On entering the Catholic Church earlier this year, Hadley Arkes explained that he had become convinced that the Church was fundamentally a truth-telling institution. He arrived at this judgment after repeatedly seeing the Church act as the lone voice of reason defending unpopular moral truths in an age of relativism. From his academic perch, Arkes, too, has defended these moral truths, casting doubt on the claims of some overly excitable commentators that the defense of life or the protection of marriage is the work of “Christianists,” “theocons,” or other Bible-thumping theocrats. Arkes’s latest book, written well before his baptism, shows that the anchoring truths of the natural law are accessible to reason and provide the proper lens for seeing beyond the illusions of some of the trickiest cases of constitutional law.

A professor at Amherst College since 1966, Arkes is one of the leading proponents of natural-law jurisprudence. His new book, Constitutional Illusions and Anchoring Truths, can profitably be read as the culmination of many diverse yet intertwined strains of Arkes’s thought. From moral philosophy to applied ethics and constitutional theory, the foundational role that moral reasoning plays in public life unites all his life’s work.

Arkes first made a splash on the political-theory scene with his 1981 book The Philosopher in the City. In what he described as “a manuscript in which Immanuel Kant meets Mayor Daley,” Arkes showed how principles of moral judgment — not only expediency or power — affect daily political realities, from the demands of civility to racial equality, from public education to the regulation of vice. His 1986 tome First Things provided a more elaborate philosophical defense of these first principles of moral judgment, drawing on the insights of Kant, Reid, and Aristotle. Comparing moral science to other sciences, Arkes argued not only that there are truths of morality, but that there are necessary moral truths — first principles of practical reasoning — that we regularly use in our judgments, knowingly or not. He then applied his moral theory to topics ranging from war and welfare to abortion and privacy.

In Beyond the Constitution, published in 1990 to the acclaim of political and legal theorists, Arkes made his most extensive case that interpreting the Constitution requires going beyond the written text to the principles that informed its drafting. With a particular focus on the Bill of Rights, Arkes showed how only a philosophical understanding of what was deserving of protection could identify which rights we possess by nature (and, thus, which ones the Framers sought to protect in the Constitution). He further elaborated this natural-rights jurisprudence with The Return of George Sutherland (1994). Through a
detailed treatment of the jurisprudence of this anti–New Deal Supreme Court justice, Arkes argued that both conservatives and liberals failed to grasp the moral grounding of Sutherland’s legal opinions and thereby lost sight of key principles of interpretation.

These points all converged in Arkes’s most penetrating analysis, Natural Rights and the Right to Choose (2002). This book included a detailed history of the “Born-Alive Infants Protection Act,” an act that Arkes drafted and defended through passage in Congress, to establish the “most modest first step” in explaining the logic against abortion “rights.” As Arkes showed in this book, the entire system of natural rights falls to pieces if a so-called natural right to choose abortion — i.e., to choose to kill another innocent human being — is upheld. Once, in the name of “privacy” or “autonomy,” a right to kill one’s child is established in law, the moral logic that explains the entirety of our other (real) rights is eviscerated. Having pointed out in this modest way that surely the child who survives an abortion attempt and is born alive deserves the protection of the law, Arkes worked this premise backwards to show that the same protection of law is deserved by the child in the process of being born (refuting justifications of partial-birth abortion), along with the child waiting to be born.

Constitutional Illusions, published this summer, builds on Arkes’s insistence that moral judgment pervades all politics, that it relies upon standards of judgment that are rationally accessible, and that understanding our Constitution requires grasping these moral standards. Provocatively, he challenges the conventional wisdom on issues such as “prior restraint,” substantive due process, and ex post facto laws.

Arkes opens the book with a defense of the natural-law foundations of our positive-law rights. Are the rights protected in our written laws bestowals on us lowly citizens by beneficent earthly rulers? Are some constitutional regimes better than others, and, if so, why? Answering these questions, Arkes insists, requires appeal to the natural law. He argues, for example, that the Founders understood that our right to speech comes not from the First Amendment that enshrines it, but from nature. Understanding the amendment’s protections, then, requires a philosophical grasp of its underlying moral principle.

While much contemporary work in natural law — especially the legal theories of John Finnis and Robert George — relies heavily on Aristotle and Aquinas, Arkes finds his main inspiration in Kant’s philosophy and in his own teachers’ seminal works: Leo Strauss’s Natural Right and History and Harry Jaffa’s Crisis of the House Divided. From the fact that we are rational animals who can give — and demand — reasons for action (and thus justifications of state coercion), Arkes develops the groundwork for a categorical imperative to act on a universalizable maxim. Failure to do so, Arkes argues, forces one into contradiction: “To the extent that we would govern our acts by principles of judgment that are true, the standards that are grounded in this way, in propositions that must be true of necessity, have an unsurpassed claim on us.” Arkes sees something like this at play in Lincoln’s insistence that “there was nothing one could cite to disqualify the black man as a human being, and the bearer of rights, that would not apply to many whites as well.” Force the principle of your judgment to apply to all similar cases, and bad reasons for action drop out of the picture.

With this theory of practical judgment in place, Arkes turns to a series of puzzling cases to pursue “the thread that runs through them and connects everything,” that is, “the move back to first principles and the moral ground of the law.” He begins by defending what has become viewed as indefensible economically conservative judicial activism: the majority opinion in 1905’s Lochner v. New York. Arkes argues that the Supreme Court, in striking down a New York law that limited the number of hours one
could work in a bakery, simply protected “the ‘natural right’ of the worker to his own labor,” labor that “did not belong, in the first instance, to the state.” Of course, one could not contract one’s labor for immoral or otherwise unlawful or unhealthful acts. But Arkes sees in the Court’s opinion the sound judgment that the New York statute was ultimately an arbitrary regulation, and thus an infringement of liberty. As the Court said, “No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power.” And as Arkes notes, the Court “seemed to recognize that even people in prosaic callings may find it quite as useful to have the freedom that we are quicker to attribute to the professional classes.”

Arkes also reconsiders the question of “prior restraint,” arguing that the Supreme Court doctrine against laws allowing the government to review and prohibit the publication of dangerous information is wrong, and incoherent: The reasoning in Snepp v. U.S. (1980) — which allowed the CIA to redact writings by Agency members before publication — contradicts precedents in the Pentagon Papers case (1971) and Near v. Minnesota (1931) without actually overturning these faulty cases. As Arkes sees it, to bring criminal or civil suit after the fact against someone who has recklessly published unjustifiably harmful information — e.g., classified documents that reveal undercover agents’ locations to an enemy, or reckless defamations — is to get the moral logic of responsibility backwards. Criminal or civil sanctions cannot repair one’s unjustly damaged reputation, to say nothing of one’s unjustly taken life. Instead, Arkes argues, the Court should allow the government to seek “prior restraint” in the publishing of such sensitive information, subjecting it to Court review before the damage is done. Granting that a suit seeking reparations after the fact is a valid legal action shows that the Court understands the wrong committed, but fails to see that once there are valid grounds for suspicion, the burden of proof should lie on the would-be publishers to justify their intended action.

Those familiar with Arkes’s work will find much to praise in Constitutional Illusions. But the standard criticisms will be made by the standard critics. The Aristotelians and Thomists will think his account of natural law is too Kantian, and thus too thin because insufficiently grounded in an understanding of human flourishing. Conservative jurists who think our constitutional regime leaves questions of the natural law entirely to elected legislators will think Arkes allows too broad a role for judges’ moral judgments — and his concluding “good word on behalf of the legal positivists” will do little to assuage their worries. All of these criticisms have some merit.

But none is fatal. Though Arkes does not claim the charism of infallibility, he has proven over his long academic career that he, too, is a truth-telling institution. For those who only now have recognized this truth about Arkes, reading Constitutional Illusions may prove to be a critical step in their own intellectual conversion.

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