

# The United States Should Not Ban Human Cloning

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*Cloning, 2012*

"Banning human cloning sends the regrettable message that politics and public pressure triumph over logic and the law."

In the following viewpoint, Elizabeth Price Foley contends that cloning is protected under the First Amendment of the US Constitution and that using cloning to procreate is a fundamental constitutional right. Foley examines important legal cases and the impact of judicial rulings on cloning. She concludes that First Amendment protections of free speech extend to scientists' right to perform cloning. Additionally, she concludes that the due process clauses of the Constitution protect an individual's right to procreate, including the right to procreate through cloning. Elizabeth Price Foley is a legal theorist who writes and comments in the fields of [constitutional law](#), bioethics, and health care law. She is the Institute for Justice chair in constitutional litigation and professor of law at Florida International University College of Law.

As you read, consider the following questions:

1. According to Alexander Meiklejohn, the First Amendment was designed to ensure what?
2. According to Foley, Skinner is not a due process case. What kind of case does Foley say it is?
3. According to Foley, in Lindley, the court suggests that a critical factor in determining the scope of the fundamental right of procreation is what?

While there is undoubtedly great popular support for banning human cloning both at the federal and state level, there are several possible constitutional impediments to doing so. Even if cloning bans are enacted (as they have already been in several states), such bans likely will be challenged on various constitutional grounds. This section explores the likelihood of success of such challenges.

## Cloning Bans Would Likely Violate the First Amendment

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The opponents of human cloning do not seem content with a ban on governmental funding of human cloning research, which has already been implemented. Rather, they seek to ban all human cloning research, regardless of whether the research is conducted with public or private dollars. In effect, the current cloning ban proposals would say to scientists, "thou shalt not research" in this particular area.

As an initial matter, it should be noted that a simple ban on federal funding of scientific research is not constitutionally troubling. Congress has the power, pursuant to the spending clause, to spend federal dollars in any way it wishes, so long as the spending can be said to be within the broad notion of the "general welfare." Congress thus has the corresponding constitutional power to deny federal funding of scientific research it deems not in furtherance of the general welfare. The Executive Branch may likewise restrict federal funding, provided it is not contrary to statutory language. In the mid-1970s, for example, the National Institutes of Health ("NIH") and other federal agencies promulgated regulations

restricting federal funding of recombinant DNA research that did not conform to certain guidelines. Likewise, in the 1980s, the Reagan and Bush administrations imposed a fetal tissue research ban, which specified that federal dollars could not be spent on fetal tissue research. The rationale behind the restriction was that federal funding of such research would create a need for fetal tissue, which in turn could encourage more women to have abortions.

The research restrictions on recombinant DNA and fetal tissue were qualitatively different from the proposed federal or state bans on human cloning because they merely restricted public funding of such research and did nothing to prevent such research from being funded by private dollars. The proposed bans on human cloning, by contrast, would prohibit all cloning research or specific applications thereof, whether publicly or privately funded.

The question therefore becomes whether a law banning all cloning research, or specific applications thereof, would run afoul of the First Amendment, which states that "Congress shall make no law ... abridging the [freedom of speech](#)...." It is well accepted, of course, that the First Amendment is not absolute. Even protected speech may be regulated, provided the law in question is necessary to further a compelling governmental interest. It is necessary, therefore, to determine whether scientific research—such as human cloning—constitutes "speech," and, if so, to what extent such speech is protected.

One of the most commonly held views of the Founders' purpose in drafting the First Amendment is that it was designed to ensure robust discussion through protection of the "marketplace of ideas." Another common view is that the First Amendment is designed to protect speech and expressive conduct which is essential to informed self-governance. Alexander Meiklejohn posits that the First Amendment was designed to ensure the existence of a well-informed citizenry capable of self-governance by protecting such things as education, philosophy, science, literature, and the arts, and public discussions of public issues. He concludes:

I believe, as a teacher, that the people do need novels and dramas and paintings and poems, "because they will be called upon to vote." The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.

Thus, the First Amendment protects ideas, not because of their substantive merit but simply because ideas stimulate thought, which in turn breeds the courage and boldness necessary for effective self-governance. And while cloning research is clearly disturbing to many, the Supreme Court has stated that "the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of [obscenity](#) or libel, and protects speech ... regardless of [its] motivation, orthodoxy, truthfulness, timeliness, or taste...."

## Scientific Actions Are Expressions of Ideas

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But what of scientific *action*? Can a scientist be punished for action, i.e., for testing certain kinds of hypotheses? After all, once a scientific idea or hypothesis is formed, the scientist naturally wants to

test his hypothesis through the scientific method. Any hypothesis untested by research or experimentation is relatively useless. The legislative bans on human cloning enacted thus far do not prohibit anyone from *thinking* about human cloning, but from *acting* upon their thoughts by engaging in certain actions. The proposed federal anti-cloning bills, for example, would prohibit either: (1) all use of somatic cell nuclear transfer techniques; or (2) the implantation into a mother's womb of a human embryo created by cloning. The former would prohibit all scientific experimentation using cloning techniques (whatever the ultimate goal of the scientist may be), whereas the latter would prohibit a scientist from actually implanting a human embryo created by cloning. Both, of course, ban action, not thoughts.

May such scientific action be proscribed consistent with the First Amendment? The Supreme Court has long held that the First Amendment free speech clause protects "expressive conduct," such as the wearing of black armbands in protest of the Vietnam War, the display of an American flag with a superimposed peace symbol, or the refusal of schoolchildren to salute the flag. While almost all speech arguably contains an element of conduct, the court, in *Spence v. Washington*, articulated a two-part test for determining whether conduct is sufficiently expressive as to warrant First Amendment protection: (1) the conduct must be intended to "convey a particularized message"; and (2) there must be a "great" likelihood that "the message would be understood by those who view ... it."

Would scientific research satisfy the two-pronged test of *Spence v. Washington*? Scientific research and experimentation is undoubtedly intended to "convey a particularized message" about the value and utility of underlying intellectual ideas—an unmistakable message to all who view the resulting scientific data. A scientist conducts experiments to either prove or disprove a hypothesis through the scientific method. Through experimentation, scientists express their creativity and intellectuality in much the same way that musicians express themselves through music or artists express themselves through art. A law which banned scientific research on human cloning could therefore interfere with the conveyance of a message in the same way as would a law which banned impressionistic painting or rap music.

A more narrow legislative ban on certain specific *applications* of human cloning research, such as a ban only on the implantation of the embryo into a womb, could also present First Amendment problems. Under such legislation, the banned conduct—implantation of a human embryo created by cloning into a womb—arguably is "intend[ed] to convey a particularized message" that would have a "great" likelihood of being "understood by those who viewed it." The message being sent by an attempt at implantation would be that "human cloning is normatively worthwhile and technologically possible"—a message with a great likelihood to be understood by most people who viewed or otherwise learned of the attempted implantation.

By attempting implantation, a scientist would be applying the knowledge she has gained from scientific research. Attempting implantation is therefore a natural and logical next step, a step fully as expressive as, for example, performing a play one has written or singing a song one has composed. Absent a compelling interest, the government could no more ban the performing of a play than the writing of it. If human cloning research is expressive conduct protected by the First Amendment, so too should be the actual expression of that research (e.g., implantation)....

# The Right to Procreate

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The due process clauses of the Fifth and Fourteenth Amendments prohibit, respectively, federal or state governments from depriving any individual of "life, liberty, or property without [due process of law](#)." These clauses have long been interpreted as not only providing protection against procedural unfairness but also as providing positive, substantive protection against governmental deprivations of life, liberty, or property....

One of the most important cases implying a positive right of procreation is the 1923 decision in *Meyer v. Nebraska*, in which the Supreme Court struck down a Nebraska law which prohibited the teaching of any language other than English to [children](#) prior to the eighth grade. Specifically, the court held that the law violated the "liberty" interest protected by the due process clause of the Fourteenth Amendment, stating in dicta [in their opinion]:

Without doubt, [the liberty interest of the due process clause] denotes not merely freedom from bodily restraint but also the right of the individual ... to marry, establish a home and bring up children ... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Thus, the liberty interest protected by the Constitution appeared to the court, in 1923, to encompass much more than simply a right to be free from physical restraint; it encompassed affirmative rights to the essentials of individual domestic happiness: marriage, establishment of a home, and the raising of children.

The Supreme Court subsequently and more specifically addressed the right of procreation in the case of *Skinner v. Oklahoma*, in which the court invalidated an Oklahoma statute which mandated sterilization for criminals convicted two or more times for felonies involving moral turpitude. Strictly speaking, *Skinner* is an [equal protection](#) clause case, not a due process case. The court invalidated the law in question because it forced sterilization upon certain habitual felons convicted of crimes of "moral turpitude" but left other habitual felons untouched. The court noted the discriminatory effect of the law, stating:

A clerk who appropriates over \$20 from his employer's till and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the act no matter how large his embezzlements nor how frequent his convictions.

*Skinner* clearly intimates that procreation is a fundamental right, since the court invoked strict scrutiny, proclaiming that "marriage and procreation are fundamental to the very existence and survival of the [human] race" and concluded that, by preventing conception, the law in question interfered with "one of the basic [civil rights](#) of man...."

Taken in its narrowest form, *Skinner* and its progeny stand for the proposition that married individuals have a fundamental right to coital procreation. A strong case can be made, however, to extend this right to unmarried persons. Indeed, in *Eisenstadt v. Baird*, the court stated 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."

Moreover, because all cases decided by the court thus far have dealt with coital reproduction, it is unclear to what extent, if at all, noncoital forms of reproduction, such as artificial insemination, IVF [in vitro fertilization], or cloning, are constitutionally protected. The court's language regarding "procreation" and "bear[ing] or beget[ting] a child" is clearly broad enough to encompass noncoital forms of procreation. But since these issues were not before the court, it is not clear whether we should presume that the fundamental right of procreation is limited to sexual intercourse. Perhaps it means something slightly broader but still not so broad as to encompass cloning, such as any form of sexual procreation (which would include ARTs [assisted reproductive technologies] such as IVF or artificial insemination) but not asexual procreation.

Very little case law exists to help answer these questions because neither the states nor the federal government have prohibited the use of existing ARTs. Moreover, when the government has tried to differentiate between procreation by intercourse and procreation through the use of ARTs, the lower courts have generally upheld the right of individuals to use ARTs....

In *Lindley v. Sullivan*, the plaintiffs adopted a son and soon thereafter applied for Child Insurance Benefits (CIB) that are generally provided to the disabled and other beneficiaries of the Social Security Act. The Social Security Administration denied the Lindleys' application for CIB, because the Social Security Act explicitly stated that CIB was not available to parents who adopted children after the beneficiary became entitled to Social Security benefits. In contrast, parents who conceived children through coitus or ARTs after the beneficiary became entitled to benefits *were* entitled to CIB. The Lindleys challenged the disparate treatment between adoptive parents and natural parents, asserting that such disparity violated the equal protection clause. The Lindleys asserted that the Seventh Circuit should apply strict scrutiny to the law in question, because the disparate treatment between adoptive and natural parents violated the fundamental right to procreation which, they further asserted, included the right to adopt children. The Seventh Circuit declined the Lindleys' invitation to proclaim that the fundamental right to procreation included a right of adoption, stating that there were "critical distinctions" between adoption and procreation. More importantly for purposes of this [viewpoint], however, in dicta [in their opinion] the Seventh Circuit cited *Griswold [v. Connecticut]* and stated that "the rights to marry and to procreate biologically are older than any state law and, for that matter, older than the Constitution or the Bill of Rights." Thus stated, the court suggested that while the fundamental right of procreation may not reach so far as to entitle an individual to adopt nonbiologically related children, it does protect an individual's right to "procreate biologically," which presumably would include the use of ARTs. The court in *Lindley* was not, of course, being asked to decide whether ARTs fall within the ambit of the right of procreation. But the court acknowledged that such a right existed and that it was fundamental. The court further suggested that a critical factor in determining the scope of this fundamental right is biological linkage between parent and child, a linkage that exists with intercourse and ARTs, but not adoption.

One additional case, *Lifchez v. Hartigan*, squarely presented this issue to a district court: whether the right of procreation included the right to use an ART, specifically, IVF. The court held that reproductive technology use is constitutionally protected, stating, "It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure

that may bring about, rather than prevent, pregnancy."

The *Lifchez* court's rationale is compelling. Individuals have a right under *Griswold v. Connecticut* to use contraceptives and a right under *Roe v. Wade* to abort a fetus, both of which indicate a broader right to prevent or terminate pregnancy. Moreover, under *Skinner* and *Eisenstadt*, individuals have a right to be free from forced sterilization, which indicates a broader right to bear or beget a child. These cases, viewed as a coherent whole, reveal that the constitutional right protected by the court thus far is not likely a narrow right to be free from forced sterilization, to obtain birth control, or to obtain an early-term abortion. Rather, the right is one of procreational autonomy, the fundamental right to decide whether, when, and how to bear or beget a child.

Because cloning is merely an asexual form of procreation, it is arguably as much a fundamental constitutional right as our right to procreate by either passion or the petri dish....

## Cloning Should Not Be Banned

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If our Constitution does, in fact, give us the right to procreate by cloning, should we be afraid? Should we begin mobilizing politically in an attempt to pass a constitutional amendment via the procedures of Article V to ban human cloning? The answer should be "no," for several reasons.

First, the science fiction abuses associated with human cloning are unlikely to occur under current law, both statutory and constitutional. The current legal construct provides us with both the fundamental freedom to procreate as well as corresponding protections for the products of our procreation, our children, regardless of how they are conceived. Current law, in short, does not recognize genetic classification of human beings; if one is human, then one is entitled to all the legal rights enjoyed by other humans.

Second, the primary objections to human cloning appear to be unfounded, based more on morality, theology, and fear than objective data. Such subjective notions should not provide the sort of important or compelling interest sufficient to justify infringement of constitutional rights. Finally, even assuming that banning human cloning would serve one or more important or compelling governmental interests, such a law may nonetheless be unconstitutional because there are numerous, more narrowly tailored means—short of a total prohibition—by which to effectuate such ends.

Banning human cloning sends the regrettable message that politics and public pressure triumph over logic and the law. If citizens and lawmakers can just remember that clones are people, too, we can face this brave new world, confident that our laws are adequate to carry us all, safely, into the twenty-first century.

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## Further Readings

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