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## Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine

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TEN YEARS OF RANDOMIZED JURISPRUDENCE:  
AMENDING THE SPECIAL NEEDS DOCTRINE

ROBERT D. DODSON\*

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I. INTRODUCTION

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>1</sup>

The Court has generally interpreted this language to require that any search or seizure be supported by probable cause and a warrant.<sup>2</sup> Throughout the years, however, the Court has carved out numerous exceptions to the warrant and

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1. U.S. CONST. amend. IV.

2. See, e.g., *Agnello v. United States*, 269 U.S. 20, 32 (1925) (holding warrantless search of suspect’s home invalid).

probable cause requirements.<sup>3</sup> One of the most striking and sweeping exceptions is the “special needs” doctrine.

The special needs doctrine allows the state to dispense with the normal warrant and probable cause requirements when two conditions are satisfied.<sup>4</sup> First, the state must show it has some “special need” or governmental interest beyond normal law enforcement activities that make the search or seizure necessary.<sup>5</sup> Second, the state must show that its interest cannot be achieved or would be frustrated if a court imposed normal warrant and probable cause requirements.<sup>6</sup> If the state satisfies these two conditions, the court engages in an independent analysis balancing the state’s interest against individual privacy interests.<sup>7</sup> Only if the court is satisfied that the state’s interest in the search or seizure outweighs the individual’s privacy interest will it uphold the search and dispense with the warrant and probable cause requirements.<sup>8</sup>

The special needs doctrine is a recent development and had its origin in the school-search cases of the mid-1980s.<sup>9</sup> Initially, the Court justified the doctrine by reasoning that schoolchildren have a diminished expectation of privacy while at school.<sup>10</sup>

The Court’s early use of the special needs doctrine did not have the sweeping effect that it does today.<sup>11</sup> While the early cases invoking the special needs doctrine allowed searches and seizures without probable cause or a warrant, in each case there was individualized suspicion to believe a person had

3. See Elise Bjorkan Clare et al., Project, *Twenty-fifth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals: 1994-1995*, 84 GEO. L.J. 641, 743 (1996). The authors list several categories of exceptions to the warrant and probable cause requirements of the Fourth Amendment. These include investigatory detentions, warrantless arrests, searches incident to arrest, the plain view doctrine, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and the special needs searches. *Id.* at 743-820; see also Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (listing several exceptions to the warrant and probable cause requirements of the Fourth Amendment).

4. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). The Court stated that “our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant . . .” *Id.* (citation omitted).

5. See *id.* at 666.

6. See *id.* at 665-66.

7. See *id.*

8. See, e.g., *id.* at 666-67, 677 (holding that in this case, the government demonstrated such a compelling interest).

9. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (stating that “the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause”).

10. See *id.* at 338-39.

11. Compare *id.* at 347 (holding single search of schoolchild for cigarettes was constitutional) with *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (upholding randomized drug testing of student athletes without individualized suspicion).

violated the law.<sup>12</sup> Moreover, the Court's early special needs cases focused on individual litigants and did not deal with large groups subject to random searches and seizures.<sup>13</sup>

By the end of the 1980s, the focus of the special needs doctrine began to change. In 1989 the Court decided *National Treasury Employees Union v. Von Raab*<sup>14</sup> and *Skinner v. Railway Labor Executives' Ass'n*.<sup>15</sup> *Von Raab* and *Skinner* radically expanded the special needs doctrine. These cases involved randomized drug tests of federal Customs agents and railway workers.<sup>16</sup> The Court expanded the special needs doctrine to allow this testing even when there was no individualized suspicion to believe that particular employees were using drugs.<sup>17</sup> The Court justified the expansion of the special needs doctrine textually by focusing on the "unreasonable search and seizure" language of the Fourth Amendment.<sup>18</sup> The Court concluded that there must be some showing that a search or seizure is "unreasonable"<sup>19</sup> before the probable cause and warrant requirements are triggered.

Following *Von Raab* and *Skinner*, different government agencies adopted randomized drug-testing procedures. Lower courts were flooded with Fourth Amendment challenges to such procedures.<sup>20</sup> The vast majority of cases upheld these testing programs.<sup>21</sup>

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12. See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (upholding search of probationer's home based on informant's tip that the home contained contraband); *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987) (holding search of public employee's office based on suspicion of impropriety must be judged by the reasonableness standard); *T.L.O.*, 469 U.S. at 347 (upholding search of student for marijuana based upon the presence of rolling papers during a cigarette search).

13. *Griffin*, 483 U.S. at 870; *O'Connor*, 480 U.S. at 712; *T.L.O.*, 469 U.S. at 328.

14. 489 U.S. 656 (1989).

15. 489 U.S. 602 (1989).

16. See *Von Raab*, 489 U.S. at 660-63; *Skinner*, 489 U.S. at 611.

17. See *Skinner*, 489 U.S. at 624.

18. *Id.* at 613-14.

19. *Id.* at 618-24.

20. See *infra* note 21.

21. See, e.g., *Pierce v. Smith*, 117 F.3d 866, 880 (5th Cir. 1997) (upholding required drug test of resident doctor not based on individualized suspicion or a drug-testing program); *American Fed'n of Gov't Employees v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993) (upholding drug testing of federal prison guards); *Carrelli v. Ginsburg*, 956 F.2d 598, 605 (6th Cir. 1992) (upholding testing of horse-racing trainer based on reasonable cause); *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 509 (9th Cir. 1991) (upholding drug test of civilians with military security clearance); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1309 (9th Cir. 1991) (upholding drug testing of commercial truck drivers); *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 481 (6th Cir. 1991) (upholding drug testing of GCRTA employees after accident); *Penny v. Kennedy*, 915 F.2d 1065, 1066-68 (6th Cir. 1990) (commenting on random drug testing of police and firefighters); *International Bhd. of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1464 (9th Cir. 1990) (upholding drug testing of gas pipeline employees); *Bluestein v. Skinner*, 908 F.2d 451, 457 (9th Cir. 1990) (upholding FAA regulation requiring drug testing of airline employees); *National Treasury Employees Union v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989) (upholding drug testing of federal employees in safety-sensitive positions); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989) (holding

In 1995 the Court revisited the special needs doctrine in the school search context. *Vernonia School District 47J v. Acton*<sup>22</sup> upheld a school policy requiring student athletes to submit to random drug tests.<sup>23</sup> While the Court ultimately upheld the school's drug-testing policy, some of the Justices showed reluctance to invoke the special needs doctrine.<sup>24</sup> This reluctance manifested itself again two years later in *Chandler v. Miller*.<sup>25</sup> *Chandler* invalidated a Georgia law that required political candidates to take a drug test.<sup>26</sup> The Court reasoned that Georgia had no special governmental interest in testing political candidates, and an eight-Justice majority refused to apply the special needs doctrine.<sup>27</sup>

Despite the fact that the Court has addressed the special needs doctrine several times in the last several years, it has not adequately defined what a "special need" or "special governmental interest" is. Indeed, until recently the Court had failed to provide any criteria that lower courts could use in

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that drug testing of corrections officers was constitutional); *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989) (finding that drug testing of pipefitter at chemical weapons plant was constitutional); *English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775, 783 (N.D. Ala. 1996) (upholding drug testing of school bus mechanic); *Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387, 397 (E.D.N.Y. 1996) (commenting on drug testing of flight attendant pursuant to FAA regulation); *Mayfield v. Dalton*, 901 F. Supp. 300, 304 (D. Haw. 1995) (upholding tissue sampling for DNA matching for members of the armed forces), *vacated as moot*, 109 F.3d 1423 (9th Cir. 1997); *Wilcher v. City of Wilmington*, 891 F. Supp. 993, 1002 (D. Del. 1995) (upholding random drug tests of firefighters), *vacated on other grounds*, 139 F.3d 366 (3d Cir. 1998); *Laverpool v. New York City Transit Auth.*, 835 F. Supp. 1440, 1456 (E.D.N.Y. 1993) (upholding the drug testing of all employees that could affect public safety); *Romaguera v. Gegenheimer*, 798 F. Supp. 1249, 1261 (E.D. La. 1992) (upholding random testing of certain court employees, including those who drove vehicles or had access to evidence room); *Plane v. United States*, 796 F. Supp. 1070, 1075 (W.D. Mich. 1992) (upholding drug testing of hazardous waste workers); *Bailey v. City of Baytown, Tex.*, 781 F. Supp. 1210, 1216 (S.D. Tex. 1991) (upholding drug testing of employee who drove a motor vehicle for the city); *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 418 (N.D. Ohio 1991) (upholding random HIV testing of firemen); *American Fed'n of Gov't Employees v. Derwinski*, 777 F. Supp. 1493, 1503 (N.D. Cal. 1991) (upholding drug testing of Veterans Affairs employees in some safety-sensitive positions); *National Treasury Employees Union v. Hallett*, 776 F. Supp. 680, 682 (E.D.N.Y. 1991) (upholding a program of drug testing for Customs agents); *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1369 (S.D. Miss. 1991) (upholding drug testing of hospital employee); *Holloman v. Greater Cleveland Reg'l Transit Auth.*, 741 F. Supp. 677, 687 (N.D. Ohio 1990) (finding that drug testing of city bus drivers was constitutional); *Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 847 (S.D.N.Y. 1990) (finding no Fourth Amendment violation for random drug testing or drug testing with suspicion for some Transit Authority employees); *Moxley v. Regional Transit Servs.*, 722 F. Supp. 977, 982 (W.D.N.Y. 1989) (finding that drug testing of bus drivers was constitutional); *Brown v. City of Detroit*, 715 F. Supp. 832, 835 (E.D. Mich. 1989) (upholding random drug testing of police officers).

22. 515 U.S. 646 (1995).

23. *Id.* at 665.

24. *Id.* at 666-67 (Ginsburg, J., concurring) and (O'Connor, J., dissenting).

25. 520 U.S. 305 (1997).

26. *Id.* at 309.

27. *Id.* at 318.

determining if the special needs doctrine applied. Additionally, the Court has not explained how the special needs balancing test should be applied by lower courts, and it has failed to consider all the relevant factors that should be considered when balancing state interests against individual privacy interests.

Part II of this Article traces the development of the special needs doctrine. Its focus is primarily on Supreme Court precedent, but also shows how the Supreme Court cases have been interpreted by lower courts. Part III of this Article critically examines the special needs doctrine as it currently stands in light of *Chandler v. Miller*. I argue that while the outcome in *Chandler* is correct, the Court's reasoning is flawed. Specifically, I criticize the Court's definition of special need and argue that the Court's definition in *Chandler* is confusing and inconsistent with earlier case law. I also suggest that the balancing test used when a state has a special need heavily favors the state, and I contend that the balancing test has become little more than a judicial stamp of approval on randomized drug testing. In light of these problems, whether the Court should have ever adopted the special needs doctrine is questionable. Part IV of this Article considers the basic criticisms of the special needs doctrine, but concludes that despite the doctrine's failings, none of the current Justices on the Court support dispensing with the doctrine. Thus, Part IV also suggests ways in which the Court could clarify and correct problems with the special needs doctrine.

## II. THE HISTORICAL DEVELOPMENT OF THE SPECIAL NEEDS DOCTRINE

The Court first recognized the special needs doctrine in *New Jersey v. T.L.O.*<sup>28</sup> T.L.O. was a student at a New Jersey public school when she was caught smoking in the restroom.<sup>29</sup> A teacher at the school brought T.L.O. to the school principal who searched her purse without a warrant.<sup>30</sup> The search uncovered cigarettes, marijuana, rolling paper, and other drug paraphernalia.<sup>31</sup> Departing from its ordinary Fourth Amendment analysis, the Supreme Court held that the principal's search was constitutional.<sup>32</sup> The three Justice plurality neither discussed whether the search was based on probable cause nor did it concern itself with the fact that no warrant was issued. Instead, the Court argued that because the student was in the custodial care of the state while at school, it was not necessary for the principal to have a warrant before searching her bag.<sup>33</sup> Justice White, who authored the plurality opinion, reasoned that the school had a special need in maintaining discipline and an environment

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28. 469 U.S. 325 (1985).

29. *Id.* at 328.

30. *Id.*

31. *Id.*

32. *Id.* at 333-48.

33. *Id.* at 341.

conductive to learning.<sup>34</sup>

For the Court, the issue was not whether a warrant had been issued.<sup>35</sup> Rather, the Court focused on whether the search was “reasonable” under the Fourth Amendment.<sup>36</sup> To determine reasonableness the Court used a balancing test.<sup>37</sup> On one side of the scale, the Court considered the need public school officials had in maintaining order in schools.<sup>38</sup> In the Court’s eyes this interest was significant, and it would be severely burdened if a school official had to obtain a warrant before conducting a search.<sup>39</sup> On the other side of the scale, the Court considered T.L.O.’s privacy interest.<sup>40</sup> Justice White acknowledged that the student had an expectation of privacy even though she was a minor in the custodial care of a public school.<sup>41</sup> However, he argued that her privacy interest was more limited in scope than an adult’s expectation of privacy on the street.<sup>42</sup> The Court concluded that the school’s interest outweighed the student’s limited privacy interest and held that the principal’s search did not violate the Fourth Amendment.<sup>43</sup>

The *T.L.O.* plurality opinion was significant because it marked the first time the Court invoked the special needs doctrine outside a prison setting. The Court did not discuss exactly what types of state interests were “special interests” triggering the balancing test. Subsequent Supreme Court opinions sought to clarify the doctrine.

Following *T.L.O.* the Court began to apply a balancing test in other Fourth Amendment cases involving searches outside of schools.<sup>44</sup> In *O’Connor v. Ortega* the Court considered a claim by a doctor employed at a public hospital who argued his Fourth Amendment rights were violated when his office was searched by a supervisor without a warrant.<sup>45</sup> The hospital claimed that it had a special interest because it was the doctor’s employer.<sup>46</sup> It argued this interest outweighed the need for a warrant.<sup>47</sup> The Court agreed with the state and invoked the special needs balancing test.<sup>48</sup> A four-Justice plurality led by Justice O’Connor reasoned that a state employer had a significant interest in

34. *Id.* at 339.

35. *Id.* at 341-42.

36. *Id.* at 341-48.

37. *Id.* at 341.

38. *Id.* at 342-43.

39. *Id.* at 340.

40. *Id.* at 344-46.

41. *Id.* at 338.

42. *Id.* at 339.

43. *Id.* at 347-48.

44. *See Griffin v. Wisconsin*, 483 U.S. 868 (1987); *O’Connor v. Ortega*, 480 U.S. 709 (1987).

45. 480 U.S. at 712-14.

46. *Id.* at 717.

47. *Id.*

48. *Id.* at 719.

maintaining an organized, efficient work place.<sup>49</sup> The Court found that the doctor had a privacy interest in his office space, but concluded that the interest was limited.<sup>50</sup> The Court did not determine whether the search was reasonable because the district court held no evidentiary hearing to ferret out the facts in the case.<sup>51</sup> Nonetheless, the plurality made clear that the lack of a warrant did not necessarily mean the search was unreasonable and therefore unconstitutional.<sup>52</sup>

The plurality opinion in *O'Connor* made clear that the special needs balancing approach could be used outside the public school context, but it left unanswered questions. First, the plurality failed to define exactly what constituted a special need sufficient to displace the warrant and probable cause requirements of the Fourth Amendment. Additionally, the plurality provided little guidance on exactly how privacy interests were to be weighed against governmental interests.

In *Griffin v. Wisconsin*<sup>53</sup> the Court issued its first majority opinion invoking the special needs balancing test. *Griffin* involved a search of a probationer's home without the warrant or finding of exigent circumstances normally required under the Fourth Amendment.<sup>54</sup> A Wisconsin administrative regulation allowed probation officers to search probationers' homes without a warrant provided that there were "reasonable grounds" to believe that there was contraband inside the home.<sup>55</sup> After learning that there "might be guns in Griffin's apartment," probation officers went to his home to conduct a search.<sup>56</sup> The search uncovered a handgun, and Griffin was eventually charged and convicted under a law that made it illegal for a convicted felon to possess a firearm.<sup>57</sup> He challenged the search on the ground that it violated his Fourth Amendment rights.<sup>58</sup> In a narrow 5-4 decision, the Court found the search reasonable under the special needs doctrine.<sup>59</sup> Justice Scalia, writing for the majority, noted that Griffin had a constitutionally protected right to privacy in his home.<sup>60</sup> However, Justice Scalia believed that Wisconsin's probation system, like a government office, prison, or school, gave the State a special need beyond normal law enforcement activity.<sup>61</sup> Specifically, the Court found Wisconsin to have a significant interest in seeing that probationers follow

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49. *Id.* at 718-19.

50. *Id.* at 719-21.

51. *Id.* at 726-27.

52. *Id.* at 727-29.

53. 483 U.S. 868 (1987).

54. *Id.* at 870-72.

55. *Id.* at 870-71 (citation omitted).

56. *Id.* at 871.

57. *Id.* at 871-72.

58. *Id.* at 872.

59. *Id.* at 880.

60. *Id.* at 873.

61. *Id.* at 873-75.



probation terms.<sup>62</sup> It argued that a warrant requirement would hamper the probation program and was not necessary given the nature of the intrusion.<sup>63</sup> The Court's opinion emphasized that the probation officer was not a police officer. Instead, the law in question referred to probationers as "clients" of the probation officer.<sup>64</sup> The probation officers were directed to help clients through "individualized counseling designed to foster growth and development . . ."<sup>65</sup> Arguing that Griffin was a "client," Justice Scalia reasoned that the search by the probation officers was less intrusive than if it had been conducted by a police officer.<sup>66</sup> The Court also was not concerned with the fact that the Wisconsin regulation dispensed with probable cause.<sup>67</sup> In Justice Scalia's eyes, a probable cause requirement would "unduly disrupt[]" the state's probation program.<sup>68</sup> The Court's opinion concluded by finding the search of Griffin's home constitutional under the special needs doctrine despite the lack of a warrant or probable cause.<sup>69</sup>

The case was significant because for the first time the Court hinted that the special needs doctrine could be used to dispense with both the warrant and probable cause requirements of the Fourth Amendment. However, the Court did not completely eliminate the need for individual suspicion. The Wisconsin regulation at issue in *Griffin* specifically required that there be "reasonable grounds" for the search.<sup>70</sup>

In two landmark cases the following year, the Court moved away from the requirement of individualized suspicion. In both cases the Court upheld randomized drug-testing programs using the special needs doctrine.<sup>71</sup> In *National Treasury Employees Union v. Von Raab*, the Court considered the constitutionality of a random drug-testing program in the U.S. Customs Service.<sup>72</sup> The drug-testing program required Customs agents involved in the interdiction and seizure of contraband and drugs to submit to drug testing.<sup>73</sup> The policy was implemented because the Service feared that Customs agents on duty could not adequately perform their duties and might pose a danger to society if they used drugs.<sup>74</sup> As in *Griffin*, a five-Justice majority decided that the government's action was motivated by a special need beyond normal law

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62. *Id.* at 875.

63. *Id.* at 876.

64. *Id.* (citation omitted).

65. *Id.* (alteration omitted).

66. *Id.* at 876-77.

67. *Id.* at 878.

68. *Id.*

69. *Id.* at 880.

70. *Id.* at 871 (citation omitted).

71. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

72. 489 U.S. at 659.

73. *Id.* at 660-61.

74. *Id.* at 661.

enforcement efforts.<sup>75</sup> Justice Kennedy's majority opinion emphasized the fact that the employees subjected to drug testing were required by their positions to carry firearms.<sup>76</sup> The Court reasoned that Customs agents on drugs posed a serious danger to the public, and thus the Customs Service had an interest in ensuring public safety.<sup>77</sup> The Court also noted that U.S. Customs was the first line of defense in the war on drugs, and it found that the Customs Service had an interest in ensuring that its employees remain drug free while fighting the drug problem.<sup>78</sup>

After concluding that the Customs Service had a special interest in its drug-testing policy, the Court examined the interests at stake.<sup>79</sup> It held the government interest in ensuring a drug-free Customs Service was significant given the potential safety concerns and sensitive nature of the work Customs agents perform.<sup>80</sup> Justice Kennedy reasoned that while a drug test "could be substantial," the operational realities of the work place gave employees at the Customs Service a diminished expectation of privacy.<sup>81</sup> Justice Kennedy compared Customs agents with employees at the U.S. Mint or military intelligence. Like these employees, Customs agents had more reason to expect a limited amount of privacy than the general public.<sup>82</sup> While Customs agents had a reasonable expectation to privacy, their privacy interest was not as significant as an ordinary person on the street.<sup>83</sup> Given the nature of the interests at stake, the Court concluded the Customs Service drug-testing policy was reasonable despite the fact that tests were conducted without any individualized suspicion of wrongdoing.<sup>84</sup>

The Court reached a similar conclusion in *Skinner v. Railway Labor Executives' Ass'n*.<sup>85</sup> *Skinner* dealt with federal regulations that required railroad workers involved in major accidents to submit to drug and alcohol tests following the accident.<sup>86</sup> The regulations also authorized the randomized testing of railroad employees involved in "safety-sensitive positions."<sup>87</sup> The regulation was passed in response to several accidents that occurred over the years because of drug and alcohol use.<sup>88</sup> Justice Kennedy delivered the opinion of the Court.<sup>89</sup> He argued that the safety-sensitive nature of railroad work gave the

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75. *Id.* at 665.

76. *Id.* at 670.

77. *Id.*

78. *Id.*

79. *Id.* at 670-71.

80. *Id.* at 674.

81. *Id.* at 671-72.

82. *Id.*

83. *Id.*

84. *Id.* at 677.

85. 489 U.S. 602 (1989).

86. *Id.* at 606-13 (citations omitted).

87. *Id.* at 630.

88. *Id.* at 606-08.

89. *Id.* at 606.

government a special need in deterring drug and alcohol use to ensure public safety.<sup>90</sup> In balancing the interests of the government against the individual, the Court found the government's interest compelling.<sup>91</sup> It was well documented that several accidents with fatalities had occurred because railway operators were using drugs or alcohol on the job.<sup>92</sup> In considering the nature of the privacy invasion, Justice Kennedy argued that railway workers, like some other federal employees, had diminished privacy expectations because of the nature of their employment.<sup>93</sup> The Court also determined that the tests were minimally intrusive given the nature of the information the government sought.<sup>94</sup> The opinion also emphasized the fact that test results were used only by the employer and had never been released to law enforcement for criminal prosecution.<sup>95</sup> The Court concluded that the government's interest in ensuring safe railroads outweighed any privacy concerns, and it upheld the regulations as reasonable under the Fourth Amendment.<sup>96</sup>

Justice Scalia dissented in *Von Raab*, but joined the majority in *Skinner*.<sup>97</sup> Justice Stevens joined Justice Scalia in both cases.<sup>98</sup> Justice Scalia's dissent in *Von Raab* argued that the two cases should be distinguished.<sup>99</sup> Justice Scalia pointed out that the government in *Von Raab* never showed that drug use was a particular problem among Customs agents.<sup>100</sup> According to the dissent in *Von Raab*, the same was not true under the facts in *Skinner*.<sup>101</sup> The dissent also stated that in *Skinner* the government produced overwhelming evidence indicating that in fact drugs and alcohol had caused several fatal train accidents over several years.<sup>102</sup> This was the critical difference in the cases for the dissenting Justices.<sup>103</sup> Justice Scalia argued that before the government should be allowed to dispense with the warrant and probable cause requirements of the Fourth Amendment, it must demonstrate that the problem it is addressing is real and not merely hypothetical.<sup>104</sup>

*Von Raab* and *Skinner* were significant for a number of reasons. Both cases marked the first time a majority of the Court agreed on how the special needs

90. *Id.* at 620.

91. *Id.* at 633.

92. *Id.* at 607-08.

93. *Id.* at 627.

94. *Id.* at 625-27.

95. *Id.* at 623-24.

96. *Id.* at 633.

97. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting); *Skinner*, 489 U.S. at 605.

98. *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting); *Skinner*, 489 U.S. at 634 (Stevens, J., concurring).

99. *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).

100. *Id.* at 681.

101. *Id.*

102. *Id.*

103. *Id.* at 681-82.

104. *Id.*

doctrine should be applied. While earlier cases used the doctrine, disagreements existed among the Justices on exactly how the doctrine should apply. *Von Raab* and *Skinner* settled these disputes and expanded the doctrine to encompass a wide range of situations. Most importantly, the decisions negated the need for the state to show any individualized suspicion when its interest outweighed an individual's privacy interest.

Following *Von Raab* and *Skinner*, the Court did not invoke the special needs doctrine until 1995. However, between 1989 and 1995 local, state, and federal government agencies drastically expanded the use of randomized drug tests. Lower courts were flooded with challenges to these testing programs.<sup>105</sup> With only a few exceptions, lower courts upheld randomized drug-testing programs using the special needs doctrine.<sup>106</sup> Even drug-testing programs that had tenuous benefits to public safety were upheld by lower courts.<sup>107</sup>

Despite the fact that challenges to randomized drug testing were largely unsuccessful, cases were still litigated. In 1995 the Supreme Court revisited the special needs doctrine in *Vernonia School District 47J v. Acton*.<sup>108</sup> The drug-testing program at issue required all student athletes to be tested for illegal drugs by urinalysis prior to beginning the season.<sup>109</sup> Throughout the season student athletes were subject to random drug tests.<sup>110</sup> The District's policy was adopted in response to a growing drug problem in the community and disciplinary problems at various schools around the District.<sup>111</sup> James Acton, a junior high student who was interested in trying out for the football team, challenged the law claiming it violated his Fourth Amendment right of privacy.<sup>112</sup>

The Court disagreed.<sup>113</sup> Writing for a six-Justice majority, Justice Scalia stated that the pervasive problem of drug use by schoolchildren gave the District a special interest beyond normal law enforcement activities.<sup>114</sup> In balancing the interest of the District against personal privacy interests, the Court relied on its *T.L.O.* holding and reasoned that schoolchildren have a diminished expectation of privacy.<sup>115</sup> Justice Scalia argued that the nature of student athletics gave student athletes a lesser expectation of privacy than other students.<sup>116</sup> The Court noted that athletes dressed out together, took showers together, and were subject to other conditions that afforded them little

105. *See supra* note 21.

106. *Id.*

107. *See infra* notes 156-69 and accompanying text.

108. 515 U.S. 646 (1995).

109. *Id.* at 650.

110. *Id.*

111. *Id.* at 648-50.

112. *Id.* at 651.

113. *Id.* at 665.

114. *Id.* at 661.

115. *Id.* at 656-57.

116. *Id.* at 657.

privacy.<sup>117</sup> In the Court's view, these facts negated much of the intrusive nature of a urinalysis.<sup>118</sup> Justice Scalia also took notice of the fact that drug test results were not used to expel students or subject them to criminal prosecution.<sup>119</sup> Rather, a student that tested positive was sent to drug counseling and had the opportunity to correct the drug problem before any disciplinary action was taken.<sup>120</sup>

The Court then went on to consider the District's interest in testing student athletes for drugs.<sup>121</sup> The dangers of illegal drug use, particularly when used by children, weighed heavily in favor of the District.<sup>122</sup> The Court also argued that student athletes were often "role model[s]" for other students and the District had a great interest in insuring that these role models were drug free.<sup>123</sup>

Interestingly enough, the Court did not address the specifics of the drug-testing policy when applied to junior high school athletes. While the Court discussed a number of problems the District faced, those problems appeared much more pervasive in the District's high schools. Indeed, the only evidence of drug use by athletes was at a District high school.<sup>124</sup> Similar testimony about drug use at the junior high was not heard. Apparently, the Court believed that a problem at one school in the District warranted a District-wide drug-testing policy applicable to all student athletes. Accordingly, the Court upheld the School District's drug-testing program.<sup>125</sup>

*Vernonia* was significant for a number of reasons. It marked the first time in six years that the Court had decided a case based on the special needs doctrine. The Court reaffirmed its *T.L.O.* holding and ultimately upheld a drug-testing policy with a considerably broader scope than that at issue in *Von Raab* and *Skinner*. While the Court upheld the testing policy, Justice Ginsburg's concurrence expressed concern with the breadth of the special needs doctrine.<sup>126</sup> The three dissenting Justices likewise expressed concern that the special needs doctrine had grown out of control.<sup>127</sup>

### III. CHANGING THE "SPECIAL NEEDS" LANDSCAPE: CHANDLER V. MILLER

In 1997 the Court revisited randomized drug testing and the special needs doctrine in *Chandler v. Miller*.<sup>128</sup> *Chandler* made substantial changes to the

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117. *Id.*

118. *Id.* at 658.

119. *Id.*

120. *Id.* at 651.

121. *Id.* at 660-63.

122. *Id.* at 661-62.

123. *Id.* at 663.

124. The high school's football and wrestling coach testified that students were high on drugs while at practice. *Id.* at 649.

125. *Id.* at 666.

126. *Id.* (Ginsburg, J., concurring).

127. *Id.* at 676 (O'Connor, J., dissenting).

128. 520 U.S. 305 (1997).

special needs doctrine. Importantly, it marked the first time that the Court struck down a law in which the state argued the special needs doctrine applied. Justice Ginsburg's majority opinion showed concern with the breadth of the special needs doctrine, and the Court's analysis tried to place meaningful limits on the doctrine's ever-widening scope.

*Chandler* involved a Georgia statute that required candidates for various state political offices to undergo drug testing thirty days prior to qualifying for a nomination.<sup>129</sup> Three candidates challenged the law arguing that it was unconstitutional under the Fourth Amendment.<sup>130</sup> The district court denied the candidates' motion for a temporary injunction and subsequently entered a final order upholding the law.<sup>131</sup> A divided Eleventh Circuit affirmed, upholding the law on the ground that it served special needs similar to those in *Von Raab*.<sup>132</sup> An eight-Justice majority of the Court reversed that holding, finding that Georgia had no special need justifying a departure from the warrant and probable cause requirements of the Fourth Amendment.<sup>133</sup>

The Court's opinion limited the special needs doctrine in an important way. The Court emphasized that the government must show that a "concrete danger" exists before the special needs doctrine can be invoked to dispense with the warrant and probable cause requirements of the Fourth Amendment.<sup>134</sup> The *Chandler* Court was concerned that nothing in the record indicated that there had been any problem with political candidates using drugs.<sup>135</sup> Without evidence of a pre-existing problem, the majority believed that there was simply no "special need" sufficient to override the usual warrant and probable cause requirements of the Fourth Amendment.<sup>136</sup> In essence, the Court found that Georgia's drug-testing scheme was directed at protecting an image rather than combating any concrete problem.<sup>137</sup>

By requiring the government to demonstrate an actual problem before invoking the special needs doctrine, the Court appeared to adopt the rationale in Justice Scalia's dissent in *Von Raab*. Justices Scalia and Stevens dissented in *Von Raab* on the ground that the government did not demonstrate that drug use among Customs agents had ever been a problem.<sup>138</sup> Before these Justices would invoke the special needs doctrine, they argued that the government must prove that it is addressing an actual problem. Both Justices Scalia and Stevens joined the majority in *Skinner* because they believed the government had shown it was addressing an actual problem.

129. *Id.* at 309-10 (citation omitted).

130. *Id.* at 310.

131. *Id.* at 311.

132. *Id.*

133. *Id.* at 323.

134. *Id.* at 318-19.

135. *Id.* at 319.

136. *Id.* at 318.

137. *Id.* at 321-22.

138. *See supra* notes 97-104 and accompanying text.

The impact of this requirement is significant and limits the use of the special needs doctrine. It is not sufficient that the government demonstrate some potential problem. It must demonstrate an actual problem or, at the very least, the likelihood that any drug use could be catastrophic.

Nevertheless, the *Chandler* Court did not go so far as to overrule *Von Raab*. Instead, the Court distinguished *Von Raab* on the ground that it involved safety-sensitive positions.<sup>139</sup> Justice Ginsburg argued that “*Von Raab* must be read in its unique context.”<sup>140</sup> The majority opinion in *Chandler* noted that Customs agents, unlike elected officials, spent most of their effort trying to intercept illegal drugs before they entered the country. Therefore, it would be dangerous for those individuals involved in intercepting drugs to themselves be actively using drugs.<sup>141</sup>

The Court also attempted to limit the special needs balancing approach by holding that it applies only when public safety is in jeopardy.<sup>142</sup> The Court invalidated the Georgia statute precisely because the government failed to show that drug-using political candidates posed any real danger to public safety.<sup>143</sup> However, this limitation raised more questions than it answered.

The Court tried to justify the public safety limitation by arguing that the unifying theme in *Von Raab*, *Skinner*, and *Vernonia* was public safety.<sup>144</sup> The Court concluded that “where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”<sup>145</sup>

However, the Court’s preoccupation with public safety and its demand that the public safety be threatened in order to invoke the special needs doctrine is odd. There is simply nothing “special” about state laws designed to promote public safety. Generally applicable criminal laws, traffic laws, and numerous rules and regulations promote public safety. Indeed, many laws have no utility other than the fact that they promote public safety. If the term “special needs” is to have any real meaning and provide guidance to lower courts, the Court must do more than simply equate the term with public safety.

Moreover, defining the terms “special needs” or “special governmental interest” by requiring that the public safety be threatened is misleading and inconsistent with prior case law.<sup>146</sup> The special needs doctrine had its origin in a concern for student discipline at school, and the Court affirmed this holding in *Vernonia*.<sup>147</sup> It was only after the special needs doctrine was articulated in these early cases that a majority of the Court applied the special needs doctrine

139. *Chandler*, 520 U.S. at 321.

140. *Id.*

141. *Id.*

142. *Id.* at 323.

143. *Id.*

144. *Id.* at 313-23.

145. *Id.* at 323.

146. See *supra* note 21.

147. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

in a public safety context. However, the Court never abandoned the plurality opinion in *T.L.O.*<sup>148</sup> In fact, the Court emphasized the point in *Vernonia* by holding that the special needs doctrine could be invoked by the state to maintain discipline and order in public schools.<sup>149</sup> In *Chandler* Justice Ginsburg's majority opinion completely ignores *O'Connor v. Ortega* in which the Court held that reasonableness applies to a warrantless search based on the special needs doctrine.<sup>150</sup> That case simply had no bearing on public safety.

A closer review of the Court's later special needs cases also reveals problems with equating special needs and public safety. In *Skinner* the Court upheld regulations that required drug and alcohol testing of employees involved in major railway accidents and authorized drug testing of employees that violated safety regulations.<sup>151</sup> The regulations had some connection with public safety, but had no effect until after an accident had already endangered public safety. The Court tried to overcome this problem by arguing that the regulations would have a deterrent effect on drug use, but as the dissent in *Skinner* pointed out, if the threat of a fatal accident did not serve as a deterrent, neither would the threat of a drug test.<sup>152</sup>

Moreover, there is nothing unique or special about laws promoting public safety by deterring dangerous behavior. Sanctions in the criminal law are defended on the ground that they deter certain types of behavior. For example, ticketing speeding motorists might well be defended on the ground that it deters behavior dangerous to the public. If the regulations at issue in *Skinner* were merely designed to deter drug use in order to promote safety, one might well wonder what makes that regulation any different from a speed limit.

Public safety played little part in the Court's *Vernonia* decision. *Vernonia* upheld a junior high drug-testing policy that required randomized testing of junior high school athletes.<sup>153</sup> Justice Scalia's majority opinion showed more concern with the disruption and lack of discipline resulting from drug use than a concern for public safety. The only safety concerns cited by the Court involved sports-related injuries caused by student athletes on drugs.<sup>154</sup> A coach, who believed drug use by athletes resulted in injuries during sports participation, testified before the district court. The coach was from the local high school and did not testify to drug use at the junior high school that James Acton attended.<sup>155</sup> Additionally, while concern over student safety is certainly a legitimate interest, drug-using student athletes pose no more of a public safety problem than any other drug users.

148. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

149. *Vernonia*, 515 U.S. at 653.

150. *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987).

151. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633-34 (1989).

152. *Id.* at 652-53 (Marshall, J., dissenting); see *infra* notes 170-74 and accompanying text.

153. *Vernonia*, 515 U.S. at 665.

154. *Id.* at 663.

155. *Id.* at 649.



Before *Chandler* lower courts had also invoked the special needs doctrine in cases that had no relation to public safety. The district court decision in *Mayfield v. Dalton*<sup>156</sup> provides an example. *Mayfield* involved a Department of Defense program to collect DNA through blood and cell samples of service members.<sup>157</sup> The samples were stored for seventy-five years and were to be used only if a service member's remains could not be identified.<sup>158</sup> To aid identification, DNA samples from a service member's remains could be compared with the previously collected blood samples.<sup>159</sup> The government did not argue that the testing was designed to promote public safety. The district court described the government's interest as a "need to account internally for the fate of its service members and in ensuring the peace of mind of their next of kin and dependents in time of war."<sup>160</sup> The court ultimately upheld the sampling on this ground, but never mentioned public safety.<sup>161</sup>

Similar reasoning was used by the Seventh Circuit in *Dimeo v. Griffin*.<sup>162</sup> *Dimeo* involved a challenge to a regulation promulgated by the Illinois Racing Board.<sup>163</sup> The regulation required that horse jockeys and other horse-race participants submit to random drug tests.<sup>164</sup> The Seventh Circuit upheld the regulation.<sup>165</sup> Writing for the court, Judge Posner argued that Illinois had two interests that went beyond normal law enforcement activities.<sup>166</sup> First, it had an interest in the safety of the participants.<sup>167</sup> Second, the state had a financial interest.<sup>168</sup> The court explained its reasoning:

The Illinois Racing Board has a dual concern with the use of illegal drugs by participants in horse races. First is a concern with the personal safety of those participants, who might be injured or killed in accidents that would not have occurred but for such use. Second is a financial concern. Illinois derives tens of millions of dollars in tax revenues annually from parimutuel betting. Those revenues would fall if betting declined as a result of a belief by the public that the fairness of the races was being impaired because jockeys and other

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156. 901 F. Supp. 300 (D. Haw. 1995), *vacated as moot*, 109 F.3d 1423 (9th Cir. 1997).

157. *Id.* at 302.

158. *Id.*

159. *Id.*

160. *Id.* at 304.

161. *Id.*

162. 943 F.2d 679 (7th Cir. 1991).

163. *Id.* at 680-81.

164. *Id.* at 681-82.

165. *Id.* at 685.

166. *Id.* at 681.

167. *Id.* at 681-82.

168. *Id.* at 682.

participants were using drugs.<sup>169</sup>

Nowhere in the court's opinion did it indicate the special needs doctrine was limited to cases in which public safety might be threatened. In fact, prior to *Chandler v. Miller* neither the Supreme Court nor any of the lower federal courts limited the special needs doctrine to situations when public safety was threatened.

Even more problematic is the fact that equating special need with public safety provides no real limits on the types of cases that might fall under the special needs doctrine. Any number of laws would undoubtedly promote public safety while compromising the most basic Fourth Amendment rights. If police were allowed to search anyone in a high-crime neighborhood without any individualized suspicion of wrongdoing, one might plausibly argue that such a practice would reduce crime and have a positive impact on public safety. Similarly, a law that required all citizens to undergo random drug testing might well benefit public safety by reducing drug use and its attendant consequences, such as violent crime. Yet it is doubtful that any court faced with such practices would dispense with the warrant and probable cause requirements of the Fourth Amendment in favor of the special needs balancing approach. One problem with the Court's *Chandler*<sup>170</sup> opinion is that it fails to clarify which types of public safety concerns constitute special needs triggering the balancing test.

More disturbing is the fact that the Court has never invalidated a law under the special needs balancing test. The Court invalidated the Georgia drug-testing law in *Chandler* only because Georgia had no special need that justified the law.<sup>171</sup> In the Court's words, "Georgia's requirement that candidates for state office pass a drug test, we hold, does not fit within the closely guarded category of constitutionally permissible suspicionless searches."<sup>172</sup> Because the Court held that Georgia had no special need, it was not necessary for the Court to balance Georgia's interest against individual privacy interests. Whenever the Court has discovered a special need, however, it has upheld the law in question by holding that the governmental interest outweighed the individual's right to privacy. This special solicitude towards governmental interest is due in large part to the subjective nature of the balancing test. Nothing in the Court's balancing test provides anything concrete by which to measure state interest and compare that interest with individual privacy interests. What the balancing test amounts to is how the Justices feel about a particular law. Consider the majority and dissenting opinions in *Skinner*.<sup>173</sup> Both the majority and dissent purported to apply the same balancing test, but each reached opposite

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169. *Id.* at 681-82 (citation omitted).

170. *Chandler v. Miller*, 520 U.S. 305 (1997).

171. *See supra* notes 128-43 and accompanying text.

172. *Chandler*, 520 U.S. at 318.

173. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

conclusions.<sup>174</sup> Justice Marshall's dissent attacked Justice Kennedy's majority opinion on the ground that Justice Kennedy overvalued the government interest and undervalued the individual privacy interests at stake.<sup>175</sup> Justice Kennedy agreed with the dissenting judge below on just how threatening drug use is in operating trains.<sup>176</sup> Neither Justice could point to any standard to justify his belief. This is not surprising because the Court's guidance in applying the doctrine has been remarkably spartan. In *Von Raab* Justice Kennedy described the balancing test in a single sentence:

[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.<sup>177</sup>

Nothing in the Court's balancing test provides guidance to lower courts on how the interests should be weighed. *T.L.O.* and *Vernonia* provide the most detailed discussion using the special needs balancing approach. Unfortunately, both cases dealt with the privacy interests of children while at school, and the Court noted that children at school have only a limited privacy interest. Most lower courts have been required to balance the interests of adults against the state's interest.

The Court's other special needs cases also provide little guidance to lower courts. The bulk of the Court's opinion in both *Von Raab* and *Skinner* is devoted to justifying the special needs exception and showing that a special need existed thus triggering the balancing approach. Once that balancing approach is triggered, the Court gives only a limited discussion of the interests at stake. Moreover, most of the Court's balancing in *Von Raab* and *Skinner* is nothing more than restating the government need for randomized drug testing in the first place.<sup>178</sup>

Because the Court has never invalidated a law using the special needs balancing test, it is unclear what privacy interests, if any, are sufficient to outweigh a governmental interest. Therefore, lower courts have been extremely reluctant to find in favor of individual privacy interests, even when the government's interest is weak. The drug testing of horse jockeys in *Dimeo v.*

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174. *Id.* at 619-34, 650-54.

175. *Id.* at 647 (Marshall, J., dissenting).

176. *Id.* at 628.

177. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (citing *Skinner*, 489 U.S. at 619-201).

178. *See supra* notes 71-96 and accompanying text.

*Griffin* is a prime example.<sup>179</sup> In that case the Seventh Circuit justified a law that subjected horse jockeys and others in the horse-racing industry to drug testing. The primary basis for the law was a paternal need by the horse-racing industry to protect riders. The other interest was a fear that jockeys on drugs might lead to the demise of the industry, which could reduce public betting on horse racing and cause a decline in the tax money collected.<sup>180</sup> In making this argument, the court assumes quite a lot. It assumes that without drug testing jockeys will use drugs. It assumes that if this happens people will stop betting, and tax revenues will decrease. One hardly needs to point out that such assumptions are purely speculation, but even if such assumptions are correct, does a government interest in taxes justify the special needs exception? If such economic interests are sufficient to dispense with the warrant and probable cause requirements, one might well ask why courts should even bother to consider the individual privacy interests at stake.

A few courts seem to have done exactly that and have not bothered to consider individual privacy interests before dispensing with the probable cause and warrant requirements of the Fourth Amendment. In *International Brotherhood of Electrical Workers, Local 1245 v. United States Nuclear Regulatory Commission*,<sup>181</sup> the Ninth Circuit addressed a Nuclear Regulatory Commission rule that required drug tests of employees at nuclear power plants.<sup>182</sup> The rule applied to all employees, including clerical workers, warehouse employees, maintenance crews, and other employees whose duties were such that they posed little danger to the public.<sup>183</sup> Nonetheless, the court went into great detail describing how each employee could pose a potential danger by distracting workers in safety-sensitive positions.<sup>184</sup> Nowhere in the court's opinion did it mention the intrusive nature of drug tests or consider the possibility that such an intrusion was not warranted given the tenuous nature of the government's claim of danger. For the Ninth Circuit, it was enough that some worker might possibly pose a safety danger.

In short, the special needs balancing test has become little more than a judicial rubber stamp of approval for randomized drug-testing programs. The balancing of governmental interests against individual privacy interests tilts so heavily in favor of the state that the Court has never invalidated a law using the special needs doctrine. An overwhelming majority of lower courts have likewise upheld drug-testing programs using the special needs doctrine. In addition, the Court's special needs jurisprudence is so vague about what constitutes a special need or special government interest that courts are free to pick and choose which problems in society are pervasive enough to warrant

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179. See *supra* notes 162-69 and accompanying text.

180. *Dimeo v. Griffin*, 943 F.2d 679, 681-82 (1991).

181. 966 F.2d 521 (9th Cir. 1992).

182. *Id.* at 523-24.

183. *Id.*

184. *Id.* at 526-27.

abandonment of the warrant and probable cause requirements of the Fourth Amendment.

Perhaps the most disturbing problem with the special needs doctrine is that in some circumstances it has been used as a prosecutorial tool in the "war on drugs." As the doctrine developed, the Supreme Court emphasized that the special needs doctrine should be applied only when the state had a special need "beyond the normal need for law enforcement."<sup>185</sup> In *Von Raab* the majority specifically noted that the policy at issue provided: "Test results may not be used in a criminal prosecution of the employee without the employee's consent."<sup>186</sup> Cases following *Skinner* and *Von Raab* reaffirmed this essential holding.<sup>187</sup> In *Vernonia*, for example, Justice Scalia's majority opinion emphasized the fact that drug-test results obtained from student athletes were not turned over to law enforcement or used for any internal disciplinary function.<sup>188</sup> While the Court has never gone so far as to hold that test results could not later be used in criminal prosecutions, the Court's rationale would appear to provide meaningful limitations on the doctrine.

Unfortunately, this apparent limitation has been largely ignored. Prosecutors have frequently used evidence obtained in searches justified by the special needs doctrine in criminal prosecutions and juvenile delinquency proceedings.<sup>189</sup> Even more troubling, most courts that have addressed the issue have upheld the use of such evidence in criminal prosecutions and juvenile

185. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

186. 489 U.S. at 666.

187. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Chandler v. Miller*, 520 U.S. 305 (1997).

188. 515 U.S. at 658.

189. *See, e.g., People v. Reyes*, 968 P.2d 445, 451-53 (Cal. 1998) (upholding search of parolee based in part on special needs doctrine and allowing evidence obtained to be used in subsequent prosecution); *State v. J.A.*, 679 So. 2d 316, 320 (Fla. Dist. Ct. App. 1996) (upholding evidence obtained during a random search of a public school student); *State v. Roche*, 681 A.2d 472, 475 (Me. 1996) (upholding testing of all drivers involved in serious accidents and affirming subsequent criminal conviction for manslaughter and OUI); *In re Patrick Y.*, 723 A.2d 523, 529 (Md. Ct. Spec. App. 1999) (upholding delinquency conviction based on evidence obtained during a search of all lockers in school after report of a weapon); *Commonwealth v. Cass*, 709 A.2d 350, 365 (Pa. 1998) (upholding conviction for possession of marijuana based on drug-dog search of lockers in a school); *In re S.S.*, 680 A.2d 1172, 1176 (Pa. 1996) (upholding juvenile delinquency conviction based on evidence obtained during a search of all students at a public school); *State v. Olivias*, 856 P.2d 1076, 1089 (Wash. 1993) (upholding testing of convicted criminals in order to create DNA data bank for later law enforcement investigations); *In re Angelia D.B.*, 564 N.W.2d 682, 692 (Wis. 1997) (holding that trial court committed error in excluding evidence obtained in a search of a public school student after a report she was carrying a weapon); *State v. Bohling*, 494 N.W.2d 399, 406 (Wis. 1993) (upholding drug and alcohol testing of motorists under arrest for drunk driving when "clear indication" that blood will show evidence of intoxication). *But see Commonwealth v. Kohl*, 615 A.2d 308, 316 (Pa. 1992) (holding testing of all drivers involved in serious accidents and admission of such evidence in subsequent criminal prosecutions violated the Fourth Amendment).

delinquency proceedings.<sup>190</sup>

While allowing the use of evidence obtained from special needs searches is misguided and inconsistent with the Court's current formulation of the special needs doctrine, much of the problem stems from the Court's own failure to adequately define or explain the doctrine. In fact, the Court's early jurisprudence lends support to decisions allowing evidence obtained from special needs cases in criminal prosecution. *Griffin v. Wisconsin* specifically upheld a criminal conviction based on evidence obtained from a search of a probationer's home, which was justified based on the special needs doctrine.<sup>191</sup> Moreover, as the dissenting Justices in *Skinner* noted, the fact that evidence had not yet been used in the criminal context did not prevent the state from doing so.<sup>192</sup> Today, the conflict and tension remains unresolved as the Court's most recent cases on the special needs doctrine do little more than repeat and re-emphasize the Court's inconsistent reasoning.

#### IV. RETHINKING THE "SPECIAL NEEDS" DOCTRINE

Considerable doubt exists over whether the Court should have ever adopted the special needs doctrine. The doctrine has come under fire from scholars<sup>193</sup> and judges<sup>194</sup> alike. Perhaps the most eloquent opposition to the special needs doctrine came from Justice Marshall's dissent in *Skinner*.

Justice Marshall, who was joined by Justice Brennan, called the majority's reasoning "shameless," "shortsighted," "unprincipled," and "dangerous."<sup>195</sup> Marshall stated that the government's random drug-testing procedure was a

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190. See *infra* note 192.

191. See *supra* notes 53-70 and accompanying text.

192. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 651 (1989) (Marshall, J., dissenting).

193. See, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991); Kenneth C. Haas, *The Supreme Court Enters the "Jar Wars": Drug Testing, Public Employees, and the Fourth Amendment*, 94 DICK. L. REV. 305 (1990); Kenneth Nuger, *The Special Needs Rationale: Creating A Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89 (1992); Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1992); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991); 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 (1988); Phoebe Weaver Williams, *Governmental Drug Testing: Critique and Analysis of Fourth Amendment Jurisprudence*, 8 HOFSTRA LAB. L.J. 1 (1990); James M. Sokolowski, Note, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343 (1990).

194. See, e.g., *International Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521, 527 (9th Cir. 1992) (Fernandez, J., concurring) ("This case . . . demonstrates just how slippery the slippery slope we have stepped upon has become. Perhaps because I have slid down that slope with the rest of the judiciary, I can and do accept most of the reasoning contained in the majority opinion.").

195. *Skinner*, 489 U.S. at 635-36, 641, 647 (Marshall, J., dissenting).

“Draconian weapon” in the war on drugs.<sup>196</sup> Rhetoric aside, Justice Marshall criticized the special needs doctrine along several lines.

First, Marshall argued that the text of the Fourth Amendment did not support the majority’s reading.<sup>197</sup> The Fourth Amendment states that “The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”<sup>198</sup> According to Justice Marshall, the Court had always determined reasonableness based on the probable cause and warrant clauses of the Fourth Amendment.<sup>199</sup> However, the majority’s reading of the Amendment stopped at the word “violated.”<sup>200</sup> In essence, the dissent claimed that the Court had dispensed with any kind of probable cause or warrant requirements in favor of its own subjective notions of reasonableness.<sup>201</sup>

Justice Marshall also pointed out that when the Court had previously crafted exceptions to the warrant and probable cause requirements, it had almost always required the government to have some level of individualized suspicion justifying the search in question.<sup>202</sup> While the Court had relied on the special needs doctrine in previous cases, it had never used the doctrine to dispense completely with some showing of individualized suspicion.<sup>203</sup> Accordingly, the dissent claimed that the Court’s total disregard for individualized suspicion was manifestly unreasonable and unwarranted by both the text of the Fourth Amendment and the Court’s own precedent.<sup>204</sup>

Second, Marshall suggested that the majority’s willingness to join the fight against drug use had led it to “join[] those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies.”<sup>205</sup> Justice Marshall did not question the government’s need to deter drug use: “The importance of ridding our society of such drugs is, by now, apparent to all.”<sup>206</sup> However, he claimed that the Court should not relax constitutional safeguards in an effort to solve some particular problem, no matter how pervasive.<sup>207</sup> Citing cases such as *Schenck v. United States*<sup>208</sup> and *Korematsu v. United States*,<sup>209</sup> Marshall claimed that the Court’s greatest mistakes occurred when it unquestionably accepted the government’s solution to a pervasive

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196. *Id.* at 635, 650.

197. *Id.* at 636-41.

198. U.S. CONST. amend. IV.

199. *Skinner*, 489 U.S. at 637.

200. *Id.*

201. *Id.* at 636-41.

202. *Id.* at 638.

203. *Id.*

204. *Id.* at 640-41.

205. *Id.* at 635.

206. *Id.*

207. *Id.*

208. 249 U.S. 47 (1919).

209. 323 U.S. 214 (1944).

public problem.<sup>210</sup>

Finally, Justice Marshall argued that the balancing test used by the majority tilted decisively against individual privacy.<sup>211</sup> Marshall simply did not accept the majority's claim that the searches and seizures at issue in *Von Raab* and *Skinner* were "minimal."<sup>212</sup> Pricking a person's skin to draw blood or requiring an individual to urinate under the "direct observation" of another person were two of the most invasive intrusions of bodily integrity.<sup>213</sup> Drawing on the Court's precedent, Justice Marshall observed that in the past the Court had called a search and seizure of a suspect's fingernails a "severe, though brief, intrusion upon cherished personal security."<sup>214</sup> Additionally, in *Schmerber v. California*<sup>215</sup> the Court held that police must have an individualized suspicion of drunk driving before drawing a person's blood for sobriety testing.<sup>216</sup> Marshall argued that it was ironic to permit multiple persons to have their blood tested without any individualized suspicion of drunkenness, while simultaneously protecting a single person from precisely the same type of bodily intrusion.<sup>217</sup> The fact that the government had never used the drug-test results in a criminal investigation meant little to Justice Marshall.<sup>218</sup> He argued that nothing in the Court's opinion limited the use of the test results, and that such results would likely be used in criminal investigations in the future.<sup>219</sup> In short, the dissent found the invasion of personal privacy much more pervasive than the *Skinner* majority was willing to acknowledge.<sup>220</sup>

The dissent also argued that the government's interest in randomized drug testing was far less weighty than the majority claimed.<sup>221</sup> While Marshall did not challenge the government's goal of deterring drug use,<sup>222</sup> he did question whether the drug-testing policies at issue in *Skinner* would have a deterrent effect.<sup>223</sup> Particularly, Marshall argued that if the fear of being involved in a catastrophic train collision because of illegal drug use did not have a deterrent effect, then the fear of being tested after the accident would provide little additional incentive to remain drug free.<sup>224</sup> Construing the interests at stake in this light, the dissent concluded that the significant bodily invasion at issue

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210. *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).

211. *Id.* at 650.

212. *Id.*

213. *Id.* at 644-646.

214. *Id.* at 644 (citing *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)).

215. 384 U.S. 757 (1966).

216. *Skinner*, 489 U.S. at 644-45.

217. *Id.* at 645.

218. *Id.* at 651.

219. *Id.*

220. *Id.* at 650-53.

221. *Id.* at 653-54.

222. *Id.* at 653.

223. *Id.*

224. *Id.*



could not be outweighed by the government's interest.<sup>225</sup>

Justice Marshall was not alone in his criticism of the special needs doctrine. Following *Von Raab* and *Skinner*, law reviews were littered with scholarly articles critical of the court's expansion of the doctrine. Professor Phyllis Bookspan, for example, declared in the pages of the *Vanderbilt Law Review* that *Skinner* and *Von Raab* "epitomize[d] the continuing dismemberment of the fourth amendment."<sup>226</sup>

The dissent in *Skinner* and the other criticisms by academics are well founded. Since *Von Raab* and *Skinner*, lower courts have upheld a wide variety of randomized drug-testing programs.<sup>227</sup> The lower courts hearing constitutional challenges to randomized drug-testing programs have engaged in little critical analysis in their rush to uphold such programs. There are exceptions, but the vast majority of cases have added few teeth to the special needs doctrine.

Nevertheless, in recent years the Court has shown no willingness to abandon the special needs doctrine altogether. The dissent in *Skinner* by Justice Marshall has gone largely unnoticed by the current Supreme Court Justices. In the last four years the Court has revisited the special needs doctrine twice, but no Justice has displayed an open willingness to overrule *Von Raab* or *Skinner*.<sup>228</sup> Based on current case law and the makeup of the Court, it is safe to assume that the special needs doctrine is here to stay.

However, the current Justices have shown more willingness to revisit the special needs doctrine and tighten the requirements necessary to dispense with the probable cause and warrant requirements of the Fourth Amendment. For example, the Court's latest case dealing with the special needs doctrine required the government to show that an actual drug problem exists and that the particular problem threatens public safety.<sup>229</sup> These requirements helped clarify the meaning of special need, but did not go far enough. The Court never gave a clear definition of special need, and it did not provide any criteria that lower courts could use in trying to decipher if the government had a special need beyond normal law enforcement. Additionally, as previously discussed, the Court has never overturned a law when using the special needs balancing approach. *Chandler v. Miller* overturned a Georgia drug-testing law because it held Georgia had no special need,<sup>230</sup> but the Court did not reach this decision because privacy interests outweighed Georgia's need for the test. Consequently, it is difficult to determine what factors might be sufficient to tip the scales in favor of individual privacy interests.

In what follows, I suggest factors that should be considered in weighing

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225. *Id.* at 654.

226. *See supra* note 193.

227. *See supra* note 21.

228. *See supra* notes 22-27 and accompanying text.

229. *See supra* notes 134-41 and accompanying text.

230. *See supra* note 143 and accompanying text.

individual privacy interests. Specifically, I argue that courts should consider the number of individuals subjected to a special needs search. I then suggest ways the Court might clarify the meaning of special need and provide guidance to lower courts about what types of governmental interests go beyond normal law enforcement. Finally, I argue that test results obtained from drug tests justified by the special needs doctrine be limited to the purported special need and excluded from any criminal case.

*A. Weighing the Public's Interest in Privacy: Adding Weight to a Person's Privacy Interest*

When considering the constitutionality of government drug-testing programs, the Court has always weighed the individual privacy interest at stake by looking to the invasive nature of the challenged test. Among the factors the Court has considered have been the nature of test, the degree of privacy afforded during the test, how the test results are used, and the group of citizens to be tested. Unfortunately, the Court's analysis has been purely qualitative. It has focused solely on the nature of the search and seizure by considering its effect on a single individual. What the Court has neglected to include is any quantitative analysis; it has not considered the number of individuals affected by a particular drug-testing policy.

Something very deep and fundamental in our constitutional framework suggests that the Court should consider just how many people the state plans on testing or that might be tested under similar programs. This idea is embodied in the language of the Fourth Amendment. Specifically, the Amendment provides that warrants shall describe with "particularity . . . the place to be searched, and the persons or things to be seized."<sup>231</sup> What I suggest is that anytime our government makes a search or seizure, the search should be limited to "particular" persons, places, or things whether a warrant is required or not. When the scope of a government search or seizure becomes thousands of people, it is difficult to think of our government as one with limited power.

Perhaps the point can be made clearer by examining some of the laws that the lower courts have upheld under the special needs doctrine. Lower courts have routinely upheld laws that require commercial truck drivers, bus drivers, and the like to submit to randomized drug testing.<sup>232</sup> These laws have been defended on the ground that they promote safety. Proponents point out that one cannot safely drive these types of vehicles while under the influence of drugs or alcohol, and they argue that the state has a special interest in promoting public safety on the roads. Now consider a similar law with a much broader scope. It is not inconceivable to think of a state passing a law that requires all motorists to undergo drug testing. The same rationale could be applied to such

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231. U.S. CONST. amend. IV.

232. See *supra* note 21.

a law. Drivers under the influence of drugs or alcohol cause thousands of traffic fatalities each year. The state has a significant interest in maintaining safety on its roads, which is sufficient to trigger the special needs balancing test.

Many things are troubling about the hypothetical law described above. Among other problems with this hypothetical law is the sheer number of individuals the state would test. The law described above would force the vast majority of citizens to submit to a drug test. The very idea that a state could require virtually every citizen to submit to an intrusive search and seizure of her body is offensive to American constitutional notions of privacy.

At least some members of the Court may share this idea. In *Vernonia* Justice Ginsburg's concurrence emphasized only one point: A school may test student athletes who choose to participate in athletics, but the Court has never decided that a school may test all students based solely on their attendance.<sup>233</sup> Justice Ginsburg did not explain why such a search would be unconstitutional. In fact, the concurrence was less than half a page long.<sup>234</sup> However, I suggest that one of the factors troubling Justice Ginsburg was that such a large number of citizens would be subjected to a search for no other reason than their presence at school.

This was certainly one factor that troubled the dissenting Justices in *Vernonia*.<sup>235</sup> Justice O'Connor, who was joined by Justices Stevens and Souter in the dissent, began by noting that millions of students would be subject to a search under the Court's holding.<sup>236</sup> The dissent wrote: "Blanket searches, because they can involve 'thousands or millions' of searches 'pos[e] a greater threat to liberty' than do suspicion-based ones, which 'affect one person at a time.'"<sup>237</sup>

Despite these concerns a majority of the Court has never openly acknowledged that the number of citizens to be tested should be weighed in the Court's balance of governmental interest against individual privacy interests. This is ironic given the fact that the Court has justified random drug testing on the ground that it is in the public's interest. If the Court is willing to consider the benefits to the public on one side of the balance, it should likewise consider the number of citizens adversely affected because they are subject to such a search.

I advocate that the Court balance the interests equally. Because the Court has never considered the adverse effects on society from mass invasions of privacy, a disproportionate number of cases have upheld random drug-testing programs.<sup>238</sup> If the special needs balancing test is to have any real meaning and

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233. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring).

234. *Id.*

235. *Id.* at 666 (O'Connor, J., dissenting).

236. *Id.* at 667.

237. *Id.* (brackets in original) (citations omitted).

238. See *supra* note 21.

provide any limits on government power to effectuate a search and seizure, courts must take into account the number of individuals subjected to a search.

I am not suggesting the number of individuals tested should be the only factor considered by courts or even that it should be the most important factor. I am suggesting that to this point, courts have ignored this factor altogether. This has given government lawyers a distinct advantage because they are able to justify any drug-testing program by simply pointing to its supposed societal benefits. But if the federal courts are serious about protecting constitutional rights to privacy, as I assume they should be, then judges should consider every relevant factor when balancing the interests involved in drug-testing programs. The number of individuals subject to the test is a crucial factor that has been ignored for too long.

### *B. Defining Special Needs: The Court's Critical Omission*

The Court has never adequately defined what it means by special need. In *Chandler* the Court suggested that special need could be equated with public safety, and it explained that the special needs doctrine applies only when the state passes a drug-testing procedure that might benefit public safety.<sup>239</sup> I have argued the definition used by the Court is inadequate because it does not explain several special needs cases in which safety was not at issue or the benefit to public safety was very questionable.<sup>240</sup>

However, even assuming that the *Chandler* Court meant to limit the special needs doctrine to cases in which public safety is at issue, the doctrine is still critically flawed. The biggest problem with the public safety limitation is that it excludes very little at all. In Part III of this Article, I argued that defining the special needs doctrine by equating special need with public safety puts few limitations on a state's right to impose randomized drug testing on a large percentage of the population.<sup>241</sup> If the special needs doctrine is to remain a viable part of the Court's Fourth Amendment jurisprudence, then the Court must provide more guidance about what kinds of safety concerns constitute special needs.

One solution comes from case law in the lower courts. In *Watson v. Sexton*<sup>242</sup> the district court considered a New York City Department of Sanitation regulation that required employees to submit to drug tests in certain situations. Deborah Watson missed several days of work for no apparent reason, and pursuant to its policy, the Department required her to take a drug test.<sup>243</sup> After some effort to comply, she ultimately refused to take a urinalysis and was discharged by the Department. She filed suit claiming the requirement

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239. See *supra* notes 142-45 and accompanying text.

240. See *supra* notes 146-69 and accompanying text.

241. See *supra* notes 169-70 and accompanying text.

242. 755 F. Supp. 583 (S.D.N.Y. 1991).

243. *Id.* at 585-86.

that she submit to a drug test violated her Fourth Amendment rights.<sup>244</sup> The Department defended its discharge decision on individualized suspicion or, alternatively, the special needs doctrine.<sup>245</sup> It argued that while most of Watson's duties did not involve safety-sensitive activities, she was occasionally required to drive a company vehicle. The Department claimed this task was sufficient to warrant a special government need.<sup>246</sup>

The district court rejected this reasoning.<sup>247</sup> Judge Mukasey found that Watson's occasional obligation to drive a car did not make her any different from the general public.<sup>248</sup> The court did not deny that the state had a safety interest, but the court simply believed that there was nothing "special" about the government's safety interest.<sup>249</sup> The court concluded that the state's interest in ensuring safe driving was no more special concerning Watson than it was concerning other citizens that operated motor vehicles.<sup>250</sup>

Implicit in the district court's reasoning is the idea that before a governmental public-safety special need attaches, a government employee must first pose a greater safety risk to the public than an ordinary citizen. What makes the government's interest special is that the employee, by her relationship and position within the government, may pose a greater safety risk to the public than an ordinary citizen.

This approach has the advantage of limiting the special needs doctrine to cases in which employees or other agents of the state have considerably more influence over public safety than members of the general public. The doctrine would still have application to employees such as police, firefighters, and other state employees or agents who, by the nature of their relationship to the government, pose a greater risk to public safety than ordinary citizens.

### *C. The Exclusionary Rule and the Special Needs Doctrine*

The Court has held that the special needs doctrine may be used to dispense with the normal warrant and probable cause requirements of the Fourth Amendment when the state has some special need *beyond normal law enforcement activity*.<sup>251</sup> Thus, the Supreme Court's very definition of special needs emphasizes that the exception is applicable only when the state has some

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244. *Id.* at 585.

245. *Id.* at 588.

246. *Id.* at 588-89.

247. *Id.* at 589.

248. *Id.*

249. *Id.*

250. *Id.*

251. See *Chandler v. Miller*, 520 U.S. 305, 311 (1997) (emphasis added); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

need that extends beyond enforcement of drug laws.<sup>252</sup> Unfortunately, this repeated teaching has been lost on many judges that have upheld the use of evidence obtained from special needs searches in criminal cases.<sup>253</sup> If the special needs doctrine is to remain a viable exception to the warrant and probable cause requirements of the Fourth Amendment, then courts should allow evidence obtained from special needs searches to be used only to address the special need that triggers the search. In short, I advocate an exclusionary rule to the special needs doctrine whereby courts limit the use of evidence obtained from a special needs search. This evidence ought to be allowed only for that special need beyond normal law enforcement activity and should be excluded from criminal prosecutions or juvenile delinquency proceedings.

An exclusionary rule finds support in both the Court's special needs cases and the subsequent lower court cases upholding the doctrine. As early as 1989, the Court emphasized that the constitutionality of the special needs exception rests in part on its unavailability as a prosecutorial tool. For example, in upholding drug testing of railway employees, the *Skinner* Court wrote: "The FRA has prescribed toxicological tests, *not to assist in the prosecution of employees*, but rather 'to prevent accidents . . .'"<sup>254</sup> Likewise, in *Von Raab* the Court upheld drug testing of Customs employees in part because Customs could not turn the test results over to prosecutors without the employee's consent.<sup>255</sup> In *Vernonia* Justice Scalia's majority opinion specifically emphasized that drug test results obtained from student athletes were not used for disciplinary purposes or in criminal prosecutions.<sup>256</sup> In 1997 the Court again emphasized that the special needs doctrine ought to apply "[w]hen such 'special needs'—*concerns other than crime detection*—are alleged . . ."<sup>257</sup>

Although the Court's opinion in *Griffin v. Wisconsin*<sup>258</sup> used the special needs doctrine in the criminal context, that case was decided before the doctrine was fully developed in *Von Raab* and *Skinner*. More importantly, since *Griffin* was decided the Court has failed to use the special needs doctrine

252. See generally *supra* note 251.

253. See *supra* note 189.

254. 489 U.S. at 620-21 (emphasis added) (citation omitted).

255. *Id.* at 666. The Court wrote:

It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent. The purposes of the program are 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.

*Id.*

256. *Id.* at 658.

257. *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (emphasis added).

258. 483 U.S. 866 (1987).

in another criminal case.<sup>259</sup> In fact, in *Chandler v. Miller*,<sup>260</sup> the Court's most recent special needs case, the majority failed to even mention the *Griffin* opinion.

Lower courts interpreting the special needs doctrine have recognized the need to exclude evidence obtained under a special needs search in subsequent criminal prosecutions.<sup>261</sup> In *State ex rel. J.G.* the New Jersey Supreme Court reviewed a state law that mandated testing of sexual assailants for HIV at the victim's request.<sup>262</sup> That case involved a group of minors who allegedly forced a mentally retarded ten-year-old to engage in certain sex acts.<sup>263</sup> The New Jersey court held that while the law passed constitutional muster under the special needs exception to the Fourth Amendment, the blood samples obtained from the alleged perpetrators could not be tested and used for identification purposes in a subsequent criminal trial.<sup>264</sup>

Similar reasoning was used by the Indiana Court of Appeals to overturn a criminal conviction based on drug-test evidence obtained through the special needs doctrine.<sup>265</sup> *Oman v. State* involved a firefighter who was charged with operating a motor vehicle under the influence of a controlled substance.<sup>266</sup> The firefighter was tested after an accident pursuant to city ordinance.<sup>267</sup> The test results showed that he was under the influence of marijuana at the time of the accident.<sup>268</sup> The trial court admitted the evidence based on the special needs doctrine, but the court of appeals reversed.<sup>269</sup> Relying on the Supreme Court's reasoning in *Skinner*, *Von Raab*, and *Chandler*, the court of appeals held the trial court erred in admitting the test results under the special needs doctrine.<sup>270</sup> The court of appeals emphasized that the special needs doctrine was improperly applied in the context of criminal cases.<sup>271</sup>

Indeed, the Supreme Court's repeated holdings and rationale emphasize this point.<sup>272</sup> In case after case, the Court has repeatedly and consistently held that the special needs doctrine applies when governmental interests extend beyond mere law enforcement activities. Unfortunately, this point has been missed by a number of lower courts.<sup>273</sup> The result has been a perversion of the

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259. See *supra* note 251.

260. 520 U.S. 305 (1997).

261. See, e.g., *Oman v. State*, 707 N.E.2d 325 (Ind. Ct. App. 1999); *State ex rel. J.G.*, 701 A.2d 1260 (N.J. 1997).

262. 701 A.2d at 1262.

263. *Id.* at 1263.

264. *Id.* at 1266.

265. *Oman*, 707 N.E.2d at 329.

266. *Id.* at 326-27.

267. *Id.*

268. *Id.* at 327.

269. *Id.* at 329.

270. *Id.* at 328-29.

271. *Id.*

272. See *supra* notes 185-88.

273. See *supra* note 189.

doctrine. As the doctrine stands, states have been free to exploit the exception by arguing that the absence of probable cause or a warrant is justified because of special needs beyond mere law enforcement. But prosecutors have then turned around to use evidence obtained by virtue of the special needs doctrine precisely for criminal prosecutions. If the special needs doctrine is to remain a viable exception to the warrant and probable cause requirements of the Fourth Amendment, courts should limit this evidence by excluding it from subsequent criminal prosecutions.

## V. CONCLUSION

The special needs doctrine is problematic. The Court has never defined what a special need is, and it has provided no analytical framework for lower courts to use in determining what types of drug tests or other searches and seizures fall within the parameters of the special needs doctrine. Additionally, the balancing test used when the Court invokes the special needs doctrine is highly subjective. For over ten years, the Court has never invalidated a law using this balance. Given the subjective nature of the balancing test and the Court's reluctance to invalidate any law under this standard, the vast majority of lower courts have upheld random drug tests and other searches and seizures without requiring a warrant or individualized suspicion. The result has been that millions of drug-free citizens have been subjected to bodily searches based on nothing more than governmental policy choices.

If the Court is to maintain the special needs exception to the Fourth Amendment, then it should afford greater protection to individual privacy interests. First, courts should openly consider the number of people to be searched by a drug test or other means. I have argued something deep and fundamental in American jurisprudence cautions against massive searches of the public. However, courts have largely ignored this concern in the special needs context and have readily allowed random drug testing regardless of the number people to be tested. Courts should no longer ignore the teachings of generations past and should consider the number of individuals to be searched before dispensing with the probable cause and warrant requirements of the Fourth Amendment.

Moreover, it is necessary for the Court to provide greater guidance to lower courts as to when the special needs doctrine is applicable. To date, the Court has never clearly defined what a special need is. The handful of Supreme Court cases dealing with the issue have done little more than apply the special needs doctrine by waving a magic wand and asserting that a special need exists. If the special needs doctrine is to be a viable part the Court's Fourth Amendment jurisprudence, the Court should provide a better framework for its application.

Finally, the Court has repeatedly defined the special needs doctrine as extending to cases where a government interest beyond law enforcement activity justifies dispensing with the normal warrant and probable cause requirements of the Fourth Amendment. If the Court means what it says,



evidence obtained in a special needs search and seizure ought to be limited to the articulated special need. I therefore advocate excluding the use of such evidence from subsequent criminal trials.