomes enormous, and with it the possibility of creating the kinds of cartels that were routinely supported in dealing with various kinds of agricultural products.<sup>28</sup> But the social problem of monopoly does not once attract Professor Tushnet's attention, although discussion of that issue pervades *Design for Liberty*.<sup>29</sup>

Professor Tushnet shows a similar blind eye to the role of reasonableness in legal discourse, to which he assigns virtually universal significance. But the proper role of the term in many contexts is both necessary and limited. As I develop the point, reasonableness, properly construed, always plays a back-up role in those systems where it is possible to implement consistent property rules—that is, those which will result in zero accidents that generate liability when everyone complies.<sup>30</sup> This condition is not as exacting as it sounds, for it only demands that the operators of the public roads make sure that north-south and east-west traffic don't both have green lights at the same time.

As a first approximation, in the simple two-party case we can develop four boxes depending on who deviates from the rules of the road. In one box, neither party deviates from the rules, so there is no responsibility at all, for whatever odd accidents occur

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<sup>27</sup> *Id.* at 75.

<sup>28</sup> For a discussion, see Richard A. Epstein, *The Cartelization of Commerce*, 22 *Harv J L & Pub Pol* 209, 210–11 (1998). For a more detailed development of the same theme, see Michael S. Greve, *The Upside Down Constitution* 201–20 (Harvard 2012).

<sup>29</sup> Epstein, *Design for Liberty* at 56–57, 70 (cited in note 1).

<sup>30</sup> *Id.* at 31–42.



are attributable to acts of God. In the second box, one side deviates from the rules of the road, and the other does not, at which point 100/0 allocations are appropriate for all harms. The same holds true when the roles of the two parties are reversed, only now the allocation is 0/100. The difficult cases, relatively small in number, are those where both sides deviate from the rules of the road. In most cases the correct response is normally a 50/50 division, given that pure comparative negligence principles introduce uncertainty and expense without improving incentives.<sup>31</sup>

The situation above assumed that each party acted in ignorance of the conduct of the other. Reasonableness enters the system when one party gains knowledge that the other has violated the rules of the road. At this point, it would be mindless to insist that the innocent party need not alter his conduct in light of the perceived circumstances. Behind a veil of ignorance, everyone would prefer that the innocent party not plow full speed into another driver who has run the red light. But what precautions should be taken? The endless variations invite the use of a reasonableness standard, with both its objective and subjective component, because no one set rule can cover all the possible scenarios that arise in light of the unexpected change. It would be pointless to insist that someone who is trying his best to avoid harm guess the right result every time or be held equally culpable as the other party. The best that can be done is to incentivize people to seek the right solution by punishing them if they show a reckless indifference to the unfolding events.

The rules that embed these elements are the so-called emergency rule<sup>32</sup> and the last clear chance rule,<sup>33</sup> both of which are unfortunately in decline under modern law, which tends to adopt an open-ended pure comparative negligence system that can never quite make itself operational.<sup>34</sup> It will result in some mistakes. Yet by cordoning off most routine cases from this reasonableness inquiry, the law resolves most disputes quickly and accurately without the routine free-for-all disputes that Professor Tushnet envisions. By having a clear sense of what parties

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<sup>31</sup> For discussion, see Epstein, *Simple Rules for a Complex World* at 329 (cited in note 24).

<sup>32</sup> See, for example, *Lyons v Midnight Sun Transportation Services, Inc*, 928 P2d 1202, 1203 (Alaska 1996) (summarizing and rejecting the emergency rule).

<sup>33</sup> See, for example, *Fuller v Illinois Cent R Co*, 56 So 783, 786 (Miss 1911) (applying the last clear chance doctrine).

<sup>34</sup> For a harbinger of the decline, see *Li v Yellow Cab Co of California*, 532 P2d 1226, 1240–42 (Cal 1975) (folding last clear chance into the calculus).

are required to maximize, the residual reasonableness cases are that much easier to handle. Judicial administration in highway accidents could be further improved by knocking out such defenses as epilepsy and insanity, but these arise in too few cases to really matter. The same cannot be said about infancy, which if allowed to alter rights and duties would make for nightmarish complications, all rightly resisted by a per se rule that makes compliance or noncompliance the test of negligence.<sup>35</sup>

Reasonableness, however, takes on a very different complexion when it becomes the sole source of liability in all cases. Just that unfortunate transformation has happened in both medical malpractice and product liability law, and by the same mechanisms.<sup>36</sup> The first stage is to reject the relatively clear guidelines at work in both of these areas. The use of an unbending standard of custom, which goes a long way to keep the law of medical malpractice on an even keel, tends to be pushed aside.<sup>37</sup> Similarly, the open and obvious defect defense in both design and warnings cases of products liability could have gained some much needed rigor by allowing recovery only for latent defects that cause harm for products in their original condition while in normal and proper use, which ironically was the standard that Justice Roger Traynor adapted in his strict liability concurrence in *Escola v Coca Cola Bottling Co of Fresno*.<sup>38</sup> These tests are intended to give content to a notion of reasonableness that can be made operational in ordinary cases.

The next step is to eliminate all efforts by service suppliers to control potential liability by contractual limitations. The key landmarks in that journey were the 1960 decision in *Henningsen v Bloomfield Motors, Inc.*,<sup>39</sup> for product liability cases, and the 1963 decision for medical malpractice cases in *Tunkl v Regents*

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<sup>35</sup> Richard A. Epstein, *The Irrelevance of the Hand Formula: How Institutional Arrangements Structure Tort Liability*, in Jef De Mot, ed, *Vrank en Vrij: Liber Amicorum Boudewijn Bouckaert* 65 (Die Keure 2012).

<sup>36</sup> For a discussion, see Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1976 Am Bar Found Rsrch J 87, 91–108; Richard A. Epstein, *Modern Products Liability Law* (Greenwood 1980).

<sup>37</sup> For the evolution of custom, see generally Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J Legal Stud 1 (1992).

<sup>38</sup> 150 P2d 436, 444 (Cal 1944) (Traynor concurring) (“The manufacturer’s liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.”).

<sup>39</sup> 161 A2d 69, 84–96 (NJ 1960).

of the University of California.<sup>40</sup> Those two decisions opened the path for the unbounded reasonableness tests that were best embodied in Professor John W. Wade's risk/utility factors,<sup>41</sup> which ushered in the vast expansion of product liability law. The change is well captured in just two cases that show what happens when the notion of reasonableness is not moored to any stronger conception of substantive law. In *Campo v Scofield*,<sup>42</sup> Judge Stanley H. Fuld put the point thusly:

[T]he manufacturer has the *right* to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered. In other words, the manufacturer is under no duty to render a machine or other article "more" safe as long as the danger to be avoided is obvious and patent to all.<sup>43</sup>

Yet twenty-six years later, in *Micallef v Miehle Co, Division of Miehle-Goss Dexter, Inc*,<sup>44</sup> Judge Lawrence H. Cooke opened his broadside attack on *Campo* with this terse remark: "The time has come to depart from the patent danger rule enunciated in *Campo v. Scofield*."<sup>45</sup>

The key difficulty with the "reasonableness writ large" approach is that it cannot explain why one approach is better than the other. But a clearer understanding that the earlier rule overcomes all dangers of asymmetrical information while enlisting optimal precautions from both sides does explain why the retreat from rules is as disastrous in the common law context as it is in the statutory context. That result only gets worse in the Supreme Court's dreadful decision in *Wyeth v Levine*,<sup>46</sup> which refuses to allow FDA warnings to control the issue in product liability cases.<sup>47</sup> Professor Tushnet has nothing substantive to say about the case; nor does he answer the critique that I offered of

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<sup>40</sup> 383 P2d 441, 446–47 (Cal 1963) (en banc).

<sup>41</sup> John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss L J 825, 837–38 (1973).

<sup>42</sup> 95 NE2d 802 (NY 1950).

<sup>43</sup> Id at 804 (emphasis added).

<sup>44</sup> 348 NE2d 571 (NY 1976).

<sup>45</sup> Id at 573.

<sup>46</sup> 555 US 555 (2009).

<sup>47</sup> Id at 563–81.

it.<sup>48</sup> Yet the Court's great sin was to allow open-ended, *ex post* adjudications of the reasonableness of warnings on an issue that can be resolved cleanly, once and for all, by a standardized agency warning that gives complete protection against duty-to-warn liability for firms that comply with it. That one modification can eliminate the huge dislocations that come with the current common law rule. Professor Tushnet's all-encompassing reasonableness test has proved the undoing of the common law of torts. Yet there is nothing inevitable about the rise of reasonableness, given that the alternative approach had been in place for many years.

The same analysis could easily apply to many forms of regulations that are challenged on either takings or due process grounds.<sup>49</sup> There is no time to go into the matter here, but the basic impulse is to reduce overall government discretion by three devices. First, the just compensation limitation never allows the state to take or to regulate without having to take the price of its actions into account. Consistently applied, that one principle prevents the state from initiating negative sum games in the form of fractional transfer payments that can rip a society apart, as routinely happens today in zoning and landmark designation cases.<sup>50</sup> Next, the unconstitutional conditions doctrine works to divide the social surplus from positive sum projects equally among various participants so that it is not frittered away in factional strife.<sup>51</sup> Finally, a flat tax on either income or consumption should be the *only* revenue collection mechanism because it allows the government to raise what revenues it needs, again without playing favorites among its citizens. Otherwise, a large set of special taxes will be imposed, some of which will be ruinous until repealed, and others of which create undue uncertainty in the bargain.<sup>52</sup> When meshed together,

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<sup>48</sup> See Epstein, *Design for Liberty* at 41 n 15 (cited in note 1), citing Richard A. Epstein, *What Tort Theory Tells Us about Federal Preemption: The Tragic Saga of Wyeth v. Levine*, 65 NYU Ann Surv Am L 485 (2010).

<sup>49</sup> See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 100–04 (Harvard 1985) (discussing regulatory takings).

<sup>50</sup> See *id.*

<sup>51</sup> See Richard A. Epstein, *Bargaining with the State* 98–103 (Princeton 1993).

<sup>52</sup> For the ruinous variety, see Eric Felten, *How the Taxman Cleared the Dance Floor*, Wall St J A13 (Mar 17, 2013). For the luxury boat tax, see Penny Singer, *Luxury-Tax Repeal Encourages Sellers*, NY Times WC12 (Oct 3, 1993). For medical devices, see Kim Dixon, *U.S. Senate May Back Symbolic Repeal of Medical Device Tax*, Reuters (Mar 21, 2013), online at <http://www.reuters.com/article/2013/03/21/usa-tax-medical-device-idUSL1N0CDGB120130321> (visited Mar 25, 2013).

these private law systems minimize political actors' level of discretion to transfer wealth from less- to more-favored constituencies. This tripartite approach goes a long way, first, to knocking out all negative sum transactions and, second, to maximizing the gain from the positive sum transactions that go forward.

This brief account of these basic public and private rules exerts a positive influence on the middle piece of *Design for Liberty's* title—public administration—by cabining the discretion of public officials by avoiding the difficulties of creating any system of positive rights. Once government activity is limited to a class of well-defined issues, it should be possible for more qualified people to attend to the basic governance functions, and thus reduce the opportunities for individuals to game the system by removing any of these constitutional constraints. It is an open question whether a system this austere could withstand any of the massive claims for income and wealth redistribution, which right now are tearing this nation apart. But even if those claims are accepted, their administration will be far easier in a flat tax regime when overall wealth levels are higher and ordinary people have more market opportunities. To allow for this configuration, I have defended the approach that asks governments to adopt a stance that considers “redistribution last.”<sup>53</sup> First liberalize market arrangements and then see what is left to be done. Professor Tushnet thinks that the widespread concern with economic stagnation and the mounting deficit are idle conservative pabulum. I beg to disagree, and think that the slow recovery is directly attributable to policies that block gains from trade in labor, real estate, and lending markets, while piling on heavy social obligations that drag down the economy. Even the most generous application of the redistribution last approach will produce a smaller government and a more prosperous nation than we have today.

### III. TUSHNET'S SPECIFIC MISTAKES

Given this general framework it is worth spending a few moments on some of the particular cases that Professor Tushnet mangles in his overall analysis. Here are four particular discussions that illustrate his deep confusions on such key topics as intellectual property law, health and safety regulation, real estate development, and religious freedom. Let me take these up in order.

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<sup>53</sup> Epstein, *Design for Liberty* at 148 (cited in note 1).

### A. Patent Infringement and Trademark Dilution

Professor Tushnet objects that the account of private property that I have given does not seem to address, “except metaphorically,” such common institutions as patents and trade dilution.<sup>54</sup> But there is nothing metaphorical about these relationships. I gave a short account of some of the key resemblances in *Design for Liberty* by stressing how the use of strong injunctions against infringement and free licensing—subject only to antitrust constraints—should be the norm.<sup>55</sup> I also explained why it is that limited terms make sense for patents, since there is a downside to their perpetual exclusive use, given that nonrivalrous use of inventions is possible in ways that are not possible for land. As usual, I footnoted a reference to a recent article that gives an exhaustive account of these issues, which Professor Tushnet ignores.<sup>56</sup>

It is also evident that he does not understand the first thing about this topic when he speculates that “we ought to think about whether there might be equally metaphorical trespass or nuisances on real property. The prime candidate for trespass is, unfortunately, reducing the value of property by setting up a competing business down the block.”<sup>57</sup> His intellectual carelessness gets the better of him. The central opposition in real estate law—indeed in many areas of law—is that between physical invasions and market competition, where the former leads to negative sum outcomes and the latter to positive sum outcomes, which is why they should receive different legal treatments. This stark opposition needs modification with intellectual property because there can be no physical entrance in patent cases, where the use of another patent is what should trigger the per se obligation to compensate.<sup>58</sup> Whether we deal with physical or intangible property, the same distinction holds: invasion or infringement is a

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<sup>54</sup> Tushnet, 80 U Chi L Rev at 495 (cited in note 2).

<sup>55</sup> Epstein, *Design for Liberty* at 165 (cited in note 1).

<sup>56</sup> Id at 164, citing Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 Stan L Rev 455 (2010). See also Richard A. Epstein, *What Is So Special about Intangible Property? The Case for Intelligent Carryovers*, in Geoffrey A. Manne and Joshua D. Wright, eds, *Competition Policy and Patent Law under Uncertainty: Regulating Innovation* 42, 42–76 (Cambridge 2011). For a discussion in a much more technical vein, see generally Richard A. Epstein, *The Constitutional Protection of Trade Secrets and Patents under the Biologics Price Competition and Innovation Act of 2009*, 66 Food & Drug L J 285 (2011).

<sup>57</sup> Tushnet, 80 U Chi L Rev at 496 (cited in note 2).

<sup>58</sup> See Richard A. Epstein, *The Constitutional Protection of Trade Secrets under the Takings Clause*, 71 U Chi L Rev 57, 61–62 (2004).

negative sum game, while competition is a positive sum game. This is a distinction that never enters into the social calculus of the free-wheeling Professor Tushnet.

His analytical sloppiness carries over to the question of trademark dilution, a well-recognized head of liability.<sup>59</sup> Professor Tushnet confesses that he cannot see “what property law rule ‘carries over to support the dilution cause of action.’”<sup>60</sup> But libertarian theory says otherwise. The party who uses another’s name makes a false representation to the world that his product is that of another person. The imitator’s reference to the owner’s brand or product is not randomly chosen. It belongs to the person whose strong reputation is now being appropriated to help the competitive rival. At the same time, the improper use of the brand adds more noise to the signal, which is the loss associated with trademark dilution. In principle, the innocent party should have, by way of analogy to trespass, the choice of remedy between damages for harm caused to its own brand or restitution for benefits taken. Both of these are difficult to measure, which is why injunctive relief is provided to cope with continuing harm. These harms matter, even though the loss in question does not come, as in the typical case, from a direct competitor, which tends to attenuate the total loss. The trademark action is intended to forestall that form of dilution. The tort contains many tricky points, but the only point that is clear is how notions of misrepresentation, so central to libertarian thought, carry over to this area.

#### B. Regulation: Health or Safety versus Competition

Professor Tushnet’s weak grasp of intellectual property carries over to his understanding of the role of regulation in dealing with both public and private property. Early on in his Review, and with evident despair, Professor Tushnet takes me to task for this sentence, which attempts to draw the line between permissible and impermissible government action:

The government that can stop the use of dangerous equipment on private construction sites or issue drivers’ licenses for the operation of motor vehicles on public roads need not

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<sup>59</sup> See, for example, Trademark Dilution Revision Act of 2006, Pub L No 109-312, 120 Stat 1730, codified at 15 USC § 1051 et seq (redefining the requirements and remedies for trademark dilution liability).

<sup>60</sup> Tushnet, 80 U Chi L Rev at 496 (cited in note 2).

be given the power to plan comprehensively what buildings should be built where and for what purposes people shall take the highways.<sup>61</sup>

He then asks, “What on earth does Epstein have in mind? HOV [high occupancy vehicle] lanes? Congestion pricing?”<sup>62</sup> Let me explain it to him. Start with public roads. The first point to note is that the government as operator of the basic system has management responsibilities that cannot be reduced simply to the control of accidents, which is discussed above. It also is under some duty to maximize the value of the system, which certainly includes the use of HOV lanes if those will smooth the flow of traffic. To Professor Tushnet this is a source of modest wonderment when he writes: “A deep libertarian might not concede that the government has the power to construct highways, but Epstein’s libertarianism does not seem to run that deep.”<sup>63</sup> But why doubt my libertarian credentials in the first place when the control and operation of the system is something that easily falls to the state under a classical liberal theory that accepts the need for government action to handle network industries and coordination problems—a position that I have always held.<sup>64</sup> Once that classical liberal perspective is kept firmly in mind, it is perfectly natural to insist that the purpose of highway management is to *maximize* the net use value of the system, and then to use constitutional arguments that bless arrangements that tend in that direction, while attacking those that work against that objective.

At this point, the general split comes into view. In the first place, all safety regulations are needed to ensure the smooth flow of traffic and set the framework not only for tort liability, but for fines and license suspensions. Not that hard. Next, the state should clearly be allowed to issue licenses to parties to prevent the very kinds of harms that they could be held responsible for in tort. And surely congestion pricing falls within that ambit as well.

What Professor Tushnet misses is that there are things that governments have regulated that manifestly fall outside that

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<sup>61</sup> Id at 492, quoting Epstein, *Design for Liberty* at 8 (cited in note 1).

<sup>62</sup> Tushnet, 80 U Chi L Rev at 492 (cited in note 2).

<sup>63</sup> Id.

<sup>64</sup> See, for example, Epstein, *Bargaining with the State* at 161–77 (cited in note 51). See also Epstein, *Skepticism and Freedom* at 124–26 (cited in note 7). The title gives some clue as to the intellectual orientation.



situation because of their explicit anticompetitive nature. The courts began reviewing this practice in cases such as *Frost & Frost Trucking Co v Railroad Commission of California*,<sup>65</sup> which invalidated a California statute that forced private carriers to take all freight just as if they were common carriers.<sup>66</sup> For example, Congress passed the Motor Carrier Act of 1935,<sup>67</sup> which required any new entrant into the trucking industry to receive a “certificate of public convenience and necessity.”<sup>68</sup> In the name of curtailing cutthroat competition, that statute restricted new firms from entering the trucking business, and imposed route and rate restrictions, which competitors were allowed to challenge, and authorized regional rate bureaus to set rates in what should have been competitive markets.<sup>69</sup> It often issued perverse regulations that allowed a carrier to carry, say, tiles in one direction while requiring it to head back to the place of origin empty handed.<sup>70</sup> Similarly, with the Communications Act of 1934,<sup>71</sup> the same public interest, convenience, and necessity standard restricted entry into the telecommunications business.<sup>72</sup> How could Professor Tushnet *not* understand these references to the government’s excessive regulatory control over public roads?

Likewise, on the private side it is imperative that government run inspections for defective equipment that can cause damage on construction sites. It is equally important that it regulate access to and from private lands. But it hardly follows that the modern zoning laws should dictate what kind of housing should be built on what land, or require that all new construction contain certain minimum amounts of affordable housing, or meet specific disability access standards. The costs of meeting the Americans with Disabilities Act of 1990<sup>73</sup> housing

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<sup>65</sup> 271 US 583 (1926).

<sup>66</sup> *Id.* at 599. This case is discussed at length in Epstein, *Bargaining with the State* at 162–64 (cited in note 51).

<sup>67</sup> Pub L No 74-255, ch 498, 49 Stat 543.

<sup>68</sup> Motor Carrier Act, 49 Stat at 551.

<sup>69</sup> For the gory details, see Thomas Gale Moore, *Trucking Deregulation*, in David R. Henderson, ed, *Concise Encyclopedia of Economics* (Liberty Fund 1st ed 1993), online at <http://www.econlib.org/library/Enc1/TruckingDeregulation.html> (visited Mar 26, 2013).

<sup>70</sup> See *id.*

<sup>71</sup> Pub L No 73-416, ch 651, 48 Stat 1064, codified as amended at 47 USC § 151 et seq.

<sup>72</sup> See *FCC v National Broadcasting Co*, 319 US 239, 240 (1943). For a critique of the practice, see R.H. Coase, *The Federal Communications Commission*, 2 J L & Econ 1, 17–40 (1959) (arguing that the broadcasting industry does not pose special dangers justifying heightened government regulation).

<sup>73</sup> Pub L No 101-336, 104 Stat 327, codified as amended at 42 USC § 12101 et seq.

requirements often reach 20 percent of new construction. Indeed, there are regulations that afford some limited relief when the costs go above that amount, subject to the inevitable technical qualifications and exceptions.<sup>74</sup> The benefits are just a fraction of the revenues expended. The critical line between health and safety on the one hand, and anticompetitive or factional legislation on the other, should not escape Professor Tushnet, who has at least some passing acquaintance with constitutional law. But it does.

### C. Real Estate Development.

The same abuse from large government is nowhere more apparent than in connection with real estate development. For many years I have taken the position that the comprehensive form of ex ante review of permitting is both a dangerous and unconstitutional exercise of the permit power of local government.<sup>75</sup> The massive defects in the current permit system go to both means and ends. First, the number of ends for which government regulation is permissible has expanded far beyond the sensible limits imposed by the law of nuisance. Second, the government is granted far too much latitude in choosing the means to reach those ends. One major concern is that the collective review process does not follow the sensible private law rules on injunctions, which have two parts. First, there is no injunction until there is actual or imminent harm, which means that most projects go to completion free of delay.<sup>76</sup> Second, when actual or imminent damage does occur, the builder is shut down until he makes the appropriate accommodations to obviate the harm.<sup>77</sup>

In pointing out the dangers of the modern system, I instanced one account where a Northern California developer, Doug Kaplan, recounted his multiple difficulties in securing the requisite building permits.<sup>78</sup> Professor Tushnet cleverly distorts that account, by acting as if Mr. Kaplan made an isolated observation that “an application [ ] ‘must be submitted by phone to a

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<sup>74</sup> 28 CFR 36.403(f) (requiring that certain alterations made to buildings make the altered area accessible to all, unless the cost of accessibility exceeds 20 percent of the cost of the alteration).

<sup>75</sup> See, for example, Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 Iowa L Rev 407, 414–18 (1995).

<sup>76</sup> *Id.* at 411–14.

<sup>77</sup> *Id.*

<sup>78</sup> Epstein, *Design for Liberty* at 116 (cited in note 1).

public official who is never in his office.”<sup>79</sup> Next, he makes excuses for this apparent lapse of good judgment by noting—and here I quote his disingenuous account:

[E]xamining the source on which Epstein relies, one discovers that the problem was not that the official was never in his office, but rather that the official accepted phone applications only during a narrow window of time (perhaps because he was charged with other duties as well, though the source does not go into that). The problem, that is, is that the official's *supervisors* had allocated—or misallocated—resources in a manner inconsistent with sound public administration.<sup>80</sup>

No one “discovers” Professor Tushnet's beguiling excuses. The problem that Kaplan identified is massively systemic, not oddly idiosyncratic. Here is the full passage I quoted from Kaplan immediately following from Professor Tushnet's snippet:

We submitted 17 sets of plans that were routed to the 14 separate departments, agencies and individuals who were charged with issuing the dozen separate approvals we needed to build our 2,700-square-foot building. By the time we were finished, we had passed an all-too-familiar milestone in our community: The number of government employees involved in the review and processing of our permits outnumbered the number of construction workers who would eventually build the building.<sup>81</sup>

What innocent excuses can be made for this endurance contest? The point of the passage was to show that as the class of permissible ends increases, the entire process grinds to a halt. Professor Tushnet seems to think that he makes his case by showing that somehow I think that “this behavior is *in principle* part of sound public administration, which of course it is not.”<sup>82</sup> We all agree that public administration *should* be more efficient. But the basic point is the one that Professor Tushnet does not address; namely, that it becomes difficult to follow the principles

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<sup>79</sup> Tushnet, 80 U Chi L Rev at 492 (cited in note 2), quoting Epstein, *Design for Liberty* at 116 (cited in note 1).

<sup>80</sup> Tushnet, 80 U Chi L Rev at 501 (cited in note 2).

<sup>81</sup> Doug Kaplan, *Simplify, Don't Subsidize: The Right Way to Support Private Development*, 4 Persp on Eminent Domain Abuse 1, 5 (2008), online at <http://www.eminentdomainabuse.com/images/publications/perspectives-simplify.pdf> (visited Mar 26, 2013).

<sup>82</sup> Tushnet, 80 U Chi L Rev at 501 (cited in note 2).

of sound administration when those who wield power are given so many levers that it becomes impossible to engage in ordinary construction. As the night follows the day, the ability to expedite or delay administrative review can be used to block the entry of potential competitors or new residents. The short-term local victories presage long-term breakdowns in places like California and New York as each local maneuver tends to create long-term dislocations. No one should want to make excuses for those parochial forms of conduct. But Professor Tushnet does, in his role as apologist for the bloated administrative state.

#### D. Unconstitutional Conditions and Religious Liberty

Professor Tushnet's deep confusions also carry over from property to religion. One central theme of *Design for Liberty* is, of course, the dangers that come from extensive government action, which allow the state either to waive or enforce rights against specific parties. My phrase, "Government by Waiver,"<sup>83</sup> helps to capture the risk. This issue arises with any major program, including the Patient Protection and Affordable Care Act,<sup>84</sup> which I address in Chapter 13 of *Design for Liberty*.<sup>85</sup>

Professor Tushnet seeks to make light of these considerations by dismissing my treatment of *Christian Legal Society Chapter of the University of California, Hastings College of the Law v Martinez*<sup>86</sup> ("CLS"). In *CLS*, the Supreme Court, by a five-to-four vote, held that Hastings College of Law was within its right to exclude members of the CLS from the use of its bulletin boards and other collateral services routinely given to all other Hastings student groups.<sup>87</sup> Why? Because the CLS on religious grounds refused to admit those individuals who did not subscribe to its fundamental beliefs, which included its rejection of homosexuality and its strong conviction that sex should only take place within marriage. In her decision for the Court, Justice Ruth Bader Ginsburg revived an old and discredited distinction

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<sup>83</sup> Richard A. Epstein, *Government by Waiver*, 7 Natl Affairs 39 (2011). For the contrary view, see David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 Colum L Rev 265 (2013).

<sup>84</sup> Pub L No 111-148, 124 Stat 119 (2010).

<sup>85</sup> Epstein, *Design for Liberty* at 172–89 (cited in note 1).

<sup>86</sup> 130 S Ct 2971 (2010).

<sup>87</sup> *Id.* at 2995.

by insisting that it was just fine that Hastings “merely” denied a benefit to the CLS without inflicting harm on the CLS.<sup>88</sup>

In my view, *CLS* was incorrect under the doctrine of unconstitutional conditions, which recognizes the constraint that the state’s monopoly position places on its ability to discriminate among users of its own facilities. Within a “limited public forum” it can exclude persons who are not connected to the school, but it cannot pick and choose favorites among its students for these extra benefits.<sup>89</sup> Professor Tushnet disagrees with this conclusion, without bothering to discuss the explicit antireligious impact on which the exclusion rested. Indeed, he thinks that my argument is fatally flawed because it rests on some unarticulated account of the “essential functions” of the college, which could in his view be not just education, but “education plus character formation,” that gives Hastings the full discretion to choose sensible means to limit is newly chosen end.<sup>90</sup>

In making this point, Professor Tushnet is blissfully unaware of the obvious offensiveness of his new formulation, as if devout Christians pose a threat to character formation. Does he really believe that the character formation argument would be sufficient to allow the state to exclude all potential members of the CLS from attending the law school on the ground of their supposed character deficits? Under the First Amendment, however, that viewpoint discrimination would draw the highest level of scrutiny and Hastings would, and should, lose in a rout.

The simple point here is that the state could not exclude these Christian students from membership in the CLS, and it cannot therefore impose the lesser ban on students’ full and equal enjoyment of the various benefits conferred on other students in other groups. The First Amendment surely offers that protection for Marxist students. Why not for the tiny minority of Hastings students who do not want their religious organization to be overrun by nonbelievers? Why then keep them from bulletin boards? Professor Tushnet seems oblivious to the point and concludes from his bizarre example that “the project of developing a

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<sup>88</sup> *Id.* at 2986.

<sup>89</sup> For the record, I filed a brief for the Cato Institute in the case, and wrote extensively about it afterwards. See Richard A Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009–10 *Cato S Ct Rev* 105. Just the invocation of the Cato name gives rise to hoots of derision from Professor Tushnet, who dismisses its work as “conservative pabulum.” Tushnet, 80 *U Chi L Rev* at 492 (cited in note 2). His work here does not come close to the level of excellence found in Cato publications.

<sup>90</sup> Tushnet, 80 *U Chi L Rev* at 500 (cited in note 2).

system of private law based on a set of strong property rights, while possible in principle is impossible in practice.”<sup>91</sup> But to the extent that one can decipher his dense prose, he gets this backward. There is no difficulty in private competitive organizations setting their own admission standards, but there is every reason to prevent public institutions, supported with tax dollars, from making that same distinction.

#### CONCLUSION

My central thesis is that, as has often proved the case, it should be possible in both private and public law to develop well-articulated rules that sharply limit the level of discretion that regulators and judges need to design particular institutions and decide particular cases. These rules can be formulated in ways that optimize the value of property rights and contractual relations, and thus protect private arrangements from the constant factual intrigue that can divide public sentiment and sap private initiative. That system also contains comprehensive rules governing government initiatives for takings and regulating private property, and for the distribution of public benefits, which achieves the same end. Let the system be properly executed and it goes a long way to fulfilling this fundamental social objective: each voluntary private and publicly initiated action tends to maximize the social gain from a set of positive sum transactions. There is nothing narrow or parochial about the choice of ends. Nor is there anything utopian about the means that I support, for many of them were once in common use, even if they have fallen into desuetude today.

Professor Tushnet’s Review of *Design for Liberty* heaps scorn upon the enterprise, but offers no detailed alternative blueprint. Instead, Professor Tushnet conjures up an ersatz legal philosophy that is a deadly combination of the unwholesome negativism of Critical Legal Studies and the unwise desire to vest judges and administrative officials alike with dangerous running room by downplaying the role of rules in the organization of our legal affairs. It is indeed the case that the margins of every legal system must resort to notions of reasonableness to resolve some borderline cases. But by the same token a good legal system sets the rules of the road that allow people to organize their private affairs by conforming their conduct to sensible

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<sup>91</sup> Id.

rules that simultaneously limit the discretion of public officials. I do not think that it is a utopian vision to insist that modern societies can form these rules. In many cases, all that is required is for both judges and public officials to return to many of the practices that dominated American life and culture before the rise of the progressive revolution that took hold during the New Deal. The truth is that the rule of law cannot survive the rise of the modern administrative state. The classical writers that linked the rule of law to the institutions of private property and freedom of contract were wrong insofar as they thought that this tight connection was a matter of intellectual necessity. But the truth remains every bit as important, even if it is only a contingent empirical truth, that these traditional institutions offer the greatest protection against tyranny and the greatest opportunity for human advancement. Deep down Professor Tushnet must sense the vulnerabilities of his chaotic position, which is why he lashes out against a book that offends his own ingrained prejudices.