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Substantive Due Process and a Right to Clone

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Summary

As Congress continues to explore whether restrictions on cloning should be imposed, this report will consider whether a right to clone may be found under the Due Process Clauses of the Fifth and Fourteenth Amendments. In past cases, the U.S. Supreme Court has recognized certain personal rights as being fundamental and protected from government interference. Some of those cases involve various reproductive matters, including procreation and childbearing. If a right to clone is found to be fundamental, any infringement on that right would be evaluated with strict scrutiny, the most rigorous form of judicial review, if challenged. Because government action often fails to withstand strict scrutiny, the judicial recognition of a fundamental right to clone could raise questions about legislation that would prohibit or limit cloning. However, if a fundamental right to clone is not found, government regulation of cloning would be subject to rational basis review, the most deferential level of judicial review.

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In 1997, scientists in Scotland reported the first successful cloning of an adult mammal, a sheep named Dolly. Since that time, debate over the use of cloning for both reproductive and therapeutic purposes has steadily increased.[1] The possibility that a cloned human being may be forthcoming has generated additional concern.[2]

In July 2001, the U.S. House of Representatives passed H.R. 2505, the Human Cloning Prohibition Act of 2001. The Act would make it unlawful for any person or entity, public or private, to knowingly perform or attempt to perform human cloning, to knowingly participate in an attempt to perform human cloning, or to ship or receive an embryo produced by human cloning or any product derived from such embryo.[3] The Senate is expected to consider a similar measure, as well as a bill that would prohibit reproductive cloning, but allow medical research, including stem cell research, to continue.[4] Therapeutic cloning, which generally involves medical research to develop new therapies and treatments, would seem to be distinguished from reproductive cloning, where a cloned embryo is transferred to a womb to produce a cloned human being.

As Congress continues to explore whether restrictions on cloning should be imposed, this report will consider whether a right to clone may be found under the Due Process Clauses of the Fifth and Fourteenth Amendments. In past cases, the U.S. Supreme Court has recognized certain personal rights as being fundamental and protected from government interference. Some of these cases involve various reproductive matters, including procreation and childbearing. If a right to clone is found to be fundamental, any infringement on that right would be evaluated with strict scrutiny, the most rigorous form of judicial review, if challenged. Because government action often fails to withstand strict scrutiny, the existence of a

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[1]See Judith A. Johnson, *Human Cloning*, CRS Rept. RL31358 (2002).

[2]See David Brown, *Human Clone's Birth Predicted*, Wash. Post, May 16, 2002, at A8; Rick Weiss, *Free to Be Me: Would-Be Cloners Pushing the Debate*, Wash. Post, May 12, 2002, at A1.

[3]H.R. 2505, 107th Cong. § 2 (2001). The term "human cloning" is defined to mean "asexual reproduction, accomplished by introducing nuclear material from one or more human somatic cells into a fertilized or unfertilized oocyte whose nuclear material has been removed or inactivated so as to produce a living organism (at any stage of development) that is genetically virtually identical to an existing or previously existing human organism."

[4]See Adriel Bettelheim, *Divided Senate Examining Research Value, Moral Issues As It Ponders Vote on Cloning*, CQ Wkly., May 4, 2002, at 1154 (discussing S. 1899, the Human Cloning Prohibition Act of 2001, and S. 2439, the Human Cloning Prohibition Act of 2002).

fundamental right to clone would raise questions about legislation that limits or prohibits human cloning.

Background

Although federal law does not currently prohibit cloning, it does restrict the availability of federal funds for cloning research. Since 1996, Congress has included riders in appropriations measures for the Departments of Labor, Health and Human Services, and Education that prohibit the use of appropriated funds for the creation of human embryos for research purposes or for research in which human embryos are destroyed.[5] In general, the riders define human embryos as any organism "derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells."[6]

Federal funds for human cloning research have been similarly restricted. In 1997, President Clinton issued a memorandum to the heads of the executive departments and agencies that addressed the funding of human cloning.[7] The memorandum stated that federal funds would not be used for the cloning of human beings. In remarks to the press, President Clinton urged the private sector to adopt a voluntary moratorium on the cloning of human beings: "Of course, a great deal of research and activity in this area is supported by private funds. That is why I am urging the entire scientific and medical community, every foundation, every university, every industry that supports work in this area to heed the federal government's example."[8]

Bills to restrict cloning have been introduced since the 105th Congress.[9] Early cloning bills sought to restrict either the federal funding of cloning research or the cloning of a human being.[10] These bills appear to have received little legislative action. H.R. 2505 is the first substantive cloning bill to have been passed by a congressional chamber.

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[5]Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, 110 Stat. 34 (1996). See Johnson, *supra* note 1 at 5 n.11 (identifying the relevant appropriations measures between 1996 and 2002).

[6]Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 107-116, 115 Stat. 2219 (2002).

[7]Memorandum on the Prohibition on Federal Funding For Cloning of Human Beings, 33 Weekly Comp. Pres. Doc. 281 (Mar. 4, 1997).

[8]Remarks Announcing the Prohibition on Federal Funding For Cloning of Human Beings and an Exchange With Reporters, 33 Weekly Comp. Pres. Doc. 278 (Mar. 4, 1997).

[9]See Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 Har. J.L. & Tech. 643, 675-76 (1998) (discussing early cloning bills).

[10]*Id*.

Substantive Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments provide that no person shall be deprived of "life, liberty, or property, without due process of law."[11] The U.S. Supreme Court has understood due process to protect both procedural and substantive rights. Under the doctrine of substantive due process, the Court has held that certain rights, while not expressly recognized in the text of the Constitution, are subsumed within the notion of liberty in the Due Process Clauses. One aspect of the liberty interest protected by the Due Process Clauses is a right of personal privacy or "a guarantee of certain areas or zones of privacy."[12] The Court has found that certain personal rights that can be deemed "fundamental" are included in this guarantee of personal privacy.[13]

If the Court determines that a right is fundamental, any government infringement on that right will be subject to strict scrutiny. Strict scrutiny is the most rigorous form of judicial review applied by a reviewing court. Government action will survive strict scrutiny only if such action is narrowly tailored to achieving a compelling government interest.[14] Where there is no fundamental right involved, the government must show simply that there is a rational basis for its action. This level of judicial review, referred to as rational basis review, is characterized by its deference to legislative judgment. Because of the distinction between strict scrutiny and rational basis review, a determination on whether there is a fundamental right to clone is critical.

The Court's recent substantive due process jurisprudence illustrates its reluctance to find new fundamental rights.[15] The Court has indicated that it has always been reluctant to expand the doctrine of substantive due process "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[16] In *Washington v. Glucksberg*, the Court identified two features of its

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[11]U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

[12]*Roe v. Wade*, 410 U.S. 113, 152 (1973).

[13]See *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (recognizing the right of parents to control their children's education); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (recognizing right of marriage and procreation); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding a right to contraceptives for unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (finding a woman's right to decide whether or not to terminate her pregnancy); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (recognizing the right to marry).

[14]*Roe*, 410 U.S. at 155. See also *Carey v. Population Services Int'l*, 431 U.S. 678, 686 (1977).

[15]See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (no fundamental right conferred on homosexuals to engage in sodomy); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (no fundamental right to assisted suicide). But see *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (recognizing right to refuse lifesaving hydration and nutrition as fundamental).

[16]*Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

substantive due process analysis.[17] First, the Court noted that the Due Process Clause protects those rights and liberties which are deeply rooted in the nation's history and tradition and are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[18] Second, the Court maintained that a careful description of the asserted fundamental liberty interest is required in substantive due process cases.[19]

The Court's consideration of the nation's history and tradition in its substantive due process analysis could make it difficult to find a fundamental right to clone. Some argue flatly that a right to clone does not emerge from our nation's tradition.[20] They maintain that cloning is a "radical new technology" that is not deeply rooted in national tradition.[21] On the other hand, proponents of a fundamental right to clone have identified examples from the nation's history that they believe support recognition of such a right.

Reproductive Cloning

In attempting to show that a right to clone for reproductive purposes is deeply rooted in the nation's history and tradition, proponents have referenced the nation's experience with reproductive technologies. They have identified reports of artificial insemination dating back to the 1790s to argue that assisted reproduction has been a part of the nation's history.[22] Proponents also contend that the absence of state bans on in vitro fertilization ("IVF") illustrate a continued unwillingness on the part of state legislatures to prevent infertile couples from exploring new reproductive technologies.[23]

The inactivity of state legislatures could provide support for recognizing a historical acceptance of the use of new reproductive technologies. In *Glucksberg*, the Court discussed the existence of state bans on assisted suicide in almost every state before upholding a similar ban in Washington. The Court noted that the bans represented longstanding expressions of the states' condemnation of suicide. The Court engaged in a similar discussion in *Bowers v. Hardwick*.[24] In that case, the Court reviewed the historical and continued existence of criminal sodomy laws

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[17]*Glucksberg*, 521 U.S. at 720-21.

[18]*Id*. (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

[19]*Glucksberg*, 521 U.S. at 721.

[20]See Cass R. Sunstein, Is There a Constitutional Right to Clone? 3 (Apr. 5, 2002) (Chicago Public Law and Legal Theory Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304484 ("If the right to clone must emerge from such traditions, the case is simple: There is no such right.").

[21]Anne Lawton, *The Frankenstein Controversy: The Constitutionality of a Federal Ban on Cloning*, 87 Ky. L.J. 277, 351 (1999).

[22]See Note, *Human Cloning and Substantive Due Process*, 111 Harv. L. Rev. 2348, 2360 (1998).

[23]*Id*. at 2361.

[24]478 U.S. 186 (1986).

before concluding that the Due Process Clause does not confer a fundamental right on homosexuals to engage in sodomy.[25] In contrast, the absence of bans on IVF could be offered to show a lack of condemnation for the use of new reproductive technologies.

Although states have not passed bans on IVF, some have passed laws that prohibit reproductive cloning.[26] A court would likely consider the existence of such laws to determine whether they reflect a traditional and historical rejection of reproductive cloning. However, because only six states appear to have bans on reproductive cloning, it is possible that the cloning laws would be given less consideration than the assisted suicide and criminal sodomy statutes.[27] While a majority of states adopted assisted suicide and criminal sodomy laws, it seems that only six have adopted bans on reproductive cloning.

However, those who oppose finding a fundamental right to clone for reproductive purposes could argue that more states have not adopted cloning statutes because a reasonable ability to clone was not established until 1997. Thus, a comparison between the number of cloning statutes and the number of assisted suicide and criminal sodomy laws is inappropriate. Moreover, opponents would likely contend that the recent adoption of state cloning laws emphasizes that cloning is not deeply rooted in the nation's history and tradition. They would probably distinguish between cloning and other reproductive technologies.

Even if it could be established that a right to clone for reproductive purposes is deeply rooted in the nation's history and tradition of allowing the use of reproductive technologies, it is not certain that such a right is "implicit in the concept of ordered liberty." The Court's past cases involving procreation, contraception, and other deeply personal matters suggest that cloning could be similarly included in the constitutional guarantee of personal privacy. However, some argue that because cloning is replication and not reproduction, the Court's decisions on the right of privacy should have little influence.[28]

The Court's decisions on procreation and contraception appear to demonstrate its recognition of such matters as fundamental. In *Skinner v. Oklahoma*, the Court invalidated Oklahoma's Habitual Criminal Sterilization Act, which provided for the sterilization of criminals who have been convicted "two or more times for crimes

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[25]*Bowers*, 478 U.S. at 192 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights.").

[26]See Cal. Health & Safety Code § 24185; 2001 IA S.F. 2118 (enacted Apr. 26, 2002); La. Rev. Stat. Ann. § 40:1299.36.2; Mich. Comp. Laws § 750.430a; R.I. Gen. Laws § 23-16.4-2; Va. Code Ann. § 32.1-162.22.

[27]See *Glucksberg*, 521 U.S. at 710 n.8 (identifying forty-four states as prohibiting or condemning assisted suicide); *Bowers*, 478 U.S. at 193-94 (recognizing that twenty-four states prohibit sodomy, but also noting that until 1961, sodomy was outlawed in all fifty states).

[28]See Andrews, *supra* note 9 at 666.

'amounting to felonies involving moral turpitude.'"[29] The Court noted: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[30]

In *Griswold v. Connecticut*, the Court invalidated a Connecticut law that prohibited the use or the aiding and abetting of the use of contraceptives.[31] The Court maintained that the law offended the notions of privacy surrounding the marital relationship. In *Eisenstadt v. Baird*, the Court concluded that the right to contraceptives is also maintained by unmarried persons.[32] The Court noted that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[33] This concept was explored further in *Carey v. Population Services International*.[34] In that case, the Court discussed *Griswold* in the context of its decisions in *Eisenstadt* and *Roe v. Wade*: "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[35]

If cloning for reproductive purposes can be characterized simply as a new form of childbearing, the Court's decisions could be instructive. Some maintain that cloning may be distinguished from traditional reproduction "only insofar as the genetic relationship between the parent and the child is identical rather than derivative and the child is conceived in vitro rather than in utero."[36] However, others contrast traditional reproduction and cloning by recognizing that cloning does not involve the mixing of genes to produce a unique individual.[37] Instead, cloning is characterized as genetic duplication.[38]

Despite the scientific differences between traditional reproduction and cloning, it is possible that a court would recognize cloning for reproductive purposes as implicating the same personal interests that exist with procreation, contraception, and childbearing in general. For individuals that cannot reproduce in the traditional manner, the availability of reproductive cloning might seem to be instrumental in the decision of whether to "bear or beget a child."

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[29]316 U.S. 535 (1942).

[30]*Skinner*, 316 U.S. at 541.

[31]381 U.S. 479 (1965).

[32]405 U.S. 438 (1972).

[33]*Eisenstadt*, 405 U.S. at 453.

[34]431 U.S. 678 (1977).

[35]*Carey*, 431 U.S. at 687.

[36]Note, *supra* note 22 at 2356.

[37]Andrews, *supra* note 9 at 666.

[38]*Id*.

Recognition of a fundamental right to clone for reproductive purposes would require the government to demonstrate a compelling interest to justify any infringement on that right. Scholars have identified at least two interests that are likely to be articulated. First, government could contend that a ban on reproductive cloning is necessary to prevent the conception of babies that would be plagued by physical disorders.[39] Second, government could argue that a ban is necessary because cloned children would suffer social stigma and psychological harm.[40]

Concern over the physical health of cloned babies may be complicated by the Court's decision in *Roe*.[41] In that case, the Court found that the government's interest in protecting potential life becomes "compelling" only at the point of fetal viability.[42] Thus, it is possible that the government could not justify a restriction on reproductive cloning by asserting the interests of pre-viable human beings. However, opponents contend that questions about viability and fetal development should have no impact on the government's interest in preventing disease and deformity.[43]

If it is determined that there is not a fundamental right to clone for reproductive purposes, it is likely that the government's interests in preventing harm to cloned children would adequately justify regulation.[44] The articulated interests would probably survive rational basis review. However, if a fundamental right is found, the outcome would seem to be less certain.[45]

Therapeutic Cloning

Proponents of a fundamental right to clone for therapeutic purposes have characterized the right as one of scientific inquiry.[46] They maintain that scientific inquiry has been "an enduring American value."[47] In attempting to establish that therapeutic cloning is deeply rooted in the nation's history and tradition, they identify

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[39]See Note, *supra* note 22 at 2362. See also Sunstein, *supra* note 20 at 9.

[40]*Id*.

[41]Note, *supra* note 22 at 2362.

[42]*Roe*, 410 U.S. at 163 (1973).

[43]Note, *supra* note 22 at 2362.

[44]See Sunstein, *supra* note 20 at 11.

[45]*Id*. Funding restrictions on human cloning research, as well as research involving therapeutic cloning, may survive strict scrutiny. The Court has held that restrictions on the use of public funds to perform abortions are permissible. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court reasoned that the government has no duty to subsidize an activity simply because it is constitutionally protected. For additional discussion of *Rust*, see Karen J. Lewis et al., *Abortion: Legislative Response*, CRS Issue Brief IB95095 (2002).

[46]Andrews, *supra* note 9 at 661.

[47]*Id*.

the nation's system of patents as evidence of our tradition of promoting scientific inquiry and invention.[48]

However, a right to clone for therapeutic purposes would seem unlike other rights recognized by the Court. In *Meyer v. Nebraska*, the Court did conclude that the liberty guaranteed by the Due Process Clause encompasses the right "to acquire useful knowledge."[49] However, the facts underlying that case are different from those involved with therapeutic cloning. In *Meyer*, the Court found unconstitutional a Nebraska statute that prohibited the teaching of any language other than English to students below the eighth grade. The acquisition of information by students may be distinguished from research or experimentation conducted by scientists. In fact, in two lower court cases involving fetal research, the courts found, with little discussion, that the rights of medical researchers are not fundamental under the Constitution.[50]

Those who oppose recognition of a fundamental right to clone for therapeutic purposes would also likely contend that therapeutic cloning does not involve the kind of personal decisions that would suggest inclusion within the right of personal privacy. Unlike reproductive cloning, which could involve fundamental childbearing issues, therapeutic cloning does not implicate similarly personal matters for scientists and other researchers.

Government regulation of therapeutic cloning would likely respond to the belief that personhood begins at conception and that the cloning of embryos is morally wrong.[51] This justification for regulation would appear to be sufficient to withstand rational basis review.[52] However, if a fundamental right to clone for therapeutic purposes is found, a reviewing court would likely undertake a more searching inquiry and an outcome would be less certain.

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[48]*Id*.

[49]262 U.S. 390, 399 (1922).

[50]See *Wynn v. Scott*, 449 F.Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom.*, *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979); *Margaret S. v. Edwards*, 488 F.Supp. 181 (1981).

[51]See Sunstein, *supra* note 20 at 13-14.

[52]*Id*.