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DOES THE THIRTEENTH AMENDMENT PROVIDE A JURISDICTIONAL BASIS FOR A FEDERAL BAN ON CLONING?

Sean Charles Vinck

I. INTRODUCTION

Over the past several years, human cloning has become the subject of intense public debate because the possibility of cloned human persons raises grave ethical qualms. For many, the practice of cloning "violates a fundamental principle of human rights—to treat human beings as ends and not as means." Human cloning presents unique ethical and legal quandaries, in part, because the "utilitarian considerations that are appropriate for [cloning] plants and animals . . . cannot ethically be extended to humans." Human cloning thus fails moral scrutiny because "to use human beings and to maximize benefits through performing experiments on them" is morally objectionable.

The importance of the ethical questions involved in the debate over human cloning has justifiably provoked the interest of Congress. In light of these ethical and legal considerations, political will in Congress has arisen for the enactment of a statute outlawing human cloning. However, in order for Congress to enact a valid statute to ban the practice of cloning, the Federal Constitution must provide a font of authority for such a law because "an act of Congress is invalid unless it is affirmatively authorized under the Constitution." Article I, § 1 endows Congress "not with all 'legislative power',” but only with the powers the Constitution specifically enumerates.

A review of the Court’s “new federalism” jurisprudence reveals that the commerce clause would not suffice as a jurisdictional basis for a ban on human cloning. Consequently, Congress must focus its attention on alternative sources of authority. Because of cloning’s potential to impose “badges and incidents” of slavery on cloned persons, the Thirteenth Amendment is a plausible source of authority for a ban on human cloning.

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2. Id.
3. Id. at 529.
5. Id. at 297.
6. For a discussion of the Thirteenth Amendment as a jurisdictional predicate for a ban on patenting embryos, see Esther Slater McDonald, Note, Patenting Human Life and the Rebirth of the Thirteenth Amendment, 78 NOTRE DAME L. REV. 1359 (2003) (arguing that the patenting of embryos runs afoul of the Thir-
II. THE COMMERCE POWER IS AN INSUFFICIENT JURISDICTIONAL PREDICATE FOR A HUMAN CLONING BAN

Without a credible jurisdictional basis for a ban on cloning, the statute would fail to pass judicial and legislative scrutiny. While many might believe that the commerce clause is a sufficient jurisdictional basis for the enactment of a cloning ban, the United States Supreme Court in *United States v. Lopez* and *United States v. Morrison* has limited Congress's scope of regulatory authority pursuant to its commerce power. In *Lopez*, the Court recognized that Congress may only regulate three broad areas under the commerce clause:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce.

A ban on human cloning could not fall under the rubric of a regulation of the channels of interstate commerce. If anything, the materials necessary for cloning or the cloned human itself may constitute objects in the flow of interstate commerce. As such, Congress, conceivably, could regulate the interstate transport of the technological material necessary to perform cloning. However, crafting a statute that would identify exclusively and precisely the materials necessary for cloning would be difficult without inhibiting the transport of technology that has alternative, legitimate purposes. Furthermore, this would be a cumbersome method of regulating the activity in question; one could perform cloning in a purely intrastate fashion and locate him or herself beyond the legislative reach of Congress.

Most likely, for Congress to regulate cloning under the commerce power, Congress would have to articulate as jurisdictional justification the belief that human cloning exercises a substantial effect on interstate commerce, the third prong of the *Lopez* test. *Morrison* propounded a set of criteria for identifying activities exerting a substantial effect on interstate commerce. In *Morrison*, the Court stated:

Reviewing our case law, we noted that 'we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. . . . [W]e stated that the pattern of analysis is clear. . . . '[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'

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10. 514 U.S. at 558-59 (citations omitted).
It is certainly not clear that a law regulating the practice of human cloning could fairly be categorized as a regulation of economic activity. If Congress were to craft a law specifically to regulate the sale of cloned persons or the body parts of cloned persons, such a prohibition would almost certainly pass constitutional muster as a legitimate economic regulation. Yet, a statute regulating the transport of clones or their body parts would amount to a blunt or indirect means of regulating the practice of cloning, which is the legitimate object of the regulation. What is objectionable is not only the trade of cloned persons, but the actual process of cloning. Thus, the practice of cloning should be the primary object of regulation. Unfortunately, a statute simply attacking the practice of cloning would not meet the first of Morrison's criteria, since the practice of cloning is not economic in nature. The Court pointed out that it has never sustained the regulation of non-commercial intrastate activity predicated on the “substantial effects” prong: “Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”

Morrison's second factor considers whether a statute contains an “express jurisdictional element which might limit its reach to [activities having] . . . an explicit connection with or effect on interstate commerce.” Certainly, Congress could attach to the statute a jurisdictional provision limiting the effect of the proscription of cloning to entities engaged in interstate commerce. Yet, this factor alone would not be dispositive. The Court, in Morrison, held only that such a jurisdictional element “may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.”

Finally, the Court has indicated that “formal findings” as to the effect that the regulated activity exerts on interstate commerce may “enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect [is] visible to the naked eye.” Undoubtedly, Congress could make a tenuous argument that the practice of cloning could affect interstate commerce by creating a market for the body parts of cloned human persons. However, the forging of such a link would be mostly conjectural. Moreover, it is questionable whether there would be a market for cloned humans or their body parts large enough to rise to the level of “substantial” that the Lopez test demands for a statute to pass Commerce Clause scrutiny. Thus, it is unlikely that Congress could legitimately use its commerce power to enact a human cloning ban.

III. THE THIRTEENTH AMENDMENT AS A JURISDICTIONAL PREDICATE

Since the Commerce Clause is unlikely to offer a sufficient jurisdictional basis for a federal cloning ban, it is necessary to look to other sources of congressional authority in the Federal Constitution. The Thirteenth Amendment is a particularly promising source of such authority. The Amendment comprises two sections. The first, of course, prohib-
its slavery and involuntary servitude, except as punishment for crime. Critically for the purpose of regulating cloning is its second section, which states that "Congress shall have power to enforce this article [a prohibition on slavery and involuntary servitude] by appropriate legislation." The Supreme Court has dealt with congressional legislation predicated on the enabling clause of the Thirteenth Amendment in several cases. In *United States v. Harris*, the Supreme Court held that:

> it is clear that this amendment [Thirteenth Amendment], besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure.\(^6\)

In other cases, the Court has expanded further upon the definition of those practices which the Thirteenth Amendment's Enabling Clause permits Congress to proscribe. In *Jones v. Alfred H. Mayer Co.*, the Court held that section 2 of the Thirteenth Amendment clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."\(^7\) Justice Stewart's majority opinion stated further that "surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."\(^8\) The Court articulated a broad understanding of badges and incidents of slavery, which include "restraints upon ‘those fundamental rights which are the essence of civil freedom, [examples of which include the right] to inherit, purchase, lease, sell, and convey property . . . .\)

**IV. Cloning's Imposition of "Genetic Bondage" Is a Badge or Incident of Slavery**

In order for Congress to regulate cloning under the Enabling Clause of the Thirteenth Amendment, the drafters of the legislation must maintain that the practice of human cloning will impose on the cloned individual "badges and incidents" of slavery. Courts should afford deference to Congress's judgment as to what constitutes a badge or incident of slavery.\(^9\) While some may perceive benefits to the science of cloning, namely, "[p]roviding children to infertile couples, making available to families a genetic duplicate of a prematurely deceased child, a relative, or an admired person, and controlling the sex of children to accommodate parental desires for a ‘balanced’ family or to evade . . . risk of any of some 50 sex-linked genetic diseases,"\(^10\) the manifest ethical and

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17. 106 U.S. 629, 640 (1882) (citing United States v. Rhodes, 1 Abb. (U.S.) 28 (1866)).
19. Id. at 440.
20. Id. at 441.
21. Id. at 443.
legal problems with cloning are severe enough to plausibly implicate the Thirteenth Amendment.

Upon entry into the world, a cloned human person becomes the victim of “genetic bondage.” Since a cloned individual does not have a unique genetic makeup, his or her sphere of freedom is limited; unfettered cloning’s inevitable result “is the diminution of internal autonomy.” Genetic bondage amounts to a badge or incident of slavery because it impinges upon ‘those fundamental rights which are the essence of civil freedom.’ The Thirteenth Amendment is a plausible jurisdictional predicate since “it is a constitutional repository of our notions of free will and personal autonomy by virtue of its guarantee against the imposition of all ‘badges of slavery,’ whether occasioned by private or state action.”

Francis Pizzuli’s article on cloning technology makes a strong case for the notion that cloning amounts to genetic bondage. He identifies four principles that support the notion that cloned humans are the victims of genetic bondage. First, he argues that “the rendering of human constitution and behavior to a degree of predictability is incompatible with a widely held theory of free will.” This argument echoes the liberty jurisprudence the Supreme Court articulated in Planned Parenthood of Southeastern Pa. v. Casey, in which the majority opinion pronounced 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” What cloning attempts, as Pizulli writes, is to predetermine the constitution and disposition of a human person by insisting on a predetermined genetic makeup, the necessary and unavoidable result of asexual reproduction. As such, the cloned individual suffers a loss of the liberty to define his or her own concept of “existence.” A federal ban on cloning, under the rubric of the Thirteenth Amendment, would go some length in promoting the Court’s stated desire to protect individual liberty, an interest articulated eloquently by the Casey plurality and reiterated recently in Lawrence v. Texas. Thus one compelling reason for Congress to enact a human cloning ban is the fact that the purposeful generation of offspring asexually with the aim of predetermining their behavioral traits is incompatible with values that the Supreme Court has held to be implicit in the text of the Constitution.

That “the recognition of this incompatibility [between predetermined genetic makeup and free will] will cause an impairment of internal autonomy, or the capacity for feeling free” is another reason for enacting a human cloning ban. The dearth of spontaneity in the person’s development, particularly if the cloned individual is aware of his or her true origin, will exert a negative impact on his or her ability to forge a unique, fully free identity or existence. Again, the negative impact on “internal autonomy” Pizz-

23. Id. at 517.
24. Id.
27. See id. at 517-18.
29. 123 S. Ct. 2472, 2481(2003) (“In Planned Parenthood of Southeastern Pa. v. Casey, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”).
ulli laments seems to speak to the same concerns to which the Casey plurality spoke in articulating the philosophical bases of Constitutionally protected liberties. Indeed, there is a plausible case that the Supreme Court should interpret the Thirteenth Amendment in such a way as to protect citizens’ internal autonomy just as much as it protects the populace from strictures imposing constraint on external autonomy.\(^3\) Newer interpretations of the Thirteenth Amendment “recognize that man’s freedom may be limited by either external or internal barriers to achievement.”\(^3\)\(^2\)

Another argument for a human cloning ban is that “an impact on internal autonomy will have a direct and proportionate impact on external autonomy and the exercise of one’s civil liberties.”\(^3\)\(^3\)\(^1\) This is plausible, since a clone’s knowledge of his genetic past would lead him or her to a sense of entrapment. This internal barrier would eventually become an external hindrance; the sense of powerlessness would deter a cloned person from taking advantage of the full scope of social, economic, and political privileges of a free society. In sum, the awareness that parents or physicians had imposed a predetermined genetic identity on the clone would result “in the diminution of one’s [the cloned person’s] external autonomy, [raising] an issue of ‘badges of slavery’ under the Thirteenth amendment.”\(^3\)\(^4\)

Congress should not be dissuaded from accepting that predetermined genetic identity constitutes a badge or incident of slavery out of a belief that the Thirteenth Amendment protects only African Americans or a specific racial group. On the contrary, the Thirteenth Amendment “is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation it commits every race and every individual thereof.”\(^3\)\(^5\)

Numerous other factors militate in favor of a finding that cloning imposes a badge or incident of slavery onto the cloned person. All that is required for a cloning ban to pass constitutional muster with respect to the question of whether the Thirteenth Amendment is a legitimate jurisdictional predicate is a Congressional finding that federal legislation is “rationally capable of classification as a ‘badge’ or ‘incident’ of slavery.”\(^3\)\(^6\) The cloned person suffers not only “loss of genetic distinctiveness like the identical twin,” but also “is . . . saddled with a genotype that has already lived.”\(^3\)\(^7\) Furthermore, “it is altogether likely that the . . . parents will desire to manipulate and control the environment as well as the genotype in an attempt to reproduce the person who was copied.”\(^3\)\(^8\) Additionally,

[a] clonant’s future could not be charted out by his parents with inexorable determinism, but there would be sufficient psychological damage by having him [the cloned person], along with his parents believing otherwise. Forcing him into a lifestyle he

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31. See id. at 518.
32. Id. (citing Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 HARV. L. REV. 1294, 1307 (1969)).
33. Id.
34. Id.
35. Hodges v. United States, 203 U.S. 1, 16-17 (1906).
37. Pizzulli, supra note 22 at 509 (citation omitted).
38. Id.
might neither fit nor want would most likely distort his outlook and stunt his potential.\textsuperscript{39}

The imposition of a predetermined genetic makeup is a restraint on the fundamental rights of personhood and citizenship. All persons, regardless of race or ethnicity, possess a unique genotype and have the potential for unique development. Given the diverse genetic makeup of persons produced from sexual intercourse, the sexually reproduced child would not suffer under the weight of expectation of genetic similarity that a cloned child would. Each person's uniqueness is as fundamental a liberty as the political and economic freedoms the Court mentioned in \textit{Civil Rights Cases}.\textsuperscript{40} Because the uniqueness of which the cloned person is deprived is irreplaceable and life-long, a rational Congress could term reproduction from cloning a "badge or incident" of slavery.\textsuperscript{41}

Other scholars have endorsed the notion that cloning imposes the badge or incident of slavery on a person born through asexual reproduction. One argues that "because cloning would create a later-born genetic twin, the resulting child's 'autonomy might be limited [because] his or her genetic traits and predispositions are already known.'"\textsuperscript{42} In addition, "[t]he person created by cloning . . . may lack the same free will as a person created by sexual procreation."\textsuperscript{43} Cloning's potential to diminish free will and human dignity persuades others that human cloning would subject a clonant to forbidden subjugation. One scholar argues that "[b]oth human cloning and genetic manipulation raise fears of the creation of a master and/or subjugated population."\textsuperscript{44} Furthermore, "human cloning . . . thus may run afoul of the Thirteenth Amendment because . . . creating humans with a predetermined genetic makeup, laden with expectation, thereby limit[s] a cloned individual’s freedom."\textsuperscript{45} Many experts agree that predetermined genetic makeup will exert a negative impact on the freedom of the clonant. It is plausible that the impact will be severe enough to qualify as a badge of slavery.

\textbf{V. ROE DOES NOT MANDATE A RIGHT TO REPRODUCTIVE FREEDOM BROAD ENOUGH TO ENCOMPASS HUMAN CLONING}

One possible objection to the use of the Thirteenth Amendment as a jurisdictional predicate for a ban on cloning would be the fact that the Supreme Court has determined that women have a broad Constitutional liberty to reproductive freedom.\textsuperscript{46} In \textit{Roe}, the Court held that the Due Process Liberty Clause of the Fourteenth Amendment secured a right for women to choose whether or not to terminate a pregnancy.\textsuperscript{47} Presumably, one could

\begin{itemize}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} 109 U.S. 3 (1883).
\item \textsuperscript{41} \textit{Foley, supra} note 36 at 667.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 666.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} See \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").
\item \textsuperscript{47} 410 U.S. at 153 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").
\end{itemize}
argue that a ban on cloning would undermine the reproductive freedom the Court endorsed in Roe. However, the ruling in Roe would not be controlling in the case of a ban on human cloning; abortion and cloning are factually and legally distinguishable.

First, the Court would not have to change its jurisprudence to consider cloned fetuses Constitutional persons in order for Congress to outlaw human cloning. A cloning ban would regulate the practice of cloning before the cloned fetus even came into existence. Thus, the question of whether the cloned fetus is in fact a person in Constitutional terms would be irrelevant. In addition, Roe limited its holding to abortion and did not extend explicitly or implicitly to a woman's decision to engage in alternative means of asexual reproduction. Furthermore, even the right recognized in Roe is not absolute.48

States may not proscribe abortion, at least in the pre-viability stage of pregnancy, because the Court has determined that a woman's right, grounded in personal privacy, to terminate her pregnancy, outweighs the right of a fetus to live.49 But in the case of cloning, the rights-balancing calculus would be fundamentally different. For example, it may fairly be said that one reason for giving such weight to a woman's personal privacy liberty in the situation of abortion is that the woman is seeking to terminate a pregnancy. In other words, a woman's right to personal liberty in the reproductive sphere becomes the focus of Constitutional scrutiny in the case of abortion because she is seeking to stop the progression of a natural process (pregnancy) whose burdens she alone must bear in the physical, psychological, and financial sense. In the case of cloning, the same considerations which might induce the Court to place great emphasis on the woman's personal liberty as in the case of abortion do not exist. The intentions and burdens of the parents with respect to the reproduction in the case of cloning and in the case of an unwanted pregnancy which a mother seeks to terminate are fundamentally different. Consequently, the constitutional liberties of parents in each situation should be different. The reproductive rights of parents seeking to clone children are also less compelling because the offspring they are seeking to bear would be subject to unique suffering. Human cloning is a process in which prospective parents voluntarily seek to have a child through complex, extraordinary means. Because parents of cloned children consciously seek the birth of a child and because they would not be subject to the same burdens of a mother seeking an abortion, human cloning implicates different Constitutional rights. With respect to cloning, the relevant Constitutional questions involve more the legal rights and status of the cloned individual after birth, not the legal rights and status of its parents prior to birth: parents of cloned children could not assert the same injuries resulting from carrying a cloned child as would a mother carrying a child she seeks to abort. Legislation would ban human cloning on the basis of the potential maladies a cloned individual would suffer outside of the womb and not on the basis of the maladies its mother would suffer during pregnancy.

48. See generally Casey, 505 U.S. 833, infra note 49.
49. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) (stating that a central principle of Constitutional abortion jurisprudence "is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."'}).
VI. CONCLUSION

Despite the various legal complexities that permeate the discussion of a federal cloning ban, the ethical and moral repercussions of unrestrained human cloning are severe enough to invite proscription by the United States Congress. In crafting a permanent ban, Congress members should employ the Thirteenth Amendment as its jurisdictional predicate. Not only is the Commerce Clause a less than completely satisfactory jurisdictional predicate, but proscribing cloning in the same fashion as slavery would have the effect of demonstrating the nation's collective moral revulsion towards cloning and its dangerous fruits. While it is not certain that a majority of Congress would accept the notion that cloning amounts to a badge or incident of slavery, it is equally apparent that the society "may choose not to support a procedure that implicates a genetic form of slavery, undermines free will, and infringes upon the civil liberties guaranteed under the constitution."\(^{50}\) Besides political and ethical concerns, cloning also raises biological and health issues. While there are "substantial unknowns attendant to the long-range impact of genetic modification accompanied by cloning," the "increased susceptibility to disease, increased occurrence of developmental abnormalities, and adverse effect upon longevity"\(^{51}\) are areas that concern researchers most familiar with the subject. Generations of humans unnecessarily plagued by these types of recurring health problems further speak to cloning's potential to force on human persons slave-like conditions. In sum, the harm that cloning imposes on cloned individuals make the Thirteenth Amendment a plausible jurisdictional basis for the enactment of a federal ban on cloning.

\(^{50}\) Id.
\(^{51}\) Id.