1-10-2020

Reproductive Due Process

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Abstract

This Article engages in a thought experiment. It assumes that the Supreme Court has correctly identified the constitutional scope of the substantive right to abortion by balancing a pregnant person's right to liberty with the state's interest in potential life. Following on this assumption, it asks the question: What else might the Constitution require? At the moment when the criminalization of abortion becomes constitutionally permissible in light of the countervailing state interest in fetal life, is there evidence to suggest that the state has any additional constitutional obligation to the pregnant person whose rights were overcome by the force of the state interest? And what other constitutional principles can be utilized to discern the form such an obligation might take?

In various other contexts, the state can constitutionally infringe on the liberty and property of individuals through incarceration, quarantine, eminent domain, civil commitment, and conscription into military service, among other examples. In this way, the infringement of liberty and property attendant to compelled pregnancy is in line with other types of constitutionally permissible government action. In contexts outside of pregnancy, however, state action that deprives individuals of liberty and property in light of a countervailing state interest is constitutional only if the state also adheres to a number of other requirements before the deprivation of an individual's right occurs, after the deprivation occurs, or both. These pre- and post-deprivation requirements include the mandate that the government provide notice, a hearing for the individual to contest the appropriateness of the deprivation, minimum conditions of care for those deprived of liberty, or fair compensation as remuneration for deprivations of property. In this way, the government infringement of a right that would be constitutionally impermissible becomes valid by ensuring such an infringement occurs only through established and fair processes and procedures. This concept is enshrined in the constitutional scheme as due process, and it ensures that government action which deprives individuals of protected rights is nonetheless fair and non-arbitrary in its application.

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* Assistant Professor, The University of Alabama School of Law. The author presented prior versions of this Article at the Family Law Scholars and Teachers Conference, the Mid-Atlantic Junior Faculty Forum at the University of Richmond School of Law, and the Wake Forest Journal of Law & Policy's 2018 Fall Symposium, *Thinking About the Future of Reproductive Freedom on the 45th Anniversary of* Roe v. Wade. She would like to thank the participants of those workshops for their helpful critiques, comments, and questions. The author would like to thank all those who took the time to comment on this project, including Deborah Dinner, Daniel Epps, Andrea Freeman, Russell Gold, Ronald Krotoszynski, Jr., Wilson Parker, Meredith Render, and Robin West. Finally, she would like to thank the editorial board and staff of *The George Washington Law Review* for their thoughtful suggestions and edits.

If the substantive right to abortion is stated nowhere in the Constitution but can be derived from a penumbra of other rights specifically enumerated, then is it possible that a different constellation of constitutional provisions could be employed to argue a pregnant person who is deprived of liberty and property by virtue of state-compelled pregnancy is entitled to additional procedural protections? And if she were entitled to these rights, what might they look like? The answer to these questions provides insight into the rights and remedies that comprise the constitutional preconditions for the criminalization of abortion—Reproductive Due Process.

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Introduction

Beginning in 1973, the Supreme Court announced that the right to have an abortion was a part of the zone of privacy created by the penumbra of guarantees in the Bill of Rights.[1] A pregnant person's[2] fundamental right to privacy, protected by substantive due process, prevailed over the state's interest in the potential life developing inside her, at least until that developing life was viable outside of the womb.[3] At that point, the state's interest could overcome the pregnant person's interest such that states were free to regulate, and even completely prohibit, abortion.[4] The Court found the existence of this right despite the lack of specific constitutional text,[5] instead relying on the holding in *Griswold v. Connecticut*[6] that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[7]

The subsequent judicial decisions regarding abortion have reasserted this fundamental right to previability abortion while refining the circumstances under which the state can criminalize abortion entirely.[8] Whether this is the normatively correct standard is certainly up for debate, but this project assumes, arguendo, its basic legitimacy.[9] This existing framework states that: (1) when certain circumstances present themselves, the state can constitutionally criminalize abortion, thus compelling a pregnant person to use her body and property to

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1 Roe v. Wade, 410 U.S. 113, 152–53 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

2 This Article uses the more gender-neutral "pregnant person" as opposed to "pregnant woman" to include transgender men and non-binary individuals capable of pregnancy. Female pronouns (she/her/hers) are used throughout, however, for purposes of clarity and readability, and are not intended to exclude these other groups of potentially pregnant people.

3 *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

4 The Court in *Roe* required reserving exceptions for the life or health of the mother, *id.* at 163–64, although subsequent case law has complicated this holding. *See* Gonzales v. Carhart, 550 U.S. 124, 156, 166–68 (2007) (holding that a ban on certain late-term abortions which lacked a health exception for the woman was not facially unconstitutional).

5 *Roe*, 410 U.S. at 129.

6 381 U.S. 479 (1965).

7 *Id.* at 484.

8 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 872 (1992) (reaffirming right to abortion previability while discarding the strict trimester framework from *Roe* in favor of a viability standard).

9 For a fuller discussion on how this project does not, and should not be read to, undermine arguments for the substantive right to abortion, see *infra* Section V.G. *See also infra* note 37.

complete the pregnancy in furtherance of the state interest,[10] and (2) the Constitution does not burden the state with any further duty to her throughout her pregnancy or as a new parent.[11] It is important to note, however, that the point at which the state's interest in potential life is sufficient to compel the continuation of the pregnancy does not simultaneously result in a decision that the pregnant person no longer *has* a protected liberty interest. To the contrary, the Court's jurisprudence in this area makes it clear that the moment at which abortion can be criminalized is merely the inflexion point at which the interests tip to favor the government over the pregnant person's continuing interest in her own liberty and property.[12]

In various other contexts, the state can also constitutionally infringe on rights that have been deemed fundamental.[13] The state can constitutionally undermine physical liberty, including through incarceration,[14] quarantine,[15] civil commitment,[16] imposition of the death penalty,[17] and conscription into military service.[18] Likewise, the Constitution gives the state the power to deprive people of property interests through taxation[19] and eminent domain.[20] In these other

10 *See* Harris v. McRae, 448 U.S. 297, 313 (1980) ("[A]t viability, usually in the third trimester, the state interest in protecting the potential life of the fetus was found to justify a criminal prohibition against abortions . . . .").

11 *Cf. id.* at 318 (finding that due process does not create an affirmative obligation on the government to provide services, including abortion services).

12 *See Casey*, 505 U.S. at 869 ("The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.").

13 *See* Frederick Schauer, *Rightful Deprivations of Rights* 1 (U. Va. Sch. L., Public Law & Legal Res. Paper Series No. 2018-43, July 2018) ("Both legal doctrine and generations of philosophy have recognized that rights, as with duties and obligations, may be overridden.").

14 *See* United States v. Moore, 643 F.3d 451, 456 (6th Cir. 2011) ("In general, Eighth Amendment jurisprudence grants 'substantial deference' to the legislatures who determine the types and limits of punishments.").

15 *See* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (stating that, in certain circumstances, authorities can quarantine a person who has come into contact with a communicable disease against his will).

16 *See* Addington v. Texas, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").

17 *See* Gregg v. Georgia, 428 U.S. 153, 186–87 (1976) (upholding the constitutionality of the death penalty).

18 *See* Arver v. United States, 245 U.S. 366, 389–90 (1918) (upholding the constitutionality of conscription into military service).

19 *See* Johnson v. New Jersey, Div. of Motor Vehicles, 134 F. App'x 507, 509 (3d Cir. 2005) (stating that "[t]he collection of income tax has long been deemed constitutional").

circumstances, there is no doubt that the state has the power to overcome the fundamental liberty or property interests of the individuals it is acting upon. In this way, the state's ability to compel pregnancy past a certain point is unremarkable.

In non-pregnancy examples, however, state action that undermines a fundamental right is only constitutional if the state also adheres to a number of other requirements before the deprivation of an individual's right occurs, after the deprivation occurs, or both.[21] A number of examples illustrate the general concept that government action that would be constitutionally impermissible can become permissible when paired with appropriate pre- and post-deprivation government actions. As one of the most obvious examples, the state can criminalize conduct and has the constitutional authority to incarcerate those who commit acts defined as criminal, thereby taking away their fundamental right to liberty.[22] Nevertheless, the person who stands accused of a crime retains procedural due process rights before conviction[23] and, following conviction, rights to minimum conditions of care[24] and freedom from excessive fines and cruel or unusual punishment.[25]

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20 *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[A] State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking . . . .").

21 *See* United States v. Salerno, 481 U.S. 739, 746 (1987) ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." (citation omitted)). The process required under the Fifth and Fourteenth Amendments must adhere to constitutional minimums. *See* Hurtado v. California, 110 U.S. 516, 541 (1884) (holding that the powers of the state are constrained by the requirements of due process in the same way as those of the "general government").

22 *See* United States v. Comstock, 560 U.S. 126, 136–37 (2010) (discussing "broad authority" of government to define criminal behavior and punishment); Solem v. Helm, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . .").

23 *See* U.S. CONST. amend. V (guaranteeing the right to a grand jury and protecting the accused against self-incrimination); U.S. CONST. amend. VI (protecting the right of a criminal defendant to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, the right to confront accusers, and the right to know the nature of the charges and evidence).

24 *See* Helling v. McKinney, 509 U.S. 25, 31–32 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").

25 U.S. CONST. amend. VIII.

The state can deprive citizens of liberty in non-criminal contexts, as well. For instance, the state can draft citizens into military service.[26] Nevertheless, the First Amendment may provide pre-deprivation relief to would-be conscripted soldiers by providing reprieve for conscientious objectors,[27] and the prohibition on quartering soldiers in private residences contained in the Third Amendment suggests that the state has a duty to provide at least minimally for individuals once they are in the military.[28]

The state can also infringe on fundamental property rights, as well, through condemnation of private property for public use.[29] While the question of what pre-deprivation rights property owners enjoy is an open one,[30] it is unquestionable that post-deprivation the state must adhere to the Fifth Amendment and provide the owner with adequate compensation.[31]

These are not the only salient examples of the state's ability to infringe on liberty and property rights, but they all neatly illustrate the general principle that the existence of a fundamental property or liberty interest—on its own—does not necessarily constrain the state's ability to act in a way that undermines individuals' rights.[32] In each of these scenarios, the state can undermine what would otherwise be considered a fundamental right because of its own countervailing interest. The determination that the state *can* overcome such a right in furtherance of its own interests, however, does not end the inquiry

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26 Arver v. United States, 245 U.S. 366, 366 (1918) (upholding the constitutionality of conscription into military service).

27 *See* Howard R. Lurie, *Conscientious Objection: The Constitutional Questions*, 73 W. VA. L. REV. 138, 144 (1971); Gail White Sweeney, *Conscientious Objection and the First Amendment*, 14 AKRON L. REV. 71, 71–72 (1980).

28 *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."). If the government is not housing soldiers in private homes, it stands to reason it has to put them somewhere.

29 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

30 *See generally* D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010) (exploring what pre-deprivation procedural due process rights might be contained in the principle of eminent domain).

31 *See* Yee v. City of Escondido, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation.").

32 *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 Nw. U. L. REV. 589, 604 (2016) (noting the long-standing principle that "individual rights may need to yield to the state's police power in order to preserve the public health or safety").

into the constitutionality of the state action.[33] In each case, the deprivation is only legal when it is preceded or followed by additional state action—pre- and post-deprivation rights and procedures.[34] Not so in the case of the pregnant person. Once the state can deprive her of her liberty by requiring her to carry a pregnancy to term and compel her to use her own property in furtherance of that goal,[35] current precedent suggests it owes her no further duty—either before or after such a deprivation occurs.[36] If we accept that the state has the power to coerce the continuation of a pregnancy, thereby undermining fundamental rights to both liberty and property,[37] why does the pregnant person have no additional rights? She gets no process. She is entitled to no compensation, protection, or minimum conditions of care. And yet, like the other examples detailed above, the state has compelled her to use her body and property in furtherance of the *state's own interest*.[38] Although scholars have extensively explored the scope of

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33 *See* Carey v. Piphus, 435 U.S. 247, 259 (1978) (stating that the Due Process Clause "'raises no impenetrable barrier to the taking of a person's possessions,' or liberty, or life," but instead "[is] meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). The Court in *Carey* goes on to explain that "substantively unfair" deprivations of rights are minimized by procedural due process protections, as well. *Id.* at 259–60.

34 *See* United States v. Salerno, 481 U.S. 739, 746 (1987) ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." (citations omitted)).

35 Whether or not an individual has a property interest in their own body has been the subject of considerable scholarly debate. *See, e.g.*, Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 549 (2013). For purposes of this Article, the infringement on property created by the criminalization of abortion is used to both describe the property interest a pregnant person may have in their reproductive capacity as well as the more traditional property implications of the costs of bearing and raising a child. See *infra* notes 144–49 and accompanying text for further discussion.

36 In various contexts, the Court has held that there is no affirmative right to governmental aid. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989); Harris v. McRae, 448 U.S. 297, 313, 318 (1980).

37 To be clear, this premise is accepted only to the extent that it reflects the current state of the law and as a necessary precursor to the other arguments in this Article. There are compelling arguments that such a premise is flawed. *See generally, e.g.*, Jeffrey D. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 UCLA L. REV. 1597 (1991); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

38 *See* Gonzales v. Carhart, 550 U.S. 124, 145 (2007) ("[T]he government has a legitimate and substantial interest in preserving and promoting fetal life . . . .").

the substantive right to abortion,[39] considerably less attention has been paid to what additional process might be due to the pregnant person in the face of constitutionally permissible criminalized abortion.[40]

This project attempts to fill that void by positing that state-compelled pregnancy effectuated through the criminalization of abortion results in a deprivation of liberty and property rights that is only constitutionally sound if it is paired with pre- and post-deprivation rights similar in form to other rights contained in the Constitution—including rights to notice, a hearing, compensation, and minimum conditions of care. Much in the same way that the substantive right to abortion is found not in the text of the Constitution itself but instead through a penumbra of Amendments and constitutional underpinnings,[41] this Article argues that pre- and post-deprivation rights can likewise be inferred from the constitutional scheme generally and from a properly expansive conception of procedural due process specifically.[42] Due process has been consistently articulated as a flexible concept—designed to address the fairness of governmental action in a way that is responsive to the particular action involved.[43] It is also a concept that has developed in light of our evolving sense of justice and fair play.[44] Such evolution in the concept of due process has resulted in the recent expansion of procedural due process rights to government action which heretofore lacked such protections—such as quarantine.[45] The

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39 *See supra* note 37.

40 Advocates for abortion rights may rightfully be concerned that such arguments would undermine the substantive right to abortion by suggesting that procedural protections *alone* would suffice to constitutionally criminalize abortion. These concerns are addressed *infra*, in Section V.G.

41 Roe v. Wade, 410 U.S. 113, 153 (1973).

42 This Article does not argue (and could not reasonably argue) that the text of the Constitution is explicit on this point, nor that the Framers intended—or even considered in their wildest imaginings—such an argument. Instead, it is an argument about the overarching constitutional scheme and the values that undergird it. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200 (1987) (describing one type of constitutional argument as attempting to "understand the Constitution as a whole, or a particular provision of it, by providing an account of the values, purposes, or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible").

43 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) ("'[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (alterations in original) (citation omitted) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

44 *See infra* Section I.B.

45 *See* James J. Misrahi, *The CDC's Communicable Disease Regulations: Striking the Bal-*

flexibility of due process, coupled with an evolving understanding of what government action might implicate procedural due process, makes this moment a compelling time to revisit what process rights might attach in the face of the continuing criminalization of abortion.[46] Indeed, as abortion opponents ramp up the drive to criminalize abortion, it is a crucial time to protect pregnant people in every manner possible.[47]

There are many public policy reasons for the government to fund reproductive health and child-friendly services,[48] such as free or reduced-cost contraceptives[49] and prenatal care,[50] comprehensive sex education in public schools,[51] parental leave,[52] and subsidized child-

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ance Between Public Health & Individual Rights, 67 EMORY L.J. 463, 463, 477 (2018) (describing the new procedural due process rights and protections contained in quarantine regulations following challenges to the government's unfettered authority in this area).

46 *Cf.* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990) ("No inquiry is more central to constitutional jurisprudence than the effort to delineate the duties of government.").

47 *See, e.g.*, *Texas Lawmakers Consider the Death Penalty for Abortion*, FOX 5 DC (Apr. 9, 2019), http://www.fox5dc.com/news/texas-lawmakers-consider-the-death-penalty-for-abortion [https://perma.cc/UQH7-R6KZ] (reporting on Texas House Bill 896, which would classify abortion as a homicide and could subject those who have abortions to the death penalty). This is particularly true as the push for criminalization increasingly targets women who seek abortions—and not, as was true historically, only doctors that perform abortions.

48 *See, e.g.*, Julia A. Walsh et al., *The Impact of Maternal Health Improvement on Perinatal Survival: Cost-Effective Alternatives*, 9 INT'L J. HEALTH PLAN. & MGMT. 131, 131 (1994) (detailing the low-cost and effective interventions that improve maternal and perinatal outcomes).

49 *See* Laura D. Lindberg et al., *Changing Patterns of Contraceptive Use and the Decline in Rates of Pregnancy and Birth Among U.S. Adolescents, 2007–2014*, 63 J. ADOLESCENT HEALTH 253, 253 (2018) (noting the decline in teen pregnancy as a result of contraceptive use and access).

50 *See* James W. Henderson, *The Cost Effectiveness of Prenatal Care*, 15 HEALTH CARE FINANCING REV. 21 (1994) (finding that the expected average hospital cost savings for females who received prenatal care was over $1,000); William J. Hueston et al., *How Much Money Can Early Prenatal Care for Teen Pregnancies Save?: A Cost-Benefit Analysis*, 21 J. AM. BOARD FAM. MED. 184, 184 (2008) (finding that the provision of prenatal care in teen pregnancies saves between $2,369 and $3,242 per person in Medicaid dollars); Michael C. Lu et al., *Elimination of Public Funding of Prenatal Care for Undocumented Immigrants in California: A Cost/Benefit Analysis*, 182 AM. J. OBSTETRICS & GYNECOLOGY 233, 237 (2000) (finding that for every dollar "saved" through the elimination of prenatal care to undocumented women from government benefit programs, taxpayers can expect to pay an additional $3.33 for the provision of neonatal care necessarily created as a result of the failure to provide prenatal care).

51 *See* Joerg Dreweke, *Promiscuity Propaganda: Access to Information and Services Does Not Lead to Increases in Sexual Activity*, 22 GUTTMACHER POL'Y REV. 29, 32–33 (2019) (discussing studies that show sex education can result in a delay of sex among teenagers and a reduction in the number of sexual partners and risky behavior).

52 *See* Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RES. CTR. (Mar. 23, 2017), https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/ [https://perma.cc/TCZ8-Q82U] (finding that a significant por-

care.[53] But these policy arguments have done little to move the needle in terms of getting the government to actually foot the bill,[54] despite public support for such initiatives.[55] This Article takes a different approach by arguing not only that the government should pay for these services as a matter of policy, but that principles of procedural due process demand that it pay for these services in light of the continuing criminalization of abortion.

This Article proceeds in five Parts. Part I discusses the scope of procedural due process rights as currently understood and lays out the method for ascertaining what process is due in any particularized circumstance. Building on that framework, Part II describes how both the traditional and expansive concept of procedural due process might apply in the reproductive context. Part III performs a comparative analysis between compelled pregnancy and other types of government deprivations. Part IV outlines and addresses some potential critiques to the proposal presented in this Article. Finally, Part V concludes that, while the exact scope of reproductive due process rights may be hard to define, our constitutional scheme strongly suggests the presence of such rights and the need for further exploration in this area.

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tion of individuals without access to paid leave will deplete savings, go into debt, or rely on public assistance in order to care for a new infant or an ill family member).

53 *See* Tarjei Havnes & Magne Mogstad, *No Child Left Behind: Subsidized Child Care and Children's Long-Run Outcomes*, 3 AM. ECON. J. 97, 97 (2011) (finding that "subsidized child care had strong positive effects on children's educational attainment and labor market participation, and . . . reduced welfare dependency").

54 *See* Christopher Ingraham, *The World's Richest Countries Guarantee Mothers More Than a Year of Paid Maternity Leave. The U.S. Guarantees Them Nothing*, WASH. POST (Feb. 5, 2018, 3:11 PM), https://www.washingtonpost.com/news/wonk/wp/2018/02/05/the-worlds-richest-countries-guarantee-mothers-more-than-a-year-of-paid-maternity-leave-the-u-s-guarantees-them-nothing/ [https://perma.cc/GRM5-3RDQ].

55 *See, e.g.*, Amy Bleakley et al., *Public Opinion on Sex Education in U.S. Schools*, 160 ARCHIVES PEDIATRIC ADOLESCENT MED. 1151, 1151 (2006) (concluding that the majority of Americans support sex education that includes comprehensive information about preventing pregnancy and sexually transmitted diseases); Dreweke, *supra* note 51, at 30 ("[C]ontraceptives are widely used and policies making them more accessible are politically popular . . . ."); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1690 (2008) ("Women's rights, needs, and interests *matter* to the voting public . . . ."); CATO INST., CATO INSTITUTE 2018 PAID LEAVE SURVEY 2 (2018), https://www.cato.org/sites/cato.org/files/survey-reports/tables/cato_2018_paid_leave_survey_tables.pdf [https://perma.cc/D2LE-J4W2] (finding that 74% of Americans support a new federal government program to provide twelve weeks of paid leave to new parents); John Halpin et al., *Affordable Child Care and Early Learning for All Families: A National Public Opinion Study*, CTR. FOR AM. PROGRESS (Sept. 13, 2018, 7:00 AM), https://www.americanprogress.org/issues/early-childhood/reports/2018/09/13/457470/affordable-child-care-early-learning-families/ [https://perma.cc/L8CW-PUBF] ("Voters want the government to be more involved in ensuring all families have quality, affordable child care and early learning options.").

I. The Scope and Nature of Procedural Due Process

Due process is a bedrock principle of our constitutional scheme. Indeed, the idea that the government must adhere to basic concepts of fairness and non-arbitrariness in its actions predates even our own Constitution, so interwoven is it in the concept of ordered society.[56] Due process is mentioned twice in the Constitution—the Fifth and Fourteenth Amendments prohibit federal and state governments, respectively, from depriving individuals of "life, liberty, or property, without due process of law."[57] All three branches of government must comply with the requirement that their actions afford the individuals affected with due process of law.[58]

While not explicit in the text of the Due Process Clause, modern due process jurisprudence analyzes substantive due process, which prohibits the state from violating liberty or property rights without sufficient justification, as distinct from procedural due process, which prohibits the state from enforcing an otherwise valid infringement of an individual's rights through an unfair process.[59] Despite the Supreme Court's admonition that these are distinct concepts,[60] histori-

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56 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (noting that due process has its roots in the Magna Carta's "*per legem terrae*," meaning law of the land); Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926) ("[S]tate action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"); Hurtado v. California, 110 U.S. 516, 542 (1884) (admonishing that, in interpreting what process is due, courts must first look to the text of the Constitution itself and then "must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" (emphasis omitted)); *see also infra* notes 99–100 and accompanying text.

57 U.S. Const. amends. V, XIV.

58 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) ("It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave [C]ongress free to make any process 'due process of law,' by its mere will."); *see also* Andrew McCanse Wright, *Congressional Due Process*, 85 Miss. L.J. 401, 409 (2016) ("Today, we most closely associate due process with a check on executive and judicial power. However, due process originally developed with an eye toward limitation on unchecked legislative power."). For a discussion of procedural due process in the legislative arena, see *infra* Section V.B.

59 Simona Grossi, *Procedural Due Process*, 13 Seton Hall Cir. Rev. 155, 158 (2017) ("A law whose content impairs a liberty or property interest without a sufficient reason or justification will violate substantive due process rights. A law that is enforced through an unfair process that impairs a liberty or property interest will violate procedural due process rights."); *see* Wright, *supra* note 58, at 410 ("Procedural due process, in contrast [to substantive due process], requires sufficient procedural safeguards given the interest at stake in a government activity.").

60 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and prop-

cally[61] and conceptually they are often intertwined.[62] Taken together, the concept of due process governs what government action is absolutely prohibited and what government action is prohibited only in the event the government fails to adhere to certain procedures when acting.[63] Due process demands, at the most basic level, that the government itself adhere to the rule of law.[64]

Despite the fact that due process is a bedrock constitutional concept, however, the exact contours of the doctrine remain elusive.[65] While the axiomatic requirements of procedural due process are no-

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erty—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.").

61 *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 417 (2010) (noting that a distinction between the concepts of substantive and procedural due process was not generally recognized until the early twentieth century).

62 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 861–62 (2010) (Stevens, J., dissenting) ("But substance and procedure are often deeply entwined. . . . Procedural guarantees are hollow unless linked to substantive interests; and no amount of process can legitimize some deprivations."); Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 BYU L. REV. 1, 19 (2012) (discussing the interrelated nature of procedural and substantive due process claims in the punitive damages context); *see also* Lounsbury v. Thompson, 374 F.3d 785, 788 (9th Cir. 2004) (discussing habeas petition in which procedural and substantive due process claims were intertwined).

63 *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*."). Due process was not always separated into procedural and substantive components, but the development of law has resulted in the two distinct concepts. Grossi, *supra* note 59, at 158–59 (describing how the demise of original technical forms of legal action and the development of substantive bodies of law resulted in the separate development of procedural and substantive due process).

64 John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) ("In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law.").

65 Even early Supreme Court opinions regarding due process recognized the inherently amorphous nature of the constitutional text. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–77 (1855) ("The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process.").

tice[66] and a right to be heard,[67] even these apparently straightforward requirements can cause interpretative difficulty.[68]

The following sections explore three critically important characteristics of due process—its flexibility, its ability to evolve based on changing societal attitudes and values, and its position as the general constitutional backstop to unfair government action. Finally, I examine how the current understanding of due process—and particularly procedural due process—is incorrectly restricted to only requirements of notice and some type of hearing, instead arguing that it also contains rights to care and compensation in certain circumstances.

A. Flexibility

The Supreme Court has frequently articulated that procedural due process is a flexible concept and cannot be reduced to a formulaic procedure to be applied in all instances of a government deprivation of rights.[69] Instead, the constitutionality of process afforded in any specific instance is judged by evaluating the particular nature of the rights and interests involved. The Court in *Mathews v. Eldridge*[70] laid out three interests that must be balanced when determining what process is required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe-

66 *See* Lambert v. California, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.").

67 *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

68 *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270–75 (1975) (exploring the history of the right to a hearing under procedural due process).

69 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," but instead "'is flexible and calls for such procedural protections as the particular situation demands.'" (alteration in original) (citation omitted) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Morrissey v. Brewer, 408 U.S. 471, 481 (1972))); *see also* Cty. of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) ("The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." (alteration in original) (quoting Betts v. Brady, 316 U.S. 455, 462 (1942))).

70 424 U.S. 319 (1976).

> guards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[71]

Taking into account these three factors, courts determine what safeguards are constitutionally required in response to the particular deprivation at issue, allowing for significant variation. In contexts as varied as the deprivation of government benefits,[72] to the termination of parental rights,[73] from the deportation of noncitizens,[74] to the involuntary civil commitment of individuals to mental hospitals,[75] courts have fashioned due process rights responsive to the interests involved.

This intrinsic flexibility makes due process capable of responding to real-world facts and circumstances. What might be constitutionally permissible government action in one context could nevertheless be impermissible in another context as a result of subtle differences in the balance between the interests of private citizens and the interests of the government.[76] And its flexibility further allows it to be a useful framework to evaluate new circumstances that were unlikely to be contemplated by the Framers.[77] The applicability of due process to

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71 *Id.* at 335.

72 *See* Goldberg v. Kelly, 397 U.S. 254, 254–55 (1970) (holding that procedural due process in the form of an evidentiary hearing was required prior to the termination of government benefits).

73 *See* Santosky v. Kramer, 455 U.S. 745, 753–54, 758, 768 (1982) (applying the three *Eldridge* factors to determine the evidentiary standard that should apply in parental rights termination proceedings).

74 *See* Landon v. Plasencia, 459 U.S. 21, 37 (1982) (outlining factors to be considered in determining whether due process was afforded to a noncitizen in her deportation hearing and remanding case to the appellate court).

75 *See* Addington v. Texas, 441 U.S. 418, 425, 432–33 (1979) (recognizing that civil commitment constitutes a "significant deprivation of liberty" and determining that a preponderance of the evidence standard provided insufficient due process in commitment hearings).

76 *See Mathews*, 424 U.S. at 334 ("[R]esolution of the issue whether the . . . procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."). Importantly, the Court has required only that procedural due process protections be responsive to the general type of case involved, and not necessarily the specific plaintiff in any particular scenario. *See* Ingraham v. Wright, 430 U.S. 651, 657, 682 (1977) (finding that no pre-deprivation hearing was necessary before the use of corporal punishment in schools generally, even in the face of two plaintiffs who experienced particularly harsh physical punishments that were outside the norm). Whether this approach does enough to satisfy the constitutional mandate is the subject of scholarly debate, however. *See generally* Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283 (2014) (arguing that procedural due process requires, at minimum, an evaluation of how the application of certain rules affects subgroups within classes of individuals affected by government action).

77 *See* Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1151–52 (2019) ("[T]he Court rejected the argument that the Framers' view of the Due Process Clause limits the

new circumstances is, on its own, a feature of the constitutional scheme, as explored in the following subsection.

B. Ability to Evolve

Both procedural and substantive due process evolve to keep pace with societal standards and expectations about the fairness of government action.[78] While the evolution of substantive due process has received more attention in scholarly literature and popular imagination,[79] what is a "fair" procedure according to prevailing sensibilities has also shifted a fair amount in the almost 250 years since the founding.[80]

At the outset, the procedural due process analysis necessarily examines what has been traditionally considered sufficient process. This review of traditionally sufficient process, however, does not end the inquiry.[81] As the Supreme Court has made clear, "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms."[82] The Court thus has retained its "authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid," in the event that a "rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of

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scope of procedures required by the Constitution. . . . Indeed, procedural rules, 'even ancient ones, must satisfy contemporary notions of due process.'" (quoting Burnham v. Superior Court, 495 U.S. 604, 630 (1990) (Brennan, J., concurring))).

78 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2595–99 (2015) (detailing history and evolution of substantive due process right to marry); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992) ("[P]rocedural decisions are often the only vehicle for taking substantive constitutional rights seriously, and procedural surrogates for substantive constitutional rights have evolved as a result.").

79 *See generally* Williams, *supra* note 61 (detailing the history and debate regarding the existence and scope of substantive due process rights).

80 *See* McGautha v. California, 402 U.S. 183, 242 (1971) (Douglas, J., dissenting) ("The whole evolution of procedural due process has been in the direction of insisting on fair procedures.").

81 *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31–32 (1991) (Scalia, J., concurring in the judgment) ("If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process.").

82 Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 340–42 (1969) (declaring unconstitutional the garnishment of wages without notice or a hearing as inconsistent with modern conceptions of due process); *see also* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (invalidating general quasi in rem jurisdiction because "'[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage").

due process in every case."[83] Some Supreme Court Justices have even gone as far as to describe due process as not only capable of evolution, but as the constitutional standard that is *most able* to adapt to the changing values of society.[84] It is this unique ability to reflect the values of society that is the focus of the following section.

C. Constitutional Backstop

Beyond its flexibility and ability to evolve, a third feature of due process is simply its function as a catchall constitutional backstop for determining the fairness of government action.[85] Due process has long been understood to contain the admittedly amorphous concepts of "justice" and "fair play."[86] What process is due is subject to an analysis of "the totality of facts in a given case,"[87] and depends on whether government action is reasonable and follows discernable standards.[88] The Supreme Court has recognized, in determining the scope of the

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83 Burnham v. Superior Court of Cal., 495 U.S. 604, 628 (1990) (White, J., concurring in part and concurring in the judgment). Further, Professor Jason Parkin has argued that this feature of procedural due process is so intrinsic to its constitutional import that even the development of new factual circumstances can warrant a finding that a procedure that was once constitutionally permissible can become invalid as a result of these new circumstances. *See* Parkin, *supra* note 76, at 315, 318 (arguing that new facts about the provision and termination of welfare benefits require a reevaluation of the procedural due process rights that attach to the benefits process).

84 *See* Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring in the judgment) ("'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.").

85 *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("[T]he guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" (quoting Hurtado v. California, 110 U.S. 516, 532 (1884))), *quoted in* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions.").

86 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *see also* Grossi, *supra* note 59, at 156 ("The principle [of due process] carries with it the ideas of fairness, reasonableness, and efficiency, all to be measured, balanced, and applied to the various, changing circumstances that confront a judicial system in a democracy.").

87 Cty. of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (quoting Betts v. Brady, 316 U.S. 455, 462 (1942)).

88 Grossi, *supra* note 59, at 183 ("Whether a law is deemed arbitrary depends on whether it contains discernable standards and whether those standards are reasonable. The absence of discernable standards runs the risk of violating the principle of equality. But the absence of reasonableness would invite unjustified intrusions on liberty. As to the latter, the due process measure of reasonableness requires a balancing of the private and public interests at stake. This balancing must take into account fairness, efficiency, institutional competence, and the ultimate rationality of the standard at issue.").

government's interest in providing due process, that society has an "interest in treating [individuals] with basic fairness."[89]

Thus, due process is the best—and often only—constitutional vehicle for determining the fairness of government action not specifically addressed in the constitutional text by constraining government action that is unfair.[90] Indeed, due process has been called on frequently in the past to act as just such a last resort safeguard.[91]

D. Procedural Due Process Reimagined

Despite the sweeping language used to describe due process at various historical moments, the modern understanding of due process—and particularly procedural due process—is considerably less broad. In fact, at the current moment, the stock understanding of procedural due process is that it only protects the rights to notice and some type of hearing when the government deprives an individual of liberty or property.[92] And certainly, this Article does not question the wisdom of the need for such basic protections. But the Supreme Court has explicitly stated that the Due Process Clause of the Constitution incorporates by reference the other "processes" encompassed in the Bill of Rights and the constitutional scheme.[93] These comprise many more protections—and more *types* of protections—than simple notice and opportunity to defend. These protections include a broad variety of affirmative rights that the government must provide if it wants to constitutionally deprive citizens of liberty or property—including the requirement that the government provide minimum levels of care to

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89 Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (explaining that "[s]ociety has a stake" in the fair treatment of parolees in parole revocations).

90 *See Hurtado*, 110 U.S. at 527–28 ("[T]he good sense of mankind has at last settled down to this: that [the concept of due process imported from the Magna Carta was] intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819))).

91 *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) ("In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution.").

92 Goss v. Lopez, 419 U.S. 565, 579 (1975) ("At the very minimum, [due process requires] *some* kind of notice and . . . *some* kind of hearing.").

93 *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("First, the [Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights."); Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. (18 How.) 272, 276–77 (1856) ("To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions.").

some whose liberty is deprived[94] and the requirement that the government pay fair compensation to those whose property is permissibly taken for public use.[95] Indeed, the Supreme Court has found in various circumstances that different or additional procedures beyond notice and an opportunity to be heard are constitutionally necessary.[96]

Further, while the Court has stated that what constitutes constitutionally permissible government action for purposes of due process can, in part, be understood in the context of other, more specific constitutional protections, it has also stated that due process cannot be reduced to such references.[97] Instead, due process broadly mandates that the government comply with the settled principles of law that govern more generally—including provisions of the common law.[98] If due process is intended to compel the government to comply with the "law of the land," then that necessarily includes more than just a notice and opportunity to defend. It should be understood against the full scope of the protections in the Bill of Rights and the common law generally.[99]

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94 *See* Frances-Colon v. Ramirez, 107 F.3d 62, 63–64 (1st Cir. 1997) (finding no affirmative right to adequate medical care, unless "(a) the government has taken the claimant into custody or otherwise coerced the claimant into a situation where he cannot attend to his own well-being; or (b) the government employee, in the rare and exceptional case, affirmatively acts to increase the threat of harm to the claimant or affirmatively prevents the individual from receiving assistance" (internal citations omitted)).

95 *See* United States v. Miller, 317 U.S. 369, 373 (1943) (stating that "just compensation" in the Fifth Amendment "means the full and perfect equivalent in money of the property taken" such that "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken").

96 *See, e.g.*, Nelson v. Colorado, 137 S. Ct. 1249, 1255–56 (2017) (invalidating as violative of due process law that allowed the state to retain conviction-related fines from defendants whose convictions had been overturned unless the prevailing defendant instituted a civil proceeding and proved innocence by clear and convincing evidence); Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972) (ruling that the revocation of parole requires the right to notice, disclosure of evidence against the parolee, an opportunity to appear and present evidence, an independent decisionmaker, and written findings).

97 *See* Hurtado v. California, 110 U.S. 516, 528, 542 (1884) (admonishing that, in interpreting what process is due, courts must first look to the text of the Constitution itself and then "must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" (quoting *Murray's Lessee*, 59 U.S. at 277)).

98 *See Zinermon*, 494 U.S. at 126 (stating that whether a violation of procedural due process has occurred requires an examination of "the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law").

99 *See* Wright, *supra* note 58, at 403 n.3 (exploring the concept and scope of "congressional due process" which "includes the formal substantive and procedural components of the Due Process Clause, but also extends to more diffuse, yet important, elements of procedural fairness grounded in other provisions of the Constitution, common law, rules of evidence, and rule of law

Finally, due process requires that state action to deprive individuals of rights is non-arbitrary and adheres to a consistent set of intelligible principles.[100] In other words, if the state must provide a particular type of process in one instance, it should be obliged to provide the same type of process in analogous circumstances.[101] In so doing, the government upholds the basic fairness that due process is intended to protect.[102]

II. Reproductive Due Process

The discussion in the preceding Part demonstrates that procedural due process may have been overlooked as a vehicle to secure additional rights for pregnant people. In the context of the criminalization of abortion, due process can be called on to serve its function as a last resort constitutional bulwark against the unfairness that results from the government forcing individuals to continue pregnancies that they would otherwise choose not to, while simultaneously failing to provide them with any of the protections that attach to other similar types of deprivations.

The broad features of due process outlined in the previous Part, however, do not inevitably aid in the identification of *how* the

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principles"). It might be the case that the *specific* guarantees in each of the Bill of Rights are not applicable in any particular situation—particularly with respect to the amendments that have not been incorporated against the states. *See* McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) (noting that the Third Amendment's protection against quartering of soldiers, the Fifth Amendment's grand jury indictment requirement, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment's prohibition on excessive fines have not been incorporated against the states). Nevertheless, the requirements of due process should be understood and interpreted with an eye toward the basic and foundational concepts of fairness contained therein.

100 *See* Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) ("The decision of an apparently novel [constitutional] claim must depend on grounds which follow closely on well-accepted principles and criteria.").

101 Thomas M. Cooley, A Treatise on the Constitutional Limitations 356 (1868) ("Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.").

102 *See Hurtado*, 110 U.S. at 527–28 ("[T]he good sense of mankind has at last settled down to this: that [the concept of due process imported from the Magna Carta was] intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819))); Harrison, *supra* note 64, at 498 ("Ordinary procedural due process, as articulated in *Murray's Lessee*, differs from the rule of law in that 'due' means not 'appropriate according to the applicable law,' but appropriate in a broader sense, a sense that has its own content rather than a meaning derived from other legal rules.").

criminalization of abortion might be made constitutional through additional pre- or post-deprivation rights or procedures. In other words, establishing that due process might be a useful tool in crafting novel arguments about the necessity of such rights in the reproductive context does not tell us what constitutionally sufficient process might actually look like.

The three-step test laid out in *Mathews v. Eldridge* helps to answer that question by examining the various interests of state and private actors as well as the benefit and burden that additional protections would create.[103] As the following sections make clear, applying the *Mathews* test to the deprivations of property and liberty resulting from the criminalization of abortion reinforces the argument that procedural due process rights should attach to individuals affected by such criminalization.

A. The State Interest

One of the steps in the *Mathews* inquiry is determining "the Government's interest, *including* the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[104] Thus, while the state interest can include a concern in avoiding the burden of providing additional procedural protections, the test explicitly invokes the state's more general interests as well.[105] In arguing for the constitutionality of various limitations on abortions, states have long argued that a robust set of state interests apply—including protecting potential life,[106] promoting childbirth,[107] and the promotion of life and dignity generally.[108]

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103 *See* Parham v. J.R., 442 U.S. 584, 599–600 (1979) (stating that Mathews v. Eldridge provided "a general approach for testing challenged state procedures under a due process claim"). *But see* Dusenbery v. United States, 534 U.S. 161, 168 (2002) (utilizing the earlier standard for procedural due process articulated in *Mullane* and stating that "we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims").

104 Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (emphasis added). Generally, this is the *last* step in the inquiry, although such a chronology is not mandated by precedent; it is simply customary.

105 *See id.*

106 *See* Harris v. McRae, 448 U.S. 297, 313 (1980) ("[A] State has legitimate interests during a pregnancy in . . . protecting potential human life.").

107 *See id.* at 325 ("It follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life.").

108 *See* Whole Woman's Health v. Hellerstedt, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017) (noting that government agency "maintain[ed] the singular purpose of the Amendments [was] to promote respect for life and protect the dignity of the unborn").

It is worth exploring at the outset why the state encourages reproduction at all, particularly in the face of arguments from all sides of the political spectrum concerning overpopulation and overburdening of resources,[109] including the current anti-immigration political sentiments.[110] Such arguments might cause a casual observer to incorrectly conclude that the United States has an interest in limiting reproduction. This is not the case. Despite the concerns that increased fertility rates may create, the United States has primarily taken a pronatalist position based on the idea that it has both an economic and moral interest in encouraging reproduction.[111]

Governments have a vested interest in maintaining a steady population, because such constancy promotes economic stability and growth.[112] Demographers generally agree that a "replacement fertility" rate of just over two children per woman is ideal in creating a stable population in which "new births fill the spaces left behind by deaths."[113] In reaction to the serious economic consequences of a failure to meet replacement-level reproduction, countries currently experiencing population decline are actively attempting to spur reproduction through a variety of policies aimed at easing the economic burdens of parenthood.[114] Japan and Germany are just two ex-

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109 Marisa S. Cianciarulo, *For the Greater Good: The Subordination of Reproductive Freedom to State Interests in the United States and China*, 51 AKRON L. REV. 99, 108 (2017) ("To the extent that unfettered procreation raises concerns for the environment, government resources, and sustainability, the right to reproductive freedom potentially conflicts with these other rights.").

110 *See* Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 21–22 (2019) (discussing the animus towards immigrant groups that animated the travel bans of 2017).

111 *See* Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 897 (2000) ("Like most developed countries, the United States, by tradition and politics, is a pronatalist culture which tolerates reproductive self-determination."); Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS*, 77 N.C. L. REV. 13, 48–49 (1998) ("Consistent with national population policies, U.S. tax policies historically have been pronatalist, primarily through government subsidies that provided for the financial burden of children."); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 952–56 (1985) (chronicling the pronatalist labor policies of the twentieth century). However, the United States has a long and tragic history of encouraging the reproduction of certain groups while discouraging—or even outright preventing—the reproduction of disfavored groups. *See generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

112 *See generally* PHILLIP LONGMAN, THE EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY (AND WHAT TO DO ABOUT IT) (2004).

113 Chris Weller, *10 Countries that Desperately Want People to Have More Sex*, INDEPENDENT (Mar. 5, 2017, 2:12 PM), https://www.independent.co.uk/life-style/10-countries-that-desperately-want-people-to-have-more-sex-a7612246.html [https://perma.cc/4ME2-VZVX].

114 *See generally* Robert Smith, *When Governments Pay People to Have Babies*, NPR (Nov.

amples of countries struggling to reverse a declining fertility rate in the face of fears of economic slowdown.[115] Nineteen of the world's most populous thirty countries "are already around or below replacement-level fertility."[116]

On the opposite side of the spectrum, China famously implemented a harsh policy in 1979 that limited Chinese couples to having only one child, in response to concerns that an exploding population would overburden the Chinese economy.[117] Beginning in 2013, however, the Chinese government reversed course by relaxing the policy and began permitting some Chinese couples to have a second child.[118] By 2016, all couples were encouraged to have a second child.[119] This turnaround was in response to widespread fears that an inverted population graph posed a real threat to the economic viability and stability of the country.[120] Many of the pronatalist approaches already adopted by other countries are now being considered or adopted in China as the looming crisis of a rapidly aging population becomes ever more pressing.[121]

The United States is somewhat unique among developed nations in its historical ability to maintain close to a replacement rate fertil-

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3, 2011, 5:10 AM), https://www.npr.org/sections/money/2011/11/03/141943008/when-governments-pay-people-to-have-babies [https://perma.cc/PM8K-9WE5].

115 *Germany Passes Japan to Have World's Lowest Birth Rate*, BBC NEWS (May 29, 2015), https://www.bbc.com/news/world-europe-32929962 [https://perma.cc/DA6T-NZHV] (discussing the damaging economic consequences of a low birth rate); *Japan Targets Boosting Birth Rate to Increase Growth*, REUTERS (Nov. 12, 2015, 5:42 AM), http://www.reuters.com/article/us-japan-economy-population/japan-targets-boosting-birth-rate-to-increase-growth-idUSKCN0T113A20151112 [https://perma.cc/45GP-QH5X] (discussing how Japan's low birth rate is an impediment to economic growth).

116 David Fickling, *Global Population Could Peak Sooner Than We Think*, BLOOMBERG (June 22, 2019, 8:00 PM), https://www.bloomberg.com/opinion/articles/2019-06-23/global-population-may-peak-sooner-than-the-un-predicts [https://perma.cc/38FR-MJLS].

117 *See* Steven Lee Myers & Olivia Mitchell Ryan, *Once Strict on Births, China Races for a Boom*, N.Y. TIMES, Aug. 12, 2018, at A1 ("The 'one child' policy was introduced in 1979 as a way to slow population growth and bolster the economic boom that was then just beginning.").

118 *See id.*

119 *See id.*

120 *See id.* ("Officials are now scrambling to devise ways to stimulate a baby boom, worried that a looming demographic crisis could imperil economic growth . . . .").

121 *See id.* (discussing new policies including limitations on abortion and divorce, as well as "an array of new benefits for young families, including tax breaks, housing and education subsidies and longer maternity and paternity leaves, as well as investments in clinics and preschools"); *see also* Minxin Pei, *China's One-Child Policy Reversal: Too Little, Too Late*, FORTUNE (Nov. 2, 2015, 12:13 PM), https://fortune.com/2015/11/02/china-one-child-policy/ [https://perma.cc/7USN-H5D4] (describing the one-child policy as "disastrous" because it has trapped China in a "dire demographic spiral" that will have "catastrophic consequences").

ity.[122] This enviable fertility rate has placed the United States in an advantageous economic position vis-à-vis other developed countries. Various pro-birth policies are evidence that the United States government is cognizant of the economic advantage that replacement level fertility creates.[123] For example, the tax system has historically encouraged reproduction through a variety of incentives.[124]

The United States' interest in encouraging reproduction can also be witnessed in its approach to the regulation of assisted reproductive technologies ("ART").[125] While other developed countries have outlawed or heavily regulated the use of ART, the United States has instead adopted a mainly laissez-faire approach to the regulation of such technologies, allowing the ART industry in the United States to mostly self-regulate.[126]

As birth rates in developed countries plummet[127] and women begin to enter the market of offering reproductive services as paid prov-

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122 As of 2017, the United States' fertility rate was approximately 1.8 births per woman, although it hovered close to 2.0 for the two decades between 1990 and 2010. *See* Fertility Rate, Total (Births Per Woman) - United States, WORLD BANK, https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=US [https://perma.cc/TPY8-5GPU]. The average birth rate for high income countries in 2017 was 1.6. *See* Fertility Rate, Total (Births Per Woman) - High Income, WORLD BANK, https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=xd&name_desc=false [https://perma.cc/AW2F-XNCF].

123 *See* Emma Green, *The Rebirth of America's Pro-Natalist Movement*, ATLANTIC (Dec. 6, 2017), https://www.theatlantic.com/politics/archive/2017/12/pro-natalism/547493/ [https://perma.cc/59FA-ASA9] (detailing efforts by policymakers to address declining birth rates).

124 Hymel, *supra* note 111, at 49 ("Consistent with national population policies, U.S. tax policies historically have been pronatalist, primarily through government subsidies that provided for the financial burden of children."). In the United States, individuals can claim a tax credit of up to $2,000 per year for each child, *see* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 972, CHILD TAX CREDIT AND CREDIT FOR OTHER DEPENDENTS 3 (2020), http://www.irs.gov/pub/irs-pdf/p972.pdf [https://perma.cc/MSR4-NLHA], plus, subject to limitations, an additional tax credit of up to $2,100 based on work-related childcare expenses per year. *See* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 503, CHILD AND DEPENDENT CARE EXPENSES 2 (2020), http://www.irs.gov/pub/irs-pdf/p503.pdf [https://perma.cc/4NTU-9DE3].

125 *See* Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX: J. L.-MED. 65, 68 (2006) ("The United States and Israel are widely regarded as possessing two of the most ART-friendly environments in the world. Both countries stand at the epicenter of fertility-related research and practice and support the supply and demand sides of the ART market with avidity.").

126 *See id.* at 67–69 ("In the United States, where government-sponsored healthcare is the exception, not the rule, free-market preferences combined with ambivalence about ART's 'brave new world' capacities yield an unruly, unregulated patchwork environment. This regulatory vacuum has allowed ART suppliers to offer their wares with little interference from either federal or state governments.").

127 *See supra* notes 112–16 and accompanying text.

iders,[128] the economic value of reproductive labor becomes obvious in a way that was obscured in the past.[129] Thus, the state has an interest in fetal life beyond its esoteric moral preferences. The state has a real, immediate, economic interest in reproductive labor.

Beyond the economic incentives that the United States has in promoting reproduction, there is robust evidence that state and federal governments believe that encouraging reproduction is the inherently superior moral position. Perhaps in no other respect is the government's position as explicitly pronatalist more demonstrable than in the context of its statements regarding the morality of abortion.[130] From the beginning of the Supreme Court's decisions regarding abortion in the landmark case of *Roe v. Wade*,[131] through its most recent cases dealing with abortion,[132] the state has indicated a strong preference for birth and the Court has accepted the value of this interest without question.[133] Indeed, in the face of the constantly reiterated state preference for life and birth in this context, it would be exceed-

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128 *See* Lindsay Beyerstein, *Why Gestational Surrogacy Should Be Legalized and Unionized*, CITY & ST. N.Y. (June 17, 2019), https://www.cityandstateny.com/articles/opinion/commentary/why-gestational-surrogacy-should-be-legalized-and-unionized-in-new-york.html [https://perma.cc/VZ6Y-EFZM] (arguing that women who provide gestational surrogacy services should be compensated fairly for their labor and protected from exploitation).

129 *See* Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 413 (2012) (explaining that the commercial surrogacy market is rapidly expanding despite the restrictions imposed by many countries). Of course, such reproductive labor is still likely undervalued by the market. *See infra* notes 309–12 and accompanying text; *see also* Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 252 (2010) ("Without even considering the time that it takes to actually become pregnant, a well-paid surrogate makes substantially less than minimum wage for the 24-hour a day, 9-month long job that she performs.").

130 Reply Brief for Petitioner at 19, Gonzales v. Carhart, 550 U.S. 124 (2007) (Nos. 05-380, 05-1382), 2006 WL 3043976, at *19 (referring to the morality of promoting life as "the interest that underpins all of the government's valid abortion regulations"); Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 144, 151–52 (explaining that the Supreme Court decision in *Gonzales v. Carhart* was "laced with moral language" that permitted Congress to "ban partial-birth abortion based on the view that the procedure was morally repugnant").

131 *See* 410 U.S. 113, 150 (1973) ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

132 *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2325–26 (2016) (Thomas, J., dissenting) ("'[T]he State may use its regulatory power' to impose regulations 'in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.'" (quoting *Gonzales*, 550 U.S. at 158)).

133 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) ("The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.");

ingly difficult for the government to argue that it takes any other position than a consistent interest in the promotion of reproduction.

In the end, whether the state expresses its interest in the criminalization of abortion in moral or economic terms is irrelevant for purposes of proving the existence of a state interest generally. The fact remains that both state governments and the federal government have articulated, time and again, that such an interest *does* exist and the Supreme Court has accepted such an interest as valid.[134]

B. The Individual Interest

A second element of the *Mathews* inquiry is defining the private interest implicated by the government action.[135] In the abortion context, the private interest is easily identified—compelled pregnancy in the face of the criminalization of otherwise available abortion procedures[136] undermines both an individual's liberty and property interests.[137] Compelled pregnancy undermines liberty by forcing an individual to use her body to perform physical labor that is extremely burdensome, dangerous, and physically taxing.[138] It results in a loss of autonomous decision-making in one of the most fundamental aspects of life.[139] Depending on the course of the pregnancy, it can subject an

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Harris v. McRae, 448 U.S. 297, 328 (1980) (White, J., concurring) (discussing validity of legislative preference for birth over abortion).

134 *See, e.g.*, *Casey*, 505 U.S. at 846 ("[T]he State has legitimate interests from the outset of the pregnancy in . . . the life of the fetus that may become a child.").

135 Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (stating that "identification of the specific dictates of due process generally requires consideration of three distinct factors," one of which is "the private interest that will be affected by the official action").

136 It is important to note that the criminalization of abortion is a government-created circumstance. *Cf.* Bandes, *supra* note 46, at 2305 ("[I]t defies common sense to argue that the government's choice [to not fund abortion services] is not a substantial cause of the woman's inability to obtain an abortion."). The criminalization of abortion, in fact, is a relatively recent phenomenon. *See* Siegel, *supra* note 37, at 281–82 (detailing the rise of abortion restrictions in the nineteenth century).

137 *See* Siegel, *supra* note 55, at 1689 ("Criminalizing abortion would not, for instance, address the needs of women who seek abortion because they lacked contraception, or were raped, or are living in an abusive relationship, or will have to drop out of work or school to raise a child alone, or are stretched so thin that they cannot emotionally or financially provide for their other children.").

138 *See* Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 BUFF. L. REV. 1141, 1149 (2015) ("Commanding that someone must remain pregnant against her will makes her suffer in ways analogous to penalties that governments have in the past imposed on criminals and some still use: imprisonment, flogging, torture, surveillance. Forced childbearing is in some ways more severe than any of these punishments. Its impact is lifelong. Its hurtful consequences, which can include severe pain and death, are exceptionally intimate.").

139 *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 171 (2017) (describing the "enduringly disrupted life plans and transformed life experiences" that occur when gestation

individual to additional infringements on liberty, such as forced medical interventions[140] or even criminal sanction.[141] It also results in the loss of collateral liberties—such as the ability to travel freely.[142] Indeed, there can be no serious argument that the private interest involved is not among the most fundamental liberty interests in existence.[143]

Although less commonly discussed, compelled pregnancy also undermines an individual's property interests. It does so in three ways. First, pregnancy and childrearing are expensive, with the average cost of prenatal care and delivery ranging from $4,000 to $17,000,[144] and the average cost of raising a child through the age of seventeen topping $200,000.[145] Second, studies show that women stand to lose up to

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is compelled, as well as the loss of the victim's ability "to determine [their] life's course" (quoting Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting))).

140 *See id.* at 178 ("[U]nwanted pregnancy subjects women to a distinct form of distress that exposes them to fetal-protective restrictions including forced Cesarean surgeries, hospital deliveries, drug testing, and life support.").

141 *See* Nina Liss-Schultz, *Tennessee's War on Women Is Sending New Mothers to Jail*, MOTHER JONES (Mar. 14, 2016), https://www.motherjones.com/politics/2016/03/tennessee-drug-use-pregnancy-fetal-assault-murder-jail-prison-prosecution/ [https://perma.cc/JC3D-GPKP] (discussing new fetal endangerment laws that expose pregnant women to criminal prosecution for substance use).

142 *See* Barbara Woolsey, *Here are 14 Major Airlines' Policies for Flying Pregnant*, USA TODAY (Aug. 8, 2015, 2:00 PM), https://www.usatoday.com/story/travel/roadwarriorvoices/2015/08/08/here-are-14-major-airlines-policies-for-flying-pregnant/83846106/ [https://perma.cc/ED7X-F96R] (detailing the restrictions imposed on pregnant travelers by major airlines); *see also* Fox, *supra* note 139, at 179–80 ("Childcare responsibilities may entail losing sleep with a fussy baby, passing on travel opportunities while breastfeeding, and keeping the child in one's immediate sight at all times.").

143 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (characterizing the decision of whether to have an abortion as "central to the liberty protected by the Fourteenth Amendment" because it "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (characterizing the right of reproductive decision-making in the marital relationship as "a right of privacy older than the Bill of Rights").

144 Kara Brandeisky, *Here's What It Costs to Actually Become a Mother*, MONEY (May 6, 2016), http://money.com/money/4319343/childbirth-cost-insurance-mother/ [https://perma.cc/MBD7-U2VU] (detailing average costs, including $3,035 for routine prenatal care and a vaginal delivery, $3,382 for a cesarean section, $2,132 for an epidural, and costs averaging between $1,189 to $11,986 for a hospital stay following delivery). Even insured individuals often pay significant out-of-pocket costs. *Id.*

145 *See* Mahita Gajanan, *The Cost of Raising a Child Jumps to $233,610*, MONEY (Jan. 9, 2017), http://money.com/money/4629700/child-raising-cost-department-of-agriculture-report/ [https://perma.cc/5Q7N-JXJE] (describing a USDA report that estimates the cost for a middle-income family to raise a child through the age of seventeen at $233,610).

$230,000 in lifetime earnings as a result of becoming mothers—even if they continue working outside the home.[146] Thus, the infringement on a pregnant person's property does not end at birth, but continues for a significant period of time afterwards.[147] Third, compelled pregnancy precludes an individual from participating in the open market for reproductive services such as surrogacy and egg donation,[148] as the fact of current pregnancy obviously removes the ability to simultaneously engage in such work. Pregnancy in this context thus results in foregone income.[149]

Indeed, compelled gestation results in such a far-reaching loss of liberty and property[150] that it is hard to correctly describe it in terms that adequately express its scope.[151] And there can be no be no doubt that, for at least the portion of pregnant people who would choose abortion but for the removal of that choice by state law, the deprivations they experience are a direct result of the government's placing its own interest above the interests of the individual.[152]

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146 Elizabeth Ty Wilde et al., *The Mommy Track Divides: The Impact of Childbearing on Wages of Women of Differing Skill Levels* 1, 26, 45 (Nat'l Bureau of Econ. Research, Working Paper No. 16582, 2010), https://www.nber.org/papers/w16582 [https://perma.cc/MVS6-3F62].

147 *See* Fox, *supra* note 139, at 179 ("While pregnancy by itself can limit social, educational, and professional prospects for nine months and beyond, raising a child can constrain such opportunities for eighteen years or more.").

148 *See* Adeline A. Allen, *Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human*, 41 HARV. J.L. & PUB. POL'Y 753, 784–85 (2018) (noting that payment to a surrogate typically ranges from $20,000 to $30,000).

149 *Cf.* Fox, *supra* note 139, at 189 ("Forced pregnancy, for example, not only foists upon a woman the unwelcome identity as pregnant. It also renders her unable to be pregnant in a way that she *does* desire—at a different time, for example, or with a different partner—at least until that compelled pregnancy is over.").

150 The strict separation of "liberty" and "property" in the text of the Due Process Clause obscures the ways in which these concepts are interrelated. A single government action—as the case of compelled reproduction clearly shows—can implicate both. An individual can have a liberty interest in property (such as the physical body) and a property interest in liberty (such as the right to travel). *See, e.g.*, Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 589 (1997) ("[T]he textual equality of liberty and property in the Due Process Clauses is not merely a rhetorical flourish, but rather embodies an important political idea: the notion that property facilitates personal and political self-determination.").

151 *See* Fox, *supra* note 139, at 180 ("Courts err in overlooking [the] far-reaching consequences to personal identity and well-being when unwanted parenthood is imposed or wanted parenthood is deprived. The loss of control over whether to become a parent is an injury that extends beyond any other associated physical, financial, or emotional consequences.").

152 *See* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 337 (1985) ("In my view, the most striking thing about governmental choices . . . that leave some women with no alternative to continuing an unwanted pregnancy through childbirth—is that they require those women to make affirmative use of their bodies for childbearing purposes. Such governmental choices, in

C. *The Value of Additional Process*

The next step of the *Mathews* inquiry looks at the potential value of additional process. The criminalization of abortion creates a serious risk of the erroneous and unfair deprivation of liberty and property interests absent additional procedural safeguards. The blanket criminalization of abortion, even beyond the point of viability, may violate the tenets of due process because: (1) there is insufficient notice of what conduct will constitute a violation of the law,[153] (2) there is no opportunity to show that the deprivation is erroneous or fails to further the state's asserted interest in a particular circumstance,[154] and (3) it is fundamentally unfair to deprive individuals of their liberty and property absent the state providing basic levels of care or remuneration for such an imposition.[155]

A comprehensive exploration of the relative value of additional processes necessarily requires a more specific picture of what such additional processes might entail—a project undertaken, *infra*, in Section IV of this Article. The argument that *some* type of additional process would help to alleviate the unfair and potentially erroneous deprivations of rights that the criminalization of abortion may occasion, however, can rest on more general assertions.

First, additional processes would help to avoid erroneous deprivations of rights. As discussed above, the Supreme Court has found that the right to prohibit abortion past viability rests on the government's interest in potential life.[156] This is a difficult standard to consistently and correctly apply for a number of reasons. As has been pointed out by many scientists, viability is a necessarily moving target as a result of ever-changing technological advances.[157] While one fetus might be viable at 22 weeks—with extraordinary medical interventions—such viability is the exception and not the rule.[158] There is no

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fact, require women to sacrifice their liberty, and quite literally their labor, in order to enable others to survive and grow in circumstances likely to create lifelong attachments and burdens.").

153 *See* Karlin v. Foust, 188 F.3d 446, 458 (7th Cir. 1999) ("[A] statute is void for vagueness if it fails to provide 'fair warning' as to what conduct will subject a person to liability.").

154 *See* Siegel, *supra* note 55, at 1688 (noting that abortion restrictions are often "wildly over- and underinclusive and are unresponsive to the real dilemmas women face").

155 *See infra* notes 165–70 and accompanying text.

156 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) ("The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.").

157 *See, e.g.*, Danton Char, *The Advance of Rescue Technologies and the Border of Viability*, Am. J. Bioethics, Aug. 2017, at 40.

158 *See generally* Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and*

bright line of viability.[159] Indeed, some fetuses who are considerably further along the gestational timeline—up until birth—are not "viable" because of medical conditions which render them unable to live outside of the womb or to do so for only very short periods of time.[160]

Nevertheless, state-level bans on abortion often result in an inability to access procedures which could not possibly harm fetal life—such as abortions sought following stillbirth or the discovery of fetal abnormalities that would result in a low or nonexistent chance of neonatal survival.[161] This deprivation of the right to abortion even when

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Outcomes in Extremely Preterm Infants, 372 NEW ENG. J. MED. 1801, 1804–05 (2015) (observing that (i) survival rates for extremely preterm infants—defined as between 22 and 26 weeks—vary considerably, (ii) in the absence of medical treatment, the overall rate of survival among children born at 22 weeks is 5.1% and the rate of survival without moderate or severe impairment is only 2.0%, and (iii) "[a]ll infants born before 22 weeks of gestation died within 12 hours after birth").

159 Further complicating this picture is the fact that gestational age is calculated using a variety of inconsistent methods, including the "post-fertilization age," which can be calculated from the moment of conception or alternatively, from the starting date of the pregnant woman's last menstrual period. *See* Michelle Ye Hee Lee, *Setting the Record Straight on Measuring Fetal Age and the '20-Week Abortion'*, WASH. POST (May 26, 2015, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2015/05/26/setting-the-record-straight-on-measuring-fetal-age-and-the-20-week-abortion/ [https://perma.cc/X6HZ-BYBL].

160 These outcomes are referred to as "lethal anomalies" or "lethal malformations," and fetuses with such anomalies are sometimes considered "non-viable" even if they are born alive after 22–24 weeks. *See* Adam R. Jacobs et al., *Late Termination of Pregnancy for Lethal Fetal Anomalies: A National Survey of Maternal–Fetal Medicine Specialists*, 91 CONTRACEPTION 12, 13–17 (2015). Many of the fetal conditions that would render a fetus unviable are not discovered until the second trimester, *see* AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, PRACTICE BULLETIN: SECOND TRIMESTER ABORTION 1 (2013), and some structural malformations and genetic conditions are not diagnosed until even later in pregnancy. *See* Jacobs, *supra*, at 12.

161 *See* Doe v. United States, 419 F.3d 1058, 1060, 1063 (9th Cir. 2005) (determining that the Hyde Amendment's prohibition on government funding for abortion applied with equal force to claim for an abortion following discovery that fetus had an "unequivocally fatal birth defect," even though under these circumstances it was nearly certain the fetus would not survive beyond a few days, if at all). This case further illustrates the need for the individualized protections of due process, as the court noted that equal protection could not be invoked in order to secure the funding that the plaintiff sought "[b]ecause the statute is rationally related to a legitimate government purpose and because an 'imperfect fit' [between the particular circumstances of the plaintiff and the stated government interest] does not render a statute invalid" under equal protection, which only requires rational basis review. *Id.* at 1063 (quoting Russell v. Hug, 275 F.3d 812, 820 (9th Cir. 2002)). In so doing, the court noted that the outcome was not necessarily fair. *Id.* at 1063 (explaining that the court could not "judge the wisdom, fairness, or logic of legislative choices" (quoting Heller v. Doe, 509 U.S. 312, 319 (1993))). Nevertheless, the court felt it must rule in the manner it did because of the legislative scheme that applied:

> We depart from our analysis only to observe that while recognizing that the foregoing discussion may seem at times callous and unfeeling, we express our deepest sympathy for the families who must face this difficult ordeal. It is the nature of the legal analysis, the commands of stare decisis, and the deference we must afford congressional judgment that require the result we reach here today. We remain confident, however, that the law commands it.

the state interest in potential life is unsubstantiated illustrates the risk of an erroneous deprivation of liberty in the face of comprehensive criminalization schemes, which lack any sort of continuing, periodic determination of whether the prohibition of abortion *in the particular circumstance* is a warranted exercise of state power.[162] Blanket criminalization of abortion past a certain gestational age fails to provide a pregnant individual a fair opportunity to argue that the deprivation of the right to abortion, as it applies to their situation, is an unwarranted deprivation of their liberty.[163] Next, the additional process, including post-deprivation compensation or the commitment to provide minimum conditions of care, could help ensure that government action in criminalizing abortion was not undertaken in a way that was arbitrary or unfair. Although the government is generally not under any affirmative duty to provide care or services to individuals, the law dictates that such a duty arises in circumstances in which the government's own action results in the condition that necessitates aid or when the individual is in the custody of the government, thus preventing them from accessing the means of support for themselves.[164] The criminalization of abortion is analogous to both of these scenarios—the government's action of criminalizing abortion creates the condition that requires the pregnant person to seek aid and prevents her from accessing the means to avoid the need for such aid through criminalizing the only way to become un-pregnant—abortion.

Id. at 1064. Using a due process framework would have afforded the court considerably more leeway in determining the fairness of the government action in this particular circumstance.

162 *Cf.* O'Connor v. Donaldson, 422 U.S. 563, 574–75 (1975) (finding that a state must release a person who is involuntarily committed if the grounds for his commitment cease to exist).

163 In fact, the Supreme Court has recognized that the state interest in life is tied to viability, and that viability is "a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support," which is necessarily determined on a case-by-case basis. Colautti v. Franklin, 439 U.S. 379, 388–89 (1979). The continued importance of viability is apparent in recent cases that address blanket criminalization of abortion past a certain number of weeks. *See, e.g.*, Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, 389 F. Supp. 3d 631, 637 (W.D. Mo. 2019) (citing *Colautti* for the proposition that criminalization untethered to viability is unconstitutional). State abortion bans, however, continue to prohibit abortion past a certain week of gestation regardless of the viability of the fetus. *See* Jacobs, *supra* note 160, at 13.

164 *See* Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) ("When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When a state cuts off sources of private aid, it must provide replacement protection."); *see also* Bandes, *supra* note 46, at 2277–78 ("It would not be a correct characterization to say that once government has acted, it must act competently, or fairly, or continue to act at all. The public services cases have flatly rejected this formulation. It is more accurate to describe the rule as saying that once government has acted to place a person in danger, it must protect him from that danger.").

Although modern conceptions of procedural due process do not generally include rights to minimum conditions of care,[165] such affirmative government obligations exist in the constitutional scheme both under substantive due process and the Eighth Amendment's prohibition on cruel and unusual punishment,[166] and are a part of how the fairness of government action is judged.[167]

The right to post-deprivation compensation is also a feature of the constitutional scheme, including the process necessary to determine the amount of compensation the government may owe as a result of its action to deprive an individual of liberty or property.[168] While what compensation is considered "just" would certainly be

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165 *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."). *But see* Collins v. City of Harker Heights, 503 U.S. 115, 127–28 (1992) ("The 'process' that the Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain minimal custodial standards.").

166 *See* United States v. Espinoza, No. EP-08-CR-2673-PRM, 2008 WL 11358027, at *2 (W.D. Tex. Dec. 18, 2008) (explaining that while pretrial detainee's "rights arise from the procedural and substantive due process guarantees of the Fourteenth Amendment, rather than the prohibition against cruel and unusual punishment in the Eighth Amendment," both provisions require the same standard of care from the government). Importantly, the Eighth Amendment guarantee of minimum conditions of care applies even when the complained-of conduct is not "punishment," but merely a condition experienced as a result of otherwise lawful government custody. *See* Wilson v. Seiter, 501 U.S. 294, 297 (1991) (holding that the Eighth Amendment "could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment").

167 *See* Wright, *supra* note 58, at 407–08 ("The concept of due process of law embraces several doctrines of American constitutional law designed to protect fundamental rights. Due process further guarantees that any deprivation of those rights will be undertaken by valid and fair procedures. 'These doctrines are rooted in the common law, state constitutions, the Bill of Rights, and the Fifth and Fourteenth Amendments' to the U.S. Constitution." (quoting *Due Process of Law*, DICTIONARY OF AM. HIST. 88 (3d ed. 2003))); *see also* COOLEY, *supra* note 101, at 356 ("Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."). Here, pregnant women belong in the "class" of people for whom government action has created a dependency and the "settled maxims of law" include constitutional rights to care and compensation for those in government custody (or the functional equivalent).

168 *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Wright v. Chambers, No. 09-4155-CV-C-SOW, 2009 WL 4884495, at *1 (W.D. Mo. Dec. 11, 2009) (discussing due process right to "adequate remedies to compensate individuals for wrongful property loss"); State Rd. Comm'n v. Bd. of Park Comm'rs, 173 S.E.2d 919, 924 (W. Va. 1970) ("[T]he primary purpose of an eminent domain proceeding is to determine the amount which the condemnor shall be required to pay the defendant as just compensation for the property taken.").

open to debate,[169] there are compelling arguments that *some* compensation is appropriate.[170] Certainly, the availability of process to at least raise arguments regarding harm and compensation is warranted.

Thus, in the reproductive space, and in the face of the deprivation of liberty and property attendant to the criminalization of abortion, additional process both pre- and post-deprivation would reduce the chance of erroneous or unfair deprivations.

D. The Burden of Additional Process

As the final step of the *Mathews* inquiry, the benefit of additional process must be balanced against the burden on the state of providing such protections.[171] But such balancing must also occur in the context of general constitutional principles.[172] Indeed, the fairness and arbitrariness of government action is not considered in a vacuum, but with reference to the nature of the property and liberty at stake.[173] It would be patently unfair for the government to impose a one-cent tax on all citizens with the name "John." But the deprivation—a single penny—would be minor. In the reproductive context, the burden on the government to provide additional procedure must be viewed in light of the extreme burden placed on pregnant individuals as a result of its action.[174] When such an extreme deprivation of both liberty and prop-

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169 Of course, assigning an exact value on the interest is impossible. Such difficulty, however, does not prevent courts from engaging in this analysis. Suits for wrongful death or conviction that must assign monetary value to deprivations of liberty might be used as a model. *See* Fox, *supra* note 139, at 225 ("Incommensurability is no greater problem for reproductive negligence than it is in other contexts in which juries determine recovery for intangible losses.").

170 *See* Susan E. Looper-Friedman, *"Keep Your Laws Off My Body": Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 282–83 (1995) ("If we accept the argument that preventing the unnatural termination of prenatal life serves an important public purpose, this still would not obviate the fact that such a public 'benefit' can only be gained at great expense to the woman who must endure an unwanted pregnancy and subsequent childbirth.").

171 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

172 *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (reviewing a procedural due process claim in the context of prison and finding that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application").

173 *See* Ingraham v. Wright, 430 U.S. 651, 672 (1977) ("'[T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.'" (quoting Bd. of Regents v. Roth, 408 U.S. 564, 570–71 (1972))).

174 *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly . . . 'consid-

erty results from government action—as it does in the case of compelled pregnancy—then the procedures used to effectuate such a deprivation must more closely hew to notions of fairness even if they result in a heavier burden on the government.[175]

Further, the current cost to the government of the criminalization of abortion is effectively zero.[176] While additional procedural protections would therefore necessarily result in some measure of additional cost and burden to the government, such an increase would more accurately reflect the existence of the government's asserted interest in compelling reproduction and protecting fetal life.[177]

III. The Constitutional Obligation to Provide Pre- and Post-Deprivation Protections

The Supreme Court has held that procedural due process protections attach to myriad types of government action, including involuntary civil commitment,[178] corporal punishment in schools,[179] civil forfeiture,[180] detention of enemy combatants,[181] exclusion proceed-

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eration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'" (citations omitted) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961))).

175 *See id*. This is especially true when the government compels, rather than merely encourages, particular action. *See* Maher v. Roe, 432 U.S. 464, 476 (1977) ("Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.").

176 *See* Looper-Friedman, *supra* note 170, at 283 ("Under the current privacy doctrine, abortion legislation has been an all-or-nothing proposition. Regulations are either constitutionally invalid, and therefore unenforceable, or are valid, enforceable, and cost the state next to nothing. If the regulation under consideration is constitutionally valid, the legislature need not concern itself with all of the costs of the regulation, since the only cost borne by the state is that of enforcement.").

177 Moreover, even constitutionalizing additional process rights in this scenario might not affect the level of government spending, at least in the short term. *See* Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J.L. & Econ. 713 (2017) (finding that the adoption of constitutional social rights to education and health care is not associated with increases in government spending in those areas).

178 Addington v. Texas, 441 U.S. 418, 425–27 (1979).

179 Ingraham v. Wright, 430 U.S. 651, 676 (1977).

180 United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–61 (1993).

181 Hamdi v. Rumsfeld, 542 U.S. 507, 528–35 (2004).

ings,[182] habeas review,[183] and terminations of public benefits,[184] parental rights,[185] and public employment.[186]

While some types of deprivations are too minor or insignificant to warrant procedural due process protections,[187] the evolution of procedural due processes has been towards providing more protections for a wider variety of rights.[188] It is not necessary to analogize compelled pregnancy to each of these circumstances, however, to illustrate the general point that in order for government infringements of fundamental liberty and property rights to be constitutionally valid, they must occur only alongside the provision of certain rights and protections prior to the deprivation, following the deprivation, or both. Below, three examples—the rights associated with the criminal process, eminent domain, and civil commitment—stand in to showcase the general principle.

More so than in any other category, the Bill of Rights specifically enumerates the procedural protections that attach to the criminally accused and convicted. The Court has stated that protections in this arena are particularly important because they allow the government to deprive an individual of their most fundamental liberty, and sometimes even their life.[189] The Bill of Rights contains four amendments that specifically deal with the rights of alleged criminals pre-conviction and address their rights post-conviction: the rights of the accused include the right to be free of unreasonable searches and seizures,[190]

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182 Landon v. Plasencia, 459 U.S. 21, 34–37 (1982).

183 Boumediene v. Bush, 553 U.S. 723, 781 (2008).

184 Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

185 Santosky v. Kramer, 455 U.S. 745, 758–68 (1982).

186 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543–45 (1985).

187 *See, e.g.*, Doe v. Bagan, 41 F.3d 571, 575 (10th Cir. 1994) ("The Supreme Court has acknowledged that freedom from bodily restraint is a liberty interest protected by the Constitution. That interest, however, does not extend to restraints that are insignificant. . . . This brief interference with [plaintiff's] freedom is not the kind of deprivation . . . historically protected by the due process clause." (citations omitted)).

188 *See supra* notes 78–80.

189 *See* Gardner v. Florida, 430 U.S. 349, 357–58 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); O'Connor v. Donaldson, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring) ("It is elementary that the justification for the criminal process and the unique deprivation of liberty which it can impose requires that it be invoked only for commission of a specific offense prohibited by legislative enactment.").

190 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

self-incrimination,[191] and excessive fines or fees.[192] The accused also have the affirmative rights to notice of the charges against them, counsel, confrontation of the witnesses against them, and a speedy trial by a jury of their peers.[193] Even after conviction, individuals are afforded substantial rights. The Court has interpreted the Eighth Amendment prohibition of "cruel and unusual punishment"[194] to include not only the right to be free from punishment that offends our societal notions of decency, but also the right to minimum conditions of care while in the custody of the government.[195] This protection includes minimally adequate housing, food, and medical care.[196] None of the panoply of procedural protections afforded to criminals and the criminally accused, however, suggest that the government lacks the fundamental ability to deprive individuals of life, liberty, or property—only that its ability to do so in a constitutionally permissible way rests on its adherence to pre- and post-deprivation process and procedures.[197]

There is considerable evidence that the modern-day criminal justice system has failed to live up to the Constitution's guarantee of fair treatment for the criminally accused[198] and convicted.[199] There can be no doubt, however, that the Constitution requires that deprivations of

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191 U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

192 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

193 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

194 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

195 *See* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976) (finding an obligation to provide medical care for incarcerated individuals under the Eighth Amendment's prohibition on cruel and unusual punishment).

196 *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment . . . imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984))).

197 *See* United States v. Salerno, 481 U.S. 739, 750–51 (1987) ("On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard.").

198 *See, e.g.*, Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 501–02 (2019) (arguing

liberty resulting from the criminal process are accompanied by protections both before and after the deprivation.

In addition to deprivations of life and liberty, the Due Process Clause also requires proper procedure when the government deprives individuals of property. Once again, the Constitution does not *prohibit* the government from taking private property,[200] but it places two important limitations on that power—one substantive and one procedural. The substantive limitation is that the government may only take private property for public use.[201] But even government action to take property rightfully determined as for public use is further constrained by the requirement that the government pay the owner of the property "just compensation" as recompense for the deprivation.[202] An otherwise constitutionally permissible deprivation of property for public use is thus still procedurally deficient absent appropriate compensation.[203]

What pre-deprivation process is due the owner of property is up for debate, but recently scholars have advocated that the basic requirements of pre-deprivation notice and a hearing apply to exercises

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that criminal pretrial detention should more closely mirror the civil system of injunction in taking into account the cost of detention to the defendant).

199 *See* PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 34 (2012) (detailing widespread prison overcrowding); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 1–2 (2019) (detailing multiple unconstitutional conditions in Alabama's state prisons, including overcrowding, violence, sexual abuse, and poor facilities). The lack of procedural protections for incarcerated people is more striking in light of the protections afforded to certain non-criminal liberty rights and property in non-criminal contexts. *See* Gerstein v. Pugh, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) ("[T]he Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license." (citations omitted)).

200 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) ("As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" (quoting First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 314 (1987))).

201 *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

202 *Id.*; *Lingle*, 544 U.S. at 536–37 ("[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (quoting *First English Evangelical Lutheran*, 482 U.S. at 315)).

203 *See* Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 236–37 (1897) ("The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.").

of the government's takings power, as well.[204] Early Supreme Court precedent supports this proposition.[205]

Another potentially fruitful analogy is the collection of requirements procedural due process creates in the civil commitment context.[206] Through civil commitment, the government has the power to deprive individuals of their liberty when they present a danger to themselves or society.[207] The Court has articulated the government's interest in this context as twofold—protection of the public and promotion of the welfare of the individual affected.[208] The Court, however, has consistently required the state to adhere to a robust set of procedures before constitutionally depriving an individual of their liberty through civil commitment.[209] These procedures are similar in some respects to those afforded to criminal defendants and different in others.[210] Further, once in the custody of the government as a result of civil commitment, individuals are entitled to minimum conditions of care.[211] In part, this is in recognition that individuals deprived of

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204 *See* Hudson, *supra* note 30, at 1282–83 (exploring what pre-deprivation procedural due process rights might be contained in the principle of eminent domain).

205 *See Chicago, Burlington & Quincy R.R.*, 166 U.S. at 234–35 ("If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.").

206 *See* O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) ("There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law.").

207 *See* United States v. Comstock, 560 U.S. 126, 149 (2010) (upholding federal statute providing for civil commitment of sex offenders following their release from prison).

208 *See* Addington v. Texas, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").

209 *See id.* at 425 ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *see also* Lawrence O. Gostin et. al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 122–23 (1999) ("In cases involving civil commitment of persons with mental illness, the Supreme Court has required 'clear and convincing' proof of dangerousness, and many lower courts have required an array of procedural protections.").

210 Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 6 (2006) (noting the "Supreme Court's divergent approaches to procedural due process in criminal and civil litigation, which may differ in the hearing rights granted even when the interests at stakes seem quite similar").

211 *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) ("Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.").

their liberty to promote the general public welfare are entitled to something as recompense for the individual burden they must bear in the process, and in part because the government must act in the best interests of those whom it prevents from acting in their own interests.[212]

In summary, if the government sought to take control of your body through incarceration, the Constitution would permit you to insist on process to challenge the conviction and to demand minimum conditions of care while you were in the physical control of the government.[213] If the government took your house, you could challenge the validity of the taking and, at minimum, would demand payment.[214] If the government committed you to a mental institution, you could demand both process to challenge the deprivation and minimum conditions of care while in government custody.[215]

When compared with these other situations in which individuals deprived of liberty or property are protected by due process either pre- or post-deprivation, it is only rational that pregnant people would seek to demand similar protections from the government. Just as in the situations described above, the government deprives pregnant people of liberty and property in furtherance of the government's own interest.[216] The deprivation of liberty and property experienced by unwillingly pregnant people is similarly weighty and, just as in the three examples explored above, the burden on the individual of erroneous or unfair government action is high compared to the potential harm to the state.[217] Just as in other situations where an individual is taken into government custody, pregnant individuals are deprived of their ability to provide for their own care by accessing legal means of discontinuing their pregnancies.[218] And they are deprived of the fundamental right to use or exclude others from their property by the forced use of

212 *See* O'Connor v. Donaldson, 422 U.S. 563, 582–83 (1975) (Burger, C.J., concurring) ("[A] particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves.").

213 *See supra* notes 189–99 and accompanying text.

214 *See supra* notes 200–05 and accompanying text.

215 *See supra* notes 206–12 and accompanying text.

216 *See supra* notes 35, 138–52 and accompanying text.

217 *See* Addington v. Texas, 441 U.S. 418, 427 (1979) (requiring heightened standard of proof in the civil commitment context because "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state"); *see also supra* Sections II.C–.D.

218 *See supra* note 164 and accompanying text.

their bodies for purposes of furthering the government's interest.[219] In the face of these similarities, pregnant individuals' complete lack of entitlement to pre- or post-deprivation rights is striking.

Of course, all fundamental interests are not entitled to the *same* due process protections. As the previous Sections articulate, due process necessarily looks different depending on the competing interests involved and the nature of the deprivation. It might be that the analogies explored above are compelling in some respects and not in others. Nevertheless, the examples in this section—and many others—nicely illustrate the general principle that other constitutional deprivations of fundamental liberty and property interests are generally paired with *some* additional rights or procedural protections. What protections make sense in the reproductive space can be the subject of debate while not undermining the more basic assertion that something more is warranted.

Although due process protections will not always be identical, if government action is to be constitutional, it must adhere to intelligible principles which recognize the parallels between like circumstances.[220] Thus, due process compels the government to treat similarly individuals in similar circumstances—to provide process to those whose rights are undermined, minimum conditions of care to those who are deprived of the ability to protect themselves as a result of government action, and compensation for property taken from an individual in furtherance of a public interest.

IV. The Boundaries of Reproductive Due Process

This Article is intended to begin a conversation about how procedural due process rights might attach at the moment that state power is used to deprive individuals of liberty and property through the criminalization of abortion. It is not intended to delineate the exact scope or substance of what such process would look like. Nevertheless, it is worthwhile to briefly explore at least the most limited application as well as the outer boundaries of what reproductive due process might involve. There are, of course, many possibilities that exist between these two extremes. By providing a rough sketch of the

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219 *See supra* Section II.B.

220 *See* Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) ("The decision of an apparently novel [constitutional] claim must depend on grounds which follow closely on well-accepted principles and criteria."); *see also* Tribe, *supra* note 152, at 339 ("Clashes between competing fundamental rights surely must be resolved on more principled grounds.").

possible boundaries, however, a sense of the general possibilities that this framework contemplates emerges.

A. The Constrained View

As previously mentioned, procedural due process has been understood to require—at a minimum—notice and the opportunity to be heard prior to the deprivation of a liberty or property right.[221] What would such a notice and hearing requirement look like in the reproductive context? Citizens are assumed to be on notice of the law's requirements generally, including any prohibition on abortion.[222] The Supreme Court has struck down criminal laws as violative of due process, however, when they are vague such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [s]he may act accordingly."[223] Considering the variety of opinions concerning what constitutes fetal "viability"—and even the proper way to calculate gestational age[224]—laws which criminalize abortions using these standards may fail to provide individuals or physicians with sufficient notice regarding what actions will run afoul of the prohibition.[225] Perhaps sufficient notice in this context would require the government to provide basic prenatal medical services that could establish, with at least reasonable certainty, fetal viability or gestational age. Through the provision of such services, an individual deciding whether to terminate a pregnancy could be reasonably certain of whether her conduct would be considered criminal—and thus be furnished with notice relevant to her particular pregnancy.

Procedural due process also includes the right to some type of hearing.[226] Substantive due process would rightly prohibit the state

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221 *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475 (1986) ("[T]he Supreme Court has often stated that the core rights of due process are notice and hearing . . . .").

222 *See* United States v. Baker, 197 F.3d 211, 218 (6th Cir. 1999) (discussing "the centuries-old maxim that 'ignorance of the law is no excuse.'").

223 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Court in *Grayned* goes on to say that vague criminal statutes are particularly concerning when they "'abut[ ] upon sensitive areas of basic . . . freedoms'" because such vagueness "'operates to inhibit the exercise of [those] freedoms'" by "lead[ing] citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'" *Id.* at 109 (alteration in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961)).

224 *See supra* notes 158–59 and accompanying text.

225 *See* Tribe, *supra* note 152, at 332.

226 *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951); *see also supra* text accompanying note 92.

from requiring individuals to submit themselves to an adjudicative process in the previability stage because it would constitute an undue burden on the right to an abortion.[227] The availability of some type of hearing in the post-viability stage for those who seek to access an abortion, however, may be required under procedural due process. If the factual issue of viability or gestational age were contested, a hearing would enable a pregnant person to challenge a state's determination that an abortion was criminal in her circumstance.[228] Such a hearing would be particularly critical for individuals who become aware of issues late in a pregnancy and desire the opportunity to argue that the state's interest is not sufficiently compelling in their particular situation to warrant the deprivation of their right to choose abortion.[229] Procedural due process requires not only the baseline right to be heard—it requires the ability to be heard "at a meaningful time and in a meaningful manner."[230]

In certain circumstances, the Court has found that pre-deprivation process is not required at all. In these instances, some type of post-deprivation process is sufficient to meet the dictates of procedural due process.[231] In the reproductive context, a hearing to determine the appropriate level of compensation due to a pregnant person who was erroneously compelled to continue a pregnancy might be contemplated, even if a pre-deprivation hearing was not required or possible.

In either instance, the barest view of procedural due process requires that an individual compelled to continue a pregnancy in the

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227 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (prohibiting state action that places an undue burden on abortion previability).

228 Such factual medical questions have been answered in hearings required by procedural due process in other contexts. *See* Vitek v. Jones, 445 U.S. 480, 495 (1980) ("[W]hether an individual is mentally ill and cannot be treated in prison 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.' The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." (citations omitted)).

229 *See* O'Connor v. Donaldson, 422 U.S. 563, 574–75 (1975); Doe v. United States 419 F.3d 1058, 1060, 1064 (9th Cir. 2005); *supra* notes 160–61 and accompanying text; *supra* text accompanying notes 162–63.

230 Barry v. Barchi, 443 U.S. 55, 66 (1979) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (finding that due process required a "prompt postsuspension [sic] hearing . . . without appreciable delay" in order to avoid the full force of the injury of the government's action); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

231 Zinermon v. Burch, 494 U.S. 113, 128 (1990) ("In some circumstances, however, the Court has held that a statutory provision for a postdeprivation [sic] hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process.").

face of the criminalization of abortion should have *some* forum, at *some* point, to argue that the government's interest was not compelling as it applied to her, or that as a result of the government's actions she was erroneously deprived of her liberty and property. Failure to provide her with basic notice and an opportunity to be heard could, standing alone, form the basis for a successful argument that she has been deprived of procedural due process rights and is entitled to a remedy.[232]

B. The Expansive View

A more expansive view of what procedural due process might require in the reproductive space is expansive indeed. If procedural due process is understood, as this Article argues it should be, to require that the government adhere to the broad constitutional and common law principles which constitute the law of the land more generally,[233] then individuals who are compelled to complete pregnancies in furtherance of the government's interest might reasonably demand not only a more robust requirement of notice and an opportunity to contest the deprivation,[234] but also reasonable care and compensation in recognition of the deprivation.[235]

In the pre-deprivation context, the requirement for providing notice might encompass the right to comprehensive sex education in order for individuals to adequately understand the basis for the law's requirements and how to avoid pregnancy in a legally permissible way.[236] The basic information of gestational age or viability contemplated by the constrained view may rationally be extended to include a right to access a wide variety of medically-relevant information, including information about the health of the pregnant person, the developing fetus, and the likelihood of complications later in the pregnancy or following birth. Such information—gained through free prenatal care which may include ultrasounds, prenatal genetic testing,

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232 *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[B]ecause of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." (citations omitted)).

233 *See supra* notes 56, 97–99, 220 and accompanying text.

234 *See supra* notes 38, 66–67 and accompanying text.

235 *See supra* notes 163–68 and accompanying text.

236 Support for comprehensive sex education has at least the potential to be a bipartisan political win, as anti-choice activists have also advocated for comprehensive sex education to be partnered with abortion restrictions as a common-sense way to decrease the need for abortions. *See* Siegel, *supra* note 55, at 1681–84 (noting anti-abortion activist's support for comprehensive sex education as a method to avoid future abortions).

and basic medical screening for the pregnant person—would ensure that the pregnant person was fully on notice of the deprivations that she might experience if she continued the pregnancy beyond the point when abortion was no longer a legally permissible option for her. Without access to such particularized information, notice about the criminalization of abortion past a certain point would not be meaningful because it would fail to apprise the pregnant person of how such criminalization may affect her in the future. Similarly, the pre-deprivation requirements for a fair hearing might also be expanded to include the right to counsel or an initial burden of proof on the government to show that the prohibition on abortion as it applied to a particular pregnant person's situation was a valid expression of the state's interest.

Whatever the specific contours of the pre-deprivation rights to notice and a hearing, however, under the expansive view of reproductive due process, some type of pre-deprivation procedure is clearly required. While pre-deprivation process is not always constitutionally compelled,[237] in circumstances where it is not required there are usually at least one of several factors present that make pre-deprivation process impossible, impractical, or unnecessary. For instance, pre-deprivation process is not necessarily required when the government is not aware that the deprivation will occur or when the deprivation must happen with unusual speed.[238] The criminalization of abortion creates certainty that deprivations of liberty and property will occur, so the former concern is not present.[239] The nature of pregnancy does create some temporal pressure for a timely pre-deprivation hearing, although not comparable in speed to the type of deprivations that must happen so quickly that they allow for a complete abdication of pre-deprivation procedure.[240] Pre-deprivation process can also be constitutionally forgone when the type or extent of the deprivation at is-

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237 *See supra* note 231.

238 *See* Zinermon v. Burch, 494 U.S. 113, 128, 132 (1990) (discussing circumstances in which a post-deprivation remedy is adequate for procedural due process purposes).

239 *Cf.* Cty. of Sacramento v. Lewis, 523 U.S. 833, 851 (1998) (noting that "in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare").

240 For example, pre-deprivation hearings would not be required under circumstances that implicate national security or present a clear and immediate threat to the public welfare generally. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599–600 (1950) ("One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health."); Cent. Union Tr. Co. v. Garvan, 254 U.S. 554, 566 (1921) ("There can be no doubt that Congress has power to provide for an immediate seizure in war times of property

sue is not particularly weighty or severe.[241] But even the temporary termination of utility services such as water or internet have been held to be sufficiently weighty to warrant some type of pre-deprivation process.[242] Certainly, the deprivation of rights associated with compelled pregnancy rises at least to the level of the cancellation of internet service. Finally, deprivations of liberty often necessitate pre-deprivation procedures in a way that deprivations of property alone may not.[243] As the criminalization of abortion deprives individuals of both liberty and property interests,[244] providing only post-deprivation process is insufficient.

In other contexts, due process has required not only a procedure for the initial deprivation of liberty, but a commitment to a periodic review.[245] Thus, procedural due process is not tied to a single point in time, but instead is present as a constitutional mandate throughout the deprivation.[246] This periodic review of the constitutionality of the deprivation is relevant in the reproductive context because the facts and circumstances of a pregnancy can continually shift throughout the forty-plus weeks of an average pregnancy.[247] While the state may validly express an interest in a healthy thirty-week old fetus that could substantiate a continuing deprivation of a pregnant person's liberty, complications very late in pregnancy might result in a different

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supposed to belong to the enemy . . . if adequate provision is made for a return in case of mistake.").

241 Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978) ("On occasion, this Court has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional 'advance procedural safeguards.'" (quoting Ingraham v. Wright, 430 U.S. 651, 680 (1977))).

242 *Id.* at 20 (finding pre-deprivation process was required for utility services because "the cessation of essential services for any appreciable time works a uniquely final deprivation").

243 *See* Albright v. Oliver, 510 U.S. 266, 315–16 (1994) (discussing need for pre-deprivation process in circumstances that implicate liberty as opposed to property interests); Phillips v. Comm'r, 283 U.S. 589, 596–97 (1931) ("Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.").

244 *See supra* notes 135–51 and accompanying text.

245 *See* Parham v. J.R., 442 U.S. 584, 606–07 (1979) (holding that procedural due process required not only sufficient protection of children involuntarily committed to ensure that they met standards for initial admission, but also required a continuing need for the basis for the commitment to be reviewed by an independent procedure); Proctor v. LeClaire, 846 F.3d 597, 614 (2d Cir. 2017) (requiring periodic review of the basis for the administrative segregation of prisoner).

246 *See Parham*, 442 U.S. at 606–07.

247 *See supra* notes 160–63 and accompanying text.

calculus of the weight of both the individual's and the state's interest.[248] Thus, the ongoing right to a hearing throughout the course of the infringement would be necessary, not simply the right to a single hearing.

The expansive view of what reproductive due process might require post-deprivation is similarly robust. In order to fairly compel a person to remain pregnant, give birth, and parent a child until at least the age of majority—all against her wishes and in furtherance of the state's independent interest—the state must provide her with reasonable protection against the harms she is likely to experience as a result of pregnancy and birth and compensate her for the loss of liberty and property that she experiences.[249]

Rights to post-deprivation minimum standards of care could include the provision of prenatal care, payment of childbirth expenses, or effective legal recourse for discrimination encountered as a result of pregnancy or parenthood. The Supreme Court has made it clear that the state generally owes no duty to private individuals to protect them from harm—including deprivations of life, property, or liberty—even if it knows of the potential for such harm or has communicated an intention to help protect against such harm.[250] But the Court has made it equally clear that the state does have a duty to protect against harm in two, interrelated scenarios—when the individual is in the custody of the state or when the state itself has acted to remove an individual's means of securing protection for herself.[251] In the compelled pregnancy context, therefore, the government may be responsible for removing or at least ameliorating the harm associated with pregnancy as a result of its action to remove the only legal way to terminate a pregnancy.

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248 *See id.*

249 I am not the first or only scholar to argue that the government should be required to pay the costs that women incur as a result of forced pregnancy. *See, e.g.*, Goldberg, *supra* note 37, at 1644–45 (noting that the "drastic scope of the invasion of an unwanted pregnancy militates in favor of finding a taking"); Looper-Friedman, *supra* note 170, at 256–57, 282–83 (arguing that prohibitions on abortion constitute a "taking" under the Fifth Amendment). While these scholars focused more specifically on eminent domain arguments, my argument is rooted in a broader reading of the constitutional scheme, and due process protections specifically, but absolutely draws on this earlier work.

250 DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

251 *Id.* at 199–200 (holding that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being" and that such an affirmative duty "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf").

Rights to compensation for forced gestation could include legal entitlements to paid maternity leave, free or subsidized childcare, and even payment for the costs of raising the child. The possibility that a woman may place for adoption the child that results from an unwanted pregnancy does not undermine the right to this type of compensation. The reality is that the vast majority of women, either through choice or social expectation, will go on to raise a child that results even from an unwanted pregnancy.[252] Thus, it is incorrect to assume that compensation, to the extent it is required, should be limited to the costs of the pregnancy and birth itself.[253]

While the argument that the government must compensate pregnant people for their labor might strike some as outrageous, Justice Blackmun, in his concurrence in *Planned Parenthood v. Casey*, implicitly made such an argument by noting the similarity of forced pregnancy to other types of government action that require compensation, stating:

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.[254]

In the few instances in which courts have allowed private litigants to secure damages for wrongful pregnancy claims, plaintiffs have been able to secure damages up to the costs of raising a child to the age of majority—or beyond.[255] There is no rational reason why the govern-

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252 *See* Siegel, *supra* note 37, at 370, 371–72 (describing how social reality dictates that women who experience unwanted pregnancies and who lack access to abortion nevertheless overwhelmingly go on to raise the resulting children, and that the politicians who enact anti-choice legislation both expect and rely on this outcome); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1410 (2009) ("Parenting is not the sort of at-will employment from which an employee can simply walk away if the terms are not favorable; there are moral, emotional, and legal restraints on one's ability to do so.").

253 In fact, the mental anguish that may accompany relinquishment of parental rights might subject a woman to more—not less—harm. *See* Bernstein, *supra* note 138, at 1189 n.238 (collecting sources discussing why the option to relinquish parental rights does not negate the harm of an unwanted pregnancy).

254 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

255 *See* Zehr v. Haugen, 871 P.2d 1006, 1013 (Or. 1994) (holding that "defendant physician's alleged failure to perform a tubal ligation" was adequate basis for plaintiffs to assert "damages in the form of expenses of raising the child and providing for the child's college education"); Marciniak v. Lundborg, 450 N.W.2d 243, 248 (Wis. 1990) ("We therefore conclude that the parents of a healthy child may recover the costs of raising the child from a physician who negligently per-

ment should be able to intentionally compel pregnancy and pay nothing when private actors must pay the costs associated with only negligently inflicted pregnancy. If anything, the intentional nature of the government's action results in a stronger argument that it must provide recompense.[256] This is particularly true in light of the fact that the pregnant person, unlike an incarcerated individual who *is* entitled to minimum standards of care, committed no offense that would substantiate the government's uncompensated limitation on her liberty.[257] Further, the provision of such care and compensation would more accurately reflect the government's stated interest for criminalizing abortion in the first place—protecting the life and health of the pregnant person and the unborn child.[258]

The sweeping language used to describe the protections of due process in the past provides evidence that this expansive view of reproductive due process rights is a compelling one:

> Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.[259]

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forms a sterilization."). *But see, e.g.*, Hartke v. McKelway, 526 F. Supp. 97, 105 (D.D.C. 1981), *aff'd*, 707 F.2d 1544 (D.C. Cir. 1983) (holding that damages for unsuccessful sterilization procedure did not include the expense of raising a child where mother did not seek sterilization for economic reasons).

256 *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.").

257 *See* Morrissey v. Brewer, 408 U.S. 471, 483 (1972) (noting that because parolee was found guilty of a crime, the state was justified in "imposing extensive restrictions on [his] liberty").

258 *Cf.* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (finding that individual committed to mental institution had rights to "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests," in part because "[s]uch conditions of confinement would comport fully with the purpose of respondent's commitment"); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (noting the minimum requirement under due process that "the nature and duration of commitment" to a mental hospital must "bear some reasonable relation to the purpose" of the commitment).

259 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951).

The underlying fairness and sense of justice that due process is intended to protect fits neatly in this space.[260] At its most basic, the argument for reproductive due process is that the government must protect the fundamental rights of pregnant people by affording them the same basic protections given to others whose rights are infringed in analogous circumstances—including meaningful chances to contest the deprivation, minimum conditions of care during the period of deprived liberty, and fair compensation for deprivations already inflicted.[261] Previous scholarship has situated the right to abortion in various other constitutional provisions—including the Equal Protection Clause,[262] the Free Exercise Clause,[263] the Establishment Clause,[264] the Thirteenth Amendment's prohibition on slavery,[265] the Takings Clause,[266] and the Eighth Amendment's proscription of cruel

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260 There is a growing consensus even among those who oppose abortion that blanket abortion provisions do not sufficiently address the needs of women. *See* Siegel, *supra* note 55, at 1690 ("[T]he antiabortion movement itself seems to be acknowledging that restrictions on abortion must respect women's autonomy and welfare, even if Americans continue to argue about what this means." (emphasis omitted)).

261 In this way, I invoke Laurence Tribe's invitation to "consider a view of our Constitution's structure from the conceptual bridges that connect the inalienable rights of individuals, the affirmative duties of government, and those legal norms that seek to avoid domination and to assure the diffusion and sharing of power." Tribe, *supra* note 152, at 330. But instead of using such a framework to argue that the government must fund abortion, as Professor Tribe does, I argue that it at least requires the government to attend to the rights and needs of those whom it deprives of rights as a result of its criminalization of abortion. *Id*. at 338.

262 *E.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 378–79, 384 n.69, 384 n.71, 386 n.83 (1985); Siegel, *supra* note 37, at 263.

263 *E.g.*, Carla Graff, Note, *The Religious Right to Therapeutic Abortions*, 85 GEO. WASH. L. REV. 954, 954, 963 (2017).

264 *See, e.g.*, Peter Wenz, ABORTION RIGHTS AS RELIGIOUS FREEDOM 48, 78–79 (1992) ("[B]eliefs concerning the personhood of fetuses twenty weeks or younger are religious beliefs. Legislation having no justification except the protection of such fetuses for their own sakes amounts to the unconstitutional establishment of religion."). This argument was also asserted by Justice Stevens in his dissenting opinion in *Webster v. Reproductive Health Services*, where he wrote that he was "persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution." 492 U.S. 490, 566 (1989).

265 *See, e.g.*, Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 116–23 (2019) (detailing history of arguments for abortion access under the Thirteenth Amendment); Tribe, *supra* note 152, at 335. *But see* Jane L. v. Bangerter, 794 F. Supp. 1537, 1548–49 (D. Utah 1992) (rejecting the argument that the Thirteenth Amendment makes criminalizing elective abortions unconstitutional).

266 *See, e.g.*, Goldberg, *supra* note 37, at 1644 ("Surely the drastic scope of the invasion of an unwanted pregnancy militates in favor of finding a taking.").

and unusual punishment.[267] The argument advanced here broadens and incorporates these prior arguments by asserting that the nature of the deprivation of liberty and property that pregnant individuals experience as a result of the criminalization of abortion implicates each of these concerns and that vindication of the penumbra of constitutional protections that would apply in this situation can be found through the catchall fairness and rule-of-law requirements contained in the concept of procedural due process.[268]

If the actual boundaries of the expansive view of reproductive due process sound familiar, it is because the type of benefits it contemplates—sex education, subsidized contraception, healthcare, and childcare, and freedom from discrimination as a result of pregnancy—are all pillars of the feminist political platform and the political left more generally.[269] While social and political movements have had some success securing these benefits through legislation, many remain unrealized.[270] Finally, the fact that the exact scope of reproductive due process protections is difficult to ascertain does not, standing alone, compel the conclusion that such rights do not exist.[271] The scope and

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267 *E.g.*, Avalon Johnson, *Access to Elective Abortions for Female Prisoners Under the Eighth and Fourteenth Amendments*, 37 AM. J.L. & MED. 652, 654 (2011).

268 This argument is based, in part, on the Court's willingness to situate the substantive liberty interest in abortion in a penumbra of constitutional rights that, taken together, form the basis for the right. Roe v. Wade, 410 U.S. 113, 152–53 (1973). But it should also be viewed in light of recent scholarship on aggregate constitutional claims. *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1310 (2017) (explaining how a single government action can violate an individual's "cumulative constitutional rights").

269 *See, e.g.*, Tribe, *supra* note 152, at 341 (noting that the government could reduce the need for abortion by "providing better sex education and more widely available contraception" and "can also help make those unplanned pregnancies that *do* occur easier for women to want—or at least to tolerate—by providing improved prenatal care, better financial support for women with infants, and expanded adoption opportunities"); DEMOCRATIC PLATFORM COMMITTEE, 2016 DEMOCRATIC PARTY PLATFORM 33 (2016) (describing the party position on reproductive health rights, health care and family planning services, low-cost contraception, sex education, and discrimination against women); *see also* Peter Beinart, *The Growing Partisan Divide Over Feminism*, ATLANTIC (Dec. 15, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-partisanship-of-feminism/548423/ [https://perma.cc/SAU4-RT7P] (discussing increasing alignment between feminist and democratic platforms with respect to women's rights).

270 *See, e.g.*, 42 U.S.C. § 2000e(k) (2018) (providing that discrimination on the basis of pregnancy is sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (requiring health plans to cover contraceptives).

271 *See* Tribe, *supra* note 152, at 341–42 (arguing that the lack of an intelligible answer regarding the extent of the government's duty to "reduce the cruel clash of interests between women and their unborn children . . . bears only upon *how* the constitutional duty in question

meaning of many constitutional protections is the subject of fierce debate. The fact that these debates exist reflect only the vibrancy of our constitutional scheme, not a lack of constitutionally based rights.

V. Potential Critiques

Without question, the proposals contained herein are far afield of the current state of the law. And while it is not possible to meet every potential critique of the project, the novelty of its content necessitates a preemptive response to some of the most likely counterarguments. In the following sections, those counterarguments are acknowledged and briefly addressed.

A. Procedural Due Process Does Not Do That

Some may simply argue that the substantive due process right to abortion is already established and that the contours of procedural due process have been developed in a way that does not allow for this novel application in the reproductive context.[272] An argument based solely on the premise that the sort of rights contemplated here have not traditionally been encompassed by a due process framework, however, ignores one of the central features of due process—its ability to evolve to match current conceptions of fairness and justice.[273] Tradition can inform, but should not completely constrain, the limits of due process. Government action that is out of step with modern conceptions of fairness and equality should be discarded even if that action has long been standard practice.[274] As Justice Frankfurter articulated:

> Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitu-

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should be elaborated and enforced—not upon *whether* such a duty, however nebulous its boundaries, should be thought to exist at all").

272 *See* Jason Parkin, *Adaptable Due Process*, 160 U. Pa. L. Rev. 1309, 1317 (2012) (noting, but ultimately rejecting, the argument that "[w]ith a stable legal doctrine, an ossified set of procedural protections, and a lack of recent attention from legal scholars, it might appear that there is little left to say about procedural due process and the right to a fair hearing").

273 *See* Hurtado v. California, 110 U.S. 516, 529 (1884) (finding that adhering strictly to traditional notions of due process "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.").

274 *See* Grossi, *supra* note 59, at 159 ("The science of procedure has progressed over the years. And yet sometimes procedural rules and doctrines disserve logic and the democratic aspirations, and they don't offer the quickest, cheapest, and most reliable means and methods of enforcing substantive rights.").

> tional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.[275]

There is also relatively modern precedent for the rapid expansion of both substantive and procedural due process rights into areas that were traditionally considered outside the scope of constitutional protection. Of course, it was not until the last half century that the Court used substantive due process to announce rights to abortion, reproductive choice, and privacy.[276] And it was only in the 1970s that the Court rapidly expanded the meaning of "property" and developed the procedures necessary to protect against deprivations of these new types of property.[277] Thus, modern precedent provides examples of how due process can swiftly develop.

Finally, the *sui generis* nature of pregnancy and the burdens that accompany it—including the state-created deprivations of liberty and property that result from the criminalization of abortion—will necessarily create unique due process requirements. It is unsurprising that procedural due process has not been called on to provide for the rights to pre- and post-deprivation processes contemplated here in other scenarios for the simple reason that no other circumstance is exactly analogous to government-compelled gestation.

B. Procedural Due Process Does Not Attach to Legislative Action

In many circumstances, the Supreme Court has indicated that procedural due process protections do not attach to legislative acts because legislation created by normal political mechanisms presumptively constitutes "process."[278] As the criminalization of abortion is a

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275 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 173–74 (1951) (Frankfurter, J., concurring).

276 *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

277 *See* Parkin, *supra* note 272, at 1320–21 (describing the "due process revolution" of the 1970s following the expansion of property rights to include welfare benefits).

278 *E.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445 (1915) ("General statutes within the state power are passed that affect the person or property of individuals . . . without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.8(c) (3d ed. 1999) ("When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process."). *But see* Peter M. Shane, Commentary, *Back to the Future of the American State: Overruling* Buckley v. Valeo *and Other Madisonian Steps*, 57 U. PITT. L. REV. 443, 455–56 (1996) (arguing that the exemption of legislative process from due process review is facially incorrect).

legislative act, there is thus an argument that no further process attaches. This argument fails in two respects.

First, the Supreme Court has held that the right to process is maintained when a legislative act exceptionally affects a particular group of people in an individualized manner.[279] This retention of procedural due process for certain legislative acts ensures that individualized deprivations cannot masquerade as generalized legislative schemes without the attendant procedural protections. When an individual is compelled to continue an unwanted pregnancy, the nature and extent of the deprivation is unique to that individual. Further, such deprivations do not affect the general population. Thus, procedural protections can still attach even though the underlying government act is legislative.

Second, the true constitutional import of a law can often only be accurately judged at the point when it is applied in a particular circumstance.[280] No one would maintain that a state lacks the power to imprison the criminally convicted or take private property for public use through the power of eminent domain.[281] But validly enacted state legislation that, nonetheless, resulted in an unconstitutional abridgement of process rights can still run afoul of the requirements of procedural due process at the moment the law was enforced.[282] For instance, a state legislature could—consistent with valid legislative process—pass a law that says criminal defendants aren't entitled to a neutral decisionmaker at trial. Obviously, the first individual prosecuted under such a law would have a valid procedural due process claim even though the underlying state action was legislative. In such instances, including the criminalization of abortion, the validity of the substantive power of the state is unquestioned, while the need for process at the moment that power is exercised against a particular individual is likewise clear.

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279 *See, e.g.*, Londoner v. City & Cty. of Denver, 210 U.S. 373, 380, 384–86 (1908).

280 *See, e.g.*, David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 833 (1993) ("Most of the time, if not always, constitutional rules take shape at the application stage.").

281 *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[A] State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking . . . ."); United States v. Moore, 643 F.3d 451, 456 (6th Cir. 2011) ("In general, Eighth Amendment jurisprudence grants 'substantial deference' to the legislatures who determine the types and limits of punishments.").

282 *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 430, 432 (1994) (holding that amendment to the Oregon Constitution abrogating traditional common law judicial review of punitive damages lacked the procedures necessary to comport with due process).

C. *The Constitution Is a Charter of Negative Rights*

The language of "negative" and "positive" rights dominates much of the scholarship discussing the constitutional right to abortion,[283] and courts are often quick to characterize the Constitution as only guaranteeing pregnant people the former—the right to be free of government intrusion into their personal decisions regarding health and reproduction for the first portion of their pregnancy.[284] Under this line of constitutional reasoning, the government is under no constitutionally mandated "positive" duty to provide pregnant people with anything—contraception, comprehensive sex education, healthcare, maternity leave, or childcare.[285] The Constitution itself, however, contains examples of affirmative government duties—of which process rights are a subset.[286] Further, the positive and negative rights dichotomy has been persuasively undermined by a number of scholars,[287] and there is evidence that the Supreme Court is moving away from reliance on such a framework in its decisions.[288]

While due process has also been conceptualized as a negative right—to be free from arbitrary government actions—it can likewise be seen as imposing a positive duty on the government to provide process that is fair and just in light of the fact that the state will inevitably act to deprive citizens of liberty or property at least occasionally.[289] Moreover, this distinction obscures the fact that in a pregnancy unwillingly undertaken in the shadow of the criminalization of abor-

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283 *See, e.g.*, Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 736 (1981).

284 *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 507–09 (1989).

285 *See id.* at 507 ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); Tribe, *supra* note 152, at 330 ("In our constitutional system, rights tend to be individual, alienable, and negative.").

286 *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

287 *See, e.g.*, Bandes, *supra* note 46, at 2279; Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 411–12 (1990); Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, A Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 544–45 (2009).

288 *See* Phillip M. Kannan, *Logic from the Supreme Court that May Recognize Positive Constitutional Rights*, 46 U. MEM. L. REV. 637, 639 (2016) (arguing that the Supreme Court case of *Glossip v. Gross* evinces a willingness of the Court to abandon the negative/positive rights framework).

289 *See* Grossi, *supra* note 59, at 180 ("[E]ven if the Court has sometimes described the due process function as a 'negative' one, that is, one intended to protect the individual against arbi-

tion, the government is *compelling* the action that gives rise to the need for services in the first place, at least in some instances. This unique circumstance necessitates affirmative action on the part of the government.[290]

D. The Existence of Common Law Remedies

Another argument against the need for due process protections in the reproductive area might be the availability of common law remedies. The Supreme Court has held that the existence of a common law tort remedy against the government, standing alone, can satisfy due process.[291] It is not clear, however, that such a common law tort remedy exists in the reproductive context or that the damages available in such a suit are adequate.[292] In fact, courts are often very reluctant to award tort damages for wrongful birth or similar claims, for fear of what such damages might say about the value of human life.[293] This failure of the common law to consistently provide adequate remedies suggests that it is an insufficient protection. Further, the Court has found common law suits deficient in terms of procedural protections because they are less likely to be pursued or to result in an accurate determination of rights.[294]

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trary state action, due process has a positive function too as it imposes an obligation on the states to provide a judicial system that is fair, efficient, and just.").

290 *Cf.* Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) ("When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When a state cuts off sources of private aid, it must provide replacement protection."); Bandes, *supra* note 46, at 2277 ("[T]he sixth amendment's affirmative protections are made necessary by its peculiar context: the government's initial deprivation of liberty.").

291 *See* Zinermon v. Burch, 494 U.S. 113, 128 (1990). While recognizing the possibility that post-deprivation tort remedies might be sufficient for procedural due process, the Court in *Zinermon* ultimately held that the allegations of a mental patient concerning his admission to a state mental treatment facility without taking any steps to ascertain whether he was mentally competent to sign admission forms were sufficient to state a claim for a violation of procedural due process, notwithstanding availability of post-deprivation tort remedies. *Id.* at 128, 138–39.

292 *See* Fox, *supra* note 139, at 168–69 (noting many courts' refusals to hear tort suits for forced procreation and the inability of courts to adequately assess damages even in the cases they allow). The abrogation of the traditional protections found at common law has formed the basis for a successful due process challenge in the past. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 430, 432 (1994) (finding that amendment to the Oregon Constitution prohibiting judicial review of punitive damages awarded by jury violated due process).

293 *See* Fox, *supra* note 139, at 168–69 ("Reckoning damages in terms of child-rearing expenses also risks implying that parents do not want the child they now have or that they would have been better off had that child not been born.").

294 *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 21 (1978) ("An action in equity to halt an improper termination, because it is less likely to be pursued and less likely to be

Finally, even when claims for compelled reproduction have been successfully asserted, they are suits for the *negligent* infliction of compelled reproduction,[295] which is not analogous to the intentional compulsion of reproduction undertaken by the government when it criminalizes abortion.[296] The state is in a unique position, through its legislative power, to infringe on the rights of private citizens in a way that lacks a corollary in the common law of tort. As Justice Rehnquist observed, "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[297] Wholesale government action to compel individuals to use their reproductive capability in furtherance of the government's own interest cannot be vindicated by the common law alone.

E. Procedural Due Process Does Attach—If You Violate a Criminal Prohibition on Abortion

Another potential argument is that the state can criminalize all sorts of behavior that may impinge on individual liberty without incurring an obligation to the would-be criminal. Stated differently, the state owes no additional duty to the would-be thief or murderer as a result of the criminalization of such acts. This argument fails in three respects.

First, self-induced abortion is illegal in almost all circumstances,[298] and practically inaccessible in the later stages of pregnancy. Thus, an individual generally cannot break the law through her actions alone—

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effective, even if pursued, will not provide the same assurance of accurate decisionmaking as would an adequate administrative procedure.").

295 *See* Fox, *supra* note 139, at 168–69.

296 It is unclear whether the state would even be subject to such a suit for the negligent infliction of coerced reproduction. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

297 *Id.* at 332.

298 *See* Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion*, GUTTMACHER INSTITUTE (2013), https://www.guttmacher.org/sites/default/files/article_files/gpr160118.pdf [https://perma.cc/8ZPF-2JSG] ("[M]edication abortion [must] be provided only by a physician who is in the same room as the patient, essentially ruling out provision by physician assistants and advanced practice nurses or by telemedicine."); *see also* Farah Diaz-Tello & Cynthia Soohoo, *Criminalization of Women Who Self-Induce Abortions in the United States* (May 2017), https://www.ifwhenhow.org/download/?key=PJTCcDlynavc6xZ4z0d6Begu4dOOIx1g9uE8JzyZgbUbrV7BdXCdRthHz3lOmYzj [https://perma.cc/3DB9-DHK3] ("Medication abortion is only legally available through a physician in the U.S. . . . .").

she must compel a physician to perform an illegal abortion and therefore break the law on her behalf before she would even have the ability to challenge the constitutionality of the deprivation.[299]

Second, and more compellingly, the choices available to the would-be criminal and the pregnant person considering an illegal abortion are starkly different in type. If you refrain from committing a different type of criminal activity—say murder—you are not subject to a deprivation of liberty vis-à-vis incarceration. Thus, you do not get due process because there is no deprivation. In the pregnancy context, even if you do not break the law by having an illegal abortion, your liberty and property are still infringed through compelled pregnancy. There is no neutral choice.

Finally, this argument overlooks the nature of the burdens involved in criminalizing different types of behavior and how the benefit of such criminalization is shared. It is illegal, for example, to murder someone. By prohibiting certain conduct, such as murder, the state is taking away some portion of your liberty to do as you please. You can no longer murder, and if you do, the state has the power to punish you. But the burden of this prohibition is comparatively low. Most daily activities are unaffected by your inability to murder others.[300] And the burden is shared exactly equally by everyone—no one can murder. The societal benefit of the criminalization of murder, however, is comparatively high and shared equally—each person can now enjoy the peace of mind that comes from knowing their fellow citizens are prohibited from murdering them free of consequence.

In the context of the criminalization of abortion, however, the burden on the individual's liberty and property is high. Pregnancy and birth are inherently expensive, risky, and onerous.[301] The burden on liberty and property is not shared by everyone—only those capable of

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299 *See* Tribe, *supra* note 152, at 337 (arguing that "women are uniquely vulnerable" to the encumbrance of compelled labor caused by forced pregnancy "because they must call upon others to provide assistance if they would choose not to make this sort of sacrifice").

300 Hopefully.

301 Planned Parenthood of Alaska v. State, No. 3AN-97-6014 CI, 2003 WL 25446126, at *5 (Alaska Oct. 13, 2003) ("Physical risks associated with pregnancy and childbirth are numerous. Preexisting maternal health conditions such as diabetes, seizure disorders, bleeding disorders, hypertension, heart disease, and asthma, can complicate pregnancy. Also, complications can arise during pregnancy including: gestational diabetes, pregnancy-induced hypertension, overdistension of the uterus, postpartum hemorrhage, and respiratory conditions. . . . Women who carry a pregnancy to term are at risk of psychiatric illness such as postpartum depression. A full-term pregnancy is also associated with depression."); *see also supra* notes 144–47 and accompanying text.

pregnancy must bear the costs.[302] The benefit to society, in aggregate, is also high because everyone benefits from a stable reproductive rate.[303]

The state can fairly criminalize behavior without incurring additional obligations when the burden is equally shared, relatively low, and enjoyed by everyone. The state cannot fairly criminalize conduct without incurring additional constitutional obligations when the prohibited conduct only burdens particular individuals while benefitting everyone else.[304] In these circumstances, the state becomes obligated to provide additional pre- and post-deprivation rights and protections to the burdened parties before criminalization is just—not only provide protections to those accused of criminal abortion.

F. Other Deprivations Do Not Result in Additional Process Rights

The principles articulated in this Article may reasonably be extended to argue that other types of government action entitle individuals deprived of liberty and property to additional pre- and post-deprivation process rights. For instance, under this framework, conscripted soldiers may likewise be able to argue that, as a result of the deprivation of liberty and property incident to military service, the government may owe them additional process in the form of pre-deprivation hearings regarding the government's interest in their service or post-deprivation standards of care or compensation while performing military service. Why have such arguments not been made if they are compelled, as this project contemplates, by the dictates of procedural due process? The answer lies not in any deficiency on the part of the theoretical basis for the argument, but in the simple fact that no one has, or would, seriously argue that the government was not *already* obligated to provide drafted soldiers a forum to challenge their

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302 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.").

303 *See supra* notes 112–13 and accompanying text. There is an additional argument that the criminalization of abortion benefits all those for whom abortion is a moral wrong. *See Casey*, 505 U.S. at 852 (discussing the moral consequences of abortion on individuals and society).

304 The Constitution contains multiple examples of a commitment to shared burden. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 877–79 (1990) (holding that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability and that a law that burdens religion is still constitutional assuming it does not single out a particular religion for punishment); Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

conscription, or that the government was under no obligation to feed, house, and pay soldiers once they were in the service of the government. The government already does all of these things.[305] It is unremarkable that the government, when compelling military service from private citizens, takes basic steps to protect their rights.[306] And while there is not a Supreme Court case which outlines the constitutional duty to do so, there is a deep popular understanding that the government owes members of its military such a duty.[307]

As a society, we are unaccustomed to conceptualizing the labor involved in reproduction *as* labor.[308] This is because such labor is performed, almost exclusively, by women. Women's labor has a long his-

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305 *See* Caitlin Foster, *Military Pay: This Is How Much US Troops Are Paid According to Their Rank*, BUS. INSIDER (Feb. 15, 2019, 1:53 PM), https://www.businessinsider.com/how-much-military-service-members-make-2019-2#o-3-68052-12 [https://perma.cc/E9CD-L7Q9] (detailing salaries and other benefits, such as, food allowances and tax exemptions, for service members); *Postponements, Deferments, Exemptions*, SELECTIVE SERVICE SYSTEM, https://www.sss.gov/About/Return-to-the-Draft/Postponements-Deferments-Exemptions [https://perma.cc/7EY9-R6DA] (detailing general categories that may qualify individuals for an exemption from conscripted military service and the mechanisms in place for raising objections); Rod Powers, *US Military Housing, Barracks, and Housing Allowance*, BALANCE CAREERS (Sept. 12, 2019), https://www.thebalancecareers.com/what-the-recruiter-never-told-you-3332705 [https://perma.cc/VE32-6GNL] ("Due to the nature of their job and the less than average income, service members receive housing allowances or have access to military housing facilities.").

306 In other contexts, the Court has noted that the contours of due process have not been explicitly articulated because no state has ever attempted to undermine the generally accepted mandates of due process. *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994) ("Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial."). Viewed in this light, the omission of compelled pregnancy as a basis for additional due process rights is an even starker contrast to the assumed and unchallenged rights afforded to other individuals whose liberty or property has been burdened as a result of a government interest.

307 *See* Frank Newport, *Americans Say "Yes" to Spending More on VA, Infrastructure*, GALLUP (Mar. 21, 2016), https://news.gallup.com/poll/190136/americans-say-yes-spending-infrastructure.aspx [https://perma.cc/34VC-ZZ9E] (noting that a proposal to spend federal funds on efforts to modernize the Veteran's Administration is "extremely popular with Americans, with high levels of agreement and little disagreement"). While there is no explicit duty to pay or care for soldiers contained in the constitution, the duty to do so has been assumed throughout the history of the United States. As President Abraham Lincoln stated in his second inaugural address, it is the nation's solemn duty "to care for him who shall have borne the battle and for his widow and his orphan." Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) (transcript available at https://avalon.law.yale.edu/19th_century/lincoln2.asp [https://perma.cc/8BBP-TU8F]).

308 *Cf.* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1322 (1982) ("In our everyday life we notice change and movement, while things that do not change fade into the background. It is consistent that we perceive the state as involved in our affairs when it assists in changing the status quo, and not when it assists in maintaining it. The invention of the phrase 'state *action*' to describe the ambit of the fourteenth amendment reflects and buttresses the distinction.").

tory of being overlooked, uncounted, and undervalued.[309] This is particularly true of reproductive labor.[310] Thus, such labor is not considered labor at all and, by virtue of its mischaracterization, is not viewed for what it is—valuable and difficult.[311]

With this context in mind, it is unremarkable that state-compelled pregnancy, in the interest of fundamental fairness, should warrant pre- and post-deprivation protections and processes. While pregnancy and military service are obviously not completely analogous experiences, they share common features—physical risk, temporary impairment of the freedom of movement and travel, and financial burden—that suggest the state should adhere to common principles when compelling individual citizens to perform them.[312]

In fact, scholars and individuals have recently (and successfully) argued that state deprivations of property and liberty that have not traditionally been afforded procedural due process protections should be afforded these protections. For instance, individuals deprived of their liberty through quarantine have not traditionally been afforded much in the way of due process protections.[313] Nevertheless, recent outbreaks of Ebola—and the forced quarantines that have accompanied them—have resulted in new calls for due process protections for those affected.[314] These concerns are particularly pressing in light of

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309 Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1075 (1994) (discussing the long history of women arguing for property rights in their domestic labor).

310 *Cf.* Fox, *supra* note 139, at 240 (arguing that the law incorrectly "treats wrongfully disrupted plans concerning reproduction like one of those life adversities that people are expected to abide without any remedy").

311 *See generally* ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED (2001) (discussing how motherhood is undervalued despite the enormous economic benefit it confers on society).

312 *See supra* note 220 and accompanying text. Of course, in some circumstances pregnancy is voluntarily undertaken by private citizens without government compulsion. This does not undermine the analogy to military service, which is also voluntarily undertaken by large numbers of individuals, as well. The voluntariness of service does not negate the government's duty of fair compensation or minimum standards of care. *See* HEIDI GOLDING & ADEBAYO ADEDEJI, CONG. BUDGET OFFICE, PUB. NO. 2960, THE ALL-VOLUNTEER MILITARY: ISSUES AND PERFORMANCE 8 (2007) (noting that the costs of supporting a volunteer military force may be higher than supporting conscripted service members).

313 *See* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding validity of compelled quarantine); Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 394 (2018) (noting the inclination of public officials to ignore constitutional rights to quell panic surrounding outbreaks of disease). Other scholars have advocated for a state-based compensation scheme as desirable even absent a constitutional mandate. *See* Christine Coughlin, *Public Health Policy: Revisiting the Need for a Compensation System for Quarantine to Maximize Compliance*, 7 WAKE FOREST J.L. & POL'Y 415 (2017).

314 *See* Ulrich & Mariner, *supra* note 313, at 396–97, 408, 420 (discussing concerns over the

the history of how the quarantine power has been exercised in a manner that disproportionately harms the poor, minorities, and other marginalized groups.[315] Scholars have correctly pointed out that what constitutes a constitutional deprivation of liberty in the quarantine context can and should reflect the flexible nature of due process, varying what process is due based on the nature of the contagious disease at issue and the potential harm it poses to public health.[316] This is just one example of a recent expansion of due process that might serve as a testament to the possibility of the evolution of the right to process.

Finally, even if analogies to other types of deprivations are imperfect, the deprivation of liberty and property effectuated by the criminalization of abortion actually might support a *more* compelling argument for additional protections than these other types of deprivations. First, the dual nature of the deprivation—implicating both liberty and property—is a convincing basis for the need for additional protections.[317] Second, the life-defining importance of the rights involved make the reproductive context particularly worthy of protection.[318] And third, the state's ability to deprive only pregnant individuals in such a way implicates equality concerns.[319]

G. This May Undermine the Substantive Due Process Right to Abortion

Through tracing the additional procedural due process requirements that must be in place in order to criminalize abortion consistent with our constitutional scheme, I am aware I may be unintentionally providing a pathway for the expansion of laws that permissibly criminalize abortion. In the strongest possible way, I must state that this is not the intent of this project. Despite the danger of the path, I

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due process protections for those detained under the quarantine power, including the adequacy of both the pre-detention process afforded to a would-be quarantined individual as well as the conditions of care afforded to those already detained).

315 *See id.* at 398 (describing early efforts to quarantine those of Chinese descent as a result of an erroneous belief that they were more susceptible to plague).

316 *Id.* at 413 (allowing that for "an easily transmissible disease that poses a serious threat of harm," a process that allows for judicial approval following initial apprehension would comport with procedural due process).

317 *See supra* notes 135–51 and accompanying text.

318 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.").

319 *See* Siegel, *supra* note 55, at 1689 ("[I]t is fair to say that this use of public power [to ban abortion] is sex-based state action that reflects and enforces constitutionally prohibited gender stereotypes about women.").

think it is still worthwhile to tread for three reasons—each of which reflect a more pragmatic approach to the realities of the abortion debate.

It is an inescapable truth that there is a deep divide in this country regarding the morality of abortion.[320] One way to unite people on both sides of the issue is to focus on the welfare of women and families.[321] There is historical precedent for people on both sides of the abortion debate to rally behind laws which protect and support pregnant people, babies, and families.[322] While two people can vehemently disagree about the substantive right to abortion previability, it does not follow that they will disagree about the desirability and fairness of providing material support to pregnant people and children.[323] The proposals outlined above might be one way to harness this narrow zone of agreement across political lines.

Second, inherent in the central premise of this project is admittedly a hint of calling the government's bluff.[324] Agreeing, arguendo, that the state has an interest in fetal life allows a more robust discussion of the nature and extent of that interest—and how the government might reasonably be expected to protect the interest at the expense of private citizens. Such an exploration lays bare one of the fundamentally flawed premises that has, heretofore, allowed for the criminalization of abortion—that women are naturally mothers and can be expected to continue their reproductive labor without remuneration or care taken on the part of actors who benefit from this labor.[325] If this was *not* the case—if individuals could not be required to perform this function without a concomitant responsibility on the

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320 *See* Anna Edgerton & Sahil Kapur, *Abortion Debate Reignited as Divisive Issue for 2020 Campaigns*, BLOOMBERG (Feb. 9, 2019, 4:00 AM), https://www.bloomberg.com/news/articles/2019-02-09/abortion-debate-reignited-as-divisive-issue-for-2020-campaigns [https://perma.cc/9ZPX-LEYW].

321 *See generally* Siegel, *supra* note 55, at 1687–90 (describing how anti-choice activists adopted the strategy of advocating that abortion harms women, and not just babies, because of popular sentiment that the movement had historically been deaf to the concerns of women).

322 *See* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 505–11 (2014) (discussing how feminists and anti-abortion activists collaborated to pass pregnancy discrimination legislation).

323 *See id.*

324 *See cf.* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207 (2018) (developing a framework to compare state laws that reflect life-affirming values outside of the abortion context and finding—perhaps unsurprisingly—that states with the most aggressive abortion restrictions also often lack laws that protect and value life in other ways).

325 Siegel, *supra* note 309, at 1165 ("'[W]hat motive is presented to women to induce them to be good wives and mothers, beyond their own natural affection and instincts? None at all.'"

part of the party compelling them—then it might result in the government internalizing some of the costs associated and rethinking its own interests.[326] In other words, if the government really had to treat pregnant people fairly through the provision of constitutional process, it very well might decide that criminalization is not such a valuable goal after all. This argument also reflects a desire to shift the current arguments about abortion, many of which are made from a defensive position, to a more affirmative position that assumes the correctness of a robust vision of reproductive justice.[327]

Finally, the reality of the shifting composition of the Supreme Court makes it possible—if not quite likely—that the substantive right to abortion will be eroded or erased completely.[328] In the face of that possibility, legal scholars and lawyers must press novel theories and claims to ensure that pregnant people are afforded some constitutional protection even if it is not the full autonomy that they should rightfully enjoy.

CONCLUSION

This Article argues that there is a constitutionally derived requirement that the government provide pre- and post-deprivation

(quoting JENNIE C. CROLY, FOR BETTER OR WORSE: A BOOK FOR SOME MEN AND ALL WOMEN 103 (Boston, Lee & Shepard 1875))).

326 *See* Looper-Friedman, *supra* note 170, at 283 ("Requiring the state to pay compensation for regulations that result in takings forces legislative bodies to consider all of the costs of preserving their view of the public welfare. If forced to balance the real costs of abortion regulations against their alleged benefits, the outcome of the legislative processes would likely leave the abortion decision to the individual."). Even members of the pro-life community may agree that the government ought to fund its supposed interest in the protection of fetal life. *See, e.g.*, Stephen G. Gilles, *Should Pregnancy Help Centers Offer Post-Natal Financial Support to Reduce the Incidence of Abortion?*, 13 AVE MARIA L. REV. 21, 22–26 (2015) (arguing that pro-life Americans should "put their money where their moral views are" and that even 25 billion dollars in post-natal payments to women who forgo abortion "would be a small price to pay to save the lives of one million unborn children").

327 Robin West has argued that it is, in part, the presence of the constitutional right to choose abortion that allows for the delegitimization of claims to government assistance in the work of childbearing and rearing. *See* West, *supra* note 252, at 1424 ("A right to an abortion looks all the more desirable if one has no right to assistance in dealing with the economic stresses of parenting. It becomes another 'defensive' lethal right, necessitated, in part, by an excessively minimalist state."). As I argue in this Article through the lens of procedural due process, if the "choice" to have an abortion is removed in some or all cases, the right to make claims to state resources is strengthened.

328 *See* Brendan T. Beery, *Tiered Balancing and the Fate of* Roe v. Wade*: How the New Supreme Court Majority Could Turn the Undue-Burden Standard into a Deferential* Pike *Test*, 28 KAN. J.L. & PUB. POL'Y 395, 396–98 (2019) (arguing that *Roe* is unlikely to be overruled outright, but the countervailing state interest in life is likely to be given more weight thus pushing earlier the point at which abortion is criminalized).

rights to all potentially pregnant people as a precondition for the criminalization of post-viability abortion. If the government believes that its own interest in fetal life is important enough to compel private citizens to do the difficult, dangerous, and expensive work of reproduction, then it must place a value on that interest that is more than zero. As a result, basic fairness requires that the government cannot compel an individual to bear the full burden of reproduction without an opportunity to challenge the deprivation or receive care or recompense.[329] Such an unfair bargain would be contrary to shared conceptions of fair play inherent in due process.[330]

329 Such a bargain offends the basic notion of balance inherent in the due process inquiry. *See* Grossi, *supra* note 59, at 180 ("The core of due process is balance. It is the balance between the interests of the individuals—the parties directly and indirectly affected by the rule, doctrine, or the outcome of the litigation—and the society those individuals belong to.").

330 *See* United States v. Lovasco, 431 U.S. 783, 790 (1977) (describing due process as requiring adherence to "'the community's sense of fair play and decency'" (quoting Rochin v. California, 342 U.S. 165, 173 (1952))).