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SUSPICIONLESS DRUG TESTING AND CHANDLER v. MILLER: IS THE SUPREME COURT MAKING THE RIGHT DECISIONS?

During the last decade, the United States Supreme Court has rendered four major decisions regarding the validity of suspicionless drug testing policies. Such drug testing policies have become a common way for employers and other interested parties—including the government—both to deter the use of drugs and to determine who is acting under the influence of illegal narcotics. Because government officials often randomly select individuals for drug testing, some of these individuals have charged that a governmental drug testing policy violates the Fourth Amendment. The Supreme Court found this argument unconvincing in three cases decided between 1989 and 1997, but in its most recent decision the Court found the argument persuasive and struck down the drug testing policy in question. This Note will explain how the Supreme Court's most recent drug testing decision fails to follow established—and unrenounced—Supreme Court precedent.

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"'The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'"\(^1\)

INTRODUCTION

Illegal drug use is a pervasive and deadly problem in the United States. Although a 1994 study by the National Institute of Drug Abuse indicated that drug use was declining, a 1995 survey conducted by the same organization found that "an estimated 12.8 million Americans had used an illegal drug in the past month."\(^2\) During the 1980s, private companies began implementing drug testing policies in an attempt to curb drug use in the workplace;\(^3\) and in 1986, President Ronald Reagan issued an Executive Order\(^4\) requiring drug tests for approximately 400,000 federal employees.\(^5\) Because a relatively large number of people use illegal narcotics,\(^6\) many

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1. Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997) (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). This warning should apply not only to local, state, and federal executive and legislative branches, but to the judiciary as well.
3. See id. Private employers are not subject to all of the constitutional restraints with which the federal government must comply. Although constitutional questions arise from private sector drug testing policies, such questions are not based on Fourth Amendment violations, and this Note will not address them.
5. See Hill, supra note 2, at 19.
6. See id. ("[T]he National Institute of Drug Abuse ("NIDA") found that while drug use was declining, 1.3 million Americans had used cocaine in the last month, 1.2 million had
governmental, non-governmental, and quasi-governmental entities have endeavored to implement a drug testing policy to ensure that individuals using such narcotics are not in a position to endanger others or to encourage them to use drugs.\(^7\) Although in many instances the Court has declined to review such policies,\(^8\) this Note will analyze the circumstances in which the Court reviewed the constitutionality of suspicionless drug testing policies. Part I of this Note provides a brief analysis of the Fourth Amendment.\(^9\) This section first will identify what constitutes a search or seizure and the reasons drug testing may qualify as such.\(^10\) It will identify the reasons why the Court normally requires that both a warrant and probable cause support a


\(^8\) See supra note 7.

\(^9\) U.S. CONST. amend. IV ("The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

\(^10\) See United States v. Jacobsen, 466 U.S. 109 (1984) (holding that there is no expectation of privacy in information revealed by a chemical test if such information reveals only the existence of contraband). But cf. Skinner v. Railway Labor Exec. Ass’n, 489 U.S. 602, 617 (stating that because the chemical testing of urine can reveal private information, such as epilepsy or pregnancy, it must be considered a search). Because the Court has deemed that a drug test is a search, there is no need to analyze here the reasons why a drug test could be considered a seizure as well. See infra note 22.
Finally, Part I explains the special needs balancing test used by courts to decide suspicionless drug testing cases.

The Supreme Court has decided four important suspicionless drug testing cases: National Treasury Employees Union v. Von Raab,\textsuperscript{12} Skinner v. Railway Labor Executives' Ass'n,\textsuperscript{13} Vernonia School District 47J v. Acton\textsuperscript{14} and, most recently, Chandler v. Miller.\textsuperscript{15} These cases form the framework for an analysis of the Supreme Court's treatment of suspicionless drug testing policies. Part II of this Note describes the facts and conclusions of each case.

Part III of this Note examines why the Court in Chandler decided that the drug testing policy in question mandated a different result than those of the three previous Supreme Court drug testing cases.\textsuperscript{16} This section considers policy implications and legal theories, and examines the decisions of Justice Scalia to exemplify some of the Court's inconsistencies in its suspicionless drug testing doctrine. Part IV identifies the scope of the Chandler decision and explains how the Supreme Court, and some later commentators on Chandler, came to the wrong conclusion.\textsuperscript{17} This section also suggests guidelines for applying the Court's precedent to future cases involving suspicionless drug testing policies.

I. AN INTRODUCTION TO THE FOURTH AMENDMENT

A. What Constitutes a Search or Seizure?

The phrase "search and seizure" likely is one of the most recognizable clauses in the United States Constitution. It often is difficult to understand exactly what "search and seizure" means, however, because the phrase is stated in such a broad fashion in the text of the Fourth Amendment.\textsuperscript{18} Rather than a blackletter rule of law,
It is more an expression of a philosophy that grew out of offensive British procedures prior to the Revolution and was written into the fundamental law of the land by framers who hoped to assure that government must always respect the sanctity of the people and the effects they hold dear.  

This definition presents a valid theoretical purpose, but the practical difficulty with the definition is that it makes possible a number of different interpretations of Fourth Amendment applications.

The Fourth Amendment only applies when there is governmental action; private entities are not subject to the Amendment. When governmental action results in a search or a seizure, the Fourth Amendment is applicable. Perhaps the most controversial part of the Fourth Amendment is its prohibition against unreasonable searches and seizures, because it is unclear whether reasonableness or the

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19 SALTZBURG & CAPRA, supra note 11, at 34.

20 See New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) ("[T]he Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority.'" (quoting Burdeau v. McDowell, 256 U.S. 465, 475 (1921))).


[A] seizure [of an individual] occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." . . . The narrow question before [the Court] is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

Id. (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (emphasis added)). See also Soldal v. Cook County, 506 U.S. 56, 61 (1992) ("A 'seizure' of property, we have explained, occurs when there is some meaningful interference with an individual's possessory interests in that property." (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984))). But cf. Skinner, 489 U.S. at 617 n.4 ("It is not necessary . . . to characterize the taking of blood or urine samples as a seizure of those bodily fluids, for the privacy expectations protected by this characterization are adequately taken into account by our conclusion that such intrusions are searches.").

23 See U.S. CONST. amend. IV, supra note 9.
requirement of a warrant supported by probable cause should be the controlling factor in determining whether a search or a seizure is constitutionally valid. In any Fourth Amendment analysis, the Court also must address the issue of privacy. With regard to a search, the privacy issue is "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Suspicionless drug testing issues exemplify the tension between the warrant clause, the reasonableness clause, and the right to privacy.

B. The Warrant and Probable Cause Requirement

"Generally, a search, in order to be reasonable, must be carried out pursuant to a warrant based on probable cause." The number of exceptions that have developed to this seemingly simple rule have rendered it anything but simple, yet the rule remains the initial premise upon which courts base their Fourth Amendment analysis. The Court has indicated consistently that it is constitutionally preferable to conduct a search with a valid warrant than without. One of the reasons for the warrant preference is to ensure a search is based on the opinion of a neutral and

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24 See id. Some scholars of the Fourth Amendment believe that because the "unreasonableness" clause precedes the Warrant Clause, it should predominate and, therefore, a warrant should be required only in certain instances. See SALTZBURG & CAPRA, supra note 11, at 33. The Court, however, often has stated that there exists a presumption that a search or seizure is unreasonable unless the actor obtains a warrant. See, e.g., Payton v. New York, 445 U.S. 573 (1980) (holding that a warrant is required to enter a home for the purpose of making an arrest); Mincey v. Arizona, 437 U.S. 385 (1978) (holding that there is no "murder scene exception" to the warrant requirement). The Court has oscillated between applying the reasonableness clause and the warrant clause, and has created a middle ground of exceptions to the warrant clause. One such exception is the special needs exception, which requires a balancing test rather than a strict reasonableness or warrant test. See Gottlieb, infra note 33, at 28. The Court has leeway in determining how it will apply the Fourth Amendment in a given case. For a detailed discussion of the special needs application, see infra notes 33-41 and accompanying text.


27 Indeed, the warrant requirement has become "so riddled with exceptions that it [is] basically unrecognizable." California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

28 See, e.g., Arkansas v. Sanders, 442 U.S. 753 (1979) (stating that police had no justification for a warrantless search); Spinelli v. United States, 393 U.S. 410 (1969) (holding that police officer did not have sufficient information to support a warrant); Johnson v. United States, 333 U.S. 10 (1948) (finding that police had enough time and enough evidence to obtain a warrant and thus should have done so).
The primary reason for the warrant requirement, however, is that it establishes that there must be probable cause for the search in question. One of the most treasured rights an individual has is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." At the very least, a valid warrant declares there is an acceptable reason for intrusion into one's privacy, because a disinterested party made a determination that there was probable cause for the intrusion. The purpose of requiring a search warrant is "to guarantee a substantial probability that the invasions involved in the search will be justified by discovery of offending items." This is the reason the Court has discussed so thoroughly the requirements of a warrant and probable cause in drug-testing cases—ignoring them is no minor endeavor. These requirements are excused only for important and recognized exceptions; the Court's special needs doctrine is one such exception. As Part II of this Note will make clear, the Court in Skinner, Von Raab, Vernonia, and Chandler spent a great deal of time discussing why (or why not) the special needs exception applied to cases involving suspicionless drug testing policies.

C. The Special Needs Exception

In certain circumstances the warrant and probable cause requirements are inapplicable to the particular civil search in question. "[I]n determining whether a search is reasonable, the Court has employed a 'balancing' test, weighing the intrusion of the government practice against the government interest served by the program." The Court has been rather liberal in identifying civil searches that, although not supported by warrant or probable cause, were nevertheless constitutional because of the existence of special needs. The Court fashioned the

29 See Illinois v. Gates, 462 U.S. 213 (1983) (agreeing that magistrate relied on the totality of the circumstances in issuing a warrant); Spinelli, 393 U.S. 410 (finding that magistrate took a common sense approach in evaluating an application for a warrant to determine reasonableness of proposed search). But cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (holding that an executive officer was not a neutral and detached magistrate); United States v. Decker, 956 F.2d 773 (8th Cir. 1992) (explaining that magistrate was not neutral and detached when he issued a warrant without reading the application for said warrant).
32 See infra notes 42-103 and accompanying text.
special needs balancing test because "the traditional requirement of a warrant based on probable cause is not well-suited to searches for purposes as varied as enforcing school discipline, public safety, and administrative efficiency." The special need searches, however, cannot be for criminal law enforcement purposes; if officials seek to use this evidence in criminal proceedings, they generally need a warrant or probable cause. Thus, if the government has a compelling interest that outweighs the individual’s privacy expectations, and the government’s interest is for purposes other than that of criminal law enforcement, then courts may rely upon the special needs exception to affirm the constitutional validity of a search.


35 SALTZBURG & CAPRA, supra note 11, at 299.
36 See id.
37 See Vernonia, 515 U.S. at 653 (“We have found such ‘special needs’ to exist in the public-school context.”); Von Raab, 489 U.S. at 666 (“These substantial interests [to deter drug use and prevent the promotion of drug users], no less than the Government’s concern for safe rail transportation at issue in Railway Labor Executives, present a special need that may justify departure from the ordinary warrant and probable-cause requirements.”); Skinner, 489 U.S. at 619 (“When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”); International Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Reg. Comm’n, 966 F.2d 521, 525 (9th Cir. 1992), cert. denied, 498 U.S. 1083 (1991) (“‘[T]he usual Fourth Amendment requirements of a warrant and probable cause do not necessarily apply in the drug testing context.’” (quoting Bluestein v. Skinner, 908 F.2d 451, 455 (9th Cir. 1990)); Hartness v. Bush, 919 F.2d 170, 172 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991) (“[Drug testing] does not require a warrant, a probable cause, or any level of individualized suspicion . . . but is instead governed by the balancing process weighing the interests of the government qua employer against the privacy interests of the employees.”). But cf. Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997) (“The need revealed, in short, is symbolic, not ‘special,’ as that term draws meaning from our case law.”).
suspicionless drug testing cases are similar in nature to administrative search cases, "and thus it is not surprising that the infrequent litigation on this subject has drawn upon the Supreme Court’s business inspection cases." The Court’s decision in New York v. Burger is useful both for identifying the rationale for warrantless administrative searches and for revealing the similarities to warrantless drug testing.

The Court has made a concerted effort, albeit one marked by inconsistencies, to delineate what is necessary for a drug testing program to be constitutional; in its case law, the Court’s decisions have turned on the applicability of the special needs exception to the Fourth Amendment. Although the merits of the special needs exception are questionable, the Court nevertheless is obligated to apply the special needs test consistently. The Court failed to do so in Chandler.

II. CREATING AN INCOHERENT FRAMEWORK—DETERMINING THE CONSTITUTIONALITY OF SUSPICIONLESS DRUG TESTING POLICIES

A. Skinner v. Railway Labor Executives' Ass’n

Skinner and its companion case, National Treasury Employees Union v. Von Raab, involved the constitutionality of suspicionless drug testing by public agencies. In Skinner, a number of railroad labor groups protested the Federal Railroad Administration’s (“FRA”) requirement that employees be subjected to blood or urine tests after being involved in major train accidents or after having

Raab, 489 U.S. at 679 (“We hold that the suspicionless testing of employees is reasonable.”); Skinner, 489 U.S. at 624 (“In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”).

4 LAFAVE, supra note 21, at 446.

40 482 U.S. 691, 702-03 (1987). The Court stated:

This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a “substantial” government interest. Second, the warrantless inspection must be “necessary to further [the] regulatory scheme.” Finally, “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.”

Id. (citations omitted). The important government interest versus privacy interests distinction echoes the drug testing constitutionality requirements.

This Note is not intended to address the problems inherent in the special needs test. In one of this Note’s recommendations, however, some of the specific problems with the special needs test are identified. See infra notes 249-59 and accompanying text. Although the problems of application may lie with the test itself and not with the failure of the Court to apply it correctly, the Court nevertheless remains responsible for inconsistent application of the test while rendering its decisions.


violated particular safety rules. The FRA used statistics to show that forty-two fatalities and sixty-one injuries between 1972 and 1983 were attributable to employees who had been under the influence of alcohol or drugs. These statistics indicated that substance abuse was an identifiable problem in the railroad industry. In 1985, the FRA, in response to these statistics, implemented a program that required any employee involved in a major train accident which caused either a fatality, the release of hazardous material, or railroad property damage in excess of $500,000, to provide blood and urine samples for testing. The Railway Labor Executives’ Association brought suit to prevent such samples from being taken.

The United States District Court for the Northern District of California upheld the FRA’s position, and stated that the government’s interest in both the safety of its employees and the general public outweighed the privacy interest in one’s own body. The Ninth Circuit Court of Appeals reversed and held that the taking of blood and urine samples constituted a Fourth Amendment search that, while not necessarily requiring a warrant or probable cause, did require particularized suspicion to be constitutionally valid. The Supreme Court granted certiorari and assumed the task of defining how to apply the requirements of the Fourth Amendment to a mandatory drug testing policy for certain predetermined actions. This was an issue of first impression for the Court, and the 6-1-2 decision to reverse and allow the suspicionless drug testing failed to provide anything other than general theories upon which to rely in future cases. This failure fostered the lack of continuity which has characterized the Court’s suspicionless drug testing doctrine.

The Court dismissed the FRA’s claim that the railroad regulations were a “private initiative” and thus not subject to the Fourth Amendment. The Court further stated that the Fourth Amendment would have applied if the regulation had been promulgated by a private party acting as an agent of the government. After an extensive analysis of case precedent, the Court determined that both the taking and the testing of blood and urine samples constituted searches as defined under the Fourth Amendment. The Court then acknowledged it could dismiss the warrant and

44 See Skinner, 489 U.S. at 602.
45 See id. at 607.
46 See Skinner, 489 U.S. at 609-10.
47 See id. at 612.
48 See id. at 612-13. See also Railway Labor Exec. Ass’n v. Burnley, 839 F.2d 575 (9th Cir. 1988), rev’d sub nom. Skinner v. Railway Labor Exec. Ass’n, 489 U.S. 602 (1989) (holding that individualized suspicion was necessary because only “the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis” for discipline.) Id. at 589.
49 For an examination of Fourth Amendment issues, their relevance, and the Court’s unique application of Fourth Amendment tenets in its drug testing cases, see supra notes 18-41 and accompanying text. For a more in-depth analysis, see 1-5 LAFAVE, supra note 21.
50 See infra notes 104-64 and accompanying text.
52 Id.
53 See Skinner, 489 U.S. at 616-18; see also supra note 22.
probable cause requirements of the Fourth Amendment if special needs made them inapplicable.\textsuperscript{54} Balancing the privacy rights of the individual with the compelling interest of the government, the Court held that the special needs exception applied because the intrusions created by drug testing were minimal compared to the safety concerns underlying the FRA’s drug testing policy.\textsuperscript{55} The Court thus deemed the drug testing policy constitutionally valid and, in doing so, tentatively established a framework for deciding drug testing cases. Justice Scalia joined the \textit{Skinner} majority in finding the drug testing policy legally permissible, but determined that the same analysis required a different result in \textit{Skinner}'s companion case, \textit{Von Raab}, in which he dissented.\textsuperscript{56}

B. National Treasury Employees Union v. Von Raab\textsuperscript{57}

\textit{Von Raab}, the companion case to \textit{Skinner}, involved similar issues. The public employees under scrutiny in \textit{Von Raab} were employees of the United States Customs Service, an agency administered by the Department of Treasury. The Customs Service has a number of different responsibilities, but the duty in question in \textit{Von Raab} was the interception of contraband that included, but was not limited to, illegal drugs.\textsuperscript{58} In May 1986, Customs Service Commissioner William Von Raab implemented a drug testing program for all employees who were to be promoted or hired to serve in positions that involved drug interdiction, the carrying of firearms, or the handling of classified material.\textsuperscript{59} The National Treasury Employees Union brought suit to prevent the program from taking effect.

The United States District Court for the Eastern District of Louisiana granted the Union’s motion for an injunction because “the drug testing plan constitute[d] an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy.”\textsuperscript{60} The Fifth Circuit

\textsuperscript{54} \textit{See id.} at 619.
\textsuperscript{55} \textit{See id.} at 634.
\textsuperscript{56} While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place. . . . By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct. \textit{Id.} at 629-30.
\textsuperscript{58} \textit{489 U.S. 656 (1989).}
\textsuperscript{59} \textit{See id.} at 659-60 (citing United States Customs Service, Customs U.S.A., Fiscal Year 1985, p.4).
\textsuperscript{60} \textit{Id.} at 660-61.
reversed, holding that the government had a "strong interest" in implementing such a policy. The Supreme Court affirmed the Fifth Circuit's decision in part and held, in a 5-4 decision, that the drug testing program was constitutional as it applied to those employees involved in drug interdiction and those who were required to carry firearms. It vacated the Fifth Circuit's ruling to the extent that it applied to employees who handled classified materials, and remanded the case to the District Court.

The Court clearly was less certain about the decision in this case than it was in Skinner, as indicated by the divided Court, the two dissenting opinions, and the holding that affirmed the drug testing policy in part, vacated it in part, and remanded the case for further proceedings. It is interesting to note that Justice Scalia, who agreed with the majority in Skinner, not only changed sides in Von Raab but authored one of the two dissenting opinions. Part III of this Note discusses Scalia's about-face, and its significance to the Court's suspicionless drug testing doctrine.

The Court in Von Raab used much of the same precedent and much of the same reasoning as it did in Skinner. In fact, the very first sentence of Part II of the Von Raab opinion referred to the Skinner holding and used that decision to support the view that "it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment." The Court determined that the required urinalysis amounted to a search, again dismissed the usual Fourth Amendment requirements of warrant and probable cause, and then engaged in special needs balancing to determine that the drug testing program was constitutional under the Fourth Amendment. The Court did not require that there be a specific showing

La. 1986)). The Ninth Circuit took a similar position in its decision in Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). The confusion that existed (and still exists to a certain extent) regarding drug testing programs was possibly one of the reasons the Court granted certiorari in Skinner and Von Raab.

Von Raab, 489 U.S. at 664. The Fifth Circuit used a balancing test that nearly was identical to the one the Court used in Skinner, and the same test was ultimately applied by the Court in Von Raab.

See id. at 677.

See id. at 664-65.

See id. at 679.

See id. at 680 (Scalia, J., dissenting) ("In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."). The majority in Von Raab did not agree with Scalia's symbolism argument, but this line of argument became the foundation for the majority decision eight years later in Chandler. See Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997).

See infra notes 158-64 and accompanying text.


Id. at 665. The Court relied on Skinner to a substantial degree in deciding Von Raab, most likely to provide the lower courts with a consistent framework for reviewing drug testing policies. The Court's degree of success is questionable. See infra notes 104-64 and accompanying text.

See id. at 666-68, 670-72. In supporting its argument, the Court stated:
of drug-related problems with Customs Services employees. It determined, however, that the program, as applied to employees who handled classified information, was overbroad and thus unconstitutional.

C. Vernonia School District 47J v. Acton

Six years passed before the Supreme Court next addressed a drug testing policy. Both the focus and forum were different than in previous cases—a school system, rather than the federal government, implemented the policy, and the persons subject to the drug testing were student athletes rather than public employees.

The Vernonia School District noticed a rise in drug use in schools that was encouraged by its student athletes. To counteract the problem, the District initiated a program that would require randomly selected athletes to submit to drug tests. Acton, a seventh-grade student, objected to the drug testing program as a violation of the Fourth and Fourteenth Amendments. The Oregon District Court dismissed the suit, but the Ninth Circuit reversed and held that the program did violate the Fourth and Fourteenth Amendments. The Supreme Court granted certiorari to review the claims asserted by Acton, and it issued a 5-1-3 opinion. Despite his Von Raab dissent, Justice Scalia not only sided with the majority, but authored the opinion. He used the same framework and analysis relied upon by the majorities in Skinner and Von Raab.

It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Additionally, the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.

Id. at 670-71.

See id. at 673-74. This is an important point because the Court in Skinner partially relied on the statistical existence of a problem in rendering its decision. After Von Raab, an existing problem does not need to be identified if the government interest is sufficiently compelling to outweigh the privacy interests of the individual.

See id. at 678. Although the Court did indicate that employees who handle "sensitive" information could be required to submit to a drug test, the application of the program at issue in Von Raab to "Co-op Students" and "Animal Caretakers" was likely the basis for characterizing the program as overbroad. See generally Department of the Navy v. Egan, 484 U.S. 518 (1988) (discussing the review procedures for an employee who holds a "sensitive" position).


See id. at 649.

See id. at 650.

See id. at 651.

See id. at 652.

See id. at 647.

The Court recognized that the drug testing policy in question resulted in "a 'search' subject to the demands of the Fourth Amendment." It then addressed the warrant and probable cause issue and, just as in *Skinner* and *Von Raab*, found that although the suspicionless drug testing policy did not meet either requirement, it nevertheless could be constitutional if it could pass the Court's special needs balancing test. The Court held the government did have a compelling interest in ensuring that school athletes were drug-free, citing clinical journals and articles which reported the problems of adolescent drug abuse. Although it recognized particularized suspicion was preferable in the Fourth Amendment context, the Court once again found that the governmental interest outweighed an individual's right to privacy.

D. Chandler v. Miller

The *Chandler* decision was the fourth case regarding a drug testing program for which the Supreme Court granted review. Unlike the three preceding cases, however, the Court in *Chandler* did not agree with the testing policy in question.

Two years after the *Vernonia* decision, in which the Court expanded the rationale for suspicionless drug testing by applying it to public schools, the Court in *Chandler* examined the constitutionality of yet another forum for drug testing: state political office. In 1990, the Georgia legislature implemented a statute that required "candidates for designated state offices to certify that they have taken a drug test and that the test result was negative." In order to satisfy the requirements of the statute,

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79 *Vernonia*, 515 U.S. at 652.

80 See id. at 653. The Court previously had determined that special needs existed in public schools, and found that requiring a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and 'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.' *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985)).

81 See id. at 662. The Court remarked upon the State's duty to help the nation's children live drug-free lives, stating that "the necessity for the State to act is magnified by the fact that this evil [drug use] is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Id.*

82 See id. at 665 ("We find insufficient basis to contradict the judgment of *Vernonia*'s parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.").


85 See *Chandler*, 117 S. Ct. at 1304-05. Whether the Court was successful in presenting its rationale for the decision is addressed infra notes 104-240 and accompanying text.

86 See id. at 1298.

87 *Id.* The statute required the following state officers to submit to the test:

[The Governor, Lieutenant Governor, Secretary of State, Attorney General,
each candidate was required to present a special certificate from a state-approved laboratory that stated that the candidate was not using illegal drugs.88 Petitioners were candidates for the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the General Assembly, who challenged the statute as a violation of the First, Fourth, and Fourteenth Amendments.89

In 1994, the District Court for the Northern District of Georgia denied the candidates' motion for a preliminary injunction and, in 1995, entered final judgment upholding the drug testing policy.90 The Eleventh Circuit affirmed, stating the statute served special needs and that it was necessary to "balance the individual's privacy expectations against the Government's interests to determine whether it [was] impractical to require a warrant or some level of individualized suspicion in the particular context."91 The Court of Appeals determined that individualized suspicion was impractical, and relied heavily on Supreme Court precedent in making that determination.92 The Supreme Court granted certiorari and reversed in an 8-1 decision.93

Typical of its past approach to drug testing cases, the Court began its analysis "with an uncontested point: Georgia's drug-testing requirement, imposed by law and enforced by state officials, effects a search within the meaning of the Fourth and Fourteenth Amendments."94 Because the Georgia statute did not allow for a warrant based on probable cause, the Court proceeded to determine whether the law was based on special needs that would make it constitutional.95 Recognizing the drug testing policy mandated by the statute was "in line with our precedents most immediately in point: Skinner, Von Raab, and Vernonia,"96 the Court indicated it would focus on these cases to determine the constitutionality of the statute. After a

State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.


88 See Chandler, 117 S. Ct. at 1299.
89 See id.
90 See id.
92 See generally Chandler, 73 F.3d 1543.
93 Chandler, 117 S. Ct. at 1298.
94 Id. at 1300. The Court relied on drug testing precedent (primarily Skinner) to declare that any drug test is a search per se as defined by the Fourth Amendment. See supra note 22. Once the Court finds a search it then must determine if such a search was reasonable.
95 See id. at 1301. Again relying on Skinner, the Court in Chandler stated that "[i]n limited circumstances, where the privacy interests implicated . . . are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. (quoting Skinner v. Railway Labor Exec. Ass'n, 489 U. S. 602, 624 (1989).
96 Id.
cursory examination of these precedents, however, the Court determined that the drug testing policy at issue in Chandler did not qualify for the special needs exception because it was "symbolic, not 'special,' as that term draws meaning from our case law." The Court thus declared the statute facially unconstitutional.

Because the Chandler decision was so different from those in Skinner, Von Raab, and Vernonia, the Court had a responsibility to identify thoroughly either why it departed from established precedent or why this case was so different from its predecessors as to require the opposite ruling. Although the Court may have been on the right track by refusing to validate the "free-wheeling, fact-specific balancing of costs and benefits" required by the special needs test, Parts III and IV of this Note will identify the reasons why the Chandler decision is legally unsupportable in light of established precedent.

It is also relevant that Justice Scalia (who voted to uphold the drug testing policy in Skinner, to overturn in Von Raab, and to uphold in Vernonia) sided with the majority in Chandler to strike down the policy. The history of Scalia's decisionmaking is indicative of the constitutional confusion that drug testing policies often cause. Despite the 8-1 decision in Chandler, the near-unanimity of the Court does not eliminate the confusion surrounding the constitutionality of suspicionless drug testing.

III. CHANDLER V. MILLER—WHY A DIFFERENT RESULT?

In deciding Chandler, the Court acknowledged that drug tests are searches under the Fourth Amendment and, in order for such tests to be constitutional without a showing of individualized suspicion, they must satisfy the Court's special needs balancing test. The Court also declared that, in determining whether the special

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97 Id. at 1305. This rationale, and the reason it was flawed, will be discussed infra notes 104-64 and accompanying text.
98 If the Court had decided Chandler differently, it would have had to support its decision by relying on relevant precedent, by effectively distinguishing the relevant precedent, or by formally abandoning precedent to create new law. In Chandler, the Court ultimately was unable to rely on any of these theories and, thus, its decision lacked a solid legal foundation.
99 Silas J. Wasserstrom & Louis Michael Seidman, The Fourth Amendment as Constitutional Theory, 77 GEO. L.J. 19, 22 (1988). It may be true that "balancing tests are notoriously manipulable. For the very reason that they do not provide bright lines, they are subject to slippage when the Court is under political pressure to crack down on criminals." Id. at 48 (citations omitted). The Court has relied on special needs balancing in the past, however, to decide suspicionless drug testing cases. It was thus incumbent upon the Court to provide a better rationale for its Chandler decision.
100 See infra notes 104-259 and accompanying text.
needs exception applied, "[o]ur guides remain Skinner, Von Raab, and Vernonia."

Thus, to hold the special needs exception inapplicable to the drug testing policy in question, the Court had to distinguish Chandler from its previous decisions upholding drug testing policies. The Court was unsuccessful in doing so.

To support its departure from the traditional Fourth Amendment requirements of warrant and probable cause, the Court consistently has relied on the special needs exception. This "balancing method has permitted the Court to uphold warrantless searches without any degree of individualized suspicion of wrongdoing." Some commentators have commended the Court for its decision in Chandler, but have complained that there is still no concrete test for determining when the special needs framework applies. The Court's reliance on a test that is difficult to apply consistently likely contributed to the discrepancies present in the Chandler decision.

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105 Id. at 1303.
106 See The Supreme Court, 1996 Term—Leading Cases, 111 HARV. L. REV. 289 (1997) [hereinafter Chandler Comment] (reviewing the Chandler decision and its purported reliance on the special needs exception to the Fourth Amendment). See also supra notes 18-41 and accompanying text (discussing the requirements of the Fourth Amendment and the special needs exception).

Although the Court reached the correct result, the Chandler opinion is in many ways a step backwards rather than one forward. On one hand, Chandler marks the first time that the Court has applied a balancing test and yet concluded that the significance of the government's interests did not trump [sic] the individual's interest in privacy. . . . On the other hand, . . . the Court's application of a balancing test to determine reasonableness without first identifying a special need is devastating.

109 See infra notes 110-64 and accompanying text.
In *Chandler*, the issue was whether Georgia’s drug testing program qualified as a constitutionally acceptable special needs exception to the Fourth Amendment. The urinalysis required of particular candidates for political office clearly was a search, and because the search was not based on individualized suspicion, a special need was necessary to legitimize the search mandated by the state statute. The special need in *Chandler* had to identify a compelling, substantial, or important governmental interest that would justify an intrusion upon an individual’s right to privacy—the very same requirements that were imposed in *Skinner*, *Von Raab*, and *Vernonia*. The Georgia legislature satisfied both requirements: its statute called for a minimal intrusion upon an individual’s privacy in order to fulfill the compelling state interest that its political leaders be drug-free. Based on the requirements of the special needs test and the case law established by *Vernonia*, *Von Raab*, and *Skinner*, the Court in *Chandler* should have held the drug testing policy in question to be constitutional.

The Court discussed the procedural history of the case and stated a special needs exception was required for the program to be constitutional. The Court then examined the “precedents most immediately in point: *Skinner*, *Von Raab*, and *Vernonia*. The Court recognized that the railway employees in *Skinner* had a reduced expectation of privacy, and that the proposed urinalysis was minimally intrusive. When balanced with the “surpassing safety interests” of the state, the Court in *Skinner* stated that special needs were present in enough force to support a policy of drug testing without individualized suspicion. In *Von Raab*, there was

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10 See *Chandler*, 117 S. Ct. at 1301.
11 See supra notes 18-25 and accompanying text.
12 See supra note 38 and accompanying text.
13 See *Chandler*, 117 S. Ct. at 1303 (“Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”).
14 489 U.S. 602, 619 (1989) (“When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”).
15 489 U.S. 656, 665-66 (1989) (“Where a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”).
16 515 U.S. 646, 653 (1995) (“A search unsupported by probable cause can be constitutional, we have said, ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’” (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal quotation marks omitted))).
17 *Chandler*, 117 S. Ct. at 1301.
18 See id. (citing *Skinner*, 489 U.S. at 626-27).
19 Id. (citing *Skinner*, 489 U.S. at 634).
20 See id.
no demonstrated drug problem among the employees of the Customs Service, but the possibility that "illicit drug users in such high-risk positions might be unsympathetic to the Service's mission, tempted by bribes, or even threatened with blackmail" was enough of a special need for the Court to uphold the suspicionless drug testing policy. The Court upheld the drug testing policy in *Vernonia* because of "the importance of deterring drug use by schoolchildren," and noted that "students within the school environment have a lesser expectation of privacy than members of the population generally." It is important to highlight the various findings on which the Court claimed to rely in *Chandler*. The inconsistencies between those findings and the *Chandler* decision are inescapable.

To satisfy the special needs exception, the government must have a compelling reason to interfere with a protected privacy interest. The Court, in *Chandler*, addressed the privacy issues presented by the drug testing of candidates for political office, and found "the State could not be faulted for excessive intrusion." The Court also declared that the drug testing program in *Chandler* was similar to those approved by the Court in *Skinner*, *Von Raab*, and *Vernonia*. The Georgia

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121 *See id.* at 1302 (citing National Treas. Emp. Union v. Von Raab, 489 U.S. 656, 660 (1989)).
122 *Id.* (citing *Von Raab*, 489 U.S. at 668-71).
123 *Id.* (citing *Vernonia* Sch. Dist. 471 v. Acton, 515 U.S. 646, 661 (1995)).
124 *Id.* (quoting *Vernonia*, 515 U.S. at 657 (quoting New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) (internal quotation marks omitted))).
125 *See supra* notes 113-16.
126 *Chandler*, 117 S. Ct. at 1303.
127 489 U.S. 602, 627-28 (1989). After a "major train accident," all crew members and other involved employees are transferred to a medical facility where blood and urine samples are taken. The samples are then shipped to the Federal Railroad Administration (FRA) laboratory where they are analyzed for the presence of alcohol or other drugs. The FRA is required to notify the employees of the test results and give them "an opportunity to respond in writing before preparation of any final investigative report." *Id.* at 609-10. "More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety . . . . We conclude, therefore, that the testing procedures . . . pose only limited threats to the justifiable expectations of privacy of covered employees." *Id.* at 627-28.
128 489 U.S. 656, 663 (1989). An independent contractor sets the time and place for collecting the urine sample, and "a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination." *Id.* at 661. The sample is then sent to a laboratory where it is tested for the presence of drugs. Test results will not be turned over to any other agency without the employee's written consent. *Id.* at 662-63. "We think Customs employees . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. . . . [W]e do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders." *Id.* at 672.
129 515 U.S. 646, 650-51 (1995). Athletes are tested at the beginning of the season and, throughout the season, 10% are selected randomly for testing once a week. Each athlete must produce a urine sample while in the presence of a monitor, who listens "for normal sounds of urination." *Id.* The sample is then sent to an independent laboratory for analysis. If the
statute allowed a candidate to provide a urine specimen at the office of a private physician, and the candidate controlled whether the results would be released to the public or to any law enforcement agencies.\textsuperscript{130} The Court conceded the test did not burden the candidates’ privacy interests excessively, and then considered the issue of whether there was a compelling interest to support the minor infringement of the privacy interest.\textsuperscript{131} The remainder of Part III of this Note will illustrate that the drug testing policy in \textit{Chandler} was not distinguishable enough from those in \textit{Skinner, Von Raab,} and \textit{Vernonia} to warrant a different result.

Georgia defended its statute by stating that “the use of illegal drugs draws into question an official’s judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials.”\textsuperscript{112} The Court held that these were not compelling interests and stated there was no “concrete danger,”\textsuperscript{133} no “demonstrated problem of drug abuse,”\textsuperscript{134} and the state could detect only those “prohibitively addicted.”\textsuperscript{135} The Court attempted to support this statement with precedent by explaining that both \textit{Skinner} and \textit{Vernonia} involved policies directed at existing drug problems.\textsuperscript{136} The facts of \textit{Von Raab}, however, did not involve existing drug problems, and the Court acknowledged such problems were “not in all cases necessary to the validity of a testing regime.”\textsuperscript{137} The Court also failed to explain why the danger of a Customs Service official being bribed or becoming more susceptible to blackmail was a good reason to allow suspicionless drug testing in \textit{Von Raab},\textsuperscript{138} but the danger of impaired judgment of a potential state leader was insufficient to support drug testing in \textit{Chandler.}\textsuperscript{139} Additionally, the Court never explained why identifying “prohibitively addicted” candidates was not a compelling interest, and simply stated that ordinary law enforcement methods would be sufficient to control

results of the first test are positive for drugs, a second test is administered to confirm the result. Only specified school personnel have access to the test results. \textit{See id.} “Legitimate privacy expectations are even less [than the general student population] with regard to student athletes. . . . [Based on] the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia’s Policy is reasonable and hence constitutional.” \textit{Id.} at 661, 664-65.

\textsuperscript{130} \textit{See Chandler,} 117 S. Ct. at 1303.
\textsuperscript{131} \textit{See id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 1304 (explaining that, because of the opportunity to schedule the test any time—within thirty days of qualifying for the ballot—most drug users would be able to abstain long enough to avoid detection).
\textsuperscript{136} \textit{See id.} at 1303.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{See supra} text accompanying note 122.
\textsuperscript{139} \textit{See supra} text accompanying note 132.
any problems. One is left to wonder what methods states would employ so as to identify future political candidates with severe drug addictions.

The Court remarked that Georgia "overlook[ed] a telling difference between the facts of Von Raab and Georgia's candidate drug-testing program." The Customs Service did not subject employees in Von Raab to "the kind of day-to-day scrutiny that is the norm in more traditional office environments," while candidates for public office "are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments." This distinction, however, clearly indicates that candidates for public office have a diminished expectation of privacy similar to that of the public employees in Skinner and Von Raab, and the student athletes in Vernonia. The Court, again, proffered inconsistent arguments in Chandler by proclaiming that it relied on its suspicionless drug testing case precedent. The Court seemed to hold that a diminished expectation of privacy in Skinner and Vernonia lent support to a suspicionless drug testing policy. It then purported to rely on those decisions, however, in stating that the lesser degree of privacy enjoyed by political candidates in Chandler did not lend support to Georgia's suspicionless drug testing policy. The Court confused not only its precedent, but itself as well.

It is also unclear why the Court in Chandler relied on the holding of Vernonia if it wished to focus on "concrete danger." In Vernonia, there was no imminent danger of the kind addressed by the Court in Skinner and Von Raab—only a desire by the Court to address a drug problem that it found to be particularly detrimental to the health of student athletes. The Court apparently believed that the nation was

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140 See Chandler, 117 S. Ct. at 1304.
141 Id. at 1304.
142 Id. (quoting National Treas. Emp. Union v. Von Raab, 489 U.S. 656, 674 (1989)).
143 Id.
144 See Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 627 (1989) ("[T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety.").
145 See Von Raab, 489 U.S. 656, 672 (1989) ("We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy.").
146 See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) ("There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.").
147 See Chandler, 117 S. Ct. at 1303-04.
148 See also Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) ("A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." (emphasis added)).
149 Chandler, 117 S. Ct. at 1303.
150 See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) ("That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring
more interested in preventing student athletes from using drugs than it was in ensuring that its political leaders be drug-free. The Court in Chandler engaged in a line-drawing exercise, but its attempt to rely on Vernonia to do so made little sense.

In Skinner and Von Raab the Court focused on the "safety-sensitive" nature of the jobs performed by the persons subject to the drug testing policies as one of the reasons to uphold the policies. The policy at issue in Vernonia was constitutionally acceptable to the Court because it helped to eliminate the "role model' effect of athletes' drug use." The Court, however, did not rely upon either of these rationales in Chandler, nor did it effectively distinguish either rationale. Candidates for public office were attempting to place themselves in "safety-sensitive" areas, and the Court has acknowledged it is not a good idea to allow drug-influenced officials access to particular areas of the government. In striking down the drug testing policy in Chandler, the Court also stated that "[w]hat is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse." The Court held this, on its own, was an improper purpose, and thus refused to accept a role model rationale—despite having done so only two years before in Vernonia.

The special needs analysis by the Court does not support its conclusion that the special needs exception was not warranted in Chandler. The inconsistencies between the Chandler case and the decisions in Skinner, Von Raab, and Vernonia make the confusion which embodies this area of the law more evident. The Court supposedly

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152 See id.; see also National Treas. Emp. Union v. Von Raab, 489 U.S. 656, 668-69 (1989) (explaining that nine agents died while on duty).
153 Vernonia, 515 U.S. at 663. The Court indicated that, because "student athletes are admired in their schools and in the community" and are "the leaders of the drug culture," other students would be influenced to use illegal drugs. Id. at 648-49; see also Vernonia Sch. Dist. 47J v. Acton, 796 F. Supp. 1354, 1357 (D. Ore. 1992) (stating that athletes would have "a significant poisoning impact upon the broader student population").
154 See Skinner, 489 U.S. at 629; see also supra text accompanying note 151.
155 Cf. Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) ("[T]here is reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say." (quoting Cole v. Young, 351 U.S. 536, 546 (1956))). To allow an official on drugs to have the "final say" with regards to particularly sensitive matters clearly is not in the best interests of public safety or general well-being.
157 Vernonia, 515 U.S. at 663.
decided each of the four cases—Chandler, Vernonia, Von Raab, and Skinner—within
the special needs framework, which it then applied or not applied based on the facts
of each case. As Justice Scalia’s decisions make clear, consistently interpreting and
applying the special needs test in suspicionless drug testing is not an easy task for the
Court. It is a much more difficult chore for the lower courts, which are expected to
apply the Supreme Court’s muddled interpretations.

In Skinner, Justice Scalia agreed with the six-member majority in concluding a
suspicionless drug testing policy applicable to railroad employees served a
compelling governmental interest without undue intrusion into individual privacy
rights, and was therefore constitutional. In Skinner’s companion case, Von Raab,
Scalia argued that the drug testing policy was unconstitutional and authored one of
the dissenting opinions, stating that “[t]he only pertinent points, it seems to me, are
supported by nothing but speculation, and not very plausible speculation at that.”
Nevertheless, reliance on speculation served Scalia well when he authored the five-
member majority opinion in Vernonia six years later. In his Vernonia opinion,
Scalia devoted almost two full pages to the potential adverse effects of drug use, the
possibility of lawsuits, and the expanded roles of schoolteachers that would
materialize if the suspicionless drug testing policy was not upheld. Most recently,
Scalia joined seven other members of the Court in Chandler to strike down a Georgia
statute that allowed for suspicionless drug testing of candidates for political office.
Scalia apparently believed that the “symbolic” nature of this drug testing policy
clearly was distinguishable from his “role model” rationale in Vernonia. Scalia’s
decisions indicate that predicting the manner in which the Court will react to the next
suspicionless drug testing policy is difficult, if not impossible.

IV. AFTERMATH OF CHANDLER—WHERE DO WE GO FROM HERE?

The Supreme Court decided Chandler v. Miller on April 15, 1997. Since that
date, courts have distinguished the decision once, judicially examined it six
times, discussed it ten times, and cited it thirteen times. Although not all of

See Skinner, 489 U.S. at 602-34.

National Treas. Emp. Union v. Von Raab, 489 U.S. 656, 682 (1989) (Scalia, J.,
dissenting).

See Vernonia, 515 U.S. at 646-66.

See id. at 661-64.


Id. at 1305.

Vernonia, 515 U.S. at 663; see supra note 153 and accompanying text.


Pilkington Barnes Hind v. Sup. Ct., 77 Cal. Rptr. 2d 596, 599 n.4 (Cal. App. 1 Dist.
1998) (noting that the Chandler decision did not forbid suspicionless drug testing of job
applicants by a private employer).

See Knox County Educ. Ass’n v. Knox County Bd. of Educ., Nos. 97-5405, 97-5408,
1998 WL 663336, at *1 (6th Cir. Sept. 29, 1998) (stating that suspicionless drug testing of
school teachers and administrators was constitutional); 19 Solid Waste Dep’t Mechanics v.
City of Albuquerque, No. 96-2177, 1998 WL 646876, at *1 (10th Cir. Sept. 22, 1998) (asserting that suspicionless drug testing of employees applying for license renewal was not based on a special need); Willis v. Anderson Community Sch. Corp., No. 98-1227, 1998 WL 569114, at *1 (7th Cir. Sept. 9, 1998) (declaring that the school drug testing policy was not based on individualized suspicion and did not qualify for the special needs exception to the Fourth Amendment); Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998) (explaining that the special needs exception to the Fourth Amendment justified suspicionless drug testing of employees deemed to be in safety sensitive positions); Pierce v. Smith, 117 F.3d 866 (5th Cir. 1997) (holding that a suspicionless drug testing policy, as applied to a physician was constitutional as a special needs exception to the Fourth Amendment); New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 701 A.2d 1243 (N.J. 1997) (adopting the special needs balancing test to determine the constitutionality of random drug testing).

See DesRoches v. Caprio, No. 97-2173, 1998 WL 652338, at *3-*4 (4th Cir. Sept. 23, 1998), rev'd DesRoches v. Caprio, 974 F. Supp. 542, 547-48 (E.D. Va. 1997) (stating that individualized suspicion was required to search a student's backpack and that such individualized suspicion existed); United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853, 856 (5th Cir. 1998) (holding that a regulation requiring employees injured on the job to submit to a drug test did not qualify for the special needs exception to Fourth Amendment); Norwood v. Bain, 143 F.3d 843, 859-60, 862 (4th Cir. 1998) (Wilkins, J., dissenting) (asserting that special needs justified the search of motorcyclists' unworn clothing and saddlebags); Berthiaume v. Caron, 142 F.3d 12, 15 (1st Cir. 1998) (citing Chandler to support the argument that drug testing is a search within the meaning of the Fourth Amendment); Makula v. Village of Schiller Park, No. 95 C 2400, 1998 WL 246043, at *6 (N.D. Ill. Apr. 30, 1998) (granting partial summary judgment to plaintiff with regard to involuntary searches); Todd v. Rush County Sch., 983 F. Supp. 799, 805-06 (S.D. Ind. 1997), reh'g denied en banc, Todd v. Rush County Sch., 139 F.3d 517, 571-73 (7th Cir. 1998) (stating that evidence of drug use indicated a special need for a random drug testing policy for students participating in extracurricular activities); Trinidad Sch. Dist. No. 1 v. Lopez, No. 97SC124, 1998 WL 373305, at *13, *18 (Colo. June 29, 1998) (declaring that a suspicionless drug testing policy applied to students in extracurricular activities does not qualify for the special needs exception to the Fourth Amendment); State v. Zeta Chi Frat., 696 A.2d 530, 542-44 (N.H. 1997) cert. denied, 118 S. Ct. 558 (1997) (holding that random warrantless searches by a probation officer were constitutional); In re J.G., 701 A.2d 1260, 1265-67 (N.J. 1997) (declaring that state statutes requiring suspicionless AIDS testing of sex offenders was a constitutional special needs exception to the Fourth Amendment); Jaramillo v. City of Albuquerque, 958 P.2d 1244, 1246-47 (N.M. Ct. App. 1998) (holding that suspicionless drug testing of employees who were not operating heavy vehicles did not qualify for the special needs exception to the Fourth Amendment).

See Wilcher v. City of Wilmington, 139 F.3d 366, 374 (3d Cir. 1998) (holding that the city's method of random drug testing, as it pertained to firefighters, did not violate the Fourth Amendment); United States v. Ward, 131 F.3d 335, 342 (3d Cir. 1997) (explaining that a requirement for a defendant to submit to an HIV test did not violate his Fourth Amendment rights); Jones v. Bates, 127 F.3d 839, 853 (9th Cir. 1997), aff'g Bates v. Jones, 958 F. Supp. 1446, 1465 (N.D. Cal. 1997), cert. denied, 118 S. Ct. 1302 (1998) (holding that lifetime legislative term limits violated the First and Fourteenth Amendments); Lucero v. Trosch, 121 F.3d 591, 598 (11th Cir. 1997) (holding that some of the provisions enjoining anti-abortion protesters did not violate the First Amendment (citing Chandler v. Miller, 73 F.3d 1543,
these references to Chandler are relevant to this Note, the decisions rendered by the courts that have examined Chandler in detail indicate that the Chandler decision has not systematically precluded lower courts from finding suspicionless drug testing policies to be constitutional.\textsuperscript{170} Even though each of the six decisions analyzed below discuss Chandler, and likely could have relied on Chandler-style symbolism and lack of a compelling interest to strike down the particular drug testing policy, the majority of the courts in question relied on the Skinner-Von Raab-Vernonia rationale to uphold the policy. Since Chandler was decided, only two lower courts which examined that decision have chosen to rely on it to strike down the challenged drug testing policy before them.\textsuperscript{171}

Three months after the Supreme Court decided Chandler, the Fifth Circuit, in Pierce v. Smith,\textsuperscript{172} became the first court to thoroughly examine that decision. The plaintiff-appellee, Diane Pierce, was a medical resident at the Texas Tech University Health Science Center ("TTUHSC"), and was serving a two month rotation at St. Joseph's Hospital.\textsuperscript{173} After an incident in which she "hard slapped" an uncooperative patient, TTUHSC required Pierce to undergo psychiatric evaluations and a urinalysis.\textsuperscript{174} Pierce brought suit against TTUHSC officials. The District Court jury entered a verdict for Pierce based on the jury instruction that individualized suspicion

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\textsuperscript{170} See infra note 239.


\textsuperscript{172} 117 F.3d 866 (5th Cir. 1997).

\textsuperscript{173} See id. at 868.

\textsuperscript{174} Id. at 868-69.

\(\text{1546 n.3 (11th Cir. 1996))}; Johnson v. City of Harvey, No. 95 C 7687, 1998 WL 381702, at *8 (N.D. Ill. June 30, 1998) (holding that no special need existed to justify the search of a locker or the arrest of plaintiff); Dwan v. Massachusetts Bay Transp. Auth., No. CIV.A.95-12430-GAO, 1998 WL 151242, at *2 (D. Mass. Mar. 20, 1998) (explaining that a drug testing program for government employees need not require individualized suspicion to be constitutional); Medina v. City of Osawatomie, 992 F. Supp. 1269, 1278 (D. Kan. 1998) (finding that publication of plaintiff's status as a convicted felon did not violate his constitutional rights); Green v. Mortham, 989 F. Supp. 1451, 1454 (M.D. Fla. 1998) (stating that state requirements for appearance on an election ballot are not unconstitutional); United States ex rel. Felton v. Aliflex USA, Inc., 989 F. Supp. 259, 260 (Ct. Int'l Trade 1997) (relying on Chandler for the proposition that policymaking should be left to the legislatures); State v. Peters, 941 P.2d 228, 232 (Ariz. 1997) (stating that squeezing and sniffing of luggage was not an unconstitutional search); Cole v. State, 714 So. 2d 479, 489 (Fla. App. 2 Dist. 1998) (holding that the lower court lacked jurisdiction to enforce its drug abuse treatment order which violated defendant's due process rights); Reames v. Department of Pub. Works, 707 A.2d 1377, 1379 (N.J. Super. Ct. App. Div. 1998) (holding that a random drug testing policy was unconstitutional because had not established protocol for administering the test); State v. Yeargan, 958 S.W.2d 626, 627 (Tenn. 1997) (explaining that a police officer's decision to stop a vehicle was constitutional).
was required before a drug test could be mandated. The TTUHSC officials appealed the decision to the Fifth Circuit Court of Appeals.

The Fifth Circuit cited Skinner, Von Raab, Vernonia, and Chandler to support its holding that a urinalysis clearly was a constitutionally-protected search, and that, in order for such a search to be permissible, it must qualify as a special needs exception to the Fourth Amendment. The Fifth Circuit believed that "[p]lainly, this is a 'special needs' case. It is clear that the . . . challenged search [in Pierce] was 'not designed to 'serve the ordinary needs of law enforcement', . . . and no law enforcement personnel were in any way involved." The court held that after performing "a context specific inquiry, examining closely the competing private and public interests," there was no reason to require individualized suspicion for the drug test at issue in this case. The court held Pierce had a diminished expectation of privacy, and stated there was no need to show that there was a previously established drug testing policy in place in order for the special needs exception to apply. Accordingly, the Fifth Circuit reversed the District Court ruling and upheld the right of TTUHSC to require a urinalysis from Pierce.

One can only wonder how the Supreme Court would have decided this case. The Court likely would have acknowledged that the special needs test was appropriate, because the Court relied on that test in each of its four previous suspicionless drug testing cases. The Court also likely would have approved of the privacy analysis by which the Fifth Circuit determined that the intrusiveness of the drug test on

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175 See id. at 870.
176 See id.
177 See id. at 872-74.
178 Id. at 874 (citation omitted).
179 Id. at 877 (quoting Chandler v. Miller, 117 S. Ct. 1295, 1301 (1997)).
180 See id. at 874.
181 See id. at 879 ("[T]he presence of a testing policy would not have materially ameliorated the situation from the point of view of one in Dr. Pierce's position."). The fact that the Supreme Court never has addressed this question provides yet another example of how little guidance the lower courts have in deciding suspicionless drug testing cases.
182 See id. at 880.
183 See Chandler, 117 S. Ct. at 1301 ("When such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) ("We have found such 'special needs' to exist in the public school context."); National Treas. Emp. Union v. Von Raab, 489 U.S. 656, 665-66 (1989) ("[W]here a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impracticable to require a warrant or some level of individualized suspicion in the particular context."); Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987))).
Pierce's privacy was minor compared to the state interest in ensuring physicians are not under the influence of illegal drugs.\textsuperscript{184} Although the Court may have approved of the methods, however, it could have deemed the drug test in Pierce to be just as "symbolic" as the drug testing policy in Chandler.\textsuperscript{185} In Chandler, the Court exacerbated the problems of the already convoluted special needs test by failing to distinguish Chandler effectively from the other drug testing cases. Whether the Court would use the Skinner-Von Raab-Vernonia rationale and uphold a drug testing policy, or whether it would rely on the Chandler rationale and declare the policy "symbolic," is a question the lower courts must address with very little guidance from the Court.

Several months after the decision in Pierce; the New Jersey Supreme Court acknowledged Chandler in deciding New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.\textsuperscript{186} Pursuant to an established policy, all transit employees in "safety sensitive" functions were subject to random drug testing in order to "ensure that NJ TRANSIT operates in the safest and most efficient manner possible and to promote the safety and welfare of our employees and customers by creating a drug and alcohol-free workplace and ensuring that our employees are free from the effects of drugs and alcohol."\textsuperscript{187} The union representing the transit police brought suit, and claimed the testing was "an illegal search and seizure."\textsuperscript{188} The state trial and appellate courts each upheld the drug testing policy, and the case was appealed to the New Jersey supreme court.\textsuperscript{189}

The state supreme court, like the Fifth Circuit in Pierce, relied extensively on Skinner, Von Raab, Vernonia, and Chandler to hold that the drug testing policy in question was constitutional.\textsuperscript{190} The court agreed the special needs balancing test

\begin{itemize}
\item \textsuperscript{184} The Fifth Circuit referred to the Court’s primary drug testing decisions in concluding that the privacy intrusion was acceptable. See Pierce, 117 F.3d at 875 ("Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search . . . .") (quoting Vernonia, 515 U.S. at 663)); Id. at 875 ("[E]mployees [such as Pierce] ‘reasonably should expect effective inquiry into their fitness and probity.’") (quoting Von Raab, 489 U.S. at 671)); Id. at n.10 ("[R]ailway employers ‘by reason of their participation in an industry that is regulated pervasively to ensure safety’ had diminished expectations of privacy.” (quoting Chandler, 117 S. Ct. at 1301 (quoting Skinner, 489 U.S. at 627))).
\item \textsuperscript{185} Chandler, 117 S. Ct. at 1305 ("The need revealed, in short, is symbolic, not ‘special,’ as that term draws meaning from our case law.”).
\item \textsuperscript{186} 701 A.2d 1243 (N. J. 1997). The Fourth Amendment is applied in this case because the New Jersey Transit Corporation receives federal funding, thus making it subject to the federal Constitution.
\item \textsuperscript{187} Id. at 1246.
\item \textsuperscript{188} Id. at 1248.
\item \textsuperscript{190} See New Jersey Transit Corp., 701 A.2d at 1251-55.
\end{itemize}
should be adopted and applied in Pierce because the drug testing policy "limits the intrusion on transit officers' privacy interests, and . . . because of their law enforcement status, transit police officers have a diminished expectation of privacy." The court further held that "[t]he government also has a compelling interest in ensuring that its drug enforcement authorities are themselves drug-free." Finding the special needs test satisfied, the court affirmed the lower courts' holding that the drug testing policy did not violate the Fourth Amendment.

The New Jersey supreme court made a concerted effort to pattern its decision after Von Raab because random testing of customs officials and transit police officers raised similar concerns. The United States Supreme Court, as it likely would have done in deciding Pierce, probably would have approved of the court's focus on the special needs test and its application—but it is unclear whether the Court would have relied on Chandler or Von Raab to decide the case. The history of the Court's drug testing decisions provides little guidance with which to answer dilemma. The state supreme court decision was well-reasoned and grounded in unrenounced Court precedent, but the Court's Chandler decision makes even the most logical applications of suspicionless drug testing doctrine questionable.

After New Jersey Transit, over a year passed before the judiciary referred to Chandler with more than a footnote or several brief sentences. When the Fifth Circuit did so in Aubrey v. School Board of Lafayette Parish, the resulting decision echoed that same court's reasoning in Pierce. The court quoted extensively from Skinner, Von Raab, Vernonia, and Chandler, and stated that "unlike Chandler, the special need in this case is substantially more than symbolic or a desire to project a public image." In holding that the special needs exception to the Fourth Amendment was applicable, the court was influenced by the stated intent of the drug testing program to "prevent drug users from obtaining a safety sensitive position" and the "school system's role as a guardian." Although the lone dissenting judge

\[191\] Id. at 1258.
\[192\] Id. at 1259.
\[193\] See id. at 1259-60.
\[194\] See id. at 1257-59.
\[195\] See supra notes 183-84 and accompanying text.
\[196\] See Chandler, 117 S. Ct. at 1305.
\[197\] 148 F.3d 559 (5th Cir. 1998).
\[198\] Id. at 564.
\[199\] Id. at 563-64. The drug user in the "safety sensitive" position was a school custodian. Ironically, although the Supreme Court in Chandler held that Georgia's elected officials "do not perform high-risk, safety-sensitive tasks," see Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997), the Fifth Circuit in Aubrey was not at all deterred from holding that a custodian does perform such tasks because he "interact[s] regularly with students." Aubrey, 148 F.3d at 565.
\[200\] Id. at 564. The comparison with the decision in Aubrey and the rationale for the Court's decision in Vernonia is inevitable. The Fifth Circuit even stated that "the most significant element in both this case and Acton [Vernonia] is that 'the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.'" Id. (quoting Vernonia Sch. Dist. 47J v. Acton,
did not believe that the special needs exception was applicable;\(^{201}\) the majority was able to support its assertions by citing to the Supreme Court cases directly on point: \textit{Skinner}, \textit{Von Raab}, and \textit{Vernonia}. The court simply distinguished \textit{Chandler}. Once again, the \textit{Chandler} decision failed to influence a lower court’s determination of the constitutionality of a suspicionless drug testing policy.

The Sixth Circuit, in \textit{Knox County Education Ass’n v. Knox County Board of Education},\(^{202}\) joined the ranks of New Jersey and the Fifth Circuit by deciding to distinguish \textit{Chandler} in order to work with the \textit{Skinner-Von Raab-Vernonia} line of cases. In \textit{Knox County}, the Knox County Education Association (“KCEA”) challenged the drug testing policy instituted by the Knox County Board of Education (“Board”).\(^{203}\) The drug testing policy provided for suspicionless drug testing and suspicion-based alcohol testing of all school personnel who were employed in “safety sensitive” positions.\(^{204}\) The district court held the policy violated the Fourth Amendment, and the case was appealed to the Sixth Circuit.\(^{205}\)

On appeal, the Board insisted civil procedure concerns should dictate a reversal of the district court decision.\(^{206}\) Although the Sixth Circuit was not willing to summarily recognize these civil procedure claims, it acknowledged that “a crucial issue is whether teachers are ‘safety sensitive’ employees—a question which the Board claims has already been resolved.”\(^{207}\) After a thorough analysis of the district court’s opinion and the testing procedures in question,\(^{208}\) the Sixth Circuit began its own analysis with a brief overview of the drug testing precedent: \textit{Skinner}, \textit{Von Raab}, \textit{Vernonia}, and \textit{Chandler}.

The court seemed to be particularly influenced by the \textit{Von Raab} holding, stating that “[w]e can imagine few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administrators.”\(^{209}\) The court also quoted \textit{Skinner}’s warning ““that even a momentary lapse of attention can have

\footnotesize

515 U.S. 646, 665 (1995)).

\(^{201}\) See id. at 565 (Dennis, J., dissenting).


\(^{203}\) See id.

\(^{204}\) Id.

\(^{205}\) See id. at *1-2.

\(^{206}\) See id. at *1. The Board argued that the 1994 case referred to as “KCEA I” was binding, under the doctrines of res judicata and collateral estoppel, with regard to its findings on “safety sensitive” positions in the Knox County school system. \textit{Id.}

\(^{207}\) \textit{Id.} at *4.

\(^{208}\) See id. at *4-9.

\(^{209}\) See id. at *10-12.

\(^{210}\) \textit{Id.} at *14. The court attempted to distinguish this compelling governmental interest from that rejected in \textit{Chandler}, noting that “[t]eachers and administrators are not some distant societal role models, as in the case of the Georgia political candidates in \textit{Chandler}.” \textit{Id.} Although \textit{Chandler} rejected a role model rationale for upholding suspicionless drug testing, see \textit{Chandler}, 117 S. Ct. at 1305, the Sixth Circuit chose to adopt such a rationale nevertheless by apparently relying on the unrenounced holding of \textit{Vernonia} rather than the more recent \textit{Chandler} decision.
disastrous consequences," in support of its contention that employment as a teacher constituted a safety sensitive position that warranted suspicionless drug testing.\textsuperscript{211} The Sixth Circuit concluded its analysis by stating that people who serve as school teachers and administrators have a privacy interest that is "significantly diminished . . . by the level of regulation of their jobs and by the nature of the work itself."\textsuperscript{212} Having thus satisfied the two prongs of the special needs test, the court reversed the district court and upheld the Board's suspicionless drug testing policy.\textsuperscript{213}

The Sixth Circuit in \textit{Knox County} cited a portion of the \textit{Chandler} decision, which in turn cited portions of the \textit{Skinner} and \textit{Von Raab} decisions, to show the accepted method for analyzing suspicionless drug testing cases was the application of the special needs balancing test.\textsuperscript{214} Because the cited cases are Supreme Court precedent, it would have been difficult for the court to deny that the special needs test provided the proper framework for analysis. It is evident from the decision in \textit{Knox County}, however, that the Sixth Circuit wanted to rely on the \textit{Skinner-Von Raab-Vernonia} triad rather than the \textit{Chandler} decision. The language of the court's decision highlighted some of the inconsistencies between \textit{Chandler} and the rationale adopted by the Sixth Circuit in \textit{Knox County}.\textsuperscript{215} Lower courts are not supposed to selectively apply Supreme Court precedent—but in the suspicionless drug testing context, that is the trend which appears to be developing after \textit{Chandler}.

Of the six courts that have judicially examined \textit{Chandler}, two have chosen to strike down the suspicionless drug testing policy at issue. In \textit{Willis v. Anderson Community School Corp.},\textsuperscript{216} the School Corporation required that any student suspended for more than a three-day period be tested for drug and alcohol use.\textsuperscript{217} James Willis, an Anderson high school student suspended for fighting, challenged the drug testing policy as a violation of the Fourth and Fourteenth Amendments.\textsuperscript{218} The district court upheld the policy as constitutional, and Willis appealed to the Seventh Circuit.\textsuperscript{219}

Although the School Corporation believed that Willis' conduct created individualized suspicion, the Seventh Circuit did not believe "that the Corporation's

\textsuperscript{211} \textit{Knox County}, 1998 WL 663336, at *18 (quoting \textit{Skinner v. Railway Labor Exec. Ass'n}, 489 U.S. 602, 628 (1989) (referring to railroad engineers)). It appears that the Sixth Circuit would rather favorably compare teachers to railway employees than be forced to rely on \textit{Chandler} to reject the drug testing policy at issue.

\textsuperscript{212} \textit{Id.} at *25.

\textsuperscript{213} \textit{See id.}

\textsuperscript{214} \textit{See id.} at *12-*13.

\textsuperscript{215} \textit{See, e.g., id.} at *18 ("[W]e do not read the definition of 'safety sensitive' so narrowly as to preclude application to a group of professionals to whom we entrust young children."). The Sixth Circuit had to ignore that the Supreme Court, in \textit{Chandler}, decided to read the definition of "safety sensitive" to preclude application to those individuals to whom an entire state government would be entrusted.

\textsuperscript{216} No. 98-1227, 1998 WL 569114, at *1 (7th Cir. Sept. 9, 1998).

\textsuperscript{217} \textit{See id.}

\textsuperscript{218} \textit{See id.}

\textsuperscript{219} \textit{See id.}
data [was] strong enough to conclusively establish reasonable suspicion of substance abuse when a student is suspended for fighting. The court then stated the drug testing policy still could be constitutional if it satisfied special needs, thus acknowledging the Supreme Court's holdings in Skinner, Von Raab, Vernonia, and Chandler. Perhaps because of the public school context, the court focused much of its analysis on "each of the factors set forth in Vernonia." Although the Seventh Circuit did not believe the compelling interest of the School Corporation was of a lesser degree than the compelling interest held to exist in Vernonia, the court stated Willis did not "voluntarily engag[e] in misconduct—at least not as the term 'voluntary' is used in Vernonia." The court concluded that because suspicion-based drug testing was a viable option for the School Corporation, the "imposition of a suspicionless policy seems to serve primarily demonstrative or symbolic purposes." Because the testing was not based on individualized suspicion, and because the special needs exception was held to be inapplicable, the court reversed the district court and struck down the drug testing policy.

In 19 Solid Waste Department Mechanics v. City of Albuquerque, the Tenth Circuit relied heavily on Chandler in affirming the district court's decision to overturn the city's suspicionless drug testing policy. Although it briefly mentioned the decisions in Skinner, Von Raab, and Vernonia, the Tenth Circuit "turn[ed] to the details of Chandler to understand what the government's special need showing requires." The court noted that because the mechanics in question were tested only when their commercial drivers' licenses were renewed every four years, the drug

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220 Id. at *3.
221 See id. at *4.
222 Id. at *5.
223 See id. at *7.
224 Id. at *6. In Vernonia, "the Court noted a series of steps that an athlete had to take in order to compete—submitting to a preseason physical, maintaining a minimum grade point average, attending practices, etc." Id. (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)). The actions required to engage in fighting, as Willis had done in the instant case, were not of the same voluntary nature.
226 Id. at *8 (citing Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997)).
229 Id. at *3. In its discussion of the Skinner, Von Raab, and Vernonia decisions, the court explained that the constitutionality of suspicionless drug testing programs was determined by balancing the intrusion of an individual's privacy interests against the existence of legitimate governmental interests. Id. When it discussed the Chandler decision, however, the Tenth Circuit stated that the Court "added a step to the analysis it had followed in Skinner, Von Raab, and Vernonia." Id. It identified this "added step" as the special needs test, which implies mistakenly that the special needs test was not considered in the drug testing cases prior to Chandler. This may explain why the Tenth Circuit focused so heavily on Chandler.
testing policy was similar to that in Chandler because it lacked "any deterrent effect."230 The court thus held that because there was no effective deterrence, there was no special need for suspicionless drug testing.231

Both Willis and Solid Waste Mechanics indicate that the lower courts have not entirely ignored the Chandler decision. Even though the Seventh and Tenth Circuits struck down the drug testing policies in question after examining Chandler, however, the Chandler decision still appears unconvincing. The Seventh Circuit, in Willis, could have struck down the drug testing policy by relying solely on the distinguishable aspects of Vernonia.232 The Tenth Circuit's reliance on Chandler was suspect because the court believed that decision "added" the inquiry of "whether the drug-testing program at issue is warranted by a 'special need.'"233 Neither court's reference to Chandler is particularly compelling, and the decisions rendered by these courts indicate that what Chandler has added to the Court's drug testing precedent is a degree of discord rather than harmony.

Some legal scholars adhere to the theory that any comprehensive attempt to rationalize Supreme Court decisions ultimately is futile because the Court will always render decisions like Chandler.234 This theory, known as "Critical Legal Studies,"235 demonstrates "the inability of doctrinal analysis to produce results that are independent of the prior pred[ic][t]ions [sic] of the judge or academic doing the analysis."236 Proponents of this theory would assert the backgrounds and experiences of Supreme Court Justices predetermine the decisions of the entire Court. This contention presents an interesting rationale for Scalia's irreconcilable decisions in the drug testing context. Critical legal theorists ask "only that judges not delude themselves into thinking that what they do has significance different from, and broader than, what every other political actor does."237

Perhaps the Court in Chandler was exerting its own political muscle by not allowing Georgia to take advantage of a Court that has been a regular proponent of states' rights over the last several years. It may be true that "no court can create a

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230 Id. at *6. In Chandler, the advance notice provided to political candidates before the drug test was administered made it too easy for drug users to avoid detection. Id. (citing Chandler v. Miller, 117 S. Ct. 1295, 1304 (1997)).

231 See id.

232 See Willis v. Anderson Community Sch. Corp., No. 98-1227, 1998 WL 569114, at *7 (7th Cir. Sept. 9, 1998) ("[T]here is sharp contrast between the efficacy of the policy in Vernonia . . . and the efficacy of the policy in this case.").


235 Id. at 245.

236 Id. (quoting Mark V. Tushnet, Perspectives on Critical Legal Studies: Introduction, 52 GEO. WASH. L. REV. 239, 239 (1984)).

237 Id. at 258 (quoting Mark V. Tushnet, The Dilemmas of Liberal Constitutionalism, 42 OHIO ST. L.J. 411, 425-26 (1981)).
precedent that will inexorably bind its successors; the decision to be bound must be made by the successors themselves.\textsuperscript{238} If the Supreme Court’s successors (or the current Court in a different context), however, choose not to be bound by precedent, they would be wise to defend their departure from such precedent more effectively than the Court did in Chandler.

Subsequent decisions by the lower courts have illustrated that the Chandler decision has not dissuaded courts from upholding suspicionless drug testing policies.\textsuperscript{239} It is surprising, however, that the inconsistencies with relevant precedent present in Chandler have not drawn more attention.\textsuperscript{240} As an attempt to remedy future inconsistencies in applying the special needs balancing test, this Note presents two recommendations.

A. Abandon or Limit the Decision in Vernonia School District 47J v. Acton\textsuperscript{241}

This decision was as symbolic as the Chandler decision, perhaps even more so. By not relying on a decision that was, for the most part, indistinguishable from that in Chandler, the Court could add a degree of legitimacy to the Chandler decision.

The Vernonia decision marked "the first time that the United States Supreme Court has addressed the issue of drug testing in the public schools."\textsuperscript{242} The rationale used to support this issue of first impression for the Court, however, was not as solid as those used to support Vernonia’s predecessors, Von Raab and Skinner, and the decision rested on a premise little different from the one rejected in Chandler.\textsuperscript{243} In Von Raab and Skinner the Court upheld the drug testing policy in question because of the substantial public safety concerns posed by customs officials and railway employees under the influence of illegal narcotics, and noted both classes of employees enjoyed a diminished expectation of privacy.\textsuperscript{244} The student athletes in Vernonia also enjoyed a diminished expectation of privacy, but the rationale for the suspicionless drug testing policy was to prevent the "role model" effect of athletes’ drug use\textsuperscript{245}—hardly the "compelling state interest" required by the special needs

\textsuperscript{238} Id.


\textsuperscript{240} See supra notes 104-64 and accompanying text.

\textsuperscript{241} 515 U.S. 646 (1995).


\textsuperscript{243} See supra notes 104-64 and accompanying text.


\textsuperscript{245} Vernonia, 515 U.S. at 663.
balancing test, particularly when compared to the rationales in Von Raab and Skinner.

When the Vernonia decision is compared to the Chandler decision, the Court's inconsistencies are even more pronounced. The Court in Chandler indicated that candidates for political office have a diminished expectation of privacy, but then held that "the image the State seeks to project" is not enough of a rationale to establish a compelling state interest. The Court in Chandler thus rejected the idea that a diminished expectation of privacy and a role model rationale were sufficient to satisfy the "special needs" test—yet it found that same diminished expectation and rationale to be satisfactory in Vernonia. Such a glaring inconsistency makes the Chandler decision judicially suspect.

For consistency and clarity, the Court should abandon the Vernonia decision and exclude it from its suspicionless drug testing doctrine. Alternatively, the Court simply should limit the decision to the school context, thereby making Skinner, Von Raab, and Chandler the relevant precedent for other suspicionless drug testing cases. Regardless of the Court's choice, abandoning or limiting Vernonia would strengthen the credibility of the decisions in Skinner, Von Raab, and Chandler. The rationale of Skinner and Von Raab—public safety concerns balanced by a diminished expectation of individual privacy—could be applied more consistently by the lower courts if they were not required to rely on the Vernonia role model rationale. The Chandler decision would make more sense because the Court, based on precedent, effectively could reject the drug testing policy as symbolic and as an attempt to make candidates into role models, without having to effectively distinguish Vernonia.

B. Add More Specific Requirements to the Special Needs Test or Replace it Altogether

Commentators are correct when they complain about the arbitrary way in which the special needs test is applied. Their misguided approval of the Chandler decision may be viewed as a thinly veiled sigh of relief that the Court once again did not uphold a Fourth Amendment search based on the results of a test that cannot be applied consistently.

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246 See Chandler v. Miller, 117 S. Ct. 1295, 1304 (1997) ("Candidates for public office . . . are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments.").

247 Id.

248 See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975) ("Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 . . . .") (emphasis added). The Court in Wood thus limited the applicability of its § 1983 decision to schools. The Court could limit the Vernonia decision in the same way by stating that the rationale relied on in that decision was intended to be used only to analyze suspicionless drug testing policies promulgated in public school systems.

249 See Buffaloe, supra note 108; Brown, infra note 264.
The Court seems to have acknowledged that the special needs balancing test provides the proper framework for analysis of suspicionless drug testing policies. The Court has relied on that balancing test in deciding each of the four cases in which it has addressed random drug testing. Nevertheless, the special needs exception is rife with inconsistencies that negate almost entirely its effectiveness as a tool of judicial analysis.

Authors Michael Vaughn and Rolando V. del Carmen identify at least five problems with the special needs exception:

1. Because the special needs test has no clear standards, "danger looms that the Court, serving an ideological agenda and using the convenience of a balancing test, may effectively negate decades of Fourth Amendment precedent and case law by carving out a few broad exceptions that can be misinterpreted and misapplied by lower courts."

2. "[T]he balancing test used by the Court in some cases is so broad it can subordinate virtually any individual interest in favor of competing governmental concerns."

3. The special needs test originally was designed to apply only when "no other reasonable alternative was available"; it has since been expanded.

4. "[T]he line between administrative and law enforcement searches is in fact often blurred and difficult to distinguish." As a result, it is easier for the Court to rely on the special needs test than on the traditional Fourth Amendment requirements of warrant and probable cause.

5. A court that wants to maintain a "crime-control agenda" can rely on the "end-justifies-the-means" rationale of the special needs test to validate searches for the purposes of law enforcement, even though such searches are improper under the strictures of the test. Such a result is possible because the special needs test is so easy to manipulate.

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In light of the Supreme Court’s decisions in Skinner and Von Raab, as well as the circuit court decisions extending their application, it seems clear that suspicionless warrantless drug testing will be constitutionally evaluated using a kind of ad hoc balancing approach. What is not yet clear is how this balance will be struck.

251 See supra note 183.


253 Id. at 220.

254 Id. at 221.

255 Id. at 221-22.

256 Id. at 222.

257 Id. at 222-23.
It may not be possible to eliminate all of the problems with the special needs exception to the Fourth Amendment. One cannot fault the Court for wanting to consider "compelling state interests," particularly because of the rampant drug problems that continue to plague this nation. A socio-political agenda cannot supplant the constitutional mandates of the Fourth Amendment, yet the special needs test, at times, seems designed to serve just that purpose. A decision by the Court to change the requirements of the special needs test, or to simply refuse to apply it, may help to establish some consistency in future suspicionless drug testing cases.

CONCLUSION

The Chandler decision is not indicative of a new trend by the Court to strike down suspicionless drug testing policies. It is, rather, an illustration of how difficult it is to render consistent decisions when relying on the special needs exception to the Fourth Amendment. Chandler, Vernonia, Von Raab, and Skinner all cannot exist concurrently as coherent examples of Supreme Court suspicionless drug testing doctrine; the inconsistencies are simply too great. Chandler may require a different result than its predecessors, but the Court must find a way to distinguish the Chandler rationale, particularly with respect to the Vernonia and Von Raab decisions.

Regardless of whether commentators approve or disapprove of the Chandler decision, the underlying problem is not Chandler. The problem lies in the

258 See supra notes 33-41 and accompanying text.
259 See supra note 6.
264 See, e.g., Nathan A. Brown, Recent Developments: Reining in the National Drug Testing Epidemic, Chandler v. Miller, 117 S. Ct. 1295 (1997), 33 HARV. C.R.-C.L. L. REV. 253 (1998) (supporting the Chandler decision, but suggesting that the Court should overrule Von Raab to make sense of the Court's suspicionless drug testing doctrine); Buffaloe, supra note 108, at 564 n.1 (applauding the Court's efforts to draw a bright line for constitutionally permissible drug testing, but criticizing its methodology). But cf. David G. Savage, Speaking of Drugs and Deadbeats: Court Says No Testing of Candidates, No Child Support Class Action Against States, 83 A.B.A. J. 46, 47 (1997) ("[The Chandler decision] appears to doom proposals to test large groups of white-collar government workers."); Justin Scott, Casenote, 49 MERCER L. REV. 1131, 1139 (1998) ("Perhaps the holding in Chandler will doom future deployments of the government's 'Draconian weapon—the compulsory collection and chemical testing of . . . blood and urine' on large groups of white-collar employees in an attempt to revitalize this nation's war on drugs." (footnote omitted)).
265 See Brown, supra note 264, at 254 ("Chandler exposes Von Raab as anomalous and inconsistent with previous suspicionless search cases to which Chandler adheres."); Buffaloe, supra note 108, at 564 n.1 ("This casual reliance on the standard of general reasonableness reaffirms the fear expressed throughout this Note that a balancing test is replacing the warrant
Court’s analysis of suspicionless drug testing cases. Although scholars, and certainly the Court itself, may disagree about what should be altered or disregarded, the solution to the Chandler inconsistencies depends upon the Court’s ability to restructure the special needs balancing test and reconcile its own suspicionless drug testing precedent.

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and probable cause requirements as the touchstone of Fourth Amendment jurisprudence.”). Cf. Dery, supra note 17, at 103 (“The Chandler Court decided that Georgia’s mandate to drug test candidates for state office went too far. Yet, trapped in a doctrine of its own making [the special needs test], the Court could not rationally distinguish state politicians from railroad employees, Customs Service agents, or schoolchildren.”).

266 See sources cited supra notes 264-65.