UNDUE PROCESS: REVISITED

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INTRODUCTION

Nearly a decade ago, I wrote my law-school note on how there was a tension brewing between IVF and abortion rights.[1] The observation largely being that, because courts had begun enforcing contracts entered among IVF progenitors, providers, and surrogates, they were implicitly (and, at times, explicitly) treating human embryos as a kind of thing that could be *owned*. After all, one could not lawfully enter, let alone ask courts to enforce, these kinds of agreements unless those among the contracting parties had some ownership—or proprietary—interest in the embryos. Yet it is precisely that ownership interest that, I argued, would allow a father to demand due process before his embryo were terminated, even if it meant the process due to him had to be balanced against the mother's competing right to terminate her pregnancy.[2]

Quite a lot has changed since then. Most notably, the Supreme Court has now held that abortions are not guaranteed by the Constitution, leaving it for states to decide whether the unborn deserve personhood status or, conversely, a mother may abort the unborn child during some window in her pregnancy.[3] Meanwhile, and less headline-grabbing, lower courts have continued to give more and more credence to the embryo-as-property notion, with many state supreme courts enforcing not just IVF and surrogacy contracts—but a recent high court going so far as to honor one years *after* the child was born. While perhaps not readily apparent, these two trends are, in my view, on a collision course.

I thus write this essay to elucidate that tension and offer a perspective on where things stand. I do so by revisiting the challenge I laid out in my last article, arguing that fathers have a constitutional claim to demand due process before and, even, after an abortion takes place: the necessary consequence of courts continuing to recognize embryos as "property" of their progenitors. From there, I address why a court faced with such a challenge would find no easy answers, having to grapple with the looming implication that, if not property, then embryos must

* J.D., University of Florida 2016. I would like to thank my friends and colleagues who offered input on this essay and the topic more broadly. In particular, I am thankful for the insights provided by my friends Anthony and Austin. The views expressed here are my own and do not reflect those of my firm or any of our clients.

[1] Anthony Jose Sirven, *Undue Process: A Father's Proprietary Interest in an Embryo and Its Clash with Casey*, 68 FLA. L. REV. 1469 (2016).

[2] *See* discussion *infra* Section II.B. for how state action would be implicated.

[3] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

be *persons* for whom the "right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[4]

But if embryos are property, then fathers should have what seems to be a constitutional basis for challenging abortions as deprivations of their "property" interests without due process of law. There is no middle ground; embryos are either persons or property, even if some have paid lip service to the idea that they might fall somewhere in between.[5] And that is why, I believe, a challenge of this sort could push the Court to take up a question it has long avoided head on: *Are unborn human beings "persons" entitled to the constitutional guarantee to life, or mere "property" that can be owned, transferred, donated, and destroyed?*

I expand on the relevant considerations in turn.

I. EMBRYOS AS PROPERTY

That embryos are considered property of their progenitors no longer seems like a novel or, for that matter, controversial position.[6] This at least appears to be the growing consensus reached by courts (and commentators) who've considered the issue, including those in California,

[4] Roe v. Wade, 410 U.S. 113, 156–57 (1973).

[5] Constitutional personhood doesn't so much represent one end of a spectrum opposite personhood, allowing room for other categories to fall somewhere in-between. Rather, personhood is all that *exempts* one from being owned or treated like the property of another—something that hasn't always been the case. *See* Carter Dillard, *Future Children As Property*, 48 DUKE J. GENDER L. & POL'Y 47, 49 (2010) (arguing that IVF, surrogacy, and other agreements that "treat a class of persons, prospective children, as property" run afoul of the "Reconstruction Era amendments" given they "forbid[] reading the Constitution (and most certainly [the Thirteenth and Fourteenth] amendments) as granting a fundamental right to one class of persons to treat another class of persons (even temporally disadvantaged people like prospective children) as property"); *see also* Paul Finkelman, *Slavery in the United States: Persons or Property?*, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5386&context=faculty_scholarship ("[S]lavery was not simply a system of exploitive labor. Rather, it was a system of treating *people* like *property*[.]") (emphasis added).

[6] Whether courts have legally or morally erred in reaching this conclusion is beyond the scope of this paper.

Colorado,[7] Connecticut,[8] Georgia,[9] Indiana,[10] Maryland,[11] Missouri,[12] New York,[13] Oregon,[14] Tennessee,[15] Texas,[16] Virginia,[17] and Washington, to name a few.

In my last article, I covered the first set of cases to do so.[18] I won't rehash them here. Nor will I tread the same ground many others have already offered on this topic. What I want to highlight, for this essay, are a handful of particularly notable cases that have come up since I last wrote on this topic—some that have altogether done away with any distinction between embryos *in vitro* and those *in vivo*. In fact, one case honored the terms of a surrogacy agreement years *after* the child was born. I cover these developments below.

A. Recent, Notable Cases Holding That Embryos Were Property that Could be Subject to a Contract and Otherwise be Owned

1. In re Marriage of Rooks

The first case I want to highlight is *In re Marriage of Rooks*.[19] There, as the title suggests, a former husband and wife sought a divorce but could not come to terms over who would keep the cryogenically preserved embryos they had left over from IVF rounds they underwent in the past. For the wife, these embryos offered a last chance to have more children given her age. She

[7] In re Marriage of Rooks, 429 P.3d 579, 591 (Colo. 2018) ("[W]e agree with courts that have categorized pre-embryos as marital property of a special character.").

[8] Bilbao v. Goodwin, 217 A.3d 977, 990–91 (Conn. 2019) (rejecting the father's argument that the embryo was "not 'property' . . . because it is a human life," and enforcing the mother's right to destroy the embryos under the terms of the agreement).

[9] Smith v. Smith, 892 S.E.2d 832 (Ga. Ct. App. 2023) (enforcing embryo-cryopreservation agreement that acknowledged the embryos were "property" of the couple).

[10] Freed v. Freed, 227 N.E.3d 954, 971 (Ind. Ct. App. 2024) (deeming in-vitro embryos "marital property" subject to contract an equitable-distribution laws).

[11] Jocelyn P. v. Joshua P., 250 A.3d 373, 392–93 (Md. Ct. Spec. App. 2021) (following *Davis v. Davis*, *infra* note 15, along with its progeny cases, and holding embryos are property that warrant "special respect").

[12] McQueen v. Gadberry, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) (holding that, because progenitors, as [contracting parties with] decision-making authority over the frozen pre-embryos created subsequent to their marriage, including but not limited to when they can exercise rights to use them, [their interest] is consistent with the broad definitions of 'marital property' and 'property' set out above").

[13] K.G. v. J.G., 149 N.Y.S.3d 830, 834 (Sup. Ct. 2021) (recognizing the embryos as property and, in turn, enforcing the parties' "Consent for Cryopreservation of Embryo(s) by Couples with Joint Custody agreement, [under which] the parties specifically agreed that the cryopreserved embryos are their joint property and will not be used without both of their consent").

[14] Matter of S.D.S., 539 P.3d 722, 729 (2023), discussed, *infra*, at Section I.A.3.

[15] Davis v. Davis 842 S.W.2d 588, 595, 604 (Tenn. 1992) (rejecting status of IVF embryos as "persons" and, instead, holding they are "property" that could be the subject of an enforceable contract or divided equitably by the court as part of a divorce proceeding).

[16] Antoun v. Antoun, No. 02-22-00343-CV, 2023 WL 4501875, at *5 (Tex. App. July 13, 2023) (rejecting the wife's argument "that the embryos are 'unborn children' and not property" and, in turn, enforcing the couples' IVF agreement); Roman v. Roman, 193 S.W.3d 40, 54–55 (Tex. App. 2006) (recognizing an IVF embryo as "joint property" of the married couple and, in turn, enforcing the terms of their IVF agreement).

[17] Jessee v. Jessee, 866 S.E.2d 46, 50–52 (Va. Ct. App. 2021) (affirming "the parties[']and the circuit court['s] agree[ment] to treat the pre-embryo as a type of property subject to equitable distribution under Code § 20-107.3," but noting "we do not address the general applicability of the equitable distribution statute to pre-embryos or whether they constitute property under Virginia law").

[18] SIRVEN, *supra* note 1, at § II.C.–E.

[19] 429 P.3d 579 (Colo. 2018).

thus argued that she should have a right to keep and bring them to birth so long as she took responsibility as their sole legal parent.[20]

The husband saw it differently. He didn't want to have any more children with his ex-wife (they already had three) even if, legally speaking, he wouldn't be recognized as the children's father. He also pointed to emotional harms doing so might cause him and the siblings, who he argued (and the trial court agreed) would be put in a confusing situation if their mother had children who, at least legally speaking, would have no father. The husband thus wanted the embryos destroyed.[21]

Their dispute made its way up to the Colorado Supreme Court, with the threshold issue being how, exactly, the law should treat *in-vitro* embryos. As the *Rooks* Court observed, "IVF can present a host of legal dilemmas, including how to resolve disagreements over the disposition of cryogenically preserved pre-embryos that remain at the time of dissolution."[22] Chief among those dilemmas was figuring out the legal status of the embryo. That is, the *Rooks* Court had to first decide whether the embryos were the sort of thing that could be treated as property, allowing for contractual arrangements or equitable-distribution laws (which govern property disposition in divorce proceedings) to control.[23] Ultimately, after surveying cases in and out of Colorado, the *Rooks* Court held embryos are "marital property" that could be governed by "an enforceable agreement between the parties regarding the[ir] disposition" or, if none controlled, subject to Colorado's equitable-distribution laws.[24]

In doing so, the *Rooks* Court largely followed the growing consensus among states.[25] But what makes this case unique is that the Colorado Supreme Court took off the table any notion that an embryo could ever be considered a "person," no matter how developed.[26] Pointing to state

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[20] *Id.* at 583.

[21] *Id*. at 583–84.

[22] *Id.* at 580.

[23] If embryos are deemed "persons" or, for that matter, recognized as "children," making them subjects of a contract would offend prohibitions against treating children like "chattel." *See also* Com. ex rel. Children's Aid Soc. v. Gard, 362 Pa. 85, 92 (1949) ("The basic error in the argument" for "custody of this child" based on "[the claimant's] 'rights' under the contract" is "that the child is treated as a *chattel*," rather than a person, which runs afoul "established law") (emphasis added); Huss v. Weaver, 134 A.3d 449, 455 (2016) ("Because children are not mere chattel, agreements regarding custody and visitation are always subject to court review and adjustment in the best interests of the child."); Matter of Adoption of T.M.M.H., 307 Kan. 902, 936 (2018) (Stegall, J., concurring in part) ("[Parental rights are] not like the right of *property* which would render a child . . . like a horse or any other *chattel*, subject-matter for . . . gift or contract.") (internal quotation and citation omitted) (emphasis added); Verrocchio v. Verrocchio, 16 Va. App. 314, 317 (1993) ("[A] contractual agreement between parents as to custody is not binding upon our courts."); *cf.* Matter of S.D.S., 539 P.3d 722, 760 (2023) (Bushong, J., dissenting) (criticizing, as unprecedented under Oregon law, the majority's conclusion that an IVF agreement might allow parties to, in effect, "'contract into' parental rights [with respect to a later-born child] without going through adoption procedures").

[24] *Rooks*, 429 P.3d at 592–94.

[25] *See supra* notes 7–17. *But see* LePage v. Ctr. for Reprod. Med., P.C., __ So.3d __, 2024 WL 656591 (Ala. Feb. 16, 2024) (holding that extrauterine children are "children" or "persons" under Alabama law); LA. STAT. ANN. § 9:123 ("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 law.") (emphasis added).

[26] *Rooks*, 429 P.3d at 591 ("Before turning to th[e] task [of determining the legal status of an embryo], we note that Colorado law generally provides that pre-embryos are not "persons," as a legal matter. *See* COLO. REV. STAT. § 13-21-1204 (2018) ('Nothing in this part [Damages for Unlawful Termination of Pregnancy] shall be construed to confer the status of "person" upon a human embryo, fetus, or unborn child *at any stage of development prior to live birth*.'); COLO. REV. STAT. § 18-3.5-110 (2018)

statutes, the *Rooks* Court observed that Colorado does not "confer the status of 'person' upon a human embryo, fetus, or unborn child at *any* stage of development prior to live birth."[27] And so, whether *in vitro* or *in vivo*, at the beginning stages of development or seconds before birth, the highest court in Colorado rejected the notion that an "*embryo*, *fetus*, or *unborn child*" can be persons—period.

That move effectively left "property" as the only category available to the embryos by default.[28] At least, short of the court having found the embryos might still be persons under constitutional (wholly apart from state) law: an issue the *Rooks* Court did not take on.

2. Antoun v. Antoun

A more recent case out of Texas presented a similar dilemma.[29] Though, there, the court sought to distance embryos *from* a Texas statute that would have otherwise treated the "unborn" as persons—basically the inverse of the anti-personhood statutes dealt with in *Rooks*.

Specifically, in *Antoun*, the couple had entered into an IVF agreement that provided that, if they ever divorced, then "the embryos [we]re to be at the disposition of the husband."[30] The couple did, later, divorce. So (like in *Rooks*), how the Court could resolve their embryo-ownership dispute, including whether it could enforce the IVF agreement, turned on the legal status of the embryos. In fact, their legal status became all the more prominent given, after *Dobbs*, the Texas legislature enacted a statute (the Texas Human Life Protection Act) protecting "unborn children," which the statute defined as all "individual living member[s] of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development."[31] And based on it, the wife argued her embryos were protected as persons, guarding them against being destroyed or kept frozen indefinitely. The majority, however, disagreed.

As they saw it, the post-*Dobbs* personhood statute applied to embryos *in vivo*. But not to those *in vitro.* Even though the statute extends to "an individual living member of the homo sapiens species from *fertilization* until birth, including the *entire embryonic* and fetal stages of development," the majority reasoned it was limited to protecting "unborn children" against an "abortion" while "living *in* the body of a pregnant female[.]"[32] In doing so the majority gave particular significance to the legislature's silence about *in-vitro* embryos noting that, well over a decade earlier, a sister court had held that *in-vitro* embryos were "joint property" of their progenitors while, at the same time, inviting the Texas legislature to address the legal status of

('Nothing in this article [Offenses Against Pregnant Women] shall be construed to confer the status of "person" upon a human embryo, fetus, or unborn child *at any stage of development prior to live birth*.').") (emphasis added).

[27] *Id*.

[28] *See* discussion *infra* Concluding Thoughts addressing why there really aren't any options other than property or person and explaining how courts who support the notion that there might be some "interim" or "middle" category does no more than revert to applying black-letter property law in the end. Davis v. Davis 842 S.W.2d 588 (Tenn. 1982); Jocelyn P. v. Joshua P., 250 A.3d 373 (Md. Ct. Spec. App. 2021); Freed v. Freed, 227 N.E.3d 954, 962–64 (Ind. Ct. App. 2024).

[29] Antoun v. Antoun, 2023 WL 4501875, at *7–8 (Tex. App. July 13, 2023) (holding that *in-vitro* embryos, unlike those *in vivo*, did not qualify as "unborn children" under Texas' fetal-personhood statute, but, instead, were "property subject to contractual requirements between the parties").

[30] *Id.* at 1.

[31] *Id.* at 4.

[32] *Id*. at 4–5 (emphasis added).

human embryos in light of its ruling.[33] But because the Texas legislature never took that court up on its offer, nor did it specifically address *in-vitro* embryos in the text of the fetal-personhood statute, the majority concluded that the prior precedent remained intact.[34] They thus affirmed the trial court's award in favor of the husband.

This result did not sit well with one of the judges on the panel. In a pointed concurrence, Judge Kerr called out whatever distinction Texas law seemed to be making between embryos *in vitro* and those *in vivo* as, ultimately, untenable. The main difference turning on their physical "location": embryos *in vivo* being in a womb while those *in vitro* outside of one.[35] For Judge Kerr, such a distinction was unsettling. Indeed, Texas law would effectively confer personhood status to embryos *in vivo* from conception on forward, but treat as property those *in vitro*, even if more developed.

"Frozen or not, embryos are human life—life that our law now protects from being aborted when growing within a mother's body."[36] And as a "life," Judge Kerr asked, isn't the embryo "also worthy of some protection when it exists instead in suspended animation, in limbo? Ought that suspended life be treated as something more than the subject of lifeless *property* and *contract* law?"[37]

Judge Kerr did find the majority's decision was correct as a matter of strict Texas precedent, pointing back to its sister-court's prior ruling. Still, she "urge[d] the Texas Legislature to grapple" with the questions she raised, calling out the seemingly arbitrary distinctions between *in-vivo* and *in-vitro* embryos under Texas law. Otherwise, she warned, a "public-policy clash" would keep "brewing" in the meantime.[38]

3. Kotkowski-Paul v. Paul

The last case I want to call attention to is *Kotkowski-Paul v. Paul*, another embryo-custody battle between a divorcing couple.[39] There, the Eleventh District Court of Appeals for Ohio settled on the notion that *in-vitro* embryos were "marital property" that could be disposed of by contract or, if none controlled, equitable-distribution laws. So, in that respect it mostly followed the going trend. But what makes Paul stand out is that, there, the court was far more explicit about the implications that would follow if it held embryos were anything *other* than property.

For instance, the *Paul* Court brought to the forefront what many embryo-enforcement decisions have tended to let go unsaid: that "implicit in [each of these] holdings is the principle

[33] *Id.* at 5–6. *See also* Roman v. Roman, 193 S.W.3d 40, 44, 54–55 (Tex. App. 2006) (holding that *in-vitro* embryos were "joint property," and not persons, and thus were the subject of an enforceable "Cryopreservation agreement").

[34] *Id.* at 6–7 ("Though this situation is not precisely an issue of statutory construction, the *Roman* court put the legislature on notice of the significance of the issue and the need for legislative action in an area where the legislature had exercised its legislative prerogative. In the ensuing seventeen years, the legislature has done nothing to change the law as pronounced in *Roman*. We hold that the trial court did not abuse its discretion in treating the embryos in question as property subject to contractual requirements between the parties.").

[35] *See id.* at 7–8 (observing embryos are "life that our law now protects from being aborted when growing within a mother's body," yet treats IVF embryos as mere "property" just because they are "in a different location").

[36] *Id.* at 7.

[37] *Id.* (emphasis added).

[38] *Id.* at 7–8.

[39] Kotkowski-Paul v. Paul, 204 N.E.3d 66, 73–74 (Ohio Ct. of Appeals December 12, 2022) (holding *in-vitro* embryos were property that could be the subject of a contract and equitable-distribution laws).

that the frozen embryos are marital *property* that are subject to contractual provisions regarding their ultimate destiny."[40] This, perhaps, goes without saying. Yet few other courts have so pointedly stressed that, without an ownership interest to the embryos, there would be no valid contractual right to enforce or marital property to equitably distribute in the first place.[41]

In a similar vein, the *Paul* Court went out of its way to acknowledge that, if the embryos were not property, then any ownership claim over them might face constitutional scrutiny. Though, there, the Court pointed to concerns under the Thirteenth Amendment—which prevents one class of persons from treating another as personal property[42]—rather than the "right to life"-related implications under the Fourteenth (as famously acknowledged in *Roe*).[43]

Paul thus confronted concerns most other courts have tended to be rather coy about. It pointed out how, without an ownership interest in the embryos, there could be no contract to enforce or "marital property" to distribute. It also recognized that, if the embryos were *not* considered property, owning or making them the subject of a contract may offend the Constitution.

Of course, these problems lurk behind every one of these kinds of disputes. The *Paul* Court was just more transparent about facing them.

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These cases add to the embryo-as-property consensus building among the various courts that have considered the issue. And although they reach their holdings in slightly different ways, and for slightly different reasons, they each agreed on at least one core premise: that the embryos are property, *not* persons. That is, each one had to—whether implicitly or outright—rule out the possibility that the embryo was a person. Not just to get around fetal-personhood statutes that might otherwise protect unborn children from being frozen indefinitely or destroyed.[44] But to keep intact the ownership—or property—interest underpinning the IVF, surrogacy, or any other

[40] *Id.* (emphasis added).

[41] *Id. See also* SIRVEN, *supra* note 1, at § II.E.

[42] *Paul*, 204 N.E.3d at 72. *See also* DILLARD, *supra* note 5, at 49 (arguing that IVF, surrogacy, and other agreements that "treat a class of persons, prospective children, as property" run afoul of the "Reconstruction Era amendments" given they "forbid[] reading the Constitution (and most certainly [the Thirteenth and Fourteenth] amendments) as granting a fundamental right to one class of persons to treat another class of persons (even temporally disadvantaged people like prospective children) as property").

[43] Roe v. Wade, 410 U.S. 113, 156–57 (1973) ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument."); John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J.L. PUB. POL'Y 927, 1010 (2022); C'Zar Bernstein, *The Constitutional Personality of the Unborn*, 18 J.L. ECON. & POL'Y 281 (2023); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539 (2017); Madeline E. Guillot, *Playing God: Why the Thirteenth Amendment Protects Human Embryos from Stem Cell Research*, 14 LOY. J. PUB. INT. L. 171, 173 (2012); DILLARD, *supra* note 5, at 49.

[44] *See* Antoun v. Antoun, 2023 WL 4501875, at *6–7 (Tex. App. July 13, 2023); *cf.* LePage v. Ctr. for Reprod. Med., P.C., __ So.3d __, 2024 WL 656591 (Ala. Feb. 16, 2024) (holding that extrauterine children are "children" or "persons" under Alabama law).

kind of embryo-related agreement. Without that, there could be no enforceable contract to begin with.[45]

Still, by categorizing *in-vitro* embryos as property, instead of persons, these cases seem to rest on rather shaky—if not altogether arbitrary—distinctions. Judge Kerr stressed this in her concurrence, observing how confounding it was that Texas treats one class of embryos as persons, even if they might be at an earlier stage in their development, while at the same time treating others as property based on little other than their "location."[46] I made that same point in my last paper, arguing such a distinction would likely prove unworkable.[47] Not to mention, it raises only more questions than it answers.

For instance, even if *in-vitro* embryos are treated as mere property precisely because they are not located within a womb, what happens to them once they are implanted into their mother's or a surrogate's womb? Do they cease being property (and thus become persons) *then*? If so, what does that mean for surrogacy agreements at large? Do they turn unenforceable just as the embryo enters the surrogate's womb? Or, if the surrogacy agreement were enforced beyond that point, wouldn't that mean the embryo somehow remained being property even after implantation? Were that not the case, wouldn't the implication then be that the unborn child could be the subject of a contract (and thus owned) despite being a person? And if so, would that stay true even after the child is born?[48]

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[45] *Paul*, 204 N.E.3d at 73–74 ("Nevertheless, implicit in [such] holdings is the principle that the frozen embryos are marital property that are subject to contractual provisions regarding their ultimate destiny."); SIRVEN, *supra* note 1, at § II.E.; *Antoun*, 4501875, at *7–8 (Kerr, J., dissenting) ("Ought that suspended life be treated as something more than the subject of *lifeless property and contract law*?") (emphasis added); *cf.* In re Marriage of Rooks, 429 P.3d 579, 591 (Colo. 2018) (ruling out personhood status in order to adjudicate dispute over "marital property").

[46] *Antoun*, 2023 WL 4501875, at *7–8; *cf. LePage* 2024 WL 656591, at *4 (holding *in-vitro* embryos are "children" or "persons" regardless of their "developmental stage, physical *location*, or any other ancillary characteristics") (emphasis added).

[47] It may also prove immaterial given "property," as used within the Due Process Clause under the Fourteenth Amendment, extends to interests that may not qualify as "property" under state or common law. What matters is "whether th[e] [claimed] interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005). For instance, the Ninth Circuit has held that parents had a procedural-due-process claim against the state after allowing a state coroner to donate their deceased-children's eyes without informing them first. *See* Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002). This was so despite, as the state coroner argued, state law prohibiting one from claiming a property interest in human tissue. For the Ninth Circuit, the parents still had a *constitutional* interest in the disposition of their children's bodies, thus falling within the "property"-related protections of the Fourteenth Amendment. *See also* Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) ("Evading the question of whether to call the spouse's interest 'property,' [prior precedent has] recognized that Ohio does grant that right which resides at the very core of a property interest: the right to possess." Thus, given "[t]he concept of 'property' in the law is extremely broad and abstract," and "whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the due process clause is determined by federal law" and not "state law," a wife stated a procedural-due-process claim over the state's removal of her deceased-husband's corneas without notice or a hearing); Crocker v. Pleasant, 778 So.2d 978, 984 (Fla. 2001) (parents of a deceased man could move forward with procedural- and substantive- due-process claims against the city and county after burying their son, who was found dead without any identification, thus depriving the parents of their right to "possess the body for 'burial or disposition'").

[48] Since *Roe*, the Supreme Court has consistently refused to reach the personhood question. The idea being that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, 410, U.S. at 159. Yet IVF and surrogacy have now posed the exact same question to lower courts, albeit in reverse. That is, assuming an *in-vitro* embryo is property, at what point does it cross over from property to person? At implantation? At viability? At a certain trimester? At birth? Sometime after birth? Lower courts have had—and will continue—to make judgment calls on these questions without any guidance so far from our highest Court.

This is a messy area of law. Hence why courts continue to struggle with how to classify human embryos given, depending on what status they choose, rights to abortions, IVF, and surrogacy arrangements may be directly or indirectly impacted—if not rendered illegal altogether.[49] Though however courts draw these distinctions, extending property-law notions seems to provoke more questions than answers. A few recent cases on post-surrogacy births highlight that tension best. I address those next.

4. Cases Enforcing the Terms of Surrogacy Contracts *After* Birth

Along with the three cases I highlighted above, I want to briefly touch on a few cases that enforced the terms of IVF and surrogacy agreements as well. The reason is, since the last time I wrote on this topic, courts have begun enforcing these agreements even after IVF- and surrogacy-children were *born*, taking the embryo-as-property position a step still further. One of the clearest examples of a court doing so is offered in *Matter of S.D.S.*, a recent decision from the Oregon Supreme Court.[50]

There, a former egg donor wanted to be recognized as the mother of an eight-year-old boy born to a surrogate who his father had hired to bring him to term. The father challenged the donor's status as mother, arguing that, even though she was technically a genetic parent of the child, she gave up whatever parental rights she had once she entered an egg-donation agreement with him. Along with that, he argued Oregon law presumed that the woman who physically birthed the child—the surrogate—was his legal mother, and that she, days after birth, willingly revoked her parental rights through a stipulated judgment recognizing the father as the boy's sole parent. The Oregon Supreme Court sided with the father, holding that the donor's "genetic" connection to the child, without more, was not enough to make her his mother.[51]

Legal parentage, however, was not the end of the story. Going back to the original egg-donation agreement, the Court observed the donor may have *contractual* rights vis-à-vis the child that "overlap" with traditional "parental rights."[52] So, even though she had no right as a "*legal parent*" to visit, associate with, or "play some type of 'mothering role'" for the child, the Court ruled the donor "may have bargained for certain nonparental rights with respect to S[] . . . based on her written and unwritten agreements with [the father]."[53]

The majority thus "tasked the trial court," on remand, "with evaluating any agreements between [the donor] and [the father]," including whether they had "bargained" ahead of time

[49] Davis v. Davis 842 S.W.2d 588, 594 (Tenn. 1992) ("One of the fundamental issues the inquiry [concerning custody of IVF embryos] poses is whether the preembryos in this case should be considered 'persons' or 'property' in the contemplation of the law."); Freed v. Freed, 227 N.E.3d 954, 964 (Ind. Ct. App. 2024) ("The ways courts have classified pre-embryos—as property, persons, or an interim category—impacts the outcome of pre-embryo disposition cases."); Paige Mackey Murray, *Disposition of Pre-Embryos Upon Dissolution of Marriage in Colorado*, COLO. LAW., February 2021, at 40, 41 ("One of the foundational principles that guides courts in determining how to resolve disputes over pre-embryos is whether pre-embryos are considered 'persons' under the law."); Wendy Dullea Bowie, *Multiplication and Division - New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 174 (1990) ("Theoretically, any state statute that . . . provides for the destruction of unused embryos, could be characterized as state action that deprives the individual embryo of life without due process of law.").

[50] 539 P.3d 722 (2023).

[51] *Id.* at 741.

[52] *Id.* at 745.

[53] *Id.* at 745.

over rights that might otherwise "overlap with some 'parental rights,'" such as the "right to be known to [the] child, to visit, or to have an ongoing relationship" with him.[54] In other words, the majority held that one's "bargained"-for contractual rights to a child could override a legal parent's—here the father's—wishes.

Troubled by that holding, Justice Bushon (joined by three colleagues) dissented that "no Oregon court—before today's majority opinion—has ever held that Oregon law allows a person to 'contract into' parental rights without going through adoption procedures."[55] "At most," he added, "a court will *consider* [the] contracts the parents have executed when determining parental rights[.]"[56] "But even there, the ultimate decision is made by the court based on its determination of what is in the child's best interests—not the terms of a contract or what the parties to a contract may have intended."[57] "[C]ontract law," as he put it, "is an awkward fit."[58]

High courts in Wisconsin, Iowa, Ohio, and California have reached similar conclusions.[59] They were just a bit less explicit about how far the contracting parties' interest could extend over the legal parents' wishes.

These decisions take the embryos-as-property notion even further. They go past birth, treating the surrogate-born child as something less than a full person—such that the child remains the subject of an enforceable contract—even years after leaving the womb.[60] This is precisely what makes "contract law [such] an awkward fit," to borrow Justice Bushon's phrasing. Were that not the implication, the surrogacy agreement would cease being enforceable upon birth (if not implantation) given constitutional and policy-related prohibitions against allowing one class of persons to own another: the post-surrogacy-born child.[61]

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[54] *Id*.

[55] *Id*. at 760.

[56] *Id*. (emphasis added).

[57] *Id.*

[58] *Id.*

[59] In re F.T.R., 833 N.W.2d 634, 652 (Wis. 2013) (holding that "a [Parentage Agreement] is a valid, enforceable contract" with respect to born child); P.M. v. T.B., 907 N.W.2d 522, 544 (Iowa 2018) (same and adding that, even if the child had "substantive due process rights" at stake for which the surrogate-mother had standing to assert, she "waived her rights to assert claims on behalf of Baby H in the Surrogacy Agreement"); S.N. v. M.B., 935 N.E.2d 463, 471 (Ohio Ct. App. 2010) (holding "we must apply the law of contracts in interpreting the validity of the surrogacy agreement in the instant matter" even though the child was already born); C.M. v. M.C., 7 Cal. App. 5th 1188, 1202–03 (2017) (enforcing surrogacy agreement with respect to a born child).

[60] Barry E. Adler, *Property Rights in Children*, 95 NOTRE DAME L. REV. 1629 (2020) (arguing once a surrogate is "implanted with an embryo, she becomes, in essence, a *bailee*," who would thus be "contractually obligated to relinquish the child, once born, . . . [as] *property* not her own") (emphasis added); *see also*, Kotkowski-Paul v. Paul, 204 N.E.3d 66, 73–74 (Ohio Ct. of Appeals December 12, 2022) (enforcement of contract implies embryo is property such that it can be "subject to contractual provisions regarding their ultimate destiny"). More recently, in LePage v. Ctr. for Reprod. Med., P.C., the Alabama Supreme Court observed that, absent recognizing *in-vitro* embryos as persons, then an unintended consequence would be that surrogacy-born children (having been conceived *in vitro*) never amount to full persons—even after birth. __ So.3d __, 2024 WL 656591 at *3 (Ala. Feb. 16, 2024) ("[O]ne latent implication . . . is that, under the defendants' [position that in-vitro embryos are not persons], even a full-term infant or toddler conceived through IVF and gestated to term in an in vitro environment would not qualify as a 'child' or 'person,'" even after birth).

[61] DILLARD, *supra* note 5, at 49; *see also* In re Giavonna F. P.-G., 142 A.D.3d 931, 932, 36 N.Y.S.3d 892, 893–94 (2016) (refusing to enforce surrogacy agreement in determining custody and other parental rights given "[s]urrogate parenting contracts have been declared contrary to the public policy, and are void and unenforceable"); *F.T.R.*, 833 N.W.2d at 658–59 (Abrahamson,

Constitutional and policy-related concerns aside, surrogacy contracts blur whatever lines courts might have otherwise drawn between embryos *in vitro* and those *in vivo*. These contracts, to be enforceable, depend on an underlying property interest just the same. That's true even if courts enforce them without calling too much attention to the underlying status of the *in-vivo* embryo or, if already born, child.

II. FATHERS' PROPERTY INTERESTS REVISITED.

As shown above, these developments have only bolstered a father's claim that he has an ownership interest to the embryo. Some of these cases found the embryos were "property" of the mother and father outright; others were a bit more subtle about it. Either way, by enforcing the IVF and surrogacy agreements, they inevitably found that the embryos were, at bottom, something the parties owned and thus could make the subject of a contract. Or, if no contract governed, "marital property" that could be equitably "divided" in a divorce.

This means that courts have held that embryos are property. And not just *in-vitro* ones stored in cryopreserved chambers. But *in-vivo* embryos already implanted into a surrogate and, for that matter, post-surrogacy-born children as well. And so, whatever distinction one might've drawn between *in-vitro* and *in-vivo* embryos years ago has altogether broken down. Save for a small minority,[62] most courts (and commentators) appear locked into the position that embryos—inside the womb or out—are property of their progenitors.[63] Fathers included.[64]

As discussed next, fathers looking to challenge an abortion can point back to these cases as giving them grounds to demand due process before their "property" is terminated.

A. How A Challenge Could Arise

Fact patterns that may give rise to this sort of challenge could take various forms. It may, for instance, involve a couple that entrusted their embryo to a surrogate who, they later learn, has

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C.J., dissenting) (rejecting enforcement of a surrogacy agreement over "*an existing child*" because it implicates the "constitutional rights of the child" along with broader "public policy" prohibitions such as, among others, the "policy against baby-buying") (emphasis added).

[62] *LePage*, 2024 WL 656591 (recognizing *in-vitro* embryos as persons because, among other things, "one latent implication" of not doing so would be that "even a full-term infant or toddler conceived through IVF would not qualify as a 'child' or 'person,'" even after birth); La. Stat. Ann. § 9:123 (recognizing in vitro embryos as "juridical person[s]") (emphasis added).

[63] *See* Dara E. Purvis, *Frozen Embryos, Male Consent, and Masculinities*, 97 IND. L.J. 611, 652–53 (2022) ("Assisted reproductive technologies, particularly IVF and frozen embryos, challenge rhetoric around abortion, . . . [leading] [e]very court that has not been explicitly instructed by law to treat embryos as *persons* [to] instead treat[] them as *property*.") (emphasis added).

[64] As discussed in note 47, *supra*, one can pursue a procedural-due-process claim for an interest that, despite not being considered "property" under state or common law, is still protected by the Fourteenth Amendment. Courts have, in fact, adjudicated rather analogous claims based on next-of-kin rights to their deceased-relatives bodily remains. *See, e.g.*, Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002) (parents of deceased children could pursue procedural-due process claims after a coroner donated the children's organs without informing the parents first, even though the organs were not considered property under state law); Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) (same but claim brought by wife of deceased husband); Crocker v. Pleasant, 778 So. 2d 978, 984 (Fla. 2001) (same but involving state's burial of deceased child). That is, even if one cannot establish a traditional "property" interest under *state* law, that would not, on its own, prevent one from doing so under *federal* law—as the Constitution's protection of "property" extends more broadly than state and common law. *See* SIRVEN, *supra* note 1, at § III.

scheduled an appointment to abort the child at a local hospital or abortion clinic.[65] Or, it may simply involve a husband who learns that his wife became pregnant but has decided to have an abortion, without seeking his input or, at least, letting him know ahead of time.

The core fact would be that a willing father (or, in the surrogacy context, couple) either learns that an abortion will soon take place, or has already taken place, without ever affording him a say or chance to be heard. As I covered in my last paper, that is the *least* that the Due Process Clause demands: "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[66]

Beyond that, a challenge could take one of two paths. Either it comes in as one seeking relief *before* the abortion. Or as one seeking redress *after* it has already occurred. Last time I focused mainly on the pre-abortion challenge, where a father might seek injunctive relief pending being afforded with due process.[67] But he would still have one even if he brought it after the abortion occurred. And along with it, claims for substantive deprivations of this property right, including damages, as well.[68]

B. A Word About State Action

Whenever the state grants private citizens, whether by statute, code or regulation, the ability to deprive others of property without due process, state action is satisfied through operation of

[65] In § III.B., I will touch a bit more on how "state action" would be implicated here, though the easiest form would involve a state-run abortion facility, like a VA or public hospital.

[66] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (internal quotation and citation omitted). *See also* SIRVEN, *supra* note 1, at § III.C. It is worth noting that the right to "terminate a pregnancy" is often assumed to include the right to end the life of the fetus. Some scholars, however, have argued that might not necessarily be the case. Stephen G. Gilles, *Does the Right to Elective Abortion include the Right to Ensure the Death of the Fetus,* 49 U. RICH. L. REV. 1009 (2015) (arguing the right to an abortion may not necessarily entail the right to insist on the death of the unborn child, and that technological advancements—like artificial wombs—may offer an alternative to traditional abortions). Should a court have to balance a father's due-process right against the abortion right, particularly in the later stages of pregnancy, it's an open question whether he might demand his child be transferred to, say, an artificial womb or surrogate.

[67] Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012) (affirming preliminary injunction against the City preventing it from disposing of homeless' peoples' belongings, deemed "property" for purposes of the Fourteenth Amendment, without due process of law); Baghaei-Rad v. Jones, No. 76605/2013, 2014 WL 344267, at *3 (N.Y. Sup. Ct. Jan. 27, 2014) (granting a preliminary injunction against the defendant from "selling, transferring or removing" animal embryos given the "unique quality and character" of the embryos).

[68] *See, e.g.*, In re: Pacific Fertility Center Litigation, No. 18-CV-01586-JSC, 2021 WL 3602266, at *1 (N.D. Cal. Aug. 13, 2021) (entering judgment for, approximately, $13.5 million in favor of the plaintiffs' claims against fertility clinic that negligently destroyed the plaintiffs' cryogenically preserved embryos); Frisina v. Women & Infants Hosp. of Rhode Island, No. CIV. A. 95-4037, 2002 WL 1288784, at *10 (R.I. Super. May 30, 2002) ("[Hospital's] motion for summary judgment on the issue of damages for emotional harm due to the loss of irreplaceable property [i.e., cryogenically preserved embryos] must be, and, is denied."); Del Zio v. Columbia Presbyterian Med. Ctr., No. 74–3558 (S.D.N.Y. April 12, 1978) (awarding female IVF patient damages to compensate her for the destruction of her eggs).

the law itself.[69] That is, if the statute, in practice, causes the deprivation, state action is met even if the parties involved are not themselves state actors.[70]

Fathers looking to challenge an abortion could argue that is precisely what state abortion statutes accomplish. For the very act taken to deprive them of their property interest—the abortion—is permitted only because the state has passed a law allowing for the mother to do so, without giving him any notice or a chance to be heard. That is particularly so after *Dobbs* overturned *Casey*, eliminating any competing right from the mother to object to giving notice or, on top of that, asking for the father's consent on constitutional grounds.

This means that state action would, potentially, be satisfied even if the dispute arises among private actors. That said, many abortions are done at public facilities, like university and VA hospitals. I thus raise this only to make one other observation about how *Dobbs* has changed the legal landscape in more ways than just one.

C. Implications for Either Holding

Against this backdrop, should a court receive a demand for due process against an abortion, the presiding court will inevitably have to decide the legal status of the embryo. There would be no narrower ground to adjudicate the dispute, at least on the merits. And in turn, the court would be left with no easy answers. Particularly once it considers the broader implications for either holding.

For instance, if a court were to resist recognizing the father's due-process rights concerning the embryo's disposition, it would imply—or perhaps outright hold—he has no property interest in it. But at least two major consequences would flow as a result. First, it would imply that embryos, as a class, are not the sort of thing that one can claim an ownership interest over, rendering any agreement purporting otherwise—like IVF and surrogacy contracts—unenforceable. That is, if a father is found to have no property interest at the time of an abortion, it would be tough to square how he (or anyone else) wouldn't meet the same fate if, for instance, he were looking to enforce a surrogacy agreement instead. Second, and more notable still, it would imply the reason the father has no property interest to the embryo is precisely because the embryo is *not* property—but a person.

On the other hand, if the court did recognize the father's property interest, his basic due-process rights would seem all but guaranteed. Now that *Dobbs* has downgraded abortion rights

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[69] Fuentes v. Shevin, 407 U.S. 67, 96–97 (1972) ("We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor."); Loudermill, 470 U.S. at 541 ("[Ohio] may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. In short, once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the Ohio statute.") (internal citations and quotations omitted); Newman, 287 F.3d at 798 ("The effect of § 27491.47 was to remove a procedure—notice and request for consent prior to the deprivation—and a remedy—the opportunity to seek redress for the deprivation in California's courts. . . . 'While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'") (quoting *Loudermill*).

[70] BOWIE, *supra* note 49, at 174 ("Theoretically, any state statute . . . that provides for the destruction of unused embryos, could be characterized as state action that deprives the individual embryo of life without due process of law. *Arguably, legislation that delegates that decision to the parents could be similarly characterized.*") (emphasis added).

from one grounded in the Constitution to one provided, if at all, under state law, the father's competing right to due process would likely be treated as paramount given it implicates a federally protected one. In fact, hardly do constitutional rights yield to those stemming only under state law. Though at the very least, a court would have to balance the father's constitutional rights against those the mother has under state law, ensuring he is given basic procedural protections—like notice and a hearing—along with substantive remedies as well—like the right to control the remains of his property[71] and to seek damages from those who deprived him of it.[72]

CONCLUDING THOUGHTS: HUMAN EMBRYOS ARE EITHER "PERSONS" OR "PROPERTY," AS THERE REALLY ISN'T ANYTHING IN BETWEEN

Should a father bring the sort of challenge detailed above, the presiding court would have to decide the legal status of a human embryo. There would, on the merits, be no narrower ground to resolve it.[73] So either the court finds the in-vivo embryo is owned by its progenitors—i.e., property—thus giving rise to the father's right to due process. Or holds it is not, implying or perhaps outright acknowledging that the embryo is a child—i.e., a person—deserving of constitutional protection. As far as the law goes, there is no in-between.

I raise this point because some courts (and commentators) have pedaled the notion that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[74] The idea being the law recognizes such a thing that, on the one hand, can be owned and thus the subject of a contract while, on the other, be regarded as anything but property. It doesn't.[75] And that is why, even though these courts might "pay lip service" to the notion that embryos occupy some "interim category," they wind up applying black-letter property law in the end.[76] Besides, that

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[71] *See* Crocker v. Pleasant, 778 So. 2d 978, 984 (Fla. 2001).

[72] *See supra* note 57.

[73] *Cf.* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), (declining to reach whether unborn children are "persons" under the Fourteenth Amendment); LePage v. Ctr. for Reprod. Med., P.C., __ So.3d __, 2024 WL 656591 at *2 (Ala. Feb. 16, 2024) ("The parties to these cases have raised many difficult questions, including ones about the ethical status of extrauterine children, the application of the 14th Amendment to the United States Constitution to such children[.] But the Court today need not address these questions because, as explained below, the relevant statutory text is clear: the Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation.").

[74] Davis v. Davis 842 S.W.2d 588, 595, 604 (Tenn. 1992).

[75] *See* 90 AM. JUR. PROOF OF FACTS 3d 1 ("Currently, the law has two clearly separated categories: property, and juristic persons."); *see supra* note 5.

[76] Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2132–33 (2007) (observing that when courts make it seem as if embryos occupy a "status of property deserving of special respect," at bottom, it offers no "middle-ground approach, but rather is synonymous with the status of pure property" because "[w]hile a court may designate the embryo as deserving of 'special respect,' no special treatment is afforded to the embryo under this status.") (citing *Davis v. Davis* as an example); Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 414 (2013) (observing that although "[t]he majority of commentators and courts subscribe to or at least pay lip service to a conceptual middle ground between viewing the frozen embryo as human and viewing the frozen embryo as mere property," in reality, "courts routinely decide in favor of their destruction," with the "term"—i.e., "entity deserving special respect"—"persist[ing] . . . as nothing more than a comfort for Americans who are unwilling to designate frozen embryos as property"); SIRVEN, *supra* note 1, at §§ II.C, II.E.

embryos might fit some unique, middle-category status would not, constitutionally speaking, prove dispositive anyway.[77]

I want to conclude with one final observation. Most of us have no trouble with the notion that animals—like horses, cattle, sheep, poultry, or the like—can be owned.[78] Or, put another way, that living creatures of all kinds can become one's legal property. For that matter, even though we don't usually think of our dogs or cats as our personal "property," we tend to have no reservations about calling ourselves their respective "owners." It's really only when we deal with human embryos that the notion of property, and corresponding ownership rights, no longer feels fitting. Not just because embryos are living creatures; after all, we (and centuries of common law) have had no problem treating every other kind of living creature as property, along with their embryos.[79]

The real hang-up here is that human embryos are uniquely *human.* And it is exactly *that* quality which calls us to ask whether they deserve to be treated, not as mere property, but, as *persons*, for whom—as the *Roe* Court itself recognized—the "right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[80]

[77] The Due Process Clause extends broadly enough to protect interests that, despite not being considered property under state or common law, merit protection on constitutional grounds. Parents have, in fact, prevailed on rather analogous claims—ones seeking redress for the deprivation of their deceased-children's' organs, even though state laws prohibited them from actually owning the organs as property. *See supra* notes 47, 64. And so, if parents have prevailed on due-process claims for interests categorically barred from being considered their "property" under state law, it stands to reason that a father would have at least as strong a claim for the deprivation of his "special property": the embryo.

[78] *See* 4 AM. JUR. 2d Animals § 3 ("Animals are generally regarded as personal property. . . . [For] domestic animals, which include horses, cattle, sheep, barnyard poultry, and the like, a person may have as absolute a dominion and property as over any other useful and valuable chattel.").

[79] *See, e.g.*, Fairview State Bank v. Edwards, 739 P.2d 994, 995 (Okla. 1987) ("Because both creditors involved in this case have security interests in debtors' livestock, including increases, we conclude that these creditors also have security interests in the proceeds received by debtors from the sale of *embryos* produced by debtors' donor cows.") (emphasis added).

[80] 410 U.S. 113, 156–57.