Constitutional Illusions & Anchoring Truths

The Touchstone of the Natural Law

HADLEY ARKES

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Advance praise for
Constitutional Illusions and Anchoring Truths

"Hadley Arkes's *Constitutional Illusions and Anchoring Truths* clearly illustrates the value, famously emphasized by John Stuart Mill, of attending to important, carefully considered – if also unconventional, unsettling, or contrarian – arguments. Professor Arkes remains one of the law's most gifted and rewarding prose stylists."

– R. George Wright, Indiana University School of Law, Indianapolis

"Hadley Arkes is a well-known scholar, a superb stylist, and perpetual gadfly disturbing the peace of scholars on both the right and the left. *Constitutional Illusions and Anchoring Truths* continues his project of elaborating a 'natural law' approach to jurisprudence, which argues that implicit in widely accepted forms of legal reasoning is a commitment to certain principles of reason that transcend the text itself. He develops his argument through discussions of ex post facto laws, the Eleventh Amendment, substantive due process, prior restraint, and the Bob Jones case, and nothing indicates Arkes's skill as a writer and thinker better than his ability to find novel and fascinating perspectives on cases talked about endlessly by others. Constantly thought-provoking, chock-full of original insights, and elegantly written, this book is a powerful reminder to everyone that written law cannot be interpreted without reference to the fundamental moral understandings within which it is embedded."

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"In his extraordinary book, Arkes's powerful intellect, wit, encyclopedic knowledge, and grace are all on full display as he takes us through a number of landmark cases that we thought we knew – cases whose meaning, we thought, was firmly settled – only to have him show us that we do not know them as we thought we did. He shows us what a difference it makes if we read these cases with more attentiveness to their reasoning and a clearer sense of the logical properties of their propositions. In short, he shows us by his example how we, too, can be freed from the tyranny of understanding landmark cases through the eyes of others."

– Ralph Rossum, Claremont McKenna College

Constitutional Illusions and Anchoring Truths

This book stands against the current of judgments long settled in the schools of law in regard to classic cases such as *Lochner v. New York, Near v. Minnesota*, the Pentagon Papers case, and *Bob Jones University v. United States.* Professor Hadley Arkes takes as his subject concepts long regarded as familiar, settled principles in our law – "prior restraints," ex post facto laws – and he shows that there is actually a mystery about them, that their meaning is not as settled or clear as we have supposed. Those mysteries have often given rise to illusions or at least a series of puzzles in our law. They have at times acted as a lens through which we view the landscape of the law. We often see what the lens has made us used to seeing, instead of seeing what is actually there. Arkes tries to show, in this text, that the logic of the natural law provides the key to this chain of puzzles.

Hadley Arkes is Edward Ney Professor of American Institutions and Jurisprudence in the Department of Political Science at Amherst College. He is the author of six books, most notably *First Things* (1986), *Beyond the Constitution* (1990), and *Natural Rights and the Right to Choose* (Cambridge University Press, 2002). His articles have appeared in professional journals as well as the *Wall Street Journal*, the *Weekly Standard*, *National Review,* and *First Things*, a journal that took its name from his book of that title.

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For Michael Petrino '68 and Michael Petrino '03,
Jay Beech '67 and Scott Beech '99,
Doug Neff '70 and John Neff '09
Kevin Conway '80 and Jack '10 and Ryan '12

From the professor blessed by their presence in class,
And by their counsel in later years

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Introduction

The Anchoring Common Sense and the Puzzles of the Law

It might have been struck off in Verona. Or at least, that was the first inference likely to spring to mind, for the statute sounded as though it had been drafted in response to Romeo and Juliet, that it had been framed in contemplation of a city riven by small wars, with factions and families set off against one another. It smacked, that is, of a place "where civil blood makes civil hands unclean." And indeed, it had come from a city in Italy in the late Renaissance – in the fifteenth century – but it was from Bologna, and it decreed "that whoever drew blood in the streets should be punished with the utmost severity." Blackstone had noted the case in his *Commentaries on the Laws of England*, and he reported the judgment, reached after a long debate, that the statute was "not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit."[1] That the question should arise at all is a kind of testament to the enduring credulity of human beings – or the powerful need many people have to follow the rigid letter of the law rather than seek counsel in their own judgment, not guided by anything set down in the law.

For many people that diffidence may reflect a proper doubt about their own resources of judgment when left unguided or uninstructed. But the case was cited by Blackstone, and it was drawn in turn from Samuel Pufendorf's classic study of the law of nations. The example was cited in both of these venerable sources precisely because it was understood at once that the law made no sense when it was applied to the doctor using his arts to save a human life. The case was used, that is, by the classic commentators on the

[1] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, l765), Bk. I, p. 60. I am using here the edition published by the University of Chicago Press in 1979, with a copy of the original plates and preserving the same pagination.

law, to make a point that runs counter to the doctrines of postmodernism, or to the dressed up versions of moral relativism that put themselves forward in our own time under the title of "theories of law." The classic commentators understood that the positive law, the law that was "posited," or written down in statutes, could not exhaust the definition of justice. It could not possibly take account of all of the facts and circumstances that could make a difference for a moral judgment, a judgment on the rightness or wrongness, the justice or injustice, of the situation at hand. The classic commentators knew that there were serious limits to the law, but they also assumed that neither the law nor its practitioners would be witless. The law sprang from deeper principles of justice or moral understanding; and when the law itself, in its narrow focus, seemed to confront a case beyond its terms, or a situation beyond the imagining of its drafters, those deeper principles of the law might still supply guidance. And so, Blackstone offered the example of a law, passed by Parliament, assigning to a certain man the authority "to try all causes, that arise within his manor of Dale":

> [Y]et, if a cause should arise in which he himself is a party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.[2]

Blackstone would commonly refer to "the laws of reason and nature" as he sought to explain the grounds of judgment. We know, of course, that there are some tangled philosophic problems behind those innocent terms, "reason and nature." We know that people could invoke "nature" while not being entirely clear as to whether they were offering generalizations about the way that most men, most of the time, tend to behave, or whether they were offering "first principles" or axioms, which have the quality of "necessary truths."[3] But in either event, there was a certain confidence that there were things in the domain of moral judgment that were accessible to our reason. Propositions about right and wrong were not merely matters of the most personal and subjective taste. Certain things in this domain were indeed true, which is to say, objectively true, true for others as well as ourselves. And at the very least, a lifetime of reflection on the conditions of justice or the principles of right was not thought to impair judges in the exercise of that judgment. That they were only human, that they were given to mistakes and corruption, merely confirmed the setting and conditions of the law. That state

[2] *Ibid.*, at 91.

[3] That critical difference is taken up in my book *First Things* (Princeton: Princeton University Press, 1986), Ch. 4.

of affairs did not call into question the very capacity of human beings to grasp the difference between a plausible and an implausible argument, between a reasonable and a corrupted judgment.

I was delighted, though I shouldn't say surprised, to find that the example of Bologna was cited by one of my favorite jurists of the nineteenth century, the redoubtable Stephen J. Field. The case was *United States v. Kirby* (1868), and it involved an act of Congress, from 1825, directed against persons who "shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same."[4] Kirby, who was prosecuted under the act, was a sheriff in Kentucky. He had been charged with the duty of executing a warrant for the arrest of one, Farris, who had been charged with murder. Farris happened to be a carrier of mail, and on the day of the arrest he was on a steamboat with the mail. Kirby had called to his aid a small posse of men, and together they entered the steamboat with the purpose of arresting Farris. As it was noted later, in the report of the Supreme Court, Kirby and the posse "entered the steamboat Buell to make the arrest, and only used such force as was necessary to accomplish this end; and . . . they acted without any intent or purpose to obstruct or retard the mail, or the passage of the steamer." When Kirby's act was set, though, against a literal rendering of the statute – a rendering, that is, detached from any sense of the moral purpose of the statute – Kirby could be prosecuted for "obstruct[ing] or retard[ing] the mail."

But Justice Field, writing for the Court, found it incomprehensible that Kirby could be charged with any intention of "knowingly and willfully" obstructing the mails. His purpose was not to do anything with the mail, but to make a lawful arrest. The arrest might indeed have caused a certain interference with the mails, but people of ordinary sense could ordinarily make distinctions between interferences that were "justified" or "unjustified." As Field remarked, then,

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.[5]

This bizarre reading of the law might be dismissed, of course, by some commentators as a throwback to an earlier, less sophisticated time. But they would

[4] 74 U.S. 482.
[5] *Ibid.*, at 486–87.

be making a notable mistake, for they would discount the way in which the same fallacies show a remarkable staying power among jurists, especially those who are "winging it" in their moral and jural reasoning. The most notable example cropped up in the spring of 2003, as Justice O'Connor wrote for her colleagues in addressing, again, the problem of burning crosses, this time in the case of *Virginia v. Black*.[6] O'Connor recognized that a burning cross was established, quite clearly, in our experience, as a gesture of assault. We might say, from another angle, that the meaning of this symbol was rather firmly established in our "ordinary language," or the way in which people commonly understand the meaning of words and symbols. In the case at hand, arising from Virginia, youngsters had burned a cross in the backyard of a black family newly moved into Virginia Beach, and in a companion case, a cross was burned at an outdoor meeting of the Ku Klux Klan in Carroll County. A statute in Virginia barred the burning of crosses with "an intent to intimidate a person or group of persons." The Court showed its willingness to break away from an earlier decision on the burning of crosses, and acknowledge more readily now that this gesture of assault could be restricted under the First Amendment even though it was a species of symbolic expression.

But in a curious turn, the Court professed to be more willing to sustain convictions in these cases because the statute did not seek to ban speech directed at only certain favored classes of victims. That had been the concern animating Justice Scalia, eleven years earlier, when he wrote for the Court in striking down an ordinance in St. Paul, Minnesota, forbidding the burning of crosses.[7] Faced then with another case, in 2003, the judges found ingredients in the case that meshed with Scalia's earlier opinion. As Justice O'Connor noted, the burning of crosses had been used in the past against Catholics and Jews, as well as blacks; and the statute did not tie the act of intimidation to any particular group of victims. Still, over the last fifty years, the burning of crosses has been understood rather plainly as a symbol of assault against black people. Nevertheless, the Court decided to strike down the conviction of Barry Black, leading the meeting of the Ku Klux Klan, because the Supreme Court of Virginia had interpreted the statute with this rule of construction: that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution." As Justice Scalia pointed out in dissent, the instruction offered to a jury did not bar evidence that would overcome the presumption, and permit the defendants to show that they had

[6] 538 U.S. 343 (2003).
[7] *R.A.V. v. St. Paul*, 505 U.S. 377, and see 380, 396 (1992).

not intended any act of intimidation. Yet, even Scalia was disposed to send the cases back to get a clearer reading of the intent of the people burning crosses. What made the issue more complicated for Justice O'Connor was the sense that not every act of burning a cross necessarily marked an intent to assault or intimidate. As O'Connor observed, "Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake."

But with that move of seeming open-mindedness to the world, the Justice detached herself from the moral reasoning that must ever be a part of the common sense that is incorporated in statutes – as in the case of Bologna in the fifteenth century. In the classic case of *Chaplinsky v. New Hampshire* (1942),[8] Justice Murphy described that category of insulting or "fighting words" – "those which by their very utterance inflict injury or incite to an immediate breach of the peace."[9] They were words or symbols, once again, clearly fixed in our language, at any given time, words such as "nigger," "kike," "wop" (and, not so clearly, words like "meter maid" or "telemarketer"). Even people unbedecked with college degrees, people who made their livings, say, in driving trucks or digging ditches, show the most acute sense of when they are being insulted or even subtly disparaged. And yet, at the same time, people commonly understood what linguistics also taught: context was utterly necessary to meaning. Justice Murphy caught that sense of things when he referred to words spoken "without a disarming smile." A person of ordinary wit would understand the difference between people cavorting in Nazi uniforms at the annual satire of the Harvard Lampoon, as compared with a bunch of scruffy characters parading with Nazi banners and uniforms in a Jewish neighborhood in Skokie, Illinois. In the same way, people could grasp, at once, the difference between a hostile mob and the crowd that welcomed home the Boston Red Sox after they had won the World Series. When a statute bars the burning of crosses, targeted at classes of persons, no one with a modicum of wit could suppose that the statute was doing anything but condemning and forbidding. What it figured to forbid were wrongful acts, acts animated by the intention of assaulting or intimidating. And no one could have supposed for a moment that the statute meant to forbid, say, the burning of crosses in a theatrical production or a film such as "Mississippi Burning."

In other words, the legislators were not acting in a random way, without moral common sense – and neither, as it turned out, had the assailants. Mark Russell once told the story of a family of Unitarians who moved into

[8] 315 U.S. 568.
[9] *Ibid.*, at 571–72.

a southern town. In the middle of the night some bigots burned a large question mark on their lawn. Something like that might have taken place if the young men in Virginia Beach had chosen, say, to paint swastikas on the house of the black family. There would have been an act of defacing property, but the assailants might have been counted as too witless to know what they were doing in carrying out acts of intimidation. The assailants in Virginia did not suffer that distraction or confusion, and they did not choose at random from the symbols available to them in our language. They chose a burning cross, planting it in the yard of a black family, and that joining of moves should have been sufficient to mark the understanding of what they were plainly doing. The Supreme Court in Virginia had not slipped then into carelessness when it offered as a presumptive rule that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution" – with the defendants free, of course, to rebut that presumption. And unless justices of the Supreme Court were consumed with theories so refined that they apply only to a closed system of their own, there should have been no need to send the cases back for clarification in a lower court. The meaning of the act should have been plain enough to be judged by people of ordinary sense, who find themselves every day making discriminations among the acts that are threatening or harmless, justified or unjustified.

And so, in a scene quite familiar, a person arrives home from work and discovers that the street containing his house has been blocked off, and his entrance barred. It makes the most notable and elementary difference as to whether it was barred, say, by the fire department, because firefighters are putting out a blaze; or whether it was barred through the obstruction of a gang, closing off the street to its enemies. In common parlance, we can distinguish between cases in which the access is temporarily barred for a purpose that was *justified* or *unjustified*. The Constitution does not seek to bar all searches and seizures, but only searches that are unreasonable or unjustified. As I sought to show then in another place, the task of judgment, in our constitutional law, persistently moves us away from the text, or from a gross description of the act, and it moves us to the commonsense understanding of the principles that guide these judgments: the principles that help us in making those distinctions between the things that are justified or unjustified.

As we make that move to the ground of our judgments, we find ourselves moving back to those deeper principles that informed and guided the judgment of the Founders as they went about the task of framing the

Constitution. I argued sometime back, in a book called *Beyond the Constitution*,[10] that there was a need to appeal beyond the text of the Constitution to those "first principles," those principles antecedent to the Constitution, if we were to apply the Constitution sensibly to the cases that arise in our law. As I sought to argue, that kind of move requires a certain practice, or a kind of reflection that is distinctly philosophic. It involves a certain style of principled reasoning, a style that was cultivated quite handsomely by the jurists in the Founding generation, and even by jurists in Abraham Lincoln's generation, even though many of them did not have the advantages of formal schooling.

In the course of making that argument, I offered as a dramatic case in point the original argument over the Bill of Rights. It seems to have slipped from the memory of most of our people – indeed, if it was ever lodged in that memory – that there was quite a serious debate about the Bill of Rights at the time of the Founding. The reservations about a Bill of Rights did not spring from people who were hostile to rights, but quite the reverse. There was a serious concern, held by some of the most thoughtful among the framers, that the Bill of Rights would have the effect of narrowing, or truncating, the rights that were protected under the Constitution. And it would have that effect mainly because it would misinstruct the American people about the ground of their rights. It has become quite common in our own time to hear people speak of "those rights we have *through* the First Amendment." But the understanding contained in that passage reveals precisely the problem. When we speak of those rights we have "through the First Amendment," does that not rather imply that the Amendment was the source of those rights? In the absence of the First Amendment, would we not have had those rights?

The Bill of Rights ran the risk of shaping the understanding of citizens and lawyers to this fallacy: that our rights did not spring from nature, from the things that marked our character as human beings, but that they arose merely from the law that was "posited" or written down. The rights mentioned in the Bill of Rights would be thought to have then the standing of rights, or their claim to solemnity, precisely because they had been written down, or stipulated in an inventory of "rights." The assumption would engage itself slowly, but steadily, that the things written down were far more important as rights than the things left unmentioned. In this subtle shift we find the essential move from natural rights to positive rights, from rights grounded in the nature of human beings as "moral agents," to the sense rather of rights that have standing as rights because we have decided, as a people, to confer

[10] (Princeton: Princeton University Press, 1990).

them on one another. In the age of a relativism so portable and facile, so deeply absorbed that it is rarely even noticed, many people by now have made the shift to the latter understanding without being aware that they had made any shift at all. Much less are they aware that they had made a decisive moral break from the premises of the American Founders.

In recovering this sense of the problem, I was trying to make the case for recovering at the same time the understanding of that Founding generation, for those lawyers and political men revealed furnishings of mind quite strikingly different from those of our own day. Consider the contrast: on the one hand a group of lawyers who have memorized a list of rights, set down in the first eight amendments to the Constitution; on the other hand, a generation of lawyers who had cultivated the art of tracing their judgments back to first principles and anchoring truths. There is no need for me here to renew the argument over the Bill of Rights; but there is ever a need to restore the remarkable capacity of that first generation of jurists to trace judgments back to first principles. My purpose in this book is to draw again on that perspective, cultivated long ago, for the sake of casting new light on parts of our Constitution that have remained in a curious shadow. These clauses, or doctrines, in the Constitution have become obscure to us, not because they are hidden and unfamiliar. They have become obscure, rather, because they have been placed beyond our sight, or beyond the kind of sight that looks closely, in a probing way, as though it were looking for the first time. These parts of our constitutional law have become hidden to us, even before our eyes, because they have been closed off to our inspection by understandings too quickly and complacently settled. But if we looked upon these clauses or doctrines with a fresh eye, or if we treated them as puzzles, we would find that they bear a certain mystery that beckons us in. If we respond to that beckoning, we would find, I think, that we would be drawn back to the root, to the philosophic ground of our understanding, before we could finally unlock the puzzles here, in the parts of the Constitution that we have thought, in the past, most firmly and serenely settled.

To take one notable example, the question arose during the Constitutional Convention in Philadelphia as to whether the framers should descend to the exercise of specifying particular kinds of rights, such as the right not to suffer the imposition of laws made "ex post facto." Roughly speaking, those were laws made after the fact, imposing penalties or enlarging them. And with this kind of a move, the law would make punishable something that had not been considered wrongful before the passage of the law. Or at least that was, by and large, the sense of the problem with "ex post facto laws." And yet, when the proposal was made to mention ex post facto laws explicitly, in the

body of the Constitution, both Oliver Ellsworth and James Wilson entered some rather refined reservations. It was not that they doubted in the least the wrong of ex post facto laws. It was rather that the wrong was so obvious, and so widely known, that it was almost embarrassing to set it down as though the framers were proclaiming news.[11]

If there was any principle of constitutional government that had, for the Founders, a necessary force and a crisp definition, it was the principle that barred ex post facto laws. And yet, as I will try to show, there is a certain puzzle about the meaning of "ex post facto" laws, which emerges as soon as we look more closely into the subject. We come to discover, for example, that there are many instances, in our experience, of laws applying *retrospectively*. The fact that they administer surprises, and catch people unaware, has not been regarded as a decisive count against them. Consider – as we will later – that unlucky fellow, the first man to be sued because he had given herpes to his partner in sex. There had been no statutes or laws on the subject. No court had found people liable in the past for affecting others with the virus. And yet, courts came to the judgment *that he should have known*. What exactly he should have known and how he should have known it – those things I'll consider in due course in the opening chapter. I would also underscore the point that the law had placed these burdens of "knowing," not on people trained in the law, or people in high office, but on ordinary folk, of no special distinction, who were simply functioning in the world. Still, there are stories to tell in the ranks of the celebrities as well. During the 1980s, some rather important people, in offices of state, were embarrassed by certain laws, bristling with moral consequence, which were enacted and enforced *after the fact*. It is curious that even the engagement of celebrities did not seem to draw much attention to the fact that they had become the targets of ex post facto laws. The matter seemed to go strangely unnoticed by the world of law – but on that, more later.

I would suggest, then, that we treat the matter as the puzzle it is, and open ourselves to the mystery contained in the problem. For when we do, we find that the strands or the paths of reflection will lead us back to a philosophic root that runs even deeper. In the course of following out those paths, we may also illuminate something more about the conditions of constitutional government and that creature who is destined, by nature, to live in a *polis*, an association governed by law. To deepen the problem, I'd suggest that some of the same points of fascination can be found by treating, as problematic, other

[11] *The Records of the Federal Convention of 1787*, ed. Max Farrand (rev. ed. l937) (New Haven: Yale University Press, l966), Vol. 2, p. 376 [August 22].

notions that have been long settled. One such famous notion, passing from concepts into legend, has been the notion of "prior restraints" on publication. That term achieved a remarkable standing only in 1931, in the classic case of *Near v. Minnesota*. But by the time we reached the Pentagon Papers case in 1971, it was clear that the term had a near iconic standing. In that sweep of development, all too uncritical, something of moral substance was lost. I propose to take another, critical look at those cases, with the willingness to argue that the decisions in those cases might actually have been wrong; that there really could not be a plausible principle of constitutional law that rules out, categorically, all species of restraints in advance of publication. In that respect, I find myself running against the dominant lines of interpretation, which have hardened now into orthodoxies in the schools of law.

And just to make that point even clearer, I take the occasion, in one chapter, to offer, not an apology, but a defense of *Lochner v. New York* (1905). That case seems to inspire an even-handed condemnation, from the political Right as well as the Left. Yet, if we could detach ourselves from the slogans built up over the years, and look at the case again, it would become apparent, I think, that the cast of argument in *Lochner*, with Justice Rufus Peckham's opinion, marks the cast of our law today. For Justice Hugo Black and the judges of the New Deal, it became important to reject *Lochner* and discredit its principles. But after *Griswold v. Connecticut* in 1965, the Court brought forth a new jurisprudence, grounded in notions of "privacy" and personal autonomy, and that new doctrine would soon encompass a "right to abortion." Justice Black was a notable dissenter in the Griswold case, and it should have been apparent to anyone with the slenderest acquaintance with the law that the decisions on privacy and abortion had to rest on the most thoroughgoing rejection of the liberal jurisprudence of the New Deal. That is not to say that the jurisprudence of Rufus Peckham and the Old Court would have brought forth a "right to abortion." But it does suggest that any serious defense of rights will find its way back to the logic of natural rights, and there the understanding of Peckham and the Old Court would provide a more coherent fit. In fact, if we look again, and look anew – if we look with a willingness actually to read Peckham's opinions – we would find, in Peckham and his so-called conservative colleagues, a far more expansive view of personal freedom than the view we associate with the liberal judges of the New Deal. And if the question of the case arose for us in another form – say, in restricting the hours of work for assistant professors, or for people spending long hours over keyboards – the response of the judges is virtually certain to follow the lines of Peckham's understanding in *Lochner*. Peckham and *Lochner* are remarkably closer to us than most commentators seem willing

to acknowledge, for as I will try to show, the understanding of the law in *Lochner* provides the template, or cast, of the law in our own day. It is the law we would choose again for ourselves whenever we are given the occasion to choose.

It is not my purpose to entertain with paradox, but it is part of my design to entertain by drawing the reader to a series of genuine puzzles that spring from our constitutional law. They are puzzles that have drawn my own deep interest over the years, and I decided finally to collect them, in a series of chapters that would offer the occasion to reflect on these cases in a more searching way, and pursue the threads that run through them. But the point that bears repeating is that the thread that runs through them, and connects everything, is the move back to first principles and the moral ground of the law. I would point out then that those threads, and the design, were there from the beginning, and it is mainly an accident that the first four essays seem to be shaped for quite different occasions. The first was a Bradley Lecture at the law school of Notre Dame in February 1999. The second was a lecture offered in Washington in April 2006 to launch the new Ralph McInerney Center, in honor of the legendary teacher, Thomist, novelist. The third was offered as a lecture at Princeton, in February 1997, as part of the celebration of the 250th anniversary of the university.

The lecture at Notre Dame offered me a chance to explore some of those understandings long thought settled in the law – notions such as "bills of attainder" and "ex post facto laws," laws casting blame and responsibility after the acts of wrongdoing had been committed. As I pursued the puzzle, the solution could be unlocked only with the understandings contained in the natural law. I could be counted, in my writings over the years, as a contributor to that project on the revival or restoration of natural law. John Finnis's book *Natural Law & Natural Rights* (1980) was an important marker here. My own version followed a different path, closer to the summons of my late teacher Leo Strauss in his *Natural Right and History* (1953). But my own work was far more precisely shaped by his devoted student Harry Jaffa in *Crisis of the House Divided* and the vast body of his writings. My book *First Things* (1986) offered another statement in this accumulating series of works, and yet it was not often noted as a work in natural law. For the advent of the McInerney Center, nothing seemed more apt than sounding anew the case for natural law. This launching of the Center offered then the occasion for me to try my own restatement of the issue. In the fall of 2008, I was invited to offer my latest refinement of this essay as a plenary address at the Maritain Society, meeting in Boston. The society is filled with colleagues who have made careers in the study of Thomas Aquinas, and it is fair to say that

they are amply familiar with the literature on natural law. The reaction of this audience was buoying. Their response finally confirmed my sense that this essay should be part of a manuscript in which the key to a series of enduring puzzles in the law would be found in the natural law.

And so, while the occasions were various, along with the wines, I hope the reader will not be distracted by the sudden changes of scene, but notice, in these essays, a student of the law and politics pursuing the threads of the same set of concerns. I have brought together then a collection of puzzles I have found deeply engaging, but to switch the figure, the key that unlocks the various puzzles is to be found by returning to the axioms of the law, in the first principles of our moral judgment.

Part of my theme in these essays is to point up the fact that a Constitution, with settled understandings, and supposedly settled principles, may keep generating, for us, unsettling surprises. But that is in part the charm, and the deep magic, of real principles. With their abstract sweep, they can be detached from the instances of daily life that are more familiar to us, and suddenly cover cases we had never anticipated. And yet, more than that: They bring forth, in novel cases, implications that we had never seen lurking in them. That task of drawing them out may often be bracing, and yet it may also be jolting. It may be the source, as I say, of surprises that unsettle. I trust that the reader will see, from the outset, that my purpose is not to keep things unsettled, but to settle again, settle more surely – but with the awareness that the same questions, at another time, may be opened yet again. We may suddenly look at these doctrines of the law from another angle, as I seek to do here. Still, I hope the reader may find something either consoling or persuasive in the notion of settling judgments on a ground rendered ever firmer by "first principles," and yet preserving through it all a certain willingness to find puzzles lurking in cases and doctrines that were once thought to be comfortably settled. With that sense of the matter, I would beckon the reader in and consider, as I did at the law school at Notre Dame, the unsettling surprises that may still be served up by the most settled of constitutions.

One

On the Novelties of an Old Constitution: Settled Principles and Unsettling Surprises

There was a moment, in Evelyn Waugh's *Brideshead Revisited*, when the young, reflective, eccentric Lord Brideshead pondered aloud over the chapel attached to the family castle. Young Brideshead turned, in his thoughts, to the quality of the chapel as a work of architecture, and he took advantage of the presence of Charles Ryder, who was a student of art. "You are an artist, Ryder," he said, "what do you think of [the chapel] aesthetically. . . . Is it Good Art?"

"Well, I don't quite know what you mean," said Ryder. "I think it's quite a good example of its period. Probably in eighty years it will be greatly admired."

"But surely," said Brideshead, in the voice of Aristotle or Kant, "surely it can't be good twenty years ago, and good in eighty years, and not good now?"

Ryder spoke with the convictions of the modern historicist: He would not claim to speak about the things that are "good" or "bad" outside that epoch in which he lived and cast his judgments. Judgments of right and wrong, in aesthetics as well as politics, were always "relative," in this view, to the place and the time. He would not speak across historical epochs and pronounce on the goodness or badness of the buildings that were built in ancient Athens or in Paris at the turn of the century. He would not speak, that is, about any things that might be enduringly good. Brideshead seemed to grasp almost intuitively the logic that had to attach to the notion of "commending" a "good." It was a matter of moving beyond "personal feelings," to the grounds of reason that made a thing "good" for others as well as ourselves. It was a shift from notions of good that are entirely personal, subjective, and perhaps ephemeral, to notions of a good that are reasoned, impersonal, universal, and far more enduring.

In our own time, the notion of a "living Constitution" has been affected, in turn, by the "historicism" that pervades the world of letters. The Constitution is "adapted," as they say, to our own age. That can be done either by applying the principles of the Constitution to new cases or by suggesting that some of the provisions of the Constitution no longer fit the sensibilities of our time. Hence, the remarkable finding, on the part of Justices Thurgood Marshall and William Brennan, that capital punishment cannot be constitutional any longer, by the advanced views of our own generation, even though the Constitution contains several references to punishment for capital crimes. The Constitution also assigns, explicitly, to Congress the authority to alter the appellate jurisdiction of the federal courts. But when Congress showed signs of making use of that provision, on the matter of abortion, commentators came forth to suggest that this part of the Constitution had been repealed by the march of time. Professors of law offered the opinion, solemnly, that this part of the Constitution could no longer, decently, be used by the Congress even though it remained a part of the text.

But we might ask, in an echo of the young Lord Brideshead, how could the Constitution be good in one period and not good in another? If the principles of the Constitution prescribe what is right and bar what is wrong, why would they not enjoin or forbid the same things fifty years from now as well as today? They would enjoin the same things if those principles are true principles – if they name the things that are truly right or wrong. And so, if the Constitution condemns and forbids "bills of attainder" or ex post facto laws, would we not assume fifty years from now that the Constitution still meant to stamp these things as wrong and forbid them to us? We may discover that there is more of a mystery about these terms than we usually suppose – that they are not quite as clear, or as crisp in their edges, as we have been inclined to assume – and yet, we don't suffer a moment's doubt that whatever they are, bills of attainder or ex post facto laws were things that the Constitution meant to forbid.

These considerations may be elementary, and yet they may at times be elusive, and the temptation to evade these axioms may be seductive. They were especially seductive during the Depression, when legislators sought ever more inventive ways of canceling debts and disguising a rather brute, unromantic fact: that they were, in effect, relieving people of an obligation to return the money they had borrowed from others. The state of Minnesota found a social cause in saving farms from foreclosure and doing it through the device of declaring a moratorium on the foreclosure of mortgages. The sale of the property could be postponed, or there could be an extension in the period

for the redemption of the mortgage.[1] This benevolent end was attained by removing, from the lender, the rights he possessed under the original contract for the loan. It barred him, that is, from reclaiming money that was his; money that he had been free to invest in other ways, with more profit and less hazard. What was morally problematic in this arrangement was a point that could be obscured by the high-minded rhetoric. Cicero had crystallized the moral problem long ago, in *De Officiis* (Of Duties): What is the meaning, he asked, of an "abolition of debts, except that you buy a farm with my money; that you have the farm, and I have not my money?"[2]

But a Court that did not wish to appear unfeeling, or too rigid to notice the Depression, was willing to bend, or find some angle from which to view the statute in a more defensible light. On the face of things, the statute looked to be a rather plain violation of that stricture, in Article I, Section 10, that states should pass no laws "impairing the Obligation of Contracts." Still, a majority of the Court was prepared to believe that this command, in the Constitution, could not be so unequivocal, or so indifferent to circumstances. The judges thought, in fine, that the Constitution could bear a certain degree of tinkering, or a *slight* impairment of the obligation of a contract, for the sake of a public benefit. Chief Justice Hughes invoked that memorable passage from John Marshall in *McCulloch v. Maryland*: "We must never forget that it is a *constitution* we are expounding." That Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[3] This famous line of Marshall's would be enduringly invoked, in the years to come, by the proponents of a "living Constitution" – a Constitution so adaptable to its times that the literal provisions of the Constitution could be turned into their contrarieties for the sake of accommodating the politics of the day.

In this manner did Chief Justice Hughes make a nullity of the Contracts Clause through "adaptation": When the honoring of contracts could affect many people adversely, then the Contracts clause could be in a state of tension with "public needs." The Court would then seek "to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests." And that new moral understanding would be incorporated in the very notion of the contracts that the

[1] See *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, at 416 (1934).
[2] Cicero, *De Officiis* (Cambridge: Harvard University Press, Loeb edition, 1975), p. 261.
[3] 4 Wheat. 326, at 407 and 415 (1819), cited in *Home Building & Loan Assoc. v. Blaisdell*, *supra*, note 1, at 443. Italics in the original.