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## ARTICLE

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### POLICING AS ADMINISTRATION

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CHRISTOPHER SLOBOGIN†

*Police agencies should be governed by the same administrative principles that govern other agencies. This simple precept would have significant implications for regulation of police work, in particular the type of suspicionless, group searches and seizures that have been the subject of the Supreme Court’s special needs jurisprudence (practices that this Article calls “panvasive”). Under administrative law principles, when police agencies create statute-like policies that are aimed at largely innocent categories of actors—as they do when administering roadblocks, inspection regimes, drug testing programs, DNA sampling programs, and data collection—they should have to engage in notice-and-comment rulemaking or a similar democratically oriented process and avoid arbitrary and capricious rules. Courts would have the authority to ensure that policies governing panvasive actions are authorized by statute and implemented evenhandedly, both in individual instances and as they are distributed within the agency’s jurisdiction. Furthermore, these principles would apply regardless of whether the panvasive practice has been designated a search or seizure under the Fourth Amendment.*

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## INTRODUCTION

Searches and seizures carried out by law enforcement agencies can be divided into two types: “suspicion-based” and “panvasive.”<sup>1</sup> Most police efforts to detect and deter crime involve a decision about whether to seize a particular person or search his or her possessions, based on “probable cause” or “reasonable suspicion.”<sup>2</sup> The officer in the field determines whether the confrontation takes place, the unit of investigation is usually no more than a few individuals, and the motivation behind the police action is suspicion of crime.

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<sup>1</sup> See Barry Friedman & Cynthia Benin Stein, *Redefining What's “Reasonable”: The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 286 (2016) (“When policing agencies police, they do one of two things: (1) they investigate, and (2) they seek, in a programmatic or regulatory way, to curb a social problem.”).

<sup>2</sup> See DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 16, 25-26 (1994) (noting that most policing involves either “patrol” or detective work and stating that both are “overwhelmingly reactive”). I include in this category suspicionless actions incident to arrest, stop, or search because they immediately follow suspicion-based actions. See, e.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973) (discussing the officer's ability to search an arrestee or his vicinity simply by virtue of the person having been placed under arrest).

Panvasive searches and seizures, which have also been called dragnets<sup>3</sup> and programmatic searches and seizures,<sup>4</sup> are something quite different.<sup>5</sup> These police actions usually share three characteristics: (1) they occur pursuant to a legislative or executive branch *policy*, written or unwritten, that officers are directed to follow; (2) they seek to ferret out or deter *undetected wrongdoing*, usually within a designated group, rather than focus on a particular crime known to have already occurred; and, relatedly, (3) they are purposefully *suspicionless* with respect to any particular individual, and thus will almost inevitably affect a significant number of people not involved in wrongdoing.<sup>6</sup> Examples of panvasive actions include residential and business inspection programs, checkpoints (aimed at detecting, inter alia, illegal immigration, drunken drivers, or drivers without licenses), drug testing programs, creation of DNA databases, collection of communications metadata, and establishment of surveillance regimes involving cameras, tracking systems, and the like.<sup>7</sup>

Although all of these investigative techniques involve searching for and seizing items or people, not all of these techniques (for instance, metadata collection and public camera surveillance) are considered searches or seizures

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3 I have used this term in previous work. See Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107 (2010). However, for reasons indicated below at note 5, I have since used the panvasive nomenclature.

4 See, e.g., Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016) (distinguishing “programmatic surveillance” from “transactional” search-by-search analysis); see also Friedman & Stein, *supra* note 1, at 286.

5 I use the word “panvasive” to describe these actions because they are pervasive, invasive, and affect large numbers of people, most of whom police know are innocent of wrongdoing. See Christopher Slobogin, *Rehnquist and Panvasive Searches*, 82 MISS. L.J. 307, 308 (2013) (“Although these techniques are now pervasive, and are often invasive, their defining characteristic is their panvasiveness—the fact that they affect so many people, most of them innocent of any wrongdoing.”). The term “dragnet” is less apt because it has generally been applied solely to detentions in connection with solving a particular crime, and thus includes neither searches nor preventive actions. See, e.g., *Davis v. Mississippi*, 394 U.S. 721, 728-29 (1969) (Harlan, J., concurring) (referring to the detention of twenty-four black youths for fingerprinting purposes as a “dragnet procedure[.]”). The word “programmatic” is also misleading, because suspicion-based searches and seizures can also be part of a program. See Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168-69 (2015) (describing New York City’s recently suspended stop-and-frisk policy, which ostensibly required reasonable suspicion before a stop could occur, as a “program”).

6 Note, however, that panvasive searches and seizures could be based on data that suggest a particular type of location or activity is likely to be associated with the crime or crimes of interest and thus could sometimes be said to be based on what I have called “generalized suspicion.” Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 57 (1991); cf. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 846-50 (2011) (arguing that “hit rates,” predicted beforehand or obtained after a government action, can provide the “suspicion” needed to make a search or seizure reasonable).

7 See *infra* text accompanying notes 24–96.

under the Fourth Amendment.<sup>8</sup> When the courts do find that a particular investigation program is a search or a seizure, they usually conclude that the government interest in the program outweighs its intrusiveness, often using what has come to be called “special needs” analysis, on the theory that these situations are outside the typical bailiwick of the police.<sup>9</sup> Thus, the Supreme Court has upheld, against Fourth Amendment challenge, suspicionless inspections of gun stores, liquor stores, mining operations, and junkyards, suspicionless stops at border and sobriety checkpoints, suspicionless drug testing of government officials, railway workers, and school children, and suspicionless DNA sampling of arrestees, and lower courts have upheld suspicionless operation of counterterrorist checkpoints, metadata programs, and camera surveillance systems.<sup>10</sup>

These decisions have been controversial and are currently in a state of flux. Some scholars would impose the traditional suspicion-based warrant regime in many of these situations,<sup>11</sup> or would preclude prosecutorial use of any evidence thereby obtained,<sup>12</sup> whereas others agree with the Court’s

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8 The constitutional test is whether the police action (1) infringes reasonable expectations of privacy or (2) involves a physical intrusion into a constitutionally protected space. *See* *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012) (identifying the “reasonable expectation of privacy” and “common-law trespass” formulas as the tests for when the Fourth Amendment applies). The Supreme Court’s “third party” doctrine holds that a person has no expectation of privacy when he or she voluntarily surrenders information to a third party, whether it be a bank, phone company, or internet service provider. *See* *United States v. Miller*, 425 U.S. 435, 443 (1976) (“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party . . .”). The Supreme Court has also held that surveillance of public activities is not a search, so long as that surveillance is not prolonged. *See* *United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”); *see also Jones*, 132 S. Ct. at 964 (Alito, J., concurring) (“[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”).

9 *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“[W]e have upheld certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement.” (internal quotation marks omitted)).

10 *See infra* Sections I.A–F.

11 *See* STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* 93-144 (2012) (disagreeing with most of the Court’s special needs cases); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 522-23 (1991) (arguing that suspicionless searches should be permitted only in cases involving extreme exigency or presenting “the most minimal potential for abuse and unnecessary intrusion”); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 25-32 (1994) (criticizing the suggestion that probable cause should not be required for all government intrusions, including surveillance).

12 *See, e.g.,* Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 920-21 (2010) (arguing that when government purports to be carrying out “regulatory” searches and seizures, as is the case with many special needs situations, it should be prohibited from using any evidence it garners in criminal prosecutions); *see also* Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless*

intuition that balancing is required, but would require a much weightier, “compelling” government interest before upholding a panvasive action.<sup>13</sup> The Court itself has begun to backtrack from its early decisions narrowly construing the Fourth Amendment’s threshold.<sup>14</sup> And just last Term, in *City of Los Angeles v. Patel*, the Court signaled that it may also rethink its highly deferential special needs jurisprudence.<sup>15</sup>

The time for rethinking is at hand. But the template should be neither traditional Fourth Amendment law nor strict scrutiny analysis. In fact, constitutional law should largely be beside the point in this setting, functioning only as a backstop protection for fundamental liberties and as an exhortation that panvasive actions be reasonable. Instead, the concrete rules governing panvasive techniques should be viewed through the entirely different prism of administrative law.

The reason administrative law should be the primary mechanism in this setting is simple: police departments are agencies, and as such should have to abide by the same constraints that govern other agencies. Although scholars from as long ago as the 1970s have recognized that administrative law can be a useful means of regulating the police,<sup>16</sup> and a few scholars have recently rejuvenated this idea,<sup>17</sup> none have provided a convincing rationale for why the administrative template is *required* in this setting or fleshed out in any detail how it might work.

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*Searches*, 38 RUTGERS L.J. 719, 781 (2007) (noting that “‘special needs’ searches are more easily tolerated if they do not result in criminal penalties”).

<sup>13</sup> See *infra* note 119.

<sup>14</sup> In *United States v. Jones*, five Justices signaled a willingness to hold that prolonged public tracking, whether or not accompanied by a trespass, is a search. See 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (“I agree with Justice Alito that, at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’”); *id.* at 964 (Alito, J., concurring) (writing on behalf of himself and three other Justices that “the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy”); see also *Florida v. Jardines*, 133 S. Ct. 1409, 1411 (2013) (holding that a dog sniff of a home from curtilage is a search).

<sup>15</sup> See 135 S. Ct. 2443, 2452–53 (2015) (holding that, although special needs analysis applied, a hotel owner is entitled to have a neutral decisionmaker review a demand to search the hotel’s registry before he can be penalized for failing to comply).

<sup>16</sup> See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423 (1974) (“[I]nformed authorities today agree with rare unanimity upon the need to direct and confine police discretion by the same process of rulemaking that has worked excellently to hold various other forms of public agencies [accountable] under standards of lawfulness, fairness and efficiency.”); Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 725 (1974) (“My central idea is that police practices should no longer be exempt from the kind of judicial review that is usual for other administrative agencies.”); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 690 (1972) (touting police department rulemaking because “direct discipline imposed by the police internally is far more likely to deter than remote exclusions of evidence in criminal trials”).

<sup>17</sup> See *infra* Section II.C.

The myopia on the part of most of the academy and the courts results in part from the understandable belief that the Fourth Amendment, as a practical matter, has preempted the field of police regulation. But it also derives from the fact that the usual starting point of analysis conceives of police work as a suspicion-based endeavor. An officer's decision to stop, arrest, or search someone is typically thought of as an individualized assessment, and most Fourth Amendment cases have in fact involved just such a search or seizure. In administrative law parlance, the suspicion-based model of policing could be characterized as a form of "adjudication" by the officer on the street, and thus not amenable to the administrative regulatory mechanisms that focus on legislative-like "rulemaking."<sup>18</sup> In a suspicion-based regime, to the extent legislative pronouncements are relevant at all, the governing rules come from the criminal law; law enforcement officials who act based on suspicion are engaged in determining when a person may have violated a criminal statute.

By contrast, when police instead carry out searches and seizures that are panvasive in nature, they are not adjudicating whether the people who are stopped or searched violated a criminal or regulatory prohibition enacted by the legislature. Rather, they are enforcing a rule, often adopted by the police themselves, that *purposefully* impedes perfectly *innocent* activity, such as driving on the roads, going to school, or relying on common carriers to communicate. Like Environmental Protection Agency rules requiring pollution-reduction regimens or Food and Drug Administration rules mandating certain types of food processing, panvasive actions by the police impose conditions on everyday, legitimate conduct of potentially huge numbers of people, enforced by coercive measures or avoidable only by changing that conduct. Because, as explained earlier, panvasive searches and seizures are policy-driven, group-based, and suspicionless, they are legislative in nature. They are carried out in aid of a generally applicable regime that, if promulgated by any other executive agency, would be considered a form of rule governed by administrative law principles.

That conclusion has significant regulatory implications. For instance, it means that panvasive actions have to be legislatively authorized. It triggers notice-and-comment or analogous procedures that ensure public input into police rulemaking. And it occasions "hard look" judicial review<sup>19</sup> of both the

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<sup>18</sup> See 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:2, at 4 (2d ed. 1979) ("[R]ulemaking is the part of the administrative process that resembles a legislature's enactment of a statute . . . and adjudication is the part of the administrative process that resembles a court's decision of a case.").

<sup>19</sup> See, e.g., Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 154-59 (2006) (discussing the Administrative Procedure Act and associated case law establishing the hard look doctrine).

substance of police agency regulations and the process by which they are created. While that review does not amount to strict scrutiny, it requires meeting more than the minimal rationality standard that the Supreme Court usually applies to panvasive searches and seizures.<sup>20</sup> Furthermore, the hard look standard applies regardless of whether the government program is designated a Fourth Amendment “search” or “seizure.”

A reorientation of panvasive search and seizure jurisprudence toward administrative law principles stakes out a middle position that many of those involved in the debate about panvasive actions might find palatable. Critics of the Court and of current ways of policing might welcome the greater emphasis on the rule of law, public input, and judicial rationality-with-bite review, as well as the fact that these constraints do not depend on the Court’s definition of the Fourth Amendment’s threshold. At the same time, a reframing of panvasive searches and seizures as administrative actions gives significant weight to legislative and executive decisionmaking, and it draws from the Court’s precedent, such as it is.

This Article begins in Part I with an overview of the relevant case law on panvasive searches and seizures, with an emphasis on the Supreme Court’s treatment of inspections, checkpoints, drug testing programs, and DNA sampling, as well as lower court cases concerning surveillance. Part II points out the internal inconsistencies of the Court’s jurisprudence—in particular, the peculiar implications of its special needs analysis—and also critiques the most prominent alternatives suggested by commentators, the strict scrutiny model and the “new administrativist” model. Part III then argues, based in part on the premise that all public officials must be subject to administrative law, in part on widely ignored aspects of the Supreme Court’s inspection cases, and in part on the structure of panvasive search and seizure itself, that administrative law principles should be the primary means of curbing government discretion in this setting. Using examples from the surveillance and street policing contexts, Part IV fleshes out how these principles would apply: to be legitimate, panvasive actions would require authorizing legislation, policymaking procedures that involve community input, a written product with a written rationale, and strictures on implementation to ensure even application both across jurisdictions and within a particular application of the program. It also explains why these principles should apply even to local policing efforts that usually are thought to be exempt from federal and state administrative procedure statutes. If followed, these constraints would provide a robust regulatory structure even if the Fourth Amendment does not

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<sup>20</sup> See *id.* at 156 (defining one principal element of the hard look standard as “the requirement that the agency’s ultimate policy choice be reasonable, not just minimally rational”).

apply to panvasive actions or applies only in the very deferential manner contemplated by special needs analysis.

## I. RELEVANT CONSTITUTIONAL JURISPRUDENCE

The Supreme Court has decided over twenty cases involving panvasive searches and seizures as defined in this Article, the first in 1973 and the most recent in 2015. In most of these cases, the Court has employed a straightforward balancing analysis that weighs the government's interests against the individual's, and then has either upheld the program or modified it in only a minimal fashion. In a few cases, it has declared the program unconstitutional and imposed a suspicion-based regime instead. The dividing line usually depends on whether the Court views the situation as one involving "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable."<sup>21</sup> This language first appeared in a 1985 case (ironically, one that did not involve a panvasive search or seizure<sup>22</sup>), but the Court has since used it in referring to pre-1985 panvasive cases as well.<sup>23</sup>

The discussion below is organized under the five major types of panvasive actions that have occupied the courts to date—inspections, checkpoints, drug testing, DNA sampling, and mass surveillance. It does not cover the cases in detail but rather focuses on the Court's themes. In particular, it emphasizes the ways the Court has tried or failed to cabin executive discretion.

### A. *Inspections*

The leading case on panvasive searches and seizures is *Camara v. Municipal Court*, involving a warrantless health and safety inspection of a residence.<sup>24</sup> The Court held that when such an inspection is nonconsensual, it requires a warrant, but one founded on a type of "probable cause" quite different from its normal definition: rather than requiring probable cause to

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21 *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). This language has since found its way into numerous other opinions, whether they involve panvasive actions, *see* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding drug testing of athletes), or suspicion-based actions, *see* *City of Ontario v. Quon*, 560 U.S. 746, 756 (2010) (upholding a search of an employee's text messages). The special needs moniker has thus done double-duty. *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 259 (2011) ("[M]y central argument is that much of the mischief in administrative search law can be traced to the Supreme Court's conflation of two distinct types of searches within one doctrinal exception . . . 'dragnet searches' and 'special subpopulation searches.'").

22 *See T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (joining in an opinion upholding a search of a student's purse by school officials).

23 *See infra* text accompanying note 38.

24 387 U.S. 523 (1967).

believe a particular home is violating municipal codes, issuance of an inspection warrant may be “based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area,” and “will *not* necessarily depend upon specific knowledge of the condition of the particular dwelling.”<sup>25</sup> In other words, this type of search may be suspicionless, so long as it is based on a preexisting inspection plan relying on neutral criteria. In permitting this departure from the suspicion-based model, the Court found that the invasiveness of a home inspection is minimal, indeed often welcomed by the homeowner, and is outweighed by the government’s goal of ensuring area-wide health and safety.<sup>26</sup> Implicit in the Court’s holding was the conclusion that this goal could not be achieved if the traditional probable cause requirement were applied in this setting.

In a companion case, *See v. City of Seattle*, the Court held that businesses may be subject to similar suspicionless code inspections, as long as they occur “within the framework of a warrant procedure” like that approved in *Camara*.<sup>27</sup> Ten years later, in *Marshall v. Barlow’s, Inc.*, the Court applied the same approach to inspections under the federal Occupational Safety and Health Act.<sup>28</sup> Again, while a warrant was needed for nonconsensual entry, it could be based on “a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area.”<sup>29</sup>

The Court has done away with even this diluted warrant requirement in cases involving “pervasively regulated” industries.<sup>30</sup> Asserting that company owners who choose to be involved in such industries are on notice that they will be entitled to relatively little privacy from government monitoring,<sup>31</sup> the Court has upheld warrantless nonconsensual inspections in cases involving

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<sup>25</sup> *Id.* at 538 (emphasis added).

<sup>26</sup> *See id.* at 537 (“First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of . . . privacy.” (citation omitted)).

<sup>27</sup> *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967).

<sup>28</sup> 436 U.S. 307 (1978).

<sup>29</sup> *Id.* at 321.

<sup>30</sup> This phrase first appeared in *United States v. Biswell*, 406 U.S. 311, 316 (1972), in which the Court upheld warrantless inspections of gun stores.

<sup>31</sup> *See id.* (“When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.”); *see also Marshall*, 436 U.S. at 313 (“[W]hen an entrepreneur embarks upon such a business [of gun and liquor sales], he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.”).

liquor stores, gun stores, mining operations, and junkyards.<sup>32</sup> However, the Court did not give the government *carte blanche* in these cases. In *Donovan v. Dewey*, for instance, it established that pervasively regulated industries are still entitled to demand “a constitutionally adequate substitute for a warrant,” such as a statute that defines the scope and timing of the inspections and the precise standards by which the business owner must abide.<sup>33</sup>

Additionally, the Court has made clear that, despite the ubiquity of government regulation in virtually every commercial arena, not every business is pervasively regulated for purposes of the Fourth Amendment. While *New York v. Burger* held that junkyards, which the state of New York believed were often used to launder stolen automobile parts, fall into that category,<sup>34</sup> the recent decision in *City of Los Angeles v. Patel* held that hotels, which the City of Los Angeles was worried might be used to facilitate drug and sex trafficking, are not pervasively regulated.<sup>35</sup> Thus, whereas searches of junkyard records and lots are permissible in the absence of an *ex ante* determination (assuming a sufficiently specific authorizing statute exists),<sup>36</sup> under *Patel*, some type of “precompliance review” is necessary before police may search registries over the hotel owner’s objection.<sup>37</sup>

At the same time, the *Patel* Court had no hesitation in labeling inspections of hotel registries a “special needs” situation (a label that it also applied, retroactively, to all of the foregoing cases).<sup>38</sup> It concluded that the registry searches “serve a ‘special need’ other than conducting criminal investigations: They ensure compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels’ premises.”<sup>39</sup> Thus, as in its other inspection cases, the Court bowed to practicalities by signaling that police are not required to obtain a warrant to search the registry of a nonconsenting hotel, but rather can meet Fourth Amendment requirements if they obtain an “administrative subpoena” from a “neutral decisionmaker”;

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32 See *New York v. Burger*, 482 U.S. 691, 703 (1987) (junkyards); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (mining); *Biswell*, 406 U.S. at 313 (gun stores); *Colonnade Catering Corp. v. United States*, 392 U.S. 72, 76-77 (1970) (liquor stores).

33 *Dewey*, 452 U.S. at 603-04; see also *Biswell*, 406 U.S. at 315 (“In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.”).

34 *Burger*, 482 U.S. at 703-04.

35 See 135 S. Ct. 2443, 2455 (2015) (“To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule.”).

36 *Burger*, 482 U.S. at 702-03.

37 See *Patel*, 135 S. Ct. at 2456 (finding a California ordinance unconstitutional because “it fails to provide any opportunity for precompliance review before a hotel must give its guest registry to the police for inspection”).

38 See *id.* at 2452 (equating special needs searches with administrative searches like those authorized in *Camara*).

39 *Id.*

further, the latter individual need not be a magistrate but rather can be an “administrative law judge.”<sup>40</sup> While the subpoena can be quashed if the hotel owner shows the search was for “illicit purposes” or was “used as a pretext to harass,” presumably that showing can be made only if the officers admit their illicit purpose or, more likely, the officers failed to follow a neutral inspection plan in an evenhanded manner.<sup>41</sup> Nothing in *Patel* requires that the government’s defense of its subpoena be based on explicit proof that the hotel is harboring criminals. Whether closely regulated or not, and whether their operation triggers special needs analysis or not, businesses subject to inspection can count on the protection of an *ex ante* policy aimed at minimizing abuses of discretion, but cannot demand a warrant or court order that requires individualized suspicion.

### B. Checkpoints

A separate line of panvasive search and seizure cases involves checkpoints. At the Supreme Court level, the first such case was *United States v. Martinez-Fuerte*, which upheld a checkpoint near the border with Mexico that was aimed at detecting illegal immigrants.<sup>42</sup> Citing *Camara* for the proposition that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion,” the Court permitted suspicionless seizures of motorists at the initial checkpoint because of the minimal intrusion involved and the limits a checkpoint places on police discretion.<sup>43</sup> On the latter point, the Court noted that the checkpoints were conducted in a “regularized manner” because they stopped only those cars that passed the checkpoint, thus minimizing “abusive or harassing stops.”<sup>44</sup> Moreover, “[t]he 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,” who, the Court assumed, “will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.”<sup>45</sup>

Using similar reasoning, the Court has upheld suspicionless stops on international waters (for the purpose of checking a boat’s documents),<sup>46</sup> at sobriety checkpoints,<sup>47</sup> and, in dictum, at license checkpoints.<sup>48</sup> As in

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<sup>40</sup> *Id.* at 2452-53.

<sup>41</sup> *Id.* at 2452-54.

<sup>42</sup> 428 U.S. 543, 562 (1976).

<sup>43</sup> *Id.* at 561-62.

<sup>44</sup> *Id.* at 559.

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

<sup>46</sup> *United States v. Villamonte-Marquez*, 462 U.S. 579, 592-93 (1983).

<sup>47</sup> *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

<sup>48</sup> See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (“This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or

*Martinez-Fuerte*, these cases sung the praises of the checkpoint's "regularized" nature. For instance, in both *Michigan Department of State Police v. Sitz* (the sobriety case) and *Delaware v. Prouse* (the license case), the Court favorably distinguished checkpoints from "random stops," which involve "[the] kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed."<sup>49</sup>

At the same time, the Court has given short shrift to the argument that checkpoint procedures do not restrict government power *enough*. In *United States v. Villamonte-Marquez* (the boat case), the Court responded to the argument that checking documents in port would limit discretion more than doing so at sea by noting that, given the wide open nature of sea travel and the fact that ships do not have to dock, such a requirement would make "less likely" the government's ability "to accomplish the obviously essential governmental purposes involved."<sup>50</sup> In *Sitz*, the Court responded to the argument that watching for weaving vehicles could be even more effective than a sobriety checkpoint by stating that "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>51</sup> Similarly, in still another roadblock case, *Illinois v. Lidster*, the Court sanctioned a roadblock at the scene of a hit-and-run accident that was designed to identify possible witnesses, implicitly finding irrelevant the dissent's observation that a more effective, less intrusive method of finding witnesses might have been simply to put flyers on the cars of workers at nearby businesses.<sup>52</sup>

The Court put its foot down, however, in *City of Indianapolis v. Edmond*, involving a checkpoint to detect narcotics using drug-sniffing dogs.<sup>53</sup> Here, for the first time in a checkpoint case, the Court alluded to special needs analysis. According to the Court, that analysis did not apply because the "primary purpose" of the roadblock was "to uncover evidence of ordinary criminal wrongdoing"<sup>54</sup>—a "general interest in crime control"<sup>55</sup>—in contrast

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that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.").

<sup>49</sup> *Id.* at 661; see also *Sitz*, 496 U.S. at 454 (reinforcing the Court's decision in *Prouse*, but distinguishing DUI traffic stops because they are not based on decisions by officers in the field).

<sup>50</sup> 462 U.S. 579, 593 (1983).

<sup>51</sup> *Sitz*, 496 U.S. at 453-54.

<sup>52</sup> 540 U.S. 419, 428-30 (2004) (Stevens, J., concurring in part and dissenting in part) (arguing that the issue of whether the roadblock was reasonable should be remanded, in part because planting flyers might have accomplished the State's goal).

<sup>53</sup> 531 U.S. 32 (2000).

<sup>54</sup> *Id.* at 41-42.

<sup>55</sup> *Id.* at 40.

to the roadblocks at issue in *Martinez-Fuerte*, *Sitz*, and *Prouse*'s dictum, which arose in the special contexts of border security and roadway safety.<sup>56</sup> Since the cars in *Edmond* were stopped in the absence of individualized suspicion, the Fourth Amendment was violated.<sup>57</sup> However, in a subsequent case, the Court signaled that if the "primary" purpose of a checkpoint is not ordinary crime control, the fact that drug-sniffing dogs might be present does not violate the Constitution so long as the dog sniff does not prolong the detention.<sup>58</sup> Many lower courts have adopted this suggestion as a holding.<sup>59</sup>

Lower courts have also been willing to slap the special needs moniker on checkpoints designed to catch terrorists. Most noteworthy is the opinion of Judge Sotomayor when she was on the Second Circuit, sitting on a case involving suspicionless searches of cars and people boarding ferries in New York State.<sup>60</sup> Judge Sotomayor found the program to be a special needs situation because "[p]reventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and indeed go well beyond them."<sup>61</sup> She reasoned that, because the Coast Guard had identified the Lake Champlain ferry as a potential target, and because the resulting searches of bags and car trunks were announced beforehand, lasted only a few moments, applied to everyone, and consisted of visual inspections of vehicles and brief examinations of carry-on baggage aimed at finding explosives, the Fourth Amendment was not violated.<sup>62</sup> Citing the language from *Sitz* quoted above, she also dismissed the argument that the government should have used magnetometers to accomplish its goal in a less intrusive manner.<sup>63</sup>

### C. Drug Testing

In contrast to inspection and checkpoint cases, special needs analysis has permeated drug testing cases from the beginning. Both *Skinner v. Railway Labor Executives' Association* and *National Treasury Employees Union v. Von Raab*, companion cases upholding suspicionless drug testing programs of railway workers and customs agents, respectively, began with the proposition that the primary purpose of the programs was not to obtain evidence for

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<sup>56</sup> *Id.* at 42-44 (distinguishing *Martinez-Fuerte*, *Sitz*, and *Prouse*).

<sup>57</sup> *Id.* at 47-48.

<sup>58</sup> *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005).

<sup>59</sup> See Brooks Holland, *The Road 'Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 298 (2006) ("[T]he weight of authority so far indicates that a secondary purpose of crime control will not upset a checkpoint with a lawful primary purpose.").

<sup>60</sup> *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006).

<sup>61</sup> *Id.* at 82.

<sup>62</sup> *Id.* at 79-80, 87.

<sup>63</sup> *Id.* at 80, 85.

prosecution but rather to promote safety.<sup>64</sup> Both cases went on to conclude that drug testing, while a search, is minimally intrusive, and that the government's interest in ensuring its employees are not drug-impaired is significant, thus making a warrant unnecessary.<sup>65</sup> But, echoing the inspection and checkpoint cases, the majority also emphasized that "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate."<sup>66</sup>

The Court came to similar conclusions in two cases involving drug testing in the school setting, the first aimed at student athletes<sup>67</sup> and the second at students involved in any extracurricular activity.<sup>68</sup> After concluding that these cases also came under the special needs rubric,<sup>69</sup> the Court reasoned that a suspicionless testing program is permissible because school children expect less privacy, the government's interest in deterring drug use among such a vulnerable population is compelling, and a suspicion-based program would be "impracticable."<sup>70</sup> In *Vernonia School District 47J v. Acton* (the student athlete case), the majority also asserted that a suspicion-based program might harm individual interests more than a group-wide one, given the likelihood that it would "transform[] the process into a badge of shame," increase the potential for discriminatory action by teachers, and divert teachers from their normal functions.<sup>71</sup>

The Court struck down two other drug testing programs, however. *Chandler v. Miller* confronted a law that required testing of every person seeking nomination or election to state office in Georgia.<sup>72</sup> The Court applied the special needs label, but, for the first (and only) time in such a case, found that the government's interest in the program, which it characterized as

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<sup>64</sup> See *Skinner*, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct of railroad employees to ensure safety . . . [']presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."); *Von Raab*, 489 U.S. 656, 666 (1989) ("It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement . . . [but] to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions.").

<sup>65</sup> See, e.g., *Skinner*, 489 U.S. at 627-31.

<sup>66</sup> *Id.* at 622.

<sup>67</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>68</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002).

<sup>69</sup> *Vernonia*, 515 U.S. at 653; see also *Earls*, 536 U.S. at 829-30.

<sup>70</sup> *Vernonia*, 515 U.S. at 657, 660-64; see also *Earls*, 536 U.S. at 837 ("[W]e question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers[,] . . . might unfairly target members of unpopular groups [and because of] fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.").

<sup>71</sup> 515 U.S. at 663-64.

<sup>72</sup> 520 U.S. 305 (1997).

largely symbolic, was outweighed by the individual interests affected.<sup>73</sup> It pointed out that candidates were given thirty-day notice of the testing (thus making it ineffectual), that their high profile meant that impairment on the job would be easily discoverable through normal means, and that evidence that there was any kind of drug problem among candidates was lacking (unlike in the school testing cases).<sup>74</sup> In *Ferguson v. City of Charleston*, the Court refused to find that special needs analysis applied at all because, despite the city's protestation that the goal of the program was to seek treatment for women who used drugs while pregnant and to save their babies, the police department was heavily involved in implementing the program and positive test results were sent to the police as a means of cajoling patients into such treatment.<sup>75</sup> While the Court conceded that the ultimate goal of the program was "benign," when doctors obtain test results from patients "for the specific purpose of incriminating those patients," the Fourth Amendment prohibits a warrantless procedure unless the patient consents after being informed of how the results will be used.<sup>76</sup>

#### D. DNA Sampling

In *Maryland v. King*, the Court upheld a state program that permitted suspicionless DNA testing of every person charged with a crime of violence or burglary or an attempt to do so.<sup>77</sup> Although the Court employed the type of balancing analysis that had become familiar in its special needs cases, and although it noted that its result was "in full accord" with that analysis, the Court explicitly held that *King* did not involve a special needs situation.<sup>78</sup> The Court explained that the statute did not authorize "programmatic searches of either the public at large" (as in the inspection, checkpoint, and drug testing cases) "or a particular class of regulated but otherwise law-abiding citizens" (as in *New Jersey v. T.L.O.*, involving searches of school children<sup>79</sup>); rather, it was aimed at an adult arrested for crime, who "unlike . . . a citizen who has not been suspected of a wrong, . . . has a reduced expectation of privacy."<sup>80</sup>

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<sup>73</sup> *Id.* at 322.

<sup>74</sup> *Id.* at 319-20.

<sup>75</sup> See 532 U.S. 67, 79-80 (2001) (stating that "the critical difference" between previous drug testing cases and this one was that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment").

<sup>76</sup> *Id.* at 85-86 (emphasis omitted).

<sup>77</sup> 133 S. Ct. 1958, 1980 (2013).

<sup>78</sup> *Id.* at 1978.

<sup>79</sup> See 469 U.S. 325, 340-43 (1985) (holding that a search of a public school student's purse did not require probable cause or a warrant given the diminished privacy expectations of students and the likelihood the warrant requirement would interfere with "maintenance of the swift and informal disciplinary procedures needed in the schools").

<sup>80</sup> *King*, 133 S. Ct. at 1978.

The fact remains that, in addition to its usefulness in identifying arrestees,<sup>81</sup> DNA is often helpful in convicting a person for the crime of arrest or in nabbing a perpetrator in the future; for instance, King was arrested for assault, but his DNA was eventually used to link him to an unrelated rape.<sup>82</sup> Some lower courts, recognizing that the search involved in DNA cases is principally designed for this purpose and thus could be seen as a *suspicionless* search for evidence of "ordinary crime," have felt the need to justify DNA sampling on special needs grounds.<sup>83</sup> They easily do so, reasoning that, at the time of the search, the government "is not trying to 'determine that a particular individual has engaged in some specific wrongdoing.'"<sup>84</sup>

Under either approach, balancing analysis applies and, for the Court in *King*, it was straightforward. The Court found that the buccal swab necessary to get a DNA sample is minimally intrusive, at least if, as required by Maryland law, all of those arrested for serious offenses are subject to it; that regime avoids judgment calls by officers whose perspective might otherwise be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'"<sup>85</sup> The value of the DNA to the government, in contrast, can be significant, as the *King* case itself showed.

### E. Surveillance Programs

Many surveillance programs operate by collecting information or observations about a large number of predominately law-abiding individuals in the hope that patterns of criminal activity can be discovered or that the data will subsequently help convict someone. Camera systems record activity in large sectors of urban areas twenty-four hours a day.<sup>86</sup> Tracking systems can monitor every car traveling through areas under surveillance in real time

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81 The majority noted, *inter alia*, that DNA is more accurate than fingerprinting at identifying people, and thus better able to ensure that government officials obtain accurate information about an arrestee's criminal history and dangerousness that can help in pretrial release and jail security decisions. *Id.* at 1971-75.

82 *Id.* at 1966. The dissent argued that crime detection was the *primary* reason for the Maryland statute. *See id.* at 1980 (Scalia, J., dissenting) ("It is obvious that no . . . noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous.").

83 *See, e.g.,* *Nicholas v. Goord*, 430 F.3d 652, 667 (2d Cir. 2005); *see also* *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (rejecting special needs analysis, but applying balancing analysis to permit collection of DNA not only for identification purposes but for the purpose of solving other cases).

84 *Goord*, 430 F.3d at 668 (quoting Report and Recommendation, *Nicholas v. Goord*, No. 01-7891, 2003 WL 256774, at \*13 (S.D.N.Y. Feb. 6, 2003)).

85 *King*, 133 S. Ct. at 1970 (internal quotation marks omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 12 (1968)).

86 *See generally* THE CONSTITUTION PROJECT, GUIDELINES FOR PUBLIC VIDEO SURVEILLANCE: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES (2007) (describing video surveillance systems).

and retrospectively.<sup>87</sup> And, as Edward Snowden told the world, the federal government at one time routinely swept up virtually everyone's "metadata"—the identifying information about our communications—and may well have collected (and continue to collect) much more than that.<sup>88</sup>

At the initial collection stage, all of these surveillance techniques are suspicionless; their whole point is to obtain and store information about a large population, presumably mostly innocent, for later analysis.<sup>89</sup> The analysis stage, in contrast, is suspicion-based, whether it seeks patterns or is going after a particular individual.<sup>90</sup> While the attempt to discern patterns—for instance, which cars visit a crime-ridden area, or which phones are used to contact someone in ISIS-held territory—can proceed anonymously via computer until the government observes the pattern of interest,<sup>91</sup> the government can also easily "de-identify" most of the information it collects, at which point the suspicion model kicks in.<sup>92</sup> A traditional suspicion-based search also takes place if the government already has a suspect or knows about a crime and uses the data to find out where the suspect is or who committed the crime.<sup>93</sup>

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<sup>87</sup> See Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 565-66 (2015) (noting that tracking systems allow common carriers, and therefore the government, to collect information from phones and cars about everyone's travel over time).

<sup>88</sup> See Glenn Greenwald, *XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet'*, GUARDIAN (July 31, 2013, 8:56 AM), <https://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data> [<https://perma.cc/K3VQ-HWBX>] (describing a file provided by Snowden that purportedly discusses an NSA program called XKeyscore, which "allows analysts to search with no prior authorization through vast databases containing emails, online chats and the browsing histories of millions of individuals," encompassing "nearly everything a typical user does on the internet").

<sup>89</sup> Although Congress recently ended the NSA's ability to engage in bulk collection of domestic metadata, which now must be stored with the common carrier, the NSA still collects metadata of calls made by or to an individual in the United States to or from someone overseas. Faiza Patel, *Bulk Collection Under Section 215 Has Ended ... What's Next?*, JUST SECURITY (Nov. 30, 2015, 2:25 PM), <https://www.justsecurity.org/27996/bulk-collection-ended-whats-next> [<https://perma.cc/9NXD-TUUG>].

<sup>90</sup> For instance, according to the NSA, the surveillance starts with a "seed identifier" such as a phone number or email address that the agency has "reasonable, articulable suspicion" to believe is associated with a terrorist organization. *The National Security Agency: Missions, Authorities, Oversight and Partnerships*, NAT'L SECURITY AGENCY (Aug. 9, 2013), <https://www.nsa.gov/news-features/press-room/statements/2013-08-09-the-nsa-story.shtml> [<https://perma.cc/72MK-5X2K>].

<sup>91</sup> See *id.* ("Technical controls preclude NSA analysts from seeing any metadata unless it is the result of a query using an approved identifier."); see also Shaun B. Spencer, *When Targeting Becomes Secondary: A Framework for Regulating Predictive Surveillance in Antiterrorism Investigations*, 92 DENV. U. L. REV. 493, 496 (2015) (noting that current law fails to grapple with the collection and anonymous-analysis phase of terrorism investigations).

<sup>92</sup> See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1706 (2010) (asserting that "advances in reidentification thwart the aims of nearly every privacy law and regulation").

<sup>93</sup> See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 191-96 (2007) (describing "event-driven" surveillance).

The focus of this discussion of panvasive surveillance, then, is the collection stage. While the Supreme Court has yet to deal with this precise issue, some lower courts, relying on Supreme Court precedent, have held that data compilation does not even trigger the Fourth Amendment, at least if the information compiled concerns activity in public or data surrendered to a third party such as an internet service provider or a phone company (as is the case with the metadata program).<sup>94</sup> At least one court has bucked this trend, holding that the NSA's metadata collection program is a Fourth Amendment "search," and strongly suggesting that, even under special needs reasoning, the program is unconstitutional given the government's failure to provide evidence that the program has detected any terrorists.<sup>95</sup> Even if this view prevails in the metadata context, however, it may not transfer to the type of information collected via cameras and tracking devices, where courts have been reluctant to find that the Fourth Amendment applies.<sup>96</sup>

#### F. Summary

Surveying the courts'—and, in particular, the Supreme Court's—decisions in panvasive search and seizure cases as a whole, four themes stand out. First, the courts are concerned with whether the program is in aid of "ordinary crime control" or aimed at something else. Second, if the primary goal of the program is something other than crime control, the courts do not require individualized suspicion but rather engage in balancing the government's interest against the privacy and autonomy interests of those affected in figuring out the degree of protection warranted. Third, the panvasive nature of the search and seizure tends to enhance the government's position because, in the courts' eyes, its regularized nature diminishes the impact on privacy at the same time as it limits official discretion. Finally, while the Supreme Court

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<sup>94</sup> See *ACLU v. Clapper*, 959 F. Supp. 2d 724, 752 (S.D.N.Y. 2013) (noting that the "collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search," and, relying on *Smith v. Maryland*, 442 U.S. 735 (1979), holding the NSA's bulk telephony metadata collection program to be constitutional), *vacated in part*, 785 F.3d 787 (2d Cir. 2015); *In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from [REDACTED]*, No. 13-109, slip op. at 9 (FISA Ct. Aug. 29, 2013) (relying on *Smith* to conclude that, because the Application concerned only call detail records or telephony metadata, there was no Fourth Amendment impediment to the collection).

<sup>95</sup> See *Klayman v. Obama*, 957 F. Supp. 2d 1, 43-44 (D.D.C. 2013) (finding the metadata program unconstitutional but staying the decision pending review by the appellate courts).

<sup>96</sup> See *State v. Augafa*, 992 P.2d 723, 725 (Haw. Ct. App. 1999) (holding that "open and visible video camera surveillance of the public sidewalk area on which Defendant was situated was not violative of Defendant's constitutional right against unreasonable searches"); see also *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (holding that a court order mandating the production of cell phone records did not violate the Fourth Amendment). But see *United States v. Graham*, 796 F.3d 332, 344-45 (4th Cir. 2015) ("We hold that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI for an extended period of time.").

is influenced by evidence that a suspicion-based approach would render the government's goal very difficult to achieve, it is usually unmoved by evidence that such an approach could provide an effective alternative.

One other aspect of these cases bears emphasis. Despite the fact that all of them involve panvasive actions pursuant to policies promulgated and implemented by law enforcement *agencies*, the Supreme Court has never explicitly turned to administrative law for help in its analysis. Outside of allusions to that course of action in its inspection cases (discussed in Part III), the Court is content with an ad hoc approach that adopts no particular regulatory structure. Partly as a result, its jurisprudence in this area is a mass of contradictions, as the next Part makes clear.

## II. THE COURT AND ITS CRITICS

A comparison of the decisions that approve panvasive searches and seizures to those that do not reveals an embarrassingly incoherent jurisprudence. Other commentators have criticized these cases, but not in the comparative way undertaken here. Nor have commentators been particularly successful at improving the analysis of panvasive searches and seizures. After critiquing the Court's cases, this Part analyzes the primary competitor to the Court's approach, which I call the strict scrutiny model because it tracks that type of Fourteenth Amendment analysis. This Part also examines the work of commentators who have proposed a third alternative—legislative and administrative regulation that is encouraged through judicial means—and begins to distinguish that approach from the more straightforward administrative law tack proposed in this Article.

### A. *The Supreme Court's Free-For-All*

The Supreme Court's cases dealing with panvasive searches and seizures are difficult to figure out. With respect to each of the four themes identified above—the ordinary crime threshold, balancing analysis, regularization, and the availability of alternatives—the Court has sent conflicting signals.

Explicitly since the creation of the special needs rubric and implicitly before then, the Court has permitted panvasive searches and seizures only when special circumstances beyond “ordinary crime control” are involved.<sup>97</sup> But virtually all panvasive searches and seizures—most obviously DNA sampling and surveillance,<sup>98</sup> but also those that involve inspections, checkpoints, or drug testing—are aimed at crime control. Most regulatory

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<sup>97</sup> See *supra* Part I.

<sup>98</sup> See *supra* text accompanying notes 81–88.

inspections are backed up by criminal sanctions.<sup>99</sup> Criminal charges not only arise out of stops at narcotics checkpoints, which the Court has declared are not a special needs situation, but also routinely follow Court-approved stops at sobriety checkpoints, checkpoints for illegal immigrants, and checkpoints in international waters (and, indeed, the litigants in all of the relevant Court cases were subject to criminal charges).<sup>100</sup> And while it is true that the threat of criminal prosecution was particularly explicit in the drug testing program struck down in *Ferguson*,<sup>101</sup> the possibility of criminal charges hovers in the background *any* time someone tests positive for an illegal substance. Further, serious quasi-criminal consequences (suspension from employment or school activities, for instance) are virtually inevitable.<sup>102</sup>

The difficulties that the Court's case law have created are evident in *Patel*, the Court's most recent foray into this area. There, the Court "assumed" that the searches authorized by the city's hotel registry inspection ordinance "serve[d] a 'special need' other than conducting criminal investigations," to wit "deter[ring] criminals from operating on the hotels' premises."<sup>103</sup> Not explained was why deterrence of crime is not considered an aspect of "ordinary" police work, but investigation of crime is. In any event, surely the Los Angeles city council that enacted the ordinance was just as interested in detecting criminals who were on hotel premises as it was in deterring them from frequenting such places. There can be no deterrence without the possibility of detection; every panvasive search and seizure program tries to accomplish both goals.

More fundamentally, the Court has never made clear why the distinction between crime control and its opposite (perhaps regulatory control?) matters. Apparently, the idea is that those suspected of "ordinary crime" are entitled

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99 See, e.g., *New York v. Burger*, 482 U.S. 691 (1987) (junkyard owner arrested for five counts of possessing stolen property found during inspection); *United States v. Biswell*, 406 U.S. 311 (1972) (pawn shop operator convicted of dealing in firearms without having paid occupational tax, as the result of an inspection); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (store owner suspected of refilling liquor bottles, which under 26 U.S.C. § 5301(e) can bring a criminal penalty of up to one year).

100 See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (suit seeking to enjoin sobriety checkpoint, making clear that those found drunk would be arrested); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (boarding of boat based on 19 U.S.C. § 1581(a), which sets out penalties for faulty documents); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (driver stopped at checkpoint near border charged with two counts of illegally transporting aliens); see also *supra* notes 58–59 and accompanying text (describing license checkpoints accompanied by drug-sniffing dogs).

101 See *supra* text accompanying notes 75–76.

102 See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 683 (1995) (O'Connor, J., dissenting) ("[T]he substantial consequences that can flow from a positive test, such as suspension from sports, are invariably—and quite reasonably—understood as punishment."); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 650 (1989) (Marshall, J., dissenting) ("[T]he agency's regulations . . . appear to invite criminal prosecutors to obtain the blood and urine samples drawn by [railway authorities] and use them as the basis of criminal investigations and trials.").

103 *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015).

to greater constitutional recognition because of the greater deprivation of liberty associated with arrest and conviction for a crime. But as Justice White pointed out in *Camara*, the first panvasive search and seizure case, “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>104</sup>

Once denominated a special needs situation, a panvasive search or seizure is subjected to balancing analysis under the reasonableness clause.<sup>105</sup> Here, too, the Court has sent mixed messages, in part because of its confusing stance on the crime control distinction. One way of demonstrating the confusion is by considering the Court’s cases by category (e.g., inspections, checkpoints, and drug testing). That method of analysis allows both the level of intrusion and the degree of regularization—important to the second and third themes identified above—to be held constant, and exposes the Court’s inconsistency. Thus, for instance, while the Court considered detection of stolen car parts in New York sufficiently important to allow suspicionless inspection of junkyard records,<sup>106</sup> it was apparently not as concerned about detecting the drug, sex, and human trafficking allegedly transpiring in a large number of Los Angeles hotels.<sup>107</sup> Likewise, interdiction of narcotics transportation was not considered an important enough goal to justify the checkpoint in *Edmond*,<sup>108</sup> while detecting illegal immigration, drunk driving, and suspended licenses were adequate grounds for permitting the checkpoints discussed in *Martinez-Fuerte*,<sup>109</sup> *Sitz*,<sup>110</sup> and *Prouse*.<sup>111</sup> While the Court might well be right that the government’s interest in stopping drug use by political candidates is less substantial than its interest in detecting drug use among railway workers,

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<sup>104</sup> *Camara v. Mun. Court*, 387 U.S. 522, 530 (1967).

<sup>105</sup> See *Skinner*, 489 U.S. at 619 (“When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”).

<sup>106</sup> See *New York v. Burger*, 482 U.S. 691, 703, 709 (1987) (noting that “regulation of the vehicle-dismantling industry reasonably serves the State’s substantial interest in eradicating automobile theft”).

<sup>107</sup> See *Patel*, 135 S. Ct. at 2457 (Scalia, J., dissenting) (noting that “the parties do not dispute” that motels “are a particularly attractive site for criminal activity ranging from drug dealing and prostitution to human trafficking”).

<sup>108</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (stating that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose”).

<sup>109</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (“[M]aintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border.”).

<sup>110</sup> See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (“No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it.”).

<sup>111</sup> See *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) (recognizing states’ “vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles”).

customs agents, and school children,<sup>112</sup> the protection of unborn babies from their mothers' substance abuse would seem to trump most or all of these other goals; yet, the Court's decision in *Ferguson* stands for the contrary proposition.<sup>113</sup>

Of course, a balancing analysis can consider a host of other factors, the most important of which raises the fourth theme found in the Court's cases: the efficacy of a panvasive search or seizure compared to its feasible alternatives. As with the other factors, however, the Court's reliance on this factor is erratic. Consider again the Court's cases by category, in reverse order this time. In the drug testing cases, the relative efficacy factor points in precisely the opposite direction of the Court's conclusions: suspicion of drug use by school children and employees is much easier to develop than suspicion of drug use by pregnant mothers, who are not subject to the constant monitoring that the first two groups are.<sup>114</sup> The same assertion can be made about the Court's checkpoint decisions. Developing a good hunch in a case like *Edmond* (where the working assumption of the police was that drug traffickers were hiding drugs in their cars<sup>115</sup>) is significantly more difficult than in cases like *Sitz* (involving drunk driving, which is often observable) or *Martinez-Fuerte* (involving illegal immigration, also usually observable),<sup>116</sup> yet the Court gave the government a break only in the latter settings. And if, as the Court has indicated in its *Patel* decision, the government's concern about precompliance review (which might tip off miscreant hotel owners) can be alleviated by seizing the hotel's records pending a subpoena,<sup>117</sup> why isn't the same procedure required in the junkyard, gun shop, and liquor store settings?<sup>118</sup>

112 See *Chandler v. Miller*, 520 U.S. 305, 319 (1997) (contrasting Georgia's concerns about drug use by political candidates with "the evidence of drug and alcohol use by railway employees engaged in safety-sensitive tasks in *Skinner*, and the immediate crisis prompted by a sharp rise in students' use of unlawful drugs in *Vernonia*" (citations omitted)).

113 See *Ferguson v. City of Charleston*, 532 U.S. 67, 71 (2001) (holding that nonconsensual, suspicionless drug testing of pregnant women violated the Fourth Amendment, despite "an apparent increase in the use of cocaine by patients who were receiving prenatal treatment").

114 See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting) ("In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms.").

115 See *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000) (characterizing the highway checkpoint program as one "to interdict unlawful drugs").

116 See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 461-62 (1990) (Stevens, J., dissenting) (noting a study showing that Michigan police, using normal investigative techniques, made 71,000 such arrests in one year); *United States v. Martinez-Fuerte*, 428 U.S. 543, 575 (1976) (Brennan, J., dissenting) (noting that the Court had held that stops based on reasonable suspicion could be based on factors such as the type of car, its apparent load, and whether it contains an extraordinary number of people or people trying to hide (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975))).

117 See *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015) ("In most contexts, business owners can be afforded at least an opportunity to contest an administrative search's propriety without unduly compromising the government's ability to achieve its regulatory aims.").

118 See *New York v. Burger*, 482 U.S. 691, 710 (1987) (upholding a statute that permitted warrantless entry into a junkyard, stating that "surprise is crucial if the regulatory scheme aimed at

The Supreme Court purports to have developed coherent rationales in its panvasive search and seizure decisions. That is far from the case. While Part IV of this Article agrees with the Court that regularization is a crucial requirement in panvasive cases, and also contends that efficacy considerations should be pertinent, these factors, as applied by the Court, are singularly poor at explaining the results the Court has reached.

### B. *The Strict Scrutiny Alternative*

Many commentators have lambasted the Court's decisions on panvasive searches and seizures, usually on the ground that they take insufficient account of the privacy intrusion involved and the possible alternatives to suspicionless action. Most of these commentators have proposed instead some version of what could be called a strict scrutiny model of analysis.<sup>119</sup> Under this model, courts would determine (1) whether the government objective is "compelling" and (2) whether the investigative technique chosen by the government is the least restrictive way of achieving it.

An initial concern with the strict scrutiny model is that, in other constitutional contexts, this type of analysis has always been reserved for governmental actions that affect "fundamental" rights or engage in suspect classifications.<sup>120</sup> While the Fourth Amendment's right to be secure from unreasonable searches and seizures is, as a general matter, fundamental, the Court's cases reasonably recognize that not all searches and seizures are equally intrusive or equally deserving of similar protection.<sup>121</sup> It is surely a stretch to

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remedying this major social problem is to function at all"); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (upholding warrantless entry of a gun store for inspection purposes on the ground that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential"); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (upholding criminal conviction for refusal to permit an inspector's entry into a liquor storeroom).

<sup>119</sup> See, e.g., *Primus*, *supra* note 21, at 261-62 (arguing that dragnets should not be permitted if individualized suspicion can accomplish the government's objective); see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 487 (1995) (arguing that suspicionless searches and seizures should be "aberrational" and founded on "a strong showing of governmental necessity"); 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, 1176-77 (1988) (arguing for least drastic means analysis); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 446 (1988) (arguing for a compelling state interest or least intrusive means test that "unambiguously reorients fourth amendment analysis toward protection of the individual's privacy interest").

<sup>120</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring) ("[A] government practice or statute which restricts 'fundamental rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.").

<sup>121</sup> This is a principle with which I agree, albeit with significant caveats about how the Court applies it. See SLOBOGIN, *supra* note 93, at 21-47 (defending a Fourth Amendment justification

say that a search of an impersonal business property or a fifteen-second seizure at a roadblock implicates the same “fundamental right” as a search of a bedroom or an arrest.<sup>122</sup> At the least, scrutiny of lesser types of searches and seizures might call for modulation of both the word “compelling” in the first stage of the analysis and the phrase “least restrictive” in the second.

More important as a practical matter, while the two queries generated by strict scrutiny analysis are routinely raised and answered in other contexts, they are close to imponderable in the criminal justice setting. That is because, in structure, the strict scrutiny model is no different than the Court’s special needs approach. Indeed, precisely because the model requires stronger proof than the Court has demanded concerning both the importance of the government’s interest and the difficulty of achieving it through other means, it is even more likely to raise the conundra the Court’s analysis does.

Begin with the first, “compelling interest,” prong of strict scrutiny analysis. Even with the thumb on the scale implied by the word “compelling,” the inquiry into the strength of the government’s objectives sends judges into a morass. Courts are understandably loathe to say that the state does not have a strong interest in stifling illegal immigration, drunk driving, and safety code violations, much less terrorism. Nor is gauging the government’s interest at less abstract levels any easier. Consider the following statistics from the checkpoint cases: 0.12% of those stopped at the checkpoint in *Martinez-Fuerte* were illegal immigrants,<sup>123</sup> 1.6% of those stopped at the checkpoint in *Sitz* were drunk,<sup>124</sup> and (very perturbably) almost 9% of those stopped at the checkpoint in *Edmond* had narcotics or other illegal items in their cars.<sup>125</sup> Initially, the government’s interest seems stronger in the latter case (where the government lost) than in the other two (where it won). At the same time, the checkpoint in *Martinez-Fuerte* handled a much greater traffic flow (which might have lowered the hit rate) and was more permanent (and thus perhaps a better deterrent) than the checkpoints in the other two cases.<sup>126</sup> These considerations about the size of the hit rates in these cases and what they

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scheme based on proportionality reasoning, but requiring suspicion in many cases where the Court requires none).

<sup>122</sup> See *id.* at 112, 184 (providing data showing that the “intrusion” associated with different investigative techniques varies significantly); see also MARK TUSHNET, WHY THE CONSTITUTION MATTERS 152-53 (2010) (“How can we deal with deep and persisting disagreement about what our fundamental rights are? By coming to grips with the fact that these disagreements are reasonable, no different in principle from our disagreements about how to finance a national health care policy or about the proper tax rate for capital gains.”).

<sup>123</sup> Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 455 (1990).

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

<sup>125</sup> City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000).

<sup>126</sup> See United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (explaining the rationale for siting checkpoints along important highways).

mean pose, at the least, a major challenge in deciding whether they demonstrate a significant problem.

Since the government's interest can almost always be made to look compelling,<sup>127</sup> advocates of the strict scrutiny alternative will usually have to fall back on the second prong of the scrutiny analysis, involving assessments of whether suspicion-based searches and seizures or some other "less restrictive" alternative can achieve the government's goal. This prong presents even more of a quandary, however, because it requires evaluation of variables that courts are ill-equipped to assess, specifically the impact of a given panvasive program compared to its suspicion-based alternative. That is probably why, as indicated earlier, the Supreme Court has completely shied away from the subject.

Consider the following questions about the potential alternatives to the panvasive actions involved in the cases discussed in Part I:

- First, there are questions about the *efficacy of suspicion-based alternatives*: For instance, are suspicion-based car stops more effective than checkpoints at detecting and inhibiting illegal immigrants, drunk drivers, and drivers transporting narcotics, or are widely publicized checkpoints likely to have a greater deterrent effect?<sup>128</sup> Will drug testing that can only take place if some type of impairment is perceived be as protective of students in schools and passengers on railway trains as the drug testing programs aimed at those groups in *Vernonia* and *Skinner*?<sup>129</sup> Is the low hit rate of the NSA's metadata program<sup>130</sup> a sign of failure, or is it evidence that the program is a

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<sup>127</sup> This is so even in cases where the government loses or has little data. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001) (noting that the Charleston hospital staff had noticed an increase in cocaine use among women seeking prenatal care); *Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting) (arguing, despite the absence of evidence indicating a significant drug abuse problem among political candidates, that "surely the State need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become Governor before it installs a prophylactic mechanism"); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) (concluding that, even though there was no evidence of a serious drug abuse problem among customs agents, "the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm").

<sup>128</sup> Compare *supra* text accompanying note 51, with U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., THE DETERRENT CAPABILITY OF SOBRIETY CHECKPOINTS: SUMMARY OF THE AMERICAN LITERATURE 14 (1992), <http://ntl.bts.gov/lib/25000/25800/25836/DOT-HS-807-862.pdf> [<https://perma.cc/BQ77-N28Q>] (finding that prior studies support the hypothesis that sobriety checkpoints can deter impaired driving).

<sup>129</sup> Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 680 (1995) (O'Connor, J., dissenting) ("I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be as effective as a mass, suspicionless testing regime.").

<sup>130</sup> Compare Yochai Benkler, *Fact: The NSA Gets Negligible Intel from Americans' Metadata. So End Collection*, *GUARDIAN* (Oct. 8, 2013, 12:02 PM), <https://www.theguardian.com/commentisfree/2013/oct/08/nsa-bulk-metadata-surveillance-intelligence> [<https://perma.cc/SF75-7DU9>] (arguing

significant deterrent, and should it matter that prohibiting collection and retention of metadata will gravely hinder the government's ability to investigate the communication history of an individual it subsequently suspects of terrorism?<sup>131</sup>

- Second, there are questions about the *efficacy of alternatives to panvasive actions that are not suspicion-based*. For instance, are the *Lidster* dissent's flyers or the magnetometer rejected by Judge Sotomayor in *Cassidy* (the ferry case) as likely to achieve the government's goal as the method chosen by the government? Should the Court in *Ferguson* have considered the likelihood that its ruling would replace a program that gave pregnant cocaine users a second and third chance with a rule that imposes a "more rigorous system?"<sup>132</sup> If, as is likely, DNA testing of arrestees is more effective at clearing unsolved crime than suspicion-based testing, why isn't DNA testing of the entire population permissible for the same reason?<sup>133</sup> Alternatively, if DNA testing of arrestees is held to be impermissible, is DNA testing of convicted felons impermissible as well, or is it permissible on the ground that it will generate a higher percentage of clearances?
- Finally, there are comparative questions about the *intrusiveness of these various alternatives* to panvasive actions. Are panvasive actions affecting large groups of people more inimical to government legitimacy or, as suggested by the majority in *Vernonia*,<sup>134</sup> are suspicion-based actions that end up erroneously, and perhaps discriminatorily, singling out individuals more likely to antagonize the populace and occasion a greater overall sense of intrusiveness?<sup>135</sup>

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that the marginal evidence of the effectiveness of the NSA's metadata collection program calls for the discontinuance of the program), *with* *ACLU v. Clapper*, 959 F. Supp. 2d 724, 755 (S.D.N.Y. 2013) (recounting three terrorist plots allegedly foiled through metadata analysis), *vacated in part*, 785 F.3d 787 (2d Cir. 2015).

<sup>131</sup> See Rahul Srinivas, *Edward Snowden's Revelations Have 'Clearly Helped the ISIS', Claims Former NSA Official*, INQUISITR (Sept. 5, 2014), <http://www.inquisitr.com/1454270/edward-snowden-helped-isis> [<https://perma.cc/96U5-7CB9>] (discussing a former NSA official's comments regarding the negative impact that Edward Snowden's revelations had on the government's counterterrorism effort).

<sup>132</sup> See *Ferguson v. City of Charleston*, 532 U.S. 67, 90 (2001) (Kennedy, J., concurring) (after noting that doctors could, for legitimate medical reasons, test pregnant women for cocaine, and that prosecutors could "adopt legitimate procedures" to obtain this information, stating that "[o]ne of the ironies of the case, then, may be that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system").

<sup>133</sup> See generally Arnold H. Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEX. TECH L. REV. 261 (2015) (arguing that such a system is constitutionally permissible).

<sup>134</sup> See *supra* text accompanying note 71.

<sup>135</sup> See Tom R. Tyler et al., *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMPIRICAL LEGAL STUD. 602, 603 (2015) ("Our argument is that it is not contact with the police per se that is problematic. . . . Rather it is contact that communicates suspicion and mistrust that undermines the relationship between the public and the police.").

These types of questions do not begin to exhaust the list of issues that strict scrutiny analysis needs to address in these cases. There may be answers to them, but the answers will not be easy. Arguably, these empirical quagmires are better left to legislatures and the executive branch.<sup>136</sup> That, at least, is the assumption that informs the work of those commentators who have argued that the political process may be a better mechanism for regulating many types of police work.

### C. *The New Administrativists*

Andrew Crespo recently coined the term “new administrativist” to describe a resurgent trend in criminal justice scholarship that suggests that legislatures and administrative agencies are often better situated than courts to identify and constrain abuses of state power in the criminal justice system, and thus protect core constitutional rights and liberties.<sup>137</sup> On this view, the capacity of the political branches to address issues in a comprehensive and data-driven fashion, rather than through the case-by-case and relatively intuition-laden manner usually prevalent in the courts, makes them better at evaluating the systemic effects of criminal procedure rules; this structural approach may, in turn, result in superior protection of constitutional rights as a pragmatic matter.<sup>138</sup> The argument is also made, particularly by those who are concerned about the advent of surveillance technologies, that legislatures and the executive branch can be more responsive to rapidly changing investigative techniques, and also devise more creative means of regulating

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<sup>136</sup> The literature on interbranch competencies is vast and will not be regurgitated here. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (4th ed. 2007). For my own take on the issue, see Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1733-45 (2014), which provides arguments based on political process theory as to why legislative approaches should normally be preferred in devising panvasive policies.

<sup>137</sup> See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2059 (2016) (describing “contemporary scholars” who advocate a “pivot toward agency-centric regulation of law enforcement authority . . . leveraging valuable insights from administrative law in the hopes of righting [the] criminal justice system”).

<sup>138</sup> *Id.* at 2051-54; see also Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 603 (2000) (arguing, in the criminal justice context, for “a relaxed administrative-type rulemaking process . . . that draws upon but is not constrained by [the APA or state equivalents]”); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 213 (2015) (“[I]n some areas of criminal procedure regularly litigated in criminal cases, second-order regulation should benefit defendants overall, while freeing political policy makers to choose the most cost-effective constitutional safeguards that will get the job done.”); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1045, 1111 (2016) (noting that administrative agencies can be “more systematic and data-driven” than courts and thus can be more “holistic” in their approach to regulating law enforcement).

them, than courts that must both wait for a case and controversy and resolve it based on hidebound precedent that offers only a few options.<sup>139</sup> Further, Barry Friedman and Maria Ponomarenko have forcefully contended that political institutions should be brought into the picture to ensure that police are accountable for their actions through the democratic process, a move which they believe might be preferable to a regulatory regime based on exclusion or damages in individual cases.<sup>140</sup> In short, the new administrativists posit that administrative law can help fill in the gaps left by constitutional jurisprudence.

I place myself in the new administrativist category. In other work, I have argued that administrative law principles can help ensure that police practices are authorized, rationalized, and transparent, even if the Fourth Amendment has little or nothing to say about them.<sup>141</sup> But neither my previous work nor that of the other new administrativists sufficiently addresses three crucial issues.

First, and probably most importantly, little is said about how legislatures and agencies are to be motivated to produce constitutionally sufficient regulatory regimes.<sup>142</sup> The usual suggestion is to use the Fourth Amendment as leverage. On this view, courts should announce that, unless legislatures and agencies specifically authorize the police conduct, it should be declared unreasonable under the Fourth Amendment.<sup>143</sup> Outside of a few isolated

139 See, e.g., Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 806 (2004) ("I contend that the legislative branch rather than the judiciary should create the primary investigative rules when technology is changing."); Peter P. Swire, *Katz is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 925 (2004) ("The case for court review of reasonable procedures [rather than substantive review] is significantly stronger if limited to the context of emerging technologies.").

140 See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1875 (2015) ("[J]udicial review is not, and could not possibly be, a substitute for democratic accountability. Yet, democratic review is what is necessary to strike the policy balance that rests at the bottom of policing decisions.").

141 Slobogin, *supra* note 136, at 1758-75.

142 See, e.g., Rappaport, *supra* note 138, at 256-57 (suggesting the Court will voluntarily resort to a second-order regime once it realizes its epistemic and political advantages); Renan, *supra* note 138, at 1108 (recognizing that "[c]ourts have been reluctant to evaluate programmatic efficacy under the Fourth Amendment," but offering no mechanism for overcoming that reluctance). The one exception is found in Friedman & Ponomarenko, *supra* note 140. These authors argue that "courts ought to defer to police decisions about enforcement methods only to the extent that those decisions represent considered, fact-based judgments formulated with democratic input," and propose five ways in which courts can encourage such judgments. *Id.* at 1892-1903. But all of their prescriptions require courts to act in ways that, in recent years at least, the Supreme Court has been unwilling to pursue; at bottom, these authors, too, do not provide a coercive mechanism for implementing administrative principles, which they suggest are insufficient in any event. *Cf. id.* at 1883 ("The risk of arbitrariness in this context is far too great to give policing agencies the same discretion to forego rulemaking that the APA gives to traditional administrative agencies.").

143 See, e.g., *id.* at 1898 ("Courts can refuse deference when there is a constitutional doubt, but by the same token they can accord deference if policing is governed by rules that are the product of sound democratic processes."); Swire, *supra* note 139, at 925 (adapting Anthony Amsterdam's formulation that defines reasonableness primarily in terms of whether a search or seizure "is

contexts, however, the Supreme Court has demonstrated no inclination to pursue this route, and on the few occasions when it has held that legislative or executive policies can fulfill the Fourth Amendment's reasonableness requirement (discussed in Part III), it has indicated that virtually any policy will do.<sup>144</sup> Furthermore, the Fourth Amendment is useless as leverage, even in this weak sense, in situations that do not infringe reasonable expectations of privacy; unfortunately, those situations include police use of many of the surveillance and datamining techniques that the new administrativists would like to see regulated.<sup>145</sup>

Second, assuming we get the political branches to act, the new administrativists are unduly sanguine about the ability of legislatures and their delegates to avoid catering to law enforcement interests. Admittedly, there are examples of legislation providing the same or even greater protection than the Fourth Amendment requires.<sup>146</sup> But as Part I demonstrated, numerous other domains have been left alone or regulated only minimally by the other two branches. Presumably, this void is due at least in part to collective action problems; law enforcement entities are better organized and their needs more salient to legislatures than are the needs of the groups that are most directly affected by the police.<sup>147</sup> Claims that police will impose limits on themselves

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conducted pursuant to and in conformity with either legislation or police departmental rules and regulations" (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974))); Peter P. Swire & Erin E. Murphy, *How to Address Standardless Discretion After Jones 2* (Ctr. for Interdisciplinary Law & Policy Studies at the Ohio State Univ. Mortiz Coll. of Law, Working Paper No. 177, 2012), <https://ssrn.com/abstract=2122941> [<https://perma.cc/4KUY-FX2F>] (arguing that if no legislation or executive branch policies exist, the intrusion should be declared unreasonable, but that if such policies do exist, "the court would assess their constitutionality," a review that "although meaningful, would be deferential and structural in nature").

<sup>144</sup> See *infra* text accompanying notes 192–95 (describing the Court's inspection cases); see also *Florida v. Wells*, 495 U.S. 1, 4 (1990) (holding that, while an inventory of items in a car is only valid if conducted pursuant to a policy, "policies of opening all containers or of opening no containers are unquestionably permissible [as are policies that] allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors").

<sup>145</sup> See *supra* note 8.

<sup>146</sup> The best example is the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (2012), which allows a warrant for interception of oral and wire communications to be issued only if "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," and only if the warrant directs that the interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception," two requirements that go beyond standard Fourth Amendment rules. Cf. *Berger v. New York*, 388 U.S. 41, 44, 55, 59 (1967) (invalidating a New York statute permitting eavesdropping in part because it authorized officers to seize any and all conversations based on a reasonable ground to believe that evidence of a crime may be obtained).

<sup>147</sup> Probably the best known account of this problem is found in Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079–81 (1993), which asserts that legislatures have done little by way of limiting the discretion of police because "an overwhelming preponderance

once they are made to understand the full impact of their power,<sup>148</sup> or that the rules that come from self-regulation will result in more overall protection because they will be better obeyed than stricter Fourth Amendment standards imposed by distant and unempathetic courts,<sup>149</sup> ring hollow in light of the multifaceted pressure to fight crime the police face on a daily basis.<sup>150</sup>

Third, even assuming a less one-sided rulemaking environment, the new administrativists tend to be vague about the way administrative principles will ensure robust limitations on law enforcement. Reference is made to notice-and-comment procedures and similar administrative law standbys, but detail as to how they would work in the law enforcement context is usually lacking.<sup>151</sup> More thought needs to go into formulating both the necessary process and the substance of policing as administration.

The burden of Part III is to address these issues. It first explains why law enforcement must abide by administrative principles, at least where panvasive actions are involved. It then explains how those principles can reduce public choice pressures and ensure that police discretion is limited.

### III. WHY ADMINISTRATIVE LAW APPLIES TO PANVASIVE SEARCHES AND SEIZURES

Administrative agencies exist in large part because legislatures (and courts) do not have the expertise or resources to deal with the complex regulatory issues that arise in a modern state.<sup>152</sup> For most agencies, that

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of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods."

148 See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 95 (1969) ("[E]ven the police themselves need to be educated in the realities of what they are doing; many of them would refuse to participate if they were more sharply aware of the realities.").

149 See Rappaport, *supra* note 138, at 255 ("We should not regret the loss of paper-tiger rights if they are replaced with rules that, because better obeyed, will actually improve net social realities.").

150 See Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 28-33 (1978) (describing training, peer, organizational, prosecutorial, and political pressures on the police that contribute to a "crime control bias" on the part of the police).

151 Renan is probably the most specific, but she suggests that, to ensure administrative principles apply to surveillance agencies, current law would have to be interpreted in an innovative fashion. Renan, *supra* note 138, at 1082-85; see also Friedman & Ponomarenko, *supra* note 140, at 1877 (calling for "clearer legislative authorization on the front end, rules adopted by police departments themselves through a transparent process that allows for public participation, or some other method of obtaining community input into policing policy"); Swire & Murphy, *supra* note 143, at 3 (proposing, in toto, that courts look at the extent to which the statute minimizes government intrusions and includes "mechanisms of transparency and accountability").

152 See Patricia M. Wald, *The "New Administrative Law"—with the Same Old Judges in It?*, 1991 DUKE L.J. 647, 658-59 ("[A]sking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation, so that we can participate as equals in their good governance, is asking a great deal."); Peter Marra, Comment, *Have Administrative*

expertise is exercised within the substantive and procedural constraints of the federal Administrative Procedure Act (APA) and its state and local equivalents.<sup>153</sup> While the Constitution supplies the legal backdrop, administrative law is the primary means of regulating most agencies.<sup>154</sup>

The analogy to police departments is straightforward. Police and other law enforcement agencies possess expertise about the various ways the criminal law and associated regulatory statutes can be enforced that legislatures (and courts) usually do not have. Police agencies are much better positioned to make decisions about resource allocation and the relative efficacy of enforcement methods than are other institutions.<sup>155</sup> The assertion made here is that, as in other administrative contexts, exercise of that expertise should be mediated through administrative law.

If administrative law were the template governing panvasive searches and seizures, the relevant inquiries would not be about whether the primary purpose of a program is crime control or whether that purpose is compelling, nor would they center on the program's efficacy compared to a suspicion-based regime. Rather, as is the case with the programs of other agencies, the focus would be on whether the police department has followed a rational procedure that produced a rational policy consistent with legislative directives and on whether the policy is implemented in an evenhanded manner.<sup>156</sup> While this regulatory regime is fairly deferential to police-initiated programs, it would impose more structured constraints on them than current Supreme Court law does. In fact, an administrative law regime of the type described below would not countenance the outcomes in many of the cases in which the Court has approved panvasive searches and seizures, or at least would place a heavier burden on the government in order to prevail.

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*Agencies Abandoned Reasonability?*, 6 SETON HALL CONST. L.J. 763, 777 (1996) (describing why, in light of legislative inefficiencies, "the need for administrative agencies is arguably irrefutable").

<sup>153</sup> The federal APA is found at 5 U.S.C. §§ 501–59 (2012). As indicated earlier, most states have their own administrative procedure acts, which are largely modeled on the federal one. See Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 300 (1986) ("Because most current state APAs are based in whole or in part on the 1946 and the 1961 model [state administrative procedure] acts, and those model acts incorporate many general concepts embedded in the federal act, the federal APA appears to have had a significant impact on the development of state administrative procedure law."). While local governments, which are responsible for most police agencies, are typically exempt from state APAs, they are not necessarily immune from the dictates of administrative procedure. See *infra* text accompanying notes 234–39.

<sup>154</sup> See Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 35 (1996) (referring to the APA as "the constitution of the modern regulatory state").

<sup>155</sup> See, e.g., Renan, *supra* note 138, at 1113–14 (observing that, in the context of surveillance technologies, those actually taking collection of the information will be closest to the technology in question and to the specific circumstances of the situation).

<sup>156</sup> See *infra* text accompanying notes 264–95.

Before explaining this conclusion, a key predicate question must be addressed: why haven't police agencies been subject to the constraints of administrative law already? If the analogy described above is so evident, why hasn't it been formally recognized by commentators or courts? Indeed, to the extent the issue has been addressed, the accepted wisdom is directly to the contrary. For instance, even though the Administrative Procedure Act does not include law enforcement in its exemptions,<sup>157</sup> the leading treatise on the subject flatly states that "administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, *except* for those matters dealt with by the criminal law."<sup>158</sup> David Zaring has noted that, at the federal level, "[t]he DOJ . . . does not make policy through the APA. Its important criminal law function is regulated by the courts through criminal, rather than administrative, procedure."<sup>159</sup> Despite the extensive efforts of well-known scholars such as Kenneth Culp Davis and Anthony Amsterdam going back to the early 1970s,<sup>160</sup> police agencies have for the most part remained immune from the formal strictures of administrative statutes. Of course, most police departments have *some* regulations, governing everything from use of deadly force to traffic stops.<sup>161</sup> But none of these rules are required to go through the filter of the APA as occurs with other agencies.

This immunity from regulatory oversight, to the extent it is absolute, is illegitimate for three reasons. First, virtually all other public officials have always been subject to administrative law. The fact that police are exempt appears to be an inadvertent byproduct of judicial constitutional activism and our federalist structure rather than a considered policy development. Second, despite the Fourth Amendment's practical preemption of the field, the Supreme Court's cases—in particular, its inspection cases—can be interpreted as a command that administrative law governs in the panvasive context. And third, even if Fourth Amendment precedent is inapposite in this setting, the generalized, prospective nature of panvasive searches and seizures, as distinguished from suspicion-based searches and seizures, requires that they function consistently with administrative law principles.

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157 See 5 U.S.C. § 551(1) (2012) (exempting Congress, the courts, governments of the territories, certain banking functions, and the military from coverage).

158 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.1, at 1 (3d ed. 1994) (emphasis added) (quoting Henry J. Friendly, *New Trends in Administrative Law*, 6 MD. BAR J. 9, 9 (1974)).

159 David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 239 n.263 (2010).

160 See *supra* note 16 and accompanying text.

161 See Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 446 (1990) (noting the increase in internal written police policies in the second half of the twentieth century).

### A. Police and the Development of Administrative Law

The term “new administrativist” implies, correctly, that regulating police through administrative law is not a new idea. As early as 1903, Bruce Wyman at Harvard Law School was asserting that police should be subject to the constraints of administrative law.<sup>162</sup> In his book published that year, *The Principles of the Administrative Law Governing the Relations of Public Officers*, he devoted sections to arrest and to seizure of property, and discussed the use of force and warrant and cause requirements.<sup>163</sup> While he recognized that the latter requirements come from the “law of the land,” he saw administrative rules as a way to mitigate their effect on officers who acted fairly.<sup>164</sup>

Fast forward to the 1970s when scholars such as Davis, Amsterdam, and Judge Carl McGowan were advocating for application of administrative law principles to the police,<sup>165</sup> and several national organizations, including the American Bar Association, the Law Enforcement Assistance Administration, and the International Association of Chiefs of Police made similar declarations.<sup>166</sup> Probably best known is the work of Davis, who published *Police Discretion* in 1975, and an article making similar points the same year.<sup>167</sup> Bemoaning the fact that police are not governed by “the principles of administrative law,” he argued that “administrative law thinking can be profitably applied to criminal administration.”<sup>168</sup> He went on to make several provocative assertions:

Five basic facts about police policy are astonishing: (1) Much of it is illegal or of doubtful legality. (2) Subordinates at or near the bottom of the organization, not top officers, make much of it. (3) Most of it is kept secret from those who are affected by it. (4) Police policy is characteristically based on superficial guesswork and hardly at all on systematic studies by staffs of qualified

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<sup>162</sup> See generally BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903).

<sup>163</sup> See *id.* at 275-80 (discussing arrest and seizure of property); see also *id.* at 275 (stating that an officer “may not use more force than is absolutely necessary”); *id.* at 276-77 (stating that an arrest of a person who turns out to be innocent is nonetheless permissible if founded on probable cause to believe a felony has been committed).

<sup>164</sup> See *id.* at 277 (referring to rules governing police as “true rules of administrative law”).

<sup>165</sup> See *supra* note 16.

<sup>166</sup> See STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4.3, at 19 (AM. BAR ASS’N 1974) (“Police discretion can best be structured and controlled through the process of administrative rule-making by police agencies.”); NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, POLICE standard 1.3, at 22 (1973) (“Every police executive should formalize procedures for developing and implementing . . . written agency policy.”); MODEL RULES FOR LAW ENFORCEMENT OFFICERS r. 6.10 (INT’L ASS’N OF CHIEFS OF POLICE 1972) (noting that determinations about selective enforcement “should be made only through an established departmental administrative rulemaking procedure which provides for citizen participation and judicial review”).

<sup>167</sup> KENNETH CULP DAVIS, *POLICE DISCRETION* (1975); Davis, *supra* note 16.

<sup>168</sup> Davis, *supra* note 16, at 703.

specialists or on investigations like those conducted by our best administrative agencies and legislative committees. (5) It is almost completely exempt from the kind of limited judicial review deemed necessary for almost all other administrative agencies.<sup>169</sup>

Davis's hope was that courts would address this "astonishing" situation through administrative law. In particular, he wanted to use administrative principles to regulate what he called "selective enforcement," the exercise of discretion in deciding whom to arrest or search among those suspected of violating the law.<sup>170</sup>

Between these publications of Wyman and Davis came a deluge of laws meant to regulate the administrative lawmaking process, triggered in large part by concern about the huge discretion wielded by New Deal agencies.<sup>171</sup> Congress enacted the federal Administrative Procedure Act in 1946 and, within the next few decades, every state followed suit, although their approaches did not always mimic the federal statute.<sup>172</sup> These administrative procedure acts were meant to regularize rulemaking and adjudication by administrative agencies, increase agency accountability, ensure an opportunity for public input during agency rulemaking deliberations, and reduce, in the federal APA's words, "arbitrary" and "capricious" conduct by the agencies.<sup>173</sup> By the time Davis was writing, courts had produced a considerable amount of case law exploring the role of the courts in ensuring agencies followed these statutes. Davis pointed in particular to Supreme Court and lower court decisions that had required agencies to develop "ascertainable standards" governing their discretionary actions.<sup>174</sup> Although none

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<sup>169</sup> *Id.* at 703-04.

<sup>170</sup> *See id.* at 705 (arguing that "rulemaking can reach all police activities, including the vital subject of selective enforcement").

<sup>171</sup> *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996) (recounting the legislative reaction to New Deal legislation).

<sup>172</sup> *See* BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 1.13, at 32-33 (3d ed. 1991) (noting that, as of 1991, thirty states and the District of Columbia followed the Model State Administrative Procedure Act, which is similar to the federal APA, and twenty other states had similar administrative procedure laws); Bonfield, *supra* note 153, at 297 (noting that the states "adopted many of the general concepts embodied in the 1946 federal Administrative Procedure Act").

<sup>173</sup> 5 U.S.C. § 706(2)(A) (2012); *see also* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 2.1, at 29 (3d ed. 2014) (stating that the federal APA "requires that rulemaking be participatory and comprehensive" as well as "demonstrably rational"); William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 154-55 (1991) (discussing rationality review of agency rulemaking in the states).

<sup>174</sup> Davis, *supra* note 16, at 708 (quoting *Holmes v. N.Y.C. Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968)). Davis also cited the Supreme Court's opinion in *Morton v. Ruiz*, 415 U.S. 199, 231 (1974), which held that "[t]he agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial . . . to potential beneficiaries." Davis, *supra* note 16, at 710. Davis also claimed to have collected more than a dozen cases requiring administrative rulemaking. *Id.* at 709-10.

of these cases involved the police, Davis believed they stood for the proposition that any administrator, including a police administrator, “violates due process if he fails to confine and structure his discretion to the extent required to avoid unnecessary arbitrariness in the choices made.”<sup>175</sup>

Since Davis wrote, judicially required administrative rulemaking and judicial review of those rules have burgeoned.<sup>176</sup> Yet, police agencies have remained largely unaffected by these developments, and the courts have not picked up on Davis’s suggestion. Nor have the arguments of the new administrativists fared any better.

One set of explanations for this void might focus on ways in which the function of the police differs from that of other agencies. Arguments along these lines would suggest that intermeddling with police work by inexperienced judges will lead to particularly costly mistakes (including needless loss of life), or that police need more speed and flexibility than other public officials and therefore cannot be saddled with rulemaking requirements.<sup>177</sup> Another concern, often voiced by police themselves, is that police decisionmaking requires greater secrecy than is typically permitted in an administrative law regime.<sup>178</sup>

None of these attempts at distinguishing police agencies from other agencies works. Judicial second-guessing of agency decisions can exact enormous costs in a host of other settings involving, for instance, pollution, food, and health regulations, yet judicial review persists in all of them.<sup>179</sup> Speed and flexibility are important in connection with any number of executive branch activities, ranging from environmental protection to health-related matters to financial regulation, and the relevant agencies have managed to function despite rulemaking requirements; furthermore, of course, rules can account for emergency situations and unforeseen circumstances.<sup>180</sup> And any

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<sup>175</sup> *Id.* at 708.

<sup>176</sup> See AMAN & MAYTON, *supra* note 173, § 3.3 n.28 (citing cases requiring publication of general rules of eligibility, entitlement to government benefits, and “articulated standards”).

<sup>177</sup> These concerns, among others, have been associated with other executive endeavors that are not subject to administrative control. See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935-46 (2015) (arguing that these and related concerns do not justify exempting foreign affairs from the accountability associated with administrative principles).

<sup>178</sup> See *Freedom of Information Reform Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 119 (1983) (describing a Drug Enforcement Administration (DEA) study finding that the release of training manuals and investigative reports “has apparently served to educate and enlighten the criminal element in many of the subtle aspects of DEA’s undercover operations, including the use of informants, surveillance techniques, and the technical aspects of many of DEA’s more sophisticated investigative techniques”).

<sup>179</sup> See Sitaraman & Wuerth, *supra* note 177, at 1946 (providing examples, including judicial evaluation of agency decisions about clean air, cigarette smoking, and expansion of health care).

<sup>180</sup> See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1636-39 (2009) (noting how, in the modern administrative state, the executive and administrative agencies have been “the main crisis managers” of national security threats after 9/11 and of the financial meltdown of 2008).

police need for secrecy can be accommodated. For instance, the federal APA and most state APAs provide that police agencies need not disclose, in the federal APA's words, "techniques and procedures for law enforcement investigations or prosecutions, or . . . guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."<sup>181</sup> Note, however, that this provision, which is part of the Freedom of Information Act,<sup>182</sup> does not exempt police from the rest of the APA; rather, it only permits nondisclosure of a "selective enforcement" policy, of the type Davis advocated, that would tip off potential criminals about whom the police will target.

In short, nothing about the police function suggests police agencies should be treated differently than other agencies. One might nonetheless conjecture two other reasons why the police are left alone by administrative jurisprudence. First is the fact that most policing in the United States is local. The lion's share of searches and seizures, especially those that are suspicion-based, are carried out by municipal and county authorities, not federal agents or state police.<sup>183</sup> Yet the federal APA applies only to federal agencies, and municipal agencies are not necessarily covered by state APAs. Although I argue below that even local police agencies usually should be covered by their state's APA,<sup>184</sup> the local nature of policing may have stymied easy application of APA-like procedure.

Finally, and perhaps most obviously, administrative law may have had a minimal impact on the police because police regulation has been dominated by the Fourth Amendment, at least after *Mapp v. Ohio* applied the exclusionary rule to the states.<sup>185</sup> Since that 1961 decision, the Supreme Court has handed down hundreds of opinions with nationwide application on the warrant requirement and its exceptions,<sup>186</sup> the definitions of probable cause and reasonable suspicion,<sup>187</sup> and the application of the exclusionary rule.<sup>188</sup> Probably no other type of agency work is so heavily surrounded by constitutional doctrine. The ubiquity and scope of this jurisprudence make it easy to assume that the Fourth Amendment—along with the Fifth and Sixth Amendments—has occupied the field of police regulation.

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<sup>181</sup> 5 U.S.C. § 552(b)(7)(E) (2012).

<sup>182</sup> 5 U.S.C. § 552 (2012).

<sup>183</sup> ROY ROBERG, KENNETH NOVAK & GARY CORDNER, *POLICE & SOCIETY* 16 (4th ed. 2008) ("Local police, when compared with state and federal law enforcement, have the most employees, cost the most money, respond to a majority of police-related problems, and tend to have a closer relationship with citizens.").

<sup>184</sup> See *infra* text accompanying notes 234–39.

<sup>185</sup> 367 U.S. 643, 655 (1961).

<sup>186</sup> See 2 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* (3d ed. 2007).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

The fact remains that Fourth Amendment jurisprudence has left considerable room for experimentation. Indeed, the Supreme Court has recognized as much in a series of cases, all of which involve panvasive actions.

### B. *Supreme Court Case Law Redux*

A clear goal of all of the Supreme Court's Fourth Amendment cases is to avoid anything smacking of the "general warrant," the term used to describe government authorizations that give complete discretion to officers in the field, and the one type of government action that every court and scholar agrees is barred by the amendment.<sup>189</sup> The traditional antidote to the general warrant is the specific warrant, describing with particularity the person or items for which the government has suspicion.<sup>190</sup> There are good historical and normative reasons for ensuring that the specific warrant, or at least some sort of *ex ante* determination of suspicion, is the default protection against infringements on interests that are clearly fundamental; as I have argued elsewhere, these fundamental interests would include the ransacking of homes, investigatory detentions and arrests of individuals, and certain other particularly intrusive government actions.<sup>191</sup> But these reasons usually do not apply in the panvasive cases addressed by the courts, and some regulatory mechanism other than the specific warrant can be contemplated. Several of the passages in these cases suggest—although admittedly they do not hold—that the mechanism should be administrative law.

A largely unnoticed aspect of the Supreme Court's business inspection cases is that many of them reference administrative law principles and appear to incorporate them as Fourth Amendment requirements. For instance, in *Marshall v. Barlow's, Inc.*, the Court stated that, to protect business owners from the "unbridled discretion [of] executive and administrative officers," the judiciary must ensure that there are "reasonable legislative or administrative standards for conducting an inspection . . . with respect to a particular

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<sup>189</sup> See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 583 (1999) ("No one questions that the Framers despised and sought to ban general warrants.").

<sup>190</sup> See *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1253 (2012) (Sotomayor, J., dissenting) ("To prevent the issue of general warrants . . . the Framers established the inviolable principle that . . . 'no Warrants shall issue, but upon probable cause . . . and particularly describing the . . . things to be seized.'" (quoting U.S. CONST. amend IV)).

<sup>191</sup> Slobogin, *supra* note 136, at 1738-42. In making this argument, I rely on both JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), and BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). In particular, Ackerman's "constitutional moments" thesis is useful in explaining why, even if legislatively approved, nonfacilitative panvasive searches of the home and seizures of people are unconstitutional. See ACKERMAN, *supra*; cf. *Riley v. California*, 135 S. Ct. 2473, 2495 (2014) (holding that searches of cell phones require a warrant); *Davis v. Mississippi*, 394 U.S. 721, 728 (1969) (prohibiting dragnet seizures).

[establishment].”<sup>192</sup> In *Donovan v. Dewey*, the Court upheld a mine inspection program because the statute

requires inspection of *all* mines and specifically defines the frequency of inspection. . . . [T]he standards with which a mine operator is required to comply are all specifically set forth in the [Mine Safety] Act or in . . . the Code of Federal Regulations. . . . [R]ather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the [program] establishes a predictable and guided federal regulatory presence.<sup>193</sup>

Even in *Colonnade Catering Corp. v. United States*, perhaps the least fulsome opinion in this category of cases, the Court said, in the course of authorizing warrantless inspections of liquor stores, “Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.”<sup>194</sup> These various statements indicate that administrative law can perform the Constitution’s regulatory function if the legislature or agency in fact promulgates constraining rules.<sup>195</sup> They also suggest that if the agency does develop such rules, it has established a safe harbor from aggressive judicial intervention.

The Court’s cases outside the inspection context do not make similar explicit reference to administrative regulation. But, as Part I made clear, most of the Court’s panvasive search and seizure cases resonate with the inspection cases in their insistence on regularization, either through standardized procedures, control by superiors, or both. More specifically, one can glean from the Court’s panvasive search and seizure cases—including those outside the inspection setting—the goal of avoiding four overlapping types of government abuse: (1) *capricious* searches and seizures that are based on inarticulate hunches or whim rather than neutral criteria; (2) *biased* searches and seizures, based on irrelevant criteria associated with discriminatory abuse or simple malice; (3) *pretextual* searches and seizures that use the program as an excuse for action in the absence of individualized suspicion; and (4) *ultra vires* searches and seizures that go beyond the original investigative purpose of the search or seizure (sometimes called “mission creep”).

For instance, the Court’s checkpoint cases censure “random” stops and stops based on arbitrary grounds,<sup>196</sup> and the Court’s drug testing decisions

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<sup>192</sup> 436 U.S. 307, 320, 323 (1978) (alteration in original) (internal quotation marks omitted).

<sup>193</sup> 452 U.S. 594, 603-04 (1981).

<sup>194</sup> 397 U.S. 72, 77 (1970).

<sup>195</sup> See *United States v. Biswell*, 406 U.S. 311, 315 (1972) (“In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.”).

<sup>196</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 39, 44 (2000) (affirming *Prouse*’s holding declaiming “standardless and unconstrained discretion” (internal quotation marks omitted) (quoting

and *King*'s holding about DNA stress the limited discretion afforded government officials in those cases.<sup>197</sup> Likewise, *Patel* explained its decision requiring precompliance review of nonconsensual hotel registry searches as a hedge against harassment.<sup>198</sup> *Patel* also suggested such review would curb pretextual actions.<sup>199</sup> Several other Court opinions, including *Edmond*, have declared that pretext arguments *must* be entertained in the panvasive search and seizure context, in direct contrast to the rule when the avowed reason for a search and seizure is individualized suspicion.<sup>200</sup> And concern about mission creep is reflected in the Court's emphasis in its drug testing cases that the blood samples be used only for determining impairment,<sup>201</sup> and its assumption in *King* that DNA samples do not reveal genetic traits and are unlikely to disclose private medical information.<sup>202</sup>

Given the Court's concern about abuses of discretion, why hasn't it contemplated resorting to administrative law outside of a subset of its inspection cases? Perhaps it is easier to think of searches and seizures of businesses as an administrative endeavor because they occur pursuant to statute and are carried out by officials who are not police. But neither aspect of inspections distinguishes them from other panvasive actions. Federal

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Delaware v. Prouse, 440 U.S. 648, 661 (1979)); United States v. Martinez-Fuerte, 428 U.S. 543, 558-59 (1976) (reiterating that "random roving-patrol stops [cannot] be tolerated because they 'would subject the residents of . . . [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.'" (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975))).

<sup>197</sup> See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 622 (1989) ("[I]n light of the standardized nature of the [drug] tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate."); see also *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (quoting *Skinner*).

<sup>198</sup> See *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452-53 (2015) ("Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests.").

<sup>199</sup> *Id.*

<sup>200</sup> See *Edmond*, 531 U.S. at 45 (distinguishing *Whren v. United States*, 517 U.S. 806 (1996), which prohibits pretext arguments when the police can justify the search and seizure on individualized suspicion, from roadblock scenarios where no suspicion exists); see also *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987) (emphasizing that the statute was not enacted "as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations"); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (stating that "there is no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive"). *Whren* itself recognized the distinction. See 517 U.S. at 811 (distinguishing *Whren* from *Burger* and *Colorado v. Bertine*, 479 U.S. 367 (1987)), by noting that the latter involved searches "conducted in the *absence* of probable cause").

<sup>201</sup> See, e.g., *Skinner*, 489 U.S. at 626 n.7 ("While this procedure permits the Government to learn certain private medical facts that an employee might prefer not to disclose, there is no indication that the Government . . . uses the information for any other purpose. Under the circumstances, we do not view this procedure as a significant invasion of privacy.").

<sup>202</sup> See *King*, 133 S. Ct. at 1979 (emphasizing that "the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee").

regulations were the basis for the drug testing program in *Skinner*,<sup>203</sup> a state law established the DNA program in *King*,<sup>204</sup> and local legislation often authorizes camera surveillance and other types of panvasive actions.<sup>205</sup> Immigration officials were in charge of the checkpoints in *Martinez-Fuerte*,<sup>206</sup> and school officials supervised the drug tests in *Vernonia*.<sup>207</sup> The DNA sampling and testing in *King* were carried out by correctional officials.<sup>208</sup>

Perhaps the judicial intuition is the slightly different notion that businesses are “pervasively regulated,” whereas private citizens are not. But even if this were true (it turns out to be an interesting question),<sup>209</sup> this distinction supports an argument for *less* protection for businesses than for individuals, not more. Yet it is only in panvasive cases involving businesses that the Court explicitly recognizes the relevance of statutory and administrative regulation. If such regulation is necessary in the inspection cases, it ought to be the minimum requirement in all other panvasive search and seizure cases.

### C. *The Structure of Administrative Law and of Policing*

The Supreme Court’s Fourth Amendment precedent lays important groundwork for the argument that administrative law principles are relevant to panvasive searches and seizures. However, that precedent does not establish what those principles might look like. Either explicitly or implicitly, many of the Supreme Court’s decisions have referenced administrative law principles such as regularization and discretion-reduction in analyzing how the Fourth Amendment applies in the panvasive setting. But the fact remains that none of these cases, not even the inspection decisions, mentions the APA or analogous statutes, or the law construing or expanding upon those statutes. Nor, as noted earlier, have these statutes typically been viewed as applicable to the police.<sup>210</sup>

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203 See *Skinner*, 489 U.S. at 608 (citing regulations promulgated by the Federal Railroad Administration, at 49 C.F.R. § 219.101(a)(1) (1987), as the law governing the drug testing program).

204 See *King*, 133 S. Ct. at 1967 (citing the Maryland DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (Lexis 2011), as the law governing the testing program).

205 See, e.g., DEP’T OF HOMELAND SEC., CCTV: DEVELOPING PRIVACY BEST PRACTICES 6 (2007) (recounting the practices of several cities and towns regarding camera surveillance); see also *Edmond*, 531 U.S. at 34 (noting that the roadblock program was established by the city of Indianapolis); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995) (indicating that the local school board established the school drug test policy).

206 *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-46 (1976).

207 515 U.S. at 650.

208 See 133 S. Ct. at 1966 (stating that “booking personnel” took the buccal swab in *King*’s case).

209 See Louis Michael Seidman, *The Problems with Privacy’s Problem*, 93 MICH. L. REV. 1079, 1096 (1995) (“[T]he logic of *Burger* [(the junkyard inspection case)] can be extended to automobiles or, indeed, to almost anything else. After all, there is no constitutional right to sidewalks; in principle, walking on sidewalks could be treated as a highly regulated activity.” (footnote omitted)).

210 See *supra* text accompanying notes 157-61.

This is an oversight, but it is understandable, given traditional views on how the police function interacts with the structure of administrative law. The APA categorizes agency actions into four types.<sup>211</sup> Formal rules are rules that the governing statute requires the agency to produce through a trial-like proceeding.<sup>212</sup> An informal rule is any other “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”<sup>213</sup> Formal adjudication, like formal rulemaking, is also provided for by statute and allows for resolution of disputes under agency rules through a quasi-judicial process, akin to a trial.<sup>214</sup> Finally, informal adjudication consists of virtually any other agency action, whether it involves allocation of resources, promises, threats, negotiation, or, most important here, investigation.<sup>215</sup> Unlike the other three categories, the APA imposes “few, if any, requirements on informal adjudication” and, indeed, “barely acknowledges the concept.”<sup>216</sup> Ed Rubin has argued that informal adjudication is more accurately labeled simply “executive action.”<sup>217</sup>

Traditional, suspicion-based searches and seizures—including decisions that selectively enforce criminal statutes in the way that concerned Davis—fit most readily into the latter box. Such actions do not have “general effect” like a rule does, but rather are akin to informal executive branch “adjudication,” either by a police officer or a magistrate. The typical decision about whether there is probable cause or reasonable suspicion to arrest, search, stop, or frisk an individual is a case-specific determination.<sup>218</sup> If this is the type of police work at issue, it is not surprising that the APA would not be considered applicable. That is not to say that this type of police work should be exempt from administrative oversight,<sup>219</sup> only that such oversight is not required by

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<sup>211</sup> See *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 705 (1947).

<sup>212</sup> See 5 U.S.C. § 553(c) (2012) (defining a formal rule as one “required by statute to be made on the record after opportunity for an agency hearing”).

<sup>213</sup> *Id.* § 551(4).

<sup>214</sup> *Id.* § 554(a).

<sup>215</sup> See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.5, at 156 (4th ed. 2002) (stating that informal adjudications constitute “the largest class of federal agency actions” and providing examples).

<sup>216</sup> Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 108 (2003).

<sup>217</sup> *Id.* at 109.

<sup>218</sup> See *Ybarra v. Illinois*, 444 U.S. 85, 91, 94 (1979) (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person . . . . The ‘narrow scope’ of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked . . .”).

<sup>219</sup> Cf. Friedman & Stein, *supra* note 1, at 285-86 (arguing for administrative rulemaking across the board); see also *infra* text accompanying notes 313-14.

the current APA framework, which generally gives a wide berth to enforcement actions by agencies.<sup>220</sup>

In contrast, a panvasive search and seizure program—establishing checkpoints, drug testing, inspections, and the like—is best viewed as the kind of general, prospective directive established by administrative rules. As defined at the beginning of this Article and fleshed out since, panvasive searches and seizures are based on a policy, aimed at groups, and, most importantly, applicable despite the complete absence of particularized suspicion concerning the people affected.<sup>221</sup> To use language often associated with administrative rulemaking, such programs directly affect “individual rights and obligations,” such as driving, going to school, and using banks.<sup>222</sup> Because they impose costs on legitimate activities unmediated through an officer’s judgment about individual wrongdoing, panvasive searches and seizures differ from suspicion-based policing in the same way that rulemaking differs from adjudication. Thus, these interventions should only be permitted if they are subject to the vetting and procedural restrictions that apply to other agency rulemaking.

An administrative law buff might nonetheless object that panvasive police policies do not fit the commonly accepted paradigm of *legislative* rulemaking. Typically, an agency rule is legislative only if it tells private citizens and companies what they may and may not do.<sup>223</sup> One might argue that search and seizure policies are more aptly described, in administrative law parlance, as “internal” or “housekeeping” rules—rules that govern agency operatives<sup>224</sup>—or “interpretive rules”—rules that spell out an agency’s interpretation of a statute or court ruling<sup>225</sup>—neither of which are subject to the same degree of regulation as legislative rules.

Even assuming these distinctions are coherent,<sup>226</sup> once again they justify, at most, exempting suspicion-based searches and seizures from the APA’s

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220 See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (“The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”).

221 See *supra* text accompanying notes 5–6.

222 See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172-73 (2007) (associating notice-and-comment rulemaking with a regulation that “directly governs the conduct of members of the public, ‘affecting individual rights and obligations’” (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979))); see also *infra* note 228.

223 See SCHWARTZ, *supra* note 172, at 5 (noting that regulatory agencies are vested with “authority to prescribe generally what shall or shall not be done” in ways that “impinge upon private rights and regulate the manner in which those rights may be exercised”).

224 See 5 U.S.C. § 553(a)(2) (2012) (excluding from coverage “matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts”).

225 See *id.* § 553(b)(3) (“[T]his subsection does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . .”).

226 But see David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278-79 (2010) (“There is perhaps no more vexing conundrum in the field of

purview. In the suspicion-based search and seizure setting, the relevant legal rules are concededly aimed at the police; the obligations imposed on private citizens come not from those rules but from criminal statutes. As long as citizens obey the criminal law, or at least do not arouse suspicion that they are violating that law, they may not be subjected to a search or seizure. The restrictions imposed by the probable cause and reasonable suspicion requirements, in turn, are meant to speak to the police about when they may enforce the criminal law, and thus any rule that the police devise to operationalize these requirements could plausibly be said to be internal or interpretive.<sup>227</sup>

In contrast, panvasive search and seizure policies are like statutes that directly regulate the public. In these regimes, citizens are told they must submit to an inspection, checkpoint, or drug testing program or expose their information to the government, not because a criminal statute says so—citizens cannot avoid a panvasive search and seizure even if they completely abjure suspicious behavior—but because the panvasive policy dictates it. While the policy also governs the police, it is directed at the public.

In short, unlike internal or interpretive rules, panvasive search and seizure policies prospectively affect the “rights and obligations” of the citizenry,<sup>228</sup> both individually and as a group. In fact, they do so to a much greater extent than many other policies that are considered “rules” under the APA. For instance, the APA requires that agencies abide by its rulemaking dictates when dealing with such matters as workplace ergonomics, the height of a fence around animals, and the precise manner in which farm yields are reported.<sup>229</sup> A regime

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administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules. . . . [C]ourts have labeled the distinction . . . ‘tenuous,’ ‘baffling,’ and ‘enshrined in considerable smog.’”). Criticism of this lax treatment of internal rules has been robust even in the typical administrative context. See Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules and “Spurious” Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 4 (1994) (noting the frequent criticisms of the distinctions as ‘fuzzy’ or ‘enshrined in considerable fog’”).

227 Indeed, Davis himself thought that selective enforcement rules should probably be classified as “interpretive rules,” see DAVIS, *supra* note 167, at 110, which, as noted above, *supra* note 225 and accompanying text, are rules that state what the administrative officer thinks the statute or regulation means and are exempt from notice-and-comment requirements. See also Friedman & Ponomarenko, *supra* note 140, at 1857 (“For the most part, police rules are *internal*—they simply instruct police officers how they must go about enforcing the laws already in place. Rules contained in a police manual may be binding on individual officers, but the police are not permitted to make members of the general public do (or abstain from doing) anything not already written into the substantive law.” (footnote omitted)).

228 See Davidson v. Glickman, 169 F.3d 996, 999 (5th Cir. 1999) (“Interpretive rules state what the administrative officer thinks the statute or regulation means, while legislative rules ‘affect[] individual rights and obligations’ and create law.” (citations omitted)).

229 See, e.g., Chamber of Commerce v. U.S. Dep’t of Labor, 174 F.3d 206, 211-13 (D.C. Cir. 1999) (holding that a directive regarding workplace ergonomics and the handling of materials in certain types of industries was not a mere “procedural rule” or “general statement of policy” exempt from APA notice-and-comment requirements, but rather a substantive rule, before promulgation of which the Occupational Safety and Health Administration was required to conduct a notice-and-comment

that requires the relevant agency to submit to administrative law constraints in these situations, but not when police want to require citizens to submit to drug testing, checkpoints, and surveillance, is seriously askew.

Taken together, the history and rationale of administrative law, allusions in the Court's inspection cases, and the structure of panvasive actions support the proposition that, when carrying out such actions, police ought to be governed by administrative law. At the same time, as the Supreme Court suggested in *Colonnade*, a rule that has cleared the relevant administrative law hurdles might provide a constitutional safe harbor<sup>230</sup>—a domain in which police deserve to exercise discretion because they have followed a process for limiting it. The remainder of this Article fleshes out what these hurdles might be and how they might function in the panvasive setting.

#### IV. ADMINISTRATIVE LAW AS A VEHICLE FOR REGULATING THE POLICE

On the assumption that administrative law principles should apply to panvasive actions administered by police agencies just as it would to other government agencies, this Part will use the Administrative Procedure Act and subsequent judicial interpretations of its application at the federal level as the template for discussing the types of restrictions that administrative law might place on panvasive police actions. The APA, as amended, has three central objectives: (1) to subject agency actions to public scrutiny; (2) to establish requirements for rulemaking and adjudication; and (3) to provide a method of challenging agency action in court on constitutional or statutory grounds, including claims that the APA itself has been violated.<sup>231</sup> The courts and Congress have added significant gloss to the APA, particularly with respect to judicial review of agency actions and legislative or executive overview of

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rulemaking proceeding); see also *Davidson*, 169 F.3d at 999 (finding that a U.S. Fish and Wildlife Service handbook provision regarding the method of reporting use of farm acreage affected individual rights and thus qualified as a legislative rule that required notice and comment); *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 177-72 (7th Cir. 1996) (holding that a Department of Agriculture guidance regulating fence height for "dangerous" animals was a legislative rule requiring notice-and-comment procedure); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (concluding that Food and Drug Administration (FDA) action levels for contaminants were legislative rules subject to notice-and-comment requirements); *EnSCO Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, at \*5 (E.D. La. Oct. 19, 2010) (finding that a notice to lessees and operators of mobile offshore drilling units setting forth new safety measures for oil rigs was a substantive rule that required notice and comment).

<sup>230</sup> See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); see also *supra* text accompanying note 194. A few scholars have recognized that good faith legislative or administrative attempts to solve a problem might be treated as a safe harbor against constitutional attack. See, e.g., Rappaport, *supra* note 138, at 208 ("[T]he Court could offer a 'safe harbor' of relaxed constitutional scrutiny to jurisdictions that voluntarily adopt and comply with reforms . . .").

<sup>231</sup> See Rubin, *supra* note 216, at 100-01 (setting forth these three aims of the regime established by the APA).

those actions.<sup>232</sup> The most pertinent aspects of this body of law for panvasive police conduct are the notice-and-comment requirement, the requirement that rules be adequately explained in writing, the requirement that rules be implemented evenhandedly, and the requirement that rules not exceed the relevant legislative authorization.<sup>233</sup>

One caveat to the notion that administrative law principles such as these ought to apply to the police is that the majority of police departments are municipal, local entities,<sup>234</sup> yet most municipalities are not governed by APA-like statutes.<sup>235</sup> Further, even if they were governed by such a statute, many of these municipalities run small departments that might have great difficulty constructing and explaining rules, as required by notice-and-comment and other administrative procedure mandates.<sup>236</sup>

The latter problem can largely be addressed by allowing smaller departments to piggyback on policies developed by their larger counterparts and other policy organs.<sup>237</sup> The first objection is more substantial, but not fatal. Not only should federal, state, and county police be governed by the relevant APA, but municipal police departments should be as well, at least to the extent they are carrying out panvasive actions in service of state or federal criminal law rather than a purely local statute; under those circumstances they are functioning like an agency of those entities.<sup>238</sup> That would mean that, even if carried out by local authorities, checkpoints aimed at drug and alcohol interdiction, most drug testing programs, many inspection programs, and most surveillance would be governed by the notice-and-comment, explanation, implementation, and authorization requirements discussed here.<sup>239</sup>

232 See generally *infra* text accompanying notes 264–95.

233 See AMAN & MAYTON, *supra* note 173, at 37–39, 445–49 (explaining the first two components); see also *infra* text accompanying notes 282, 296–97 (explaining the last two components).

234 Of the approximately 18,000 law enforcement agencies, almost 13,000 are local, rather than county, state, or federal. See SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 63 (8th ed. 2013).

235 Note, however, that the biggest cities usually have such statutes. *E.g.*, N.Y.C. CHARTER ch. 45, §§ 1041–47 (2004).

236 See Friedman & Ponomarenko, *supra* note 140, at 1886–89 (noting that almost half of American police departments have fewer than ten full-time officers, and describing the difficulty of imposing administrative rulemaking obligations on a small municipal police force).

237 For instance, the Constitution Project has developed detailed guidelines for the fusion centers and camera systems discussed later in this Article. See THE CONSTITUTION PROJECT, *supra* note 86; see also *infra* notes 241–44 and accompanying text.

238 Further, in at least nine states, municipalities are considered agencies of the state. See 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 2.8.10 (3d ed. 1999) (“[A municipal corporation] is variously described as an arm of the state, a miniature state, an instrumentality of the state, an agency of the state, and the like.” (emphasis added) (footnotes omitted)).

239 Residential and business inspections are the one major exception; such inspections generally stem from local ordinances rather than state or federal policy. See, e.g., *Camara v. Mun. Court*, 387 U.S. 523 (1967) (involving a routine inspection for possible violations of San Francisco’s

In the following survey of how these requirements would apply to panvasive searches and seizures, three sorts of modern programs—involving physical surveillance, datamining, and physical seizures—can serve as illustrations of how they might play out in practice. The first type of program is well-represented by the Domain Awareness operation that has existed in New York City since 2012.<sup>240</sup> Among other things, this brainchild of the New York Police Department and Microsoft endeavors to collate and provide to officers in the field information about public activities gleaned from thousands of surveillance cameras, geospatial data that reveals crime “hot spots,” feeds from license recognition systems, and GPS signals that permit real-time and historical tracking of cars.<sup>241</sup> Domain Awareness is representative of numerous other types of physical monitoring systems, including a recent surge in wide-ranging drone surveillance.<sup>242</sup> The second type of program—known as the “fusion center”—exists in well over half of the states, and uses computers to collect financial, rental, utility, vehicle, and communications data from federal, state, and local public databases, law enforcement files, and private companies in an effort to identify suspicious individuals or provide information on already-identified suspects.<sup>243</sup> Fusion centers are, in essence, junior versions of the NSA metadata program and similar federal record-collection efforts.<sup>244</sup> The third illustrative program, representative of panvasive seizures rather than searches, is a discontinued District of Columbia police department “Neighborhood Safety Zone” policy permitting checkpoints at roads leading into neighborhoods thought to be experiencing extreme violence, at which drivers were asked why they wanted

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Housing Code). Although efforts to combat local crime are burgeoning, they tend to be implemented through suspicion-based policing. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1416-19 (2001) (describing the increasing use of criminal law by cities and towns).

<sup>240</sup> See Colleen Long, *NYPD, Microsoft Create Crime-Fighting Tech System*, YAHOO! NEWS (Feb. 20, 2013), <https://www.yahoo.com/news/nypd-microsoft-create-crime-fighting-tech-system-174310276-finance.html?ref=gs> [<https://perma.cc/T43E-Q5T5>] (describing New York City's Domain Awareness System).

<sup>241</sup> *Id.*; see also New York Police Department, Public Security Privacy Guidelines (Apr. 2, 2009), [www.nyc.gov/html/nypd/downloads/pdf/crime\\_prevention/public\\_security\\_privacy\\_guidelines.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/crime_prevention/public_security_privacy_guidelines.pdf) [<https://perma.cc/NA8D-MS26>] [hereinafter Guidelines] (describing the contours and legal authority for the program).

<sup>242</sup> On the increase in drone surveillance and attempts to regulate it, see generally Marc Jonathan Blitz, James Grimsley, Stephen E. Henderson & Joseph Thai, *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49 (2015).

<sup>243</sup> See THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR FUSION CENTERS: PRESERVING PRIVACY & CIVIL LIBERTIES WHILE PROTECTING AGAINST CRIME & TERRORISM 4 (2012), <http://www.constitutionproject.org/pdf/fusioncenterreport.pdf> [<https://perma.cc/2D3K-HXXH>] (describing the establishment of seventy-seven fusion centers nationwide and the types of information these centers collect).

<sup>244</sup> See *id.* (discussing the role of fusion centers).

to enter the neighborhood and could be denied entrance if the police decided their reason was not “legitimate.”<sup>245</sup>

An initial issue is how these programs prospectively affect individual rights and obligations in a way that triggers the administrative rulemaking process. While the answer to that question is clear with respect to the stops that occurred under the D.C. program, given a roadblock’s interference with autonomy,<sup>246</sup> it may not be as obvious in connection with the two surveillance programs. Channeling the Supreme Court’s Fourth Amendment cases,<sup>247</sup> one could argue that those pervasive programs affect no important interests because they neither physically intrude on nor directly coerce citizens; they simply collect information, usually from publicly available sources. But the fact remains that, like a roadblock policy, a surveillance program influences people’s legitimate activities. To avoid the impact of such a program, one would have to sacrifice traveling in numerous public spaces and engaging in many public and private transactions; since such activities are usually unavoidable, the more likely outcome is that the existence of surveillance will modify how those activities are carried out.<sup>248</sup> Thus, the Domain Awareness and fusion center programs do affect those subject to surveillance, even though no physical intrusion or direct coercion is involved.<sup>249</sup>

#### A. Notice and Comment

Under the APA, if an agency engages in informal rulemaking, it must issue a generally available notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>250</sup> The goal is to permit public comment on the proposed rule or rule change, and thereby

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<sup>245</sup> Maria Glod, *Federal Courts Say D.C. Police Checkpoints Were Unconstitutional*, WASH. POST (July 11, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/10/AR2009071002750.html> [<https://perma.cc/68MV-D9R7>].

<sup>246</sup> See *Mills v. District of Columbia*, 584 F. Supp. 2d 47, 54 (D.D.C. 2008) (stating, in the course of assessing the constitutionality of the D.C. program, that “roadside checkpoints, however brief, intrude on motorists’ ‘right of “free passage without interruption” and ‘arguably on their right to personal security’” (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-58 (1976))), *rev’d*, 571 F.3d 1304 (D.C. Cir. 2009).

<sup>247</sup> See *supra* note 8.

<sup>248</sup> Cf. Sean Gallagher, *Mall Owners Pull Plug on Cellular Tracking (For Now)*, WIRED (Nov. 29, 2011, 11:11 AM), <http://www.wired.com/epicenter/2011/11/mall-pull-plug-cell-tracking> [<https://perma.cc/5DJN-TA8W>] (describing the outcry over and eventual termination of a program that used cell phone signals to track the activities of shoppers, with Senator Charles Schumer objecting that people could only opt out of the tracking by turning off their cell phones).

<sup>249</sup> For more discussion of how surveillance influences the public’s behavior and how this influence relates to standing issues, see Christopher Slobogin, *Standing and Covert Surveillance*, 42 PEPP. L. REV. 517, 530-44 (2015), which provides several reasons why “chilling” arguments should lead to Article III standing.

<sup>250</sup> 5 U.S.C. § 553(b)(3) (2012).

improve the agency's decisionmaking process and enhance political legitimacy.<sup>251</sup> Case law establishes that if the agency fails to pinpoint critical issues covered by the proposed rule and identified in comments, any regulation that results can be challenged in court and nullified.<sup>252</sup>

Application of this rule in the panvasive search and seizure setting could not but help democratize the process. As Eric Miller has written, unlike the rulemaking of other agencies,

police rulemaking is most often not open to [the] public . . . . The resulting policy is often based solely on [the police's] own internal assessment of the appropriate goals and values to pursue, independent of the interests of the community they police. Departmental policy-makers thus remain remote from the community, looking inwards rather than outwards to determine the proposed policy's social and criminological impact. Given this feature of police policy-making, community members lack the ability to participate in—and especially, to challenge—police policy at the front-end during the equivalent of the drafting and comment process.<sup>253</sup>

Consistent with these observations, programs like Domain Awareness, fusion centers, and neighborhood blockades are often simply sprung on the public,<sup>254</sup> or in the case of at least some fusion centers, never formally presented to the public at all.<sup>255</sup> Nor were most of the panvasive policies involved in the Supreme Court's cases subject to any type of pre-initiation debate.<sup>256</sup>

Application of the APA would have a dramatic impact on the usual cloistered police policymaking process.<sup>257</sup> For instance, despite numerous

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251 See Rubin, *supra* note 216, at 113 ("The entire point of the comment process is to effect changes in the proposed rule. Agency rulemaking is a policy process that should involve the collection of new information and the use of that information to design optimal solutions." (footnote omitted)).

252 See, e.g., *AFL-CIO v. Donovan*, 757 F.2d 330, 333 (D.C. Cir. 1985) (enjoining the Department of Labor from adopting a new rule because the Secretary failed to comply with the notice-and-comment requirements of the Administrative Procedure Act).

253 Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 522-23 (2015) (footnote omitted).

254 See, e.g., Long, *supra* note 240 (quoting the director of the NYPD counterterrorism program as stating that the domain awareness program "was created by cops for cops" and remarking that "the latest version has been quietly in use for about a year"); see also Glod, *supra* note 245 (indicating that residents were surprised and upset by the roadblock in the Trinidad neighborhood of Washington, D.C.).

255 Cf. Slobogin, *supra* note 136, at 1751 (stating that, in most jurisdictions where fusion centers operate, "no local legislative body has debated the purpose or scope of fusion-center operation").

256 There were some exceptions, however. For instance, the school district in *Vernonia* presented the proposed drug testing policy at a "parent input" night, where the parents who were in attendance gave unanimous approval. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649-650 (1995). More common is the process in *Sitz*, where a task force composed of police, prosecutors, and state transportation department officials created the policy without public consultation. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

257 Miller is pessimistic about the capacity of the notice-and-comment procedure to encourage full public participation. See Miller, *supra* note 253, at 548 ("[Notice and comment] does little, on its

news stories about domain awareness programs and fusion centers, we still do not know the extent to which New York City is keeping tabs on its citizens, or the precise types of records (such as bank accounts, medical documents, communication logs?) that fusion centers are compiling.<sup>258</sup> Requiring a notice-and-comment period or something like it would mandate transparency about these types of issues and at least a patina of democratic participation.<sup>259</sup> In particular, it could provide concrete testimony about what Jane Bambauer has called the “hassle” associated with panvasive programs—the extent to which a program will affect innocent members of the public in its efforts to catch bad actors.<sup>260</sup>

A perennial concern of the police—and one reason their rulemaking is so secretive—is that knowledge of their tactics will tip off criminals and undermine crime detection efforts; indeed, as noted earlier, the APA itself accommodates police in this respect.<sup>261</sup> But in the panvasive context, this concern is highly exaggerated. First, of course, the primary aim of panvasive search and seizure programs such as roadblocks, drug testing, and inspections

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own . . . . What more is needed is to have the community actually participate, and have the institution take them seriously . . . .”). Others are concerned that the feedback it produces will come too late in the process. See Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 404 (2010) (suggesting that information obtained in the notice-and-comment period would be more valuable before any proposed rule was formulated). But some participation is better than none, and agencies are not prevented from revising rules after receiving comments. Erik Luna laid out the basic chronology as “(1) preparation of enforcement principles, (2) publication and invitation for comments, (3) public deliberation in an open forum, (4) revision based on the comments, (5) publication of the final principles, and (6) inculcation of the principles among rank-and-file officers.” Luna, *supra* note 138, at 603–04.

<sup>258</sup> See, e.g., Torin Monahan & Neal A. Palmer, *The Emerging Politics of DHS Fusion Centers*, 40 SECURITY DIALOGUE 617, 630 (2009) (quoting one fusion center trainer as saying, “If people knew what we were looking at, they’d throw a fit.” (internal quotation marks omitted)).

<sup>259</sup> A formal notice-and-comment procedure may not be required before promulgation of many panvasive policies. See William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 61–62 (2015) (noting that the overriding goal sought by administrative principles is bureaucratic transparency, rather than adherence to formal process). Further, it would make no sense to require such a procedure before every particular panvasive action. For instance, a departmental decision to deploy extra officers at a given location or the siting of a particular roadblock should be consistent with an *ex ante* policy and should be subject to *ex post* review on antidiscrimination grounds, see *infra* text accompanying notes 282–94, but could of course take place without a notice-and-comment period.

<sup>260</sup> See Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 464 (2015) (defining “hassle” as “the chance that the police will stop or search an innocent person against his will”); cf. Martin Kaste, *In ‘Domain Awareness,’ Detractors See Another NSA*, NAT’L PUB. RADIO (Feb. 21, 2014, 4:00 PM), <http://www.npr.org/sections/alltechconsidered/2014/02/21/280749781/in-domain-awareness-detractors-see-another-nsa> [<https://perma.cc/J6CZ-NCDM>] (describing controversy over Oakland’s domain awareness program, the nature of which was initially hidden from the public, and noting that the program may be scaled back as a result).

<sup>261</sup> See *supra* text accompanying note 181.

is deterrence, which publicity can only enhance. Second, matters of specific implementation need not be disclosed. For instance, if camera surveillance is meant to be covert, the fact and general area of such surveillance should be disclosed, but exact camera locations need not be. Similarly, the types of records sought by fusion centers should be revealed, but the algorithms that might be used to analyze them need not be. And only the approximate number and location of inspection checks or drug tests, not their precise timing, would have to be revealed to the public. Third, and most importantly, police should have to accept the fact that they function in a democracy.<sup>262</sup> Democratic accountability—a key value sought to be implemented by administrative law—requires that the public be told not only what panvasive capacities police have, but also how those capacities will be used.<sup>263</sup>

### B. *Explanation of the Policy*

A much discussed issue in administrative law circles is the extent to which an agency must take public comments into consideration and, when it does not follow the route suggested by a comment, explain why it failed to do so.<sup>264</sup> The APA does not require a response to every comment; demanding that an agency answer all of the submissions it receives, regardless of coherence or number, would be inefficient and unproductive.<sup>265</sup> At the same time, the APA does state that agency rules and their underlying findings may not be “arbitrary” or “capricious.”<sup>266</sup>

The Supreme Court’s solution to this dilemma has been to require a written rationale for rules the agency promulgates, and require as well that the rationale link the agency’s evidence, policies, and actions in a cogent way.<sup>267</sup> Thus, courts are entitled to ensure that agencies have taken a “hard look” at the rules they generate. As Kevin Stack states:

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<sup>262</sup> See DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 157-58 (2008) (defending the idea that policing practices and fundamental aspects of democracy are irretrievably linked).

<sup>263</sup> See Friedman & Ponomarenko, *supra* note 140, at 1832 (“It is both unacceptable and unwise for policing to remain aloof from the democratic processes that apply to the rest of agency government.”).

<sup>264</sup> See Rubin, *supra* note 216, at 115-17 (discussing the difficulty courts face in defining which comments an agency must respond to when rulemaking).

<sup>265</sup> The APA requires that the rules incorporate “a concise general statement of [their] basis and purpose,” *Tri-State Generation & Transmission Ass’n v. Envtl. Quality Council*, 590 P.2d 1324, 1330 (Wyo. 1979), but the agency need not discuss “every item or factor or opinion in the submissions made to it,” SCHWARTZ, *supra* note 172, at 200-01.

<sup>266</sup> See 5 U.S.C. § 706(2)(A) (2012) (authorizing reviewing courts to “set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>267</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasizing that an agency must set forth the basis for each rule “with such clarity as to be understandable”); *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (“We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . .”).

Under the leading formulation of [the hard look] doctrine, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’” The court “consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” In addition, the agency may not “entirely fail[] to consider an important aspect of the problem,” may not “offer[] an explanation for its decision that runs counter to the evidence before the agency,” nor offer an explanation that is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” The agency must also relate the factual findings and expected effects of the regulation to the purposes or goals the agency must consider under the statute as well as respond to salient criticisms of the agency’s reasoning.<sup>268</sup>

Note that the hard look standard does not require an agency to demonstrate a “compelling” state interest nor does it allow a court to second guess executive choices among alternatives; thus, it is not as demanding as strict scrutiny analysis. But, just as clearly, hard look analysis is not equivalent to the minimal rationality review applicable in cases involving economic legislation.<sup>269</sup> Rather, it is meant to endorse a tougher stance, perhaps akin to the constitutional standard known as “rationality with bite,”<sup>270</sup> on the ground that executive agents are not popularly elected or imbued with supreme legislative authority, but rather appointed officials who are restrained by legislative policy.<sup>271</sup>

Thus, the hard look standard stands in stark contrast to the Court’s current “soft look” special needs jurisprudence. As applied to pervasive searches and seizures, hard look doctrine would be less deferential to government programs because it would require a greater demonstration of effectiveness at crime reduction than the Court’s special needs cases do. For instance, the drug testing program of customs agents upheld in *Von Raab* would have failed hard look analysis, because there was virtually no evidence

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<sup>268</sup> Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 378-79 (2012) (second, third, and fourth alterations in original) (footnotes omitted).

<sup>269</sup> Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1197 (2008) (“Traditional rational basis review only asks whether any theoretical, or hypothesized, rational relationship exists to a legitimate governmental interest; the challenger must essentially prove a negative by eliminating any real or imagined basis for the enactment. By way of contrast, under ‘rationality with bite,’ the government bears the burden of establishing the actual reason for the law that would be advanced by applying the law . . .”).

<sup>270</sup> *Id.*

<sup>271</sup> See Stack, *supra* note 268, at 379 (“Hard-look review further distinguishes regulations from legislation; it has long been understood as requiring a higher standard of rationality than the minimum rational basis standard of constitutional review.”).

of a problem to be solved.<sup>272</sup> A similar conclusion could easily have been drawn with respect to at least one of the two school drug testing programs addressed by the Court.<sup>273</sup> Whether other pervasive actions discussed in Part I would have survived a hard look is difficult to know, since the courts, operating under the special needs rubric, have generally not demanded the “relevant data” required under the doctrine. In general, however, judicial pressure enforcing the hard look requirement should have the salutary effect of moving police toward data- and evidence-based practices rather than programs that rely on unsupported intuition.<sup>274</sup>

Were a court applying hard look analysis to examine the three programs at issue here, it could justifiably ask for a written explanation of the crime problems they are aimed at addressing and how they are meant to do so. New York’s Domain Awareness System is touted as a much more efficient way of facilitating communication of crime-relevant information to police in real time, and also as a means of enhancing police safety by alerting officers to the location and history of suspects.<sup>275</sup> Fusion center repositories likewise make information access and collation more efficient.<sup>276</sup> The D.C. roadblock

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272 See *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 683 (1989) (Scalia, J., dissenting) (“What is absent in the Government’s justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.”).

273 See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 849 (2002) (Ginsburg, J., dissenting) (indicating that drug use at the school was not a major problem at this time); *id.* at 852-53 (noting that the targets of the program—students who engaged in extracurricular activities—were less likely than the general student population to engage in drug usage). Lower courts have occasionally been willing to rely on the Fourth Amendment to implement the same objective. See, e.g., *Lebron v. Sec. of Fla. Dep’t of Children & Families*, 772 F.3d 1352 (11th Cir. 2014) (holding that drug testing of Temporary Aid for Needy Families (TANF) funds recipients constituted an unreasonable search where there was no empirical showing that drug use concerns were particularly strong for TANF applicants); *Tannahill ex rel. Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001) (holding unconstitutional a school district’s drug testing policy where empirical evidence showed that drug use had not increased prior to adoption of policy and was generally lower than in other schools in the state).

274 See Lawrence Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIME & JUST. 377, 383-84 (2013) (defining “evidence-based policing” as “the use of best research evidence on ‘what works’ as a guide to police decisions” and arguing that police need to move toward evidence-based policing not only to improve efficacy but to increase legitimacy).

275 See Chris Francescani, *NYPD Expands Surveillance Net to Fight Crime as Well as Terrorism*, REUTERS (June 21, 2013, 11:24 AM), <http://www.reuters.com/article/usa-ny-surveillance-idUSL2NoEVoD220130621> [<https://perma.cc/MHY5-HUUQ>] (recounting how the system brings together data from multiple technological sources and makes them available to the individual police officer).

276 See *Fusion Center Success Stories*, U.S. DEP’T HOMELAND SECURITY, <http://www.dhs.gov/fusion-center-success-stories> [<https://perma.cc/5DX7-4DZT>] (describing the successes of fusion centers, which state and local entities have established to improve information sharing and analysis regarding a range of threats within their jurisdictions). *But see* Danielle Keats Citron & Frank

program, probably the most controversial of the three when it was implemented, was nonetheless conceived and justified (albeit *ex post*) as a response to an increase in random, drive-by shootings in the Trinidad area of the District.<sup>277</sup> Thus, on the face of it, all three programs appear to have a rational basis. But courts would not be remiss in asking for data supporting these points.

Moreover, hard look analysis should not end with abstract assessments of program rationales. Just as important is an evaluation of whether the program, as implemented, is rationally aimed at achieving its objectives. If, for instance, domain awareness and fusion center policies do not specify how the information collected will be kept secure, screened for accuracy, and accessed, they fail (quoting from Stack's explanation) "to consider an important aspect of the problem."<sup>278</sup>

Agency deployment of its panvasive resources must be rational as well. For instance, some applications of domain awareness technology are meant to help police focus their presence in "hot spots" that are thought to be particularly prone to crime.<sup>279</sup> But suppose the police department chooses to flood with cops only some of the zones designated as hot, and those spots happen to be heavily populated by people of color.<sup>280</sup> The D.C. roadblock program ended up affecting only the Trinidad area, which consisted primarily of residences owned by poor African Americans.<sup>281</sup> In such situations, hard look review leads to a third inquiry, which can help uncover biased, capricious, or pretextual programs.

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Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1444 (2011) (noting that "[y]ears after they were initiated, advocates of fusion centers have failed to give more than a cursory account of the benefits they provide").

<sup>277</sup> See Glod, *supra* note 245 (quoting the District of Columbia Attorney General as saying that the roadblock "was effective" because "[p]eople were coming in, using cars to shoot the place up and then escaping in their vehicles").

<sup>278</sup> Stack, *supra* note 268, at 378 (internal quotation marks omitted) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); see also *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (explaining that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures").

<sup>279</sup> See *How to Identify Hot Spots*, NAT'L INST. JUST. (May 25, 2010), <http://nij.gov/topics/law-enforcement/strategies/hot-spot-policing/pages/identifying.aspx> [<https://perma.cc/D5CW-V55E>] (describing the use of Geographic Information Systems "to more accurately pinpoint hot spots to confirm trouble areas, identify the specific nature of the activity occurring within the hot spot and then develop strategies to respond").

<sup>280</sup> Cf. Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance and Race in the New Policing*, 42 FORDHAM URB. L.J. (forthcoming 2016) (manuscript at 52-53) (on file with author) (finding that, despite the use of data-based policing methods in Boston, black suspects are more likely than white suspects to be observed, interrogated, and frisked, controlling for gang membership and prior arrest history).

<sup>281</sup> Glod, *supra* note 245.

### C. Implementation of the Policy

Once a rule is promulgated, the APA says nothing about how it should be carried out, apparently because implementation is considered a form of informal adjudication for which the APA has not developed standards. Here, however, the logic of administrative law, consistent with Fourth Amendment jurisprudence, dictates that agency actions be performed in a "regularized" fashion; as formulated by one commentary, "It is firmly established that an agency's unjustified discriminatory treatment of similarly situated parties constitutes arbitrary and capricious agency action."<sup>282</sup> Thus, courts have held that, unless the rationale for the rule signals a different result, all potential targets of a program should be treated in the same manner.<sup>283</sup>

In its inspection, checkpoint, and drug testing cases, the Court has often insisted on this evenhanded implementation requirement, citing the Fourth Amendment but also referencing, explicitly or implicitly, administrative regimes.<sup>284</sup> Accordingly, checkpoints, drug testing programs, inspection plans, data collection systems, and other panvasive actions must be implemented in a way that minimizes or eliminates discretion through either universal or random application of the program to those intended to be affected by it. Allowing police on the beat to decide who has "legitimate" business within a neighborhood, as occurred in the D.C. roadblock program,<sup>285</sup> would violate this precept, as would the drug testing policy invalidated in *Ferguson*, which did not apply to all pregnant women but only those who had no, late, or incomplete prenatal care, "[p]reterm labor 'of no obvious cause,'" or "[p]reviously known drug or alcohol abuse."<sup>286</sup> Application of these types of criteria changes a panvasive search and seizure into a suspicion-based one, where traditional normal Fourth Amendment doctrine

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<sup>282</sup> Joseph T. Small, Jr. & Robert A. Burgoyne, *Criminal Prosecutions Initiated by Administrative Agencies: the FDA, the Accardi Doctrine and the Requirement of Consistent Agency Treatment*, 78 J. CRIM. L. & CRIMINOLOGY 87, 103-04 (1987).

<sup>283</sup> See, e.g., *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) ("We reverse the Commission not because the strict rule it applied is inherently invalid, but rather because the Commission has invoked the rule inconsistently. We find that the Commission has not treated similar cases similarly."); *Crestline Mem'l Hosp. Ass'n v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982) (noting that the NLRB "cannot treat similar situations in dissimilar ways" (internal quotation marks omitted) (quoting *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966))); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (explaining that "[p]atently inconsistent application of agency standards to similar situations lacks rationality" and is prohibited under the APA's arbitrary and capricious standard); *Distrigas of Mass. Corp. v. Fed. Power Comm'n*, 517 F.2d 761, 765 (1st Cir. 1975) ("[An administrative agency] has a duty to define and apply its policies in a minimally responsible and evenhanded way.").

<sup>284</sup> See *supra* Part I.

<sup>285</sup> See *Mills v. District of Columbia*, 584 F. Supp. 2d 47, 54 (D.D.C. 2008), *rev'd*, 571 F.3d 1304 (D.C. Cir. 2009).

<sup>286</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 71 n.4 (2001).

should govern. The inspection program in *Burger* might have flunked for this reason as well: the program was apparently implemented in a highly scattershot manner.<sup>287</sup>

The evenhandedness requirement goes well beyond ensuring that a particular program is carried out in a nondiscriminatory fashion, however. Agencies must also ensure that the program, as defined, does not irrationally fixate on a particular area or group; to use Stack's formulation, "the factual findings and expected effects of the regulation" must be related "to the purposes or goals the agency must consider."<sup>288</sup> In effect, this aspect of hard look analysis mimics disparate treatment doctrine,<sup>289</sup> but without requiring the usual predicate of race or religion. If it turns out that police cannot point to solid evidence that the areas or groups subject to domain awareness, records collection, or roadblocks are prone to more crime, the administrative policy begins to look irrational.<sup>290</sup> To avoid the potential for rejection under the hard look standard, the *ex ante* differences in crime rates in these various scenarios should be noticeable. Otherwise, the agency should apply the program across the board to all similarly situated zones, groups, or neighborhoods, or do so randomly.<sup>291</sup>

In short, hard look doctrine requires that, when carrying out panvasive searches and seizures, police agencies provide a rationale for any distinctions they make between places or groups of people. This requirement would redress a problem that special needs jurisprudence—which evaluates panvasive actions atomistically—leaves completely unregulated. Most importantly, it would

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287 See *New York v. Burger*, 482 U.S. 691, 723 (1987) (Brennan, J., dissenting) ("Neither the statute, nor any regulations, nor any regulatory body, provides limits or guidance on the selection of vehicle dismantlers for inspection. . . . I conclude that 'the frequency and purpose of the inspections [are left] to the unchecked discretion of Government officers.'").

288 Stack, *supra* note 268, at 378.

289 Disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

290 Some courts confronting the placement of checkpoints have been willing to use the Fourth Amendment to achieve this goal. See, e.g., *People v. Jackson*, 727 N.Y.S.2d 881, 881 (App. Div. 2001) (stating that "the People were obligated, *inter alia*, to demonstrate the gravity of the public concern that would be served by the roadblock" and finding that the State did not meet its burden because, "although the People's witnesses testified that the relevant locality suffered from an increase in various crimes, they offered only generalized assertions to support this claim"); see also *State v. Parns*, 523 So. 2d 1293 (La. 1988) (holding a sobriety checkpoint unconstitutional because there was "no evidence of [a] basis for the site selection"); *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1985) (upholding a sobriety checkpoint plan developed after extensive research into locations within the city where there had been DUI arrests and alcohol-related accidents).

291 See *Harcourt & Meares*, *supra* note 6, at 816 ("[R]andomized stops at suspicion-sufficient checkpoints should be the focal point of Fourth Amendment reasonableness: randomized engagement of citizens offers a better constitutional model for controlling the exercise of police power against individuals.").

recognize that policing is redistributive.<sup>292</sup> Police do not execute searches and seizures in a vacuum; they choose where, when, and how they will deploy their resources and, as a result, affect some localities and types of people more than others. Today, these choices occur with little or no oversight. The result, some allege, is that some communities unfairly bear the brunt of police activity.<sup>293</sup> Courts should have the authority to make sure that is not the case.

The hard look doctrine applies only to agency actions, not legislation. But Fourth Amendment jurisprudence suggests that the evenhanded implementation requirement should apply even when the pervasive policy is dictated by statute rather than agency policy. For instance, the registry inspection scheme in *Patel* was explicitly authorized by a legislature,<sup>294</sup> an entity that need not explain itself in the way an agency must. Nonetheless, the statute was unconstitutional because, the Supreme Court implied, it permitted nonconsensual searches of a hotel registry on the whim of the police;<sup>295</sup> in practice, the law permitted police to ignore some hotels entirely but choose to search others every day. Because the statute set out no neutral inspection plan, police searches under it resembled a suspicion-based search without the requisite suspicion.

#### D. Legislative Authorization and Oversight

This latter point leads to a final important attribute of administrative law. A predicate to administrative rulemaking is that legislation authorizes the agency action about which rules are made.<sup>296</sup> Sometimes, as in *Patel*, the legislation directly mandates the action. Usually, however, the statute sets out a general directive that the agency must implement more precisely through its own policies. If an agency generates a rule, it must be consistent with its statutory delegation.<sup>297</sup> Any agency rule that is *ultra vires* is void.

<sup>292</sup> See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1173 (2012) (“[C]ourts and scholars should conceptualize arrests, and proactive policing more generally, as a distributive good.”); see also Miller, *supra* note 253, at 525 (“[P]olicing presents (in addition to the usual procedural and corrective issues) a problem of distributive justice. The distributive issue addresses the differential imposition of the benefits and burdens of policing across different communities and localities.”).

<sup>293</sup> See Sekhon, *supra* note 292, at 1211 (“In proactive policing, police departments have considerable discretion to ration arrests as they see fit. These departmental choices generate winners and losers, with significant distributive consequences.”).

<sup>294</sup> See L.A., CAL., MUNICIPAL CODE § 41.49(2)–(4) (2015).

<sup>295</sup> See *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2456 (2015) (holding that the statute “is also constitutionally deficient . . . because it fails sufficiently to constrain police officers’ discretion as to which hotels to search and under what circumstances”).

<sup>296</sup> See SCHWARTZ, *supra* note 172, § 4.4, at 171 (“The statute is the source of agency authority as well as of its limits. If an agency act is within the statutory limits (or vires), its action is valid; if it is outside them (or *ultra vires*), it is invalid.”).

<sup>297</sup> *Id.* § 4.4, at 172.

This principle could have significant implications for panvasive searches and seizures because a large number of such programs are not explicitly authorized by legislation. For instance, drug testing programs like the one in *Skinner*, sobriety checkpoints like those in *Sitz*, and surveillance systems like New York's Domain Awareness System are, at best, grounded on omnibus statutory delegations of law enforcement powers.<sup>298</sup> Similarly, fusion centers often operate without any explicit statutory authority;<sup>299</sup> thus there is no legislative directive as to the types of information they can collect, the length of time they may maintain it, or the types of wrongdoing they can attempt to detect with the information collected. In an administrative paradigm, courts might well conclude that a more specific legislative mandate is required when government action is so significant in scope and involves such sensitive information.<sup>300</sup>

Of course, at the federal level, the Supreme Court has indicated that, at most, legislation need only set out a vague "intelligible principle" to guide agencies.<sup>301</sup> But if the only relevant legislative pronouncement is "to enforce

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298 The drug testing policy in *Skinner* was promulgated under the Federal Railroad Safety Act of 1970, which simply states that the Secretary of Transportation is to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 606 (1989) (quoting 45 U.S.C. § 431(a) (1976)). The sobriety checkpoint in *Sitz* was triggered by a gubernatorial request over legislative opposition. *Sitz v. Dep't of State Police*, 429 N.W.2d 180, 181 (Mich. Ct. App. 1988), *rev'd sub nom.* *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). The New York City Domain Awareness System was based on the authority of chapter 18, section 435(a) of the New York City Charter, which states that police shall "preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages . . . ; protect the rights of persons and property, guard the public health, [and] preserve order[;] . . . regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health . . . ; inspect and observe all places of public amusement [and] all places of business . . . [; and] enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses." N.Y.C. CHARTER ch. 18, § 435(a) (2004).

299 See THE CONSTITUTION PROJECT, *supra* note 243, at 6 (stating that fusion centers "derive their authority from general statutes creating state police agencies or memoranda of understanding among partner agencies"); see also Citron & Pasquale, *supra* note 276, at 1453-55 (discussing "confusing lines of authority" with respect to fusion centers).

300 See Friedman & Ponomarenko, *supra* note 140, at 1844 ("As compared with the regulation of almost any other aspect of society that fundamentally affects the rights and liberties of the people, rules adopted by democratic bodies to govern policing tend to be few and far between.").

301 *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (internal quotation marks omitted) (quoting *J.W. Hampton, Jr., & Co., v. United States*, 276 U.S. 394, 409 (1928)). The Court has struck down only two statutes on nondelegation grounds, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474. The first statute found to be "unintelligible" required that the agency act in the "public interest," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-27 (1943), and the second ordered the agency to regulate in a "fair and equitable" manner, *Yakus v. United States*, 321 U.S. 414, 420, 447 (1944).

the criminal law,”<sup>302</sup> even that vacuous mandate might not be met. It is also worth noting that the nondelegation doctrine—which is the genesis of the intelligible principle requirement—is frequently much more robust in the states than it is at the federal level.<sup>303</sup> Thus, for instance, one state court has held that the nondelegation doctrine “requires that the legislature, in delegating its authority provide sufficient identification of the following: (1) The *persons* and *activities* potentially subject to regulation; (2) the *harm* sought to be prevented; and (3) the general *means* intended to be available to the administrator to prevent the identified harm.”<sup>304</sup>

As this language suggests, taken seriously the nondelegation doctrine would force the relevant legislature to be specific in authorizing panvasive actions. The legislating body would have to endorse in a statute the use of cameras and license plate recognition systems necessary to carry out the domain program, the collection of information from financial and communications entities that occurs within fusion centers, and the detentions that occur at neighborhood checkpoints aimed at fighting violence;<sup>305</sup> likewise with other types of panvasive actions, such as sobriety checkpoints, drug testing of school children, and DNA testing. Forcing these issues to be debated at the highest policy level ensures democratic accountability.<sup>306</sup>

Just as importantly, a specific legislative directive identifying the “persons or activities” sought to be regulated, the “harm” to be prevented, and the “means” of prevention would provide crucial guidance for law enforcement in panvasive cases, especially with respect to the first category: persons and activities to be affected. If, for instance, the legislature authorizes drug testing of school children, the principle of evenhanded application would require testing of *every* child in the jurisdiction or, in the alternative, a random subset of that group or a subset of that group that is demonstrably more likely to be involved in illegal drug use. The legislative provision would define the group

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302 See Friedman & Ponomarenko, *supra* note 140, at 1844 (noting that “[t]he typical enabling statute of a policing agency simply authorizes it to enforce the substantive criminal law—but says little or nothing about *what* enforcement actions police are permitted to take”).

303 See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1172 (1999) (“In many states, courts impose substantive limits on delegation. Legislatures are not allowed to delegate to agencies unless they have articulated reviewable standards to guide agency discretion, even where procedural safeguards are in place.”).

304 *Stofer v. Motor Vehicle Cas. Co.*, 369 N.E.2d 875, 879 (Ill. 1977).

305 See Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 50 (2010) (arguing that “delegations lacking intelligible principles are often less deserving of judicial deference because the resulting policies lack the political authority that typically underlies the rationale for the deference in the first place”).

306 See Friedman & Ponomarenko, *supra* note 140, at 1875 (asserting that “democratic review [not judicial review] is what is necessary to strike the policy balance that rests at the bottom of policing decisions”).

to be subjected to the panvasive action, which would force both the legislature and the law enforcement agency to consider and be clear about the stakes involved and cabin the agency's discretion.

A final observation on the legislature's role has to do with oversight. Enforcement of legislative directives has usually been left to the courts and the agencies themselves. However, Congress has occasionally created other agency-oversight mechanisms. For instance, Congress has required that all major agency actions be subject to cost-benefit analysis by the Office of Information and Regulatory Affairs.<sup>307</sup> Other statutes set up legislative oversight committees for particular agency actions, such as those involving national security surveillance.<sup>308</sup> While such oversight is not required as a first principle of administrative law, it might be a factor that a reviewing court considers in weighing whether a police agency has been sufficiently attentive to effectiveness and other policy considerations in establishing a search or seizure program.<sup>309</sup>

#### E. Future Directions

The goal of this Article is to give teeth to the new administrativist approach to police regulation. The essential claim is that, given their legislative nature, panvasive actions not only should, but must, be governed by administrative law principles. These principles would improve democratic accountability and counter the usual law enforcement orientation of legislative bodies by requiring public input prior to implementation, agency rationalization of the program, implementation that is both consistent with the stated rationale and evenhandedly carried out, and legislative authorization that is sufficiently specific to satisfy a court that a representative body considers the program permissible. Finally, these principles apply regardless of whether the courts have formally designated a particular type of panvasive action a search or seizure under the Fourth Amendment.

For one who is persuaded by these points, a cause for concern is that the entire scheme is dependent on the whims of the legislature. Congress and state legislatures, lobbied by police-oriented groups, could explicitly exempt law enforcement agencies from the APA and the equivalent state

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<sup>307</sup> See, e.g., James T. O'Reilly, *Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy*, 10 J. LEGIS. 95, 115 (1983) (noting that Congress delegated responsibility for the Paperwork Reduction Act to OIRA, which gave the office "important management powers").

<sup>308</sup> See Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 316-25 (2015) (describing the Federal Privacy and Civil Liberties Oversight Board).

<sup>309</sup> Berger, *supra* note 305, at 52-53 (discussing the importance of oversight and the weight it should receive in reviewing delegations to agencies).

administrative procedure statutes.<sup>310</sup> The question then becomes whether the Fourth Amendment or, as Davis argued years ago,<sup>311</sup> the Due Process Clause would nonetheless require that some version of these principles apply. Certainly the notice and rationality requirements outlined here could be seen as aspects of the Fourth Amendment reasonableness inquiry. But further elaboration of that point is left for future inquiry, as is the extent to which the exclusionary rule, rather than the usual administrative remedy of enjoining a flawed program, is appropriate in this setting.<sup>312</sup>

Also left for later work is whether these same precepts ought to apply to other aspects of police work. This Article has distinguished panvasive and suspicion-based actions on the ground that only the former type of policing is sufficiently legislative in nature to mandate application of traditional administrative law principles. But that distinction may at most exempt from administrative purview the decision to stop, arrest, or search a particular person. While that decision is akin to an adjudication, the *methods* police use to carry out stops, arrests, and searches are closer to legislative rules. For instance, the force used to effect a detention, the protocol for communicating with the targets of a search, and the use of body cameras are all issues that can easily be dealt with prospectively. Like the panvasive actions discussed in this Article, these methodological matters clearly affect the “rights” of citizens. The key question is whether they are sufficiently distant from “internal” or “interpretive” concerns to be subject to written policies that are developed after public input, bolstered by written justifications, and subject to judicial review.

Ironically, the focal point of Professor Davis’s seminal scholarship—the decision about whom to stop, arrest, and search once the requisite cause is established—is the type of police work that sits least comfortably with current administrative law requirements. The mismatch is compounded by the unavailability of an obvious remedy in such situations. The administrative law remedy for failure to devise a rule, follow the appropriate rulemaking process,

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310 In Florida, for instance, the state APA exempts law enforcement policies and procedures which relate to “[t]he collection, management, and dissemination of active criminal intelligence information and active criminal investigative information; management of criminal investigations; and . . . [s]urveillance techniques, the selection of surveillance personnel, and electronic surveillance, including court-ordered and consensual interceptions of communication.” FLA. STAT. § 120.80(6)(a)–(c) (2016).

311 See *supra* text accompanying notes 174–75.

312 On the exclusionary rule issue, my tentative preference is to use exclusion as a deterrent to pretextual use of panvasive actions, but otherwise to rely on equitable remedies. See Slobogin, *supra* note 3, at 142–43. Thus, drugs found during a license checkpoint stop would be inadmissible even if the checkpoint is legitimate, but drugs found during a narcotics checkpoint would not be, whether or not the checkpoint is valid as a matter of administrative law. As the Supreme Court said in *United States v. Caceres*, “we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.” 440 U.S. 741, 755–56 (1979).

or implement a rule evenhandedly is to enjoin the administrative action.<sup>313</sup> That remedy works when the challenge is to a policy authorizing a panvasive action; once chastised by a court, the police agency must simply go back to the drawing board. But when the challenge is to a failure to follow a selective enforcement rule, the analogous remedy would be dismissal of charges, which will strike most as overkill, especially when the police action is in fact based on probable cause or meets other Fourth Amendment requirements.<sup>314</sup> None of this means that selective enforcement decisions would not benefit from development of administrative rules as well. But even if regulation of that part of police work is left to the Fourth Amendment, the Equal Protection Clause, and the substantive criminal law, a significant amount of police conduct beyond panvasive actions might still be subject to administrative law principles.

### CONCLUSION

Searches and seizures of groups have proven to be a major challenge for Fourth Amendment jurisprudence. The traditional requirement of individualized suspicion, if rigorously applied, would spell the end of all panvasive searches and seizures, even those that most would agree are effective and minimally intrusive. But foregoing all regulation of panvasive actions creates a huge potential for abuse, akin to that associated with the dreaded general warrant, especially as modern policing increasingly moves in the direction of mass surveillance and other technologically driven programs such as DNA testing. The Supreme Court's attempt to mediate this tension through its special needs doctrine is incoherent and overly deferential. The strict scrutiny alternative proposed by many commentators errs too far in the other direction, and sends courts into thickets best reserved for the legislative and administrative processes.

This Article has argued that, given the administrative nature of panvasive searches and seizures, the courts should turn to administrative law in this setting. Both Supreme Court precedent and the rule-like structure of panvasive actions support such an approach. A regulatory regime based on administrative law principles would hold law enforcement agencies more accountable to legislatures, the public, and the courts than does the Court's special needs doctrine, but would avoid subjecting departmental decisions to detailed second-guessing by the judiciary. In short, police agencies should be

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313 See 5 U.S.C. § 706(2)(A) (2012) (authorizing reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); see also *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (involving a suit to enjoin the operation of a sobriety checkpoint that would result in the arrest of drivers found to be drunk).

314 See Friedman & Ponomarenko, *supra* note 140, at 1904-05 (recognizing this problem).

treated like other agencies. While still granted significant deference, police agencies, like other agencies, would be required to seek public input before enacting search and seizure programs, provide reasons for their decisions, act consistently with those reasons, and distribute policing power evenly within the scope of legislative mandates. That combination of restrictions, enforced by the courts, would be consistent with the Fourth Amendment's central goal—embodied in its reasonableness requirement—of limiting government discretion, without imposing impossible or difficult-to-decipher burdens on either the executive or judicial branches.