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ARTICLES

Constitutional Constraints on the Regulation of Cloning

Robert A. Burt*

In 1995, Congress enacted a ban on federal funding for experimentation with human embryos.[1] In 2001, President George W. Bush issued a presidential policy statement extending this funding ban to research on human stem cells extracted from embryos except for research on a limited number of cell lines that had previously been established;[2] he reiterated this position in a 2007 executive order.[3] In his 2008 presidential campaign, Barack Obama promised to support stem cell research.[4] It now seems likely that in addition to rescinding Bush's executive order,[5] Obama will ask Congress to repeal its funding ban from 1995, which still prohibits scientists from generating new stem cell lines.[6]

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1. Known as the Dickey-Wicker Amendment, this ban was formally a rider to federal appropriations for Labor, Health and Human Services, and Education; it has been renewed every year since 1996. Balanced Budget Downpayment Act, Pub. L. No. 104-99 § 128, 110 Stat. 26, 34 (1996); *see* Sheryl Gay Stolberg, *New Stem Cell Policy To Leave Thorniest Issue to Congress*, N.Y. TIMES, Mar. 9, 2009, at A1.

2. Press Release, Office of the Press Secretary, White House, President Discusses Stem Cell Research (Aug. 9, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html.

3. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 22, 2007).

4. *See, e.g.*, Barack Obama & Joe Biden, The Change We Need, Technology, http://www.barackobama.com/issues/technology/ (last visited Mar. 25, 2009).

5. Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009); *see also* White House Press Office, Fact Sheet on Presidential Executive Order: Removing Barriers to Responsible Scientific Research Involving Human Stem Cells, http://www.whitehouse.gov/the_press_office/Fact-Sheet-on-Presidential-Executive-Order (last visited Mar. 25, 2009).

6. *See* Stolberg, *supra* note 1; CNN, CNN's John King Interviews President-Elect Barack Obama, Jan. 16, 2009, http://news.turner.com/article_display.cfm?article_id=4209 ("Well, if we can do something legislative then I usually prefer a legislative process because those are the people's representatives. And I think that on embryonic stem cell research, the fact that you have a bipartisan support around that issue . . . I think that sends a powerful message . . . . I like the idea of the American people's representatives expressing their views on an issue like this.").

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The politics surrounding this research could shift again—as the ethical issues of stem cell research are reopened, some critics may promote a total prohibition of human embryonic and stem cell research. Public debate on this issue has thus far focused on policy concerns. The purpose of this Article is to explore constitutional arguments that might be invoked to overturn any federal or state restrictions on human embryonic stem cell research.

Broadly speaking, I will evaluate four different constitutional challenges to a total ban: 1) that such regulations violate researchers' constitutional right of free scientific inquiry; 2) that such regulations violate individual rights to reproductive freedom; 3) that the former Executive Branch restriction imposed an unconstitutional condition on the availability of government funding; and 4) that neither reproductive nor therapeutic cloning is a permissible subject for congressional enactment, but that both are reserved exclusively for state regulatory authority. Exhaustively evaluating these four possible constitutional objections would require writing at least a small textbook on constitutional law; I will instead be suggestive rather than exhaustive.

I. THE RIGHT OF FREE SCIENTIFIC INQUIRY

The First Amendment proscription that Congress "shall make no law . . . abridging the freedom of speech"[7] might seem an obvious haven for scientific researchers committed to intellectual inquiry into the basic workings of the human organism. On at least a few occasions, the Supreme Court has clearly asserted that freedom of speech applies not just to expression but also to teaching and intellectual inquiry that could lead to expression.[8] In its most expansive

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7. U.S. CONST. amend. I.

8. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564, 567 (1969) (striking down a Georgia law forbidding the possession of obscene material, noting that the "right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society," and that "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits"); Keyishian v. Bd. of Regents, 385 U.S. 589, 591-92, 603 (1967) (considering a First Amendment challenge to a New York law requiring teachers to answer questions about membership in the Communist Party); Sweezy v. New Hampshire, 354 U.S. 234, 236, 250 (1957) (plurality decision holding that a professor's academic freedom is infringed when he is compelled to answer questions about a lecture dealing with communism). *But see* Zemel v. Rusk, 381 U.S. 1, 13-17 (1965) (upholding restrictions on citizen travel to Cuba despite a citizen's stated purpose of gathering information about Cuban life and noting that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information"); Steve Keane, *The Case Against Blanket First Amendment Protection of Scientific Research: Articulating a More Limited Scope of Protection*, 59 STAN. L. REV. 505, 528-531 (2006) (rejecting the theory that scientific research should receive First Amendment protection simply because it is a

embrace of this ideal, the Court in 1967 extolled free academic inquiry as a "transcendent value" forbidding "laws that cast a pall of orthodoxy over the classroom."[9] Similarly, in 1957 the Court stated as follows:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[10]

It is a seemingly easy step to apply these encomia to the pursuit of scientific knowledge in research laboratories, and it is a tempting step beyond that to assert that the current or proposed restrictions on reproductive and research cloning are nothing more than a (forbidden) "pall of orthodoxy" over free-ranging scientific inquiry.

The constitutional argument is, however, not so easy to sustain. The courts have in fact been very sparing in giving any enforceable content to these high-flown dicta.[11] Consider the cases in which individual researchers have claimed that state university officials "cast a pall of orthodoxy" over their free scientific inquiry by dismissing them from employment or removing them from classroom teaching based on the content of their expressed views.[12] The First Amendment

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"precondition" of speech). The Court has also acknowledged the right of the organized press to "gather news." *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (overturning a Massachusetts law excluding the press from court during testimony of minor sex victims); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that an order closing a criminal trial infringed the First Amendment right to attend criminal trials); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). *See generally* Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment,* 54 EMORY L.J. 979, 1053-54 (2005) (using different modes of constitutional reasoning to assess how the First Amendment may protect scientific inquiry, and noting that press-oriented cases may not apply to the gathering of information through scientific inquiry because much scientific research is performed without publication as a primary goal).

9. *Keyishian*, 385 U.S. at 603.

10. *Sweezy*, 354 U.S. at 250.

11. *See generally* J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment,"* 99 YALE L.J. 251, 255 (1989) (arguing that "constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state").

12. *See, e.g.*, Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001) (upholding summary judgment where a university stripped a professor of privileges when he refused to submit grading materials and finding that "[n]o person has a fundamental right to teach undergraduate engineering classes without following the university's grading rules"); Bonnell v. Lorenzo, 241 F.3d 800 (6th

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would clearly be violated if state officials removed political candidates from the ballot based on substantive objections to the content of their campaign literature, but substantive review by tenure committees in state (as well as private) universities is a well-accepted method of scientific quality control. The First Amendment thus cannot be applied with the same free-ranging breadth in academic or scientific pursuits as in other social endeavors. Moreover, the courts have not been particularly searching or welcoming in any effort to translate this supposed "transcendent value" of free academic inquiry into a coherent and enforceable protection.

A different tack for future doctrinal development might be imagined. Freedom of intellectual inquiry might be conceived not as an individual researcher's right, but as a right of the scientific or academic community—a right based on a recognition of the special characteristic of "scientific truth" as based on communal standards of scientific self-regulation. This conception of scientific truth would be transgressed by restrictions imposed by government officials guided by non-scientific criteria. This formulation would, however, run up against some considerable difficulties of application. Officials clearly have authority to refuse funds for scientific research based on the decidedly non-scientific criterion that other demands on government resources should have higher priority; this difficulty might be addressed, however, by specially permissive rules for restrictions on government funding.[13]

With this proviso, a challenge might be launched against the proposed ban on all (not just federally funded) research or reproductive cloning based on non-scientific criteria about denigrating the "human status" of the cloned organism. But here too the principled basis for such challenge immediately becomes cloudy. For reproductive cloning, there is a respectable body of scientific literature suggesting that there may be substantial (or at least unknown) risks for the long-range health status of the cloned person.[14] This basis for prohibiting

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Cir. 2001) (upholding a teacher's suspension for using offensive language in class when it was not germane to the subject matter and citing similar cases from other jurisdictions); Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (upholding a state statute restricting the ability of state employees to access sexually explicit material as applied to public university professors and characterizing academic freedom as inhering in universities, not in individual professors); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3rd Cir. 1998) (finding that the First Amendment does not grant the professor the right to select curriculum materials that contravened university policy and noting that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom"). *But see* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001) (finding that refusal to renew a teaching contract based on in-class speech could violate the First Amendment and noting that "a teacher's in-class speech deserves constitutional protection").

13. *See infra* Part III.

14. *See generally* IRVING L. WEISSMAN, SCIENTIFIC AND MEDICAL ASPECTS OF HUMAN

reproductive cloning might appear well within "scientific criteria." But is it clear that other objections to reproductive cloning, based on humanistic values such as respect for individuality, should be barred from public protection? Is it clear that professional exponents of "science" should be given exclusive social authority for deciding our collective futures? To assert that only "scientific" criteria might guide social regulation is to beg the ultimate question at issue: what is the proper role of science and scientists in shaping the values of our shared social life?

The First Amendment, in its commitment to wide-open, robust inquiry, does not answer this question; it demands that the answer be openly and endlessly debated. Scientists cannot, therefore, claim its protection on the basis that their self-regulated community is the sole repository of "truth" about any contestable issue regarding our social life; that claim, in itself, is antithetical to the underlying value of the First Amendment of free speech and inquiry.

II. THE RIGHT TO REPRODUCTIVE FREEDOM

Publicly enacted bans on cloning might be challenged not by their scientific purveyors but by individuals who want to use the technology, whether to reproduce an entire human being or only to produce human embryos by cloning their own cells. This claim could be based on the Supreme Court's decision in *Roe v. Wade*[15] and the line of cases endorsing a constitutional right of "privacy" or "liberty" in controlling one's own reproductive capacities.[16] The principle derived from the abortion cases could clearly apply to an individual's choice to give birth to a child whether the child is conceived by cloning, *in vitro* fertilization or some other methodology. The *Roe* principle could also support the right to refrain from having a child—not just by contraception or abortion, but through other techniques for interrupting fetal development, such as destroying the embryo for research purposes.

Given the way the Supreme Court has developed the *Roe* doctrine in recent years, however, it seems most likely that none of the proposed congressional restrictions on reproductive cloning would be invalidated on individual "privacy" or "liberty" grounds. In 1992, the Court reinterpreted *Roe* by ruling that states were not entirely prohibited from restricting an individual's right to reproductive choice, but instead that states were prohibited only from imposing an "undue

REPRODUCTIVE CLONING (2002).

15. 410 U.S. 113 (1973).

16. *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (enforcing strict scrutiny for review of the classifications used in state sterilization laws because of the "basic liberty" being deprived).

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burden."[17] The distinction between impermissible "undue" and permitted "due" burdens is not exactly pellucid in the Court's formulary. It seems likely, however, that prohibition of reproductive cloning in order to protect the health of the cloned child would pass muster under this cloudy standard, whether the health risk is understood as physical or psychological. Even before narrowing its interpretation of *Roe*, the Court had endorsed restrictions on access to drugs to protect all potential users from health risks, although some individuals wanted to forego this protection.[18] Similarly, the Court has subsequently upheld prohibition of physician-assisted suicide even for terminally ill individuals who wanted this course for themselves.[19] If the Court has been willing to uphold restrictions on choices in order to protect individuals from health risks they would themselves accept, there would be no basis for overturning state prohibitions against one individual's inflicting health risks on another (namely, the embryo potentially able to develop into a viable human being) who had expressed no choice in the matter.

In contrast to reproductive cloning, a person's claim for the right to use her cells for research or therapeutic cloning would face a different obstacle. A state prohibition preventing one from using her cells for therapeutic purposes does not seem to present an "undue" burden on the donor because the state is not forcing her to use her body in ways she does not want to (as it does in the case of abortion bans). Instead, prohibition of research or therapeutic cloning might be understood as a restriction on an individual's liberty to do what she pleases with any part of her body, but it is not clear that *Roe* itself endorsed this libertarian premise. (Consider, for example, laws restricting prostitution or drug use, which narrow the claimed liberties on individuals' use of their bodies.) Understanding *Roe* as more concerned with "privacy" than with "liberty" provides a justification for prohibitions against research or therapeutic cloning, which, unlike forcing continuation of pregnancy, regulate events entirely outside the body of the individual cell donor. *Roe* itself, moreover, accepted state regulation of abortion after the fetus was capable of survival outside the mother's body—after the moment of "viability"[20]—and state regulation of the disposition of the viable

17. *Casey*, 505 U.S. at 16.

18. *See* United States v. Rutherford, 442 U.S. 544 (1979) (upholding the FDA's proscription of Laetrile for cancer treatment). The D.C. Circuit recently made a similar holding denying terminally ill cancer patients access to experimental medications that have not been FDA-approved. Abigail Alliance v. von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007), *cert. denied*, 128 S.Ct. 1069 (2008).

19. *See* Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksberg, 521 U.S. 702 (1997).

20. *Roe v. Wade*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.").

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cloned cell would find justification here.

III. UNCONSTITUTIONAL CONDITIONS ON THE AVAILABILITY OF GOVERNMENT FUNDING

With Congressional restrictions still in force at this time,[21] the use of federal funds for reproductive or research cloning outside specific circumstances remains forbidden. If government funding were equated with private philanthropy, it would be difficult to imagine a basis for challenging the government's decision to spend its funds for some purposes but not for others, as it saw fit. In our constitutional scheme, however, the government has obligations that private philanthropists do not; the government is obliged to honor public norms of behavior that private parties are free to avoid. Thus, for example, the Constitution forbids the government from giving funds only to Catholics but not to other religious groups,[22] whereas private parties are free to indulge religious preferences (and, indeed, are constitutionally protected in acting on such preferences under the First Amendment).

Nonetheless, a constitutional argument against federal funding restrictions on cloning for reproductive or research purposes would be unlikely to succeed. The funding restriction cannot be opposed on the ground that potential recipients have an independent constitutional right to engage in cloning; for the reasons already outlined here, it is difficult to see the basis for claiming such a right. Even if there were a constitutional right against government prohibition of cloning, it still would not follow that the federal or state governments are obliged to provide funds for carrying out these activities.

The Supreme Court has clearly set its face against such a ruling in a series of cases where state and federal legislatures forbade the use of public funds in carrying out abortions, or even simply prohibited the funded agency from counseling women about the possibility of obtaining an abortion.[23] These

21. *See supra* note 1.

22. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that to avoid infringing the Establishment Clause, state statutes must have a secular legislative purpose, must not have the primary effect of advancing or inhibiting religion, and must not foster excessive entanglement with religion); *see also* Jane Lampman, *Obama Would Overhaul Bush's Faith-Based Initiatives*, CHRISTIAN SCI. MONITOR, Jul. 2, 2008, http://www.csmonitor.com/2008/0702/p25s10-uspo.html (noting that some watchdog groups have won lawsuits when faith-based groups have used federal funding for religious purposes and describing the restrictions Obama recommends for federal dollars given to faith-based groups).

23. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (upholding congressional prohibition against physicians employed by federally funded agencies from informing women about abortion services); Harris v. McRae, 448 U.S. 297 (1980) (upholding congressional denial of federal Medicaid funds for abortions, even for maternal health protection); Maher v. Roe, 432 U.S. 464

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funding restrictions obviously made it more difficult for pregnant women to obtain abortions, but the Court has ruled that public agencies are not obliged to financially subsidize or to provide any measure of support for abortions, even though the agencies may not constitutionally prohibit any woman from obtaining an abortion. If, as I have suggested, governmental restriction of cloning for reproductive or research purposes is not constitutionally prohibited, it is difficult to see the basis for any constitutional challenge to refusal of public funding restrictions for such cloning.

IV. CLONING MAY BE REGULATED ONLY BY STATES AND NOT BY CONGRESS

Just a few years ago, it would have been difficult to imagine a successful argument that states possess exclusive constitutional authority to regulate cloning. Two bases for congressional regulatory authority would have seemed available. One basis could have been found in Section 5 of the Fourteenth Amendment to the Constitution. This section provides that "Congress shall have power to enforce, by appropriate legislation, the provisions" of the Amendment, including its guarantee of equal protection of the laws.[24] In the 1960s, as Congress sought to extend protections against state-supported race and sex discrimination, the Court construed Section 5 authority to permit broader congressional conceptions of equal protection than the Court alone might have been willing to endorse without statutory expansion.[25] By this construction, Congress could readily have justified a conclusion that reproductive cloning harmed the resulting person and thereby infringed his right to equal protection of the laws. Similarly, Congress could have asserted that a cloned embryo was sufficiently endowed with human characteristics that its use for research cloning violated the equal protection guarantee. But this expansive conception of the scope of Congress' Section 5 authority has effectively vanished from the current Court's jurisprudence.[26]

In particular, the Court's recent decision in *United States v. Morrison*[27] has removed any possibility of constitutional authority for congressional regulation of cloning under Section 5 of the Fourteenth Amendment. In the Violence Against Women Act (VAWA), Congress had provided a federal court remedy for

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(1977) (upholding state denial of Medicaid benefits for abortion while covering childbirth expenses).

24. U.S. CONST. amend. XIV, § 5.

25. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966).

26. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (arguing that the Court's recent Section 5 jurisprudence breaks from decades of deference and reflects an aggressive vision of a "juricentric" Constitution).

27. 529 U.S. 598 (2000).

gender-motivated violence by private actors partly on the ground that state laws in many jurisdictions were inadequate to protect women's safety.[28] The *Morrison* Court ruled, however, that the Fourteenth Amendment applied only to "state action" and not to private conduct, rejecting the congressional rationale that state failure to provide adequate protection against violence to women was, in itself, an adequate basis for finding an equal protection violation by states. By the Court's narrow construction of requisite state action, it is not possible to see how Congress could justify any ban of reproductive or research cloning unless the activity were directly conducted in state-run laboratories. Following *Morrison*, Section 5 of the Fourteenth Amendment provides no authority for congressional regulation of cloning.

The second possible basis for federal regulation of cloning—seemingly even clearer than its Section 5 authority—would have been congressional authority to regulate interstate commerce, as authorized by Article I, Section 8 of the Constitution. Prior to the 1930s, the Supreme Court had narrowly construed this authority to exclude such matters as child labor or coal mining from congressional regulatory authority, even though such activities had clear connections with and substantial impact on interstate commercial activity.[29] The Great Depression and the activist interventions of the New Deal led the Court to abandon its restrictive interpretation of the federal commerce authority and, over the next sixty years, to validate federal regulatory actions with even the most tenuous demonstrable connection with interstate commerce.[30] At the same time, the increasingly complex integration of national economic activity apparently provided a constitutionally sufficient link with interstate commerce for virtually any conceivable federal regulation. If the post-New Deal permissive interpretation still held, finding a requisite connection with interstate commerce to justify federal regulation of reproductive or therapeutic cloning would be a foregone conclusion. A sufficient case would arise simply from the economic competition among laboratories in various states to develop the latest cloning techniques and employ the most innovative research scientists—not to mention the interstate transportation of paraphernalia for the cloning activity itself. But the post-New Deal permissiveness is increasingly under challenge by the contemporary Supreme Court.

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28. Violence Against Women Act of 1994, 108 Stat. 1796, 1902, 1941-42 (codified as amended at 42 U.S.C. § 13981 (2000)).

29. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918).

30. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); United States v. Carolene Products Co., 304 U.S. 144 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

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The Court's recent decision in *Morrison* appears to undermine any Commerce Clause justification for federal regulatory authority over cloning. In striking down the provision of a federal cause of action for violence against women, *Morrison* dismissed extensive congressional findings that violence against women had substantial impact on interstate commerce because of women's lost hours of employment and increased medical expenses. The Court held that the commerce clause only justified federal regulation of activity which was "economic in nature" rather than "noneconomic . . . conduct [with an] . . . aggregate effect on interstate commerce."[31]

Determining whether cloning is "economic" or "non-economic in nature" is surely a snark hunt, but beneath this foggy concept, the Court appears intent on drawing a constitutional "distinction between what is truly national and what is truly local."[32] Though this "truth" is scarcely less self-evident than the distinction between economic and non-economic conduct, the Court's examples of the "truly local"—that is, "marriage, divorce, and childrearing"[33]—strongly suggest that regulation of cloning would fall on the "truly local" side of the Court's delineation of constitutional authority. Prohibition of reproductive cloning is clearly nothing more than identification of an impermissible technique of "childrearing"; and the destruction of embryos involved in cloning research is based on the progenitor's decision to refrain from childrearing—that is, from carrying embryos to term. There may be other rationales for congressional restrictions—for example, to protect nationwide threats to "the sanctity of embryonic life." But if the Court is intent on constructing a protected area of state hegemony over "non-economic activity" and if childrearing is one defining characteristic of this hegemonic realm, the Court will ignore other characterizations of cloning just as it ignored the economic consequences of gender-based violence in its eagerness to give narrow definition to congressional Commerce Clause authority.

The Court's rediscovery of the constitutional imperative to protect state regulatory autonomy against federal encroachment has thus far been applied to strike down congressional enactments of a liberal stripe; in addition to the Violence Against Women Act, the Court has invoked state-autonomy concerns to overturn federal laws restricting gun possession near school premises[34] and federal protections against age or disability-based discriminations in state government employment.[35]

In its most recent decision, a Court majority appeared to pull back from this

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31. *Morrison*, 529 U.S. at 613, 617.

32. *Id.* at 617-18.

33. *Id.* at 616.

34. United States v. Lopez, 514 U.S. 549 (1995).

35. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

enterprise of constraining congressional authority. In *Gonzales v. Raich*,[36] upholding congressional preemption of state laws that permitted the "medical use" of marijuana, the Court insisted that the new state-autonomy cases were limited exceptions that must be read in "the larger context of modern-era Commerce Clause jurisprudence preserved by these cases."[37] Three Justices, however, strenuously dissented from this ruling. The question of the existence and reach of a resuscitated state-autonomy principle thus remains open to dispute.

If, notwithstanding the contrary indication of *Gonzales v. Raich*, the Court persists in refurbishing state autonomy limitations on congressional power, that principle must be sauce for right-wing geese as well as left-wing ganders. If any future Congress were to enact cloning restrictions, the Court should apply its new-found respect for state autonomy with evenhanded consistency. In my view, virtue as well as consistency would support this application. As fuzzy as the line might be for distinguishing the "truly national" from the "truly local" or "economic" conduct from "non-economic" conduct, it is important to protect institutional structures for public deliberation about deeply contentious moral convictions that promote respect for diversity of views and ensure that none of the combatants in these divisive issues can be easily silenced. The moral values at stake in deliberating an issue such as the propriety of reproductive or research cloning are complex and incommensurate. Conclusive resolution of this issue by Congress—a single, national body acting definitively at one moment in time—fails to give adequate respect to the complexity and diversity of the moral perspectives at stake. Unlike other morally contentious matters, cloning research presents no obvious need for the adoption of a singleminded national resolution of whether reproductive or research cloning should go forward. Notwithstanding that some people would prefer a uniform national resolution either for or against cloning, the fact is that local variations on this issue are conceivable—and the Court should seize on this fact in order to promote the democratic values of pluralism.

This issue should be conclusively resolved only by successive actions of state legislatures, necessarily deliberating at different times and responding to different constellations of constituents. This institutional deliberative structure is not only best suited to the specific character of these moral issues, but it is also, and most importantly, a respectful recognition of the diverse character of American society. It may be that, notwithstanding this diversity, a nationally uniform moral position will emerge regarding the moral status of cloning, particularly given recent political events.[38] But we can most reliably assure

36. 545 U.S. 1 (2005).

37. *Id.* at 23.

38. *See supra* notes 5-6.

adequate respect for the currently diverse moral perspectives on this issue by insisting on a multiplicity of deliberative sites and occasions as a requisite path toward the forging of any uniform national view. The actions by various state governments to fund embryonic stem cell research[39] exemplify the workings of a democratic, deliberative process.[40] A blanket Congressional prohibition on such research would dishonor this process. Accordingly, the present and any future Congress should restrain itself or be restrained by the Constitution.

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39. *See, e.g.*, James W. Fossett, *Beyond the Low-Hanging Fruit: Stem Cell Research Policy in an Obama Administration*, 9 YALE J. HEALTH POL'Y L. & ETHICS 523 (2009); Kaiser Family Foundation, State Funding of Embryonic & Fetal Research as of January, 2008, http://www.statehealthfacts.org/comparetable.jsp?ind=112&cat=2 (last visited Mar. 25, 2009); Joe Palca, *States Take Lead in Funding Stem-Cell Research* (National Public Radio broadcast, Mar. 30, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=9244363.

40. *See* Gretchen Ruethling, *Illinois To Pay for Cell Research*, N.Y. TIMES, July 13, 2005, at A17.