

Abstract:

This Article examines the constitutional status of suspicionless searches and seizures of groups—an exceedingly important question in an age of terror, and a subject recently brought back to the forefront by the searches of subway passengers in New York City. It draws on process theory to argue that when a legislature has authorized a group search or seizure, courts should generally apply rational basis review.

First, other areas of constitutional doctrine exhibit deep trust in the power of groups to protect their interests in the political process, and there is no reason why the Fourth Amendment should not do the same. Second, the Fourth Amendment guarantees only reasonableness or cost-effectiveness, which legislatures are particularly competent at determining and are normally trusted to do. Finally, the legislative process, if anything, exhibits a bias in favor of too few general searches and seizures: the costs of general searches and seizures are relatively concentrated and visible, while the benefits to law enforcement are diffuse and invisible, which means that advocates of more privacy should have an organizational advantage.

No previous law review article has elaborated all of these reasons for deferential review, much less in this depth. The Article makes three other contributions to the literature. It details the process failures that should justify more intrusive review, including excessive executive discretion and burdening of certain minorities. It provides a thorough critique of recent doctrine, including the *Edmond* and *Chandler* cases. Finally, it debunks the original meaning objections to the political process approach.

Most of all, the Article provides a fresh look at general searches and seizures. The typical law review article analyzes these practices with a narrow and critical Fourth Amendment lens. This Article adopts a more comprehensive constitutional perspective, and arrives at the surprising result that judicial review of these practices is too intrusive.

## The Case for Rational Basis Review of General Suspicionless Searches and Seizures

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Suspicionless searches and seizures of groups of people have never been more important than they are today. Passenger screens at airports and on the subway are essential ways to prevent potentially disastrous terrorist attacks. Random drug tests help to preserve the integrity of workplaces and schools. Administrative searches of workplaces ensure that businesses are complying with safety regulations. The debate about the utility of these methods is vigorous and ongoing. But commentators have paid surprisingly little attention to whether this debate should play out primarily in the political process or in the courts.<sup>1</sup>

Thus far, the Supreme Court has generally assumed that courts must independently weigh the costs and benefits of these searches to determine whether they are “reasonable” for purposes of the Fourth Amendment. A court allows a practice to stand only if, in the court’s judgment, that practice is reasonable or cost-effective. This Article argues that searching judicial review of general searches and seizures is inappropriate. Drawing on the lessons of process theory, the Article shows that courts should apply a more deferential level of review because these searches and seizures can safely be left to the political process.

Process theory has shaped many other areas of constitutional law, including equal protection, due process, takings, and free exercise. The theory holds that a court should use an indeterminate constitutional provision to strike down a statute only when the court can thereby remedy some flaw in the democratic process. Judges should conduct intrusive review only when they can somehow produce a more democratic result than the legislature did. The theory respects our society’s presumption of democratic

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<sup>1</sup> The notable exceptions are William J. Stuntz, *Local Policing After the Terror*, 111 *Yale L.J.* 2137 (2002); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *Va. L. Rev.* 747 (1991); and Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153 (1998).

decisionmaking, and holds simply that judicial review should always be affirmatively justified by some representation-reinforcing rationale.

Commentators have previously observed that general searches and seizures affect large groups who can presumptively protect themselves in the political arena, and thus usually exhibit no process failure warranting intrusive judicial review. Michael Klarman has said, “[I]f the majority of the community chooses to sacrifice some personal privacy in exchange for greater law enforcement efficacy, and does so in a manner evenly spreading costs throughout the community (as opposed to concentrating them upon a politically impotent minority group), political process theory can have no objection.”<sup>2</sup> Bill Stuntz has observed that “[w]hen the police stop large groups of people...[l]aw enforcement’s costs are spread more broadly; the effect is to convert searches and seizures from takings, burdening only isolated individuals, into taxes, burdening classes of people...These difference mean that political checks are much more likely to function.”<sup>3</sup> But until now, no-one has systematically elucidated the reasons why it is particularly appropriate for legislatures to be primarily responsible for balancing the costs and benefits of general searches and seizures.

This Article provides three reasons. First, other areas of constitutional doctrine exhibit deep trust in the power of groups to protect their interests in the political process. The Court applies deferential review to laws burdening groups under the equal protection, due process, and takings clauses, and there is no reason why it should not do the same under the Fourth Amendment. Second, the nature of the Fourth Amendment guarantee means that legislatures are particularly competent at balancing the competing

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<sup>2</sup> Klarman, *supra* note 1, at 767.

<sup>3</sup> Stuntz, *Local Policing After the Terror*, *supra* note 1, at 2165.

interests. The Fourth Amendment mandates only reasonableness or cost-effectiveness, and we trust legislatures to determine the cost-effectiveness of policies affecting groups on a daily basis. That is simply what it means to live in a democracy. By contrast, courts have little capacity to measure or register the social costs and benefits of general searches and seizures.

Finally, there is no reason to distrust the legislative process because, if anything, it is biased towards *too few* general searches and seizures. Advocates of more privacy have an organizational advantage. The costs of such searches are relatively concentrated and visible, while the benefits in terms of law enforcement interests are diffuse and invisible. This means that collective action problems on the cost side are much less intense and the legislative process ought to exhibit a bias in favor of too few general searches and seizures. Though courts cannot remedy this problem by enacting general search and seizure programs out of thin air, the next best thing they can do is apply deferential review to searches and seizures that *do* make it through the legislative gauntlet. The affected groups are perfectly capable of protecting their interests, and do not need the courts to intervene to protect them.

Process theory also implies, however, that courts *should* reweigh costs and benefits when a process failure is present. Practices that discriminate against discrete and insular minorities threaten to impose costs on people who have no voice and no power in the legislative process. Practices that vest executive officials with a great deal of discretion in implementing a scheme allow legislatures to pass the buck to officers who might apply their schemes in an arbitrary or discriminatory way. In these situations, courts cannot be sure that the legislature has considered and balanced all the relevant

values, and strict scrutiny is therefore justified. Conversely, when one of these process failures is not present, courts should trust the political process to authorize only a reasonable amount of searching and seizing.

Part I of this Article makes the affirmative case for a political process approach to general searches and seizures. Part II then reviews the process failures that should constitute the exceptions to the general rule of rational basis review. Part III canvasses current Supreme Court doctrine on general searches and seizures, showing that the courts have appropriated tasks that should properly be left to legislatures. Part IV concludes by identifying the textualist and original meaning objections to deferential review, and shows that they are without merit.

Ultimately, this Article aims to reorient the discourse of general searches and seizures. Courts should not distrust legislatures in this area. Searched and seized groups are capable of protecting themselves. Intervention by courts promises only to empower idiosyncratic dissenters from globally reasonable general searches and seizures. The time has come to discard irrational fear of legislative innovation in the area of general searches and seizures.

## *I. Trusting general searches and seizures to the political process*

Political process theory is an attempt to justify judicial review: namely, the power of unelected judges to overturn democratically enacted statutes.<sup>4</sup> It begins with the simple observation that most constitutional provisions are highly indeterminate. While it is clear that the Constitution prohibits a President from running for three terms, it is not immediately apparent what “due process,” “equal protection,” or “unreasonable searches and seizures” mean. Reasonable people might disagree about whether a particular statute falls within the language of an ambiguous constitutional provision.<sup>5</sup>

Process theory maintains that in these ambiguous situations, the statute should normally prevail over the judge’s interpretation. We live in a democracy, which means a presumption of democratic decisionmaking.<sup>6</sup> Legislatures are the institutions with the most democratic pedigree. Thus if reasonable people could disagree about the application of the constitutional language, the majoritarian decision of the legislature should ordinarily be preferred to the decisions of unelected and unaccountable judges. Otherwise, unconstrained application of the Constitution might lead judges to usurp some of the policymaking functions that should be the province of society’s elected representatives in a democracy.

At the same time, a presumption of democratic decisionmaking does not imply that legislatures are always right. Process theory also maintains that judges should strictly review statutes when there is the potential to make the political process *more* democratic and *more* responsive to the preferences of the population. For example, a law might

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<sup>4</sup> The theory is notably associated with the work of John Hart Ely, especially *Democracy and Distrust* (1980).

<sup>5</sup> See Klarman, *supra* note 1, at 770.

<sup>6</sup> The idea of presumption of democratic decisionmaking (or as he termed it, the counter-majoritarian difficulty) was first explicated by Alexander Bickel in *The Least Dangerous Branch* 16 (2d ed. 1986).

burden a discrete and insular minority that is somehow blocked from accessing the political process, and thus has no voice in the give and take of the political process.<sup>7</sup> Or a legislature could delegate policymaking functions to unelected executive officials who might apply the law in an arbitrary or oppressive manner. In these situations, judicial scrutiny can help to replicate the result that would have obtained in a more perfect democracy where everyone is represented. Judicial review in these cases thus does not violate the presumption of democratic decisionmaking. The judge is not applying an ambiguous constitutional provision to invalidate a majoritarian result. Rather, the judge is applying it to reinforce and improve the political system by ensuring that legislatures make important policy choices and that every person receives due regard in the lawmaking process. Process theory is often referred to as a “representation-reinforcing” theory precisely because it holds that judicial review under ambiguous constitutional provisions is justified if and only if it has this democracy-enhancing effect.<sup>8</sup>

Political process theory is not uncontroversial. Rival schools of constitutional interpretation include textualism, originalism, and positivism.<sup>9</sup> Part IV of this Article discusses some of the objections that these theories might make to the political process approach to the Fourth Amendment. For the moment, it is sufficient to say that the ambitions and influence of process theory remain strong. The theory has had an undeniably large impact on the course of modern constitutional law. There is hardly an area of constitutional law that has not been touched. Process theory has been so

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<sup>7</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

<sup>8</sup> See Ely, *supra* note 4, at 102 (arguing that “a representation-reinforcing approach assigns judges a role they are conspicuously well situated to fill,” that is, the role of ensuring a fair process).

<sup>9</sup> See Silas J. Wasserstrom and Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 *Geo. L.J.* 19, 63 (1988) (explaining the various ways of approaching the Fourth Amendment).

successful because it fits soundly with some foundational assumptions of our society: that democratic decisionmaking should be the norm and judicial review the exception; that “activist” judges should not overreach in interpreting potentially broad constitutional provisions; and that people should normally try to redress grievances by convincing their fellow citizens to make a change, instead of resorting to the courts for a plastic interpretation of often-ambiguous constitutional commands.<sup>10</sup> The theory’s influence and continuing resonance with American values mean its consequences must be taken seriously. In essence, all the theory says is that judges should have a democracy-strengthening rationale for using arguably ambiguous constitutional provisions to strike down majoritarian results.

Enter the Fourth Amendment. It provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>11</sup> The Amendment has remained largely invulnerable to political process theory. Commentators have long noted this peculiarity. Akhil Amar said in 1994, “From a legal process perspective, we fail to focus clearly on basic constitutional questions like: Who should decide whether a search or seizure is reasonable? Legislatures? Administrators? Judges? Juries? Some combination?”<sup>12</sup> One explanation, according to Prof. Amar, for the theory’s relative lack of influence in Fourth Amendment

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<sup>10</sup> The notion that judicial review should be as narrow as possible, and that democratic decisionmaking should be given its full scope within constitutional limits, traces back at least to Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). *See also* Klarman, *supra* note 1, at 782 (“A political process theory of judicial review is grounded on a reasonably uncontroversial vision of democracy by which majorities rule through elected representatives”).

<sup>11</sup> U.S. Const. Amend. IV.

<sup>12</sup> Akhil Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 758 (1994).

law is the Amendment's long-standing but ahistorical association with the criminal procedure provisions of the Bill of Rights.<sup>13</sup> A bevy of other commentators have noted that the Fourth Amendment is, like all the other constitutional provisions, amenable to a political process approach.<sup>14</sup> Most recently, Bill Stuntz has criticized the Court's interpretation of the Amendment on political process grounds, arguing that the Court should use the Fourth Amendment to protect against police discrimination but generally defer to legislatures that pass laws impinging on the general privacy of ordinary citizens.<sup>15</sup>

Yet despite the clear analogues in other areas of the Constitution and Bill of Rights, political process theory has left the Fourth Amendment virtually untouched. No tiers of strict scrutiny or rational basis review exist under the Fourth Amendment, as they do under the Equal Protection Clause. The Court essentially applies strict scrutiny in every case. In the area of criminal investigation, the Court presumes that a warrant and probable cause are required, subject to exigent circumstance and other exceptions. In the case of every other search or seizure, the Court applies a balancing test, assessing reasonableness under all the circumstances. But even there the Court does not defer to legislative judgments. Rather, it undertakes its own *de novo* balancing of the search or

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<sup>13</sup> Amar, *supra* note 12, at 758. The Fourth Amendment originally had nothing to do with criminal procedure: it arose out of the disputes with the crown over the searches conducted by customs agents under general warrants and writs of assistance, and contemplated enforcement not through an exclusionary rule but rather through a civil damages remedy.

<sup>14</sup> See, e.g., Wasserstrom and Seidman, *supra* note 9, at 63 ("One theory of the fourth amendment requires the Court to compensate for defects in the political system by replicating the results that would be achieved if all preferences were accurately reflected in the political process."); Kahan and Meares, *supra* note 1, at 1172 ("When a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is worthwhile"); Klarman, *supra* note 1, at 782 (1991) (arguing for a political process approach to the Fourth Amendment); Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum. L. Rev. 1751, 1768 (1994) (observing that strict scrutiny of majoritarian police policies is difficult to justify once the Fourth Amendment is seen to mandate only "reasonable" police behavior).

<sup>15</sup> See William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 834 (2006).

seizure at issue. This one-size-fits-all approach to the Amendment means that the Court frequently invalidates legislative enactments without even hinting that there may be situations where such enactments are entitled to deference.<sup>16</sup>

The Fourth Amendment is ripe for a political process treatment, and the best candidate is the general, suspicionless search or seizure. These practices include random checkpoint traffic stops; random drug tests; administrative inspections of homes and businesses; airport screening procedures; subway searches; and all other searches and seizures of groups of people. To see why courts should apply rational basis review to these practices, it is helpful to first consider a prototypical democracy. Assume that this society is a town-hall style direct democracy. Assume that it is considering whether to authorize a checkpoint traffic stop in the center of town; say, to prevent the flow of illegal drugs through the town center. Assume also that the members have similar utility functions: that is, each person derives the same utility from marginally greater privacy and security. Finally, assume that the proposed practice will affect everyone in the same way; for instance, because it is a checkpoint stop on Main Street that everyone uses once per day.

In this prototypical society, a majority vote will perfectly determine whether the practice is reasonable; that is, whether the benefits exceed the costs. Every person will experience the same intrusion: that occasioned by the stop. Because they have the same

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<sup>16</sup> For cases where the Court has invalidated statutes, without any mention of the potential for deference, *see, e.g.*, *Chandler v. Miller*, 520 U.S. 305 (1997) (invalidating a state statute requiring candidates for high political office to take drug tests); *Payton v. New York*, 445 U.S. 573 (1980) (invalidating a state statute authorizing police officers to enter homes without warrants to make routine felony arrests); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (invalidating Congressional statute authorizing OSHA inspectors to make warrantless searches of businesses); *Berger v. New York*, 388 U.S. 41 (1967) (invalidating state statute that authorized warrantless and suspicionless eavesdropping); and *Brown v. Texas*, 443 U.S. 47 (1979) (invalidating state statute that gave police officer authority to stop individual and request name and address). Some of these cases would, however, come out the same way under the political process approach, due to the presence of some process failure.

utility functions, each person feels this intrusion the same way. Finally, every person can evaluate the benefit to them in terms of less drug trafficking, greater security, and less crime. If a majority approves the search, this means that the benefits exceed the costs; if a majority does not approve it, the benefits do not exceed the costs. It is not necessary for a court to determine reasonableness, or cost-effectiveness, because even if the court could correctly do so, it would be superfluous. The Fourth Amendment would be completely self-enforcing in this society with respect to this practice.

It will be quickly pointed out that actual democracies differ from this prototype in several notable ways. First, any practice at most affects groups, not every person. Not everyone uses that street every day. Even in the affected group, it may affect some more than others: for instance, people who use that road twice a day instead of once.

Second, people do not have identical utility functions: some people value privacy more highly than others. This introduces the possibility of error in the majority vote, because everyone receives only one vote, regardless of the strength of their preferences. For example, in a society of three, where one person experiences a net detriment of three, and the two others each a net benefit of one, the practice will be approved, even though it has a net detriment of one and thus decreases social welfare.

Finally, actual democracies are representative rather than direct democracies, which introduces collective action problems. As public choice theory points out, it is relatively harder to organize people who are diffusely harmed or benefited by a policy. People in such groups have incentives to free ride on the efforts of others. As a result, when costs are diffuse and benefits are intense, inefficient enactment may occur. And

when benefits are diffuse and costs are intense, inefficient failure to enact may occur.<sup>17</sup>

For all three of these reasons, one might argue that legislatures will never perfectly determine the cost-effectiveness of general searches and seizures, and as a result, judicial review is necessary to enforce the reasonableness command of the Fourth Amendment.

The problem with this set of arguments is that it adopts perfection as the relevant point of comparison. The correct baseline is not perfection, however, but the alternative: judicial review of reasonableness. If perfection were the standard, it would imply that courts should superintend *all* social policy under a general reasonableness requirement, because legislatures cannot be trusted to appropriately weigh the costs and benefits. That is of course entirely inconsistent with our fundamental commitment to democracy. As Einer Elhauge has observed, critics of legislatures are often excessively demanding:

The political process may have defects, but critical analysis is misleading if it proceeds on the premise that those defects should be measured by the ‘nirvana’ standard, where any deviation from an unobtainable ideal is grounds for criticism. A more accurate measure of the desirability of any legal process, or for that matter any law, is whether the mix of results it produces is better than the mix of results we could get with alternative processes or laws...This suggests that the true basis for putting one's faith in the democratic process is not a naive belief that it will always produce the best results, but a lack of naiveté about the alternatives.<sup>18</sup>

Or, as Winston Churchill succinctly put it, “Democracy is the worst form of government, except for all those other forms that have been tried from time to time.”<sup>19</sup> One might be skeptical of judges’ ability to determine the reasonableness of search and seizure practices for a number of reasons: primarily their incompetence to effectively balance

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<sup>17</sup> See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 36 (1991).

<sup>18</sup> *Id.* at 109.

<sup>19</sup> Oxford Dictionary of Modern Quotations 55 (Tony Augarde ed., 1991) (quoting Winston Churchill).

social costs and benefits, and the unaccountable and therefore less legitimate nature of their decisions.

The operative question, then, is whether legislatures can be trusted to balance the costs and benefits of general searches and seizures. When we say trust in constitutional law, we mean not that the legislature will get things right one hundred percent of the time. Rather, we mean that the legislature will get enough things right enough of the time to outweigh the disadvantages of turning decisions over to unelected and unaccountable judges who often have little capacity to determine whether a policy is cost-effective, or expedient, or reasonable.

The three Sections in this Part will show that trust is generally warranted in the case of general searches and seizures. First, in other areas of constitutional law, the Court generally trusts the political process to handle issues involving groups of people. The Court has long assumed that groups can protect their interests by political means, and that the clash of groups will ultimately produce the social good. Second, the nature of the Fourth Amendment guarantee means that deference is especially warranted in the general search area. The Amendment guarantees only cost-effectiveness, which legislatures are presumptively capable of handling—and far more competently than judges. A final reason for deferring to legislative judgments is the nature of the groups affected by general searches and seizures. The political process, if anything, exhibits a bias in favor of searched and seized groups, because those groups experience acute and visible costs, and thus have an organizational advantage over the diffuse beneficiaries who experience only invisible gains. When a general search or seizure makes it through the legislative gauntlet, the Court should thus be especially confident that the benefits exceed the costs.

*A. Other areas of constitutional law trust legislatures to handle issues involving groups*

It is impossible to determine scientifically how much is too much when it comes to legislative deviation from the ideal of the social good, and when the costs of judicial review are worth bearing in order to provide a corrective. The problems of concentrated costs, collective action problems, and different preferences exist, yet at the same time constitutional law gives the democratic process an extraordinarily wide sway, consistent with our commitment to representative democracy. Analysis of the Fourth Amendment problem should thus begin with other constitutional provisions that have been far more influenced by process theory. These provisions show the extent to which the Court has been willing to tolerate the problems inherent to representative democracy.

A review of other constitutional provisions shows immediately that the Court trusts the political process to handle issues involving groups. The Equal Protection Clause, for example, could be read to give courts a license to review the expedience of any legislative enactment that burdens one group of people unequally. The Supreme Court has not adopted that interpretation. The Court applies rational basis review so long as the law does not unequally burden a suspect class.<sup>20</sup> This means that the vast majority of laws affecting groups receive deferential review under the clause. Only statutes that classify by race, alienage, or national origin are subject to strict scrutiny because “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.”<sup>21</sup> But it is not easy for groups to obtain a right to strict scrutiny. The poor, for example, are not a suspect class because they are “not saddled with such disabilities, or subjected to such a

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<sup>20</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>21</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>22</sup> As a result, “[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.”<sup>23</sup>

The Court’s interpretation of the Equal Protection Clause thus demonstrates a fundamental trust in the power of groups to protect their interests in the political process. While groups may not get exactly the equality they deserve and are arguably entitled to in a perfect world under the Clause, the Court recognizes that because of groups’ substantial power, issues involving them are best left to the political process.

The Court has exhibited this same faith in the power of groups in its interpretation of the Due Process Clause. The Clause could be read to give courts the authority to review the reasonableness of any legislative enactment at the behest of an affected group, due to the problems with the democratic process adverted to above. But courts normally do not strictly review the substantive wisdom or expedience of laws affecting economic or social welfare. The Court strictly scrutinizes deprivations only of “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”<sup>24</sup> The rest are, despite the flaws in the political process adverted to above, trusted to legislative resolution. As Justice Rehnquist recognized in *Washington v. Glucksberg*,

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care

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<sup>22</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>23</sup> *Cleburne Living Ctr.*, *supra* note 21, at 440.

<sup>24</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.<sup>25</sup>

The Court's due process jurisprudence thus indicates a fundamental faith in the likelihood that clashing groups will eventually lead to the social good. Most deprivations receive only rational basis review because the Court trusts legislatures to balance the needs of individuals against the needs of society. Where fundamental rights are not implicated, "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."<sup>26</sup> In general, "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts."<sup>27</sup>

The same trust in groups is evident in the area of procedural due process. The Due Process Clause could theoretically be read to require a hearing any time the state deprives property, or any time the state deprives a significant amount of property. The Court has not taken this route. Instead, it has held that a hearing is required only when a deprivation affects individuals, and not when it affects a large group, as established by the complementary cases of *Londoner v. Denver* and *Bi-Metallic Investment Company v. State Board of Equalization*.<sup>28</sup> The Court recognized in *Bi-Metallic* that groups can protect themselves in the political process, and thus do not need courts to protect them by granting them hearing rights:

The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state

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<sup>25</sup> *Id.* at 720. Justice O'Connor also concurred in *Glucksberg* on group-based political process grounds: "Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure." *Id.* at 737.

<sup>26</sup> *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955).

<sup>27</sup> *Id.* at 488 (quoting *Munn v. Illinois*, 94 U.S. 113 (1877)).

<sup>28</sup> *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441 (1915).

power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.<sup>29</sup>

Procedural due process doctrine thus also expresses a fundamental faith in the democratic process. Most notably, it exhibits confidence in the power of groups to protect their interests.

Finally, regulatory takings doctrine also evidences trust in the power of groups. Whether a regulation constitutes a taking is necessarily a fact-sensitive inquiry: “if regulation goes too far it will be recognized as a taking.”<sup>30</sup> The definition of a taking could theoretically have a very broad sweep. But the Court has restricted its definition by trusting the power of groups. The broader the sweep of the regulation, the easier it is for the affected people to protect themselves in the political process, and the more likely the deprivation will not be classified as a taking. Zoning regulations are presumptively valid, as are other comprehensive land use plans.<sup>31</sup> The purpose of judicial review of takings, according to the Court, is essentially to protect individuals from a specific process flaw: to make majorities internalize the cost of taking property from politically powerless individuals. But when such burdens affect groups rather than individuals, the Court “indulge[s] our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.”<sup>32</sup> Just like the more explicit formulations in the equal protection and due process contexts, takings doctrine exhibits a presumption that groups normally

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<sup>29</sup> *Bi-Metallic*, *supra* note 28, at 445.

<sup>30</sup> *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>31</sup> *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978) (holding that New York City’s historic landmark regulation did not constitute a taking).

<sup>32</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

can take care of themselves in the political process, and a corresponding restriction of courts to situations where the political process is likely to go awry.

Like laws that treat groups unequally, deprive groups of property, deprive groups of property without a hearing, or take property without compensation, laws that authorize general searches and seizures impact the interests of groups, not individuals. In those other areas, the Court has implicitly determined that so long as there is *significant* spreading of costs, even if there is not *perfect* spreading, judicial review would cause more harm than good.<sup>33</sup> The potential pitfalls of democratic governance do not justify judicial review. Groups can organize to protect their interests, can pressure representatives, and can generally make themselves heard quite effectively.

The treatment of groups in other areas of constitutional law implies that, so long as searched or seized groups are not discrete and insular, and no other process failure is present, they should be able to protect themselves from an unreasonable amount of searching and seizing in the political process.<sup>34</sup> Dissenters should press their claims in the legislature rather than in the courts. While general searches and seizures authorized by a legislature might not be absolutely justified on a cost-benefit rationale, the treatment of groups in other areas of constitutional law shows that the Court believes that courts can do no better.

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<sup>33</sup> See Kahan and Meares, *supra* note 1, at 1172 (noting that when a community can be said to internalize the relevant cost, courts generally do not apply heightened scrutiny, with reference to the Privileges and Immunities Clause, dormant Commerce Clause, and Free Exercise Clause).

<sup>34</sup> See Klarman, *supra* note 1, at 767 (“[I]f the majority of the community chooses to sacrifice some personal privacy in exchange for greater law enforcement efficacy, and does so in a manner evenly spreading costs throughout the community (as opposed to concentrating them upon a politically impotent minority group), political process theory can have no objection.”); Wasserstrom and Seidman, *supra* note 9, at 96 (“If motorists and airline passengers think that the intrusiveness and inconvenience of these searches outweigh [sic] the benefits to law enforcement, there is no reason to doubt that their political representatives will respond to the complaints of their constituents”).

Deference to general searches authorized by a legislature is, if anything, *more* appropriate than the similar deference in other areas. First, the personal interests involved in these searches and seizures are often less compelling than those involved in cases where the Court already applies rational basis review. A drug test or the intrusion occasioned by being stopped on the road for a few minutes is certainly no more momentous than the values involved in the equal protection, due process, and takings cases. These cases have involved much more than a brief intrusion on privacy: they have involved, for example, the right to equal funding of school districts (*Rodriguez*), and the right to make decisions about when and how to end a terminally ill life (*Glucksberg*).<sup>35</sup> This is not to denigrate Fourth Amendment values. It is merely to point out that the Court feels confident leaving disputed questions of constitutional value to the political process in contexts that involve interests that are just as or more compelling than the privacy interests involved in general searches and seizures. That is because the Court has overwhelming confidence in *democratic* values and the virtues of self-government. Where groups are affected and process flaws are absent, very important, disputed questions of value can safely be left to the political process.

The nature of the Fourth Amendment guarantee also means that the case for a political process approach to general searches and seizures is all the more compelling there. The Fourth Amendment requires only that searches and seizures be reasonable. Reasonableness must, in some sense, mean only cost-effectiveness.<sup>36</sup> The Court has long

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<sup>35</sup> Justice Stevens made this point in dissent in *Lucas*, where he pointed out that a neutral law of general applicability should receive deference in the takings context because if such a law may severely burden the practice of religion, “a comparable burden on property owners should not be considered unreasonably onerous.” *Lucas*, *supra* note 32, at 1072 n.7.

<sup>36</sup> The concept is of course familiar from negligence law, *see* *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947) (Hand, J.).

recognized that Fourth Amendment reasonableness requires only a balancing of social costs and benefits. As the Court said in *T.L.O.*,

The determination of the standard of reasonableness governing any specific class of searches requires balancing the need to search against the invasion which the search entails. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.<sup>37</sup>

This need not be a restrictive balancing that considers only economically quantifiable factors. But it is a balancing nonetheless. The Fourth Amendment inquiry is inevitably a balance between liberty and privacy on the one hand, and the government's interest in searching or seizing on the other.<sup>38</sup>

And once the Fourth Amendment is seen as a guarantee of cost-effectiveness, then in the absence of process failures discussed below, the legislature should be especially capable of striking an acceptable balance between security and liberty or privacy. The Fourth Amendment is in essence a requirement of social welfare maximization.<sup>39</sup> And maximizing social welfare is precisely what we trust legislatures to do. The reason we choose democracy as our form of government is because we have implicitly decided that it will ordinarily lead to the greatest good for the greatest number. Just as we trust legislatures to weigh the costs and benefits of tax policy or pensions policy, we should trust legislatures to weigh the costs and benefits of general searches

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<sup>37</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). *See also* *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (“the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests”); *United States v. Martinez-Fuerte*, 428 U.S. 523, 555 (1976) (“In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual”).

<sup>38</sup> *See* *Whren v. United States*, 517 U.S. 806, 817 (1996) (“It is of course true that in principle every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors”) (emphasis added).

<sup>39</sup> *See* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 *Sup. Ct. Rev.* 49, 64 (“A reasonable search is a cost-effective search”).

and seizures. The Fourth Amendment is not a font of timeless principles stretching back to Magna Carta—as the Due Process Clause is—and which courts therefore have a special duty to enforce. In the absence of process failures, general searches and seizures seem a much *more* likely candidate for deference than similar laws in the due process or equal protection contexts, where the constitutional guarantees embody deontological concepts of fairness and morality. Because courts normally defer to legislatures that deprive groups of property or liberty, then *a fortiori* they should defer to legislatures that deprive privacy under similar conditions.

*B. Legislatures have a comparative advantage in determining the reasonableness of general searches and seizures*

Other areas of constitutional law demonstrate a basic trust of the power of groups in contexts far more sensitive than the cost-effectiveness guarantee of the Fourth Amendment. The essence of what it means to live in a democracy, rather than in a society ruled by elite judges, is that the legislature should get to determine the social good.<sup>40</sup> That presumption of democratic decisionmaking should be trusted all the more with group searches and seizures, because the Amendment requires nothing more than cost-effectiveness, which is what we trust legislatures to determine on a daily basis.

It is helpful, however, to give content to this intuition. Even though legislatures might not perfectly determine reasonableness—for the uneven preference, collective action, and concentrated costs problems discussed above—those costs are present in *all*

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<sup>40</sup> This is the fallacy of public choice theory, which sees more intrusive judicial review as a cure-all for democracy, without recognizing that rule by courts has problems of its own. See Elhauge, *supra* note 17, at 67 (noting that “[i]nterest group theory can justify more intrusive judicial review only if it shows that the litigation process has some *comparative advantage* over the political process,” and that the litigation process often has the same free rider and collective action problems as the political process). This is discussed more fully below.

the forms of decisionmaking where the court already defers: for example, in the area of social and economic legislation under the Due Process and Equal Protection Clauses. And where the constitutional guarantee is cost-effectiveness, as under the Fourth Amendment, the comparative competence of legislatures in weighing costs and benefits provides an additional reason for deferential review. There are at least five reasons why legislatures should be better than courts at determining the reasonableness of a given general search or seizure practice: and accordingly, why the costs of judicial review in terms of error and reduced legitimacy are likely to be especially high.

First, legislatures are better at rationally weighing the costs and benefits of a practice. The Court is well aware of this in the equal protection and due process contexts. In *Glucksberg* the Court recognized that one purpose of deferential review is to allow legislatures to conduct cost-benefit balancing: “by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.”<sup>41</sup> In *Rodriguez* the Court noted that “the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”<sup>42</sup>

The problem of balancing costs and benefits is equally complex in the area of general searches and seizures. Judges simply have no rational way to determine the cost-effectiveness of a particular police practice. The judge’s traditional tools of logic and

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<sup>41</sup> *Glucksberg*, *supra* note 22, at 722.

<sup>42</sup> *Rodriguez*, *supra* note 24, at 43.

history do not yield unambiguous answers. Judges can identify the interests involved, but have no way of deciding what weight those interests should receive and whether one interest outweighs the other.

By contrast, legislatures have a developed ability to register competing preferences. The legislators represent the relative weight of the interests involved: the members are in direct contact with the people affected by the action, they have an interest in being a more or less accurate proxy for those interests, and legislatures can adopt compromise solutions that give appropriate weight to all the interests involved. Legislators would normally be unwise to authorize invasions of privacy unless the public benefits are likely to justify the costs. Even with the uneven preference, concentrated costs, and collective action problems noted above, legislatures are much more likely than courts to register a judgment that reasonably reflects the preferences of the population.

The Court recognizes its inability to balance costs and benefits in the checkpoint traffic stop context. In *Sitz*, Chief Justice Rehnquist said,

[The Fourth Amendment] 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 political 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 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.<sup>43</sup>

In other contexts, however, such as drug testing by public officials, the Court inexplicably attempts to conduct its own cost-benefit analysis. The result in one of the Court's drug testing cases, *Board of Education v. Earls*, shows how the Court simply has no principled way to make the complex balancing decisions that underlie the

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<sup>43</sup> Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990).

reasonableness of a particular practice.<sup>44</sup> Both the majority and dissent agreed on the interests involved: the students' privacy and the government's desire to root out drug abuse. But their "analysis" of the balance amounted to a restatement of these factors in a more or less emphatic way. The majority rejected the suggestion that participants in extracurricular activities have a greater privacy interest than participants in athletic activities (where the Court has permitted drug testing);<sup>45</sup> credited anecdotal evidence of drug activity at the school;<sup>46</sup> and found that prevention of a drug problem was a sufficiently strong interest, even in the absence of concrete evidence of a problem.<sup>47</sup> The dissent thought that participants in extracurricular activities did have a greater privacy expectation;<sup>48</sup> believed there was no immediate danger of a drug problem;<sup>49</sup> and believed that even if there was a drug problem, it was not sufficiently big to justify a drug testing program.<sup>50</sup> Both positions boiled down to a thumbs up or thumbs down on the program, with each judge voting his or her personal preference. There was simply no rational link between the actual interests involved in the case and the decision that the Court handed down.

A majority vote in the legislature would be superior even if it were not representative: the legislature is far more numerous and thus a better sample of the expectations of "the people" protected by the Amendment than a nine (or three!) member appellate court ever could be. Legislative balancing is all the *more* reasonable because the fortunes of legislators are directly tied to their constituents' preferences. A majority vote

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<sup>44</sup> Bd. of Education of Independent School Dist. No. 92 v. Earls, 536 U.S. 822 (2002).

<sup>45</sup> *Id.* at 831.

<sup>46</sup> *Id.* at 835.

<sup>47</sup> *Id.* at 835.

<sup>48</sup> *Id.* at 847.

<sup>49</sup> *Id.* at 849.

<sup>50</sup> *Id.* at 850.

of legislators thus bears some rational relationship to the actual costs and benefits, unlike a vote of the justices.<sup>51</sup>

The second reason why legislatures are better at determining reasonableness is that they have better access to the relevant facts. The typical plaintiff willing to challenge a general search or seizure in court is likely to have an idiosyncratically large privacy interest. And it may be difficult for the government to communicate to a court the diffuse benefits of a particular practice. A court is likely to view the reasonableness question in any such case as close, even if in reality it is not. Nor can the judges generate facts on their own. The justices periodically bemoan the Court's inability to collect the data they need to make important decisions about police policy.<sup>52</sup> What all this means is that the justices often have to make search and seizure policy on the basis of biased facts and their own personal knowledge and experience. Their own experience is also likely to be highly unrepresentative and (perhaps unintentionally) biased.<sup>53</sup>

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<sup>51</sup> Chief Justice Rehnquist recognized as much in *Sitz*, which upheld a system of drunk driving checkpoints: “[The requirement that courts inquire into the effectiveness of checkpoint stops] 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 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.” *Sitz*, *supra* note 43, at 453. Given this commitment to politically accountable decisionmaking, it is puzzling why the Court in other contexts, such as drug testing, continues to engage in *de novo* evaluation of reasonableness.

<sup>52</sup> *See Hudson v. Palmer*, 468 U.S. 517, 549 (1984) (Stevens, J., dissenting) (complaining that the Court's “perception of what society is prepared to recognize as reasonable is not based on any empirical data; rather it merely reflects the perception of the four Justices who have joined the opinion that the Chief Justice has authored.”); *Georgia v. Randolph*, 126 S. Ct. 1515, 1532 (2006) (Roberts, C.J., dissenting) (“[T]he majority has no support for its basic assumption—that an invited guest encountering two disagreeing co-occupants would flee—beyond a hunch about how people would typically act in an atypical situation.”). *See also* Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 *Wis. L. Rev.* 657, 667 (observing that “the courts have built up a large body of law regulating professional police officers without seeking information about what those officers actually do in the field”).

<sup>53</sup> *See* Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 *Geo. Wash. L. Rev.* 359, 363 (1994) (“All permanent government officials—even Article III judges—may at times pursue self-interested policies that fail to reflect the views and protect the liberties of ordinary Americans”).

Legislatures, whatever their flaws, are much better at collecting the information necessary to determine what interests are at stake and how much weight they should receive. A rational legislator is in constant contact with his or her constituents. Moreover, the legislator represents ordinary, average people, not the lone dissenter. Legislators can seek out facts instead of relying simply on those that interested parties put before them. The self-interested amici in the appeals court become the called witnesses in the legislative hearing. Legislatures can also impose programmatic or compromise solutions, thus giving the witnesses a much greater incentive to tell the truth about what is really going on in the world, instead of selecting facts to help one side or the other in a one-shot lawsuit. Finally, legislatures can harness expertise by delegating to expert administrative agencies.

The Court's relative incompetence in finding legislative facts is an important reason why it should apply deference to a statute authorizing a general search or seizure.<sup>54</sup> The Court is unlikely to be able to collect better information than the legislature about the interests involved, and might end up emphasizing some interests over others on the basis of the unrepresentative parties before it.<sup>55</sup>

The third reason why it is preferable to have legislatures balance costs and benefits is legitimacy. It is more *legitimate* for a legislature to balance costs and benefits

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<sup>54</sup> See also Ely, *supra* note 4, at 53 (“Broad questions of public policy are likely to involve what are called, uncoincidentally, ‘legislative facts,’ or broad factual generalizations, as opposed to specific ‘adjudicative facts.’ The conventional wisdom here, that courts are markedly worse than legislatures at determining legislative facts, surely can stand significant qualification—but at the same time there isn’t any reason to suppose they are better at it”).

<sup>55</sup> As Judge McGowan once noted, “There are obvious advantages in the legislative approach over the judicial. Decisional rule-making can occur only in the sporadic context of individual cases. The Code approach permits the whole area to be surveyed at once, with the result that the provisions made for various parts of the process can be related to, and made consistent with, each other. And, before the Code becomes law in any state, it will have to run the gamut of public legislative hearings in which all interested and informed persons can be heard, as contrasted with the immediate parties to a criminal prosecution.” Carl McGowan, Rule-making and the Police, 70 Mich. L. Rev. 658, 672 (1972).

than to leave it to an unelected judge. Ordinary people can feel involved in the process of formulating the rules that apply to them. They can vote for their representatives, influence their representatives, and even become their representatives. Majority rule is generally seen as the fairest way to decide disputed questions of social policy.<sup>56</sup> The possibility of democratic governance leads to debate and deliberation, which also has an information-generating effect.

Leaving general searches and seizures to the political process would allow a debate about the merits of the various policies to replace the dry legalese of the Court's special needs opinions. The opportunities for participation and dialogue are especially strong in the general search context because the issues are ones everyone understands. Citizens do not need the acumen of a tax policy expert or a pensions expert to participate in the debate about appropriate searches and seizures. And because we trust legislatures to handle pensions and tax policy, we should also trust them to regulate these practices.

Fourth, legislatures can accommodate local variation in reasonableness. As the Court has observed in the equal protection context, "Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny."<sup>57</sup> Allowing the Supreme Court to have the final say over the reasonableness of every general search or seizure imposes a hard and fast national baseline for general searches that may be considerably more protective than is reasonable, given the varying privacy preferences of the different states. This results in a

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<sup>56</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1388 (2006) ("Better than any other rule, [majority decision] is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions").

<sup>57</sup> Rodriguez, *supra* note 22, at 44.

suboptimal mix of police practices in particular jurisdictions. The lower federal courts cannot be relied upon to accommodate these regional variations because any disparity in their rulings appears as a “circuit split” that is subject to eventual correction by the Supreme Court. As Judge Easterbrook once noted,

One glory of a federal society is that the people may choose for themselves not only laws but also law-enforcement methods. State A may employ extra police to follow a high-probability-of-detection and low-sentence approach; State B may choose fewer police, fewer intrusions on privacy, but higher sentences for those who are caught. Each may be reasonable...If [a practice] strikes the wrong balance, the people may throw out of office those who adopted it.<sup>58</sup>

Deferring to legislatures thus has this additional federalism-related benefit. Where there is a perceived interest in a national baseline, Congress would undoubtedly be able to provide such protection.<sup>59</sup> Otherwise, the possibility of experimentation and accommodation to local variation must be counted as yet another reason why legislatures are better than courts at determining reasonableness.<sup>60</sup>

Fifth and finally, legislatures can adapt to changed circumstances. When courts determine reasonableness, the doctrine of *stare decisis* is a strong barrier to change. This leads to an exceedingly rigid set of constitutionalized rules.<sup>61</sup> Many of the crucial decisions that still govern Fourth Amendment law were handed down almost forty years ago.<sup>62</sup> Even in the 1970s, a federal judge could remark, “[T]here has not been the

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<sup>58</sup> *Edmond v. Goldsmith*, 183 F.3d 659, 671 (1999).

<sup>59</sup> At the very least, Congress would have the authority to promulgate such standards for state police behavior through its power under section 5 of the Fourteenth Amendment, as the Fourth Amendment has been incorporated into the Due Process Clause of the Fourteenth Amendment. So long as Congress made appropriate findings, it would have such authority under even the Court’s recent restrictions on the section 5 power, because it would be prescribing rules for state officials rather than regulating state citizens directly. *See United States v. Morrison*, 529 U.S. 598, 619 (2000).

<sup>60</sup> *See also Stuntz*, *Political Constitution*, *supra* note 15, at 832 (suggesting that state legislatures should have the opportunity to experiment with different policing regimes).

<sup>61</sup> *See McGowan*, *supra* note 55, at 677.

<sup>62</sup> *See Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967).

continuous re-examination of established methods, the periodic probing to see if the desired objective can be achieved through new exercises of ingenuity and imagination without sacrifice of other social ends.”<sup>63</sup> Thirty years after that was written, we live in an Internet age with Fourth Amendment law developed for a wiretapping age. A court has to apply *stare decisis* to preserve its own legitimacy: when rules are described as constitutional, they come to be seen as mandated by the Constitution, rather than simply variable instantiations of a flexible reasonableness guarantee. Legislatures are not so restricted, and their ability to adapt to changed circumstances is yet another reason why they are better than courts at determining reasonableness. The timeless principle that courts should apply—the one protected by *stare decisis*—should be rational basis of general searches and seizures, unless one of the process failures discussed below is present.

Responding to changed circumstances is especially important in an age of terror. Who knows what the future holds in terms of mass terror within the United States? Is the Court really willing to dictate what is reasonable for all time? If mass terror strikes, it might be disastrous to apply old precedents to determine what constitutes a reasonable general search or seizure.<sup>64</sup> And lest this conjure up images of *Korematsu*: the courts can be trusted to prevent violations of civil liberties, including practices that discriminate against minorities or political dissidents, practices that vest excessive executive discretion, and practices that have no rational basis (see Part II, below).

In the end, this enumeration of the advantages of legislatures has merely confirmed what our basic faith in the ability of democracies to protect groups already told

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<sup>63</sup> McGowan, *supra* note 55, at 681.

<sup>64</sup> See Earls, *supra* note 44 (essentially reasoning by analogy from *Vernonia* to determine whether a drug test in a different context was reasonable).

us was true. In other areas of constitutional law, groups do not normally have their grievances redressed by courts. Those doctrines implicitly recognize that the collective action, uneven preference, and concentrated costs problems are not sufficiently acute to justify incurring the costs of judicial review: the loss in democratic legitimacy and the specter of unaccountable judges determining social policy. This Section has shown that allowing courts to second-guess legislatures is even less justified in the Fourth Amendment area. The Amendment guarantees only cost-effectiveness, a task that is normally entrusted to legislatures on a daily basis. And with good reason: legislatures can balance, collect facts, are more legitimate, and can accommodate regional and temporal variation. Conversely, when courts try to assess reasonableness, they are very likely to get it wrong. Given that the Court acknowledges in other areas of doctrine that groups can protect themselves, these competence-based advantages of legislatures make deference in the Fourth Amendment area even more appropriate. In the end, allowing courts to second-guess legislative authorization of general searches and seizures is, in the absence of a process flaw, simply inconsistent with democratic values.

*C. The political process is, if anything, likely to err in the direction of too few cost-effective general searches and seizures*

The previous two sections showed that there are good reasons to believe that any systematic error occasioned by the uneven preference, concentrated costs, and collective action problems are far outweighed by the advantages of deferring to legislatures authorizing general searches and seizures. In other areas of constitutional law, the Court has assumed that judicial review is not worth the trouble where groups are involved: the costs are sufficiently spread out that groups can be expected to protect their interests in

the political process. The case for deference is even more compelling in the Fourth Amendment arena because the deprivations are less serious and the guarantee only mandates cost-effectiveness. Further, legislatures are generally trusted to determine cost-effectiveness in our democracy, precisely because they are good at it. They can balance costs and benefits, find facts, accommodate variation, and are trusted to resolve the competing concerns in a fair and equitable manner. Politics does not get things perfect, but where groups are involved, it is the best option we have.

The final reason why strict judicial review of general searches and seizures is unnecessary is that the political process should exhibit a bias in favor of *too little* searching and seizing of groups. The typical searched or seized group is medium-sized: the students subject to a drug test, or the people who ride the subway, or the people who drive cars on a particular highway. Public choice theory predicts that medium-sized groups like these should be the political actors best positioned to achieve their aims. They have numerous members, so they have the economies of scale that individuals lack. Yet the group is not so large that collective action and free rider problems are particularly acute.<sup>65</sup>

If anything, then, the concern about leaving group searches and seizures to the political process would be that *not enough* searches and seizures get approved by the legislature. The benefits redound to the population as a whole and are largely invisible, while the costs are highly visible and concentrated on medium-sized groups that are particularly effective at achieving political gains. From the perspective of public choice

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<sup>65</sup> See Elhauge, *supra* note 17, at 39.

theory, groups who are searched or seized are disproportionately powerful.<sup>66</sup> They can protect themselves, and by no means need the courts.

What empirical evidence exists on privacy protection through the political process shows that people who prefer more privacy are perfectly capable of organizing on behalf of their interests. The State of Florida, for example, has repeatedly refused to authorize cameras that photograph people who run red lights. Even though this is an extremely minor intrusion, a local paper reported that, “Critics say...the notion of government photographing drivers smacks too much of Big Brother in George Orwell’s 1984.”<sup>67</sup> Congress alone has provided significant protection for privacy interests in the knock and announce statute;<sup>68</sup> the Wiretap Act;<sup>69</sup> the PATRIOT Act;<sup>70</sup> the Privacy Protection Act of 1980;<sup>71</sup> and the pen register statute.<sup>72</sup> All provide more privacy protection than is constitutionally required.

Calls for privacy protection are also unusually likely to receive bipartisan support. The Wisconsin Assembly recently passed a bill with bi-partisan support that would make it illegal for government to require people to have an identification microchip implanted under their skin.<sup>73</sup> Tellingly, the only exceptions to the bill are for people who cannot vote, and therefore receive no representation in the legislative process: registered sex

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<sup>66</sup> In addition, businesses on highways where a traffic stop slows traffic or businesses in airports where intrusive searches are contemplated have a direct interest in advocating on behalf of their customers. *See* *United States v. Hartwell*, 436 F.3d 174, 180 (2006) (Alito, J.) (“And the airlines themselves have a strong interest in protecting passengers from unnecessary annoyance and harassment.”).

<sup>67</sup> Carlos Moncada, *Cities Seeking Loopholes to Use Red-Light Cameras*, Tampa Tribune, August 11, 2006, at 6.

<sup>68</sup> 18 U.S.C. § 3109.

<sup>69</sup> 18 U.S.C. §§ 2510-2520.

<sup>70</sup> USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>71</sup> 42 U.S.C. § 200a (providing more protection than the Supreme Court did in interpreting the Fourth Amendment in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)).

<sup>72</sup> 18 U.S.C. § 3121 (requiring more protection from pen registers than the Supreme Court required under the Fourth Amendment in *Smith v. Maryland*, 442 U.S. 735 (1979)).

<sup>73</sup> Tom Sheehan, *Schneider’s Odd Don’t-Chip-Me Bill Manages to Pass Assembly*, Wisconsin State Journal, March 19, 2006, at D9.

offenders and children at the direction of their parents.<sup>74</sup> Republicans and Democrats in the House are currently planning to introduce legislation that would require automakers to disclose the existence of black boxes in cars that record driving information for police and insurance companies, and to tell consumers how to disable them. Representative Capuano was reported as saying, “What’s next, a GPS in my suit jacket?”<sup>75</sup> Finally, the ambient fear of terrorism has not abated privacy concerns in the least. In 2003, a bipartisan group in Congress joined to prevent the Pentagon from data-mining health, financial, and travel information from American citizens.<sup>76</sup> Senator Leahy observed, “If there is one thing that should unite everybody, from the very conservative member to the very liberal member, it is a concern that our own government should not spy on law-abiding citizens.”<sup>77</sup>

The likelihood of voter engagement on privacy issues is particularly driven home by the vigorous recent debate in Congress and in the public sphere over the PATRIOT Act and the Foreign Intelligence Surveillance Act (FISA). Most commentators focus on the supposed abridgements of civil liberties contained in these acts or their proposed uses or revisions. But the remarkable feature of these laws is that there is any support at all for the *protection* these laws afford. They go far beyond what the Court has required under the Fourth Amendment, and they have a very real cost to law enforcement interests. Further, this cost can be especially dire because these agencies are investigating terrorists who want to do nothing less than destroy the United States. Finally, the likelihood of ordinary citizens ever bearing any costs from the behavior prohibited by the statutes is

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<sup>74</sup> *Id.*

<sup>75</sup> Rebecca Carr, Black Boxes in Autos Raises Privacy Concerns, Cox News Service, June 7, 2006.

<sup>76</sup> Adam Clymer, Congress Agrees to Bar Pentagon From Terror Watch of Americans, New York Times, February 12, 2003, at A1.

<sup>77</sup> *Id.*

remote: most ordinary people will *never* encounter a sneak and peek warrant under the PATRIOT Act, or be subject to a national security wiretap under FISA.

If ordinary people really were not engaged in debates about the proper balance between privacy and law enforcement, these statutes simply would not exist. They protect virtually nothing of value to the ordinary person, and at a potentially steep cost. But not only do they exist: there is significant public support for strictly interpreting FISA and for restricting the scope of permissible activities under the PATRIOT Act.<sup>78</sup> Some polls have almost 50% of Americans opposing some actions taken under one or the other act.<sup>79</sup>

The police practices implicated by FISA and the PATRIOT Act affect very few ordinary citizens but give rise to heated political debate and legislative compromise. A *fortiori*, there should be even more vigorous participation in debates over general searches and seizures, which are both more local and more likely to affect ordinary citizens.<sup>80</sup> The Supreme Court in *Cleburne Living Center* used similar reasoning to find that the mentally retarded are not entitled to suspect class status under the Equal Protection Clause. The Court observed that legislatures often provide protection for the mentally handicapped. This legislation, “which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”<sup>81</sup> Similar to advocates for the retarded, privacy advocates have been perfectly capable of organizing and representing their interests. As a result, they do not

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<sup>78</sup> See, e.g., Republican Speaks Up, Leading Others to Challenge Wiretaps, New York Times, February 11, 2006, at A1; Once-Lone Foe of PATRIOT Act Has Company, New York Times, December 19, 2005, at A1.

<sup>79</sup> See, e.g., Poll Finds U.S. Split Over Eavesdropping, Cnn.com, January 11, 2006 (reporting that 46% of Americans oppose the President’s warrantless domestic eavesdropping program).

<sup>80</sup> See also Stuntz, Political Constitution, *supra* note 15, at 795 (noting that there are large constituencies for many Fourth Amendment rules, for instance traffic stops, where 23 million people are stopped per year).

<sup>81</sup> *Cleburne Living Ctr.*, *supra* note 21, at 445.

need protection from the political process, and legislatures should be allowed to reach a final resolution on general searches and seizures without strict scrutiny under the Fourth Amendment—at least in the absence of the potential process failures discussed below.

This Part has shown that strict scrutiny of general searches and seizures is inconsistent both with other areas of constitutional law and with the fundamental trust we place in legislatures to determine reasonableness or the social good. The subjects of general searches and seizures can be expected to protect their interests in the political process. Their interests will receive a full airing. Then the legislature can weigh the costs and benefits, and approve the practice only if the benefits exceed the costs.

The legislature may not achieve a perfect balance, for all the reasons discussed above. But our instinctive confidence in democracy and self-government tell us that the long-term legislative balance will be better than any other that could be achieved, or any that a court might impose. The Court's other constitutional doctrine implies it: the Court defers to legislative decisionmaking affecting groups in situations implicating far more absolute values than the cost-effectiveness guarantee of the Fourth Amendment. The competence of legislatures in balancing, finding facts, and adapting to changed circumstances confirms our trust. And the collective action problems that result in a systematic bias in favor of privacy advocates seal the deal. Intrusive judicial review promises only to empower idiosyncratic dissenters through conducting reasonableness review of general searches and seizures. Our trust in the power of groups should convince us that it is normally not necessary for a court to intervene.

## *II. A role for courts: policing general searches and seizures for process failures*

It is far from the case, however, that all general searches and seizures should be constitutional. Rather, they should be constitutional unless courts have a good, democracy-enhancing reason for subjecting them to intrusive review. Instead of reviewing all general searches and seizures de novo, courts would take steps to ensure that legislatures make as many of the important decisions as possible, and pick up the slack where the legislature fails to make a decision or makes a decision in a way that does not allow everyone to be heard. Judicial review of these practices under the Fourth Amendment would thus simply resemble what the courts already do under the equal protection, due process, and takings clauses. Judges would strictly scrutinize (that is, reweigh costs and benefits) only when they can identify one of these flaws that prevented some group from being heard or represented in the political process. This Part does not pretend to enumerate all the possible process failures, but merely intends to show that the scope of intrusive judicial review should be tailored to particular problems, and narrower than it currently is.

### *A. No legislative authorization*

First, a court should apply strict scrutiny if neither a state legislature nor Congress has explicitly endorsed the practice. Requiring legislative approval ensures that the relevant interests in liberty, privacy, and security have been weighed in an open, deliberative, and representative process. It ensures that the affected groups have had an opportunity to voice their concerns, organize, and achieve representation. When executive or administrative officials embark upon an independent program of general searches, courts cannot be sure that there has been representation, deliberation, or

balancing. The independent decisions of such agents thus should not necessarily be entitled to deference under the Fourth Amendment.

The decisions of local representative bodies such as school boards or city councils also might not receive the same degree of deference as legislatures. Local bodies can generate externalities. A city council, for example, represents only city residents. It thus might approve checkpoint stops that inefficiently impose externalities on drivers in the county, who also use city streets, but who may have different privacy preferences and no voice in city politics. Legislatures internalize the relevant costs of general searches and seizures. The legislature encompasses both city drivers and county drivers. Legislatures in general encompass entire communities, and are accordingly more likely to represent all of the relevant interests.

But local representative bodies do have an advantage over legislatures: it is more difficult for groups that bear costs to block cost-effective general searches and seizures. In a smaller population and at a local level, the benefits are relatively more concentrated and visible (more drug free schools, less narcotics trafficking, etc.). It is thus more likely that the beneficiaries can stand firm against the organized interests of people who might be adversely affected by the search. This is undoubtedly why the vast majority of general searches that have come to the courts have been authorized not by a legislature but by a local representative body.<sup>82</sup> Indeed, the Court has already *relied* on approval by local bodies in upholding general searches and seizures. In *Vernonia School District 47J v. Acton*, the Court approved a program of random, suspicionless drug tests of athletes in part because “[t]he record shows no objection to this districtwide program by any parents

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<sup>82</sup> See, e.g., *Earls*, *supra* note 44; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents’ views.”<sup>83</sup> Because of this school board approval, the Court found “insufficient basis to contradict the judgment of Vernonia’s parents [and] its school board...as to what was reasonably in the interest of these children under the circumstances.”<sup>84</sup>

It is important to note, however, that because of the two competing effects, it is unclear whether local representative bodies should receive deference. The possibility of externalities is higher, but they are also better positioned to weigh the relevant costs and benefits in a fair and deliberative manner.<sup>85</sup> The Court would ultimately have to decide this question. But it is quite clear that if the Court has been willing to defer to a certain extent to local bodies, then *a fortiori* it should be willing to defer to legislatures.

Legislatures do not have the externality problem. And if anything, they will approve too few general searches and seizures, because of the affected groups’ enhanced ability to mobilize against a diffuse group of beneficiaries who experience only intangible benefits.

Regardless of which bodies should ultimately receive deference, the authorization requirement ensures that the affected groups have received representation in an open and deliberative forum. Lack of legislative authorization was the real problem in one of the

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<sup>83</sup> Vernonia, *supra* note 82, at 665.

<sup>84</sup> *Id.*

<sup>85</sup> Professors Kahan and Meares have latched onto the advantages, proposing to allow sub-communities like housing complexes to opt out of Fourth Amendment protections: for instance, to allow police officers to conduct searches of apartments on less than probable cause. *See* Kahan and Meares, *supra* note 1. Their proposal might be unwise, however, because of the externality factor. The decision of a sub-community to opt out might impose externalities on the rest of the city or neighborhood. For example, the opportunity to opt out splinters support in the neighborhood for more police funding. If, say, one-third of the complexes opt out and sacrifice some privacy in the short term for more efficient police techniques, it decreases the incentive of the neighborhood as a whole to advocate for more funding that might be equally effective in combating crime. In other words; the decision of a third imposes externalities on the other two-thirds. Thus even though the building might internalize the costs to its own residents, it might not internalize the costs to the entire neighborhood of opting out. The proposal thus does not guarantee a politically meaningful balancing of costs and benefits, and the decisions of such bodies should not necessarily be entitled to deference.

Court's recent general search cases that was decided on a different ground. In *Ferguson v. City of Charleston*, local city and hospital officials, frustrated with efforts to get pregnant mothers off crack, decided to put teeth into the program by sending the results of suspicionless tests to law enforcement officials for criminal prosecution.<sup>86</sup> The Court invalidated the program, holding that a general search or seizure can never have crime control as its immediate purpose. This was a weak rationale, as will be discussed below in Part III. But the search was problematic nonetheless. This important question of social policy had been made unilaterally by local officials, many of whom were unelected, and all of whom were not required to deliberate or take views on the options. Their final decision thus went untested by debate, deliberation, and representation. Furthermore, their decision was highly debatable as a matter of policy. At the Court, amici—including the American Medical Association—persuasively argued that the get-tough policy was counterproductive, as the criminal sanction would likely cause crack-addicted mothers not to seek any medical care at all, to the detriment of mother and child.<sup>87</sup>

The debatable wisdom of the policy was still no reason to withdraw it from *legislative* purview, for all time. If a legislature had authorized the policy, it would have represented a judgment that the policy was reasonable, and should have been entitled to deference. Justice Scalia recognized this principle in his dissent. He argued that “[t]he Constitution does not resolve all difficult social questions, but leaves the vast majority of them to resolution by debate and the democratic process—which would produce a decision by the citizens of Charleston, through their elected representatives, to forbid or

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<sup>86</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 72 (2001).

<sup>87</sup> *See id.* at 84 n.23 (citing briefs from AMA, APHA, and NARAL).

permit the police action at issue here.”<sup>88</sup> But then he failed to apply the principle correctly. No representative body—not even a local one—had considered or approved the policy in this case. The Court thus should have invalidated the program on that ground, while leaving it open for the citizens of South Carolina to adopt the policy if they believed it was effective. In the ensuing debate, the AMA and NARAL could have presented their expert concerns—effectively representing the interests of the crack-addicted mothers and their children. Instead of taking this democracy-enhancing tack, the Court found that such a policy is *always* unreasonable under the Fourth Amendment, enshrining a principle that is, for reasons discussed in Part III, dubious from a political process perspective.

The legislative authorization requirement prevents most of the counter-examples that are typically arrayed against the political process approach. Any general search or seizure that seems terribly unreasonable (like requiring all Americans to register or wear serial numbers) could never come to pass—absent some calamity that might actually justify it. It is exceedingly difficult to pass a general search and seizure policy, precisely because the affected groups have such an organizational advantage.

That is why the vast majority of general searches and seizures that seem troubling are adopted by officials freelancing in the field. For example, in Michigan a teacher unilaterally decided to strip search 20 members of a class to discover a few stolen dollars.<sup>89</sup> It would suffice to dispose of cases like this for courts to find a lack of legislative authorization. One cannot imagine that parents of schoolchildren, a politically powerful group, would ever authorize such a practice. But if strip searches of

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<sup>88</sup> *Id.* at 92 (Scalia, J., dissenting).

<sup>89</sup> *Beard v. Whitmore Lack Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005).

schoolchildren ever became essential to the citizens of Michigan—that is, if they seemed reasonable—citizens would retain the option to approve them. In the normal course of events, that would never happen, precisely because the practice *is* unreasonable. Legislatures can be trusted to register that instinctively correct judgment.<sup>90</sup> If anything, as public choice theory teaches, they will approve too few general searches and seizures.

*B. Excessive executive discretion*

A court should also strictly scrutinize a general search or seizure when the legislature approves it but gives executive officials discretion on how to apply it. For instance, a legislature might approve a drug testing scheme but allow executive officials to choose how and who to test. This is problematic from a political process perspective because it passes the buck. The legislature abdicates responsibility for making the important value choices, short-circuiting the relationship between the representative process and the final choice. The officials who end up making the decisions—often politically unaccountable and isolated from public scrutiny—may make decisions about whom to target for arbitrary reasons unrelated to the values underlying the legislative scheme.

Police officers, for example, are unelected, their decisions are made at a low level, and their decisions are often not a matter of public record. Given the discretion to choose how and to whom the scheme is applied, they may choose based on arbitrary reasons. Most troubling, officers might arbitrarily impose burdens on discrete and insular

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<sup>90</sup> For laudable examples of cases where the Court of Appeals disposed of a case by finding that the legislature had not authorized the search at issue rather than by finding that the search violated the Fourth Amendment, *see* *United States v. Herrera*, 444 F.3d 1238 (10th Cir. 2006) (invalidating suspicionless search of commercial vehicle because it was one pound under legislative authorization) and *United States v. Fort*, 248 F.3d 475, 479 (5th Cir. 2001) (parsing meaning of statute to determine which suspicionless searches the legislature had authorized).

minorities—imposing burdens that might become entrenched because those minorities do not have recourse to the political system to redress their grievances. Thus, when a legislative scheme vests officials with discretion, courts are justified in conducting an independent balancing of costs and benefits to make sure that the program is being executed in a reasonable manner.<sup>91</sup> Conversely, when executive officials have no discretion under a scheme, courts can be sure that the legislature has made the important value choices, and that decision is entitled to respect.

The problem of executive discretion (and especially police discretion) is why judges generally *must* apply strict scrutiny to police practices under the Fourth Amendment. Discretionary police activity is extremely necessary: legislatures cannot resolve to target Drug Dealer Johnson. But because a legislature has not (and cannot) authorize the targeting decision, courts must make sure that the action is in fact reasonable.

This was how Ely in *Democracy and Distrust* explained why searching judicial review is the norm under the Fourth Amendment. He recognized that the requirements of warrant and probable cause are important means for ensuring that executive decisions to search and seize are globally reasonable:

The warrant requirement injects the judgment of a ‘neutral and detached’ magistrate and also has what may be the more important effect of compelling a contemporaneous recordation of the factors on whose basis the action is being taken. The probable cause requirement obviously can’t guarantee a lack of arbitrariness: invidious choices among those respecting whom there is probable cause are possible. By setting a substantive parameter at one end of the decision, however, it at least requires that

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<sup>91</sup> See Klarman, *supra* note 1, at 765 (“A credible political process theory must not only superintend the legislative process for systemic biases, but also ensure that legislatures retain responsibility for making important policy choices that govern society. In constitutional lingo, political process theory supports a strong nondelegation doctrine. Wholesale legislative delegation of criminal procedure issues to politically unaccountable law enforcement officials cannot pass such a test.”).

persons not be singled out for arrest or search in the absence of strong indication of guilt.<sup>92</sup>

In essence, the court-imposed warrant and probable cause requirements ensure that executive decisions to search and seize are, on the whole, reasonable. Probable cause ensures that the officers generally must have a very good reason to search, and the warrant requirement ensures compliance with the probable cause requirement. Because police officers often retain a good deal of discretion in conducting criminal investigations, free of legislative superintendence, courts will generally have an important role in defining reasonableness in the context of everyday law enforcement.<sup>93</sup>

The element of executive discretion is absent, however, in the prototypical general search approved by a legislature. The legislature says “drug test all schoolchildren” or “stop every tenth motorist at stop 125 on I-40.” There is nothing left for officials to decide: the legislature has weighed the options and made the relevant choices. The courts must make sure that officials comply with their mandate. But beyond that, courts should limit themselves to applying rational basis review to the legislature’s balancing of costs and benefits, for all the reasons discussed in Part I.

There are of course degrees of executive discretion, and the courts must be the arbiters of how much is too much. The Supreme Court has already dealt with the problem of excessive executive discretion in a number of general search cases. At one extreme is *Delaware v. Prouse*.<sup>94</sup> There the police officer claimed the authority to stop any car at any time, regardless of suspicion, to check for safety violations. The Court identified the classic problem of executive discretion: “we cannot conceive of any legitimate basis upon

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<sup>92</sup> Ely, *supra* note 4, at 172-3.

<sup>93</sup> One might argue that legislatures should be allowed to adopt different but equally reasonable preauthorization and suspicion requirements. That is, of course, a topic for another day.

<sup>94</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.”<sup>95</sup> Moreover, it is very easy to imagine many pernicious reasons why an officer might stop a car: the race of the driver, or the color of the car, for example. The Court was thus quite right to impose a minimum level of suspicion in this case to ensure that the officer’s reasons for stopping a car more or less matched up with society’s reasons for allowing cars to be stopped. That is, the suspicion requirement ensures that officers are stopping the cars for the right reasons: to prevent traffic law violations, and not to harass drivers.<sup>96</sup>

*Camara v. Municipal Court* is another case of excessive officer discretion.<sup>97</sup> In *Camara*, officers had the authority to inspect any home for safety violations without suspicion. The problem was that officers could choose, for any reason or no reason at all, to search any home or business an arbitrary number of times. This had the potential to impose burdens on certain home or business owners that were not justified by the need to conduct safety inspections. As the Court observed, “The practical effect of this system is to leave the occupant subject to the discretion of the official in the field.”<sup>98</sup> A practice that seems globally reasonable—allowing safety inspections to enforce an administrative scheme—might end up being unreasonable in the application. The problem in this case, however, was that requiring individualized suspicion as in *Prouse* would have rendered the whole scheme ineffective: once suspicion of a safety violation develops, it is often too late to prevent catastrophic damage.

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<sup>95</sup> *Id.* at 661.

<sup>96</sup> *See also* *Brown v. Texas*, *supra* note 16, at 52 (invalidating suspicionless stop to ask for identification because “[w]hen such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.”)

<sup>97</sup> *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

<sup>98</sup> *Id.* at 532.

The Court solved the problem by taking advantage of the power groups wield in the political process. The Court imposed a requirement of *area-wide* probable cause: in the terminology of Bill Stuntz, it converted potential takings into taxes. The requirement could be satisfied by showing that inspection of an area was justified by the passing of time or its condition.<sup>99</sup> This ensured that officers would not burden individual homeowners, and if they unjustly burdened groups, they could redress any grievances through the political process. The Court thus achieved a workable balance, minimizing the risk of uneven application, while enabling the fulfillment of the statutory purpose.

The Court's trust in the power of groups to resist unreasonable searches and seizures was also evident in *United States v. Martinez-Fuerte*.<sup>100</sup> Here the Court said it *was* permissible for executive officials to select the location of an immigration traffic stop checkpoint. The Court observed that

The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be *unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class*. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.<sup>101</sup>

According to the Court, then, two things made this exercise of discretion reasonable. First, the policymaking officials had no reason to use the stops for harassment and were politically accountable, which meant there was less reason to distrust exercises of their discretion. Second, the affected class was politically powerful. The Court trusted groups of motorists to be able to protect their interests in the political process. These factors

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<sup>99</sup> *Id.* at 539.

<sup>100</sup> *United States v. Martinez-Fuerte*, 428 U.S. 523 (1976).

<sup>101</sup> *Id.* at 559 (emphasis added).

combined meant it was exceedingly improbable that executive officials would abuse their discretion, and ensured compliance with the purpose of the legislative scheme.

Finally, *New York v. Burger* represents the apex of executive discretion under the Court's suspicionless search decisions.<sup>102</sup> There the Court allowed officials to make unannounced, suspicionless searches of junkyards for compliance with a regulatory scheme. Officers in the field retained a great deal of discretion because the scheme placed no limits on the number of inspections that could be conducted in a certain period.<sup>103</sup> There was thus a risk of officials differentially burdening of junkyards based on arbitrary considerations.

This was a questionable case from a political process perspective. Neither of the factors that made the searches in *Martinez-Fuerte* reasonable was present. The discretion lay with officers in the field rather than politically accountable policymakers. And those officers had the ability to burden individual businesses rather than groups. The possibility of abuse of discretion was therefore very real, as Justice Brennan pointed out in dissent.<sup>104</sup> It is troubling that politically unaccountable officers in the field were allowed to make unreviewable decisions about which junkyards would be burdened under the legislative scheme, and *Burger* very well may have been wrong for this reason.

*Martinez-Fuerte* should be the model for courts deciding whether a scheme vests executives with too much discretion. Searches are least problematic when executive officials retain no discretion: as when a legislature specifies that everyone in a certain group should undergo random periodic drug tests. Searches should also pass muster when the discretion is in politically accountable officials who are only allowed to burden

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<sup>102</sup> *New York v. Burger*, 482 U.S. 691 (1987).

<sup>103</sup> *Id.* at 711 n.21.

<sup>104</sup> *Id.* at 722 (Brennan, J., dissenting).

groups and who are given guidelines on how to exercise their discretion. A legislature could, for instance, allow a mayor to designate which stretch of highway is most prone to narcotics trafficking and thus needs a narcotics interdiction roadblock; or which schools have drug problems justifying random drug testing, according to some neutral and reliable measure reviewable by courts. But legislatures should not be allowed to vest unaccountable officers in the field with the discretion to burden individuals, as in *Prouse*, *Camara*, and *Marshall*.

This approach to executive discretion has analogues in other areas of constitutional doctrine influenced by process theory. The preference for burdening groups rather than isolated individuals of course is a theme in equal protection doctrine. As Justice Jackson once noted, “[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”<sup>105</sup> And the emphasis on legislatures making the important decisions about who gets searched and seized comports with the Court’s vagueness doctrine under the Due Process Clause. That doctrine works to prevent legislatures from allowing lower-level, politically unaccountable police officers define crimes through the application of extremely broad criminal statutes.<sup>106</sup>

Where the legislature does make the important choices about a scheme of general searches and seizures, the courts should normally defer to that judgment as presumptively

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<sup>105</sup> *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

<sup>106</sup> *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding that “the more important aspect of the vagueness doctrine is...the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections”); *City of Chicago v. Morales*, 527 U.S. 41, 60-1 (1999) (invalidating an anti-loitering statute because it “entrusts lawmaking to the moment-to-moment judgment of the policeman on the beat [and] provides absolute discretion to police officers to determine what activities constitute loitering”).

reasonable. By applying a jurisprudence of executive discretion, courts can make sure that legislatures strike the relevant balance between liberty and security, while leaving them free to reach balances that are in fact reasonable.<sup>107</sup> Legislatures should be allowed to delegate to a limited extent in order to make their schemes work, but only when appropriate safeguards like those in *Martinez-Fuerte* are in place. Where they delegate too much, courts will remain to conduct de novo review and determine whether executives' decisions are ultimately reasonable.

### *C. Discrimination against discrete and insular minorities*

The third major process flaw that might give rise to strict review of general searches and seizures is discrimination against discrete and insular minorities. A minority is discrete and insular if it is somehow blocked from accessing the political process. As a result, the members' interests go unrepresented, and prejudiced or unthinking majorities may force them to bear unjustifiably heavy burdens. The risk of disproportionate burdening of these minorities is one reason why executive discretion to search and seize is so troubling.<sup>108</sup> But legislative burdening of these minorities is also troubling: because these groups go unrepresented, the legislature is not bound to consider their interests or respect them as persons. The political process does not provide a remedy for these groups, so reweighing of costs and benefits is justified.<sup>109</sup>

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<sup>107</sup> Cases that would come out the same way, but for different reasons, under this approach include *Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004) (denying qualified immunity to officer who placed roadblock in order to discourage a concert from taking place) and *Spencer v. City of Bay City*, 292 F. Supp. 2d 932 (E.D. Mich. 2003) (striking down city ordinance that allowed officers to give breathalyzer test to anyone under 21, upon reasonable suspicion, without a warrant).

<sup>108</sup> See Klarman, *supra* note 1, at 764 (arguing that the Warren Court's Fourth Amendment jurisprudence can be explained as an attempt to protect blacks from the unconstrained discretion of white police officers).

<sup>109</sup> See *Carolene Products*, *supra* note 7, at 152 n.4; Ely, *supra* note 4, at 157.

A general search most clearly burdens a discrete and insular minority when it targets people who go completely unrepresented in the political process. Policies that target prisoners, aliens, and others who lack both the franchise and effective practical representation run the risk of concentrating undue burdens.<sup>110</sup> These groups do not even have the potential to organize to protect their interests, so the courts must independently weigh the reasonableness of a general search or seizure as applied to them, even if the legislature authorized it.<sup>111</sup> But school children do not qualify: they have practical representation because their parents can be relied upon to represent their interests.<sup>112</sup>

A general search also burdens a discrete and insular minority when it singles out a racial, ethnic, or religious minority: for example, when it targets “all Muslims” for a general search. Intentional discrimination is troubling from a political process perspective because it concentrates costs. When searches are defined according to neutral criteria—the location of a checkpoint stop, or the drug testing of an entire school system—costs are spread and there are likely to be no permanent winners or losers. Everyone goes to school at some point, and everyone drives at some point. The majority can safely be said to internalize the cost of searching and seizing. But when searches are defined by reference to immutable personal characteristics not shared by the majority, costs are concentrated. The majority knows that it can achieve the benefits of the search without bearing any of the costs. This is essentially an extreme form of the criticism adverted to in Part I: that legislatures cannot be trusted to weigh reasonableness because not everyone is affected

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<sup>110</sup> See *Hudson v. Palmer*, *supra* note 52, at 557 (Stevens, J., dissenting) (“The courts, of course, have a special obligation to protect the rights of prisoners. Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a ‘discrete and insular minority.’”).

<sup>111</sup> An example is *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004) (invalidating legislatively authorized policy of strip-searching girls in juvenile facility). These girls are not practically represented because, as social outcasts, their interests are not necessarily aligned with those of their parents.

<sup>112</sup> See *Kahan and Meares*, *supra* note 1, at 1173.

by a given general search policy. Thus, while it is perhaps incorrect to call racial and religious minorities “discrete and insular,” since they possess the franchise and wield significant political power, intentional discrimination still counts as a process flaw. Equal protection and free exercise doctrine clearly recognize this: laws that intentionally discriminate against racial or religious minorities are subject to strict scrutiny.<sup>113</sup> In the Fourth Amendment context, courts should also invalidate general searches that target racial or religious minorities.

General search and seizure policies might also differentially burden racial or religious groups without being intentionally directed at them. For example, imagine a narcotics interdiction checkpoint placed in a high-crime neighborhood. The checkpoint would have a neutral and legitimate purpose: stopping the flow of narcotics traffic. But it might have a disparate impact. Minority communities tend to have more crime than non-minority communities. Thus a checkpoint situated to stop crime will end up stopping minorities at a rate greater than their proportion in the population. The question is whether the political process is sufficient to protect the privacy interests of minorities who are disproportionately affected by the checkpoint.

The answer is probably yes. So long as the affected groups have access to the polls, there is no reason why they cannot protect their interests, just as any other medium-sized group could. The political process dangers of intentional discrimination are much more muted. The legislature made the choice on neutral grounds, rather than on the basis of prejudice. And the majority now no longer has the opportunity to get something for nothing. The costs are spread more broadly: there is a disparate impact on minorities, but because the search is not based on minority status, it also impacts some members of the

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<sup>113</sup> See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

majority who are subject to the search. This means that the majority has a far greater interest in striking a correct balance between the costs and benefits of the general search practice.

Moreover, public choice theory predicts that in this situation, minority groups should be quite capable of protecting their interests. The theory shows that medium-sized groups—like minorities affected by a disparate impact search—should have disproportionately large power in the political process. As Einer Elhauge observes, “Interest group theory...suggests that such intensely interested minorities will face less severe free rider problems in forming a political organization. This collective action advantage should sometimes enable the intensely interested minority to achieve political success that is socially desirable.”<sup>114</sup> This result fits with our perceptions about the power of racial and religious minorities, who certainly wield substantial political power in today’s society, and often hold the balance of power in closely disputed elections.<sup>115</sup> The disparate impact result also accords with the Court’s equal protection decision in *Washington v. Davis*, where it held that disparate impact alone does not trigger strict scrutiny;<sup>116</sup> as well as the Court’s free exercise decision in *Employment Division v. Smith*, which held the same for laws that differentially burden religious minorities.<sup>117</sup> Furthermore, precisely because of the history of racial prejudice in this country, and the positive legacy of historical events like the Civil Rights Movement, majorities can be expected to be solicitous of minorities’ concerns about general searches. As the majority in *Smith* noted,

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<sup>114</sup> Elhauge, *supra* note 17, at 64.

<sup>115</sup> See Kahan and Meares, *supra* note 1, at 1167 (noting that many minority communities support policing practices that have a disparate impact because they help to make their neighborhoods safer).

<sup>116</sup> *Washington v. Davis*, 426 U.S. 229, 248 (1976).

<sup>117</sup> *Smith*, *supra* note 113.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well....But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.<sup>118</sup>

But *Washington v. Davis* and *Employment Division v. Smith* are not without their critics. And Fourth Amendment law need not look exactly like equal protection law or free exercise law. Disparate impact might be especially troubling in the police context. There is a history of racial injustice in policing in this country. Because of this history, and because of racial problems in policing today, disparate impact general searches and seizures might be thought to pose a particularly severe risk of stigmatic harms.<sup>119</sup> For these reasons, it would be perfectly legitimate for the Court to expand strict scrutiny of general searches and seizures to include those that have a disproportionate racial or religious impact.<sup>120</sup> Even this relatively expansive interpretation would be far better than

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<sup>118</sup> *Id.* at 890.

<sup>119</sup> For example, the phenomenon of racial profiling or “driving while black” is one of the major factors tending to decrease the legitimacy of law enforcement in the eyes of minority communities today. Some of this is attributable to the Court’s own jurisprudence, which in a move that itself denigrates political process values declined to establish stricter scrutiny of racially charged police practices in *Whren v. United States*, *supra* note 38. For scholarly commentary, see David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659, 660 (1994) (arguing that “stops and frisks are applied disproportionately to the poor, to African Americans, and to Hispanic Americans...This begins and perpetuates a cycle of mistrust and suspicion, a feeling that law enforcement harasses African Americans and Hispanic Americans with *Terry* stops as a way of controlling their communities”). For news accounts, see, e.g., Fletcher, Driven to Extremes, Washington Post, March 29, 1996 (noting that “[m]any African American men suspect that police single them out for stops and searches, and statistics, where they exist, show that blacks are stopped more frequently than whites”); Schneider, State police I-95 drug unit found to search black motorists 4 times more often than white, Baltimore Sun, May 23, 1996; Whitman Admits Police Used Race in Turnpike Stops, New York Times, April 21, 1999, at B1.

<sup>120</sup> Prof. Amar has proposed something like this. See Amar, *supra* note 12, at 807 (“Even if racially disparate impact alone does not violate the Constitution, surely equal protection principles call for concern when blacks bear the brunt of a government search or seizure policy...As long as courts organize Fourth

today's one-size-fits-all approach to general searches and seizures. It would still leave the vast majority of searches and seizures—which do not have a disparate impact—to the legislative process. In short, judicial review should be tailored to the potential ways the political process might go awry. Where there is not even a colorable chance that a practice burdens a discrete and insular minority, the courts should apply rational basis review.

#### *D. No rational basis*

A general search or seizure should also be invalid if it has no rational basis. Where the reasonableness of the policy is not even debatable, it is not entitled to deference. In such a case, the application of the “reasonableness” requirement of the Fourth Amendment is not doubtful, and political process theory thus does not quarrel with invalidating the legislative judgment.

The Court's equal protection and due process cases have shown that the rational basis standard is not toothless. In *Cleburne Living Center*, the Court found that a zoning regulation that prohibited a home for the mentally retarded but allowed boarding houses, hospitals, and fraternity houses had no rational basis.<sup>121</sup> The Court also applied rational basis review in *Lawrence v. Texas* to find that a law criminalizing same-sex sodomy was irrational.<sup>122</sup>

In the Fourth Amendment context, rational basis review offends no political process values because a court is not performing a plastic reweighing of costs and

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Amendment discourse around warrants, probable cause, and exclusion, rather than reasonableness, this open engagement of race will likely not occur in Fourth Amendment case law”).

<sup>121</sup> *Cleburne Living Ctr.*, *supra* note 21.

<sup>122</sup> *Lawrence*, 539 US 558 (2003).

benefits to invalidate a legislative judgment. Rather, it is finding that *no* rational legislature could have approved the policy. By contrast, if the reasonableness of the policy is at all debatable, a legislature is in the better position to decide, for all the reasons discussed in Part I above.

*E. Violation of an independent constitutional provision*

This final exception might appear obvious. But it bears emphasizing. Courts too often move directly to find a Fourth Amendment violation when the conduct is clearly prohibited under another amendment. The troubling aspect of the general search or seizure is not the practice itself, but rather its impingement on other constitutional values. A general search or seizure thus might very well offend the equal protection, due process, free exercise, cruel and unusual punishment, or free speech clauses, even if it has been authorized by a legislature.

A good example of such a case comes from the Eleventh Circuit. In *Bourgeois v. Peters*, the court considered a policy that required protestors near the School of the Americas site in Georgia to submit to a magnetometer search at a checkpoint a few blocks away—a search that would have delayed the protest for one or two hours.<sup>123</sup> The search clearly violated the First Amendment. In fact, according to the court, it violated it “in five ways,” including unbridled discretion, prior restraint, impermissible content-based regulation, unreasonable time place and manner restriction, and unconstitutional condition.<sup>124</sup>

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<sup>123</sup> *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004).

<sup>124</sup> *Id.* at 1316.

For that matter, the policy also violated the legislative authorization, executive discretion, and rational basis canons discussed above. The legislature had not authorized the searches. Even if it had, officers in the field had full discretion to pick which gatherings would be subject to magnetometer screens.<sup>125</sup> And the policy had no rational basis. The town did not subject any other similarly large and potentially volatile gatherings (such as sporting events) to magnetometer screens. Furthermore, the isolated instances of violence at previous School of the Americas protests had nothing to do with metal objects that could be detected by a magnetometer.<sup>126</sup> There was thus good reason to think the officials were targeting these political protesters, and no fewer than eight ways to dispose of this case without holding that such general searches were forever foreclosed as a matter of constitutional law.

But that is not what the court did. Instead, it held that such general searches were *always* impermissible under the Constitution because

[t]he text of the Fourth Amendment contains no exception for large gatherings of people...[T]he Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence—rather than potentially effective, broad, prophylactic dragnets—as the constitutional norm.<sup>127</sup>

The court thus would *always* require officers to have some suspicion before subjecting participants at a rally to a magnetometer screen.

The *Bourgeois* court's claims about original meaning will be dealt with in Part IV below. For now, it is enough to see that its general Fourth Amendment principle establishing a presumption against general searches and seizures was far too broad.

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<sup>125</sup> See *id.* at 1318.

<sup>126</sup> *Id.* at 1322.

<sup>127</sup> *Id.* at 1311-12.

Where the search implicates First Amendment concerns—as these political protests did—the courts should certainly apply strict scrutiny and re-balance the costs and benefits of the general search or seizure at issue. Applying relaxed scrutiny might allow majorities to impede political minorities and thus clog avenues for change. But the courts should not use the Fourth Amendment as a categorical bar against general suspicionless searches and seizures. Absent the process flaws described in this Part—no legislative authorization, excessive executive discretion, discrimination against discrete and insular minorities, no rational basis, or violation of independent constitutional provision—the courts should uphold the practice. And unlike the *Bourgeois* court, they should use the narrowest ground available to avoid chilling cost-effective general searches. The groups affected by such neutral and generally applicable searches and seizures can be expected to protect their interests in the political process, and the legislature can be trusted to reach an appropriate compromise of the values and interests involved.

The process failures described in this Part should form the basis for a new doctrine of general searches and seizures. The courts should apply two tiers of review. If the practice exhibits one of these process failures—no authorization, executive discretion, discrimination, no rational basis, or violation of an independent provision—the court should apply strict scrutiny. That does not necessarily mean that the court should invalidate the search. Rather, it means that the court should reweigh the costs and benefits and uphold the search only if it seems reasonable *to the court*. If none of these process failures are present, on the other hand, the court should apply rational basis review. The practice should stand if it bears a rational relationship to a legitimate governmental purpose. As demonstrated by the other areas of constitutional doctrine, the relative

competence of legislatures in balancing costs and benefits, and the collective action problem that leads to a bias in favor of too little searching, courts can trust the political process to handle searches and seizures affecting groups. So long as a rational legislature could have thought the practice necessary, judges should not be in the business of imposing their views of reasonableness on the population, when the affected groups are perfectly capable of protecting their interests through the political process.

### *III. The democracy-impeding effects of current general search and seizure doctrine*

The previous Parts have outlined a new, process-based theory of general searches and seizures. General suspicionless searches should be entitled to a presumption of constitutionality, so long as they are approved by a legislature, have a rational basis, do not vest executive discretion, and do not discriminate. As shown above, the Court has recognized that groups do not need protection from the political process in equal protection, due process, free exercise, and takings law. A survey of doctrine shows that this is inexplicably not the case in the Fourth Amendment context. The Court permits many general suspicionless searches and seizures.<sup>128</sup> But it has set up a number of artificial roadblocks on the way to approving a general search.

No brief treatment could summarize the whole of suspicionless search and seizure doctrine, which encompasses administrative searches, inventory searches, border searches, special needs searches, checkpoint searches, probationer searches, and perhaps more.<sup>129</sup> This Part will simply treat the most objectionable features of current doctrine.

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<sup>128</sup> See, e.g., Earls, *supra* note 44; Vernonia, *supra* note 82; Martinez-Fuerte, *supra* note 37.

<sup>129</sup> Even some Courts of Appeals have difficulty discerning how the doctrines all fit together. Witness the recent debate over whether suspicionless DNA testing of convicted felons fits in the special needs or the probationer search category. See, e.g., United States v. Kincade, 379 F.3d 813 (9th Cir. 2005).

First, the Court often requires that the search or seizure not be conducted for a general law enforcement purpose, such as criminal investigation. Second, the Court often requires that the search be conducted for some special need; and legislative approval by no means automatically qualifies the need as special. Finally, the Court often requires an independent, de novo assessment of reasonableness rather than rational basis review of costs and benefits. This Part shows that all three requirements are unjustified on a political process rationale.

*A. First requirement: no general searches or seizures for the purpose of criminal investigation*

In *City of Indianapolis v. Edmond*, the Court struck down a traffic checkpoint whose purpose was to interdict illegal narcotics.<sup>130</sup> The stops were conducted on a random basis: that is, executive officials had no discretion to stop cars, but could only stop a predetermined number according to a predetermined scheme.<sup>131</sup> The stops lasted for no more than five minutes per car, and consent was necessary to do more than a dog sniff of the car (which, according to the Court's precedents, does not constitute an independent search).<sup>132</sup> Except for the fact that the Indiana legislature had not authorized the program, the Fourth Amendment should have no problem with the checkpoint. It affected drivers: a large, neutrally defined group of people whose interests are well-represented in the political process. There was no executive discretion that could have

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<sup>130</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>131</sup> *Id.* at 35.

<sup>132</sup> *See United States v. Place*, 462 U.S. 696 (1983).

arbitrarily concentrated burdens on individuals, and there was no illicit discrimination.<sup>133</sup>

Further, the program clearly had a rational basis: a legislature could reasonably believe that it is appropriate to curtail the supply of drugs to a major city by targeting the major supply route. The program thus had all the hallmarks of reasonableness.

The Court, however, did not rely on the narrow ground of no legislative authorization. It found that because the primary purpose of the checkpoint was ordinary crime control, the program could *never* be valid under the Fourth Amendment.<sup>134</sup> The opinion relied mainly on the fact that the Court had never before approved a suspicionless search with a crime control purpose. The Court's primary rationale was that "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."<sup>135</sup>

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<sup>133</sup> One reply might be that criminals are a suspect class, the search intentionally targets them, and thus strict scrutiny is appropriate under the "discrete and insular minorities" exception. But criminals are clearly not a suspect class. Criminal status is not an immutable personal characteristic, like race or religion, that gives rise to situations where majorities bear no costs while helpless minorities bear them all. Criminal status is a *choice*. And a socially disfavored one at that. Criminal laws burden criminals, but we do not subject them to strict scrutiny. Furthermore, for purposes of the Fourth Amendment, the Court has long held that the interests of criminals have no bearing on the reasonableness determination. *See* *Trupiano v. United States*, 334 U.S. 699, 709 (1948) ("The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy, while leaving adequate room for the necessary processes of law enforcement"); *McDonald v. United States*, 335 U.S. 451, 455 (1948) (noting that the Amendment is not meant "to shield criminals nor to make the home a safe haven for illegal activities"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (noting that the Amendment "prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion"). *See also* Christopher Slobogin and Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at 'Understandings Recognized and Permitted by Society,' 42 *Duke L.J.* 727, 732 (1993) ("[T]he notion that the Fourth Amendment threshold is to be determined from the viewpoint of the non-criminal has been firmly endorsed"); Posner, *supra* note 39, at 51-2 (arguing that the Amendment cannot protect criminals both because "nowhere does the language of the Fourth Amendment suggest a purpose to confer rights on criminal defendants" and "the English cases that inspired the Fourth Amendment were not criminal cases").

<sup>134</sup> Edmond, *supra* note 130, at 41.

<sup>135</sup> *Id.*

The Court's instinctual preference for individualized suspicion in the crime control context led it astray in *Edmond*. There *is* a force that would prevent such roadblocks from becoming routine: the legislature, which would register the annoyance of drivers who face even longer commutes because of a law enforcement technique of debatable effectiveness. The argument from precedent (or lack thereof) is also unavailing. Courts should normally subject crime control techniques to strict scrutiny *not* because they happen to have a crime control purpose, but rather because they involve a great deal of executive discretion, which risks imposing arbitrary burdens on individuals. By contrast, when *groups* of people are randomly stopped on the highway, the legislature should be able to protect their interests, and balance those interests against the effectiveness of the method as a crime control technique, regardless of whether the purpose is crime control or something else.<sup>136</sup> Just as courts trust legislatures to determine the amount of taxes or the details of classifications in pensions policy, they should trust legislatures to handle these searches and seizures affecting groups of people.

But hyperbole often takes the place of reason when it comes to general searches and seizures. In the precursor to *Edmond* at the Seventh Circuit, Judge Posner summoned up a parade of horrors to condemn suspicionless searches conducted with a crime control purpose.<sup>137</sup> He said, "In high-crime areas of America's cities it might justify methods of policing that are associated with totalitarian nations. One can imagine an argument that it would be reasonable in a drug-infested neighborhood to administer drug

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<sup>136</sup> See also Jonathan Kravis, A Better Interpretation of 'Special Needs' Doctrine After *Edmond* and *Ferguson*, 112 Yale L.J. 2591 (criticizing *Edmond* because there is no reason why searches conducted for law-enforcement purposes are categorically less reasonable than those conducted for non-law-enforcement purposes, the distinction between searches in the two categories is fuzzy, and drawing the distinction involves inquiry into subjective motivation in violation of *Whren v. United States*).

<sup>137</sup> *Edmond v. Goldsmith*, *supra* note 58.

tests randomly to drivers and pedestrians.”<sup>138</sup> But there were many ways Posner could avoid that potentially troublesome result if it ever came up. He could decide that rational basis review is generally justified, but that disparate racial impact triggers strict scrutiny. Or he could decide that, as in the equal protection and free exercise contexts, disparate impact is not constitutionally significant, and uphold such a search as a rational way to control the flow of drugs in a crime-ridden community. Regardless, that potential process failure does not justify the result in *Edmond*, where there was *no* showing of racially disparate impact, and thus no reason for intrusive review.

Furthermore, Posner’s comparison to totalitarian methods was entirely inapt. Our society is totally different from a totalitarian one. Instead of a dictatorship, we have a legislature that can register and redress wrongs that affect groups of people. Judge Easterbrook’s dissent exposed the fallacy of the totalitarian label:

Some cities enforce their drug laws by heavy reliance on spies, infiltrators, informers, turncoats, wiretaps, and nighttime searches where battering rams smash through doors; others may substitute more civil methods, such as roadblocks where the only imposition is a five-minute wait with man’s best friend outside. Which of these is most like the ‘methods of policing that are associated with totalitarian nations’?...Scaling back these tactics (none of which requires person-specific justification) in favor of roadblocks would make enforcement of the drug laws a good deal more reasonable. Or so at least the people may conclude.<sup>139</sup>

Judge Easterbrook’s modesty was appropriate. In a democracy, “the people” who are ultimately protected by the Fourth Amendment *can* conclude that an innovative police practice is reasonable. In the absence of process failures, they should have that chance.<sup>140</sup>

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<sup>138</sup> *Id.* at 662.

<sup>139</sup> *Id.* at 671.

<sup>140</sup> Nor do we run the risk of allowing the creation of a totalitarian society through general searches and seizures. Any general search or seizure aimed at the political process or political groups would qualify for strict scrutiny, and so long as courts exist, they could invalidate it.

The *Edmond* rule is particularly perverse because it curtails those general searches and seizures that are most reasonable. Actions are criminal precisely because they are deeply resented by the community as a whole. Conduct that does not violate the shared moral sense of the community is more properly classed as a civil violation rather than criminal. General searches with a crime control purpose are thus potentially the *most* useful and of the *most* interest to the community. The effect of the *Edmond* rule is thus to select out those actions the community most cares about preventing and disqualifying them from being the subject of a general search or seizure.

Since the *Edmond* rule was announced, communities have predictably tried to use pretexts to evade it, so that they might use the general search for the completely laudable purpose of controlling crime. For example, in *Davis v. State*, a Florida community had to posit the less important purpose of roadway safety, when the real goals were to reduce drugs and prostitution and restore a sense of safety to the neighborhood.<sup>141</sup> The search was invalidated anyway, to the detriment of that crime-infested neighborhood. Police officers, who possess a good deal more common sense than judges, are flummoxed by the *Edmond* rule. They find it difficult to understand that they have the authority to combat the lesser harm (like seatbelt violations) but not the greater (like narcotics control).

Witness this colloquy between a defense lawyer and an officer in a Georgia case, concerning the purpose of a checkpoint stop:

At another point, the officer testified:

Answer: I don't know what you mean by setting the purpose of it. The purpose is to enforce the laws.

Question: General law enforcement?

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<sup>141</sup> *Davis v. State*, 788 So. 2d 1064 (Ct. of App. Fla. 2001). See also *People v. Trotter*, 28 A.D.3d 165 (App. Div., 4th Dep't 2006) (invalidating initiative "to detect and deter violent crime and drug trafficking in the target area"); *People v. Jackson*, 782 N.E.2d 67 (N.Y. 2002) (to detect carjackings and taxicab/livery robberies that were otherwise undetectable).

Answer: Every law. It doesn't matter...

Question: And the primary purpose of this checkpoint was not just licenses?

Answer: That's correct.

Question: It was general law enforcement?

Answer: It was—yes. Enforce all the laws of the state of Georgia.

Question: The primary purpose of this roadblock though, if I understand—

Answer: To enforce the laws of the state of Georgia.<sup>142</sup>

In light of the officer's testimony, the court was compelled to apply *Edmond* to invalidate the checkpoint.<sup>143</sup> But it should not have had to. Traffic stops whose interest is crime control are highly reasonable. The government interest is greater than an administrative traffic stop to, say, check licenses, while the intrusion is no greater than that caused by any other five-minute checkpoint. Or at least so a legislature might reasonably conclude.

General searches and seizures with a crime control purpose are all the more important in an age of mass terror. Such searches are often the only way to detect potential disasters. Yet terrorist activity often correlates with criminal offenses, precisely because it is so serious. The Court recognized a terrorism exception in *Edmond* for situations where “an appropriately tailored roadblock [is] set up to thwart an imminent terrorist attack.”<sup>144</sup> But that exception may not cover the more common situation where officials have no particularized evidence of an attack—only a constant and credible fear of potential attacks and daunting problems of detecting the perpetrators.

To its credit, the Second Circuit recently upheld New York City's program of suspicionless random inspections on the subway: an obvious high-risk target for terrorist

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<sup>142</sup> State v. Ayers, 570 S.E.2d 603 (Ga. Ct. App. 2002).

<sup>143</sup> The *Edmond* rule is all the more surprising because in the administrative search context the Court recognizes that an administrative inspection scheme may overlap with criminal law enforcement purposes. See Burger, *supra* note 102, at 712 (“[A] State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem”).

<sup>144</sup> *Edmond*, *supra* note 130, at 44.

attacks, especially in light of the London attacks in the summer of 2005.<sup>145</sup> But in *Bourgeois v. Peters* (discussed above), the Eleventh Circuit appeared to embrace an extremely restrictive view of the *Edmond* exception. It stated that a purpose of detecting weapons could never justify a general search or seizure because “The City of Columbus and the State of Georgia have enacted a variety of laws against the possession or use of certain kinds of weapons, smoke bombs, and incendiary devices to achieve this goal of public safety” and

In a case such as this, where the very purpose of the particular law (such as the law banning the possession of certain dangerous items) is to protect the public, and the government protects the public by enforcing that law, it is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined.<sup>146</sup>

In essence, the *Bourgeois* court said that anything prohibited by the criminal law cannot form the basis for a general search or seizure, even if the purpose of the search is something quite apart from enforcing the criminal law—such as preventing a terrorist attack. This gives communities confronting terrorism a stark choice: criminalize the conduct and lose the option of general searches, or decline to criminalize the conduct and use general searches to detect it.

Society should not be put to that choice. The political process should be perfectly capable of dealing with the repercussions and fostering a rational society-wide debate about how much privacy the population is willing to sacrifice to prevent terrorism. There is nothing special about terrorism that disables the political process from functioning. As discussed above, a bipartisan group in Congress joined to prevent the Pentagon from data-mining sensitive information about ordinary Americans. The political process has

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<sup>145</sup> See *MacWade v. Kelly*, 2006 U.S. App. LEXIS 20587 (2d Cir. 2006).

<sup>146</sup> *Bourgeois*, *supra* note 123, at 1313.

proved perfectly capable of reaching a resolution on FISA and the PATRIOT Act, even though the likelihood of voter engagement is so much less because they adversely affect far fewer citizens than the typical general search or seizure. If anything, there will be too *few* general searches and seizures because the subjects of such searches have an organizational advantage over the diffuse beneficiaries.

*Edmond* was a pre-9/11 case. Perhaps for that reason, the Court has shown some willingness to retreat. In *Illinois v. Lidster* the Court held that it is permissible for police officers with crime control purpose to stop people without suspicion to gather information about a potentially witnessed crime (as opposed to identifying a suspect traveling in the car).<sup>147</sup> The Court seemed to recognize a political process limit on such stops: “Practical considerations—namely, limited police resources and community hostility to related traffic tie-ups—seem likely to inhibit any such proliferation.”<sup>148</sup> The same rationale applies to general stops and searches currently barred by *Edmond*, so long as the legislature has authorized them and officers exercise no discretion. Absent the process failures discussed above, the groups affected should be perfectly capable of preventing such stops from becoming a “routine” part of American life. If they do become routine, it will be because the population views them as reasonable. And if that is the case, no court could call the judgment “unreasonable” under the Fourth Amendment. For all these reasons, *Edmond* should be overturned.

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<sup>147</sup> *Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

<sup>148</sup> *Id.* at 426.

*B. Second requirement: no general searches or seizures without a “special” need*

Even if a general search or seizure is not conducted for a law enforcement purpose, the Court has held that not any purpose will do. The purpose must still be “special,” which the Court defines as “[a] need[], beyond the normal need for law enforcement, [which] make[s] the warrant and probable-cause requirement impracticable.”<sup>149</sup> And *Chandler v. Miller* shows that legislative approval is not sufficient to make the purpose special.<sup>150</sup> The Georgia legislature passed a law requiring candidates for high political office to take a drug test thirty days before the election. The Court invalidated the requirement, finding that the state had not shown a special enough need for the testing. First, the state had not proven that a drug problem existed among elected state officials, and anyway, “those officials typically do not perform high-risk, safety-sensitive tasks.”<sup>151</sup> Second, the Court seemed to require a perfect fit between means and ends, finding that the test was *insufficiently* intrusive because a drug user “could abstain for a pretest period sufficient to avoid detection.”<sup>152</sup> Finally, the Court concluded that the benefit of the program was merely symbolic, and that was not a compelling enough reason to constitute a special need.<sup>153</sup>

The Court’s rationale was exceedingly odd even judged solely by its other special needs cases. It had previously approved suspicionless drug testing of student athletes and students who participate in extracurricular activities.<sup>154</sup> Presumably, preventing the head cheerleader from using drugs is not more important than preventing the Governor of

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<sup>149</sup> *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989).

<sup>150</sup> *Chandler v. Miller*, 520 U.S. 305 (1997).

<sup>151</sup> *Id.* at 321.

<sup>152</sup> *Id.* at 320.

<sup>153</sup> *Id.* at 322.

<sup>154</sup> *Vernonia*, *supra* note 82; *Earls*, *supra* note 44.

Georgia from doing the same.<sup>155</sup> And in its employee drug testing cases, the Court has not required evidence of a drug problem before permitting testing.<sup>156</sup> As a result of this inconsistency with the Court's own precedents, Chief Justice Rehnquist argued that the Court was merely imposing its policy preferences on the State of Georgia: "Nothing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the members of this Court."<sup>157</sup>

But the most offensive aspect of *Chandler* was the Court's lack of respect for the Georgia legislature's decision in favor of drug testing for political candidates. The Georgia legislature had determined that the statute *did* serve an important public purpose, and decided that the interest in having marginally more drug-free candidates outweighed, on balance, the minimal intrusion on political candidates' privacy. Moreover, the perceived need was important enough that it overcame the usual legislative inertia that makes passing any general search quite difficult. Further, this was no local school board: it was a *state legislature*. The legislature represented the entire political community. There was no invidious discrimination, and no vesting of executive discretion. Under political process theory, a need should be "special" enough if the legislature had a rational basis for thinking it was important.

To be sure, *Chandler* was a somewhat unusual case under process theory. The group in this case was "political candidates." That group might be thought to be specially

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<sup>155</sup> See George M. Dery, 40 Ariz. L. Rev. 73, 88 (1998) (arguing that the drug test at issue in *Chandler* was both less intrusive and more important than those the Court upheld in the school drug testing cases, thus demonstrating that special needs analysis under the Fourth Amendment really depends only on "whether or not as few as five members of the Court value a particular government action").

<sup>156</sup> Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 (1989).

<sup>157</sup> *Chandler*, *supra* note 150, at 328.

disabled from protecting its members' interests. Political candidates as a whole are an inherently fragmented group. It is nearly impossible to organize a group of political candidates from all different parties for any purpose, much less for the purpose of fighting unreasonable candidate drug testing (which might be career suicide). The candidates' political differences are precisely why they belong to different parties. There may as a result be unusually high barriers to collective action, and *Chandler* itself might represent a special case warranting stricter scrutiny. In fact, it could be argued that the Court should strictly scrutinize any search or seizure directed at the political process as such, since that may be necessary to safeguard dissenters and the political system as a whole.

But the principle of *Chandler* requiring a special need beyond legislative authorization for *any* general search or seizure is pernicious. The lower courts have, for example, applied *Chandler* to outlaw for all time general drug testing for school teachers.<sup>158</sup> This is an especially odd result since employees in the private sector are routinely subjected to drug tests. It is not clear why teachers should receive a special exemption from this common employment practice.

Both *Edmond* and *Chandler* represent a presumption against general suspicionless searches and seizures. As this Article has shown, this presumption is unjustified, given the Court's assumption in other areas of constitutional law that groups can protect themselves, and given the good reasons to expect that they should be even more capable

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<sup>158</sup> See, e.g., 19 Solid Waste Dep't Mechanics v. City of Albuquerque, 156 F.3d 1068 (10th Cir. 1998) (refusing to find special need for drug testing program where state's proffered purpose was to ensure workplace safety and health in dangerous context of mechanics' work); United Teachers v. Orleans Parish Sch. Bd., 142 F.3d 853 (5th Cir. 1998) (invalidating suspicionless drug testing of teachers). Even when a court upholds such a test, *Chandler* makes it exceedingly hard to do so, as witnessed by Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998) (upholding drug testing program for teachers, after 42 pages of analysis).

of protecting themselves against general searches and seizures. The political process functions as the ultimate check on the proliferation of those practices. If the intrusions become too prevalent, the searched groups have ready recourse to the legislature. If anything, the legislature will approve too few of these searches because the benefits are diffuse and the costs are concentrated, which gives the affected groups an organizational advantage as against the beneficiaries.

But there are other reasons, aside from our preference for democratic decisionmaking, that make the Court's presumption against general suspicionless searches and seizures odd. First, broad suspicionless searches and seizures do not carry the same stigma as suspicion-based searches. Suspicion-based searches by their nature imply that the subject has done something wrong.<sup>159</sup> The Court itself recognized this factor in one of its school drug testing cases. It found that in the school context, suspicion-based drug testing "may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame."<sup>160</sup> The same is true of any suspicion-based search—or so a legislature might presume.

Second, general searches and seizures are often preferable because they minimize the risk of invidious discrimination, as compared with suspicion-based searches. Suspicion-based searches inevitably carry this risk because, despite the probable cause and reasonable suspicion standards, police still have the ability to pick and choose among targets for whom there is probable cause or reasonable suspicion. For example, police

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<sup>159</sup> See Stuntz, 44 Stan. L. Rev. 553, 565 (1992) (noting that innocent people might prefer broader search regime to one with individualized suspicion).

<sup>160</sup> *Vernonia*, *supra* note 82, at 663.

have wide discretion to choose among the pool of speeders on the highway, and may use this discretion to target minority drivers: the well-known phenomenon of “driving while black.”<sup>161</sup> Moreover, the remedy for such police discrimination is often inadequate. The Equal Protection Clause provides the only remedy, and it requires proof of intentional discrimination. If the police officer never records what he was thinking, this intent is impossible to prove.<sup>162</sup> Discovering police intent is even more difficult than discovering intent in other equal protection contexts because of the “blue wall of silence” that prevents discovery of accurate information about police activities.<sup>163</sup> For this reason, Bill Stuntz has concluded that “it is the individual stops that carry the greatest risks of both harm to the target and discrimination by the police. It is also the individual stops that are hardest for the citizenry to monitor.”<sup>164</sup> In any event, it is certainly perverse from a political process perspective to apply a special needs requirement that *disfavors* broad suspicionless searches and thus forces legislatures, against their will, to use searches that carry a greater risk of discrimination against discrete and insular minorities.<sup>165</sup>

Because there is no *ex ante* reason to distrust this kind of search, and because the political process serves to curtail their inefficient deployment, the *Chandler* special needs principle, like the *Edmond* rule, has no basis in political process theory. A need is special

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<sup>161</sup> See note 119 above, on the phenomenon of “driving while black.”

<sup>162</sup> See *Washington v. Davis*, *supra* note 116.

<sup>163</sup> See David A. Slansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 326 (“Equal protection doctrine treats claims of inequitable policing the same as any other claim of inequity; it gives no recognition to the special reasons to insist on evenhanded law enforcement, or to the distinctive concerns with arbitrariness underlying the Fourth Amendment. As a result, challenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police...[T]his amounts to saying that they will almost always fail.”).

<sup>164</sup> Stuntz, *Local Policing*, *supra* note 1, at 2168.

<sup>165</sup> See also *Earls*, *supra* note 44, at 837 (“Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive...A program of individualized suspicion might unfairly target members of unpopular groups.”).

enough if it attracts legislative attention. A court determining the specialness of the need is only sitting as an adjunct legislature: an improper state of affairs in a democracy.

*C. Third requirement: no general searches and seizures that a court deems unreasonable*

Finally, even if a general search or seizure does not have a crime control purpose and has a “special” need, the courts often conduct a de novo review of the reasonableness of the search. The constitutionality of checkpoint stops without a crime control purpose “still depends on a balancing of the competing interests at stake and the effectiveness of the program,” though the courts do defer somewhat to the political branches’ determination of effectiveness.<sup>166</sup> The courts are far less deferential in other areas. For example, in drug testing cases, the court must “balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”<sup>167</sup> The Court mandates a similarly intrusive review in the administrative search context.<sup>168</sup> And the courts do not uphold the search if it has any rational basis. Rather, they independently weigh the costs and benefits, without deferring to the legislature’s judgment.<sup>169</sup>

Critics have long taken issue with the courts’ application of this balancing test. They claim that courts are incompetent to conduct any real weighing of social costs and benefits, and therefore the test merely masks an application of the judges’ own policy preferences. Justice Brennan, dissenting in *T.L.O. v. New Jersey*, said,

All of these ‘balancing tests’ amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in

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<sup>166</sup> Edmond, *supra* note 130, at 47.

<sup>167</sup> Skinner, *supra* note 149, at 619.

<sup>168</sup> See Burger, *supra* note 102, at 702.

<sup>169</sup> See, e.g., Vernonia, *supra* note 82; Earls, *supra* note 44.

an unanalyzed exercise of judicial will...On my view, the presence of the word ‘unreasonable’ in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good.<sup>170</sup>

These critics believe that because the balancing test is so malleable, it follows that the more concrete standards of warrant and probable cause must apply to all searches and seizures.<sup>171</sup>

The critics are correct that courts are in no position to weigh the social costs and benefits of general searches and seizures. As shown above, there are at least five reasons why legislatures are more competent than judges in this area: their ability to conduct meaningful balancing, their ability to collect facts, their greater legitimacy, their ability to accommodate local variation, and their ability to adapt to changed circumstances. And the Court trusts legislatures to weigh the costs and benefits of social policy affecting regular groups in most areas *except* police policy.

But far from supporting more stringent application of the equally arbitrary requirements of warrant and probable cause, the relative incompetence of courts implies that *legislatures* should be presumptively responsible for the balancing. A general search or seizure affects groups of people that can protect their interests through political channels.<sup>172</sup> We basically trust legislatures to balance costs and benefits in every other area of social policy where process failures are absent, even when constitutional values

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<sup>170</sup> T.L.O., *supra* note 37, at 369-70.

<sup>171</sup> See Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*, 72 Minn. L. Rev. 383, 439 (1988) (arguing that balancing tests conducted by courts will inordinately favor the government because interests in controlling crime and saving lives will always seem to outweigh interests in privacy); Nadine Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. Rev. 1173, 1188 (1988) ((arguing that reasonableness balancing often depends on judges’ personal values).

<sup>172</sup> See Klarman, *supra* note 1, at 826 (arguing that the drug testing cases clearly violate any notion of political process theory, because “a majoritarian legislature presumably would not consent to such widespread privacy invasions unless substantial countervailing benefits were generated”).

are implicated, as in the due process, equal protection, and free exercise contexts. There is thus no reason to make a special exception for deprivations of privacy that affect groups. If anything, the affected groups have an organizational advantage and should be *disproportionately* capable of blocking practices that affect their privacy. A court should restrict itself to spotting process failures such as executive discretion and discrimination. Otherwise, the court should uphold the policy if it has any rational basis—not merely if it seems wise or expedient. Once the Court has decided that reasonableness is the appropriate test under the Fourth Amendment—as it has in countless cases—the natural implication is that the legislature should be responsible for determining reasonableness in the absence of a process failure.

This Part has shown that the Court’s treatment of general searches and seizures is unsupportable. Rather than inquiring into the purpose of the search and conducting an intrusive review of the practice, the Court should simply ascertain whether a process failure is present and, if not, apply only rational basis review. It remains only to answer some of the inevitable criticisms from other schools of constitutional interpretation that will be levied against this approach to the Fourth Amendment.

#### *IV. The ambiguity of the Framers’ intentions regarding legislatively authorized general searches and seizures*

The political process approach conflicts with two theories of the Fourth Amendment that have at one time or another been embraced by one or more justices. It is worthwhile to conclude by showing that both theories are without merit.

The first theory claims that the Amendment’s command of reasonableness requires an irreducible level of suspicion before the government can search or seize. On

this view, even if the ideal conditions of democracy are present (a set of conditions that political process theory tries to replicate), the legislature cannot authorize departures below that level of suspicion.<sup>173</sup>

Chief Justice Taft's opinion in *Carroll v. United States* was the progenitor of this view. He remarked, "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."<sup>174</sup> Regardless of the fact that large groups of people who could be heard in the political process were affected, Taft would have required probable cause to search any given car.

Justice Brennan is the modern proponent of the irreducible suspicion theory of the Fourth Amendment. In his dissent in the seminal case of *T.L.O. v. New Jersey*, he said,

The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some 'balancing test' than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the 'reasonable' requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'<sup>175</sup>

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<sup>173</sup> See Klarman, *supra* note 1, at 767 ("The fourth amendment's prohibition on unreasonable searches and seizures can be conceptualized as serving two distinct values: (1) creating a zone of personal privacy unimpingeable by government (except for compelling reasons), and (2) protecting against illegitimate exercise of discretionary authority by law enforcement officers. Political process theory wholly supports the second of these 'privacy' values, but rejects the first").

<sup>174</sup> *Carroll v. United States*, 267 U.S. 132, 153 (1924).

<sup>175</sup> *T.L.O.*, *supra* note 37, at 361 (Brennan, J., dissenting).

Brennan thus also condemned any deviation from the probable cause standard, which in his view represented the constitutional baseline below which neither courts nor legislatures could depart.

The first thing to note is that Brennan lost. The Court has repeatedly held that the Amendment does not require any irreducible level of suspicion for searching and seizing.<sup>176</sup> Reasonableness is the touchstone.<sup>177</sup> And once reasonableness is seen as the operative clause, it is difficult to see why judges should have the authority to revise a legislative judgment, in the absence of a process failure. Reasonableness implies some balancing of costs and benefits—both broadly defined, of course, to include privacy, liberty, and dignity values. Absent a process failure that blocks access, legislatures are presumptively capable of conducting that balancing, as shown in Part I. Courts will of course always retain a role in monitoring most police behavior, because it does involve executive discretion. But where that process failure is absent, as in the typical general search or seizure, a legislature’s judgment should control.

The second thing to note is that Brennan lost for a reason: his position is atextual. The controlling clause of the Fourth Amendment requires only reasonableness. The Amendment mandates probable cause only when a warrant issues, and not necessarily in other circumstances. Historians have confirmed that this is a correct reading of the Amendment. The probable cause requirement was intended to be a barrier to getting a warrant, because the warrant was an evil at the time of the founding that rendered executive officials immune from civil damages for arbitrarily broad searches and

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<sup>176</sup> See Martinez-Fuerte, *supra* note 37, at 560 (“The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.”).

<sup>177</sup> See *supra*, note 37.

seizures.<sup>178</sup> Probable cause was not intended to be the sine qua non of reasonableness. Where the problem of executive discretion is not present, the text provides no reason to require any level of suspicion. All that remains is the *judge's* own opinion that reasonableness requires some level of suspicion. And that opinion should fall in the face of a proper majority vote, which is presumably better able than Justice Brennan to determine what “the people” protected by the Amendment deem reasonable.

A more serious objection to the political process approach does not claim that the Fourth Amendment *requires* an irreducible level of suspicion. Rather, it claims that the Amendment embodies a strong *presumption* against suspicionless searches and seizures. Thus, in order to be reasonable, such searches must be strictly circumscribed, and a court must do the circumscribing.

This theory finds support in the original understanding of the Amendment. As is well known, the Amendment was primarily intended to outlaw the practice of the general warrant: a device that gave royal officials the authority to conduct broad searches and seizures of private homes and businesses. The theory analogizes the general search to a general warrant, and claims that general searches too must have been excluded from the framers' understanding of “reasonableness” and must be strictly cabined, even if a legislature approves it, absent a constitutional amendment.

Justice O'Connor's dissent in *Vernonia* is the chief example of this argument. She argued that the Fourth Amendment prohibits broad-based searches unless they are the only effective way to achieve some important governmental interest.<sup>179</sup> She noted that “what the Framers of the Fourth Amendment most strongly opposed, with limited

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<sup>178</sup> See Amar, *supra* note 12, at 770; Posner, *supra* note 39, at 72.

<sup>179</sup> *Vernonia*, *supra* note 82, at 667.

exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority.”<sup>180</sup> This is undoubtedly true. But those practices are all distinguishable from general searches. Each involved a great deal of executive discretion. The general warrant, for example, immunized executive officials from civil damages for arbitrarily broad searches and seizures. The Framers thus may very well have been concerned not with the fact that the general warrant was general, but with the fact that it was a “warrant,” as that term was understood at the time.

The text of the Amendment is perfectly consistent with that position: rather than outlaw general searches, the Framers simply placed significant limits on the breadth of warrants. And the political process approach *also* recognizes that general warrants are an evil. Strict scrutiny is *justified* when the legislature authorizes a scheme that vests executive officials with a great deal of discretion. The general warrant is essentially the case of *Delaware v. Prouse*, which comes out the same way under the political process approach. The example of general warrants is thus no objection to the process approach to the Amendment.

O’Connor nevertheless claimed that the framers would have disapproved of a political process approach to the Amendment: “More important, there is no indication in the historical materials that the Framers’ opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to *every* person in a given group.”<sup>181</sup>

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<sup>180</sup> *Id.* at 669.

<sup>181</sup> *Id.* at 670.

O'Connor's argument does not prove much because it is phrased in the negative. It is true that there is no evidence the framers would have approved of general searches that applied to everyone equally. But there is also no evidence that they would have objected. The historical materials on the Fourth Amendment are notoriously spotty, and provide no definitive guidance either way.<sup>182</sup> If anything, the framers likely would not have been capable of comprehending what this article terms a general search or seizure. At the time of the founding, there were no organized police forces and thus no administrative state capable of conducting such searches.<sup>183</sup> Given that the historical materials are ambiguous at best, the case based on original meaning is not compelling. The political process approach preserves the recognized core of the original meaning of the Amendment: the concern with executive discretion. In the absence of more concrete guidance, the political process approach is certainly not foreclosed.

Moreover, the Fourth Amendment must be read in conjunction with the framers' basic trust of representative democracy. As Ely noted, "We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government. The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it."<sup>184</sup> Prof. Amar has shown that the original Constitution was a profoundly democratic document for its time.<sup>185</sup> The Bill of Rights was of course intended to be a limit on majoritarian rule. But the political process approach is consistent

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<sup>182</sup> See Wasserstrom and Seidman, *supra* note 9, at 80.

<sup>183</sup> *Id.* at 82 ("When the fourth amendment was written and ratified, there were no organized police forces even remotely like those we take for granted today. The few law enforcement officials that there were—sheriffs, constables, and customs inspectors—had very limited power to search or seize without a warrant and were subject to harsh civil penalties at common law if they exceeded those limits.").

<sup>184</sup> Ely, *supra* note 4, at 5.

<sup>185</sup> See Akhil Amar, *America's Constitution 15-6* (2005) (cataloguing the democratic provisions of the Constitution).

with the purpose of the Bill of Rights, which was to limit majoritarian excess while preserving as much self-government as possible. By focusing the courts on policing those general searches and seizures where the political process is most likely to go awry, the political process approach is consonant with the framers' vision for the Bill of Rights. The approach provides significant constraints on legislative action: courts continue to scrutinize such searches for discrimination, executive discretion, and rational basis. Without more explicit original meaning evidence to the contrary, the framers should not be found to have foreclosed a political process approach to the Amendment.

Finally, O'Connor's position, like Brennan's, is arbitrary because it invalidates a legislative judgment where there is no process failure and no clear text or original understanding on point. She permits a great number of general searches: those that *judges* deem necessary to fulfilling an important governmental purpose. The examples she cites include the building inspections in *Camara* and, most surprising, *other drug tests!*<sup>186</sup> Her version of the original understanding is thus quite equivocal, and it is unclear why judges rather than legislatures should get to decide when a general search is "necessary." O'Connor's position thus ultimately runs up against the same problem that Brennan's did. Once the Court has interpreted the text of the Amendment as requiring only reasonableness, it is very difficult to argue that judges rather than legislatures should be conducting the balance between liberty and security.

A final objection to the political process approach is textual: that it makes the Fourth Amendment redundant by converting it into a mini-Equal Protection clause. It is true that the approach is informed by principles that have shaped equal protection doctrine. But that is not damning. The Court has already adopted an equal-protection-

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<sup>186</sup> See *Vernonia*, *supra* note 82, at 674.

style approach to interpreting the Free Exercise Clause in *Employment Division v. Smith*, where it held that rational basis review applies so long as a law burdening religious practice is neutral and generally applicable.<sup>187</sup> Further, as the Court noted in *Lukumi*, “In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.”<sup>188</sup> There is no reason why the Fourth Amendment cannot also be informed by principles that have shaped equal protection law.

Moreover, even once we carve out general searches for rational basis review, the Fourth Amendment retains plenty of independent force not found in any other constitutional provision. Executive discretion is an inherent part of most police activity, so the courts will retain a major role in elaborating guidelines for police conduct under the Amendment. Finally, even in the realm of general searches, the standards for political process review of general searches and seizures do not have to be identical to equal protection standards. As noted above, disparate impact review might be appropriate in the Fourth Amendment context because of the particular stigmatic harms of searches and seizures and the history of racial problems in policing. Consistency with the Court’s interpretation of the due process, equal protection, free exercise, and takings clauses should be counted as a *virtue* of the political process theory, not a drawback.

Arguments from text and original meaning against the political process approach are thus unavailing. The Amendment requires no irreducible level of suspicion, except where warrants are involved. And the process approach is entirely consistent with the only unambiguous evidence of the framers’ intent: the prohibition on general warrants. Any other attempt to give substantive content to reasonableness is simply inconsistent

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<sup>187</sup> See *Smith*, *supra* note 113, at 878. See also *Lukumi* at 540 (“In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases”).

<sup>188</sup> *Lukumi*, *supra* note 187, at 540.

with our general trust of legislatures to weigh costs and benefits and determine the social good. A legislature's judgment that a particular general search or seizure is reasonable should be entitled to deference. The presumptive capacity of the legislature to weigh costs and benefits is quite simply what it means to live in a democracy rather than a judge-ocracy.

#### *V. Conclusion: Eliminating the irrational fear of general searches and seizures*

The political process approach outlined in the previous three Parts should not be controversial. Nearly all the justices have endorsed some version of it in some general search or seizure opinion.<sup>189</sup> And the Court has adopted a similar approach in many other areas of constitutional law. Yet an argument that legislatures should be primarily responsible for defining the reasonableness of general searches and seizures is bound to strike some readers as counter-intuitive. Hopefully the preceding arguments have alleviated many of their concerns. There are three reasons why courts should apply rational basis review to general suspicionless searches authorized by a legislature: the

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<sup>189</sup> See *Vernonia*, *supra* note 82, at 665 (Scalia, J., majority opinion) (“We may note that the primary guardians of *Vernonia*’s schoolchildren appear to agree. The record shows no objection to this districtwide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents’ views.”); *Sitz*, *supra* note 43, at 453 (Rehnquist, C.J., majority opinion) (“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 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.”); *Earls*, *supra* note 44, at 841 (Breyer, J., concurring) (“When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community the opportunity to be able to participate in developing the drug policy. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program.”); *Ferguson*, *supra* note 86, at 92 (Scalia, J., dissenting) (“The Constitution does not resolve all difficult social questions, but leaves the vast majority of them to resolution by debate and the democratic process—which would produce a decision by the citizens of Charleston, through their elected representatives, to forbid or permit the police action at issue here.”).

Court trusts groups to protect their own interests in every other area of constitutional law; legislatures are particularly capable of implementing the cost-effectiveness guarantee of the Fourth Amendment; and, if anything, legislatures will authorize too few general searches and seizures because of the organizational advantage possessed by the affected groups.

It also bears emphasizing that nearly every general search and seizure case the Court has heretofore considered would come out the same way, though for different reasons. *Edmond*, for example, would rest on the ground of no legislative authorization. *Chandler* is the only case where a legislature authorized the search and arguably no process failure was present. Accordingly, the suggestions in this Article mean mainly a change in emphasis and a change in the way the Court approaches Fourth Amendment questions, not a license to subject the population to scores of general searches and seizures.

In fact, it is precisely because affected groups wield so much power in the political process that there is so little to fear from rational basis review of general searches and seizures. Because intensely interested groups are so powerful in the political process, it is extremely difficult for legislatures to approve general search and seizure programs that target voters.<sup>190</sup> And because passage is so difficult, the Court should pay all the more attention to a program that has made it through the legislative gauntlet. Such a program is surely entitled to a presumption of reasonableness. The reflexive responses against a political process approach are just so much hyperbole. The remark in *Skinner*—that drug testing of employees is the first step on a slippery slope to “[t]he World War II relocation-camp cases and the Red Scare and McCarthy-era internal subversion cases”—

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<sup>190</sup> Disenfranchised prisoners may be another story, see below.

is off base. If a legislature ever tried to conduct a general search or seizure directed at a racial minority or at a fundamental freedom like the right to free speech, the courts would retain full authority to invalidate the practice if it was not necessary to achieve a compelling governmental interest.

The political process approach is eminently “reasonable.” It places responsibility for defining reasonableness or cost-effectiveness in the institution that we usually trust with that task: the legislature. And there is no risk of unfairness because the courts remain to police process failures.

The main purpose of this Article has been to restructure the discourse surrounding general searches and seizures. Too often the debate among judges turns into a slippery slope, ending in a totalitarian regime. This all-too-familiar trope should be retired. It reflects an irrational distrust of democracy. So long as such searches affect groups of people, and so long as courts exist to police the situations where the political process might go awry, the legislature should be perfectly capable of reaching a reasonable accommodation between security and privacy.

The need for a shift in discourse is evident from the Ninth Circuit’s recent decision in *United States v. Kincade*.<sup>191</sup> The case concerned the constitutionality of a Congressional statute requiring the extraction of DNA from convicted felons. The practice is somewhat interesting in its own right because it is another in a long line of cases in tension with *Edmond*’s prohibition of crime control purposes. The purpose of the DNA extraction is quite clearly to solve future crimes that the particular convict might

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<sup>191</sup> *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2005).

commit.<sup>192</sup> But despite *Edmond*, all the circuits have upheld the practice.<sup>193</sup> And political process theory has no quarrel with a court independently weighing the costs and benefits of DNA extraction: felons are often disenfranchised, and thus legislatures cannot be expected to give proper weight to their interests in privacy.

What is objectionable is the rhetoric that surrounds DNA extraction. *Kincade* produced a dissent improbably pairing Judges Reinhardt and Kozinski. They argued that “[u]nder the rationales [the majority] espouse... all Americans will be at risk, sooner rather than later, of having our DNA samples permanently placed on file in federal cyberspace, and perhaps even worse, of being subjected to various other governmental programs providing for suspicionless searches conducted for law enforcement purposes.”<sup>194</sup> They then summoned the parade of horrors: “The compulsory extraction of blood samples and the maintenance of permanent DNA profiles of American citizens is, unfortunately, the beginning not the end. 1984 arrives twenty years later than predicted.”<sup>195</sup>

The problem with the dissent’s argument is that our society is totally different from the one depicted in 1984. That is a novel portraying a totalitarian government. Our society is a democracy with political checks built in. Is it any accident that the DNA extraction statute only applies to people who cannot vote? The political backlash would doom to defeat any politician who proposed putting all Americans into a DNA registry.

But if there ever comes a day when a majority of legislators *could* support such a

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<sup>192</sup> The government claims that another purpose is to *exculpate* those same convicts. But if the purpose were exculpation, the convict would be willing to voluntarily provide a DNA sample at some later date. *See United States v. Weikert*, 421 F. Supp. 2d 259, 265 (D. Mass. 2006) (“The government’s purpose is not merely the disinterested creation of a database. Instead, the government’s purpose is to obtain information related to possible crimes that the individual subject to the search may have committed.”).

<sup>193</sup> *See, e.g., Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005).

<sup>194</sup> *Kincade, supra* note 191, at 843 (Reinhardt, J., dissenting).

<sup>195</sup> *Id.* at 870.

proposal, would judges be so bold as to say that the measure is not reasonable? Many things that were once considered unreasonable are now obviously reasonable. The framers would have been troubled by the fact that we have a standing army of police officers in our midst; we quite literally cannot do without them. Using the Fourth Amendment as a bar to change that the political process justifiably deems reasonable is the worst kind of sentimentalism. And it denigrates the value of self-government.

The *Kincade* dissent thus had it exactly wrong. Courts *should* strictly review general suspicionless searches of convicts. But the fact that legislatures are willing to approve those searches says *nothing* about what they are willing to do to voters. Courts should trust the political process to approve the right balance when it comes to searches and seizures of groups of ordinary citizens. If anything, as discussed above, too few of these searches will occur because of the disproportionate power wielded by intensely interested, medium-sized groups, which have an organizational advantage over diffuse beneficiaries.

As with other areas of constitutional law, the political process approach to general searches and seizures promises a sound division of labor between the institutions of government. It will enhance liberty. Legislatures will no longer be constrained to rely on inefficient amounts of suspicion-based searching—which also pose an unavoidable risk of invidious discrimination. The discourse surrounding general searches and seizures will improve. The debate will take place in terms ordinary people can understand instead of in the legalese of the courts of appeals. And the courts will augment their own legitimacy. Instead of using malleable and ad hoc balancing tests to strike down general searches and seizures, courts will be the guardians of democracy, intervening only when process

failures make it necessary. There is nothing to fear from giving legislatures primacy in deciding the reasonableness of general searches and seizures. And there is very much to gain.