How Abortion Politics and Technophobia Created the Distinction Between Patently Human and Patentably Non-Human

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On September 8, 2011 Congress passed the Leahy-Smith America Invents Act (AIA). AIA was "in the making" for about seven years and its enactment is considered as the most significant patent legislation since the Patent Act of 1952. Yet, in a "last minute" addition, Congress included in the AIA bill language similar to that of the Weldon Amendment, which was regularly tacked on to each year's consolidated appropriations bill since 2004. Outspokenly seeking to achieve the same "pro-life" objectives as the Weldon Amendment, AIA Section 33 decrees that "[n]otwithstanding any other provision of law, no patent may issue on a claim directed to or encompassing a human organism." But what is a "human organism" and what would "encompass a human organism" for patent law purposes? The AIA does not say; nor does it indicate where one may look for such a definition. And so the question becomes: what was Congress seeking to prohibit by excluding "human organisms" from patentable subject matter? It appears that the drafters of Section 33 sought to undermine what they perceived as incentives existing under patent law to conduct certain kinds of scientific research involving human embryos. However, there is nothing in the language of Section 33 that guarantees this result. Moreover, arguably, existing patent law includes barriers to ethical abuses of the kind that Section 33 in its current form purports to prohibit. Hence, not only is Section 33 unlikely to become the moral floodgates that its drafters purported for it to be, but it will likely instill further ambiguity into the area of patentable subject matter – widely viewed as already one of most chaotic and least predictable areas of patent law.