

BOOK REVIEWS
Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law

BY HADLEY ARKES

Reviewed by Diarmuid F. O’Scannlain*

It was her last day of testimony before the Senate Judiciary Committee, and the question seemed to surprise Elena Kagan, the President’s nominee for the Supreme Court. “Do you believe it is a fundamental, pre-existing right to have an arm to defend yourself?,” asked Senator Tom Coburn of Oklahoma.¹ When Kagan began to answer by stating that she “accept[ed]”² the Supreme Court’s decision in *District of Columbia v. Heller*,³ which held that the Second Amendment guarantees an individual right to keep and bear arms, Coburn interrupted. He was not asking whether she believed the right to be protected by the Constitution, but rather whether she considered it to be a “natural right.”⁴ “Senator Coburn,” replied Kagan, “to be honest with you, I—I don’t have a view of what are natural rights independent of the Constitution.”⁵

Such agnosticism on the existence of natural rights is hardly uncommon among Americans today—which is why Professor Hadley Arkes’s latest book, *Constitutional Illusions and Anchoring Truths*, is so timely. Too many of us, Arkes rightly laments, have succumbed to the fallacy that our rights arise “merely from the law that [is] ‘posited’ or written down.”⁶ Few take seriously the notion of natural rights, *i.e.*, of rights grounded in nature, held by all humans as a matter of moral principle. Thus, Arkes notes, when we refer to the freedoms of speech and of religion, we speak of “those rights we have *through* the First Amendment,” as if their existence depended on the positive law.⁷ Or, like Kagan at her confirmation hearing, we speak of our right to keep and bear arms *under* the Second Amendment, as if the right was created by the Constitution.

Fortunately, Professor Arkes has made it his project once again to guide us back to the understanding of natural rights shared by our nation’s Founders. Throughout *Constitutional Illusions*, Arkes makes the point—forcefully and persuasively—that the founding generation was deeply attuned to the moral grounds of our rights. As Arkes observes, the Founders possessed “the remarkable capacity . . . to trace [their] judgments back to first principles.”⁸ Their writings are replete with references to a higher, unwritten law, accessible to human reason. The Declaration of Independence, which famously invokes the

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“Laws of Nature and of Nature’s God,” is but one example.⁹ Others include the *Federalist Papers*, several of which rely on “nature” and “reason” to justify general principles of law.¹⁰

It should come as no surprise, then, that the Founders’ understanding of natural rights informed the framing of the Constitution itself. Arkes gives, as one example, the Constitution’s prohibition on *ex post facto* laws—on laws that impose retroactive punishment.¹¹ “For the Founders,” Arkes explains, “the principle on ‘*ex post facto*’ laws was one of those deep principles of lawfulness that had a claim to be respected in all places, or incorporated in the basic law of any country that would claim to be a civilized country under the rule of law.”¹² Indeed, Arkes recounts, the principle was so obvious and fundamental that some questioned the need to make it explicit in the Constitution.¹³ James Wilson, for one, feared that doing so would “proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.”¹⁴

Arkes cites, as another example of a constitutional provision grounded in the natural law, the First Amendment.¹⁵ Here, Arkes’s work dovetails nicely with that of another eminent constitutional scholar, Philip Hamburger. In an article entitled *Natural Rights, Natural Law, and American Constitutions*, Hamburger demonstrates that the Founders regarded the freedoms of speech and of the press as natural rights—rights individuals had even in the absence of government.¹⁶ Writing in 1789, for instance, Roger Sherman declared “the rights . . . of Speaking, writing and publishing their Sentiments with decency and freedom” as among the “natural rights which are retained by [the people] when they enter into society.”¹⁷ Patrick Henry similarly invoked “the freedom of the press” as one of “the rights of human nature.”¹⁸ Given such statements, it can hardly be doubted that the First Amendment reflects the Founders’ understandings of the natural law.

For Arkes, however, the main significance of the Constitution’s natural-law origins is jurisprudential rather than historical. Echoing themes from his earlier works,¹⁹ Arkes argues that if judges are “to apply the Constitution sensibly,” they must “appeal beyond the text of the Constitution” to “those deeper principles that informed and guided the judgment of the Founders as they went about the task of framing the Constitution.”²⁰ In Arkes’s view, the line separating law and morals is a thin one, and judges must sometimes engage in moral reasoning and give effect to “the first principles of . . . moral judgment,” when interpreting the Constitution.²¹

Arkes readily acknowledges that the “philosophic” reading of the Constitution he advocates will be difficult for many judicial conservatives to accept,²² and I must admit that I myself harbor reservations about his proposed method of interpretation. It is not that I question the existence of natural law or natural rights; I embrace the Declaration of Independence and the “self-evident” truths expressed therein.²³ Nor is it that I question the influence of natural-law philosophy on

* *Hadley Arkes’s Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law is published by Cambridge University Press.*

the framing of the Constitution. Abraham Lincoln, himself a devoted student of the Founding, perhaps said it best: “The Declaration is the apple of gold; the Constitution is the frame of silver. The Constitutional frame is made to fit the apple, not the other way around.”²⁴

Be that as it may, it does not follow, in my view, that judges have the authority to enforce principles of natural law beyond the text of the Constitution. As Robert P. George has explained, the proper scope of judicial authority is itself a question of the positive law of the Constitution.²⁵ And I believe the “judicial Power” conferred by Article III is limited in constitutional cases to enforcing the constitutional text, as understood at the time of its enactment.²⁶ This is not to say that the natural law is altogether irrelevant to the task of constitutional interpretation. It is of course relevant where a constitutional provision incorporates a principle of natural law. But even there, the judicial inquiry is a historical one, not a philosophical one; the question is how the relevant principle was understood at the time the provision was enacted—not how the principle ought to be understood as matter of abstract moral philosophy.²⁷

Consider, in this respect, the recent controversy over the meaning of the Second Amendment. The question presented in *Heller* was “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment.”²⁸ The majority (in an opinion by Justice Scalia) engaged in a historical inquiry into the natural right to bear arms which the Second Amendment was designed to protect.²⁹ It asked not whether the right to keep and to bear arms was *in fact* grounded in nature, but rather whether the founding generation *believed* it to be. As to that question, the majority held the answer is yes: At the time the Second Amendment was enacted, the right to keep and bear arms was understood to be part and parcel of what Blackstone called “the natural right of resistance and self-preservation.”³⁰ As such, it was not (as the dissent argued) a collective right, connected only with militia service;³¹ rather, it was an individual right, extending to possession of weapons in the home for self-defense.³² On that historical understanding of the right—rather than a philosophical understanding of natural law—the Court declared the D.C. handgun ban unconstitutional.³³

Like Arkes, I am a believer in natural law, and I recognize its influence on the framing of the Constitution. But as *Heller* illustrates, the relevance of natural law to the task of constitutional interpretation is limited. Where, as in the case of the Second Amendment, a constitutional provision embodies a particular conception of a natural right, judges must uphold that conception, as understood at the time the provision was enacted. Judges have no authority, in my view, to go beyond that original understanding. It is not our role to enforce judgments of natural law, however correct they may be as a matter of moral philosophy, that have not been incorporated into the positive law of the Constitution.³⁴

After stating at her confirmation hearing that she did not “have a view of what are natural rights independent of the Constitution,” now-Justice Kagan stressed that her “job as a justice will be to enforce and defend the Constitution and other laws of the United States”; in that office, she would not “act in

any way” on the basis of her personal beliefs about natural law.³⁵ Arkes’s latest book is a timely reminder that none of us should be agnostic on the existence of natural rights. But with respect to the role of a federal judge under the Constitution, I believe Justice Kagan got it right. To interpret the Constitution faithfully, one need not believe personally in natural law. One need only respect the judgments of natural law enacted by the people throughout our nation’s history into the Constitution itself.

Endnotes

1 *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, WASH. POST, June 30, 2010, available at <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf>.

2 *Id.*

3 128 S. Ct. 2783 (2008).

4 *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, *supra* note 1.

5 *Id.*

6 HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 7 (2010).

7 *Id.* (internal quotation marks omitted).

8 *Id.* at 8.

9 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

10 THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 81, *supra*, at 545 (Alexander Hamilton); see ARKES, *supra* note 6, at 25.

11 U.S. CONST. art. I, §§ 9, 10; see *Smith v. Doe*, 538 U.S. 84, 92 (2003).

12 ARKES, *supra* note 6, at 28.

13 *Id.* at 26–27.

14 *Quoted in id.* at 27.

15 *See id.* at 261.

16 Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993).

17 *Quoted in id.* at 948.

18 *Quoted in id.* at 919 n.39.

19 *See, e.g.*, HADLEY ARKES, BEYOND THE CONSTITUTION (1990).

20 ARKES, *supra* note 6, at 6–7.

21 *Id.* at 12.

22 *Id.* at 7.

23 THE DECLARATION OF INDEPENDENCE, *supra* note 9, para. 2.

24 Abraham Lincoln, *Fragment on the Constitution and the Union*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy Basler ed., 1953).

25 ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 180 (2001).

26 U.S. CONST. art. III, § 1.

27 *See* GEORGE, *supra* note 25, at 181–82, 196.

28 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787–88 (2008).

29 *Id.* at 2788–2804.

30 *Id.* at 2798 (internal quotation marks omitted).

31 *Id.* at 2831 (Stevens, J., dissenting).

32 *Id.* at 2817–18 (majority opinion).

33 *Id.* at 2821–22.

34 See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 66 (1990); GEORGE, *supra* note 25, at 181–82, 196.

35 *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, *supra* note 1.

Institutionalizing Counterterrorism: A Review of *Legislating the War on Terror: An Agenda for Reform*

EDITED BY BENJAMIN WITTES

By Adam R. Pearlman*

Late last year, Benjamin Wittes compiled a series of ten essays that offer a range of suggestions for congressional action with respect to U.S. counterterrorism policies. He means for the text not to be taken as a fluid whole, but rather as a series of independent observations and examinations of the broad, complex swath of legal and policy issues encompassing the once-called War on Terror.

The authors of the various pieces range greatly in both their backgrounds and political persuasions. Contributors include noted scholars as well as practitioners, including former officials from both Democratic and Republican administrations, but, Wittes tells us, the common thread among them is “the belief in the value of legislative action to help shape the contours of the continuing U.S. confrontation with terrorism.” In this period of institutionalizing counterterrorism legal authorities in such a way as to recognize evolving strategies and constantly changing tactics, this text overwhelmingly favors statutory lawmaking to establish what can be done, rather than relying on jurisprudential fiat to decree what cannot.

What follows will read more like a “book report” than a book review, but, with a modicum of commentary interspersed throughout, it offers an outline of the key points of each chapter, with the goal of piquing the reader’s interest in this interesting compilation.

I. Mark H. Gitenstein: Nine Democracies and the Problems of Detention, Surveillance, and Interrogation.

Mark Gitenstein offers an informative review of the United States’ and eight other democratic countries’ practices with respect to the detention, interrogation, and surveillance, of suspected terrorists. Gitenstein begins with brief descriptions of Australia, France, Germany, India, Israel, Spain, South Africa, and the United Kingdom’s respective experiences with terrorism, discussing major attacks each country has faced and from what groups they face threats. He notes the uniqueness of the United States in terms of our governing structures (including the bifurcation of criminal investigation and intelligence functions), robust civil liberties, and the fact that those who would do us harm generally reside, train, and plan far from our borders. The post-9/11 treatment of terrorism as a largely military operation, Gitenstein says, is therefore partly a result of the fact that the American criminal justice process “is quite restrictive and because the enemy, in any event, tends to reside in areas where application of U.S. law is difficult.”

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