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Constitutional Law II
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A.

A number of new methods of having or adopting children have recently begun to flourish. Among these are artificial insemination techniques, in-vitro fertilization, surrogate mother arrangements, and combinations of these. Usually the surrogate mother arrangement provides a couple, one or both of whom are infertile or otherwise unable to conceive or bear children, with an opportunity to have a usually unrelated woman carry a child for them. The child normally is the product of the fertilization of the ovum of the surrogate mother through artificial insemination, using the sperm of the male of the couple trying to have a child.

Often the couple will contract with the surrogate mother through an attorney for a fee. The attorney is responsible for arranging the contract between the couple and the surrogate mother, for arranging the couple's or natural mother's adoption of the child subsequently, and for coordinating medical and counseling procedures which accompany the process. Under a typical arrangement in the state of Wisconsin, the surrogate mother might be paid \$10,000 to carry the child; there might also be \$5,000 in expenses and an attorney's fee of from \$10,000 to \$15,000.

For couples who are desperate to have a child, the surrogate mother arrangement can be wonderful. And through it they are able to have a child who is at least the natural child of the husband, and sometimes the product of both the husband and wife.

Section 74-302(a) of the Wisconsin Revised Code however provides that "no adoption shall be permitted except with

the written consent of the living parents of a child ... unless a parent has surrendered rights in the child to a state licensed child placing agency or to the adoption court. In order to curb the influx of ordinary adoptions and adoptions resulting from new human and medical reproduction techniques and to make more adoptable children available to Wishagainers, the state legislature recently amended Section 74-302 to provide at Section 74-302(c) that children born to a surrogate mother in Wishagain, who is unrelated to the adopting parents, may be adopted only by Wishagain residents.

Pierre L'Enfant of Deerborne, Wishagain, a lawyer, has represented hundreds of couples seeking children through surrogate mothers. L'Enfant represents numerous out-of-state couples who wish to adopt their children through Wishagain surrogate mothers a number of whom are under contract with Mr. L'Enfant. L'Enfant is challenging the statute in federal court as unconstitutional.

As construed by the Wishagain Supreme Court, the statute allows the children of surrogate mothers born in Wishagain to be adopted by residents of Wishagain. L'Enfant is joined in his lawsuit by Bill and Tammy Beeker of Caliphonia, who have contracted through L'Enfant with a surrogate mother who is now pregnant in Wishagain, and Sydney and Sam Surk of Illanoise who are about to contract through L'Enfant with a potential surrogate mother.

Frank Celibaci, the state's attorney general, has threatened to seek injunctions under the recently amended law in order to prevent the transfers of any newborns of surrogate mothers in Wishagain, including the Beekers.

U.S. District Court Judge Oliver Madison has assigned you, his law clerk, the task of writing a brief memorandum with respect to certain aspects of L'Enfant vs. Celibaci.

Judge Madison feels perfectly comfortable with respect to rights of privacy, personal autonomy and child bearing issues, however he would like your memorandum to concentrate on constitutional provisions and analyses other than any under the First through Eighth and Fourteenth Amendments. Briefly discuss what other constitutional provision or provisions may be implicated in L'Enfant's challenge, the appropriate analytical framework or frameworks, and analyze the facts and issues in the case accordingly.

B.

Assume for the purposes of Part B only that Judge Madison has preliminarily enjoined the application of Section 74-302(c) to Sydney and Sam Surk.

Earlier this year the U.S. Conference of Catholic Bishops issued an interpretive document on Catholic doctrine concerning reproductive technologies. In that document the Bishops stated that under Church doctrine "the conception of a child in the uterus of a woman who is not married to the father of a child for a non-biological parent is a serious debasement of the dignity of human life, ...it is sinful for any Catholic to act as a surrogate mother or to obtain a child, through adoption or otherwise, from a surrogate mother. Surrogate mother arrangements are hereby prohibited." The issues surrounding reproductive technologies and surrogate mothers have been very controversial, normally and otherwise to say the least.

Shortly, after the Bishops' interpretive document and one week after Judge Madison's action Congress passed a statute, The Reproductive Technologies Act of 1989 which read, in pertinent part,

...and whereas the contracting for sale of babies

constitutes a serious debasement of the dignity of human life;

...and whereas inconsistency in state laws leads to crass, commercial shopping for baby-sale states;

...and whereas the advancement of reproductive technology and surrogate parenting seriously implicates interstate economic, as well as moral, concerns;

...and whereas the matter of surrogate parenting is a matter of national concern...

...3. Surrogate mother arrangements are hereby prohibited.

...5. No court shall enforce a surrogate mother contract nor permit the adoption of a child borne to a surrogate mother by a contracting couple or person..."

The federal statute goes on to provide for criminal fines and penalties.

Two days after the federal statute went into effect, Frank Celibaci, Attorney General of Wishagain, filed another suit in the U.S. District Court for the Eastern District of Wishagain against the U.S. Secretary for Health and Human Services, Mia Madre, who had authority over the Reproductive Technologies Act.

Ironically, another suit was filed by Sydney and Sam Surk the couple from PART A of this question also against Madre. Celibaci, of course sought to preserve the vitality of his state's adoption statute and related amendments of Sec.74-302, set out in PART A. The Surks who are also Jewish

and agnostic, respectively, want among other matters to preserve their ability to obtain a child by a surrogate and not to have moral judgments imposed upon them. The cases are consolidated by the court. This time as clerk you are assigned to another Judge, Judge William Manquist who asks you what constitutional provisions, affecting both the rights and powers of the parties, will be implicated in the consolidated case, Celibaci vs. Madre? Where appropriate describe the analytical framework or frameworks which are applicable, and analyze each issue in terms of the appropriate analytical framework.

C.

Assume that the Ohio Supreme Court and State Bar Association as part of the Code of Professional Responsibility for lawyers in Ohio promulgated the following rule:

No law firm shall contract or pay for any dramatic representations of lawyers engaged in lawyering activities on television as advertising for the firm.

If a law firm decided to advertise through a televised dramatic sequence and wanted to challenge the constitutionality of that rule, what provision and concept would it assert? What analytical framework would be employed by a court in resolving the constitutional issue asserted?