Embryonic Rights

Self-Interest and the Thirteenth Amendment

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Conflict underlies all relationships, even the most intimate such as that between a mother and the fetus she carries. The fetus is like a parasite to the mother, deriving all nutrients from her, and depending on her for oxygen and for the disposal of waste products. Even before the determinative event of fertilization, the fetus's potentiality is at conflict with the mother as energy is diverted from her to catalyze the formation of the nutrient-laden egg. Once fertilization occurs, the newly formed embryo must quickly implant into the uterus to extract from the mother a continuous supply of food necessary for him or her to grow and mature into a fully functional baby. The competition between the mother and her offspring is reiterated genetically in a process known as "imprinting," where the fetus selectively inactivates certain maternally derived genes in favor of the counterpart genes contributed by the father.[1]

[1]See, e.g., Jon F. Wilkins and David Haig, "What Good Is Genomic Imprinting: The Function of Parent-Specific Gene Expression," *Nature Reviews Genetics* 4.5 (May 2003): 359–368.

Legal conflict also arises in the context of the mother-fetus relationship. A woman's right to privacy has repeatedly been invoked to silence the voice of the unborn child. In the seminal case of *Roe v. Wade*,[2] a woman's right to abort the fetus was upheld, relegating the fetus to the fringes of human society. Supreme Court jurisprudence simply does not recognize the unborn child as a right holder. Up until the point of viability, the fetus has no rights or privileges of his or her own to exercise. The state is permitted to promote its own interest in favoring the life of a fetus over abortion, but not at the expense of burdening the woman's right to abortion[3]. Without constitutional rights for the fetus, balancing the mother's interest against her fetus's is straightforward. The mother always wins.

Recently, it was proposed[4] that constitutional protection is available to an unborn child through the Thirteenth Amendment[5] and the aura of rights which are associated with it, collectively called the "right of self-interest." The congressional debates produced at the time of the Thirteenth Amendment suggest that a far broader goal was in mind than simply the prohibition of slavery.[6] Significantly, a conscious extraction of natural rights from the Declaration of Independence was relied upon in fashioning the Thirteenth Amendment. These natural rights were considered more basic than the fundamental interests conferred by the previous amendments to the Constitution but extended to the more elemental properties associated with being alive—the right to one's own life: to survive, to procreate, to maintain relations with one's family, to keep one's labor, and to be free from physical abuse by another. Collectively, these have been referred to as the "right of self-interest" to indicate that they impart fundamental rights essential to selfhood and self-preservation. The objective of the Thirteenth Amendment was not only to ban slavery, but also to recognize that individuals who had previously been held out as only property were entitled to the benefits of natural rights. These rights provided the foundation for the Thirteenth Amendment, and continue to enliven the Constitution.

The strength of this argument is that it provides a constitutional basis for enforcing the premise of natural rights. It has been argued before that natural right theory confers the entitlement to be born on a human embryo. But, this claim has no relevance in the legal forum where the battle for embryonic rights is now being fought. Courts look at the law, not at philosophical ideas about what the law ought to be. The idea that the Thirteenth Amendment created a constitutional natural right reconfigures natural-right theory into a new legal ground for challenging the constitutionality of abortion legislation.

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[2]410 US 113 (1973).

[3]*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992).

[4]R.M. Lebovitz, "The Accordion of the Thirteenth Amendment: Quasi-Persons and the Right of Self-Interest," *St. Thomas Law Review* 14.3 (Spring 2002): 561–600.

[5]"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *U.S. Constitution*, amendment 13, §1.

[6]See Jacobus TenBroek, *Equal Under Law* (New York: Collier Books, 1965), e.g., 166–173.

The Accordion of the Thirteenth Amendment

Consistent with its purpose, the Thirteenth Amendment has been used expansively to end "all badges and incidents of slavery."[7] The first civil rights legislation, enacted in 1866 under its enabling power, conferred on all persons born in the United States, the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real property and personal property."[8] Laws created under the Thirteenth Amendment have been repeatedly used to end both public and private discrimination against individuals.[9] Its logical extension is into the milieu of embryo rights—to end discrimination against them and to gather them up under the umbrella of the right of self-interest where they belong.

An important aspect of the Thirteenth Amendment was the repudiation of the rule by brute force. Slavery was abolished not because there was consensus that slaves were equal in the physical and mental attributes of the ruling class of human beings (i.e., the white European descendents), but because the concept of tyranny by force was considered repugnant to the ideas upon which the United States was founded. In examining the congressional debates that swirled around the slavery issue, it becomes evident that the legislators were not considering political or social equality, but equality in the sense of being entitled to exist—to survive and reproduce—unencumbered by the hand of might. The Thirteenth Amendment made these rights explicit.

To extend the Thirteenth Amendment even further—into the realm of embryo rights—is a legitimate exercise of a vibrant constitutional right that Congress intended as a tool to abolish all forms of discrimination and coercion. When the Thirteenth Amendment was passed into law in 1865, it was the first time that a constitutional right was extended to individuals who were not considered "persons" under the law. At the time of its enactment, slaves were treated as property, not persons. This was reflected in the legion of state laws that dealt with slaves and capped by the Dred Scott decision[10] in which the Supreme Court made perfectly clear that for constitutional purposes, slaves were personal property, and no more. The Thirteenth Amendment abolished the right to hold property in another human being, but it did not confer federal personhood on slaves. They remained in the nether world, not quite property anymore, but not persons, either—quasi persons—until the Fourteenth Amendment opened the way to full personhood.

Like slaves at the passing of the Thirteenth Amendment, human embryos have also not yet been accorded personhood. They can be created in tissue culture media, manipulated under sterile hoods, and disposed of like commodities in the stream of commerce. As a woman's personal property, they can be washed out of her

[7] *Civil Rights Cases*, 109 US 3, 20 (1883).

[8] *Jones v. Alfred H. Mayer Co*., 392 US 409, 422 (1968).

[9] See, e.g., *Jones v. Alfred H. Mayer Co*., 392 US 409 (1968); and *St. Francis College v. Al-Khazaraji*, 481 US 604 (1987).

[10] *Dred Scott v. Sandford*, 60 US 393 (1856).

uterus, like a pathogenic parasite, without any consideration of the embryo as a self or as a holder of human rights. Yet, like slaves, they are not wholly property, either. Several recent state cases have recognized that they have a unique status. In *Davis v. Davis*,[11] the disposition of seven frozen embryos was at the center of a dispute between a divorced couple. The father wanted the embryos discarded, while their mother argued for implantation into her, where they could be brought to full term. In deciding the case, the Tennessee Supreme Court wrote: "We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." A number of state courts have concurred with this opinion. This category of life can be aptly termed "quasi person," and at the very least, entitles them—like their legal progenitor, the slave—to the constitutional right of self-interest, even if federal law continues to deny that they are persons.

The expansion of the right of self-interest conforms to the principles repeatedly evoked during the slavery debates. Slavery was considered a brutal system that denied inalienable, natural rights to individuals who were "equal on the scale of creation." This equality was not measured by strength or intellect, but by the essential quality of being human. "Where does he belong in the scale of creation? Is he a rational, accountable being, the proper subject of civil and moral government, or is he a beast? That is all the question."[12] Human embryos at the point of diploidy[13] are clearly peers on the scale of creation to full-fledged human beings when it comes to their essential nature and potentiality. Slaves, too, were denied status and denigrated as lacking mental and physical skills of the white American. Depriving embryos of the constitutional protections of self-interest is akin to the subjugation and coercion of the impotent, the same conduct that the framers of the Thirteenth Amendment sought to end.

In creating the Thirteenth Amendment, Congress first had to establish federal power over the slavery issue, and then find a means to outlaw it. The theory of natural rights set forth in the Declaration of Independence served as both the source and power for eradicating slavery. In wielding it to shape the antislavery provision, Congress literally had to animate the Constitution with natural rights by recognizing certain fundamental entitlements that were apart from the question of whether they were persons under the law. These entitlements—jointly the right of self-interest—were the wellspring of the Thirteenth Amendment, and are separable from it, and together comprise a freestanding right of its own.

"Self-interest" is deliberately used to invoke the same ego-centered theories that are associated with the term in the economic and evolutionary biology arenas.

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[11]842 S.W.2d 588 (Tenn. 1992).

[12]House, Representative Benjamin Stanton of Ohio, speaking to the Committee of the Whole, *Congressional Globe*, 36th Cong., 1st sess. (May 3, 1860): 1911.

[13]Gametes (egg and sperm) each have half the amount of DNA (they are "haploid") that is present in a normal body cell. When the sperm and egg come together, the total complement of DNA is restored. This state is referred to as "diploid." Quasi personhood starts at diploidy, eliminating the need to resolve the question of when personhood begins.

For economists, the theory of self-interest originated in Adam Smith's book *An Inquiry into the Nature and Causes of the Wealth of Nations*, published in 1776, wherein he proposed that individuals acting for their own benefit as economic agents comprised the engine of economics: "Every man working for his own selfish interest will be led by an invisible hand to promote the public good." Evolutionary biology has a similar fascination with self-interest. According to Darwin's theory, individuals are pitted against the environment, and each other, in a struggle to survive; and those equipped with the most favorable characteristics to compete are able to survive and successfully procreate. At the core of this theory is the premise that organisms act in their own selfish interests. These principles are echoed in constitutional self-interest.

Balancing the Rights of the Mother and Child

If unborn children possess the constitutional right of self-interest, the question in the abortion case becomes different. The issue is now how to balance the constitutional rights of the two parties. In the abortion cases, the conflict was between the mother and the state police power. Constitutional law often deals with this kind of clash, weighing whether the state's interest is important enough to interfere with a woman's fundamental right of privacy. Setting the woman's interests against her unborn child's changes the equation, since it is now the child's interest with which we are concerned. Rather than balancing an individual's right against the whole community, it becomes a question of weighing the rights of two individuals, a much tougher problem.

There are two key approaches that can be applied to resolving the maternal-fetal conflict in the context of the right of self-interest. First, a balancing scheme can be used, where specific criteria are utilized to weigh and value the interests of each party, and then determine whose interest is superior. Balancing can be accomplished with any standards or measures that are deemed appropriate, including economic, emotional, or physical hardships, where the relative difficulties to the child and parent are weighed against each other to determine a fair outcome. A second means to settling the conflict is by the supremacy approach, where no balancing goes on, but one party's interest is taken to be supreme, regardless of the circumstances which are presented.

The supremacy approach from the mother's perspective is really the current state of the law. This is the position that her interest in the abortion is superior to the embryo's, irrespective of any embryo rights. It can be argued from the standard privacy right under *Roe v. Wade*, but can also be cast into new terms using the mother's own right of self-interest, relying on its procreation component. Either way, the conclusion is that the mother's constitutional rights are absolute over her unborn child's, entitling her to the abortion.

When the embryo's self-interest rights are regarded as superior, the supremacy argument has a similar outcome as the sanctity-of-life point of view. According to the sanctity position, a human embryo—from the point of conception[14]—is a life

[14] The term "conception" refers to the fusion of the egg and sperm.

secured against violation by virtue of its connection with, and creation by, God. Life is sacred and cannot knowingly be destroyed. As a consequence, abortion is justified in only rare circumstances.

The difficulty with the sanctity position is that it traditionally has been a religion-based argument, with no firm foundation in the law. As a consequence, when faced off against the constitutional privacy right, sanctity of life is rejected as an indefensible violation of the Constitution's Establishment[15] clause, the source for the federal requirement of separation of church from state.

Asserting that an embryo's right of self-interest is superior to the mother's has the same effect as the sanctity argument, but dissects out of it the secular religious deity component. As a result, the church/state separation concern is eliminated, while preserving the interest of the embryo as absolute, even against the mother's privacy or own self-interest right. This position is consistent with the right of self-interest as it emerged on the congressional floor. As indicated earlier, the Thirteenth Amendment was a rejection of the rule by strength, where the strong were enabled by the state to dominate the weak. As one Senator argued during one of the slavery debates:

> If might gives the right; if strength is a warrant which will authorize one man to subjugate another man to his will, then it is just as applicable to despots subjugating millions, as it is to the individual. You are therefore cut loose from all moral obligations or moral restraints, and you resolve the whole government of mankind in favor of brute force.[16]

Letting the mother's interest dominate the embryo's by a per se rule is antithetical to the policy reasons behind the Thirteenth Amendment. The mentality that those perceived as weaker could be disenfranchised entirely from the political system was abandoned in favor of a right of self-interest, available to even those who had yet to achieve constitutional personhood.

The balancing approach to the right of self-interest is contradictory to the important principles upon which the Thirteenth Amendment was established. It is difficult to see how financial hardship—e.g., being unable to provide for the embryo, a loss of income, being a severe detriment to the interests of existing children, etc.—could ever dictate abridging the right of self-interest. The impact of the Thirteenth Amendment on the South's economy was serious. The abolition of slavery eliminated an important source of labor for southern plantation owners. Yet, this did not impede Congress from going forward with the legislative plan. With this as guidance for what standard should be applied, it is nearly foregone to conclude that a severe financial effect (on either party) is insufficient to override an embryo's right of self-interest, even if it means being unable to provide for the child's basic necessities.

In circumstances where both the mother and embryo are healthy, there does not appear to be any reasonable basis for extinguishing the embryo's right of self-

[15]U.S. Constitution, Amendment I. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

[16]Stanton, speech.

interest. There must be a compelling state interest to interfere with a fundamental constitutional right,[17] and it is unlikely that any can be found to impede and discriminate so brutally against embryos.

Where there is a physical hardship—to either party—the case may be different. For example, where health risks (such as certain cardiovascular disorders) endanger the life of the mother by continuing with the pregnancy, other principles, such as the principle of totality or the lesser of two evils, may be involved that would permit interference with the embryo's life. What if the embryo is deformed or otherwise debilitated, e.g., with Down's syndrome, muscular dystrophy, or cystic fibrosis? In each case, a child would be seriously physically impaired if born. A mother who discovered these facts could bring an action for abortion arguing that the hardship to the baby (and herself by having to care for it) merits abrogating the baby's rights of self-interest. These kinds of issues were discussed extensively in the context of the conjoined twins, Jodie and Mary,[18] and are not separately addressed here. However, it is worth noting that legislation like the *American with Disabilities Act of 1990* was specifically enacted to protect disabled individuals against discrimination. Once embryos are recognized as right holders, this clear preference for safeguarding the rights of the infirm, coupled with the legislative intent of the Thirteenth Amendment, makes a strong argument against abortion when the reason is a disability.

How can embryo rights be implemented? No sleight of hand is necessary to enact legislation under the enabling powers of the Thirteenth Amendment to immediately confer civil rights on human embryos. While such rights are not as complete as those available to full constitutional persons, the status of quasi personhood at least is associated with the elemental right of self-interest, assuring embryos of the right to survive and be free of physical domination and coercion. But even without any express legislation, embryos are empowered to go into court—with a legal guardian acting in their best interest—to assert their right of self-interest against a parent or state who connives to takes their life away.

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[17] *Roe v. Wade*, 410 US 113, 154, 155 (1973).

[18] Jodie and Mary were conjoined twins, joined at the lower abdomen and sharing a spine. Because Mary's heart and lungs were undeveloped and defective, she was kept alive by Jodie. Doctors predicted that with the strain, Jodie's heart would fail within months, and both twins would die. Separating the twins was the only way to save Jodie's life, but Mary would die as a result of the surgery. Should one twin be sacrificed in order to save the other, or should both be allowed to die? Against the wishes of their parents, a British high court ordered the surgical separation of the twins. Royal Courts of Justice (UK), Court of Appeals, case no: B1/2000/2969, September 22, 2000. http://www.courtservice.gov.uk/View.do?id=80&searchTerm=conjoined+twins&ascending=false&index=14&maxIndex=14. See also Benedict Guevin, O.S.B., "The Conjoined Twins of Malta: Direct or Indirect Killing?"; William E. May, "'Jodie' and 'Mary': Separating the Maltese Twins"; Michel Therrien, "Did the Principle of Double Effect Justify the Separation?," all in *National Catholic Bioethics Quarterly* 1.3 (Autumn 2001): 397–427; Mark S. Latkovic and Timothy A. Nelson, M.D., "Conjoined Twins of Malta: A Survey of Catholic Opinion," *National Catholic Bioethics Quarterly* 1.4 (Winter 2001): 585–614.