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UNDUE PROCESS: A FATHER'S PROPRIETARY INTEREST IN AN EMBRYO AND ITS CLASH WITH *CASEY*

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Abstract

In *Planned Parenthood of Missouri v. Danforth* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court respectively held that it is unconstitutional to require a mother to seek consent from or to notify the father before she has an abortion. Fathers thus lost consent and notification rights. However, courts have recently begun to recognize a property interest in human embryos. This legal trend—resulting from the widespread use of assisted reproductive technology—could allow fathers to claim that the abortion of their unborn children violates the Due Process Clause, which protects people from being deprived of "life, liberty, or property, without due process of law."

A conflict thus arises between *Casey*'s holding and the due process rights fathers are entitled to in the context of abortion. This Note reviews cases that have found property and property-like interests in embryos, as well as due process jurisprudence regarding property interests. This Note argues that since embryos have been deemed property, fathers have grounds for challenging abortions as unconstitutional deprivations of their property interest without "due process of law." Yet, since due process rights for fathers in the abortion context would essentially guarantee the very thing the *Casey* decision denied fathers, this Note argues that the Supreme Court should reexamine its holding in *Casey* to balance the two conflicting Fourteenth Amendment rights.

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INTRODUCTION

In *Planned Parenthood of Missouri v. Danforth*,[1] and later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] the United States Supreme Court held that fathers need not consent to, or be notified of, the abortion of their unborn child. The Court deemed such restrictions an "undue burden" on a woman's right to have an abortion.[3] Fathers lost consent and notification rights ever since. However, courts have recently begun to recognize property interests in human embryos. This trend could allow fathers to claim that the abortion of their unborn children violates the Due Process Clause, which states that no person shall be deprived of "life, liberty, or property, without due process of law."[4]

The legal status of embryos as property would confer upon fathers due process rights that could protect them from being deprived of their property via an abortion. Yet, allowing fathers due process rights in the abortion context conflicts with *Casey* because it would guarantee fathers precisely what *Casey* denies: the right to notice and an opportunity to be

1. 428 U.S. 52, 69 (1976) (striking a spousal consent statute as an impermissible restriction on abortion rights).

2. 505 U.S. 833, 893–95 (1992) (striking a spousal notification statute as an "undue burden" on abortion rights).

3. *Id.* at 895.

4. U.S. CONST. amend. XIV, § 1. As an aside, the focus of this Note is only on due process rights that stem from law that regards embryos as property. This Note does not seek here to support the proposition that embryos should be regarded as property—to the contrary, the Author maintains embryos should be afforded full personhood status. Nevertheless, the development of recent case law would seemingly entitle procedural due process protections to fathers who want to prevent the abortion of their unborn child on the grounds of a property interest.

heard.[5] Therefore, *Casey* should be reexamined to address this conflict between two Fourteenth Amendment rights.

This Note argues that fathers living in the post-*Casey* world may be entitled to constitutional rights that *Casey* instructs states to deny. To demonstrate this conflict, Part I of this Note examines how fathers' due process rights in the abortion context would create a tension with the *Casey* decision. Part II explains how the widespread use of assisted reproductive technology has led to case law establishing property interests in embryos. Part III explains how the Due Process Clause provides basic procedural rights that protect people from being deprived of their property unfairly. Lastly, Part IV revisits how granting fathers due process rights would conflict with *Casey* and explains why the Supreme Court should address this tension.

I. THE CONFLICT BETWEEN FATHERS' DUE PROCESS RIGHTS IN AN ABORTION AND *CASEY*

Fathers' due process rights in the abortion context are based on laws that deem human embryos, directly or indirectly, to be property.[6] Although human embryos are not typically thought of as property, the word "property" in the Due Process Clause has been interpreted broadly to cover proprietary interests that are also not ordinarily thought of as property. For example, government jobs, a deceased kin's body parts, and welfare payments—things not usually understood as property—have been deemed protected "property" interests under the Due Process Clause.[7] As this Note demonstrates in Parts II and III, a developing body of case law has deemed embryos property, and wherever a property interest lies, due process protects it.

In short, the Due Process Clause guarantees individuals certain substantive and procedural rights. The most basic procedural rights due process assures are notice and an opportunity to be heard.[8] But in the

5. *Casey*, 505 U.S. at 893–95; Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that [a] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

6. While many find the characterization of a frozen embryo as property disconcerting, scholars debate the merits of treating embryos as property, persons, or something in-between. *See* Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 410–15 (2013) (discussing the various legal statuses of the frozen embryo).

7. *See infra* Part III.

8. *Mullane*, 339 U.S. at 313–14; *see also* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863))).

abortion context, fathers are not—and in fact they cannot be—given that. *Casey* and its progeny have deemed any governmental requirement to provide a father with notice of or to ask for his consent to an abortion as being an unconstitutional undue burden.[9] Therefore, after *Casey*, state actors, such as public medical facilities—and, more generally, state laws that adhere to *Casey's* repudiation of fathers' notice rights—participate in a system that deprives fathers of a property interest without affording them due process before their unborn child in the embryonic stage of life is aborted.[10]

It is clear then that recognizing a father's due process right in the abortion context would conflict with some aspects of a mother's abortion right under *Casey*; namely, requiring that fathers be notified before an abortion would violate *Casey*'s ban on spousal notification laws. But by the same token, following *Casey* in this context would violate basic principles of due process with respect to the father's interest. So what should be done about this conflict? Fittingly enough, the *Casey* majority answers that question, too. Indeed, the *Casey* majority addressed the principle of *stare decisis*, which requires a court to follow precedent, and stated that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[11] The Court cautioned, however, that precedent should be followed unless and until "a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[12]

For fathers in the abortion context, the "error" of *Casey* is that its enforcement may now "doom" their constitutional right to due process of law. This Note thus argues that, for the very reasons the *Casey* Court said

9. *E.g.*, *Casey*, 505 U.S. at 895 ("[Section] 3209 . . . will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 69 (1976) (striking a spousal consent statute as an impermissible restriction on abortion rights).

10. The Due Process Clause only protects individuals from deprivations by the State. *E.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982). In the abortion context, public hospitals that perform abortions would be considered state actors against whom a father could bring his claim. More generally, state laws that allow for deprivations of property without due process can meet the requirements for state action. *See, e.g.*, *Fuentes*, 407 U.S. at 96 (holding that two state statutes "work[ed as] 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" by the State); Newman v. Sathyavaglswaran, 287 F.3d 786, 795, 798 (9th Cir. 2002) (striking a state statute that allowed a public hospital to remove a deceased's body parts without the kin's consent or notice). Discussion of state actors is beyond the scope of this Note, which focuses on the theoretical implications of a father's property interest in embryos and assumes a state actor in this context.

11. *Casey*, 505 U.S. at 854.

12. *Id.*

that precedent should be reexamined, the Supreme Court should reexamine *Casey*.

II. PROPERTY RIGHTS IN EMBRYOS

The post-*Casey* conflict between a mother's abortion right and a father's due process right is based on embryos being recognized as "property." But not all courts agree with this notion. The property/person dichotomy regarding the legal status of human embryos is one that continues to be debated,[13] especially since how the law defines human embryos has significant implications.[14] For example, the embryo's status as property could mean fathers are entitled to due process in the case of a possible abortion, whereas the embryo's status as a person would confer upon it a right to life that is primary, and its destruction would constitute a homicide.[15] Either scenario would conflict with the mother's abortion right in some respect. Deeming embryos property, however, may entail a lesser threat to abortion rights. This consideration perhaps explains why many lower courts have extended the embryos-as-property notion.[16] Regardless of the reasons courts have deemed embryos property instead of persons, examining the contexts where courts have done so is important for understanding this conflict.

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13. The moral, philosophical, and public policy concerns about deeming human embryos as property and the reasons for doing so are beyond the scope of this Note. This Note focuses only on the implications those cases have for fathers in the abortion context.

14. Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 396–97 (2005) ("[S]hould [a] court determine that the embryo is human life, its authority to direct the destruction of the embryo will be significantly limited. By contrast, a determination that the embryo is purely property provides the court and the progenitors with more latitude in arriving at possible options for disposition of the embryo.").

15. *See* Roe v. Wade, 410 U.S. 113, 156–57 (1973) (stating that if "personhood is established, the appellant's case [a woman seeking an abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment"); *see also Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part) (explaining that without the status of "person," a fetus would not have a "right to life"); Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 205 (1997) ("If the law deems frozen embryos 'persons,' their damage would constitute criminal or tort assault, their destruction would be homicide . . . .").

16. Upchurch, *supra* note 14, at 403 ("The legal status of 'personhood' would also arguably give the embryo its own protected rights. This could possibly have the effect of outlawing, or at least rendering impractical, the work of most IVF clinics. For these reasons, no other jurisdiction has adopted the approach followed by the Louisiana Legislature and characterized embryos as 'persons.'" (footnotes omitted)).

A. *Problems Involving Leftover Embryos*

Science sometimes develops faster than the law. This is particularly true of assisted reproductive technologies (ART), principally in vitro fertilization (IVF), which enables people to have children who otherwise cannot.[17] However, the widespread use of ART has provoked unintended consequences that have raised difficult legal questions—chiefly, what is the legal status of the human embryo?

Although ART provides more people with the opportunity to conceive children, its use invites certain problems. Take IVF, for example. It presents health risks for patients[18] and is very expensive.[19] To deal with these concerns, IVF patients often create and keep multiple embryos frozen through a process known as cryopreservation.[20] This technique increases parents' overall chances of a successful live birth by allowing for more than one embryo to be used, minimizes health risks by reducing the invasiveness inherent in the procedure, and reduces the procedure's costs.[21] As a result, however, once an IVF patient successfully becomes pregnant, she will often have leftover embryos that are then stored and kept frozen indefinitely.[22] Recent studies estimate there are over half a million cryopreserved embryos stored in the United States.[23]

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17. *See In Vitro Fertilization (IVF)*, MAYO CLINIC (June 27, 2013), http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/why-its-done/prc-2001 8905?p=1.

18. *See id.*

19. The national average costs for an IVF procedure is about $12,000; however, it jumps to about $20,000 once other necessary costs are added. *See* Jennifer Gerson Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility*, FORBES (Feb. 6, 2014, 3:00 PM) http://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility/.

20. *See* Jennifer Marigliano Dehmel, Note, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1381–82 (1995).

21. *See* DEP'T OF OBSTETRICS & GYNECOLOGY, UNIV. OF ROCHESTER MED. CTR., IN VITRO FERTILIZATION (2015), https://www.urmc.rochester.edu/MediaLibraries/URMCMedia/fertility-center/documents/In-Vito-Fertilization-4-29-15-updated.pdf.

22. *See* Laura Biel, *What Happens to Extra Embryos After IVF?*, CNN.COM (Sept. 2, 2009, 12:32 PM), http://www.cnn.com/2009/HEALTH/09/01/extra.ivf.embryos/ (explaining that parents may have up to six leftover embryos after successfully having a child through IVF). Although embryos can be stored indefinitely, facilities charge between $300 and $1,200 a year to store embryos. Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html?_r=0.

23. *E.g.*, Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 378 (2013); Liza Mundy, *Souls on Ice: America's Embryo Glut and the Wasted Promise of Stem Cell Research*, MOTHER JONES (July 2006), http://www.motherjones.com/politics/2006/07/souls-ice-americas-embryo-glut-and-wasted-promise-stem-cell-research (calculating, based on a 2002 study, that there are over

Dealing with the growing population of leftover embryos is problematic because they have a vague status in the law. Given the embryos' unclear legal status, those involved with an IVF procedure—couples, doctors, and IVF clinics—are left in the dark, not knowing how to deal with the leftover embryos. This uncertainty raises difficult questions that have no clear answers: Should the clinic keep the embryos in storage indefinitely?[24] Can the clinic donate the embryos? If the clinic negligently damages or loses the embryos, or simply refuses to return them,[25] can the parents sue the clinic? On what legal grounds might they do so? Tort? Loss of property?[26] Can the parents seek criminal charges against the clinic for kidnapping or homicide?[27] The answers to these questions each depend on the embryos' legal status.[28]

These difficult questions illustrate why it is important to define an embryo's legal status, so as to give parties involved with IVF, and ART generally, an understanding of their rights in the embryos and what liabilities and dangers they face. Courts deal directly with this issue when, for example, couples with leftover embryos seek a divorce,[29] when one who owns frozen reproductive material dies,[30] or when a couple reclaims its embryos from a clinic but the clinic refuses to return them[31] or has destroyed, donated, or lost them.[32]

500,000 frozen embryos in the United States). There is such an excess of frozen embryos that the government has a campaign to spread awareness of their availability for adoption. *See Embryo Adoption*, OFF. POPULATION AFF., http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/ (last visited Sept. 9, 2016).

24. IVF clinics would be required to keep the embryos in storage indefinitely if embryos are granted personhood status. If the embryo is defined as a person, the disposing of the embryos would constitute homicide and the IVF enterprise would likely be outlawed or rendered impractical. *See* Upchurch, *supra* note 14, at 403 & n.44 ("This [personhood] status could hamper the work of IVF clinics because it could require IVF clinics to provide storage for the embryos indefinitely. Also, the IVF clinic could arguably be subject to lawsuits brought by the guardians of the embryos if the embryo is damaged, wrongfully implanted in another person, or disposed of by the clinic.").

25. *See* York v. Jones, 717 F. Supp. 421, 423–25 (E.D. Va. 1989) (holding that a clinic must return a couple's embryos under bailment law).

26. *See* Frisina v. Women & Infants Hosp. of R.I., No. 95-4037, 2002 WL 1288784, at *9–10 (R.I. Super. Ct. May 30, 2002) (allowing a plaintiff to advance an argument for recovery for damages for emotional distress based on the loss of irreplaceable property).

27. *See* Guzman, *supra* note 15, at 205.

28. Upchurch, *supra* note 14, at 396 ("Under an adversarial model, the court must assign a legal status to the embryo. Such a determination is imperative, as it will determine the progenitors' and the court's authority over the embryo and dictate the possible options for resolution of the dispute.").

29. *E.g.*, Kass v. Kass, 696 N.E.2d 174, 177 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992); Litowitz v. Litowitz, 48 P.3d 261, 264 (Wash. 2002).

30. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276–78 (Cal. Ct. App. 1993).

31. *See* York v. Jones, 717 F. Supp. 421, 423–25 (E.D. Va. 1989).

32. *See* Frisina v. Women & Infants Hosp. of R.I., No. 95-4037, 2002 WL 1288784, at *1–2 (R.I. Super. Ct. May 30, 2002).

These ordinary, real-life situations often provoke ligation that requires courts to decide an embryo's legal status to resolve the dispute. Doing so, however, puts courts in an uncomfortable position. Courts have inconsistently defined the legal statuses of embryos,[33] and in fact the determination may invite moral and philosophical considerations that go well beyond their expertise.[34] Yet, for better or worse, some courts have tended to apply property law in cases involving reproductive materials and cryogenically preserved embryos.

B. *Sperm as Property*

Courts have recognized a property interest in one's own genetic and reproductive material.[35] A principal case is *Hecht v. Superior Court*,[36] in which Mr. Kane, the decedent, had deposited fifteen vials of his sperm at a California sperm bank.[37] There he signed a "Specimen Storage Agreement" giving his partner, Ms. Hecht, control over the sperm in the event of his death.[38] A few days later, Mr. Kane executed a will bequeathing all "right, title, and interest" in the sperm to Ms. Hecht and wrote a letter stating his desire that Ms. Hecht use the sperm to become pregnant, should she so choose.[39] Several weeks later, Mr. Kane sent a letter to both his actual and potential children (those who would be born from his sperm) declaring his love and affection for them.[40] A week after penning the letter, he committed suicide.[41]

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33. *See* Guzman, *supra* note 15, at 197 (discussing the confusing and inconsistent legal framework surrounding the rights and status of frozen reproductive material); *see also* Upchurch, *supra* note 14, at 397 ("While the adversarial model promotes such determinations, courts have been unable to articulate a status for the embryo that provides for a workable solution to the dispute while simultaneously preserving respect for the unique attributes of the embryo.").

34. *See* Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When 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."); Dehmel, *supra* note 20, at 1378 (arguing that when courts determine whose wishes should prevail in cases involving the disposition of frozen embryos, they must consider questions that, "[f]ar from the detached methods of science which necessitate them . . . , spawn highly charged inquiries into complex legal, philosophical, and emotional issues").

35. *See generally* Jennifer Long Collins, Note, Hecht v. Superior Court*: Recognizing a Property Right in Reproductive Material*, 33 U. LOUISVILLE J. FAM. L. 661, 662–63 (1995) (analyzing the *Hecht* decision and reasons for recognizing property rights in sperm).

36. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

37. *Id.* at 276.

38. *Id.*

39. *Id.* at 276–77.

40. *Id.* at 277.

41. *Id.*

After the suicide, Ms. Hecht and Mr. Kane's children fought over Mr. Kane's frozen sperm.[42] The children requested that the sperm be destroyed or, alternatively, that it be distributed to them.[43] They argued that they wished to "guard the family unit" by preventing the birth of children who would never meet their father or "have the slightest hope of being raised in a traditional family," and they wanted to "prevent the disruption of [their] existing famil[y]," which would suffer "additional emotional, psychological and financial stress."[44] Ms. Hecht responded that neither the estate nor the children had a property interest in the sperm, because it was gifted to her at the time that it was deposited in the sperm bank as either an inter vivos gift or a gift causa mortis.[45]

California's Second District Court of Appeal agreed with Ms. Hecht and ruled in her favor.[46] The court stated the law provided the decedent with a transferrable property right.[47] The court found that

> at the time of [Mr. Kane's] death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the sperm within the scope of policy set by law. Thus, decedent had an interest in his sperm which falls within the broad definition of *property* in Probate Code section 62, as "anything that may be the subject of ownership and includes both real and personal property and any interest therein."[48]

Accordingly, the court recognized a valid property interest in Mr. Kane's sperm and held it was properly part of his estate.[49] By recognizing ownership rights to human genetic material, the *Hecht* decision essentially extended personal property rights to human reproductive material and in so doing rejected public policy concerns about ownership of human reproductive material.[50] And although *Hecht* may be viewed as a drastic decision by some,[51] perhaps more far-reaching are cases that have recognized property rights in human embryos.

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42. *Id.* at 278.
43. *Id.* at 278–79.
44. *Id.*
45. *Id.*
46. *Id.* at 280, 291.
47. *Id.* at 281.
48. *Id.* (emphasis added) (citation omitted).
49. *See id.* at 283, 291.
50. *See id.* at 280–81.
51. *But cf.* Collins, *supra* note 35, at 673 (stating that the *Hecht* decision simply clarified existing law).

C. *Embryos as Property*

York v. Jones[52] was one of the first cases to find a property interest in an embryo. In that case, a married couple, the Yorks, contracted to undergo IVF to help them have a child.[53] Soon after this, the Yorks decided to move to California.[54] Before moving, they requested that their embryos, which were being kept at the Jones Institute in Virginia, be transferred to a California clinic so that they could complete the IVF procedure there.[55] However, the Jones Institute refused to send the Yorks' embryos to California.[56] The Yorks then sued the Jones Institute, claiming they were entitled to the embryos.[57]

Applying bailment law, the court found the clinic, as a bailee, had a duty to return the embryos to the Yorks as they were the rightful owners.[58] Moreover, the court also found the "plaintiffs ha[d] properly alleged a cause of action in detinue," which requires, among other things, "a *property interest* in the thing sought to be recovered . . . ."[59]

In short, the *York* court, without explicitly defining the embryos as property, found a property interest in human embryos by applying bailment law—a common law property principle. And by applying property law, the court recognized the Yorks indeed had an ownership interest in their embryos.[60] Therefore, *York* plainly recognized a personal property interest in human embryos.[61]

Discussion of *York*'s implications and the person/property embryo dichotomy is abundant.[62] For instance, Professor Angela Upchurch explains that *York*'s finding of a property interest in embryos was not too shocking given that IVF consent forms often contain divorce provisions that characterize the embryos as the "marital property" of the parents.[63]

52. 717 F. Supp. 421 (E.D. Va. 1989).
53. *Id.* at 423–24.
54. *Id.* at 423.
55. *Id.* at 424.
56. *Id.*
57. *Id.* at 422–24.
58. *Id.* at 425.
59. *Id.* at 427 (emphasis added).
60. *See id.* at 425.
61. *See id.* at 425–27.
62. *See, e.g.*, Upchurch, *supra* note 14, at 396–97, 401; *see also* Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 207–08 (2005) (arguing courts are applying a property framework to disputes over embryos, even though they are unwilling to frame the arguments in those terms); Guzman, *supra* note 15, at 197–98 (noting the disparate ways embryos are characterized across disciplines); Shelly R. Petralia, Note, *Resolving Disputes over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 106 (2002–2003) (discussing the ways courts attempt to frame the issue in embryo-dispute cases).
63. Upchurch, *supra* note 14, at 401.

These consent forms, therefore, demonstrate that the *York* position is shared—or at least comprehended—by those who undergo IVF.

Professor Upchurch, however, also cautions that characterizing embryos as property would imply embryo disputes should be resolved using traditional contract and property law principles.[64] She claims this characterization would render irrelevant any argument that parties have interests in the embryo because of their potential to become born persons.[65] Professor Upchurch maintains some courts are unwilling to label embryos as property for that reason.[66] Yet, despite these concerns, many courts have done exactly that.

Another case that explicitly deemed embryos property was *Frisina v. Women & Infants Hospital of Rhode Island*.[67] There, a couple sued a hospital for "loss of irreplaceable property," claiming that the hospital had destroyed their embryos.[68] However, the hospital moved for summary judgment arguing in part that there was no precedent in Rhode Island allowing the award of damages "for emotional distress from the loss of [embryo] property based on breach of contract or negligence."[69]

The court explained that "while courts have not considered pre-embryos persons within the meaning of the law, they have been deemed '*property*' of progenitors," or the progenitors are deemed to at least have an ownership-like interest in the embryos.[70] Accordingly, the court found "merit in the argument raised by plaintiffs that recovery for damages for emotional distress based on the 'loss of irreplaceable *property*,' the loss of their pre-embryos, [was] permissible" and denied summary judgment on that claim.[71]

The *Frisnia* and *York* cases plainly recognized the parents' property interest in human embryos.[72] They were not distinct in this regard; they were simply more explicit. But not all embryo ownership cases overtly

64. *Id.*

65. *Id.*

66. *Id.*; *see also* Howell, *supra* note 6, at 414 ("The 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. Most contend that the frozen embryo is an entity 'entitle[d] . . . to special respect' because it represents potential life. It is difficult, however, to define respect in this context." (alteration in original) (footnotes omitted) (quoting Davis v. Davis, 842 S.W.2d. 588, 597 (Tenn. 1992))).

67. No. 95-4037, 2002 WL 1288784 (R.I. Super. Ct. May 30, 2002).

68. *Id.* at *2 (internal quotation marks omitted).

69. *Id.* at *8.

70. *Id.* at *9 (emphasis added) (footnote omitted) (quoting York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989)).

71. *Id.* at *10 (emphasis added).

72. *See* Howell, *supra* note 6, at 413–14 ("The court in *York v. Jones* applied the property approach . . . [by holding] that the clinic acted as bailee of the *property* and was under a legal duty to return it to the rightful owners." (alteration in original) (footnotes omitted)).

recognize such interests.[73] Some courts are apprehensive about deeming embryos property and tend instead to recognize embryo ownership—either treating the embryo as property deserving "special respect" or implying ownership by applying contract law.[74]

D. *Embryos as "Property-Like"*

Davis v. Davis[75] is an example of a court hesitating to call embryos property but nevertheless recognizing the parents' ownership interest in the embryos.[76] There, a Tennessee couple used IVF to create seven cryopreserved embryos.[77] The couple later divorced, which led them to litigate over the custody rights to the embryos.[78] Mrs. Davis wanted to keep the embryos for herself in order to have children, but Mr. Davis wanted to keep the embryos stored because he was undecided about whether he wanted to be an unwed parent.[79]

At trial, Mrs. Davis was awarded custody of the embryos.[80] In turn, Mr. Davis appealed. The appellate court reversed the trial court's decision and ruled in favor of Mr. Davis, finding Mr. Davis had a constitutionally protected right not to have a child "where no pregnancy has taken place."[81] Disagreeing with that decision, Mrs. Davis appealed to the Tennessee Supreme Court, which granted review.[82]

The Tennessee Supreme Court found that Mr. Davis was entitled to custody of the embryos.[83] By referring to The American Fertility Society's ethical standards, the court reasoned that the legal status of embryos "occupy an interim category that entitles them to special respect" and thus lie somewhere between property and human life.[84] Accordingly, the Court determined that Mr. and Mrs. Davis's interest in their embryos was "not a *true* property interest . . . , [but that] they *do have an interest in the nature of ownership*, to the extent that they have decision-making authority concerning disposition of the preembryos."[85]

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73. Courts are often uncomfortable with treating human embryos as mere property and often describe it falling within a middle ground between property and a human life. *See id.* at 414.

74. *See* Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005).

75. 842 S.W.2d 588 (Tenn. 1992).

76. *See id.* at 597–98.

77. *Id.* at 589.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 590.

83. *See id.* at 604.

84. *Id.* at 596–97.

85. *Id.* at 597 (emphasis added).

Interestingly, the *Davis* court tiptoed around the question of whether embryos are mere property by stating that the embryos deserve "special respect" and that the Davises did not have a "true property interest" in them.[86] Still, putting the "special respect" language to the side, the *Davis* court nevertheless recognized the Davises had an interest in the ownership of the embryos and thereby recognized a property—or at least a "property-like"[87]—interest in human embryos. Indeed, Professor Upchurch explains that, although *Davis* and other cases[88] put embryos in this "property-like" middle category between property and human life, in reality those cases treat the embryos like property to resolve the dispute.[89] Therefore, *Davis* and cases applying the property-like category show another way that courts have recognized a property interest in embryos.

E. *Embryo Ownership Enforced by Contract*

A third way that courts recognize a property interests in embryos is by contract. In *Kass v. Kass*,[90] for instance, a married couple signed consent

86. *Id.*; *see also* Upchurch, *supra* note 14, at 401 & n.31 (stating that "courts are reluctant to characterize embryos as mere property under the law").

87. Upchurch, *supra* note 14, at 404–05 (explaining that *Davis* and cases like it "support[] the view of the embryo as *property-like*" because they treat "the embryo more as property than as a person" by allowing for them to be donated for research and by allowing "the progenitors [to] freely contract for sole control over the embryo" (emphasis added)).

88. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005) ("[P]re-embryos occupy an interim category between mere human tissue and persons because of their potential to become persons. Accordingly, such embryos are due varying degrees of *special respect* dependent on the issue involved." (emphasis added)).

89. *See* Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2123 & n.102 (2007) ("In acknowledging the progenitors ownership interests and ability to dispose of the embryo in any manner consistent with the law, the court in *Davis,* ultimately treated the embryo like property despite holding it was entitled to special respect."); *see also* Berg, *supra* note 62, at 211–12 ("Although it may seem tempting to talk about these entities as if they are neither persons nor property but a new special category, such terminology does little by itself to advance the legal analysis or provide a helpful framework for evaluation. In fact, the courts that seem to choose this route merely note the embryo's 'special' status, but then revert to precepts of property law to resolve the dispute." (footnote omitted)); Beth E. Roxland & Arthur Caplan, *Should Unclaimed Frozen Embryos Be Considered Abandoned Property and Donated to Stem Cell Research?*, 21 B.U. J. SCI. & TECH. L. 108, 115 (2015) ("Even where a court makes explicit statements regarding the status of the embryo (*i.e.*, person, property or entity deserving of special respect), there is often a disconnect between the court's general characterization of embryos and the ordered disposition of the embryos at issue. Several opinions that initially declare it inappropriate to categorize embryos as property ultimately order that the embryos be thawed or destroyed in the course of research—remedies that arguably treat the embryos more like property than persons.").

90. 696 N.E.2d 174 (N.Y. 1998).

forms to undergo IVF.[91] They later sought a divorce.[92] Before deciding to divorce, however, the couple had unsuccessfully tried IVF nine times and had five leftover cryopreserved pre-zygotes.[93] Like the couple in *Davis*, Mrs. Kass wanted the right to use these pre-zygotes in another IVF procedure while Mr. Kass did not.[94] This disagreement sparked litigation over the rights to the pre-zygotes.[95]

Ultimately, the court denied the pre-zygotes personhood status and upheld the signed IVF consent forms.[96] The court explained that one approach to deciding the issue is to "regard the progenitors as holding a 'bundle of rights' in relation to the pre-zygote that can be exercised through joint disposition agreements."[97] Here, the agreement provided that the embryos would be donated to an IVF program if the parties could not agree on the disposition of the zygotes.[98] So, to resolve the case, the court enforced the contract and let Mr. Kass donate the embryos to an IVF research program.[99]

Kass shows that the existence of a contract allows courts to punt on the issue of whether embryos are property, property-like and entitled to "special respect," or persons. Given the existence of a written agreement, a court may simply enforce the contract, thus implying ownership rights in the embryos that allow for their donation.[100]

Litowitz v. Litowitz[101] provides yet another example of a court upholding a contract implying embryo ownership.[102] In this case, a married couple received eggs from a donor.[103] The couple fertilized the eggs with the husband's sperm to create five pre-embryos.[104] After the birth of a daughter through a surrogate, the couple was left with two

91. *Id.* at 176.
92. *Id.* at 177.
93. *Id.* at 175–77.
94. *Id.* at 177.
95. *Id.*
96. *Id.* at 179–80.
97. *Id.* at 179.
98. *Id.* at 181.
99. *Id.*; *see also* Berg, *supra* note 62, at 161 ("[*Kass*] rejected the 'interim category' approach and stated that progenitors hold a 'bundle of rights' in their frozen embryos." (footnote omitted)).
100. *Kass*, 696 N.E.2d at 182; *see also* Upchurch, *supra* note 89, at 2124 (arguing that although the *Kass* court attempted to avoid "the morass of confusion" regarding the legal status of an embryo, it nonetheless "implicitly gave the disputed embryo a property-like status").
101. 48 P.3d 261 (Wash. 2002).
102. *Id.* at 273–74.
103. *Id.* at 262.
104. *Id.*

cryopreserved embryos.[105] They later divorced,[106] after which the ex-wife sought to "implant the remaining preembryos in a surrogate mother and bring them to term."[107] The ex-husband did not want to have a child with her and instead wanted to put the embryos up for adoption.[108] This disagreement spilled into the courtroom.[109]

The court acknowledged that the husband and wife had equal rights to the pre-embryos—even though the wife was not a progenitor of the pre-embryos like in *Kass* or *Davis*—due to the donor contract.[110] The court, however, looked solely to the cryopreservation contract the couple signed and ordered the pre-embryos thawed and disposed of in accordance with the contract.[111] In deciding the case by interpreting the contractual agreement, the court avoided the "legal, medical or philosophical discussion [about] whether the preembryos in this case are 'children'" or not.[112] By referring only to contract and property principles, the ruling supports Professor Upchurch's claim that deeming embryos property allows courts to mechanically apply common law principles to embryo ownership disputes without giving significance to the embryos' potential to be born persons.[113]

As with the property-like category, Professor Upchurch maintains the "resolution of the embryo dispute under principles of contract law necessitates a property-based view of the legal status of the embryo."[114] The reason for this, she argues, is that parents cannot contract away child visitation rights if the agreement is not in the child's best interest, but potential parents can contract for one parent to receive sole control of an embryo or for an embryo to be donated for research. Moreover, courts do not oversee the disposition of the embryos the way they oversee child custody agreements.[115] These differences demonstrate that courts treat embryos like property in order to enforce contracts.[116]

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105. *Id.* at 262–63.
106. *Id.* at 264.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 267.
111. *Id.* at 271.
112. *Id.*
113. *See supra* Section II.C.
114. Upchurch, *supra* note 14, at 406; *see also* Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 134 n.7 (2009) ("In order for genetic parents to lawfully contract away their ownership rights to their embryos, the excess cryopreserved embryos must first be deemed to be their property. If embryos are deemed to be property rather than legally recognized 'persons,' either contract or property law could govern the transfer.").
115. Upchurch, *supra* note 14, at 405.
116. *Id.* at 406.

F. *Embryo Property in the Abortion Context*

These cases establish that human embryos can be owned. Some cases demonstrate this by explicitly applying property law,[117] others by acknowledging property-like interests,[118] and others by applying contract law.[119] Ultimately, these cases acknowledge an ownership-like interest in embryos—particularly on behalf of those whose genetic material created the embryos.

Under this case law, a father, as a progenitor, has a proprietary interest in an embryo. Thus, a father who wants to protect himself from being deprived of this property via an abortion should be entitled to the due process rights that the Constitution promises him. A challenge in such a case, however, is that in the abortion context courts might be apprehensive to extend property rights to an embryo in vivo, i.e., one inside the womb. But distinguishing embryos in vitro from those in vivo would be problematic.

First, courts finding that progenitors have a property interest in their embryos did not do so because of where the embryos were located; rather, those courts recognized the progenitors' property interest in the embryos because the embryos contained their genetic material. Second, due to the person/property dichotomy, granting property status to an embryo in vitro but not to an embryo in vivo inevitably invites granting the in vivo embryo personhood status—something courts have avoided as it would call into question the legality of abortion altogether. Third, as discussed in Part III, the Due Process Clause may protect a proprietary interest despite embryos not being recognized as property by state law. For these reasons, courts may be unwilling to distinguish between embryos in vitro and embryos in vivo; moreover, such a distinction is not determinative of whether embryos are property for the purposes of due process. In sum, a father in the abortion context, especially in jurisdictions that deem embryos property, should be entitled to a proprietary interest in an embryo in vivo, and that property interest entitles him to constitutional due process rights.

III. PROPERTY AND THE DUE PROCESS CLAUSE

The Fifth and Fourteenth Amendments of the United States Constitution protect people from being deprived of their "life, liberty, or property without *due process of law*."[120] As mentioned above, due

117. *See supra* Section II.B.

118. *See supra* Section II.C.

119. *See supra* Section II.D.

120. U.S. CONST. amend. XIV, § 1 (emphasis added); *see* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.1 (5th ed. 2012).

process has procedural and substantive elements. Procedural due process protects people against state deprivations[121] of life, liberty, or property by requiring "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[122]

However, a prerequisite for due process protection with regard to property is demonstrating the existence of a "property" interest recognized under the Fourteenth Amendment's Due Process Clause.[123] In fact, only certain types of "property" are protected under the Due Process Clause. Thus, to qualify for due process protection of property, a person must have the type of property the Constitution protects. In the due process context, however, the concept of property can be quite broad.

A. *"Property" Under the Due Process Clause*

"[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."[124] The Supreme Court made this clear in *Board of Regents of State Colleges v. Roth*, when it established that the Due Process Clause protects "property" interests derived from independent sources such as state law.[125] *Roth* involved a state university professor who sued the school for not rehiring him,[126] claiming the school's decision not to rehire him violated his Fourteenth Amendment right by depriving him of property without due process of law.[127]

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121. *See supra* note 10 and accompanying text.

122. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313–14 (1950). The legendary Justice Story, describing due process rights (although in the criminal context), stated that "[i]t is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence [sic] before his property is condemned . . . . If a seizure is made . . . so that the parties in interest have no opportunity of appearing and making a defence [sic], the sentence is not so much a judicial sentence, as an arbitrary sovereign edict." Bradstreet v. Neptune Ins. Co., 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) ("[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."); Windsor v. McVeigh, 93 U.S. 274, 280–81 (1876) (quoting Justice Story's opinion in *Bradstreet*).

123. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886 (2000); *see also* Robert Michael Kline, Comment, *Constitutional Law: Is There a Protected Interest in Protection (or Are Court Orders Merely Suggestions)?*, 58 FLA. L. REV. 459, 460 (2006) ("[T]he first element of a procedural due process claim that alleges a deprivation of property is the identification of a property interest. In cases involving tangible property, a property interest is usually easy to ascertain. When the property interest is not readily identifiable, however, procedural due process cases become more complicated." (footnotes omitted)).

124. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972).

125. *Id.* at 577.

126. *Id.* at 566.

127. *Id.* at 568–69.

The Court explained that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[128] Therefore, one must claim a deprivation of a "liberty" or "property" interest for the Due Process Clause to apply.[129] The Court defined a property interest by stating:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . [and] more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus welfare recipients ha[ve] a claim of entitlement to welfare payments that [are] grounded in the statute defining eligibility for them. . . .[130]

As such, the Court clarified that as a welfare recipient's "property" interest in welfare payments is created by statutory terms, the professor's "property" interest in his employment was created by the terms of his appointment.[131] The Court thus recognized that the professor did in fact have a "property" interest in his employment, which was protected under the Fourteenth Amendment's Due Process Clause.[132] However, because the terms of the professor's employment agreement automatically expired on a specific date, and did not provide for a renewal, he did not have an interest in his future employment and was thus not deprived of his property interest under the Due Process Clause.[133]

Recently, the Supreme Court in *Town of Castle Rock v. Gonzales*[134] reaffirmed *Roth*'s definition of property but also added:

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128. *Id.* at 569.

129. *Id.*

130. *Id.* at 577.

131. *Id.* at 578.

132. *Id.* at 578–79.

133. *Id.*; *see also* 3 ROTUNDA & NOWAK, *supra* note 120, § 17.5(a) ("A person has an entitlement-property interest in employment with the government if he has already received the position and applicable law guarantees him continued employment. However, . . . if one occupies a position that applicable law defines as terminable for any reason, that person can be discharged without the requirement of fair procedures." (footnote omitted)).

134. 545 U.S. 748 (2005).

> Th[e] determination [of property interests protected by the Due Process Clause], despite its state-law underpinnings, is ultimately one of federal constitutional law. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."[135]

Therefore, *Gonzales* allows for property interests to be recognized under the Due Process Clause even if those interests would not be recognized as property under state law.[136] In other words, what is considered property under the Due Process clause can, but need not be, considered property under state law.

Consistent with *Gonzales* and *Roth*, in the abortion context a father's interest in his embryo could be protected under the Due Process Clause of the Fourteenth Amendment regardless of whether the state law defines his interest as one of property. As a matter of constitutional law, federal law—not state law—determines what interests are protected as property under the Fourteenth Amendment.[137] Examples of this principle include cases finding Fourteenth Amendment property interests in one's public employment[138] and in one's deceased child's body parts,[139] even though state law did not clearly define those interests as "property."

Accordingly, although only some jurisdictions explicitly consider parents' interest in their embryo to be one of mere property while other jurisdictions deem it "property-like," either scenario may entitle a father to due process rights. As long as state law, case law, or a court recognizes a father's interest in his embryo as "property" under the Due Process Clause, then he has a right to not be deprived of his interest without due process of law.[140]

B. *Property Rights to a Deceased Kin's Body Parts*

A good example of due process rights attaching to an interest not regarded as "property" under state law—and that also involved rights to human material—is provided in the case of *Newman v. Sathyavaglswaran*.[141] In brief, the Ninth Circuit held that parents had a

135. *Id.* at 756–57 (emphasis omitted) (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978)).

136. *Id.*

137. *Id.*

138. *See Roth*, 408 U.S. at 576–77.

139. *See* Newman v. Sathyavaglswaran, 287 F.3d 786, 797–98 (9th Cir. 2002).

140. *See Gonzales*, 545 U.S. at 756–57.

141. 287 F.3d 786 (9th Cir. 2002).

property interest in their deceased children's body parts.[142] Accordingly, the Ninth Circuit found "next of kin" property interests are afforded protection under the Due Process Clause of the Fourteenth Amendment.[143]

The facts of *Newman* involved parents who sued the coroner's office for removing their deceased children's corneas without providing them notice or asking for their consent after the children died.[144] It was uncontested that the coroner's actions were a deprivation under the laws of the state,[145] but in his defense, the coroner argued the parents could not bring a due process claim because they did not have a property interest in their children's bodies.[146]

The Ninth Circuit disagreed and reiterated *Roth*'s language, holding procedural due process protects property interests well beyond actual ownership of real estate or chattels and protects the "security of interest" already acquired.[147] The court then looked to determine whether the coroner had deprived the parents of a property interest they, as parents, had acquired over their children's bodies and whether that interest was protected under the Due Process Clause.[148] To do so, the court defined property as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."[149]

Applying this definition of property, the *Newman* court found the parents, as next of kin, had a due process property interest in their deceased children's bodies.[150] And by removing the deceased children's body parts and transferring them to others, "the coroner did not merely 'take a single "strand" from the "bundle" of property rights: it chop[ped] through the bundle, taking a slice of every strand[,]' [which] *was a deprivation of the most certain variety*."[151] Accordingly, the court held that the coroner deprived the Newmans of property without due process of law.[152] In effect, the Ninth Circuit protected a property interest—here,

142. *Id.* at 798.

143. *Id.* at 797–99.

144. *Id.* at 788.

145. *Id.* at 789.

146. *Id.*

147. *Id.* at 790.

148. *Id.* at 795.

149. *Id.* (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)). The court further relied on *Roth*, stating a person must have more than an '"abstract need or desire,"' but rather must have a '"legitimate claim of entitlement to it."' *Id.* (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

150. *Id.* at 796–97.

151. *Id.* at 798 (first alteration in original) (emphasis added) (citation omitted) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1989)).

152. *Id.*

in the children's body parts—under the Fourteenth Amendment even though that same interest was not deemed property under state law.[153]

C. *A Father's Due Process Rights in the Abortion Context*

These cases demonstrate that an individual's property is constitutionally protected from State deprivation under the Due Process Clause. As shown in Part II, there should be no doubt that embryos have been deemed property: they have been subject to contract, transfer, and division as marital property in a divorce.[154] Progenitors who have a property interest in an embryo should thus be entitled to due process rights.

This proposition is especially true in jurisdictions that explicitly deem embryos property by precedent, such as in the *York* and *Frisnia* cases, or by statute, since property interests protected by the Due Process Clause "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[155] These jurisdictions have case law establishing a property interest in embryos, and the Due Process Clause should protect that interest.

Moreover, as *Roth* and *Newman* showed, even when a state or its courts do not recognize a particular interest as property, that interest may still be recognized as property under the Due Process Clause. The Court has repeated that, despite the interest's foundations in state law, determining whether property interests are protected by the Due Process Clause is a question of federal constitutional law.[156] Therefore, even in jurisdictions that do not explicitly deem embryos property, and instead recognize a "property-like" or ownership interest in the embryos, such that parties may enter into a contract regarding the embryos—or even where a jurisdiction or state has not considered the issue at all, such as in *Roth* and in *Newman*—parents' interest in their embryo may still be recognized as a property interest under the Due Process Clause.

By having a proprietary interest in an embryo, fathers facing an abortion should be entitled to the due process rights the Constitution promises them: notice and an opportunity to be heard.[157] In the abortion context, however, fathers are often not notified about, or afforded opportunity to voice protest against, the destruction of their protected property interest. But due process demands at least that. The problem is

153. *Id.* at 789, 797.

154. *See supra* Part II.

155. Bd. of Regents of State Colls. v. Roth, 408 U.S. 546, 577 (1972).

156. Town of Castle Rock v. Gonzales, 545 U.S. 748, 756–57 (2005).

157. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (stating that notice and hearings "must measure up to the standards of due process").

that after the *Danforth* and *Casey* decisions,[158] abortion statutes cannot require notice and an opportunity to be heard without being struck down as unconstitutional undue burdens on the mother's abortion right.[159] Needless to say, even if fathers are constitutionally entitled to due process rights regarding their property interests in the abortion context, *Casey* has made it such that they cannot be given it.

IV. REVISITING THE CONFLICT WITH *CASEY*

In *Casey*, the Supreme Court held that a Pennsylvania statute requiring married women to notify their husbands before having an abortion was unconstitutional.[160] The Court reasoned that spousal-notification requirements would deter some women from having an abortion and thus constitute an "undue burden" on a woman's exercise of her abortion right.[161] But before striking down spousal notification requirements, the Court first had to address whether *Roe*, which established a woman's right to an abortion under the "liberty" prong of the Fourteenth Amendment,[162] was still good law.[163]

A. *Overturning Stare Decisis*

The *Casey* majority began its opinion by stating that "[l]iberty finds no refuge in a jurisprudence of doubt."[164] So to address the doubts about *Roe* and the calling for it to be overruled, the Court expounded on the principle of stare decisis.[165] The Court explained that because "no judicial system could do society's work if it eyed each issue afresh in every case that raised it," stare decisis demands respect for prior cases.[166] That is to say, legal consistency is important if the judicial system is to work for the benefit of society. At the same time, the Court stressed that following

158. *See supra* Part I.

159. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) ("[Spousal notification requirements] will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.").

160. *Id.* The statute at issue stated that "no physician shall perform an abortion on a married woman . . . unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion." 18 PA. CONS. STAT. § 3209(a) (1989). The statute also stated the statement must contain a notice that false statements are punishable by law. *Id.*

161. *Casey*, 505 U.S. at 895.

162. Roe v. Wade, 410 U.S. 113, 153–54, 164 (1973).

163. *Casey*, 505 U.S. at 845–46.

164. *Id.* at 843–44.

165. *Id.* at 853 ("[Doubts about] Roe are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." (alteration in original)).

166. *Id.* at 854.

precedent is not an "inexorable command."[167] Rather, changes in society and in the law may require a court to break precedent when "a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[168] Thus, a Court must make "prudential and pragmatic considerations" to determine whether precedent should be followed.[169]

The Court listed several factors to be considered in determining whether to follow precedent.[170] One important consideration it listed was "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[171] Applying this principle to *Roe*, the Court then examined medical advancements that had allowed fetuses to reach viability sooner than was the case when *Roe* was decided.[172]

For the Court, the medical advances since *Roe* ultimately had "no bearing on the validity of *Roe*'s central holding," as it only changed the "point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[173] The Court reasoned that simply because the State's interest in a viable fetus originated sooner in the pregnancy did not, by itself, call into question the "soundness or unsoundness" of the *Roe* decision.[174] Accordingly, the Court found there were no changes that rendered *Roe*'s central holding obsolete nor any that supported arguments for overruling it.[175] But that may not be the case anymore. Indeed, since the time that the Supreme Court decided *Casey*, laws regarding the advancements in reproductive technologies have significantly changed the legal interests involved in an abortion.

B. Casey *Must Be Reexamined*

Facts central to the soundness of *Casey*'s holding have significantly changed. A dominant concern in *Casey* was whether spousal notification rights are constitutional.[176] However, the considerations needed to decide that question have changed significantly in light of a father's proprietary interest in the embryo. As previously discussed, this interest would entitle

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 854–55.
171. *Id.* at 855.
172. *Id.* at 860.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 844, 887.

him to due process rights in the abortion context. This constitutional right was not factored into the *Casey* equation.[177]

Indeed, the Court did not consider the legal changes allowing for a father's potential due process right in the abortion setting. Therefore, the fathers' competing right to notice and an opportunity to be heard was something the *Casey* Court did not consider. Yet due process rights are guaranteed in the text of the Constitution, and notice and an opportunity to be heard are the least that due process requires. So the fact that a father may have a property interest in the embryo that entitles him to procedural due process is undoubtedly a significant "fact [that] ha[s] so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[178] Had the *Casey* Court considered a father's due process right in relation to the pregnancy, the Court would have likely balanced these competing interests differently.[179]

Additionally, by balancing the mother's abortion right against the state's interest in the fetus' potential personhood, the *Casey* decision demonstrates that the mother's right to an abortion is not absolute.[180] In fact, the Court determined that the State's interest at viability "is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[181] Conversely, before a fetus reaches viability, the State's interest is deemed subordinate to the mother's and any restriction on her abortion right would need to survive the Court's undue burden test.[182]

The Court thus struck a balance between the mother's right and the State's interest, and between the father's interest and the mother's liberty; yet the father's potential due process rights were never placed on the Court's scale. If *Casey* were being decided today, however, the Court would need to balance each competing interest involved in the abortion. The Court would thus have to account for the father's due process right, which is currently at odds with its previous holding. This development would give rise to, as the *Casey* majority put it, a "necessity" to reexamine the *Casey* precedent itself because it would otherwise entail maintaining

177. *Id.* at 895–98 (discussing a husband's interest in his wife's pregnancy and the well-being of the fetus, but never considering the potential property interests a husband may have in a developing fetus).

178. *Id.* at 855.

179. *See id.* at 898. In discussing the competing interests between husband and wife, the Court describes the husband's interest as one in the "potential life of the child," while describing the wife's interest as one of "liberty," a constitutionally protected right. *Id.* If the Court recognized both interests as constitutionally protected, the balancing test may have garnered a different result.

180. *Id.* at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted.").

181. *Id.* at 860.

182. *Id.* at 876.

two Constitutional rights that are currently in contradiction.[183] Therefore, this tension between two constitutional rights robs *Casey* of "significant application or justification."

Lastly, as it stands, the Court has never addressed a father's proprietary interest in the fetus. The *Casey* decision is therefore neither indicative of whether fathers indeed have due process rights in the abortion context nor of whether such rights would be subordinate to the mother's abortion right. The possibility that fathers are entitled to due process in the abortion context raises doubts about *Casey*'s holding that fathers cannot be required to be given, among other things, notice of an abortion. And since the *Casey* Court felt it was necessary to address the "doubts" surrounding *Roe* and the statutory restriction of a non-textual right,[184] the Court should have at least equal reasons to address doubts surrounding *Casey* and its renunciation of a textual right—a father's due process right to notice and an opportunity to be heard. But without reexamining *Casey*, questions about a father's due process right and how it should be balanced against the mother's abortion right will remain unanswered. These questions only add to the looming uncertainties covered in Part II.

Ultimately, the law is trending toward deeming an embryo the property of its progenitors. As such, fathers should be entitled to due process rights that protect them from being deprived of property without due process of law. However, the *Casey* Court did not consider this or the resulting tension it created between two constitutionally protected rights. Given the changes, conflicts, and doubts involving the different interests and rights that must now be balanced in an abortion, the Supreme Court must reexamine its holding in *Casey* to determine whether a father's proprietary interest in his embryos entitles him to due process rights and, if so, what process is due.

CONCLUSION

In sum, as courts, legislatures, and individuals continue to—directly or indirectly—treat embryos as property, the tension between a mother's abortion right and a father's due process right will only become more pronounced. And, as this Note has shown, although the Constitution explicitly states that no person shall be deprived of "property, without due process of law,"[185] until *Casey* is reexamined, fathers living in the post-*Casey* world may suffer exactly that.

183. *Id.* at 854. As stated above, *Casey* struck down spousal notification requirements for abortions but due process rights for a father would constitutionally entitle him to at least notice. *See supra* Section III.C.

184. *See supra* notes 170–72 and accompanying text.

185. U.S. CONST. amend. XIV, § 1.