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## **Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State**

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# ARTICLES

## SPECIAL NEEDS AND SPECIAL DEFERENCE: SUSPICIONLESS CIVIL SEARCHES IN THE MODERN REGULATORY STATE

FABIO ARCILA, JR.\*

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## INTRODUCTION

Individual suspicion is a constitutional protection of decreasing relevance. Suspicionless civil searches occur in areas such as public health, security, and revenue, to name but a few.<sup>1</sup> Case after case demonstrates that courts can be readily persuaded that regulatory regimes must be freed from an individualized suspicion requirement.<sup>2</sup> This inclination was prevalent well before our national tragedy on September 11, 2001, and the security concerns that have come to the fore since then only make it more likely that the government will seek to use a suspicionless civil search power. In the face of such pressures, the question is whether the Fourth Amendment will remain a meaningful protection against governmental overreaching.

The debate over this question is largely being fought in the context of the Fourth Amendment's "special needs" principle, a controversial exception to individualized suspicion and warrant requirements. This principle applies where a special need "beyond the normal need for law enforcement" exists, and allows suspicionless civil searches if a court concludes that public interests supporting the search outweigh the countervailing private interests against it.<sup>3</sup> In all but one of the Supreme Court's special needs cases, the Court has been deferential to governmental justifications and has validated the Fourth Amendment constitutionality of the challenged suspicionless civil search. The many commentators who view the special needs principle as a threat to Fourth Amendment protections commonly urge more stringent adherence to an individualized suspicion rule.<sup>4</sup> But they fail to address the systemic demands that have

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1. "Civil searches" refers to governmental searches having civil ends, while "criminal searches" refers to those whose primary purpose is to uncover evidence of criminal wrongdoing.

2. See Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 875-77 & nn.466-80, 485-88 (1999) (surveying numerous professions in which suspicionless civil drug searches have been upheld).

3. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

4. See *infra* note 90.

made the Court more receptive to suspicionless civil searches.

This Article examines the Supreme Court's handling of these special needs cases, with an emphasis on suspicionless searches, and argues that both courts and commentators have insufficiently acknowledged the tension between the modern regulatory state, which is significantly dependent upon such searches, and adequately protecting liberty interests. The commentators who criticize the Court's deference ignore that a deferential approach can be justified. Suspicionless civil searches, for example, are not necessarily incompatible with original intent.

Moreover, the many proposals for reforming suspicionless civil search jurisprudence, such as reinvigorating the individualized suspicion requirement, fail to acknowledge that the Court has applied deferential review in the special needs cases because the modern regulatory state's effectiveness is in large measure dependent upon suspicionless searches. By the same token, the many commentators who have criticized the Court for insufficiently guarding Fourth Amendment protections against civil searches have had understandable reactions. These commentators are rightly concerned about the Court's deferential review because meaningful Fourth Amendment protections are at risk. The regulatory state has resulted in a dramatically expanded governmental search power as regulatory regimes extend beyond the commercial context to private homes and the person. No longer does the federal government's regulatory arm extend only to the railroads. Now, public health and security concerns have resulted in regulatory regimes that include suspicionless civil searches into the home and of the person, including coercive searches that invade the person's very corporeal being.<sup>5</sup> This regulatory power threatens individual liberties, particularly since virtually all regulatory regimes can be premised on some public health or public safety rationale.<sup>6</sup> Such public health invocations, at least those that are non-trivial, are paradigmatic justifications for suspicionless civil searches. The Supreme Court developed the special needs principle to accommodate a governmental search power for such civil purposes, so this accommodation threatens to undermine Fourth Amendment protections against civil searches.

To provide background knowledge for the present discussion, Part I presents an introduction to Fourth Amendment civil searches, as well as to special needs jurisprudence and its inadequacies. Part II suggests that attempts to increase protections against overreaching governmental searches must accommodate the modern regulatory state's commonplace

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5. See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 609 (1989) (describing a suspicionless drug testing program that required obtaining blood, as well as urine, samples).

6. For a case example, see *infra* notes 41-45 and accompanying text.

need to conduct suspicionless civil searches. It then reviews some proposals others have made for improving special needs jurisprudence, and explains that they fail to account for the need to allow suspicionless civil searches, or the Supreme Court has rejected them because it believes they suffer from that deficiency.

This Article then posits that, having rejected the most common proposals for improving special needs jurisprudence, the Court may be seeking to bring greater coherence to this area by applying a flexible deferential standard. To explain this concept, Part III draws from administrative law to suggest that the Supreme Court may be applying varying levels of deference in its special needs jurisprudence, depending on the degree of correlation between the government's asserted special need and the predefined regulatory objective at issue. It goes on to question the wisdom of applying varying levels of deference in special needs cases given the degree to which agencies and legislatures can manipulate regulatory objectives. The Article concludes by suggesting that, while a correlation approach may have some value because it could increase the predictability in special needs cases, it should be given a limited scope and not be allowed to dominate other factors the courts have used to protect against governmental overreaching.

## I. BACKGROUND

### *A. The Fourth Amendment and the Development of the Special Needs Principle*

Prior to 1967, civil searches conducted at reasonable times fell outside the Fourth Amendment's purview.<sup>7</sup> In *Camara v. Municipal Court*,<sup>8</sup> however, the Supreme Court held for the first time that the Fourth Amendment's protections apply to civil searches, thus marking the beginning of contemporary Fourth Amendment civil search jurisprudence. *Camara* made a raging debate concerning the relationship between the Fourth Amendment's two clauses, the Reasonableness Clause and the

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7. See *Frank v. Maryland*, 359 U.S. 360 (1959) (addressing the constitutionality of housing inspections). *Frank* was consistent with the antiquated notion that the Fourth Amendment protected only against criminal searches, and was inapplicable to civil searches. See, e.g., *Murray v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1855); *In re Strouse*, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); *In re Meador*, 16 Fed. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869). In the late 1800s, the Supreme Court arguably departed from this rule when it invoked the Fourth Amendment (in combination with the Fifth Amendment) to invalidate the compulsory search and seizure of a party's papers for use against him in a civil in rem forfeiture proceeding. See *Boyd v. United States*, 116 U.S. 616 (1886). But the Court considered this to be a criminal search, see *id.* at 633-34, thus technically depriving *Boyd* of the status of a landmark civil search case.

8. 387 U.S. 523 (1967).

Warrant Clause, relevant to civil searches.<sup>9</sup> The subject of this debate concerns the extent to which searches can be constitutional under the Reasonableness Clause when governmental authorities have not obtained a warrant or acted under probable cause (or even any suspicion whatsoever), or conversely whether the Warrant Clause provides the measure of a search's reasonableness and hence constitutionality.<sup>10</sup> Initially, the Supreme Court indicated that, as with criminal searches, it would judge the constitutionality of civil searches of commercial and residential premises under the Warrant Clause.<sup>11</sup> Soon thereafter, the Court developed the administrative search doctrine, in which it assessed the constitutionality of civil searches of commercial premises solely under the Reasonableness Clause.<sup>12</sup> This development proved a harbinger of what was to come. The present Supreme Court has resolved the debate concerning the relationship between the Fourth Amendment's two clauses in favor of limiting the Warrant Clause's application to criminal searches, while resolving the constitutionality of all civil searches solely under the Reasonableness Clause.<sup>13</sup>

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9. The Fourth Amendment states:

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.

U.S. CONST. amend. IV.

10. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (exemplifying this debate, as seen through a comparison of the various opinions).

11. See *Camara*, 387 U.S. at 523 (indicating that the home is protected under the Warrant Clause); see also *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding that OSHA's power to conduct searches of employee work areas is unconstitutional without a warrant); See *v. City of Seattle*, 387 U.S. 541 (1967) (indicating that a commercial warehouse is protected under the Warrant Clause).

12. E.g., *Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding the warrantless search of a mine); *United States v. Biswell*, 406 U.S. 311 (1972) (upholding the warrantless search of a firearm dealer); *Colonnade Catering Co. v. United States*, 392 U.S. 72 (1970) (upholding the warrantless search of a liquor establishment).

13. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citations omitted):

In most criminal cases, we strike [the Fourth Amendment] balance [between individual and governmental interests] in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. We have recognized exceptions to this rule, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

Very persuasive scholarship supports the Court's conclusion that reasonableness is the ultimate constitutional touchstone for governmental searches, which need not always comply with the Warrant Clause. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL

The Supreme Court moved away from the administrative search doctrine, and began developing the special needs principle, as civil search litigation less often involved commercial premises and increasingly involved challenges to more personalized searches. Examples include searches of homes or of an individual's personal possessions at a public workplace.<sup>14</sup> From the Court's perspective, the special needs principle has proved wonderfully flexible. For example, the Court has applied it to civil searches that were premised on individualized suspicion, as well as to suspicionless civil searches.<sup>15</sup>

The special needs principle provides that, when a special need beyond the normal need of law enforcement exists, courts will determine Fourth Amendment reasonableness by balancing the competing governmental and private interests at stake.<sup>16</sup> Justice Blackmun first formulated the special needs test in *New Jersey v. T.L.O.*,<sup>17</sup> writing that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."<sup>18</sup> As this formulation indicates, the special needs principle requires consideration of three factors. Under the first factor, special need, courts ask whether a legitimate governmental interest apart from crime detection exists. Under the second factor, impracticability, courts determine whether a warrant or individualized suspicion requirement would frustrate the non-criminal governmental interest. Under the third factor, balancing, courts inquire whether the governmental interests at stake outweigh the private interests in order to decide the ultimate issue of

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INTERPRETATION (1969); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). But see Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (critiquing the limited sphere of influence the Supreme Court has given the Warrant Clause).

14. E.g., *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (holding that the supervision of probationers constitutes a special need authorizing warrantless residential searches); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (assessing constitutionality of employer's search of employee's personal possessions in the workplace). This is not to say that a strict delineation exists between the contexts in which the Supreme Court applies the administrative search doctrine and the special needs principle. For example, the Court has applied the special needs principle to regulatory searches of commercial premises. See *New York v. Burger*, 482 U.S. 691 (1987).

15. See *Griffin*, 483 U.S. at 871, 879-80 (discussing the basis of individualized suspicion supporting a search); see also *Burger*, 482 U.S. at 693-94 & n.2, 711 (involving a suspicionless search).

16. See *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997); see also *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) ("[W]here 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.").

17. 469 U.S. 325 (1985).

18. *Id.* at 351 (Blackmun, J., concurring).

whether the search was reasonable under the Fourth Amendment. A negative answer to any of these three factors renders a civil search unconstitutional under the Reasonableness Clause.

In the years since *New Jersey v. T.L.O.*, the Supreme Court has decided a series of suspicionless civil search cases using the special needs principle, the most recent of which all involved suspicionless drug testing of individuals. In the first three of these drug testing cases, the Court approved suspicionless drug testing of some railroad employees in *Skinner v. Railway Labor Executives' Association*,<sup>19</sup> certain customs officials in *National Treasury Employees Union v. Von Raab*,<sup>20</sup> as well as precollegiate student athletes in *Vernonia School District 47J v. Acton*.<sup>21</sup> Not until the fourth such case, *Chandler v. Miller*,<sup>22</sup> which involved candidates for public office in Georgia, did the Court strike down a suspicionless drug testing regime that had come before it. Most recently, the Court expanded *Vernonia's* scope through its decision in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,<sup>23</sup> in which it held constitutional the suspicionless drug testing of all pre-collegiate students who participate in extracurricular activities. Apart from border cases,<sup>24</sup> these drug testing cases constitute the only instances in which the Court has held constitutional state-sponsored suspicionless civil searches of individuals.<sup>25</sup>

The Supreme Court has made itself vulnerable to criticism by embracing the special needs balancing test because this approach necessarily suffers from the generalized deficits of all balancing tests.<sup>26</sup> Balancing raises the

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19. 489 U.S. 602 (1989).

20. 489 U.S. 656 (1989).

21. 515 U.S. 646 (1995).

22. 520 U.S. 305 (1997).

23. 536 U.S. 822 (2002).

24. See generally *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (holding constitutional custom agents' random stop and boarding of a vessel for the purpose of inspecting documentation, in the absence of any suspicion of wrongdoing); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding a fixed border patrol checkpoint located over 60 miles from the border that allowed questioning and apprehension of illegal aliens).

25. Since *New Jersey v. T.L.O.*, the Court also has reviewed several cases involving suspicionless searches in law enforcement contexts. See *Ferguson v. City of Charleston*, 532 U.S. 67, 79-80, 82-84, 85-86 (2001) (rejecting a hospital's involuntary drug testing of pregnant women, without compliance with Warrant Clause, because the results were shared with law enforcement); see also *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453-55 (1990) (validating fixed-checkpoint automobile stops used to detect intoxication). These cases are not relevant to the present discussion because they involved criminal, rather than civil, searches.

26. Compare T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (expressing critical views on constitutional balancing), Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), and Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963), with Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988) (approving of constitutional balancing), and Erwin N. Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to*



risks of unbounded constitutional decisionmaking and decreases the law's predictability. The Court, however, has sought to mitigate these deficiencies in the special needs cases by considering factors protecting against governmental overreaching. These factors include whether the individual has diminished privacy interests in the context presented,<sup>27</sup> the search regime's invasiveness,<sup>28</sup> the degree of governmental discretion it allows,<sup>29</sup> the immediacy of the government interest,<sup>30</sup> the search regime's efficacy,<sup>31</sup> and its deterrence value.<sup>32</sup> Unfortunately, the Court's efforts

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*Constitutional Questions*, 8 UTAH L. REV. 167 (1963).

27. The Court has considered individuals to have diminished privacy expectations for numerous reasons. Often, the Court analogizes to the pervasively regulated industry rationale found in the administrative search cases, untroubled by any difference in the nature of a search of commercial premises as opposed to of an individual. *See, e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 at 671-72 (1989) ("Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms . . . reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms."); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 at 627-28 (1989) ("The expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees. . . . [This is particularly so because] the covered employees have long been a principal focus of regulatory concern."); *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) ("A State's operation of a probation system, like . . . its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."). Sometimes, the Court relies on safety rationales. *See, e.g.*, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 656-57 (1995) (explaining decreased privacy expectations of students in general due to condition-specific health screenings and vaccination programs to which they must submit, and of student-athletes in particular due to required physical examinations); *Griffin*, 483 U.S. at 875 (noting that probationers have decreased liberty interests in order to assure their rehabilitation and community safety). The Court also has relied on the idiosyncratic nature of the testing subjects' environment to support a decreased privacy expectation. *See generally Pottawatomie*, 536 U.S. at 822 (invoking in loco parentis principle); *Vernonia*, 515 U.S. at 654-55, 657 (same and pointing to nature of locker room life).

28. *E.g., Vernonia*, 515 U.S. at 658-60; *Von Raab*, 489 U.S. at 672 n.2; *Skinner*, 489 U.S. at 624-27 & n.7 (discussing the invasion of privacy that resulted from compelled disclosure of prescription medications).

29. *E.g., Von Raab*, 489 U.S. at 667; *Skinner*, 489 U.S. at 622 & n.6.

30. *E.g., Vernonia*, 515 U.S. at 662-63; *Von Raab*, 489 U.S. at 673-74 (indicating that the immediacy of the national drug problem justified a suspicionless search regime though the Customs Service had failed to show that any actual problem existed among its employees). The immediacy of the governmental interest also played a significant role in *Skinner*. *Id.* In its recitation of the facts, the Supreme Court noted evidence that "on-the-job intoxication was a significant problem in the railroad industry." *Skinner*, 489 U.S. at 607. Justice Scalia, who dissented in *Von Raab* because he did not believe the government had shown an immediate interest, noted that he had joined the *Skinner* majority in upholding the suspicionless search regime "because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society." *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).

31. *See Vernonia*, 515 U.S. at 663; *see also Skinner*, 489 U.S. at 631-32.

32. *E.g., Vernonia*, 515 U.S. at 658 n.2, 661 (discussing the value of "protecting student athletes from injury and deterring drug use in the student population"); *Von Raab*, 489 U.S. at 676; *Skinner*, 489 U.S. at 630, 632; *Griffin*, 483 U.S. at 878.

have not diminished the fear that using the Reasonableness Clause as the controlling constitutional criterion poses an increased threat to liberty.<sup>33</sup> For instance, because the special needs balancing test ultimately turns upon nothing more than “reasonableness,” it is a constitutional standard that is essentially subjective, turning upon each reviewing judge’s perception of what is reasonable under the circumstances.<sup>34</sup> This deficiency is apparent in the special needs cases, where the Court’s balancing test has been remarkably malleable, allowing for a common factor to be treated differently from one case to another.<sup>35</sup>

Prior to *Chandler*, the lack of constraints on the special needs analysis was particularly troublesome. To address this deficiency, the *Chandler* Court added a new requirement and emphasized that, to qualify as a special need, the governmental justification had to be sufficiently “substantial,” a factor that encompasses the justification’s importance and vitality.<sup>36</sup> As explained in the next section, however, this reformulation holds little hope for improving the special needs principle.

### B. The Inadequacy of the Current Special Needs Formulation

Though the Supreme Court has been developing its special needs jurisprudence for over 15 years, it remains a mystery, with courts and commentators struggling to locate the boundaries that separate constitutional from unconstitutional suspicionless civil searches. The Supreme Court’s application of a three-step special needs analysis, which tests whether sufficient protections against governmental overreaching

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33. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 415 (1974); see also TAYLOR, *supra* note 13, at 99 (“Inspectorial searches . . . can much better be dealt with by requiring that they be ‘reasonable’ within the first clause of the fourth amendment. This does not, however, mean a relaxed standard . . . . On the contrary, inspectorial searches can be a vehicle of abuse ranging from officious insensitivity to corrupt or malicious oppression.”).

34. See Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1043, 1047-48 (1978) (stating that constitutional balancing tests allow decisions based on judicial “intuitionism” or “essentially impressionistic reaction[s]”); see also 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, 1184-85 (1988) (balancing is not objective methodology; it leaves litigants at mercy of subjective opinions of judges despite veneer of objectivity).

35. See *Chandler v. Miller*, 520 U.S. 305, 323-27 (1997) (Rehnquist, C.J., dissenting); see also Luna, *supra* note 2, at 875-77 & nn.466-88 (surveying conflicting lower court results concerning the constitutionality of suspicionless drug testing for attorneys, automobile drivers, carpenters, clerks, computer specialists, custodians, federal executive branch employees, firefighters, health and safety inspectors, high school students, law enforcement officers, secretaries, soldiers, teachers, as well as truck drivers and commercial vehicle operators, while pointing to “specter of whimsy” that rejects as unconstitutional the drug testing of college athletes, meter readers, plumbers, and postal workers, but holds constitutional similar testing of horse trainers, chemists, elevator maintainers, and cashiers).

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

exist,<sup>37</sup> has proven insufficient. For example, this analysis was satisfied in *Chandler*. A special need was present because (1) assuring that candidates for public office were drug-free served a regulatory interest apart from detecting criminal activity;<sup>38</sup> (2) requiring compliance with the Warrant Clause, with the attendant probable cause requirements and delays in enforcing a warrant, would have frustrated the goal of assuring drug free candidacies; and (3) each individual candidate's private interests were outweighed by the public's interest in assuring that the candidate would be faithful to anti-drug laws. Additionally, protections against governmental overreaching existed, as the Supreme Court acknowledged.<sup>39</sup> Yet, the Court held that *Chandler*'s suspicionless drug testing program was unconstitutional, a holding it was able to reach only after adding a new and previously unspecified requirement of special need substantiality.<sup>40</sup>

The Court's new gloss is not helpful. Take, for instance, Michigan's effort to impose suspicionless drug testing upon welfare applicants and recipients.<sup>41</sup> Is the state government's desire to assure a drug-free welfare population "substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth

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37. See *supra* notes 17-32 and accompanying text.

38. As Georgia argued, the suspicionless drug testing regime served to "deter unlawful drug users from becoming candidates and thus stops them from attaining high state office." *Chandler*, 520 U.S. at 318. Thus, the regime served non-criminal interests because "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including anti-drug law enforcement efforts; and undermines public confidence and trust in elected officials." *Id.*

39. *Id.* ("[W]e note . . . that the testing method the Georgia statute describes is relatively noninvasive; therefore . . . the State could not be faulted for excessive intrusion.").

40. See *supra* note 36 and accompanying text.

41. The Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (PRA) authorized states to conduct suspicionless drug testing of welfare applicants and recipients. See Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of the United States Code). The PRA's title 9, § 902 provides that "[s]tates shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances." 21 U.S.C. § 862b. After the PRA's passage, Michigan quickly moved to implement a welfare drug testing program. See MICH. COMP. LAWS § 400.571 (2002); see also STATE OF MICHIGAN FAMILY INDEPENDENCE AGENCY, PROGRAM ELIGIBILITY MANUAL § 280 (Program Policy Bulletin 2000-001) [hereinafter PEM]; MICH. COMP. LAWS §§ 400.57d(2), 400.57e(1)(e), 400.57g (2002). Michigan's program required the mandatory, suspicionless drug testing, by urinalysis, of all welfare applicants, along with random testing under the same conditions of twenty percent of benefits recipients. See MICH. COMP. LAWS § 400.571 (2002); see also PEM, *supra*, § 280, at 1-3 (headings "AGENCY POLICY," "WHO MUST BE TESTED?" and "TESTING PROCEDURE").

Unless the Supreme Court intervenes, Michigan's policy is unenforceable. A federal district court struck down Michigan's welfare drug testing program as unconstitutional, but the decision was reversed on appeal. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002). The Sixth Circuit then vacated the initial appellate decision and granted a rehearing en banc. *Marchwinski v. Howard*, 319 F.3d 258 (6th Cir. 2003). The en banc panel was evenly divided, which under Sixth Circuit rules and controlling precedent resulted in an affirmation of the district court's opinion. *Marchwinski v. Howard*, No. 00-2115, 2003 WL 1870916 (6th Cir. Apr. 7, 2003).

Amendment's normal requirement of individualized suspicion?"<sup>42</sup> One's answer to that question is likely to closely correlate with one's view about the ultimate reasonableness of Michigan's welfare drug testing regime.

Further, most public needs are substantial in one sense or another. Michigan has implemented its welfare drug testing regime with the goal of fostering self-sufficiency.<sup>43</sup> One might argue that this is not a "substantial" need because it does not relate to public safety considerations, which is one way of reconciling the drug testing cases.<sup>44</sup> But a state could just as easily invoke a different need; the most obvious example is that a state could invoke a desire to protect welfare applicants' and recipients' health. States now have work requirements for welfare recipients, so they also could invoke a desire to protect the well-being of a welfare recipient's co-workers. Michigan's welfare drug testing regime applies only to the Temporary Assistance to Needy Families program,<sup>45</sup> under which an eligibility requirement is that the applicants must be raising children. Consequently, a state such as Michigan could assert a substantial need to protect welfare applicants' and recipients' children to show a special need for a suspicionless drug testing regime. These possibilities provide examples of how unlikely it is that the Court's "substantiality" factor will prove particularly helpful in differentiating between legitimate and illegitimate special needs that states may assert.

Michigan's welfare drug testing regime exemplifies two fundamental problems with the Court's special needs jurisprudence. First, it lacks predictability, especially anytime that public health conceivably could be at issue (which is most of the time). The litigation history pertaining to the program epitomizes this problem. The district court ruled the program unconstitutional, the reviewing appellate panel reversed, the appellate court vacated the reversal and granted an en banc hearing, and then the en banc

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42. *Chandler*, 320 U.S. at 318.

43. See PEM, *supra* note 41, § 280 (heading "AGENCY PHILOSOPHY").

44. See David A. Miller, *Mandatory Urinalysis Testing And The Privacy Rights Of Subject Employees: Toward A General Rule Of Legality Under The Fourth Amendment*, 48 U. PITT. L. REV. 201, 217-18 (1986). This view emphasizes that suspicionless drug testing was upheld in *Von Raab* and *Skinner* because of the damage that could be done, respectively, by gun-toting customs officers or those with drug interdiction duties, and by staff responsible for operating trains, while suspicionless testing was struck down in *Chandler* because drug-using politicians do not present a comparable threat to public health. Cf. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 374-79 (6th Cir. 1998) (approving suspicionless drug testing of high school teachers because they are responsible for students' safety). Though *Vernonia* and *Pottawatomie* emphasized harm to self rather than others, those decisions are distinguishable because they deal with minors, who lack complete autonomy.

45. See PEM, *supra* note 41, § 280, at 1-3 (headings "AGENCY POLICY," "WHO MUST BE TESTED?" and "TESTING PROCEDURE"); see also *id.* § 100 at 1 (heading "GENERAL INFORMATION"). In Michigan, the Temporary Assistance to Needy Families program is referred to as the Family Independence Program (FIP).

court found itself evenly divided on the program's constitutionality.<sup>46</sup> All of this resulted in the district court being affirmed, albeit on the most tenuous ground imaginable.<sup>47</sup> After the parties and the judicial system had invested a tremendous amount of resources on the issue, the public was left with nothing more than a district court opinion on the subject, a wasteful result attributable to the murky special needs analysis.

Second, special needs jurisprudence lacks any discernable stopping point, a constitutional boundary beyond which suspicionless civil searches are invalid. The limiting factors<sup>48</sup> that the Supreme Court has used in its attempt to constrain the special needs reasonableness inquiry are of limited value in establishing any such boundary, largely because of the deference that the Court has extended in these cases. Continue to consider Michigan's welfare drug testing regime. The Court considers welfare recipients to have decreased privacy interests,<sup>49</sup> which makes it easier for the government to justify suspicionless civil searches in the welfare context. Further, the Court approved the suspicionless drug testing regime in *Von Raab* even though the Customs Service failed to establish the existence of any actual drug problem among its employees.<sup>50</sup> As a result, it is quite possible that Michigan's failure to document a similar problem among its welfare population would not be held against it. *Chandler* is the only special needs case where the Court has given the limiting factors any bite, but the Court's deferential track record leads back to the predictability problem and leaves one mystified as to why the limiting factors were meaningfully applied in *Chandler* but not in other cases.<sup>51</sup>

These problems have led to widespread dissatisfaction with the special needs principle. Accordingly, many commentators have offered proposals for improving Fourth Amendment suspicionless civil search jurisprudence. Before turning to some of those proposals, the following section will first examine the proper historical understanding of the Fourth Amendment, and will then turn to a crucial challenge that such proposals must confront: the reality that the modern regulatory state is, in a very significant sense, dependent on suspicionless civil searches.

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46. See *supra* note 41.

47. *Id.*

48. See *supra* notes 27-32 and accompanying text.

49. See *Wyman v. James*, 400 U.S. 309, 318-24 (1971).

50. See *supra* note 30.

51. Chief Justice Rehnquist thoroughly catalogued the inconsistencies between the majority's treatment of its limiting factors in *Chandler* as opposed to how those same factors had been treated in other special needs cases. See *Chandler*, 520 U.S. at 323-27 (Rehnquist, C.J., dissenting).

## II. DISCUSSION

### *A. Original Intent, the Fourth Amendment, and Suspicionless Civil Searches*

Our history has been marked by an increasing concern for assuring adequate protections from overreaching governmental searches. This concern is likely at its zenith today after the Supreme Court's relatively recent drug testing cases allowed suspicionless civil searches, which raise the greatest threat of governmental overreaching,<sup>52</sup> to extend beyond the commercial context so that even individuals and their bodily fluids are subject to them.<sup>53</sup> As a result, many proposals have been made for increasing Fourth Amendment protections against suspicionless civil searches. Often these proposals proceed from the premise that suspicionless civil searches are fundamentally incompatible with the Fourth Amendment. But history teaches that this is not so because the Fourth Amendment, and its relationship to suspicionless civil searches, is much more nuanced.

English history is marked by a long practice of using suspicionless searches to further regulatory aims.<sup>54</sup> This practice continued in the

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52. See *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting) ("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government [for cowing a population].").

53. The focus here on individuals might seem odd given that, traditionally, the home has enjoyed a special status under the Fourth Amendment, perhaps even more so than individuals. One of the most stringently guarded bright-line rules protecting against governmental search powers applies to homes: "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)). This heightened concern for protecting the home goes back to ancient legal history and is consistent with the English maxim that a man's house is his castle. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 18, 34 n.78 (Leonard W. Levy, ed., Da Capo Press Reprints in *AMERICAN CONSTITUTIONAL AND LEGAL HISTORY* (1970)). By contrast, the individual commonly can be subject to governmental searches in less procedurally protective circumstances. Cf. *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing warrantless stop-and-frisk search of individual upon reasonable suspicion). Nonetheless, the focus here is on the individual rather than the home because decades ago the Supreme Court allowed suspicionless civil searches of private homes in *Wyman v. James*, 400 U.S. 309 (1971), in which the Court approved a welfare eligibility guideline that required beneficiaries to allow investigative caseworkers to conduct home visits. By contrast, the first non-border case in which the Court allowed a suspicionless civil search of an individual did not occur until a decade and a half later in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

54. See LASSON, *supra* note 53, at 23-24 (explaining that English suspicionless searches for regulatory purposes date back as early as the fourteenth century, such as in the monetary and commercial contexts). In the next century, the Court of Star Chamber showed greater, but short lived, restraint in pursuing a regulatory printing regime. Initially, the Star Chamber enacted an ordinance that authorized searches only upon suspicion. See *id.* at 24-25. However, a mere two years later, the Star Chamber amended this regulatory regime to authorize unlimited search powers because the prior suspicion-based ordinance had been

colonies, where the Crown used broad search powers for regulatory purposes, particularly as a means of enforcing its customs laws.<sup>55</sup> Early on, customs officials regularly conducted warrantless searches in the colonies, but eventually colonists began “to resist or sue the officials,”<sup>56</sup> leading to the Crown’s adoption of writs of assistance as validating mechanisms for the searches.<sup>57</sup> The continued, intrusive regulatory searches, however, increasingly magnified dissatisfaction with the monarchy, both in England and the colonies. The dissension that occurred in England can be seen, for example, in the Crown’s efforts to enforce the 1763 cider tax.<sup>58</sup> The resistance against intrusive regulatory searches certainly extended to the colonies as well, as exemplified by the 1765 Stamp Act Riot.<sup>59</sup>

The Framers, of course, recognized the danger that a governmental search power posed, and focused their efforts on limiting that power. Because writs of assistance are an analog to warrants, the colonies’ experience with writs is generally discussed in terms of warrant-based searches. But writs of assistance also are relevant to suspicionless searches because they were so broad as to impose virtually no limits on the searcher’s discretion. As a result, though writs of assistance arguably required suspicion to justify a search,<sup>60</sup> they shared many characteristics with suspicionless searches.<sup>61</sup> As an influential scholar has written with regard to writs of assistance, “[t]he discretion delegated to the official was . . . practically absolute and unlimited.”<sup>62</sup> For example, writs were of

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“ineffective.” See *id.* at 25. Later, starting in the seventeenth century, England began using legislative statutory warrants to accomplish regulatory searches, such as in the revenue and customs fields. See TAYLOR, *supra* note 13, at 26.

55. See LASSON, *supra* note 53, at 51-78 (describing the English use of search and seizure laws to enforce exploitative customs and trade policies on the American colonies).

56. See *id.* at 55.

57. See *id.* at 55-56; see also Maclin, *supra* note 13, at 218-22. Some historical ambiguity exists concerning the pervasiveness of the use of writs of assistance in the colonies. Telford Taylor contends that writs were used only in Massachusetts and New Hampshire. TAYLOR, *supra* note 13, at 35, 38. Taylor’s view may be a bit too restrictive, as evidence supports that writs of assistance were used at least occasionally in other colonies as well, albeit not as commonly as in Massachusetts and New Hampshire. See LASSON, *supra* note 53, at 55 & n.20, 73-75.

58. LASSON, *supra* note 53, at 41-42 (describing the furor aroused by the enactment of the 1763 cider tax).

59. LASSON, *supra* note 53, at 68 (noting that the uproar created by the Stamp Act did not subside once the Act had been repealed but constituted a larger feud with the Crown over its search and seizure authority).

60. See *id.* at 54 (“The writ empowered the officer and his deputies and servants to search, at their will, wherever they *suspected* uncustomed goods to be, and to break open any receptacle or package falling under their *suspecting* eye.”) (emphasis added).

61. See Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 836 (1989) (writing, with regard to writs of assistance, that “[s]uspicion” was practically no restraint upon official discretion”).

62. LASSON, *supra* note 53, at 54; see Amsterdam, *supra* note 33, at 366 (“[T]he primary abuse thought to characterize the general warrants and the writs of assistance was

nearly unlimited duration, remaining valid during the entire lifetime of the sovereign under whom they had been issued and even six months after his death.<sup>63</sup> In addition, the writs addressed only a general subject, rather than being specific to a particular controversy.<sup>64</sup> One noteworthy anecdote concerned a judge who, with the aid of a constable, called a customs officer to answer for the minor offense of profane swearing in “breach of Sabbath-day acts.”<sup>65</sup> After the proceeding finished, the indignant customs officer proclaimed that he would show them a “little of [his] power,” and proceeded to thoroughly search the judge’s and constable’s homes—“from the garrett to the cellar”—for uncustomed goods.<sup>66</sup>

In response to this history, the Framers adopted the Fourth Amendment to limit the government’s search power, including its power to conduct suspicionless searches. The Warrant Clause is the most concrete example of this effort. Through the Warrant Clause, the Framers intended to end the use of writs by imposing more stringent requirements for obtaining warrants, most notably the individualized suspicion requirement, as opposed to the lesser requirements that had existed for obtaining general warrants or writs of assistance.<sup>67</sup>

The Framers took this action because they viewed writs with hostility.<sup>68</sup> Not only did writs essentially allow suspicionless searches because they did little to constrain a search official’s discretion, they also immunized such an official from an aggrieved individual’s suit, which otherwise could have resulted in the official’s liability for damages.<sup>69</sup> It was for this immunizing purpose, not to assure greater protection of the citizenry through imposition of an individualized suspicion requirement, that British customs officers began using writs of assistance and abandoned their practice of conducting searches *ex officio*.<sup>70</sup> Because of the Framers’ experience with regulatory civil searches, including suspicionless ones, the Fourth Amendment

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their indiscriminate quality, the license that they gave to search Everyman without particularized cause, the fact that they were—as Wilkes proclaimed Lord Halifax’s warrant for the authors and publishers of No. 45 of the North Briton—“a ridiculous warrant against the whole English nation.””).

63. LASSON, *supra* note 53, at 54; TAYLOR, *supra* note 13, at 35; Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U.L. REV. 215, 223 (1995).

64. *Id.*

65. JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDICATED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 1761-1772, Appendix I at 476 n.29 (1865).

66. *Id.*

67. See LASSON, *supra* note 53, at 103; Bradley, *supra* note 61, at 833-38.

68. See TAYLOR, *supra* note 13, at 38 (“The writs of assistance were anathema in the colonies.”).

69. See Amar, *supra* note 13, at 771-72, 774, 779; Bradley, *supra* note 61, at 844.

70. See Maclin, *supra* note 13, at 218-22.



represents an effort to restrain such searches out of a concern that they could be overly intrusive.

But this does not mean that the Framers intended to impose either an individualized suspicion or warrant requirement for all regulatory civil searches. The Framers were not hostile to all suspicionless civil searches. It is true that the Framers possibly displayed a preference for regulatory search regimes based upon individualized suspicion, having promulgated several.<sup>71</sup> These search regimes required individualized suspicion and a warrant for the most intrusive searches on land, such as searches of commercial premises and private residences.<sup>72</sup> At the same time, even soon after the nation won independence from England, the Framers supported suspicionless civil searches of maritime vessels for regulatory purposes at the border.<sup>73</sup> But the Framers' early attempt to draw distinctions on the basis of whether regulatory searches occurred on land or water soon proved unsatisfactory. By 1799, the Founders chose to loosen some of the stringent land-based regulatory search restrictions, authorizing customs officers to open packages on suspicion of fraud without requiring them to obtain a warrant.<sup>74</sup> By 1815, land-based regulatory searches were further eased when two separate Acts authorized customs officers to conduct

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71. E.g., Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 (1846) (granting authority to customs officials to stop and search for illegal goods upon suspicion); Act of Feb. 4, 1815, ch. 31, §§ 2, 4, 3 Stat. 195, 195-96 (1846) (same); Act of Mar. 2, 1799, ch. 22, §§ 67-68, 1 Stat. 627, 677-78 (1845) ("That it shall be lawful for the collector, naval officer, or other officer of the customs, after entry made of any goods, wares or merchandise, *on suspicion of fraud*, to open and examine . . .") (emphasis added); Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207 (1845) (allowing search and seizure of spirits fraudulently concealed "upon reasonable cause of suspicion"); Act of Aug. 4, 1790, ch. 35, §§ 46-48, 1 Stat. 145, 169-70 (1845) (providing for the search and seizure, upon suspicion, of goods subject to duty); Act of July 31, 1789, ch. 5, §§ 22-24, 1 Stat. 29, 42-43 (1845) (giving customs officials search and seizure powers upon suspicion of fraud in the collection of duties).

72. E.g., Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 (1846) (entitling officers to judicially-issued warrants for the daytime search of "any particular dwelling-house, store, or other building" if the officers suspected a concealment of undutied merchandise); Act of Feb. 4, 1815, ch. 31, §§ 2, 4, 3 Stat. 195, 195-96 (1846) (same); Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677-78 (1845) (same); Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207 (1845) (authorizing judges, "upon reasonable cause of suspicion," to issue warrants allowing officers "to enter into all and every such place or places" where uncustomed spirits might be hidden); Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170 (1845).

73. E.g., Act of Mar. 3, 1815, ch. 94, § 1, 3 Stat. 231, 231-32 (1846); Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315 (1845); Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164 (1845); see *United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85, 592 (1983) (discussing § 31 of the Act of August 4, 1790, the Court wrote "the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment").

74. See Act of Mar. 2, 1799, ch. 22, § 67, 1 Stat. 627, 677 (1845). Presumably, a warrant was deemed unnecessary because protection against governmental overreaching existed through the statute's requirement that packages could be opened only "in the presence of two or more reputable merchants." *Id.*

suspicion-based, but warrantless, searches of vehicles, beasts of burden, and even pedestrians.<sup>75</sup>

Precisely what lesson this historical evidence holds for contemporary Fourth Amendment interpretation can be disputed. Perhaps the Framers merely established a narrow border-search exception to a generalized Fourth Amendment individualized suspicion requirement, in which case the special needs principle contravenes original intent. This view is quite defensible. The 1799 and 1815 Acts retained suspicion requirements. Moreover, the 1815 statutes authorizing suspicion-based but warrantless searches on land can be seen as anomalies based on exigencies arising from the 1812 war against Britain. Indeed, one of the 1815 Acts expressly addresses the concern of preventing the transportation of wartime provisions to the enemy.<sup>76</sup>

But a plausible argument can be made that the special needs principle is consistent with original intent. The Framers' endorsement of suspicionless border searches may be indicative of a general understanding that regulatory regimes sometimes require such searches, which therefore must be accommodated under the Fourth Amendment. This case becomes stronger if one accepts that the Framers' departure from a warrant requirement in the 1799 and 1815 Acts stemmed from an appreciation that regulatory regimes require Fourth Amendment flexibility.

More importantly, it is quite likely that these Acts' individual suspicion requirements had limited impact in constraining official discretion or providing meaningful protection against any but the most outrageous examples of governmental overreaching. At the time, no exclusionary rule existed,<sup>77</sup> and government officials who conducted searches based on

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75. See Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 (1846) (allowing customs officers "to stop, search, and examine any carriage or vehicle, of any kind whatsoever, and to stop any . . . beast of burden, on which he shall suspect there are any goods, wares, or merchandise, which are subject to duty, or which shall have been introduced into the United States in any manner contrary to law" and extending search power to "any . . . person travelling on foot"); see also Act of Feb. 4, 1815, ch. 31, § 2, 3 Stat. 195, 195 (1846) (same).

76. Act of Feb. 4, 1815, ch. 31, § 4, 3 Stat. 195, 196-97 (1846) (granting power to search and seize, on probable cause, "all naval or military stores, arms, or the munitions of war, cattle, live stock, articles of provisions, cotton, tobacco, goods, money, or other supplies, transported, or attempted to be transported, . . . as well as the carriage, wagon, cart, sleigh, vessel, boat, raft, or other vehicle or vehicles, beast or beasts, used to transport the same"). This section specifically exempts from any warrant requirement the search of "any carriage, wagon, cart, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, or to packages, on any animal or animals, or carried by man on foot." *Id.*

77. Under the common law, evidence was admissible regardless of how it was obtained. See *Adams v. New York*, 192 U.S. 585 (1904). Though the Supreme Court first excluded evidence as a remedy for a Fourth Amendment violation in *Boyd v. United States*, 116 U.S. 616 (1886), the Court did not formally adopt the exclusionary rule until *Weeks v. United States*, 232 U.S. 383 (1914).

inadequate suspicion could be held liable only for damages.<sup>78</sup> The need for such damages to potentially offset the costs related to pursuing such a remedy, discounted by the risk that no damages at all might be obtained, most likely allowed officials to conduct suspicionless searches (or at least limited ones) under the Acts with impunity, including suspicionless searches of individuals traveling the new nation's byways. Thus, a substantial argument can be made that the Framers, at a minimum, implicitly tolerated non-border and non-maritime suspicionless searches for regulatory purposes under the 1799 and 1815 Acts, even though those Acts facially required suspicion as a predicate to search.

Despite the ambiguity in the historical record, commentators commonly argue that the special needs principle is bankrupt because it departs from the Fourth Amendment's individualized suspicion and warrant requirements, and allows suspicionless searches based on an ad hoc balancing test.<sup>79</sup> But these commentators can justify their position only in two ways. First, they can ignore the numerous instances in which the Framers authorized, either explicitly or implicitly, suspicionless civil searches. Second, they can limit the implications of those instances, but can do so only by claiming certainty where it is unobtainable. Given the difference between the extremely limited regulatory state that existed in the decades after the nation's founding and the expansive regulatory state that exists today, it is not necessarily true that the boundaries of Fourth Amendment protections should be the same today as they were for the Framers.

*B. The Difficulty in Improving Special Needs Jurisprudence: Protecting Against Governmental Overreaching While Accommodating the Modern Regulatory State's Need for Suspicionless Searches*

Although the extent to which the special needs principle is consistent with original intent is debatable, it is clear that we have moved from a limited government with a commensurately limited civil search power, to an expansive government whose effectiveness calls for a Fourth Amendment jurisprudence that accommodates suspicionless civil searches. In the *Lochner* era, the Supreme Court interpreted the Constitution as imposing extensive and substantive limits on the government's regulatory power.<sup>80</sup> These regulatory limits minimized suspicionless civil search

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78. Amar, *supra* note 13, at 767 & nn.30-33 (explaining, however, that if a police authority "merely played a hunch and proved right—if the suspect was a felon, or if the goods were stolen or contraband—[then] *ex post success* apparently was a complete defense").

79. See Stephen J. Schulhofer, *On The Fourth Amendment Rights Of The Law-Abiding Public*, 1989 SUP. CT. REV. 87, 115.

80. See *Lochner v. New York*, 198 U.S. 45 (1905).

regimes in two ways. First, suspicionless civil search regimes were reduced in absolute terms because of the decreased number of regulatory regimes in existence. Second, and perhaps less well known, is that these substantive limits fundamentally called into question the government's search power. Nearly twenty years before *Lochner* was decided, the Court's tendency to discern substantive limits on governmental power had already surfaced in the Fourth Amendment context in *Boyd v. United States*.<sup>81</sup> In *Boyd*, the Court held that the Fourth and Fifth Amendments prohibited the government from compelling an owner of customs documents to produce them in a civil in rem forfeiture proceeding.<sup>82</sup> The *Boyd* Court's view that the Fourth Amendment imposed substantive limits on state-sponsored searches predictably stunted expansions in the government's search power.

This subsequently led to a crisis in the *Lochner* era because the Supreme Court's willingness to discern substantive limits on the government's regulatory power coincided, but conflicted, with the Industrial Revolution. Increasingly, the Industrial Revolution was viewed as causing or contributing to important social problems in a manner that required its management. For example, one year after *Boyd*, Congress passed the Interstate Commerce Act, which ushered in the modern administrative state by creating the Interstate Commerce Commission (ICC), "the first federal regulatory agency authorized to police broadly the detailed operations of a significant sector of the U.S. economy."<sup>83</sup> Efforts to assert some regulatory power over the Industrial Revolution continued, with Congress subsequently passing antitrust and bankruptcy legislation. But the Supreme Court's predisposition to find substantive constitutional limits on governmental powers increasingly frustrated these regulatory efforts. For instance, entities and individuals subject to the regulatory schemes resisted them, relying on *Boyd*. Railroads objected to ICC investigations on constitutional grounds, debtors sought to bar compelled production of documents in bankruptcy, and alleged antitrust violators invoked *Boyd* as a shield from liability.<sup>84</sup>

Ultimately, the New Deal and the constitutional crisis brought about by President Roosevelt's "court-packing" plan led the Supreme Court to reject the *Lochner* era's substantive limits on government regulation.<sup>85</sup> This

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81. 116 U.S. 616 (1886); see Amar, *supra* note 13, at 788 ("[T]he spirit inspiring *Boyd* and its progeny was indeed akin to *Lochner*'s spirit . . .").

82. 116 U.S. at 618-33.

83. JERRY L. MASHAW, ET AL., ADMINISTRATIVE LAW—THE AMERICAN PUBLIC LAW SYSTEM 4 (5th ed. 2003).

84. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1030-31 & nn.55-64 (1995).

85. See generally LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW §§ 8-1 to 8-10 (3d ed. 2000); Henkin, *supra* note 34, at 1042.

rebuff extended to the Fourth Amendment context through *Boyd's* rejection.<sup>86</sup>

The end of substantive Fourth Amendment limits on the government's regulatory power helped make the modern regulatory state possible. Though the regulatory regimes proposed during the Industrial Revolution and as part of the New Deal focused on commercial regulation, the regulatory state has now expanded well beyond that realm. Now, public health and security concerns require children to submit to suspicionless civil searches at schools where they must enroll—think mass scoliosis and lice screenings, as well as metal detectors at schoolhouse doors—and welfare laws require individuals to provide extensive disclosure of private information to ascertain and maintain eligibility for benefits. In this modern world, requiring the government to articulate a basis for suspicion before allowing a search would cripple many of these regulatory regimes.<sup>87</sup> If school officials were required to articulate a reason for believing that a child suffered from some health-impairing condition before conducting a search, it is quite probable that fewer children would receive proper health care, and those that did likely would present themselves for medical treatment in worse health. Similarly, requiring an individualized suspicion of fraud before welfare officials could require disclosure of family finances would fundamentally undermine welfare eligibility criteria.

Thus, we continue to be confronted with the perplexing but familiar dilemma about how to balance legitimate governmental search needs with adequate protections against governmental overreaching. Resolving this dilemma in the context of suspicionless civil searches is increasingly important now that an expansive regulatory state is entrenched, and the implications of an erroneous choice are larger than ever.

### *C. Impracticable or Rejected Alternatives for Increasing Fourth Amendment Protections Against Suspicionless Civil Searches*

Given its analytical deficiencies, it is understandable that the Supreme Court's special needs jurisprudence has been viewed uncharitably. Most Fourth Amendment commentators have criticized the Supreme Court for extending insufficient protections against suspicionless civil search regimes, particularly prior to *Chandler*.<sup>88</sup> Much of this criticism results

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86. See Amar, *supra* note 13, at 788 n.119; see also Stuntz, *supra* note 84, at 1050 & n.113, 1052-53, 1059; Stan Krauss, Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 190-211 (1977).

87. The tension between the modern regulatory state and maintaining meaningful Fourth Amendment protections is sufficiently obvious as to have been noted before. See Louis Michael Seidman, *The Problems With Privacy's Problem*, 93 MICH. L. REV. 1079, 1084, 1092-96, 1101 (1995); see also Stuntz, *supra* note 84, at 1048-54.

88. E.g., Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment*:

from the special needs analysis' lack of analytic rigor, and the resulting danger that it will fail as a bulwark against the incoming tide of the regulatory state, with its attendant calls for ever-increasing suspicionless searches. Due to this pervasive dissatisfaction with the special needs principle, a great deal of Fourth Amendment literature relating to civil searches suggests analytical devices for increasing Fourth Amendment protections.<sup>89</sup> Unfortunately, this literature does not acknowledge the complexity of the original intent analysis regarding suspicionless civil searches, and fails to recognize that suspicionless searches are essential to regulatory effectiveness.

Perhaps the most common proposal for increasing Fourth Amendment protections against suspicionless civil searches is to call for an individualized suspicion requirement, or even application of the Warrant Clause, before a valid governmental search should be allowed.<sup>90</sup> One problem with such proposals is that they arguably are inconsistent with history and original intent to the extent that they seek to impose a per se

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*Confessions of a Patron Saint*, 94 MICH. L. REV. 2553 (1996) (critiquing *Vernonia* on basis that the Supreme Court erred by proceeding as if suspicionless drug testing was merely different in degree from testing on reasonable suspicion, though actually it is different in kind); Phoebe Weaver Williams, *Governmental Drug Testing: Critique and Analysis of Fourth Amendment Jurisprudence*, 8 HOFSTRA LABOR L.J. 1 (1990); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 269, 278 n.78 (1989); Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOKLYN L. REV. 1013 (1990); Darren K. Sharp, Note, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 DRAKE L. REV. 149 (1997).

Several articles have examined legal theories that might successfully challenge suspicionless drug testing regimes. See generally Corinne A. Carey, Comment, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs*, 46 BUFFALO L. REV. 281 (1998); Philippa M. Guthrie, Note, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?*, 66 IND. L.J. 579 (1991). At least one commentator welcomed *Chandler* as the first case where the Supreme Court invalidated a suspicionless drug testing regime under the special needs analysis. See Joy L. Ames, *Chandler v. Miller: Redefining "Special Needs" For Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 295 (1997) ("With *Chandler*, the Supreme Court has taken a step backward in the right direction.").

89. E.g., Hemphill, *supra* note 63, at 215; Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531 (1997) (advocating use of a strict scrutiny model in striking the proper balance between Fourth Amendment rights and legitimate law enforcement needs); Strossen, *supra* note 34; Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529 (1997); Carey, *supra* note 88; Sharp, *supra* note 88.

90. E.g., James Felman & Christopher J. Petrini, *Drug Testing and Public Employment: Toward a Rational Application of the Fourth Amendment*, 51:1 LAW & CONTEMP. PROBS. 253, 280-81 (1988); Holly, *supra* note 89, at 562-65; James T. Ranney, *The Constitutionality of Drug Testing of College-Athletes: A Brandeis Brief for a Narrowly-Intrusive Approach*, 16 J.C. & U.L. 397, 424 (1990); Buffaloe, *supra* note 89, at 550, 561-62; Sharp, *supra* note 88, at 171-72.

rule of unconstitutionality any time individualized suspicion does not support a civil search.<sup>91</sup>

Moreover, though an individualized suspicion requirement appears superficially attractive to the extent that, unquestionably, it would increase the scope of constitutional protections against governmental searches, applying such a requirement conflicts with the government's need under the modern regulatory state to conduct some amount of suspicionless civil searches. Consider, for example, the restaurant health inspections that municipalities conduct. These regulatory schemes would lose their efficacy if some form of individualized suspicion were necessary for the governmental search to occur. Yet, it is unlikely that the citizenry would find acceptable a constitutional regime that imposed a buyer-beware restaurant industry upon them, with its corresponding public health implications.

This leads to another problem with imposing an individualized suspicion requirement, namely that it will create problems with identifying proper exceptions to the rule. For example, a proponent of an individualized suspicion requirement might address the restaurant health inspection issue by suggesting an exemption only for commercial civil searches, while preserving a suspicion requirement in other contexts, especially for searches of individuals. Unfortunately, that approach is unfeasible, as the suspicionless security searches conducted of all airport passengers demonstrates. Particularly after recent tragic events, it is difficult to imagine anyone who would be satisfied with a constitutional regime that precluded the government from conducting security searches at airports unless a basis for individualized suspicion could be articulated. Further, adding a criminal/civil distinction does not alter the debate. If, for example, attempting to board a plane with a utility knife were merely a civil offense punishable by a monetary fine, rather than a criminal offense, surely an individualized suspicion requirement still would be universally condemned.

Not only would imposing an individualized suspicion requirement create problems with identifying proper exceptions to the rule, but such a requirement would be viable only with exceptions that swallow the rule, or an unnatural definition of what constitutes a "search."<sup>92</sup> Consider the issue of creating what are supposed to be "narrowly-tailored" exceptions. Since many regulatory schemes would be hobbled under a suspicion-based Fourth Amendment regime, this option is unwieldy because exceptions

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91. See *supra* notes 73-78 and accompanying text.

92. See Amar, *supra* note 13, at 783-84 (drawing similar conclusions for probable cause requirement in criminal context).

necessarily would proliferate.<sup>93</sup> As a result, the pervasiveness of the regulatory state surely would cause the individualized suspicion rule to be honored often, if not mainly, in the breach. Due to the modern regulatory state's rise, these exceptions would span the gamut of search targets. Certainly, exceptions would apply to many regulatory searches in the commercial context, such as workplace safety inspections or the corporate disclosures that are mandated under securities laws. But exceptions to an individualized suspicion requirement also likely would extend to more personalized regulatory search regimes. For example, residences are subject to municipal housing inspections.<sup>94</sup> Even individuals often must subject themselves to regulatory regimes whose effectiveness is dependent on suspicionless searches, such as when individuals are forced to disclose private information to satisfy tax-reporting requirements or to obtain eligibility for welfare benefits.

Another option would be to manipulate the meaning of what constitutes a "search." Such reasoning is utterly unsatisfying and unacceptably contorts the Fourth Amendment. A regulatory security search at an airport does not pass constitutional muster because it falls outside some distorted definition of what constitutes a "search," but because it is a search that is reasonable.<sup>95</sup>

Adopting a least intrusive means analysis for suspicionless civil searches is another option for increasing Fourth Amendment protections. Indeed, this is a promising alternative, and commentators have made a very strong case for it.<sup>96</sup> Further, it is certainly plausible that a least intrusive means

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93. Compare, for example, the rampant exceptions to the general criminal rule that searches are unconstitutional absent a warrant. At least when taken together, those exceptions can hardly be deemed "narrow" now that the warrant requirement does not apply to: searches incident to arrest, *Chimel v. California*, 395 U.S. 752, 762-63 (1969); searches performed under exigent circumstances, *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967); consent searches, *Illinois v. Rodriguez*, 497 U.S. 177, 183-86 (1990), *United States v. Matlock*, 415 U.S. 164, 169-71 (1974); plain view searches, *Arizona v. Hicks*, 480 U.S. 321, 328 (1987); *United States v. Dunn*, 480 U.S. 294, 297-98, 300-01 (1987); *California v. Ciraolo*, 476 U.S. 207, 215 (1986); stop and frisk searches, *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968); or automobile searches, *California v. Carney*, 471 U.S. 386 (1985). And this is not even an exhaustive list of the warrant requirement exceptions in Fourth Amendment criminal jurisprudence. For an excellent review of the warrant requirement and its exceptions, see WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (3d ed. 1996).

94. These searches ostensibly are subject to the Warrant Clause. See *Camara v. Mun. Ct.*, 387 U.S. 523 (1967). However, the "regulatory warrants" that justify these searches essentially allow suspicionless searches. The value of these regulatory warrants is not to assure the satisfaction of some threshold level of individualized suspicion, but to limit the government's discretion in executing the search. See Schulhofer, *supra* note 79, at 91-93 & n.17.

95. Cf. Amar, *supra* note 13, at 768-70.

96. For the best of these proposals, see Strossen, *supra* note 34, at 1208-66. For other supporters of this approach, see Holly, *supra* note 89, at 578-86, and Kevin C. Newsom, *Recent Development, Suspicionless Drug Testing and the Fourth Amendment: Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995), 19 HARV. J.L. PUB. POL'Y 209, 213 &



analysis could accommodate the modern regulatory state's need to engage in suspicionless civil searches. In spite of all this, the case against a least intrusive means requirement is quite straightforward: the Supreme Court has, when deciding the constitutionality of suspicionless civil searches, repeatedly (and perhaps even vociferously) rejected this option.<sup>97</sup> Thus, absent a significant and quite unexpected change in the Supreme Court's position, this alternative simply is not available.

As explained in the preceding section, efforts to increase Fourth Amendment protections against suspicionless civil searches must confront that, in a very real sense, the modern regulatory state's efficacy is dependent upon such searches. Though an individualized suspicion requirement is a popular proposal for amending special needs jurisprudence, ultimately such proposals are misguided because they fail to account for the post-*Lochner* advent of the modern regulatory state, which cannot effectively operate under an individualized suspicion requirement, much less the Warrant Clause's strictures.<sup>98</sup> Similarly, the Supreme Court clearly has rejected a least intrusive means analysis out of a fear that such a standard also would prove too restrictive of the government's regulatory power. This was particularly clear in *Skinner*, where the Court explicitly invoked the time and effort invested in fashioning a new regulatory regime as a justification for its refusal to second guess the government's regulatory judgment.<sup>99</sup>

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n.35 (1995).

97. *E.g.*, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."); *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 629 n.9 (1989); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976).

98. *E.g.*, *Hemphill*, *supra* note 63, at 246, 256 (arguing for return to original conception of Fourth Amendment protections, namely "protect[ing] individuals from government intrusion without suspicion and . . . proper procedural safeguards," without addressing the feasibility of that change in light of the modern regulatory state).

99. *See Skinner*, 489 U.S. at 629 n.9 (citations omitted and emphasis added):

Respondents offer a list of "less drastic and equally effective means" of addressing the Government's concerns, including reliance on the private proscriptions already in force, and training supervisory personnel "to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine tests." We have repeatedly stated, however, that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." It is obvious that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," because judges engaged in post hoc evaluations of government conduct "can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished." Here, the [government] expressly considered various alternatives to its drug-screening program and reasonably found them wanting. *At bottom, respondents' insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the [government] after years of investigation and study. This we decline to do.*

### III. RECOMMENDATIONS

#### *A. A New Model: Merging Deference to the Regulatory State with Fourth Amendment Constitutionality*

Understandably, critics of special needs jurisprudence are frustrated with the Supreme Court. While the Court has rejected the most common proposals for increasing Fourth Amendment protections against suspicionless civil searches, it has voiced very little useful guidance as to the constitutional bounds of such searches. But maybe the Court is developing its special needs jurisprudence in a subtle, perhaps even unconscious, manner. This possibility is evident if one views the special needs cases through an administrative law lens. Over the last few decades, as judicial review in administrative law has become more deferential towards government agencies, Fourth Amendment jurisprudence also has become more accepting of governmental justifications for suspicionless civil searches. The similar tracks that administrative law and Fourth Amendment civil search cases have followed may be more than coincidental. Many of the suspicionless civil search cases have involved an overlap between administrative law and the Fourth Amendment because the defending party was a governmental agency. Even the more recent special needs cases can be viewed from an administrative law perspective because they all involve a governmental defendant that, while perhaps not a public agency in the traditional sense, can be defined in terms of an administrative mission. For example, though public schools do not fall within the classic notion of governmental agencies, public administrative missions such as educating minors or maintaining their safety easily can be attributed to them.

Viewed from this perspective, a greater degree of predictability may be available in the suspicionless civil search cases if one focuses upon the degree of correlation between the asserted special need and the predefined regulatory end. The cases seem to support more deferential judicial review when the Supreme Court believes that a strong correlation exists, and less deferential review as the gap widens between the special need and the regulatory objective. However, as explained below, the usefulness of this approach is questionable.

#### *1. High Degree of Deference in Administrative Law and Special Needs Cases*

Administrative agency decisions are presumptively subject to review.<sup>100</sup> The Supreme Court embarked on an effort to limit the scope of that review,

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100. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

however, in response to a perception that a quagmire of litigation had been thwarting progress on administrative agendas. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court expanded the scope of discretionary agency decisionmaking, holding that when a dispute involves statutory uncertainty, courts may not substitute their preferred construction of a statute for an agency's reasonable interpretation.<sup>101</sup>

An interesting parallel exists between this administrative law deference and the Fourth Amendment special needs doctrine. The special needs cases echo the high degree of deference in administrative law cases because, in the former, the Supreme Court is essentially applying rationality review.<sup>102</sup> With the exception of *Chandler*, absent from the special needs cases is any searching inquiry into governmental justifications or motives behind implementing a suspicionless civil search regime.

One of the best examples of the Supreme Court's deferential approach in special needs cases is its repeated lack of concern, especially since the *Chevron* era's advent, about the possible criminal ramifications of a suspicionless civil search. The Court's indifference to this risk is manifest in various suspicionless civil search cases involving drug testing, junkyards, and welfare home visits.<sup>103</sup> The Court's lax attitude is dangerous because the permissive civil search doctrines easily could be used to evade the more demanding Fourth Amendment protections applicable to criminal searches. The junkyard case is particularly disquieting because, in accordance with the enabling statute, police, rather than administrative agents, carried out the civil search.<sup>104</sup> Further, the civil search very quickly became a criminal search after the junkyard owner admitted to having violated the administrative record-keeping requirements because the police's subsequent search of the premises had no purpose other than to uncover evidence of criminal wrongdoing.<sup>105</sup>

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101. 467 U.S. 837 (1984). See Hon. Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 244 (1996) ("*Chevron* was basically meant as a device to enhance the power of agencies vis-à-vis the courts and Congress."); see also *id.* at 247 ("*Chevron* was a preemptive strike to force the courts out of the business of telling the agencies what they could do, or could not do, when the law itself was not clear.")

102. See Maclin, *supra* note 13, at 236-39 (positing that "minimum judicial review is condoned in search and seizure cases because the Court has 'relegated [the Fourth Amendment] to a deferred position'" (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)); see also William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (explaining that the concept of special needs is ill-defined).

103. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658 (drug testing); see also *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620-21 & n.5 (1989) (drug testing); *New York v. Burger*, 482 U.S. 691, 716 (1987) (junk yards). The Supreme Court's indifference also extended to one pre-*Chevron* case. See *Wyman v. James*, 400 U.S. 309, 323 (1971) (welfare home visits).

104. *Burger*, 482 U.S. at 693-94 & n.1.

105. See Schulhofer, *supra* note 79, at 103.

Though the Supreme Court's deferential review has alarmed Fourth Amendment proponents, it is not necessarily wrong. Clearly, rationality review applies to certain areas of constitutional jurisprudence, such as the equal protection doctrine when no classification receiving special protection is at issue. By the same token, the deferential review that the Supreme Court has applied in special needs cases contrasts quite sharply with the skepticism the Supreme Court has evinced towards governmental justifications in other areas of constitutional jurisprudence. One example is the equal protection doctrine when a suspect classification is at issue. For example, in cases alleging race discrimination the Court applies strict scrutiny.<sup>106</sup> Another example is first Amendment free speech doctrine involving prior restraints because there the Court presumes unconstitutionality.<sup>107</sup>

Approached on these terms, the special needs cases might represent a Supreme Court struggle to determine the proper scope of constitutional review applicable in all Fourth Amendment cases. If this is so, it certainly appears that those preferring deferential review are prevailing, not only when civil searches are at issue, as demonstrated by the special needs cases, but also in criminal search cases, as exemplified by the "good faith" exception that applies to searches conducted under invalid warrants.<sup>108</sup>

## 2. *Determining the Level of Deference Based on the Correlation Between the Special Need and the Ultimate Regulatory Objective*

Regardless of one's opinion of the Supreme Court's special needs jurisprudence, it is difficult to avoid the conclusion that *Chandler* is an especially instructive decision because it is the only special needs case where the Supreme Court has held unconstitutional a suspicionless drug testing regime. So what should we learn from *Chandler*? Perhaps that the regulatory end to be achieved is of central importance in determining Fourth Amendment constitutionality in special needs cases. Under this

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106. *Gutter v. Bollinger*, 539 U.S. 306, 326 (2003).

107. Free speech rights are considered so important that the Supreme Court has consistently iterated a long-standing rule that courts presume the unconstitutionality of content-based prior restraints. *E.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995); *R.A.V. v. City of Saint Paul, Minn.*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See generally* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641-43 (1994); *Lovell v. City of Griffen, Ga.*, 303 U.S. 444, 450-52 (1938); *Near v. State of Minnesota ex rel. Olson, Co.*, 283 U.S. 697, 713-18 (1931). For thoughtful discussions of the prior restraint doctrine, see Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955), John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983), and Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

108. *See United States v. Leon*, 468 U.S. 897 (1984).

approach, the dispositive issue is not whether the special need is substantial, as the Supreme Court stated in *Chandler*.<sup>109</sup> Rather, the central issue in the special needs cases might be the degree to which the government's asserted special need facilitates a predefined regulatory end. This appears to be a flexible, sliding-scale inquiry. The closer the special need correlates to the ultimate regulatory objective, the more deference is extended to the suspicionless civil search regime. Correspondingly, judicial review of the justification proffered in favor of the regime is less demanding.

The proposed approach explains the outcomes in *Skinner*, *Von Raab*, and *Chandler*. In *Skinner* and *Von Raab*, the suspicionless civil search regime bore a close correlation with the predefined regulatory objectives. The regulatory objective in *Skinner* was to assure the operation of the nation's railways, while in *Von Raab* it was to enforce the nation's drug laws. These regulatory objectives cannot reasonably be separated from safety concerns. Safety is more than merely an indirect, implicit objective of these regulatory regimes because each would be considered an abject failure if public safety was not assured. A close correlation existed in *Skinner* because it is difficult to contest that drug-using railway workers would jeopardize safety. A similar situation applied to the customs officers in *Von Raab*, at least those that sought to attain positions directly involving the interdiction of illegal drugs or that required carrying firearms. Thus, the Supreme Court affirmed the Customs Service's suspicionless drug testing of these employees.<sup>110</sup> Notably, the special need/regulatory end correlation is weaker with regard to customs employees applying for positions where they would handle classified information. Though public safety issues might be implicated in that situation, the correlation is less direct than compared to a front-line interdiction officer or one who carries a firearm. Therefore, consistent with the correlation hypothesis, the Supreme Court applied less deference when reviewing that issue and remanded for further consideration as to employees who would have access to classified material.<sup>111</sup>

In contrast to *Skinner* and *Von Raab*, a significant disjunction existed in *Chandler* between the government's asserted special need and the predefined regulatory end. *Chandler* involved the suspicionless drug testing of candidates for certain public offices in Georgia. Undoubtedly, the candidates were subject to regulation, such as financial disclosure requirements and campaign contribution restrictions and reporting

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109. See *supra* note 36 and accompanying text.

110. *Von Raab*, 489 U.S. at 668.

111. *Id.* at 677-78.

standards.<sup>112</sup> But little, if any, correlation existed between those regulatory ends and Georgia's asserted special need to drug test the candidates absent any suspicion. While an argument can be made that having a drug-free candidate would foster compliance with campaign regulations, the correlation is tenuous, and certainly much weaker than the correlation that existed in *Skinner* and *Von Raab*. Thus, from an administrative law point of view, one can understand why the Supreme Court applied less deferential review in *Chandler*, leading it to strike down the suspicionless drug testing program.

Though the degree of deference extended often may be predictive of outcomes, it should not be dispositive. One could imagine cases presenting shockingly intrusive special needs searches that likely would be ruled unconstitutional though a close correlation existed between the special need and the regulatory end. For example, there is no doubt that the suspicionless civil searches that take place at airports prior to boarding improve public safety, which is a central objective of airline regulations. Thus, one would expect that judicial review of constitutional challenges to such searches would be quite deferential. But that is not to say that the outcome of such challenges would be preordained. If the regulatory regime involved universal strip searches of all passengers to preclude the smuggling of deadly explosives in body cavities, one would expect the suspicionless civil search regime to be held unconstitutional.

Thus, though the correlation hypothesis may help determine the level of deference that will be extended in a given special needs case, courts should continue to consider other factors that protect against governmental overreaching,<sup>113</sup> which in some cases may be dispositive regardless of the level of deference that applies. The converse also should be true, namely that a suspicionless civil search could be constitutional despite rigorous judicial review resulting from a lack of correlation between the asserted special need and the predefined regulatory end because, for example, the search was negligibly intrusive.

One would expect that the hypothesis proposed here would not necessarily apply to the pre-*Chevron* era. That is indeed the case. For example, in *Colonnade Catering Corporation v. United States*,<sup>114</sup> the Supreme Court invalidated a forcible warrantless search of a liquor licensee's premises, limiting the available administrative remedies for the licensee's failure to allow the search to a fine because it was the only

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112. See, e.g., GA. CODE ANN. §§ 21-5-30 (regulating campaign contributions), 21-5-32 (outlining campaign contribution accounting requirements), 21-5-34 (specifying requirements for disclosure reports), 21-5-50 (financial disclosure requirements).

113. See *supra* notes 27-32 and accompanying text.

114. 397 U.S. 72 (1970).

expressly allowed penalty in the administrative regime. Instead of following a deferential administrative law model, which had not yet come into being, the *Colonnade* Court demonstrated a willingness to actively intervene into administrative proceedings and take a narrow view of the agency's delegated power.

In contrast to *Colonnade*, some decisions from the same period are consistent with the theory that the Supreme Court's deference in reviewing the constitutionality of suspicionless civil searches depends on the correlation between the asserted special need and the predefined regulatory end. For example, *Wyman v. James*<sup>115</sup> approved of suspicionless home searches of welfare recipients, and *United States v. Biswell*<sup>116</sup> permitted the suspicionless search of a federally licensed firearm dealer's locked storeroom. In each of these cases, the Supreme Court held that a close correlation existed between the special need to conduct suspicionless searches and the predefined regulatory end. In *Wyman*, the regulatory end was the need to determine welfare eligibility through a non-adversarial relationship between welfare recipient and caseworker. In *Biswell*, because of the federal government's interest in regulating interstate firearm traffic, the Court termed suspicionless inspections "a crucial part of the regulatory scheme."<sup>117</sup>

These cases show an evolution in the Supreme Court's civil search jurisprudence. Pre-*Chevron*, the Court sometimes actively questioned administrative power related to civil searches. In the days since deference to the administrative state firmly took hold, however, the Supreme Court hardly has vacillated in the high level of deference that it applies to civil search cases. One of the best examples of the Court's contrasting levels of deference over time in suspicionless civil search cases is its treatment of the possible criminal implications of such searches. In earlier cases, before the age of deference, the Court at least professed concern about such implications.<sup>118</sup> But now, as discussed above, unless the challenger is able to make an affirmative pretextual showing, the Court is quite content to plainly ignore the criminal implications of suspicionless civil searches.<sup>119</sup>

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115. 400 U.S. 309 (1971).

116. 406 U.S. 311 (1972).

117. *Id.* at 315-16.

118. See *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 530-31 (1967).

119. See *supra* note 103 and accompanying text. Recently, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Supreme Court appears to have provided some guidance as to how such a pretextual showing can be made. Though it did not expressly address the pretext issue, the majority was unwilling to proceed as if only a civil search was at issue because, from its inception, the search program had sought to advance criminal law objectives. See *id.* at 82-83 & n.20.

### *B. The Limits of Fourth Amendment Deference*

Profound separation of powers concerns arise if the Supreme Court is merging the deferential model from administrative law with Fourth Amendment constitutionality. *Chevron* deference in administrative law is posited upon majoritarianism. Therefore, the proper relationship between majoritarianism and Fourth Amendment constitutionality is central to whether a merger between administrative law and Fourth Amendment jurisprudence is advisable. Arguments in favor of Fourth Amendment majoritarianism have been made. These arguments have a certain appeal, particularly given the persistent criticisms that have been made of Fourth Amendment civil search jurisprudence. Where the constitutional touchstone is reasonableness, why not entrust decisions as to whether particular searches are reasonable to the majority? By passing search laws, legislatures would express their views on the constitutionality of the search regime. Specific searches could be judged through other majoritarianist methods, such as jury trial. Undeniably, majoritarianism could be used to construct a coherent Fourth Amendment civil search jurisprudence. The problem with a majoritarian view of the Fourth Amendment, however, is that it requires a fundamental change in how we conceive of the Bill of Rights and of the judiciary's role under the separation of powers.

*Chevron* is based upon a profoundly majoritarian separation of powers concern. The *Chevron* Court made this clear when it wrote:

When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of an agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, *federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do*. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."<sup>120</sup>

*Chevron* deference therefore "assuage[s] another of the prime constitutional anxieties bred by broadly delegative statutes: the fear that the power to define public policy is passing out of the hands of the people's elected representatives."<sup>121</sup>

*Chevron* formulated a test to determine when, under the separation of powers, the majority or the judiciary should decide the legality of governmental action. Underlying the test is the *Chevron* Court's presumption that Congress means to confer discretion upon executive

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120. 467 U.S. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)) (emphasis added).

121. Cynthia R. Farina, *Statutory Interpretation And The Balance Of Power In The Administrative State*, 89 COLUM. L. REV. 452, 499 (1989).



agencies while they accomplish their legislatively mandated missions.<sup>122</sup> As a result of this presumption, *Chevron* extended deference to agencies charged with construing ambiguous statutes.<sup>123</sup> Only if the statute is unambiguous is the judiciary charged with ruling on whether the executive action is consistent with legislative authorization.<sup>124</sup> The separation of powers doctrine demands this result because the “judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”<sup>125</sup> Through this division, the *Chevron* Court delineated the majoritarianist and adjudicative zones of responsibility in administrative law under the separation of powers, and intended to promote majoritarianism by limiting judicial involvement in administrative disputes. One of the Court’s justifications for this approach was that the legislature might properly delegate to the executive branch the power to make statutory policy decisions, which the judiciary should avoid because such choices are viewed as being properly committed to the executive branch.<sup>126</sup> This justification was at the heart of *Chevron*’s majoritarian concern.

A case can be made for extending similar deference in the suspicionless civil search cases, many of which fit neatly into the *Chevron* paradigm of delegated statutory authority. In *Skinner*, as well as in the case of Michigan’s suspicionless welfare drug testing program, the challenged suspicionless drug testing regimes were imposed through regulatory power premised on a statutory authorization. In *Skinner*, the Federal Railroad Administration based its regulatory authority to impose a suspicionless

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122. See Claire R. Kelly & Patrick C. Reed, *Once More Unto The Breach: Reconciling Chevron Analysis And De Novo Judicial Review After United States v. Haggar Apparel Company*, 49 AM. U. L. REV. 1167, 1189 (2000); see also Bernard W. Bell, *Using Statutory Interpretation To Improve The Legislative Process: Can It Be Done In The Post-Chevron Era?*, 13 J.L. & POLITICS 105, 118 (1997); Karin P. Sheldon, “It’s Not My Job To Care”: *Understanding Justice Scalia’s Method Of Statutory Interpretation Through Sweet Home And Chevron*, 24 B.C. ENVTL. AFF. L. REV. 487, 497 (1997).

123. See 467 U.S. at 843-45.

124. See *id.* at 843-44.

125. See *id.* at 843 n.9.

126. Kelly & Reed, *supra* note 122, at 1192; Gregory E. Maggs, *Reconciling Textualism And The Chevron Doctrine: In Defense Of Justice Scalia*, 28 CONN. L. REV. 393, 401 (1996). The Court’s other two justifications were that (1) judicial deference to the executive branch was warranted because statutory ambiguity was presumed to equate with either an explicit or implicit legislative delegation of authority to the executive branch, and (2) agencies, as compared to the courts, have a greater expertise and ability to carry out regulatory missions. See *Chevron*, 467 U.S. at 843-44. As Professor Farina has pointed out, the first of these justifications is debatable. Farina, *supra* note 121, at 467-69. As for the second justification, the *Chevron* view is that agencies can be trusted to select acceptable interpretations of ambiguous statutes because of their expertise in their regulatory area, which results from their (1) greater resources in comparison to judges, (2) interest in hiring specialists, (3) ability to obtain information without relying upon litigants, (4) familiarity with the history and purposes of the legislation at issue, and (5) practical knowledge of what will best effectuate those purposes. See *Chevron*, 467 U.S. at 844-45; see also Kelly & Reed, *supra* note 122, at 1189; Bell, *supra* note 122, at 145; Maggs, *supra*, at 401.

drug testing regime on railroad workers upon its statutory authority to “prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.”<sup>127</sup> Similarly, in the welfare drug testing example, the federal statute that authorized states to impose such testing clearly represented a congressional intent to delegate power to the states.<sup>128</sup> The Michigan legislative scheme that required the testing in turn delegated to the Michigan welfare department a substantial amount of power to design the program. Except for imposing reporting requirements upon the welfare agency and requiring retesting to avoid false positives, the Michigan legislature provided few details concerning the drug testing program that it wanted implemented.<sup>129</sup> Based on little guidance from either the federal or state legislatures, the Michigan welfare department created detailed rules for a comprehensive drug testing program.<sup>130</sup>

The primacy that *Chevron* gives to majoritarianism is not necessarily incompatible with the Fourth Amendment. Professor Bradley, for instance, has argued that modern conceptions of the Fourth Amendment are inadequate, and that in their stead we should adopt a model in which Congress has at least primary, if not exclusive, authority to define the scope of lawful searches.<sup>131</sup> He contends that the Fourth Amendment’s Reasonableness Clause is only “a positive theoretical statement of the nature of ‘liberty’ and ‘rights’ in the Constitution,” and that a proper understanding of the Bill of Rights, derived from its structure, reveals that the majority’s right to make laws overrides any individual’s right to be governed according to any norms.<sup>132</sup> In his view:

[T]he people are affirmed in their right to govern the search and seizure activity of its [sic] government through laws of their choosing. The reasonableness clause . . . places the government on notice that the measure of appropriate search and seizure is that with which the people would burden themselves if delegation of lawmaking authority to Congress was not obliged by the extended sphere of the republic. . . . Individuals have no claim to be governed by particular search and seizure laws other than the ban on general warrants.<sup>133</sup>

Professor Bradley is not alone in arguing for a significant role for majoritarianism in Fourth Amendment jurisprudence.<sup>134</sup>

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127. See 489 U.S. at 606 (quoting 45 U.S.C. § 431(a)).

128. Congress provided no guidance concerning the details of any welfare drug testing program. It merely authorized states, through a negative declaration, to impose drug testing upon their welfare populations. See *supra* note 41 (quoting 21 U.S.C. § 862b).

129. See MICH. COMP. LAWS § 400.571 (2002) (enabling the “family independence agency [to] require substance abuse testing as a condition for [assistance eligibility]”).

130. See PEM, *supra* note 41, § 280.

131. Bradley, *supra* note 61, at 855-58.

132. *Id.* at 860-61.

133. *Id.* at 862.

134. See Lundy Langston, *Sweep Searches—The Rights of the Community, and the*

Accepting a majoritarian view of the Fourth Amendment could justify a deferential suspicionless civil search jurisprudence. *Chevron* deference is premised on the legislature delegating lawmaking authority to the executive. Similar judicial deference could result from the majority delegating to the legislature the power to define the proper scope of Fourth Amendment protections against suspicionless civil searches. Once the majority has legitimately transferred the power to the legislature, the legislature may delegate it once again to the executive branch so long as it does so through a legislative act announcing an "intelligible principle" that courts can use to evaluate whether the executive branch is properly applying its power.<sup>135</sup>

The difficulty in extending *Chevron*'s deferential model to suspicionless civil searches is, of course, that the executive action in the search cases has a constitutional dimension because it must conform to the Fourth Amendment's strictures. By contrast, the *Chevron* model is restricted to statutory law. This constitutional/statutory distinction must be fully examined because of its separation of powers implications.

The correlation hypothesis proposed here could be used to account for the constitutional dimension in the suspicionless civil search cases. *Chevron* used statutory ambiguity to properly delineate the judicial role under the separation of powers doctrine when entertaining challenges to administrative actions. Similarly, the correlation between the government's asserted special need and the predefined regulatory end could be used to delineate the judiciary's role in resolving challenges to the constitutionality of suspicionless civil searches. A strong correlation would result in strong deference to the executive branch's search. An absence of a correlation would result in the judiciary extending no deference to the executive branch's claim that it was empowered to conduct the search. In between would be a sliding scale of deference, in which the degree of deference the judiciary extends would depend upon the degree of correlation that exists.

This approach, however, raises fundamental separation of powers concerns because a Fourth Amendment deferential regime has much graver separation of powers implications than does *Chevron*'s statutory deference.

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*Guarantees of the Fourth and First Amendments: Moms of the Chicago Public Housing Complex, Revisit Your Civil and Constitutional Rights and Save Your Babies*, 11 WISC. WOMEN'S L.J. 259 (1996) (arguing that a super-majority of public housing tenants should be allowed to democratically waive their Fourth Amendment right against sweep searches). In proposing that Fourth Amendment reasonableness might be subjected to civil jury decisions, Professor Amar has proposed a Fourth Amendment reasonableness regime with majoritarian undertones. See Amar, *supra* note 13, at 818 ("Reasonableness" is largely a matter of common sense, and the jury represents the common sense of common people.").

135. See *Yakus v. United States*, 321 U.S. 414 (1944); see also *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); Farina, *supra* note 121, at 483-87.

Using the correlation hypothesis to apportion power to decide Fourth Amendment constitutionality threatens to destabilize the separation of powers in a manner that delegating statutory policy-making does not. Since *Marbury v. Madison*, the judiciary has declared that interpreting the Constitution is its quintessential responsibility.<sup>136</sup> The separation of powers concerns that animate *Chevron* and are ubiquitous in administrative law have not weakened the judiciary's primacy in constitutional matters. For example, administrative expertise—a crucial justification for *Chevron* deference—does not extend to defining the scope of constitutional protections.

Nothing in *Chevron* justifies a full-scale retreat from the judiciary's adjudicative role in our constitutional scheme, particularly because *Chevron*'s notion of delegable power is largely inapplicable to constitutional litigation. *Chevron*'s premise is that the legislature has delegated power (in the form of a policy choice) to the executive branch. In this respect, *Chevron* is faithful to the regulatory state, which exists only because our jurisprudence has accepted the view that the legislature may delegate a portion of its lawmaking power to the executive.<sup>137</sup> But neither the legislature nor the executive branch has the power to delegate any portion of the judiciary's constitutional adjudicatory power. To the contrary, the Court has carefully guarded its adjudicatory power and rejected the possibility that any portion of it might be transferred to the executive branch.<sup>138</sup>

Another justification for extending *Chevron*-style "strong" deference into special needs jurisprudence also comes up short. The case for adopting a deferential Fourth Amendment model is helped by the legislature's and the executive's responsibility for considering the constitutionality of laws. Arguably, using the correlation hypothesis to allocate each branch's scope of power to determine Fourth Amendment constitutionality is proper because it does nothing more than recognize that the judiciary is not the only branch charged with determining constitutionality. The legislative and executive branches work together to make, enforce, and modify laws. While carrying out these responsibilities, these branches are charged with making their own constitutional determinations and to avoid implementing laws that they believe are

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136. See 5 U.S. (1 Cranch) 137, 177 (1803); see also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7-12 (1983).

137. Farina, *supra* note 121, at 478-87; Monaghan, *supra* note 136, at 25 & n.143.

138. See *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("[T]he 'judicial power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.").

unconstitutional. The correlation hypothesis, the argument goes, could be used simply to help allocate this division of responsibility. The shortcoming of this argument, however, is that the perspectives of the legislative and executive branches on constitutionality have always been merely persuasive authority to which the judiciary may turn.

Drawing the line beyond which courts would not meekly defer to the constitutional determinations of the other branches in suspicionless civil search cases would be crucial to the legitimacy of any deferential Fourth Amendment approach, due to the different separation of powers concerns that exist in constitutional, as opposed to statutory, adjudication. These separation of powers concerns mandate that any adopted deferential Fourth Amendment regime could not be allowed to empower the executive and the legislature to effectively exclude the judiciary from constitutional determinations.

The threat of a deferential regime being used to exclude the judiciary is real. Focusing upon the degree of correlation between the asserted special need and the predefined regulatory end threatens to emasculate Fourth Amendment protections because regulatory ends are sufficiently amorphous to be subject to both executive and legislative manipulation. For instance, suspicionless welfare drug testing fails a correlation test if the regulatory purpose is to meet the client populations' minimal financial needs. But the executive, through the relevant governmental agency, could add a drug-free requirement to the eligibility criteria. If necessary, the legislature could ratify the agency's action.

Moreover, even if a successful challenge could be lodged against the rationality of the new eligibility criteria based on its lack of foundation with the predefined regulatory end, the legislature is empowered to change that regulatory end to one that meets the correlation test. The welfare drug testing cases become much harder to attack under a correlation theory if, for example, the regulatory purpose is to facilitate self-sufficiency through entrance into the work force. Indeed, the welfare drug testing case from Michigan falls into this category because Michigan posits that facilitating self-sufficiency is the central purpose of its welfare program.<sup>139</sup> It would be unpopular, and probably difficult, to contend that there is little correlation between substance abuse and difficulty finding or holding a job. As a result, a strong correlation would be hard to deny, and a deferential approach would be hard to avoid. The possibility of executive or legislative manipulation of regulatory ends shows that a correlation test greatly raises the potential for a Fourth Amendment that lacks an inviolable sphere of protection. The possibility of manipulation is real, particularly

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139. See *supra* notes 41-43 and accompanying text.

because public safety rationales can be invoked with respect to all regulatory schemes.

The judiciary must avoid this outcome, and is well positioned to do so. The judiciary has considerable power to resist a minimizing of its role in deciding upon the constitutionality of suspicionless civil searches because it will control the degree of deference that it extends. It is easy enough for the judiciary to protect itself on this score by declaring that constitutional limits exist to the degree of deference that it can extend in constitutional matters. Such a declaration certainly is legitimate under our separation of powers, and merely acknowledges that, unlike the separation of powers concern behind *Chevron*, the separation of powers concern in constitutional interpretation is profoundly anti-majoritarian. These separation of powers concerns require that judicial deference on constitutional matters be limited because legislative or executive efforts to mandate too much judicial deference would fundamentally alter the judiciary's adjudicative role that was integral to our constitutional design and the Framers' intent,<sup>140</sup> by emasculating the system of checks and balances that is integral to the separation of powers.<sup>141</sup> By drawing the line that prevents this result, the judiciary can assert its power in a self-protective—but proper—manner, and prevent the executive and legislative branches from excluding it from a meaningful role in determining constitutionality.

### CONCLUSION

A merger of Fourth Amendment civil search and administrative law may be occurring in the Supreme Court. If so, then the Court's special needs cases may be subject to greater predictability if one considers the degree of correlation between the government's asserted special need and the predefined regulatory objective at issue. Courts that perceive a strong correlation may be disposed to extend deferential judicial review. Conversely, a weak correlation may result in a more demanding judicial inquiry into the validity of the government's justification for the search. If

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140. See 1 CHARLES MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. XI, ch. 6, at 163 (T. Nugent trans. 1878) ("There is no liberty, if the judiciary power be not separated from the legislative and executive."); see also James Madison, *The Federalist* No. 51, in *THE FEDERALIST PAPERS* 347-49 (Roy P. Fairchild ed., 2d ed. 1961) (explaining that "the necessary partition of power among the several departments" requires "contriving the interior structure of the government, [such] that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places" because "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others").

141. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 617 (1984) (stating that checks and balances are "at the heart of the framers' formula"); see also James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1047 (1975) (explaining that checks and balances are the system "upon which the Constitution was made to rest").

correct, this insight is valuable to litigants who challenge or defend suspicionless civil search regimes. Challengers should emphasize the lack of correlation between the search and the regulatory objective, while defenders should stress how the search is consistent with and serves the regulatory mission.

Though this new paradigm may be helpful in terms of divining the outcomes of cases, its pervasiveness must be checked. The danger is that regulatory objectives are manipulable through executive and legislative action. Thus, allowing the correlation paradigm to run unchecked threatens to fundamentally undermine Fourth Amendment protections against overreaching governmental searches. As a result, though it may be helpful to consider the correlation between the special need and the regulatory objective, the correlation should be a limited factor, considered alongside other Fourth Amendment factors that protect against governmental overreaching, and should not be allowed to dominate the reasonableness analysis.

The Supreme Court in *Chandler* may have signaled that it was well aware of this. *Chandler* is not only consistent with the correlation hypothesis; it also appears to constitute a stark rebuke to any argument that the Court has fully embraced majoritarianism as its controlling legal determinant in the special needs cases. It is true that the deference the Supreme Court has shown in the suspicionless civil search cases appears to represent its willingness to give majoritarianism a significant role in Fourth Amendment jurisprudence. But *Chandler* strongly signals that the Court properly intends to limit the role of majoritarianism, which is necessary to preserving the separation of powers. Were the Supreme Court following a fully majoritarian approach to the Fourth Amendment, *Chandler* would have affirmed the suspicionless drug testing of electoral candidates. Other than a referendum, there is no greater example of majoritarian will than legislative action becoming law, and there is no constituency better able to use the majoritarian process to protect itself than legislators. Though the *Chandler* drug testing program applied to executive officers with little to no role in the law-making process, such as the state school superintendent, the commissioners of agriculture and labor, and judges, it also applied to electoral candidates for governor as well as for legislative seats in the General Assembly, which is comprised of both the state House and Senate.<sup>142</sup> *Chandler's* rejection of the suspicionless drug testing regime that legislators imposed on themselves strongly hints that the Court is disinclined from adopting a completely majoritarian approach to the Fourth Amendment.

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142. 520 U.S. at 309-10.

Thus, though the future direction of a deferential model in suspicionless civil search cases is not yet clear, *Chandler* at least indicates that the Supreme Court continues to recognize itself as the ultimate arbiter of Fourth Amendment constitutionality. Whether it exercises that power to heed the voices of the majority of commentators who are calling for reform of the special needs principle and greater protections from suspicionless civil searches remains to be seen. What should be clear, however, is that those who desire these greater protections will best persuade the Court by proposing new means of achieving those protections that do not unacceptably conflict with the modern regulatory state's need to conduct such searches.



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