Logic from the Supreme Court that May Recognize Positive Constitutional Rights

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“Man has the fundamental right to freedom, equality
and adequate conditions of life, in an environment of a quality
[that is, the necessary means] that permits a life of dignity and
well-being, [that is, to a protected right]. . . .”1

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I. INTRODUCTION: BACKGROUND AND PURPOSE

Professor Christopher Serkin recently characterized the general understanding of the nature of rights protected by the United States Constitution as follows: “The Constitution is typically thought to create only negative rights--rights that constrain the government from acting in certain proscribed ways.”2 This is especially true in the judicial branch;3 however, as the discussion below demonstrates, the United States Supreme Court (“the Court” or “Supreme Court”) might be prepared to recognize tightly constrained positive constitutional rights.4

In an earlier article, I argued that the Constitution does recognize and protect positive rights and, in fact, that the positive right-negative right dichotomy is illusory.5 What appears to be a negative right can be rearticulated into what appears to be a positive right6 and vice versa.7

A recent Supreme Court case exemplifies the illusory nature of this distinction. In McCullen v. Coakley,8 the Court stated the issue to be decided as follows: “Petitioners are individuals who approach and talk to women outside [abortion clinics], attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities’ entrances. The

3. See, e.g., DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting) (“The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys’ claim is first and foremost about inaction (the failure, here, of respondents to take steps to protect Joshua), and only tangentially about action (the establishment of a state program specifically designed to help children like Joshua).”); see also Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”).
4. See infra Part III.
6. See id. at 568.
7. See id. at 567.
question presented is whether the statute violates the First Amendment.9 This issue can be phrased in positive right language as: Must the state provide space on the public sidewalk in which the petitioners may approach and talk to women outside such facilities? It may also be phrased in negative rights terms as: May the state deny petitioners the right to approach and talk to women outside such facilities? The Court ultimately held that the state may not “clos[e] a substantial portion of a traditional public forum to all speakers.”10 The Court could have rephrased this as a positive right, namely, that the state must keep open an adequate portion of a traditional public forum to all speakers. A preference for the negative version is traditionally prevalent in court opinions; however, change may be on the horizon.

The Supreme Court may be moving away from its history of refusing to recognize and protect positive constitutional rights. The Court’s opinion in the recent case Glossip v. Gross provides support for the existence of positive rights protected by the Constitution and for the illusory nature of distinguishing between positive and negative rights.11

Although there are no authoritative definitions of positive right and negative right, there are attempts to correlate negative rights with a prohibition or limitation of government action. Thus, the First Amendment provision that “Congress shall make no law . . . abridging the freedom of speech”12 is held out as recognizing a negative right that only prohibits Congress from enacting legislation limiting the speech of persons protected by the Constitution. Under this interpretation, Congress would have no obligation to enable or facilitate free speech because imposing such a requirement would be seen as recognizing a positive right. Clearly, this understanding devalues the role of governments. Just as the United States government did not and could not constitutionally allow a mob in Little Rock, Arkansas, to use violence and intimidation to prevent African American children from attending a formerly all-

9. Id. at 2525.
10. Id. at 2541.
12. U.S. CONST. amend. I.
white high school, the police could not stand idly by and allow a mob to beat a protestor who was attempting to burn an American flag. People exercising their First Amendment right of free speech have a right to be protected from mobs that would silence them; otherwise, the right to free speech would be merely theoretical.

When one goes beyond the plain language of the Free Speech Clause and considers its functionality, it is clear that it is a positive, as well as a negative, right. Moreover, as I illustrated in my earlier article, rights that are articulated so as to appear to only be negative rights can be rephrased as positive rights. In spite of the fact that the dichotomy of positive rights and negative rights is inconsistent with “the actual state of things,” the Supreme Court and lower courts have continued to assume its existence and to give it legal significance. The purpose of this Article is to demonstrate that the constitutional landscape may be changing. Perhaps the conservative members of the Court, the Justices who traditionally deny the existence of positive rights, are beginning to realize that the categorical rule against positive rights is detri-

13. See Cooper v. Aaron, 358 U.S. 1, 12 (1958) (“The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year.”) (citation omitted).

14. See Kannan, supra note 5, at 564 n.122 (referring to Cass R. Sunstein, A New Deal For Speech, 17 HASTINGS COMM. & ENT. L.J. 137, 145 (1994) (asserting that “positive dimensions” of the First Amendment “consist of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority to private [citizens]”).

15. Kannan, supra note 5, at 567–68.

16. This is a phrase used often by Chief Justice John Marshall to focus attention on the actual facts from which the case arose and the context in which they exist. See, e.g., Johnson v. M’Intosh, 21 U.S. 543, 591 (1823); Worcester v. Georgia, 31 U.S. 515, 520, 543, 546 (1832).

17. See Kannan, supra note 5, at 587–92.
mental to some important constitutional doctrines they favor. For example, in the majority opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas (the conservative wing of the Court) in *Glossip v. Gross*, the Supreme Court stated a major premise, on which it ultimately relied for its holding, which is more consistent with “the actual state of things,” namely, that there are “positive” rights protected by the Constitution.

To develop the argument supporting this conclusion, Part II analyzes *Glossip v. Gross* and the case on which it is based, *Baze v. Rees*. Part III then constructs an argument which concludes that the principle from *Baze* and *Glossip* is that a constitutional end implies existence of constitutional means to realize the end, and that the means at times will be positive rights. Part IV demonstrates that the argument developed in Part III is analogous to and consistent with the logic the Court used in *Griswold v. Connecticut* to recognize a constitutional right of privacy. Part V analyzes and discusses *District of Columbia v. Heller*, a case that arguably recognizes and applies the general principle developed in this Article. Part VI summarizes the struggle over abortion rights and posits the role the general principle advocated in this Article may play in that struggle. Part VII concludes that in addition to inherent rights and peripheral-penumbral rights that have been recognized by the Supreme Court as emanating from enumerated rights, there are rights that are the necessary means for achieving protected rights.

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19. 553 U.S. 35 (2008) (plurality opinion). The plurality opinion written by Chief Justice Roberts constitutes the holding of the Court. *Glossip*, 135 S. Ct. at 2738 n.2 (“In *Baze*, the opinion of The Chief Justice was joined by two other Justices. Justices Scalia and Thomas took the broader position that a method of execution is consistent with the Eighth Amendment unless it is deliberately designed to inflict pain. Thus, as explained in *Marks v. United States*, The Chief Justice’s opinion sets out the holding of the case.” (citations omitted)).
20. 381 U.S. 479 (1965).
22. See infra Part III.
II. ANALYSES OF BAZE V. REES AND GLOSSIP V. GROSS

In the canonical case McCulloch v. Maryland,23 Maryland challenged the authority of the United States to establish the Bank of the United States.24 In upholding the power of Congress to do so, Chief Justice Marshall, in his opinion for the Court, interpreted the “necessary and proper” clause in the Constitution.25 This required the Court to explore the means-end relationship regarding the limited powers the Constitution granted to Congress. The Court’s interpretation gave Congress broad discretion when legislating a means to an end: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”26 Applying this interpretation, the Court upheld Congress’s creation of the Bank of the United States by concluding: “Throughout this vast republic . . . revenue is to be collected and expended, armies are to be marched and supported.”27 Congress’s incorporation and operation of the Bank of the United States was a constitutional means to achieve its enumerated taxing power,28 power to declare war,29 and power to raise and support armies.30

The interpretation of the necessary and proper clause stated in McCulloch v. Maryland can be applied to test the constitutionality of a specific, identified means to an end; however, it does not consider the question: If the Constitution or a law enacted under it establishes an end, must there exist a constitutional means for achieving that end? This question was answered by the Court, al-

23. 17 U.S. 316 (1819).
24. Id. at 321–22.
25. Id. at 413–22; U.S. CONST. art. I, § 8, cl. 18 (granting Congress the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).
27. Id. at 408.
29. U.S. CONST. art. I, § 8, cl. 11.
most two hundred years later, in *Baze v. Rees*[^31] and *Glossip v. Gross.*[^32]

*Baze* involved challenges to the means selected by Kentucky for executing prisoners sentenced to death—lethal injection. In Kentucky, death row inmates claimed that Kentucky’s lethal injection protocol constituted cruel and unusual punishment in violation of the Eighth Amendment.[^33] This protocol included injecting the prisoner with a series of three drugs.[^34] The first, sodium thiopental, is intended to cause the prisoner to be unconscious and not suffocate in that state as a result of the second drug or experience pain from the third.[^35] The prisoners claimed that Kentucky’s protocol did not include adequate measures to assure that sodium thiopental would be administered properly so as to achieve these objectives.[^36] They claimed that this constituted unnecessary risk and that subjecting them to this unnecessary risk violated the Eighth Amendment prohibition against cruel and unusual punishment.[^37] A plurality of the Court rejected that claim,[^38] reasoning as follows:

> We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does

[^33]: U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”); *Baze*, 553 U.S. at 41 (“Petitioners . . . contend that the lethal injection protocol is unconstitutional under the Eight Amendment’s ban on ‘cruel and unusual punishments’ . . . .”).
[^34]: *Baze*, 553 U.S. at 44.
[^35]: *Id.* (“The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.”).
[^36]: *Id.* at 49.
[^37]: *Id.* at 47.
[^38]: *Id.*
not demand the avoidance of all risk of pain in carrying out executions.  

The prisoners’ theory that any unnecessary risk of pain constituted cruel and unusual punishment, if accepted by the Court, would render all means of execution unconstitutional since all means are subject to error and thereby would make capital punishment itself unconstitutional. This would effectively defeat the well-established holding in Gregg that capital punishment is constitutional. Instead of the "unnecessary risk" of harm standard, the Court applied a principle under which the prisoners must propose an alternative to Kentucky’s protocol. The Court imposed high standards on the alternative: “To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.” Because the prisoners failed to meet this burden-of-proof requirement, the Court affirmed the Kentucky Supreme Court’s decision that Kentucky’s procedure was consistent with the Eighth Amendment.

Seven years after issuing its opinion in Baze, the Court heard Glossip, which was also a challenge to lethal injections as a means of carrying out the death sentence. In this case, the prisoners claimed that Oklahoma’s lethal-injection protocol violated the Eighth Amendment because it created an unacceptable risk of severe pain. The Court summarized their theory as follows: “They argue that midazolam, the first drug employed in the State’s current three-drug protocol, fails to render a person insensate to pain.” The Court rejected their claim for two independent reasons. The first was based on Baze: “[T]he prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain.” The second was a failure by the prisoners “to establish that Oklahoma’s use of a massive dose of

39. Id. (citation omitted).
40. Gregg v. Georgia, 428 U.S. 153, 177 (1976) (“It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.”).
41. Baze, 553 U.S. at 52.
42. Id. at 63.
44. Id.
45. Id.
midazolam in its execution protocol entails a substantial risk of severe pain.\textsuperscript{46}

In explaining its first reason for rejecting the prisoners’ theory, the Court affirmed and restated the following analysis used by the plurality in \textit{Baze}:

\begin{quote}
[I]n \textit{Baze}, seven Justices agreed that the three-drug protocol [used by Kentucky] does not violate the Eighth Amendment.

Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, “[i]t necessarily follows that there must be a [constitutional] means of carrying it out.” And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. . . . Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.\textsuperscript{47}
\end{quote}

The Court, as it had done in \textit{Baze}, again refused to allow a back-handed overruling of \textit{Gregg v. Georgia} and its affirmation of the constitutionality of the death penalty.

\section*{III. The Principle from \textit{Baze} and \textit{Glossip}: A Constitutional End Implies the Existence of Constitutional Means to Realize the End}

In refusing to hold that all means of carrying it out were a violation of the Eighth Amendment, and thereby declaring the death penalty unconstitutional, the Court applied a theory of constitutional logic that should be appropriate beyond the Eighth Amendment. Stated in a more general form, the constitutional logic used by the Court in \textit{Baze} and \textit{Glossip} is that when there is an end or right protected by the Constitution, there must be a constitutional means to attain that end or right. The hypothesis of this Ar-

\textsuperscript{46} Id.

\textsuperscript{47} Id. at 2732–33 (citations omitted).
article is that this general form is a constitutional principle derived from Baze and Glossip; it will be referred to as the “General Principle” in the remainder of this Article.

The argument proving the General Principle can be constructed by recasting the logic used by the Court in Baze and Glossip as follows. If a right were protected by the Constitution, but all means of realizing that right were unconstitutional, that right would provide no benefit to the people nor would it be an effective restraint on the government; functionally, the right itself would be removed from the Constitution. This would be contrary to the intention of those who drafted and ratified the Constitution and the Bill of Rights. It would also be contrary to the Supreme Court’s principle for interpreting the Constitution: “[E]very word [in the Constitution] must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”48 Giving due force to a constitutional right requires a means through which it can be realized.

IV. THE ARGUMENT USED TO ESTABLISH THE GENERAL PRINCIPLE IS ANALOGOUS TO THE LOGIC APPLIED BY THE COURT TO RECOGNIZE UNENUMERATED CONSTITUTIONAL RIGHTS IN GRISWOLD V. CONNECTICUT

The logic discussed in Part III has been applied in the past by the Supreme Court to recognize constitutionally protected rights that were not listed in the Constitution or Bill of Rights as specific guarantees.49 One of the most important examples of this is the Court’s analysis in Griswold v. Connecticut,50 in which the Court recognized a constitutionally protected right of privacy.51 In Gris-
Wold, a Connecticut law made it a crime for married couples to use contraceptive devices and for a physician to advise couples about contraceptive devices.\textsuperscript{52} The Court found that the Connecticut law did not violate any \textit{enumerated} constitutional provision.\textsuperscript{53} It held, consistent with the Ninth Amendment,\textsuperscript{54} that there were other rights, \textit{un-enumerated}, but still protected by the Constitution.\textsuperscript{55} The Court’s logic in arriving at this holding begins with the premise that each enumerated right created peripheral rights.\textsuperscript{56} For example, in the First Amendment:

The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.\textsuperscript{57}

Regarding the First Amendment, the Court held that it created a right of association that included more than “the right to attend a meeting [and that] it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.”\textsuperscript{58} The Court then gave its logic for declaring the existence of, and protection for, these peripheral constitutional rights: “Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment \textit{its existence is necessary in making the express guar-

\begin{itemize}
\item Griswold, 381 U.S. at 480.
\item \textit{Id.} at 481–86.
\item U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparate others retained by the people.”).
\item Griswold, 381 U.S. at 484.
\item \textit{Id.} at 483.
\item \textit{Id.} at 482 (citations omitted).
\item \textit{Id.} at 483.
\end{itemize}
What is important for this Article is that, in *Griswold*, the Court developed a logical process which recognized un-enumerated rights called peripheral rights, and that the Court found them enforceable even if the peripheral rights were positive rights.60

In the reasoning of the preceding paragraph, the Court discussed the First Amendment; however, that was merely a particular example of its overall logic. It was in no way meant to suggest that the logic only applies to the First Amendment. In fact, in *Griswold* the Court combined peripheral rights from the First, Third, Fourth, and Fifth Amendments to form the constitutionally protected right of privacy.61

V. A SUPREME COURT DECISION WHICH SUPPORTS THE GENERAL PRINCIPLE

No decided Supreme Court case better represents the application and recognition of the General Principle than *District of Columbia v. Heller*.62 The plaintiff, Dick Anthony Heller, challenged a District of Columbia law, which “totally ban[ned] handgun possession in the home.”63 Heller claimed this law violated his rights under the Second Amendment64 to keep and bear arms.65 The Court held that the strict scrutiny standard must be applied to

59. *Id.* (emphasis added).
60. See *id.* at 482–83.
61. *Id.* at 484. Finding a peripheral right protected by the Constitution by implication from several enumerated rights is an indication that the Bill of Rights is as much a system of rights as a “bill,” that is, a list of unrelated rights. When interpreting the Bill of Rights, one should take into account the systems dynamics of the document as a whole and the multidimensional nature of each of the enumerated rights.
63. *Id.* at 628.
64. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).
65. *Heller*, 554 U.S. at 573 (“We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”).
the District of Columbia’s law. In striking down this law, the Court stated:

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.

The Court then held that the District of Columbia had an obligation to provide Heller with the means of exercising this constitutional right; this meant that the District must issue Heller a license. This holding may be interpreted as applying the principle that when there is an end or right protected by the Constitution, the state must provide a constitutional means to attain it, i.e., a means to an end. The Supreme Court’s opinion provides strong evidence that this is the interpretation the majority intended when it cited, with approval, the following quotation from the Alabama Supreme Court: “A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”

66. See id. at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).
67. Id. at 628–29 (citations omitted) (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).
68. Id. at 635.
69. Id. at 629.
70. State v. Reid, 1 Ala. 612, 616–17 (1840).
preted, *Heller* would clearly constitute precedent for the General Principle of this Article, specifically that when there is an end or right protected by the Constitution, there must be a constitutional means to attain that end or right.\(^{71}\)

VI. AN ONGOING STRUGGLE THAT COULD LEAD TO A TEST CASE FOR THE GENERAL PRINCIPLE

The battle over abortion rights continues to this day, and it has been fought in legislatures, in courts, in the media, and on the streets.\(^{72}\) A brief review of the tactics and successes of the anti-abortion rights groups from *Roe v. Wade*\(^ {73}\) to the present will develop the factual and legal settings from which there might arise a Supreme Court case in which the General Principle advocated by this Article could be argued.

*Roe,* the Plaintiff, challenged Texas criminal statutes that criminalized abortions unless they were “for the purpose of saving the life of the mother.”\(^ {74}\) The Court acknowledged the social, as well as the legal dimensions of this conflict as follows: “We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires.”\(^ {75}\) The Court reaffirmed its holding in *Griswold* “that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”\(^ {76}\) This right may be limited by a state, said Justice Blackmun in his opinion for the Court, only if the state could prove “a compelling state interest,”\(^ {77}\) and that its statutes were

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71. See supra Part III.


73. 410 U.S. 113 (1973).

74. Id. at 118.

75. Id. at 116.

76. Id. at 152. The Court held that this right of privacy was founded in the Fourteenth Amendment’s concept “of personal liberty and restrictions upon state action.” Id. at 153.

77. Id. at 156.
“narrowly drawn to express only the legitimate state interest at stake.”78 This is the familiar strict scrutiny test, which is by far the most demanding standard imposed on government actions.79 This was the standard applicable to state regulations that restricted abortions during the period before viability of the fetus, the point called the “compelling point” by the Court.80 The compelling point was approximately at the end of the first trimester of pregnancy.81 After the compelling point, the states were free to enact laws to “regulate the abortion procedure in ways that are reasonably related to maternal health,”82 a standard much lower than strict scrutiny. The Court gave examples of the types of laws that could satisfy this lower constitutional standard; these include “requirements as to the qualifications of the person who is to perform the abortion . . . [and] the facility in which the procedure is to be performed.”83 Roe also allows states to enact restrictions that vary depending on the length of the pregnancy.84

As discussed below, states recognized authoritative advice85 when they saw it and began to pass laws that made both obtaining and performing an abortion costlier, more inconvenient, and more difficult.86 Anti-abortion groups viewed the five-to-four Roe decision as reversible if one of the justices in the majority re-

78. Id. at 155.
79. See, e.g., Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. REV. 1267, 1273 (2007) (“[T]he requirement of [strict scrutiny] also contrasts with an intermediate form of scrutiny under which the government, in defending challenged legislation, must point to an interest that is ‘important.’ Within this hierarchy, [strict scrutiny] stand[s] at the top.”).
80. Roe, 410 U.S. at 163.
81. Id.
82. Id. at 164.
83. Id. at 163.
84. Id. at 150. (“Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman’s own health and safety when an abortion is proposed at a late stage of pregnancy.”).
85. See Phillip M. Kannan, Advisory Opinions by Federal Courts, 32 U. RICH. L. REV. 769 (1998) (demonstrating that the Supreme Court may give what amounts to advisory opinions in dicta and by discussing examples).
86. See infra notes 98–101 and accompanying text.
tired and was replaced by a justice who opposed abortion. 87 It was widely anticipated and theorized that when President Reagan appointed Justice O’Connor this goal had been achieved. 88

Planned Parenthood v. Casey 89 gave the Court the opportunity to test this hypothesis. At issue in Casey was the Pennsylvania Abortion Control Act (“PACA”). 90 The judgment of the Court was given by Justice O’Connor, Justice Kennedy, and Justice Souter in a joint opinion. 91 They announced early in Section I of the joint opinion: “[T]he essential holding of Roe v. Wade should be retained and once again reaffirmed.” 92 The Court repeated this reassuring message later in Section IV: “Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding.” 93 In spite of this reassuring rhetoric, Casey did reverse important holdings in Roe. Perhaps the most important of these is that the strict scrutiny standard for state regulations applicable before viability under Roe is replaced by an “undue burden” standard in Casey. 94 Under this standard, a state regulation that has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abort-

87. See Christopher E. Smith & Thomas R. Hensley, Unfilled Aspirations: The Court-Pack ing Efforts of Presidents Regan and Bush, 57 ALB. L. REV. 1111, 1117–18 (1994) (noting that Reagan and Bush attempted to “pack the Supreme Court with Justices who would undo the objectionable liberal decisions of the preceding three decades,” and one reason Reagan chose O’Connor was because O’Connor “explicitly criticized the reasoning in Roe and . . . endorsed government restrictions on abortion” (citations omitted)).
88. See Ronald Reagan, Interview with Eleanor Clift, Jack Nelson, and Joel Havemann of the Los Angeles Times, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (June 23, 1986), http://www.reagan.utexas.edu/archives/speeches/1986/62386e.htm (Opposition to Roe on the bench grew when President Reagan, who supported legislative restrictions on abortion, began making federal judicial appointments in 1981. Reagan denied that there was any litmus test: “I have never given a litmus test to anyone that I have appointed to the bench . . . . I also place my confidence in the fact that the one thing that I do seek are judges that will interpret the law and not write the law.”).
90. Relevant provisions are reproduced in Casey, 505 U.S. at 902 (appendix to the opinion of O’Connor, Kennedy, and Souter, JJ.).
91. Id. at 843.
92. Id. at 846.
93. Id. at 879.
94. Id. at 874.
tion of a nonviable fetus” is unconstitutional.\textsuperscript{95} Not only is this substantive component of the undue burden standard less protective than strict scrutiny of the woman’s right, the new standard also shifts the burden of proof from the state having to prove the elements of strict scrutiny to the woman seeking an abortion, who now has to identify an obstacle that is impeding her abortion and then prove that it is a substantial impediment.\textsuperscript{96} The strict scrutiny standard was replaced by a “reasonable relation” standard.\textsuperscript{97} The actual holding of the Court is thus in conflict with its rhetoric.

The Court continues on to provide examples of types of state pre-viability regulations which may be constitutional.\textsuperscript{98} These examples include means by which the state, parents, or guardian of a minor “may express profound respect for the life of the unborn;”\textsuperscript{99} measures “designed to persuade her to choose childbirth over abortion;”\textsuperscript{100} and “[r]egulations designed to foster the health of a woman seeking an abortion.”\textsuperscript{101} Next, the Court considered post-viability state regulation and concluded:

We also reaffirm \textit{Roe’s} holding that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”\textsuperscript{102}

After establishing the general doctrines summarized in the preceding paragraphs, the Court turned to the specific requirements of PACA. The first of these is that informed consent must be given after the pregnant woman is provided with information describ-
ing the fetus, the medical assistance for child birth, child support, adoption agencies, and after a 24 hour waiting period.\footnote{Id. at 881.} In upholding this part of PACA, the Court reconsidered its decisions in \textit{Akron v. Akron Center for Reproductive Health, Inc.} (\textit{Akron I})\footnote{462 U.S. 416, 451 (1983) (invalidating sections of Akron’s “Regulations of Abortions” ordinance that dealt with parent consent, informed consent, a twenty-four-hour waiting period, and the disposal of fetal remains).} and \textit{Thornburg v. American College of Obstetricians and Gynecologists}\footnote{476 U.S. 747, 764 (1986) (affirming the holding which invalidated specific provisions of Pennsylvania’s 1982 Abortion Control Act).} and overruled both.\footnote{\textit{Casey}, 505 U.S. at 882 (“\textit{To the extent \textit{Akron I} and \textit{Thornburgh} find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases are inconsistent with \textit{Roe’s} acknowledgment of an important interest in potential life, and are overruled.”) (citations omitted)).} \textit{Casey}\footnote{Id. at 883 (“[W]e depart from the holdings of \textit{Akron I} and \textit{Thornburgh} to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”).} The information requirement and waiting period were upheld even if they were intended by the State to express a preference for childbirth over abortion.\footnote{Id. at 883 (“[W]e depart from the holdings of \textit{Akron I} and \textit{Thornburgh} to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”).} Reporting requirements in PACA were also upheld under the undue burden test.\footnote{Id. at 900–01.} 

The only section of PACA struck down by the Court under the undue burden standard was the requirement that wives notify their husbands of their intent to have an abortion.\footnote{18 PA. STAT. AND CONS. STAT. ANN. § 3209 (West 1990); see also \textit{Casey}, 505 U.S. at 898 (“These considerations confirm our conclusion that § 3209 is invalid.”).} This provision did not survive under the new standard because it would give the husband “[a] troubling degree of authority over his wife.”\footnote{\textit{Casey}, 505 U.S. at 898. The Court justified its rejection of § 3209 by stating: “A State may not give to a man the kind of dominion over his wife that parents exercise over their children.” Id.} 

As a result of \textit{Casey}, states that wanted to restrict the constitutionally protected rights of pregnant women who wanted abor-
tions had two new advantages: (1) the state restrictions must meet only an undue burden standard rather than the most demanding standard in constitutional law, strict scrutiny; and (2) by combining the examples given in Roe of pre-viability restrictions that would be upheld even under strict scrutiny with those upheld in Casey under the undue burden standard, states have a catalogue of examples and models to choose from, extrapolate from, build on, and generalize. Many states have used this catalogue extensively. More specifically, they have enacted:

[Laws banning] common abortion procedures; requirements that abortions be performed in hospitals; licensure, reporting, and other requirements for abortion facilities; limits on the performance of abortions after fetal viability; requirements for parental consent or notice for minors, or husband consent or notice for married women; mandatory delivery of information designed to discourage abortions; waiting periods; and bans on publicly funded abortions or use of public facilities for abortions. [And] pre-abortion ultrasound requirements [to] try to persuade women to forego abortion. [And] abortion clinic standards . . . [and] healthcare professionals’ right to refuse to provide treatment . . .

Each of the conditions listed above makes abortions more expensive; more time consuming; less convenient; less accessible; a more difficult moral choice; less autonomous; and/or riskier for the woman seeking an abortion and for the person or institution willing to provide it. If a trend of building burden on burden becomes prevalent, even if no single one would constitute an undue burden under Casey, the cumulative result could be that the means to the constitutionally protected rights of pregnant women are ef-

111. Id. at 874 ("Only where state regulation poses an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").
112. Borgmann, supra note 72, at 253.
113. Id. at 259.
114. Id. at 261.
fectively foreclosed, especially for poorer women. Under these circumstances, a pregnant woman could assert the positive right, advocated in this Article, called the General Principle. Under that principle, she would claim that because she has constitutionally protected rights even under Casey, the government must provide her constitutional means to achieve those rights.

The case Planned Parenthood of Greater Texas Surgical Health Services v. Abbott may provide Planned Parenthood of Greater Texas Surgical Health Services (“Texas Surgical”) the opportunity to persuade the Court that the General Principle should be applied. In this case Texas Surgical challenged two provisions of a Texas statute:

The first requires that a physician performing or inducing an abortion have admitting privileges on the date of the abortion at a hospital no more than thirty miles from the location where the abortion is provided. The second mandates that the administration of abortion-inducing drugs comply with the protocol authorized by the Food and Drug Administration (FDA), with limited exceptions.

The abortion clinics petitioned the Supreme Court for certiorari to reverse the holdings of court of appeals, and certiorari was granted in November 2015, with Texas Surgical being consolidated with other cases and renamed Whole Woman’s Health v. Cole. In their petition, the clinics assert that other provisions of

115. See Abortion and Down Syndrome, N. Y. TIMES, Aug. 25, 2015, at A18 (“[Ohio] lawmakers . . . [have] plowed ahead with 16 abortion restrictions, all signed by Mr. Kasich, since 2011 . . . . These measures are part of a larger national effort to undermine reproductive rights and, eventually, to overturn Roe v. Wade in full . . . .”).

116. See supra Part III.


118. Abbott, 748 F.3d at 587.

this law have caused twenty of the forty-one abortion clinics in Texas to close, and these two provisions would reduce the number of abortion clinics in Texas to ten.

The impact of these two provisions of the Texas law on women seeking abortions was summarized as follows: “The Plaintiffs presented evidence that, as a result of the closure of approximately one third of Texas abortion clinics and the remaining clinics’ inability to meet the inevitably increased demand, approximately 22,000 women per year will be precluded from accessing abortion services in Texas.”

It is these 22,000 women who would have standing to bring a suit under the General Principle that Texas must offer them a means for them to obtain a lawful abortion. They would argue that they have a well-established, constitutionally protected right to an abortion and that the state must provide a means by which they can realize that right. Just as the District of Columbia must provide Heller with a means to exercise his constitutionally protected right of self-defense in his home, Texas must provide women seeking an abortion in Texas a means to that end.

VII. CONCLUSION

Constitutionally protected rights do not exist as isolated points on a plane. Each is a multi-dimensional complex of rights. For example, although the Second Amendment does not mention self-defense, the Supreme Court recognized it as an “inherent” component of the rights expressed to keep and bear arms. In Griswold v. Connecticut, the Court recognized that each constitutionally protected right had peripheral-penumbral constitutionally

120. Liptak, supra note 117 (“Other parts of the law have already caused about half of the state’s 41 abortion clinics to close. If the contested provisions take effect, Wednesday’s filing said, the number of clinics will again be halved.”).
121. Id.
122. Abbott, 769 F.3d at 345 (Dennis, J., dissenting).
123. District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (“As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.”).
protected rights. For example, regarding the First Amendment, the Court stated: “The First Amendment has a penumbra where privacy is protected from governmental intrusion.”

In addition to recognizing and protecting rights that are inherent to or peripheral to enumerated constitutionally protected rights, this Article argues that there are constitutionally protected rights which are means necessary for protecting the enumerated and un-enumerated rights, and further, that the state must provide these means.

This argument is based on Baze and Glossip, which established the principle that where the state has a constitutional power to achieve a specific objective or outcome, there must be constitutional means for carrying out or achieving the objective or outcome. The General Principle posited in this Article makes the logical extrapolation from Baze and Glossip that when a person has a constitutionally protected right, the state must provide a constitutionally protected means to achieve it. Thus, each complex, multidimensional, constitutionally protected right includes (1) inherent rights, (2) peripheral-penumbral rights, and (3) necessary means for achieving constitutionally protected rights.

The General Principle posited in this Article reflects the basic logic of Principle 1 of the Stockholm Declaration. In the context of U.S. law, the General Principle has been applied by the Supreme Court in Baze and Glossip regarding the Eighth Amendment and, very probably, in District of Columbia v. Heller regarding the Second Amendment. This Article posits that the General Principle applies to all constitutionally protected rights. As courts begin to recognize the multidimensional aspects of constitutionally protected rights, particularly the General Principle that when there is an end or right protected by the Constitution, there must be a constitutional means to attain that end or right, the landscape of

124. 381 U.S. 479, 484 (1965) (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).
125. Id. at 483 (emphasis added).
126. See supra Part III.
127. See supra Part III.
128. See Stockholm Declaration, supra note 1 (“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality [that is, the necessary means] that permits a life of dignity and well-being, [that is, to a protected right]. . . .”).
analysis and application of existing constitutional interpretation may begin to shift from a blunt categorical refusal to recognize positive rights to a more nuanced normative analysis. Conservative Justices, for example, may be willing to accept a positive right under the Second Amendment.