I TEACH YOU THE SUPERMAN:† WHY CONGRESS CANNOT CONSTITUTIONALLY PROHIBIT GENETIC MODIFICATION

JASON C. GLAHN‡

A great deal of ink has been expended evaluating the constitutional implications of congressional regulations concerning human cloning.1 In contrast, there has been little discussion in the legal literature regarding the possibility of a federal law regulating human genetic modification.2 Perhaps, the paucity of analysis reflects the fact that human genetic modification, by which I mean genetic alterations employed in order to enhance our most fundamental phenotypic characteristics such as appearance, personality, and intelligence, is seen as a distant possibility. Or, perhaps, genetic modification is viewed as relatively

† With apologies to Nietzsche, for no amount of genetic modification could give rise to his Superman. Friedrich Nietzsche, Thus Spake Zarathustra 6 (Thomas Common trans., Modern Library 1989).
‡ Ph.D. Program University of Missouri, Columbia; J.D. University of Texas School of Law 2002; Editorial Board, Texas Law Review 2001-2002. I would like to thank the participants in the Human Genome Seminar at the University of Texas and Professor Jane Cohen for inspiring this article. Professor Philip G. Peters Jr. of the University of Missouri, Columbia has also provided valuable advice. I would also like to thank the members and staff of Whittier Law Review, especially Jeff Resnick and Melisa Rockhill, for their excellent work in making my first law review article a reality.


2. The only examples of such attempts discovered by the author are: John B. Attanasio, The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide, 53 U. Chi. L. Rev. 1274, 1289-1303 (1986); Thomas Stuart Patterson, Student Author, The Outer Limits of Human Genetic Engineering: A Constitutional Examination of Parent's Procreative Liberty to Genetically Enhance Their Offspring, 26 Hastings Const. L.Q. 913, 922-25 (1999) (discussing genetic therapy regulations and the potential need for additional regulation). Perhaps the reason so little attention has been paid to genetic modification, as opposed to human cloning, is that the former is still largely hypothetical. Genetic therapy has been successfully used to treat a rare disease known as severe combined immune deficiency. Matt Ridley, Genome: The Autobiography of a Species in 23 Chapters 248-50 (Harper Collins 2000).
similar to human cloning for purposes of constitutional analysis. In any case, it will be more productive to address the possible consequences of the Human Genome Project when there is still time for measured contemplation, rather than be forced into a reactionary posture because of a *fait accompli*.

Because questions concerning genetic modification will likely pose serious problems for our society, this article has undertaken an analysis of the likely constitutional status of regulations prohibiting genetic manipulation. The analysis is based on current positive law and reflects the varying options available to the judiciary and legislators when considering how and whether to permit individuals to genetically modify their offspring. The article is unabashedly normative because it is a preemptive first strike against those who would invoke an egalitarian ethic to restrict the individual use of genetic technology. In sum, the article advocates the position that genetic modification (in either its “therapeutic” or “non-therapeutic” form) is constitutionally protected.

Part I describes the relevant science of the Human Genome Project and the relevant philosophical conceptions of genetic causation. A hypothetical congressional statute prohibiting genetic modification is introduced, which serves as a heuristic device throughout the article. Part II analyzes current Commerce Clause jurisprudence in relation to genetic modification. Although many authors have discussed the application of the commerce power to human cloning, Part II endeavors to provide a more technical synthesis of the relevant cases than has been previously achieved. This model is then applied to the hypothetical statute articulated in Part I. Next, application of the right to scientific research to the hypothetical statute will be addressed. Part III involves both positive and normative components and addresses whether the First Amendment is a desirable provision for protecting a right to genetic modification. Part IV analyzes the question of whether genetic modification should be viewed as a fundamental right under the Fourteenth Amendment. Individual reproductive rights as well as parental rights’ cases are considered. Finally, Part V analyzes whether genetic modification should be protected as a fundamental right under the Ninth Amendment. Here, the possibility of joint Ninth and Fourteenth Amendment considerations in discerning fundamental rights is investigated.

---


5. I believe that Congress has reacted to human cloning in a knee-jerk fashion. Their reaction is, however, mediated by the fact that human cloning may result in horrendous abnormalities. Natl. Bioethics Advisory Commn., *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission* vol. II, C18-20 (1997) (recommending that human cloning be temporarily banned because of the potential for harm to the fetus). For a description of congressional attempts to regulate human cloning, see Andrews, supra n. 1, at 675 (describing, *inter alia*, President Clinton’s legislative proposal, the Cloning Prohibition Act of 1997). Although this article describes Constitutional challenges to the congressional regulation of genetic modification, the Incorporation Doctrine allows my analysis of constitutional provisions such as the First, Ninth, and Fourteenth Amendments, discussed in parts III. and IV., to apply in instances where state governments seek to regulate genetic modification.

6. It is a contestable matter whether a good distinction between “therapeutic” and “non-therapeutic” genetic modification may be drawn. Nevertheless, the Supreme Court has adopted the distinction for some purposes. See e.g., *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 509-10 (1989) (holding that a state may ban the use of public facilities to perform non-therapeutic abortions).