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The Case for a Liberal Communitarian Jurisprudence

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The Case for a Liberal Communitarian Jurisprudence[1] ©

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I. INTRODUCTION

The COVID-19 pandemic revealed a profound and troubling communitarian deficit in American society. When the very severe pandemic swept the U.S., state governments ordered Americans to don masks, primarily to protect other Americans from disease and death (although the masks were later said to offer some benefits to the wearer as well). A very large number refused, a good part of them for principled reasons. Some argued the government did not have constitutional authority to mandate masks and that such mandates violated individual rights; but above all, these anti-maskers wanted to be left alone. When vaccines became available but required wide acceptance by the general public in order to be effective, the nation faced strong resistance, often from the same individuals who resisted the masks. This response comes despite the fact that, on a given day, the pandemic can kill more people than were lost on 9/11 or at Pearl Harbor, both of which led to various widely supported counter mobilizations.[2] This unwillingness to serve the common good—even when the costs and risks to the individual are minimal and the benefits to the common good are high—is a clear indication of a severe communitarian deficit. This deficit is also reflected in the political polarization that has overtaken the country and in the country's inability to reach shared understandings crucial for effective governance.

As is the case in many countries, in the U.S. there is a complex interaction between jurisprudence (the philosophy of law) and public discourse. American legal doctrine strongly protects individual rights but offers no grounds for courts to consider the common good[3].

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[2] *COVID-19 Deaths Surpass 9/11 Deaths in Single Day*, WebMD (December 10, 2020), https://www.webmd.com/lung/news/20201210/covid-19-deaths-surpass-911-deaths-in-single-day.

[3] U.S. CONST. Because some hold that there is no common good, merely an aggregation of individual goods, I note that the term "common good" refers to goods that serve no one individual but future generations. Examples include basic research, climate control, public safety, and public health.

This article will examine four court cases that directly deal with this communitarian deficit. It will also explore the ways courts have dealt with the issue of when individual rights yield to the common good.

II. LIBERAL COMMUNITARIAN THOUGHT

The best-known version of communitarianism is the East Asian school system, which emphasizes prioritizing the common good and one's obligations to the community. It teaches that individuals are part of an organic whole and can find their meaning in their contributions to the whole. In this version of communitarianism, there is no fundamental place for liberty or individual rights, although such rights may be granted if they would advance the common good.[4]

Western intellectuals, and all others who consider individual right self-evident, soundly reject East Asian communitarianism. Liberal communitarianism combines two fundamentally opposing philosophies, liberalism and communitarianism. Liberal communitarianism assumes, from the outset, that a society ought to treat both individual rights and the common good as basic moral principles; and a society should not assume, a priori, that one trumps the other. Liberal communitarianism does not overlook the fundamentally incompatible nature of liberalism and communitarianism; rather, it seeks to embrace their incompatibilities because one's strength is the other's deficiency. Liberal communitarians recommend constant balancing of these two moral principles; liberal communitarianism requires legislators and citizens to weigh the common good against individual rights and to create policies and social norms that protect

[4] *Late Singapore Leader Lee Kuan Yew Had Opinions on Everything*, TIME (Mar. 15, 2015), https://time.com/3748654/singapore-lee-kuan-yews-opinions/; *see also* WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998).

both. And, when the common good conflicts with individual liberty, a liberal communitarian society must rule which should take precedence.

The Fourth Amendment captures the basic liberal communitarian thesis extremely well. Unlike the First Amendment, which states that "Congress shall make no law,"[5] the Fourth Amendment protects against "unreasonable searches and seizures,"[6]," which on its face recognizes a whole category of searches and seizures that are constitutional—those that are reasonable, i.e., in the public interest. Therefore, like liberal communitarianism, it recognizes both rights and the common good. (The new golden rule). Moreover, the Fourth Amendment establishes the courts as a mechanism for determining the permissibility of searches and seizures.

Societies constantly correct the balance between individual rights and social responsibilities as cultural values change. For example, after 9/11, Congress quickly passed a series of new security measures.[7] When no new attacks occurred over the next decade, these measures were reined in.[8]

In short, liberal communitarians hold that no society should be designed according to one set of principles, that liberal communitarian societies can fall along a continuum (meaning that some may be more liberal or more communitarian than others), and that the relative weight

[5] U.S. CONST. amend. I.

[6] U.S CONST. amend. IV.

[7] 9-11 Commission, Homeland Security, and Intelligence Reform, https://www.hsgac.senate.gov/issues/9-11-commission.

[8] *Amitai Etzioni*, HOW PATRIOTIC IS THE PATRIOT ACT? FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM 38-42 (2004).

accorded to the two sets of principles must not be fixed but, rather, must be adapted to change with changing societal values.[9]

III. THE COURTS' STRUGGLE

When I mentioned this article's thesis to a colleague, she exclaimed, "But neither the common good nor the public interest are mentioned in the Constitution!" After discussing, we agreed that the phrase "in Order to form a more perfect Union"[10] has such overtones; however, these words are in the Constitution's Preamble, and, though often cited by public speakers, have no legal standing or heft. None of the cases under study mention them.[11] Instead, we shall see that courts, when they draw on the concept of the common good, make ad hoc statements not anchored in any constitutional foundation; and they must invent grounds on which the common good may prevail.

A. THE GOVERNMENT'S INTEREST/SPECIAL NEEDS V. PRIVACY

In 1983, the Federal Railroad Administration (FRA) reviewed accident reports dating back to 1972 and determined they would increase regulation to address alcohol and drug impairment of on-duty railroad employees.[12] The review found that, during that decade, "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use

[9] For more discussion of liberal communitarianism, *see* Philip Selznick, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1998) and Amitai Etzioni, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY AND MY BROTHER'S KEEPER: A MEMOIR AND A MESSAGE (1996).

[10] U.S. CONST. pmbl.

[11] The same holds true for the phrase, "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." *Id.*

[12] Skinner v. Railway Lab. Execs. Ass'n, 489 U.S. 602, 607 (1989).

as a probable cause or contributing factor."[13] The twenty-one accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars)."[14] Additionally, alcohol or drugs contributed to another seventeen railroad employees' deaths at work.[15]

These findings prompted the FRA to institute new regulations delineating actions that railroad companies were required or permitted establishing procedures for resting employees for drug and alcohol-impairment in 1985.[16] The regulations required railroad employees and other covered employees to submit blood and urine samples to an independent medical center for drug and alcohol tests after certain accidents.[17] The Railway Labor Executives' Association claimed the regulations were unconstitutional and sued to prevent their implementation..[18] The case, *Skinner v. Railway Labor Executives Ass'n*, ultimately reached the Supreme Court in 1988, and the Court decided it the following year. The Court decided the case in favor of the regulations, seven-to-two, with Chief Justice Rehnquist and Justices Blackmun, Kennedy, O'Connor, Scalia, Stevens, and White taking the majority opinion (written by Kennedy) and Justices Brennan and Marshall dissenting.[19]

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[13] Control of Alcohol and Drug Use in Railroad Operations, 48 Fed. Reg. 30726 (July 5, 1983).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Skinner*, 489 U.S. at 608-612.

[19] *Id.* at 605.

Both the majority and dissenting opinions discussed the Fourth Amendment. The majority opinion noted "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."[20] Further, it cited Court precedent to establish that reasonableness is context-specific—it depends on the particular circumstances in question—and must be calculated by weighing the Fourth Amendment rights of individuals against valid government interests. The Court generally considered a search or seizure reasonable following the issuance of a warrant based on probable cause.[21] However, in this discussion, the Court did not explain how a judge or magistrate should weigh the government's interest against the rights of individuals in determining the existence of probable cause.[22] Hence, it is unclear whether the decision to issue a warrant, and thus the reasonableness of a search, is based on a judge or magistrate's discretion.

In this case, the Court held that the blood and urine testing did not need probable cause or a warrant because the railroad tested all relevant employees after certain accidents even if they showed no signs of impairment. However, the majority created a "special needs" exception to the warrant and probable cause requirements. According to the Supreme Court, "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety" made the railroad regulations a "special needs" case.[23]

First, the Court explained:

> An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized

[20] *Id.* at 619.

[21] *Id.*

[22] *Id.* at 619

[23] *Id.* at 620.

> by law, and that it is narrowly limited in its objectives and scope. A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case [citations omitted].[24]

The Court argued that the purposes of a warrant were inapplicable in this case because the regulations already defined and limited the intrusions on individual rights, the Court assumed covered employees were familiar with the regulations, and the regulations provided a standardized system that did not require a neutral magistrate's discernment.[25] Further, the Court held that because the bloodstream and breath naturally eliminate alcohol and other drugs over time, securing a warrant before drawing blood or conducting a breath test could result in the loss of important evidence.[26]

In this case, however, the Court did not explicitly state that allowing railroad employees to work while impaired endangers the common good. Instead, the Court provided a narrow, ad hoc exemption to the warrant requirement, tailored to the specific situation, relying on a concept that has no place in the Constitution—namely special needs. Although stare decisis is a key element of Anglo-Saxon jurisprudence, a strong normative case is benefited when it is firmly anchored in constitutional law, as was the case when the concept of privacy was in effect added to it.

After discussing warrants, the Court examined probable cause. First, the Court acknowledged permissible warrantless searches typically require both probable cause and individualized suspicion. However, reasonable searches may occur "[i]n limited circumstances[:(1)] where the privacy interests implicated by the search are minimal, and

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[24] *Id.*

[25] *Id.* at 622.

[26] *Id.* at 623–624.

[(2)]where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion . . . ."[27] The majority asserted that the railroad regulations belonged among those "limited circumstances."[28] Here, the Court introduced a criterion to determine when individual rights or the common good should yield. However, the Court uses different criteria in different cases, demonstrating liberal communitarian jurisprudence needs development and consolidation.

The Court relied on two primary reasons to argue that blood, breath, and urine tests are not significant intrusions on privacy. First, employment often involves restrictions on movement, so any intrusions related to transportation or movement for blood extraction, breath, and urine samples imposed by the regulations did not fall far outside workplace privacy norms. Second, the Court argued that none of the tests under consideration were invasive. Blood tests, when performed properly, are a reasonable, routine, and safe part of physical examinations, involve negligible risk, and require a miniscule blood extraction.[29] Breath tests impose an even less infringement on bodily autonomy and private health information.[30] Although the majority noted that urine tests presented a privacy challenge, the regulations aimed to respect privacy concerns.[31] In addition, the Court held that covered railroad employees have a lower expectation of privacy than other individuals because they are involved in an industry that imposes strict

[27] *Id.* at 624.

[28] *Id.*

[29] *Id.* at 625 (citing *Schmerber v. California*, 384 U.S. 757, 771 (1966)).

[30] *Id.*

[31] *Id.* at 624. While urine tests are less physically invasive than blood tests, the way urine samples are collected present a privacy challenge. *Id.*

safety regulations, including some regulations related to health and fitness.[32] Therefore, the Court held that, on the whole, the government's invasion of privacy in this case was limited.

The Court used the concept of "government interest" as a stand-in for the common good, and, much like "special needs" and the "common good" discussed above, "government interest" is not in the Constitution. Further, the Court incorporated the phrase "government interest" in some cases that deal with the common good, but not in others. The Court determined that "the Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[33] Moreover, "employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others."[34] Additionally, the majority claimed that the regulations serve as a deterrent because employees taking the tests will likely lose their jobs if they are impaired.[35] Even if employees are confident they will not behave abnormally if they drink or use drugs at or before work, employees know that, due to the regulations, they will be caught and fired if a triggering event occurs.[36] Thus, according to the majority, the public safety (a common good), the potential lack of observable evidence of

[32] *Id.* at 624–628.

[33] *Id.* at 628.

[34] *Id.*

[35] *Id*. at 628–629.

[36] *See id*., Because employees cannot predict when an accident will happen, notice of the regulations will prevent them from engaging in such risky behavior.

impairment, and the need for a deterrent all justify searches of railroad employees without individualized suspicion.[37]

The Court also reasoned that the alcohol and drug tests mandated by the regulations in the wake of an accident would foster research and provide helpful clues in accident investigation. These clues, in turn, would allow the railroads "to take appropriate measures to safeguard the general public."[38] This data can inform the railroad company as it moves forward in its efforts to understand the accident and prevent future accidents.[39] Similarly, tests that are permitted based on a particular employee's rule violation may help railroads determine whether alcohol or drug-related impairment is the issue.[40] Following an accident or rule violation, requiring particularized suspicion could prevent the railroad from obtaining crucial evidence because chaos after an accident and the difficulty of observing all forms of impairment could allow covered employees to avoid suspicion..[41]

The majority determined that ultimately, "[i]n view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns."[42]

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[37] *Id.*

[38] *Id.* at 630 (majority opinion).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 630–631.

[42] *Id.* at 633.

Justice Marshall, in his dissent, which was joined by Justice Brennan, saw a need for balancing individual rights and the common good. However, he held that the invasion of privacy was too high and the weight of the common good not high enough to allow the kind of searches stipulated in the regulations. He wrote:

> I recognize that invalidating the full-scale searches involved in the FRA's testing regime for failure to comport with the Fourth Amendment's command of probable cause may hinder the Government's attempts to make rail transit as safe as humanly possible. But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well-intentioned, must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this spectre reflects our shared belief that even beneficent governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to "a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U. S. 266, 413 U. S. 273 (1973). The Constitution demands no less loyalty here.[43]

The dissent's disapproval of the FRA's post-accident testing regulations focused on their invasiveness and the importance of probable cause and warrants in all extensive searches. Addressing the importance of probable cause and warrants, the dissent held that "the majority ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges."[44] The dissent also argued the Warrant Clause is essential to the Fourth Amendment's meaning because warrant requirements serve as the reasonableness standard for searches and seizures. In the words of the dissent, "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent

[43] *Id.* at 649-650 (Marshall, J., dissenting).

[44] *Id.* at 636.

when 'special needs' make them seem not."[45] Later, the dissent continued its argument against "special needs," claiming the majority was making decisions based on policy, not the Constitution, and was straying too far from the Constitution's protections:

> The fact is that the malleable "special needs" balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest.[46]

This argument highlights this article's thesis that there is a need to anchor the common good in the Constitution in the way the Court has anchored privacy in the Constitution in other cases.

The second part of the dissent focused on the specific searches at issue. While—as noted above—the dissent disagreed with the "special needs" reasoning used by the majority, it agreed that "the importance of collecting blood and urine samples before drug or alcohol metabolites disappear justifies waiving the warrant requirement for those two searches under the narrow 'exigent circumstances' exception."[47] However, according to the dissent, the chemical analysis of the samples constitutes a separate search. Given that blood and urine samples remain usable as long as they are appropriately preserved, the "exigent circumstances" exception no longer applies to the testing of the samples. Hence, by the dissent's logic, the extraction may not require a warrant, but the testing does.[48]

The dissent also took issue with the Court's characterization of the searches, claiming that the majority diminished the invasiveness of the extraction of blood, the collection of urine,

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[45] *Id.* at 637.

[46] *Id.* at 641.

[47] *Id.* at 642.

[48] *Id.* at 642–643.

and the analysis of the samples. Blood sample retrieval requires using a needle to break the surface of a person's skin, an act intruding upon their physical being. Chemical analysis of blood and urine samples can reveal deeply personal and private information, including medical disorders and medication information. Finally, the dissent argued that permitting searches without probable cause or individualized suspicion, even in a heavily-regulated industry, would aggravate.[49] The dissent holds:

> The benefits of suspicionless blood and urine testing are far outstripped by the costs imposed on personal liberty by such sweeping searches. Only by erroneously deriding as "minimal" the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the FRA's testing program, does the majority strike a different balance.[50]

The dissent further noted that the regulations allowed the government to use these searches, though civil in this case, in criminal prosecutions, which exacerbated the trespass by allowing suspicionless searches to lead to criminal consequences.

Further, the dissent disapproved of the use of urine samples, noting that the FRA acknowledges that urinalysis may show drug or alcohol use dating back up to two months but may not show current impairment. Thus, mandating urinalysis may not further the FRA's purposes as testing is meant to determine on-duty impairment not irrelevant past recreational use.[51] Moreover, the dissent agreed with and quoted Justice Stevens's concurrence regarding the supposed deterrent function of the regulations, concluding that "[i]t is, of course, the fear of the accident, not the fear of a post-accident revelation, that deters."[52] Given this determination, the

[49] *Id.* at 644–649.

[50] *Id.* at 650.

[51] *Id.* at 650–652.

[52] *Id.* at 653.

only remaining argument in favor of the government interest is that the regulatory testing regime would help post-accident investigations. However, the dissent stated that this "seems a slender thread from which to hang such an intrusive program,"[53] especially because this evidence alone is not sufficient to determine an accident's cause, and the necessary corroborative evidence could be used to form particularized suspicion that could justify a search in the first place.[54]

The dissent's arguments attest to the lack of clear balancing criteria.

I. States' Interests: drivers under the influence of alcohol killed over 25,000 people and injured nearly one million more in the studied time span.[55] In 1986, the Michigan Department of State Police created a pilot program to introduce sobriety checkpoints on selected state roads.[56] Law enforcement officials would create a checkpoint on a road and stop every vehicle traveling through the checkpoint, looking for indications that the driver might be intoxicated. The police permitted motorists without signs of intoxication to proceed, while subjecting additional screening, and, if necessary, arrest, on those that showed signs of intoxication. The sobriety checkpoints became the subject of a lawsuit that alleged they infringed upon Fourth Amendment rights.[57] On February 27, 1990, the Supreme Court heard the case, *Michigan Department of State Police v. Sitz*. The Court published its decision on June 14, 1990.[58] Chief Justice

[53] *Id.* at 653.

[54] *Id.* at 653–654.

[55] Michigan Department of State Police v. Sitz, 496 U.S. 444, 451 (1990).

[56] *Id.*

[57] *Id.* at 447–448.

[58] *Id.* at 444.

> Rehnquist wrote for the majority, which found, in a 6-3 vote, that Michigan's sobriety checkpoint program did not violate the Fourth Amendment. Justices Kennedy, O'Connor, Scalia, and White joined in the majority opinion, and Justice Blackmun filed a concurring opinion. Justices Brennan, Marshall, and Stevens dissented.[59]

The majority began by stating, "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."[60] The Court cites both anecdotal and statistical evidence to support its observation. It also draws on the balancing notion, stating that "the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight."[61] Based on this reasoning, the Court ruled that the common good outweighs individual rights.

The majority also examined lower courts' use of a still different balancing criterion, an "effectiveness" test, which sought to evaluate the legitimacy of the checkpoint program. The lower courts considered the efficacy of the checkpoints as part of their analysis of "'the degree to which the seizure advance[d] the public interest,'" which is part of a standard that the Court utilized in the 1979 decision for *Brown v. Texas*.[62]The majority asserted:

> This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among

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[59] *Id.* at 444–445.

[60] *Id.* at 451. Note that the Court introduces a different term here, namely the "States' interest," which seems to replace the term "government interest."

[61] *Id.* at 451.

[62] *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Sitz*, 496 U.S. at 453.

> such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.[63]

Here, the government decides what is effective. However, after claiming that the judicial branch is not the appropriate governmental arm to determine policy effectiveness, the Court uses the data from Saginaw County, Michigan and other checkpoint initiatives to try to show the checkpoint program's effectiveness. The Michigan program led to two drunk driving arrests from 126 detained vehicles, which amounted to an arrest rate of approximately 1.5%. other states found sobriety checkpoint arrest rates of approximately one percent. In contrast, only 0.12% of vehicles going through illegal immigrant checkpoints were engaged in human smuggling, for an arrest rate of 0.5% (because some vehicles contained multiple people), and the Court approved of those searches.[64]

Ultimately, the Court's ruling rested on the conclusion that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."[65]

Three justices dissented from this decision, and two wrote dissents. One is by Justice Brennan, who Justice Marshall joined.[66] The other is by Justice Stevens, and Justices Brennan and Marshall joined his dissent for Parts I and II.[67] They, too, joined the data analysis. In the

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[63] *Sitz*, 496 U.S. at 453–454.

[64] *Id.* at 454–455.

[65] *Id*. at 455.

[66] *Id*. at 445.

[67] *Id*. at 445.

introduction to his dissent, Justice Stevens raised concerns about the efficacy of sobriety checkpoints. He noted that "the record in this case makes clear that a decision holding these suspicionless seizures unconstitutional would not impede the law enforcement community's remarkable progress in reducing the death toll on our highways."[68] In fact, a study comparing traffic statistics found that alcohol-related accidents fell by ten percent in a Maryland county with sobriety checkpoints and 11 percent in a Maryland county without sobriety checkpoints. Fatal accidents in the county without sobriety checkpoints dropped approximately eighty-one percent (from sixteen percent to three percent), while fatal accidents in the county with sobriety checkpoints increased twofold. With these facts in mind, Justice Stevens determined that the Court used an improperly weighed balancing test.[69] In concluding the introduction to his dissent, he wrote that the majority decision both "overvalues the law enforcement interest in using sobriety checkpoints" and "undervalues the citizen's interest in freedom from random, unannounced investigatory seizures."[70] He also disputed the majority's claim that sobriety checkpoints, which may change locations and rely on surprise, are the same as permanent checkpoints.[71]

Both Justices Stevens and Brennan highlighted differences between the circumstances of this case and the circumstances of an earlier case on which the majority relied for precedent.[72] The earlier case, *United States v. Martinez-Fuerte*, allowed suspicionless searches of the general

[68] *Id.* at 460 (Stevens, J., dissenting).

[69] *Id.* at 461–462.

[70] *Id.* at 462.

[71] *Id.* at 462–463.

[72] *Id.* at 460

public, and, at least at the time of the *Sitz* decision, was the only other case to do so.[73] As a result, distinguishing *Martine-Fuerte* from *Sitz* was significant. Justice Stevens discussed several differences between fixed checkpoints (as utilized in *Martinez-Fuerte*) and moveable checkpoints (as used in *Sitz*) and asserted that these differences call into question the majority's precedential reliance on *Martinez-Fuerte*. Pop-up sobriety checkpoints typically operate at night, are based on surprise, and induce feelings of being targeted. Sobriety checkpoints also allow for discretion regarding the location, timing, and officer activities, as they are not mere identification checks, and any suspicion on the part of an officer, even if it stems from a motorist's ruddy complexion or speech impediment, could lead to a longer detention.[74]

In other sections, Justices Brennan and Stevens continued to distinguish *Martinez-Fuerte*, calling into question its applicability.[75] Justice Brennan explained that, in *Martinez-Fuerte*, the Court reasoned that heavy traffic impeded law enforcement officials' ability to observe particular cars for suspicious behavior but that was not at issue in this case.[76] Justice Stevens, on the other hand, argued that bringing illegal immigrants into the country is irrelevant to a driver's skills, increasing the need for checkpoints.[77] Drunk driving is different because it leads to observable changes in drivers' skills; thus, stopping everyone, including many innocent people, is unnecessary for efforts to catch those who drive drunk.[78] Both the majority and dissenting

[73] *Id.* at 463–464.; *Id.* at 458 (Brennan, J., dissenting) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

[74] *Id.* at 463–465 (Stevens, J., dissenting).

[75]*Id.* at 463–464.; *Id.* at 458 (Brennan, J., dissenting) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

[76] *Id.* at 458 (Brennan, J., dissenting).

[77] *Id.* at 463–465 (Stevens, J., dissenting).

[78] *Id.* at 472 (Stevens, J., dissenting).

justices ruled that it is up to government officials to determine what is effective. However, all justices weighed policy considerations, adding to the lack of clarity around balancing: who will determine the relevant facts of the case?

A different part of Justice Stevens' dissent focused on the majority's reliance on the balancing test in explaining its decision.[79] First, Justice Stevens asserted that, while highway safety is clearly a serious public concern, precedent shows that this alone is not enough to justify a suspicionless search.[80] While he reiterated his distaste for surprise checkpoint programs and believed such pop-up seizures were more than minimal infringements on individual liberty, Justice Stevens conceded that a portion of his dissent may represent a fundamental, but expected, difference of opinion with regard to constitutional interpretation.[81]

Further, Justice Stevens noted that the statistics used by the Court did not align with the reasons that law enforcement authorities gave to support their use of sobriety checkpoint programs, as both Michigan law enforcement officials and a Maryland officer primarily cited the program's value as a deterrent, not as a source of arrests. Justice Stevens approved deterrence as a law enforcement technique.[82] However, he noted that the effectiveness of a deterrence program could not be measured "by counting the arrests that were made"; rather, effectiveness must be

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[79] *Id.* at 463–465 (Stevens, J., dissenting).

[80] *Id.* at 467–468.

[81] *Id.* at 468–469.

[82] *Id.* at 470–471.

based on "measur[ing] the number of crimes that were avoided."[83] The majority opinion does not follow this logic.[84]

Brennan's dissent pushes back against the Court's use of a balancing test, but Brennan adds a different reason. Brennan argues that balancing tests are not the usual yardstick courts use to judge searches and seizures.[85] Brennan states, "In most cases, the police must possess probable cause for a seizure to be judged reasonable. Only when a seizure is '*substantially* less intrusive' than a typical arrest is the general rule replaced by a balancing test [citation omitted]."[86] Although Brennan does not dispute the Court's judgment that the invasiveness of the initial sobriety checkpoint stop is small enough for it to fall within the latter category, he nevertheless disagrees with the majority's decision and argument. He holds that "[t]he Court ignores the fact that, in this class of minimally intrusive searches, [the Court has] generally required the Government to prove that it had reasonable suspicion for a minimally intrusive seizure to be considered reasonable."[87] Further, Brennan argues that Court precedent and the Fourth Amendment require the individualization of suspicion before a search or seizure can take place.[88] In this case, "[b]y holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the

[83] *Id.* at 471.

[84] *Id.*

[85] *Id.* at 457.

[86] *Id.* at 457.

[87] *Id.*

[88] *Id.*

general public to arbitrary or harassing conduct by the police."[89] The Court seems to have difficulty determining what amounts to reasonable suspicion.

In Part III of Stevens's dissent, which Brennan and Marshall do not join, Stevens raises a few final points. He starts by asserting that "[t]he most disturbing aspect of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures."[90] Then, he suggests that the Court's willingness to completely discount this interest and its effort to support law enforcement might be attributable to the majority's intense desire to do something to promote highway safety.[91] This leads Stevens to declare that, while he opposes temporary, movable checkpoints, his dissent does not apply to other standard law enforcement techniques that do not rely on surprise. For example, he has no issue with metal detectors in airports and other public buildings. Similarly, he suggests that he would not raise the same constitutional objections as he did in this case if a state were to add mandated breathalyzer tests, affecting all drivers, to its toll roads, as such a system could be fixed in place (and therefore would not rely on surprise) and would not be subject to arbitrary geographic or procedural decisions.[92] After showing he is willing to allow for certain warrantless, suspicionless, universally applied searches to protect the public, he concludes by stating his opposition to sobriety checkpoints by writing that they "are elaborate, and disquieting, publicity stunts."[93] Further, as he concludes, he states, "This is a case that is driven by nothing

[89] *Id.* at 458.

[90] *Id.* at 473.

[91] *Id.*

[92] *Id.* at 473–74.

[93] *Id.* at 475.

more than symbolic state action -- an insufficient justification for an otherwise unreasonable program of random seizures."[94]

Brennan disagrees with Stevens's determination regarding the extent to which sobriety checkpoints infringe upon people's rights.[95] However, he nevertheless dissents from the majority's decision on constitutional grounds. Near the end of his dissent, Brennan writes:

> Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the "minimally intrusive" seizures involved in this case.
> I do not dispute the immense social cost caused by drunken drivers, nor do I slight the government's efforts to prevent such tragic losses. Indeed, I would hazard a guess that today's opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunken driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis.[96]

All of this valuable give-and-take highlights the need for clearer criteria regarding what constitutes minimally intrusive searches—and whether conditions exist where the compelling needs of the common good could not justify even more intrusive searches. For instance, does concern for the common good extend to requiring people to allow the search of their laptops when they enter the U.S.?

Finally, one passage in Stevens's dissent remains particularly relevant today, given the national conversation regarding the police's use of force and escalation during traffic stops:

> To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or

[94] *Id.* at 477.

[95] *Id.* at 459.

[96] *Id.* at 459.

> unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe.[97]

These important lines introduce a whole new consideration to the balancing analysis. Namely, those who claim to serve the common good must commit to serving it, rather than abusing the mantle.

A. THE COMMON GOOD IS RECOGNIZED BUT DELEGATED

On December 6, 1904, the Supreme Court heard arguments in the case of *Jacobson v. Massachusetts*.[98] The Court released its decision on February 20, 1905. The case concerns the constitutionality of a Massachusetts state law that allowed a city or town's board of health to mandate that adult residents within their community obtain free vaccinations or revaccinations.[99] Those who did not comply with such a requirement would subject themselves to a five dollar fine.[100] Children with a signed certificate from a doctor did not have to receive the mandated vaccinations.[101] During smallpox outbreak in 1902, the Cambridge, Massachusetts Board of Health used its authority under the state law to order the vaccination or revaccination of all residents.[102] The appellant in this case refused to comply with the order and therefore became the

[97] *Id.* at 465.

[98] Jacobson v. Massachusetts, 197 U.S. 11, 11–14 (1905).

[99] *Id.* at 12.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 12–13.

defendant in a criminal case.[103] He pleaded not guilty.[104] The judge did not allow the defendant to present many of his arguments, nor did he give the jury the instructions the defendant requested.[105] The jury found the defendant guilty.[106] The Supreme Judicial Court of Massachusetts upheld the trial court judge's decisions and allowed the jury's verdict to stand.[107] The Supreme Court sustained the lower court's rulings.[108] Justice John Marshall Harlan wrote the majority opinion.[109] (Two justices dissented from the decision, but they do not appear to have published written dissents).[110]

The majority opinion begins by quickly dispelling two ideas put forth by the plaintiff regarding the Constitution.[111] First, the Court asserts that the Preamble of the Constitution has no standing in law.[112] The plaintiff argued "that the particular section of the statute of Massachusetts now in question (§ 137, chap. 75) is in derogation of rights secured by the preamble of the Constitution of the United States."[113] In response, Justice Harlan wrote:

> Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source

[103] *Id.* at 13.

[104] *Id.*

[105] *Id.* at 13–14.

[106] *Id.* at 14.

[107] *Id.* at 11–14.

[108] *Id.* at 14.

[109] *Id.* at 11.

[110] *Id.* at 39.

[111] *Id.* at 22.

[112] *Id.* at 22.

[113] *Id.*

> of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.[114]

In other words, courts must reject any argument based on the Preamble to the Constitution, as there are no powers associated with the words of the Preamble, and they may only interpret and rule on the powers enumerated in the Constitution's articles and amendments.[115] This ruling confirms that the Preamble, especially the reference to "a more perfect Union," lack legal standing.[116]

Second, the court addresses the appellant's claim that the Massachusetts statute infringes upon "the spirit of the Constitution."[117] The Court discounts this argument, holding that the case under consideration can be decided solely based on the words of the Constitution and their literal meanings, and not by delving into their spirit.[118]

The primary question before the Court in this case concerns the constitutionality of the Massachusetts law allowing local boards of health to mandate vaccinations and imposing a penalty on those who refused to receive the locally-required inoculations.[119] According to the majority, the authority under consideration is the police power of the state, a power whose bounds had remained undefined by the Supreme Court, at least up to that point.[120] However, the Court had upheld quarantine laws and other health laws that would only impact activities within

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[114] *Id.*

[115] *Id.*

[116] U.S. CONST. pmbl.

[117] Jacobson, 197 U.S. at 14.

[118] *Id.*

[119] *Id.* at 12.

[120] *Id.*

the border of the state that enacted the law.[121] The Court's approval of such laws rests on the need to safeguard the public: "According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[122] To carry out these duties, states may delegate their powers in this regard to local authorities, and the discretion of the states and the localities are bound by the fact that neither can infringe on the federal powers or individual rights laid out in the Constitution.[123]

As other public health laws are deemed to be constitutional, and thus do not seem to present a conflict with the federal powers enumerated in the Constitution, the next line of inquiry in determining the constitutionality of the Massachusetts law focuses on the question of individual rights.[124] Although the defendant holds that the law infringes upon his individual rights, the Court disagrees.[125] As the majority puts it:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.[126]

The Court follows this sentiment with quotations from previous cases making the same point, explaining that rights are both restrained by and dependent upon provisions ensuring the

[121] *Id.* at 24–25.

[122] *Id.* at 25.

[123] *Id.*

[124] *Id.* at 25–26.

[125] *Id.* at 25–26.

[126] *Id.* at 26.

common good.[127] Further, the Constitution of Massachusetts explicitly refers to the common good, and case law shows that "[t]he good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts."[128] Here common good is cited, rather than the government interest or the state's interest.[129]

Regarding the question of who will determine what is in the common good, in this particular case, the Massachusetts legislature enacted a law that delegated its authority to local boards of health. The purpose of this provision was to ensure that vaccinations would only be mandated for residents "when, in the opinion of the Board of Health, that was necessary for the public health or the public safety."[130] Considering that some individual or group must have the authority to decide on the best course of action during an emergency, the Court asserts that a local board of health is a reasonable choice, as its members presumably have both local knowledge and the necessary subject matter expertise.[131]

The vaccinations under consideration in this protect against smallpox.[132] The majority holds that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[133] When the city of Cambridge put its regulations in place, smallpox cases within city

[127] *Id.* at 26–27.

[128] *Id.* at 27.

[129] *Id.* at 27.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

limits were numerous and growing despite the fact that the smallpox vaccine was in common use.[134] Hence, the Court determined that it "would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case."[135] The majority acknowledges that its judgment in this case may not apply in all cases.[136] It is possible, and precedent shows, that regulations meant to protect the community could be enacted "in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what it reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."[137] However, in this case, the objection is based on the idea that the community protection is "distressing, inconvenient or objectionable to some," and, as such, "it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few."[138] The Court cites the need to quarantine citizens entering the country from a ship which was known to have included passengers with contagious diseases, such as yellow fever and the military draft, as other instances in which the need to protect the community might override individual rights.[139]

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[134] *Id.* at 27–28.

[135] *Id.* at 28.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 28–29.

[139] *Id.* at 29–30.

Another issue is what body of evidence is relevant and who is authorized to determine what evidence may inform the rulings of the court. An objection raised by the appellant relates to his rejected attempts to introduce evidence in his defense. The Court finds that the pieces of evidence the defendant wished to put forth were "more formidable by their number than by their inherent value."[140] The defendant primarily based his evidence on the idea that vaccinations did not significantly contribute to the protection of populations from the proliferation of smallpox, as well as the suggestion that vaccinations could actually cause health problems.[141] While some medical professionals subscribed to those theories, they ran counter to accepted medical authorities' findings about vaccinations, and courts were aware of that fact.[142] Further, the majority notes that the Massachusetts legislature must have known about the opponents of vaccination when it enacted the law in question, and the legislature had to make a decision about what to do to best serve the public health.[143] The Court rules that, for the most part, courts and juries have no place in such decisions—they are up to the discretion of the legislature.[144] A brief exploration of the exception to this general rule regarding the separation of powers follow this determination.[145] The case at hand does not meet this standard, as the common practice of mandatory smallpox vaccinations for children in public schools of several states and for residents of several counties proved effective.[146] Further, "[w]hatever may be thought of the expediency of

[140] *Id.* at 30.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 30–31.
[146] *Id.* at 31–33.

this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution."[147] Hence, courts and juries may not interfere with a legislature that imposes such regulations.[148]

Having settled the constitutionality of the law in terms of its value to the common good and the judiciary's lack of standing to evaluate the law as a public health policy choice, the opinion turns to the specific complaints of the defendant.[149] In addition to raising concerns about the efficacy and safety of vaccinations for the population at large, the defendant noted that, during his youth, he personally became sick for an extended time as a result of a vaccination, and he has since watched his son and others suffer similarly.[150] The Court notes that this argument put the legislature's deliberations under judicial review and that "[t]he legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination, and it is suggested—and we will not say without reason—that such is the case with some adults."[151] He offered only generalities and his experience as a child suggested the impossibility of telling in advance if a vaccination is safe for any particular person.[152] The majority concluded that these arguments lacked sufficient strength and relevancy to warrant an exemption from the vaccination requirement for the defendant have agreed upon the safety of vaccinations.[153] Furthermore, granting an exemption to the defendant "would practically strip the legislative

[147] *Id.* at 31.

[148] *Id.* at 35.

[149] *Id.* at 35–36.

[150] *Id.* at 35–36.

[151] *Id.* at 36.

[152] *Id.* at 36.
[153] *Id.* at 37 (1905).

department of its function to care for the public health and the public safety when endangered by epidemics of disease" because it would make it impossible to enforce any legislation mandating vaccinations.[154] The Court determined that minority factions and individuals who choose to stay in a community and experience the benefits provided by the local government may not abide by certain laws that a majority of duly-authorized legislators legally enacted by a majority of duly-authorized legislators—a solid communitarian conception.[155] In other words, living in a democratic community means deferring to all of the laws of the community; liberty does not grant individuals the right to choose to follow only the laws that are agreeable to them and ignore the rest—a text that fits squarely into the liberal communitarian doctrine.[156]

After this declaration, the Court reiterates two points made earlier.[157] First, the opinion notes that the Commonwealth of Massachusetts bears responsibility for the health and safety of its residents and that the national government need not involve itself in most cases.[158] The law in this case does not infringe upon the rights granted to the federal government, and which in part justifies the law remaining in effect of the reasons that the law may remain in effect. Second, the majority returns to the issue of the state's police power, reaffirming that abuses reaffirming the possibility of abuses and that, in those instances, the courts must step in to protect the people.[159] For example, with regard to the law under consideration, there could be an adult could have the

[154] *Id.*

[155] *Id.* at 37–38.

[156] *Id.*

[157] Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)

[158] *Id.* at 38.
[159] *Id.* at 38.

"particular condition of his health or body" that would render it "cruel and inhuman in the last degree" to mandate that he receive a vaccination.[160] If the commonwealth of Massachusetts or a local jurisdiction within it were to attempt applying the law to this person, the court should act to prevent the state's police power from being carried to fruition.[161] On the whole, however, precedent mandates the Court to assume the legislature meant to allow for exceptions in such circumstances.[162] The case at hand is not consistent with a circumstance that would merit such an exemption, though.[163] As a result, the Court ultimately ruled that it is unacceptable that the defendant, "while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease."[164]

B. MORE CRITERIA FOR BALANCING AND AN OVERREACHING RULING

On January 27, 2021, the Court of Appeal of Florida, Fourth District, released its decision in the case of *Machovec v. Palm Beach County.*[165] The case arrived in the Court of Appeal after a trial court refused to grant four Floridians an emergency temporary injunction barring the implementation of the Palm Beach County "mask mandate" (Palm Beach County Emergency Order No. 20-12, also known as EO-12). As reported in the appellate court opinion, "EO-12 mandates that 'facial coverings' must be worn in Palm Beach County at businesses and

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[160] *Id.* at 38–39.

[161] *Id.*

[162] *Id.* at 39 (citing *United States v. Kirby,* 74 U.S. 482, 486-87 (1968) and *Lau v. United States,* 144 U.S. 47, 59 (1892)).

[163] *Id.*

[164] *Id.*

[165] *Machovec v. Palm Beach Cnty.*, 310 So.3d 941, 941–42 (Fla. Dist. Ct. App. 2021).

establishments, public places, county and municipal government facilities, and while using public transportation."[166] The order includes several exemptions, including for all children under the age of two, all children in licensed childcare settings, adults with medical conditions that make it unsafe for them to wear a mask, and anyone who is actively eating or drinking.[167] When they filed the original suit, the appellants asserted that EO-12 infringed upon their rights to privacy and due process both of which Florida enshrines in Article I of its constitution.[168] According to the opinion from the Court of Appeal, the appellants held that the mask mandate did not promote "a compelling state interest."[169] However, the trial court disagreed; the trial court decision, as quoted in the Court of Appeal's opinion, states:

> Plaintiffs' minimal inconvenience caused by the Mask Ordinance must be balanced against the general public's right to not be further infected with a deadly virus. It is beyond dispute that the potential injury to the public that would result from enjoining the government's ability to prevent the spread of a presently incurable, deadly, and highly communicable virus far outweighs any individual's right to simply do as they please.[170]

This time, the common good appears as a right of the general public. This right does not emanate from the Bill of Rights. One may argue that the fact that the courts use different terms in different cases to refer to the common good matters not. However, there is no widely agreed-upon, well-established legal anchoring for favoring the common good over individual rights in court decisions.

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[166] *Id.* at 942.

[167] *Id.* at 942.

[168] *Id.* at 942–44.

[169] *Id.* at 944.

[170] *Id.* at 943.

The Court of Appeal quoted the lower court as determining "the requirement to wear such a covering has a clear rational basis based on the protection of public health."[171] Once the trial court released its decision, appellants claimed the trial court erred in using a "rational basis review" and the correct way to analyze the case would be through the lens of "strict scrutiny."[172] This assertion rested on appellants' belief that the mask mandate prevents people from refusing medical treatment, which is a constitutional rights violation.[173] Hence, the appellate court took up the case.

In the "Background" section of its opinion, the appellate court quotes the Palm Beach County Code.[174] It states that "[t]he County's Board and Administrator are 'authorized and empowered during a state of emergency . . . to make, amend, and rescind emergency orders deemed necessary to protect the health, safety, and/or welfare of the people of Palm Beach County[.]'"[175] Ultimately, the three appellate court judges who decided this case unanimously ruled against the appellants—issuing a single opinion allowing the mask mandate to remain in effect.[176] The court then presents its analysis, which adds some balancing considerations.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 943–44.

[174] *Id.* at 943–45.

[175] *Id.* at 943.

[176] *Id.* at 941.

The court referred to multiple Florida precedential cases.[177] Among these references was a block quote from *Donoho v. Allen-Rosner*, where the court cited its decision from *University Med. Clinics, Inc. v. Quality Health Plans, Inc.*:

> To obtain a temporary injunction, the petitioner "must establish that (1) irreparable harm will result if the temporary injunction is not entered; (2) an adequate remedy at law is unavailable; (3) there is a substantial likelihood of success on the merits; and (4) entry of the temporary injunction will serve the public interest.[178]

Further, the opinion notes that the "and" is crucial because all four of the conditions listed above must be met for an injunction to be granted.[179] One may argue that these criteria place an undue burden on the common good. Regardless, the criteria listed above provide a framework for determining the appropriate balance between individual rights and the common good when someone is seeking a temporary injunction.

The appellants contended that, based on the definition of medical treatment included in the Federal Food, Drug & Cosmetic Act, mask wearing is a medical treatment and, hence, mask mandates must be prohibited under the Fourteenth Amendment's Due Process Clause and Article 1, Section 23 of the Florida Constitution.[180] The court rejects this argument, explaining that, although the Centers for Disease Control and Prevention (CDC) have found that wearing a mask provides some measure of protection to the person whose face is covered, the CDC's principal

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[177] *Id.* at 945 (citing *Thompson v. Planning Comm'n of Jacksonville,* 464 So. 2d 1231, 1236 (Fla. 1st DCA 1985), *Donoho v. Allen-Rosner*, 254 So. 3d 472, 474 (Fla. 4th DCA 2018), and *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC,* 236 So 3d 466, 472 (Fla. 1st DCA 2018)).

[178] *Id.* at 945 (citing *Donoho v. Allen-Rosner*, 254 So. 3d 472, 473 (Fla. Dist. Ct. App. 2018)) (quoting *Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So. 3d 1191, 1195 (Fla. Dist. Ct. App. 2011)).

[179] *Id.*

[180] *Id.*

reason for advising people to wear masks is to protect others—not oneself.[181] According to the CDC, approximately half of all COVID-19 transmissions have happened as a result of contact with people who are asymptomatic or pre-symptomatic, and therefore, do not feel ill.[182] Universal mask wearing helps to prevent this kind of transmission.[183] As the opinion puts it, "[t]hus, requiring facial coverings to be worn in public is not primarily directed at treating a medical condition of the person wearing the mask/shield."[184] Similarly, the court quotes the order issued by the trial court: "[T]he covering of one's nose and mouth is designed to safeguard other citizens."[185] The court likened the mask mandate to the Florida Clean Indoor Air Act, which bans smoking in certain indoor settings.[186] Just as the mask mandate offers some protection to the mask wearer but was chiefly concerned with protecting others, the indoor smoking ban could help smokers by making it less convenient for them to smoke, but it was enacted to protect others from secondhand smoke.[187]

Another part of the appellate court's analysis of this case returned to the question of who has the authority to decide these kinds of issues—to make the balance.[188] The opinion quotes precedent: "It is within the police power of the State to enact laws to prevent the spread of

[181] *Id.* at 946–48.

[182] *Id.* at 945–46.

[183] *Id.*

[184] *Id.* at 946.

[185] *Id.* at 947.

[186] *Id.* at 946.

[187] *Id.*

[188] *Id.* at 945 (citing *Donoho v. Allen-Rosner*, 254 So. 3d 472, 473 (Fla. Dist. Ct. App. 2018)) (quoting *Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So. 3d 1191, 1195 (Fla. Dist. Ct. App. 2011)).

infectious or contagious diseases."[189] To further support the notion that the state may mandate certain health and safety precautions, the court raised the issue of a law requiring motorcycle riders in Florida to wear helmets.[190] Although that law has since been discarded, a 1969 case affirmed its constitutionality.[191] The opinion for this case quotes one line from the aforementioned 1969 case's decision as part of its argument in this case:

> Just as "the legislature may constitutionally conclude that the cyclist's right to be let alone is no more precious than the corresponding right of ambulance drivers, nurses and neurosurgeons," . . . the Board of County Commissioners had the legislative authority to require facial coverings to be worn in public settings (with exemptions) in response to a virus deemed responsible for over 400,000 deaths in the United States (as of January 20, 2021).[192]

In the appellate court opinion's conclusion, the judges continue to cite precedents to emphasize their main points.

> A person's "right to be let alone and free from governmental intrusion into the person's private life," guaranteed by Article I, Section 23 of the Florida Constitution, is an important right, but it is not absolute. "Although a person's subjective expectation of privacy is one consideration in deciding whether a constitutional right attaches, **the final determination of an expectation's legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster.**" [emphasis added] To that end, "there are circumstances in which a public emergency, for instance . . . the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government's police power."[193]

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[189] *Id.* at 947 (quoting *State Dep't. of Agric. & Consumer Servs. Div. of Animal Indus. v. Denmark*, 366 So. 2d 469, 470 (Fla. Dist. Ct. App. 1979)).

[190] *Id.* at 947.

[191] *State v. Eitel*, 227 So. 2d 489 (Fla. 1969).

[192] *Id.* at 947 (quoting *Eitel*, 227 So. 2d at 491).

[193] *Id.* at 948 (first quoting *Jackson v. State*, 833 So. 2d 243, 245 (Fla. Dist. Ct. App. 2002); then quoting *Davis v. City of South Bay*, 433 So. 2d 1364, 1366 (Fla. Dist. Ct. App. 1983).

Communitarian's desire American society to place more weight and consideration on the common good. However, even for a liberal communitarian, this formulation may go too far. The appellate court opinion can be interpreted to mean that rights are conditional on societal contexts and values and that the common good should take precedence over individual rights. A liberal communitarian position would hold that the common good, societal contexts, and individual rights all have the same fundamental normative standing, and that none trumps the others.[194]

V. CONCLUSION

The Constitution is a living document, interpreted and reinterpreted as historical conditions change. However, the U.S has a great communitarian deficit. The pandemic revealed that major parts of the population disregard common good, public philosophy, and jurisprudence. This disregard is not limited to public health as the same holds true for a variety of issues including initiatives to curb climate change, to reimagine public safety, and to defend against domestic terrorism. Canada provides an example of a nation that incorporates the concept of common law into law using the term "public order."[195]

The constitution should be an anchor for the common good. This can be done by rereading the Fourth Amendment not as one that treats reasonable searches, those in which the common good prevails over rights, as a residual category, but as one in which unreasonable searches has the same standing as reasonable. To best implement this radical restructuring of the fourth amendment, academics should implement one single term to be used for applicable administrative purposes.

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[194] PHILLIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 357-87 (1992).

[195] Canada Criminal Code, R.S.C. 1985, c C-46.

Surprisingly, the possibility of a third option has not been considered by higher courts.[196] Liberal communitarians believe that judicial decision makers ought to determine whether they can find a way to serve both the common good and individual rights before seeking to determine which way to tilt. [197]

Next, the criteria for balancing needs to be consolidated.[198] First, minimizing intrusions on individual rights, if they must take place, seems to be a sound criterion.[199] However, one notes that, the more serious the challenge to the common good, the higher the tolerance for intrusions.[200] Thus, during the height of the pandemic, the courts tolerated quarantining, which is quite intrusive.[201]

There is a great need to clarify who has the authority to determine what is rational. Courts have traditionally used the "Reasonable person" standard in their analysis, risking bias brought

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[196] Amitai Etzioni, *Law in a New Key: Essays on Law and Society* (2010); Amitai Etzioni, *The New Normal: Finding a Balance between Individual Rights and the Common Good* (2015).

[197] *ACLU Urges Halt to Use of Red-Light Cameras Until Privacy and Fairness Issues are Addressed*, ACLU (Aug. 23, 2001), https://www.aclu.org/press-releases/aclu-urges-halt-use-red-light-cameras-until-privacy-and-fairness-issues-are-addressed. When speed cameras were first introduced, the American Civil Liberties Union objected, on the ground that the cameras violate the privacy of the drivers. *Id.* A compromise was reached, according to which the cameras were lowered, so that they capture only the license plates but not who was in the car. *See FAQ's—Speed Cameras*, N.Y.C. DEP'T OF TRANSP., https://www1.nyc.gov/html/dot/downloads/pdf/speed-camera-faq.pdf (last accessed Apr. 4, 2022). Arguably, Justice Stevens dissent in *Sitz* regarding movable versus stationary checkpoints was an attempt to find such a middle ground. *Sitz*, 496 U.S. at 460.

[198] *See* AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 34-57 (1996).

[199] *See id.*

[200] *See id.*

[201] Laurie Sobel & MaryBeth Masumeci, *Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures*, KAISER FAM. FOUND. (Jun. 5, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures/.

on by what a judge or jury might consider reasonable.[202] This actually means that decisions are based on what judges or the jury consider reasonable.[203] In the quest to restore trust in liberal democratic institutions, it might be best to acknowledge this fact more openly.

The doctrine of proportionality in Israeli law provides one example of a way to promote balance between individual rights and the common good.[204] There are four components of proportionality.[205] The first is the idea that legislation should advance a "proper" objective.[206] However, opinions about what is "proper" may vary. The second component of the proportionality doctrine mandates that the government's actions be rationally linked to its aim.[207] Thirdly, the government's action must be the least harmful choice available in the specific context in which the legislation is enacted.[208] Finally, and most in line with the name of the doctrine under consideration, the benefit of the legislation must be proportional to its infringement on individual rights.[209] In addition, most new measures should have a sunset time, a point at which their necessity will be reviewed and, unless the measures are renewed, they will automatically expire, on the ground that the new measures are all based on specific and likely-to-change historical conditions.

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[202] *See, e.g.*, Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

[203] *Id.*

[204] Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. OF TORONTO L. J. 369 (2007).

[205] *Id.* at 380–81.

[206] *Id.* at 370.

[207] *Id.* at 380–81.

[208] *Id.* at 380–81.

[209] *Id.* at 381.