Barry Law Review

Volume 20
Issue 2 *Spring 2015*

Article 5

9-29-2015

The Standing of the Public Interest

Amitai Etzioni

THE STANDING OF THE PUBLIC INTEREST

Amitai Etzioni[*]

I. INTRODUCTION

Liberal communitarianism holds that a good society is based on a carefully crafted balance between individual rights and the common good; that both normative elements have the same fundamental standing and neither a priori trumps the other.[1] Societies can lose the good balance either by becoming excessively committed to the common good (e.g., national security) or to individual rights (e.g., privacy). Even societies that have established a careful balance often need to recalibrate it following changes in historical conditions (such as the 2001 attacks on the American homeland) and technological developments (such as the invention of smart cell phones).

This article responds to those who reject the very concept of a common good (or the public interest) on a variety of philosophical and methodological grounds. It then asks: (1) how the American courts, in particular the Supreme Court of the United States, define the common good; (2) what weight the courts have granted the common good versus individual rights; and (3) what criteria they have employed in rendering these judgments in three key areas: free speech, public safety, and a major form of taking, eminent domain.

To cover these vast subjects, this article by necessity employs very broad strokes. Readers may allow the author to indulge in these kind of strokes if they keep in mind that this article seeks to make merely a few limited points, though making them requires covering a great deal of ground. What is considered a common good and the relative normative standing it commands has varied over history.[2] These historical changes require a separate treatment, from society to

* I am indebted to Rory Donnelly for research assistance and to Professors Scott Cummings and Sudha Setty for comments on a previous draft.

1. BEAU BRESLIN, THE COMMUNITARIAN CONSTITUTION 206 (2004); Amitai Etzioni, *A Liberal Communitarian Approach to Security Limitations on the Freedom of the Press*, 22 WM. & MARY BILL RTS. J. 1141, 1146–47 (2014).

2. *See, e.g.*, ARISTOTLE, POLITICS: BOOK I ¶¶ 1–12 (Benjamin Jowett trans.) (c. 350 B.C.E.) ("Every state is a community of some kind, and every community is established with a view to some good; . . . the state comes into existence . . . for the sake of a good life."), *available at* http://classics.mit.edu/Aristotle/politics.1.one.html; MARCUS TULLIUS CICERO, THE REPUBLIC OF CICERO 56 (G. & C. Carvill 1829) (c. 51 B.C.E.) ("Every assemblage of men however, gathered together without an object, is not the people, but only an assemblage of the multitude associated by common consent, for reciprocal rights and reciprocal usefulness."), *available at* https://archive.org/stream/republicofcicero00cicerich#page/56/mode/2up; PHILIP SCHAFF, ST. AUGUSTIN'S CITY OF GOD AND CHRISTIAN DOCTRINE 597 (1890) ("where there is not this righteousness whereby . . . man loves God as He ought to be loved, and his neighbor as himself—there, I say, there is not an assemblage associated . . . by a community of interests."), *available at* http://www.documentacatholicaomnia.eu/03d/1819-1893,_Schaff._Philip,_2_Vol_02_The_City_Of_God._Christian_Doctrine,_EN.pdf; ROBERT BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 333 (2008) (discussing the

society in the same time frame. The discussion here focuses on the modern era in the United States.

II. WHAT IS A COMMON GOOD?

The common good (also referred to as the "public interest" or "public goods") is the sum of "those goods that serve all members of a given community and its institutions," including "goods that serve no identifiable particular group, as well as those that serve members of generations not yet born."[3]

For many economists, the common good is the aggregation of individual goods.[4] It grows out of economic exchanges, and hence there is no need for the state to promote the common good.[5] The "term 'the common good' is contested on a number of fronts. First, there are those who argue that it does not exist at all."[6] Ayn Rand wrote that, "Since there is no such entity as 'the public,' since the public is merely a number of individuals, the idea that 'the public interest' supersedes private interests and rights, can have but one meaning: that the interests and rights of some individuals take precedence over the interests and rights of others."[7]

In contrast, communitarians hold that the common good encompasses much more than the sum of all individual goods.[8] Moreover, "[c]ontributions to the common good often offer no immediate payout or benefit" to anyone, and it is frequently difficult to foresee who will be the beneficiaries in the longer run.[9] Moreover, members of communities invest in the common good not because their investment will necessarily benefit them "but because they consider it a good that ought to be" promoted and served.[10] The nature of these commitments is revealed

---

direction of the common good in the United States); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS VI.II.46 (1790) ("The wise and virtuous man is at all times willing that his own private interest should be sacrificed to the public interest of his own particular order or society."), *available at* http://www.econlib.org/library/Smith/smMS6.html.

3. Amitai Etzioni, *Common Good*, *in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT 603, 603 (Michael T. Gibbons ed., 2015), *available at* http://icps.gwu.edu/sites/icps.gwu.edu/files/downloads/Common%20Good.Etzioni.pdf.

4. *See, e.g.*, Lawrence H. Summers, Morning Prayers Address at Appleton Chapel, Memorial Church, Cambridge, MA (Sept. 15, 2003) ("It is the basis of much economic analysis that the good is an aggregation of many individuals' assessments of their own well-being."), *available at* http://www.harvard.edu/president/speeches/summers_2003/prayer.php.

5. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 95 (Psychology Press, 2001) (1944).

6. Etzioni, *supra* note 3, at 607.

7. Ayn Rand, *The Pull Peddlers*, *in* CAPITALISM: THE UNKNOWN IDEAL 167, 170 (1967); *see also* Interview by Douglas Keay with Margaret Thatcher, Prime Minister of the United Kingdom, in London, Eng. (Sept. 23, 1987) *available at* http://www.margaretthatcher.org/document/106689 ("There are individual men and women and there are families and no government can do anything except through people and people look to themselves first. . . . There is no such thing as society.").

8. Amitai Etzioni, *Communitarianism*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/1366457/communitarianism/299522/A-synthesis-Rights-and-responsibilities (last visited Apr. 1, 2015).

9. Etzioni, *supra* note 3, at 607.

10. *Id.*; *see also* PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 385 (1994).

"when serving the common good entails . . . costs to the individual (e.g., taxes)" and above all risks "such as fighting for one's country."[11]

Economists do recognize that there are situations in which the market fails to provide "public goods" that benefit society at large, making government promotion of these goods legitimate.[12] Such "public goods include defense, basic research, and public health (e.g., fluoridation and vaccinations)."[13]

Political scientists who adopt the assumptions of economics see little need for the concept of the public interest.[14] These political scientists hold that in a liberal democracy, "competition among interest groups—which reveal and are guided by the preferences of individuals (i.e., private goods)—gives rise to a public policy that maximizes general welfare."[15]

Critics of that view argue that discrepancies in wealth, power, and social status grant various groups varying measures of leverage over the government.[16] As a result, public policy—based on interest group politics—does not serve the common good, but rather the interests of the powerful groups.[17]

A criticism of the common good from the left holds that the "concept . . . serves to conceal class differences in economic interests and political power so as to keep those who are disadvantaged from making demands on the community."[18] However, the fact that a concept is abused does not mean that it is without much merit.

Finally, several academic communitarians, in particular Michael Sandel and Charles Taylor, showed that conceptions of the common good "must be formulated on the social level, and that the community cannot be" neutral in this matter.[19] Moreover, in the author's view, "[u]nless there is a social formulation of the good, there can be no normative foundation for resolving conflicts of value among individuals and groups."[20]

To state that a given value is a common good of a given community does not mean that all the members subscribe to it, and surely not that they all live up to its dictates.[21] It suffices that the value is recognized as a common good by large majorities and is embodied in law and in other institutions.[22] At the same time, a

11. Etzioni, *supra* note 3, at 607.

12. Erik Bækkeskov, *Market Failure*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/1937869/market-failure (last visited Apr. 1, 2015).

13. Etzioni, *supra* note 3, at 604; *see also* Dinesh Sharma, *A Vaccine Nation*, 28 HEALTH AFF. 590, 590 (2009) (reviewing JACOB HELLER, THE VACCINE NARRATIVE (2008)); *see also* Bækkeskov, *supra* note 12.

14. This view is advocated particularly by the public choice school of political economy. *See, e.g.*, William F. Shughart II, *Public Choice*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 427 (2nd ed. 2008), *available at* http://www.econlib.org/library/Enc/PublicChoice.html.

15. Etzioni, *supra* note 3, at 606; *see also* Clive S. Thomas, *Interest Group*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/290136/interest-group (last visited Apr. 1, 2015).

16. Etzioni, *supra* note 3, at 606.

17. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576 (2014).

18. Etzioni, *supra* note 3, at 608.

19. *Id.*; *see* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO 260 (2009); *see also* CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 190–91 (1995).

20. Etzioni, *supra* note 3, at 608.

21. *See* Amitai Etzioni, *The Good Society*, 1 SEATTLE J. SOC. JUST. 83, 89–90 (2003).

22. *Id.*

value to which members merely pay lip service cannot qualify. This article will clarify below that it is essential for solid analysis to consider the extent to which values are institutionalized as a continuous variable rather than as a dichotomous one. Some values are relatively highly institutionalized (e.g., marriages in the United States in the 1950s). Others are merely aspirational (e.g., the belief that the United States should promote democratic regimes overseas). The common good may be promoted and enforced by the state, but this is not necessarily the case.[23] Indeed, often core values are promoted by informal social controls, by peer pressures, and by communities.[24]

Particularly important and challenging is the observation that references to the common good should be read as if the emphasis is on the "common" and not on the "good." For the following discussion, the main issue is whether a value is widely shared and institutionalized—not whether a particular ethicist would judge it to be morally good. Thus, for example, a society may define a common good as giving precedence to economic development over political development—or expect that all members adhere to a particular religion. Many may not consider it a good society, but it is the "good" the given society has formulated as its common good.

Several scholars made strong arguments against the kind of balancing approach here followed.[25] They argue that rights are a common good, and hence, the very opposition of the two goods—rights and the common good—that the balancing analysis presupposes is a false one.[26] This view is held particularly with regard to freedom of speech, taking inspiration from Justice Holmes' dissent in *Abrams v. United States*[27] that the "ultimate good," both for the individual and society, is "better reached by free trade in ideas."[28] It is expressed in the Federal Communications Commission's opinion that "the public interest is best served by permitting free expression of views."[29] Likewise, Scott Cummings points out that many believe that "strong protection for individual rights is itself advancing the public interest."[30]

At first, it may seem that one can resolve this issue by granting that common goods are a right. For instance, instead of referring to security as a common good, one can recognize a right to be safe, or a right to life.[31] However, such redefinition does not vacate or obviate the balancing question. It merely moves it from asking about the balance between a good and a right to the balance between adhering to two rights that command different pubic policies and behaviors. One can speak

23. *See* Etzioni, *supra* note 3, at 605–06.
24. *Id.* at 608–09.
25. *See* Kevin P. Quinn, *Sandel's Communitarianism and Public Deliberations over Health Care Policy*, 85 GEO. L.J. 2161, 2182–83 (1997).
26. *See* Jack B. Sarno, *A Natural Law Defense of Buckley V. Valeo*, 66 FORDHAM L. REV. 2693, 2737 (1998).
27. *See* Abrams v. United States, 250 U.S. 616, 624 (1919).
28. *Id.* at 630.
29. *The FCC and Freedom of Speech*, FCC, http://www.fcc.gov/guides/fcc-and-freedom-speech (last visited Mar. 6, 2015).
30. Interview with Scott L. Cummings, Robert Henigson Professor of Legal Ethics, UCLA School of Law (Dec. 9, 2014).
31. AMITAI ETZIONI, SECURITY FIRST 5–7 (2007).

about the difference between what the right to privacy and the right to safety call for, but this change in wording leaves standing the questions of which right the nation is tilting toward in a given period, and where it ought to tilt.

One next notes that many common goods are not recognized as rights either in the United States Constitution or the Universal Declaration of Human Rights.[32] There is no right to national parks, historical preservation, public health, or basic research.[33] One can of course aspire to add these rights; but until they are recognized as such, it is best not to dismiss the normative claims for these goods because they are "merely" common goods and not individual rights.

Last but not least, some common goods cannot be reasonably defined as individual rights.[34] The National Archive in Washington, D.C. houses the original copy of the Constitution.[35] There is a clear common good.[36] However, to argue that individual Americans have a right to have the Constitution preserved is stretching the concept of right to the point it becomes meaningless and has no foundation, neither in American core normative concepts nor legal traditions.

The following application of the liberal communitarian balancing approach to the analysis of the balancing of individual rights and the common good in three major areas of law—free speech, public safety, and eminent domain—provides an opportunity to test the suggestion that this mode of analysis is quite productive.

III. FREE SPEECH: SURPRISING HOMAGE TO THE COMMON GOOD

There is a rather wide consensus that the Supreme Court of the United States has tilted heavily in favor of the right to free speech and has shown little concern for the common good (other than the common good free speech itself engenders) when serving it entails curbing free speech.[37] The United States' legal and normative commitment to free speech is considered one of the strongest in the world.[38] The text of the First Amendment, which enshrines this right, reads unequivocally that "Congress shall make *no* law . . . abridging the freedom of speech . . . ."[39] The United States tolerates hate speech that several other democracies have banned, such as Holocaust denial, racist speech, and fascist speech; and the Supreme Court has generally overturned laws that ban speech

32. *See* George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1095–96 (1991). *See generally The Universal Declaration of Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/udhr/ (last visited Mar. 6, 2015) (not recognizing all common goods as rights).

33. *See* UNITED NATIONS, *supra* note 32.

34. *See generally* Sarno, *supra* note 26, at 2737 (noting that individual rights are part of the common good).

35. *See The National Archives: Temple of Founding History*, CONSTITUTIONALFACTS.COM, http://www.constitutionfacts.com/founders-library/national-archives/ (last visited Mar. 6, 2015).

36. *See* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalism Precedent, and the Common Good*, 36 N.M. L. REV. 419, 437, 441 (2006).

37. *See, e.g.*, Elizabeth J. Bohn, *Put on Your Coat, A Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in the Tenth Circuit First Amendment Retaliation Claims*, 83 DENV. U. L. REV. 867, 887 (2006).

38. *See* Margot Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587, 587 (2014).

39. U.S. CONST. amend I (emphasis added).

based on its hateful or otherwise distasteful content.[40] The Supreme Court has also set an extremely high bar on restricting speech based on its advocacy of violence or illegality; such speech must be likely to cause "imminent lawless action" to lose First Amendment protection.[41] Almost no speech clears this bar in the Court's view.[42]

True, this strong interpretation of the First Amendment was gained only in the 1920s, following the founding of the American Civil Liberties Union (ACLU) and the influential dissents of Justices Oliver Wendell Holmes and Louis D. Brandeis in *Abrams v. United States*[43] that eventually convinced the Court majority to adopt stricter standards for legal restrictions on speech.[44] Previously, the Court had been much more communitarian in this matter.[45] This is evident in cases such as *Rosen v. United States*,[46] *Schenck v. United States*,[47] and *Abrams v. United States*,[48] all of which permitted significant content-based restrictions on speech.[49] However, beginning in the 1920s, the Court became a very strong defender of the right to free speech.[50] And this right was extended in *Brandenburg v. Ohio* to permit "advocacy of the use of force or of law violation" unless it is likely to incite "imminent lawless action,"[51] and extended further in *Hess v. Indiana*, to permit speech with a "tendency to lead to violence" unless "intended to produce, and likely to produce, imminent disorder."[52] Other right-broadening rulings include the holdings in *National Socialist Party of America v. Village of Skokie*;[53] *Texas v. Johnson*;[54] *Snyder v. Phelps*; [55] and *McCullen v. Coakley*.[56]

At first blush, one may argue that the 1973 ruling about obscenity in *Miller v. California* laid out clear content-based guidelines about impermissible speech, and hence showed that the Court in this area was willing to accord great weight to what it perceived as a common good.[57] However, in practice, obscenity laws are "rarely

40. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 434–35 (1992); Snyder v. Phelps, 562 U.S. 443, 459–60 (2011); United States v. Stevens, 559 U.S. 460, 481–82 (2010).
41. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).
42. *See, e.g.*, *id.*
43. Abrams v. United States, 250 U.S. 616, 624, 631 (1919).
44. *See, e.g.*, *Freedom of Expression*, ACLU, https://www.aclu.org/free-speech/freedom-expression (last visited Mar. 6, 2015).
45. *See, e.g.*, Rosen v. United States 161 U.S. 29, 43 (1896).
46. *Id.* (upholding a conviction for mailing "obscene" material).
47. Schenck v. United States, 249 U.S. 47, 52–53 (1919) (upholding a conviction for criticizing the draft).
48. *Abrams*, 250 U.S. at 624 (upholding a conviction for criticizing war production).
49. *See* Erin D. Guyton, *Tweeting "Fire" in a Crowded Theater: Distinguishing Between Advocacy and Incitement in the Social Media World*, 82 MISS. L.J. 689, 695, 698–99 (2013).
50. *See* ACLU, *supra* note 44.
51. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
52. Hess v. Indiana, 414 U.S. 105, 109 (1973).
53. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977) (requiring "strict procedural safeguards" for a state to obstruct a neo-Nazi march in a neighborhood of Holocaust survivors).
54. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) (allowing flag burning).
55. *See* Snyder v. Phelps, 562 U.S. 443, 449–50 (2011) (ruling speech on a public issue in a public place is not liable to a tort of emotional distress, even if "outrageous" in content and context).
56. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2549 (2014) (invalidating a "buffer zone" against protests near an abortion clinic).
57. Miller v. California, 413 U.S. 15, 36–37 (1973).

enforced and widely ignored,"[58] not least due to the vagueness of parts of the *Miller* test.[59] Similarly, having determined in *Chaplinsky v. New Hampshire* that "fighting words" that provoke violent retaliation are not protected by the First Amendment,[60] the Court proceeded to weaken that ruling in subsequent decisions and has not found *any* speech to qualify as fighting words in the cases that followed.[61]

As for the incitement or advocacy of violence, while the Court upheld in *Whitney v. California* the prohibition of speech threatening to "incite to crime, disturb the public peace, or threaten [the] overthrow [of government] by unlawful means," [62] it overturned that standard in *Brandenburg v. Ohio*,[63] interpreting the "clear and present danger" standard for unprotected speech of *Schenck v. United States*[64] as limited to that likely and intended to produce "imminent lawless action."[65] As the concurrence acknowledged, such a standard only applies in very "rare instances."[66] The bar for finding that speech constitutes such incitement has been set so high that the prosecution finds it next to impossible to clear, and thus serves as a powerful speech protection, particularly given that the Court upheld this protection in subsequent cases.[67] One notable exception has been in terrorism cases, where the *Brandenburg* test has been bypassed or applied by lower courts on shaky grounds,[68] and where the Supreme Court has held that material support for terrorist organizations through forms of speech (such as legal services and advice) is not protected by the First Amendment.[69]

At first it may seem that the Court's upholding of laws against child pornography is a major exception to its very strong protection of free speech. However, it is important to note that even in the case of such a popularly detested form of speech,[70] the Court justified its restrictions on child pornography not with reference to the harm associated with viewing or distributing child pornography to the moral fabric of society or to the debasement of the culture, but rather to the specific harm inflicted on children as actors who play a role in its production.[71]

58. Michael J. Gray, *Applying Nuisance Law to Internet Obscenity*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 317, 317 (2010).

59. *See id.* at 352.

60. *See* Chaplinsky v. New Hampshire , 315 U.S. 568, 573 (1942).

61. *See*, *e.g.*, Terminiello v. City of Chi., 337 U.S. 1, 6 (1949); Cohen v. California, 403 U.S. 15, 26 (1971); Gooding v. Wilson, 405 U.S. 518, 528 (1972); *see also* David L. Hudson Jr., *Fighting Words*, FIRST AMENDMENT CTR., (Mar. 7, 2015), http://www.firstamendmentcenter.org/fighting-words.

62. Whitney v. California, 274 U.S. 357, 371 (1927).

63. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

64. Schenck v. United States, 249 U.S. 47, 52 (1919).

65. *Brandenburg*, 395 U.S. at 449.

66. *Id.* at 457.

67. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973); Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 450 (1974); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982); Texas v. Johnson, 491 U.S. 397, 435 (1989).

68. *See, e.g.*, United States v. Rahman 189 F.3d 88, 115; Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 730–731 (2009).

69. Holder v. Humanitarian Law Project, 561 U.S. 1, 41, 59 (2010).

70. *See, e.g.*, Daniel P. Mears et al, *Sex Crimes, Children, and Pornography*, 54 CRIME & DELINQ. 532, 533 (2008).

71. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 235–36 (2002).

Thus, in *New York v. Ferber*, the Court upheld a statute banning child pornography on the basis that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[72] Likewise,in *Osborne v. Ohio*, the Court upheld a ban on the mere possession of child pornography on the basis of "compelling interests in protecting the physical and psychological well-being of minors."[73]

Moreover, the Court explicitly denied in *Osborne* any "paternalistic interest in regulating [the] mind" for fear "that obscenity would poison the minds of its viewers,"[74] and it made clear in *Ferber* that its ruling was limited to "live performances and photographic reproductions," not all child pornography per se.[75] This distinction was affirmed in *Ashcroft v. Free Speech Coalition* when the Court held that a ban on virtual child pornography (that is, pornography not involving real children) was "overbroad and unconstitutional" as it "also prohibit[ed] speech having serious redeeming value."[76] In short, the Court's rulings have sought to limit child pornography as employment, not as a speech issue.[77] Even here, the Court refused to limit speech to defend a common good, however good it may seem to many people.[78]

This article will not deal with the Court's rulings on libel and defamation, as these forms of speech are disputed mainly on the basis of harm to individuals rather than to the common good. It also does not cover the Court's treatment of money used in election campaigns as speech because the rulings involved raise such a great number of other issues that they command a separate treatment.

Given the Court's very strong defense of free speech in the contentious areas of obscenity, provocation, and incitement not found in other democracies,[79] one might conclude that the Court has little regard for public interests in this area and takes an absolutist approach to free speech rights. Indeed, this is a position often articulated both in public discourse and in academia.[80] Some find that the "absolutist free speech model in the United States" is "foundationally very different and much more protective of liberty . . . than those of Europe or Canada,"[81] while others bemoan the "'absolutist' position" and "ideological refusal to acknowledge [the] dangerous implications for the growth of hate speech."[82] However, we find that the Court has taken a surprisingly communitarian position in one area—in greatly limiting the time, place, and manner (TPM) of speech, in order to serve a variety of

72. New York v. Ferber, 458 U.S. 747, 757 (1982).
73. Osborne v. Ohio, 495 U.S. 103, 103 (1990).
74. *Id.* at 109.
75. *Ferber*, 458 U.S. at 762.
76. *Free Speech Coal.*, 535 U.S. 234, 235 (2002).
77. *See, e.g.*, *id.* at 235–36, 271.
78. *See id.* at 272.
79. James M. Boland, *Is Free Speech Compatible with Human Dignity, Equality, and Democratic Government: America, a Free Speech Island in a Sea of Censorship?*, 6 DREXEL L. REV. 1, 17 (2013).
80. *Id.* at 18.
81. *Id.* at 23.
82. John D.H. Downing, *'Hate Speech' and `First Amendment Absolutism' Discourses in the US*, 10 DISCOURSE & SOC'Y 175, 175 (1999), *available at* http://www.sagepub.com/lippmanstudy/articles/Downing.pdf.

communitarian interests that do not command nearly as much normative standing as avoiding violence, inter- group hatred, or degrading the moral culture.[83]

For example, the Court upheld Los Angeles' ban on posting fliers on public property, given the City's interests in "preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property."[84] It upheld permit requirements that limit marches on public streets in order to protect "public convenience"[85] rather than speech. Other relevant cases concern those in which the Court upheld a ban on sound trucks that emit "loud and raucous noises," given the "need for reasonable protection in the homes or business houses from the distracting noises,"[86] as well as a ban on noisy protests on school grounds on the basis of the "compelling interest in having an undisrupted school session."[87] And the Court upheld a statute forcing performers to use government-provided sound equipment and technicians to ensure that performances in a certain venue were not too loud.[88]

Many other TPM rulings limit speech to provide noise controls.[89] For example, the Court upheld a ban on picketing outside residential homes in order to protect the "wellbeing, tranquility, and privacy of the home," an "important aspect" of protecting "unwilling listeners" from the intrusion of objectionable or unwanted speech.[90] That is, of course, the kind of speech that supporters of the First Amendment hold to be most worth protecting.[91]

The Court has been willing, consistently, to limit speech for common goods that may be justified but command less of a standing in society's scale of values as compared to those it left almost completely unprotected.[92] One may argue that the Court found it much easier to limit speech causes served by TPM limitations on speech because these restrictions are content-neutral, while to serve other causes might well entail limiting speeches of one kind of content (e.g., radical) and not others (e.g., moderate). However, Britain, Canada, Denmark, Sweden, France, Germany, and Australia are among the nations that were able to set such content-based limits; and still free speech thrives in these countries, and they are considered

83. Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 918–19 (1995).

84. Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 789 (1984).

85. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

86. Kovacs v. Cooper, 336 U.S. 77, 78, 89 (1949).

87. Grayned v. City of Rockford, 408 U.S. 104, 119 (1972).

88. Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

89. State v. Adams, No. 02CA171, 2004 WL 1380494, at *5 (Ohio Ct. App. June 14, 2004) ("The desire to reduce and control noise has repeatedly been held to be a content-neutral justification for laws that regulate the time, place, or manner of protected speech.").

90. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

91. Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan-Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INTL. L. 303, 364–65 (2008).

92. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 399 (1989) (ruling flag burning is constitutional); Snyder v. Phelps, 562 U.S. 443, 459 (2011) (ruling that protesting during a fallen soldier's funeral is constitutionally protected); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 381 (1992) (ruling law prohibiting hate speech unconstitutional); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (ruling a noise ordinance constitutionally valid); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding an ordinance prohibiting the use of sound amplifying devices making loud and raucous noises on the city streets).

solid democracies.[93] Moreover, American society has erected strong taboos against select terms and symbols such as the "N-word," which has led to the firing of news anchors and the benching of sports stars who used it,[94] illustrating that one can draw a content line without sliding down a slippery slope of censorship or otherwise suppressing free speech.

In short, it seems quite clear that the Court is willing to allow the most profound sensibilities of the majority of Americans to be offended (e.g., by flag burning), let their emotions and values be assaulted (e.g., when they bury their fallen soldiers), tolerate speech that promotes hate in the most vile terms, and even allow speech that may well incite violence or riots—but ban speech that may disrupt the slumber of some suburbanites or upset the tranquility of the downtown business community.[95] Instead of being particularly un-communitarian when it comes to free speech by greatly privileging this right, the Court has repeatedly shown itself to be willing to curb speech for relatively light common goods and not for the weightiest ones.[96]

IV. PUBLIC SAFETY: UNCLEAR BUT PRESENT BALANCE

A review of Supreme Court rulings shows that the Court has a broad understanding of public safety that allows diverse intrusions into the realm of individual rights to serve this common good.[97] The most basic element of public safety *is upholding law and order, the deterrence and prevention of crime*.[98] A second element of public safety relates to *preventing accidental death and injury*.[99] Thus, the Court allowed suspicionless, random drug and alcohol testing of train engineers in the wake of a series of train accidents,[100] as well as random sobriety

93. Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 976 (2009).

94. *See* Sam Wood, *Suit over Fired Fox Anchor's Use of 'N-word' Gets Green Light*, PHILLY.COM, (Feb. 10, 2015, 1:57 PM), http://www.philly.com/philly/news/Suit_over_fired_Fox_anchors_use_of_N-word_gets_green_light_.html; *Liverpool's Suarez Fined, Suspended over Racist Remarks*, CNN, (Dec. 21, 2011), http://edition.cnn.com/2011/12/20/sport/football/suarez-racism/.

95. *See, e.g.*, *Johnson*, 491 U.S. at 399; *Phelps*, 562 U.S. at 459–60; *R.A.V.*, 505 U.S. at 381; *Rock Against Racism*, 491 U.S. at 790; *Cooper*, 336 U.S. at 87.

96. *See, e.g.*, *Johnson*, 491 U.S. at 399; *Phelps*, 562 U.S. at 459–60; *R.A.V.*, 505 U.S. at 381; *Rock Against Racism*, 491 U.S. at 790; *Cooper*, 336 U.S. at 87.

97. *See infra* pp 17–27.

98. While there is no universal definition of public safety, it is a term most often associated with law enforcement, typically with fire and emergency medical services, and less consistently with public health and infrastructure. *See, e.g.*, *Public Safety Law & Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/p/public-safety/ (last visited Aug. 9, 2015) ("Public Safety refers to the welfare and protection of the general public. . . . The primary goal . . . is prevention and protection of the public from dangers affecting safety such as crimes or disasters. In many cases the public safety division will be comprised of individuals from other organizations including police, emergency medical services, fire force etc."); Jonas Prager, *Contract City Redux: Weston, Florida, as the Ultimate New Public Management Model City*, 68 PUB. ADMIN. REV. 167, 167–80 (2008); Donny Jackson, *Public-Safety Groups Disagree on 'Public-Safety Entity' Definition, Including Utility Usage of FirstNet*, IWCE'S URGENT COMM., (Nov. 6, 2014), http://urgentcomm.com/ntiafirstnet/public-safety-groups-disagree-public-safety-entity-definition-including-utility-usage-f; VA. CODE ANN. § 9.1-801 (2015) (defining a public safety officer).

99. *See supra* text accompanying note 98.

100. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 634 (1989).

checkpoints on highways to prevent deadly car accidents resulting from drunk driving.[101] A third element of public safety is the promotion of *public health*.[102] Thus, the Court held that the public interest in eradicating the smallpox disease justified compulsory vaccination programs,[103] despite the resulting intrusion on privacy, and held that search warrants for Occupational Safety and Health Act (OSHA) inspections do not require "probable cause in the criminal law sense."[104]

Another element of public safety is the promotion of national security and counterterrorism.[105] This element is not encompassed in this examination because of great differences between this public good and the others under study.

In seeking to determine where to draw the communitarian balance in this area, the Court very often draws on the Fourth Amendment.[106] This Amendment captures the basic thesis of the liberal communitarian way of thinking well. By banning only *unreasonable* searches and seizures,[107] the Fourth Amendment recognizes, on the face of it, a category of reasonable searches, which turn out typically to be those that promote public safety and do not require a warrant or probable cause. That is, the very text speaks of two sides, and hence, of a balance in sharp contrast to the First Amendment, which states "Congress shall make *no* law . . . abridging the freedom of speech . . . ."[108]

Finally, disregarding those who oppose the very notion of balancing,[109] the Court determines whether searches are reasonable through "the balancing of competing interests," which the Court views as the "key principle of the Fourth Amendment."[110] Thus, the Court weighs the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"[111] to determine whether "the totality of the circumstances justified a particular sort of search or seizure."[112] The Fourth Amendment is thus a liberal communitarian text par excellence.

In seeking the point of balance between individual rights and public safety, the Court has used a variety of criteria, each with its own rationale.[113] The result is a

101. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990).

102. Jacobson v. Massachusetts, 197 U.S. 11, 11 (1905) (arguing that overturning mandatory vaccination would "would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease").

103. *Id.* at 38.

104. Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978).

105. *See, e.g.*, *Terrorism*, INTERPOL, http://www.interpol.int/en/Crime-areas/Terrorism/Terrorism (last visited Sept. 2, 2015) ("terrorist incidents carried out with chemical, biological, radiological, nuclear and explosives materials . . . would constitute a major threat to public safety and security, both nationally and internationally.").

106. *See infra* pp 17–27.

107. U.S. CONST. amend IV.

108. U.S. CONST. amend. I (emphasis added).

109. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.").

110. Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981).

111. United States v. Place, 462 U.S. 696, 703 (1983).

112. Tennessee v. Garner, 471 U.S. 1, 9 (1985).

113. *See, e.g.*, *Warrantless Searches and Seizures*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 37, 37 (2005) (listing criteria that the Court uses to rationalize warrantless searches and seizures).

complex, difficult, and at times wavering or inconsistent approach. Thus, the Court adopted in 1948 the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable,"[114] only to assert two years later (following the appointment of new justices) that the "relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable" based on "the facts and circumstances" of each case.[115] The following review of several of the Court's key positions on public safety reveals that in a considerable number of cases, the Court places a high value on public safety when balanced against individual rights.[116] The review strictly aims to support a conclusion rather than attempt to provide a comprehensive review of all or even most relevant cases.

A. Exigent Circumstances

One criterion used by the Court to balance public safety and individual rights is the presence of "exigent circumstances" that make a warrantless search or seizure "imperative;" for instance, when an emergency creates an urgent need for police to act.[117] The Court has held such emergencies to include the pursuit of a fleeing suspect, the imminent destruction of evidence, and the "need to protect or preserve life or avoid serious injury."[118]

Two cases illustrate this criterion.[119] In *Warden v. Hayden*, the Court upheld the warrantless entry of police into a private house to pursue a fleeing armed robbery suspect on the ground that to "require police officers to delay in the course of an investigation" might "gravely endanger their lives or the lives of others." [120] Having concluded the search was reasonable, the Court also rejected the broader principle that police may only search a home for, and seize, evidence in which the State has some property interest (such as stolen goods), holding instead that searches for "mere evidence" of a crime does not violate constitutional protections against self-incrimination.[121] Thus, the Court qualified both the Fourth and Fifth Amendments in order to promote public safety.

In *Kentucky v. King*, the Court upheld the warrantless entry of police into an apartment after officers smelled marijuana, knocked on the door, and heard what they suspected to be the destruction of evidence.[122] In this case, the Court held that "exigent circumstances—the need to prevent destruction of evidence—justified the warrantless entry," despite the fact the police "created" the exigent circumstance by knocking on the door, because the knock itself did not constitute a violation of the

114. Trupiano v. United States, 334 U.S. 699, 705 (1948).
115. Martin v. United States, 183 F.2d 436, 440 (4th Cir. 1950).
116. *See, e.g.*, Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 615 (1989) (ruling that the railroad has a duty to promote public safety and cannot do anything inconsistent with that duty).
117. McDonald v. United States, 335 U.S. 451, 456 (1948).
118. Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006).
119. Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967); Kentucky v. King, 563 U.S. 452 (2011).
120. *Hayden*, 387 U.S. at 298–99.
121. *Id.* at 310.
122. *King*, 563 U.S. at 452.

Fourth Amendment.[123] Although cases such as this one have broadened the exigent circumstances exception, it should be noted that exigent circumstances generally are narrowly defined.[124] The Court refuses to apply this exception when the timing of a search is not urgent or the "gravity of the underlying offense" is minor.[125] Thus, in *Welsh v. Wisconsin*, the Court held that suspicion of drunk driving did not constitute an exigent circumstance justifying warrantless police entry into the suspect's home to arrest him.[126]

B. Special Needs and Administrative Searches

In seeking criteria to ferret out the liberal communitarian balance, the Court carved out a very large category of exceptions to the need for individualized suspicion and Court approval, namely administrative searches that are justified by "special needs beyond the normal need for law enforcement."[127] Most deal with searches that do not involve criminal investigations—for instance, routine inspections by personnel from OSHA.[128] This category also includes warrantless searches by administrative authorities in public schools, government offices, and prisons; drug testing of public transportation and other government employees; and inspection of automobile junkyards and dismantling operations.[129]

In all of these cases "the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government's regulatory interest against the individual's privacy interest; in all of these instances the government's interest has been found to outweigh the individual's."[130]

A key precedent for the "special needs" exception is *Skinner v. Railway Laboratory Executives Association*, where the Court allowed suspicionless, warrantless drug and alcohol testing of train engineers in the wake of a series of train accidents.[131] In that case, the Court held that while such tests do constitute

123. *Id.*

124. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 481. "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. . . . [T]he burden is on those seeking the exemption to show the need for it.'" *Id.* at 455 (footnote omitted).

125. Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).

126. *Id.* at 754.

127. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

128. *See, e.g.*, *Warrantless Searches and Seizures*, *supra* note 113, at 116–23.

129. *See, e.g.*, *Griffin*, 483 U.S. at 873–74 ("[A] school, government office or prison, or its supervision of a regulated industry . . . presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 634 (1989) (ruling random drug and alcohol testing of train engineers in the wake of a series of train accidents is constitutional); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989) (ruling that warrantless drug testing of Customs agents is constitutional); New York v. Burger, 482 U.S. 691, 712 (1987) (ruling that a warrantless inspection of vehicle dismantling business is constitutional).

130. *Annotation 1 - Fourth Amendment*, FINDLAW, http://constitution.findlaw.com/amendment4/annotation01.html (last visited Mar. 4, 2015).

131. *Skinner*, 489 U.S. at 634.

searches under the Fourth Amendment, they are "reasonable" searches because the government's "compelling" interest in ensuring "the safety of the traveling public" outweighs the employees' privacy concerns.[132]

Similar considerations affected the Court's ruling in *Michigan Department of State Police v. Sitz*, which upheld warrantless sobriety tests at random highway checkpoints.[133] In that case, while acknowledging that checkpoint stops constitute a "seizure" under the Fourth Amendment, the Court denied the respondents' argument that such stops failed to serve a "special need."[134] Instead, the Court pointed to the "magnitude of the drunken driving problem [and] the States' interest in eradicating it," as well as the Court's approval of similar checkpoints to search for illegal immigrants in *United States v. Martinez-Fuerte*.[135] Applying a balancing test, the Court found the privacy intrusion of sobriety checkpoint stops to be small and the effectiveness of the program to be adequate.[136]

For those who are not tutored in the law (the author included), this special needs category could be divided into several subcategories that seem reasonable. In one, the acts of those subject to search without judicial review are those who can directly and significantly endanger the lives of others, e.g., train engineers. "Directly and significantly" is added to limit this subcategory because a very large number of people have some effect on the probability that someone will be hurt.[137] Another subcategory is where enforcement is regulatory and cannot result in criminal charges—for instance, ensuring that restaurant workers maintain safe food-handling practices and personal hygiene.[138] A third subcategory is when it is not practical to seek a warrant because a very large number of people need to be searched in short order.[139] One example of this is when the police set up sobriety checkpoints on New Year's Eve. Another is the screening gates first introduced into United States airports in 1972, which stopped skyjacking effectively but were challenged by the ACLU.[140] In all of these kinds of cases, the Court privileged the common good over privacy.[141]

132. *Id.* at 621, 633.
133. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990).
134. *Id.* at 450.
135. *Id.* at 451; United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).
136. *Sitz*, 496 U.S. at 455.
137. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 622 n.6 (1989).
138. *See* Woods & Rohde, Inc. v. State, Dep't of Labor, 565 P.2d 138, 144 (Alaska 1977) (noting that many courts have adopted warrantless inspections of food establishments as a constitutional administrative search).
139. *See infra* note 140.
140. *See, e.g.*, *Civil Liberties Implications of Airport Security Measures: Hearing Before White H. Comm. in Aviation Safety and Security*, (1996) (statement of Gregory T. Nojeim, Legis. Counsel, ACLU), *available at* http://www.epic.org/privacy/faa/aclu_testimony.html; *see also Airport Security: Increased Safety Need Not Come at the Expense of Civil Liberties*, ACLU (Dec. 2, 2001), https://www.aclu.org/national-security/airport-securityincreased-safety-need-not-come-expense-civil-liberties.
141. *See, e.g.*, *Skinner*, 489 U.S. at 622 n.6 (1989); *Woods & Rohde, Inc.*, 565 P.2d at 144.

C. Consent

A third criterion used by the Court to balance public safety and individual rights is the presence of consent.[142] Simply put, individuals are free to waive their Fourth Amendment protection against warrantless searches and seizures by consenting to the search or seizure in question.[143] At first blush, one may think that this criterion does not affect the balance because consent is willingly granted.[144] However, many people are not aware of their right to refuse to consent.[145] In contrast to the Fifth Amendment's Miranda warning requirement, the Court has held that police do not need to inform an individual of his or her right to refuse consent to a search or seizure.[146] Moreover, authority to consent may be shared among multiple individuals (for instance, among roommates) with only the consent of one required for police to search.[147] In dealing with such questions, the Court's rulings reveal that even in this matter the Court has tended to favor the public interest over individual rights.[148] Thus, the Court has held that consent to a search of joint property may be given by any resident in the other's absence;[149] though, if both owners are present, either may refuse consent.[150] Even the latter limitation on the consent exception is qualified by the fact that police may still enter a shared home if they suspect domestic violence has occurred.[151]

D. Intrusiveness

A fourth criterion used by the Court draws on the extent individual rights are intruded upon more than on the weight accorded to the specific public interest involved, drawing on concerns about the level of intrusiveness engendered by a given search or seizure.[152] Put another way, the Court is more likely to consider upholding a warrant exception for a search or seizure—whatever the common good—if the government action is minimally intrusive.[153] Thus, in reference to seizure of a suspected container of illegal drugs, the Court articulated that "seizures of property can vary in intrusiveness," and "when the nature and extent of the

142. *Warrantless Searches and Seizures*, *supra* note 113, at 78.
143. *Id.*
144. Schneckloth v. Bustamonte 412 U.S. 218, 248 (1973) (holding that a search is valid as long as consent is "voluntarily given").
145. Kate Schuyler, *Right-to-Refuse Warnings: A Minority's Crusade for Justice*, 38 U. TOL. L. REV. 769, 769 (2007).
146. *Schneckloth*, 412 U.S. at 231 (1973).
147. Schuyler, *supra* note 145, at 88.
148. *See, e.g.*, Wyman v. James, 400 U.S. 309, 318 (1971) (noting that the public interest in the welfare of children is a factor in determining that a search was not unreasonable).
149. United States v. Matlock, 415 U.S. 164, 169 (1974).
150. Georgia v. Randolph, 547 U.S. 103, 106 (2006).
151. United States v. Martinez, 406 F.3d 1160, 1162 (9th Cir. 2005). Somewhat offsetting these tilts towards the public safety, the Supreme Court does limit the consent exception by holding that burden of proof is on the prosecution to prove that consent was given freely and not under coercion. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).
152. *Warrantless Searches and Seizures*, *supra* note 113, at 49–52.
153. *Id.*

detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause."[154]

Two examples illustrate the role of the level of intrusiveness in the Court's Fourth Amendment balancing. On the one hand, in *Maryland v. King*, the Court upheld compulsory DNA sampling of those arrested based on probable cause of serious crimes, in large part due to the limited intrusiveness of the search.[155] Having already concluded that the public safety interest in identifying suspects was great and that DNA sampling significantly furthered that interest, the Court went on to assert that the "intrusion of a cheek swab to obtain a DNA sample is minimal" as it involves "virtually no risk, trauma, or pain,"[156] and furthermore that police DNA databases do "not intrude on . . . privacy in a way that would make [such] DNA identification unconstitutional."[157] The Court held this finding that the intrusion was "negligible" to be of "central relevance to determining reasonableness."[158]

On the other end of this scale, the Court held in *Tennessee v. Garner*, largely on the basis of level of intrusiveness, that use of deadly force against an unarmed, fleeing burglary suspect was unconstitutional.[159] In this case, the Court acknowledged that "burglary is a serious crime" and that police had probable cause to arrest the suspect.[160] However, given that the "intrusiveness of a seizure by means of deadly force is unmatched," it ruled the seizure to be unconstitutional.[161] Note, however, that the Court did not rule out the use of deadly force entirely, but instead limited it to situations where "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury," thus avoiding excessive harm to public safety interests.[162]

E. Expectation of Privacy

A fifth criterion used by the Court is the expectation of privacy, which to a significant extent tilts in favor of the individual rights side of the communitarian equation.[163] The Court's analysis of privacy expectations originates in its ruling in *Katz v. United States*,[164] which held that although "what a person knowingly exposes to the public" is not protected by the Fourth Amendment, "what he seeks to preserve as private, even in an area accessible to the public" may be protected as long as the person exhibits a subjective expectation of privacy that society

154. United States v. Place, 462 U.S. 696, 706, 703 (1983).
155. Maryland v. King, 133 S. Ct. 1958, 1980 (2013).
156. *Id.* at 1964.
157. *Id.* at 1979.
158. *Id.* at 1969.
159. Tennessee v. Garner, 471 U.S. 1, 21 (1985).
160. *Id.*
161. *Id.* at 9 (rejecting the argument that killing the suspect would make other suspects more likely to surrender).
162. *Id.* at 3.
163. *Warrantless Searches and Seizures*, *supra* note 113, at 58.
164. Katz v. United States, 389 U.S. 347 (1967).

recognizes as "reasonable."[165] Since then, the *Katz* test has been criticized for being circular and subjective, and for leading to mixed results in Fourth Amendment cases.[166] For the purposes of this discussion, it suffices to point out that the Court's evaluation of specific privacy expectations has favored the public interest in several key cases.

One notable example is found in *California v. Greenwood*,[167] where the Court held that the Fourth Amendment does not protect against warrantless search and seizure of garbage left outside the home, which had been conducted by the police to support a search warrant for a drug raid on a nearby house.[168] In this ruling, the Court asserted that an expectation of privacy in items discarded "in an area particularly suited for public inspection" is "not objectively reasonable."[169]

Also, the Court held in *Smith v. Maryland* that the tracking of phone numbers dialed by a suspect at the request of police did not constitute a "search" under the Fourth Amendment.[170] In this ruling, the Court held that the suspect "in all probability entertained no actual expectation of privacy" in his calling records, and such an expectation would not have been "legitimate," given that telephone users "typically know . . . that the company has facilities for recording this information and does in fact record it for various legitimate business purposes."[171] This case set an important precedent for the third-party doctrine, which holds that information shared with third parties is not protected by the Fourth Amendment.[172] As advances in information technology have led third parties to play an increasingly important role in storing and transmitting otherwise confidential information, this doctrine increasingly privileges the public-interest side of the communitarian equation by facilitating law enforcement's access to personal information.[173]

F. Additional Considerations

The five criteria listed above are not a comprehensive list of factors considered by the Court in balancing public safety and individual rights. In its extensive Fourth Amendment jurisprudence, the Court has formulated several other specific exceptions and qualifications to the Fourth Amendment warrant, probable cause, and individualized suspicion requirements—and provided additional rationale for so ruling.[174] Thus, the Court held that warrantless searches of automobiles are permitted given probable cause,[175] that searches at international borders require

165. *Id.* at 351.
166. Amitai Etzioni, *Eight Nails into* Katz*'s Coffin*, 65 CASE W. RES. L. REV. 413 (2014).
167. California v. Greenwood, 486 U.S. 35, 37 (1988).
168. *Id.* at 37–38.
169. *Id.* at 35.
170. Smith v. Maryland, 442 U.S. 735, 745–46 (1979).
171. *Id.* at 745, 735.
172. *See, e.g.*, Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009).
173. Katrina Fischer Kuh, *Personal Environmental Information: The Promise and Perils of the Emerging Capacity to Identify Individual Environmental Harms*, 65 VAND. L. REV. 1565, 1626 (2012).
174. *See, e.g.*, *Warrantless Searches and Seizures*, *supra* note 113, at 37.
175. Carroll v. United States, 267 U.S. 132, 149 (1925).

neither warrants nor probable cause,[176] and that evidence in "plain view" during a legitimate search may be seized,[177] giving different rationales in each case, although some partially overlap with those already cited above.

Some argue that the Court's rulings over the last few decades have steadily undermined individual rights, particularly privacy, by favoring public safety considerations in Fourth Amendment cases. Thus, Thomas N. McInnis argues that the Court's changing interpretations of the amendment have eroded the warrant requirement over time.[178] William Stuntz finds that the Court's change of emphasis in focusing on "unreasonable searches and seizures" rather than the warrant clause has narrowed the scope of the warrant requirement.[179] Andrew Talai holds that "in the last few decades, the Supreme Court has narrowed its vision of Fourth Amendment rights to an opaque privacy rationale."[180] Shaun Spencer states that changing technology, coupled with the Court's "reasonable expectations" doctrine of privacy, facilitates the incremental erosion of privacy.[181] Likewise, Shima Baradaran notes that the Court has tended to favor the government when balancing individual rights and public safety in recent Fourth Amendment cases because the Fourth Amendment case is typically made by a "criminal defendant whose hands are dirty."[182] For his part, Christopher Slobogin argues that the Court's Fourth Amendment jurisprudence has failed to keep pace with evolving government surveillance techniques.[183]

At the same time, no one claims that all the cases have lined up on one side of liberal communitarian balancing equation. Any such trend is offset in part by two factors: the Court's restricting warrantless searches in recent cases and its creation of new rights. The Court has introduced and clarified new rights, though mainly in the 1960s.[184] The Court introduced the Miranda right[185] and the reasonable expectation of privacy standard, which, for all its limits, has upheld individual rights against public safety concerns in contexts where a different Fourth

176. *See* United States v. Ramsey, 431 U.S. 606, 628 (1977).

177. *See* Horton v. California, 496 U.S. 128, 136–45 (1990).

178. *See* THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 110–13 (2009).

179. William J. Stuntz, *Warrant Clause*, *in* HERITAGE GUIDE TO THE CONSTITUTION 426, 429 (David F. Forte et al. eds., 2012), *available at* http://www.heritage.org/constitution/#!/amendments/4/essays/145/warrant-clause.

180. Andrew B. Talai, *Drones and* Jones*: The Fourth Amendment and Police Discretion in the Digital Age*, 102 CALIF. L. REV. 729, 729 (2014).

181. *See* Shaun Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 844–60 (2002).

182. *See* Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 4–7 (2013).

183. *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 3–4 (2007); *see also* Andrew J. DeFilippis, *Securing Informationships: Recognizing a Right to Privity in Fourth Amendment Jurisprudence*, 115 YALE L.J. 1086, 1092 (2006) (criticizing the Court's third-party doctrine in particular for undermining privacy in a society increasingly characterized by "shared access to and exchange of personal information"); George Dery, *Expedient Knocks and Cowering Citizens: The Supreme Court Enables Police to Manufacture Emergencies by Pounding on Doors at Will in* Kentucky v. King, 17 BERKELEY J. CRIM. L. 225, 255–56 (2012) (arguing that recent decisions show "a trend in Fourth Amendment precedent in which the Court has continually lowered the bar for police [intrusions]" and diminished the warrant requirement).

184. *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966).

185. *Id.* at 444–45.

Amendment doctrine might not have, as with thermal imaging[186] and use of drug-sniffing dogs[187] on the periphery of a house.[188]

More recently, in *Riley v. California*[189] the Court limited the warrant exception for searches incident to a lawless arrest by affirming that police searches of arrestees' cell phone data require a warrant.[190] The Court also limited the expectation of privacy doctrine in *United States v. Jones*,[191] holding that surreptitious police attachment of a GPS surveillance device to a suspect's car violated his Fourth Amendment *property* rights, thus constituting a "search" regardless of privacy expectations.[192] Commentators have argued that *Riley* and *Jones*, respectively, "brought the Fourth Amendment into the digital age"[193] and "bode well for continued protection of citizens' public privacy rights."[194]

In short, whether one finds that the Court has found a sound liberal communitarian balance, or that it has tilted too heavily toward either the public safety or the individual rights side of the balancing equation, there is no question that the Court has accorded considerable weight to the public interest.

V. EMINENT DOMAIN: OPENINGS TO CAPTURE

A third area in which we study the Supreme Court balancing of the common good and individual rights is that of eminent domain, or the expropriation of private property by the government in the service of one public interest or another.[195] The legal concept of eminent domain is based on the Fifth Amendment takings clause, which reads, "nor shall private property be taken for public use, without just compensation."[196] In 1875, the Court asserted that the clause "contains an implied recognition" of eminent domain: what is the "provision that private property shall not be taken for public use without just compensation . . . but an implied assertion that, on making just compensation, it may be taken?"[197] As a result, the Court affirmed the Federal Government's "power to appropriate lands or other property within the states for its own uses," arguing that such power is "essential to its independent existence and perpetuity"[198] and "is an attribute of

186. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).
187. *See* Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).
188. *Id.*
189. Riley v. California, 134 S. Ct. 2473 (2014).
190. *Id.* at 2485, 2495.
191. *See* United States v. Jones, 132 S. Ct. 945 (2012).
192. *Id.* at 949.
193. Marc Rotenberg & Alan Butler, *Symposium: In* Riley v. California*, a Unanimous Supreme Court Sets out Fourth Amendment for Digital Age*, SCOTUSBLOG (June 26, 2014, 6:07 PM), http://www.scotusblog.com/2014/06/symposium-in-riley-v-california-a-unanimous-supreme-court-sets-out-fourth-amendment-for-digital-age/.
194. Daniel T. Pesciotta, *I'm Not Dead Yet:* Katz*,* Jones*, and the Fourth Amendment in the 21st Century*, 63 CASE W. RES. L. REV. 187, 254 (2012).
195. Kohl v. United States, 91 U.S. 367, 373–74 (1875).
196. U.S. CONST. amend. V.
197. *Kohl*, 91 U.S. at 372–73.
198. *Id.* at 371.

sovereignty."[199] The Court's subsequent rulings concerned defining what uses of confiscated property may qualify as "public use," and thus are constitutionally valid.[200]

The Court recognized that eminent domain may be used to secure property for government buildings; water, transportation, communications, and energy infrastructure; and national defense.[201] The Court also upheld the use of eminent domain for "public buildings," including "for forts, armories, and arsenals, for navy yards and lighthouses, for custom houses, post offices, and courthouses, and for other public uses."[202] Subsequent rulings affirmed that eminent domain could be used to secure land for memorial sites,[203] aqueducts,[204] canals,[205] railroads,[206] war production,[207] and public parks.[208]

State legislatures and state and federal courts also permitted the use of eminent domain by private entities, such as canal, railroad, and turnpike companies, to build transportation infrastructure to which the public would have access,[209] as well as for electricity and lighting infrastructure,[210] oil pipelines,[211] telephone lines,[212] and cable and fiber optic lines.[213]

In *Berman v. Parker*[214] the Court permitted the State not only to seize property for literal "public use" (whether under private or public ownership), but also to transfer property to a new private owner for his or her own private use, albeit in pursuit of some broader "public purpose."[215] Specifically, the Court found that the use of eminent domain to facilitate "urban renewal" programs was a justifiable way to deal with "urban blight," or slum conditions.[216] The Court deferred to Congress and state legislatures to determine what qualifies as a "public purpose" justifying eminent domain, upholding "all means necessary and appropriate" to deal with conditions "injurious to the public health, safety, morals, and welfare."[217] As such, the Court upheld in *Berman* both the seizure of non-blighted property within a

199. Boom Co. v. Patterson 98 U.S. 403, 406 (1879).

200. *See The Civil Rights Implications of Eminent Domain Abuse: Testimony Before the United States Comm'n on Civil Rights* (2011) [hereinafter *Somin Testimony*] (statement of Ilya Somin, Professor of Law, George Mason University), *available at* http://www.law.gmu.edu/assets/files/faculty/Somin_USCCR-aug2011.pdf.

201. *Id.*

202. *Kohl*, 91 U.S. at 371.

203. *See, e.g.*, United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 679–80 (1896).

204. *See, e.g.*, United States v. Great Falls Mfg. Co., 112 U.S. 645, 654–56 (1884).

205. *See, e.g.*, United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62–64 (1913); *see also* Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 588–90 (1923).

206. *See, e.g.*, Hairston v. Danville & W. Ry. Co. 208 U.S. 598, 605–09 (1908).

207. *See, e.g.*, United States v. Cent. Eureka Mining Co., 357 U.S. 155, 156–57 (1958).

208. *See, e.g.*, Shoemaker v. United States, 147 U.S. 282, 322 (1893).

209. *See* Arnold v. Covington & Cincinnati Bridge Co., 62 Ky. 372, 374–75 (1864); *see also* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 59–60 (2006).

210. *See, e.g.*, Twin City Power Co. v. Savannah River Elec. Co., 161 S.E. 750, 763 (S.C. 1930).

211. *See, e.g.*, Producers Pipe Line Co. v. Martin, 22 F. Supp. 44, 48 (W.D. Ky. 1938).

212. *See, e.g.*, Buncombe Metallic Tel. Co. v. McGinnis, 109 N.E. 257, 258 (Ill. 1915).

213. *See, e.g.*, Cablevision of the Midwest v. Gross, 639 N.E.2d 1154, 1156–57 (Ohio 1994).

214. *See* Berman v. Parker, 348 U.S. 26 (1954).

215. *Id.* at 34–36.

216. *Id.* at 34.

217. *Id.* at 28.

blighted area in pursuit of a comprehensive development plan and the transfer of property to another private owner for private, rather than public, use.[218]

The Court noted that while the government's "police power" had been traditionally associated with "public safety, public health, morality, peace and quiet, law and order," these examples "merely illustrate the scope of the power, and do not delimit it," as the "concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."[219]

Taking *Berman* as precedent, another unanimous ruling upheld a Hawaii land reform program intended to broaden land ownership, accepting the Hawaii Legislature's position that "concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and reaffirming that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[220] In making this judgment, the Court broadened the precedent from *Berman*, asserting that while taking "one person's property . . . for the benefit of another" requires a "justifying public purpose . . . . [i]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate . . . [for it] to constitute a public use."[221]

Continuing this trend, the Court's five-to-four ruling in *Kelo v. City of New London* held that the government may also use eminent domain to transfer private property from one owner to another "for the purpose of economic development." In upholding the taking of property from neighborhood residents for use by a private developer, the Court neither mandated a finding of urban blight nor required the new owner to perform a public function or grant public access.[222] Instead, the Court deferred to the City's "determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation," arguing that "because that plan unquestionably serves a public purpose, the takings challenged here satisfy . . . the Fifth Amendment."[223] Thus, the Court rejected the argument that "economic development does not qualify as a public use," countering that "[p]romoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes."[224] Crucially, it rejected calls for "'reasonable certainty' that the expected public benefits will actually accrue" (such as a legal obligation on the developer to meet certain economic goals), noting the "departure from [the Court's] precedent" and "disadvantages of a heightened form of review" that such requirements would entail.[225]

218. *Id.* at 34.
219. *Id.* at 28, 32–33.
220. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 232, 242 (1984).
221. *Id.* at 241, 244.
222. *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005).
223. *Id.* at 483.
224. *Id.* at 484.
225. *Id.* at 487–88.

The *Kelo* ruling weakened the safeguards against eminent domain abuse by creating a new incentive for private interests to influence regulators while reducing the potential for public accountability.[226] That is not to argue that eminent domain in line with *Kelo* cannot serve the public interest. Defenders of *Kelo* point out that "residential condemnation for redevelopment" is rare, and in most states is required to produce more and better low-income housing.[227] By watering down the definition of public use, however, the ruling greatly increased the risk that special interests will capture the process. Thus, Justice O'Connor, arguing for the minority, warned that the

> specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory . . . . The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.[228]

Even Justice Kennedy, who concurred with the judgment, warned that courts must still strike down any taking "that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."[229] He argued that courts should "treat the objection as a serious one and review the record to see if it has merit" when "confronted with a plausible accusation of impermissible favoritism to private parties."[230] Finally, he suggested that there "may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[231]

It is important to note that the "blight" standard for eminent domain in place prior to *Kelo* already created opportunities for abuse due to the broad definition of blight—which critics argue includes "vague and subjective criteria" that could apply to virtually any property[232]—and the permissive process for its determination—which critics allege facilitates rent-seeking and regulatory capture behavior by developers, and suffers from excessive deference by the judiciary.[233] Most notoriously, the mid-twentieth century urban renewal projects facilitated by

226. *See, e.g.*, H.R. REP. NO. 113-357, at 4–5 (2014).
227. Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, 7 VT. J. ENVTL. L. 41, 44 (2006).
228. *Kelo*, 545 U.S. at 503, 505.
229. *Id.* at 491.
230. *Id.*
231. *Id.* at 493.
232. *See* Matthew Kokot, *Balancing Blight: Using the Rules Versus Standards Debate to Construct a Workable Definition of Blight*, 45 COLUM. J.L. & SOC. PROBS. 45, 56 (2011).
233. *See* Eric R. Claeys, *That 70's Show: Eminent Domain Reform and the Administrative Law Revolution*, 46 SANTA CLARA L. REV. 867, 871–74 (2006).

Berman, while having some positive economic impact,[234] are generally seen even by today's proponents of eminent domain[235] to have been racially discriminatory in their motivations and impact, as they tended to displace African American and Puerto Rican communities,[236] thereby reinforcing racial segregation[237] and leading critics to dub such programs "Negro Removal."[238]

Martin Gold and Lynne Sagalin find that a "large and strong coalition of mutual interests supports redevelopment," including "city officials, redevelopment agencies, urban planners, real estate consultants and attorneys, developers, and environmental interest groups," making abuse of eminent domain more likely.[239] Whereas the government may be held accountable by taxpayers for condemning property and then failing to use that property productively, private interests are less accountable.[240] Thus, Nancy Kubasek and Garrett Coyle warn that

> [b]ecause corporations do not face consequences if their estimates to the legislature differ from reality, a moral hazard problem is present: corporations have an incentive to overstate the number of jobs and the amount of tax revenue they will create given a suitable site. Moreover . . . the judiciary cannot review the likelihood that the public benefit targeted by the taking will be achieved. The logical corollary of this moral hazard problem is that legislatures may press for eminent domain condemnations to which they would never have consented had they known the actual or even likely outcomes.[241]

Likewise, Ilya Somin takes issue with the Court's deference to the legislature on this issue:

> "[A]mong all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference" . . . . There is little sense in recognizing a constitutional right for the purpose of curbing abuses of government power, and then leaving

234. William J. Collins & Katharine L. Shester, The Economic Effects of Slum Clearance and Urban Renewal in the United States 5 (Oct., 2010) (working paper) (on file with the Vanderbilt University Department of Economics), *available at* http://as.vanderbilt.edu/econ/wparchive/workpaper/vu10-w13.pdf.

235. *But see Eminent Domain and Racial Discrimination: A Bogus Equation, Testimony Before the United States Comm'n on Civil Rights* (2011) (statement of J. Peter Byrne, Georgetown University Law Center), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1960&context=facpub.

236. *See* SAMUEL ZIPP, MANHATTAN PROJECTS: THE RISE AND FALL OF URBAN RENEWAL IN COLD WAR NEW YORK 10 (2010).

237. *See* Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUSING POL'Y DEBATE 443, 447–48 (2000).

238. ZIPP, *supra* note 236, at 10.

239. Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1159 (2011).

240. Nancy Kubasek & Garrett Coyle, *A Step Backward Is Not Necessarily a Step in the Wrong Direction*, 30 VT. L. REV. 43, 59–65 (2005).

241. *Id.* at 60–61.

> the definition of that right up to the discretion of the very officials whose power the right is supposed to restrict.[242]

The issues noted by Justices O'Connor and Kennedy have had negative impacts in practice.[243] In the case of the Fort Trumbull neighborhood of New London, the subject of the *Kelo* ruling, the expropriation and demolition of the residential and commercial property in question was never followed by the promised economic development.[244] Pfizer, the pharmaceutical company on behalf of which eminent domain was exercised, not only failed to develop the area but ended its operations there.[245] Instead of the expected hotel, conference center, condominium complex, health club, and shopping area, Fort Trumbull is now a "vast, empty field . . . entirely uninhabited."[246] This was not an isolated incident: the "most famous economic development taking"[247] prior to *Kelo*, *Poletown Neighborhood Council v. City of Detroit*,[248] condemned a residential area in order to build a General Motors factory that likewise became an expensive failure.[249]

Following *Kelo*, the government has used economic growth to justify the use of eminent domain to acquire property even for development projects of questionable social utility, such as casinos in New Jersey.[250] In New York City, both the Columbia University Harlem expansion and the Atlantic Yards project were accused by opponents of "questionable determination[s] of blight," collusion between developers and regulators, and ignoring community input.[251] Furthermore, a 2012 study on "judicial biographies and takings decisions since 1975" concluded that "decisions favoring physical takings increase [economic] growth by 0.2% points but reduce minority home ownership and employment by 0.5% and 0.3% points respectively."[252]

Kelo drew adverse public and legislative reaction, including a 365 to 33 vote in the House of Representatives to condemn the ruling, denunciations from public

242. *Somin Testimony*, *supra* note 200, at 3 (quoting James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004 CATO SUP. CT. REV. 39, 40–43).

243. Kelo v. City of New London, 545 U.S. 469, 490–523 (2005).

244. *See, e.g.*, Jeff Jacoby, *Eminent Disaster Homeowners in Connecticut Town were Dispossessed for Nothing*, BOS. GLOBE (Mar. 12, 2014), http://www.bostonglobe.com/opinion/2014/03/12/the-devastation-caused-eminent-domain-abuse/yWsy0MNEZ91TM94PYQIh0L/story.html.

245. *Id.*

246. *Id.*

247. *Somin Testimony*, *supra* note 200, at 8.

248. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

249. Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1016–19 (2004).

250. *See, e.g.*, Erin O'Neill, *Atlantic City Property Owner Fights Eminent Domain Case*, NJ.COM (May 21, 2014, 7:09 AM), http://www.nj.com/atlantic/index.ssf/2014/05/atlantic_city_eminent_domain.html.

251. *See* Kate Klonick, *Not in My Atlantic Yards: Examining Netroots' Role in Eminent Domain Reform*, 100 GEO. L.J. 263, 276–80 (2011).

252. Daniel L. Chen & Susan Yeh, The Economic Impacts of Eminent Domain 1 (Jan., 2012) (unpublished manuscript), *available at* https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=NASM2012&paper_id=530. For more on the harm to minorities and the poor see Brief of Amici Curiae NAACP et al. Supporting Petitioners at 8, Kelo v. City of New London, 545 U.S. 469 (2005).

figures and organizations across the political spectrum, and critical public opinion polls.[253] Embracing *Kelo*'s caveat that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power," and responding to the "intensity and broad-based, nonpartisan character of the backlash,"[254] a large number of state legislatures passed some form of eminent domain reform.[255] The Institute for Justice, which campaigned for eminent domain and blight standards reform following *Kelo*, asserts that twenty-three states have passed "substantive eminent domain reform" and twenty-one states have added "increased eminent domain protections" since 2005, leaving only six without significant reform.[256] The intensity and effectiveness of these reforms varied: a few eliminated blight as a condition for eminent domain; others narrowed the definition of blight to more closely fit its original meaning as conditions "detrimental to or an actual danger to public health and safety;" and still others narrowed the scope of blight determination to focus on individual units more than whole areas.[257]

Political science has developed a considerable body of scholarship on what is called "capture theory."[258] It refers to conditions in which private interests gain control of a public asset or process and employ it to do their bidding, thus voiding its contribution to the common good.[259] Capture comes in several forms including regulatory capture, when those that are to be regulated use the regulations to advance their special interests, and legislative capture, in which private interests pervert the democratic process, often by passing laws that seem to serve the public interest but actually rain down benefits upon limited private groups.[260] Capture is often achieved through campaign contributions, sometimes referred to as legalized bribery, and sometimes through illegal means.[261] The preceding discussion of eminent domain suggests that the judicial process can also be captured. This is

253. *See, e.g.*, Kelo v. City of New London*: What it Means and the Need for Real Eminent Domain Reform*, INST. FOR JUSTICE (Sept. 2005), http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf (criticism by a libertarian advocacy organization); *A Win for Big Government*, WASH. TIMES (June 23, 2005), http://www.washingtontimes.com/news/2005/jun/23/20050623-084200-4178r/ (describing the *Kelo* decision as "Robin Hood in reverse"); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2101–78 (2009) (noting that critics included "Bill Clinton, then-Democratic National Committee Chair Howard Dean, and prominent African-American politician and California Representative Maxine Waters" as well as "[t]he NAACP, the AARP, the liberal Southern Christian Leadership Conference").

254. Gold & Sagalyn, *supra* note 239, at 1150–51.

255. *Id.* at 1151–52.

256. *Legislative Center*, CASTLE COAL., http://www.castlecoalition.org/legislativecenter (last visited Sept. 3, 2015).

257. *See* Gold & Sagalyn, *supra* note 239, at 1157–59. There is some debate over whether these measures have been effective. *Compare* Somin, *supra* note 253, at 2105–06 (arguing that about half of state reforms have been ineffective) *with*, Powell on Real Property § 79F.03[3][b][iv] (Michael Allan Wolf ed., LexisNexis Matthew Bender) (arguing that state reforms have been effective).

258. *See, e.g.*, Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341–44 (1974); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089, 1089–90 (1991).

259. *See, e.g.*, George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–4 (1971); Posner, *supra* note 258, at 341–44; Gary Becker, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 245, 245 (1976); Laffont & Tirole, *supra* note 261, at 1089–90.

260. Posner, *supra* note 258, at 341–44.

261. Liam Wren-Lewis, *Regulatory Capture: Risks and Solutions*, *in* EMERGING ISSUES IN COMPETITION, COLLUSION, AND REGULATION OF NETWORK INDUSTRIES § 7.2 (2011).

especially likely to occur when judges are elected rather than appointed and must raise campaign funds in order to increase their chances of becoming elected, a recent trend.[262]

All of this shows that a sound liberal communitarian policy needs not only a carefully crafted balance between the public interest and individual rights that is recalibrated as conditions change significantly, but also requires ensuring that the purposes served are indeed public goods. This analysis brings us full circle. We started by showing that one can distinguish the public good from those sought by private parties, and we now see that without a clear line, there is a danger that the concept of public good will be abused by special interests, many of which serve neither the common good nor individual rights but merely their particular members.

VI. CONCLUSION

We have seen the common good (or the public interest) can be defined, and that liberal communitarian philosophy suggests that a good society will draw a carefully crafted balance between the common good and individual rights. Moreover, this balance will be recalibrated as historical conditions change. We found the Supreme Court of the United States is much more willing to curb free speech for common goods that seem to command not nearly the same normative standing as those the Court has shortchanged when it comes to the First Amendment. Free speech protection would be undermined very little if the Court set limits on hate speech similar to those society in effect has set, such as providing more protection for the those burying their fallen heroes by keeping radical zealots further away, and by shielding women seeking abortions from aggressive, in-your-face verbal abuse, thus enforcing society's norms and incentives.

We saw that, in dealing with public safety as a common good, the Court came particularly close to the liberal communitarian position, when it drew on the text of the Fourth Amendment that bars only unreasonable searches and seizures. The Court made numerous specific rulings in this area, and provided different rationales for the various rulings, tilting sometimes to public safety and sometimes to individual rights. One may argue whether, given the current conditions, it tilted too far toward promoting public safety or toward protecting individual rights.

Likewise, one can agree that, in general, the Court followed a liberal communitarian approach in dealing with takings, in particular with eminent domain. The Court in effect created a whole area in which it allows individual rights, in particular private property rights, to be set aside in the service of one common good or another. However, in the process, the Court opened the door to fake public goods, which allow special interests groups to use the terminology and legal basis of eminent domain to serve not the public interests, but their private

262. Billy Corriher, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*, CTR. FOR AM. PROGRESS 6 (Oct. 25, 2012), https://cdn.americanprogress.org/wp-content/uploads/2012/10/NonpartisanElections-3.pdf.

ones. Liberal communitarians need to draw on reforms instituted by many states to shore up the line that separates genuine from faux public goods.