Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology

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DAVIS v. DAVIS: AN INCONSISTENT EXCEPTION TO AN OTHERWISE SOUND RULE ADVANCING PROCREATIONAL FREEDOM AND REPRODUCTIVE TECHNOLOGY

INTRODUCTION

Several centuries ago, the thought that a human child could be produced without sexual contact between a man and woman would have been considered ludicrous, if not downright heresy. However, since 1978, in vitro fertilization ("IVF") has made such "heresy" possible and has become widely accepted throughout the industrialized world. With the advent of IVF, traditional concepts such as parenthood and the status of the unborn have been revolutionized. The importance of these developments cannot be understated, as they impact the health of the family and the roles that both men and women play within the family unit. It is axiomatic that the family lies at the heart of every society; it has thus been called "essential to the orderly pursuit of happiness by free men." As a result, rights associated with the family have been deemed fundamental by the United States Supreme Court. Consequently, the moral, societal, and legal developments surrounding IVF and its associated procedures must be closely monitored.

When confronted with an unprecedented concept such as IVF, a court has two choices: it can either apply legal principles as they currently exist, or it can fashion new rules of law to apply to the novel situation. The question therefore arises whether existing legal principles are sufficient to handle the social and ethical implications of IVF, or whether IVF is so innovative that the law must, by necessity, reinvent itself. Moreover, whichever direction a court chooses,

1. See infra note 26 (discussing the first successful in vitro fertilization and the birth of Louise Brown).
2. See infra notes 20-56 and accompanying text (detailing the IVF procedure).
3. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Matters pertaining to the family have been deemed "fundamental" by the United States Supreme Court. See infra notes 57-106 and accompanying text (discussing Supreme Court cases establishing the fundamental rights of reproduction, parenting, and the use of birth control).
4. See infra notes 59-69 and accompanying text (discussing the development of privacy rights as applied to familial matters).
the issue of how far such constructs can and should reach must be addressed. If a court considerably alters existing law in order to shape it to the peculiarities of IVF, it risks accusations of judicial meddling in the business of the legislature. And yet, if a court fails to take any action, fundamental rights guaranteed by the United States Constitution could be violated. In addition to these concerns, the inherent risk in any new approach is that it may prove unworkable.

The Tennessee Supreme Court was forced to address these issues in the case of *Davis v. Davis*, where IVF collided head-on with the Constitution. The *Davis* court chose to extend existing constitutional precedent in order to protect the fundamental rights of IVF participants. The highly unique fact pattern of the *Davis* case arose in the context of a divorce. The divorcing couple, Mary Sue and Junior Davis, underwent in vitro fertilization procedures during the course of their marriage with the hope that they could produce their own biological child. The couple produced nine “preembryos” in all; two were implanted and seven were cryogenically-preserved, or frozen, for later transfer to Mary Sue’s uterus. However, before the

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5. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (arguing that the Supreme Court awarded itself “sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not judicial”).

6. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court refused to extend the right of privacy to protect consensual homosexual conduct in the privacy of a home. *Id.* at 189. By failing to extend the right of privacy in this instance, the Court arguably violated the fundamental “right to be let alone.” *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

7. The trimester analysis formulated by Justice Harry Blackmun in *Roe v. Wade*, 410 U.S. 113 (1973), is an example of a legal innovation that has been repeatedly criticized as “problematic.” See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2811 (1992) (noting that “time has overtaken some of Roe’s factual assumptions”); *Webster*, 492 U.S. at 529 (O’Connor, J., concurring) (referring to Roe’s framework as “problematic”); *Thorburn v. American College of Obstets. and Gynecs.*, 476 U.S. 747, 828 (1986) (O’Connor, J., dissenting) (describing Roe’s framework as “outdated”); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 455 (1983) (O’Connor, J., dissenting) (explaining that because of new medical technologies, the point of viability is no longer static and therefore the trimester approach is no longer helpful); see also *infra* notes 83-98 and accompanying text (explaining the Roe trimester framework in more detail).


9. *Id.* at 589.

10. See *infra* note 34 and accompanying text (discussing the propriety of the term “preembryo”).

11. See *infra* notes 40-56 and accompanying text (discussing the cryopreservation process).

12. *Davis*, 842 S.W.2d at 592.
couple could implant the remaining seven preembryos, Junior Davis filed for divorce.\textsuperscript{13} During the proceedings, Mary Sue asked for “custody” of the preembryos so that she could implant them and bring them to term.\textsuperscript{14} However, Junior contested Mary Sue’s request because he did not wish to become a parent “outside the bounds of marriage.”\textsuperscript{15} Because a failure to implant the preembryos would eventually result in their destruction,\textsuperscript{16} the Davises found themselves embroiled in a “custody” battle over seven four- to eight-celled frozen entities. The Tennessee Supreme Court awarded Junior Davis the preembryos, holding that his right to procreational autonomy included the “right to avoid procreation.”\textsuperscript{17}

This Note analyzes the Davis decision in light of previous constitutional precedent and discusses the opinion’s future impact on disputes involving frozen embryos and constitutional rights. It begins with an overview of in vitro fertilization and cryopreservation. This Note then surveys the fundamental right to privacy; where, when, and to whom it applies; and the decisions that have found that the right to procreate is “implicit in the concept of ordered liberty.”\textsuperscript{18} Within this context, this Note explores four differing perceptions of a preembryo’s status: the “Right-to-Life” posture, the Supreme Court’s position, the widely-held “Special Respect” view, and the notion that preembryos should be considered personal property.

This Note then focuses on the particular facts of the Davis case and its procedural history, undertaking a detailed analysis of the Tennessee Supreme Court’s opinion. It concludes that the court’s extension of constitutional principles to IVF situations was, for the most part, sensible. Moreover, it agrees that the Special Respect view adopted by the court\textsuperscript{19} is the proper mechanism by which to

\textsuperscript{13} Id.
\textsuperscript{14} Id. at 589.
\textsuperscript{15} Id.
\textsuperscript{16} See infra note 51 and accompanying text (discussing the longevity of cryogenically-preserved preembryos).
\textsuperscript{17} Davis, 842 S.W.2d at 601-04.
\textsuperscript{18} Palko v. Connecticut, 302 U.S. 319, 325 (1937). In Palko, the Supreme Court held that “immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty.” Id. at 324-25. This phrase has been used by the Court to support the rights of privacy and procreation. See infra notes 57-106 and accompanying text (discussing the constitutional rights implicated by IVF and cryopreservation).
\textsuperscript{19} The Special Respect view of preembryos posits that because of their moral significance, preembryos deserve greater respect that mere human tissue, but less respect than that accorded to a person. See infra notes 122-31 and accompanying text (discussing the Special Respect view in
judge the legal status of preembryos. And while this Note concludes
that the right of privacy can, as the Davis court held, encompass the
two coexisting rights of procreation and nonprocreation, it disagrees
with the Tennessee Supreme Court’s creation of an exception to the
Davis decision which in effect “swallows up” the holding itself.

Finally, this Note analyzes the balancing test the Davis court
used to evaluate the interests of both Mary Sue and Junior Davis. It
concludes by discussing the possible impact of the Davis court’s
holding and by advocating the use of prior dispositional agreements
for all participants in IVF programs in order to prevent situations
similar to that experienced by the Davises from happening in the
future.

I. BACKGROUND

A. In Vitro Fertilization and Cryopreservation

Procreation is a fundamental right not only because it ensures the
survival of our species but also because procreation gives
meaning to life. In vitro fertilization developed as a result of this
primary instinct: it is the means by which infertile couples may
produce biologically-related offspring.

A discussion of infertility best evidences the need for IVF. Recent
studies show that 15 percent of all couples of reproductive age expe-
rience some difficulty having children. Out of sixty-seven million
reproductively active couples, ten million are, in fact, infertile. As
a result, many couples have sought alternative means of reproduc-
tion, which have developed and become more socially acceptable in
recent years. In vitro fertilization is one such relatively new pro-

20. Physicians consider couples infertile if they fail to conceive after one year of unprotected
intercourse. 1 ROBERT K. AUSMAN & DEAN E. SNYDER, MEDICAL LIBRARY, LAWYERS EDITION
§ 1.32, at 175 (1988).
21. Tamara L. Davis, Comment, Protecting the Cryopreserved Embryo, 57 TENN. L. REV. 507,
510 n.22 (1990).
22. Id.
24. Such methods include in vitro fertilization as well as artificial insemination, surrogacy, and
embryo transfer. See generally id. at 1643-75 (describing each of the procedures and the legal
treatment they receive).
25. The term “in vitro” refers to conception outside of the mother’s body that takes place “in
an artificial environment.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 851 (27th ed. 1988)
[hereinafter DORLAND’S].
PROCREATURAL FREEDOM

Procedure which allows infertile couples to produce biologically-related offspring. From 1978 to 1985, more than 5,000 children were born in the United States alone using IVF technology.~

While a woman’s body produces a single egg during a normal menstrual cycle,~ in vitro fertilization procedures use hormonal stimulation of a woman’s ovaries to generate multiple eggs.~ When these eggs mature, they are surgically removed, or aspirated,~ in a procedure called laparoscopy.~ An aspirated egg is nourished in a culture medium~ and then placed in a petri dish, where sperm are


27. John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 440 (1990) [hereinafter Robertson, Legal Status of Early Embryos]. Furthermore, approximately 15,000 children worldwide have been brought into existence through IVF. Alise R. Panitch, Note, The Davis Dilemma: How to Prevent Battles Over Frozen Preembryos, 41 CASE W. RES. L. REV. 543, 543 (1981). In 1987, it was estimated that IVF techniques were used an average of once a day in the United States. Davis, supra note 21, at 511. In 1991, there were approximately 220 in vitro fertilization clinics in the United States. Panitch, supra, at 545.


29. John A. Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939, 948 (1986) [hereinafter Robertson, Legal Structure of New Reproduction]; see also AUSMAN & SNYDER, supra note 20, § 1.32 (d)(3) (listing some of the chemical compounds administered during in vitro procedures). Stimulating ovum production increases a woman’s odds of becoming pregnant because more than one fertilized egg is eventually transferred to the uterus. Robertson, Legal Structure of New Reproduction, supra, at 948. It is entirely normal for ten or more eggs to be retrieved. Robertson, Prior Agreements, supra note 28, at 407. As Professor Robertson points out, “While increasing efficacy, the technique also makes excess embryos and embryo selection possible, and thus is the source of many of the ethical issues that arise in this area.” Robertson, Legal Structure of New Reproduction, supra, at 948 n.24.

30. Aspiration is the “removal of fluids or gases from a cavity by the application of suction.” DORLAND’S, supra note 25, at 156-57.

31. A laparoscope is “a type of endoscope, consisting of an illuminated tube with an optical system, that is inserted through the abdominal wall for examining the peritoneal cavity.” MOSBY’S MEDICAL, NURSING, & ALLIED HEALTH DICTIONARY 676 (3d ed. 1990). Laparoscopy entails:

[The insertion of a laparoscope of ½ inch in diameter through a small incision in the abdomen to see inside the ovary. A needle is then inserted through a second incision and the eggs and surrounding fluid are drained. The entire procedure is usually done under general anesthesia. Because of the pain and accompanying risks of surgery, it is recommended that the patient undergo the procedure only when deemed necessary.


32. Lorio, supra note 23, at 1666; see also AUSMAN & SNYDER, supra note 20, § 1.32(d)(3)
Once a sperm fertilizes the egg, it remains in a simulated womb environment for forty-eight to seventy-two hours. During this period the preembryo will grow into a two-, four-, six-, or eight-celled entity. At this point, one or more preembryos are then cervically transferred to the woman's uterus by a catheter. If all goes well, one of the early embryos implants itself in the uterine wall, develops into a fetus, and is born approximately nine months later.

(Explaning the egg recovery process).

33. Lorio, supra note 23, at 1666. Chemicals are added to the petri dish in order to give the sperm the ability to pierce the ovum's cell wall. Margie M. Eget, Note, The Solomon Decision: A Study of Davis v. Davis, 42 MERCER L. REV. 1113, 1114 (1991).

34. It is a much debated, and still unsettled, question whether to call the developing fertilized egg a zygote, conceptus, embryo, or preembryo. Robertson, Legal Structure of New Reproduction, supra note 29, at 952 n.45. Fertilization occurs in over 90 percent of the cases in which eggs are inseminated. Robertson, Prior Agreements, supra note 28, at 407 n.3. Traditionally, "zygote" has been used to denote the fertilized egg after fertilization, but prior to the first cellular division. Davis, supra note 21, at 511. Some scholars define an embryo as the product of conception from the precise moment of fertilization until approximately the eighth week. Id. Others define an embryo as a "developing organism . . . from about two weeks after fertilization to the end of the seventh or eighth week." DORLAND'S, supra note 25, at 543. Still others feel that a fertilized egg is only considered an embryo after it has been implanted in the mother's uterus. See Robertson, Legal Structure of New Reproduction, supra note 29, at 952 n.45 (noting that the embryo does not develop until after implantation). Thus, the term "preembryo" is used to denote a fertilized egg before implantation. Id. "Early embryo" refers to the fertilized egg and subsequent developmental stages, i.e., zygote, morula, and blastocyst, up until implantation and shortly thereafter. Robertson, Prior Agreements, supra note 28, at 407 n.1.

Because the terms "preembryo" and "early embryo" have gained acceptance in legal-medical literature, this Note will call all fertilized eggs not yet implanted in a woman's womb "preembryos" or its synonym, "early embryos." After implantation, the zygotes will be called "embryos." However, one should not confuse this with the term "frozen embryos," which is a term of art denoting cryogenically-preserved preembryos. None of these terms are used to indicate that a particular entity is or is not life, but rather are merely used for reference. Cf. Kim Schaefer, Comment, In-vitro, Fertilization, Frozen Embryos, and The Right to Privacy — Are Mandatory Donation Laws Constitutional?, 22 PAC. L.J 87, 90 n.23 (1990) (stating that "embryo" refers to both pre-implantation and post-implantation embryos, although usually it refers to pre-implantation embryos).

35. Lorio, supra note 23, at 1166; see also AUSMAN & SNYDER, supra note 20, § 1.32 (d)(3) (explaining how the embryo is incubated after fertilization).


37. Id.; see also AUSMAN & SNYDER, supra note 20, § 1.32 (d)(3) (explaining that the embryo transfer occurs when there are between four and eight cells).

38. Robertson, Legal Structure of New Reproduction, supra note 29, at 948. Three or four embryos is the maximum number that can be placed in a woman's uterus without causing undue risk to the offspring and the mother from multifetal pregnancy. Robertson, Prior Agreements, supra note 28, at 407 n.3.

39. Davis, supra note 21, at 510. There is a one in ten chance that any single transferred embryo will implant in the woman's uterus. Robertson, Legal Structure of New Reproduction, supra note 29, at 970 n.100. Because of a 25 to 35 percent chance of spontaneous abortion or wastage, there is an even lower chance that an implanted embryo will come to term. Id.
Preembryos that are not immediately transferred to a woman’s uterus may be preserved and stored for later implantation through cryopreservation. Cryopreservation is extremely advantageous for most couples utilizing IVF because the IVF process is costly and both mentally and physically taxing; in general, the fewer egg retrievals a woman undergoes, the better. With cryopreservation, all the eggs retrieved in one laparoscopy can be fertilized and the extra preembryos preserved for later transfer.

Besides reducing both cost and physical suffering, cryopreservation benefits women who cannot undergo laparoscopy a second time due to damaged or blocked ovaries, or who anticipate future damage to either their ovaries or eggs. Cryopreservation also reduces the risk of a multiple pregnancy because only one preembryo need be implanted at one time. Furthermore, one of the greatest benefits of cryopreservation is that it delays the inherent ethical dilemmas concerning the disposition of surplus preembryos; without cryopreservation...

40. Cryopreservation is “the maintaining of the viability of excised tissue or organs by storing at very low temperatures.” Dorland’s, supra note 25, at 403. More specifically, preserving preembryos consists of freezing them in liquid nitrogen at sub-zero temperatures. Marcia J. Wurmbrand, Note, Frozen Embryos: Moral, Social, and Legal Implications, 59 S. CAL. L. REV. 1079, 1083 (1986).


42. One woman described just how taxing IVF can be:

There was a year of testing on me — biopsies, dyerotubogram, post-coitals; as well as repeated tests of my husband. We had a programmed sex life keyed to a basal temperature chart. At the end of that year an acute abdominal episode, improperly handled, cost me the ovary and tube on the right side. After recovery from surgery, on to a new doctor — more tests, more programmed sex life — everything was just fine, “relax.” Relaxing did no good. On to a new doctor. Discovery of a cyst on the left ovary — resection by surgery. Six months later, success. Pregnancy — followed by miscarriage at 13 weeks. On to another doctor — an activist. “We’ll have you pregnant again in no time!” Emergency admission to the hospital after an acute reaction to the fertility pills he prescribed. My cycles ceased. The best effort of men and their medicine could not coax another cycle forth. At 31 I experienced menopause due to the surgical and medical assault on my ovaries.


43. Robertson, Prior Agreements, supra note 28, at 408.

44. Wurmbrand, supra note 40, at 1084. Radiation from undergoing X-rays might damage a woman’s ovaries. Id.

45. Id. n.35.

46. Without cryopreservation, the maximum number of fertilized eggs possible must be implanted in the woman’s uterus immediately in order to avoid their inevitable expiration in the laboratory. Id. at 1083.
tion, a couple must immediately decide whether or not to destroy or donate surplus embryos that cannot be presently transferred to the woman’s uterus. Finally, cryopreservation may increase a woman’s odds of becoming pregnant. Because a woman utilizing cryopreservation has the ability to wait before implantation, previously frozen preembryos can be placed in a woman’s uterus during a normal menstrual cycle, when her body is free from drugs and surgical intrusion, thereby making it easier for her to become pregnant. For all of these reasons, many couples choose to utilize cryopreservation.

If preembryos are preserved through such cryogenic procedures, several contingencies might arise which could make implantation undesirable or even impossible for one or both of the parents. For example, a couple might inadvertently allow too much time to lapse before implanting the preembryos, rendering them unfit for implantation. One spouse could die before implantation, or experience a change of heart. In addition, the couple might suddenly conceive by natural means, or, as with the couple in the Davis case, decide to separate or divorce. As a result, many IVF clinics require their patients to sign consent forms before beginning treatment that stipulate what the agency should do with the preembryos should any of

47. It must be noted that this ethical dilemma is merely prolonged and not terminated by cryopreservation. For example, if a woman becomes pregnant after transferring the first preembryo to her uterus, the decision to donate or destroy any surplus cryogenically-preserved preembryos must then be made.

In order to avoid the dilemma presented by the existence of spare preembryos, some IVF clinics remove only the number of eggs that can be fertilized and safely reimplanted and then reimplant all those that are healthy, which is usually no more than two. Clifford Grobstein, The Moral Uses of “Spare” Embryos, 12 HASTINGS CTR. REP., June 1982, at 5.

Cryopreservation, however, also raises ethical considerations irrespective of the decision whether to donate or destroy embryos. There are the unknown risks of birth defects, embryo loss due to failure in mechanical support systems, unresolved questions of embryo ownership and inheritance rights, the morality of placing human life forms in a suspended state of deep freeze, and the length of time embryos can remain viable while frozen. Ethics Comm. of the Am. Fertility Soc’y, Ethical Considerations of the New Reproductive Technologies: The Moral and Legal Status of the Preembryo, 53 FERTILITY & STERILITY 58S, 59S (Supp. II 1990).

48. Robertson, Prior Agreements, supra note 28, at 408.

49. In 1987, a survey found that 63 percent of all in vitro fertilization programs offered embryo freezing, with another 33 percent planning to offer the technique by 1990. Id. There were 73 children born due to the transfer of frozen embryos in 1988; in that year alone, 9,605 embryos were frozen. Davis, supra note 21, at 511.

50. Panitch, supra note 27, at 548.

51. Cryopreservation cannot maintain a preembryo indefinitely; a maximum of ten years in storage is recommended by most experts. Wurmbrand, supra note 40, at 1098.

52. See id. at 1098-99 (noting that experts have speculated about the dangers involved with posthumous transfers).
these contingencies occur. As recently as 1990, twenty-three of twenty-seven programs offering cryopreservation required patients to sign such cryopreservation contracts. These agreements also give patients the option to donate frozen embryos to other couples, to donate them for use in research, or to discard the preembryos altogether. Such agreements are advantageous because they maximize a couple's reproductive freedom, result in increased certainty for patients and IVF programs, and help prevent costly disputes.

B. Constitutional Rights Relevant to In Vitro Fertilization and Cryopreservation

In vitro fertilization, if successful, enables an infertile couple to produce a biologically-related child. Parenthood, whether induced by IVF or natural means, and the family are the cornerstones of our society; they are esteemed as inalienable rights of humankind. As such, they receive the utmost protection by the United States Constitution and Supreme Court. The Supreme Court closely guards

53. See id. at 1099 (suggesting that IVF participants should be required to make their embryos available for adoption).
54. Robertson, Prior Agreements, supra note 28, at 410.
55. Id.
56. Id. at 414.
57. The Supreme Court provides its strongest protection to certain rights or classes of people by using a "strict" level of judicial scrutiny. The Bill of Rights, consisting of the first ten amendments to the United States Constitution, catalogs several explicit or "enumerated" rights. For example, the First Amendment states in clear and unequivocal language that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The Framers of the Constitution enumerated rights in the Constitution because they believed them to be extremely important; thus, there is agreement that these rights are "fundamental." Loving v. Virginia, 388 U.S. 1, 11 (1967). The proper standard of judicial scrutiny for cases involving fundamental rights is strict scrutiny, where laws "must be shown to be necessary to the accomplishment of some permissible state objective." Id. For example, the Court in Loving struck down a miscegenation law prohibiting interracial marriage. Id. Because the Fourteenth Amendment was enacted to prevent discrimination based on race, the Court found that the right to be free from racial discrimination was fundamental. Id. Applying strict scrutiny, the Court found no permissible justification for the law. Id. at 12.

By contrast, the Framers of the Fourteenth Amendment did not design it to protect other classes of individuals. Thus, laws affecting these "other" classes do not receive strict scrutiny. For example, government action discriminating on the basis of such "unenumerated" classifications as gender, alienage, and legitimacy receive an "intermediate" tier of scrutiny. Lawrence H. Tribe, American Constitutional Law 1544-65 (2d ed. 1988). Any classification undergoing intermediate scrutiny "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

The Supreme Court will invoke a final tier of scrutiny when the issues involved in a case do not concern, or even resemble, enumerated rights. Under "minimal" scrutiny, which is used in the area of economic regulation, the Court will uphold legislation that has a "rational basis." See, e.g., Nebbia v. New York, 291 U.S. 502 (1934) (upholding a state law fixing the price of milk).
family issues through the fundamental rights of privacy and procreation.\textsuperscript{58}

\section*{1. The Right of Privacy}

Early in its history, the right of privacy did not explicitly extend to the protection of familial matters. The Supreme Court first mentioned the right in \textit{Olmstead v. United States},\textsuperscript{59} where it was generally defined as "the right to be let alone."\textsuperscript{60} However, the Court later held that the right of privacy extended to activities relating to marriage,\textsuperscript{61} procreation,\textsuperscript{62} contraception,\textsuperscript{63} family relationships,\textsuperscript{64} and child rearing and education.\textsuperscript{65} Additionally, the Court expanded

\begin{itemize}
    \item \textsuperscript{58} Although it is not enumerated in the Constitution, the right of privacy has nevertheless been found to be a fundamental right. Griswold \textit{v. Connecticut}, 381 U.S. 479, 484-85 (1965). The Supreme Court has determined that a "penumbra" of unenumerated rights surrounds the Bill of Rights. \textit{Id.} In \textit{Griswold}, Justice William Douglas pointed out that although the Bill of Rights does not mention such things as the right to associate with people and the right to educate a child in a school of the parent's choice, the First Amendment has been construed to include those rights. \textit{Id.} at 482; see, e.g., \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923) (holding that parents have a fundamental right to control the upbringing of their children). Without such "peripheral rights the specific rights would be less secure." \textit{Griswold}, 381 U.S. at 484-85. For this reason, peripheral rights such as the right of privacy are very important, and are therefore treated as fundamental. Laws concerning such peripheral rights are strictly scrutinized. See \textit{supra} note 57 and accompanying text (discussing strict scrutiny).
    
    \textit{In Roe v. Wade}, 410 U.S. 113 (1973), Justice Blackmun enunciated the provisions of the Bill of Rights that contribute to this peripheral right of privacy. \textit{Id.} at 152-53. According to Justice Blackmun, the right of privacy flows not only from the penumbra of the Bill of Rights enunciated in \textit{Griswold}, but also from: the First Amendment freedom of speech and assembly; the Fourth Amendment right to be secure from unreasonable searches and seizures; the Fifth Amendment right not to be deprived of life, liberty, or property without due process of law; and the Ninth Amendment prohibition against the disparaging of unenumerated rights retained by the people through the enumerated rights of the Constitution. \textit{Id.}
    
    \textit{In Kupperman v. Kupperman}, 277 U.S. 438 (1928) (holding that evidence obtained by government officers through the use of a wire-tap does not violate the Fourth Amendment).
    
    \textit{In Kupperman v. Kupperman}, 277 U.S. 438 (1928) (holding that evidence obtained by government officers through the use of a wire-tap does not violate the Fourth Amendment).
    
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the right of privacy in *Eisenstadt v. Baird* when it protected the right of single individuals to use birth control devices. In *Eisenstadt*, Justice William Brennan asserted 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.” Precisely because private matters concerning one’s family and children affect people so vitally, the Court treats them as fundamental rights. Thus, the Supreme Court will strictly scrutinize any law or legal decision that infringes on private matters or involves intimate aspects of family life.

2. The Right of Procreation

Procreation is one of the most intimate aspects of family life. Although the right of privacy and the right of procreation are closely related, the right of privacy is usually viewed as emanating from the penumbra of the Bill of Rights, while the right of procreation originates in the Due Process Clause of the Fourteenth Amendment.

Beginning with *Meyer v. Nebraska*, the Court has interpreted the liberty aspect of the Fourteenth Amendment broadly to denote “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.” In *Skinner v. Oklahoma*, the Court relied on the *Meyer* Court’s reading of liberty in describing marriage and procreation as “one of the basic civil rights of man . . . fundamental to the very

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67. *Id.* at 443.
68. *Id.* at 453.
70. The Fourteenth Amendment provides, “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV.
71. 262 U.S. 390 (1923).
72. *Id.* at 399. In *Meyer*, a law forbidding the teaching of foreign languages to young children was struck down as an unreasonable exercise of state police power. The Court felt that the legislature could not so materially interfere “with the power of parents to control the education of their own.” *Id.* at 401.
73. 316 U.S. 535 (1942). In *Skinner*, the Court determined Oklahoma’s Habitual Criminal Sterilization Act to be an unconstitutional violation of the Equal Protection Clause. *Id.* at 535.
existence and survival of the race." These statements evidence the fact that only a compelling government interest may limit this important right.

Two watershed Supreme Court cases illustrating that the right of procreation is interrelated with the right of privacy are *Griswold v. Connecticut* and *Eisenstadt v. Baird*. In these decisions, the Supreme Court held that a state could not prevent either married couples or single couples, respectively, from using contraceptives. Although the Court relied on the right of privacy when deciding both of these "contraception cases," the two opinions also cite *Meyer* and *Skinner*, the "procreational cases." According to the Supreme Court, one's ability to use contraceptives — or, in other words, to decide not to have a child — has as much to do with the right of procreation as it does with the right of privacy.

3. Cases Analyzing the Right of Privacy and the Right to Procreate

The United States Supreme Court continued to develop the rights of privacy and procreation throughout the 1970s, primarily in the context of abortion. The leading case marking the Court's incursion into this emotionally-charged area is *Roe v. Wade*.

a. *Roe v. Wade*

Like contraception, the right to choose abortion over childbirth involves the rights of privacy and procreation. Consequently, the Supreme Court relied on such rights when it decided *Roe v. Wade* and

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74. Id. at 541.
75. See supra note 57 and accompanying text (explaining the three tiers of judicial scrutiny).
76. 381 U.S. 479 (1965).
77. 405 U.S. 438 (1972).
78. Id. at 453; Griswold, 381 U.S. at 486; see also Carey v. Population Servs., 431 U.S. 678 (1977) (striking down a New York law which made it a crime to sell or distribute any contraceptive of any kind to a minor under 16 as violative of the right of privacy).
79. Justice Brennan postulated: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Griswold*, 381 U.S. at 485-86.
80. Id. at 482, 485; *Eisenstadt*, 405 U.S. at 453.
81. This connection is noted in Justice Brennan's oft-quoted statement in *Eisenstadt*: "If 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." *Eisenstadt*, 405 U.S. at 453; see supra notes 66-68 and accompanying text (discussing Justice Brennan's opinion in *Eisenstadt*).
82. 410 U.S. 113 (1973).
legalized abortion in the United States pursuant to certain restrictions.

In *Roe*, the Supreme Court found the "right of privacy . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." However, the Court did not find the right of privacy to be so broad as to consider it "absolute." The Supreme Court legalized abortion by balancing a woman's interest in the ability to terminate her pregnancy with the state's interest in "preserving and protecting the health of the pregnant woman . . . [and] in protecting the potentiality of human life." On the one hand, the Court found that a woman forced to continue an unwanted, perhaps medically dangerous, pregnancy could suffer great harm. The court found it a very real possibility that a woman in such circumstances could suffer from distress, psychological harm, poor mental and physical health, and the social stigma associated with unwed motherhood. On the other hand, the Court recognized the state's interest in protecting a pregnant woman's health and the health of her fetus. However, the Court went on to note that the state's interest in protecting the health of the mother does not become "compelling" until the end of the first trimester, when abortions become more dangerous to perform. Moreover, the state's interest in protecting the life of the fetus does not become "compelling" until the fetus reaches the point of viability, at approximately the beginning of the third trimester. Thus, the Court concluded that during the first trimester, the state does not possess a compelling interest in the fetus and therefore cannot infringe on a woman's right to privacy by denying her the choice to have an abor-

83. *Id.* at 153.
84. *Id.*
85. *Id.* at 162.
86. *Id.* at 153.
87. *Id.*
88. *Id.* at 154.
89. *Id.* at 163.
90. *Id.* Viability is the ability to survive outside the mother's womb without artificial support; it is "especially said of a fetus that has reached such a stage of development that it can live outside of the uterus." *Dorland's, supra* note 25, at 1834.
91. *Roe*, 410 U.S. at 160 ("Viability is usually placed at about seven months . . . but may occur earlier, even at 24 weeks."). *But see* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (affirming the district court's finding that the earliest point of viability may be 20 weeks); *infra* notes 201-02 and accompanying text (discrediting the notion that viability begins with the onset of the third trimester, as medical advances have pushed the point of viability to an earlier time during pregnancy).
Accordingly, the *Roe* Court held that a state law prohibiting abortions during the first trimester is unconstitutional.\(^9\)

However, during the second trimester the *Roe* Court found that the balance tipped in favor of the state. At that time, the state possesses a compelling state interest in the woman's health and can therefore place reasonable regulations on abortion relating "to the preservation and protection of maternal health."\(^9\) Further, during the third trimester the state interest becomes compelling "[w]ith respect to the . . . interest in potential life"\(^9\) of the fetus, because that is the point at which it becomes viable. Consequently, the Court held that a state can completely proscribe abortion during the third trimester, unless the procedure is necessary to "preserve the life or health of the mother."\(^9\)

Scholars assert that *Roe* affirms a woman's fundamental right not to bear a child, and that this right exists as a corollary to the rights of privacy and procreation.\(^9\) In fact, to many people *Roe* champions the ultimate right of privacy because it encompasses the ability to make decisions concerning one's body. Subsequent court decisions have interpreted *Roe* as standing for the proposition that the Constitution guarantees a woman's autonomy over private decisions involving procreation.\(^9\)

### b. Planned Parenthood of Missouri v. Danforth

Autonomy over procreational decisions is often complicated by the fact that procreation necessarily involves two parties. However, if the decision of whether to bear or beget a child affects the autonomy and bodily integrity of one partner more than the other, the Supreme Court has, in effect, held that the privacy interests of that

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93. *Id.*
94. *Id.* at 163.
95. *Id.*
96. *Id.* at 163-64.
97. See Robertson, *Legal Status of Early Embryos*, supra note 27, at 484 n.117 (noting that, under *Roe*, a woman has a fundamental right to determine whether pregnancy will continue); Renee M. Hom, Note, *Wrongful Conception: North Carolina's Newest Prenatal Tort Claim* — *Jackson v. Bumgardner*, 65 N.C. L. Rev. 1077, 1085 n.75 (1987) (stating that *Roe* was "instrumental in establishing the principle that one has a fundamental right not to conceive or bear a child"); *Developments in the Law — Medical Technology and the Law*, 103 Harv. L. Rev. 1519, 1562 (1990) (noting a woman's "*Roe*-guaranteed right not to procreate").
partner are controlling. In *Planned Parenthood of Missouri v. Danforth*, the Supreme Court addressed the issue of whether a third party, the “father” of the fetus, could assert an interest strong enough to justify prohibiting a woman’s decision to terminate her pregnancy during the first trimester. The Court, relying on *Roe*, reasoned that because the state itself does not have the power to invade a woman’s bodily integrity in this manner, “the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . . .” Moreover, the Court balanced the privacy interests of the parties and found that because the woman is “more directly and immediately affected by the pregnancy,” her decision of whether to bear or beget the child should control. According to the Court, a woman has complete authority concerning the decision of whether or not to terminate her pregnancy during the first trimester, since the *Roe* Court had already found that there is no compelling state interest justifying a state prohibition on abortion during this time period. Because a woman’s physical being is involved, the Court in *Danforth* held that a woman’s right of privacy in the context of pregnancy overrides the man’s right of autonomy over procreational decisions.

C. The Status of the Preembryo

Thus far, the U.S. Supreme Court has explicitly extended the right of procreation only to procreation involving sexual intercourse between a man and a woman. Non-coital methods of reproduction, such as IVF, have not been explicitly protected by the

100. Id. at 69.
101. Id.
102. Id. at 71.
103. Id.
104. The Court noted:
    The obvious fact in that when the wife and the husband disagree on [the abortion] decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

*Id.*

105. See supra notes 89-93 and accompanying text (discussing the holding in *Roe* that a state does not have a compelling interest in protecting the health of the mother or the life of the fetus during the first trimester).
107. “Non-coital” is defined as a means of reproducing one’s genes that is not dependent on
United States Supreme Court. Courts also have paid little attention to preembryos, the product of IVF procedures. Resolution of disputes over frozen embryos will depend, in large part, on how courts determine the legal status of these entities. There are four different views concerning the legal status of preembryos: the “Right-to-Life” stance, the current constitutional view held by the Supreme Court, the Special Respect approach, and the private property notion.

1. The “Right-to-Life” Position

Proponents of the Right-to-Life view would accord a preembryo the full rights and protections of persons under the law because they believe life begins at the “moment” of conception. Their credo is, “If life begins at conception, then no egg should be injured or destroyed once fertilized.” The Right-to-Life view mandates that every preembryo be implanted in a uterus and given the opportunity to gestate. Therefore, actions which might harm a preembryo, such as freezing or research, should be banned. If preembryo freezing does occur, thawing must take place before expiration, and transfer to a uterus for possible implantation must ensue. Right-to-Life advocates worry that the potential abuse of in vitro fertilization and cryopreservation technology will threaten the dignity of human life and the public welfare. According to these advocates, the law should proceed with extreme caution when dealing with preserved embryos.

The state of Louisiana recently codified the Right-to-Life approach when it chose to grant full protection under the law to preembryos in its statute regulating IVF, stating: “An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with

108. The Roman Catholic Church adheres to this position. Wurmbrand, supra note 40, at 1090.
109. Lorio, supra note 23, at 1667-68.
111. Robertson, Legal Structure of New Reproduction, supra note 29, at 971.
112. See Davis, supra note 21, at 532 (discussing the opinion that a frozen embryo deserves greater protection than a nonfrozen embryo in order to preserve human dignity and effectuate the state’s interest in protecting potential life).
law.” As of this writing, the statute's constitutionality had not been challenged.

2. The Current Constitutional View

A second position regarding the status of preembryos exists in the realm of constitutional law. In *Roe v. Wade*, the United States Supreme Court decided that the word “person,” as used throughout the Constitution and especially in the Fourteenth Amendment, does not include the unborn. Although the Constitution does not define the word “person,” the Court found that “use of the word is such that it has application only postnatally.” The Court based its conclusions on a comprehensive review of religious, medical, and legal history, and determined that no rights are instilled in a fetus until live birth. This reasoning was necessary to support the Court’s decision that pregnancies can be terminated during the first and second trimester of pregnancy, limited only by “reasonable” state regulations.

Because the Supreme Court does not view fetuses as “persons” in terms of the Fourteenth Amendment, it would seem to follow that the Supreme Court would not view preembryos as “persons” either. A preembryo, when compared to a fetus, has a rudimentary

113. LA. REV. STAT. ANN. § 9:123 (West 1991). The Supreme Court's holding in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), may support the ability of Louisiana to make such a declaration. In *Webster*, the Court left intact the preamble of a Missouri statute regulating abortion, which states that the “life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being.” Id. at 504. Because the preamble merely exercises the “authority of a State to make a value judgment favoring childbirth,” the Court allowed the preamble to stand without passing on its constitutionality. Id. at 506 (citing *Maher v. Roe*, 432 U.S. 464 (1977)); see infra notes 208-10 and accompanying text (describing the *Davis* trial court's use of *Webster* to justify its holding that “life begins at conception”).

115. Id. at 158.
116. Id. at 157.
117. Id. at 160-62. The court noted, in part, that “[t]he Aristotelian theory of 'mediate animation'... held sway throughout the Middle Ages and the Renaissance in Europe... [T]he traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive... [U]nborn children have been recognized as acquiring rights or interest by way of inheritance or other devolution of property... contingent upon live birth.” Id.
118. See supra notes 89-96 and accompanying text (discussing the *Roe* framework). This holding was specifically affirmed in Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2804 (1992).
119. Panitch, supra note 27, at 560. Most states adhere to the view that preembryos are not persons in terms of the Fourteenth Amendment. Id. States do not impose criminal sanctions for the destruction of preembryos and generally do not require doctors to implant all fertilized eggs. Id. Furthermore, intrauterine devices (“IUDs”) are legal in all states; this method of birth control
biological status. Unlike a fetus, a preembryo must be transferred to a uterus for development and birth to eventually occur.\textsuperscript{120} Fetuses, on the other hand, are much closer to viability than are preembryos. Therefore, according to the view of the Supreme Court as defined by \textit{Roe} and its progeny, only a compelling state interest can override a parent's privacy and procreational rights in the cryopreservation or destruction of a preembryo.\textsuperscript{121}

3. The Special Respect Approach

A third distinct position, while consistent with the constitutional view of preembryos, holds that preembryos deserve "special respect." Proponents of this view feel that a preembryo possesses moral significance because, when transferred to a uterus, it has the potential to develop into a human being.\textsuperscript{122} Additionally, to those undergoing treatment for infertility, a preembryo symbolizes hope and potential parenthood;\textsuperscript{123} the preembryo "affirms the couple's potency."\textsuperscript{124} Indeed, "It is a powerful symbol with which [IVF participants] establish emotional connections. It may be the closest thing to parenthood the [participants] experience."\textsuperscript{125} For these reasons, some scholars believe that a preembryo cannot be treated like mere human tissue, but instead is deserving of "special respect."\textsuperscript{126} Ad-

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\item destroys preembryos at the same stage of development as those frozen for in vitro fertilization. \textit{Id}. Thus, it is almost impossible to punish the destruction of preembryos without running afoul of at least one constitutional principle.
\item 120. Robertson, \textit{Legal Structure of New Reproduction}, supra note 29, at 973 n.109.
\item 121. This is not to say that reasonable regulations which do not significantly infringe on the privacy and procreational rights of gamete-providers could not be instituted. \textit{Cf. Roe}, 410 U.S. at 164-65 (holding that certain regulations may be instituted depending on how far the pregnancy has progressed).
\item 122. Robertson, \textit{Legal Structure of New Reproduction}, supra note 29, at 972; see also Robertson, \textit{Legal Status of Early Embryos}, supra note 27, at 446 n.31 (noting several influential advisory bodies that have examined new reproductive technologies and have advocated the Special Respect view, including the Department of Health, Education, and Welfare, the British Warnock Committee, and the American Fertility Society).
\item 123. Robertson, \textit{Legal Structure of New Reproduction}, supra note 29, at 972.
\item 124. \textit{Id}.
\item 125. Robertson, \textit{Legal Status of Early Embryos}, supra note 27, at 448 n.34.
\item 126. The Special Respect view has the strongest support both nationally and internationally. Panitch, \textit{supra} note 27, at 565. The theory has been promulgated by several influential panels that have examined the issues arising out of in vitro fertilization and other modern reproductive technologies. For example, the American Fertility Society is of the view that:
\end{itemize}

\begin{quote}
[T]he preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because [sic] of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because
\end{quote}
herents to this view argue that preembryos should be transferred to a uterus whenever reasonable.\textsuperscript{127}

The Ethics Advisory Board of the Department of Health, Education, and Welfare ("EAB") advocates the Special Respect stance. In 1979, the EAB declared that the human embryo is entitled to profound respect, but that this respect does not necessarily encompass the full legal and moral rights attributed to persons.\textsuperscript{128} The EAB concluded that preembryos do not deserve the rights and duties of "persons"\textsuperscript{129} because they lack a differentiated nervous system, cannot think or feel, and are not yet individuals.\textsuperscript{130} In accordance with the EAB's findings, the Special Respect position holds that discarding or failing to transfer embryos to a uterus is ethically and legally acceptable.\textsuperscript{131}

4. Preembryos as Personal Property

A fourth view determines preembryo status by utilizing a property model. The property model shifts the focus from the preembryos themselves to those who have "rights" or "property" interests in them. Such rights are evidenced by decisional authority over the preembryos. The American Fertility Society ("AFS"), a medical sub-specialty association dedicated to the study and practice of reproductive medicine, espouses this view.\textsuperscript{132} In an ethical statement published in 1984, the AFS stated that "gametes and concepti [preembryos] are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items . . . ."\textsuperscript{133} Additionally, Professor John Robertson, a

\begin{itemize}
\item it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.
\item Ahnen, supra note 110, at 1302.
\item U.S. DEPT. OF HEALTH, EDUC., AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER, 44 Fed. Reg. 35,033, 35,056 (1979). However, the EAB did not define "profound respect" as used in this context. Davis, supra note 21, at 516.
\item Robertson, Prior Agreements, supra note 28, at 409.
\item Robertson, Legal Structure of New Reproduction, supra note 29, at 970.
\item Robertson, Prior Agreements, supra note 28, at 409.
\item Ahnen, supra note 110, at 1306.
\end{itemize}
leading expert in the field of non-coital reproduction and the law, \footnote{134} feels that viewing preembryos as property “reconciles personal pro-creative goals and respect for potential life in a generally satisfactory way.”\footnote{135} Support of this view by both the AFS and Professor Robertson has helped it acquire wide acceptance.\footnote{136}

For example, in \textit{York v. Jones},\footnote{137} a Virginia court adhered to the property model in settling a dispute over frozen embryos between the “parents” of the preembryos and the clinic who created and stored the preembryos.\footnote{138} When the Yorks entered into the IVF program at the Jones Institute for Reproductive Medicine in Norfolk, Virginia, they signed a “cryopreservation agreement.”\footnote{139} The agreement consistently referred to the early embryos as the “property” of the Yorks.\footnote{140} Consequently, the court concluded that the agreement created a bailor-bailee relationship between the Yorks and the Jones Institute, and therefore treated the frozen embryos as property of the genetic parents, the Yorks.\footnote{141}

However, Professor Robertson carefully points out that property terms do not “signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur, such as creation, storage, discard, donation, use in research, and placement in a uterus.”\footnote{142} According to the property model, this decisional authority varies at different points in the IVF process. For example, in deciding when preembryos “are or might be placed in the woman’s body . . . [t]he woman appears to be the appropriate decision-maker, because her bodily interests are directly

\footnote{134}{Professor Robertson is the Baker and Botts Professor of Law at the University of Texas at Austin. \textit{See infra} notes 196-98 and accompanying text (discussing the views of Professor Robertson).}
\footnote{135}{Robertson, \textit{Legal Status of Early Embryos}, supra note 27, at 516.}
\footnote{136}{\textit{See, e.g.,} \textit{York v. Jones}, 717 F. Supp. 421 (E.D. Va. 1989); \textit{see also infra} notes 137-41 and accompanying text (discussing the \textit{York} case).}
\footnote{137}{717 F. Supp. 421 (E.D. Va. 1989).}
\footnote{138}{\textit{Id.} at 425.}
\footnote{139}{\textit{Id.} at 424.}
\footnote{140}{\textit{Id.} at 425.}
\footnote{141}{The practical effect of a bailor-bailee agreement is to impose on the bailee (here the Jones Institute) an absolute obligation to return the subject of the bailment (here the frozen embryos) to the bailor (the Yorks) once the purpose of the bailment has terminated. \textit{Id.}}
\footnote{142}{Robertson, \textit{Legal Status of Early Embryos}, supra note 27, at 454-55. “A person is the owner of his or her gametes in several senses. The person decides whether he or she will — through masturbation, egg retrieval, or coitus — make his or her gametes available for examination, gift, or reproduction.” \textit{Id.} at 457.}
Decisional authority is "less clear" when an early embryo is located outside of a woman's body. However, because preembryos have the same reproductive significance for each gamete-donor, the property model concludes that both "parents" have equal say in their disposition when no bodily interests are implicated. Thus, the property model creates joint authority among gamete-donors by treating preembryos as property.

D. Summary

A discussion of the four theories regarding the status of preembryos only scratches the surface of the issues arising in the context of in vitro fertilization. Which of these theories is correct or most appropriate is a matter of great controversy. Furthermore, because IVF is a technique used to produce offspring, it invokes both rights of privacy and procreation. The scope of these rights is yet another hotly-debated issue. The next section of this Note addresses these questions through a detailed discussion of Davis v. Davis.

II. Subject Opinion

In Davis v. Davis, a couple in the process of getting divorced battled over the "custody" of seven cryogenically-preserved preembryos created by in vitro fertilization. During their marriage, the Davises attempted to conceive a child using IVF because of Mary Sue Davis's infertility. The Davises, however, did not sign a prior dispositional agreement determining what would happen to their preembryos should a contingency, such as divorce, arise. Junior Davis then filed for divorce several years after beginning the IVF procedures. The only contested issue was the disposition of the seven preembryos. Mary Sue wished to see the early embryos implanted and brought to term, while Junior wished to see them termi-
A. The Facts of Davis v. Davis

Mary Sue and Junior Davis met in Germany while both were serving in the United States Army. They were married in 1980, and Mary Sue became pregnant shortly thereafter. However, the pregnancy was ectopic, and Mary Sue suffered a miscarriage. Mary Sue's right fallopian tube was removed as a result of complications from this pregnancy. Four more tubal pregnancies followed; the final one, which ruptured Mary Sue's left fallopian tube, was nearly fatal. Mary Sue and her physicians concluded it would be best to ligate the fallopian tube, leaving her completely unable to conceive by natural means.

The Davises persevered in their plans to have children by instituting adoption proceedings. However, at the last moment a pending adoption fell through. Then in 1985, under the guidance of Dr. Irving King of the Fertility Center of East Tennessee, the couple began in vitro fertilization treatment. Although six attempts at IVF were made between 1985 and 1988, at a total cost of $35,000,

151. Id.
152. See infra notes 236-71 and accompanying text (discussing the Tennessee Supreme Court's rationale in ruling in favor of Junior Davis).
153. Davis, 842 S.W.2d at 591.
154. Id.
155. Id. Ectopic pregnancy, or "tubal pregnancy," is "pregnancy arising from implantation of the fertilized ovum somewhere other than in the endometrium, often in the fallopian tube. Such an extrauterine pregnancy is usually short-lived, but may cause an acute abdominal emergency by rupturing the tube." 1 THE OXFORD COMPANION TO MEDICINE 331 (John Walton et al. eds., 1986).
156. Davis, 842 S.W.2d at 591.
157. Id.
158. Id.; see also supra note 155 (defining tubal pregnancy).
160. Davis, 842 S.W.2d at 591. Ligating a fallopian tube consists of tying it or binding it with a ligature, which is "any substance, such as catgut, cotton, silk, or wire, used to tie a vessel or strangulate a part." DORLAND'S supra note 25, at 935.
161. Davis, 842 S.W.2d at 591.
162. Id.
163. The mother of the child they were expecting to adopt decided to keep the child. Id.
165. See supra notes 20-56 and accompanying text (discussing IVF methods). IVF was virtually the only available means by which Mary Sue could give birth to her own genetic child. Davis v. Davis, No. E-14496, 1989 WL 140495, at *2 (Tenn. Cir. Ct. Sept. 21, 1989).
none was successful. Because in vitro fertilization had failed, the Davises repeated their attempts to adopt a child. Once again, however, the adoption was unsuccessful.

In the fall of 1988, the Davises decided to return to the Fertility Center of East Tennessee and utilize its new cryopreservation program. The Davises briefly discussed donating their cryopreserved preembryos to another childless couple if Mary Sue were to become pregnant on the first attempt at implantation. Still, the couple never came to a definite conclusion as to the fate of the preembryos. Notwithstanding this uncertainty, the Fertility Center did not require the Davises to sign any advance directives for disposition of the preembryos.

In December of 1988, the Fertility Center surgically aspirated nine ova from Mary Sue Davis. All nine eggs were successfully fertilized, and two of the resulting preembryos were immediately transferred to Mrs. Davis. Neither resulted in a pregnancy. The Fertility Center then cryogenically preserved the remaining seven, but before any of the frozen embryos could be thawed and implanted, Junior Davis filed for divorce.

The fate of the Davises' seven cryogenically-preserved preembryos became the main dispute in their divorce proceedings. Mary Sue asked for permission to implant the embryos because she felt that the "painful, physically trying, emotionally and mentally taxing ordeals she endured to participate in the program" should not be wasted. Mary Sue also believed that the embryos constituted

166. Davis, 842 S.W.2d at 591. The Davises' combined annual income at this time was $35,500. Davis, 1989 WL 140495, at *1.
168. Id.
169. Davis, 842 S.W.2d at 592; see also supra notes 40-49 and accompanying text (discussing cryopreservation procedures).
170. Davis, 1989 WL 140495, at *3. No other contingency was mentioned. See supra notes 139-41 and accompanying text (discussing the use of a cryopreservation agreement in York v. Jones).
174. Id.
175. Id.
176. The original complaint for the disposition of the embryos was filed on February 23, 1989. Id.
177. Id. at *25; see generally Corea, supra note 42 (depicting the excruciating physical and
human "life"; her doctors described the result of leaving the preembryos in a cryogenically-preserved state as "passive death." According to Mary Sue, implantation was necessary to save the lives of her "children."

Junior Davis, on the other hand, vehemently opposed implantation. His parents had divorced when he was a small child, and he was familiar with the affects of divorce on children. He wanted to prevent his offspring from suffering any pain due to the dissolution of his marriage. Junior, therefore, wanted the court to grant him and Mary Sue joint custody of the preembryos so that they could together decide the fate of the preembryos. In the alternative, if the court would not allow joint custody, Junior wanted to altogether prohibit the preembryos from being implanted. Junior felt that bringing the preembryos to term would violate his fundamental reproductive rights by forcing unwanted parenthood upon him.

In the event the court ruled that the preembryos could be implanted, Junior wanted only Mary Sue to receive them and did not want them donated to another couple. Junior felt donation of the preembryos would not allow him to take part in the lives of his biological children; if he were forced to become a parent, Junior wanted to be involved. Junior was also opposed to donation because there was no guarantee that his children would be raised in a stable environment. Furthermore, Junior stated that he would suffer "enhanced apprehension for the child's welfare," and that
any uncertainty as to its whereabouts would place "a great psychological and emotional burden on both him and Mrs. Davis." Jun-
ior's anticipation of this negative psychological reaction was so strong that he favored destruction of the preembryos over their do-
nation. To Junior, destruction was permissible because the preem-
bryos did not constitute life, but merely the potential for life.

B. Procedural History

1. The Trial Court's Opinion

The Circuit Court of Blount County, Tennessee, rejected Junior Davis's arguments and awarded custody of the preembryos to Mary Sue Davis for implantation. The court analyzed the intent of both parties and concluded that "Mr. and Mrs. Davis participated in the IVF program . . . for one purpose: to produce a human being to be known as their child." To determine whether or not this intent had been realized, the court felt compelled to answer the question, "When does human life begin?"

Several experts presented testimony on this issue at trial. Doctor Irving King — the Davises' fertility physician — and Professor Robertson testified that the Davises' cryogenically-preserved preembryos were undifferentiated, nonunique cells; therefore, they did not deserve the unqualified rights possessed by human beings.

Adhering to the Right-to-Life view, Dr. Jerome Lejeune, a world-renowned human geneticist, disagreed with this testimony.

190. Id.
191. Id. at *19.
192. Id. at *20.
193. Id. at *1.
194. Id. at *3.
195. Id.
196. See supra notes 134-35 and accompanying text (describing Professor Robertson's qualifications and discussing his views regarding the status of preembryos).
198. King and Robertson relied in part on the views of the Ethics Committee of the American Fertility Society ("AFS"), which found "a widespread consensus that the preembryo is not a person but is to be treated with special respect because . . . [it] might become a person." The Ethics Comm. of the Am. Fertility Soc'y, Ethical Considerations of the New Reproductive Technologies: The Moral and Legal Status of the Preembryo, 46 FERTILITY & STERILITY 305 (Supp. I 1986); see also supra notes 122-31 and accompanying text (discussing the Special Respect view of preembryos).
199. See supra notes 108-13 and accompanying text (delineating the Right-to-Life position regarding preembryos).
Lejeune testified that recent advances in DNA technology proved that "[w]hen the first cell exists . . . a ' . . . tiny human being . . .' exists." Lejeune stated that even the most rudimentary human cells are differentiated and "specialized," and he concluded that the only moral choice for a frozen preembryo is implantation.

The trial court accepted the Right-to-Life view promulgated by Dr. Lejeune and decided that the seven cryopreserved preembryos were "human beings." The court concluded that the Davises had fulfilled their "original intent to produce a human being." To resolve the couple's dispute over these "children," the trial court attempted to determine the children's rights.

The trial court surveyed state case law in the area of in vitro fertilization and found that no state, including Tennessee, had established public policy recognizing the rights of preembryos. However, the court decided that the Supreme Court, in Webster v. Reproductive Health Services, "[L]eft open the door for a state to establish its compelling interest in protecting even potential human life by legislation declaring its public policy." In light of Webster, the trial court determined that Tennessee's interest in protecting potential human life could come into existence before the point of viability.

201. Id. at *5.
202. Id.
203. Dr. Lejeune believed that "the hospitality of [Mrs. Davis's] body [wa]s the best place in the world for [the preembryos] to be." Id. at *28.
204. Id. at *9.
205. Id.
206. Id. The trial court reviewed the Tennessee Wrongful Death Statute and concluded that it could not help determine the rights of the preembryos. The Wrongful Death Statute which allows immediate family members to "inherit" the right of a decedent to bring a lawsuit was inapposite to the facts of Davis because "an unborn child is accorded status only if the child is viable at the time of injury." Id. The Wrongful Death Statute did not apply because the seven embryos at issue had not "achieved a stage of development where [they] could reasonably be expected to be capable of living outside the uterus." Id. The state's criminal abortion statute was also inapplicable because "the child is accorded no recognized status during the first three months of its mother's pregnancy." Id. The trial court reasoned that, since there was no pregnancy to abort, the abortion statute could not decide the preembryos' rights. Id.
207. Id.
209. Davis, 1989 WL 140495, at *9. In Webster, a Missouri statute regulating the performance of abortions was upheld. The statute's preamble declared that the Missouri legislature had found that "[t]he life of each human being begins at conception," Webster, 492 U.S. at 504. The Court held that the preamble was a permissible value judgment of the state favoring childbirth over abortion. Id. at 506.
Traditionally, the state protects its interests in children by using the common law doctrine of *parens patriae*.

The trial court extended this doctrine to cases involving frozen preembryos and found that it was in the best interests of the "children" that Mary Sue Davis proceed with implantation, because allowing the preembryos to remain preserved for more than two years was tantamount to their ultimate destruction.

The trial court, therefore, awarded temporary custody of the preembryos to Mary Sue.

2. **The Appellate Court's Opinion**

Junior Davis appealed the trial court's ruling and the court of appeals ruled in his favor. The fact that the positions of the parties had changed dramatically in the interim between the trial court's ruling and Junior Davis's appeal greatly influenced the appellate court. Both Mary Sue and Junior had remarried. Consequently, Mary Sue no longer wished to give birth to Junior's child and intended to donate the preembryos to another couple.

Junior continued to assert that the trial court's decision violated his right to control reproduction.

The court of appeals reversed the decision based on several errors in the trial court's findings. First, the appellate court rejected the trial court's determination that the preembryos were human life.

The court noted that the Right-to-Life view failed to recognize "significant scientific distinctions between fertilized ova that have not been implanted [preembryos] and an embryo in the mother's womb." The court of appeals concluded that the two distinct enti-

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211. The common law doctrine of *parens patriae* is defined as "that power of the sovereign to watch over the interests of those who are incapable of protecting themselves. . . . The doctrine . . . is most commonly expressed as the 'best interests of the child doctrine'. . . ." *Id.* at *10-11.
212. *Id.* at *11.
213. *Id.*
215. *Id.* at *1-3.
216. *Id.* at *1.
217. *Id.* n.1.
218. *Id.* at *2.
219. *Id.* at *3.
220. *Id.* at *1. The court of appeals discussed in detail the differences between a preembryo and an embryo. The frozen embryos at issue were comprised of four to eight identical cells, with no differentiation of body parts, and no nervous, circulatory, or pulmonary systems. *Id.* The preembryo's growth is perhaps forever arrested at this juncture by cryopreservation. *Id.* In contrast, an embryo in the mother's womb has differentiated cell structure. *Id.*
ties could not hold identical rights. 221

Secondly, the appellate court determined that the trial court had ignored the existing public policy behind Tennessee statutes concerning the status of other unborn entities. 222 Tennessee had previously enacted a wrongful death statute 223 as well as abortion, murder, and assault statutes. 224 To the court of appeals, these statutes reflected the Tennessee legislature's opinion that "embryos . . . are not given legal status equivalent to that of a person already born." 225 The trial court's holding clearly contradicted these policies because the trial court had decided that preembryos were "human beings" deserving of the full protection of the law. 226

Lastly, the appellate court reversed the holding of the trial court because it believed the trial court had ignored Supreme Court decisions which involved a fundamental right not only to procreate, 227 but to prevent procreation. 228 The court of appeals noted that by awarding the preembryos to Mary Sue for implantation, the trial court had "decid[ed] that Junior may be required to become a parent against his will, thus denying to him the right to control reproduction." 229 The appellate court found nothing to support this determination; the trial court had cited no compelling state interest to justify this abrogation of Junior's fundamental rights. 228

Having reversed the trial court, the court of appeals fashioned a new resolution to the Davises' dilemma by implicitly adopting the property model of preembryo disposition. In support of this theory,

221. Id. at *2-3.
222. Id. at *3.
223. Tennessee's Wrongful Death Statute does not allow recovery for the wrongful death of a fetus that is not first born alive. TENN. CODE ANN. § 20-5-106 (1980).
226. See supra notes 204-13 and accompanying text (discussing the trial court's reasons for awarding custody of the preembryos to Mary Sue Davis).
230. Id.
231. See supra notes 57-58 and accompanying text (explaining the three standards of judicial review used for fundamental and nonfundamental rights and noting the cases in which the Supreme Court deemed the right of privacy to be a fundamental right).
the appellate court pointed out that Tennessee had made it a felony to experiment, research, or photograph an aborted fetus without the consent of its mother. Further, the appellate court relied on *York v. Jones,* the only previous American case to address the issue of cryopreserved preembryo disposition. The *York* court had treated disputed preembryos as the property of the gamete-donors who created them. Accordingly, the court of appeals granted Mary Sue and Junior joint control of the preembryos and "equal voice over their disposition."

C. The Tennessee Supreme Court's Opinion

Mary Sue contested the validity of the appellate court's adoption of the property model in her appeal to the Supreme Court of Tennessee. The supreme court disagreed with the property model, as well as with the trial court's "Right-to-Life" view of the preembryos. The court did find, however, that awarding sole custody of the preembryos to Mary Sue violated Junior Davis's procreational rights.

First, the Tennessee Supreme Court based its reasoning on the conclusion that the seven cryogenically-preserved entities were "preembryos" distinct and separate from embryos. The supreme court thus rejected the Right-to-Life view adhered to by the trial court. Next, the Tennessee Supreme Court determined the legal status of the preembryos. The court first affirmed the finding that

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233. 717 F. Supp. 421 (E.D. Va. 1989); see supra notes 137-41 and accompanying text (discussing the *York* court's adoption of the property model).
235. *Davis,* 1990 WL 130807, at *3; see supra notes 132-45 and accompanying text (explaining the property model for determining the status of preembryos). The court of appeals did not guide Mary Sue and Junior as to how "joint custody" would work, especially if the former spouses were to continue to disagree. *Davis v. Davis,* 842 S.W.2d 588, 598 (Tenn. 1992).
236. *Davis,* 842 S.W.2d at 590.
237. *Id.* at 597.
238. *Id.* at 604.
239. *Id.* at 594. Although it was not dispositive, "[the distinction] deserve[d] emphasis . . . because inaccuracy [might] lead to misanalysis such as occurred at the trial level in this case." *Id.*
240. The Tennessee Supreme Court did not find Dr. Lejeune, who espoused the Right-to-Life view at trial, as credible as did the trial court. Lejeune's "background fail[ed] to reflect any degree of expertise in obstetrics or gynecology (specifically in the field of infertility) or in medical ethics. His testimony revealed a profound confusion between science and religion." *Id.* at 593; see also supra notes 199-203 and accompanying text (describing the testimony of Dr. Lejeune before the trial court).
the preembryos were not "persons," agreeing with the appellate court that Tennessee's wrongful death, abortion, murder, and criminal statutes, as well as federal law, did not treat nonviable entities as "persons." Further, the court cited Roe's holding that fetuses are not "persons" for purposes of the Fourteenth Amendment. It was obvious to the court that the state of fetal development discussed in Roe "[was] far removed, both qualitatively and quantitatively, from that of the four- to eight-cell preembryos in this case." Thus, the court ruled that the trial court's treatment of the preembryos as human beings was erroneous.

Furthermore, the Tennessee Supreme Court rejected the appellate court's notion that the preembryos could be disposed of as if they were property, primarily because the facts of York were inapposite to the facts of Davis. In York, the parties had signed a "cryopreservation agreement" explicitly denoting the preembryos as "property." Since the Davises had not signed such a document, the property argument was much less persuasive. The court found that by relying on York, the appellate court had incorrectly concluded that entities with the "potential" for human life were property.

Having found that preembryos do not deserve the respect accorded to human beings, and having decided that they were not property because of their "potential" for life, the supreme court adopted the AFS Ethics Committee's Special Respect approach. The court also adopted AFS guidelines relating to decision-making authority over preembryos. Ultimately, the court believed that the

241. Davis, 842 S.W.2d at 594.
242. Id. at 594-95.
243. See supra notes 114-21 and accompanying text (explaining the Supreme Court's treatment of the legal status of fetuses).
244. Davis, 842 S.W.2d at 595.
245. Id.
246. See supra notes 139-41 and accompanying text (discussing the cryopreservation agreement signed by the parties in York).
247. Davis, 842 S.W.2d at 596.
248. Id.
249. Id. at 597; see supra notes 122-31, 197-98 and accompanying text (discussing the Special Respect view of preembryos and the AFS's adoption of such an approach).
250. Davis, 842 S.W.2d at 597 ("Within the limits set by institutional policies, decision-making authority regarding preembryos should reside with the persons who have provided the gametes. . . . A person's liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos.") (quoting Ethics Comm. of the Am. Fertility Soc'y, Ethical Considerations of the New Reproductive Technologies: The Moral and Legal Status of the Preembryo, 53 FERTILITY & STERILITY 34S, 36S (Supp. II 1990)).
PROCREATIONAL FREEDOM

Davises should control any decisions pertaining to their preembryos. The court of appeals had resolved the issue by granting the couple "joint" control, but the supreme court pointed out that joint control merely delineated the rights of the couple and cured their impasse by way of default. A deadlock in this situation had the effect of granting Junior "veto" power over Mary Sue's wishes, because the two-year limit on cryopreservation would cause the preembryos to decompose. In effect, the supreme court viewed the court of appeals' decision as a ruling in favor of Junior, although the appellate court had offered no justifications for its actions. Furthermore, the court found the appellate court's terminology extremely ironic; "joint custody" contradicted the actual effect of the appellate court's holding, which allowed Junior an inherent veto power. For these reasons, the Tennessee Supreme Court found the court of appeals opinion to be fatally flawed.

To the supreme court, the "essential dispute [was] . . . not where or how or how long to store the preembryos, but whether the parties will become parents." The answer to this question turned on the couple's exercise of their constitutional right of privacy. The court believed that liberty played the same role in the Tennessee Constitution as it did in the federal Constitution; however, "there [was] no reason to assume that there [was] a complete congruency." The Tennessee Supreme Court reasoned that because the United States Supreme Court had not yet addressed the issue of procreation in the IVF context, the right of privacy in such cases had to be

252. Davis, 842 S.W.2d at 598.
253. Id.
254. Id.
255. Id.
256. Id.
257. Id.; see supra notes 59-69 and accompanying text (discussing the right of privacy).
258. For example, Article I, § 8 of the Tennessee State Constitution provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges . . . or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers . . . ." Davis, 842 S.W.2d at 599 (citing TENN. CONST. art. I, § 8). Furthermore, Tennessee grants its citizens the right to abolish their government and resist the arbitrary exercise of power. Id. at 599-600 (citing TENN. CONST. art. I, §§ 1-2). Section 3 of the Tennessee Constitution allows freedom of worship; § 7 permits the right to be free from unreasonable searches and seizures; § 19 grants freedom of speech and the press; and § 27 regulates the quartering of soldiers. Id.; cf. supra note 58 and accompanying text (discussing the penumbra of rights surrounding the Bill of Rights and the resulting right of privacy).
259. Davis, 842 S.W.2d at 600.
extended by the states. The court found that in Tennessee the right of procreation was "composed of two rights of equal significance — the right to procreate and the right to avoid procreation." As a result, the court concluded that Junior and Mary Sue were "entirely equivalent gamete-providers."

Unlike in the abortion context, a woman's procreational rights cannot outweigh those of the man where IVF is involved because no concerns about a woman's bodily integrity are at issue. Therefore, the Tennessee Supreme Court balanced the equivalent procreational rights of the gamete-providers to determine the outcome of the case. Finding no state interest compelling enough to justify infringement on the procreational autonomy of the parties, the court determined that Junior Davis's procreational rights outweighed those of Mary Sue, stating:

Any disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences. . . . Donation, if a child came of it, would rob him twice — his procreational autonomy would be defeated and his relationship with his offspring would be prohibited.

Conversely, "Refusal to permit donation of the preembryos would impose on [Mary Sue] the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children." The supreme court concluded that this interest was not as significant as Junior's interests. Therefore, the court allowed the Knoxville Fertility Clinic to follow its normal procedures in dealing with unused preembryos; presumably, the preembryos would be allowed to expire in storage.

The Tennessee Supreme Court, however, added one caveat to its

260. Id. at 601.
261. Id.
262. Id.
263. See supra notes 99-106 and accompanying text (discussing the Danforth decision and the Court's reasoning that because a woman's bodily integrity is at issue when abortion is considered, the woman's procreational rights must outweigh the man's).
264. Davis, 842 S.W.2d at 601.
265. Id. at 603-05.
266. Id. at 602.
267. Id. at 603-04.
268. Id. at 604.
269. Id.
270. Id. at 604-05.
holding: "The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means."\(^ {271}\) The court appeared to imply that in this instance, Mary Sue's fundamental right to procreate would outweigh Junior's right not to procreate. However, because the facts of the Davis case differed from the scenario envisioned by this exception, the Tennessee Supreme Court left this issue unresolved.

III. Analysis

In February, 1993, the United States Supreme Court denied without comment Mary Sue Davis's request for a writ of certiorari to review her case.\(^ {272}\) Accordingly, the Tennessee Supreme Court opinion remains the most detailed discussion of the complicated constitutional issues that arise in the context of in vitro fertilization and cryopreservation. Precisely because Davis v. Davis raises these intricate issues relating to the rights of privacy and procreation, a careful analysis is necessary to determine if the decision is constitutionally accurate and in accordance with good public policy.

A. The Tennessee Supreme Court's Adoption of the Special Respect View

The Tennessee Supreme Court rejected both the opinions of the trial court and court of appeals by granting the Davises' seven cryogenically-preserved preembryos "special respect."\(^ {273}\) This model has the effect of placing preembryos on a continuum between persons and property,\(^ {274}\) and is indeed proper. First, according to constitutional precedent, preembryos do not deserve the legal rights of persons.\(^ {275}\) Furthermore, a preembryo cannot physically achieve the status of a "person."\(^ {276}\) By the same token, preembryos are not via-

\(^{271}\) Id. at 604.

\(^{272}\) Stowe v. Davis, 113 S. Ct. 1259 (1993). When Mary Sue Davis remarried, she took her new husband's name and became Mary Sue Stowe.

\(^{273}\) Davis, 842 S.W.2d at 597; see supra note 249 and accompanying text (noting the Tennessee Supreme Court's adoption of the Special Respect model).

\(^{274}\) Davis, 842 S.W.2d at 597. This is the model adhered to by the American Fertility Society. See supra notes 122-31 and accompanying text (describing the Special Respect view with regard to the legal status of preembryos).

\(^{275}\) See supra notes 114-21 and accompanying text (discussing the Supreme Court's view that preembryos do not qualify as persons within the meaning of the 14th Amendment); see also infra notes 279-80 and accompanying text (confirming the constitutional view of preembryos).

\(^{276}\) See infra notes 281-84 and accompanying text (discussing reasons why preembryos should
For these reasons, the Tennessee Supreme Court’s rejection of the trial court’s position that preembryos are persons was correct. The court was also correct in declining to adopt the court of appeals’ decision to treat preembryos as property. This model does not account for the genetic uniqueness of preembryos, their potential to develop into a fetus and then a newborn, and their symbolic meaning for the gamete-donors. Because the Special Respect model takes these factors into account without granting preembryos status equal to that accorded living persons, it is the correct view of preembryo status.

The Special Respect model is also attractive for several other reasons. It is carefully limited to ensure that any respect granted preembryos does not become superior to that of the gamete-donors who created them. In addition, the model is credible and in accordance with good public policy. For these reasons, the Tennessee Supreme Court’s adoption of this paradigm was appropriate.

1. Preembryos Are Not Persons

a. Constitutional Definition of “Person”

According to current constitutional jurisprudence, the Tennessee Supreme Court logically concluded that the Davises’ preembryos deserved “special respect,” but not the full rights usually accorded to “persons.” The Supreme Court held in Roe that the word “person,” as used in the Constitution, does not include the unborn. This particular portion of the Roe holding has never been discredited. Rather, the Court specifically reaffirmed this issue in Planned Parenthood of Southeastern Pennsylvania v. Casey. Because four- to eight-celled preembryos are obviously unborn, they are not “persons” for purposes of the Fourteenth Amendment. The Constitution does not protect the seven frozen preembryos in the Davis case in the same manner as it does persons. Therefore, the Special Respect model adopted by the Tennessee Supreme Court in Davis v.

277. See supra notes 90-96 and accompanying text (defining viability and noting the Supreme Court’s use and interpretation of viability in creating the Roe trimester framework); see also infra notes 285-88 and accompanying text (discussing the nonviability of preembryos).

278. Robertson, Legal Status of Early Embryos, supra note 27, at 446-47.

279. Roe v. Wade, 410 U.S. 113, 158 (1973); see supra notes 114-121 and accompanying text (discussing the constitutional definition of the word “person”).

b. Preembryos Do Not Physically Amount to Persons

The concept of constitutional "personhood" would be affronted if preembryos were granted the rights of persons because of the fundamental physical differences between "persons" and preembryos. A cryogenically-preserved entity lacks "the ability to interact, be conscious, have experiences, or be sentient" — the usual attributes of persons or rights-bearing entities. A preembryo has not developed the physical structures of personhood, and is not developmentally individual. Conceptually, it is therefore difficult to view these four- to eight-celled organisms on the same level as viable fetuses, infants, or adult human beings. Because preembryos are so rudimentary, they cannot and should not be treated as "persons." Consequently, the Tennessee Supreme Court's refusal to treat preembryos as persons is acceptable due to the vastly different physical composition of preembryos.

c. Preembryos Are Not Viable

Under federal constitutional law and the laws of the state of Tennessee, in order to be granted the rights of a "person," an unborn entity must be viable. A preembryo is not viable because it is dependent on cryopreservation and, ultimately, transfer to a uterus for its survival. A preembryo approaches viability only after it is transferred to a woman's uterus and given a chance to become implanted. If the preembryo does implant and develop for approximately twenty-two weeks, it might then have the ability to survive outside of the mother's womb with the help of life support and other modern technology. At that point, however, the preembryo has developed into a viable fetus. Prior to this stage, a preembryo clearly cannot be termed a viable being.

The Right-to-Life view argues that cryogenically-preserved

281. "Sentience" is defined as the ability to feel or have sensation. Dorland's, supra note 25, at 1507.
285. See supra notes 83-98, 222-25 and accompanying text (discussing the Roe standard of personhood and the Tennessee statutes that protect only fetuses which are "born alive").
286. See supra note 90 and accompanying text (defining the term "viability").
preembryos do, in fact, satisfy the definition of viability. The Right-to-Life stance views a preembryo as able to “survive” outside the womb, albeit in a cryogenically-preserved state. However, there are many differences between the viability of a fetus and a cryogenically-preserved preembryo. First, inherent in the concept of viability is the notion that a being will no longer be physically dependent on another for its existence. Unlike a viable fetus that does not need its mother’s body in order to survive, there is no possibility that a frozen embryo will ever be able to “survive” without being transferred to a woman’s body. A frozen preembryo has no hope for independent existence without first becoming dependent on another human being; therefore, it is not viable.

Second, a viable fetus will, under the best of circumstances, be able to grow and develop into a healthy infant, and later an adult. By contrast, the growth of a cryogenically-preserved preembryo is forever stalled at the four- to eight-cell stage; a preembryo does not even possess the potential for further cell division without implantation in a uterus. This lack of potential does not accord with the common notion of “viability.”

Ultimately, one cannot consider a preembryo viable because too many contingencies might arise before an implanted embryo reaches twenty-two to twenty-eight weeks. From the time a man donates his sperm and a woman’s ovum is aspirated to the time a fertilized preembryo is transferred to a woman’s uterus, chances are very slim that a human fetus will develop successfully. Many preembryos expire of their own accord in the lab or while frozen, and many never become implanted once they are transferred to a uterus, as they are expelled shortly after transfer. The notion that preembryos are viable entities is contradicted by the facts and statistics of in vitro fertilization. Therefore, preembryos cannot be treated in the same manner as persons, or even fetuses. Because the Special Respect model recognizes these inherent differences, its adoption by the Tennessee Supreme Court was proper.

287. Even if science were to develop an “artificial womb” that could bring a preembryo to term without the aid of a human female, a preembryo preserved outside the artificial womb would still not be viable. To be viable, it would have to develop to the appropriate age inside the womb. See Saltarelli, supra note 284, at 1039 (discussing artificial womb technology and some hypothetical situations).

288. See supra note 39 (discussing the odds of becoming pregnant and giving birth to a child with the aid of IVF).
2. Preembryos Are Not Property

If preembryos are not persons, it would seem that they could instead be viewed as property. However, the Tennessee Supreme Court sensibly concluded that the property model is also inappropriate to describe the legal status of preembryos, although the model does contain certain advantages. One advantage of the property model is that it creates a bright-line rule, which leads to fast, predictable results in court. Courts and legislatures have developed and defined "marital property" law for centuries, and they could avoid difficulties by applying similar rules of property law to reduce disputes over frozen embryos.

However, this bright-line test created by the property model is inappropriate in the context of disputes over frozen embryos. Frozen embryos are fundamentally different from property because they contain the genetic material of which human life is comprised. Accordingly, a court should evaluate each dispute on its merits to weigh the delicate factors involved with such important subject matter. Furthermore, disputes involving preembryos necessarily implicate constitutional issues of procreation and privacy. Such issues cannot be decided in a routine manner without considering the important rights at stake. In addition, using the property model's bright-line test to resolve disputes over preembryos is impractical. The appellate court's decision in the Davis case illustrates these impracticalities. By giving the Davises joint control of the preembryos, the court of appeals effectively granted Junior Davis's wish to see them destroyed, a result which is extremely inconsistent with the notion of "joint control." Further, Mary Sue and Junior had "joint control" over the embryos in the first place; they involved the Tennessee courts because they themselves could not solve the differences resulting from this joint control. The property model did not solve this dispute because neither party's position was amenable to modification. Mary Sue felt that destruction of one preembryo was murder, and Junior felt that transfer of one preembryo violated his con-

289. See supra notes 132-45 and accompanying text (explaining the property model used to classify the legal status of preembryos).

290. See supra notes 20-27 and accompanying text (discussing the procreational implications of IVF and preembryos).

stitutional rights. Mcm "Joint control" certainly did not solve their dilemma.

Not only is the property classification of preembryos impractical, it is also senseless. One can see this irrationality by hypothesizing the outcome of the appellate court decision in a community property state. In a community property state, property acquired during marriage is divided equally among divorcing spouses. Because the Davises' seven preembryos were acquired during their marriage, in such a state Mary Sue would receive three and one-half preembryos while Junior would receive the other three and one-half preembryos. Such a result would frustrate the individual desires of both of the Davises. Clearly, treating frozen embryos as property is not the best solution to the problem.

The preceding discussion illustrates the fundamental flaw of the property analysis: it is indifferent to the fact that preembryos contain the genetic material that comprises human life. Splitting the number of preembryos down the middle is an offensive way of treating entities that possess the possibility of developing into fetuses. Additionally, treating these preembryos as property could cause the courts to embark on a "slippery slope." If preembryos possessing the potential for human life are found to be personal property, a later court using similar reasoning might conclude that perhaps a fetus, or even a newborn, is personal property. Furthermore, making human life a commodity is prohibited by the Thirteenth and Fourteenth Amendments to the Constitution. If preembryos are property, the law comes dangerously close to entertaining the argument that human beings can be bought and sold. Thus, the Tennessee Supreme Court's rejection of the property model of preembryos is consistent with good public policy as well as the United States Constitution.

292. See supra notes 177-92 and accompanying text (noting the couple's differing opinions regarding the preembryos and procreational autonomy).

293. E.g., CAL. FAMILY CODE § 2550 (West 1994) (stating the manner of division for community property).

294. Treating children as property is clearly contrary to the public policy of our nation. The use of money in connection with adoption or even surrogacy services is strictly prohibited in all states. See, e.g., In re Baby M., 537 A.2d 1227 (N.J. 1988) (holding that the surrogate parent contract at issue, which required that fees be paid to both the mother and the infertility center, was illegal pursuant to state statutes prohibiting any relationship between adoption and the payment of money).
3. Limits of Special Respect

According to the foregoing analysis, the Tennessee Supreme Court was correct in declining to grant the Davises' preembryos the full rights of persons and in refusing to treat the preembryos as mere property. However, by granting the preembryos "special respect," the court implicitly granted the preembryos some degree of reverence and consideration. This appreciation is acceptable in constitutional terms because it does not exceed the appreciation the court granted to the gamete-donors themselves. Subject to Roe's "viability framework," any "rights" possessed by non-viable preembryos are subordinate to those of the gamete-donors who created them. The Roe line of cases stands for the general proposition that procreational decision-making is fundamental and the most intimate and private of rights. A state cannot interfere in a procreational decision without a "compelling" state interest. In Roe, the Supreme Court asserted that there is no compelling state interest in protecting the life of a fetus until it reaches the point of viability. Therefore, a woman's privacy interest in the decision of whether to "bear or beget a child" is paramount during the first trimester of pregnancy. Because the decision to implant or destroy these multi-celled preembryos involves the decision of whether to "bear or beget a child," it is a procreational decision. Thus, the Roe "viability framework," as affirmed and modified in Planned Parenthood of Southeastern Pennsylvania v. Casey, applies to cryogenically-preserved preembryos. Since the preembryos are not viable, there can be no compelling state interest justifying interference with the decision of whether to implant or destroy the Davises' seven preembryos. Therefore, the Tennessee Supreme Court properly applied the Special Respect model so that the Davises' right to choose whether to implant or terminate the preembryos outweighed any "special respect" accorded to the preembryos.

295. See supra notes 85-96 and accompanying text (discussing the Roe trimester framework).
296. See supra notes 82-106 (discussing the fundamental rights of privacy and procreation).
297. See supra notes 89-96 and accompanying text (discussing the point at which a state's interest in preventing abortion becomes compelling).
298. See supra notes 83-98 and accompanying text (discussing the Roe decision).
299. Roe v. Wade, 410 U.S. 113, 153 (1973); see supra notes 90-96 and accompanying text (discussing the Roe viability framework).
300. See supra note 57 (explaining strict scrutiny).
4. Credibility and Public Policy

One of the advantages of the Tennessee Supreme Court's adoption of the Special Respect model is its popularity. The Special Respect view is the majority position and most experts in the field agree with this model. The fact that those individuals who are the most knowledgeable about cryopreservation and its moral and legal implications endorse this view lends strong support to its credibility.

Additionally, the Special Respect position is based on sound policy considerations. A society that grants no respect whatsoever to genetic material with the potential for human life and which treats preembryos as mere property might properly be considered barbaric. Such a society seems inconsistent with modern notions of civilization. Furthermore, on the verge of the twenty-first century, with science and technology proceeding at their rapid pace, this society should be particularly careful about its attitudes towards humanity and the building-blocks of humanity, such as preembryos. Otherwise, the predictions of authors such as George Orwell and Aldous Huxley might just become reality.

On the other hand, if preembryos are given the full range of rights retained by human beings, society would still become unbearable. Preembryo implantation could become mandatory if preembryos are considered "persons." And because it is doubtful that there would be enough willing volunteers to implant all the preembryos currently cryopreserved, "eligible" women might be forced to participate against their will. Nothing could be more violative of personal autonomy than being forced to bear another person's child against one's will.

In addition, if preembryos are treated as human beings, other pre-
posterous situations might arise. For example, it would be plausible to argue that preembryos could inherit from the estates of both their biological and surrogate parents. Fights would ensue as to who had the right to implant future heirs. The foregoing discussion, although somewhat far-fetched, makes it obvious from a policy standpoint that the Tennessee Supreme Court was wise in adopting the Special Respect concept.

B. The Constitutionality of the Davis Decision

The Tennessee Supreme Court's decision in Davis v. Davis creates two interrelated lines of inquiry in the realm of constitutionality: the court's holding that the right of privacy encompasses the coextensive rights of procreation and avoiding procreation, and the balancing test used by the court to determine which of those rights should prevail on the facts of the Davis case. The Davis court acted constitutionally by creating and applying such rules of law. However, the prudence of some of the Davis court's more specific holdings remains questionable.

1. The Right to Procreate and the Right to Avoid Procreation

In granting Junior Davis's request to terminate the preembryos, the Tennessee Supreme Court decided that the right of privacy encompasses the coextensive rights to procreate and to avoid procreation. While this finding expands traditional notions concerning the right of privacy, it complies with constitutional precedent. By implication, the procreation and privacy decisions contain these two categorically opposite rights. While Skinner can be seen as the cham-

304. In fact, such a situation arose involving a Los Angeles couple who died in a plane crash, leaving an estate of $1 million, no will, and two frozen embryos in Australia. Australians Reject Bid to Destroy Two Embryos, N.Y. TIMES, Oct. 24, 1984, at A18. The couple's estate was distributed to their intestate heirs according to California law, without regard to their cryogenically-preserved preembryos. Davis v. Davis, 842 S.W.2d 588, 590 n.2 (Tenn. 1992), cert. denied sub nom. Stowe v. Davis, 113 S. Ct. 1259 (1993).

305. See supra notes 260-62 and accompanying text (noting the Tennessee Supreme Court's holding that the right of privacy extended to both the right to procreate and the right to avoid procreation); see also infra notes 307-12 and accompanying text (discussing these coextensive rights).

306. See supra notes 265-70 and accompanying text (explaining the balancing test the court applied in deciding the case); see also infra notes 313-22 and accompanying text (discussing this balancing test).

307. Davis, 842 S.W.2d at 601.

308. Skinner v. Oklahoma, 316 U.S. 535 (1942); see supra note 74 and accompanying text (discussing the right to procreate inherent in the Skinner decision, which held that convicts have
pion of one's right to reproduce, *Griswold*,\(^{309}\) *Eisenstadt*,\(^ {310}\) and *Roe*\(^{311}\) can be seen as the champions of one's right not to reproduce.

Even if a person feels that these Supreme Court decisions do not directly support the *Davis* court's holding, the *Davis* decision in no way contradicts them. In constitutional jurisprudence, the federal Constitution delineates a “floor” of constitutional rights possessed by citizens. State courts and legislatures are free to create the “ceiling” of those rights, as states are always free to grant their citizens more rights than those mandated by the federal Constitution.\(^ {312}\) Consequently, by bestowing upon Tennessee citizens the “right to avoid procreation” as well as the right to procreate, the Tennessee Supreme Court acted within its available powers.

2. The *Davis* Balancing Test and its Exception

The *Davis* court balanced the interests of the gamete-donors in deciding who possessed the right to control the fate of the seven frozen preembryos. This methodology is consistent with previous constitutional precedent. Also, based on the circumstances of the case, the *Davis* court's finding that the balance tipped in favor of Junior Davis is proper. However, in dicta, the court created an exception to the balancing test to be used when different factual conditions present themselves. This exception dangerously impairs the holding of the *Davis* case. Therefore, future courts should regard this exception as exactly what it is: mere, nonbinding dicta.

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\(^{309}\) Griswold v. Connecticut, 381 U.S. 479 (1965); see supra note 76-81 and accompanying text (discussing the right of privacy inherent in the *Griswold* holding that the state cannot prevent married couples from using birth control).

\(^{310}\) Eisenstadt v. Baird, 405 U.S. 438 (1972); see supra note 77-81 and accompanying text (discussing *Eisenstadt's* extension of *Griswold* to nonmarried couples).

\(^{311}\) 410 U.S. 113 (1973); see supra notes 83-85 and accompanying text (discussing the rights of privacy and procreation inherent in the *Roe* Court's decision that a woman may not be prohibited from obtaining an abortion in the first trimester).

\(^{312}\) The Supreme Court has held that:

Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. . . . Moreover, a state may confer procedural protections of liberty interests that extend beyond those minimally required by the Constitution of the United States.

a. Consistency With Danforth

The balancing test created by the Davis court is constitutional in that it is consistent with previous Supreme Court precedent. Specifically, Davis is in accordance with the decision in Planned Parenthood of Missouri v. Danforth, the Supreme Court’s primary statement of decisional rights in the context of reproduction. In Danforth, the Supreme Court held that a woman’s right to terminate her pregnancy prevails over the decisional interests of the fetus’s “father” because only the woman’s bodily autonomy is implicated. By contrast, the balancing test created by the court in Davis evaluates both sexes as “entirely equivalent gamete-providers.” This statement is acceptable under Danforth, because no issue of bodily integrity arises in the context of in vitro fertilization. Cryogenically-preserved preembryos are located outside a woman’s womb. Consequently, no reason exists for a male gamete-donor’s decision to be discounted in disputes over frozen embryos. Thus, the balancing test the Tennessee Supreme Court created in Davis does not contradict Danforth, and is therefore constitutional.

b. Balancing the Parties’ Interests

Once the Tennessee Supreme Court decided that Mary Sue and Junior Davis possessed equivalent rights in their preembryos, it was confronted with resolving the deadlock over the preembryos’ disposition. The court was faced with an all or nothing decision: if Mary Sue prevailed, all of the preembryos had to be implanted; but if Junior prevailed, none of the preembryos could be implanted. Furthermore, deciding in favor of one party meant violating a fundamental right of the other party: for Mary Sue the right to procreate, and for Junior the right to avoid procreation. The Davis court balanced the interests of the parties and found that a disposition in favor of Junior was less violative of his fundamental rights than would be a disposition in favor of Mary Sue. Therefore, the court tipped the balance in favor of Junior. This conclusion was com-

314. Id. at 69, 71.
316. Ahnen, supra note 110, at 1299.
317. Davis, 842 S.W.2d at 604.
318. Id.
pelled by the facts of the *Davis* case and as such was fair and equitable.

The court held that allowing Mary Sue to donate the preembryos would cause Junior to suffer irreparable harm. 319 Once a child is born, there is no way to end biological ties, and very few ways to end emotional ones. Junior's right to avoid procreation would have been irreparably damaged had the court found in favor of Mary Sue. Additionally, Junior would have faced a lifetime of unwanted fatherhood and its accompanying psychological burdens.

On the other hand, the court noted that a ruling in favor of Junior, thus allowing the preembryos to expire in storage, would not cause irreparable damage to Mary Sue. 320 Mary Sue's desire to produce a biologically-related child would merely be delayed by a decision in favor of Junior, not completely destroyed. Mary Sue was not denied the right to procreate; procreation could still be accomplished, just not with these particular preembryos.

Furthermore, the specific facts of the *Davis* case clearly indicated a disposition in favor of Junior because Junior's fundamental right not to procreate was more severely implicated than Mary Sue's right to procreate. Mary Sue did not ask the court's permission to implant the preembryos in her own body. Her ultimate objective was authorization to donate the preembryos to another woman for implantation. 321 Introducing one's genetic material into the world is obviously procreation, but at its most basic level. The right to procreate seems to encompass more rights than just an instinct to perpetuate the human race. As an outgrowth of the right of privacy, the right to procreate can be seen as one means of protecting the liberty to create family relationships and raise one's children as one sees fit. 322 By aspiring only to donate the preembryos, Mary Sue was not demanding that such rights be given effect. By contrast, Junior was demanding that his right to avoid procreation be given full force and effect. Junior did not want to introduce his genetic material into the world in combination with that of Mary Sue; he no longer wanted a child, or even a family relationship, with her. Accordingly,

319. As Professor Robertson points out, "The party who wishes to avoid offspring is irreversibly harmed if embryo transfer and birth occur, for the burdens of unwanted parenthood cannot then be avoided." Robertson, *Legal Status of Early Embryos*, supra note 27, at 480.
320. *Davis*, 842 S.W.2d at 604.
321. Id.
322. See *supra* note 58 and accompanying text (discussing the penumbra of rights related to the right of privacy).
if Mary Sue was allowed to donate the preembryos, the impact on Junior's rights would have been greater than the impact on Mary Sue's if the preembryos were permitted to expire in storage. Therefore, the Tennessee Supreme Court was correct in holding that Junior's right to avoid procreation outweighed Mary Sue's right to procreate.

c. The Exception to the Rule

The *Davis* decision creates a rule of law whereby, when faced with the donation or termination of cryogenically-preserved preembryos, the court balances the competing rights of the gamete-donors to procreate and avoid procreation. As discussed in the preceding section, one of the elements presumably underlying the *Davis* court's balancing is whether or not the gamete-donor will use the preembryos herself or donate them to another person. In fact, the court went so far as to hint that when a gamete-donor did desire to implant the preembryos, the balancing test would tip in her favor: "The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means." The effect of this statement is to create an exception to the *Davis* court's main holding, an exception which is defective for several reasons.

The primary flaw of this statement is that it contradicts the preceding portions of the *Davis* opinion. The court claimed to create a balancing test to resolve disputes over frozen embryos. By their nature, balancing tests consider and weigh different factors before a final decision is reached. By allowing one factor, such as whether or not the preembryos will be used by a gamete-donor, to weigh so heavily in the balance, an exception to the balancing test itself is created. The effectiveness and credibility of the balancing test are therefore undermined. What begins as an objective means of determining the rights of feuding gamete-donors ends up as a subjective way of favoring one party over another.

Secondly, the exception contradicts the *Davis* court's attempt to create a gender-neutral rule of law for disputes arising between IVF participants. On the one hand, the *Davis* court stated that in the context of IVF, men and women are to be seen as "entirely

323. Davis, 842 S.W.2d at 604.
equivalent gamete-providers." On the other hand, the exception works to favor female gamete-donors over male. To illustrate, imagine a dispute arising over frozen embryos where the female gamete-donor desires preembryo expiration. The male gamete-donor, however, asks the court to allow his new wife, or a surrogate volunteer, to implant the preembryos. Taken literally, the *Davis* court's exception would not apply to the man because he can not use the preembryos himself, i.e., implant them in his own body. Furthermore, IVF is usually used by couples where the woman has trouble becoming pregnant. Therefore, in the majority of situations, the male gamete-donor has other means of reproduction available. Accordingly, under the *Davis* court's reasoning, a male gamete-donor's request to implant the preembryos would probably be denied.

The final effect of the balancing test and its exception is to give female gamete-donors veto power over male gamete-donors. Mary Sue Davis's position is probably rare in that many gamete-donors will not want to merely donate preembryos, but will want to implant them themselves. Thus, in many cases, the *Davis* opinion will cause a female gamete-donor's decision to control the fate of frozen embryos: when a female gamete-donor desires to implant the preembryos in her own body, her wishes prevail, but when a male gamete-donor wants the preembryos implanted, the female's wishes still prevail. Such veto power is completely at odds with *Danforth*'s strict prohibition on granting vetoes concerning procreational rights to parties whose bodily interests are not implicated. As such, the *Davis* decision subtly undermines the Supreme Court's holding in *Danforth*. The danger in the realm of procreational freedom is apparent: allowing veto power in such a manner causes one to question the entire premise upon which procreational freedom in the United States is based, that no person or entity may interfere with one's decision of whether or not to bear a child before the point of viability.

The foregoing analysis shows that the major error of *Davis v. Davis* is the exception that the court created to its balancing test. The exception "swallows up the rule" and risks reducing the test to a cursory inquiry into a female gamete donor's fertility and plans for

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324. *Id.* at 601.
326. *See supra* notes 99-106 and accompanying text (discussing the rationale in *Danforth* supporting a prohibition of vetoes concerning procreational rights).
the preembryos' future.

3. Summary

From this discussion, it is evident that the ultimate flaw in the Tennessee Supreme Court's opinion is its lack of consistency. Although the court found the proper classification for the preembryos by granting them "special respect," and correctly balanced the Davises' procreational rights in upholding Junior Davis's right not to procreate, the court's dicta concerning the exception to its main holding potentially contradicts the main holding itself. Future courts should avoid such inconsistencies and strive for more clarity in the area of in vitro fertilization.

IV. IMPACT

The Davis decision has the potential to affect many lives. Ten million out of sixty-seven million reproductively-active couples in the United States are infertile, and in vitro fertilization is currently used once a day in the United States. Davis v. Davis is the only case of its kind in that it discusses the disposition of cryogenically-preserved preembryos when gamete-providers have not signed a prior dispositional agreement. Without a doubt, the Davis case will be looked to for guidance should future disputes involving in vitro fertilization and frozen embryos arise. Thus, one must explore the impact of Davis in detail, paying specific attention to the adoption of the Special Respect view. Furthermore, the procreational and privacy issues decided in Davis are of fundamental import. How the Davis case affects current constitutional precedent in these areas is an issue of great consequence. Finally, an investigation of the effect of the court-created exception to the Davis holding is necessary to elucidate its flaws and understand its limitations.

A. Impact of the "Special Respect" View

Among the many significant holdings of Davis v. Davis is the Tennessee Supreme Court's finding that the Davises' cryogenically-
preserved preembryos deserve "special respect." Adoption of the Special Respect view has possible implications in several areas because of the ambiguity inherent in the term "special respect." "Special respect" is not clearly defined in either the AFS guidelines or in the Davis decision. Future courts and policy-makers are left to wonder how this view of preembryo status affects areas such as abortion and birth control.

1. Special Respect and Abortion

The Tennessee Supreme Court's adoption of the Special Respect view complicates issues in the area of abortion. Despite the Davis court's strong procreational rights stance, future courts may misread the opinion to find that it contradicts Roe v. Wade. One could interpret "special respect" as granting preembryos, which are not "persons" in constitutional terms, more deference than non-viable fetuses. Granting preembryos "special respect" might cause the court to embark on a "slippery slope" where preembryos and other nonviable entities consisting of human genetic material are gradually treated like viable fetuses until they acquire the same range of rights as human beings. In this manner, "special respect" could one day trump the rights of the gamete-donors who created the preembryos.

However, the likelihood that a court will protect preembryos more than a viable or non-viable fetus, and succeed in doing so, is probably dependent upon the political composition of the United States Supreme Court. And, despite what seemed to this author to be a rampantly conservative Supreme Court during the 1980s and early 1990s, the Court in 1992 reaffirmed the principles upon which Roe v. Wade was based. Accordingly, any perceived alteration of the Roe holding resulting from the Tennessee Supreme Court's adoption of the Special Respect view is unlikely.

An additional impact of the Special Respect view on abortion rights might occur with respect to pregnant women who wish to terminate their pregnancy. If the Special Respect view were to become

331. Id. at 597.
333. See supra note 118 and accompanying text (discussing the Casey decision's affirmation of Roe v. Wade). Furthermore, with the advent of a democratic presidential administration and the recent appointment of Ruth Bader Ginsberg to the Supreme Court, it appears even more likely that the principles of Roe will continue to be upheld.
widely promulgated, pregnant women might feel as if they were acting in contravention of the “special respect” their fetus deserved if they chose abortion over childbirth. However, most women who decide to terminate their pregnancy already face a similar dilemma in that they are confronted by the Right-to-Life position, which espouses that “life begins at the moment of conception.” Furthermore, some women might see “special respect” as consistent with pro-choice principles in that it does not accord preembryos the rights typically accorded to “persons.” Hence, the Tennessee Supreme Court’s adoption of the Special Respect view will not have a striking impact on women deciding whether or not to terminate a pregnancy; if anything, the Special Respect view merely helps to reaffirm a woman’s preconceived opinion on abortion.

2. Special Respect and Birth Control

The ambiguity of the term “special respect” could impact the use of certain types of birth control. For example, some methods of birth control, particularly intra-uterine devices, terminate pregnancy at approximately the same stage of development at which cryogenically-preserved preembryos are arrested.\textsuperscript{335} Perhaps the multi-celled entities destroyed by IUDs also deserve “special respect,” and therefore it logically follows that IUDs should not be utilized. However, such an argument ignores the fact that the Tennessee Supreme Court specifically held that cryopreserved entities, although deserving of “special respect,” can be destroyed at the option of the gamete-donors who created them. Thus, the Tennessee Supreme Court’s adoption of the Special Respect model in Davis should not affect the use or legality of intra-uterine devices.

B. The Procreational Rights Impact of Davis

The Tennessee Supreme Court’s determination that Mary Sue and Junior Davis held equivalent rights to procreate and avoid procreation necessarily impacts on the way Tennessee courts will interpret the Supreme Court’s privacy and procreation decisions in the future.\textsuperscript{336} Because the Davis case reaffirms, strengthens, and ex-

\textsuperscript{334} See supra notes 108-13 and accompanying text (discussing the Right-to-Life view).
\textsuperscript{335} See supra note 119 and accompanying text (discussing the legality of intra uterine devices).
\textsuperscript{336} See supra notes 57-81 and accompanying text (discussing the right of privacy and the right of procreation).
pands upon decisions such as *Griswold v. Connecticut*, 337 U.S. 479 (1965); *Eisenstadt v. Baird*, 338 U.S. 438 (1972); and *Roe v. Wade*, 339 U.S. 113 (1973). Tennessee citizens can be assured that their state courts will protect the rights of privacy and procreation. This impact of *Davis* is especially noteworthy because several members of the United States Supreme Court and Right-to-Life activists have criticized *Roe* and its progeny. 340

C. Impact of the Davis Court's Exception

The primary conclusion of the *Davis* court is that, in the context of in vitro fertilization, gamete-donors are “entirely equivalent.” 341 Thus, the court creates a balancing test to determine the rights of such parties. However, the court went on to state that one factor weighs very heavily in the equation: that is, when a gamete-donor desires to implant the preembryos in her own body, her wishes should prevail. 342 In effect, this statement creates an exception to the court’s main holding. Ultimately, this exception favors female gamete-donors over male gamete-donors. 343 The possible impact of this rule of law is monumental because it contains the potential to threaten the balance of power among men and women in the area of procreational rights.

Currently, the law is absolutely clear: In the context of abortion and pregnancy, men and women stand on equal footing. It is due to

337. 381 U.S. 479 (1965).
341. *Davis* v. *Davis*, 842 S.W.2d 588, 601 (Tenn. 1992), cert. denied sub nom. *Stowe v. Davis*, 113 S. Ct. 1259 (1993); see supra notes 261-70 and accompanying text (discussing the *Davis* opinion and its holding that gamete-donors are equal).
342. *Davis*, 842 S.W.2d at 604.
343. See supra notes 323-26 and accompanying text (analyzing the *Davis* opinion and determining that the court manufactured an exception to its own rule that ultimately favors female gamete-donors over male donors).
bodily autonomy and not gender that women control pregnancy decisions. *Danforth* held that when procreational decisions have to be made, and when one party's bodily interests are implicated, that party's unilateral choice is decisive since that party is more directly and immediately affected.\(^{344}\) However, after *Davis*, even though no bodily interests are concerned, the court's exception tips the balance in favor of women. The imminent danger is that by favoring women in this area, men are discriminated against. One could use such a precedent to discriminate on the basis of sex in other areas as well. For example, *Davis* might be used to favor men in the context of sperm donation or artificial insemination. A better rule of law would take into account all interests of the parties involved in a reproductive dispute, and not base decisions upon gender alone.

For these reasons, future courts should minimize the importance of the aforementioned exception when deciding issues concerning frozen embryos. Since the specific issue addressed by the exception was not before the court in *Davis*,\(^{346}\) it is mere dicta. Future courts should take the interests of both of the gamete-donors into account during the balancing process and not place any undue emphasis upon their gender. Only in this way will the courts avoid the dangers inherent in the exception.

D. Impact of *Davis* on IVF Participants

The *Davis* decision lends some certainty to those couples who enter in vitro fertilization clinics and decide to have excess preembryos cryopreserved for future use. If they have not signed a cryopreservation agreement, these couples can be relatively sure that the party wishing to dispose of the preembryos will control, unless the female gamete-donor has no additional means of reproducing biologically related offspring and intends to implant the preembryos in her own body.\(^{346}\) Ultimately, the result of the *Davis* decision in these situations is a speedier resolution for disputes involving frozen embryos.

However, litigation is still necessary when a male gamete-donor

\(^{344}\) See *supra* notes 99-106 and accompanying text (examining *Danforth*, which held that a pregnant woman's bodily interests trump a man's ability to participate in the decision-making process with regard to the pregnancy).

\(^{345}\) Mary Sue Davis wanted to donate the preembryos, not implant them herself. *Davis*, 842 S.W.2d at 604.

\(^{346}\) See *supra* notes 313-26 and accompanying text (analyzing the general rule and the exception created by the *Davis* court).
wishes to see the preembryos implanted over the female gamete-donor’s wishes. A man in this situation cannot be certain of the outcome of a dispute.\textsuperscript{347} The exception created by the \textit{Davis} court provokes this uncertainty. Thus, certainty concerning the outcome of disputes involving frozen embryos is limited.

Because the \textit{Davis} decision does not adequately resolve every issue that might arise between parties disputing the disposition of frozen embryos, and because litigation over frozen embryos is expensive, time-consuming, and emotionally wrenching, the best solution to problems concerning preembryos is to address those problems before they arise. In vitro fertilization clinics should require couples being treated for infertility to sign cryopreservation agreements before treatment begins. Such prior directives present “the best way to maximize the couple’s reproductive freedom, to give advance certainty to couples and IVF programs, and to minimize disputes and their costs.”\textsuperscript{348} In the Davises’ situation, the dispute over their seven cryogenically-preserved preembryos caused great emotional pain and turmoil. Had the Davises been required to sign an advance directive, they would have avoided these problems. But perhaps the greatest impact of this case is in the lesson to be learned by those offering IVF services and undergoing IVF treatment: couples must fully disclose their desires concerning the disposal of their preembryos by signing cryopreservation agreements before preembryos are created and stored for future use.

\textbf{CONCLUSION}

The Tennessee Supreme Court had a difficult task at hand in attempting to resolve the issues raised by \textit{Davis v. Davis}.\textsuperscript{349} The court succeeded in complying with current constitutional precedent, and managed to expand the rights of Tennessee citizens in the process.\textsuperscript{350} Therefore, one cannot criticize the court for overreaching into the realm of the legislature nor for allowing abbreviation of the constitutional rights of procreation or privacy.\textsuperscript{351} Even though the

\begin{itemize}
  \item \textsuperscript{347} See \textit{supra} notes 313-26 and accompanying text (discussing the inconsistencies between the general rule developed by the \textit{Davis} court and the exception to that rule).
  \item \textsuperscript{348} Robertson, \textit{Prior Agreements}, \textit{supra} note 28, at 414.
  \item \textsuperscript{349} 842 S.W.2d 588 (Tenn. 1992), \textit{cert. denied} sub nom. Stowe v. Davis, 113 S. Ct. 1259 (1993).
  \item \textsuperscript{350} See \textit{supra} notes 256-62 and accompanying text (discussing the Tennessee Supreme Court’s expansion of existing constitutional precedent).
  \item \textsuperscript{351} See \textit{supra} notes 5-6 and accompanying text (describing these criticisms of judicial activ-
rule the *Davis* court created is a triumph for procreational freedom,\(^{352}\) the court diminished that triumph by creating an exception that effectively negates the very same rule.\(^{353}\) The court’s lack of consistency is a major flaw which will not likely stand the test of time. Future courts faced with disputes involving cryogenically-preserved preembryos would be wise to adopt the general rule of *Davis v. Davis* and ignore its inconsistent exception.

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