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# BEYOND TEXTUALISM: WHY ORIGINALIST THEORY MUST APPLY GENERAL PRINCIPLES OF INTERPRETATION TO CONSTITUTIONAL LAW

RICHARD A. EPSTEIN\*

The relationship between textualism and originalism is a central issue in constitutional interpretation. That connection runs across the full range of issues that deal with institutional structure and individual rights—the two central concerns of constitutional law. It is possible, of course, to steep oneself in the vast literature developed by judges and scholars of all political persuasions. But to do that, I think, is to engage in a deadly form of provincialism that treats the question of interpretation as though it were somehow distinctive to the field of constitutional law. That hasty conclusion is misguided because rules of interpretation are necessary to deal with any spoken statement or written document. There is, in my view, no distinctive set of tools of interpretation that are, or should be, used in constitutional law, and only constitutional law. As I have argued at length in my recent book *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*,<sup>1</sup> the best way to avoid the dangers of inbred discourse is to expand horizons to look at other areas of law, both ancient and modern, that face the difficult task of fleshing out an entire institutional design from a small particular text. In this short Essay, it is only possible to develop a brief account of these connections, which are organized around three rubrics—circumvention, justification, and remedial choice—all of which offer precise analogues between

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1. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT*, ch. 3 (2014).

the public and the private law. I begin in an odd place, which is the development of the Roman law of delict—a cross between tort and crime—that is set out in the *lex Aquilia* found in Book IX, Title 2 of Justinian's Institutes.<sup>2</sup> Thereafter, I look in succession to issues of circumvention, justification, and remedy as they appear in both private and public law. All of these techniques are, I think, strictly required by any comprehensive system of textual interpretation, whether it deals with contracts, statutes, or constitutions. The purpose of this discussion is to explain why the use of these techniques is consistent with some broader originalist conception of interpretation which treats textualism as one, but only one, constituent part of the larger interpretive enterprise both within and outside constitutional law. I then conclude with a short discussion of how the disciplined use of these techniques makes no appeal to any notion of a living constitution, but indeed stands as a mode of interpretation that exposes the defects of that approach.

#### I. THE ROMAN CONNECTION

The most important influence on my own views on interpretation comes from what most people would regard as an eccentric or outlandish subject: the Roman law, whose interpretive methods are best revealed in the *lex Aquilia*, which has two key sentences.<sup>3</sup> The first states, "If anyone 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,"<sup>4</sup> and thereafter, "In respect of all other things, besides slaves or cattle [*pecudes*] killed, if anyone does damage to another by wrongfully burning, breaking or breaking off, whatever the matter in issue shall turn out to be worth in the next thirty days, so much let him be condemned to pay to the owner."<sup>5</sup>

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2. For a brief explication of the point, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 207–11 (1962).

3. See generally Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 705–12 (1992).

4. DIG. 9.2.2 (Gaius, Ad Edictum Provinciale) in NEGLIGENCE IN THE CIVIL LAW 81 (F.H. Lawson trans. 1950).

5. *Id.* at 9.2.27.5 (Ulpian, Ad Edictum 18). I ignore here all the issues of interpolation, except to mention that "In respect of all other things, besides slaves or cat-

The hard work here begins with the explication of the text, which contains its fair set of surprises, none of which admit to an easy solution. To be sure, the Lex contains a discussion of what kinds of animals count as *pecudes*,<sup>6</sup> which gives rise to questions of inclusion and exclusion, which usually can reach a definitive answer. But other problems are more intractable, including the issues of circumvention, justification, and remedy, to which I shall turn in due course. The first of these deals with the issues surrounding the verb “to kill.” The second deals with the word “iniuria,” and the third with the issues of remedy, of which the damages included in the *lex Aquilia* are variations.

Constitutional law raises these kinds of questions, and another one that was not discussed much in the Lex, which asks about the kinds of remedies for threatened harms, or *damnum infectum*, that were dealt with in other Roman texts on the subject.<sup>7</sup> That question too arises in American constitutional law, when it is asked whether the claimant of a particular constitutional right may enjoin the government from acting, or must content himself with receiving compensation for any loss that the government receives.

So the process runs as follows: a basic text starts with a single well-crafted sentence, and ends up with a code of tort law that represents a coherent body of doctrine that transcends the assemblage of cases that are used to illustrate the basic principle. Our Constitution contains many terse texts that present just these interpretive problems, which the Framers thought would receive explication by the same techniques that had long been established. The connection between ancient law and the Constitution is not one of mere coincidence. It is not just that key terms, like a republican form of government<sup>8</sup> and “senate”<sup>9</sup> are taken right out of Roman law. That is not mere coincidence be-

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the killed” is probably interpolated by the preparers of the Digest. See NEGLIGENCE IN THE CIVIL LAW at 8–11.

6. *Id.* at 9.2.2 (Gaius, Ad Edictum Provinciale 7).

7. For a discussion, see Richard A. Epstein, *Common Law Liability for Fire: A Conceptual, Historical, and Economic Analysis* in WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES 3 (Karen M. Bradshaw & Dean Lueck eds. 2012).

8. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”).

9. U.S. CONST. art. I, § 3.

cause the drafters of the Constitution were steeped in Roman law,<sup>10</sup> as well as English legal history, including its Glorious Revolution and the adoption of its Bill of Rights in 1689.<sup>11</sup> They understood the way in which text interacted with background principles, because that was exactly the way in which the analysis was done with the classical legal texts with which they were familiar. Many of the Founders were steeped in classical tradition, and when they started to do interpretation, they wrote statutes and constitutional provisions that looked very much like the ones that had existed earlier on. And, they expected that the same tools of interpretation would be used with respect to the Constitution. James Madison, for example, had excelled in Latin and Hebrew.<sup>12</sup>

## II. CIRCUMVENTION OF TEXTUAL COMMAND

Now, what are these tools for successful textual interpretation? The first one is that you actually do have to read the text, closely and carefully, with an eye for nuance and detail. Thus, within the Roman system, the basic *prima facie* case is the killing of a slave or herd animal. The next question is what it means to kill, in Latin, by cutting or striking. There are, of course, nice points of clarification that one can kill not only with bare hands but with spears and other tools, which do not fit snugly into the Roman expression of harms “corpore corpori,” or by the body to the body.<sup>13</sup> But these actions do involve the direct application of force, so that they are treated in Roman texts just as actions for trespass in the English and American law. But it is always a mistake to equate trespass with tort; these trespass cases do not exhaust the basic inquiry. Thus, within short order the Latin text consciously shifts gears to ask what should be done in those cases where the defendant has not killed the slave or animal, but has only “furnishe[d] a cause of death”—for example, supplied poison that the slave then drank to his own demise<sup>14</sup>—for which there is again no explicit

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10. See, e.g., NEAL RIEMER, JAMES MADISON: CREATING THE AMERICAN CONSTITUTION 18–19, 24 (1986).

11. *Id.* at 25.

12. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 56 (1971).

13. See NEGLIGENCE IN THE CIVIL LAW, *supra* note 4, at 14.

14. DIG. 9.2.7.6 (Ulpian, Ad Legem Aquiliam).

textual warrant but only the strong power of analogy. Does the law want to create a royal road to evasion by allowing these activities to take place? The answer is again no. At this point, the law has two tiers of remedy, one for the direct and the other for the indirect harms. That feature is not dependent on either Latin grammar or Roman culture. The distinction between actions in trespass and actions on the case raises exactly the same set of issues in Anglo-American law.<sup>15</sup>

Similar issues work themselves into the fabric of American constitutional law. What is meant by the term “speech” or “search or seizure” could be determined with an eye toward both their core meaning and the natural extensions that each term has. Thus, with speech it would be idle to deny that a person who speaks on a pedestal on Hyde Park Corner is speaking just because he is gesticulating as well. To take the position that only “pure” speech is protected is to engage not in constitutional law, or indeed any form of interpretation. It is to engage in the exercise of arbitrary power. And if the gesticulations are protected with the speech, so too is a performance in mime, even though not a single word is uttered. It takes little imagination to offer the same protection to dance or to art, which are part of the communications enterprise, sometimes with a political message and sometimes not. But it is hard to think of any coherent theory that offers protection to speech that declines to offer it to the substitute modes of communication that are an integral part of ordinary social interactions.

At this particular point, it is necessary to inject a modicum of game theory into our constitutional interpretation to explain why the principle of circumvention plays such a key role in all interpretive systems. The initial assumption is that the constitutional texts are not just inserted to adorn a parchment monument to the aspirations of mankind. They are there as safeguards against those persons who are in power.<sup>16</sup> Therefore, it should be taken as a large risk that those persons who are entrusted with power will work on at least some occasions to engage in the fine art of circumvention to escape direct prohibitions against them.

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15. *See, e.g.*, *Scott v. Shepherd*, (1773) 96 Eng. Rep. 525 (K.B.).

16. *See, e.g.*, Senator Michael S. Lee, Opening Address at the Federalist Society 2013 National Lawyers Convention (Nov. 20, 2013).

Sticking too close to the literal meaning of the text lets them achieve their private objectives at public expense.

It is in light of this fear that the above examples lead to a principled translation in understanding. A quick peek at the titles of the various books and articles that address freedom of speech reveal this simple point. They do not talk about speech as such, but use in its stead an expanded term "expression" that brings in all the analogous cases referred to above, even though semantically speech and expression are not the same terms.<sup>17</sup> One obvious challenge to this linguistic transformation is that it represents a lawless extension of constitutional power by substituting a broad term for analysis where a narrow term is used in the text. But if the method of analogies and comparisons has any value, this charge turns out to be baseless. Indeed, if the question could be put to the drafters of the First Amendment, it is clear that they would embrace the broader meaning, even if they had not addressed that specific issue at the time of the initial drafting. The point applies both to behaviors that were known at the time (dancing) and to those that were not (broadcasting). The advent of new ways of doing something is not something that no one anticipates. It is incorporated into the very fabric of the language.

The same attitudinal approach applies to the kinds of government regulation that are directed toward the broad class of expression. The key term here is "abridge," which on its face does not seem to cover the case where the speech or other form of expression is totally suppressed. But, again, the risk of circumvention is too great, so that the protection of freedom of speech does not only apply to direct prohibitions, but to the full range of taxes, fines, and regulations that could be directed toward speech broadly defined. It will not do to combat the direct forms of government abuse if these indirect means are allowed to proceed without oversight, for otherwise the Constitution will be reduced to a parchment barrier.<sup>18</sup> The same process of expansion found in the Roman *lex Aquilia* carries over to the Constitution.

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17. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (1970).

18. See THE FEDERALIST NO. 48 (James Madison).

## III. GOVERNMENT POLICE POWER JUSTIFICATIONS

There is then ample reason to think that the basic coverage of any fundamental structural provision has to extend beyond the particular cases that gave birth to the notion. But if the system of analogical extension broadens the scope of the constitutional provision, there arises a second set of issues that can be derived from private law texts—the set of justifications for conduct that constitutes a *prima facie* wrong. Again, it is useful to look at the Roman examples as to how this technique has been used in practice. Once the *lex Aquilia* is finished with the textualist explication of the term “*pecudes*,” it veers off into a discussion of possible justifications for inflicting harm on others, in order to explicate one of the trickiest terms in the Latin (and for the same reason, also in the English) language: “*iniuria*,” which can be translated as either “unlawful” or “wrongful.”

It is something of a puzzle, perhaps, why the topic of justifications should be taken up before the *prima facie* case is itself established, and it would be a mistake to think that this depends on some deep philosophical understanding of tort liability that requires more traditional analysis of the topic. But in fact the key to this issue cannot be solved by translation, for it depends exclusively on the *word order* in the original Latin, which tucks the word “*iniuria*” right after “*pecudes*.” That term does not have any literal translation that accounts for the issues that are raised, for the discussion then turns to the justification for killing in self-defense.<sup>19</sup> There are of course other justifications, including discipline<sup>20</sup> and assumption of risk in medical procedures that have to be added into the mix. There is nothing in the text that drives these issues to the fore or that indicates how they should be resolved. There are indeed some errors on points of detail, but the key lesson to take away from this one point is that it was well understood in early times that a sound system of interpretation requires the jurist to answer questions that the text raises without any specific guidance on how this should be done.

The U.S. Constitution gives individuals certain rights against the government. It makes no references to the limitations on

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19. DIG. 9.2.4 (Gaius, Ad Edictum Provinciale 7); *id.* at 9.2.5. (Ulpian, Ad Edictum 18).

20. *Id.* at 9.2.5.3 (Ulpian, Ad Edictum 18).

those rights. Indeed, it does not have any term like “iniuria” to indicate how the question of justification might be resolved. Yet the logic of all rights works through the same system of presumptions found in the *lex*, so it should come as no surprise that there is an imperative structural need to take into account government justifications for limiting individual rights. In American constitutional law, this topic was customarily discussed under the police power, defined, nontextually, in the critical case of *Lochner v. New York* as providing health, safety, moral, and general welfare reasons for restricting individual liberty.<sup>21</sup>

It should be apparent that because the police power is not referred to by name in the Constitution, it has to be implied. To many people the process of implication is thought to be the opening of a wedge to a generalized theory of the living constitution that knows no serious boundaries. But again this basic attitude is often taken out of historical context, for nothing is more common in, for example, the law of contract than the implication of terms into standard agreement—terms that are so well attuned to the basic situation that they rarely need explicit attention even though they are in daily use.

Here is a simple contract example: A agrees to sell B a widget for \$4, and the question is whether or not this contract shall be regarded as indefinite as to its key terms and therefore unenforceable. A and B have not specified the sequence of the performance between the two parties and there is in fact no parol evidence that could address that question, even if it were regarded as admissible. However, there are, as Justice Scalia referred to in connection with takings cases, certain sets of background principles,<sup>22</sup> and the one that we use here in all cases is that essentially each party must tender either the cash or the widget, as the case may be, in order to be able to sue.<sup>23</sup> By the same token, neither party has to perform in full before it can maintain an action against its trading partner.<sup>24</sup> When the situation is presented to ordinary people, they commonly say something like “I’ve never thought about that.”

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21. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905).

22. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

23. But see, e.g., *Nichols v Raynbred*, (1615) 80 Eng. Rep. 238 (K.B.).

24. See *id.*

That comment should not be treated as an invitation to despair. When ordinary people say they've never thought about it, they do not mean to say that it is wrong. What they mean is that the background norm of proper conduct is so strong that they have never had to think about it, because they always understood that that was an underlying principle of their behavior. But once they do think about it, they realize that the standard rule makes good sense, if the effort is to maximize the joint welfare of the parties by minimizing what has aptly been called "credit risk."<sup>25</sup> The task in all cases is to figure out which sequence minimizes the sum of the default risks of the two parties. The argument here only talks about the easiest case, and clearly as the fact patterns get more complex—for example, as simultaneous performance becomes impossible—the rules have to adapt, and the solutions become less reliable. But for these purposes, the key point is that there is no hesitation in taking the first step, where the good news is that the most common pattern is likely to yield a clear dominant solution. In harder cases, moreover, parties can tailor their own rules to govern their particular cases of sequential performance.

It is easy to see how this process of implication works its way into constitutional discourse. To continue with the speech examples, it would be odd to insist that a person who yells "kill" when he attacks a stranger with a sword is engaged in protected speech under the Constitution, solely because he, like the mime, is engaged in a combination of speech and bodily acts. It is important to note the key difference between the two cases. In the former, the gesticulation is used to communicate ideas, but it does not carry with it the threat or use of force against its audience. In the latter case, the threat of force against that addressee is explicit in the speech and in the speaker's action. Nor would the situation change if the assailant carried a sign that spoke of death to his intended target. Should freedom of speech or expression be read to say that anyone has the right to lie to anyone else, so as to direct them to a place which they think to be safe, but turns out to be a trap at which they will be killed? You could not do that under the Roman law principles. They were on to that game. Is government now allowed to un-

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25. Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 910 (1942).

dertake those repressive actions with impunity? So the inquiry turns to setting out principles that talk about the things that can be enjoined and those that cannot. The point here is not only true for speech, but for every other specific liberty protected by the Bill of Rights or the Fourteenth Amendment. All of these substantive guarantees have the same basic contours, so that the division one finds among the specific guarantees are often eclipsed by the commonality of the implied exceptions.

There is good reason why judicial and scholarly discussions of police power pervade every nook and cranny of the constitution. Indeed, examples like these can be multiplied seemingly without limit, which explains why, at its root, interpretation, be it of the Constitution or of any other document, invites endless elaboration and explication. But that process is not without direction of purpose. In the end, it is clear that the dominant justifications start with three: the control of force, the control of fraud, and the control of monopoly. Often other justifications are put forward, yet even then there is usually an attempt to link those justifications with one of these three categories. But it hardly follows that every purported police power justification has to be accepted by the courts. Many of these are so broad that if they were allowed to pass muster, the entire system of basic liberties would be consumed by the spurious exceptions to the basic principle.

The point is critical because it helps explain the fatal turn in constitutional theory with the expansive New Deal definition of the police power. More concretely, it is incorrect to insist that a system of minimum price controls (which cannot be used to curb, but only to sustain, monopoly or cartel pricing) is intended to achieve any of these three objectives, when the primary motivation almost always has to do with efforts to disable competitors. Indeed, it is the police power that denies enforcement under the antitrust law to private contracts in restraint of trade. The basic police power justification is stretched beyond its proper limits when legislatures seek to jam protectionist legislation into the rubric of health and safety.

One illustration is found in the key 1934 Supreme Court decision *Nebbia v. New York*<sup>26</sup>, in which a challenged law made it a criminal offense to sell milk below its stated price. This looks

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26. 291 U.S. 502 (1934).

like a straight case of protection against the “ruinous” competition that is characteristic of an industry with overcapacity, which describes the dairy industry perfectly. But the imaginative effort to convert price regulations into safety regulations is ever-present, so the New York legislature concluded that the “[f]ailure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.”<sup>27</sup> As a tribute of vice to virtue, an ounce of health and safety can drown out a pound of protectionist legislation.

These examples are chosen to show how large political oaks grow out of small acorns, so long as these acorns are well tended. The Constitution protects the freedom of speech, but that guarantee cannot be read to say that all speech should operate free of any legal sanction. What it means is that protection is often withheld from those forms of speech that violate the libertarian norms against the use of force, fraud, and defamation. But by the same token, the organized dissent from government policies is protected against government regulation under the police power unless it relies on use of illegal threats or other, similar action. Further, qualifications are surely implicit in the basic enterprise to take into account such matters as burdens of proof and choice of remedy. But those matters only reinforce the basic point, which is that no textualist approach can survive without reference to some larger political theory that is evoked, but not explicitly referenced, in the disputed constitutional text.

So at this juncture it is not possible to escape the conflict between the classical liberal and the modern progressive view. Indeed, it is important to formalize the difference. The classical liberal view notes that there are certain kinds of behavior that an organized society has to control, which brings us back to the matters of fraud, deception, and monopoly, all of which distort behavior away from the ideal of a competitive market model. It also embraces voluntary charitable and religious operations. The narrow account of the police power is the effort to recognize that it is not all right to give people a choice between their money and their lives when they are entitled to both. Clearly the list of justifications for limiting speech is not confined to fraud cases. There are all sorts of matters associated with fair

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27. *Id.* at 517.

trials, with national security, and with the publication of trade secrets that also fall within the scope of the police power as properly understood. These have to be developed topic by topic, and always with reference to the underlying theory that animates the basic provisions.

There is one further key structural element that is critical to the task of constitutional interpretation, which stems from the simple fact that all governments have to do two things. First, They impose restraints on the actions of all those people, citizens and others, who are subject to their power. In these cases, the strong presumption is that the government should justify the restriction that it imposes. But governments also act in a second role. They operate complex institutions—the courts, the prisons, the military, the schools, the roads, the highway system, and many others. In these cases, the government acts not as a regulator but as the manager of its own activities. The great challenge in these cases is to formulate rules that give the government as manager sufficient discretion to discharge its functions without constant fear of litigation or recrimination whenever it makes a decision that in retrospect turns out to be wrong, or even debatable.

To meet this challenge, constitutional law must develop rules to deal with the role of both the legislative and executive branches, not only as a regulator of private conduct, but also as an operator of these critical public institutions. For this last set of cases, the appropriate analogies come from the law of government corporations, partnerships, and charitable organizations, all of which adopt some form of the business judgment rule, which, I believe, is usually more appropriate than the higher level scrutiny directed toward government regulation. That distinction, it must be stressed, does not come fully formed straight out of the constitutional text. Rather, the underlying structural argument depends critically on an understanding of the need for a business judgment rule under corporate and partnership law that protects directors and officers (executive and legislative members) in the ordinary pursuit of their business. Yet different considerations arise in connection with the military, which occupies a distinctive niche and is outside the federal court system. The complications can go on.

There is no shortcut of constitutional interpretation that allows any court or analyst to skip over some of the many pro-

posed police power claims raised in the wide range of contexts in which it arises. This inquiry falls on all parties who claim to fall in the originalist camp just as it falls on all parties who subscribe to some version of the “living constitution.” It is no wonder that the major nineteenth century treatises treat the issue as one that deals with the various limitations on the government’s powers. Thomas Cooley’s great 1868 volume is called “*A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union.*” The phrase “police power” works itself into the title of Christopher Tiedemann’s, *A Treatise on the Police Power in the United States*, published in 1886, and most famously into the title of Ernst Freund’s *The Police Power and Constitutional Rights* which came out in 1904. Clearly the implication of these powers does not depend on progressive theories of constitutional interpretation developed in the first third of the twentieth century. They are part and parcel of the basic structure of any constitutional discourse. The distinctive change wrought by the progressives is that they added to the list of permissible justifications of the police power any effort to stifle what they termed “ruinous competition,” which covered the situation found in *Nebbia* as well as countless other cases regulating labor and agriculture.

The transformation in constitutional orientation could not be more dramatic. The progressive view legitimates the protection of monopoly and cartel positions as a matter of constitutional law, something which the classical liberal judges were never prepared to do. By keeping the line strong, the classical liberal position tried to limit the police power to those actions that advanced social welfare, not those that degraded it. There is a constant effort on the part of the proponents of the modern position to allege that other and higher values account for the shift in position. But in the end it is not possible to identify these in any systematic way. The more expanded view of interpretation, it must be stressed, does not lead to an open-ended constitution in which anything goes. But it is not a huge leap in constitutional terms from the decisions of the 1930s to the Patient Protection and Affordable Care Act, which was upheld ultimately on a very broad account of the taxing power.<sup>28</sup>

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28. *NFIB v. Sebelius*, 132 S.Ct. 2566, 2584 (2012).

## IV. REMEDIAL CHOICES

The last of the great questions that arises to which there is no clear textualist answer concerns the choice of remedy in the event of a constitutional violation. For example, the Fourth Amendment prohibition on unreasonable searches and seizures does not indicate what should be done in the event of a violation.<sup>29</sup> I have already mentioned in this context the trespass action in *Entick v. Carrington*,<sup>30</sup> which was a trespass action for damages. It turns out that in many cases the damages for trespass are minor, and the likelihood of repetition turns out to be small, so in these cases, the key question is whether that information that has been seized illegally should be excluded from evidence either by judicial oversight<sup>31</sup> or constitutional command,<sup>32</sup> at which point the only sensible answers can be reached by trading off the risks of wanton misbehavior of public law enforcement agencies against the risk of allowing dangerous criminals to return to the street. No one thinks that this is an easy choice, and much may depend on whether the police have acted in good or bad faith in conducting their activities; they are likely to get the nod in the former cases but not in the latter.<sup>33</sup> The same kinds of choices arise with respect to all sorts of environmental wrongs, from common law nuisances, both public and private, to questions of global warming. These are the sorts of issues that ordinary courts have to face in dealing with the mix between equitable and damage remedies, both of which can be supplemented or displaced by statutory remedy. Here is not the place to solve any of these problems. It should suffice to note that the “coming to the nuisance” issue that has long vexed common law lawyers<sup>34</sup> has its constitutional analogue in *Hadacheck v. Sebastian*,<sup>35</sup> which is to say that constitutional interpretation requires that courts wade into the same remedial issues that are in evidence everywhere else in the law.

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29. *E.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

30. (1765) 19 Howell’s State Trials 1029 (C.P.).

31. *Weeks v. United States*, 232 U.S. 383 (1914).

32. *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

33. *United States v. Leon*, 468 U.S. 897, 908 (1984).

34. *Sturges v. Bridgman*, (1879) 11 Ch.D 852.

35. 239 U.S. 394 (1915).

## V. A LIVING CONSTITUTION?

The basic task of constitutional interpretation, then, must of necessity go far beyond textualism in order, ironically, to be faithful to the text. But the question then arises whether the devices at issue—which are needed to answer questions dealing with circumvention, justification, and remedy—open the door to deal with all manner of other questions. On balance I do not think that this is the case. To start with the private law, I have long defended a static conception of private law as the most accurate account of how it functions.<sup>36</sup> That account is borne out by most tort issues, whose sound resolution takes place largely independent of time and location: issues of proximate cause, self-defense, consent, infancy, and the like receive more or less the same kind of treatment in the ancient texts as they do in the modern ones. Indeed, it is in fact the case that the level of variation of opinion that one finds within and across time and culture are about the same on hard questions as those that occur within any unitary system at any given time.<sup>37</sup> It is just not that easy to decide whether coercion by a third person should count as a defense or the basis of an action for indemnity or contribution against the third party. The answer to this question can come out any which way.<sup>38</sup> The same point can be made about the “coming to the nuisance” issues referenced above. But what is equally clear is that the kinds of defenses that were not allowed within the early framework are not allowed today either. No one can claim that his actions should not be subject to punishment because he acted with malice, or because he had a legitimate right to destroy the reputation of innocent parties. Of course there are technological advances of the sort that present new problems. There are many more ways to pollute a river today than there were in medieval times. But the basic logic of physical invasions applies as much to modern nuclear and chemical wastes as to old-fashioned animal matter. To be sure, the advent of new technologies, whether airplanes

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36. See Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

37. See generally Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987).

38. See, e.g., *Morris v. Platt*, 32 Conn. 75 (1864) (allowing the defense); DIG. 9.2.45.2 (Paul, Ad Sabinum 10).

or spectrum, can generate new types of properties, but these tend to follow on such key issues as exclusion, use, and alienation, the same basic parameters that are found in older forms of property rights. There is, moreover, a wide variety of water law systems, from riparianism, to reasonable use, to prior appropriation, which vary from location to location. But the choice among these systems is largely driven by a combination of the intensity of use and the high variation in the local topology of oceans, lakes, and rivers, so that the background principles by which these water rights are governed are largely independent of cultural or temporal differences. Indeed, on matters of federal jurisdiction, it would be odd to say that there could be local commerce by horse and buggy, but that all commerce by city buses, cabs, and subways falls in interstate commerce.

There is little question that this approach does not commend itself to most modern scholars of constitutional law in large measure because they tend to downplay the critical connection between private and public systems of right. But it is in practice a road to serious error to assume that one can figure out the public law governing contract, liberty, property, religion, and speech without having some deep understanding of how these propositions work in the private law. No short essay can put these together in one tidy bundle. But the examination of even a small set of the relevant issues points out the need for textualism in a constitutional law system that starts with text but also builds out from it.