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# Cloning and Federalism

*transcribed remarks of*  
ASHUTOSH BHAGWAT\*

The topic of my talk today is “Cloning and Federalism,” two subjects which one might have thought have absolutely no connection to each other, but which I hope to convince you should be inextricably linked in our minds when we think about the wisdom and constitutionality of *regulating* cloning. The basic question I seek to answer here is this: If in fact it is likely that we as a nation will choose to regulate human cloning in one form or another, which I think is very likely, at what level of government should that regulation occur? In particular, is cloning best addressed at the federal level, through a uniform national standard, or at the state level, with fifty distinctly nonuniform legislative approaches?

In addressing the above issue, I will make certain assumptions. First of all, I assume that some form of legislative regulation of human cloning is extremely likely to occur within the next few years in this country, including, at a minimum, sharp restrictions on reproductive cloning. Cloning is an issue with grave moral overtones, which excites great political passion, and in those circumstances we as a nation have proven quite unable to resist acting, even when the arguments in favor of legal intervention are much weaker than in the case of cloning.

Second, I will assume that no serious individual rights issues are raised by the regulation of cloning, including even a flat ban on reproductive cloning. I realize that some people might disagree with this assumption (not least of all our previous speaker Mark Eibert, of course), but I tend to agree with Professor Sunstein’s remarks during lunch concluding that, as a realistic matter, it is *extremely* unlikely that the modern Supreme Court would recognize any sort of a constitutional right to clone. Thus, if governments choose to regulate cloning, in general they can do so.

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Finally, I am going to assume that while there are powerful arguments for and against the regulation or prohibition of human cloning, all of the serious arguments in favor of regulation (and therefore in opposition to cloning) are at their core *moral* arguments rather than empirical or neutral policy arguments. Not that there is anything wrong with morally based legislation, much if not most existing legislation is founded on moral beliefs, and as a general matter that is entirely unproblematic. The moral bases of the arguments against cloning are important, however, because within a country that is as culturally and morally diverse as ours, there will inevitably exist a great deal of disagreement regarding the underlying moral presuppositions which drive such arguments. This, I am sure, is the most controversial of my assumptions, and so while I cannot fully defend it here, some explanation is necessary.

First of all, consider commodification, the issue discussed by Professor Radin today. It seems obvious to me that commodification is at heart a moral argument because it is based on the presumption that the application of market morality is inappropriate with respect to certain kinds of human relationships. But that of course is a fundamentally moral, and contestable position. Similarly, I think it is fairly clear that the argument against reproductive cloning based on concerns about psychological harm to the resulting children is also at heart moral. This argument assumes that parents of their cloned children will have unusually powerful expectations of how children should live their lives, and therefore impose strong restrictions on their behavior, thereby causing them psychological harm. But what "harm" is in this context depends on what you think ideal childrearing should look like. After all, many non-western cultures are willing to accept and indeed endorse much more directed sorts of childrearing than we consider "normal," but presumably do not believe that they are thereby causing psychological harm to their children.

The last key argument against cloning is the safety argument—that under current technology cloning is simply not safe enough to be used for reproductive purposes because of the risks of multiple unsuccessful attempts before success and of genetic defects in the resulting child, when finally successful. The safety argument doesn't sound like a moral one, but I think it is. Regarding the problem of unsuccessful attempts, this is a safety concern only if we think that the resulting embryos are worthy of moral consideration—an obviously disputed point which ties in to all of the violent disputes surrounding the abortion debate. The argument based on concern about genetic defects seems a more powerful one, but ultimately this safety argument is based on the assumption that it is better for a genetically

defective child not to have been born than to have been born. This strikes me as an assumption that could at the least be disputed.<sup>1</sup>

Let us assume then that we are going to regulate cloning; the question then becomes, "Who should do it?" Right now, Congress is in the process of considering legislation regulating cloning. The House has already passed an absolute ban on both reproductive and nonreproductive cloning,<sup>2</sup> and the Senate is currently (as of February 2002) considering both that bill and alternative bills that only ban reproductive cloning.<sup>3</sup> Can they do that? The answer to that question turns on a particular area of constitutional law having to do with the powers granted to Congress by the Constitution, and in particular, with interpretations of the Commerce Clause.

Article I, section 8 of the Constitution gives Congress the power to regulate commerce among the several states.<sup>4</sup> This has become the dominant source of congressional authority since the New Deal. Indeed, since the New Deal, especially since the 1940s as confirmed by two cases upholding the Civil Rights Acts in the 1960s,<sup>5</sup> the commerce power was considered to be largely plenary. Today there are still four Justices of the Supreme Court who believe that Congress can do absolutely anything it wants in the name of the Commerce Clause. However, there are five Justices who do not hold this belief. Since 1995, in two important decisions, *United States v. Lopez*<sup>6</sup> and *United States v. Morrison*,<sup>7</sup> this majority of the Court has severely restricted, in some instances, Congress's power under the Commerce Clause.

Let me provide some background very briefly (for the lawyers this is familiar territory). The reason that the commerce power has become plenary is because in a series of cases beginning in the New Deal and culminating in the Civil Rights Act cases mentioned earlier, the Supreme Court adopted a number of rules which together

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1. I suppose one might be able to make a safety argument against reproductive cloning based on concerns about the health of the gestating mother. However, it strikes me as at least controversial to base legislation on such paternalistic concerns when we do not do the same with respect to other reproductive technologies such as the use of fertility drugs; and in any event, I am not aware of any reason to think that reproductive cloning will be *unusually* dangerous for mothers, in light of our existing system of prenatal care.

2. See H.R. 2505, 107th Cong. (1st Sess. 2001).

3. See Hervey Collette, *Senate Tackles Cloning Bans*, THE ATLANTA J. AND CONST., Feb. 24, 2002, at 5A. In addition to the House bill, the Senate is considering two bills which ban reproductive but not therapeutic cloning, one proposed by Senator Harkin (S. 1893) and the other by Senator Feinstein (S. 1758).

4. U.S. CONST. art. I, § 8, cl. 3.

5. See *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

6. 514 U.S. 549 (1995).

7. 529 U.S. 598 (2000).

substantially expanded congressional powers under the Commerce Clause. First of all, the Court held that in the name of regulating *interstate* commerce, which is a power textually committed to Congress, Congress may regulate local *intrastate* activities which affect commerce.<sup>8</sup> Second, the Court held that this power to regulate is not limited to individual activities which affect interstate commerce. The individual activities, by themselves, do not have to affect commerce, so long as the entire class of activities regulated, considered together, affect commerce. This notion was illustrated in a case in which the Court held that Congress may regulate a single farmer's growing of home-consumed wheat because his growth and consumption of wheat affects the interstate wheat market.<sup>9</sup> Third, the Court held, especially in the Civil Rights Act cases, that congressional fact findings regarding effects on commerce will be deferred to, and that it does not matter what Congress's motives were in adopting the legislation.<sup>10</sup> It is fairly clear that when the Civil Rights Acts were passed, Congress's motives were not primarily commercial, but rather moral. Nonetheless, the Court upheld the legislation as permissible uses of the commerce power.

In 1995, in *United States v. Lopez*,<sup>11</sup> and in 2000, in *United States v. Morrison*,<sup>12</sup> the Supreme Court cut back on this approach. In those cases, a majority of the Court said that all of the principles I just described remain viable except when Congress is trying to regulate a local, non-commercial activity (in *Lopez*, the possession of a handgun, and in *Morrison*, gender-based violence). In those situations, we do not aggregate and we do not defer to Congress. Under these cases, then, Congress's power to enact cloning legislation seems to turn on whether cloning is a commercial activity. I think this description of the law is fairly uncontroversial. The standard argument I have seen made in favor of congressional power (the argument occurs frequently in the flurry of articles that came out after Dolly) suggested that cloning is a commercial activity. Why?

First of all, cloning occurs in scientific labs, which are substantial commercial enterprises. At a minimum, all labs purchase their equipment and get funding from out of state, so they are involved in lots of interstate commercial activity. Thus cloning is not a fundamentally local, noncommercial activity such as possessing a handgun (the regulated activity in *Lopez*). Second, cloning services are likely to be bought and sold, as with most fertility services,

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8. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

9. *Wickard v. Filburn*, 317 U.S. 111 (1942).

10. *See, e.g., Heart of Atlanta Motel*, 379 U.S. at 257.

11. 514 U.S. 549.

12. 529 U.S. 598.

making them commercial in nature. Third, people are likely to move between states to seek out cloning services, creating a commercial interstate tie. In combination, these arguments (which seem factually true) probably establish that cloning is a commercial activity and thus within congressional power. There are, however, counterarguments.

First, not all cloning will be purchased and sold. One can imagine cloning, early on, when it is still in the research stage, being provided for couples on a voluntary basis without any payment. The argument that cloning is by its nature a commercial activity is thus open to question, at least under current circumstances (after all, there is no national market in cloning, since human cloning is not yet possible). In response to the argument that scientific labs are commercial enterprises and, therefore, cloning is sort of a commercial activity, one might argue that by that definition almost everything is a commercial enterprise. Chief Justice Rehnquist pointed out in *Lopez* that public schools, in a very real sense, are a commercial enterprise. They hire teachers and buy books from out of state, as well as sending their graduates out of state. Does that in itself make all schools subject to federal regulation? The Court said no, and I think the same argument might be made here, especially when you are talking about non-profit labs that are engaging in research. Thus, I have real doubts about the commercial activity justification for congressional power.

There is also a third reason to question the use of the commerce power here, and this, I think, ties to my later argument: The motivation to regulate cloning has essentially nothing to do with interstate commerce. I should take that back. Why "essentially?" That's just lawyer talk. The motivation to regulate cloning has *nothing* to do with interstate commerce. Indeed, it really has nothing to do with anything interstate. Whether you call it moral or safety or whatever, it is purely local policy. This is a clear distinction from other legislation the Court has upheld. When Congress regulated wheat growing, it was worried about the interstate market in wheat, which does in fact exist. When Congress regulates minimum wage or adopts environmental regulations, it looks local, but the concern is an interstate, regulatory race to the bottom. The concern is that if you do not have uniform national regulation, you are going to have states getting economic pressure to not have minimum wages or environmental regulations in order to keep businesses from fleeing that state. I do not see a race to the bottom on cloning regulation as likely, and in fact think that it is most implausible. There are in fact, therefore, some real weaknesses in the arguments for congressional authority in this area. -

Having said that, I think it is unlikely that even the Rehnquist Court, as currently composed, would go so far as to strike down

federal cloning legislation, despite the New Federalism. The reason, I think, is mostly pragmatic. If you took the arguments against federal power seriously, if you said that not everything that looks commercial is commercial, and that motivation matters, there are a lot of federal statutes which regulate local activity with minimal commercial components and which were clearly morally motivated (including, most notably, the Civil Rights Acts of 1964) whose constitutionality would be brought into question, and I cannot imagine that this Court wants to go so far. As a result, I think as a predictive matter there is probably Commerce Clause power to regulate cloning, though it would be an interesting test case. Cloning regulations (like the proposed, vetoed and now re-proposed partial birth abortion legislation in Congress) both raise interesting questions of how far Congress's power is going to be cut back by this Court.

As a final point, I should add that, strangely enough, congressional authority over nonreproductive cloning is probably more powerful than it is over reproductive cloning. This is because nonreproductive cloning is more closely associated with scientific research at a fairly high technological level, giving it a very strong commercial component as well as commercial implications. Reproductive cloning poses a somewhat closer question, but as I said, Congress probably has power under the Commerce Clause to regulate even it.

Furthermore, even if Congress does not have power under the Commerce Clause, a very unlikely scenario, it probably does have power to regulate under the Spending Clause. The Spending Clause would allow Congress to impose regulatory conditions regarding human cloning on all federal spending in this area, including Medicare/Medicaid and research funds, effectively controlling most of the industry. And Congress might even be able to force states to ban cloning by conditioning funds to states on their adoption of anti-cloning legislation. This is how we got the twenty-one year national drinking age, and the fifty-five mile-per-hour speed limit. In short, I conclude that Congress can probably regulate cloning.

Generally, this is where the debate ends, by recognizing congressional power. But it shouldn't. Twenty years ago, Professor Lawrence Sager of the New York University Law School pointed out that not all constitutional rules made by the Supreme Court fully incorporate what the Constitution means. It is an idea he called "underenforced norms."<sup>13</sup> Sager's insight is critically relevant to our issue because the reason that current jurisprudence regarding Congress's powers is so deferential to Congress has very little to do

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13. Lawrence Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

with history or constitutional theory. Instead, current deference is rooted in institutional concerns about the Supreme Court. The Supreme Court tried for the half century preceding the New Deal and the Roosevelt administration to limit congressional power, and the result was a disaster. The Court drew very arbitrary, bizarre lines, the cases did not make any sense, and finally, it abandoned the whole enterprise during the New Deal, after the Court had suffered enormous blows to its institutional prestige. Given this history, even the current members of the Court have acknowledged that there are real institutional concerns about enforcing the Commerce Clause strictly, which is why I think it will not happen. That does not mean, however, there aren't constitutional concerns here. The fact that the Court is afraid to enforce a portion of the Constitution because they are not good at it, does not mean that it is not still in the Constitution. I would argue that the principles underlying federalism, and in particular the principle that the federal government enjoys only limited, enumerated powers, suggest that this is an area where Congress's action might be unconstitutional even if the Supreme Court won't say so.

This is where my point that all of the arguments against cloning are moral comes into play. If there is any point to federalism, if the principle of federalism—that most powers in our system lie with state governments and that Congress only has enumerated powers needed to solve national problems—is to be taken seriously, then there should be a presumption that moral decisions should be made at a local level. The reason for this is based on a sense that states are more likely to be meaningful communities than the entire nation, because state populations are more homogeneous, and are more likely to agree on moral issues, than the country as a whole. Not completely—as Senator Ortiz pointed out, a big state like California has lots of disagreement—but nonetheless there is more consensus within individual states than there is across the country. Certain decisions that are purely moral in nature and where there is no national spillover effect (I don't see any national consequences of cloning that create a need for national regulation) should be made at the local level, because it is better that they be made by more homogeneous communities. That was the basis of Republican theory 200 years ago.

Even today, there are powerful arguments that fewer people are unhappy about having regulations imposed on them if regulations vary across the states. That way, states which have conservative views or liberal views are able to choose one stance and another state with

most of the population having different views will be able to choose a different stance.<sup>14</sup>

For all these reasons, it would be better if Congress left this issue alone because none of the traditional arguments for federal action are present. Furthermore, I would argue that it is constitutionally incumbent on Congress to take these concerns seriously. These are not merely policy concerns, they are constitutional concerns, albeit not concerns the Supreme Court is likely to enforce.

Is Congress going to take its constitutional obligations seriously? Most probably not. Not because Congress never does so (because it does sometimes, though not often enough), but because institutionally this is the kind of situation where it is extremely difficult for Congress to act on principle. When you have prominent hot-button issues that are frankly (and I think I agree with Professor Greely) inculcated with a certain amount of hysteria, going to your constituents and telling them the real issue is federalism does not sell very well. The President has a little more capacity to do that. The President is less subject to immediate political pressure, has more lawyers working for him (whether that is a good thing or a bad thing, who knows?) and has use of the bully pulpit to explain his actions in a way that members of Congress do not. Nonetheless, the lesson of the last ten years has been that when you talk about hot-button moral issues, whether it be abortion or cloning or any number of other ones, actual interest in the principles of federalism and commitment to the notions of leaving local communities to make their own decisions, is largely non-existent in Washington. And that is too bad.

What that suggests, is that maybe the Supreme Court is wrong about its conclusion that it has no institutional role to play here. I recently read an article where I saw a quote from Justice Scalia explaining that laws come to the Supreme Court with a presumption of constitutionality because Congress is a co-equal branch of government; but if Congress does not take its constitutional responsibilities seriously, but rather seems to think that enforcing the Constitution is up to the Supreme Court, then maybe we should not have a presumption of constitutionality anymore.<sup>15</sup> I think when you start looking at the things that Congress has been doing recently in the cloning area, in the abortion area, and in many others, sometimes successfully, sometimes not, there is a lot to be said for that argument.

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14. See, e.g., Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

15. See Neal Devins, *Congress as Culprit: How Lawmakers Spurred On the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 440 (2001), (quoting Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'LJ. 1810, 1811 (2000)).

In conclusion, cloning obviously raises profound moral and philosophical issues (indeed, we've had a whole day of talk about this). Any time you have that kind of issue (the obvious comparable issue which comes to mind today is abortion), the big question, and here I completely agree with Mark Eibert, is, "Who decides?" Who gets to decide what the correct answer is to a difficult moral question? This question has lots of possible answers. It could be international, right? There are relevant principles in international treaties, and people have been talking about imposing an international moratorium on cloning. It could also be national governments that decide this issue, so that in our case it would be up to the United States Congress. The issue could also be decided by state governments, which is more in line with the presumption of federalism that states have primary authority over most questions, including moral issues. It could also be resolved by local governments. After all, on education policy, we tend to leave most decisions at the local level, so why not cloning? Finally, it could be the individual who resolves this issue (in other words, we could refuse to regulate).

There is a lot to be said for all of those positions, but it is my bias (I admit this is a libertarian bias) that ultimately, absent strong reasons, one should not impose artificial homogeneity on contested issues, and so one should minimize imposing rules on people who disagree with their underlying moral premises. As a result, my bias is to keep the level of decision making at as low a level as possible. In the area of cloning, I think there are sufficient moral and other concerns (and sufficient legal actions already in the works) that it is unlikely that the decision is going to be left to the individual for now (however, if the safety concerns about cloning are overcome, that might change). But even given that, I still think that does not mean we should go up to the level of national government or international law. I think we should still try to keep the decision making process as close to the individual as possible. In our system this means the states, which admittedly, in a state like California, are not all that close to the individual, but it is certainly better than Congress.

Thank you.

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