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A COMMON LAWYER LOOKS AT CONSTITUTIONAL INTERPRETATION

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A HIGH STAKES GAME

The question of interpretation now enjoys the distinction of being the single most debated issue of constitutional law, surpassing the once dominant debate over the legitimacy of judicial review. The stakes involved in this interpretive venture are enormous, given the possible range of outcomes in any particular constitutional dispute. Take one view of interpretation, and affirmative action is forbidden; take another, and it is required; take a third, and it is allowed. Similarly, to take one view of the Takings Clause—mine—stops the New Deal in its tracks;1 on a second view—the Court’s—the clause is a bystander to the transformation to the welfare state, and of importance only for the resolution of individual grievances of single landowners or at most small groups of landowners.2 A similar range of positions may be detected on abortion,3 the scope of the exclusionary rule,4 the scope of the

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1 See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 281 (1985) [hereinafter EPSTEIN, TAKINGS] (“The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end.”).

2 See, e.g., Penn Cent. v. New York City, 438 U.S. 104 (1978) (holding that designating the Grand Central Terminal as a landmark did not constitute a Fifth Amendment taking); Village of Euclid v. Ambler Realty Co., 276 U.S. 365, 397 (1926) (holding a zoning ordinance to be a valid exercise of police power despite a landowner’s attempt to invalidate it as a taking of use and development rights).

3 Here, the range of positions runs from treating abortion as a fundamental right to treating it as a criminal offense, all under the same constitutional text.

Commerce Clause, the doctrines of intergovernmental immunity, self-incrimination, right to counsel, and the like.

Such a fundamental issue inevitably engenders countless theories. Some argue that we should simply follow the plain meaning of the text and the ordinary sensibilities of competent speakers of the English language. Others regard so straightforward an approach as the sure sign of linguistic and philosophical naivete. Professor Richard Fallon has identified five separate strands of interpretive thought taken into account by responsible judges:

Arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice and social policy.

The order in which Fallon places these approaches to interpretation was not chosen by mere happenstance. Quite consciously, he moved from the more restrictive to the more expansive views of interpretation. In particular, it is the open-ended appeal to arguments about justice and social policy that create the greatest sense of unease. Arguments of this sort proceed on a very high level of generality and often are invoked not to explicate a text, but to demolish it. Exotic theories of interpretation increase the levels of judicial freedom, and thus shift the power to make decisions away from the original drafters of the Constitution to its contemporary expositors.

There is something deeply disturbing about this modern interpretive tradi-

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5 See, e.g., Wickard v. Filburn, 317 U.S. 111, 118-29 (1942) (holding that Congress has the power under the Commerce Clause to regulate intrastate commerce).
6 See Gideon v. Wainwright, 372 U.S. 335, 336-45 (1963) (applying Sixth Amendment right to counsel to state criminal proceedings).
7 See Oliver W. Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417 (1899) ("Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English."). Its current champion is Justice Scalia. See, e.g., Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting) (concluding that the Court should "first, find the ordinary meaning in its textual context"). Ordinary meaning, however, is sometimes more complicated than normally supposed.
tion. One obvious concern with it is that the tradition almost always works in the negative. When Paul Brest describes at length the difficulties of interpretivism, he explains why text is insufficient without an understanding of intention, and intention is insufficient because of its inability to identify whose intention counts, and because of its insufficient appreciation of changed circumstances. His catalog of objections to the process of interpretation is so comprehensive and so formidable that it is a wonder that he thinks anyone could understand his own arguments as to why sensible textual interpretation is impossible. The fruit of the pudding, however, is in the eating. If the usual devices of text and intention—or, with a deserved nod to Herbert Wechsler, neutral principles—do not advance the cause of responsible interpretation, then what does? It is here that the well starts to run dry. Consider the response of Brest:

Having abandoned both consent and fidelity to the text and original understanding as the touchstones of constitutional decisionmaking, let me propose a designedly vague criterion: How well, compared to possible alternatives, does the practice contribute to the well-being of our society—or more narrowly, to the ends of constitutional government? Among other things, the practice should (1) foster democratic government; (2) protect individuals against arbitrary, unfair, and intrusive official action; (3) conduce to a political order that is relatively stable but which also responds to changing conditions, values, and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be acceptable to the populace.

Oh? It is difficult to imagine that so freewheeling an inquiry is suitable for the interpretation of any set text, whether we deal with a constitution, statute, regulation, or even a humble commercial contract. Brest has not given us a tool for constitutional interpretation. He has provided us with an agenda for a constitutional convention—one that is consistent with a wide range of constitutional solutions. No one can figure out exactly what each of


11 See Brest, supra note 10, passim.

12 See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). Mark Tushnet has vigorously attacked Wechsler's theory. See Tushnet, supra note 10, at 806-24. The difficulties that he points out, the aggregation of preferences of different judges with different personal agendas, the difficulty of applying two or more inconsistent principles to a hard case, the difficulties in working a system of precedent, and the inability of professional craft to solve principled questions, are difficulties that face any theory of interpretation. When there is a document or provision that contains fundamental inconsistency, no doctrine of interpretation can avoid embarrassment, for the choices are no longer semantic, but instead turn on deciding which compromise causes the least disruption to the overall system—the sort of question that no logician could answer about a system that contains a formal contradiction in its axioms.

13 Brest, supra note 10, at 226.
these five factors uniquely requires: are indirect elections consistent with the electoral college? If they are not, do we read those provisions out of the Constitution? Do we think that a strong or weak institution of private property is necessary to protect against unfair and arbitrary government power? Or is it sufficient to have procedural protections that deal with hearing and notice, and nothing more? Do we have an institution of judicial review, or one of legislative supremacy, or some intermediate position that requires supermajority votes to override limitations on individual freedoms, assuming these could be defined? The list of questions can be multiplied at length until the line between constitutional interpretation and constitutional nullification vanishes into a list of multiple factors of indeterminate weight.

The rich profusion of constitutional materials, and for that matter constitutional theories, is too often regarded as a strength when, in truth, it should be understood as a weakness. The proliferation of interpretive approaches does nothing to bind the responsible judge. Rather, it gives that judge freedom to reach virtually any result by stressing that single factor that points most clearly to the outcome that the judge desires. Claims supported by "justice and social policy," without more, give full reign to judicial imagination across the political spectrum. The most difficult task of interpretation is keeping separate and distinct our views about what the law is and what the law ought to be. The latter is a free ranging inquiry that allows individuals to develop and apply a constitutional theory most congenial to their political or moral views; it allows persons to use various consequentialist arguments to justify the retention or elimination of particular clauses from the Constitution. In Takings, for example, I advance many arguments to show that allocative inefficiencies are likely if the state is not required to pay compensation when it takes private property for public use.\(^{14}\)

Although these arguments might explain why a takings clause is necessary, they do not interpret it. Rather, the interpretive task accepts the clause as a given, and asks only how it should be applied. If the interpreter succeeds, then persons of radically different political or intellectual points of view should agree on the proper disposition of a case under the constitutional provision.\(^{15}\) Supporters of the underlying textual provision should be

\(^{14}\) The inquiry ranges over the choice of the applicable norm for social welfare, the holdout problems that arise when takings are not allowed at all, and the excessive level of government expenditure when they are allowed without compensation. See, e.g., Epstein, Takings, supra note 1, at 202-09.

\(^{15}\) Indeed, I take odd comfort from Laurence Tribe and Michael Dorf's use of Lockean notions of private property in structuring the proper interpretation of the Takings Clause. Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 70-71 (1991). Although this view undergirds my attack in Takings on the crabbed readings of the Takings Clause, Tribe and Dorf fail to spell out the systematic implications of their position and are content to dismiss mine because of its "false unitary vision" of the Constitution. Id. at 28. They also neglect to explain how the Takings Clause, as interpreted through a Lockean prism, can be reconciled with the New Deal.
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satisfied that the interpretation yields their desired conclusion in the case at hand; opponents of the constitutional provision should take some modest comfort in knowing that the unsound outcome follows logically from an unsound major premise. In the ideal interpretive world, the Marxist and the market economist should agree on the interpretation of the Takings Clause, as written, even if the former would repeal it tomorrow, and the latter would afford it pride of place in his constitutional hierarchy.

The critical point is that theories of constitutional interpretation are not theories of substantive transformation. No one should be able to win through interpretation what was lost in the initial drafting. I suspect that many of these novel theories of interpretation are attempts to do just that. No one would need, for example, an elaborate theory of interpretation to explain why “commerce” does not include manufacture and agriculture; however, such an elaborate theory is sorely needed to explain why it does include those activities and not coincidentally to justify the enormous expansion of federal jurisdiction since 1937.¹⁶

The basic task, then, is to develop a framework for constitutional interpretation that avoids the pitfall mentioned above. To discharge this project, I looked to the interpretive methods used by common lawyers. This approach might seem, at first, to be odd, given that common law principles have been so often rejected on substantive grounds as guides to constitutional decision-making.¹⁷ Nonetheless, I hope to show by elaboration that the distinctive way in which private lawyers construed the central propositions of common law, and the statutes that were so much a part of private law as to blend into the common law, provides the best clue of how to engage in the business of constitutional interpretation.

The stakes of course are far lower if the question of construction concerns a common law rule, subject to overruling or qualification, or even a statute, subject to revision and amendment. I am well aware of Chief Justice Marshall's famous observation in *M'Culloch v. Maryland*¹⁸ that “it is a constitution we are expounding.” So it is, but that makes it more imperative to ensure that it is correctly expounded. Higher stakes do not guarantee that different interpretive principles are required from those applicable to more

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¹⁷ See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). His reading of *Lochner* is incorrect, largely because the case did not go far enough into making constitutional imperatives out of common law baselines. It is sufficient to note, however, that the acceptance of extensive regulation of health and safety, notwithstanding contractual agreements to the contrary, is an important deviation from the common law principle of assumption of risk, at least as it was construed during the nineteenth century.

mundane issues. The opposite might be true, and the rules that serve us well in private law may be best suited for dealing with these issues.

What is critical is a comprehensive understanding of the legal subject matter. There is a strong affinity between the general propositions of private law and the set of constitutional norms. Both stand in opposition to the highly reticulated statutes that mark, say, a tax code, or an air pollution statute. In general, the proper approach to linguistic meaning depends less on the era of the document that is involved and more on the level of detail and specificity that it contains. The new sophistication that constitutional lawyers have injected into the debate might be the unintended source of our intellectual downfall. Meanwhile, older principles drawn from a different era might continue to serve us well.

By examining the past with a somewhat critical eye, we are no longer forced to make a fateful choice between the claims of modernity on the one hand and dogmatic fidelity to the past on the other. Rather, age-old methods of interpretation afford us unappreciated resources for coping with the problems of the present. In sum, I hope to show that the methods of "ordinary language" interpretation to which I am habitually drawn are neither simple nor simple minded, but require an enormous level of patience and sophistication and might afford us the best method of constitutional interpretation.

To see how the common law system works, I will examine one statute that has been subject to an enormous amount of common law elaboration: not the common law of our own system, but the common law as it developed casuistically in Rome, where the rules of tort law were remarkably similar to our own. The historical remoteness of the Roman law system is, for these purposes, a point in favor of making the comparison. If the approach of Roman lawyers can survive the enormous transitions of space, time, and circumstance, as the Roman rules of tort have done, then there might be less than meets the eye to the frequent assertion that our common law rules of interpretation are short term matters of convenience, unlike lasting constitutional principles.

Ironically, constitutional norms, ostensibly written for the ages, have a far shorter half-life because of the greater political pressures that they face. It is no accident that constitutional interpretation goes into overdrive when Supreme Court decisions are attacked on textual grounds: such was the case with the broad construction of "commerce" in the 1930s,\(^{19}\) the requirements of desegregation under *Brown v. Board of Education*\(^{20}\) in the 1950's, and the creation of abortion rights under *Roe v. Wade*\(^{21}\) in the 1970s. The construction of private law statutes has been largely immune from these pressures.

\(^{19}\) See *supra* note 16 and accompanying text.


The stability of much of the law of tort may give us an insight as to how to construe the broad substantive guarantees that are contained in the Constitution, even though it will not lead us all the way through the maze.

THE LEX AQUILIA

The text I shall address is the *Lex Aquilia*, the Roman statute that codifies much of the tort law of ancient Rome. I concentrate on the first section of the statute, which has the virtue of being both comprehensive and short. "If any one kills unlawfully a slave of either sex belonging to another or a four-footed animal of the kind called *pecudes*, let him be ordered to pay the owner whatever was the highest value of the victim in that year." 

A text of this generality is a peculiar mixture of old and new. Like many Roman statutes, it deals with the question of slavery, and says nothing about the protection that free individuals have in their own person. Yet, by the same token, its comprehensive coverage gives it a surprisingly modern ring. Because it was a statute of major importance, it was subject to a great deal of gloss by judges who knew that they were unable, by simple judicial decree or interpretation, to alter the outcome dictated by the text. These judges also knew that the principle that lay behind the statute was in some serious sense incomplete, and the question that they had to address was stunningly similar to that of our constitutional scholars, namely, is there a way to caress and interpret the text so as to avoid any outrages and anomalies, without moving so far as to repeal or amend the statute in the same breath? Thus, the sense of the need to move beyond what language must strictly require, and yet to recognize that the constraint of language is a problem that was faced in the early Roman context just as it is faced in ours. Indeed, because the evidence suggests that the *Lex Aquilia* was engraved in stone, it was as hard to change as our Constitution is to amend. Thus, the parallels in ambition and position between the Roman statute and the American Constitution are quite close.

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22 See Dig. 9.2. The *Lex Aquilia* is reproduced in full in F.H. Lawson, NEGLIGENCE IN THE CIVIL LAW 80-137 (1950). I have used Lawson’s translations.

23 Dig. 9.2.2 (translating: "Ut qui servum servamve alienum alienamve quadrupedemve pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto.").

24 The *actio iniuriarum*, an all-purpose statute dealing with insult as well as physical injury, contains the limited protection afforded free men in the codes. Because the *actio iniuriarum* began as a remedy for intentional insult, the statute only protects free men from intentional physical harm, although the *Lex Aquilia* provides remedies for both intentional and unintentional physical harm to slaves. See generally W.W. Buckland, A TEXT-BOOK OF ROMAN LAW 584-88 (Wm. W. Gaunt & Sons, Inc. 1990) (1921) (discussing the *actio iniuriarum*).

25 See David Daube, On the Third Chapter of the Lex Aquilia, 52 LAW Q. REV. 253, 268 (1936) (discussing his theory that the order of the text of the statute indicates its existence on stone tablets).
Given the constraints faced by early Roman lawyers, the interpretation of this statute was a genuine analytical success. Wholly apart from any precedential force it might contain, it offers us useful guidelines for addressing similar problems in our own constitutional order. In particular, the statute addresses two fundamental tasks that have to be undertaken as part of the general system of statutory interpretation. The first is deciding what the statute reaches by way of analogical extension. The second is determining what implicit justifications arise under the statute.26 The existence of these two distinct interpretive processes (which could apply as well to ancient or modern commands, such as "thou shalt not kill," or "murder is the unlawful killing of person with malice aforethought") is important because it allows for a clear demarcation between a complete interpretive system of a basic statute and a more simple minded theory of plain meaning.

The task of analogical extension requires that a textual command be taken beyond its plain meaning to encompass those behaviors that are beyond the scope of the statute but are so similar to it that they should be treated in the same fashion. Implicit justifications require that there be a comprehensive theory of what circumstances "make right" actions that are prima facie unlawful.27 Again, that task presupposes that semantic meaning (and its extensions) have already been established, and thus requires not an interpretation of the words presented, but the articulation of a general theory drawn from an understanding of the basic prohibition that explains with equal force the permissible exceptions (and their qualifications) to it.

As these two components demonstrate, the full interpretive system does not depend solely upon a simple comparison of dictionary meaning with substantive command. Rather, it seeks to use the specific command as the lodestar for a more comprehensive view of the subject that it covers. In so doing, it tries to steer a path through the uneasy middle ground between literal interpretation and freewheeling revision of the substantive law. To see how this process works, it is important to look at both parts of it with sufficient concreteness. An abstract claim that this middle ground is tenable counts for naught, without a practical demonstration of how it might be done.

**Analogical extension.**

The first issue relates to the scope of the statute. *Occidere* in Latin, loosely

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26 The question of personal excuses, however, is not important in public law because the state can always hire someone competent enough to discharge the public task. Excuses differ from justifications because they concede the wrongfulness of the act, but indicate that some personal weakness of the defendant requires that blame not be attached to the individual who has performed that act. To illustrate the difference, consider the case of a battered wife. If she kills her husband, she can plead her condition as an excuse or a justification. If she hired a third person to do the killing for her, then that person could prevail only if a justification is shown.

27 Indeed, this is a literal translation of the Latin that combines *jus* with *facere* into justification.
translated as "to kill," is something of a term of art, because its origins, associated with caedere, to cut, suggest that the killing had to take place by the use of direct force against the person of the slave, or the covered animal. The question is whether the statute reached beyond the case that was clearly set out in the text, whose clarity in Latin is somewhat greater than the English translation would allow. The early answer to the question was, first with some hesitation, and then with great conviction, yes.

The interpretive development took place in several stages. First, the easy case was given, in which the use of a sword or stick to strike the blow did not defeat the charge of the killing act, which did not have to be done with bare hands. Second, there were a host of intermediate cases in which it is not clear that the actor was responsible for the killing although he was responsible for an act, perhaps a negligent act, which increased the risk of death. The third Digest case goes one step further: a man who slips and crushes the slave with his burden. The slipping need not be regarded as an act, but culpability attaches because there was discretion in carrying so heavy a load in the first instance. In the first case, there was the clear use of force. In the next case, there was no intentional use of force, but death was brought about by circumstances for which the actor himself was culpable. Only in the third case do we reach the situation in which the defendant has not acted at all, but was held responsible solely for the prior decision on what to carry or where to go. All these cases were brought within the definition of occidere in the struggle to reach some larger conception of responsibility without going beyond the language of the act. They extend the scope of the statute while seeking to avoid express application of the principle of analogical extension.

Similarly, when one is thrown into a river only to die of exhaustion, there the blow has not killed, but the case is nonetheless brought under the statute "just as if someone had dashed a boy against a stone." This last clause points to conscious use of analogical extension. The thrashing about of the
doomed victim, the act with the most direct causal link to the death, should not insulate the defendant from causal responsibility, because death could be linked to the wrongful act of the defendant. The progression made by Roman jurists is clear. One starts with death on impact, a clear case, and moves to the case of instant drowning, where an intentional or negligent blow is the only action involved, and then moves to the case of exhaustion, where the plaintiff is in a position to prevent the loss but fails to succeed. The effort to cabin cases within the literal language becomes more uneasy because occidere is a dominant instance, but not the complete story, of the theory of causation.

Hence, when Celsus makes the critical distinction: "it makes a great deal of difference whether a person kills or furnishes a cause of death, seeing that one who furnishes a cause of death is liable, not to the Aquilian action but to an action in factum," the dynamics of the situation change markedly, and the interpretation of the Lex Aquilia bursts forth from its limited confines within the language of occidere. It is thus appropriate to acknowledge, even at this late date, how bold a step the Roman jurists took when faced with their statute engraved in stone. Why did the jurists make such a leap? Initially the leap is analogical, but the analogy only opens a wedge into a larger theory of causation. For example, there are cases in which the defendant did not kill by a blow, and yet the moral responsibility for the action is so great that it is difficult to find a relevant distinction of principle that separates that case from others. The judges and scholars, therefore, could have argued that one could go outside the text, create the actio in factum, or what we would call the action on the case, to deal with a situation that the occidere did not cover because the actor had the same relevant moral standard of responsibility. Thus, occidere could yield to a more general theory of causation by implication, as good in our own time as in Roman days.

The stakes in this shift in approach are of course very high. Romans, as readers of Robert Graves's I, Claudius would attest, seem to have had an inordinate fondness for killing by poisoning. In the crude cases, the poison was forced down the throat of the hapless victim. That was solemnly held to

\[31\] Id. 9.2.7.5.

\[32\] See S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW, ch. 11 (2d ed. 1981) (discussing the emergence of the action on the case). Within the common law the verbal grounds of distinction are between harms that are immediate and direct and those that are simply consequential. Behind this verbal distinction, however, lies the same set of concerns faced by the Romans. Those cases in which force was used could not be distinguished in principle from cases in which the injury occurred from an indirect act. This is illustrated in the English cases by the rider who is struck by a falling beam and the rider who trips over a beam that lies in the roadway. Note that the question of plaintiff's conduct is relevant here, just as it is in the Roman poison cases discussed in the text.

\[33\] ROBERT GRAVES, I, CLAUDIUS (1982).
be a case of *occidere*, even though no cutting and tugging occurred.\(^{34}\) In many cases, however, the poisoning took place by means more subtle and effective. The perpetrators deceived the victim who ingested the poison believing it to be medicine. Because no case of *occidere* occurred here, the *in factum* mode allowed the action. One can only reach that conclusion by inserting an implicit premise, done by way of interpretation, that acts of the plaintiff induced by the defendant's deception should be regarded as equivalent in law to actions that the defendant himself performed *corpore corpori*, by the body and to the body.

The need for interpretation required the Romans to develop an elaborate theory of responsibility. There are cases of intervening acts that do not sever causal connection. Here, the defendant coerces or deceives the victim or some third party into doing the act that results in physical harm. The first order wrong results when the force or fraud is applied directly against the victim. The analogous wrong results when the defendant's conduct misleads or coerces an innocent actor into doing an act that causes harm. The Romans, therefore, started with no theory of causation, but they quickly developed one, even though they never articulated the general principles on which it rested. Their process of analogical extension, however, did not continue without end. For example, the entire theory of responsibility collapsed if the victim *knew* that she would ingest poison and still chose to take it. Here, the harm resulted from her own act. Even though a fraud or deception had been attempted, the victim had ingested the poison with full knowledge of its fatal properties.

This process captures both ancient and modern strains of thought. The emphasis on force and misrepresentation recalls the conditions that Aristotle identified for voluntary actions in the *Nicomachean Ethics*.\(^{35}\) There, Aristotle did not offer an affirmative account of what constituted voluntary action but instead identified two conditions—mistake and coercion—that negated voluntariness.\(^{36}\) These two elements, when imposed on one actor by another, allow us to impute responsibility for the later act to the prior actor who is responsible because of the constraint on voluntary behavior. In a more modern vein, force and fraud have a place in basic libertarian theory, which holds that the central office of the law is to constrain their use. What better way to do this than to hold those who practice these techniques responsible for the actions undertaken by their victims. The generality of the results achieved by analogical reasoning to general principles is an

\(^{34}\) Again if a midwife gives a woman a drug from which she dies, Labeo draws this distinction, that if she administered it with her own hands, she is held to have killed: but if she gave it to the woman for her to take it herself, an action *in factum* must be given; and this opinion is correct, for she furnished a cause of death rather than killed.

**DIG. 9.2.9.**


\(^{36}\) *Id.*
impressive accomplishment. The humble task of interpretation, conducted by Roman commentators who had no political agenda to advance, required them to leap from one core case of causation to a more general theory of the subject—no modest enterprise, and no modest achievement.

Justification.

The level of interpretation, however, did not end with the articulation of analogous causation cases that subjected a defendant to liability. The command of the *Lex Aquilia*, like the command of many of our most elusive constitutional provisions, reads as though it were an absolute. If one's actions result in the *occidere* or, by extension, the furnishing of a cause of death, then liability follows. Yet, the actual development of the law is far more complex than this because of the unanticipated consequences that attach to the word *iniuria*, not lawful, that is also found in the text. The Romans had an odd exposition of the subject because the *Lex Aquilia* considered the question of justification before it undertook to examine the issue of causation. As a matter of principle, that sequence seems out of order because justifications for a prima facie wrong are discussed before the scope of the initial wrong is determined. The puzzle is resolved not by some deep theory of constitutional interpretation but through an observation of the word order in this sentence, which following the usual practice places the verb at the end of the relevant clause. Accordingly, *iniuria* comes before *occidere* and thus, in the remorseless dissection of the provision, it is the first term to be explicated.

Our concern, however, is not with the oddities of the Roman sequence in exposition, but with the universal necessity to deal with the question of justification under a statute that gives only the barest hint that this exercise must be undertaken at all. The simple issue is whether to treat the word "unlawful" as idle and redundant in the grand scheme of things, so that all killing is unlawful—"thou shalt not kill" is a perfectly serviceable commandment in non-Roman traditions as well. Because of the heavy weight that moral theory has over the structure of doctrinal interpretation, legal doctrine does not treat killing in such a manner. To insist that all killings are unlawful is to treat a legal prohibition like a stiff tree exposed to a strong wind. It will topple because it cannot bend.

A dramatic hypothetical shows that this interpretation is wrong. If a person is set upon by an ambush and finds himself compelled to use force in self-defense, he is nonetheless liable to his aggressor, just as if he had been in the wrong. It does not take great sophistication to realize that unless self-defense is allowed, then all persons will find themselves possessed of a perfect legal remedy only after they are maimed or dead, leaving scant deterrent against the use of aggression. The wrongdoer—wrong by the very standards of the *Lex Aquilia*—will therefore be able to profit from his own wrongs.

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37 See Dig. 9.2.3-9.2.5.
The introduction of a self-defense justification stems from the correct belief that the articulation of the basic rule of liability is not meant to be complete, for the word "wrongful" can be taken as an invitation to explore the circumstances by which that wrong is made right.

Once self-defense is introduced into the system, a host of related questions follow. Who is entitled to self-defense? Can force be used in defense of property or in the discipline of slaves or family? What are the risks of excessive or deadly force if there is no danger of life and limb? The statute does not answer such questions. Self-defense cannot afford an absolute justification any more than killing can be an absolute wrong. Further qualifications have to be introduced into the system. The point is well recognized in both the Roman and the common law, for each adopts a system of pleading that allows each party to introduce new matter until the parties choose to join an issue on a matter of law or fact.\(^3^8\) In essence, one must resort to a theory, even an inchoate theory, to decide what should be done in these cases. I believe it is possible to formalize these intuitions into a single theory.\(^3^9\) Here, the central task is to ensure that persons who are victims of aggression are permitted to stand their ground, at least when their lives or safety are threatened. Yet, it is necessary to see that an attack, once repulsed, does not become a pretext to allow greater mayhem on the other side. These issues are with us today in the interpretation of the defense of self-defense under both the modern criminal and tort law, and they are unavoidable once the prohibition against the use of force is regarded as one of the linchpins of the social order.

The question of justification under the statute is still more complex than this, for if the defense of self-defense is to be allowed, then what is to be made of the kindred defense of necessity when the injuries sustained by the plaintiff occurred because the defendant had no other choice but to inflict the harm in question? The modern debates on this subject show that there is a sharp division over the question of whether the privilege to damage property (for which slaves and animals could qualify) was conditional on the payment of damages, or whether that privilege was absolute, thus affording protection against suits for compensation.\(^4^0\) There exists a division of opin-

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\(^3^8\) For the Roman materials, see G. Inst. 4.35-4.60; Barry Nicholas, An Introduction to Roman Law 23-27 (1962). For a discussion of the common law rules, see Ralph Sutton, Personal Actions At Common Law, ch. 4 (1929).


\(^4^0\) See, e.g., Vincent v. Lake Erie Trans. Co., 124 N.W. 221 (Minn. 1910) (holding a non-negligent ship owner liable for damages when his ship caused damage to a dock during a storm); Ploof v. Putnam, 71 A. 188 (Vt. 1908) (holding that vessel owner, who
The Romans, like the common lawyers many centuries later, always tried to work with an assumption of individual autonomy and self-control but found themselves unable to universalize that assumption to all the cases before them.

The question of justification also extends to the issue of consent. If one can bind himself by promise, then why cannot one release a cause of action that otherwise would be available? Here, the Roman law comes up a bit short, as there is no explicit discussion of consent in connection with killing, only the hint of the defense in connection with the killing that takes place in a boxing match. There is, however, a clear explanation for this omission. Roman law did not recognize slaves as free individuals. Thus, they did not have the capacity to consent any more than they had the capacity to contract. Let the action for killing be extended to the killing of a free person, however, and the consent defense fairly invites inclusion in the system. If consent is a way that persons can bind themselves to perform affirmative actions, then it is a way that they can bind themselves to surrender a cause of action that they might otherwise have. As with self-defense, the question of consent cannot function as an absolute defense, but is subject to caveats such as duress, misrepresentation, nondisclosure, mistake, incapacity, and the like.

The list is not over, for there are still other defenses that might be made against the use of force. Discipline invoked by a teacher or parent is yet another illustration. It is of potentially great relevance because it gives the discipliner a kind of sovereign power, which may be exerted even without the special warrant provided by consent or self-defense. The connection between private master and public sovereign is one that cannot be ignored even in modern constitutional law.

The purpose of this essay is not to work out all the details in either the Roman or American contexts, but to show how the logic of interpretation is sufficient to allow, nay require, that we forge an entire system of substantive law from materials that might be thought too meagre for the task. It is first necessary to figure out the provision that animates the core prohibition of the statute—here, the control of the use of force. It is then necessary to cover those cases that are analogous to it. Finally, it is critical to deal with justifications for the use of force—self-defense—subject to suitable limitations. So by degrees we stumble into a general theory that works quite well over the entire constellation of rules that govern the killing of individuals.

moored at a private dock because of severe weather, could recover for personal injuries and the loss of his boat against the dock owner, who unmoored the vessel).

41 DIG. 9.2.45.4 (requiring payment notwithstanding necessity); id. 9.2.41.1 (allowing the defense of necessity, in case of fire).

42 Id. 9.2.7.4.

43 Id. 9.2.5.3-9.2.7.
One may ask what connection this has with constitutional interpretation. The answer is that there had better be some, or else we find that we have looked in vain. Fortunately, for our purposes, most of the great provisions of the Constitution are drafted with the same type of generality found in the Lex Aquilia so that it becomes necessary to flesh out the broad outlines of constitutional provisions by reference to similar ideas of analogy (on coverage) and justifications (for covered acts) as are found in the Roman texts. This method will not work (nor will it be needed) to interpret clear provisions such as the minimum age requirements for both representatives and senators. The method will be relevant for those clauses on which the interpretive demands are greatest.

**Analogical Extension.**

The first question that must be faced in dealing with various constitutional provisions is the scope of the coverage that they afford. Like the Lex Aquilia, these are often written in grand and general language, without any thought to the details of their coverage. Indeed, the brief elegance associated with many constitutional provisions did not happen by accident and happenstance, but was often engineered by design, as the framers likely knew that foresight in drafting was always imperfect and that some interpretation would be required to make difficult texts clear. Toward that end, it is instructive to consider several examples of analogical extension that arise quite naturally in the constitutional context.

**Searches and Seizures.**

The first clause of the Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” What is the scope of the constitutional protection against searches and seizures? Here, the obvious point is that any entrance onto the property of a private person will normally constitute a search of the property in question, although any effort to physically occupy land or to take a chattel will count as a seizure. In this area, the Constitution tracks the idea of the wrongs that one private party can commit against another, and uses them to define the wrongs that the state can commit against any person through its agents. The linkage between the private and public law narrows because the law of trespass to land and to chattels gives content to the constitutional provision.

One major issue under the Fourth Amendment, however, concerns those actions taken by the police or other public officers that do not amount to a

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44 U.S. Const. art. I, § 2, cl. 2 (requiring members of the House of Representatives to be at least 25 years of age).
45 Id. § 3, cl. 3 (requiring members of the Senate to be at least 30 years of age).
46 Id. amend. IV, § 1.
trespass in the sense of either an entrance onto land or a seizure of chattels. The question is whether these cases are covered by the Fourth Amendment even though, as a literal textual matter, they fall outside its limits. The early constitutional authority questioned analogical extensions and read the Fourth Amendment with a strictness that would have astonished the Roman interpreters of the *Lex Aquilia*. The courts ruled that Fourth Amendment violations did not occur in the absence of a physical entrance on property or a taking of a chattel. Even the class of cases that could have amounted to serious incursions on the privacy interests of the parties against which the early forms of constitutional theory developed could not provide any form of relief.

The private law response to the same problem reveals the error of this restrictive view. The normal protection afforded individuals against the entrance of strangers on their property serves important interests. It creates an exclusive zone in which each person can control his or her own destiny, and it is an important instrument for the protection of individual privacy, the right to be let alone. The sense that private property is not an end in itself but a means to achieve other ends, has important consequences for the way in which the common law construed the scope of its protection. At one level, limitations could be made on the absolute right to exclude—persons could enter private property under circumstances of necessity to save themselves from imminent peril. Additionally, individuals tolerate low level nuisances, reciprocal between neighbors, under a live and let live doctrine that gives each side greater freedom of action. Similarly, landowners are normally under a duty to supply lateral support to a neighbor, even though the removal of that support (by digging on one side of the line) does not constitute a physical invasion of the neighbor’s land. Even on matters that have little or nothing to do with privacy, the structure of ownership at common law treated the physical invasion test as a rough proxy for the sound relationships between neighbors. It did not treat it as an absolute litmus test in either direction: there are invasions that may be privileged or excused; likewise, there are noninvasions of property that may nonetheless be actionable. Both sets of exceptions aimed, to the extent that imperfect institutions can achieve such ends, to improve the position of both owners in their interactions with each other.

The same logic of noninvasive harms extends to the privacy interest related to real property. Thus, even though each of two neighbors might be able to erect a wall that prevents the other from hearing private conversations, the wall will have other undesirable effects, such as blocking views and cutting off light. A social convention, backed by the force of the state, that

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47 See, e.g., *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding warrantless tapping of telephone wires not a violation of the Fourth Amendment because no “actual physical invasion” of the defendants' house took place).

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says that each neighbor will not overhear the conversation of the other goes a long way to enhance the general value of the property that each has. Noninvasive forms of snooping can therefore be avoided by private custom, and these customs can eventually harden into legal commands. In *Roach v. Harper*, the plaintiff, a tenant of the defendant living in the defendant’s downstairs apartment, brought an action for trespass against tenant landlord for using a device to overhear the plaintiff’s “confidential and private conversations.” The landlord installed the hearing device not in the premises of the plaintiff, which would have supported a claim of physical invasion, but in the landlord’s own apartment, where that claim could not be supported. Nonetheless that court had no difficulty in reaching the conclusion that this invasion of privacy (chosen in strict analogy to the trespass actions) enabled a valid suit. Even if the landlord had physically invaded the tenant’s apartment, this invasion would not have been the source of the injury sustained. The information gleaned by the hearing device, not its location, constituted the threat to the tenant’s interests, and it is against that threat that remedies, whether by way of injunction or damages, should lie. The analogical method thus overcomes the dominant physical motif.

The treatment of the noninvasion cases under the tort law foreshadowed their principled resolution under the Search and Seizure Clause of the Fourth Amendment. The key case in this regard is still *Katz v. United States*, where the government tapped a public telephone booth in which the accused made a phone call. The government argued that the tap did not constitute a search and seizure because it did not “penetrate” the walls of the booth. The Supreme Court denied that contention and held that the accused had a “reasonable expectation of privacy” in the use of the booth that entitled him to constitutional protection. The use of the “reasonable expectation” language has caused difficulty because of the obvious charge of circularity: if there is no legal protection against the noninvasive search, then what is the source of the reasonable expectation that privacy is observed? Once the citizen knows of the law, then he has assumed the risk of being overheard. Yet, if the protection is extended against this sort of phone taps, then why is there any need to resort to the language of reasonable privacy at all? The phrase, therefore, often has been regarded as question-begging, even by those who regard the result as sound and correct.

The result looks far less dramatic to those schooled in the Roman tradi-
tion, in which the doctrine of analogous extension seems to apply. Here, the question about the reasonableness of the expectations is in turn answered by a two stage inquiry. The first question is whether there should be an action for trespass if the conduct undertaken by the government were undertaken by a private party. The decision in Roach, handed down nine years before Katz and consistent with a number of earlier decisions, indicates that the private right of action should be available against a private defendant. The second question is whether that private right of action can be allowed without running into the same circularity about reasonable expectations that plagues the decision in Katz. Again, the answer is yes. The relaxation of the invasion requirement created an alternative rights structure (no overhearing) that left both sides better off than the strict no physical invasion rules of a more primitive system of entitlements. The expectations are reasonable because they represent a configuration of rights that works to the mutual advantage of both parties in the vast run of ordinary cases. Because these extended rights have that desirable characteristic, it is reasonable to adopt them, and hence reasonable for individuals to form expectations that rest upon them.

It is therefore possible to forge a closer connection between expectation and entitlement than is evident in Katz. The mistake made by the Supreme Court in articulating the Katz rule is a familiar one. The same elusive connection between expectation and entitlement was, in a sense, evident to Jeremy Bentham over two hundred years ago: "[p]roperty is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it." This passage, like Katz, recognizes the role of expectations in formulating rights, but it offers no clue to indicate which expectations ripen into rights and which do not. What is missing from Bentham is also missing from Katz—the way in which the superior set of social returns indicate which set of rights best fulfills the set of desired social expectations. It is possible to meet that higher standard and give to Katz a stronger and more persuasive answer than it received in the case law.

The approach that I have taken to Fourth Amendment interpretation has been adopted by writers who, although unaware of the Roman methods of textual interpretations, have championed the principles that they adopted. For example, Albert Alschuler has stressed that reading the term "search" to cover more than a visual inspection is not a linguistic invention of recent
origin, but a well-established interpretive practice. He refers to passages from Chaucer, the King James Bible, Shakespeare, Milton, Locke, and Webster's Dictionary.

This display of erudition assists in understanding the issues at hand. Alschuler considers the case where a husband is forced to reveal confidences that he has received from his wife concerning property located in their household, which the police could not enter and directly inspect themselves. "If the fourth amendment were to block one route to Sandra's [the wife's] dresser but leave the other open, the law would be an ass." Sure enough, the insistence on the method of analogical extension gives rise to the conclusion advanced above: namely, that if the definition of a search as visual inspection "is rejected, no stopping point short of construing the term to encompass all privacy-invading criminal investigations seems apparent." All roads in this case, then, do lead to Rome. The class of cases that are covered by analogy under Alschuler's formulation consists of those in which X is forced to reveal the results of a visual search to the state, which is little different from a case in which A makes B kill C, covered by the Lex Aquilia.

Takings.

The question of analogical extension is also of great importance in connection with the Takings Clause of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." The threshold question under the clause is, what kinds of activities undertaken by the government constitute a taking? Under present law, that issue receives a restricted answer. Those cases in which there is physical dispossession of the private owner and physical occupation by the government constitute a straight transfer of the "property" from private to public hands. Once that case is identified, the rest remain shrouded in mystery, at least if one believes current law. One source of the confusion is the inveterate tendency of the

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59 Alschuler writes:
Chaucer said that no man could sufficiently comprehend nor search the Lord God; the Kings James version of the bible included the psalm, "O Lord, thou hast searched me and known me"; Shakespeare inquired "if zealous love should go in search of virtue"; Milton proclaimed, "Now clear I understand what oft my steadiest thoughts have searched in vain"; and John Locke spoke of those "who seriously search after ... truth." Noah Webster's first dictionary, published in 1828, defined the word search in part as "to inquire, to seek for. [A] quest [or] pursuit." Samuel Johnson's earlier, pre-fourth-amendment work had used almost identical language. Without contending that the fourth amendment governs all searches for truth and virtue, one may recognize that it encompasses more than visual inspections.

Id. at 42 (footnotes omitted).
60 Id. at 43.
61 Id. at 43-44.
62 U.S. CONST. amend. V, cl. 3.
Court to lump together the question of prima facie taking with the justifications that might be offered for those takings, a strategy no more likely to produce clarity in public constitutional law than in Roman tort law. So, in this section, I shall concentrate on the initial issue of the taking simpliciter, leaving the matter of justification for the discussion that follows.

The key question here is the extent to which the principle of analogical extension allows one to figure out the reach of the Takings Clause. There are two separate issues worthy of discussion: first, the relationship between the taking and destruction of property; and second, the relationship between physical and regulatory taking. Turning to the first, it has sometimes been argued that the term “taking” should be treated as a term of limitation, and read in opposition to the word destruction. The argument has a narrow linguistic base in the sense that some state constitutions offer protection against government action that “takes or damages” property, and it may, therefore, be argued that the term “taking” cannot be read as including the very phrase against which it is read in opposition. Nonetheless, that approach leads to an exceedingly crabbed view of interpretation.

Suppose, first, that the state decides that it will blow up a building and then condemn the land. Is there a taking of the land only, or of the land plus the building? The case is no different from one where the government first buys the land and building at market value, and then proceeds to rip down the building to put the land to some other use. It would be odd indeed if the government could reduce its own financial obligations by reversing the sequence of events. Just as with the *Lex Aquilia*, where the prohibition against killing led to an analogous protection against furnishing a cause of death, so too here, the prohibition against takings leads to an analogous prohibition against the destruction of property by the state. The great fear that drives the Takings Clause is that the government, by the use of its coercive power, will be able to internalize all the gain from its operation, while forcing other persons (whose property has been taken) to bear the costs. The risk (like the risk of causation of harm) remains the same whether the strategy adopted by the state is one of take, then destroy or destroy, then take. Indeed the risk goes further, to cases where the government destroys without taking at all, as with sonic booms.

It is arguments like these that initially led the Supreme Court to take the view that both the destruction of private property and the taking of that property are covered by the same constitutional provision. Yet, its adherence to this position has been less than consistent. Oddly enough, the sonic

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63 See, e.g., Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992) (finding that the purpose of the regulation affects the Takings Clause analysis).

64 See Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 180 (1871) (regarding as a taking the flooding of property brought on by a private party acting under government authorization).
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boom case a century later resulted in no compensation at all.\textsuperscript{65} In many cases the question is what should be done with business good will, attachable to some particular site, which is destroyed when the government takes the underlying land? As a matter of private law, the recognition of good will as a species of property that can be destroyed has long been understood: the businessman who cannot serve his customers because others defame his name, or harass his customers, has an action for the loss of good will, even if no one lays a finger on his premises. Yet, the destruction of good will receives scant constitutional protection, as the Supreme Court in this context gives property a physical interpretation so narrow as to mock the comprehensive nature of the institution.\textsuperscript{66}

A similarly narrow view of causation is taken in other cases where a dispossessed landowner brings an action for consequential damages. In Community Redevelopment Agency v. Abrams,\textsuperscript{67} the issue was whether the Redevelopment Agency had to pay compensation to a pharmacist, whose premises it had condemned, for the loss of his prescription drugs. State law required that these drugs be reopened and reinspected before they could be sold to another pharmacist, a process that cost more than the drugs' worth. The issue is the same one of remoteness of damages that troubled the Roman lawyers under the Lex Aquilia. Only here, the California Supreme Court denied the claim for compensation for these losses on the grounds that the Redevelopment Agency did not "take" the drugs. Yet, so long as the initial condemnation compelled the reinspection of the drugs, the causal connection between public action and private loss seems clear. The required loss of use value is tantamount to the destruction of drugs, which, for the reasons developed above, should be treated as a taking. The older Roman precedents contain better intuitions than our modern takings jurisprudence.

Other complications arise in connection with the analysis of regulatory takings, that is, those government actions that leave a private owner in possession of property, but nonetheless limit the use and disposition of the property above and beyond what would be allowed at common law. The question here is why does a prohibition against taking without compensation not include a prohibition against a partial taking without compensation? The risk that the government will keep all of the benefits while forcing others to bear all of the costs is every bit as great with regulation as it is with taking outright possession. It seems odd indeed that the Supreme Court should decree that compensation should be provided when a landowner has to endure the presence of a small cable television box on her property, at no

\textsuperscript{65} See Laird v. Nelms, 406 U.S. 797, 802-03 (1972) (concluding the Federal Tort Claims Act did not authorize a suit against the government based on strict liability).

\textsuperscript{66} See Epstein, Takings, supra note 1, at 80-86 (1985) (addressing the relationship between good will and takings).

\textsuperscript{67} 543 P.2d 905, 920 (Cal.) (holding that defendant's age and physical condition prevented his ability to transfer the drugs to a new location and to realize their "value"), cert. denied, 429 U.S. 869 (1975).
real inconvenience, but is often unwilling to lift a finger against the far greater losses inflicted by regulations. Again, the ability to move cautiously from one case to the other, and to link the results by a general theory, seems a standard part of analogical reasoning. In this corner of the law at least, however, the Court strives to take a narrow and literal interpretation of a great constitutional guarantee. Although it is a constitution that we are expounding, in an age of dubious constitutional sophistication, literalism has its strange constitutional bedfellows.

**Justification.**

The second great issue that arises in dealing with any constitutional text is justification. Just as the *Lex Aquilia* sets out a presumptive right that the private owner has against the state, so too the Constitution sets out a presumptive right that the citizen enjoys against the state. Of course, the protections that are given could be absolutes if they were so drafted: "nor shall private property be taken for public use, without just compensation, no matter what" is a rather different clause than the one that we now must interpret. The usual view on this subject is that a constitutional command is the first stage in a larger inquiry that allows justifications to be asserted for the limitations that are imposed. Here, as with the *Lex Aquilia*, the search for suitable justifications is not a semantic inquiry solved by reference to plain meaning, or indeed any more complicated set of linguistic tests. Rather, it is a substantive inquiry, which asks what justifications are congruent, as a matter of theory, with the admitted forms of protection afforded by the constitutional clause.

One vast area of constitutional interpretation is a search for these justifications. Historically, scholars conducted the inquiry under the rubric of the police power, for although these terms are nowhere to be found in the Constitution, entire treatises of great eminence have been written on its scope.

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69 Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (finding that when the government merely promulgates regulations, property compensation is required only if "the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole"). One manifest irony that pervades this area is that the line between physical invasion and nontrespassory account has been properly scrapped in Fourth Amendment jurisprudence, but receives inordinate sanctification in takings jurisprudence. For criticism of Yee, see Richard A. Epstein, Yee v. City of Escondido: The Supreme Court Strikes Out Again, 26 Loy. L.A. L. Rev. (forthcoming November 1992).

70 See generally Ernst Freund, The Police Power, Public Policy & Constitutional Rights (1904) (assigning police power to its place among governmental powers and discussing its various methods of operation); Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States (Da Capo Press 1971) (1886) (considering limitations on police power from both civil and criminal standpoints). There is also an extensive discussion of the police power in 2 Thomas M. Cooley, A Treatise on the Constitutional Limitations, ch. 16 (1927).
In modern times, the police power language has tended to give way to a more complex terminology, which speaks of the level of scrutiny that is given to a state limitation on a constitutional right, and which may well vary from clause to clause. Thus, in some instances, it is said that the state must have a "compelling" interest to justify the limitation of a private constitutional right. In others, it might be said that some intermediate level of scrutiny should be required. In still others, it is said that any rational (read incorrect and unsound) basis may justify the state limitation on the protected interest in question. As the constitutional text affords no neat hierarchical classification of interests, enormous energies are used to explain why some constitutional rights, e.g. speech, are more important than others, e.g. property, and why shifting levels of justification are appropriate as we move from class to class.

These issues of justification are similar to those faced under the Lex Aquilia, and should be resolved in large measure by the same kinds of considerations. The first step is to identify the type of interest that is protected from government misconduct. The next is to find the general principle that animates the selection of that substantive provision. The third is to find the exceptions that are congruent with the basic theory. In the Lex Aquilia, for example, the major concern was with the control of private force, which was why self-defense was let in as a justification for harming other individuals.

A similar argument applies across the board in constitutional areas. When the question is the First Amendment, and the protection of freedom of speech, its limitations can divide into two large categories driven by a concern for individual freedom in all its manifestations. First, freedom is not so large a category as to allow the use of force. As a matter of good libertarian theory, a threat of the use of force is actionable as between private parties on the theory of assault. If the threat is so imminent that escape is not possible, then it may be met by the use of force in self-defense. The long line of cases on subversive advocacy, starting with Schenck v. United States,71 Abrams v. United States,72 Dennis v. United States,73 and Brandenburg v. Ohio,74 illustrates the proposition that the state may use force to prevent the overthrow of the government and, on occasions, speech that threatens that overthrow, consistent with First Amendment protections. Accordingly, the interpretive constitutional question is, what form of antici-

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71 249 U.S. 47, 51-52 (1919) (holding that a pamphlet tending to influence men to obstruct the draft is subject to prohibition because it creates a "clear and present danger").
72 250 U.S. 616, 624 (1919) (holding that the First Amendment did not protect the distribution of pamphlets designed to encourage war resistance).
73 341 U.S. 494, 517 (1951) (holding that teaching and advocating the government's overthrow is a "clear and present danger").
74 395 U.S. 444, 447 (1969) (holding that a state may not prohibit speech that advocates force unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").
patory self-defense is available to the state? The same considerations that arise in the ordinary law of self-defense thus come into play. Were lesser means available? What was the level of the danger imposed? How close was the plan to its fruition? Who should bear the risk of uncertainty? Although this essay does not purport to solve these questions, the critical point is that we should expect even a strict theory of constitutional construction to range over the same class of issues that give rise to difficult problems in the private law of tort.

The justifications for the limitations on speech are not restricted to the control of force, because there is also the risk of fraud or misrepresentation. No one, I take it, thinks that the First Amendment renders unconstitutional all laws against fraud, and the same result should be true with respect to defamation, which consists in some cases at least, as deliberate fraud on large portions of the population for private advantage. Again, both deceit and defamation are extensive and complex categories of liability at common law, which, like constitutional law, also starts from a presumption of individual freedom. The common law limitations on the freedom to speak are complex in their complete elaboration, and we cannot expect the constitutional rules to escape that complexity.

Justification also arises in other contexts. Earlier, I examined the scope of the phrase “search and seizure” and its relationship to the right of privacy.\(^7\) Even if searches are construed to protect against all invasions of privacy, the justification for a search and seizure is fairly raised by the term “unreasonable” in the Fourth Amendment. Thus, the state may justifiably seize property that is likely to be removed or destroyed if not taken from the custody of a person suspected of a serious crime. There may also be a justification to search and to seize evidence that is necessary to prevent the commission of a crime. No amount of textual elaboration of what the words “search and seizure” mean will answer these questions of justification. As with the speech cases considered above, the problem requires a separate inquiry, with an irreducible component of judicial judgment in making and setting the rules.

The Eminent Domain Clause also presents a similar issue of justification for admitted takings. For example, assume a landowner wants to store large quantities of explosives on private property in an urban setting. It is surely a restriction on the use of that property, and hence a partial taking thereof, if the government imposes any restrictions on that activity. Yet, there is surely a justification for the restriction, if only because the damage remedy that might be available after the harm is caused will not restore either life or limb, even on the happy assumption that the defendant is solvent and willing to answer for his wrongs. Similarly, as between private landowners, the abatement of a nuisance is surely a justification for taking, at least on a temporary basis, someone else’s property: so too it should be a justification in

\(^7\) See supra note 46-61 and accompanying text.
this constitutional setting. As with speech and search and seizure, the Constitution, properly understood, commands us to address a set of difficult questions to which it does not supply any answers. It is only an evasion of the interpretive process to assume that no independent inquiries should be made about matters fairly raised by the text, even if not answered by them.

Again, a note of caution. Although the class of justifications for the restriction of property may be broad, it is not unlimited. Thus, suppose that the state claims that it is entitled to prevent the development of real estate because it wants to preserve the scenic beauty of a region known for its tourism. Here, one is hard pressed to find any nuisance-like wrong that a landowner makes in the ordinary use of her property. Therefore, it is not sufficient to claim that others are benefitted by the restrictions on freedom that the law imposes. There must be some distinction among different kinds of benefits. If the state does not seek to control (by way of defense of its citizens) the aggressive behavior of its citizens, then the police power justifications are not available. The taking is to provide some general public benefit, indistinguishable from using private land for a post office. If payments are required for the outright dispossession of land, then they should be required for restrictions in its use. The class of justifications for admitted takings is not infinitely elastic, but the same principles that cover dispossession also extend to regulation.

A similar form of logic applies to the constitutional protection of the free exercise of religion. If a set of religious beliefs involves the sacrifice of strangers, or of children, or if it requires the commission of fraud on persons not part of the faith, then surely some justification lies for the restrictions that are admittedly imposed. Yet, here as with the other cases, the basis for the restrictions should be the threat that religious activities impose on the like freedoms of others. When religious persons wish to practice polygamous marriages, it should be no one's concern but their own. If they wish to stay out of the social security system, both as payors and recipients, that wish should be respected against a claim of justification that the public needs their participation to preserve its own welfare system. Here, the principal justification has always been the prevention of a common law wrong against another person. Religious practices that honor that division should, therefore, be protected against state intervention.

The theory of individual liberty that drives the Free Exercise Clause cannot by interpretation be construed to allow collective justifications that are

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77 But see Reynolds v. United States, 98 U.S. 145, 168 (1878) (incorrectly applying the police power to hold that religious beliefs cannot provide justification for polygamy).
78 But see United States v. Lee, 455 U.S. 252, 259-60 (1982) (holding that the broad public interest in maintaining a sound tax system overrides religious objections to the tax).
themselves the antithesis of a belief in individual liberty. Even in a world in
which the strong protection of property rights is rejected as a constitutional
imperative, it is possible to make sense out of the narrower domain of reli-
gious freedom, and the correlative domain of the Establishment Clause. The
class of justifications consistent with a general theory of freedom are the
same limited class as those that are found in private law theories: combat-
ting aggression and misrepresentation, consent, and imposing duties for
which just compensation, in cash or kind, has been provided.

The guarantees of individual rights under the Constitution are not limited
to those clauses that call for the protection of enumerated individual rights.
Thus, consider the distinct constitutional guarantee under the Fourteenth
Amendment that no person shall be deprived of equal protection of the laws.
Like the specific substantive guarantees, this clause has spawned an enor-
mous interpretive literature. Nonetheless, on the question of justification, it
bears a close similarity to the class of justifications that are available in the
clauses that guarantee individual rights. The initial question is whether
there is some classification that calls for special government scrutiny. The
most obvious of these cases is race, but the matter has been extended to
classifications by sex, and in principle could be extended further to deal with
questions of age, alienage, and the like. Once it is decided whether the clas-
sification is prima facie suspect, the next issue asks what type of public justi-
fication can be put forward for the distinction in question. Even with
questions of race, the prohibition on racial classifications is not absolute. If a
prison warden had to separate individuals by race (or national origin) to
prevent gang warfare and to maintain the peace, a court might look very
closely at the purported justification, but it would not rule it out of bounds
as a matter of course. If it insisted on a per se rule, its argument could not
be that these distinctions are in principle never justified, but rather the more
modest one that the potential level of abuse is sufficiently great that a per se
rule is necessary to control government officials.

The theory that underlies these potential justifications for violation of the
equal protection norm is identical to those previously considered: to combat
force, to combat fraud, or to advance the interests of both groups that
receive separate treatment, when in each case the potential for abuse sets the
measure of scrutiny that should be given the proffered justification. The
institution of Jim Crow in the South could not be justified by elaborate
efforts to show the importance of the purity of the races, or by far-fetched
arguments that it was necessary to control violence, given the other means to
achieve that last end.79 Similarly, the reason why there is a larger class of
justifications for classifications by sex than there is for classifications by race
is that sex classifications are often rightly perceived as working for the
mutual advantage of both groups, but racial classifications on the same mat-

79 See Richard A. Epstein, Forbidden Grounds: The Case Against Employ-
ment Discrimination Laws, ch. 6 (1992) (discussing these issues at length).
ter are not. Think of the role of separate but equal in athletics, when sex classifications have vastly different connotations than racial ones.80

Certainly, the differences that arise in these cases are hard to make good and require a close evaluation of the way in which these various government schemes work in practice. There is no substitute for hard work: thus, the failure to draw a distinction in some cases amounts to an unacceptable burden on one class or the other. To give but one example, the Supreme Court in Craig v. Boren81 got it wrong when it held that Oklahoma could not have a twenty year minimum age for drinking 3.2% beer for men and an eighteen year age for women. The prohibition in both cases sought to minimize the likelihood of vehicular accidents caused by drinking. If the risks for men and women are different, and in this case teenage men were ten times more likely to drive drunk than women,82 then it is appropriate for a statute to reflect those differences. If the risk for eighteen-year-old men is greater than that for sixteen-year-old women, then the need to control for external harms suggests, if anything, that younger women should be able to drive when older men cannot. The conclusion holds, moreover, no matter what the reason for the sex-linked differences, be they biological or sociological, or, as seems more likely, some combination of the two. The statute is surely permissible insofar as it cuts off, or at least reduces, an implicit subsidy for men that might otherwise exist given the differential accident rates.

Oddly enough, on this view the hard question is the converse: does a state violate equal protection when it uses the same drinking limits for both men and women? Here, the received answer is surely no, especially for courts that regard the different age statutes as fatally defective. Even if the control of differential external harms is a critical issue, the uniform age limit seems sufficiently attractive to withstand constitutional attack. There are other sanctions to keep male drivers under control: thus the higher accident rate may be correlated with higher insurance premiums, and more frequent and higher tort judgments, more frequent tickets, fines, and license suspension than women. Therefore, the differential age limitation on drinking alcohol should not be strictly required, although it should surely be allowed. It is, therefore, on this view a clear violation of the Takings Clause if insurers are required, as is increasingly common today, to underwrite certain risks at a net loss by ignoring the relevant actuarial computations to provide a subsidy for some persons at the expense of others. Again, the class of justifications available under the Equal Protection Clause, like those available anywhere else, is not unlimited.

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80 The same could be said about explicit classifications for the military or for many pension and insurance programs as well.

81 429 U.S. 190 (1976).

82 Id. at 200-01.
CONCLUSION

In dealing with the raw stuff of constitutional adjudication, I have sought to develop a theory of interpretation that relies on two strategies that are appropriate for private law adjudication: extension by way of analogy, and justification for admitted wrongs. In both cases, one searches for the implicit theory that underlies the basic textual norm, and then proceeds to answer these two inquiries in light of that norm. When individual liberty and private property, religious freedom, or for that matter, equal protection are at stake, the group of analogous cases, and the class of admitted justifications, are not endless but rather well-defined: the control of force, fraud, and consent, and just compensation more or less complete the list. The method may appear modest, but it does generate comprehensive and systematic results better than any of its rivals.

Finally, I want to stress a point that should have been implicit throughout: the allegiance that I have is to the common law method, and not necessarily to the common law results that were reached by that method. In most of these cases, the two will converge, and there is a certain prudence in judges' following common law principles, especially when they are unsure of the direction that they should pursue under an independent inquiry. There are cases in which the common law and the theory diverge, and in those cases the theory should prevail. One example should illustrate the point. In common law defamation actions, the issue of truth is normally raised as a justification for the prima facie wrong, which is said to consist in words spoken or written that are harmful to reputation. The greater the truth, the greater the libel, it was sometimes said. This use of truth as a justification, unlike that of self-defense, is said to be absolute in character. That last assertion should be sufficient to tip off the defect in the reasoning of the common law, for it clashes with its usual insistence on presumptive defenses just as it has with presumptive causes of action.

Fred Schauer pressed this issue on me at the initial presentation of my lecture at Dartmouth.

The historical explanation for the maxim had, it appears, less to do with the structure of pleading and more to do with the content of the substantive law. The concern was with the mix of truth and falsity in statements made about the Crown (to whom the maxim was confined in any event). Where those statements were manifestly false in all particulars, there was little risk that they could lead to civil disorder or revolution. They would be dismissed by the public as the ravings of a lunatic fringe. But where the false statements were craftily mixed in with true states, they would gain credibility and hence pose a greater threat to sovereign power because of their enhanced capacity to persuade. The maxim did not mean that wholly truthful statements are the most wrongful. It was an effort to get at concealed half truths. See, e.g., Wilfred A. Button, Principles of Libel and Slander 16 (1935); 2 James Fitzjames Stephen, A History of the Criminal Law of England 307 (1883). For the observation on the historical point, my thanks to Boris Bittker who pointed them out and who supplied some historical references.
The question of truth arises not only in the private law, but also under the Constitution in connection with statements about public officials and public figures. If the common law rules prevailed, then the burden of proof should be on the defendant to establish the truth of the statement made. That result is wrong as a matter of general theory, however, and it was rejected when the question came before the Supreme Court. Defamation is part of a law that is designed to control the use of force and misrepresentation. To that end, it should be understood as a tort in which the defendant makes a false statement about the plaintiff to a third party who then acts on that misstatement to the plaintiff's detriment. True statements about the plaintiff are normally not those that need any special justification at all, but are instead the outgrowth of speaking one's own mind. Once the false statement is made, there are questions of whether it can be justified in self-defense, consent, or by way of some privilege. Until there is a falsehood, however, there is no occasion for justification at all.

The implications for the case law are clear. When the Supreme Court held that in suits against public officials and public figures, the plaintiff had the burden of proof on the question of falsehood, it adhered to the underlying normative theory of speech under the First Amendment even though its result deviated from the common law. It may be that this decision is wrong, but if so, it is only for a very different reason—namely, that the plaintiff should not be subject to any additional burdens given the current law under New York Times v. Sullivan. This last argument is not part of the pure theory of interpretation, but only asks the question of what should be done with problem two, given that there is an error in the solution to problem one? The question of offsetting mistakes gives rise to a set of second best problems that cannot be answered in a wholly satisfactory fashion, and it deserves an extended treatment far beyond the scope of this paper. No matter how subtle the theories of second-best interpretation, they will always be found wanting. It is best, therefore, to adopt sound theories of interpretation in the first instance to avoid facing the really interesting cases.

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85 Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776 (1986) (holding that the common law presumption that defamatory speech is false must fall to a constitutional requirement that plaintiff bear the burden of showing falsity before recovering damages).

86 376 U.S. 254, 279-80 (1964) (placing burdens on the plaintiff to show actual malice, or knowledge that the statement was false or stated with reckless disregard for its truth or falsity).