# THE PERSONHOOD OF UNBORN CHILDREN: A FIRST PRINCIPLE IN "SURROGATE MOTHERHOOD" ANALYSIS

WALTER M. WEBER*

Before beginning with my topic, I would like to make a couple of responsive comments to what Professor Schuck said.[1] It may be a bit unfair to him because it is always easier to criticize an argument than to build one, but I am sure that I am going to get plenty of critical comments on my own remarks. I suppose it all evens out in the end.

First, the fact that surrogate motherhood may result in the creation of a new and wanted life cannot be the decisive factor in evaluating such contracts, unless we are willing to adopt unreservedly the principle that the end justifies the means. Obviously, it is possible to have a good thing come from a situation which is in and of itself intolerable. Many good reasons exist for doing all kinds of atrocious things.

My second point addresses the notion that it is somehow advantageous that the gestational mother knows in advance that she will be separating from the child. The fact of maternal foreknowledge would, it seems to me, weigh against surrogacy rather than for it. Interactions occur between the mother and her unborn child about which we are only beginning to learn. When I was in law school, several of my professors talked about how the unborn child hears the voice of the mother in the womb, and after birth the child recognizes this voice because the child is accustomed to hearing it. Scientists have conducted experiments showing that it is terribly destructive for a child not to be loved or cuddled, or for the child to be treated as a stranger. Obviously there is an extremely intimate relationship between mother and child when a woman is pregnant. We cannot be sure—and I wonder whether we are willing to take the chance—that the unborn child cannot sense, and suffer adverse effects from, a maternal attitude that regards this child as a stranger, a temporary tenant in the womb. How much the un-

* Associate Counsel, Free Speech Advocates.

1. *See* Schuck, *The Social Utility of Surrogacy*, 13 HARV. J.L. & PUB. POL'Y 132 (1990).

born child understands is something that we will probably not know for years. Our lack of knowledge should at least counsel for restraint.

Third, the fee involved in surrogacy does make a difference. One need only refer to the examples of prostitution, bribery, and kick-backs to see that the payment of money for certain human conduct violates traditional moral norms.

My fourth point addresses Professor Schuck's idea that there are few apparent problems with surrogate motherhood. Surrogacy is a relatively new area of the law, and the few problems that are already apparent do not indicate that this area will develop without difficulties. In any case, practical ease is not a decisive consideration. As a society, we have decided to consider some things unacceptable even though they may not cause major practical problems. If something is wrong, it is not necessarily just because of abuses. For example, I am sure that there were many good-hearted slaveowners. Nevertheless, we recognize that treating a person as property violates a fundamental moral principle and is wrong, even though people may do so with the best intentions and without apparent practical difficulty.

In surrogacy, the child is really the heart of the issue. We need to begin by looking at the unborn child. Children do not exist for the purpose of pleasing their parents; rather, they possess intrinsic worth as human beings in and of themselves. Thus, we have to start with the question of what principles govern when we are dealing with another human being. What I would like to focus on here is not so much the substantive implications of these governing principles, which I leave to those who are better versed in domestic law and civil-rights jurisprudence. I will concentrate instead on establishing that the subject of a surrogacy contract is a person who is entitled to respect as a member of the human race.[2]

Legal and constitutional analysis of this proposition must confront the Supreme Court decision in *Roe v. Wade*,[3] which held, in part, that the unborn child is not a person for the pur-

2. The following discussion derives from a brief the author prepared for *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), on behalf of *amici curiae* Catholics United for Life, et al. The brief contains an expanded version of the present argument and includes numerous supporting citations. Reprints are available from Free Speech Advocates, New Hope, Ky.

3. 410 U.S. 113 (1973).

poses of the Fourteenth Amendment to the United States Constitution.[4] The Fourteenth Amendment secures the most basic human rights for all "persons," while the contemporaneous Thirteenth Amendment establishes the principle that people cannot be treated as property.[5] Thus, the *Roe* holding has serious implications for surrogacy: Is the unborn child, whose successful delivery is the goal of the contracting parties, a person entitled to due process and equal protection?[6] Or may the law regard this entity as a mere piece of property with no more rights than a bushel of corn?

In *Roe v. Wade*, Justice Blackmun made several arguments for the conclusion that the unborn child is not a person.[7] I will address first a sort of meta-argument about the scope of the Constitution, which, though not explicitly stated, is nevertheless a key element of Justice Blackmun's opinion. As I see it, Justice Blackmun implies that the burden of proof rests on those who assert that the unborn child is legally a person. This is a crucial point because it goes to the basic issue of the scope of the Constitution. The Constitution, if it is going to have efficacy, has to be given a presumptive application, a scope compatible with the broad import of its wording. Narrow construction of the Constitution (as opposed to straightforward fidelity to the text) effectively emasculates the document—every person claiming a constitutional right would be required to prove somehow that he is entitled to constitutional protections and that his very particular right is secured by some constitutional provision. The Constitution, however, is not a legislative scheme, a detailed code which sets forth all the possible applications. Rather, the Constitution establishes certain basic principles and structures presumed to apply generally unless counterarguments justify the creation of an exception.

This approach must govern, first and foremost, interpretation of the term "person"—that is, definition of the class of in-

4. *See id.* at 158.

5. *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

6. *See* U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

7. Justice Blackmun refers to the state's interest in protecting the "potentiality of human life." Roe v. Wade, 410 U.S. at 162. This seems to imply that the unborn child is a separate sort of entity, a "potentiality." Whether such an entity is property or something in between person and property, Justice Blackmun did not say.

dividuals included within the minimum protections of the Constitution. Must each human being produce specific evidence to support the proposition that he is a person under the Constitution? The Framers probably did not mention very many particular classes of humans, and the people who ratified the Fourteenth Amendment likely did not even consider the possibility of excepting certain categories of human beings. Thus, the proponent of an exception properly must bear the burden of demonstrating the inapplicability of constitutional safeguards to a particular human or set of humans.

Justice Blackmun created an exception for unborn children to the availability of constitutional protections. Justice Blackmun did not characterize his ruling as creating an exception, but *Roe* has to be treated that way: If we cannot presume that every individual human being is included in the Constitution, then each individual will be obliged affirmatively to prove that he is included. What is the status, for example, of people who are in comas, or newborn infants, or citizens of hostile nations? None of these people has the same rights as an adult citizen, but they do have some rights. The reason that they have some rights is that they are persons. If we understand the Constitution to be something that has the capacity to protect people substantively, we have to assume that all of these people, along with the unborn, are included.

Moving beyond this meta-argument, I would like to address the first argument that Justice Blackmun makes for excluding the unborn from Fourteenth Amendment protections: the alleged absence of precedent.[8] The issue of precedent is relevant only if the assumption is that one is not included within the basic protections of the Constitution unless one can prove it. To argue about precedent is meaningless because, as far as I know, there is no precedent establishing that a newborn child is per se a person within the scope of the Constitution.

Although the Fourteenth Amendment says that all "persons" born in the United States are citizens, it does not say what a "person" is. It is not enough to say that someone was born, unless you assume that everyone who is born is also a "person" and therefore presumptively included in the protections of the Constitution. If it is possible to separate the terms "human be-

8. *See id.* at 157-58.

ing" and "person" for those not yet born, then there is no reason that this separation could not apply to those already born. Indeed, some have argued that a human does not become a "person" until sometime after birth, and that certain dying or chronically impaired individuals are no longer "persons." Thus, the argument that just because the Constitution includes the term "born" it necessarily includes all born humans, does not address the deeper question of who is a "person" protected by the Constitution. (As I have already noted, the term "person" must be treated as presumptively synonymous with "human being," or else our entire scheme of constitutional protections will break down in the face of interminable semantic and philosophical squabbling.) In any case, contrary to Justice Blackmun's assumption that no precedent existed, there was, in 1970, a three-judge federal district court that held in *Steinberg v. Brown*[9] that an unborn child was entitled to protection under the Fifth and Fourteenth Amendments.[10]

The second argument that Justice Blackmun makes is that the provisions of the Constitution referring to persons apply only post-natally, or as he phrased it: "None indicates, with any assurance, that it has any possible pre-natal application."[11] Justice Blackmun's argument is not definitive. The parts of the Constitution with limited application for specific categories of persons contain explicit limiting declarations. For example, one must be twenty-five years old to be a representative. The age restriction does not mean that until the age of twenty-five, one is not a person. On the other hand, those provisions that do not explicitly exclude unborn children—for example, the clause authorizing a tax on the importation of persons,[12] or the Fifth Amendment protection of persons against deprivation of life, liberty, or property without due process[13]—can apply as well to unborn persons as to those already born. Argument from those provisions is therefore circular and inconclusive.

Justice Blackmun continued by discussing the alleged laxity of Nineteenth-Century abortion laws,[14] apparently to imply

9. 321 F.Supp. 741 (N.D. Ohio 1970).

10. *See id.* at 746-47.

11. Roe v. Wade, 410 U.S. at 157.

12. *See* U.S. CONST. art. I, § 9, cl. 1 (Congress may tax the "importation of such persons as any of the States now existing shall think proper to admit. . . .").

13. *See id.* at amend. V.

14. *See* 410 U.S. at 158.

that the word "person" as used in the Fourteenth Amendment could not have been meant to include the unborn. Given the historical facts, it seems more probable that the framers of the Fourteenth Amendment did consider the unborn to be persons. The Fourteenth Amendment was adopted at precisely the time when state legislators were vigorously enacting legislation against abortion.[15] In the wake of scientific discoveries revealing the facts of human reproduction by the union of egg and sperm, the medical profession had started what was essentially the first "right-to-life" movement in this country, calling for anti-abortion legislation on the basis that science had now established that the life of each human being begins at conception.[16] These ideas were circulating at exactly the same time that the Fourteenth Amendment and the civil-rights laws were under consideration. In addition, we must keep in mind that common-law prohibitions existed even prior to the statutory prohibition. The practical fact is that until abortion technology was refined with medical developments in the late 1700s, abortion was not available on the scale that it is today and was either ineffective or a highly dangerous procedure that often resulted in death or serious harm to the mother.[17] All of these facts suggest that the framers of the Fourteenth Amendment were aware of, and sensitive to, the needs of the unborn, and did not intend to exclude them from the protection of the Fourteenth Amendment.

Justice Blackmun also relied upon the apparent inconsistency of exceptions in state anti-abortion laws with the claim of personhood for the unborn.[18] The *Roe* Court raised questions such as these: If the unborn does have all the rights of a person, on what basis can there be a life-of-the-mother exception? Can the mother be exempted from prosecution? Does the state have to treat all homicides, prenatal and postnatal, the same? These questions, however, confuse two separate issues: the constitutionality of the specific state law, and the personhood or nonpersonhood of the unborn child. A state may have engaged in a

15. The Fourteenth Amendment was ratified July 9, 1868. Most state anti-abortion legislative activity occurred prior to ratification. *See id.* at 175 n.1 (Rehnquist, J., dissenting).

16. *See id.* at 141-42.

17. *See* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 371-79, 394-95 (1979).

18. *See* 410 U.S. at 157 n.54.

violation of constitutional rights for years, for example, with segregated education, but that is not an argument that those denied rights are not persons. It is merely evidence of a constitutional violation. Unequal statutory treatment in the present time is not a proof of disparate constitutional status.

*Roe v. Wade* essentially held that one could be a human being and not be a person. The Court said it was not necessary to decide when human life began,[19] yet proceeded to rule that unborn children were not persons under the Constitution. This notion of a distinction between human beings and persons, however, would have been foreign to the framers of the Fourteenth Amendment. They understood the Fourteenth Amendment to apply to all humans. They did not separate human beings into categories of people and non-people.

A few brief references to legislative history may be helpful here. Senator B. Gratz Brown, speaking in 1864 in reference to the constitutional protection of persons, said,

> does the term 'person' carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of the personality excludes [an institution which] does not regard its victims as persons but as chattels.[20]

Representative Thaddeus Stevens, on the day that the Thirteenth Amendment was declared ratified, said:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of the Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.[21]

Representative John A. Bingham, who composed the first sentence of the Fourteenth Amendment, said:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not to be inquired whether a man is "free" by the laws of England; it is only to be inquired is he a man, and therefore free by the law

19. *See id.* at 159.
20. Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).
21. Cong. Globe, 39th Cong., 1st Sess. 74 (1865).

> of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law the only question to be asked of the creature claiming its protection is this: Is he a man?"[22]

Of course, Representative Bingham was not referring only to adult humans of the male gender.

With respect to scientific evidence, it has long been established that the human organism, biologically speaking, exists from the moment of fertilization. What is at issue in abortion, and in surrogate motherhood as well, is not so much the biological question as the question of the value to be placed on a specific member of the human species. The Fourteenth and the Thirteenth Amendments settled that question by requiring that we apply an equal value to the intrinsic worth of all human beings.

Furthermore, there are logical problems in trying to create an exception for unborn children to the rights afforded under the Constitution. Birth and viability are the two most commonly proposed borders for cutting off protection. Birth is very arbitrary. People schedule caesarian deliveries for convenience. Children are sometimes taken at least partially out of the womb, operated on, and returned to the womb for further gestation. Viability, of course, is dependent upon technology. The shifting state of medical development cannot provide an inherent, essential difference upon which one might predicate a fundamental constitutional distinction between categories of human beings.

In closing, I would like to mention the legal inconsistencies of the present situation. For example, a pregnant woman who is hit by a car while on her way to an abortion can sue for the loss of her child, a child whom she intended to destroy. Absurdities like this, while explicable in the abstract, do not make sense in terms of the overriding principles which we need to look at in interpreting the Constitution.

In surrogacy agreements, the focus of the law has to be upon the child who is to be conceived and delivered. If the law treats this child as a mere commodity, then we have not yet overcome the mentality that tolerated human slavery.

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22. Cong. Globe, 40th Cong., 1st Sess. 542 (1867).