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THE SPECIAL NEEDS RATIONALE: CREATING A CHASM IN FOURTH AMENDMENT ANALYSIS

Kenneth Nuger

I. INTRODUCTION

In a society that cherishes both individual liberty and constitutional government, it may seem inevitable that increased societal complexity would complicate government’s ability to resolve conflict deemed harmful to the public interest. On the one hand, individuals demand their rights not be arbitrarily restricted by government action. On the other hand, citizens also demand that government protect them from the harmful effects from other citizens' behavior. The resulting tension creates serious obstacles for legitimate governmental action. Government must simultaneously ensure individual freedom, yet prevent behavior judged inimical to the public interest. Yet if government efforts to restrain behavior contradict constitutional standards, public perceptions of governmental legitimacy may erode. If this happens, government’s ability to assure its citizenry that collective action will not harm the public interest could be seriously jeopardized.

This article analyzes the Supreme Court’s formulation of the special needs rationale and its recent lower court application. The paper posits that the special needs rationale misplaces Fourth Amendment intent by placing an inordinate emphasis on governmental objectives and undervaluing Fourth Amendment privacy protections. Rather than assessing if a search meets probable cause requirements, the special needs rationale only requires a court to assess whether the search was reasonable in light of the perceived importance of the particular public policy. Without specific, objective parameters guiding administrative search schemes, this type of balancing test leaves absolute discretion to individuals implementing a search and effectively frees them from Fourth Amendment procedural requirements. When the Supreme Court argues that an otherwise unconstitutional search is saved because the special
needs of government justify privacy invasions against targeted citizens, the Court adopts a Fourth Amendment analytical tool fraught with fatal flaws. The special needs rationale lacks any objective methodology, devalues fundamental Fourth Amendment individual privacy rights, and undermines legal stability by requiring ad hoc analysis of the reasonableness of a governmental search. This article argues that unless the Supreme Court realigns its Fourth Amendment jurisprudence to parallel the historical intent of the Fourth Amendment, citizens' Fourth Amendment privacy protections will be subject to methodical erosion.

II. THE SPECIAL NEEDS RATIONALE IN A FOURTH AMENDMENT CONTEXT

Without constitutional principles to guard against abusive public policy, citizens could be victimized by policy developed from unprincipled, overzealous government discretion. The delegates at the Constitutional Convention, acutely sensitive to the tyrannical abuses of the English Crown, devised a constitutional scheme intended to place strong checks against unrestrained governmental action. The Bill of Rights were soon added, further defining the scope of citizens' liberty and more clearly limiting government invasions that might threaten individual liberty. As part of the Bill of Rights, the Fourth Amendment was intended to safeguard citizens against unreasonable governmental searches and seizures. It provides:

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

1. See Strossen, *infra* note 5, at 1184-87. The balancing test utilized in the special needs rationale is inherent in all Fourth Amendment balancing tests. The unique aspect of the special needs rationale, however, is that it further reduces the need for suspicion of wrongdoing by overemphasizing government objectives and government's need to efficiently carry out the stated objectives.

2. U.S. CONST. amend. IV.
However, the amendment's clauses are subject to vigorous scholarly and judicial debate. Both the "reasonableness clause" and the "warrant clause" cloud Fourth Amendment analysis with uncertainty. Issues concerned with defining reasonableness and deciding whether any search, if found reasonable, must first require probable cause, have been subject to intense judicial analysis. Historically, Fourth Amendment analysis accepted the notion that any search or seizure was presumed unreasonable unless it was based on a warrant and predicated on probable cause. A few scholars have even posited that each clause may place independent conditions requiring searches to be predicated on both probable cause, a warrant and reasonableness.

While a few carefully defined warrant exceptions have evolved, the warrant requirement has been the rule in Fourth Amendment analysis. In addition, the Fourth Amendment does not distinguish criminal from noncriminal searches and

3. Probable cause, while not precisely defined, is guided by the requirements necessary for an impartial magistrate to issue a search warrant. Government oath or affirmation suggests government agents must have evidence attesting to the integrity of the clause, "describing the place to be searched, and the persons or things to be seized." Id.

4. Case law and scholarship support the conventional interpretation. See United States v. United States Dist. Court, 407 U.S. 297, 315 (1972) (the Court iterated, "reasonableness turns, at least in part, on the more specific commands of the warrant clause"). See also Silas J. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 AM. CRIM. L. REV. 257, 282 (1984), (stating that "fourth amendment reasonableness turns on the presence of the essential precondition for a valid warrant, probable cause . . . [which] has come to be regarded as the conventional interpretation of the fourth amendment").

5. 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, 1180 (1988). Under this approach, each clause must not only meet probable cause and warrant standards, but also be reasonable. However, this approach has received little support. While Professor Strossen believes these requirements would more closely safeguard citizens Fourth Amendment rights, they have not commanded serious discussion by the Supreme Court. See id. at 1180 n.24.

seizures, presumably requiring equal application in both contexts. However, courts often require more demanding standards in criminal applications. Noncriminal, administrative intrusions have generally been paid greater deference because they are primarily intended to assure compliance with regulatory schemes, not to apprehend and criminally punish offenders. Yet Frank v. Maryland suggests that noncriminal investigations relate only peripherally to the Fourth Amendment. As a result of the criminal/noncriminal distinction, the reasonableness clause has evolved a dichotomous definition. In Camara v. Municipal Court, Justice White asserted that public health and safety justify relaxed standards of reasonableness. Unlike criminal searches, administrative searches are intended to prevent conditions inimical to the public interest. Therefore, when determining if administrative inspections are reasonable, the inspection must be considered in light of reasonable public policy.

While Camara still technically requires probable cause, probable cause will be met when there is reason to believe the objects of a search will be uncovered in the particular dwelling.

Since Camara, courts have held administrative searches to relaxed standards of reasonableness. However, deference to public policy maximizing the public interest has accelerated in the 1980s and has all but eroded the significance of individual privacy in the balancing equation. The Supreme Court has demonstrated that when it believes government activity is particularly important, it will find a way to sidestep traditional Fourth Amendment standards and accept search and inspection methods that transcend traditional law enforcement limi-

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8. The Court suggested that any resulting privacy intrusions from administrative searches would "cause only the slightest restriction on [one's] claims of privacy." Id. at 367.
10. Id. at 534-35.
11. In Camara, the goal of the search was city-wide compliance with minimum private property standards. The Court in Camara believed the search was reasonable, thereby meeting probable cause requirements, because it furthered the reasonable goals of code enforcement. Id. at 535.
12. The Supreme Court has upheld warrant exceptions when the search or inspection is (1) authorized by statute, (2) consistent with legislative goals, and (3) based on a general administrative plan necessary to enforce legislation. See Marshall v. Barlow's, 436 U.S. 307, 320 (1978).
tations. This is the basis of the special needs rationale. The special needs rationale suggests that government, to maintain the efficient and effective execution of vital government policy, may engage in extraordinary search and inspection schemes that would be unconstitutional if scrutinized from traditional Fourth Amendment analysis.

III. SETTING THE STAGE FOR SPECIAL NEEDS: BALANCING INDIVIDUAL AND GOVERNMENT INTERESTS

The traditional view of the Fourth Amendment posits that citizens have exceptional claims against arbitrary and capricious government intrusions into their private lives. As the Supreme Court reasoned in *Boyd v. United States*, searches should not be declared unreasonable because the government breaks down a person's door and rummages through his drawers, but rather because the search is an invasion of his indispensable right of personal security, personal liberty and private property.

*Boyd* suggests that Fourth Amendment protections are geared toward maximizing the personal rights of individuals against arbitrary government intrusions. *Katz v. United States* supported this view. The Supreme Court in *Katz* confronted whether a warrantless electronic surveillance of Katz's telephone conversations in a public telephone booth violated the Fourth Amendment. Although Katz conducted the conversation in public, the Supreme Court concluded that government needed to obtain a warrant before it intruded on conduct individuals sought to keep private.

Recognizing that "the fourth amendment protects people, not places," the Supreme Court noted the evolution of a

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13. The Supreme Court's standard of creating carefully drawn exceptions to the warrant requirement supports this view. See supra note 6.
15. The Court in *Katz v. United States*, 389 U.S. 347 (1967), argued that any forcible extortion of a man's testimony to be used as evidence to convict him of a crime or to forfeit his goods, would violate the command of the Fourth Amendment. If one's goods includes one's livelihood, then by reading *Katz* and *Boyd* together, one could suggest that any administrative searches conducted without probable cause and resulting in the loss of one's job or benefits would violate the Fourth Amendment. See *Boyd*, 116 U.S. at 630 n.16.
17. *Id.* at 351.
two pronged test to determine whether a search met Fourth Amendment requirements. If a person could demonstrate a subjective expectation of privacy\textsuperscript{18} and if the expectation of privacy is one society is prepared to recognize as reasonable,\textsuperscript{19} an individual could invoke full Fourth Amendment protection. Significantly different from its current special needs perspective, the Supreme Court in \textit{Katz} considered the activity in question irrelevant in its determination of the reasonableness of the search.

While shortlived, \textit{Katz} placed a preeminent value on the privacy of the individual. When citizens' conduct suggests a desire for privacy, government must first obtain a search warrant premised on probable cause. \textit{Katz} was a reminder that the Fourth Amendment's purpose was to protect individual privacy, even at the expense of governmental efficiency.\textsuperscript{20}

A year later, in \textit{Terry v. Ohio},\textsuperscript{21} the Supreme Court retreated from the individual privacy perspective and adopted a balancing approach for criminally-oriented Fourth Amendment analysis. In \textit{Terry}, the Court considered whether an officer had the right to "stop and frisk" a suspect for weapons without a warrant unless probable cause would support an arrest.\textsuperscript{22} The state argued that a stop-and-frisk was far less intrusive than an arrest and was an indispensable tool for police to investigate suspicious behavior. Police argued that to effectively guard the public interest, it must be allowed to pursue "flexible responses graduated in relation to the amount of information they possess."\textsuperscript{23} Therefore, they argued that limited pat downs for weapons would be reasonable under the Fourth Amendment when citizen activity looked suspicious.\textsuperscript{24}

\textsuperscript{18} Id. at 361 (Harlan, J., concurring).
\textsuperscript{19} Id.
\textsuperscript{20} The logic in \textit{Katz} is fundamentally at odds with current special needs analysis. \textit{Katz} condemns a Fourth Amendment methodology that lacks any objective predetermination of probable cause and in its place substitutes a far less reliable procedure that justifies probable cause on the search's potential impact on a policy goal. Id. at 358 (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964)).
\textsuperscript{21} 392 U.S. 1 (1968).
\textsuperscript{22} Id. at 15.
\textsuperscript{23} Id. at 10.
\textsuperscript{24} The police argued that the justification for a stop- and-frisk rests with the officer's assessment of whether the situation posed any potential harm to the officer, not whether there was reason to believe a crime had been committed. Accepting this logic, the Court relied on People v. Rivera, 201 N.E.2d. 32, 34-35
Sensitive to both individual and police interests, the Supreme Court in *Terry* developed balancing criteria intended to appease both interests. The balancing test, while still recognizing an individual's expectation of privacy, would balance the strength of an individual's privacy right against the strength of recognized government interests when the two interests clashed.\(^\text{25}\) Since *Terry*, the Supreme Court has used this balancing approach in a manner that increasingly undervalues individual privacy claims and defers to government policies intended to expeditiously and efficiently accomplish stated governmental objectives. While *Terry*'s brief investigative detention first justified the balancing approach in the criminal context, the Supreme Court had already articulated this balancing approach to noncriminal searches in *Camara v. Municipal Court*.\(^\text{26}\) In *Camara*, the Supreme Court validated routine building inspections lacking in probable cause to enforce health and safety codes.\(^\text{27}\) The Court recognized the inspections lacked traditional probable cause. Nevertheless, the searches met the reasonableness test because in the absence of any alternative code enforcement methods,\(^\text{28}\) these inspections constituted the only effective way to further the city's health and safety codes.\(^\text{29}\)

*Terry* and *Camara* have reduced both the perceived importance of individual privacy and the scope of Fourth Amendment protection against government intrusions. This trend developed because, when an individual's suspected harmful conduct is balanced against societal interests, individual privacy losses will appear negligible in relation to government's efforts to protect society. However, this balancing approach is improperly skewed toward the government's interest. When examined

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\(^{27}\) Id. at 530-31.

\(^{28}\) The Court rejected the view of Frank v. Maryland, 359 U.S. 360 (1959), that the Fourth Amendment was only peripherally related to administrative searches and instead accepted the probable cause standard. However, consistent with *Frank*, it recognized probable cause would be more easily met if the state could argue that the search would promote code enforcement goals. *Camara*, 387 U.S. at 530-31.

\(^{29}\) Id. at 537.
from the public's perspective, governmental intrusions on individual privacy will always seem slight when balanced against the potential harm society is spared as a result of the intrusion. *United States v. Martinez-Fuerte* illustrates this problem. In this case, the Supreme Court justified warrantless, suspicionless stops and inspections of all vehicles and passengers at border patrol checkpoints because each detention was at most, a limited and therefore acceptable Fourth Amendment intrusion. However, the Ninth Circuit Court of Appeals had argued that because nearly 150,000 stops would be made each week at just one checkpoint, the cumulative effect of these brief stops constituted an intolerable interference of the rights of innocent persons.

Less direct but equally significant implications arise from Fourth Amendment balancing. Some commentators argue that massive warrantless searches breed societal discontent that can undermine respect for the legal system. In addition, while warrantless searches and seizures may make for more efficient enforcement of government objectives, increasingly intrusive searches can undermine perceptions of public security, a trend contrary to the purpose of the Fourth Amendment. While government has a responsibility to detect and deter illegal activity, unreasonable governmental searches and seizures must be viewed every bit as illegal as individual illegal activity. It is counterintuitive for government to justify its own unreasonable and therefore illegal behavior by balancing in favor of its need to detect and deter illegal activity.

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31. Id. at 546-47.
32. United States v. Martinez-Fuerte, 514 F.2d 308, 322 (9th Cir. 1975). The appellate court noted that 999 out of 1000 cars carried persons who were lawfully entitled to use the public highways and had a right of free passage. The appellate court believed it was absurd to allow the cumulative intrusion of stopping ten million cars to find one person in a thousand violating United States law.
33. See Strossen, supra note 5, at 1198.
34. See Strossen, supra note 5, at 1199.
35. Both the Framers of the Constitution and the Supreme Court have recognized that the Fourth Amendment may result in less efficient government. In Harris v. United States, 331 U.S. 145 (1947), Justice Jackson, in his dissenting opinion, stated that our "forefathers thought [fewer arrests and convictions] was not too great a price to pay for the decent privacy of home, papers and effects which is indispensable to individual dignity and self respect." Similarly, in Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), Justice Marshall warned:
Ultimately, the balancing approach that evolved from *Terry* and *Camara* has allowed the Supreme Court to manipulate Fourth Amendment analysis to protect virtually any inspection scheme intended to preserve government's perception of public interest.\(^{36}\) Perhaps this trend is exacerbated because of the Fourth Amendment's failure to distinguish between criminal and noncriminal searches.\(^{37}\) This shortcoming could justify the position that Fourth Amendment protection should apply equally in both the criminal and noncriminal context. Recognizing that government programs are intended to foster the public interest, one could also argue that administrative inspection schemes should enjoy more relaxed standards of reasonableness than criminally-oriented searches. This rationale is the conceptual framework justifying special needs balancing. However, individual privacy interests will usually seem overshadowed by the public interest. Moreover, government, through its judiciary, engages in the balancing test. Therefore, the resulting balance may too easily reflect a pro-government bias, causing a steady erosion of Fourth Amendment protections. This inequity has occurred in the special needs cases decided in the 1980s.

**IV. THE DEATH KNEILL OF BALANCING AND THE EMERGENCE OF THE SPECIAL NEEDS RATIONALE**

The most troubling aspect of special needs analysis is the Supreme Court's overzealous protection of government's espoused interests. Since noncriminal penalties are assessed against citizens detected in administrative searches, and since these searches are primarily intended to advance government

But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this specter reflects our shared belief that even beneficent governmental power—whether exercised to save money, save lives, or make trains run on time—must always yield to "a resolute loyalty to constitutional safeguards."

*Id.* at 650.


37. *See supra* text accompanying notes 6-12.
policy rather than to criminally punish, the Supreme Court has had little difficulty embracing the constitutionality of administrative searches premised on decreasing levels of suspicion.

Although the Supreme Court has grappled with appropriate suspicion levels needed to accept an administrative search scheme, it has virtually ignored any analysis of the types of government interests that could justify searches with relaxed probable cause requirements. Lacking an objective framework defining a special need combined with accepting searches premised on decreasing levels of suspicion, the Supreme Court has steadily expanded the special needs rationale. The Court has gone so far as to use the concept in *National Treasury Employees Union v. Von Raab* to rule that a massive, suspicionless search, intended to deter activity that government admitted had not yet happened nor would not likely happen in the future did not violate the suspected individuals' Fourth Amendment rights.

A. Special Needs Justified to Further Vital Government Services

*Von Raab* notwithstanding, sometimes governmental policies are so fundamental that extraordinary search schemes might be justified to maximize the policy's efficient and effective implementation. For example, education is perhaps the most important of all governmental functions. Not only does education provide children with the tools they need to succeed as productive citizens, but it places a heightened responsibility on educators to ensure the child's safety and well being. When educators suspect school children are violating school policy and that their conduct is disruptive to the educational process, should educators have the authority to conduct an administrative search without probable cause? The Supreme Court considered this issue in *New Jersey v. T.L.O.* and adopted

39. The Commissioner stated his belief that the United States Customs Service is largely drug free, and all but a few tests proved negative. Id. at 660, 673. However, writing for the majority, Justice Kennedy rejected the contention that the slight incidence of positive tests did not impugn the program's validity. That harm was even remotely possible justified the government advancing its goal through the testing program. Id. at 674.
the special needs rationale.\textsuperscript{42} In \textit{T.L.O.}, school officials caught a fourteen-year old student and her companion smoking cigarettes in a school lavatory.\textsuperscript{43} This conduct violated school rules, and the two students were taken to the principal's office where they met with the assistant vice principal.\textsuperscript{44} The students denied smoking, which prompted the assistant vice principal to open one of the students' purses where cigarettes and rolling papers were found.\textsuperscript{45} Seeing the rolling papers, the assistant vice principal searched the entire purse and found marijuana and smoking paraphernalia.\textsuperscript{46} The New Jersey Supreme Court ruled that the search was unreasonable.\textsuperscript{47} The United States Supreme Court reversed, using a balancing test to assess the relationship between the student's individual privacy interests and the state's "substantial interest in maintaining discipline in the classroom and on school grounds."\textsuperscript{48} Arguing that the school setting requires close supervision and enforcement of rules that would be acceptable if undertaken by a parent,\textsuperscript{49} the Court recognized that school officials are placed in circumstances that often need discipline to ensure effective, immediate action.\textsuperscript{50} Therefore, the Court queried where the balance should be struck. The majority believed that maintaining a positive learning environment justified easing some of the restrictions ordinarily imposed on searches by public authorities.\textsuperscript{51} When judging how much easing of the Fourth Amendment could be allowed without tainting the reasonableness of the search, the Court argued that:

\begin{quote}
[I]n certain limited circumstances . . . we have recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause . . . . Where a careful balancing of governmental and private interests suggests that the public interest is best served by a fourth amendment standard of rea-
\end{quote}

\begin{itemize}
\item \textsuperscript{42} 469 U.S. 325 (1985).
\item \textsuperscript{43} \textit{Id.} at 328.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} 463 A.2d. 934 (N.J. 1983).
\item \textsuperscript{48} 469 U.S. at 339.
\item \textsuperscript{49} \textit{Id.} at 343.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.} at 340.
\end{itemize}
sonableness that stops short of probable cause, we have not hesitated to adopt such a standard.\textsuperscript{52}

The Supreme Court's balancing approach in \textit{T.L.O.} was hardly novel. Balancing in some form had become commonplace since \textit{Camara} and \textit{Terry}. However, \textit{T.L.O.} broke ground by introducing a category of circumstances in which the Court could further justify invoking extraordinary balancing. As Justice Blackmun expressed in concurrence, when exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, a court is entitled to substitute its balancing of interests for that of the Framers.\textsuperscript{53}

Significantly, the Court in \textit{T.L.O.} argued that some governmental objectives should be exempt from traditional Fourth Amendment analysis. When a court determines that governmental objectives are exceptionally important, it could engage in Fourth Amendment balancing in a way that effectively ignores the warrant and probable cause command of the Fourth Amendment.

While common sense might dictate support for the majority viewpoint in \textit{T.L.O.}, there is an inherent danger in the Court's adoption of the special needs rationale. The danger is not so much that balancing occurs, but rather that when governmental interests are so often perceived as vital, the resulting balancing test mocks individual privacy rights. When the Supreme Court defines the governmental function as so exceptionally important that special needs beyond the normal need of law enforcement justify inspection schemes normally vulnerable to the Fourth Amendment, it reduces the resulting balancing test to one in name only.

Another troubling aspect of the special needs rationale is that it unreasonably applies the warrantless search justification premised from the exigent circumstances warrant exception\textsuperscript{54}

\textsuperscript{52} \textit{Id.} at 340-41.
\textsuperscript{53} \textit{Id.} at 351.
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to allow warrantless searches in areas where obtaining a warrant is not impossible or infeasible. Invoking the special needs rationale, even in cases that pose extraordinary risks to society, is misplaced if obtaining a warrant is feasible. If it is not feasible, a warrantless search would still be allowed under the exigency exception. In essence, the special needs rationale dilutes the exigency exception by no longer requiring a warrant in non-emergency administrative situations.55

B. Special Needs Expanded to Promote Workplace Efficiency

While the special needs rationale creates the potential for warrantless searches in situations where obtaining a warrant was possible, its application in T.L.O. was narrowly applied to further vital government policy. Since T.L.O., the Supreme Court has expanded the special needs rationale to approve very suspect search procedures and searches predicated on virtually no suspicion at all. The first scenario, where the special needs rationale is used to justify a dubious search procedure, is well illustrated in O'Connor v. Ortega.56

O'Connor involved an administrative search of Dr. Ortega's office at Napa State Hospital.57 Ortega, a seventeen-year employee at the hospital, was promoted to Chief of Professional Education.58 In 1981, Dr. O'Connor, the Executive Director of the hospital, began suspecting improprieties in Ortega's management.59 Questions of sexual harassment and improprieties regarding an Apple computer acquisition led O'Connor to initiate an investigation on July 31, during which Ortega agreed to take a two-week vacation and remain off the hospital's premises.60 On August 14, O'Connor informed Ortega that the investigation had not been completed and placed him on administrative leave until his termination on September 22.61 While Ortega was on leave, a hospital investigative team searched his office several times, seizing both pro-

56. Id. at 709.
57. Id. at 712.
58. Id.
59. Id.
60. Id.
61. Id. at 713.
fessional and personal items from his desk and file cabinets.\textsuperscript{62} No attempts were made to separate personal from professional items, nor was an inventory made.\textsuperscript{63}

Noting its past decisions in \textit{Camara} and more recently in \textit{T.L.O.}, the Supreme Court declared that searches and seizures by government employees are “subject to the restraints of the Fourth Amendment.”\textsuperscript{64} However, the Court reasoned there was “no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.”\textsuperscript{65} Thus, the majority in \textit{O'Connor} believed it was appropriate to balance Ortega’s expectation of privacy in his business office with the government’s responsibility to ensure its employees did not engage in improper behavior.\textsuperscript{66} The Court defined the hospital workplace, or that area generally within the employer’s control, as including “hallways, cafeteria, offices, desks, and file cabinets.”\textsuperscript{67} While Ortega may still have enjoyed some Fourth Amendment rights on state property as a state employee,\textsuperscript{68} the majority believed that operational realities in the workplace could reduce an employee’s privacy expectations when an intrusion is caused by a supervisor rather than a law enforcement official.\textsuperscript{69} Claiming that it had to balance Ortega’s privacy interests with the government’s need for supervision, control, and efficient operation of the workplace,\textsuperscript{70} the majority noted that a warrant requirement is not appropriate when obtaining the warrant is likely to “frustrate the governmental purpose behind the search.”\textsuperscript{71}

\textsuperscript{62} \textit{Id.}
\textsuperscript{63} The investigative team contended that separating state from non-state property was too much to do, so they just boxed it all up. \textit{Id.} at 713-14.
\textsuperscript{64} \textit{Id.} at 715.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.} at 724-25.
\textsuperscript{67} \textit{Id.} at 716.
\textsuperscript{68} The majority cited Mancusi v. DeForte, 392 U.S. 364, 369 (1968), where it recognized that employees who had a private office enjoyed a reasonable expectation of privacy against police intrusions, and Oliver v. United States, 466 U.S. 170, 178 n.8 (1984), in which the Court recognized that an employee’s expectation of privacy is based upon “societal expectations that have deep roots in the history of the Amendment.”
\textsuperscript{69} 480 U.S. at 717.
\textsuperscript{70} \textit{Id.} at 720.
\textsuperscript{71} \textit{Id.}
After rejecting Ortega's contention that the hospital administrators needed to obtain a warrant before searching his office, the majority then speculated about the appropriate degree of suspicion required to justify the warrantless search. The Court recognized that in the past, it had not hesitated to adopt a standard defining a search reasonable with less than probable cause if doing so would further the public interest. Arguing that the public has a right to expect efficient governmental operations, special government needs beyond the normal needs of law enforcement justified wide latitude to enter employees' offices for work-related inspections. In sum, the majority concluded that both noninvestigative and investigative administrative searches would normally be judged reasonable at their inception if it seemed reasonable to assume that the search would uncover incriminating evidence or that the search was necessary for a noninvestigative work-related purpose, such as retrieving a needed file. In O'Connor, the majority held that since the hospital administrators had individualized suspicion of wrongdoing, the ensuing warrantless administrative search of his office was reasonable.

The decision in O'Connor poses two significant problems that distinguish it from T.L.O. First, the T.L.O. majority recognized that the special needs inherent in maintaining an efficient and effective educational setting obviated school administrators' requirement to obtain a warrant when they discovered disruptive violations of school rules. However, in O'Connor there was no special need to justify dispensing with the warrant and probable cause requirements. At the time of the searches, Ortega was on administrative leave, forbidden from entering the hospital premises. The hospital administrators could easily have taken their evidence of Ortega's miscon-
duct to a magistrate and obtained a warrant without jeopardizing an effective and efficient hospital environment. Indeed, if the majority in O'Connor was serious about balancing individual and governmental interests, requiring a magistrate to examine the prima facie case for this warrant request could minimize the possibility that an overzealous administrator would undervalue individual privacy and embark on an overly intrusive, procedurally unsound administrative search. Had the hospital administrators gone to a magistrate, they would have had to articulate what they intended to find. When the magistrate issued the search warrant, the administrators would likely have been prevented from generally rummaging through the doctor's office, desk, and file cabinets, taking and mixing both personal and work-related items without first inventorying them.

Second, because the Court majority implied that reasonable individualized suspicion was not a necessary component to justify the reasonableness of a search at its inception, individuals could fall prey to procedurally suspect, warrantless searches. Even if one concedes the debatable proposition that there were justifiable special needs in O'Connor, it would be difficult to justify the warrantless search of Ortega's office. There, hospital administrators justified a search that seized, without inventorying, all personal and work-related articles on the questionable grounds that it would have been administratively inconvenient to keep records that distinguished between relevant and irrelevant evidence.

The implications of O'Connor are troubling. The Supreme Court argues that it engaged in Fourth Amendment balancing before justifying the search. The Court's balancing resulted in the majority defining as reasonable a warrantless search con-

80. Id.
81. Id. at 743 (Blackmun, J., quoting United States v. United States Dist. Court, 407 U.S. 297, 317 (1972)).
82. Since the hospital administrators did have individualized suspicion in this instance the Court declined to decide whether individualized suspicion is an essential component of reasonableness. Id. at 726. However, in the most recent special needs case, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989), the Court held that the Government's need to "conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees."
83. O'Connor, 480 U.S. at 713-14.
ducted in an unreasonable, if not arbitrary and capricious manner, even when there was ample time to obtain a warrant. This type of balancing signals the Court's reluctance to give much, if any, weight to individual Fourth Amendment privacy claims.

If T.L.O. established that special governmental needs beyond normal law enforcement could justify a warrantless search to ensure the maintenance of vital government interests, O'Connor further strengthened government's position in the special needs balancing test. Two reasons support this conclusion. First, when the Supreme Court accepts the notion that special needs automatically justify governmental search policies that promote an efficient and effective workplace, and merely assumes that obtaining a warrant would frustrate government objectives, it rejects the rationale of T.L.O. T.L.O. held that if time delays inherent in the warrant process could exacerbate disruptions in the school setting, a warrantless search could be justified. However, it is unlikely that serious disruptions would have taken place at the hospital if the administrators in O'Connor spent an hour or two to obtain a search warrant.

Second, because the majority in O'Connor viewed the inspectors' search methods as reasonable, even though they lacked any standards to protect the integrity of the search, the majority appears willing to overlook, or at least undervalue, the second prong of the Terry test that determines a search's reasonableness.84 Any search that lacks intent to distinguish between relevant and irrelevant evidence, and especially without any inventory procedures, is clearly contrary to Terry's requirement that searches be "reasonably related in scope to the circumstances which justified the interference in the first place."85 Yet the majority concluded that a reasonable search did not require a hospital inventorying policy. As long as a search intends to secure state property, the scope of the intrusion would meet reasonableness standards.86 However, without an inventorying system, there is little incentive for investigators to confine their search to state property. More general-

85. Id. According to the standard stated in Terry, the search in O'Connor should have been limited to items suspected of being improperly secured and not include personal and other irrelevant items that may have been in Ortega's office.
86. O'Connor, 480 U.S. at 728.
ly, O'Connor suggests that there is little incentive for government to articulate a clear and convincing nexus between a search, any items seized and the purpose of the search.

O'Connor signalled a significant erosion of the balancing test in special needs cases. Evident in O'Connor was the Supreme Court's willingness to summarily argue that an efficient and effective government workplace is in itself a special need justifying a warrantless administrative search. As a result of O'Connor, special needs analysis is no longer confined to whether a warrantless search could neutralize immediate threats to vital government policy. O'Connor extends the special needs rationale to warrantless searches that foster an efficient and effective workplace in non-vital government operations.

C. Special Needs Expanded to Promote Supervisory Powers

The Supreme Court further strengthened special needs analysis when it held in Griffin v. Wisconsin87 that warrants were unnecessary when probation officers wished to search a probationer's residence.88 In Griffin, the majority ignored Griffin's privacy interests in his home, despite the conclusion that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'"89 The Court justified this significant intrusion and declared the warrantless search reasonable because "[a] State's operation of [its] probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . present[ed] 'special needs' beyond normal law enforcement" that justified relaxed Fourth Amendment procedural requirements.90

The Supreme Court justified the search of Griffin's residence because the probation officer had a tip that Griffin "'had' or 'may have had' " a weapon at the home.91 The majority in Griffin believed that subjecting the officer to the warrant requirement would have interfered with the probation system, impeded the officer's ability to respond quickly to

88. Id. at 875-76.
89. Id. at 873.
90. Id. at 873-74.
91. Id. at 875-76 (citing State v. Griffin, 388 N.W.2d 535, 544 (Wis. 1986)).
misfeasance, and reduced the deterrent effect resulting from an expeditious search.\textsuperscript{92} Furthermore, the Court justified invoking the special needs rationale to protect the community from a potentially dangerous probationer.\textsuperscript{93} However, the majority's reasoning is misplaced. While some states have instituted intensive surveillance programs [ISP] aimed at reducing felony recidivism,\textsuperscript{94} Wisconsin had not instituted an ISP. Rather, the search of Griffin's residence was haphazard and even violated state regulations outlining circumstances when a probationer's residence could be searched.\textsuperscript{95} Additionally, Griffin was on probation for misdemeanor charges, suggesting the ISP concept to be inapplicable in the present circumstance.\textsuperscript{96}

Equally important, the majority justified the warrantless search by arguing that obtaining a warrant would have hindered a quick response to a potentially dangerous situation. However, the probation supervisor waited two to three hours after receiving the tip before searching Griffin's residence.\textsuperscript{97} Had there truly been a compelling need to search Griffin's residence without delay, the exigent circumstances exception would have justified a warrantless search.\textsuperscript{98}

Finally, the majority argued that special deterrent needs justify this warrantless search. While the Griffin majority argued that warrantless searches would help protect the community from the risk posed by probationers at large,\textsuperscript{99} the state admitted that over eighty percent of its probationers success-

\textsuperscript{92} \textit{Id.} at 876.
\textsuperscript{93} \textit{Id.} at 875.
\textsuperscript{95} Wis. ADMIN. CODE § DOC 328.21(6) (April 1990) prescribes circumstances upon which the Department of Health and Social Services can implement a search of a probationer's residence, all of which were lacking in the present circumstance. \textit{State v. Griffin}, 388 N.W.2d. 535, 545 (Wis. 1986) (Bablitch, J., dissenting).
\textsuperscript{96} Intensive Surveillance Programs are designed to better monitor felons who, because they were convicted of a felony, theoretically pose a greater safety risk to society. It seems less likely that a probationer convicted of a misdemeanor, as was the case in Griffin, poses nearly the same potential threat to society.
\textsuperscript{97} Griffin, 483 U.S. at 885 (Blackmun, J., dissenting). The dissent also noted that had the police, rather than a probation officer, investigated the petitioner's residence, they would have been required to obtain a warrant. \textit{Id.}
\textsuperscript{98} See Strossen, supra note 5.
\textsuperscript{99} Griffin, 483 U.S. at 875.
fully complete probation. This statistic suggests that probationers may not pose significant risks to the community. The Court’s logic is troubling because the state could easily argue that for the sake of safeguarding the public from recidivist dangers, criminally convicted citizens should be subject to warrantless searches.

As in O’Connor, the majority in Griffin is primarily concerned with maximizing government efficiency. Special needs is loosely construed, enabling government to overcome inconveniences placed on it by the Fourth Amendment. By eliminating the magistrate’s role by citing special governmental needs, government personnel are no longer deterred from conducting some searches that a magistrate might have otherwise prohibited. O’Connor and Griffin clearly indicate that the Supreme Court views Fourth Amendment procedures as a burden. Yet the Framers were willing to sacrifice speed and efficiency to protect against unrestrained governmental power. One might even postulate that any contemporary balancing test is unnecessary since the Framers had already settled the balance in favor of the individual.

In T.L.O., O’Connor and Griffin, the special needs rationale was used to uphold warrantless searches to maximize efficient and effective government service delivery. In each of these cases, some level of individualized suspicion was present which undoubtedly helped support the government’s position that the search was justified. While these cases weaken traditional Fourth Amendment analysis, the Supreme Court further eroded Fourth Amendment protection, in New York v. Burger, when it used the special needs rationale to accept suspicionless, warrantless searches. In this case, the Supreme Court upheld a suspicionless administrative search of a junkyard operator in an attempt to discover and deter traders in stolen automobile parts. The majority argued that since the junkyard was a closely regulated business, it enjoyed reduced privacy expectations. Since closely regulated indus-

100. See Maclin, supra note 94, at 724.
103. Id. at 712-18.
104. Id. at 699-707. The Supreme Court has developed a long series of prece-
tries have reduced privacy expectations, the Supreme Court ruled that it was reasonable for those industries to expect routine property inspections.

In Burger, New York’s Vehicle and Traffic Law\(^\text{105}\) authorized the police to conduct suspicionless searches of vehicle dismantlers, automobile junkyards and related businesses.\(^\text{106}\) The Court argued that the special needs rationale subjects pervasively-regulated businesses to warrantless, suspicionless searches. Thus, the majority held as reasonable a warrantless search of Burger’s junkyard, which uncovered stolen property and ultimately led to a criminal conviction.\(^\text{107}\) The majority concluded the resulting warrantless inspection would meet the Fourth Amendment’s reasonableness requirements as long as the government could: (1) show a substantial government interest to justify the inspection,\(^\text{108}\) (2) demonstrate that the inspection was “necessary to further [the] regulatory scheme”\(^\text{109}\) and (3) demonstrate that “the statute’s inspection program . . . provid[ed] a constitutionally adequate substitute for a warrant,” including adequately advising proprietors of the defined business that inspections should be expected.\(^\text{110}\)

The decision in Burger is significant because it extends special needs searches beyond vital and non-vital government enterprises that are not particularly hazardous, to inspection schemes regulating private industries not fundamentally important, but arguably requiring close regulation.\(^\text{111}\) In Burger, special needs is not used to help efficiently and effectively

\(^{\text{105.}}\) N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986).

\(^{\text{106.}}\) Burger, 482 U.S. at 694.

\(^{\text{107.}}\) Id. at 708.

\(^{\text{108.}}\) Id. at 702.

\(^{\text{109.}}\) Id. (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)).

\(^{\text{110.}}\) Id. at 703 (quoting Donovan v. Dewey, 452 U.S. 594, 603 (1981)).

\(^{\text{111.}}\) Pervasive regulation is normally confined to industries that are in themselves particularly hazardous, or are furthered by external hazardous activity. See, e.g., Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry), United States v. Biswell, 406 U.S. 311 (1972) (firearms and ammunitions sales), Donovan v. Dewey, 452 U.S. 594 (1981) (mining industry). Generally, the pervasive regulation rationale espoused in Camara is assumed where there is substantial public and judicial acceptance for the need to periodically inspect an industry. See Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1546 (6th Cir. 1988).
deliver an important government service, but instead to efficiently and effectively carry out an inspection scheme of businesses that are pervasively regulated. Of equal importance, Burger ties the logic of a special needs search, originally justified for administrative purposes, to the criminal context since evidence found from this administrative search ultimately led to a criminal conviction.

D. Special Needs Expanded to Search Persons

Until the Supreme Court decided National Treasury Employees Union v. Von Raab112 and Skinner v. Railway Labor Executives’ Association,113 the pervasively-regulated industry rationale had been confined to inspections of premises and property. However, utilizing the special needs rationale, the Supreme Court expanded the constitutionality of warrantless searches of property and premises based on some quantum of individualized suspicion, to warrantless searches of people without any particular, individualized suspicion.

In Von Raab, the Commissioner of the United States Customs Service, a bureau of the Department of the Treasury, announced plans to implement a drug testing program114 as a condition of placement or employment for positions that were directly involved in drug interdiction, for persons carrying firearms, or for persons with access to classified material.115 Customs agents who tested positive and could not explain the result to the agency’s satisfaction were subject to dismissal.116

Petitioner, National Treasury Employees Union, argued the drug testing program violated the Fourth Amendment because it was not based on any degree of probable cause or

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114. While the Commissioner admitted his belief that the Customs Service was “largely drug free,” effectively negating any individual employee suspicion, he justified the program on the belief that “no segment of society is immune from the threat of illegal drug use.” 489 U.S. at 660 (citing U.S. CUSTOMS SERVICE, CUSTOMS U.S.A., Fiscal Year 1985, 4). Even though only five employees out of 3600 tested positive for drugs, the Commissioner justified the drug testing program on the basis that his employees could conceivably use drugs, not because he suspected particular employees were using drugs. Id. at 660, 673.
115. Id. at 660-61.
116. Id. at 663.
reasonable suspicion. However, the Supreme Court upheld the drug testing plan with regard to employees who applied "for promotion to positions directly involving" drug interdiction and to positions that required carrying firearms. Although the majority recognized that governmental drug testing programs were Fourth Amendment searches, the Supreme Court bypassed Fourth Amendment scrutiny by applying the special needs rationale. While the majority recognized that some level of individualized suspicion was the rule, it was not essential to determine reasonableness in all cases. It argued that when special governmental needs are present, a balance must be struck between an individual's privacy expectations and government's need to take measures beyond normal law enforcement to ensure that government's special needs are met.

The Supreme Court reasoned that obtaining a warrant in this instance would only divert resources away from the agency's primary purpose. It further opined that since the agency's drug testing program was a noncriminal, administrative search, the probable cause standard was not particularly suitable when judging the validity of drug testing programs. Ultimately, the majority synthesized past adminis-

117. Id.
118. Id. at 679.
119. Id.
120. Id. at 665. While lower courts have consistently ruled that drug testing programs were searches within the meaning of the Fourth Amendment, the Supreme Court had not had the occasion to resolve the issue until it decided Skinner and Von Raab. Id.
121. Id. at 668.
122. Id.
123. The Supreme Court reasoned that obtaining a warrant, an administrative and fiscal inconvenience, would do little to add protection to one's personal privacy. Id. at 666-67. However, it seems unlikely that a detached and neutral magistrate would accept a warrant application absent, at the very least, reasonable suspicion, let alone probable cause.
124. Id. at 668. The Supreme Court recognized past precedents that distinguish between traditional probable cause in the criminal context, and the reasonableness test to determine probable cause in the administrative context. See Colorado v. Bertine, 479 U.S. 367, 371 (1987) (quoting South Dakota v. Opperman, 428 U.S. 364, 370 (1976)) (indicating that the probable cause approach is not helpful for routine administrative functions); O'Connor v. Ortega, 480 U.S. 709, 723 (1987) (stating that the appropriate standard for administrative searches is not probable cause in its traditional meaning); Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967) (developing a reasonableness test conception of probable cause
trative search cases into a rule of thumb suggesting government could compel suspicionless searches to uncover "latent or hidden conditions" that could pose a threat to the health and safety of government employees and society. Taking judicial notice of the perception of widespread drug use in the United States, the majority concluded that suspicionless drug testing of certain customs employees outweighed the privacy rights normally guaranteed to them by the Fourth Amendment.

In dictum, the Supreme Court further recognized that "'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be unreasonable in other contexts." In Von Raab, the Court thought it was reasonable for customs agents involved in the direct interdiction of illegal drugs and those carrying firearms to expect the kind of privacy intrusion involved in a drug test.

The majority was not persuaded by the petitioner's contention that the suspicionless drug testing program was further flawed because it failed to detect an agency-wide drug use problem. The petitioner claimed that a complete absence of any suspicion negated any government right to intrude on employee privacy rights. Rejecting this argument, the Supreme Court reasoned the drug testing programs served two purposes. First, drug testing programs can detect drug use and second, they can deter potential drug use. The fact that an

to justify noncriminal building inspections to help prevent hazardous conditions to public health and safety); and United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1967) (noting that requiring individualized suspicion to make stops on highways near the Mexican border would be administratively impractical).

125. 489 U.S. at 668-69.
126. Id. at 672.

128. 489 U.S. at 676-77.
129. Id. at 673-74.
130. Id. at 673.
131. In justifying the drug test, the Supreme Court looked to the drug testing plan's deterrent effect. It argued "[w]here, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." Id. at 674-75.
agency may not have any perceptible employee drug use was not sufficient to deny the validity of a drug testing plan.\textsuperscript{132} The Supreme Court viewed the possible deterrent effect at least as compelling a justification for drug testing programs as its ability to detect drug use.\textsuperscript{133}

\textit{Von Raab} further strengthened the special needs rationale. \textit{Von Raab} expanded the scope of special needs beyond \textit{Burger}, which allowed suspicionless searches of property in heavily-regulated businesses, to suspicionless searches of persons. As a result of \textit{Burger} and \textit{Von Raab}, the Supreme Court appears willing to accept suspicionless searches of either property or individuals when the government contends that the search will advance government interests.

In \textit{Von Raab}, the Supreme Court viewed drug use as such a substantial evil that extraordinary detection measures seemed reasonable.\textsuperscript{134} In this context, suspicionless drug testing as a means to detect and deter drug use did not contravene the reasonableness test of the Fourth Amendment.\textsuperscript{135} The United States Customs Service and the court majority were not as concerned with detection as they were with deterrence.\textsuperscript{136} Therefore, the majority in \textit{Von Raab} appeared willing to circumvent Fourth Amendment protection by engaging in massive, suspicionless searches as a means to induce particular behavior patterns in society.

Invoking special needs to justify mass, suspicionless searches mocks the Fourth Amendment's deterrent effect on government. Fourth Amendment policies are intended to deter government from engaging in unreasonable searches.\textsuperscript{137} However, in \textit{Von Raab}, the majority ignored Fourth Amendment requirements and instead allowed an oppressive policy intended

\begin{thebibliography}{99}
\bibitem{132} Id. at 674.
\bibitem{133} Id.
\bibitem{134} Id.
\bibitem{135} Id. at 679.
\bibitem{136} Id. at 674-675.
\bibitem{137} Discussions of the Fourth Amendment's deterrent effect abound. For example, in Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court argued that the exclusionary rule would be an effective deterrent to unscrupulous police behavior. Even when reducing the procedural requirements of the Fourth Amendment, the Supreme Court is cautious if the policy will reduce the deterrent effect on government officials. See United States v. Leon, 468 U.S. 897 (1984).
\end{thebibliography}
to deter citizens from behavior that it conceded was not occurring.

Similarly, the Supreme Court in *Skinner v. Railway Labor Executives' Association*\(^\text{138}\) used the special needs rationale to accept the constitutionality of drug testing programs implemented on railroad employees.\(^\text{139}\) Like the junkyards in *Burger*, the railroad was privately run.\(^\text{140}\) Again similar to *Burger*, substantial regulations imposed on the rail industry enabled the Supreme Court to rule the railroad's drug testing program tantamount to public sector action, therefore giving the railroad employees the right to raise Fourth Amendment objections.\(^\text{141}\)

The Federal Railroad Safety Act of 1970\(^\text{142}\) authorized the Federal Railroad Administration (FRA) to promulgate regulations prohibiting covered employees from using or possessing alcohol or any controlled substances.\(^\text{143}\) Specifically, subpart C required drug testing of employees when they were involved in a train accident that resulted in a fatality, the release of hazardous materials accompanied by an evacuation, or a reportable injury or damage to railroad property of at least $500,000.\(^\text{144}\) Employees were also required to take a drug test when an "impact accident" resulted in a reportable injury,\(^\text{145}\) or when an accident occurred that resulted in an on-duty employee fatality.\(^\text{146}\) While a train accident might create suspicion of drug use, the regulations required drug tests of all crew members, not just those directly responsible for the accident.\(^\text{147}\)

\(^{139}\) Id. at 618-21.
\(^{140}\) The Federal Railroad Administration (FRA) is empowered to promulgate industry-wide regulations. See id. at 606.
\(^{141}\) Justice Kennedy argued that the scope and tone of the government regulations suggest the government's affirmation toward drug testing. Id. at 615.
\(^{142}\) 45 U.S.C. § 431(a) (1982) allows the Secretary of Transportation to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety."
\(^{144}\) Id. § 219.201(a)(1).
\(^{145}\) Id. § 219.201(a)(2).
\(^{146}\) Id. § 219.201(a)(3).
The Supreme Court recognized that the railroad employees enjoyed Fourth Amendment protection.\textsuperscript{148} It also implied that the drug testing scheme would have failed traditional Fourth Amendment analysis.\textsuperscript{149} However, it found that special governmental needs to protect society from harm may shield the drug testing program from traditional Fourth Amendment scrutiny\textsuperscript{150} in this heavily regulated industry. In this policy area, any employee privacy expectations inferred from the Fourth Amendment were minimal compared with the compelling government interest of ensuring railroad safety.\textsuperscript{151} As the Court noted in \textit{Von Raab}, suspicionless drug testing serves both detection and deterrent purposes.\textsuperscript{152} The majority believed that requiring a warrant or basing the drug testing program on individualized suspicion would impede the government's efforts to detect and deter drug use.\textsuperscript{153}

The impact of both \textit{Von Raab} and \textit{Skinner} is significant. It invites regulatory agencies to justify suspicionless drug testing programs of job applicants, government personnel in safety-sensitive positions and employees in pervasively-regulated industries. Prior to \textit{Von Raab} and \textit{Skinner}, efficient and effective workplaces were the primary justifications framing special needs analysis. However, \textit{Von Raab} and \textit{Skinner} add concepts such as deterrence, employee integrity and human safety to the existing parameters that may justify special needs searches. At the very least, \textit{Von Raab} and \textit{Skinner} appear to clear the way for government to adopt suspicionless drug testing programs in a significant portion of the public and private sector. The expanded scope of reasons justifying a special needs approach articulated in \textit{Von Raab} and \textit{Skinner} and the existing justifications for special needs analysis articulated in cases prior to \textit{Von Raab} and \textit{Skinner}, means lower court judges have ample precedent to permissively apply the special needs rationale.

\begin{itemize}
\item \textsuperscript{148} Id. at 614-16.
\item \textsuperscript{149} Id. at 619.
\item \textsuperscript{150} Id. at 620.
\item \textsuperscript{151} Id. at 627-28.
\item \textsuperscript{152} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989).
\item \textsuperscript{153} Id. at 665-68.
\end{itemize}
In sum, the Supreme Court developed an analytical tool courts could utilize in a wide range of Fourth Amendment challenges. They expanded the special needs rationale in *T.L.O*, *Ortega* and *Griffin* from searches of places and things to better ensure efficient service delivery to the bodily intrusions evident in *Von Raab* and *Skinner* to control individual lifestyle choices. The following section analyzes how the lower courts have responded to this new strain of Fourth Amendment analysis. While the response time to *Von Raab* and *Skinner* has been short, lower court trends suggest the special needs rationale will be used to further erode Fourth Amendment protections against suspicionless searches.

V. **BEYOND VON RAAB AND SKINNER: RECENT LOWER COURT DEVELOPMENT OF THE SPECIAL NEEDS RATIONALE**

Given the recent proliferation of drug testing programs juxtaposed with the Supreme Court’s application of the special needs rationale in *Von Raab* and *Skinner*, recent lower court special needs decisions have generally been associated with drug testing disputes. With few exceptions, drug testing programs have been a primary, but not exclusive, focus for special needs analysis. Yet few concrete principles guide application of the doctrine. While the Supreme Court has left little doubt it endorses a broad application of the special needs rationale, lower court judges have disagreed over the appropriate scope of the rationale’s application.

In both *Von Raab* and *Skinner*, the Supreme Court cumulatively accepted three justifications to support application of the special needs rationale in Fourth Amendment drug testing disputes. First, the Supreme Court argued that protecting the integrity of certain employees was a valid special governmental need justifying drug tests of that identified group. For example, this argument was specifically applied in *Von Raab*, where the Court suggested that government had a responsibility to ensure that employees who were directly involved in drug interdiction were not using drugs. The Court also suggested that drug tests could be used to deter employees from using

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154. See, e.g., Dunn v. White, 880 F.2d. 1188 (10th Cir. 1989) using special needs to accept AIDS testing in prisons.

drugs, thereby furthering the professional integrity of that targeted group. Second, the Supreme Court argued that ensuring public safety was an appropriate special need justifying suspicionless drug tests. Finally, the Court believed that protecting sensitive information was a valid government need justifying drug testing programs.

However, in *Von Raab* and *Skinner* the drug tests were required only once and only on individuals who, if impaired, could theoretically pose immediate, irreparable harm to the public. It is unclear how lower courts will apply the special needs rationale in settings distinguishable from *Von Raab* and *Skinner*.

The first significant lower court special needs case decided after *Von Raab* and *Skinner* narrowly construed the doctrine. In *Harmon v. Thornburgh*, the United States Circuit Court of Appeals for the District of Columbia examined the constitutionality of a comprehensive drug testing plan for several types of Department of Justice employees. Chief Judge Wald narrowly construed the broad special needs principles emanating from *Von Raab* and *Skinner* and held unconstitutional most of the categories of the Justice Department’s drug testing plan.

*Harmon* involved a Department of Justice’s random drug testing program for incumbents having access to top secret classified information, all attorneys and support personnel involved in grand jury proceedings, all incumbent presidential appointments, all incumbents who prosecute criminal cases and all employees who help maintain, store and safeguard controlled substances. Noting that drug tests were possibly valid searches from a special needs perspective, even absent generalized suspicion of a drug problem, the D.C. Circuit in *Harmon* still invalidated most of

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156. 878 F.2d. 484 (D.C. Cir. 1989).
157. *Id.* at 486.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 487 (citing *Skinner*, 489 U.S. at 614 and *Von Raab*, 489 U.S. at 664).
163. *Id.* at 488 (citing *Skinner*, 489 U.S. at 624 and *Von Raab*, 489 U.S. at 664).
164. *Id.* at 487-88 (citing *Von Raab*, 489 U.S. at 674).
the Justice Department's drug testing plan. The Court distin-
guished several aspects of the Department's plan and its em-
ployees from the circumstances in both Von Raab and Skinner.

First, the Department of Justice working environment was
more traditional than customs agents or railway employees and
therefore could more easily be subjected to traditional
day-to-day scrutiny for drug impairment.165 Second, because
the Justice Department's drug testing scheme allowed periodic
tests during the targeted employees' career, it was far more
intrusive166 than the one time tests formulated in both Von
Raab and Skinner.167 Third, and perhaps most important, be-
cause Department of Justice employees were not directly
linked to law enforcement drug interdiction policies, or other-
wise linked to the public in dangerous situations, they posed
less immediate danger to the public.168

Relying on Von Raab, the Justice Department argued its
drug testing plan was constitutional because of its special need
to ensure the integrity of its workforce, to safeguard the public
and to protect sensitive information.169 The department's
broadest theory was that Von Raab allowed random testing of
all federal employees to maximize the integrity of the public
workforce.170 Rejecting this argument, Chief Judge Wald be-
lieved the integrity argument only applied if a nexus could be
established linking the responsibilities of federal employees to
law enforcement that was directly related to drug inter-
diction.171

The Justice Department also contended that drug testing
was justified to ensure public safety. Rejecting this view, Chief
Judge Wald distinguished between remote and immediate
threats to public safety. While a single mistake by a customs
agent or a train engineer may have irremediable consequenc-
es,172 "Von Raab provides no basis for extending this principle to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated."173

Finally, Chief Judge Wald narrowly construed protecting sensitive information to only those employees who have a top secret national security clearance.174 If access to any information which is confidential or closed to the public were justification enough for a drug test, too many types of employees, including clerks, typists and messengers would fall under the drug testing scheme.175 Therefore, only those employees with top secret security clearances could properly be tested under the Justice Department's drug testing scheme.

However, less than a month after Harmon, the U.S. District Court for the District of Columbia held in American Federation of Government Employees v. Cavazos176 that a drug testing program involving four percent of the Department of Education employees was, with one exception,177 constitutional.178 Relying on the special needs rationale as applied in Von Raab and Skinner,179 the district court held that drug tests were acceptable for all targeted employees except data processors. Mr. Cavazos' personal guard, who was required to carry a gun, fit the special need to ensure public safety,180 as did motor vehicle operators.181 The district court rejected the plaintiff's argument that since there was no past evidence that Education Department vehicle operators had posed public safety threats, there were no special needs justifying drug testing for this group of employees.182 Rather, the district court relied on

172. Id. at 491.
173. Id.
174. Id. at 491-92.
175. Id. at 492.
177. The district court cited Harmon, 878 F.2d at 491-92, to strike down the Department of Education's requirement to test data processors since they did not have a top secret security clearance. Cavazos, 721 F. Supp. at 1376.
178. Id. at 1377.
179. Id. at 1367-70.
180. Id. at 1372.
181. Id. at 1372-74.
182. Id. at 1373.
Von Raab, which held evidence demonstrating a drug use problem was not required as a condition for drug testing.\textsuperscript{183}

A. Problems With Special Needs Methodology

Both Harmon and Cavazos demonstrate a significant dilemma that inherently plagues the special needs rationale. There is no objective methodology upon which to apply special needs criteria uniformly. Without a consistent methodology, its application will inevitably depend on how particular judges weigh the claims of the disputing parties. Even though current Fourth Amendment analysis has generally favored the government’s position in Fourth Amendment disputes, a trend sympathetic toward broad special needs application may be developing. While a few cases like Harmon have rejected the integrity and safety component of the special needs rationale for public employees who are not directly involved in law enforcement activities,\textsuperscript{184} most cases subsequent to Von Raab and Skinner have expanded the scope of at least one of the three special needs justifications the Supreme Court used to accept public drug testing schemes. The trend appears to support the government’s ability to engage in repeated drug tests, without any showing of individual or generalized suspicion.

B. Broad Application of the Special Needs Rationale

Brown v. City of Detroit\textsuperscript{185} illustrates this trend. In Brown, the district court dissolved a temporary restraining order against Detroit’s random, periodic drug tests on Detroit police

\textsuperscript{183} Von Raab, 489 U.S. at 674.

\textsuperscript{184} See, e.g., American Postal Workers Union v. Frank, 725 F. Supp. 87 (D. Mass. 1989), rejecting the integrity and safety argument for postal workers, even those who deliver mail, because their responsibilities do not actively threaten public safety nor are they susceptible to threats to the integrity of their employment because of drug use. Similarly, see National Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989), rejecting the Energy Department’s drug testing for motor vehicle operators because they pose no greater threat to public safety than when the general public uses a motor vehicle. See also Dimeo v. Griffin, 721 F. Supp. 958 (N.D. Ill. 1989), rejecting both the integrity and safety arguments advanced by the Illinois Racing Board in its attempt to conduct random, suspicionless drug tests on several types of employees involved in the horse racing industry.

The plaintiffs argued that *Von Raab* was not applicable since the Detroit plan required repeated random drug tests and therefore was more intrusive than the test scheme in *Von Raab*. The district court rejected this argument and instead relied on the public safety arm of the special needs rationale adopted in *Von Raab*. The lower court argued that, like customs agents involved in drug interdiction or railroad engineers, one accident of a police officer could seriously threaten public safety. Clearly, *Brown* recognizes the laudable goal of furthering public safety but, in so doing, undervalues other arguments at odds with the government's special need to ensure public safety.

Similarly, in *American Federation of Government Employees v. Skinner* the court ruled that random, suspicionless drug tests given to Department of Transportation employees did not violate Fourth Amendment principles. The Court recognized the Department of Transportation's random drug testing policy was "vastly more intrusive than the limited drug testing approved by the Supreme Court," that there was no conclusive evidence that Transportation Department employees were using drugs, and further, that there was simply no correlation between a positive drug test and on the job impairment. Nevertheless, the D.C. Circuit Court still ruled the program constitutional because deterrence, not just detection, was an appropriate goal to further the public safety component of the special needs rationale.

Recently, the Ninth Circuit Court of Appeals in *Bluestein v. Skinner* expanded the scope of the special needs rationale articulated in *Von Raab* to justify random drug tests with no prior notice. In *Bluestein*, the Federal Aviation Administration, while admitting there was not a drug problem in the

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186. *Id.* at 832.
187. *Id.* at 833.
188. *Id.* at 834.
189. *Id.* at 834-35.
190. 885 F.2d 884 (D.C. Cir. 1989).
191. *Id.* at 889.
192. *Id.* at 895.
193. *Id.* at 896.
194. *Id.* at 896-97.
195. 908 F.2d 451 (9th Cir. 1990).
196. *Id.* at 457.
aviation industry, still ordered random testing of employees identified in safety-sensitive positions. The tests would be given on the same day the employees were notified, at times within two hours of notification.

The petitioners challenged the drug testing procedure arguing that the tests were unreasonable searches because there was no individual or general suspicion of drug use, and that they were substantially more intrusive than the procedures prescribed in Von Raab because the tests were unannounced. However, the Ninth Circuit, relying on the deterrence arm of the special needs rationale, rejected both arguments.

Relying on Von Raab, the appellate court argued that the drug testing procedure served the special need of deterring airline industry employees from drug use. While recognizing that employees' privacy rights were being threatened, the Ninth Circuit argued that the government's interests in deterrence outweighed individual privacy rights. The court was unsympathetic with the petitioners' attempt to distinguish Von Raab from Bluestein. The petitioners argued that since Von Raab's drug test is activated only in certain situations, i.e., applying for particular positions, it should be distinguished from Bluestein where testing is not predicated on any predetermined conditions. The petitioners contended, and the court agreed, that this distinction substantially elevated individual privacy interests. Yet while recognizing that the conditions of the drug testing scheme in Bluestein were more intrusive on individual privacy than the testing in Von Raab, the court believed the employees' privacy status was still insuffi-

197. The FAA justified the drug testing plan by merely asserting there was concrete evidence of drug use in the commercial aviation sector. Id. at 453.
198. Id. at 457.
199. Id.
200. Id. at 456.
201. Id.
202. Id. at 457
203. Id.
204. Id.
205. Id. at 456.
206. Id. at 457
207. Id. at 456.
cient to outweigh the public interest implicit in the Federal Aviation Administration’s drug testing plan.\textsuperscript{208}

This logic is troublesome and demonstrates how the lower courts can expand the application of the special needs rationale to further strengthen the government’s position in the balancing equation. This application hastens the erosion of the strict scrutiny standard in Fourth Amendment jurisprudence and supplants it with a reasonableness test that overvalues the public interest. If the special needs rationale, in the name of potential deterrence, is used to justify governmental intrusions on individual autonomy without first demonstrating individualized suspicion, government will be able to successfully circumvent even minimal Fourth Amendment due process standards. This problem is well demonstrated in \textit{Taylor v. O'Grady},\textsuperscript{209} where the Seventh Circuit Court of Appeals argued that \textit{Von Raab} and \textit{Skinner} denied the necessity to impose the least restrictive means test to assess the constitutionality of programs aimed at curbing employee drug use.\textsuperscript{210} In \textit{O'Grady}, the appellate court argued that the “reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative less intrusive means.”\textsuperscript{211}

The special needs application in \textit{O'Grady} is problematic because it ignores what was once a common principal component of the strict scrutiny standard: that when establishing government programs that intrude on fundamental freedoms, government must utilize the least intrusive means possible.\textsuperscript{212} If \textit{O'Grady}'s interpretation becomes commonplace, citizens

\begin{itemize}
\item \textsuperscript{208} \textit{Id.} at 456-57.
\item \textsuperscript{209} 888 F.2d 1189 (7th Cir. 1989).
\item \textsuperscript{210} The court in \textit{O'Grady} recognized that both \textit{Von Raab} and \textit{Skinner} support urinalysis programs without any level of individualized suspicion. \textit{Id.} at 1194. Therefore, having implicitly minimized the degree of the employees' privacy interest, the appellate court believed \textit{Von Raab} and \textit{Skinner} denied the requirement for least restrictive analysis when balancing societal and individual interests. \textit{Id.} at 1195.
\item \textsuperscript{212} The Fourth Amendment was explicitly recognized as a fundamental freedom when it was incorporated in 1949 in \textit{Wolf v. Colorado}, 338 U.S. 25 (1949). Therefore, any legislative or administrative classification must not abridge Fourth Amendment rights absent a compelling government justification and then only employing the least restrictive means. For a concise discussion of the relationship between fundamental freedoms and least restrictive analysis, see \textsc{Laurence H. Tribe, American Constitutional Law} 772-74 (2d ed. 1988).
\end{itemize}
should no longer fear individual behavior, but rather the threat of overly intrusive, abusive government policies whose unconstitutionality is too easily shielded with the special needs rationale.

In what may become an indication of judicial reaction to AIDS testing, the Fifth Circuit Court of Appeals in Leckelt v. Board of Commissioners of Hospital District No. 1 affirmed an administrative decision to dismiss a licensed nurse who refused to take an AIDS test. In this case, the hospital required Leckelt to take an AIDS test because hospital administrators suspected he was gay and believed he lived with a roommate who had AIDS. Rejecting Leckelt’s privacy claims, the Fifth Circuit argued that the public safety arm of the special needs rationale outweighed Leckelt’s considerable privacy rights. Citing Von Raab, the appellate court recognized a compelling interest in the safe and efficient public workplace. Therefore, the forced AIDS test was deemed reasonable under the Fourth Amendment.

This AIDS case, juxtaposed with the drug testing cases, indicates how much leeway courts are willing to give administrators to probe into the private lives of their employees. Because it seems intuitively reasonable in a hospital setting that supervisors know the health status of their employees, administrators, using Leckelt as a cue, may expand AIDS testing to increasingly nebulous categories of employees. Certainly this trend is clear with drug testing programs and it seems reasonable that the trend will expand to other policy areas administrators may perceive as a threat to public safety.

C. Narrow Applications of the Special Needs Rationale

Though the trend in the lower courts clearly accepts the special needs rationale, there is some debate about how expansively the doctrine should be applied. In Dimeo v. Griffin, the district court rejected a special needs justification.

213. 909 F.2d 820 (5th Cir. 1990).
214. Id. at 823.
215. Id. at 822.
216. Id. at 832-33.
217. Id. at 833.
218. Id.
to impose drug testing on a variety of employees involved in the horse racing industry. The district court distinguished Dimeo from Von Raab and Skinner in several respects. First, unlike Von Raab and Skinner, the drug tests in Dimeo were random, not predicated on any degree of individualized suspicion. Second, while recognizing that the racing board, which imposed the tests, had a responsibility to ensure the integrity of the racing industry, the district court believed the Board was stretching the integrity arm of the special needs rationale when it justified drug tests as a means to prevent decreases in state revenue. If one were to accept random employee drug tests on the basis that impaired employees increase operating costs and jeopardize potential gate revenue, virtually all employees, including judges, university professors, and state legislators, could be tested to ensure the integrity of their respective professions. Third, the district court rejected the Board's assertion that the safety arm of the special needs rationale justified testing employees such as outriders and parade marshals because they are only remotely exposed to any physical risk. It also distinguished the safety argument applied in Von Raab and Skinner from the present case because the risk in the former cases more directly involved the public, whereas in Dimeo the safety concerns involved the employees themselves. The district court felt that the link between a positive drug test and current impairment was so tenuous that one could not justify the conclusion that a positive drug test seriously increased the risk of harm in the racing industry. Finally, the district court argued that without concrete evidence that drug tests significantly deterred drug use, the deterrent arm of the special needs rationale simply could not be used to justify drug tests under these conditions.

220. Id. at 973.
221. Id. at 966.
222. Id. at 967-68.
223. Id. at 968.
224. Id.
225. Id.
226. Id. at 969.
227. Id.
228. Id.
229. The district court was not rejecting the assertion that drug tests did not
lieved any balancing test between the racing board’s interests and the racing employees’ interests would only support drug tests predicated on reasonable, individualized suspicion.230

The special needs rationale was also narrowly interpreted in National Treasury Employees Union v. Watkins.231 In this case, the Department of Energy imposed random drug tests on six classes of employees identified as safety-sensitive employees.232 As in Dimeo, the district court rejected a special needs justification to test Department of Energy motor vehicle operators because these employees created no greater public safety risk than any private citizen operating a motor vehicle.233 Unlike employees who operate vehicles that transport other people or involve constant public contact, these motor vehicle operators infrequently transport documents.234 In addition, the Department of Energy had not systematically pursued security checks or job controls and had no evidence of past drug-related accidents.235 Thus, the court concluded that the employees’ privacy rights were substantial enough to require the Department of Energy to demonstrate reasonable, individualized suspicion before an employee could be tested.236

The court in American Postal Workers Union v. Frank reached a similar conclusion.237 There, the district court rejected the special needs rationale and accepted the constitutionality of random drug tests on postal employees.238 Noting

have any potential deterrent effect, nor that deterrence could not be an acceptable special needs justification. Rather, the district court was concerned that the extent of the deterrent impact drug tests may have is still undetermined, and lacking some empirical evidence supporting the deterrent effect, courts should not merely assume an unproven assertion is sufficient to justify government intrusions on citizens. Id. at 969 n.16.

230. Id. at 973.
232. These employees include presidential appointees, law enforcement officers, other employees involved with law enforcement and national security, those dealing with “sensitive information,” positions involving protecting life, property, public health or safety and positions involving a high degree of trust. Id. at 767 n.2.
233. Id. at 769-70.
234. Id. at 770.
235. While the district court argued that a lack of evidence indicating a record of past drug-related accidents would not be sufficient to condemn drug tests where extraordinary safety and national security hazards were present, the court found these extraordinary conditions absent in the current circumstances. Id.
236. Id. at 771.
238. Id. at 90.
that tragic accidents rarely, if ever, involve postal employees, and that the postal service was not a highly regulated industry, the court determined the privacy rights of postal employees were substantial enough to require at least a showing of individualized suspicion before the employee could be subjected to a drug test.

This line of reasoning was further developed in *Beattie v. City of St. Petersburg Beach*, where the federal district court rejected a random drug testing program imposed on local firefighters. In *Beattie*, firefighters had given urine samples for several years as part of a required annual physical examination. St. Petersburg, while admitting there was no evidence of past drug use among the firefighters, believed that testing the urine samples for controlled substances would deter the possibility of future drug use. St. Petersburg argued that testing the urine for drugs would not be any more intrusive on the firefighters' privacy rights since the firefighters were already submitting to urinalysis. However, the district court rejected St. Petersburg's logic and held that, lacking individual suspicion, the special needs rationale could not be extended to accommodate the city's unfounded fear that drug abuse would eventually plague the local firefighters.

District Judge Castagna's opinion relied heavily on the firefighters' privacy rights. While admitting that these employees' privacy rights may be justifiably decreased because of the nature of their job, their privacy rights were still sufficient to protect them from unfounded attempts by government to pry into their private lives. Here, the district judge believed that without some form of individualized suspicion or some compelling reason beyond a hypothetical future

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239. *Id.*
240. *Id.* at 89.
242. *Id.* at 1456.
243. St. Petersburg relied on the deterrence and public safety justifications of the special needs rationale articulated in *Von Raab*, 489 U.S. 656 (1989). However, as the district court noted, while firefighters serve an important function in society, they cannot be analogized to a customs agent whose job is drug interdiction. 733 F. Supp. at 1458-59.
244. *Id.* at 1457.
245. *Id.* at 1459.
246. *Id.* at 1457.
problem of drug use, the invasion of privacy posed by including an analysis of controlled substances violated the privacy interests of the firefighters.\textsuperscript{247}

It is still unclear whether federal courts will offset special needs justifications for federal drug testing programs with federal employees' privacy rights. On the one hand, Capua and Beattie suggest that federal employees may enjoy enough U.S. Constitutional privacy rights to thwart a special needs formulation for drug testing programs. On the other hand, the inferential constitutional right of privacy established in Griswold v. Connecticut\textsuperscript{248} certainly allows federal judges the discretion to weigh the strength of this implied right when determining the strength of a governmentally-asserted public interest in a special needs balancing application.

However, where states have specific constitutional privacy rights pronouncements, citizens' privacy rights may substantially weaken state special needs arguments to justify dubious search schemes. In California, for example, state courts have ruled that California's privacy right protects state citizens in both the public and private sectors\textsuperscript{249} and that state privacy rights could not be preempted by the Railway Labor Act.\textsuperscript{250} The decisions suggest that California citizens may be able to invoke state privacy rights to insulate themselves from federal administrative search policies.

In sum, cases at both the federal and state level decided after Von Raab and Skinner demonstrate judicial recognition that the relationship between an employee's professional responsibilities and his or her potential to threaten the public interest will affect the scope of the employee's privacy rights. Even in cases where the special needs rationale is narrowly construed or altogether rejected, dicta suggests government interests would prevail in a special needs balancing test when

\textsuperscript{247} Id. at 1458. The district court relied on the logic formulated in Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986). In Capua, the district court invalidated a random drug testing program for the city's firefighters. Id. The court in Capua correctly recognized that a random drug testing plan reports on a person's off-duty activities just as surely as if someone was present and watching. \textit{Id}. Therefore, to be a reasonable search, government must demonstrate some compelling reason to override the employees' breached expectations of privacy. \textit{Id}.

\textsuperscript{248} 381 U.S. 479 (1965).

\textsuperscript{249} Semore v. Pool, 266 Cal. Rptr. 280, 282 (Ct. App. 1990).

individualized reasonable suspicion of some wrongdoing is present. Considering the Fourth Amendment has historically enjoyed preferred freedom status in constitutional analysis, requiring government to demonstrate only reasonable individualized suspicion is definitely compromising Fourth Amendment probable cause standards. However, the compromise may be warranted when judging the reasonableness of an administrative search. Yet as the most potent, realistic deterrent to the special needs rationale, requiring reasonable individualized suspicion is still a much weaker weapon than any standards of proof required from a strict scrutiny perspective. At best, lower courts are using the special needs rationale to further erode the probable cause standard and in its place institutionalize the reasonable suspicion standard in an increasing array of administrative settings. At the other extreme, some courts are applying the special needs rationale in a manner that completely eviscerates any Fourth Amendment suspicion requirements in administrative searches.

VI. The Special Needs Rationale and the Fourth Amendment: A Critique

The line of cases decided by both the Supreme Court and the lower courts is systematically ameliorating Fourth Amendment protections. On the one hand, the Supreme Court argues that special needs analysis is merely a form of Fourth Amendment balancing. However, the judiciary has, in barely a six year period, developed the special needs rationale to adjust Fourth Amendment balancing in a way that accepts governmental searches totally devoid of individualized or even generalized suspicion.251

Perhaps Federal District Judge Sarokin in *Capua v. City of Plainfield*252 best summarized the inherent flaw of

251. The judiciary has been conceptually in alliance with the escalating war on drugs in the 1980s. As grave as the drug problem is in several societal sectors, it does not warrant a wholesale amelioration of the Fourth Amendment. Doing so erroneously stigmatizes whole categories of behavior as criminal and dangerous when instead, drug use and abuse are more appropriately social and medical problems.

suspicionless searches when he compared suspicionless drug testing to police surveillance:\footnote{253}

We would be appalled at the specter of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" society come to life.\footnote{254}

To argue that special governmental needs justifies suspicionless, warrantless searches ignores the historical justification of the Fourth Amendment. The Fourth Amendment is intended to protect citizens against overzealous government surveillance.

We do not permit a search of every house on a block merely because there is reason to believe that one contains evidence of criminal activity. No prohibition more significantly distinguishes our democracy from a totalitarian government than that which bars warrantless searches and seizures . . . . We would not condone the beatings of suspects and the admissibility of their confessions merely because a larger number of convictions resulted.\footnote{255}

Therefore, it seems reasonable, indeed necessary, that society guard against governmental behavior that completely undervalues individual rights to ensure particular policy goals.

However, utilizing the special needs rationale, the Supreme Court seems willing to impose harsh regulatory policies on society. Now that the special needs rationale has been expanded to uphold suspicionless searches of both property and people, there is little protection left in the Fourth Amendment. Given the logic of the special needs rationale, it is possible, perhaps likely, that the courts could utilize it to accept the constitutionality of virtually all administrative search schemes. It is not inconceivable that the courts could even weave the special needs rationale into one of the Fourth Amendment warrant exceptions in criminally-related searches. Precedent for this already exists since in \textit{Burger} the special needs rationale

\footnote{253. \textit{Id.} at 1511.}
\footnote{254. \textit{Id.}}
\footnote{255. \textit{Id.}}
allowed police to engage in a suspicionless junkyard search that led to a criminal prosecution.

The special needs rationale opens a Pandora's box by which the essential ingredient justifying a search, probable cause, is being systematically eroded. Whenever a court wishes to ignore individual privacy rights, it now merely has to invoke the special needs rationale.

Applying the special needs rationale to searches of premises is itself a threat to Fourth Amendment protections. However, expanding it to justify suspicionless searches of a person is “unprincipled and dangerous.”\(^2\) It conceivably reduces Fourth Amendment analysis to allow virtually any administrative search merely because a court views a particular policy more significant than individual privacy claims. Individual privacy claims will inevitably lose this type of balancing test, for it is rare when individual behavior is perceived as more important than the burdens forced on the public by the cumulative effect of the individual behavior. However, the special needs rationale institutionalizes the view that individual behavior must summarily concede to the public interest. Undervaluing individual behavior in favor of the public interest is completely at odds with the purpose of the Fourth Amendment.

VII. UTILIZING STRICT SCRUTINY TO RESTORE THE FOURTH AMENDMENT

From judicial treatment of the special needs rationale, it is becoming increasingly apparent that if Fourth Amendment protections are to be restored, strict scrutiny and least intrusive analysis must guide Fourth Amendment special needs cases. Several commentators have offered variations of these analytical approaches as a means to counteract judicial acceptance of the rational basis approach to special needs cases.

One commentator, Scott Sundby, posits a model that would first classify government’s investigation as two distinct types of searches: responsive and initiatory.\(^2\) Responsive searches would only ensue after government determines that


individualized suspicion already exists. Initiatory searches
would take place if waiting for individualized suspicion could
frustrate government from pursuing legitimate objectives.  

However, before government could engage in an initiatory
search, it would be required to demonstrate that grave public
harm would likely result in the absence of a proposed search
and that the particular search scheme was the least restrictive
possible scheme.  

This format seems inherently logical as a
means to control arbitrary government action without cripp-
ing government's ability to engage in legitimate activities.
While critics of the plan may argue that the scheme enables
government to initiate a search that would likely be unaccept-
able if probable cause was first required, government is sad-
dled with the burden to prove, not merely assert, that impor-
tant governmental objectives would be jeopardized in the ab-
sence of the search scheme. This strict scrutiny variation cre-
ates a balancing test that, unlike the special needs rationale,
does not relegate individual Fourth Amendment rights to neg-
ligible status. Indeed Sundby's model maximizes both govern-
mental and individual interests.

Similarly, Strossen poses a least intrusive alternative analy-
sis model for Fourth Amendment balancing.  Strossen ar-


gues that least intrusive analysis should govern judicial inquiry
of a proposed government search unless government can
prove that a search's benefits exceeds its costs, and that there
is no significantly less intrusive alternative to substantially
achieve government's goals. Specifically, unless the state
could demonstrate the absence of less intrusive alternative
measures, it should not be permitted to engage in mass or ran-
don detentions, investigations, or any particularly intrusive
search with less than probable cause.

These scholars recognize that it is vital for Fourth Amend-
ment analysis to be framed within a strict scrutiny perspective.
While efficient and effective government are desirable goals,
those ends do not justify any means. The Supreme Court has
long recognized that the Fourth Amendment is a fundamental

258. Id. at 418, 425.
259. Id. at 431.
260. See Strossen, supra note 5, at 1254.
261. See Strossen, supra note 5, at 1257.
262. See Strossen, supra note 5, at 1261.
freedom deserving strict scrutiny analysis. Only recently has it retreated from this premise. While there may be some logic to Fourth Amendment balancing as envisioned in *Terry* and *Camara*, the Supreme Court has dangerously erred by substituting rational relationship analysis for strict scrutiny analysis in Fourth Amendment balancing. By doing so, it has relegated Fourth Amendment protection to minor constitutional status and has seriously subjected citizens' Fourth Amendment privacy rights to arbitrary and capricious governmental invasions. The Supreme Court could easily analyze the reasonableness of special needs searches within one of the existing warrant exceptions already developed. Before government can so intimately intrude on the dignity of its citizens, it should be forced to demonstrate a compelling government interest far in excess of mere administrative efficiency.

Had the lower court judges who accepted the special needs formulation employed a strict scrutiny approach when judging drug and AIDS testing programs, they would have been forced to confront the obvious discrepancies in their logic. First, judges would more likely require demonstrable evidence that positive drug tests correlate with on the job impairment. For example, one may have used marijuana or cocaine weeks ago and not be affected on the job the day of an accident, while one's previous evening's alcoholic binge, creating a job-performance-impairing hangover the next day that contributed to an accident, might go undetected. In essence, the special needs rationale silences any intelligent discussion pertaining to the real causes of work related inefficiency. Second, justifying the special needs rationale for deterrent purposes silences debate between the likelihood that drug use will permeate an employment sector currently free of drug abuse and employee privacy rights curtailed as a result of the test. It simply is not reasonable to assume that a work force, filled with employees whose values repulse them toward drug abuse,

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263. See *Wolf v. Colorado*, 338 U.S. 25 (1949). In *Wolf*, the Supreme Court incorporated the Fourth Amendment's ban on unreasonable searches and seizures into the due process clause of the Fourteenth Amendment. The logic of incorporation suggests that only those liberties contained in the Bill of Rights that are indispensable to the concept of ordered liberty should be incorporated. As evidenced by its decisions in *Boyd v. United States*, 116 U.S. 616 (1886) and *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court has viewed the essence of the Fourth Amendment as an indispensable component of ordered liberty.
will suddenly resocialize themselves to become drug abusers. Assuming that drug abuse could permeate a sector, while possible, is no more likely than an endless array of potentialities of human conduct and is sufficiently remote not to justify wholesale intrusions on individual privacy.

Last, government can use the special needs rationale to stretch the reach of drug testing to absurd limits. For example, in the name of safety and deterrence, should the Department of Transportation drug test postal carriers who routinely drive postal trucks? Should the test extend to the mechanics who work on the truck's brakes, to the employees who make the brake shoes? Utilizing a strict scrutiny approach will require judges to make more sensible and realistic judgements about whether an employee's potential harm to society is real or remote. By utilizing a strict scrutiny approach, government would be required to prove its assertion that some evil will or may be prevented as a result of a drug test.

VIII. CONCLUSION

This article's thesis argues that the Supreme Court, in its zeal to ensure efficient and effective government service delivery, has taken the Fourth Amendment perilously close to incomprehensible disarray. By developing the special needs rationale and expanding it to justify suspicionless governmental intrusions into citizens' private lives, the Supreme Court is developing Fourth Amendment law that is anathema to the cherished principles of liberty our forefathers defended.

With David Souter and Clarence Thomas replacing retired Justices William Brennan and Thurgood Marshall, the conservative majority that emerged in the 1989 term will likely become more pronounced in the 1990s. If these justices embrace a conservative judicial philosophy, fundamental constitu-

264. The author assumes future Supreme Court replacements will likely have a more moderate judicial ideology than Justices Brennan and Marshall. Assuming the nation's political climate does not take a radical and quick shift back to a dominant liberal political climate, it appears unlikely that either a Democratic or Republican president will replace these two justices with justices who are equally liberal. Any justice more moderate than Marshall and Brennan will certainly augment the newly emergent conservative majority now comprised by Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy and Souter.
tional freedoms will continue to erode. What is troubling is not so much the policy orientation the Supreme Court is adopting; ideological debates are endemic among rational human beings. What is so troubling is the cavalier attitude the Supreme Court is taking while eliminating basic constitutional freedoms. It is the height of judicial irresponsibility to claim, as the Supreme Court does when it adopts the special needs rationale, that the only defense of a governmental program is based on the justification that when a problem is so bad, government can adopt means that would normally be ruled unconstitutional. Perhaps such reasoning can be reconciled under extremely adverse conditions, such as a state of war or imminent catastrophe, but certainly not for problems that are not so severe they do not endanger civil government. To admit, as the Supreme Court does in Von Raab and Skinner, that suspicionless searches would not pass traditional Fourth Amendment analysis, but allow the searches anyway because special governmental needs justify any methods to detect and deter drug use, is intellectually and constitutionally indefensible.

If the judiciary continues to expand the special needs rationale, government will surely become more efficient. Problems could more quickly be addressed. Yet it would be sadly ironic if, in the name of efficient government, the public allows the judiciary, which it entrusts with protecting constitutional principles from tyrannical governmental action, to deny the broad applicability of basic Fourth Amendment constitutional principles. If constitutional principles continue to erode, governmental invasions on society will expand and at some point may spur society to demand more governmental sensitivity to basic, constitutional principles. Until then, it seems paradoxically sad that society is willing to let its freedoms slowly erode until, one day, the cumulative effect of the erosion will become so suddenly pronounced that society will condemn the Supreme Court's insensitivity to the Constitution. As the guardians of the Constitution, the judiciary, especially the Supreme Court, should have enough courage to base its decisions on solid constitutional analysis. Law and the integrity of American citizens demand no less. The special needs rationale is a doctrine standing on a tenuous intellectual basis and as such should not be the basis for constitutional doctrinal development. In an age where technology and government can
team together to probe citizens far beyond the imagination of our Framers, strict scrutiny should be the operative model to judge all Fourth Amendment challenges. Anything less will certainly erode citizens' ability to make individual judgments related to the pursuit of life, liberty and property.