rain death upon innocent creatures, both human and otherwise.” In contrast to this common stereotype, Kleck’s findings show that, on average, gun owners are better educated and more prestigiously employed than non-gun owners—and that areas with widespread gun ownership have less crime than areas where ownership is rare.

Much of the negative political impact of anti-gun sentiment could be dispelled if the Supreme Court squarely recognized the right of law-abiding adults to choose to own firearms. By preempting the prohibitionist agenda, such a decision would also prevent gun lobbyists from treating every control initiative as a prohibitionist subterfuge. With each extreme discredited, rational people could agree to correct abuses in current controls and throw out unworkable ones, while adopting or expanding those that can contribute to public safety. In any such effort, Point Blank will be the primary information source.

Don B. Kates, Jr., is a civil liberties lawyer and criminologist. He is the author of Firearms and Violence, and Guns, Murders and the Constitution.

The Letter of the Law or the Spirit of the Law?

TERRY EASTLAND


Hadley Arkes’s previous book, First Things, published in 1986, was an impressive articulation and defense of moral philosophy and what would now be called traditional morality. Now Arkes, who teaches at Amherst College, focuses specifically on jurisprudence. Arkes’s overriding concern is how judges should interpret and apply the Constitution as they decide constitutional cases. He argues that the Constitution can be understood and justified only in moral terms found in “standards of natural right that existed antecedent to the Constitution.” Jurists, he says, cannot understand the Constitution apart from those moral premises. Drawing upon these premises in constitutional cases is what it means to go “beyond the Constitution.” Ultimately, for Arkes, the discipline of jurisprudence is “the discipline of moral reasoning.”
Beyond the Constitution thus is an entry in the continuing public debate over judicial (or constitutional) review that in recent years has featured, most prominently, former Justice William Brennan and Robert Bork. Arkes, a political conservative, shares Bork’s unease with the results of many recent Supreme Court decisions, which represent what Bork has called “non-interpretive” review. But Arkes thinks Bork and “many conservatives” like him have “an extravagant skepticism toward the very notions of moral truth and natural rights.” Arkes is aware of Bork’s well-known remark that when a judge goes “outside” the Constitution to decide a case, he inevitably draws upon his own subjective values. Arkes concludes that Bork rejects “the possibility of knowing moral truths in the literal sense—i.e., truths, that hold their standing as truths in all places and cultures.” He says that for Bork and others of his persuasion the only “right” and “wrong” is that which has been accepted by a majority; in other words, only that which has been expressed in positive law. Bork and his kind are, in Arkes’s dictionary, “legal positivists,” and all legal positivists, it appears, are moral skeptics. These positivists/skeptics fail to go “beyond the Constitution” to interpret the Constitution in light of the document’s moral premises; they do not rise to the challenge of “the discipline of moral reasoning.”

Of course, Arkes does not believe that liberal jurists like Brennan, who roam well and unabashedly “beyond the Constitution,” engage in this discipline either. Their jurisprudence, he says, is only superficially concerned with morality and in fact embraces moral relativism—a charge Bork also makes. Ultimately, for Arkes, modern theories of judicial review, whether on the right or the left, are riddled with relativism and positivism, both of which, he argues, displace natural rights. Arkes aims to chart a different path for judicial review, one based on natural rights. In the natural-rights background of the Constitution, he writes, can be found “the principles of right and wrong that stood antecedent to the Constitution.” And it is these principles to which judges must repair if they are to understand and apply the Constitution.

To understand Arkes’s approach, it is useful to consider his treatment of Justice John Paul Harlan’s dissent in Plessy v. Ferguson, the 1896 case in which the Supreme Court sustained a Louisiana law segregating the races in passenger trains. As is well known, Harlan said the statute violated the equal protection of the laws guaranteed under the Fourteenth Amendment. But Arkes emphasizes what is less well known, that as Harlan concluded his
opinion he effectively referred to two other provisions in the Constitution—the Article IV guarantee to each state of a republican form of government (the Guaranty Clause) and the Article VI declaration that the Constitution is the supreme law of the land (the Supremacy Clause). Specifically, Harlan observed that the railcar law is inconsistent with the constitutional guarantee to each state of a republican form of government "and may be stricken down ... by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding." Arkes comments that these two clauses would have been sufficient to carry the constitutional argument, because they would have enabled a jurist to argue that racial segregation was incompatible with the principles of republican government guaranteed by the Constitution, principles that the courts must enforce. He adds that an argument of this kind would not have needed to invoke the Thirteenth or Fourteenth Amendments.

Arkes's treatment of Plessy well illustrates just how concerned he is with penetrating to the moral argument in a constitutional case. Here the Guaranty Clause is for him critical, because of the principle it supplies; with that principle in hand, the Plessy Court could have engaged in the discipline of moral reasoning. And not just the Plessy Court, it would seem; on the theory of this book, it would appear that a pre-Civil War Court could have reasoned from the Guaranty Clause in order to strike down slavery, assuming the necessary case.

Arkes argues for his approach to constitutional jurisprudence in numerous contexts, perhaps most remarkably in regard to federalism and the Bill of Rights. He observes, correctly, that federalism does not supply a substantive moral principle as such. Because it does not, he argues, judges should go beyond the provisions in the Constitution that bear on federalism and instead "focus on the substantive moral ground that defines the wrong" in a case involving federalism. Likewise, as to the provisions specifically in the Bill of Rights, Arkes writes that judges should enforce only those that reflect "a principle of law bound up with the logic of doing justice."

One of the implications of Beyond the Constitution is that the Supreme Court could have applied at least some of the provisions in the Bill of Rights (i.e., those "bound up with the logic of doing justice") to the states as soon as it was ratified in 1791—withstanding that the clear understanding of the time was that it did not apply to the states, a position affirmed by the Supreme Court in Barron v. Baltimore in 1833. Of course, Arkes might argue that
while the Supreme Court could have taken this course, consistent with "the principles of right and wrong," it would have been imprudent for it to do so, just as he might also argue, similarly, that it would have been imprudent, prior to the Civil War, for the Court to reason from the premises of republican government in order to void slavery, although on his theory indeed it could have.

As in First Things, Hadley Arkes shows in Beyond the Constitution that he is a fine writer and a thoughtful moral philosopher. The problem here, however, is his constitutional jurisprudence. While he usefully challenges writers on the subject to focus on the moral premises of republican government, the case he presents for his theory of judicial review does not succeed.

One difficulty lies in his contention that our first generation of jurists understood judicial review precisely as he does. Arkes is impressed with an historical truth—that almost all early Americans, not to mention early American jurists, believed in principles of natural justice and that they saw the Constitution as embodying at least the most important ones. But contrary to what Arkes implies, only a very few of our first jurists can be said to have gone "beyond the Constitution" in order to interpret and apply it. In The Rise of Modern Judicial Review, Christopher Wolfe can count only five examples of Supreme Court natural-justice (i.e., Arkes-like) review from 1789 to 1829, and his list includes a circuit-court case. During the same period, Wolfe counts sixteen instances of "interpretive" judicial review, which he calls the "mainstream" approach. Moreover, if one looks at the few examples of natural-justice review, the language of natural justice was, Wolfe points out, "either dicta [passing remarks unnecessary to the decision] or was tied to some reference to the letter of the Constitution as well." Not surprisingly, despite the impression Arkes conveys of a great host of early jurists in agreement with him, he can name only a few jurists on his side. And there are good reasons to doubt whether all of these few are really with him.

Take, for example, James Wilson, a leading Framer and one of the first justices. During the Constitutional Convention, in a passage not quoted in Beyond the Constitution, Wilson said: "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." There was a context for this observation; Wilson was arguing the need for a Council of Revision, which the Convention rejected. But what is notable for our purposes is Wilson's denial that an unjust law must therefore be ruled
unconstitutional by a reviewing court. Arkes does not take account of this remark of Wilson’s, nor of Chief Justice Marshall’s rejection of the argument (in *Barron v. Baltimore*) that provisions of the Bill of Rights are applicable to the states. (Marshall is another of Arkes’s “beyond the Constitution” early heroes.) Of course, it is possible to conceive of ways of treating this seemingly contrary evidence—Arkes could argue that, for prudential reasons, a Wilson might say a judge can hold back from declaring unconstitutional a clearly unjust law. Indeed, Arkes would seem to need a doctrine of prudence for his jurisprudence to work in a practical sense, yet he does not develop one.

Still, it must be said that his theory of judicial review does not stand or fall on whether or not our first generation of jurists can be counted unambiguously on his side; his argument is manifestly not historical. Even so, it does not work. Arkes thinks that to admit the existence of objective morality or natural rights or (to borrow the title of his previous book) “first things” is to acknowledge that judges should be guided by this light in constitutional adjudication. He is wrong. It is quite possible to agree with Arkes that there is such a thing as objective morality, that it is intelligible, and indeed that it can be a standard for criticizing positive law, and yet deny, against Arkes, that judges should be guided by anything but the positive law. What Arkes must tell us, but fails to, is why a judge has a duty to go “beyond the Constitution.”

Perhaps the reason he fails in this respect is that a judge has no such duty. Judges are not moral philosophers—not in our system of jurisprudence, anyway, and perhaps not in any other, either. (Judges in the Catholic Church’s canon law, as in Judaism’s religious tribunals, engage mainly in legal reasoning within a tradition of legal analysis, and rarely presume to go beyond this ultimate source as their authority.) Our Constitution does not authorize courts to engage in natural-justice judicial review. And the principles of natural justice themselves do not prescribe a particular theory of judicial review. Indeed, the logic of morals, while it prescribes republican government, does not require judicial review at all. Of course, we as a people could decide, ironically enough through an act of positive law, to have natural-justice review, but we have yet to do so. Should we?

For those who hold to “first things,” those things must shape our politics. The question is how. It is a threshold question Arkes should have taken up, for as between the elective branches and the courts, there are good reasons why it is the former but not the latter that may repair to moral reasoning in their decision-making. The elective branches are closer to the people than judges who are
not elected but appointed, and the mechanisms for correction of wrong legislative decisions are more easily engaged than those for correction of wrong judicial decisions. Furthermore, and most important of all, people should not be held liable in courts of law unless the behavior in question has been specified in advance in positive law as being behavior that should be punished. To do otherwise, as might be done by a judge going "beyond the Constitution," would be manifestly unfair.

Arkes's treatment of legal positivism, it must be said, leaves much to be desired. Arkes seems to think that all legal positivists are necessarily moral skeptics or moral relativists. Indeed, Arkes unfairly criticizes Bork in this regard, given that Bork, in The Tempting of America, wrote that he was "far from denying that there is a natural law." The point must be emphasized that there are different kinds of legal positivists, and they are not equally deserving of Arkes's criticism, because not all of them are moral skeptics or moral relativists.

Beyond the Constitution unfortunately plays into the hands of left-wing judicial activists who have urged courts to go beyond our supreme charter, not to understand it as Arkes does, but to decide constitutional cases in accordance with theories of jurisprudence fashionable in many elite law schools. When Arkes writes that we "cannot apply the Constitution, in the practical cases that arise every day, unless we can move, so to speak, 'beyond the Constitution,'" I hear the activists applauding. That he has a far better understanding of justice than do most activists does not redeem his book. As a practical matter, if the written Constitution is not understood to be a rule for courts, judges will be free to govern by their various lights, which will rarely be those of Arkes's "natural justice." The much more prudent alternative, and the one more likely to achieve justice in the end, is for judges to engage in the hard work of interpreting the Constitution in its own terms, staying within its demanding limits.

Terry Eastland is a resident fellow at the Ethics and Public Policy Center. He is the author of a book on the Reagan and Bush presidencies, to be published in early 1992 by The Free Press.