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Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing

Donald L. Beschle

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I. INTRODUCTION

In 1965, the Supreme Court handed down its decision in *Griswold v. Connecticut*,¹ invalidating a nearly century old statute that criminalized the use of contraceptives, even by married couples, “for the purpose of preventing conception.”² *Griswold* injected new life into the largely dormant notion that the Due Process Clause of the Fourteenth Amendment³ could effectively protect substantive individual rights, beyond those specifically enumerated in the Constitution, against state legislative action. Decades earlier, the Court had abandoned the use of a high level of due process scrutiny in cases presenting challenges to statutes regulating economic activity;⁴ most observers thought that this meant the end of any

1. 381 U.S. 479 (1965).

2. *Griswold*, 381 U.S. at 480 (citing CONN. GEN. STAT. § 53-32 (1958)).

3. “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

4. In *Lochner v. New York*, the Court held that legislation that limited “[t]he general right to

attempt to subject the substance of legislation to anything more than low level “rational basis” review, except when enumerated rights were involved, or in a limited number of cases presenting equal protection claims.⁵ *Griswold*, however, meant that a heightened standard of review would be applied to a new category of cases.

But *Griswold* left questions about the source and the scope of this newly strengthened right unanswered. The justices in the majority found that “privacy” was a value entitled to special constitutional protection, but they could not agree on a single rationale for that conclusion.⁶ In addition, the several opinions among the majority left the boundaries of the privacy right undefined.⁷ Many would read *Griswold* and conclude that it was limited to protection of the marital relationship.⁸ Others viewed its scope more broadly.⁹

make a contract” would be subjected to careful scrutiny to determine whether or not it was “a fair, reasonable and appropriate exercise of the police power of the State.” 198 U.S. 45, 53, 56 (1905). Over the next three decades, over 170 state statutes were declared unconstitutional applying the *Lochner* criteria. See BENJAMIN WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942).

By 1938, however, the Supreme Court repudiated *Lochner* in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and *West Coast Hotel Co. v. Parrish.*, 300 U.S. 379 (1937). Writing for the Court in *Parrish*, Chief Justice Hughes declared that “[r]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.” 300 U.S. at 391. This sentence captures the essence of what today is commonly referred to as the low-level “rational basis” test. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

5. In one of the most famous footnotes in the history of constitutional jurisprudence, the Court, in *Carolene Products*, stated that a higher level of scrutiny might be appropriate in three contexts: “when legislation appears on its face to be within a specific prohibition of the Constitution . . . , [when] legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” or when legislation embodies “prejudice against discrete and insular minorities” 304 U.S. at 152-53, n.4.

6. Justice Douglas, writing for the Court, found that privacy was within the “penumbra” of the Fourth and Fifth Amendments, which stand “as protection against all government invasions ‘of the sanctity of a man’s home and the privacies of life.’” *Griswold*, 381 U.S. at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Justice Goldberg, joined by Justice Brennan and Chief Justice Warren, stressed that the Ninth Amendment invited the Court to discover enumerated rights rooted in the “traditions and [collective] conscience of our people” *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Justice Harlan, rejecting the need to base Fourteenth Amendment due process claims upon specific Bill of Rights provisions, found that the statute simply “violates basic values ‘implicit in the concept of ordered liberty.’” *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Finally, Justice White found the statute lacked even a rational relationship to any legitimate government purpose, apparently concluding that it must fail even under a low-level scrutiny test. *Id.* at 502-07 (White, J., concurring).

7. Several opinions of the justices in the majority made reference to the significance of the marital or family relationship. *Id.* at 485-86, 495 (Goldberg, J., concurring); *id.* at 502 (White, J., concurring). But none of the justices explicitly limited the scope of the right to individuals in a marital relationship. See *id.*

8. See, e.g., Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 253 (1965) (“[P]ast decisions of the Court . . . offered an immediate opening for finding that marital privacy, as a facet of the freedom of family life, was a fundamental right.”); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980) (“Whatever the constitutional right of privacy may mean in other contexts, the main object of constitutional protection in *Griswold* was the marital relationship.”).

9. Thus, Professor Karst, who concludes that *Griswold* was principally concerned with the marital relationship, goes on to contend that “*Eisenstadt*,” see *infra* notes 12-18 and accompanying

The *Griswold* privacy principle would lead to the 1973 decision of *Roe v. Wade*¹⁰ and subsequent legal and political struggle over the existence and scope of a woman's right to abortion.¹¹ But a year before *Roe*, the Court decided *Eisenstadt v. Baird*,¹² which may have had as much impact on the development of the privacy right as the much more controversial *Roe*. *Eisenstadt* presented a challenge to a Massachusetts statute that prohibited the distribution of contraceptives,¹³ but unlike the Connecticut statute at issue in *Griswold*, the Massachusetts statute extended the prohibition only to distribution to unmarried persons.¹⁴ Massachusetts contended that the *Griswold* principle was limited to protecting the privacy of the marital relationship.¹⁵

The Court rejected this distinction, and struck down the statute.¹⁶ But while the outcome of the case seems, on some instinctive level, correct, the rationales employed by the justices in *Eisenstadt* seem somehow insufficient. This is true not only of the justices in the majority, but also of the dissenters. The core of the *Eisenstadt* majority argument is set forth as follows:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁷

Thus, the rationale of *Eisenstadt* begins with a clear statement that the privacy right is held by the autonomous individual; it does not depend on the

text, "follows from *Griswold*, because the values of intimate association [regardless of the presence or absence of marriage] are so closely parallel." Karst, *supra* note 8, at 662.

10. 410 U.S. 113 (1973).

11. *Id.* at 129.

12. 405 U.S. 438 (1972).

13. *Id.* at 440-41.

14. MASS. GEN. LAWS. ANN. ch. 272, § 21 (West 2003) (creating a general prohibition on, among other things, the distribution of contraceptives). Section 21(A), however, created an exception for a physician, or a pharmacist acting pursuant to a physician's prescription, distributing contraceptives to any married person. *Eisenstadt*, 405 U.S. at 441, n.2.

15. The section 21(A) exception was enacted to tailor the statute so that it would conform to the holding in *Griswold* concerning the marital relationship. *Eisenstadt*, 405 U.S. at 447-50.

16. The precise holding of the Court was "that by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the statutes] violate the Equal Protection Clause." *Id.* at 454-55.

17. *Id.* at 453. Thus, while *Eisenstadt* is formally an equal protection case, see *supra* note 16, this statement, which is the most influential declaration in the opinion, makes the case most significant for its elaboration of the scope of the due process privacy right.

individual being part of any particular relationship.¹⁸ One may disagree with the contention that rights are independent of relationships, but the position that they belong to the autonomous individual is hardly surprising in light of the history of western theory about the source of human rights.¹⁹ And, certainly, the proposition that the decision whether to bear a child should be protected from government coercion is enormously appealing. But did the Massachusetts statute in question really coerce childbirth?

Massachusetts did not, and certainly would not, maintain that the purpose of the statute was to promote the birth of nonmarital children.²⁰ And, of course, unmarried individuals could avoid the conception of children by refraining from sexual activity. Clearly, the challengers of the statute were claiming not a right to be free from coerced parenthood, but rather a right of sexual intimacy outside of marriage free from governmentally imposed impediments.²¹

Although it is possible that some justices did interpret the *Griswold-Eisenstadt* privacy right to protect all noncommercial, consensual sexual activity, this position has never been clearly endorsed by a majority of the Court. Justices in the *Griswold* majority explicitly pointed out that they were not endorsing a broad right of sexual freedom.²² Later, in *Bowers v. Hardwick*,²³ the Court, albeit by a one-vote margin, rejected a privacy-based attack on the criminalization of homosexual sodomy,²⁴ a claim that the Court distinguished from the *Griswold* line of cases as being unconnected to childbirth or the traditional family.²⁵ The tension between *Bowers* and *Eisenstadt*, if not between *Bowers* and *Griswold*, should be obvious. Recently, in *Lawrence v. Texas*,²⁶ the Court recognized and resolved this

18. *See id.*

19. For a brief discussion of the background of individual rights thought that provided a basis for American constitutional thinkers to draw upon, see LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 3-13 (1978).

20. *Eisenstadt*, 405 U.S. at 448.

21. *See generally id.*

22. “[I]t should be said of the Court’s holding today that it in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct.” *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring). Justice Goldberg also cites the earlier dissent of Justice Harlan in *Poe v. Ullman*, 367 U.S. 497, 553 (1961), where Justice Harlan distinguishes the State’s permissible prohibitions of “[a]dultery, homosexuality and the like” from “the intimacy of husband and wife.” *Griswold*, 381 U.S. at 499.

23. 478 U.S. 186 (1986).

24. The statute, GA. CODE ANN. § 16-6-2 (1984), on its face criminalized all acts of sodomy, but the Court addressed only “Hardwick’s challenge to the Georgia statute as applied to consensual homosexual sodomy . . . express[ing] no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.” *Bowers*, 478 U.S. at 188 nn.1-2.

25.

[N]one of the rights announced in [prior] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Id. at 190-91.

26. 123 S. Ct. 2472 (2003).

tension by overruling *Bowers*, and further strengthening the personal autonomy foundations of the *Griswold* lines of cases.²⁷

Dissenting justices have argued that each extension of the *Griswold* principle, and perhaps *Griswold* itself, is an unwarranted expansion of the realm of constitutional rights. From the initial argument that *Griswold's* recognition of unenumerated fundamental rights was an improper reversal of decades of due process jurisprudence,²⁸ dissenters shifted in subsequent cases including *Eisenstadt*, to arguing that the *Griswold* principle should be strictly limited to protect only traditional family relationships.²⁹

Should the *Griswold-Eisenstadt-Roe* line of cases be seen as turning on individual autonomy or deference to family relationships? While each of these positions can be credibly defended, neither addresses the central question presented to the Court in *Griswold*. In light of the myriad of ways in which government limits the liberty and autonomy of the individual and of the family unit,³⁰ what is it that compels us to draw the line when government seeks to limit access to contraceptives in pursuance of a plausible social benefit?

To understand *Griswold* and *Eisenstadt*, we must first recall the justification that the states in each case put forward, in defense of their statutes. Neither Connecticut, in *Griswold*, nor Massachusetts, in *Eisenstadt*, contended that the purpose of limiting contraceptive use was to increase the incidence of childbirth.³¹ Instead, they contended that the denial of access to contraceptives was a rational way to limit illicit sexual relations, i.e., adultery and fornication.³² In *Griswold*, this contention was easily countered by the Court noting that the Connecticut ban, by limiting contraceptive use by married couples, went far beyond the scope of serving

27. In contrast to earlier cases, however, the Court in *Lawrence* did not apply a strict scrutiny analysis, instead finding that Texas had failed to demonstrate that its statute furthered a legitimate state interest. *Id.* at 2484.

28. See *Griswold*, 381 U.S. at 507-27 (Black, J., dissenting); *id.* at 527-31 (Stewart, J., dissenting).

29. See *Eisenstadt*, 405 U.S. at 472 (Burger, C.J., dissenting) ("By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees [of the Constitution] into the uncircumscribed area of personal predilections.").

30. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (noting that the state may terminate parental rights upon a showing of neglect by clear and convincing evidence); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (stating that child labor laws may interfere with parental choices regarding children's work activities); *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (stating that juvenile curfews do not violate parental rights to decide issues concerning upbringing).

31. See *Griswold*, 381 U.S. at 505 (White, J., concurring) ("There is no serious contention . . . that the anti-use statute is founded upon any policy of promoting population expansion."); *Eisenstadt*, 405 U.S. at 442-43.

32. See *Griswold*, 381 U.S. at 505 (White, J., concurring) ("[T]he statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships . . ."); *Eisenstadt*, 405 U.S. at 442 n.3.

as an anti-adultery measure.³³ But that could not be said about the Massachusetts statute at issue in *Eisenstadt*; it applied only to unmarried persons.³⁴ And with the Court unwilling to hold that a state could not legislate against fornication, it is not entirely obvious that the connection between the state's legitimate goal and the means chosen to advance it were inadequate.

Why, then, does *Eisenstadt* seem so clearly to be a correct decision? One way to answer, of course, is to simply affirm what the Court would not, that is, that noncommercial consensual sexual relations between adults fall into the zone of privacy given special protection by the Constitution. But in failing to go so far, yet invalidating the Massachusetts statute nevertheless, the *Eisenstadt* Court may not have been acting disingenuously, but rather affirming that even conceding the non-protected status of fornication, the state has done something in pursuance of that goal which is extremely troubling, perhaps even outrageous.

Standard models of constitutional analysis, in this or any other context involving a rights claim, would have us consider the interests of the party attacking the government restriction and the interests of the community at large in upholding the restriction. But *Eisenstadt* (and *Griswold* as well) also implicates a third interest, albeit one that is rather hypothetical. In each of these cases, the state seeks to deter extramarital sex through the threat of pregnancy. In other words, the state threatens to impose the extra-judicial punishment of childbirth, and all of its attendant responsibilities, upon those committing sexual transgressions. And, in doing so, the state has, consciously or not, done something truly offensive. It has decreed that an entirely innocent person, that is, the child born as a result of the extramarital affair, shall be regarded as punishment imposed on its parents.

What the prohibition does, therefore, is to treat someone (in this case, the hypothetical out-of-wedlock child) completely as a means to an end, that end being the deterrence or punishment of sexual transgressions. The interests and welfare of the hypothetical child are completely ignored in the interest of pursuing the social goal. This disregard by the state of the child's interests should immediately remind anyone who has had even a passing familiarity with the moral philosophy of Immanuel Kant of one of the core principles upon which that philosophy was built, that an individual may not properly be regarded entirely as a means to an end, even a legitimate end. Instead, the individual must be regarded as an end rather than a means.³⁵

At first glance, this principle seems to fit uneasily, if at all, into the usual analytical framework applied to constitutional rights claims. Most, perhaps all, of the tests that courts apply in these cases include elements of utilitarian concern. In contrast, Kantian ethics is generally regarded as antithetical to

33. See *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring).

34. See *supra* note 14.

35. See *infra* notes 76-101 and accompanying text. For a concise summary of Kantian ethical thought, see ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS (1994).

utilitarianism.³⁶ But American courts clearly avoid either pure utilitarianism or a pure commitment to the individual. Some degree of balancing is inevitable, regardless of the problems inherent in employing any balancing test.

Over the years, constitutional lawyers have attempted to make analysis of rights claims more determinate by developing tests that would produce easily predictable, consistent outcomes. But in recent years, these tests have been breaking down and blurring, leading some to object vigorously to what appears to be a new, indeterminate era in constitutional rights jurisprudence. This article will contend that the breakdown in the easy use of categories, and the increased incidence of balancing in these cases, is, at least in part, a consequence of courts' recognition of countervailing legitimate values to the traditional, essentially utilitarian concerns of earlier constitutional cases. Specifically, this article will attempt to demonstrate the presence, at least implicitly, in constitutional balancing of the Kantian principle that a person may not be treated solely as a means to the achievement of some end independent of that person's own welfare. The recognition of, and respect for, this principle will by no means banish utilitarian concerns from constitutional analysis, but it will help to shed light on the factors that courts do, and must, consider when engaging in the inevitable, if messy, process of constitutional balancing.

II. CONSTITUTIONAL BALANCING: A BRIEF OVERVIEW

For over a century, the Supreme Court has claimed the power to invalidate state and federal legislation on the grounds that it violated one of the rights provisions of the Constitution. But none of these provisions is entirely self-explanatory; almost invariably, the scope of the constitutional guarantee is subject to legitimate disagreement. Since the Court, in modern times, has never adopted the suggestion that it defer to the judgment of the political branches of state and local government in all but the most indisputable instances of unconstitutionality,³⁷ the legitimacy of the specific cases in which the Court has exercised judicial review has always been controversial.

The acts of a decision-maker often appear suspect in the absence of a clear set of standards for the decision maker to employ. Clear standards,

36. Thus, in contrast to utilitarian thought, Kant maintains that "prudential rules are not fit to serve as moral rules," and that the pursuit of happiness must be subject to limits imposed by morality. See SULLIVAN, *supra* note 35, at 121-24.

37. The notion that courts should defer to legislative judgments on constitutional questions except where the unconstitutionality is "so clear that it is not open to rational question" has been put forward by some in an attempt to reconcile the power of judicial review with the commitment to democracy. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). But, at least in the twentieth-century, this suggestion has never been embraced by the Supreme Court.

even if flawed, give a degree of security by making decisions seem more predictable and by seeming to limit the power of the decision maker. Early twentieth-century rights cases failed to produce clearly articulable tests, and this, perhaps as much as negative reaction to *Lochner v. New York*³⁸ and similar cases, fuels opposition to an active role for courts in overriding legislative decisions.

In *Lochner*, a sharply divided Court invalidated a New York statute regulating the working hours of bakers.³⁹ The majority and the two dissenting opinions all began from the premise that the Due Process Clause of the Fourteenth Amendment would invalidate legislation that interfered with liberty interests if the legislation was arbitrary and unreasonable.⁴⁰ Yet the justices split over the proper standard for assessing reasonableness. The clearest standard was that set forth by dissenting Justice Holmes.⁴¹ He would defer to any legislative judgment that could have come from a rational legislator, regardless of whether Holmes would have reached the same conclusion.⁴²

The *Lochner* majority took a far different approach.⁴³ Without quite articulating it, the majority seemed to hold that any legislation imposing new types of restrictions on longstanding liberties would be upheld only if its promotion of the general welfare was beyond question.⁴⁴ Such an approach, of course, can be seen as coming perilously close to installing the Court as a third legislative branch.⁴⁵ Often overlooked is the dissenting opinion of Justice Harlan, which appears to take a middle ground between the majority and Justice Holmes.⁴⁶ Harlan would defer to the legislature when there was substantial support for its conclusion that its action furthered the general welfare; in short, he would require more proof than Holmes, but less than the *Lochner* majority.⁴⁷

With this much disagreement in the Court about how to approach due process claims, it is unsurprising that *Lochner* would be criticized not

38. 198 U.S. 45 (1905).

39. The statute set sixty hours as the maximum work-week. *Id.* at 52.

40. "In every case that comes before this court . . . the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual . . . ?" *Id.* at 56. "[U]nless the regulations are so utterly unreasonable . . . that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with . . . they do not extend beyond the power of the State to pass . . ." *Id.* at 67 (Harlan, J., dissenting). "[T]he natural outcome of a dominant opinion [should prevail] . . . unless . . . a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles . . ." *Id.* at 76 (Holmes, J., dissenting).

41. *Id.* at 74-76 (Holmes, J., dissenting).

42. *Id.* at 76 (Holmes, J., dissenting).

43. *Id.* at 52-65.

44. *Id.* at 68-73 (Harlan, J., dissenting).

45. Thus, statutes meant to protect the health and safety of workers would be struck down, "[i]f this [health benefit] be not clearly the case." *Id.* at 61.

46. *See id.* at 65-74.

47. "No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation . . ." *Id.* at 74 (Harlan, J., dissenting) (quoting *Atkin v. Kansas*, 191 U.S. 207, 223 (1903)).

merely for its outcome, but also for making this area of constitutional law hopelessly indeterminate.⁴⁸ Many lawyers erroneously believe that during the *Lochner* era, that is, prior to the implicit overruling of the case in the late 1930s,⁴⁹ the Court was consistently hostile to government attempts to regulate the workplace. In fact, the Court's post-*Lochner* decisions were quite inconsistent, upholding regulation that appeared reasonable to the justices⁵⁰ and invalidating regulation that struck them as too radical.⁵¹

The Court's rejection of *Lochner*, and its apparent rejection of any strong protection for "substantive" due process rights, then, can be seen not only as an endorsement of deference to legislative judgment, but also as an endorsement of predictability. The Court adopted, in essence, Justice Holmes' test of reasonableness as the constitutional baseline in most cases. With a few verbal reworkings, this became the now familiar "rational basis" test.⁵² To generations of lawyers and law students, application of the rational basis test would be thought of as almost automatically leading to the rejection of the constitutional challenge, and the affirmation of the government action at issue.

But at roughly the same time that the Court was abandoning rigorous enforcement of substantive due process rights, it was beginning to assert itself more vigorously in the defense of equal protection and First Amendment rights.⁵³ That could not be accomplished with the extremely deferential rational basis test, and so an alternative emerged, which would become known as "strict scrutiny."⁵⁴ The rational basis test required only that government action be rationally related to a legitimate end.⁵⁵ Strict

48. This critique of *Lochner* was the basis for the rejection by Justice Hugo Black, among others, of the entire concept of unenumerated constitutional rights. See, e.g., *Griswold*, 381 U.S. at 507-27 (Black, J., dissenting).

49. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

50. See, e.g., *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum hour legislation for factory workers); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (upholding price controls for fire insurance); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum hour legislation for women working in laundries).

51. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage legislation for women); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating price controls for gasoline).

52. For examples of the Court's application of the rational basis test to economic based regulation in the post-*Lochner* era, see *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980).

53. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating state racial discrimination); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (overturning convictions on First Amendment grounds); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

54. Ironically, the application of strict scrutiny emerged in the only Supreme Court case to hold that explicit classifications disadvantaging a racial minority were able to satisfy that test. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the World War II exclusion of Japanese-Americans from portions of the Pacific Coast).

55. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

scrutiny would also examine government's goals and the means chosen to achieve them, but would demand that government's purpose be "compelling," and that the method chosen to achieve it be necessary, rather than merely rational.⁵⁶ Although this test was first employed in *Korematsu v. United States*,⁵⁷ a case in which the government prevailed, subsequent cases would lead generations of lawyers and law students to regard strict scrutiny as the exact opposite of the rational basis test, that is, almost impossible for the government to satisfy.

For some time, then, analysis of constitutional rights claims concerning equal protection, substantive due process, and some First Amendment problems⁵⁸ appeared to be primarily a process of classification. Either the right at issue fell into the relatively short list of those calling for strict scrutiny, or the longer list of those protected only by the rational basis test. Once the case had been properly classified, the outcome would be essentially automatic: the government would lose under strict scrutiny, but prevail under the rational basis test.

This afforded a certain degree of predictability, but uncertainty remained with respect to the question of which types of claims should qualify for strict scrutiny. The use of categories did not eliminate the need for the Court to engage in the process of balancing; instead it shifted the process from the "retail" balancing of analyzing individual cases to the "wholesale" balancing of analyzing broad categories of cases.⁵⁹ The difficulty and uncertainty surrounding the balancing necessary to classify categories of cases eventually led to the first steps in the demise of the seemingly simple and determinate two-level analytical system.

For purposes of equal protection, it was clear that racial classifications were "suspect" and thus demanded strict scrutiny.⁶⁰ Non-suspect classifications were examined with the less rigorous rational basis test.⁶¹ But did other types of classes, such as those based on gender or out-of-wedlock parentage, share enough in common with racial classifications to require similar treatment? Rather than choose between these alternatives, the Supreme Court forged a third, "intermediate" test.⁶² While the creation of a third category could be seen as a simple refinement in constitutional

56. See, e.g., *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring).

57. 323 U.S. 214 (1944).

58. Whether certain types of speech receive full (or any) First Amendment protection has long been thought to be a function of whether the speech falls into any category entitled to less than full protection. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity is not protected by the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (refusing to afford absolute constitutional protection to "fighting words").

59. See Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 226-27 (2001).

60. See, e.g., *Korematsu*, 323 U.S. at 216.

61. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (applying rational basis and upholding challenged law).

62. See *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender-based discrimination).

analysis, one that might actually promote predictability, this third test would be far less determinate than its two predecessors.⁶³ At the same time that the intermediate scrutiny test emerged, the first voices were raised in separate Supreme Court opinions challenging the concept of clearly defined categories and levels of scrutiny leading to highly predictable outcomes.⁶⁴ Instead, Justices Marshall and Stevens suggested that, at least in equal protection cases, each case had to be examined on its own, with the Court asking whether the justification for the challenged classification outweighed any discriminatory effect.⁶⁵

While the Court continued to invoke the language of distinct tiers of analysis, the apparent simplicity of the system has been greatly diminished over the years. In cases involving affirmative action,⁶⁶ the Court has chosen the language of strict scrutiny over the language of intermediate scrutiny,⁶⁷ but justices who provided crucial votes for the Court's majority have stressed that in their view, strict scrutiny was not to be regarded as the practical equivalent of the imposition of *per se* invalidity on government action.⁶⁸ Instead, government would sometimes be able to justify even racial classifications.⁶⁹ At the other end of the analytical spectrum, the Court has found instances where the government has failed to satisfy the rational basis test of low level scrutiny.⁷⁰ In these instances, the line between the two

63. Compare *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding a draft registration system requiring males, but not females, to register for possible military service), with *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating Virginia's maintenance of an all-male military college).

64. See *Craig*, 429 U.S. at 211-12 (Stevens, J., concurring) ("There is only one Equal Protection Clause It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) ("[T]his Court . . . has applied a spectrum of standards in reviewing discrimination This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications.")

65. *Craig*, 429 U.S. at 212-14 (Stevens, J., concurring); *San Antonio*, 411 U.S. at 99-100 (Marshall, J., dissenting).

66. See *Adarand Constructors, Inc., v. Peña* 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

67. See *Bakke*, 438 U.S. at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Croson*, 488 U.S. at 493-98; *Adarand*, 515 U.S. at 218-31.

68. See, e.g., *Adarand*, 515 U.S. at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'") (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

69. Justice O'Connor has gone out of her way to point out that strict scrutiny is not the equivalent of *per se* invalidity. "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this court has set out in previous cases." *Adarand*, 515 U.S. at 237; see also *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (affirming the *Bakke* approach of applying strict scrutiny, but permitting the challenged program).

70. See *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). In each of these cases, the Court invalidated the challenged government act after finding that it was based upon nothing more than hostility or "impermissible assumptions" toward the disadvantaged group. See *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 465.

traditional levels of scrutiny, on the one hand, and intermediate scrutiny, on the other, has blurred. At the same time, the intermediate scrutiny test has sometimes been applied in ways that seem quite similar to traditional strict scrutiny,⁷¹ further blurring the distinction. In practice, if not in explicit language, the Court seems to have at least moved in the direction of case-by-case balancing in equal protection matters, and away from a process of rigid classifications.

The same general type of phenomenon has become evident in First Amendment cases. Categories of speech that were once regarded as outside the protection of the speech clause, such as “fighting words”⁷² or commercial speech⁷³ are now given some degree of protection, while at the same time, the Court has limited speech rights in public places⁷⁴ and balanced the rights of protesters against privacy and other legitimate public interests.⁷⁵ With respect to the religion clauses, the Court’s Establishment Clause cases have quite clearly been exercises in balancing conflicting interests, resulting in a series of outcomes without a great deal of consistency,⁷⁶ while recent free exercise cases have abandoned a strict scrutiny test that seemed, in its application, to be far less severe than what is normally thought of as strict scrutiny,⁷⁷ and there has been a return to a low

71. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating the male-only admissions policy of Virginia Military Institute). Chief Justice Rehnquist, concurring, expressed disagreement with the Court’s analysis, which seemed to employ something more rigorous than the intermediate scrutiny test used in prior cases. *Id.* at 558-59 (Rehnquist, C.J., concurring).

72. “Fighting words” were classified as unprotected by the First Amendment in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), but in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992), the Court noted that although such language may have less than full constitutional protection, it is an overstatement to say that it has none.

73. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding that commercial advertising was unprotected by the First Amendment). A series of cases has subsequently given commercial advertising significant protection. *See, e.g.*, 44 *Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980).

74. Earlier cases involving claims of First Amendment access to public property suggested that the burden was on the state to put forth a convincing reason that access would interfere with government activity on that property. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”). More recent cases, however, have adopted an approach that is quite deferential to government decisions that classify public property as “non-public forums,” giving government wide discretion to limit the types of speech activity permitted. *See generally* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713 (1987).

75. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding an ordinance banning picketing in front of a residence); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC regulations severely limiting broadcasts of “indecent,” but not obscene, speech).

76. *See, e.g.*, *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995) (funding student group’s publication of religious magazine not unconstitutional); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding an invocation at high school graduation unconstitutional); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (permitting menorah in public park and prohibiting nativity scene in county courthouse); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting publicly sponsored holiday display including religious symbols).

77. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting free exercise claim against military regulations prohibiting wearing of yarmulke); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding restrictions on religious group’s solicitation of funds at state fair).

level rational basis analysis for any government practice that does not single out religion for special, disadvantageous treatment.⁷⁸

The Court's shift to a more determinate, albeit far less protective, method for analysis of free exercise claims demonstrates the powerful allure of clear rules that can serve as guideposts for both government and individuals in shaping their activity, but it seems that this shift away from a more indeterminate balancing approach is the exception rather than the rule in recent Supreme Court jurisprudence. The desire for clearly articulated tests certainly remains strong. One way to deal with the current proliferation of approaches in constitutional cases is to suggest that the Court has created not merely three, but several different "tiers" of scrutiny.⁷⁹ But at some point, the attempt to articulate a multiplicity of tests begins to look suspiciously like a rather desperate attempt to deny that much of constitutional law is moving away from a concern with determinacy and toward more reliance, openly or otherwise, on case-by-case balancing.

Case-by-case balancing has long been the subject of severe criticism. Critics maintain that it does not fulfill one of the essential purposes of law, which is to provide a predictable consistency that will allow people and institutions to plan their future acts. In addition, balancing is itself a deceptive term. To balance is to assign relatively precise weights to two separate things. It is one thing to balance objects to determine their relative height, weight, or even dollar value.⁸⁰ But the balancing required in constitutional law requires assigning relative value to very different things. Just how does one weigh the social benefit of government practice against the pain it causes one or more individuals?⁸¹

Essentially, these criticisms maintain that to permit courts to balance is to give them a degree of discretion that they should not have. Case-by-case adjudication has a long history, of course. Courts have developed common law rules and interpreted statutes without always attempting to do more than resolve the disputes before them. But one concerned with the proper allocation of government power will point out that, in these cases, if the court strikes an unfortunate balance of the interests involved, the legislature

78. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

79. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

80. Of course, even the process of translating values into the common currency of dollars is hardly without controversy. A homeowner may consider the "fair market value" inadequate compensation for the exercise of eminent domain in taking the family home. See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981).

81. See Justice Scalia's comment that constitutional balancing is sometimes "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

can correct that judgment. When the issue is one of constitutional interpretation, the Court's judgment is, for most practical purposes, final.⁸²

But it is far too late to reverse the principle that the Supreme Court has the final say on the constitutionality of government acts, and also far too late to revert to the century-old suggestion that the Court should adopt as a single, quite determinate, standard that it will defer to legislative judgment except in cases where no reasonable person could doubt that the constitutional text had been violated.⁸³ And experience has shown that once these decisions have been made, courts must engage in some form of balancing. The only questions will be whether the balance will be struck in each individual case, or for each broad category of cases,⁸⁴ and how the relative weight of the various interests to be balanced will be determined.

Thus, even if courts continue to use the language of strict, intermediate, or low-level scrutiny, the task of assigning weights to and balancing of interests cannot be avoided. To what extent have courts accurately recognized the interests to be weighed in constitutional rights cases? Generally, the governmental interest in limiting rights has been accurately identified and assigned a reasonable weight. This should not be surprising; the value of a government practice to the community can be reasonably assessed in a utilitarian calculus. Identifying and assigning the proper weight to the interests of the individual in challenging the government act is more problematic, but it cannot be avoided. Despite academic argument that certain rights must be "trumps" that can never be overridden by merely utilitarian concerns, courts have demonstrated that even the most widely accepted constitutional rights will be trimmed if the negative consequences of refusing to do so are severe.⁸⁵

Still, while no rights are treated as absolutes, it is equally clear that some require a much greater showing of social harm to justify their limitation. How do we recognize which rights carry that much weight? The traditional answer has been either that we simply look to those individual rights enumerated in the constitutional text, or we engage in an examination of

82. See *Cooper v. Aaron*, 358 U.S. 1 (1958). It is possible to have a constitutional system that includes the power of judicial review, yet does not install the judiciary as the final arbiter of constitutional questions. See, for example, section 33 of the Canadian Charter of Rights and Freedoms, which authorizes parliament or a provincial legislature to provide that an act shall be effective (with certain limitations) notwithstanding a judicial finding that it violates the Charter, which is an essential part of the Canadian constitution.

83. This theory was never adopted by a majority of the Supreme Court. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), for the classic enunciation of this theory.

84. See *supra* notes 58-59 (discussing the use of categories in traditional First Amendment analysis).

85. Thus, even political speech may be punished "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Explicit racial discrimination against Japanese-Americans was upheld in *Korematsu v. United States*, 323 U.S. 214, 219-20 (1944), as a military necessity during World War II. Although *Korematsu* is now widely regarded as an embarrassing mistake made by the Supreme Court, the case remains as an illustration of how perceived consequences can cause the Court to trim even the most strongly protected rights.

tradition and history to locate fundamental rights.⁸⁶ These inquiries have resulted in a short list of fundamental rights, but that list is not exhaustive. To recognize this is not necessarily to argue for the recognition of “new rights,” but perhaps to suggest examining present and past case law for some principles that have been overlooked. In order to explore one of those principles, we must now turn to a source that might seem inappropriate as a guide to the proper application of any sort of balancing test: the thought of the great anti-utilitarian philosopher Immanuel Kant.

III. THE CATEGORICAL IMPERATIVE: TREATING PEOPLE AS ENDS

In weighing claims of individual rights, American constitutional law pays a great deal of attention to utilitarian concerns. Even the stringent strict scrutiny test provides for the possibility that a fundamental right might be overridden if necessary to achieve a compelling social interest.⁸⁷ In light of this, it might seem strange to turn to the thought of Immanuel Kant for any assistance in understanding American constitutional analysis. Kant’s moral philosophy, after all, is noted for its insistence that justice must be pursued in each case, regardless of the apparent cost to society.⁸⁸ Kant was certainly no utilitarian.

But if constitutional analysis is largely utilitarian, it is not entirely utilitarian. Neither the constitutional Framers, nor many judges today, would endorse Bentham’s characterization of individual rights asserted against community welfare as “nonsense on stilts.”⁸⁹ Individual rights may not act as “trumps” over social welfare in all cases,⁹⁰ but neither are they always subservient to community interests. Balancing, then, becomes inevitable, but at the same time, difficult to do in a way that seems principled and not simply as a reflection of a particular court’s subjective preferences.

The social cost of respecting a particular rights claim can be determined in a way that seems reasonably objective. The dollar cost to society, the number of people who might be harmed or offended, or other things can be expressed in numbers, and numbers have a reassuring veneer of objectivity. But the value of an individual right cannot be so easily reduced to a value that most would agree upon. How can we assign a precise weight to the

86. See *supra* note 6 (discussing the various theories employed by the justices in *Griswold* to justify recognition of a fundamental right of privacy).

87. See *supra* note 85.

88. For a very good, concise presentation of Kant’s moral philosophy, see ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT’S ETHICS* (1994).

89. Jeremy Bentham, *Anarchical Fallacies*, in *CONTEMP. CIVILIZATION READER* (8th ed., 2002-03). The work is an article-by-article critique of the French Declaration of the Rights of Man.

90. The concept of “rights as trumps” is most closely associated with the thought of Ronald Dworkin. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977).

value of an individual right to obtain an abortion, burn a flag in protest, be free of an obligation that conflicts with a religious duty, or any number of other things?

Perhaps a better way to approach the inevitable process of balancing is not to ask what value to place on a specific right, but rather to identify some weighty principles that can come into play in assessing the magnitude of a specific restraint on any number of rights. Kantian ethics can serve as a promising source for exploring and recognizing such principles.

Like other Enlightenment thinkers, Kant was an opponent of absolutist government, and believed that the legitimate moral claims of the individual should override the claims of the state.⁹¹ But at the same time, he recognized that human egoism could, if unrestrained, lead to a state where the total amount of freedom would be limited by violence and exploitation.⁹² Thus, the primacy of the individual should not lead to a radical libertarianism, but rather to a governing structure that justified its restraints by demonstrating that it would maximize the opportunities that individuals had to exercise their legitimate freedoms.⁹³ A justifiable system of law would be consistent with what Kant identified as the Universal Principle of Justice.⁹⁴ The principle holds that the limitations placed on conduct by law are just only to the extent that they promote the most freedom for all.⁹⁵ This assertion led Kant to the identification of two crucial conclusions that follow from recognizing the inherent dignity of the individual. The law must respect the equality of its citizens before the law.⁹⁶ Likewise, the law must be applied universally, according to impersonal rules that disregard

91. See SULLIVAN, *supra* note 88, at 7-8. Sullivan sees Kant's political thought as part of the work of "a group of writers whose philosophical thought underlies the fundamental documents of the American Republic." *Id.* at 7. This group includes John Locke, David Hume, Baron de Montesquieu and others. *Id.*

92. See *id.* at 9-11.

93. Thus, the concept of duty would assume a central role in Kant's thought, with the individual's freedom depending on the duty of others to respect it, and the correlative obligation of the individual to accord the same respect to others. *Id.*

94. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 56-57 (Mary Gregory trans., 1991). Gregory, in common with most translators, renders this phrase as "the Universal Principle of Right." *Id.* I adopt here Roger Sullivan's use of the word "justice" instead of right. As Sullivan explains:

Today . . . people tend to use the term 'right' to canonize whatever it is that they wish to do. Kant had quite a different meaning for the word: to say that a person has a right is to say that that person has a legally enforceable claim against others within the context of civil law. The term 'justice' rather than 'right' is therefore less subject to misinterpretation by contemporary readers.

SULLIVAN, *supra* note 88, at 26 n.5.

95. "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." KANT, *supra* note 94, at 56.

96.

In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen) are . . . civil *equality*, that of not recognizing among the *people* any superior with the moral capacity to bind him as a matter of Right in a way that he could not in turn bind the other.

KANT, *supra* note 94, at 125.

particular conditions that distract from the basic humanity which we all share, that is the source of individual rights.⁹⁷

Kant's commitment to the Universal Principle would lead him to elaborate on matters concerning the proper forms of government,⁹⁸ but perhaps better known, and of greater concern to us here, is the norm he enunciated for the moral conduct of the individual, as well as the recognized lawgiver, a norm that he called the Categorical Imperative.⁹⁹ This ultimate moral standard could be enunciated, in Kant's view, in three different ways, each presenting a somewhat different emphasis, but each essentially restating the basic principle.

The first formulation of the Categorical Imperative, the formula of Autonomy, states that "I should never act except in such a way that I can also will that my maxim should become a universal law."¹⁰⁰ The second, the Formula of Respect for the Dignity of Persons, directs that one "[a]ct in such a way that you treat humanity, whether in your own person or in the person of another, always . . . as an end and never . . . as a means."¹⁰¹ The third, and most abstract, the Formula of Legislation for a Moral Community, provides that "[a]ll maxims that proceed from our own making of law ought to harmonize with a possible kingdom of ends as a kingdom of nature."¹⁰²

However much or however little the first and third formulations of the categorical imperative may have impacted American constitutional law, this article will limit its scope to focusing on the second. As we will see, consciously or unconsciously, this principle of refusing to treat the individual entirely as a means recurs quite frequently not, as Kant would have wanted as an absolute norm, but nevertheless as a rather strong factor in weighing constitutional rights cases, even when not specifically identified as such.

Before attempting to trace the presence of this principle through several different areas of constitutional rights jurisprudence, it would be helpful to briefly summarize Kant's own explanation of his formula. The foundation for this formula, indeed for Kant's entire Categorical Imperative, is his sharp distinction between persons and things.¹⁰³ Persons can be distinguished from both animals and inanimate objects in that they have freedom to autonomously choose their actions. This ability to legislate the moral law

97. This is at the core of the first formulation of the Categorical Imperative. See *infra* notes 99-100 and accompanying text.

98. See, e.g., KANT, *supra* note 94, at 123-49.

99. IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James W. Ellington trans., 3d ed. 1993). This is where the term is first stated. *Id.*

100. *Id.* at 14.

101. *Id.* at 36.

102. *Id.* at 41.

103. Things can be recognized as having a "market price;" they can be "replaced by something else as its equivalent." *Id.* at 40. Persons, in contrast, have "an intrinsic worth, i.e., dignity." *Id.*

for ourselves is what constitutes our humanity, and it is a quality that animals, operating on instinct, and inanimate objects lack.¹⁰⁴

The value of mere things rests entirely on the extent to which they are prized by persons, and this will depend on the extent to which they provide practical or emotional utility.¹⁰⁵ In other words, things are valuable only to the extent that they satisfy the needs of those persons desiring them; things can be and are legitimately treated as means toward happiness, not as ends in themselves.¹⁰⁶

In contrast, persons, as free moral agents, can be good not merely in the sense that they have value to someone else, but objectively, apart from their subjective worth to others, simply by virtue of their existence.¹⁰⁷ This intrinsic, objective value that inheres in persons requires that we treat each other as “ends,” rather than merely as means, or objects that can properly be used solely to satisfy the desires of others.¹⁰⁸

This formula, it must be stressed, does not insist upon a saintly degree of complete selflessness. To begin with, the formula calls upon us to treat ourselves, as well as others, as ends.¹⁰⁹ Thus, to treat ourselves as merely objects to satisfy the desires of others would be not only not admirable, but actually a violation of the categorical imperative. The pursuit of our own happiness, within the constraints of the moral law, is entirely proper.¹¹⁰ And Kant recognized that since we live in communities and are inevitably dependent for our flourishing upon our relation with others, we must to a certain extent use each other for our own ends.¹¹¹ Marketplace and business transactions, perhaps the most obvious examples of placing subjective values on the time and skills of others, are not inherently immoral. Kant defined “worldly wisdom” as the skill to influence others in order to use them for one’s own ends.¹¹²

What is wrong, however, is to treat a person as only a means to another’s ends, to disregard the dignity and worth of the individual and to treat that person as we would treat a thing. We may treat a thing entirely as a means to our own ends; it does not command our respect and demand that its own dignity and well-being be recognized. But a person may be used for

104. *Id.* at 41 (“[A]utonomy is the ground of the dignity of human nature and of every rational nature.”).

105. *Id.* at 40 (“Whatever has reference to general human inclinations and needs has a market price.”).

106. *See id.* at 35 (noting that things possess only a “relative” or instrumental value).

107. *Id.* (“Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will.”).

108. *Id.*

109. Thus, Kant could not condone suicide. *Id.* at 36. “If he destroys himself in order to escape from a difficult situation, then he is making use of his person merely as a means so as to maintain a tolerable condition till the end of his life.” *Id.*

110. *Id.* at 37 (“[T]he natural end that all men have is their own happiness . . .” but this will be acceptable only if the individual “also strive[s], as much as he can, to further the ends of others.”).

111. Thus, there are pragmatic, as well as moral, imperatives, although those lack the dignity of the latter. *Id.* at 26-27.

112. *Id.* at 26 n.4.

the ends of another only within the boundaries of respect for that person's autonomy.

Kant was no utilitarian; his categorical imperative was an absolute rule. But in its application, he could and did take note of some pragmatic concerns. Significantly, he did not insist that a moral person must show no favoritism to family, friends, and neighbors over strangers.¹¹³ It is inevitable and acceptable to devote particular attention to those closest to us. Still, that does not permit total disregard for the dignity of strangers. In its actual application, then, the absolutes of the categorical imperative will not always provide easy and clear guidance. At what point does legitimate concern for the ends of oneself and one's community cross the line and treat another solely as a means of promoting those ends?

The difficulty of providing a clear answer to this question in actual practice will allow the insights behind the second formula of the categorical imperative to find their way into the balancing process that courts engage in when assessing constitutional rights claims. When we examine a range of Supreme Court opinions, we find, although not explicitly acknowledged, and not always decisive, the principle that law, while pursuing legitimate communal ends, may not treat an individual entirely as a means.

IV. THE CATEGORICAL IMPERATIVE AS A FACTOR IN CONSTITUTIONAL RIGHTS CASES

Despite the best efforts of courts and commentators to reduce constitutional analysis to a set of clear, determinate formulas, most rights claims are subjected to some form of balancing test.¹¹⁴ Whether done under the name of strict, intermediate, or low-level scrutiny, the process will involve assigning weights to the value of the asserted right and the social cost of recognizing that right.¹¹⁵ It is relatively easy to recognize and measure social cost; it is much more difficult to accurately assign a countervailing weight to a particular right.

The difficulty, and apparent subjectivity, of assigning a weight to a particular asserted right will lead some to argue that only specific rights expressly listed in the constitutional text should be recognized as having significant weight in the process of constitutional balancing. This position, under the banner of textualism¹¹⁶ or original intent¹¹⁷ will take the valuation

113. "For in wishing I can be *equally* benevolent to everyone, whereas in acting I can, without violating the universality of the maxim, vary the degree greatly in accordance with the different objects of my love (one of whom concerns me more closely than another)." KANT, *supra* note 94, at 246.

114. See *supra* Part II.

115. *Id.*

116. See generally Jed Rubenfeld, *Textualism and Democratic Legitimacy: The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998).

of individual rights as a process completed, for good or ill, by the Framers, and will disclaim judicial power or responsibility to revisit the issue. But this position must confront the conscious use, by the Framers, of imprecise language,¹¹⁸ as well as the inclusion of the Ninth Amendment in the Bill of Rights.¹¹⁹ Isn't this strong evidence that the actual intent of the Framers was that successive generations would continue to explore and debate the precise boundaries of individual rights?

Rather than asking whether or not a particular practice qualifies as a fundamental right, which then acquires something close to the status of a trump over utilitarian concerns, we might identify more general principles which serve as the basis for specific rights. Government practices that collide with these principles would, at least, need to be justified by stronger community welfare concerns than those that satisfy the traditional rational basis test. But whether a government practice collides with a broad principle will often be a question of degree, rather than one that calls for a clear yes or no answer. And, since traditional constitutional analysis calls for an initial determination of whether or not the asserted right qualifies as a "fundamental right," a "liberty interest," or something else, the existence and significance of the underlying principle involved in a case can easily be overlooked.

Perhaps the clearest example is the approach courts have taken to the enforcement of the principle of equality. The Fourteenth Amendment makes it clear, even if notions of fundamental fairness do not,¹²⁰ that equal treatment of citizens by government is a strong underlying constitutional principle.¹²¹ But since strong application of the equal protection principle has traditionally been limited to situations involving recognized fundamental rights or suspect classifications, more energy has been exerted in trying to identify those rights or classes than exploring the ways in which the equality principle itself should be defined and applied. When one does turn to equality standing alone, apart from suspect classes or the nature of the right involved, the principle that government not treat a person entirely as a means provides at least a partial insight into the meaning of the concept.

When we examine a broad range of constitutional rights cases, we can see that this principle, while rarely if ever stated in so many words, does

117. See, e.g., Raoul Berger, *New Theories of "Interpretation: The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

118. Thus, Professor Powell presents a strong case for the proposition that the true intent of the Framers was that future generations would not be bound by the Framers' narrow "original intent." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

119. See generally Randy E. Barnett, *Symposium on Interpreting the Ninth Amendment: Foreword*, 64 CHI.-KENT L. REV. 37 (1988).

120. Thus, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to the landmark case of *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), the Court outlawed racial discrimination maintained by the federal government, despite the absence of an explicit equal protection clause binding the federal government. The equality principle, the Court held, was implicit in the Due Process Clause of the Fifth Amendment. *Bolling*, 347 U.S. at 499-500.

121. U.S. CONST. amend. XIV, § 1 ("[n]or shall any State . . . deny to any person . . . the equal protection of the laws").

seem to be present surprisingly often. Something that closely resembles the Kantian principle appears, for example, in an area of constitutional rights analysis far removed from what is normally classified as an equal protection inquiry.

Since the early twentieth century, the Court has wrestled with the question of when, if ever, a government regulation of land use that does not actually deprive the owner of title might constitute a taking, giving the owner the right to just compensation.¹²² Except in a narrow range of cases,¹²³ the Court has approached the problem through the use of a rather indeterminate balancing test.¹²⁴ Dominant among the factors weighed in this test are the percentage of the value of the property reduced by the regulation in question,¹²⁵ and the legitimacy and importance of the government interest addressed by the regulation.¹²⁶ But justices have also addressed the question of whether the regulation provided a sufficient degree of reciprocal benefit to the party being regulated, or whether, in contrast, an individual or a small group of property owners were singled out to bear the full burden of providing the community with a benefit in which they would share insufficiently, or not at all.¹²⁷

The recognition and application of this factor in the regulatory takings cases illustrates both the power and the limitations on the use of Kant's formula. On the one hand, the assertion that there must be a degree of reciprocal advantage to justify limitations placed on individuals is the closest the Supreme Court has come to endorsing the notion that fundamental principles of justice require that persons not be treated entirely as means to some utilitarian end.¹²⁸ But the fact that the clear presence or absence of sufficient reciprocal benefits has not been a determinative factor in these cases strongly suggests that cases where it is clear that the rights claimant is being treated solely as a means will be rare. Most government activity, provided that it serves a legitimate purpose, will benefit the community as a whole; the party subject to the regulation will, to some degree, share in that

122. See generally WILLIAM FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995).

123. The Court has held that two kinds of regulatory actions are *per se* takings: when government action constitutes a "permanent physical occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), and where government action deprives a property owner of "all economically beneficial or productive use of land," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

124. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978).

125. "[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Keystone*, 480 U.S. at 497.

126. See *id.* at 485-93.

127. See, e.g., *Penn Cent. Transp. Co.*, 438 U.S. at 133-35.

128. *Id.*

benefit as a member of the community.¹²⁹ There is no requirement that there be a precise reciprocity in the degree of benefits and burdens allocated among members of the community, only that the individual does not become solely a means, that is to say, entirely excluded from the benefits.¹³⁰ Thus, for example, the fact that only certain property owners are affected by having their property designated as a landmark does not invalidate the restriction; the landowners share in the overall benefits that the community derives from landmark preservation.¹³¹

The proposition that the criminal law should punish only the guilty seems so obviously true that it needs no further explanation. But all societies at all times would not necessarily agree. Some societies have punished relatives of the criminal,¹³² and a pure utilitarian would have no objection to the punishment of the innocent, so long as the *in terrorem* effect upon others was sufficient to outweigh the suffering induced by the innocent who were punished.¹³³ Such a utilitarian calculus, however, blatantly violates Kant's second formula. The innocent person here is being used, quite obviously, as a means. While it might be argued that even the person unjustly punished is not solely a means, since he will share in the benefits of a more law-abiding society, the relative weight of the burden and benefit to that individual makes such a course of action unconscionable.

Punishing the guilty, of course, is not only justifiable, but in Kant's view, was obligatory.¹³⁴ This was not merely a matter of promoting community welfare; Kant's position was that a punishment approximating the crime itself was necessary to give respect to the moral choice made by the criminal. Kant's defense of capital punishment essentially maintained that by killing another, the murderer had chosen to inhabit a moral realm in which killing was justified. Executing the killer, then, was an act in which the state accepted that choice and applied the same principle to the killer himself.¹³⁵ This derives from the first formulation of the categorical imperative.¹³⁶ When the killer chose to kill, he must have accepted the right

129. See, e.g., *id.* at 134-35.

130. See *id.* at 133-35.

131. *Id.*

132. See ADEKEMI ODUJIRIN, *THE NORMATIVE BASIS OF FAULT IN CRIMINAL LAW* 32-33 (1998) (discussing the evolution of criminal law from regarding the tribe or family as both the victim and perpetrator of crime to modern concepts of individual responsibility).

133. See John Rawls, *Two Concepts of Rules: Punishment*, in *PHILOSOPHY OF LAW* 651-55 (Joel Feinberg & Hyman Gross eds., 1991).

134. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 196-98 (photo. reprint 1974) (1887).

135.

[W]hoever has committed [m]urder, must *die*. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of Justice. There is no *Likeness* or proportion between Life, however painful, and Death; and therefore there is no Equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal.

Id. at 198.

136. "[T]he undeserved evil which any one commits on another, is to be regarded as perpetrated on himself." *Id.* at 196; see also *supra* notes 93-111 and accompanying text.

of others to do likewise, and is in no position, then, to object to his own execution.

Whatever one's opinion is of Kant's position on capital punishment, it would never justify the execution of any except those actually guilty, no matter how beneficial the execution might be to community welfare. While one might strain to justify lesser punishments of the innocent on the grounds that the person punished would nevertheless benefit in the future from the general deterrent effects his unjust punishment had on future crime, even this strained argument is unavailable in cases of capital punishment, where the innocent executed person will have no share in future social welfare. Of course, it might be seen as entirely unnecessary to develop a careful explanation of why the punishment, and certainly the execution, of the innocent is wrong. Such a conclusion seems self-evident. But while it would be difficult to find serious advocates of deliberately punishing the innocent, at least a few commentators have explicitly stated that the unintentional execution of the innocent was a tolerable price to pay for the supposed social benefits created by a regime of capital punishment.¹³⁷ In a legal world where utilitarian calculations, not without justification, weigh heavily, it certainly is worthwhile to reiterate reasons why utilitarian concerns must at least share the stage with other values.¹³⁸

In recent decades, the Supreme Court has addressed the constitutionality of statutes that, in some way, disadvantage non-marital children.¹³⁹ In keeping with standard equal protection analysis, the Court has addressed the question of whether such children should be recognized as a suspect class, which would trigger the application of strict scrutiny.¹⁴⁰ This inquiry has focused on whether the class of non-marital children shared enough characteristics with established suspect classes such as racial minorities,¹⁴¹ and has not led to consistent results. While some early cases suggested that non-marital children are a suspect class for equal protection purposes,¹⁴²

137. See, e.g., Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 967 (1985) ("Whether one sees the benefit of doing justice by imposing capital punishment as moral, or as material, or both, it outweighs the loss of innocent lives through miscarriages, which are as unintended as traffic accidents.").

138. See Margaret Jane Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1170 (1985) ("Whether someone is guilty of a crime or deserves to die for it is not of concern to the pure utilitarian. But no one in her right mind is a pure utilitarian.").

139. See *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Levy v. Louisiana*, 391 U.S. 68 (1968).

140. See *Mathews*, 427 U.S. at 504-06.

141. *Id.*

142. In *Levy*, although the Court did not explicitly adopt strict scrutiny as the appropriate analytical tool, Justice Douglas' strong language criticizing legislation disadvantaging non-marital children, and his citation to cases involving racial discrimination suggested that strict scrutiny might be thought appropriate. 391 U.S. at 70-72.

later cases do not go so far, and apply only intermediate scrutiny, rather than strict scrutiny, to the challenged classification.¹⁴³

If, instead of simply comparing the class of non-marital children to other suspect classes, we apply Kant's principle to statutes that disadvantage such children, we find a clearly compelling argument against permitting such statutes. Discrimination against non-marital children, whether legal or social, uses these children entirely as a means, presumably toward furthering the end of reducing the incidence of non-marital childbirth. Most would agree that reducing the number of unmarried pregnancies is a worthwhile social goal. But, despite some recent calls for the reintroduction of shame as a deterrent to unmarried pregnancy,¹⁴⁴ most would also agree that to punish the child for what may have been a foolish or socially irresponsible act by his or her parents is fundamentally unfair. And the unfairness is rooted in violation of the Kantian principle: to disadvantage non-marital children based on their parentage is to treat them entirely as means to a utilitarian end.

While the force of the Kantian principle can be seen in such diverse places as criminal law and the law of takings, the cases involving non-marital children bring us into the area of constitutional rights cases that seem to demonstrate most starkly the power of the principle, even though it is not explicitly acknowledged. These cases are those that in one way or another deal with life or death.

At the beginning of this article, the Supreme Court's contraception cases, particularly *Eisenstadt*,¹⁴⁵ were highlighted as perhaps the clearest illustrations of the unacknowledged power of this principle. In most cases, the person claiming a rights violation will be the one who arguably is being treated as a means rather than an end. The state, in the normal run of cases, can maintain that the restriction in question in some way benefits, as well as restricts, the rights claimant, and therefore satisfies the command that no one be treated entirely as a means. The contraception cases, though, present a different situation. In addition to the state and the rights claimant, the prohibition starkly implicates a third person, although that person is offstage and merely inchoate at the moment the state is concerned with.

In both *Griswold* and *Eisenstadt*, the state disclaimed any purpose to merely promote population growth through its prohibition on contraception.¹⁴⁶ Instead, in each case, the state claimed that its purpose was to deter extramarital sex through the prevention of pregnancy.¹⁴⁷ While most of the discussion surrounding the *Griswold* line of cases has focused on

143. *Lalli*, 439 U.S. at 275-76, clearly rejects the use of a strict scrutiny standard, in favor of the intermediate standard of whether the distinction "is substantially related to the important state interests the statute is intended to promote." *Accord Mathews v. Lucas*, 427 U.S. 495 (1976); *Trimble v. Gordon*, 430 U.S. 762 (1977).

144. See, e.g., Charles Murray, *The Time Has Come to Put a Stigma Back on Illegitimacy*, SACRAMENTO BEE, Nov. 7, 1993, at F1.

145. 405 U.S. 438 (1972).

146. See *supra* note 31.

147. See *supra* note 32.

the obviously serious impact that the state statutes had on the lives of those who sought contraceptives, less attention has been paid to the fact that the state, in these cases, uses a person, the potential child conceived through extramarital sex, as not merely a threat, but also a punishment.

Here we may have the most stark example in all of constitutional law of a case that presents a flagrant violation of the general formulation of the categorical imperative. The potential child is being used by the state entirely as a means to deterring the behavior of others; there is not even a pretense of concern for the good of the extramarital child who might be conceived. Kant's formula prohibits only actions that treat someone solely as a means.¹⁴⁸ Usually some plausible argument can be made that the rule in question, while achieving some utilitarian goals, also benefits the person whose liberty is restricted. Yet here we need not puzzle over the extent to which the potential extramarital child is being used as a means or being benefited as an end. The state does not and cannot genuinely contend that the ban on contraceptives was in any way meant to further the welfare of that child. The child was solely used as potential punishment, certainly an action which should, in terms familiar to constitutional lawyers, "shock the conscience."

This is not to say that the individual rights of the plaintiffs in the *Griswold* line of cases were irrelevant or even unimportant. It is, however, to suggest that these cases can also be viewed as correctly decided apart from any effort to enunciate and define a right of privacy or sexual autonomy. Standard models of constitutional analysis demand that an individual right of the plaintiff be identified, but in these cases that obscures perhaps the most objectionable aspect of the challenged statute.

A similar phenomenon can be seen in another branch of substantive due process cases, those asserting a "right to die." Unlike in *Griswold* and *Eisenstadt*, here the principle of treating people only as ends rather than means did not lead to broad endorsement of the asserted right, but rather emerged in the cautious ways in which five of the justices dealt with their rejection of the claim.

In *Washington v. Glucksberg*,¹⁴⁹ the Supreme Court unanimously rejected the claim that a state prohibition on assisted suicide violated the privacy or autonomy rights protected by the Due Process Clause.¹⁵⁰ The outcome was unsurprising, especially in light of the Court's earlier decision in *Cruzan v. Missouri Department of Health*,¹⁵¹ where the Court upheld the power of the state to set a high standard of proof to establish that a comatose

148. See *supra* text accompanying notes 103-13.

149. 521 U.S. 702 (1997).

150. *Id.* at 735.

151. 497 U.S. 261 (1990).

patient would want life support mechanisms discontinued.¹⁵² *Cruzan* strongly suggested that a majority of the Court did recognize that a competent patient has a due process right to discontinue treatment¹⁵³ but the precise holding, and the general tenor of the decision certainly indicated that the Court intended to proceed with extreme caution in extending the privacy right in this context.

The Court's refusal to recognize a right to assisted suicide was easily predictable. But the most interesting aspect of *Glucksberg* is the cautionary note sounded in the separate opinions of several justices. While rejecting the challenge to the Washington state statute, these justices noted that the state interpreted the law as permitting the administration of palliative care, that is, the administration of drugs in order to lessen pain, despite the fact that these drugs may have the concurrent effect of shortening the patient's life.¹⁵⁴ This position, somewhere between the denial of any constitutional problem presented by the assisted suicide issue, on the one hand, and the assertion of an absolute right to end one's life, on the other, is problematic when viewed through the lens of the traditional levels of constitutional review.

If we apply low-level scrutiny to the assisted suicide claim, the *caveat* about palliative care seems unnecessary. In rejecting the claim, the Court focused on the legitimate purpose of government to prevent abuse of assisted suicide,¹⁵⁵ allowing it even under the relatively careful guidelines proposed by the Washington patients' advocates would create too great a potential for its use where the patient was coerced, uninformed, or otherwise distinct from the model of the autonomous decision-maker at the heart of the plaintiff's case.¹⁵⁶ But under strict scrutiny, the state could not justify keeping the intelligent, competent, fully informed terminal patient from exercising his fundamental right on the ground that others might abuse that right. Strict scrutiny demands the least restrictive alternative, not merely a broad prohibition affecting the competent and vulnerable equally, as does the Washington statute.¹⁵⁷

But if we replace, or at least supplement, the traditional analytical tools with the principle that a person not be treated merely as a means, the position of the several concurring justices becomes easily understandable. The basic reasons given for outlawing assisted suicide do not rest on the state's authority to keep someone alive against their true wishes. Instead,

152. *Id.* at 286-87. Missouri required "clear and convincing evidence of the patient's wishes" to have life sustaining treatment withdrawn, rather than a mere preponderance, or permitting relatives to make the choice for incompetent patients. *Id.*

153. The Court "for purposes of this case . . . assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 279. It seems clear that concurring Justice O'Connor and the dissenting justices would affirm such a right. See *id.* at 287-89 (O'Connor, J., concurring); *id.* at 304-05 (Brennan, J., dissenting).

154. See *Glucksberg*, 521 U.S. at 736-38 (O'Connor, J., concurring); *id.* at 750-52 (Stevens, J., concurring); *id.* at 780 (Souter, J., concurring); *id.* at 791-92 (Breyer, J., concurring).

155. *Id.* at 733.

156. *Id.* at 730-33.

157. See *supra* note 56 and accompanying text.

they tend to rest on the danger that patients will be euthanized against their true wishes, due to coercion, lack of full knowledge, misunderstanding, or otherwise.¹⁵⁸ And if this is so, to prohibit an individual from seeking assisted suicide can be seen as at least partly an effort to protect that individual, as well as the community.¹⁵⁹ While this aspect of the purpose behind the prohibition might be criticized as paternalistic,¹⁶⁰ it does demonstrate a concern for the individual seeking assisted suicide as well as others in the community who might also be coerced or otherwise improperly euthanized in the future. In short, the rights claimant being denied assisted suicide is not being treated solely as a means to the achievement of utilitarian ends.¹⁶¹

When the state goes so far as to prohibit palliative care, however, the analysis changes dramatically. To deny palliative care is not merely to deny the choice of an earlier death, but also to require the terminally ill patient to continue to suffer serious pain. It is difficult, if not impossible, to maintain that this is actually being done to benefit the patient. Instead, the denial of palliative care seems entirely motivated by the desire to deliver a strong message to the community about the value of preserving life, or at most the desire to establish a bright line prohibition to prevent abuse of the acceptance of palliative care to shield those who would use drugs to euthanize patients in situations not involving pain reduction for the terminally ill. In short, this seems to present a situation in which the Kantian formula is violated. The patient is being forced to endure serious pain as a means of achieving some broad social gain, in which the patient himself will not share.

Medical treatment was also at issue in the most recent Supreme Court decision that suggests the importance of the Kantian formula. In *Sell v. United States*,¹⁶² the Court held that a criminal defendant may sometimes be forcibly medicated to make the defendant competent to stand trial.¹⁶³ This will only be allowed, however, when certain conditions are met.¹⁶⁴ The state's important interest in bringing the defendant to trial must be unattainable by less intrusive means.¹⁶⁵ And the use of the medication must be in the best medical interest of the defendant, and be unlikely to itself

158. See *Glucksberg*, 521 U.S. at 734 (discussing the Dutch experience with legal voluntary euthanasia).

159. *Id.* at 729-30.

160. BERNARD GERT, CHARLES M. CULVER & K. DANNER CLOUSER, *BIOETHICS: A RETURN TO FUNDAMENTALS* 195 (1997) ("Paternalism may be the most pervasive moral problem in medicine.").

161. *Id.* at 197 ("Of course, P's actions can be partially paternalistic; they can be intended for the benefit of others, including P himself, in addition to S. But what makes P's actions toward S paternalistic is never the intended benefit to anyone other than S.").

162. 123 S. Ct. 2174 (2003).

163. *Id.* at 2184-85, 2187.

164. *Id.* at 2184-85.

165. *Id.* at 2185.

cause side effects that might compromise the fairness of the defendant's trial.¹⁶⁶

Those restrictions reflect the principle of not treating an individual entirely as a means. While the government may act to promote social welfare in its prosecution of the accused, the medication must be at the same time of medical benefit to the accused.¹⁶⁷ Even if the welfare of the accused is secondary, at best, in the mind of the state officials, it cannot be entirely ignored. The same principle can be seen in the century-old Supreme Court decision upholding the state's power to compel citizens to receive vaccinations against communicable diseases.¹⁶⁸ While this might be defended simply by asserting that the social good outweighs the burden placed on individual bodily autonomy, the fact that the program seeks the welfare of the vaccinated individual as well as the greater community seems central to the program's justification.¹⁶⁹

V. CONCLUSION

Both law and moral philosophy have long sought to frame both rules and analytical methods that would provide clear guidance and a certain level of determinacy in resolving dilemmas in each field. But in law, at least, the frequent sharp tension between utilitarian concerns and "matters of principle"¹⁷⁰ has never been entirely resolved in favor of either, but has instead led to various forms of balancing in constitutional cases.

Balancing requires the identification and weighing of competing interests. The utilitarian side of the scale usually presents little problem here; community welfare can usually be identified and weighed, if not precisely, with at least rough accuracy. More difficult is the identification and weighing of individual rights principles. Why are there such rights, and how heavily do they weigh when balanced against social goals that might be advanced by overriding them? As the Supreme Court's approach to these questions has evolved, standard analytical practice has been to try to define discrete individual rights that may be limited only when their importance is clearly outweighed by competing social imperatives. This approach leads to the creation of several different, somewhat isolated, areas of law focused on each right, such as free speech, privacy, or property rights.

166. *Id.* at 2184-85.

167. *Id.* at 2185.

168. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

169. *Id.* at 26-27.

170. Although the *Jacobson* opinion emphasizes the need to weigh the welfare of the community against the right of the individual to be free of unwanted vaccination, it does go on to note:

[S]uppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied in such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned.

Id. at 38-39.

This tendency to isolate rights questions from each other has even spilled over into analysis of the constitutional demand of equality, a principle that obviously cuts across a wide range of private and public action. Here the common practice is to initially identify a class of people or a substantive right that is entitled to special care in assuring equal treatment by government, and develop a separate body of law for each one.

To some extent, this approach is inevitable, but it may obscure the existence of constitutional principles, whether rooted in the concept of equality, or of the just treatment demanded by the Due Process Clause, that should, and often do, play a role in a broad range of litigation pursuing rights claims. One of those principles appears to be the second formulation of Kant's categorical imperative.

The use of Kant's categorical imperative as a tool to assist in balancing will seem strange at first glance; Kant, after all, is the advocate of moral absolutes. And there are few, if any, constitutional rights principles that are actually applied as absolutes. Yet when we look at the second formulation of the imperative, with its qualification that using another solely as a means is always wrong, we find, in the use of term "solely," evidence that the formula in its application will require a sort of balancing. To what extent does a restriction benefit the individual; to which extent is that individual excluded from a share in societal benefits? Invocation of the principle will be not inconsistent, then, with the almost inevitable process of balancing that courts must engage in when considering individual rights claims.

The recognition of Kant's second formulation as a principle deserving respect in constitutional rights analysis will not necessarily make constitutional decision-making any more determinate. In some cases, the principle will be of little, if any, assistance. For example, each side in the abortion debate will lay claim to the principle, invoking it to either defend the asserted rights of the women or the fetus. The categorical imperative is of no help in resolving the basic question of whether a fetus can claim personhood, and the respect that status demands.

In other cases, respect for the principle will not change outcomes, but will instead provide a better understanding of current legal doctrine, and a stronger basis for its defense and development. This seems especially true with respect to some contentious issues involving post-*Griswold* assertions of strong rights of individual autonomy. But even in other contexts, the principle that the individual should never be treated solely as a means to the satisfaction of another's ends provides a useful tool in the imprecise, but unavoidable, process of constitutional balancing.

