Understanding Justice Sutherland As He Understood Himself

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Understanding Justice Sutherland 
As He Understood Himself

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*with*

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*The Return of George Sutherland:*
*Restoring a Jurisprudence of Natural Rights.* Hadley Arkes.

*The Return of George Sutherland* is neither a legal history nor a biography, though it would fare well as either. It is, rather, a primer on constitutional jurisprudence, a guidebook for jurists who would restore a sense of the proper limits on the federal government, which for Hadley Arkes are conservatives as that term is currently used. Professor Arkes provides this primer under the guise of recovering the correct understanding of the jurisprudence of George Sutherland, Associate Justice on the Supreme Court from 1922 until 1938.

Professor Arkes’s first task is to demonstrate that much of contemporary jurisprudence—both liberal and conservative—can trace its pedigree to the opinions and principles of Justice

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Sutherland. The task is not an easy one, since Sutherland has been much maligned by historians as one of the infamous “Four Horsemen” who resisted the New Deal even after Chief Justice Hughes’s “switch in time that saved nine” (p 23). Yet overcoming the revisionism of the historians is but a mild endeavor compared to the theoretical hurdle Arkes faces. For, as Arkes demonstrates in the early pages of this book, contemporary conservative jurists—the political heirs to Sutherland’s opposition to the New Deal—have rejected the natural rights principles of Sutherland’s jurisprudence and have instead adopted the legal positivism of Justice Hugo Black (p 27). And contemporary liberal jurists, for their part, have rejected the premises of natural rights jurisprudence, even while grounding their own decisions in an appeal to its logic (p 28).

After making a case for taking Sutherland’s jurisprudence seriously, Arkes leads us on a tour of the depths of that jurisprudence. Through this tour, Arkes forces us to assess the logical coherence of the contemporary jurisprudence that finds authority in Sutherland’s work. In this assessment Arkes is highly critical of contemporary jurists, both liberal and conservative. One suspects throughout the book that Arkes does not hold conservative and liberal jurists in equal regard, however, and in the end, Arkes offers a path to logical coherence for conservatives, but merely derides liberals for the fundamental inconsistencies that lie at the heart of their jurisprudence.

I. JUSTICE SUTHERLAND’S CONTRIBUTION TO CONTEMPORARY JURISPRUDENCE

Historians dubbed them the Four Horsemen—Justices George Sutherland, Willis Van Devanter, James McReynolds, and Pierce Butler—and with that literary allusion license was given to view their work as nothing more than the product of “four cranky, conservative judges” who opposed the New Deal (p 23). Historian Arthur Schlesinger, Jr., recounted the common perception as follows:

The four stalwarts differ among themselves in temperament. I think that Mr. Justice Butler knows just what he is up to and that he is playing God or Lucifer to keep the world from going the way he does not want it to. Sutherland seems to me a naïve, doctrinaire person who really does not know the world as it is. His incompetence in economic reasoning is amazing when one contrasts it with the excellence of his his-
Historical and legal... Mr. Justice McReynolds is a tempestuous cad, and Mr. Justice Van Devanter an old dodo (p 24).1

Even today this perception remains. One of Judge Robert Bork's critics, for example, sought to bolster his opposition to Bork's nomination to the Supreme Court by ascribing to Bork the same lack of "humility and compassion and understanding... [and] statesmanship" that was characteristic, in his view, of the "Four Horsemen" (p 25).2

Arkes demonstrates that this perception is wrong on two accounts. First, the opposition to the most far reaching aspects of the New Deal came not just from the Four Horsemen, but from a unanimous or near-unanimous Court: A.L.A. Schechter Poultry Corp v United States,3 for example, struck down the National Industrial Recovery Act and its "codes of fair competition" as an unconstitutional delegation of legislative authority and as beyond the authority granted to Congress through the Commerce Clause; Louisville Joint Stock Land Bank v Radford4 struck down the Frazier-Lemke Act, through which Congress had sought to prevent farm foreclosures by, essentially, dispossessing creditors of their legal claims; Humphrey's Executor v United States5 curtailed the President's power to remove members of independent regulatory commissions; and Panama Refining Co. v Ryan6 struck down an executive order that prohibited the transportation in interstate commerce of "hot oil"—that is, oil produced in excess of legally established quotas (p 23).

Arkes asserts that the New Deal's central planners largely lost the fight over their agenda because of these decisions (p 50). Our own world, however, is so full of government regulations that Arkes's assertion leaves us to ponder what the world would have been like had the New Deal's planners won! "The nature of [Sutherland's accomplishment in opposing the New Deal] must ever be obscured," Arkes tells us, "so long as we have only a dim awareness of the path that was not taken" (p 50). He admonishes us to make the effort to become aware of the alternative that

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might have been, however, because it "has never been entirely repressed: Many features of control have indeed become incorporated in our lives through such familiar devices as 'zoning' and the authority of local governments in 'land-use planning'" (p 50).

Second, Arkes reminds us that the obscurity to which historians have relegated Sutherland and his colleagues masks a body of jurisprudence to which both contemporary liberals and contemporary conservatives are indebted. Perhaps the most notable recent example of the reach of Sutherland's jurisprudence is the legal battle over the constitutionality of the independent counsel in the Iran-Contra affair. Each side found support for its position in the opinions of George Sutherland: "The defenders of the Executive power found themselves summoning the words of Sutherland in [United States v Curtiss-Wright Export Corp7]. And on the other side, those who sought to limit the President's powers found themselves summoning the words of Sutherland in Humphrey's Executor8 (p 35).

Yet neither side completely understood the full measure of Sutherland's opinions. The majority opinion in Morrison v Olson,9 which upheld the constitutionality of the independent counsel, failed to account for the fact that in Humphrey's Executor, Sutherland had not overruled Myers v United States,10 an opinion which he himself had joined, but rather had distinguished it (p 181). Myers held unconstitutional an attempt by Congress, over presidential objection, to prevent the President from removing, at his pleasure, an official exercising purely executive functions.11 In Humphrey's Executor, by contrast, the Court rejected presidential authority to remove an official of an independent commission that had been established with the full concurrence of both Congress and the President, and that exercised quasi-legislative and quasi-judicial powers.12

The distinctions between the two cases weigh heavily against the majority's reasoning in Olson. No President, according to Arkes, ever embraced the independent-counsel law in the way that President Wilson actively supported the creation of independent agencies (p 193). More fundamentally, the independent counsel exercised powers that could hardly be more executive in

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7 299 US 304 (1936).
8 295 US 602.
10 272 US 52 (1926).
11 Id at 176.
nature; discretion over prosecutions lies at the very core of executive power, as Justice Scalia stated so forcefully in his dissent.\textsuperscript{13}

Defenders of the President’s powers likewise failed to appreciate the full depth of the Sutherland opinion with which they sought to bolster their position. Arkes addresses the failings on both sides by way of a puzzle, but it is not the puzzle he describes explicitly—that both sides in the Iran-Contra battle looked to Sutherland’s opinions to support their respective positions (p 35). Rather, considering the organizational structure of the book, we think the puzzle he means to suggest is a more oblique one. The discussion of the Iran-Contra affair occurs, oddly, not where it would seem most appropriate, in Chapter 7, which deals with the President’s powers over foreign policy, but in the book’s introductory chapter and again in its very last pages. Arkes’s notable omission of the subject from Chapter 7 thus leads us to recharacterize his puzzle as follows: If the President does indeed have such powers over foreign policy as George Sutherland described in Curtiss-Wright, and as Arkes himself summarizes in Chapter 7, why was President Reagan not able to defend his policy supporting the Nicaraguan Contras? Or, perhaps more to the point, why was a special prosecutor able to return indictments against individuals whose actions must be said to be perfectly within the authority of the President?

A short answer might be that the President’s legal advisors were among those conservatives, criticized by Arkes, who had adopted the legal positivism of Justice Hugo Black and who thus themselves doubted the proposition that the President had any authority that could not be circumscribed by an act of Congress. But that answer is too facile, for certainly some of the President’s advisors must have argued that the President did have such powers.\textsuperscript{14} Indeed, it seems that even Congress itself was unwilling to press the issue, since the Boland Amendment, which banned aid to the Contras, was admittedly “framed with a certain reserve about confining the president, precisely because there was a serious constitutional question about the authority of the Congress to bind the Executive” (p 34).

\textsuperscript{13} Olson, 487 US at 705-06 (Scalia dissenting).

\textsuperscript{14} Compare L. Gordon Crovitz, Crime, the Constitution, and the Iran-Contra Affair, Commentary 23, 28 (Oct 1987) (arguing that Reagan’s Iran-Contra policy was a proper exercise of the executive power, was authorized by historical and judicial precedents, and was not prohibited by the Boland amendment or its legislative history).
Yet, if the power of the President was so clear, why did the Iran-Contra Affair become the Iran-Contra "Scandal"? Why the indictments? We think Arkes provides an answer in his discussion of Sutherland’s opinion in *Curtiss-Wright*.

The President’s power over the “vast external realm” of foreign affairs did not, according to Sutherland, owe its existence to any act of Congress, but to “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”

For Sutherland, this power was inherent in the very notion of sovereignty. Arkes argues that by defining the source of the President’s power in this way, “Sutherland helped license a power for the president that was unconstrained by the Constitution” (p 33). We need not acquiesce in Arkes’s suggestion that the President’s powers in the field of foreign affairs are “beyond the Constitution” (p 239), however, to recognize that the

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16 Justice Scalia, on the other hand, argues in *Olson* that the President’s powers are expressly granted. The contrast between Article II, which provides that “[t]he executive Power shall be vested in a President of the United States,” and Article I, which merely provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” demonstrates, Scalia argues, that the President was granted all executive powers. *Olson*, 487 US at 697-98, 705 (Scalia dissenting).

17 Sutherland wrote, for example, that the President’s powers, “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.” *Curtiss-Wright*, 299 US at 320. The inference Arkes draws from Sutherland’s position is certainly correct, however; there are no “applicable provisions of the Constitution” that can circumscribe the President’s power over foreign affairs if, as Sutherland stated, that power is inherent in the very idea of sovereignty. We disagree not with the implication Arkes draws from Sutherland’s statement, but with the statement itself. Sutherland, it seems, misunderstood the idea of sovereignty, at least as the American Founders understood it. Sovereignty resides, originally and always, in the people, not in any organ or officer of government. Sutherland, however, apparently viewed sovereignty as if it were a king’s prerogative, a prerogative that passed, in the case of the United States, from the King of England to the Continental Congress in 1776, and from that body to the President in 1787. The following passage from Sutherland’s opinion is telling:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.
President's powers in such matters are at least not dependent on Congress and, therefore, not capable of limitation by an act of Congress. Instead, Arkes argues that the check on the President's power is not a legal one, but a moral one. It is a power, according to Arkes, that is necessarily confined by its "reasonableness" (p 289).

Once the full import of this logic is understood, the Iran-Contra puzzle resolves itself. As long as the President was able to make a case that supplying the Contras was necessary for the ultimate defense of the United States, Congress was essentially

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Id at 315-16 (citation omitted). Sutherland's premise is not only not self-evident but highly questionable. See Gerald Gunther, Constitutional Law 208-09 (Foundation 12th ed 1991) ("Justice Sutherland's Curtiss-Wright dictum is questionable historically . . . ."). The source of the Constitution's authority is not the states, but "We the People of the United States." It is the national people, as a sovereign people distinct from the people in each of the several states, that delegated some of their sovereign powers to a national government. See, for example, Speech of James Wilson, Pennsylvania Ratifying Convention (Dec 4, 1787), reprinted in Philip B. Kurland and Ralph Lerner, 1 The Founders' Constitution 61, 62 (Chicago 1987); John C. Eastman, Open to Merit of Every Description?, 73 Denver U L Rev 89, 109 (1995). The legislative powers that the national people granted to the national government, including such international powers as the power to declare war and to grant letters of marque and reprisal, US Const, Art I, § 8, cl 11, are expressly limited to the powers enumerated in the Constitution itself. See US Const, Art I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .") (emphasis added). To be sure, the grant of executive power is not so limited. See US Const, Art II, § 1, cl 1 ("The executive Power shall be vested in a President of the United States of America."). See also Olson, 487 US at 699, 705 (Scalia dissenting). But see Youngstown Sheet & Tube Co. v Sawyer, 343 US 579, 641 (1952) (Jackson concurring) ("I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."). The fact that the power is granted through a constitution, however, necessarily implies that it is also limited by other provisions in that document. Arkes no doubt recognizes this fact, as his reference to Abraham Lincoln's defense of his action suspending the writ of habeas corpus suggests (p 288), citing President Abraham Lincoln, Message to Congress, Senate Exec Doc No 1, 37th Cong, 1st Sess 9 (July 5, 1861) ("[A]re all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?"). Lincoln, however, or at least his lawyers, later claimed that the suspension of the writ was within his executive powers. See Ex parte Merryman, 17 F Cases 144, 148 (C C D Md 1861) (No 9,487) (describing the government's argument that the suspension of the writ was within the executive powers of the President); Ex parte Milligan, 71 US (4 Wall) 2, 125 (1869) (same).

18 Justice Jackson, concurring in Youngstown, distinguished among: (1) actions that the President takes pursuant to a grant of authority from Congress, in which circumstance the President's "authority is at its maximum"; (2) actions taken where the grant of authority from Congress is ambiguous, and presidential authority is therefore in "a zone of twilight"; and (3) actions taken that are "incompatible with the expressed or implied will of Congress," in which case the President's power "is at its lowest ebb." 343 US at 635-37. Notably, Jackson does not argue that the President is without power in the last circumstance, only that his power, if it exists, must be based solely on authority that is delegated in the Constitution itself, and that is not inconsistent with an authority delegated to Congress. Id at 637.
powerless to insist on compliance with the Boland Amendment. But when the policy became tied to the negotiations over the release of the Iranian hostages, which is to say when the policy became indefensible in the court of public opinion, Congress was shed of its powerlessness and was able to hold hearings, with individual members railing about the President's "violation" of the law. Interestingly, however, none of the people indicted by the special prosecutor were convicted on the counts charging conspiracy to violate the Boland Amendment,¹⁹ and some were not even charged with Boland Amendment violations.²⁰ Rather, the special prosecutor was only able to obtain convictions on derivative charges such as perjury and obstruction of justice²¹ (most of which were overturned on appeal²²), providing further proof that the President's policy was not illegal as a matter of

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²⁰ See, for example, Noble, 33 BC L Rev at 561 (cited in note 19) ("Joseph F. Fernandez, a former CIA station chief, ... was charged with two counts of obstructing proceedings of Congress [18 USC § 1505 (1988)] and two counts of giving false statements [18 USC § 1001 (1988)]."). See also United States v Fernandez, 887 F2d 465, 467 (4th Cir 1989).


²² Oliver North, for example, was convicted on three of the twelve counts brought against him: obstructing Congress under 18 USC §§ 2, 1505 (1988), destruction of documents under 18 USC § 2071(b) (1988), and accepting an illegal gratuity under 18 USC § 201(c)(1)(B) (1988). United States v North, 910 F2d 843, 851-52 (DC Cir 1990). The convictions on all three counts were vacated, id at 852, and the case was later dismissed. Haynes Johnson and Tracy Thompson, North Charges Dismissed At Request of Prosecutor, Wash Post A1, A1 (Sept 17, 1991). Similarly, John Poindexter's convictions for perjury and obstructing Congress were reversed on appeal. United States v Poindexter, 951 F2d 369, 388 (DC Cir 1991).
law, but rather became indefensible in the court of public opinion.

II. LIBERALS V CONSERVATIVES

The puzzle over Iran-Contra parallels a more significant puzzle brought to light by Arkes's restoration of George Sutherland's jurisprudence. Both liberals and conservatives draw on Sutherland's precedents, Arkes argues, yet both reject the principles underlying those precedents. Leading conservative jurists, such as Chief Justice William Rehnquist and Judge Robert Bork, have rejected Sutherland's natural rights philosophy in favor of Justice Hugo Black's legal positivism. According to Arkes:

[In their recoil from substantive due process, conservatives have followed the line of Hugo Black, Franklin Roosevelt's first appointee to the Supreme Court. For Black, the vice of substantive due process was connected, inescapably, to the vice of taking natural rights seriously (p 27).

Arkes repeats this criticism throughout the book. He describes Chief Justice Rehnquist, for example, as Justice Black's "disciple" (p 28), and Judge Bork comes under heavy criticism for his rejection of the principles underlying Justice Rufus Peckham's opinion in *Lochner v New York*—principles grounded, like Sutherland's, in natural rights (p 27). Bork, recounts Arkes, described Peckham's opinion in *Lochner* as "an opinion whose name lives in the law as the symbol, indeed the quintessence, of judicial usurpation of power. . . . To this day, when a judge simply makes up the Constitution he is said 'to Lochnerize,' usually by someone who does not like the result."25

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24 198 US 45 (1905).

25 Robert H. Bork, *The Tempting of America* 44 (Free Press 1990). Arkes might have referred as well to Judge Bork's ill fated confirmation hearing, in which he compared the Ninth Amendment to an "ink blot" on the Constitution. See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings before the
Liberals, on the other hand, have adopted the "logic" of natural rights, while rejecting the very basis of that logic. The cornerstones of liberal jurisprudence—the rights to "privacy" and to "autonomy," and, most notably, the "right to an abortion"—are grounded in substantive due process, which is to say, in the logic of natural rights that was central to the jurisprudence of George Sutherland, and Justice Peckham before him. The irony of this fact did not escape Justice Black, who, by the fortunes of history, was still on the Court when "this migration of philosophic premises" began to take root (p 28). His dissent in Griswold v Connecticut, which Arkes describes as "bitter," sounded a yet largely unheralded alarm for liberals about the dangers of grounding their new philosophy in the already rejected logic of their adversaries (id).

Arkes's claim that contemporary liberal jurisprudence is grounded in the "logic of natural rights" at first appears inconsistent with a passage in the book's preface, where he states that "Both conservatives and liberals . . . have moved away from natural rights and embraced one version or another of 'legal positivism'" (p x) (emphasis added). Arkes draws a clear distinction, however, between his claim that contemporary liberal jurisprudence is grounded in the logic of natural rights and the idea that it is grounded in natural rights itself, and he never asserts the latter. The "logic" of natural rights described by Arkes is a logic that rejects the legal positivist's view that "law" is simply the command of the sovereign, even a sovereign majority (p 25), and that "logic" is certainly the hallmark of contemporary liberal jurisprudence. Liberal jurists, according to Arkes:

[H]ave not shown the slightest hesitation in sweeping aside policies, crafted by local governments and passed by elected officials, that offer abridgements of [the] new rights [of "privacy" and of "autonomy"]. In other words, they have been willing to make a rather expansive, frequent appeal to the logic of natural rights in overturning the laws made by ma-

Committee on the Judiciary, United States Senate, 100th Cong, 1st Sess 249 (1989) ("I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it."). See also Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const Comm 93, 94 n 5 (1995).
jorities and vindicating the interests of privacy and autonomy (p 28).

But, again, Arkes leaves no doubt that the liberals’ appeal to the logic of natural rights is not an appeal to natural rights itself. He speaks, for example, of a “paradox” at the heart of the international movement for women’s rights in terms that are unmistakable:

Even in our own day many writers in the vanguard of “women’s rights” are quite explicitly hostile to the understanding of “natural rights.” They profess to doubt that there is any such “nature” of human beings that remains everywhere the same, and they especially recoil from the understanding of the Founders that “natural rights” were bound up with certain “self-evident” moral “truths.” On the other hand, they think they can identify the oppression of women in a variety of exotic settings all over the world. That is to say, they can recognize moral wrongs even in cultures that are not their own. They think themselves warranted then in casting judgments and proclaiming the “rights” of women even in distant places. And so, the paradox we find in our own time may be put in this way: In the understanding of the most advanced feminism, there are “human rights” to be vindicated in all places, but in the strictest sense there are no humans; and since there are no moral truths, there are no rights that are “truly rightful” (p 9).

Both liberals and conservatives, then, rely on Sutherland’s opinions without grasping the principles that support them. “The consequence,” according to Arkes, “is that conservatives and liberals have both produced a jurisprudence for which they cannot give a coherent moral account. The irony is that Sutherland could supply the moral ground that is missing in the jurisprudence of each” (p x). Precisely how Sutherland’s natural rights jurisprudence does that is the subject of the remainder of the book. We take up a few of his examples.

III. LIBERALS AND THE LIBERTY TO CONTRACT

The “liberty to contract,” as articulated in the opinions of Justices Sutherland and Peckham, is viewed by many historians and constitutional commentators as “the badge of a reactionary” (p 276). Yet the same idea has been revived by contemporary liberals to further the ends of the civil rights movement, and in
their hands it is viewed as a sign of progressive thinking. The Civil Rights Act of 1866,\textsuperscript{27} which recognized for blacks "the same right . . . to make and enforce contracts . . . [and] to inherit, purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens,"\textsuperscript{28} has thus been used to prohibit discrimination in, for example, private housing\textsuperscript{29} and private schools.\textsuperscript{30} Prompted by this observation, Arkes gives to us a splendid problem: "A fine question has been raised," he writes, "as to whether the drafters of the statute in 1866 had ever intended, as part of the 'right to contract,' the right to contract with a party who was unwilling to sell his products or services" (p 277).

The question, as posed by Arkes, seems at first to answer itself; one claiming the right to enter into an agreement with another through mutual consent cannot possibly also have the right to force an agreement on an unwilling party without destroying the right to contract itself. Yet for Arkes, the answer to the "fine" question is not so self-evident, for he notes that there is an "equally fine" response:

\begin{quote}
[T]he law is directed to parties who have already indicated their willingness to sell or to enter transactions with the general public. Those parties are now presuming to narrow or withdraw that willingness to be open for transactions with the public. They would close themselves off to transactions with black people and treat them, in effect, as parties unfit for their business (p 277).
\end{quote}

Arkes does not solve the problem, but rather leaves the issue, "however we come to resolve that question," for us (p 277).

Despite the fact that he uses the same adjective, "fine," to describe both the question and its response, we are not left with the sense that Arkes himself thinks the matter unresolvable, or in the equipoise that he first suggests. The adjective "fine" customarily conveys a sense of praiseworthiness in its object or describes an intellectually subtle and refined reasoning, but it can also be used ironically, even derogatorily, as raising a distinction that is too clever or cunning.\textsuperscript{31} Which definition applies to the

\begin{footnotes}
\footnotetext{27}{14 Stat 27, reenacted by the Enforcement Act of 1870, §§ 16, 18, 16 Stat 140, 144, codified at 42 USC §§ 1981-82 (1994).}
\footnotetext{28}{Civil Rights Act of 1866, § 1, 14 Stat at 27.}
\footnotetext{29}{Jones v Alfred H. Mayer Co., 392 US 409 (1968).}
\footnotetext{30}{Runyon v McCrary, 427 US 160 (1976).}
\footnotetext{31}{See 4 Oxford English Dictionary 227-28 (Oxford 1961).}
\end{footnotes}
question, and which to the response, Arkes does not say, although he does not leave us entirely without a clue as to his thinking.

In the paragraph immediately following the presentation of the “fine” question and “equally fine” response, Arkes uses the adjective again, but this time leaves no doubt as to its meaning. “It may raise [ ] a fine metaphysical question,” he notes, “[w]hy [ ] the ‘freedom of contract’ . . . marks an expansion of rights and the defense of human dignity” when used as the “banner of liberal emancipation,” but the “liberty to contract’ mark[s] a cramped spirit of cranky, ungenerous judges” when used by Sutherland and Peckham (p 277). “There is,” he writes, “no distinction of consequence” (id) between the two phrases. In so writing, Arkes demonstrates that, here at least, he means to use the adjective ironically, to show that the liberal jurists who would make such a distinction are being disingenuously clever.

Of course, as between the “fine” question and the “fine” response, the one associated with liberal jurisprudence is the latter, but to impart the same irony to that earlier use of the adjective would be too simple a solution. Indeed, Arkes’s use of the phrase “equally fine response” suggests that there is more to this problem than would first appear.

The “equally fine” response to the objection that the right to contract cannot include the right to force a contract on an unwilling party is, according to Arkes, that the law obligates parties who have “already indicated their willingness to sell or to enter transactions with the general public” (p 277). Arkes thus suggests that such parties have undertaken an implied contractual obligation to serve the general public, an obligation that has long been recognized by the common law. William Blackstone, for example, wrote that businesses that held themselves out as serving the public had a common law obligation to serve all customers under an implied contract theory.32

32 William M. Blackstone, 3 Commentaries *166 (citation omitted):

[U]f an innkeeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action will lie against him for damages, if he without good reason refuses to admit a traveller.

See also Heart of Atlanta Motel v United States, 379 US 241, 284 (1964) (Douglas concurring) (“[The English common law] reasoned that one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain.”); Lane v Cotton, 88 Eng. Rep. 855 (QB 1701) (Blacksmith obliged to serve all
The implied contract rationale does not provide an adequate foundation for the recent use made of the Civil Rights Act of 1866, however. As the history of the civil rights movement in this country demonstrates, the problem was not just that states were not enforcing the common law's implied contract to serve all customers, but that owners of theaters and lunch counters were making it vividly clear that they had replaced any implied contract to serve all members of the public with an express contract to serve only some. A "Whites Only" sign on the front of a drug store left no doubt about the unwillingness of the store owner to entertain certain customers. Or, to take an example outside of the highly charged racial context, a sign on the front door of an apartment building that reads, "Unit Available, Senior Citizens Only," negates any implied contract to rent to the general public.

That is not the end of the matter, of course, for there was more to the common law duty to serve the general public than the existence of an implied contract. For example, the common law also treated an innkeeper's refusal, without sufficient reason, to accept a traveler as a public nuisance, thus subjecting the innkeeper to indictment and fine under the state's police power.33 A state's refusal to enforce such obligations amounted to a denial of the equal protection of the laws, and thus was clearly within the power of Congress to address under § 5 of the Fourteenth Amendment. However, Congress sought to prohibit dis-

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33 As Blackstone put it:

Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behaviour.

William M. Blackstone, 4 Commentaries *168. Theaters and other places of public entertainment covered by the Civil Rights Act of 1875, § 1, 18 Stat 335, 336, also implicated state action in a way that is often lost on the late-twentieth-century audience. Dating to classical times, theaters were often constructed as public works projects and were state owned. See, for example, The Institutes of Justinian, Book II, Title 1, § 6 (Oxford 5th ed 1913) (J.B. Moyle, trans) (mentioning theaters and racecourses as examples of things that "belong to cities in their corporate capacity").
crimination by innkeepers, common carriers, and other suppliers of public accommodation with the Civil Rights Act of 1875,\textsuperscript{34} not with the Civil Rights Act of 1866. A review of the 1875 Act and its invalidation by the Supreme Court will therefore help bring our present problem into sharper focus.

The Civil Rights Act of 1875 provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theaters, and other places of public amusement."\textsuperscript{35} The law was "applicable alike to citizens of every race and color, regardless of any previous condition of servitude."\textsuperscript{36} In the \textit{Civil Rights Cases}, the Supreme Court struck down the Act, correctly holding that the Fourteenth Amendment only applied to state action.\textsuperscript{37} In so doing, however, the Court failed to recognize the extent to which state action was implicated when common carriers and places of public accommodation refused to serve all comers.\textsuperscript{38} When a state's law—common or statutory—required that certain kinds of businesses be open to the public, the state's refusal to enforce such laws on behalf of blacks, for example, denied blacks the equal protection of the laws in the truest sense of the phrase.

This is not to say that the judgment in the \textit{Civil Rights Cases} striking down the Civil Rights Act of 1875 was erroneous. Through that Act, Congress did not provide a remedy against state governments for their failure to provide to their citizens the equal protection of the laws.\textsuperscript{39} Rather, Congress sought to exercise a police power of its own, directly regulating private behavior

\textsuperscript{34} Civil Rights Act of 1875, § 1, 18 Stat 335, 336.
\textsuperscript{35} Id, 18 Stat at 336.
\textsuperscript{36} Id.
\textsuperscript{37} 109 US 3, 24-25 (1883).
\textsuperscript{38} See, for example, McCabe v Atchison, Topeka, & Santa Fe Railway Co., in which the Court stated:

It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

\textsuperscript{39} Compare Chief Justice Marshall's opinion in \textit{Marbury v Madison}, 5 US (1 Cranch) 137, 163 (1803) (recognizing that, "[i]n Great Britain, the king himself is sued" for the failure to provide to his citizens the protection of the laws).
without the nexus to state action that would have brought the Act within the scope of the authority granted to Congress by § 5 of the Fourteenth Amendment. Thus, the problem with the Civil Rights Act of 1875 was not that Congress sought to prohibit discrimination by common carriers and places of public accommodation, but that the means Congress chose to reach that end were beyond its constitutional authority.

When Congress sought to prohibit discrimination by common carriers and places of public accommodation nearly a century later by enacting Title II of the Civil Rights Act of 1964, the flawed reasoning in the Civil Rights Cases compelled it to rely on the Commerce Clause rather than the Fourteenth Amendment as the source of its authority to do so. Title II thus required a nexus with interstate commerce that distorted Congress’s authority under the Commerce Clause, and, more significantly, obscured what it is about common carriers and places of public accommodation that properly allows government to determine with whom such businesses must enter into contracts.

It was in the midst of this confusion in public accommodation law that the Civil Rights Act of 1866 was revived and used to force contracts upon unwilling private parties outside of the public accommodation and common carrier framework. The fiction

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40 See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 130 (Harvard 1992) ("[Both the Thirteenth and Fourteenth Amendments are problematic sources of federal power to enact a general antidiscrimination law applicable to the actions of private parties.").

41 See *Heart of Atlanta Motel*, 379 US at 284 (Douglas concurring) ("The Senate Committee laid emphasis on the Commerce Clause [as authority for Title II] . . . to surmount what was thought to be the obstacle of the Civil Rights Cases . . . ."). Justice Douglas argued in *Heart of Atlanta Motel* that the proper authority for Title II was nevertheless § 5 of the Fourteenth Amendment, not the Commerce Clause, though he did not expressly call for overturning of the Civil Rights Cases. See id at 280 ("I would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment . . . ."). See also Gunther, *Constitutional Law* at 148-49 (cited in note 17) (arguing that the Fourteenth Amendment rather than the Commerce Clause is the proper source of congressional power to enact Title II); Epstein, *Forbidden Grounds* at 140 (cited in note 40) ("There is no question . . . that [Title II] falls outside [the commerce] power as it was originally written and understood.").

42 It was, after all, not the effect on commerce that was Congress's concern, but the moral wrong of discrimination, as the House Judiciary Committee Report made clear: "[Title II] would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." Civil Rights Act of 1963, HR Rep No 914, 88th Cong, 2d Sess 18 (1963), reprinted in 1964 USCCAN 2391, 2393-94. See also *Daniel v Paul*, 395 US 298, 307-08 (1969); *Heart of Atlanta Motel* 379 US at 291 (Goldberg concurring) ("The primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics.") citing Civil Rights—Public Accommodations, S Rep No 872, 88th Cong, 2d Sess 16 (1964).

43 See, for example, *Jones*, 392 US at 439 (holding that § 1982 prohibits all racial dis-
that Congress had power to enact Title II under the Commerce Clause was as easily extended to private carriers and private housing as it was to purely intrastate common carriers and places of public accommodation, and the moral aversion to discrimination was as strong in the one class of cases as in the other. The legal distinction between the two classes of cases—that the state itself was implicated when it refused to enforce the obligations imposed on common carriers and places of public accommodation—was, however, lost, and with it the ability to avoid the contradiction inherent in the current “liberty to contract” jurisprudence was lost as well.

With this background, it is now possible to see how Arkes could simultaneously describe the objection to current “liberty to contract” jurisprudence as “fine” and the response as “equally fine.” Both positions could be correct, depending on the nature of the contract involved. Common carriers or places of public accommodation could be “forced” to enter into contracts because that was part of their bargain, or because to do otherwise was deemed a public nuisance. The Civil Rights Act of 1866 provides a mechanism by which such a claim is raised because of the historical anomaly that Title II was necessarily limited to businesses engaged in interstate commerce (or those that affected such commerce). Others, however, could not be forced to enter into such contracts without violating the principled grounds of the right to contract itself. Arkes leaves unanswered whether there is any limit to the expansion of what constitutes a “common carrier” or a “public accommodation,” but once we understand the principled origin of that obligation, we can more readily assess the propriety of its extension. Though that inquiry would give a moral coher-

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44 See, for example, Katzenbach v McClung, 379 US 294 (1964), in which the Supreme Court upheld on Commerce Clause grounds the application of Title II to Ollie’s Barbecue, a small restaurant that served primarily local customers, that was not situated along an interstate transportation route, and that purchased its supplies from local suppliers (although a portion of the supplies so purchased did originate out-of-state). See also Epstein, Forbidden Grounds at 140 (cited in note 40) (“Any court that is ingenious enough to find that Ollie’s Barbecue operates within interstate commerce is ingenious enough to find that every restaurant in the land does so as well.”).

45 Justice Sutherland, for his part, was unwilling to extend common carrier obligations to private carriers merely because the latter used the public highways in the course of their business, see Frost & Frost Trucking Co v Railroad Commission, 271 US 583, 599 (1926), but had no difficulty with a state statute that treated a cotton gin as a public utility, see Frost v Corporation Commission, 278 US 515, 519-21 (1929).
ence to the liberal jurisprudence on the subject, it would not necessarily support the ends furthered by that jurisprudence, since the principle on which the obligation of common carriers and places of public accommodation is based does not support an extension of that obligation to individuals or to the full range of private businesses that liberal jurists have sought to bring under the coverage of the Civil Rights Act of 1866.

IV. CONSERVATIVES AND THE COMMERCE CLAUSE

Defenders of the New Deal will find in a cursory reading of Arkes’s chapter on “The Puzzle of the Commerce Clause” a defense of the claim that the Commerce Clause confers on Congress a national police power, but the chapter is in truth a challenge to conservative jurists who, according to Arkes, have abandoned the tools necessary to oppose such a claim.

The power to regulate commerce, Arkes writes, is the power “to describe the conditions under which commerce may ‘lawfully’ be conducted” (p 131). But that determination requires that the law mark off the boundaries between “the legitimate and the illegitimate, the right and the wrong,” which Arkes recognizes “were part of the traditional police powers of the state and local governments” (p 132). He suggests that because individual states were not competent to the task in a national economy, the national government had to be given such powers (id). A few pages later, Arkes describes the full import of this proposition: “The power of Congress may finally extend to the most local operations of the most local of businesses, to the matters that were thought to lie most clearly within the jurisdiction of the states and local government” (p 137). This is so, apparently, because “the authority of Congress over commerce really draws on the same ancient moral sources as the police powers in the states” (id).

Arkes is too thorough an originalist scholar to subscribe to such an anachronistic reading of the Commerce Clause, however. 46 Indeed, although he recognizes that “[t]hrough the Com-

46 See, for example, Federalist 45 (Madison), in Clinton Rossiter, ed, The Federalist Papers 288, 292-93 (Mentor 1961) (“The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”). Even Chief Justice Marshall drew a distinction between the regulation of commerce and the police power, the latter being part of the “acknowledged power of a state,” and “not surrendered to the general government.” Gibbons v Ogden, 22 US (9 Wheat) 1, 203, 205 (1824). See also US Const, Art I, § 10, cl 2 (recognizing, as an exception to the ban on state imposition of duties on imports and exports, the states’ exercise of their
merce Clause we back into [such an] understanding, or find it inescapable," he states that "it cannot be through the Commerce Clause that we may explain this power of Congress to reach anywhere, in the territory of the United States, that the law may justly reach in legislating on rights and wrongs" (p 137). How exactly the Commerce Clause came to take on a police power dimension, Arkes does not say. By quoting Justice McKenna's opinion in *Hoke v United States*, Arkes suggests that it is the General Welfare Clause rather than the Commerce Clause that conveys such a power to the national government, but he had earlier demonstrated that the General Welfare Clause was a restriction on, rather than a grant of, congressional power (pp 112-14).

Herein lies the puzzle to which Arkes refers in the chapter's title. Let us try to solve it, first by reconstructing how it is that we "backed" into a police power understanding of the Commerce Clause, and then by assessing whether conservative jurisprudence can offer any coherent check on that power.

Conflict over commerce was one of the primary motivating factors for the Federal Convention of 1787 and, indeed, was the principal subject of discussion at the Annapolis Convention of 1786. Under the Articles of Confederation, the states retained the power to tax imports. They taxed goods imported from other states, a practice that not only impeded commerce between the states but threatened to produce "animosity and discord" between them as well. Port states were also imposing duties on goods

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47 227 US 308, 322 (1913) (upholding the White Slave Traffic Act of 1910, 36 Stat 825, which outlawed the transportation of women in interstate commerce for prostitution or other immoral purposes).

48 See also *United States v Butler*, 297 US 1, 65 (1936).

49 See, for example, Letter from Tench Coxe to the Virginia Commissioners at Annapolis, in 9 *The Papers of James Madison* 124-26 (Chicago 1975), reprinted in Philip B. Kurland and Ralph Lerner, *3 The Founders' Constitution* 473-74 (Chicago 1987) ("That Goods of the growth product and manufacture of the Other States in Union were charged with high Duties upon importation into the enacting State—as great in many instances as those imposed on foreign Articles of the same Kinds.").

50 Federalist 22 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 144-45 (cited in note 46):

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.
from foreign nations, a practice that allowed them effectively to tax the citizens of neighboring states to whom those goods were destined. Contrary to the view held by the modern Supreme Court and many scholars, these problems were addressed in the Constitution not by the Commerce Clause, but by the provision in Article I, § 10 that prohibits the states from imposing duties on imports and exports.

The levying of taxes was not the only way in which the states impeded interstate commerce, however. Through the exercise of its police powers, a state might ban the possession of certain goods—liquor, for instance—within its borders; however, the commerce between states that have not banned the goods might have to move through the intermediary state. Because the ban applies equally to liquor produced out of state and that produced in state, the ban would not run afoul of the Article IV Privileges and Immunities Clause. Nevertheless, Congress, acting pursuant to its power to “regulate Commerce . . . among the several States,” could require that the shipment be permitted lest the intermediary state’s ban prevent commerce between the other states. As Justice Bushrod Washington, writing as

The reference to “duties” that German princes imposed on each others’ goods, in the sentence immediately following, suggests that Hamilton likewise meant “duties” when he spoke of “interfering and unneighborly regulations.” See id at 145.

See Federalist 42 (Madison), inRossiter, ed, The Federalist Papers at 264, 267 (cited in note 46) (“A very material object of [the power to regulate commerce among the states] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.”).

See, for example, Brown v Maryland, 25 US (12 Wheat) 419 (1827) (invalidating tax on goods imported from other states while still in their original package). But see The License Cases, 46 US (5 How) 504, 595 (1847) (McLean) (arguing that the Article I, § 10 ban against states laying duties on imports applied only to goods imported from abroad, not from other states); Woodruff v Parham, 75 US (8 Wall) 123 (1869) (upholding state tax on goods sold at auction, including goods that had moved via interstate commerce, because they were not “imports” for purposes of the Article I, § 10 ban). Madison’s statement in Federalist 42 does suggest that it was the Commerce Clause, not the § 10 ban on duties, that provided relief against the latter problem.

See Willson v Black-Bird Creek Marsh Co., 27 US (2 Pet) 245 (1829), which Joseph Story described as “holding that the state’s authority to act under ‘other powers, beside that of regulating commerce,’ was not destroyed by the commerce clause.” David P. Currie, The Constitution in the Supreme Court: 1789-1888 176 n 126 (Chicago 1985), quoting Joseph Story, 2 Commentaries on the Constitution of the United States § 1069 at 517 (Hilliard, Gray 1833). We are greatly indebted to Professor Currie’s annotated treatise for calling our attention to these and many of the more obscure case citations which follow.

See, for example, Ward v Maryland, 79 US (12 Wall) 418, 430-32 (1871); Paul v Virginia, 75 US (8 Wall) 168, 180 (1869); Connor v Elliott, 59 US (18 How) 591, 594 (1856).

US Const, Art I, § 8, cl 3.

Indeed, under the Court’s current jurisprudence, the dormant Commerce Clause
circuit justice in *Corfield v Coryell*, stated, "[c]ommerce...among the several states...must include all the means by which it can be carried on, [including]...passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states."\(^{57}\) "It is this intercourse," wrote Washington, "which congress is invested with the power of regulating, and with which no state has a right to interfere."\(^{58}\) The Court's attempt to distinguish between goods that merely travelled through a state, the commerce in which was thus protected by the Commerce Clause, and goods that had come to rest within a state and thus became subject to the state's police powers, gave rise to what became known as the "original container" or "broken package" doctrine.\(^{59}\)

The distinction between goods moving through a state and goods coming to rest within the state proved insufficient to address all the ways in which a state might deliberately restrain interstate commerce, however. The use of the police power to close in-state markets, for example, can have a substantial effect on commerce even if transportation through the state can be required. The question that then arose was whether Congress could *require* the state not just to allow liquor to be transported through it to a final destination outside it, but also to rescind its own ban.

Justice Washington begged the question in *Corfield*: "[The commerce power] does by no means impair the right of the state government to legislate upon all subjects of internal police within their territorial limits,...even although such legislation may indirectly and remotely affect commerce, *provided it do not interfere with the regulations of congress upon the same subject.*"\(^{60}\) In the *License Cases*, however, the Supreme Court upheld a ban on retail sales of liquor imported from other states, even though the

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57 6 F Cases 546, 550 (C C E D Pa 1823) (No 3,230).
58 Id.
59 See Dahnke-Walker Milling Co. v Bondurant, 257 US 282, 290 (1921) (Commerce "embraces as well the sale of goods after they reach their destination and while they are in the original packages."); Pacific States Box & Basket Co. v White, 296 US 176, 184 (1935) ("The operation of the order is intrastate, beginning after...the original package has been broken."). Compare Brown, 25 US (12 Wheat) at 441-42 (striking down a state tax on imported goods in their original packages).
60 6 F Cases at 550 (emphasis added).
effect on commerce was great.\textsuperscript{61} Similarly, in \textit{Kidd v Pearson}, the Court upheld a ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce.\textsuperscript{62} Justice Sutherland drew on the latter case in his opinion for the Court in \textit{Carter v Carter Coal Co.}, in which he stated:

\begin{quote}
It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government \ldots \textsuperscript{63}
\end{quote}

That the states retained the power to enact police regulations, even when such affected commerce, seems unobjectionable. The Constitution itself recognizes that the national interest in commerce had to give way, when "absolutely necessary," to the legitimate exercise of police powers in the states.\textsuperscript{64}

Suppose that the purpose of a state's ban was not a police power purpose—that is, to protect the health, safety, or morals of the people—but was instead to restrict trade from another region of the country. Suppose, for example, that the states of New England banned the use and retail sale of cotton in order to benefit their own wool producers, who compete with southern cotton producers in the sale of material to New England clothing manufacturers. Since the ban technically prohibits the sale of all cotton—that made in the New England states as well as that made in the South—it would not run afoul of the Article IV Privileges and Immunities Clause.\textsuperscript{65} Yet, because the New England states do not produce cotton, this restriction on trade seems to be one of the very ills that the Framers sought to prevent. Justice

\begin{footnotes}
\item[61] 46 US (5 How) 504, 586, 596-97, 610-11, 617, 630-31, 632 (1847).
\item[62] 128 US 1, 20-23 (1888).
\item[63] 298 US 238, 301 (1936), quoting \textit{United States v E.C. Knight Co.}, 156 US 1, 13 (1895).
\item[64] See US Const, Art I, § 10, cl 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws \ldots") (emphasis added). See also \textit{Gibbons}, 22 US (9 Wheat) at 205 (acknowledging that states could affect commerce using their police powers, such as through quarantine or inspection laws).
\item[65] But see \textit{Woodruff}, 75 US (3 Wall) at 145-46 (Nelson dissenting) (arguing that a New York tax on "all sales of cotton, tobacco, or rice \ldots would be a tax without any discrimination; and yet it would be in fact, in its operation and effect, exclusively upon these Southern products").
\end{footnotes}
Washington's statement in *Corfield*—that "no state has a right to interfere" with such commerce—suggests that, even absent an act of Congress, such a regulation would be contrary to the Commerce Clause.\(^{66}\)

Yet a great difficulty arises if the New England states make a colorable argument that the ban really was a police regulation. Suppose, they argued, in the legislation's preamble, that microorganisms carried in cotton posed a health hazard in the climates of the Northeast.\(^{67}\) Were Congress to require that the New England states open their markets to cotton, or were the courts to strike down the ban as an unconstitutional restriction on trade, such action would necessarily involve each in a judgment about whether the ban was a valid exercise of the state's police power or was, instead, an impermissible regulation of interstate commerce.\(^{68}\) As the hypothetical demonstrates, such a judgment is not always easy, and we can begin to see how it is that courts backed into the understanding that the Commerce Clause has a police power dimension to it.

For legal positivists, making the distinction between state actions that affect commerce only incidentally and those that are intended to impede commerce is an impossible task, for legal positivism deprives its adherents of the tools necessary to make such a judgment. Since the principle of free trade will necessarily come into conflict with the state's police powers, the courts are then left with the unenviable choice between accepting a state's police power rationale, no matter how great the effect on commerce, or striking down even legitimate exercises of the police power if the effect on commerce is more than minimal. In other words, the courts are left not with the qualitative inquiry into whether the state legislation was intended to impede commerce or affects commerce only incidentally, but with the quantitative inquiry into how great the legislation's effect on commerce is.

Lest the Commerce Clause be eviscerated, the courts were then forced to follow the quantitative inquiry, striking down state legislation, whatever its purpose, if the effect on interstate com-

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\(^{66}\) See note 56.

\(^{67}\) Compare *Railroad Co. v Husen*, 95 US 465, 473 (1878) (striking down Missouri ban on importation of Texas, Mexican, or Indian cattle because it applied to all, not just diseased, cattle).

\(^{68}\) See, for example, *Groves v Slaughter*, 40 US (15 Pet) 449, 511-12, 516 (1841) (Baldwin concurring) (arguing in case involving ban on importation of slaves for sale that the state of Mississippi could ban such importation on grounds of morality or safety—that is, pursuant to its police powers—but not for a commercial purpose).
merce was great. A police power vacuum was thus created, and
the final piece of the Commerce Clause puzzle came into view, for
if the states could not exercise their police powers in matters that
had a substantial, though incidental, effect on interstate com-
merce, it must be that Congress had police powers of its own, at
least in areas where it was clear the exercise of the police power
had a substantial effect on commerce.

Thus, Congress's powers under the Commerce Clause were
expansively interpreted to allow Congress to regulate private
behavior that had an effect on commerce.\(^69\) Arkes traces the ex-
pansion to a series of laws through which Congress used the
Commerce Clause to ban such things as unsafe food and drugs,
prostitution, gambling, and slavery. "This movement could have
been averted," writes Arkes, "only if it had been possible for the
national government to have avoided taking seriously any moral
questions about the nature of commerce" (p 155).\(^70\) Countering
state law impediments would not, in the nature of things, ex-
hauit the responsibilities of the federal government in defining
the perimeter of the field of "legitimate commerce" (p 155), ac-
cording to Arkes, since "a state could not preserve the character
of its policy [banning prostitution, liquor, or gambling] by closing
off its borders" (p 156). But Arkes's premise is only true if we
accept the positivist dilemma, described above, that gives rise to
a police power vacuum in the first place. Absent that vacuum,
which caused courts to "back in" to a police power understanding
of the Commerce Clause itself, Congress's power to regulate pri-
ivate businesses not engaged in commerce but which necessarily
affected commerce would derive from the Necessary and Proper

\(^{69}\) Arkes recognizes that the commerce power, as originally understood, allowed
Congress to reach only state law barriers to commerce and not private actions that
affected commerce, and he argues that such an interpretation is in accord with the limi-
tations contained in US Const, Art I, §§ 9-10 (pp 150-52). See also Currie, Constitution in
the Supreme Court at 150-82, 209-22 (cited in note 53) (describing the major Commerce
Clause cases of the nineteenth century).

\(^{70}\) Arkes suggests that the extension of Congress's power to private actions affecting
commerce was inevitable. Sutherland himself, Arkes tells us, contributed to the rejection
of this distinction between state and private action in Bedford Cut Stone Co. v Journeymen
Stone Cutters' Association, 274 US 37 (1927), where he upheld the antitrust laws
against a union organizing a secondary boycott of a nonunion stone quarry (pp 153-55).
The argument that Congress's power did not extend to private behavior had earlier been
implicitly rejected in E.C. Knight, 156 US 1, where the Court refused to apply the
Sherman Act against a sugar manufacturer, not on the grounds that it was a private
concern, but because it was a manufacturing concern.
Clause,\textsuperscript{71} not the Commerce Clause alone. As Justice Black wrote in \textit{Polish National Alliance v NLRB}:

The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely "affecting" such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is "necessary and proper" to prevent injury to interstate commerce.\textsuperscript{72}

Regrettably, Arkes himself misunderstands the true source of Congress's power to regulate noncommercial concerns, for he addresses the expansion of congressional power in terms of the Commerce Clause itself, or, perhaps more accurately, in terms of a "general welfare" idea that he thinks must be implicit in the Commerce Clause. This single misconception creates two problems in his subsequent analysis. First, it requires him to fit within the Commerce Clause's word "regulate" a moral component that could limit the exercise of congressional power (pp 130-31). Such a component is much more readily found within the word "proper" in the Necessary and Proper Clause. Second, it masks the distinction between means and ends that exists between the two clauses. Ironically, the difference between the approaches was appreciated by Sutherland himself in \textit{Bedford Cut Stone Co. v Journeymen Stone Cutters' Association},\textsuperscript{73} and Arkes seems, in this instance, to have fallen prey to the very error he attributes to others—failing to understand Sutherland as he understood himself (p 14). The error does not undermine Arkes's claim that congressional power over interstate commerce must have a moral limitation, but it does cause the focus of his argument to be somewhat misplaced.

The difficulty lies not with a recognition that some goods cannot be considered "legitimate" articles of commerce, but with the failure to recognize that such a determination involves the exercise of a police power rather than any power under the Commerce Clause. The commerce aspect of the problem comes into focus only when the several states disagree on the police power issue, for it is then that a ban in one state, through which such commerce must flow, can impede commerce that other states have deemed to be legitimate. The "broken package" doctrine

\textsuperscript{71} US Const, Art I, § 8, cl 18.
\textsuperscript{72} 322 US 643, 652 (1944) (Black concurring).
\textsuperscript{73} 274 US 37, 46-47 (1927).
sought to protect the commerce, without itself venturing into the field of police powers.

When Congress decided to ban directly goods that it deemed noxious, it moved beyond exercising a Commerce Clause power and into wielding a police power. It did not ban the goods because they impeded commerce, but because they threatened the health, safety, and morals of the people. Congress could only legitimately engage in such regulation if it was a necessary and proper means to the end of regulating commerce. But legal positivists cannot make the distinction between means and ends that is necessary to assess the propriety of such regulations. The price of labor, for example, has an effect on commerce because it alters the price of goods that move in commerce. That fact, alone, for a positivist, brings a minimum wage law within the power of Congress, so long as the declared purpose of the law is to regulate the effect on interstate commerce itself. Conservative legal positivists, who would like to oppose the power of Congress to enact such a regulation of wages despite its effect on commerce, thus find themselves without an argument on which to base their opposition. Sutherland, in contrast, understood not just that

74 As Chief Justice Hughes wrote in Carter Coal: “Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly.” 298 US at 317 (Hughes separate opinion).

75 Some conservatives are even hesitant to inquire into the purpose of such legislation, at least when not codified as part of the statute itself. See, for example, Edwards v Aguillard, 482 US 578, 636-38 (1987) (Scalia dissenting); Blanchard v Bergeron, 489 US 87, 97-99 (1989) (Scalia concurring in part and concurring in judgment); Wallace v Christensen, 802 F2d 1539, 1559-60 (9th Cir 1986) (Kozinski concurring). Compare Frank H. Easterbrook, Statutes' Domains, 50 U Chi L Rev 533, 539 (1983) (“To delve into the structure, purpose, and legislative history of the original statute is to engage in a sort of creation.”), with Edwards, 482 US at 586-87 (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”).

That view renders meaningless Chief Justice Marshall’s admonition a century and three quarters ago: “[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of [the Supreme Court] . . . to say that such an act was not the law of the land.” McCulloch v Maryland, 17 US (4 Wheat) 316, 423 (1819).

76 Chief Justice Rehnquist has tried to impose a quantitative limitation on the power. In his concurring opinion in Hodel v Virginia Surface Mining & Reclamation Association, Inc., he stated that:

[It] would be a mistake to conclude that Congress’ power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the ‘regulated activity’ must have a ‘substantial’ effect on interstate com-
the Necessary and Proper Clause requires that the purpose of the regulation be a Commerce Clause one, but, more fundamentally, that the word “proper” implies that even regulations whose purpose is the regulation of interstate commerce might be illegitimate. Conservatives could thus find in Sutherland principles that would support the ends they seek; they would, however, have to reject the legal positivism they have adopted since Sutherland’s time, and embrace once again the natural rights jurisprudence that gives substance to any such “proper” inquiry.

CONCLUSION

Hadley Arkes takes us on a tour of lost territory, a tour that demands of both liberal and conservative jurists a logical consistency in the arguments they make to further the ends of their respective jurisprudences. In the course of that tour, we discover that conservative jurists have adopted a jurisprudence that is fundamentally inconsistent with the ends they seek. Were they to again take seriously the jurisprudence of their political ancestors, including George Sutherland, however, they would find the logically coherent principles that would support their ends.

Liberal jurists, on the other hand, do not fare so well. Arkes makes a prediction in the early pages of the preface:

Both conservatives and liberals in our own time have moved away from natural rights and embraced one version or another of “legal positivism.” The consequence is that conservatives and liberals have both produced a jurisprudence for which they cannot give a coherent moral account. The irony is that Sutherland could supply the moral ground that is missing in the jurisprudence of each. But that is not to say that he could justify the ends that both sides have sought to reach in the name of jurisprudence (p x) (emphasis added).

merce. . . . As recently as Maryland v. Wirtz, 392 U.S. 183, 197 n. 27 (1968), Justice Harlan stressed that “[n]either here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”

452 US 264, 310-12 (1981) (Rehnquist concurring). As described above, however, the quantitative inquiry into whether the effect on commerce is substantial ignores the at least equally essential qualitative inquiry into whether the end of the legislation is a regulation of commerce or of health, safety, and morals. In other words, Rehnquist’s “substantial effects” test addresses whether the legislation is “necessary,” but fails to address whether it is “proper.”
Throughout the book the strength of Arkes’s reasoning makes clear that although the most important aspects of liberal jurisprudence rely on the “logic” of natural rights, they are simply inconsistent with the principles of natural rights. “[T]he right to an abortion,” for example, “can[not] be sustained on any serious ground of ‘natural rights,’” according to Arkes (p xi). And, as we have shown, the use to which liberal jurists have put the “liberty to contract” is fundamentally inconsistent, in most cases, with the natural rights principles on which the “liberty to contract” is based.

Although Arkes’s case for a return to the natural rights principles underlying George Sutherland’s jurisprudence may be politically appealing only to conservatives, it is logically compelling, and it should force a reassessment of the inconsistencies that lay at the heart of the jurisprudence of liberal and conservative jurists alike. Ironically, the few instances where we disagree with Arkes’s analysis are precisely those instances when Arkes himself has failed to take Sutherland seriously, but that, of course, only makes Arkes’s defense of Sutherland all the more compelling.