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Beyond the Constitution

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BEYOND THE CONSTITUTION. By *Hadley Arkes.* Princeton: Princeton University Press. 1990. Pp. ix, 278. $24.95.

In his 1986 book *First Things: An Inquiry into the First Principles of Morals and Justice,*[1] Professor Hadley Arkes[2] sought a return to what he termed the "original understanding of the foundations of law and polity."[3] For Arkes, this understanding encompassed a notion of moral principles not as fortuitous developments of cultural systems, and not as particular devices for the maintenance of a smoothly functioning societal machinery, to be retooled or discarded when they cease to serve their purpose, but rather as universal, eternal, necessary, and *discoverable* truths. Professor Arkes confronted the "widely traveled fallacy"[4] of moral relativism and decried the abandonment of an objective ethic that, Arkes maintained, had been fully within the most basic understanding of philosophers and statesmen from the ancients to the American Founders.

Bringing to bear an arsenal of Arkes' "first principles," *First Things* took aim at a host of modern ethical dilemmas, from abortion[5] to wealth redistribution,[6] from the welfare state[7] to the nation's participation in the Vietnam conflict.[8] With wit, logic, and perhaps an air of omniscience, Arkes made a case for the existence of moral principles carrying the force and inescapability of natural laws. But if the reader of *First Things* was convinced, by wave after wave of Arkes' carefully selected conundra and dogmatic syllogisms, of the existence of an objective morality, it was conviction without comfort. Arkes seemed so concerned with rejecting moral relativism that he ignored the difficulty in identifying the universal ethics that were to take its place.

Now, in his new book, *Beyond the Constitution,* Professor Arkes has turned his attentions and his ethics toward a different front: constitutional law. In *First Things,* Arkes disparaged what he perceived as a juristic trend, since the purer days of John Marshall and Joseph Story, away from a recognition of the moral principles that underlie the Constitution and toward the modern confusion stemming from a misguided textualism. In *Beyond the Constitution,* Arkes makes a

1. H. ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986).

2. Hadley Arkes is Edward Ney Professor of Jurisprudence and American Institutions at Amherst College.

3. H. ARKES, *supra* note 1, at 8.

4. *Id.* at 6.

5. *Id.* at 360-422.

6. *Id.* at 309-26.

7. *Id.*

8. *Id.* at 232-87.

closer study of the relationship between the Constitution and the basic moral understandings that, he claims, its text merely reflects.

While the antagonist of *First Things* was moral relativism, in his latest book Arkes takes on its jural incarnation, legal positivism. Arkes decries the "modern heresy" (p. 14) — taught, he assures us, in all the law schools (p. 15) — that the basic principles behind the American polity came into being only with the promulgation of the Constitution in 1787. Lawyers and ordinary citizens alike, Arkes complains, "have come to speak the language of 'legal positivism' " (p. 81), claiming various rights only "under" or "through" the constitutional text. In fact, asserts Arkes, the Constitution is merely "a means, an instrument for conveying, in legal structure, the principles that marked the character of the American republic" (p. 40). And, says Arkes, the principles around which the Constitution was framed were part of a natural law understanding in existence long before the creation of the Constitution itself.

According to Arkes, the modern positivism has led to an almost idolatrous preoccupation with the constitutional text. Because the text is seen as the source of political rights and obligations, says Arkes, that text has become all-important, and the moral truths behind it have become obscured. The jurisprudence of the Constitution has become one of "slogans rather than principles," characterized by "convenient formulas produced by lawyers" and lacking a discourse for applying the first principles upon which the document is based (pp. 18-19). From this phenomenon, Arkes complains, has arisen a need to resort to tricky formulas and wordplay in applying the text to contemporary social dilemmas. The Framers, according to Arkes, intended only that the text provide general guidelines for applying, in each new case, what Arkes calls the "reasoning spirit" of the Constitution — a spirit animated not by the necessarily limited scope of the language, but by the universal principles that the text can only partially reflect (pp. 21-39).

Indeed, it hardly requires acknowledgement that, as Arkes suggests, the stiff eighteenth-century phrases of the constitutional text rarely apply with any clarity to dynamic twentieth-century problems.[9] How, then, would Arkes bring the constitutional text to bear on modern issues? Importantly, Arkes seeks neither to rediscover original intent by way of a "quaint project in 'historical' reconstruction" (p. 17), nor to fill in gaps in the text by appealing to dominant cultural notions of social justice. This is not to say that the "original intent" of the framers has no relevance for Arkes. Rather, for him the Framers' "intent" is relevant only as a means of understanding the moral laws that

9. Pp. 21-23. *See generally* L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 350-55 (1988); Rehnquist, *The Notion of a Living Constitution,* 54 TEXAS L. REV. 693, 694 (1976).

the framers themselves understood; it carries no inherent normative weight merely by virtue of its status as original intent.

This view sets Arkes apart from many modern conservative scholars. Both Chief Justice William Rehnquist and Robert Bork, for instance, ultimately embrace original intent not because of the insights it might provide into natural law, as Arkes does, but because it represents the first and best word on that positive law which is the Constitution.[10] At the same time, Arkes' refusal to accept prevailing social values as instrumental in interpreting the Constitution separates him not only from "liberal commentators on the law [who] have been quite willing to advance a 'living Constitution' " guided by contemporary mores (p. 11), but also from such critics of positivism as Ronald Dworkin, who would draw constitutional principles from the "nation's political traditions and culture."[11] Arkes, for whom the Constitution is a reflection of universal, natural law, finds the "habits of the tribe" (p. 13) of little value in divining constitutional meaning, whether those habits are traditional or modern in origin.

The Bill of Rights provides the starting point for Arkes' assault on constitutional positivism. Modern jurisprudence, Arkes laments, has confirmed the Federalists' fear that the Bill of Rights "would narrow our understanding of the rights that government was meant to protect" and "misinstruct the American people about the ground of their rights" (pp. 59-60). Contemporary treatment of the first ten amendments epitomizes for Arkes the dangers of venerating the text (pp. 58-80).

Most notable in Arkes' chapter on the Bill of Rights is his contention that these amendments, laying out as they do general rules for the interplay between personal rights and government interests, fail to provide adequate grounds for deciding specific ethical dilemmas. Arkes is correct in recognizing that even given broadly written rules like those in the Bill of Rights, many difficult cases can be decided satisfactorily only by applying a justification analysis that is narrow, fact-specific, and independent of the rules themselves — in essence, by asking whether, *given the specific facts of the case,* the government is justified in restraining an individual's liberty. In these cases, as Arkes asserts, "the Bill of Rights would make no difference in guiding our judgment" (p. 69), because even without a Bill of Rights the question must resolve itself to a weighing of individual interests against govern-

10. *See* Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting); Bork, *Judicial Review and Democracy,* in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1061 (L. Levy, K. Karst & D. Mahoney eds. 1986); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 14, 20-22 (1971) [hereinafter Bork, *Neutral Principles*]; Rehnquist, *supra* note 9. For an interesting commentary on Justice Rehnquist's notions of original intent, see Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?,* 10 U. PUGET SOUND L. REV. 351, 423-48 (1987).

11. R. DWORKIN, LAW'S EMPIRE 378 (1986).

ment ones.[12] But Arkes' critique of the Bill of Rights extends beyond these difficult cases: by narrowly labeling each issue as a "free speech" problem or a "due process" problem, he insists, the Bill of Rights obstructs our view of the underlying, independent principles of justification that should always be applied (pp. 58-80). As such, it does more harm than good.

In following this road, however, Arkes in essence rejects a rule-based regime in favor of a system of *ad hoc* adjudication — a system in which each case is decided based on a careful weighing of its own particular factors, *sui generis,* without regard to bright-line rules. One might seriously question whether such a system is practicable. Indeed, an important function of the Bill of Rights may well be to provide bright-line rules that obviate the need for fact-specific adjudication by clearly instructing government as to how it may, and may not, act.[13] Complete fairness is sacrificed for efficiency, adaptability for consistency.

Arkes also fails to recognize that even where written rules fail to dispose of a particularly difficult question and adjudication results, the rules serve another important function: they flag the principles that must be considered as fact-based adjudication proceeds. In constitutional jurisprudence, when a protected right is at issue in a case, a process is triggered which requires the balancing of the individual's right against the interest of the state in restricting it. This process has become automatic in our courts.[14] But without this shorthand mecha-

12. Arkes takes as an example the case Goldman v. Weinberger, 475 U.S. 503 (1986), involving an Orthodox Jewish psychologist in the Air Force who refused, contrary to regulations, to remove his yarmulke while indoors. As Arkes perceives it, "[w]hether Goldman had a 'right' to wear his yarmulke in the military would depend on whether there was a compelling, or even plausible, interest on the part of the government in preserving uniforms and avoiding the use of sectarian symbols." P. 69. A hypothetical amendment in the Bill of Rights preserving the "right to wear a hat" would add nothing to the consideration of this problem, Arkes contends, because "[w]e would still find ourselves weighing the question of whether the army could have a justification for imposing restrictions on certain kinds of headgear." P. 69. The addition of a specific "right to wear a hat" would not eliminate the task of analyzing whether, in this particular case, the government's interests were strong enough to justify restricting Goldman's personal freedom.

13. Ideally, a written Constitution would avoid litigation by enumerating easily understood rules for government to follow. Litigation would be avoided because neither government nor citizens would be confused about what the rules mean; there would be no need for courts to interpret the rules, and there would be little incentive for government to break the rules, knowing that any violation would be readily apparent and easily determined by the courts. In the real world, of course, rules cannot be perfectly expressed, nor can they be created to anticipate every possible situation; certainly, they can never achieve both ideals. In fact, common sense suggests an inverse relationship between the specificity of a rule and its adaptability. Thus there is a considerable gray area in which government action must be reviewed by the courts on a case-by-case basis. But Arkes' approach, taken to its logical conclusion, would seem to imply such a fact-specific adjudication in nearly *every* case (since facts will always differ slightly from case to case).

14. Consider, for example, the chain of "clear and present danger" cases involving first amendment rights, where the individual's right of free expression has been balanced against the threat to society that such expression has posed: Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States,

nism, in the form of the Bill of Rights, for signaling the need for justification analysis, one of two things is likely to happen: either rights must wither away outside the glare of constitutionally mandated judicial scrutiny, or the courts must of their own accord establish the existence of rights — a process beyond the reach of the electorate, subject only to the discipline of judicial precedent, and lacking the indelible permanence of an authoritative text.[15]

Arkes' mistrust of the Bill of Rights notwithstanding, he would not dispose of the written Constitution entirely. To Arkes, the Constitution stands as an estimable attempt at the mechanics of a representative government; federalism, separation of powers, checks and balances, and the like were innovations of considerable genius designed to aid public servants, already versed in the logic of morals, in their application of that logic to everyday governance. But these concepts, in Arkes' eyes, are not themselves dictated by the logic of democracy; they are merely prudential measures, "a frame of government, a legal structure" for the smoother functioning of the polity (p. 246). In this sense, the Constitution to Arkes is simply that which works best.[16]

Understanding this view of the Constitution as essentially a docu-

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249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); *see also* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

15. Such judicially established rights, of course, exist even with the Bill of Rights, a salient example being the "right to privacy" firmly set down in Griswold v. Connecticut, 381 U.S. 479 (1965), and alluded to or expanded upon in, inter alia, Carey v. Population Servs. Intl., 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Mapp v. Ohio, 367 U.S. 643 (1961). But it is worth asking whether the Court in *Griswold* would have discovered such a privacy "right" without the Bill of Rights from which to work. And unlike the textual rights of free speech, free exercise of religion, and the like, this privacy right exists much more at the whim of, and control of, the oft-changing personnel who make up our Supreme Court.

16. Graham Walker, in a recent work, writes that to Arkes the Constitution is "a windowpane, letting in on public life as much of the pure light of moral principle as prudence determines feasible." G. WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT 62 n.127 (1990). To Arkes, Walker continues, the goal of constitutional interpretation is "to arrive at the point where the glass is no longer even noticed because of the brilliance of the sunlight." *Id.* But for Walker, the difficulty with this view is that it

> seems to evacuate the very notion of a constitution; it reduces a constitution to a fiction of prudence. If, in the final analysis, this is what constitutions are, why then bother with them at all? Why not just set about making sure that those who hold the levers of power are virtuous and prudent?

Id. at 62-63 n.127. Walker's answer is that even moral realists like Arkes implicitly recognize that human beings cannot be *trusted* to be virtuous and prudent; that is, they doubt that leaders, unguided by a constitutional text, are capable of always (or even often) making the right moral decisions. *See id.* at 18-22, 60-61, 62-63 n.127, 149-52. One aspect of this argument is simply the recognition that, as I contend below, no adequate means exist of identifying ultimate moral truths or of reaching a consensus about what is virtuous (or, for that matter, prudent). Arkes fails to acknowledge this difficulty. *See infra* text accompanying notes 25-29. Another facet of the argument is the equally valid point that even given a hypothetical moral consensus, there is every possibility that leaders will choose not to act in accordance with it. This possibility, of course, would only be increased in the absence of written normative guidelines promulgated in a constitution. Arkes seems to recognize the usefulness of the Constitution in this sense when he

ment of utility is the key to understanding Arkes' approach to constitutional jurisprudence. If the Constitution is only a means of applying deeper principles of morality and justice, Arkes asserts, then certainly it cannot hinder the application of those principles (pp. 40-57, 112-49). Thus, in a case where application of such a principle is clearly in order, the absence of specific textual language should not prevent the principle from applying. And it is equally incongruous to apply the principle only through creative cajoling of the existing language to produce a textual mandate. For Arkes, the simple and logical step is to apply the principle directly, not under some forced logic tied to a specific clause but through the straightforward logic of *all* the clauses — of the very structure of a free and just society.

From this premise springs Arkes' complaint that the constitutional clauses have become "whole subsets or sections of our jurisprudence" (p. 82) — self-contained and self-perpetuating bodies of law that trigger "entirely separate logics and [give] rise to distinct lines of juridical construction" (p. 82). The effect, says Arkes, has been needless confusion in Supreme Court constitutional analysis. In this vein, Arkes chides the Court for splitting into factions based upon which clause is proper where the majority would, in fact, reach an identical result.[17]

For Arkes, this kind of battle of the clauses is both unnecessary and counterproductive. It is unnecessary because a case like *Edwards v. California,*[18] involving a state's restriction of emigration into its territory, can be decided with equal force using *either* the commerce clause or the privileges and immunities clause.[19] And it is counter-

refers to the document as a "special framework[] or regime[] with distinctive rules" (p. 92) which "supports a regime of freedom rather than a despotism" (p. 12).

Graham Walker's book also is notable in that, like *Beyond the Constitution,* it devotes considerable space to a critique of modern constitutional theorists who deny the applicability of normative morality to constitutional interpretation. *See* G. WALKER, *supra,* at 9-22 (surveying contemporary constitutional theory and its treatment of the role of moral norms).

17. He illustrates this problem using, inter alia, the case Edwards v. California, 314 U.S. 160 (1941); *see infra* note 18.

18. 314 U.S. 160 (1941). The case involved a California resident, Edwards, who had brought his brother-in-law, an indigent Texan, to California in violation of a Depression-era state law prohibiting the import of indigent persons. Edwards' conviction under the law was unanimously overturned on appeal to the Supreme Court, but the justices followed different lines of reasoning. The majority opinion applied the logic of the commerce clause, holding that the California law imposed an unjustifiable burden on interstate commerce, 314 U.S. at 170-77, while Justices Douglas and Jackson each wrote concurrences rejecting the commerce clause as a suitable mode of analysis and applying the privileges and immunities clause of the fourteenth amendment. 314 U.S. at 177-81 (Douglas, J., concurring), 181-86 (Jackson, J., concurring). Using the commerce clause to overturn a state law restrictive of personal movement, both concurring justices argued, inappropriately trivialized such restrictions by placing them in the category of regulations governing "the movement of cattle, fruit, steel and coal." 314 U.S. at 177 (Douglas, J., concurring). The right of interstate travel was more basic, inherent in the notion of national citizenship.

19. Underlying each clause, asserts Arkes, is the recognition of "the logic of a 'nation' " — a logic that implies "a territory in which people [are] free to move without encountering barriers cast up without warrant by the separate states." P. 89. Thus, as Arkes would have it, the "framework of the American Constitution," and not just a single specific clause, "creates a presumptive 'right' on the part of persons to travel freely within the territory of the United States," a

productive because analysis of cases within the strict boundaries of specific constitutional clauses obscures the need to refer to underlying laws of ethics. For Arkes, a right that arises from the logic of the Constitution, like the right to travel freely among the states, can in the end only be restricted "for reasons that are compelling and justified" (p. 92). And this kind of analysis, Arkes asserts, requires application of principles that are extraconstitutional — the "canons of justification," or "the standards that we use more generally when we try to distinguish between the justified or unjustified reasons for restricting personal freedom" (p. 93). The ground rules created by the Constitution — such as free movement among the states — imply to Arkes the application of extraconstitutional, natural law principles to judge disputes arising from those rules.

In this discussion of the clauses (pp. 81-111), Arkes again reveals his preference for case-by-case adjudication over a rule-based system, and his argument here is subject to the same critique as his treatment of the Bill of Rights.[20] However, here Arkes mistrusts the jurisprudence surrounding the clauses more than he mistrusts the text itself, and his barbs have some sting. As Arkes suggests, the Supreme Court's treatment of the clauses over the years has reduced analysis of many kinds of constitutional problems to little more than a "jural shell game" (p. 102). One aspect of this has been a judicial dishonesty about the supposed immutability and singularity of the clauses. Arkes quite rightly points out that while in some cases, such as *Edwards v. California,* the justices spar over which clause may properly be applied as if each clause is "freighted with a special juridical significance" (p. 102), in other cases the Court does not hesitate to treat the clauses interchangeably where the most obvious choice (say, the equal protection clause of the fourteenth amendment) is textually inapposite.[21]

Arkes also asserts that judges, while paying lip service to the clauses as self-contained, unique sets of principles, have in fact not hesitated to decide cases, almost subconsciously, according to extraconstitutional principles of justification (p. 110). This point, too, is well taken. In a sense, as Arkes writes, our judges "have acted in the

right that "arises distinctly from the character of the American polity." P. 92. Because the right stems from the logic of the Constitution itself, quibbling over which clause to apply is a superfluous exercise in hair-splitting.

20. *See supra* notes 13-15 and accompanying text.

21. P. 102. A telling example, mentioned by Arkes (pp. 100-03), is Frontiero v. Richardson, 411 U.S. 677 (1973), in which a U.S. Air Force regulation discriminating against servicewomen who sought to claim their husbands as dependents was struck down as violative of due process. During the previous term, the Court, in Reed v. Reed, 404 U.S. 71 (1971), had struck down similar discriminatory legislation by the state of Idaho on the basis of the equal protection clause. The *Frontiero* Court, however, could not use the equal protection clause because the fourteenth amendment does not expressly apply to the federal government. But the Court was not shy about transposing wholesale much of the *Reed* equal protection logic to the due process context — right down to a sentence, quoted from *Reed,* in which the words "Equal Protection Clause" were replaced with the word "Constitution" in brackets. *Frontiero,* 411 U.S. at 690.

style of men who have rediscovered natural law, and yet they themselves can speak only the language of legal positivism" (p. 110). Again, a potent example is the *Edwards* case, where despite the disagreement over which constitutional clause to apply — an issue the justices themselves saw as crucial — each separate opinion seemed finally to turn on the extraconstitutional, moral notion that indigence in itself is not a just reason for restricting personal autonomy rights.[22]

This core understanding of *Beyond the Constitution* — that the constitutional text should not get in the way of the extraconstitutional principles that must be applied in each case — also animates Arkes' notions of federalism,[23] especially in the context of civil rights (pp. 112-49). Here he argues that extenuated interpretations of the thirteenth and fourteenth amendments, or resort to the commerce clause to regulate Ollie's Barbecue in Birmingham, Alabama,[24] are unnecessarily strained means of dealing with the problem of private discrimination. If society views private discrimination as a wrong, as statutes like the Civil Rights Acts suggest, then action by the federal government against such discrimination need not be justified by barely credible semantic arguments. The Founders, Arkes asserts, understood that "the defense of [civil] rights formed the distinct mission of the federal government" as well as the very "rationale for the Constitution" itself (p. 124). As such, the logic of the Constitution would allow the national government to regulate local, private discrimination directly without feeling bound by any "state action" restrictions of the constitutional language.

Of course, this sort of argument lends itself readily to a "slippery slope" critique: where does federal action find its limits, and what is left of the role of state and local government? Arkes seems to suggest that the limits are those set by a combination of tradition and prudence (pp. 128-30, 141, 148-49). The Founders, he asserts, never intended that the federal government take over "that full matrix of the common law that was present already in the laws of the states" (p. 128) — laws on marriage, divorce, public amusements and displays, the preservation of the local peace, and so forth. And, says Arkes, the

22. *Edwards*, 314 U.S. at 177 (Douglas, J., concurring) ("Poverty and immorality are not synonymous."); 314 U.S. at 181 (Douglas, J., concurring) ("[T]hose who [are] stigmatized by a State as indigents, paupers, or vagabonds" must not be "relegated to an inferior class of citizenship."); 314 U.S. at 184 (Jackson, J., concurring) (" 'Indigence' in itself is neither a source of rights nor a basis for denying them.").

23. To Arkes, federalism is at best a set of "rules of prudence or statecraft" (p. 120) designed to foster local enforcement of the laws wherever possible; the federalist system does not represent " 'apodictic' or necessary truths" (p. 120) bound up with the very notion of a constitutional government itself. Because of this, then, for Arkes there is no "class of wrongs, within the reach of the law, but outside the reach of the national government." P. 111. The national government is competent under the Constitution to redress any wrongs, even narrowly local ones perpetrated by private actors; that the government does not do so should be considered merely an exercise of commonsense restraint rather than obeisance to the commands of any first principles.

24. *See* Katzenbach v. McClung, 379 U.S. 294 (1964).

national government would have no need to intervene in an area where local enforcement is quite adequate; only where some structure of the local government itself makes it either unwilling or unable to cope with injustice would federal regulation be required (pp. 129-30).

This is not an argument that is likely to ease the fears of diehard federalists. But Arkes' main point, that no wrong that deserves redress is beyond the reach of the federal government, does not lose its force for the intimidating breadth of its implications. Indeed, if the primary concern regarding such plenary federal power is the potential for abuse, it is not clear that such potential is present to a greater degree when power is exercised by the federal government than when it is exercised at the local level.

In its discussion of federalism here, as with its treatment of the Bill of Rights and the clauses, *Beyond the Constitution* is essentially a work of iconoclasm. If not quite denouncing as a false idol the constitutional text, if not quite taking the torch to it, Arkes would cast away the intricate, gilded reliquary built up around the text by years of literalist jurisprudence. He would reemphasize the message to an audience woefully distracted by the medium. But if his project succeeds in alerting us to the existence of principles of judgment beneath, and beyond, the textual Constitution itself, it leaves us grasping for a firm hold on just what those principles are. If we cannot reach a consensus on the meaning of the words, how are we to agree on the principles that give them their force? If we cannot interpret the letter of the Constitution consistently, by what means are we to understand its spirit?

The failure to address these questions satisfactorily is perhaps the greatest flaw of Arkes' book, and it reflects the obvious weakness inherent in any argument of moral realism. It is one thing to flag the existence of extralegal ethical principles; it is quite another thing to identify them; and it is a harder task still to propose a means for obtaining a consensus about them.[25] Not that Arkes suggests that absolute consensus is necessary, or even possible. But one detects curious evidence in *Beyond the Constitution* that Arkes fails to appreciate the deeper difficulties involved once a conversation takes on the language of absolute moral principles. In his first chapter, for instance, Arkes quotes a passage by Robert Bork:

> There may be a natural law, but we are not agreed upon what it is, and there is no such law that gives definite answers to a judge trying to decide a case.
>
> There may be a conventional morality in our society, but on most issues there are likely to be several moralities.[26]

25. *See, e.g.*, Bork, *Neutral Principles, supra* note 10, at 30; Bork, *The Struggle Over the Role of the Court*, 34 NATL. REV. 1137 (1982); Rehnquist, *supra* note 9, at 704-05.

26. P. 14 (quoting Bork, *The Struggle Over the Role of the Court, supra* note 25, at 1138).

Arkes takes this passage as an indication of the rejection, by Bork and other modern conservatives, of the existence of universal moral truths. But it seems here as if Arkes mistakes a recognition by Bork that people disagree — and always will — over what propositions *are* moral truths, for a denial of the *existence* of an absolute, if elusive, morality.[27] This is an error in perception that seems to follow Arkes throughout *Beyond the Constitution,* obscuring inevitable clashes between opposing moral schemata with the blanket epithet "moral relativism." Arkes appears slow to recognize that cutting through the moral relativists' smokescreen does not solve the problem of whose "morality," in the end, must stand as the true and universal one.

The difficulty of identifying norms becomes acute when we seek, as Arkes would have us do, to discover the principles that underlie the constitutional text. It appears that Arkes would posit, as the ultimate ethic animating the notion of a constitutional government, the principle that no one should be inflicted with a punishment or a burden without justification. Here is a view of the Constitution, and of morality, espousing personal freedom as its highest (but not its sole) value.

Perhaps this view is correct in an objective, universal sense. But the problem, readily apparent, is that its truth or falsity remain unverifiable. There may be some who would propose an entirely different animating principle behind the Constitution — the maintenance, for instance, of a regime in which no person enjoys any physical or psychic comforts which cannot reasonably be enjoyed by all. This is an equality-based schema, and, as with Arkes' first principle, there is support for it too in the text of the Constitution.[28] And yet, often it may conflict quite directly with the principle that Arkes espouses: providing for equality of comfort may require, at times, the punishment or burdening of individuals (through, perhaps, the removal of their property) without "justification." Or, it may simply be said that the goal of equality of comfort *provides* the "justification" necessary for consistency with Arkes' principle. But this too opens a Pandora's box: What amounts to "justification?" Some might find it in the struggle for absolute equality, others in the need to promote the "greater good," and still others in the mission of preserving, at all costs, the habitat of the horned owl.

These kinds of questions cannot be answered, as Arkes would seek

27. Indeed, Judge Bork would appear to recognize not only the existence of immutable "moral harms," but also the validity of using the law to proscribe them. *See* Bork, *Tradition and Morality in Constitutional Law,* in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 166 (M. Cannon & D. O'Brien eds. 1985). His complaint is not with the practice of "legislating moral standards," *id.* at 168; rather it is with the application by judges of their *own* moral views, irrespective of legislative or original intent. *See also* Bork, *Neutral Principles, supra* note 10.

28. *E.g.,* U.S CONST. art. IV, § 2, cl. 1; amend. XIII; amend. XIV, § 1; amend. XV; amend. XVI; amend. XXIV.

to answer them, through "the logic of morals." Every moral principle that aspires to universal application — "no punishment without justification" — would seem to require the presence of another moral principle to interpret it (the goal of absolute equality, for instance, to provide "justification"). Finally, the interpretation of morality (and justice, and the ends of a polity) must come down to a purely personal exercise, whether that person be Hadley Arkes, Ronald Dworkin, or one of the Founders. Natural law cannot break this moral freefall, because it is perceived differently by every natural lawyer. Moral truths are not like chemical reactions; they cannot be reproduced in a test tube. In the end, only intuition separates our ethics from being merely applications of prudence, of trial and error.

The fault of *Beyond the Constitution* is not its failure to prescribe a universal legal and political ethic free from subjective notions of truth; no one yet has done it, of course, no one may be expected to do it, and probably it is impossible. The fault, rather, lies in Arkes' failure to recognize the impossibility of the task. Most likely we can agree with Arkes that certain truths animate our Constitution, our polity, our basic understanding as Americans and free citizens. We may even be able to agree on what a number of those truths are. In this sense his book is important and helpful; it challenges us, gently, to back away from the words of the Constitution and seek out the truths behind them, to recognize the existence of greater principles that give life to the text. But *Beyond the Constitution* leaves one questioning the ultimate value of the enterprise. If judges, lawyers, and statesmen cannot agree, in our world of diversity, upon the superficial concepts contained in the clauses, one wonders how they are to identify the weightier principles that lie beyond the text. Ultimately, the language of moral realism fails at the task Arkes seems to have set for it; alone, in its essential indeterminacy, it cannot lay the foundation for a solid constitutional jurisprudence.[29]

These reservations notwithstanding, *Beyond the Constitution* is worth reading. It may be a book of political philosophy more than it is a book of constitutional analysis, and as such it may appeal more to the philosopher and the political theorist than to the lawyer or the constitutional scholar. For his part, Arkes can scarcely hide his desire that the book be read, in a most reflective mode, by judges above all others; one suspects, though, that we have moved too far along in our jurisprudence for Arkes' message to settle in the ears of a welcoming audience. If there is one thing that Arkes, the political philosopher, fails to appreciate fully about the esoteric world of the lawyer, it is the

29. *See generally* G. WALKER, *supra* note 16 (arguing that any constitutional theory based upon extraconstitutional moral norms must take into account the fact of moral indeterminacy, and pointing to Augustinian philosophy as the proper mode for application of morality to constitutional discourse).

lawyer's obsessive and ritual concern for precedent. To ask that our judges disregard two centuries of doctrinal buttressing of the clauses as so much extraneous clutter is to ask too much.

— *Christopher J. Peters*