

Winter 1997

The Modern Uses of Ancient Law

Richard A. Epstein

University of South Carolina

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, The Modern Uses of Ancient Law, 48 S. C. L. Rev. 243 (1997).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

SOUTH CAROLINA LAW REVIEW

VOLUME 48

WINTER 1997

NUMBER 2

THE MODERN USES OF ANCIENT LAW

*Richard A. Epstein**

INTRODUCTION: A MISSPENT YOUTH

The topic of this lecture relates in a very direct way to the unconventional course that my legal education took over thirty years ago. Upon graduation from Columbia College in 1964, I received a fellowship to study at Oxford University, Oriel College to be precise. It was common, then as now, for a future lawyer (and even a future law professor) to go to Oxford to study Politics, Philosophy, and Economics and then to return to the United States to undertake the standard three-year course of study in an American law school before sailing forth in the larger waters of the American legal system. On no one's advice in particular, I chose a path less taken and enrolled in the undergraduate law course at Oxford in October, 1964. I took the second part of the jurisprudence degree, without having taken the first part. The plan was to parlay a two-year Oxford degree into the first year at an American law school. By this strategy, I would complete my legal education in 1968, after four years (with two degrees). I was out of phase in both educational systems, a condition that has not yet righted itself.

Little did I know that my first class at Oxford would be Roman Law, taught to me by Alan Watson, now a professor down the road at the University of Georgia. My first writing assignment was on the development of the contract of *stipulatio* from the time of the Twelve Tables to the time of Justinian—hardly the way the standard American legal education begins. But that assignment had long term significance for the entire way in which I have come to view law and legal history in the thirty-odd years that I have resided safely within the bosom of the American legal system. The Oxford tradition in law, like that in philosophy, used ancient discussions of first principle to illumine modern debates over contemporary legal and policy issues. The

* James Parker Hall Distinguished Service Professor of Law. This essay is a revised and expanded version of the Charles Wilson Knowlton Law and Liberal Arts Lecture, delivered at the University of South Carolina School of Law on September 19, 1996.

object of this lecture is to indicate just some of the ways that my misspent youth (studying Roman Law and early English legal history) has influenced the work of my later years.

To some people this autobiographical account might sound odd because so much of my later work has picked up on themes of law and economics that are noticeably absent, or so it is said, from ancient law. But there is a connection. The historical emphasis of my legal education was quite congenial to the study of institutional economics. Indeed, the way I learned economics was not from a systematic study of its first principles or from a detailed use of quantitative methods. I continue to believe that there is much merit in this bottoms-up approach. The first task is to identify some social problem that has confounded lawyers and political theorists alike. Then one must use economic tools to understand how the complex social system does work or might be made to work better. Much of my own writing has followed just this tact and has quite happily veered off into questions of linguistic analysis and political theory.¹ I take a similar eclectic approach here and look not only at economic questions but also at other issues that impinge on them. And, in this approach, I do not regard myself as alone. Many scholars in the law and economics movement have written with great insightfulness about ancient legal institutions.²

This lecture follows that tradition in part by paying close attention to both the substantive and interpretive rules found in Roman law, giving illustrations of both. It seeks to show the influence that these early formulations have had on modern law, often in quite unexpected ways. The first part is devoted to Roman principles on the acquisition of property and their relationship to disputes of more modern vintage. The second part looks, more briefly to be sure, at questions of constitutional interpretation and suggests that ancient techniques often supply the necessary *tertium quid* between excessively rigid versions of the “plain meaning” rule and wide-eyed forays into freewheeling constitutional interpretation that are limited only by the imagination of their authors.

PART ONE: THE ORIGINS OF PROPERTY

I. TRADITIONAL APPROACH

Let me begin at the beginning, with the origins of property. The ancient lawyers had very decided views about that subject and were able to express

1. See, e.g., Richard A. Epstein, *The Harm Principle—And How It Grew*, 45 U. TORONTO L.J. 369 (1995).

2. See, e.g., Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321 (1995); Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987); Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEGAL STUD. 15 (1993).

them in clear and forceful language. In the beginning, or as we might want to say, in the state of nature or the original position, the early writers posited that the birds in the air, the animals on the land, and the fish in the water were all to be treated as *res nullius*, as the property of no one. Hence these *ferae naturae* were reducible to ownership by the party who was skilled or lucky enough to first capture them.³ The Romans then faced a very difficult question in deciding whether or not this rule should be subject to an implied exception where one person captured a wild animal while trespassing on the land of another. Should the animal belong to the landowner or to the trespasser: Roman law gave the nod to the latter, but recognized in the owner a right to exclude the trespasser from the land and block capture.⁴ English law has come out the other way on the same question.⁵

This rule on capture was set aside against certain other rules in which capture did not seem to operate. Most notably, as to the oceans and running bodies of water, the Roman position was that these remained held in common, *res communis*, so that no individual could appropriate any portion of it by any unilateral act whatsoever.⁶ In effect, Roman Law contemplated certain systems which were communal and others that were private and worried about the interactions that could take place between them when the two systems came together. One example of this sort of interaction would be a beach next to a body of navigable water.⁷

This distribution of rights was defended in a manner that most of us are not likely to find very persuasive, even if it did reflect the indirect influence of the Aristotelian frame of mind: we were told that “natural reason” was sufficient to dictate the structure of legal rights, without any clear indication of how that natural reason actually worked. Indeed, they were so confident

3. “Another title of natural law, besides [Delivery], is Occupation, whereby things not already subjects of property become the property of the first occupant, as the wild inhabitants of earth, air, and water, as soon as they are captured.” G. INST. 2.66. Notice the odd order of the exposition. Delivery, which presupposes that title has already been established, comes first, and occupation, which presupposes that something is unowned, comes only later. Both are regarded as natural modes of acquisition because they are common to all peoples and do not depend in any way on the formalities or conventions associated with Roman Law. For an articulation of the same principle, see also DIG. 41.1.1 (Ulpian, Ad Edictum 9).

4. See DIG. 41 (Ulpian, Ad Edictum 9).

5. See *Blades v. Higgs*, 11 Eng. Rep. 1474 (HLE 1865).

6. “Now, the things which are, by natural law common to all are these: the air, running water, the sea and therefore the sea shore.” J. INST. 2.1.1 The “therefore” indicates a little equivocation over the status of the sea-shore, for like other land, it is easily capable of occupation. But the need to preserve access to the waters is what keeps it from falling into private hands.

7. “Similarly, the use of seashores is also public by the law of nations, as also of the sea itself: and therefore it is open to anyone to put a house there to which to repair for the drying of nets or to draw up from the sea.” J. INST. 2.1.5. It should not be supposed that the “house” could count as a permanent structure. A temporary shack seems to give a better sense of the text.

of their conclusions that they were prepared to call them immutable,⁸ in ways that resonated with the writings of later natural law thinkers.⁹ So the first influence that Roman Law had on me, and on subsequent thinkers in general, was to pose the question of how to supply a pattern of justification for a set of rules that looks to be well-established on the one hand and somewhat arbitrary on the other.

My study of medieval law was able to give better explanations for one part of the project than the other. It was thus quite clear that the basic features of the English and American law of capture, unlike, say, the law of estates and future interest, were little more than intellectual hand-me-downs from the Roman system, with little in the way of justification for the rule and nothing in the way of the alternatives that might have been proposed to it. That historical link is very powerful. A reading of Grotius and Pufendorf, the great Dutch thinkers of the early and late seventeenth century, shows that they are steeped in the thinking of the earlier writers.¹⁰ Their influence, in turn, is evident in John Locke's work. Locke's theory on the origin of private property stipulates that a person who mixes his labor with an object is entitled to keep it against the rest of the world, so long as, Locke adds, there is enough and as good available for others.¹¹ Then, even so skeptical a philosophical thinker as David Hume, in setting out the principles of his own ideal legal system, is quite intent on (and content to) reproducing long passages from Justinian.¹²

The question, though, is exactly what each contributes to the debate. The Dutch position on the question of acquisition by capture is one that appeals to the uniform practice and sentiment of mankind. It invokes the ubiquitous notion of "implied consent" of mankind to explain the practice, which is nice

-
8. All peoples who are governed by laws and customs use law which is in part particular to themselves, in part common to all men: the law which each people has established for itself is particular to that state and is styled civil law as being peculiarly of that state: but what natural reason has established among all men is observed equally by all nations and is designated *ius gentium* or the law of nations, being that which all nations obey.

J. INST. 1.2.1

9. "By natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always." LEO STRAUSS, *STUDIES IN PLATONIC POLITICAL PHILOSOPHY* 137 (1983).

10. HUGO GROTIIUS, *THE RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND NATIONS* (A.C. Campbell trans., 1901) (1625); SAMUEL PUFENDORF, *THE LAW OF NATURE AND NATIONS* (1688). Their views were liberally quoted in *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (Sup. Ct. N.Y. 1805), the leading case on the common law rules of capture.

11. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ch. 5, 16-30 (Thomas P. Peardon ed., Bobbs-Merrill 1952) (1689).

12. DAVID HUME, *A TREATISE OF HUMAN NATURE* bk. III, § III, 604-06 (L.A. Selby-Bigge ed., Clarendon Press 2d ed. 1978) (1888). The basic categories of occupation, prescription, accession and succession are Roman and form the spine of Hume's treatment of the subject. See *id.* at 505.

as far as it goes.¹³ But the hard question is whether it all goes far enough. The nice part of the test is that it purports to overcome the central difficulty of the rules of original acquisition. Why should one person be able to do an act which operates to the prejudice of others who are denied the like privilege to claim the same animal? The point here is that so long as everyone else acquiesces in the outcome, none is entitled to protest it thereafter. The egoistical act of just grabbing what one wants is therefore converted into a social act that now binds the rest of mankind. The hard part of the inquiry is how can one decide that any particular process of reducing things to private ownership passes the test of implied agreement or flunks it. The opposite rule, that possession is a vicious grab that one takes against the community, has had its passionate defenders over time.¹⁴ And Grotius offers no protocol to break the evident impasse.

Other early writers did not do much better. The Lockean answer, which posits that the owner of property "mixes" his labor with the thing owned, hardly answers the question of why any individual has the right to mix his labor with some thing in the first place. Those who are opposed to individual acts of grabbing deny the right to acquire title by possession in the first place. They are hardly likely to change their minds upon seeing the winners rejoice in the trophies after the original chase has run its course. Moreover, if one thinks that the common law rule of capture is wisely recast as a principle of vesting labor in particular things, it still does not achieve the goal asked of it. Why not give a lien for the value of the labor expended in the capture, preservation or improvement of the thing, instead of giving the laborer full and unquestioned ownership? A lien for labor is used when one person in good faith improves property that turns out to be owned by another. Why adopt a different rule for property that is taken direct from the commons?

-
13. At the same time, we learn how things passed from being held in common to a state of property. It was not by the act of the mind alone that this change took place. For men in that case could never know, what others intended to appropriate to their own use, so as to exclude the claim of every other pretender to the same; and many too might desire to possess the same thing. Property therefore must have been established either by express agreement, as by division, or by tacit consent, as by occupancy.

GROTIUS, *supra* note 10, at ch. II, 89.

14. In fact, the 'own' which the laws of property protect is whatever an individual has managed to get hold of, and equality of right, applied to property, means only that every man has an equal right to grab. The institution of property was an agreement among men legalizing what each had already grabbed, without any right to do so, and granting, for the future, a formal right of ownership to the first grabber.

RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 130-31 (1951). For a defense of the earlier rules, see Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

A third solution to this problem was that proposed by Adam Smith in his *Essays on Jurisprudence*,¹⁵ which has rightly received less acclaim than either his *Wealth of Nations*,¹⁶ or his earlier volume, *A Theory of Moral Sentiments*.¹⁷ In his writings on jurisprudence, Smith rightly notes that the tenacity of the capture rule is, to say the least, far greater in practice than the attachment to it found in much of the philosophical literature. The question is why should that be so. Smith invokes his notion of the “ideal” or “impartial observer” to support the ownership claim of the first possessor. The ideal observer is not easily discarded: he is clearly the forerunner of the Rawlsian thinker who measures the soundness of alternative legal institutions by asking individuals to evaluate the alternatives from behind a veil of ignorance, where they are denied knowledge of their personal characteristics or future positions in any actual dispute. In more traditional legal terms, the impartial observer is someone who is uncorrupted by the bias that is of so much concern to the traditional natural lawyers.¹⁸ That negative prohibition is fine as far as it goes. But it does not go far enough. What is needed is not a way to disqualify certain individuals from passing on discrete legal questions. What is needed is a substantive approach which will allow the impartial observer to decide whether it is better to condemn the first taker as a mischievous grabber or to praise him as the sole and legitimate owner. And that, Adam Smith’s procedural approach has failed to do.

The three major historical efforts to justify a universal legal norm all contain serious intellectual weaknesses. At this point we are left with a choice. Do we decide to abandon the rule on the tempting assumption that if standard rationalizations fail, then its alternative has to be correct? The tactic itself is a dangerous one because it is not clear that the first possession rule has any single alternative. Do we move to a situation in which the state allocates the property to individuals? If so, which individuals have claims on the assets: all those within some narrow community? All those who inhabit the face of the globe? Or somewhere in between? And what principled method of allocation does any of these collectivities substitute in the place of the individual grab rule? And by what test do we think that its outcomes are superior to those under the traditional common law principle?

All these questions have to be addressed in due course, but for the moment, I prefer to take the other course, and ask whether it is possible to find a more persuasive intellectual foundation for the traditional rule of private law than eminent thinkers of both the civilian and common law traditions have

15. ADAM SMITH, LECTURES ON JURISPRUDENCE 16-17 (R.I. Meek, D.D. Raphael & P.G. Stein eds.) (Liberty Classics 1982).

16. ADAM SMITH, WEALTH OF NATIONS (1776).

17. ADAM SMITH, A THEORY OF MORAL SENTIMENTS (1759).

18. See, e.g., LOCKE, *supra* note 11, at ch. 2, para. 13, 9-10 (discussing natural law and the role of government in judging men).

been able to provide. In order to do that I think that we have to take a leaf from the Dutch thinkers, with their emphasis on the implied consent of mankind. Here of course the consent in question is purely hypothetical; so the inquiry is what judgments import legitimacy into this social contract. Here the answer, I believe, is that the social contract may not emulate the process of a real contract, but it yields the outcome of a real, honest-to-goodness consent contract. Interestingly, the origins of this conception lie in Roman law, at the latest, with the conception of the quasi-contract, which requires payment in a transaction for a benefit that was conferred in circumstances that make consent impossible (i.e. cases of necessity) but in which a gift was not intended.¹⁹ The key point here is that the performance of an obligation and the payment of compensation for the work done or the goods provided should, when the dust has settled, leave both sides to the transaction better off than either would have been if nothing had been done. Because there is no actual consent, the obligation has to be imposed as a matter of law. Otherwise, the original actor (who becomes the plaintiff) will not undertake any task at all. Yet the price so charged is such that gives him fair compensation for labor and leaves the party who is rescued or assisted far better off than would otherwise be the case. The reason why we call the system one of quasi-contract is that it yields a set of outcomes that are congruent with those of a voluntary arrangement—hence the “contract.” But it does so through legal command only—hence the “quasi.”

Now within the context of the first possession rule the argument has to be that the consent is to be implied because, ideally, all individuals are better off when the animal is reduced to possession. At one level this is the hopeless counsel of perfection because no rule of positive law, no matter how attractive, is likely to have this fortunate property. The law of large numbers makes it almost certain that some outlier could defeat any social scheme worthy of its salt or that in individual cases the mismatch of possession to unworthy possessor is evident to us all. But for present purposes we shall ignore the outlier and be content with a rule that meets a somewhat more modest criterion: the rule works to the long term advantage of the great mass of individuals in circumstances where the outlier cannot be identified by name when the rule is put into place.²⁰ This test is somewhat more exact than the

19. The modern theories of restitution have changed little from the earlier cases. On the general theory, see *Symposium on Restitution*, 67 S. CAL. L. REV. 1369-1571 (1994).

20. This is a great theme of Hume, who constantly reminds us that justice depends on the sound application of general rules, which cannot be defeated by their unpleasant particulars.

Justice, in her decisions, never regards the fitness or unfitness of objects to particular persons, but conducts herself by more extensive views. Whether a man be generous, or a miser, he is equally well receiv'd by her, and obtains with the same facility a decision in his favours, even for what is entirely useless to him.

HUME, *supra* note 12, at 502.

usual formulas of hypothetical compensation (which is not ideal for hypothetical contracts!) because we require something more than the benign assurance that the gains to the winners are just enough to compensate the losses to the losers. We want some clear warrant to proceed before coercion is imposed, not just some narrow margin of advantage.

Armed with this approach, why does the rule of capture work so well? To see the force of the rule, it is not enough to look solely at an isolated case in which possession is acquired. It is also necessary to look at the overall situation to see exactly how the rule plays out when all individuals are allowed the same privilege. Can we imagine a set of results in which just about everyone turns out to be a winner?

The answer is yes, but there are limitations. The reduction of one animal to possession is a clear gain, which can be increased through raising the animals domestically (through ownership of the offspring) and by trading with other individuals. In some cases the raising of these animals reduces harm to others. For example, in the famous American case on the subject, *Pierson v. Post*, the capture of the fox was thought to benefit everyone because the animal was regarded as a pest for whom extermination was perhaps too sweet a fate.²¹ The point becomes still clearer when one returns to Locke who, in defending his labor theory of acquisition, directed a pointed jab at the alternative rules: One possibility is that without some rule of individual acquisition the entire gains from farming and agriculture will be lost to ancient societies. Or it could be that one person could take an animal out of the commons only after that person has received the consent of all other individuals, such that animals could be said to belong to what has been termed “the negative community.”²² In which case, the worthy Locke answers, we should all starve before any such agreement could be reached—a point of little subtlety but of evident utilitarian consequences.²³

But clearly the Lockean variation on the ancient rule is one that leaves him unhappy. He thinks that capture is possible so long as there is no waste and so long as enough again and as good is left over to other individuals. But can we be sure that this is the case in a world of unlimited capture?²⁴ Early on the problems did not come front and center to the stage, but the expansion of the population and the improvement of the tools of capture resulted in a fundamental change in the overall social equilibrium. Modern conservationists

21. See *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (Sup. Ct. N.Y. 1805).

22. See POTHIER, *TRAITÉ DU DROIT DE PROPRIÉTÉ*, No. 21, *quoted in* *Geer v. Connecticut*, 161 U.S. 519, 524 (1896).

23. “Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.” LOCKE, *supra* note 11, at ch. V, para. 28.

24. For my more detailed explication of the problem, see Richard A. Epstein, *On the Optimal Mix of Common and Private Property*, 11 SOC. PHIL. & POL. (No. 2) 17 (1994).

and economists may not agree on much, but they surely agree on one thing: overhunting and overfishing is a dangerous practice if it reduces the capacity of a species to regenerate itself. So, now we have the flip side of the original optimism, and the history of the eighteenth and nineteenth century is marked by cases of real extinction attributable to the want of coordination of human activities. The classical rule is the easiest one to enforce because it gives legal backing to the natural advantages that possession confers and does not require the creation of some consistent public force to oppose the individual practices that drive the system. But this regime has a real defect if it leads to major resource losses that are obscured in the individual transaction but all too real in the aggregate. Now the administrative costs of a more complex legal regime might be worth incurring because something can be gained from the exercise.

II. THE MODERN RESPONSE

In the face of these evident difficulties with the classical solution, we must now ask, what forms of regulation should be introduced? Here the period of most interest is that between the Civil War and the First World War, a period during which the question of how to place the industrial state on sound constitutional footing constantly impinged itself. In particular, rate regulation under the Interstate Commerce Commission²⁵ and rate of return regulation for public utilities were new and urgent problems.²⁶ Natural resources were also on the front burner at this particular point in time. Here let me mention just two cases in which the older theories of property rights in animals came to play an important role in thinking about these matters.

A. ANIMALS

The first of these is *Geer v. Connecticut*,²⁷ in which the issue was whether a rule that prevented individuals from outside the state from killing birds within it and selling them overseas could withstand challenge under the Commerce Clause of the United States Constitution. Already it looks as though we are a long way removed from the usual disputes of Justinian and his followers, but in fact, the older learning played a critical role in the analysis of this case. The case obliquely turned on the status of these wild animals in their natural state. So, out came the early Roman sources, which were duly mistranslated from *res nullius* to *res communis*.²⁸ Now the choice

25. See *Interstate Commerce Comm'n v. Alabama Midland Ry.*, 168 U.S. 144 (1897).

26. See, e.g., *Smyth v. Ames*, 169 U.S. 466 (1898) (determining the constitutionality of a state statute regulating the maximum rates allowed for transportation of freight upon railroads).

27. 161 U.S. 519 (1896).

28. See *id.* at 522 ("Among other subdivisions, things were classified by the Roman law into public and common. The latter embrace animals *ferae naturae* [wild animals], which, having no

of these words does make a difference, although not perhaps one that could have been anticipated by the Roman jurists. Rather, the difference it makes is that the *res nullius* is owned by no one; therefore, an effort to impose such restrictions on out-of-state individuals could be counted as discrimination against persons from outside the state. This sort of discrimination runs counter to the general goal of creating national markets—a goal that should supersede pressures from states to create rules that give them preferences, overt or concealed, over their rivals.

Yet there was a second conception, *res commune*, which meant that the goods were held in common, and the next question to ask is in common by whom? This question, although skirted in earlier discussions, comes to the fore whenever a given a state seeks to prevent transportation of animals out-of-state. Because it was the state who held them in common, the animals in question, though they had not been reduced to possession, could now be regarded as the property of the citizens of that state alone; therefore, the restrictions in question only preserved a proprietary advantage that the state had in its initial position and did not create any illicit discrimination in favor of in-state persons. Thus the question of how this game gets played is strictly dependent on the set of initial property rights in animals, and for that question we move back quickly to the ancient law. When *Geer* upheld this statute it took the wrong conception, but its solution did not stand the test of time. In the years after *Geer*, the first possession rule came under endless onslaught from all quarters. But no matter; when the United States Supreme Court returned to the question some eighty years later, it looked with astonishment at its old decision. Wiser on ancient law, or at least more sympathetic to the claims of out-of-staters, the Court concluded, with the same conviction as the ancient writers, that it was self-evident (that is, a matter of natural reason) that wild animals can only be owned by the state when it, like any private party, first reduces them to possession.

A state does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.²⁹

owner, were considered as belonging in common to all the citizens of the state.") The better conclusion was that because wild animals had no owner, they were considered unowned. But notice that the view taken by Justice White was adopted by other writers in the classical tradition, such as Grotius.

29. *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977), cited in *Hughes v. Oklahoma*, 441 U.S. 322, 334-35 (1979) (overruling *Geer*).

Complete bafflement is the view with regard to any alternative position. So we travel around 2000 years, and end where we began, not only in outcome but also in the naive appeal to self-evident truth.

But the story on wild animals does not end here. Does this observation put us back in the position of our ancient ancestors? To be sure, no one wants to quarrel with the proposition that once the animal is reduced to possession, its new owner can breed or kill or hold or sell the animal. Possession is the root of title, and title is protection against killing and capture by other individuals. The system of allowing the possessor to take ownership has some real practical conveniences. But it hardly follows that any individual should be allowed to take as many animals as he chooses simply because he has the means to keep the animals that he is allowed to take.

More concretely, suppose for a moment that the government does want to protect these animals against all takers so that the question of discrimination against out of state individuals is removed from the table. May it do so, or does such a desire to protect excessively interfere with the property rights of individuals? Surely *some* interference has taken place: the ability to take and capture used to be good against the entire world, and now it is lost. How then can one say that no compensation need be provided for the loss of a right? Rather, the inquiry might be better put: what compensation should be awarded because the right has been lost? But do not assume that the compensation has to come in cash. In the usual case, the theory is that we are all better off by virtue of passage of the statute because we gain from the preservation of the species and can share in the limited rights to hunt under systems of permits. So, we again have the prospect that restraints on others compensate me for the loss of my rights to hunt and fish.

In some cases, the burdens are not so evenly distributed. What should be done, for example, if the protected animals are a threat to other animals or even to human beings? The issue might be whether the protection of the animals becomes a form of state ownership that makes government vicariously liable for the harm that these animals do to private property or, in the alternative, for the cost of precautions to keep these animals under control. Today, the courts would likely raise the flag of environmentalism so that the standard answer is that no compensation is allowed.³⁰ The only way the state could acquire ownership would be to capture these animals, which it has declined to do. So, what we have is a "mere regulation" whereby, regrettably, some individuals suffer from greater uncompensated burdens than others. This is the position taken under the Endangered Species Act (ESA) and perhaps under some earlier statutes dealing with the protection of game and habitat. But there is no question that one can find to this day a clear link to the earlier authorities. The union of concerned scientists who supported the

30. See *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988).

habitat designation provisions of the ESA regulations all started with the same mistranslation of Roman sources that influenced the decision in *Geer*.³¹ Once again it becomes far easier to assume that the state is entitled to regulate at will if the animals are already owned in common. It takes more than a small sleight of hand, however, to treat public ownership as a source of benefits but never of burdens. That is, private owners may generally receive compensation if their animals are hurt by other people or by animals that other people own. Under the banner of regulation, however, the government is able to obtain the key benefit of ownership—the right to protect animals—but it bears none of the risks associated with ownership—liability for the harm that its animals cause. In this particular, the modern cases go far beyond the earlier fish and game statutes that routinely allowed individuals to kill protected animals if necessary to save themselves or their property.³² The older rules of law can do little to explain the strong skew in favor of public power. For that, we must look to the fierce politics that surround every aspect of environmental regulation and land use control. Most importantly though, the entire growth of the property rights movement shows that the tenacity of the earlier conceptions has not been driven from the field.

B. OIL AND GAS

The influence that the early law had over definition of property rights was not confined to wild animals. It also extended to other valuable resources of which oil and gas were the most conspicuous. Such materials do not stay put under the ground, so the question is how to think about them. They have been called fugacious as if they were living things that could be reduced to ownership only by capture. But by now we are aware of the dangers of a rule that gives certain ownership to animals after merely reducing them to possession, a useful but insufficient element of a larger legal system. The question in this new context is how to prevent the drilling that leads to premature destruction of the fields, which is the same question as prompted by the overhunting of animals.

To this question too the older law, through *Geer v. Connecticut*, influenced modern thinking. Before overdrilling was perceived as a problem, the dominant rule of ownership was a rule of capture. To be sure, this rule differed from that which applied to wild animals—only the owners of the surface were allowed to drill for the oil and gas beneath their land. The lucky

31. See Brief of the *Amici Curiae* Scientists in Support of Petitioner filed in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

32. See, e.g., *Barrett v. State*, 116 N.E. 99 (N.Y. 1917) (upholding the constitutionality of a state statute protecting beavers and denying the state's liability to any individual whose property is damaged by the beavers).

landowner that brought the oil or gas to the surface could, however, claim it as his own no matter what disruption took place to the pool beneath the surface. Where all owners were similarly situated, it became empirically evident that some limitation on the right to drill, if imposed equitably on all the owners, could leave them all better off than they were before. So, once again, in an exercise of social contract, we were given a restriction intended to work to the long-term advantage of the parties whom it regulated. Just such a restriction was allowed, or so it seemed, in *Ohio Oil Co. v Indiana* (No. 1)³³ decided shortly after, and in reliance upon, *Geer*. The dominant impulse of the opinion was to treat oil and gas as a *res commune* that could be regulated for the benefit of all concerned.

However, *Ohio Oil Co.* puts forward some pronounced doctrinal differences from *Geer*. *Geer* was about a preference given to citizens of the home state over citizens from elsewhere; it was a Commerce Clause question. In contrast, the Indiana statute at issue in *Ohio Oil Co.* did not draw any explicit distinction between residents and outsiders. It only applied to persons who owned land over the common pool of resources. Therefore, the Commerce Clause should be put to one side, and the issue should concentrate simply on the correlative rights of common owners of the pool, an issue for which Roman precedents are directly applicable.

It was in just this way that Justice White, writing for a unanimous Court, treated the case. And I must confess that while I think that the Court's analysis is correct, if its premises are satisfied, a closer reading of the case has persuaded me that I took too optimistic a view of government action when I first wrote about the case in my book on takings in 1985.³⁴ As ever, wisdom lies in the details. The regulatory scheme was one which on its face required any holder of land over the common pool to restrict the flow of natural gas from the pool within the two days "next after gas or oil shall have been struck in such well."³⁵ On its face it looks like a statute that applies to both oil and gas and should impact all operators equally. It looks at most to be a minor echo of an interstate dispute, that the suit was brought by the Ohio Oil Company against the state of Indiana.

Yet a close look at the facts shows that the learned decision by Justice White glossed over certain essentials of the case to fashion harmony where in reality none existed. It is therefore necessary to offer a short case exposé. The story begins not with a tale of cooperation but with one of conflict. From the allegations in the complaint and answer, it is quite clear that the statute was not directed at single holders of land over the common pool who refused

33. 177 U.S. 190 (1900).

34. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 219-23 (1985).

35. *Ohio Oil Co.*, 177 U.S. at 191 (quoting Acts of 1893 of Indiana, c.36, § 1).

to cooperate with their neighbors; that is, it was not concerned with a scenario which invites regulation for the long-term good of the community of owners as a whole. Rather, it turns out that two classes of producers were pitted in sharp opposition to each other. On one side of the line were producers of natural gas. These were mainly small firms based in Indiana. Opposing them was the Ohio Oil Company, a large producer from out-of-state that specialized in the collection of oil, not natural gas.

In principle we might think that the two sides should be able to forge a harmonious relationship over the extensive fields that contained both oil and gas. They could drill from common wells and separate the output as it is removed from the ground. At least at the time of this statute, however, no such cooperation had taken place. Rather, the small operators from around the state drilled solely for natural gas and developed expensive facilities to support their production. For its part, the Ohio Oil Company captured only the oil, not the natural gas. The conflict between the two parties becomes clear only when we take a closer look at each parties' post removal use of natural gas. To the extent that the Ohio Oil Company allowed the gas simply to dissipate into the atmosphere, the small Indiana operators viewed its actions as a two-fold form of "waste." First, there was less natural gas left to remove and sell. Second, the release of the natural gas from one part of the field reduced the pressure needed to remove natural gas from other parts of the field. Thus, the Indiana gas concerns were hurt by the actions of the Ohio Oil Company. Ohio Oil, in turn, was being asked to spend resources to confine its output for the benefit of the other group. The burdens and benefits were hardly reciprocal.

The imbalance was still greater than this. It turns out that the release of the natural gas into the air was *not* simple waste by the Ohio Oil Company. Rather, the natural gas was a factor of production in the removal of the oil, which rode up to the surface on underground pressure facilitated by the release of natural gas. So, what was waste on one side was production on the other. In this picture it is not possible to see the statute as a way to prevent overconsumption of a common pool resource for the benefit of all. Instead, it becomes a one-sided effort in which local producers get the better of their out-of-state rivals—the Commerce Clause comes home to roost after all.

In this muddled setting, Justice White writes a learned opinion that makes it appear as though state regulation advances some common good. His brave front turns, however, to intellectual Jell-O when he confronts the specific allegations in the case. To him it makes no difference whether the common pool regulation helps everyone and hurts no one or whether it helps one team and hurts the other. To this end, we are told that "[t]hese contentions but state in a different form the matters already disposed of. They really go not to the

power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the State we may not interfere."³⁶

At this point the law is in full retreat. The language of deference, which was too common even in the so-called *Lochner* era, is used precisely because the Court did not know how to respond to the fundamental difference between reciprocal restrictions and asymmetrical ones. The Court treated a statute that improved the lot of some parties (the producers of natural gas) at the expense of other parties (the Ohio Oil Company) as though it were the constitutional equivalent of one that improved both sides.

This missed distinction is important for two reasons. First, as a matter of takings, the asymmetrical distribution of gains and losses undercuts any claim that the losses of one side were fully compensated by in-kind gains. Second, the Commerce Clause issue surfaces anew, as it were, because in-staters have prevailed at the expense of out-of-staters. How should we think about the renewed challenges to the statute?

Here, the Roman conceptions come back to help us once again. The logic of quasi-contract asks us to see whether the outcome of the situation replicates the result of real contracts—that being production of mutual gain. One obvious question, therefore, is what happens to total output of both natural gas and crude oil before and after the statute. Here, monetary values seem to be a pretty good proxy for social values; this is true because neither do we have environmental issues with which to concern ourselves with nor do deep subjective attachments to either gas or oil complicate the analysis. Unfortunately, we have no clue as to the relative magnitudes of pre- and postregulation outputs because no one thought to collect the information. Surely we would not want to pass the statute if total output were reduced, and should pass it if output were increased, taking into account the additional costs of precautions (the confinement or limitation of oil production).

But if the statute is allowed to stand, then should we require the compensation that Ohio Oil demanded? The first question is whether a property interest has been taken. In this analysis the common law rules of first possession take on new significance. They suggest that some form of compensation should in fact be provided if the state wants to persevere with its initial plans. Short of statutory intervention, it is hard to see how any owner of the surface could be excluded from drilling for oil. As such, both parties have rights in common and neither can infringe on the other at will. The common law rules (and their Roman law forebearers) thus supply the baseline against which all calculations of gain and loss are thereafter made.

If, therefore, the Indiana statute does make sense, then it should be possible to arrange for a set of side payments to the Ohio Oil Company and others similarly situated that will compensate them for the increased costs of

36. *Id.* at 211.

production incurred due to the restriction. A tax on each unit of natural gas produced offers an easy way to administer the scheme. Any unwillingness of the natural gas producers to pay such a tax would, furthermore, be a pretty good sign that they do not value the restriction as much as their own legislative campaign alleged. The case is admittedly more difficult than one in which a statute would deprive an oil company of any access to a common pool. The Indiana restriction on use looks very much like a partial taking. The difference between a full and a partial taking is best resolved by adjusting the level of compensation required.

So understood, the dramatic features of property recede in importance. The fundamental purpose of a takings clause is to convert asymmetrical into symmetrical treatment. With a bit of modern knowledge we can therefore reach the solution to a classical problem that eluded a Court that was unequipped to handle it. The change, moreover, is one with substantial consequences for the overall theory of constitutional law. Deference reigns large when precise understanding is hard to come by. This point is not only true with respect to particular institutional arrangements. It also holds true with respect to the ways we think about constitutional interpretation generally. On that question too, the processes of Roman law have something to tell us. Thus, we reach the second, albeit briefer, topic of this lecture.

PART TWO: CONSTITUTIONAL INTERPRETATION

The question of constitutional interpretation is surely one of the most mooted of our time. Even a typology of the standard approaches requires a major intellectual effort. But I for one am far from sure that the outpouring of writing on this subject is a fair substitute for a careful reading, attentive to context and structure, that should be given to any particular provision. Interpretation, in my view, does not lend itself easily to abstract philosophy but is an acquired skill that is mastered only by constant practice. Of course, practice is something that comes with age and experience. It is not untoward to discuss briefly how the Romans approached this subject.³⁷

Our constitution is filled with broad commands that are in some critical sense incomplete. In many ways these commands look like biblical commands: “Thou shalt not kill,” for example. Not so strangely, there is also a likeness to parallel commands found in Roman law: “Thou shalt not kill animals or slaves.”³⁸ These commands are all done in a style that looks absolutist, and the major question of interpretation is how they should be read.

37. For a more detailed account of my views, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992).

38. This is found in the *Lex Aquilia*, the key Roman statute on damage to property. For a full translation, see F.H. LAWSON, *NEGOTIUM IN THE CIVIL LAW* 80 (1950).

We can quickly outline two approaches. Both, however, are extremes, and neither has much appeal. One is to be quite literal about the injunction and to brook no exceptions to it. The command may be thou shalt not kill, but just what does it mean? At one level we might question how wide does the prohibition cut. It may well deal with, to use the famous Roman example, cases where you pour poison down the throat of another person, but what about those cases where you hand it over just as though it were medicine so that under mistake he consumes it and dies in consequence. The Romans were troubled by literalism, and they sought to expand its coverage (or the coverage of the command) by creating a category known as *causam mortis praestare* or "furnishing a cause of death," which deals with the second situation and treats it as though it were the first.

Such expansion is surely a start on sensible interpretation, but it is hardly a complete treatment of the issue. Consider for the moment only the narrow killing or the subtle poisoning. Suppose either of these is done with consent or in self-defense or to an individual who has entered your property with a malicious purpose or by someone who was *non compos mentis*. Each of these hypotheticals requires some attention, and the Romans dealt with them by creating a presumption in favor of liability that could be rebutted either by the wrongful act of the victim or by consent. Yet both defenses were in turn subject to qualification. Thus suppose that a plaintiff trespassed on defendant's land. Such conduct could excuse accidental harm inflicted, but not a deliberate killing of another person. Likewise, suppose that consent was given but was induced by fraud or duress. Once again, the consent would not be binding. It turns out that the Roman system of pleading was most congenial to developing substantive guidelines that defined what excuses and justifications should be allowed to statutory violations. In essence, the system allowed individuals to introduce new matter that presupposed the truth and legal sufficiency of everything that preceded it in the analysis. There were no formal limitations on what could be introduced, but substantive judgments had to be made as each new argument was presented. The question of legal interpretation therefore does not turn solely on questions of meaning, which, unfortunately, the idea of legal interpretation is sometimes exclusively wedded. Rather, the standard text is thought to invite exceptions by way of either excuse or justification (the two are not quite the same) which in turn can be overridden, in whole or in part, by still new matter. The strategies of the old pleaders correspond quite nicely to the modern theories of defeasible propositions, around which most sensible moral and legal discourse is organized.

I myself have used this system of analysis to try to explain the linkage across the various substantive theories of tort liability, and I think that it offers greater clarity than any alternative mode of presentation.³⁹ At this point, it is

39. See Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*,

perhaps sensible to outline just one path of tort law to show how various conceptions can be usefully unbundled from each other. Thus, consider the following sequence of pleas:

- (1) D hit P
- (2) P entered D's land
- (3) D meant to hurt P
- (4) P had attacked D's property or person
- (5) D used excessive force to defend said person or property
- (6) D was incapable of using less force to protect his interests.

My brief contention is that each of these pleas is valid. Additionally, when taken together, they reveal a good deal about the moral structure of ordinary tort discourse. The first proposition is one that stresses push/pull causation, that is, the use of force, which ties in neatly with Roman accounts of killing. More than force is at stake, however. Volition matters as well, but it need not be intention specifically directed toward P. Physical connection attributable to individual action is enough to establish a *prima facie* call for redress.

The basic proposition in plea number one is, however, subject to two forms of modification. The first is the extension of causation as previously illustrated. The point here is not that indirect forms of causation really involved the use of force; they do not. The parallels are sufficiently close, however, such that the same *prima facie* inference of responsibility is possible. Thus, if A sets a load down on a platform where a gentle breeze can dislodge it, then neither the breeze nor gravity count as causal intervention if the load falls on a passerby. The *prima facie* case is made out here just as it is with the Justinian Digest's example of poison that is offered as medicine.

The relationships are not just idle or haphazard but have close ties to both the philosophical and economic traditions. One can now quite neatly link up Aristotle's conception of voluntary action—those not vitiated by either compulsion or mistake—to give a more systematic accounting to the general question of remoteness of damage.⁴⁰ The casuistic method leaves open some complex cases that involve intervention by acts of God or deliberate wrongs by third persons. For present purposes, it is more important to note that it also yields a clear end point. The party who set the load down precariously on the high platform is relieved of responsibility when someone removes the load to a different place. The person who offers poison has not killed the patient if the patient has knowledge that the drink is hazardous and is under no compulsion to consume the liquid. At that point liability, if such exists, depends less on principles of causation, and more on principles of paternalism,

3 J. LEGAL STUD. 165 (1974). For an outline of the procedural method, see Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

40. See ARISTOTLE, *NICOMACHEAN ETHICS* (Martin Oswald trans., 1962).

perhaps as a response to incompetence—as today’s debate over assisted suicide and its relationship to active euthanasia reveals.

The analogical extensions of causation also make profoundly good sense from the law and economics perspective. To see why, assume that some form of game is played by both the person who furnishes the poison and the party who drinks it. The object of the analysis is to figure out in advance which party will prevail. When neither side wants the recipient to die, medicine will be furnished. When both sides want the recipient to die, poison will be furnished. In neither case should there be practical difficulty or legal liability so long as there is a concordance of wills. But what should happen when the desires of the two sides conflict. Where the supplier is able to resort to either force or deception, he will prevail. With force, the victim cannot resist; with misinformation, or worse, deception, the will to resist will be lulled to rest or overcome. With neither force nor deception, the will of the recipient will prevail. With both knowledge and choice, the recipient will refuse the poison and demand the medicine he needs to live. The hard cases of course are those of innocent mistake; for instance, the supplier may state that poison has been supplied but be heard to say that medicine has been supplied. For these cases no rule of allocation is perfect.

Not to worry, for the important cases the Roman rules on causation facilitate a universe in which individuals control their own destinies consistent with the principle of individual autonomy and self-determination. The willingness of the law to extend liability to cases of poisons ingested under compulsion or because of deception has important incentive effects. If the law only prohibited forcing poisons down the throats of helpless victims, the wily executioner would resort to compulsion or fraud, or both combined, to achieve his end. The availability of this close economic substitute undercuts the efficiency of the basic prohibition against the use of force. Sealing off those obvious and effective avenues of evasion stiffens the effectiveness of the basic prohibition. What looks to be casuistic nit-picking by classical scholars should be understood as an effort to create a set of bullet-proof rules. In this world, drawing a line between compulsion and choice and between deception and knowledge, the law has created a distinction between games in which only one side has full information and those in which both sides have full information. Moreover, by drawing the line between games with compulsion and games without compulsion, the law distinguishes between situations in which first one player and then the other has exclusive control. These are not small differences; indeed, both set out the parameters for very different behavior. The ancient rules on causation reflect a very robust economic logic, even if they were not motivated by any explicit theory.

The second interpretative mode of extension is picked up in plea number two and beyond. Let P trespass against D, and the risk of loss shifts to him. But a circumscription of the shift is evident: only the strict liability stated in plea number one is excused by the plaintiff’s wrongful entry, and then only if

P cannot justify or excuse the entry. So, here we come to a fork in the road. Plea number three suggests that the infliction of deliberate harm is not justified by the trespass. We speak about justification because one can only excuse accidental actions or consequences, not deliberate ones. By insisting on the proof of deliberate harm, we announce our willingness to foreclose D's liability for simple negligence, a point that has been the source of considerable debate in the law. Likewise, by stressing the element of deliberate harm, we raise the additional possibility that P will be able to recover only for the harms that were done and intended, but not for the unintended consequences of D's action (yet another debatable point). The pleading system does not resolve either, but it does show how a layered system of liability permits one to have different standards of culpability for different sets of circumstances and how a theory of remoteness of damage may, in appropriate cases, take into account both physical connections and mental states.

Again, plea number three represents one fork in the road. For rather than pointing to D's bad mental state, P may point to her preferred position on entry. From this simple logic, the law of licensees and invitees has developed, all from the same paradigm. In effect, the consent or assumption of risk defenses fill out the basic tort system. P's right of action can be defeated either by her own wrongful conduct or by consent.

For our purposes, we can stick to plea number three proper and ask how intention is defeasible. Self-defense and defense of property are the obvious answers. Individuals do not have to allow themselves to be hurt on the vague hope that their tort actions against aggressors will be vindicated on some future date. Such individuals can justify the use of force in instances of self-defense. Notice that we now have a very sharp contrast between the excuse imposed by plea number two and the justification of plea number four, which again comports with ordinary instincts on responsibility. It is easy to ask the ordinary trespasser to leave; however, it is far more risky to ask the same of those who threaten or commit harms. The doctrine captures both sides of the distinction.

But note that justifications are defeasible as well. The one ground of uneasiness that is picked up in plea number five is excessive force, that is force beyond that necessary to achieve the justified end. Once we pick up this notion, we have to modify our accounts of causation to reflect the change in underlying theory. Now the relevant set of consequences are those caused, intended, and unavoidable through the exercise of the proper level of care.

Yet we have still not found our way to a coherent resting place. For instance, what should happen if D did not have the personal ability to find the optimal line of defense? Excuses based on personal weakness are strictly excluded at the second stage of the argument given the initial premise of strict liability. They ring, however, true in plea number six where they are generally allowed. To be sure, questions of proof may lead a trier of fact to doubt any plea of incapacity in particular cases and insist on some reasonable

level of care. Nonetheless, the key element is that this second form of excuse should be contrasted not only with the justification at plea number four but also with the very different form of excuse (plaintiff's *prima facie* wrong) apparent in plea number two. The entire exercise thus reveals, I think, a good deal about the internal structure of tort law that is missed by any crude effort to ask simply whether D's conduct is blameworthy or not. Further, it leaves open the possibility of additional theoretical elements. Interpretation thus is not just a matter of finding the meaning of isolated words and phrases. It is an effort to place a presumptive truth into its larger context.

The same kind of dialogue can take place at the constitutional level, where the same use of intelligent analogy and defeasible propositions sheds real light on modern controversies that otherwise seem far removed from ancient disputations. To illustrate this point I shall address specific constitutional protections that are as short and pithy as those found in the Bible or in Roman Law: "Congress shall make no law . . . abridging the freedom of speech;"⁴¹ "[n]o state shall . . . pass any Law . . . impairing the Obligation of contracts;"⁴² "nor shall private property be taken for public use, without just compensation;"⁴³ and "[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."⁴⁴ Almost like clockwork we find that the two kinds of problems that were isolated in Roman Law reassert themselves in the modern context. Furthermore, the modern doctrine would be far better organized if these points were kept in mind.

First, there is the question of what kinds of conduct are caught by way of analogy to the basic prohibition. So it is that we must ask how much further beyond direct censorship we go in the area of free speech. Do we cover all forms of taxation on speech? Are all changes in the liability rules that govern wrongful speech (like defamation) within the ambit of the prohibition? Regarding the Fourth Amendment, the question of whether eavesdropping counts as a search is very similar to the Roman questions about poisoning. And the older common law rules that allowed these close analogues to trespass to be regarded as wrongs could have eased the interpretation of many of the cases in this area.⁴⁵ Regarding takings, all the issues of regulation and taxation that we dealt with above raise the same question: Is it a taking if we remove the right of individuals to protect their land and animals from attacks by wild animals? Similarly, is it a taking if we allow one to keep others off

41. U.S. CONST. amend. I.

42. U.S. CONST. art. I, § 10, cl. 1.

43. U.S. CONST. amend. V.

44. U.S. CONST. amend. IV.

45. *See, e.g.*, *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958) (permitting tenant's cause of action for invasion of privacy against landlord who placed listening device in apartment, despite alleging no special damages).

his land, but do not allow he himself to enter or use the land, as is often the case with the various forms of wetlands regulations of much controversy today. One of the earliest cases concluded that there was very surely a taking when the government flooded land to which it had never claimed title.⁴⁶ The process of analogy works very well in these cases.

So too does the process of justification apply. Just as the individual can justify self-defense, the state can do likewise on behalf of the citizens it protects. Modern law is often a delicate minuet between the assertions of property rights on the one hand and police power justifications for their limitations on the other: actions that are taken in the name of the health, safety, morals and general welfare of the population at large.⁴⁷ The earlier cases conformed more closely (but by no means exactly) to the Roman view that the only kinds of conduct that could justify the use of force were those forms of conduct that were wrongful in the acting parties. Thus, the police power extended easily to cases of nuisance prevention. But it hardly follows that cases under the Endangered Species Act fall into the same category: what wrong does a party do when he protects his land from the attack of a wild animal?⁴⁸ The modern law is really a search for justifications for state action that would be better conducted by demanding more concrete reasons for state actions than are contained in the simple proposition that the state may act as it sees fit whenever it purports to do so for the common good.⁴⁹ Once we realize that the Roman interpretation of the *Lex Aquilia* set the standard for general interpretation, we should not feel it impossible to go beyond the literal confines of the statute out of fear that the exceptions will consume the basic rule. That was not true in the private law of Rome or the English developments that followed it. The ancient methods work with great precision and power in their delineation of substantive rights. In fact, the ancient methods in an unacknowledged fashion, have established the primary categories that remain in use, even to the present day. These ancient techniques also tell us a great deal about how to read simple constitutional provisions against the backdrop of complex statutory or regulatory schemes. And often the techniques are superior to those used in modern courts.

46. See *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

47. For my views, see EPSTEIN, *supra* note 34, at chs. 8-10. The entire book is designed to show the strong linkages between private and public law, both as a substantive and as an interpretive matter.

48. For an exhaustive account of the nineteenth-century view of the police power, see WILLIAM NOVAK, *THE PEOPLE'S WELFARE, LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (1996).

49. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954) (discussing case where profitable businesses were swept under the urban bulldozer as a part of a general scheme of urban renewal).

CONCLUSION: COMPLETING THE CIRCLE

This brief tour has covered both substantive and interpretative issues; and it has dealt with issues of great importance to both the public and the private law. I think that the Oxford idea was, in reality, a correct one. We can learn from ancient text about problems that we face today and can bring to them a greater appreciation of their intellectual subtlety. I do not mean to say that the old fellows always got it right. They often made serious mistakes. More importantly though, they did have a clear approach to questions that, if understood and followed today, could illumine some of the most pressing disputes of our modern times. A closer study of many of the earlier writers would repay itself handsomely, as a corrective against some of the political zeal that is so common in legal education today. I do not think it is likely that many students will become masters of the classical sources. But I do hope more will realize that all knowledge of legal institutions and human behavior did not arise only in recent times. The earlier materials will amply repay those who invest the time to learn what they have to say.

