

played the social amenities of the time.

Knox vividly recalls the opening day of the term of the Court and those opinion days that McReynolds allowed him to attend. He takes us through the decision-making process — at least that part of it that he was permitted to observe — from the conferences through the drafting and printing process to the ultimate delivery of the opinion. The turning of the tide against the New Deal opponents began in earnest with FDR's re-election in November 1936 and the defection of Justice Owen J. Roberts, who joined what then became the majority in the key decisions that upheld the constitutionality of the New Deal legislation. The anti-New Deal stance was further eroded by Justice Van Devanter's announcement that he would retire at the end of the term. On several occasions that Knox records, McReynolds, ever the ardent foe of the New Deal's regulatory measures and their encroachment on the rights of commercial interests, carved a niche for himself in Supreme Court history by departing from the prepared text of dissents and delivering extemporaneous rants against the majority's rulings.

Knox's year in Washington ended on a sour note: He asked McReynolds for time off to take the bar exam, and McReynolds refused, telling Knox that he'd fire him if he took the exam; Knox announced his intention to take the exam, hoping McReynolds would relent, and McReynolds fired him. Nonetheless, it is clear from his memoir that Knox valued his clerkship, bittersweet as it must have been. At times in his narrative it would be easy to dismiss Knox as a mere cipher, unable to look beyond his limited experience with McReynolds to draw larger conclusions about the era. It would likewise be easy to conclude that McReynolds was a one-dimensional ideologue, a man who was mean-spirited by the standards of any era. Knox's final chapter softens those impressions by taking us beyond his year of service to offer a more complete portrayal of both the justice and himself. If Knox falls short in that effort, he is redeemed by the editors in their foreword and afterword, which

evoke a greater degree of sympathy for both men. The editors have done a service to Knox and to scholars and general readers interested in the history of the Court. Even McReynolds, however begrudgingly, would probably have to acknowledge that they got it right. **TFL**

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Natural Rights and the Right to Choose

By Hadley Arkes

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REVIEWED BY DANIEL W. SKUBIK

Does a woman's right to an abortion include the right to kill a fetus that survives the abortion and is separate from the woman's body? Does the right to infanticide follow logically from the right to abortion? Philosophic debate about how best to understand a woman's right to control her body well precedes the jurisprudence of *Roe v. Wade* and *Doe v. Bolton*. Philosophers such as Michael Tooley and Peter Singer have long argued, pre- and post-*Roe*, that to give the title "person" to any living being is to assign a moral label based on designated capacities (such as having the capacity to form the concept of a continuing self) that are not shared by *Homo sapiens*, fetus or infant. Hence, human fetuses and infants do not have a right to life, and so killing them is not in itself a wrong. But, of course, these are but the machinations of philosophers. The law does not go so far. Or does it?

Hadley Arkes, the Edward Ney Professor of American Institutions at Amherst College, declares that modern jurisprudence does indeed support

these philosophers' positions and that taking the time to reflect upon this fact should give us, as citizens and lawyers, pause. It should give us pause because supporting such legal results is evidence that we have lost our way. It eliminates our ability to defend another's rights, or our own, because it means that we have accepted the arguments that cut the moral ground from beneath our feet. Many people, Arkes writes, "who take an interest in matters of politics and law have gradually talked themselves out of the ground of their rights, without being quite aware of it. For like those professors in the academy, they can no longer offer a moral defense of those rights. ... To put it another way, they have talked themselves out of the premises on which their own freedom rests."

In support of this broad claim, Arkes offers as evidence several key judicial rulings and legislative tussles on abortion rights, as well as historical and philosophic arguments concerning the existence and range of those natural rights to which he refers in the first part of the book's title.

Arkes examines the usual array of Supreme Court cases and the expansive — almost silly — sweep of some dicta. For example, the plurality opinion by O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey* (1992) claims that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Grand language, but it can't really mean what it says without collapsing into itself when put into operation, because I (or you) could just as readily define existence not to include you (or me) as a bearer of rights; we cannot all be Humpty Dumpty, declaring that words shall mean only what we intend, neither more nor less.

More pointedly, Arkes reminds us of cases like *Planned Parenthood v. Farmer* (3d Cir. 2000), in which Judge Barry struck down New Jersey's partial-birth abortion law by explaining that the law addresses an impossible situation: "the Legislature would have

REVIEWS continued on page 44