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Between Organs and Adoption: Why Pre-Embryo Donors Should Not Be Allowed to Discriminate Against Recipients

Mark W. Premo-Hopkins

Many couples unable to conceive via natural means utilize in-vitro fertilization ("IVF") in an attempt to conceive a child. In-vitro fertilization involves the external fertilization of eggs to create pre-embryos. Because of the cost and complexity of egg harvesting, excess pre-embryos are created and often remain after the IVF procedure.

At one time, the excess pre-embryos were either discarded or donated for scientific research. However, the development of cryopreservation technologies allows excess pre-embryos to be frozen and stored for a period of time. When couples agree to participate in IVF procedures, they usually complete a disposition agreement. These agreements are contracts between the donors and the IVF clinic. They reflect the donors' intent as to disposition of the pre-embryos upon certain contingencies such as divorce, death of one or both gamete providers, or disagreement between donors. Donors may wish for pre-embryos to remain frozen, to be implanted, to be discarded, or to be donated to another couple. One could imagine that agreements calling for donation find their basis in some level of altruism. But altruism

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1 B.A. 2003, University of Alabama; J.D. Candidate 2007, University of Chicago.
2 Naomi D. Johnson, Note, Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?, 68 Brooklyn L Rev 853, 854 (2003) (noting that "IVF is one of the most frequently utilized methods of treating infertility").
3 "Pre-embryo" refers to an embryo not more than 14 days old. Ethics Committee of the American Fertility Society, Ethical Considerations of the New Reproductive Technologies, 53 Fertility and Sterility i, vii (Supp 2 1990). Pre-embryo is currently the most widely accepted terminology but some of the literature uses "embryo" interchangeably. While this Comment uses pre-embryo exclusively, when quoting other material the author intends embryo and pre-embryo as coterminous.
4 Johnson, 68 Brooklyn L Rev at 857 (cited in note 1).
5 See Alan Trounson, Preservation of human eggs and embryos, 46 Fertility and Sterility 1, 10 (1986) (giving a detailed explanation of the process of cryopreservation).
7 Id.
8 Id.
is not the only motivation to be considered. Current developments show that the politics of pre-embryo donation present interesting tensions with regard to potential discriminatory motives.

In May of 2005, President George W. Bush appeared on television with twenty families who had conceived children from donated pre-embryos. Protesting a bill supporting stem-cell research on embryos, the President and his guests attempted to rally political support for what they called the embryo adoption process. In a New York Times article, Pam Belluck discusses the details of these “adoptions” made possible by Snowflakes, the embryo-focused arm of Nightlight Christian Adoption Agency. While IVF clinics handle embryo donation through disposition agreements, Nightlight runs its embryo donation process differently. In the Snowflakes adoption process, adoptive couples are screened and go through counseling in order to be matched with a donor couple. Belluck notes one particular pair of donors that intentionally chose Snowflake out of fear that a lesbian family might receive their pre-embryos if they donated through another method. Lesbian couples often utilize traditional adoption or assisted reproductive technologies (“ART”) in order to become parents. With morally conservative groups pushing for embryo donation and non-traditional couples at the forefront of ART procedures, how successfully could a donor couple restrict certain classes of recipients based on discriminatory preferences? Could a donor couple draft their disposition agreement to prevent donation based on a recipient’s race or religion? More broadly, should the government allow donors to deploy these preferences to discriminate in selecting a pre-embryo recipient?

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8 See Pam Belluck, From Stem Cell Opponents, An Embryo Crusade, NY Times A4 (June 2, 2005) (discussing the decision of many political conservatives to add support for embryo adoption to their opposition of stem cell research).
9 Id.
10 Id.
11 Johnson, 68 Brooklyn L Rev at 859 (cited in note 1).
12 Id at 860.
13 Belluck, From Stem Cell Opponents, NY Times at A4 (cited in note 8).
Part I examines a potentially easy answer to these questions from *Shelley v Kraemer*, which deals with the Equal Protection Clause and discriminatory covenants in the sale of property. However, the distinct facts of *Shelley* and the unique form of state action involved prove unlikely to apply to the disposition agreements considered below. As such, investigating the legality of discrimination requires a different approach. Thus, Part II frames the issue by discussing case law regarding the enforcement of pre-embryo disposition agreements generally. Part III presents an analysis of arguments regarding the legal status of pre-embryos. The three positions discussed recognize pre-embryos as property, persons, or something in between. The legal status of pre-embryos intimates how current law might provide useful comparisons for discriminatory allowances in pre-embryo donation. Part IV provides background in two other areas of law: organ donation and private adoption. These areas provide useful analogues for determining the permissible scope of discrimination in pre-embryo disposition. Part V argues that the answer to discriminatory allowances can flow out of a middle ground: the widely accepted special-respect status most often afforded pre-embryos. Examination and application of legal principles from organ donation and private adoption show that discrimination should not be allowed in the preembryo donation process.

I. Shelley and its Inapplicability

In *Shelley v Kraemer*, the U.S. Supreme Court held that a state’s enforcement of a discriminatory contract violated the Equal Protection Clause of the Fourteenth Amendment. The discriminatory contract in question involved racially restrictive covenants that prevented current landowners from selling their

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15 334 US 1 (1948).
16 The use of special-respect status provides little analytical help by way of self-definition. However, looking to organ donation and private adoption as two analogues on either side of the middle ground provides some help.
17 In determining that the pre-embryo should receive special respect status the Tennessee Supreme Court stated that “pre-embryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect.” *Davis v Davis*, 842 SW2d 588, 597 (Tenn 1992). The court held that the pre-embryo rightfully belongs in the “in between” category. Id.
18 334 US at 1. The equal protection clause reads as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” US Const Amend XIV § 1.
land to anyone who was not white. The owner of property subject to the restrictive covenant, unaware of the restriction, sold to a black buyer. The state courts enforced the contract's restrictive covenants and prevented the transaction. The Supreme Court called the state court's decision state action for purposes of the Fourteenth Amendment and the enforcement of the covenants was held to violate the Equal Protection Clause.

One could imagine a situation where a donor couple enters into a disposition agreement with a “restrictive covenant” preventing an IVF clinic from providing their pre-embryos to adoptive parents of a certain race or religion. If the IVF clinic chose to release the pre-embryos in defiance or ignorance of the restrictive covenant, the facts would look quite similar to Shelley. If the disappointed donors brought an action the state would then have to decide whether or not to enforce the restrictive covenant. If it chose to enforce the covenant then, as in Shelley, the Equal Protection Clause could result in an invalidation of the discriminatory provisions upon review.

Of course, applying Shelley requires a state action. Therefore, a clinic must fail to follow the restrictive covenant and the donor must then seek to enforce the restrictive provisions of the contract. This situation seems quite rare since pre-embryo donors can choose their IVF provider.

No doubt donors and IVF clinics would quickly adjust to any potential applications of Shelley. A donor with a discriminatory intent will simply choose an IVF clinic they can trust not to go

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19 Shelley, 334 US at 4-5.
20 Id at 5.
21 Id at 6-7.
22 Id at 19-20.
23 Many commentators struggle with the scope of Shelley's application and the basis for the decision. Compare Laurence H. Tribe, Constitutional Choices 261 (Harvard 1985) with David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U Chi L Rev 935, 969 (1989). Tribe argues that the selective enforcement of racially restrictive covenants in Missouri's common law created a racist state policy and thus a state action in violation of the Equal Protection Clause. Tribe, Constitutional Choices at 261. Strauss, on the other hand, argues for a broader reading. He argues that resting Shelley on a basis of selective enforcement undermines the potential application of Shelley to other morally problematic situations. Strauss, 56 U Chi L Rev at 969-70. As far as scope is concerned, there is little question that after Shelley a state court's enforcement of a contract would qualify as state action under the Fourteenth Amendment.

When the pre-embryo donation process functions via disposition agreement with the IVF clinic as mediator, Shelley appears to be potentially applicable. If it were possible for someone to store pre-embryos on his own, then he could exercise whatever preferences he desired in choosing a recipient. Without the use of a disposition agreement and IVF clinic the situation would look much more like independent adoption discussed below, in Part IV.B.
against their wishes. Consider the example above of the couple that chose Nightlife Christian Adoption Agency for arguably discriminatory purposes. As opposed to real property that can last forever and might pass to numerous owners, pre-embryos are generally held only by one clinic and lose viability over time. *Shelley* then seems even less likely to apply. The inability of the Equal Protection Clause to get at this discriminatory action via *Shelley* suggests the need for a different approach. If the contracts themselves are unlikely to be challenged then perhaps a broader regulatory approach is necessary. The question then is how this discrimination should be regulated. The remainder of this Comment provides an answer by looking to reasoning in cases dealing with disposition agreements generally, the legal status of pre-embryos, as well as discrimination allowances in analogous areas of law.

II. TREATMENT OF DISPOSITION AGREEMENTS GENERALLY

Prior to determining whether a court would enforce conditional or discriminatory provisions, an examination of courts' propensity to enforce disposition agreements generally will prove helpful. Oftentimes, a donor's current wishes come into conflict with a previous contractual arrangement.24 State courts have taken different approaches and arrived at different conclusions when deciding whether to honor a donor's current wishes or strictly enforce the disposition agreement.25 Courts adopt one of three basic approaches: strict enforcement, invalidation as void against public policy, and invalidation based on the right to avoid procreation.26 The first two categories reflect judicial determinations based on differing policies towards the freedom of contract. The third approach, invoking the right to avoid procreation, involves a balancing of two competing constitutional rights to privacy: the right to procreate versus the right to avoid procreation. The policies animating enforcement and invalidation of disposition agreements are considered more fully below.

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25 For a general discussion, see id at 1006-16 (offering a detailed exposition of case law).

26 Id.
A. Strict Enforcement

Some courts enforce disposition agreements against the current wishes of one of the gamete donors in order to maintain the consistency and predictability of such agreements. In *Kass v Kass*, a couple entered into an agreement to donate their excess pre-embryos for research if they were unable to reach a consensus on eventual disposition. The couple later divorced without altering their initial intent to give the pre-embryos for research. Mrs. Kass then changed her mind and sought to retain the pre-embryos for later implantation. Relying on the idea that the contract was an accurate reflection of donor intent, the court upheld the earlier agreement. Preventing implantation despite Mrs. Kass's wishes, the court stated that the enforcement of disposition contracts "minimize[s] misunderstandings and maximize[s] procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."

The Tennessee Supreme Court, in *Davis v Davis*, in dicta, reached a similar conclusion. Despite the lack of a previous agreement in the case, the court made clear that disposition contracts would be enforced in the future.

The Washington Supreme Court decided the issue of pre-embryo disposition based on "contractual rights of the parties under the pre-embryo cryopreservation contract." In *Litowitz v Litowitz*, a divorced couple could not agree on the disposition of

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28 Id at 176-77.
29 Id at 177.
30 Id at 177.
31 *Kass*, 696 NE2d at 182.
32 Id at 180.
33 842 SW2d 588, 597 (Tenn 1992). The court stated that:

[w]e believe, as a starting point, that an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.

34 *Litowitz v Litowitz*, 48 P3d 261, 271 (Wash 2002). The trial court and appellate court decided the case on non-contractual principles. See *Litowitz v Litowitz*, 10 P3d 1086, 1092 (Wash App Div 2 2000) revd, 48 P3d 261 (Wash 2002). The trial court utilized a best-interests-of-the-child standard. *Litowitz*, 10 P3d at 1086. The appellate court balanced the rights of procreation. Id at 1092. Since Mrs. Litowitz provided no biological material to the pre-embryo, the appellate court awarded the pre-embryos to Mr. Litowitz. Id at 1093. For further discussion of the right of procreation, see Part II.C.
35 48 P3d 261 (Wash 2002).
pre-embryos. In their IVF procedure the couple used pre-embryos created from Mr. Litowitz's sperm and eggs from an egg donor. Mrs. Litowitz desired to use the pre-embryos to add to her post-divorce family. Dodging any questions of pre-embryo status or rights of procreation, the Washington Supreme Court relied solely on the predisposition agreement. The agreement provided that the pre-embryos be thawed after five years of cryopreservation, assuming the couple did not request an extension. Enforcing the contract, the Washington Supreme Court ordered the destruction of the pre-embryos. In this way, like the Kass and Davis courts, the Litowitz court privileged consistent enforcement of disposition agreements over the wishes of a gamete provider.

B. Void as Against Public Policy

Two main arguments stand in opposition to strict enforcement of pre-embryo contracts and courts utilize both to invalidate agreements based on public policy concerns. The first considers contractual ordering morally problematic in the family context. Proponents of this argument believe that contracts are better relegated to commercial and economic transactions. In other words, "it is the altruistic ethic of family law that should guide [a] court, not the ethic of self-gratification of the marketplace and contract law."

Some courts employ a public policy rationale to invalidate pre-embryo disposition agreements. In AZ v BZ, the Massachusetts Supreme Judicial Court invalidated a contract providing that, upon separation, any excess pre-embryos would return to

36 Id at 264.
37 Id.
38 Id.
39 48 P3d at 270-71.
40 Id at 263-64.
41 See Part II.B for a discussion of cases that utilize a public policy rationale.
43 Satpathi, 18 Temple Envir L & Tech J at 71 (cited in note 42).
45 725 NE2d 1061 (Mass 2000).
the wife. After separation, the husband attempted to prevent his wife from taking control of their pre-embryos. The court determined that agreements for the disposition of pre-embryos were void as against public policy. In the court's words, "prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions." The court's explanation stated that, "[t]his policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."

Following very similar logic, and relying on the AZ opinion, the New Jersey Supreme Court also invalidated a disposition agreement. In JB v MB, the couple agreed to donate their pre-embryos to the IVF clinic upon divorce. After the divorce, the wife decided that she did not want the pre-embryos utilized by anyone else and attempted to have them discarded. The husband disagreed and sought to have the pre-embryos either implanted in his wife or donated to another couple. The court held that enforcing an agreement "to enter into or terminate familial relationships," would violate New Jersey public policy. The New Jersey Supreme Court explicitly disagreed with Davis and Kass stating:

We believe that the better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos.

A second argument against using contracts to handle disposition of pre-embryos rests on concerns of bounded rationality. Bounded rationality "refers to the obvious fact that human cognitive abilities are not infinite." Since parenthood and the issues

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46 Id at 1054.
47 Id at 1053.
48 Id at 1059.
49 AZ, 725 NE2d at 1059.
50 783 A2d 707 (NJ 2001).
51 Id at 710.
52 Id.
53 Id.
54 JB, 783 A2d at 717.
55 Id at 719.
surrounding family decisions are so emotionally charged, parties may be less likely to “fundamentally understand the nature and consequences of the contract.” From this perspective, the inability of contracting parties to take account of relevant information supports the seemingly paternalistic intervention of courts. In the words of Cass Sunstein, “[i]f a consumer or contracting party lacks relevant information, a decision to override the choice is not obviously an interference with liberty.”

To combat these propositions, supporters of contractual ordering point to liberty and autonomy concerns. The courts in Davis, Kass, and Litowitz recognized informed contractual ordering as the most certain, efficient, and liberty enhancing method of dealing with pre-embryo disposition. They argue that since gamete providers have the most at stake, they should be the ones making the decisions. Further, “allowing gamete providers to [contract for] the disposition of their genetic material allows the parties greater latitude in determining their reproductive roles as well as future obligations.”

There is no consensus as to how courts should handle disputes regarding disposition of pre-embryos. Depending on the jurisdiction, disposition agreements might be strictly enforced or invalidated based largely on the reception of policy arguments outlined above.

While none of these policy considerations has won the day, they could provide a hint for how to evaluate discriminatory agreements. The hesitation of some courts to enforce nondiscriminatory disposition agreements might point more generally to difficulties for discriminatory agreements. With courts already considering public policy issues, the public distaste for discrimination could provide a thumb on the scale for invalidation.

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a limitation on traditional expectations of law and economics).

57 Satpathi, 18 Temple Envir L & Tech J at 72 (cited in note 42).


59 Id at 1166.

60 See, for example, Michael J. Trebilcock, The Limits of Freedom of Contract, ch 1 (Harvard 1993) (discussing these arguments in greater detail).


62 See Satpathi, 18 Temple Envir L & Tech J at 74 (cited in note 42).

63 Id at 73.
C. The Right (Not) to Procreate

A final method used to determine disputes over pre-embryo disposition involves balancing competing rights to procreate. Since there was no prior agreement in Davis v. Davis, the Tennessee Supreme Court was left to determine the disposition of the pre-embryos based on principles beyond those of contract law. In order to determine whether Mrs. Davis could implant the embryos against Mr. Davis's wishes, the court relied upon the constitutional right to privacy. Focusing on decisions from the U.S. Supreme Court, the Davis court recognized that the overarching right to privacy includes two other distinct rights: the right to procreate and the right to avoid procreation. In Eisenstadt v. Baird, the Supreme Court stated that the right to privacy includes "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." In an earlier case striking down the practice of mandatory sterilization for certain prisoners, the Court recognized the right to procreate as "one of the basic rights of man."

In balancing Mrs. Davis's right to procreate with Mr. Davis's right to avoid procreation, the court assessed both the economic, physical, and psychological hardships likely to be endured by each party. After balancing the interests involved, the Tennessee Supreme Court held that Mr. Davis's right to avoid procreation should prevail. Since Mrs. Davis was not certain to use the pre-embryos herself, and since her opportunities to procreate otherwise were not extinguished, Mr. Davis's right to avoid becoming a parent was superior to Mrs. Davis's right to procreate.

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64 842 SW2d 588 (Tenn 1992).
65 Id at 600-01.
66 Id at 601.
68 Id at 453.
70 Davis, 842 SW2d at 603-04.
71 Id. No court has yet enforced a disposition agreement that forces parenthood onto a gamete provider against his or her current wishes. Utilizing the constitutional right to avoid procreation or arguments of public policy, courts are hesitant to force the economic and psychological burden of parenthood on unwilling people. The strict enforcement in Kass and Litowitz went in the other direction, with the donors' original intent leading to donation for research or destruction. While the court in Davis suggests that it could enforce such an agreement at some point in the future, the current law suggests that a gamete provider seeking to avoid procreation has a very strong chance of success.
Recognizing a strong right to avoid procreation presents an interesting problem for discrimination in pre-embryo transfer. Even with a neutral agreement, the right to avoid procreation could provide cover for the exercise of discriminatory preferences. In jurisdictions that allow contractual ordering to trump public policy concerns, gamete providers could simply invoke the right to avoid procreation in order to prevent their pre-embryo from going to a disfavored recipient. Strict enforcement would provide a step towards rooting out all potential discrimination against recipients. Jurisdictions giving preference to the right to avoid procreation would have problems combating this discriminatory invocation. In *Davis*, the Tennessee Supreme Court examined a number of factors to determine the burden that procreation would impose on Mr. Davis.\(^7\) How successfully could a court distinguish a legitimate psychological burden from discriminatory animus? The institutional limitations of courts, the weight of the right to avoid procreation, and the ease with which litigants could develop a *legitimate* rationale are issues to be considered. The point, though, is simply that strict enforcement would make it easier for courts to limit discrimination against pre-embryo recipients.

### III. THE LEGAL STATUS OF PRE-EMBRYOS

Ever since IVF and cryopreservation made it possible for pre-embryos to survive outside of the womb, courts and state legislatures have grappled with the proper status of the pre-embryo.\(^73\) Three potential positions exist, each adopted at some point by a court or state legislature. The pre-embryo may be classified as a person, property, or "something in between."\(^74\) Each of these approaches contains particular benefits and drawbacks.

#### A. Pre-embryo as Person

One minority position, adopted by the Louisiana legislature and the Tennessee trial court in *Davis*, recognizes pre-embryos as human beings.\(^75\) Recognizing the pre-embryo as a human be-

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\(^72\) See *Davis*, 842 SW 2d at 603-04 (discussing negative impact of Mr. Davis's childhood home life as evidence supporting the burden).


\(^74\) Consider *Davis*, 842 SW2d at 597.

\(^75\) See *Davis*, id at 589 (refusing to follow the trial court's reasoning concerning pre-
ing prevents frozen pre-embryos from being destroyed. The Louisiana statute states, "[a]n in vitro fertilized human ovum is a biological human being . . . not the property of the physician . . . or the donors of the sperm and ovum." The Louisiana Statute also assigns a chain of custodial rights to excess pre-embryos.

The pre-embryo-as-person theory draws most of its support from arguments that the in vitro embryo is biologically alive and genetically unique. Supporters claim that the pre-embryo has reached a point on the "continuum" of life such that it should be protected because of its potential for birth.

Scientific and legal evidence cuts against the pre-embryo-as-person theory. Critics argue that the pre-embryo lacks "neuromuscular requirements for cognition and sentience." At this stage, despite being genetically unique, the pre-embryo consists entirely of undifferentiated cells. Further, the embryonic axis, which will become the "embryo proper," does not develop until later. Based on this scientific evidence, many argue that the pre-embryo should not garner distinct rights.

Supreme Court opinions suggest that pre-embryos do not hold a legally recognizable interest. While the Court has avoided directly stating when life begins, it has held that a state's interest in protecting human life begins at viability. In Roe v Wade, the Court dealt with the competing interests of a woman's right to privacy and the state's interest in protecting life. The court concluded that the state could not interfere with a woman's right to terminate a pregnancy until the third trimester. Later, in Planned Parenthood v Casey, the Supreme Court "adhere[d] to

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77 Id.
78 See David G. Dickman, Comment, Social Values in a Brave New World: Toward a Public Policy Regarding Embryo Status and In Vitro Fertilization, 29 SLU L J 817, 830 (1985).
79 See id.
81 Id.
82 Id at 445 n 28.
83 For a general discussion, see id at 446-60.
84 410 US 113 (1973).
85 Id at 150-54.
86 Id at 164-65.
the essence of Roe’s original decision.” However, a joint opinion of the Court rejected the trimester framework, claiming that it “undervalues the State’s interest in potential life.” Instead of prohibiting state interference prior to the third trimester, the joint opinion adopted an “undue burden analysis.” In the Court’s words, “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” While Casey allows states the power to regulate certain aspects of a woman’s choice prior to the third trimester, the Court made sure to reaffirm “the central holding of Roe v Wade” concerning a woman’s freedom to choose abortion prior to viability of the fetus. If a fetus—unquestionably further along on the “continuum of life” than a pre-embryo—cannot justify state interference until that fetus has reached viability, then a pre-embryo surely cannot under current law.

B. Pre-embryo as Property

Another minority position treats pre-embryos as property, with interests equally shared between both gamete donors. In York v Jones, a Virginia court recognized a bailor-bailee relationship between a donor couple and an IVF clinic. Citing York, the Davis appeals court implicitly adopted a pre-embryo-as-property approach recognizing a joint interest between the two donors. Later, the Tennessee Supreme Court criticized the Davis appeals court for failing to specifically define the interests of the parties involved.

Conceiving of the pre-embryo as property would make determinations of ownership and transfer easier since they could be based on well-developed, existing law. The first and most obvious problem with the property stance is that it undervalues the

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88 Id at 869.
89 Id at 873.
90 Id at 876.
91 Casey, 505 US at 878 (emphasis added). The undue burden analysis, while introduced in the joint Casey opinion, was taken up by a majority of the court in Stenberg v Carhart, 530 US 914, 921 (2000).
92 Casey, 505 US at 879.
93 717 F Supp 421 (E D Va 1989).
94 Id at 425.
96 Davis, 842 SW2d at 596.
However, the pre-embryo-as-property theory also presents practical problems. If both donors receive a joint interest in the pre-embryos then nothing will be done without agreement between both donors. This would effectively give either party veto power and "the fate of the pre-embryo will remain in limbo." Since clinics cannot store pre-embryos indefinitely, one party could assure destruction of the pre-embryos. The pre-embryo-as-property theory provides no help in resolving disputes over disposition and presents an uneasy moral position. This is why courts have generally not adopted the position in the past, and why they likely will not do so in the future.

C. Special Respect Status

The property and person options for pre-embryo status create potential for the application of current bodies of law and their discriminatory allowances. However, pre-embryos more often garner "special respect" status. The "special respect" view recognizes the pre-embryo's potential for life and negotiates a comfortable middle ground from a moral and political perspective. Uncertainty surrounding the definition and repercussions of the "special respect" view create potential problems. The vagueness of the term "special respect," and its glaring lack of self-definition, provide little help in determining what it actually means for an embryo's status to lie somewhere between property and person. The American Fertility Society explains the theory by stating:

[T]he pre-embryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The pre-embryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many

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97 See Kim Schaefer, Comment, In Vitro Fertilization, Frozen Embryos, and The Right to Privacy—Are Mandatory Donation Laws Constitutional?, 22 Pac L J 87, 96 n 69 (1990) (providing more discussion of the idea that society places value in pre-embryos because of their potential for life).

98 See, for example, Andrea Stevens, The Legal Status and Disposition of Cryopreserved Embryos: A Legal and Moral Conundrum, 13 J Suffolk Acad L 181, 189 (1999) (arguing that giving joint interest could always result in a veto by the party seeking destruction).

99 See discussion of organ donation and private adoption in Part IV. These current areas of law might apply even more directly if either property or person status was adopted.

100 Davidoff, 47 SMU L Rev at 139 (cited in note 5).
people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biological potential.101

While the theory offers little substance for legal analysis, the moral middle ground avoids some of the problems apparent in taking a more definite stance. Professor John Robertson argues that since the pre-embryo “has the potential to be more, it operates as a powerful symbol or reminder of the unique gift of human existence.”102 Adopting the property or person status presents a host of moral and functional problems discussed above. These problems, coupled with the wide acceptance of special respect status, suggest that special respect status is the most useful tool in moving towards a determination of allowable discrimination in the context of pre-embryo donation.

IV. FRAMING THE DEBATE: ORGAN DONATION AND PRIVATE ADOPTION

Since pre-embryo transfer contains similarities to other more familiar practices, it is helpful to take a closer look at established law that might be borrowed from to craft a law of pre-embryo transfer. In considering contracts for the disposition of pre-embryos, the law of organ donation and that of private adoption provide interesting comparisons. Organ donation involves the transfer of human tissue containing no chance to mature into a person and private adoption involves the transfer of an actual person. A description of these two processes, as well as arguments surrounding the discriminatory allowances in each, provides guidance for determining a scope of allowable discrimination in contracts for the disposition of pre-embryos.

A. Organ Donation

In 1984, the National Organ Transplant Act103 (“the Act”) authorized the government to contract with a private organization104 to operate a system for sharing organs. The resulting

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101 Ethics Committee of the American Fertility Society, 53 Fertility and Sterility at 35s (cited in note 2).
102 Robertson, 76 Va L Rev at 447 (cited in note 80).
process involves two steps: people choose to donate organs and those organs are then allocated. People usually express their intent to donate organs by carrying a donor card or taking appropriate steps to mark such on their driver’s license application.\textsuperscript{105} When an organ is donated from a cadaver, the first option for transplant is a biological match in the local area.\textsuperscript{106} If no one is waiting in the local area then the organ is offered subsequently to larger geographic areas—regional and then national—until a match is found.\textsuperscript{107} Most importantly for current purposes, the Act allows donation based on altruism alone.\textsuperscript{108} Donors cannot receive compensation.\textsuperscript{109} Donors cannot donate organs based on discriminatory conditions.\textsuperscript{110} Consider the UNOS Ethics Committee policy, which states, “donation of organs in a manner which discriminates for or against a class of people based on race, national origin, religion, gender, or similar characteristics is unethical and may not ethically be accepted by UNOS members or transplant professionals.”\textsuperscript{111} The system only allows a completely altruistic donation to “supply organs to unknown recipients in need of transplant operations.”\textsuperscript{112} While the current system of legal organ donation does not allow for conditional donations, scholars have considered the costs and benefits of the option.\textsuperscript{113} The central tension in this issue results from a tradition recognizing self-determination and individual preferences set against the current allocation system focused on policies of equity and justice.\textsuperscript{114} Before getting into ar-

\begin{footnotes}
\item[107] Id.
\item[109] Id.
\item[110] See National Organ Transplant Act, 42 USC § 274 (2000). Discussion of discriminatory and conditional organ donation refers to a process whereby a donor expressly chooses or excludes a class of people.
\item[112] Kaserman and Barnett, The U.S. Organ Procurement System at 44 (cited in note 104).
\item[113] For a general discussion, see, Ankeny, 10 Cambridge Q Healthcare Ethics at 389-91 (cited in note 106).
\item[114] Id at 387.
\end{footnotes}
arguments for and against, consider two examples of attempts at conditional organ donation.

First, a Florida family agreed to donate their son's organs, but only on the condition that they went to people who were white because the father was a member of a white supremacist group.\textsuperscript{115} This situation led the Florida legislature to explicitly ban organ donation directed to particular groups.\textsuperscript{116} The St. Petersburg Times article discussing the Florida case also tells a related story.\textsuperscript{117} This time the conditional donor is not a white supremacist, but a Nazi concentration camp survivor who conditioned the donation of her organs on the mandate that they not go to people of German descent.\textsuperscript{118} With both of these examples in mind, what can be said for allowing conditional donations, and what counsels against the idea?

If altruistic donors were well-informed of the situation, directed donations—even if discriminatory—could help classes of people with disproportionate needs. Wayne Arnason argues in favor of an experiment matching donor kidneys of Black Americans with black recipients.\textsuperscript{119} Since Blacks almost double the number of Whites on America's kidney waiting lists,\textsuperscript{120} the ability to direct a gift might allow for focused support where it is needed the most. The rationale behind Arnason's policy would also suggest that non-black donors could direct organs to black recipients. Of course, this extension of Arnason's argument assumes, as stated above, that donors are informed enough to make this altruistic decision. And it may assume too narrow a range of altruism. Remember that conditional donations, depending on donor preferences, might altruistically send organs to upper-middle class Whites. However, Arnason's limited point, that well-informed Blacks would donate to Blacks, seems quite probable. The question then is whether allowing conditional donations

\textsuperscript{115} Jeff Testerman, \textit{Should donors say who gets organs?}, St Petersburg Times 1A (Jan 9, 1994).
\textsuperscript{116} Fla Stat Ann § 765.514(3) (2005)
\textsuperscript{117} Testerman, \textit{Should donors say}, St Petersberg Times at 1A (cited in note 115).
\textsuperscript{118} Id.
\textsuperscript{119} Wayne B. Arnason, \textit{Directed Donation: The Relevance of Race}, 21 Hastings Center Rep 13, 16 (Nov-Dec 1991). Arnason's policy experiment would have Black recipients winning out over non-Black recipients assuming medical need criteria were equivalent. Ankeny raises an interesting difficulty with Arnason's proposed experiment: How would transplant decisionmakers qualify black versus non-black? Ankeny, 10 Cambridge Q of Healthcare Ethics at 350 (cited in note 106).
\textsuperscript{120} Arnason, 21 Hastings Center Rep at 16 (cited in note 119).
generally would reallocate organs that Blacks are already receiving from the neutral system.

Robert Sade points out another benefit that might come from conditional or directed donations. Directed donations could provide incentive for donation by “personaliz[ing] . . . the recipient,” thus creating community value not present in the current anonymous system. Sade also suggests that allowing directed donation would decrease some of the current disincentives to participate in organ donation. Deciding to whom your organs will go may help those who are uncertain of the system. Sade states that directed donation can “overcome the distrust of some who doubt the fairness of the current system, that is, the feeling of placing a loved one’s organs into a black box to be distributed by unknown others to unknown recipients.” One weakness that Sade himself points out is the lack of empirical evidence that might suggest an increase in donation based on allowing conditions.

In contrast to Sade’s utilitarian approach are moral intuitions in line with theories of distributive justice. Committing organs specifically to a particular group represents an implicit value statement that members of that group are more deserving. This concern becomes clearer if directed donations send organs away from a particular group. Directed donations based on hatred or contempt for a particular class of people create a sense of moral unease. In this sense, allowing directed donations could undermine the altruistic underpinnings of organ donation. The United States’ policies on organ donation—requiring altruistic, anonymous donations—clearly adopt these latter policies as the most important.

122 Id at 440.
123 Id.
124 Id at 441.
125 See Ankeny, 10 Cambridge Q Healthcare Ethics at 390-95 (cited in note 106) (providing further discussion of the morality of conditional organ donation).
127 But see id (criticizing the British government’s condemnation of all conditional offers of donation and its statement that such donations undermine “the fundamental principle that organs are donated altruistically”).
B. Private Adoption

While organ donation provides some analogies, others can be drawn from private adoption. Private adoption is used here to distinguish the discussion from any public, state-run adoption process. While states still regulate private adoption to a certain extent, the state does not actually make individual decisions regarding child placement. Instead, private adoption occurs either through processes known as independent adoption or private agency adoption. These two processes of private adoption differ greatly, with different actors involved and different restrictions on how children are placed.

Despite the different processes, courts rely on similar bases for evaluating the resulting adoptions in either circumstance. A court's main task is to determine whether an adoption decision "encompasses the best interests of the child." This determination requires courts to evaluate the fitness of prospective adoptive parents. State statutes often provide factors for courts to weigh in making this determination. For example, one state statute counsels a court to consider the adoptive parents’ ability "to create an atmosphere that supports the religion, race, and culture of the child, as well as provide love, affection, and guidance to the adoptee." Courts evaluate the resulting adoption similarly regardless of whether independent or private agency processes are undertaken. However, the child placement process and the amount of discretion allowed the birth parent(s) can differ between the two.

Agency adoption processes are largely creatures of state law. While state laws differ with regard to details, private agencies

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128 Private adoption, in both agency and independent forms, should be differentiated from public adoption. Public adoption, which is controlled by the state, usually involves adoption of foster children. See Christine Adamec and William L. Pierce, The Encyclopedia of Adoption 34 (Facts on File 2d ed 2000). Foster care refers to "the system set up to protect children who are abused, neglected or abandoned or whose parents or primary caretakers are unable to fulfill their parenting obligations . . . placement into foster care by parents may [also] have been voluntary." Id at 112.

129 Independent adoption is also known as direct placement adoption or individual adoption. Suzanne Herman, The Revised Michigan Adoption Code: The Reemergence of Direct Placement Adoptions and the Role and Duties of the Attorney, 74 U Detroit Mercy L Rev 583, 583 (1997). To supplement the explanation of independent adoption provided here, see Adamec and Pierce, The Encyclopedia of Adoption at 141-44 (cited in note 128).

130 For further explanation of agency adoption processes, see Adamec and Pierce, The Encyclopedia of Adoption at 33-36 (cited in note 128).

131 Herman, 74 U Detroit Mercy L Rev at 585 (cited in note 129).

132 Id at 585.

133 Id.
must usually get approval and respond to regulation by a state agency. As for the adoption process, the first step is for the biological parents to execute an instrument surrendering parental rights to the agency. Absent fraud, duress, or misrepresentation, parental rights are permanently severed, and in some cases severance cannot be revoked. The agency then proceeds to match adoptive parents to the children in its care. This matching process involves agencies utilizing both state-required and internally developed criteria for child placement.

State statutory law regulating agency placement often allows some space for discriminatory preferences to operate. States can allow biological parents to deny adoptions, even those done through agencies, based on discriminatory preferences. A Kentucky statute prevents state-approved agencies from making decisions based solely on race or religion unless pursuant to the express wishes of the biological parent(s). States can also require decisionmakers to consider certain potentially discriminatory criteria. An Arkansas statute allows consideration of a child's religion in placement determinations if a child's parent expresses such a preference. New Jersey law prohibits discrimination against potential adoptive parents "on the basis of gender, race, national origin, age, religion, or marital status." However, as is the case with most states, these factors can still be considered as part of the child's best interests calculus. Besides the state statutory standards, agencies can establish demanding criteria for adoptive parents. One commentator described the situation by stating that, "[b]ecause the demand for healthy, adoptable infants is significantly greater than the supply, agencies . . . may discriminate in the name of the child's best interests."
Independent adoption happens very differently from private agency adoption. Rather than birthparents relinquishing parental rights to an agency that proceeds to select adoptive parents, independent adoption relies on birth parents to select adoptive parents and give consent directly to them for adoption. With the aid of an adoption lawyer, birthparents participate fully in the adoption proceeding. Birthparents make decisions and evaluate the fitness of prospective adoptive parents until the child is placed permanently with the adoptive family.

States have not always allowed both private agency and independent adoption. However, almost all jurisdictions have moved towards allowing independent adoptions. One rationale for movement to independent adoptions is that the independent process provides positive incentives for both birth parents and adoptive parents to go through with adoption. Since becoming legal in most jurisdictions, the number of independent adoptions has increased dramatically. Birthparents consistently report three reasons for choosing independent adoption:

1. a perception by birthparents that agencies are profit oriented and bureaucratic in their treatment of birthparents,
2. a desire by birthparents to play an active role in the selection of the adoptive parents, and
3. a desire on the part of birthparents for the child to go directly into the physical custody of the adoptive parents rather than into temporary foster care.

Adoptive parents also have reason to choose independent adoption in certain circumstances. They can avoid long waiting

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144 Herman, 74 U Detroit Mercy L Rev at 584 (cited in note 129).
145 Id at 586-87 & n 26 (noting that Michigan did not allow independent adoption until 1995).
146 As of 2000, independent adoption was legal in all states except Connecticut, Delaware, Massachusetts, and North Dakota. See Adamec and Pierce, *Encyclopedia of Adoption* at 141 (cited in note 128).
147 Herman, 74 U Detroit Mercy L Rev at 594-96 (cited in note 129).
148 A study conducted in 1986 estimated that from its sample 16,040 adoptions were by direct placement, whereas only 15,063 were via the more traditional private agency route. Id at 586 n 19.
periods typical of agency adoption, while also avoiding some of the seemingly arbitrary agency decisions.\textsuperscript{150}

For present purposes, the most important difference between agency and independent adoption lies in the decisionmaking criteria used to choose adoptive parents. While some agencies allow birth parents to play a role in selecting adoptive parents, the information available to birth parents is often more limited.\textsuperscript{151} Further, the motives for agency placements are limited based on statutory restrictions. Through independent adoptions, birth parents can select prospective adoptive parents based on any reason at all. While a reviewing court will apply the same best interests of the child model in determining suitability of the adoptive parents, the motive for selection is entirely unquestioned. Thus, independent adoptions result in deference to the wishes of birth parents that probably could not occur through the private agency method.

Some argue that this control over the selection process can encourage adoption in general.\textsuperscript{152} Other supporters of independent adoption state that a pregnant woman made aware of independent adoption may be more willing to choose the route as an alternative to terminating pregnancy.\textsuperscript{153} Advocates for independent adoption also point to the fact that third parties "routinely connect prospective adoptive parents and birth parents."\textsuperscript{154} Thus, a state's legal recognition of independent adoption can "inject statutory accountability" into placements by intermediaries.\textsuperscript{155}

V. WHY PRE-EMBRYO DONORS SHOULD NOT BE ALLOWED TO DISCRIMINATE AGAINST RECIPIENTS

Three areas of law play a strong role in fleshing out the proposed legal framework for analyzing discrimination in preembryo disposition agreements. Organ donation and private adoption have been outlined in a more descriptive fashion in earlier sections and obviously play a part. The right to avoid procreation is a third tool that can be used to analyze whether discrimination should be allowed. To understand whether donors

\textsuperscript{150} Id.
\textsuperscript{151} Herman, 74 U Detroit Mercy L Rev at 594 (cited in note 129).
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
should be allowed to discriminate, this section applies the concepts and arguments arising from these three existing areas of law to the context of pre-embryo transfers.

A. Applying Organ Donation Law

Organ donation, because it involves the transfer of human tissues, can provide some direction with regards to pre-embryo transfer. Obviously the difference between organs and pre-embryos will cause some disconnects, but ideas with potential for application can be discerned. A direct application of the laws of organ donation to pre-embryo donation results in no allowances for discriminatory donations. Further, an analysis of the debate surrounding the benefits of conditional organ donation suggests that such an outcome in the context of pre-embryo donation would not be ideal. The moral issues surrounding conditional donation might present less of a problem with pre-embryos. But a focus on the problematic shortages in the organ and pre-embryo contexts, as well as the harms caused by each of these shortages, shows that the arguments for conditional organ donation do not map cleanly onto the pre-embryo donation process.

While organ shortages plague the organ donation process, the pre-embryo donation process suffers from a shortage of its own. IVF clinics often lack sufficient storage space. Clinics can only keep embryos frozen in storage for a limited period of time; therefore, clinics must determine policies to manage their available space. Two possibilities exist for freeing up storage space. The first option, and the one often explicitly included in many IVF contracts, provides that the IVF clinic discard frozen pre-embryos at a certain point in time. A second option would involve allowing conditional donation to free up storage space for other pre-embryos. Conditional donation of pre-embryos could encourage donation generally, much in the same way Sade argues that it might encourage organ donation.

In considering the need to encourage pre-embryo donation, as compared to organ donation, two major lines of analysis pre-
sent themselves. The first involves a comparison of the problems caused by the shortage issues in each case. The second involves one of the same problems Sade confronted: the lack of empirical evidence to support a claim of increased donation based on conditional allowances.\textsuperscript{160} Comparing the harms caused by each respective shortage helps to focus on the actual need for increased donation. How does one compare the harm caused by shortages of organs for donation to the harm caused by the discarding of pre-embryos? The pre-embryo status issues raised above provide a good starting point. The organ shortage often results in the unnecessary death of human beings. The shortage of storage space results in IVF clinics discarding pre-embryos.\textsuperscript{161} Saving fully developed human beings presents a more important goal than saving pre-embryos that present only a potential for life. While some argue that “a new person exists from the ‘moment’ of conception or fertilization, because a new, genetically unique, living human being exists,” the weight of scientific and legal evidence cuts the other direction.\textsuperscript{162} The pre-embryo “lack[s] the ability to interact, be conscious, have experiences, or be sentient—the usual attributes of persons or rights-bearing entities.”\textsuperscript{163} Further, the probability of a single pre-embryo developing into a viable fetus or eventually a fully developed human are surprisingly low.\textsuperscript{164} Following the logic laid out above with regard to when viability occurs, and thus when a developing human becomes important enough for the state to protect, the organ shortage is much more troubling. If the law has not developed toward allowing conditional donations for the purpose of saving fully developed human life, one would definitely not expect an allowance for conditional donations as encouragement to save only potential life.

Encouragement for pre-embryo donation does not rest on the same moral foundation as encouragement for organ donation. The difference in legal status might suggest that encouragement is easier in the pre-embryo setting, assuming that pre-embryos fall between organs and humans. Sade lacked empirical evidence to show that allowing conditional donations would increase organ donations generally. Similarly, we have no empirical evi-

\textsuperscript{160} See Part IV.A, discussing Sade’s ideas on conditional donation more fully.
\textsuperscript{161} Johnson, 68 Brooklyn L Rev at 858 (cited in note 1).
\textsuperscript{162} Robertson, 76 Va L Rev at 444. (cited in note 80).
\textsuperscript{163} Id.
\textsuperscript{164} Id at 443 (discussing probabilities at different stages of the developmental process).
idence regarding conditional donations of pre-embryos. But if conditional donations lead to a general increase in pre-embryo donation this could help alleviate burdens on storage facilities.

Finally, the resulting harms of conditional donations differ when it comes to organs versus pre-embryos. Conditioning pre-embryo donation on the basis of race, religion, or sexual orientation might not be the result of bad motives. If courts recognize pre-embryos as somewhere between property and people, then one can imagine the application of some sort of limited “best interest of the child” calculation. A white gamete donor could have the best interest of the pre-embryo at heart when conditioning donation only to white recipients. Rather than being motivated by any ideas of racial supremacy, the donor could simply be acting on the idea that children develop better in race-matched familial environments.

When compared with conditional donation of a pre-embryo, conditional organ donation could present a more difficult moral dilemma. The conditional organ donation represents at least an unintentional negative value statement regarding a particular class of people, and perhaps includes some hateful motive on the part of the donor. Also, if a donor conditions organ donation on the basis of a recipient’s race, religion, or sexual orientation, there are no potential interests of a pre-embryo to consider.

Organ donation laws allow very little space for a donor's discriminatory preferences. Arguments suggesting that conditional

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165 One might make a tenuous two-step argument for allowing conditional donation in order to increase donation generally. If we imagine similar incentives for pre-embryo donation and independent adoption, and if independent adoption processes encourage more adoption generally, then similar arguments could be made about giving gamete donors discretion to encourage pre-embryo donation. See Section IV.B (discussing independent adoption and its effects on adoption generally).

166 Consider Johnson, 68 Brooklyn L Rev at 861-63 (cited in note 1) (discussing embryo donation as a solution to storage problems).

167 The trial court in Litowitz awarded disposition of frozen pre-embryos based upon “the best interest of the child.” Litowitz, 48 P3d at 264 (discussing trial court’s reasoning). The Washington Supreme Court later chastised the idea because it assumed equality between pre-embryos and children. Id at 269. The Washington Supreme Court felt it unnecessary to decide the legal status of the pre-embryos. If a court truly accepted the idea that special respect status lies between property and person, then one could imagine the application of the “best interest” standard.

organ donation could increase donation in general do not sound with the same authority in the pre-embryo adoption context. The need for more donated organs outweighs the need for increased donation based on the differing legal status of pre-embryos and people. Donated organs potentially save fully developed humans. The donation of pre-embryos only provides the potential for potential future life. While there may be some moral support for conditional pre-embryo donation—imagining some external interest of the pre-embryo—this single idea cannot motivate allowing discrimination. Since conditional donation is not allowed in the more pressing area of organs, it should not be allowed with pre-embryos.

B. Applying Private Adoption Law

In order to apply any analogy from private adoption law, one must determine whether the pre-embryo situation aligns more readily with independent adoption or private agency adoption. As stated above, these processes vary greatly, most importantly with regard to the state's regulatory power over child placement decisions.

The pre-embryo donation process falls more in line with private agency adoption than independent adoption. Independent adoption involves a birth mother, adoptive parents, and a mediator (usually a lawyer). In most situations, birth parents and adoptive parents make contact via word of mouth or advertisement prior to an attorney's involvement. The lawyer then provides the necessary paperwork to move towards legalizing the adoption. The job of an IVF clinic in pre-embryo adoption requires much more involvement. The IVF clinic takes possession of the pre-embryos and utilizes cryopreservation technology to keep the pre-embryos usable. Similar to adoption agencies prior to the rise of independent adoption, IVF clinics play a critical role in making pre-embryo donation possible. Clearly, one reason that motives behind independent adoption go unregulated has to do with the difficulty of regulating them at all. How does one get inside the head of a birth parent to determine whether motives were acceptable? States are able to regulate agencies

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169 Herman, 74 U Detroit Mercy L Rev at 598 (cited in note 129).
170 Id at 599.
171 Id at 598-607.
172 Johnson, 68 Brooklyn L Rev at 856-58 (cited in note 1).
and clinics more easily because practices are centralized and more readily evaluated.

One might think that the ability, in some states, of birth parents to affect agency placement undermines the differentiation between independent adoption and private agency adoption. However, the distinction obviously holds up in jurisdictions that require severance of all parental rights to an agency. Also, the birth parent’s ability to affect placement in the agency setting need not be dispositive of the issue for pre-embryo donation. The ability of gamete-providers to affect placement does not necessarily follow from the same ability in birth parents. There is reason to think that a gamete-provider’s ability to affect placement should not be as strong as a birth parent’s. The relationship of a birth parent to his or her child suggests a stronger link than the connection between a gamete-provider and an as yet undeveloped pre-embryo.173 No doubt Mrs. Litowitz and Mrs. Davis felt connected to their pre-embryos, but a birth parent’s interest in the placement of their living child goes far beyond a gamete-provider’s interest in the placement of a pre-embryo that may or may not develop into a child.

Agency adoption provides a useful analogue to pre-embryo donation. Both agencies and pre-embryo donation facilities serve similar institutional purposes. Agency adoption has become a highly regulated process, where discriminatory preferences are limited. The same cannot confidently be said for pre-embryo donation, a process largely unregulated at present. While governments have not gotten heavily involved in pre-embryo transfers,174 similarities between the roles of private adoption agencies and IVF clinics suggest the potential for regulation of a clinic’s disposition policies.

173 Much research has been done on parent-infant attachment and some work done on parent-fetal attachment. For a discussion of the social and psychological relationship developed between parents and infants consider, Michael Lewis and Leonard A. Rosenblum, eds, The Effect of the Infant on its Caregiver (Wiley 1974). For a discussion of psychological attachment between parents and their 8-month old fetuses consider, M. Colleen Stainton, The Fetus: A Growing Member of the Family, 34 Family Relations 321 (1985) (discussing reasons for and implications of parents treating their unborn fetus as a unique individual). The argument suggested in this Comment is that as one continues back down the developmental continuum the relationship between a parent and pre-embryo becomes less valuable because similar social and psychological attachment cannot occur.

174 Johnson, 68 Brooklyn L Rev at 854 (cited in note 1).
C. Applying the Right to Avoid Procreation

The ability of a court to enforce a discriminatory disposition agreement raises two major constitutional issues. The first, dealt with in detail already, involves the potential application of *Shelley v Kraemer* and the Equal Protection Clause. The second consideration involves the right to avoid procreation. Is the right to avoid procreation strong enough to justify discriminatory donation of pre-embryos? Can the greater power to avoid procreation generally include the lesser power of avoiding certain instances of procreation for discriminatory reasons?

The above-mentioned disputes regarding the disposition of pre-embryos recognized a strong right to avoid procreation. While the *Davis* court actually went through the process of balancing the interests, the *AZ v BZ* and *JB v MB* decisions also recognize the important interest of a gamete donor to make an unfettered decision to avoid becoming a parent. Even though the eventual decisions utilized language of "public policy," the courts provided similar rationales. In *AZ*, the court stated that no agreements compelling a donor to become a parent against his or her will would be enforced because of public policy reasons. In *JB* the court refused to enforce a contract that might create a child because it would impair the wife's right not to procreate. In none of the decisions mentioned above have courts forced the use or implantation of pre-embryos. And when a contract is enforced, as in *Kass*, the contract stipulates for eventual disposal of the pre-embryos and not donation or implantation. This suggests that courts are very uneasy about forcing genetic parenthood on someone against their wishes. Based on this propensity, one might argue that a discriminatory disposition agreement should be seen as a donor exercising a qualified version of the right to avoid procreation. To accept this, one must assume an extremely powerful right to avoid procreation—and that courts are more concerned about not forcing any parenthood on unwilling donors than with preventing discrimination in this context. This argument fails for a number of reasons.

175 See Part I.
176 842 SW2d at 603-04.
177 *AZ*, 725 NE2d at 1057-58; *JB*, 783 A2d at 719.
178 725 NE2d at 1057-58.
179 783 A2d at 719.
180 696 NE2d at 177.
BETWEEN ORGANS AND ADOPTION

First, a constitutional right does not necessarily imply the ability to utilize discriminatory preferences in exercising that right. A second weakness lies in the rationale behind the right to avoid procreation. The ideas fueling the right focus on the burden of having offspring in existence at all. Selecting among recipients is not procreative choice. In fact, selecting among recipients might just as easily cut in the other direction. If gamete-providers have already shown intent to donate to someone, even if only to people of a certain class, then they look very different than Mr. Davis who sought to avoid procreation at all costs. Rather than a qualified right to avoid procreation, discriminatory disposition agreements reflect intent to procreate under problematic circumstances. For these reasons, the right to avoid procreation should not include the lesser right of avoiding procreation for discriminatory purposes.

CONCLUSION

Pre-embryo donors should not be allowed to discriminate by denying pre-embryos to certain classes of recipients. Analogous areas of law provide strong arguments against allowing discrimination. Furthermore, in certain rare situations, enforcement of a discriminatory disposition agreement could violate the Equal Protection Clause.

The difficulty of applying the Equal Protection Clause, coupled with a lack of directly applicable law suggests a new solution. Looking forward, decisions will have to be made about the importance of preventing discrimination in pre-embryo transfers. Interesting results might follow if regulation happens on the state level. First, remember that some states will have to deal with the tension between preventing discrimination and allowing a strong right to avoid procreation. Also, different states will have different ideas as to the application of these seemingly analogous areas of law. Consider organ donation as compared to pre-embryo donation. States that feel pre-embryos are far from equivalent to people might recognize less need for pre-embryo donation as compared to organ donation. This would present few problems with requiring the same altruism in both the

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181 See, for example, Shelley v Kramer where the right to transfer property did not include the right to transfer property with a racially discriminatory covenant attached. 334 US at 1-5.

182 See Part II.C. The Davis court made their determination based on both financial and psychological burdens imposed by unwanted parenthood. 842 SW2d at 603-04.
pre-embryo and organ context. Where polities recognize pre-embryos as equal in value to people, the altruistic bent of organ donation may not lead to the same requisite altruism in the pre-embryo setting.

However the organ donation analogy plays out, similarities between private agency adoption and pre-embryo donation can provide a preview of regulatory possibilities. Regulators convinced that pre-embryos are more like people should jump at the chance to apply adoption law. As noted above, many states prevent agency placement based solely on race and religion. Some states disallow placement decisions made solely on the basis of sexual preference. The important thing to realize here is that states have found little problem regulating discriminatory preferences in agency adoption settings.

With the uneasy status of pre-embryos, regulators would be wise to consult analogous areas of law. Applying the law and policies surrounding organ donation and private agency adoption shows that pre-embryo donors should not be allowed to discriminate against potential recipients.

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183 See section IV.B.
184 See, for example, Standards of Practice for Adoption Services, 18 NYCRR § 421.16 (2006) (preventing placement decisions based solely on “homosexuality” of adoptive parent).