ARE POLITICIANS MORE DESERVING OF PRIVACY THAN SCHOOLCHILDREN? HOW *CHANDLER V. MILLER* EXPOSED THE ABSURDITIES OF FOURTH AMENDMENT "SPECIAL NEEDS" BALANCING

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I. INTRODUCTION

Ever start something you wish you had not? Victor Frankenstein did.[1] Apparently, so has the United State Supreme Court. In *Chandler v. Miller*, the Court held that compelling candidates for state office to participate in a drug-testing program as a condition of campaigning violated the Fourth Amendment.[2] According to the Court, mandating a politician to provide a urine sample was unconstitutional, even though the test would occur on a date of the candidate's choosing, in the quiet of a private physician's office, and with the promise that results would be given first to the candidate, who then controlled further

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1. "I beheld the wretch—the miserable monster whom I had created." MARY SHELLEY, FRANKENSTEIN 58 (Johanna M. Smith ed., Bedford Books 1992) (1818). "I...had created a fiend whose unparalleled barbarity had desolated my heart and filled it forever with the bitterest remorse." *Id.* at 140.

2. Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997). The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

dissemination of the report.[3] Two years earlier, in *Vernonia School District 47J v. Acton*, the Court held that forcing a randomly selected schoolchild who wished to play sports to urinate in front of an adult monitor triggered only "negligible" privacy concerns and, therefore, did not violate the Fourth Amendment.[4] Such drug testing was constitutional despite the fact that the child was exposed to a more intrusive, potentially humiliating, drug testing procedure and had no control over the dissemination of the results along the school's chain of command, from superintendent to athletic director.[5]

The Court applied the same Fourth Amendment guarantee in *Chandler* and *Acton*. How can they be reconciled? The answer resides in the Court's flawed analytical creation known as "special needs" balancing.[6] The special needs test allows the Court to suspend the traditional protections embedded within the Fourth Amendment's text, such as a warrant, probable cause and individualized suspicion, and instead, to balance the competing interests of the government and the individual.[7] The Court assigns values to the parties' various needs without any standard weights or measurements. The resulting subjectivity has created absurd inconsistencies, like those between *Chandler* and *Acton*.

However, the Court's disparate treatment of politicians and schoolchildren is only one of many inevitable logical gaffs created by special needs reasoning. As this Article demonstrates, in the surreal world of special needs, any fact can be twisted to fit the desired result without regard for Fourth Amendment mainstays.

In *Chandler*, the Court appeared to attempt to apply the brakes as it slid down the slippery slope created by special needs. The increasing aggressiveness of government intrusions—from rummaging through a student's purse to mandating every candidate for state office to void into a cup—finally gave the Court pause about the wisdom of such invasions. However, despite the Court's apparent awareness of the faults in the special needs test, the Court did not check the advancing march of government searches by exposing its fallacies and returning to traditional Fourth Amendment guarantees. Instead, in *Chandler*, the Court further exploited the malleability of special needs balancing as a way to limit its impact; the *Chandler* Court correctly preserved individual privacy by incorrectly distorting special needs reasoning. At the same time, in dissent, Chief Justice Rehnquist wrongly sought to expand the government's search powers by consistently applying ill-conceived special needs precedent.

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3. *Chandler*, 117 S. Ct. at 1303–04.
4. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 657–58, 664–67 (1995).
5. *Id.* at 650–51.
6. *Chandler*, 117 S. Ct. at 1301.
7. The Court described the process as follows: "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." *Id.*

This Article begins with a review of the history of special needs balancing in Part II. Part III presents *Chandler*: its factual background, lower court rulings and the Supreme Court's decision. Finally, Part IV critically examines *Chandler's* inconsistencies in logic and discusses the potential dangers of standardless special needs balancing following *Chandler*.

II. THE BIRTH AND UNCONTROLLED GROWTH OF "SPECIAL NEEDS" BALANCING

A. The Traditional Warrant Preference

The Fourth Amendment contains two clauses, each with its own command. The Amendment's first mandate, the "reasonableness clause," is phrased in general terms: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."[8] In contrast, the Fourth Amendment's second dictate, the "warrant clause," provides specifics: "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place or thing to be searched, and the persons or things to be seized."[9]

The Supreme Court's interpretation of the Fourth Amendment has been an ongoing exercise in determining which of the two clauses embodies the driving force for guaranteeing personal privacy and security.[10] Soon after *Weeks v. United States'* exclusionary rule caused the Fourth Amendment to have a practical impact on the daily duties of federal officials,[11] the Court identified the warrant clause as the Amendment's centerpiece.[12] The warrant clause's appeal is that it explicitly measures reasonableness with probable cause and requires the prior involvement

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8. U.S. CONST. amend. IV.

9. *Id.*

10. *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 383–85 (1988); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471, 1473–75 (1985).

11. Weeks v. United States, 232 U.S. 383, 398 (1914). In *Weeks*, the Court concluded that the letters unconstitutionally seized from Weeks should have been returned to him. *Id.* By so ruling, the Court crafted the exclusionary rule as a remedy for federal violation of Fourth Amendment rights, removing the incentive for such illegality in the future.

12. Agnello v. United States, 269 U.S. 20, 32 (1925).

of a judicial official.[13] The Court therefore has often noted a judicial preference for warrants.[14]

The chorus exalting the primacy of warrants, however, has not been unanimous. As early as 1949, the Court expressed discomfort with the rigidity of the warrant clause's requirements:

> Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.
>
> It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches.[15]

The allure of a flexible reasonableness standard unfettered by the particulars of a warrant or probable cause proved powerful. A reasonableness standard was most appealing and the warrant mandate most cumbersome when the government's concerns were perceived as especially large or immediate and the individual's interests appeared insignificant or remote.[16] In such cases, forgoing the traditional Fourth Amendment safeguards in favor of a straightforward balancing of the competing interests was tempting. Ultimately, the temptation proved too strong for the Court to resist.

B. The First Cracks in the Warrant Mandate Wall

Determining reasonableness by balancing first gained the Court's acceptance in *Camara v. Municipal Court.*[17] In *Camara*, a tenant refused entry to a

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13. Justice Stewart, writing for a unanimous Court, stated:

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

14. Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); United States v. Ross, 456 U.S. 798, 825 (1982); Coolidge v. New Hampshire, 403 U.S. 443, 454 (1970); *Katz*, 389 U.S. at 357.

15. United States v. Rabinowitz, 339 U.S. 56, 65 (1949) (emphasis omitted), *overruled by* Chimel v. California, 395 U.S. 752 (1969).

16. A dramatic example of the allure inherent in the reasonableness approach is presented in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), wherein the "substantiality of the public interest" in immigration checkpoints outweighed their "quite limited" intrusion on individual motorists. *Id.* at 556–57.

17. 387 U.S. 523 (1967). In *Camara*, "reasonableness" took on a new meaning, distinct from its traditional sense in the Fourth Amendment's reasonableness clause. The *Camara* Court crafted an administrative warrant requirement for housing inspections. In

government housing inspector.[18] The Court held that the inspector could not override the occupant's refusal without first obtaining a warrant based upon probable cause.[19] However, the Court recognized that requiring the individualized suspicion of traditional probable cause in administrative searches, such as housing inspections, was impractical.[20] It therefore diluted the probable cause requirement by imposing a reasonableness test in which the government's need for the inspection was weighed against the "constitutionally protected interests of the private citizen."[21] In applying its new balancing test, the Court in *Camara* determined that code-enforcement protections were indeed reasonable, even when not supported by traditional probable cause.[22] Thus, *Camara* accepted reasonableness as the Fourth Amendment standard, but dressed it in the guise of the warrant clause's traditional requirements.

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doing so, the Court altered the probable cause standard from one focusing upon specified information to support a search to one based on a balancing of the government interests versus those of the individual. *Id.* at 534–39. While the *Camara* Court's warrant mandate for housing inspections extended the scope of protection provided by the warrant clause to cover more official conduct, the manner of its expansion of the warrant requirement resulted in lessening the protection provided by the probable cause standard. Sundby recognized this dynamic: "Ironically, in redefining probable cause as a flexible concept, the Court's efforts to satisfy the warrant clause gave reasonableness a foot in the door as an independent factor in fourth amendment analysis." Sundby, *supra* note 10, at 393.

18. *Camara*, 387 U.S. at 525.

19. *Id.* at 532–34. The Court stated:

> In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons...for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections.

Id. at 534.

20. *See* Sundby, *supra* note 10, at 392.

21. *Camara*, 387 U.S. at 534–35. The Court seemed to recognize the imprecision of its new standard: "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 536–37.

22. *Id.* at 534–39. Various factors outside those typically considered in traditional probable cause analysis were weighed, including the following:

> First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

Id. at 537 (citation omitted).

In its next term, the Court overtly embraced reasonableness in *Terry v. Ohio*.[23] In *Terry*, the Court was confronted with a "stop and frisk" on the street supported by neither a warrant nor probable cause.[24] The Court responded by announcing that it was not retreating from its previous holdings that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[25] It then determined that "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[26] Balancing the interests of the government against those of the individual, the Court found both the stop and the frisk to be reasonable.[27] As in *Camara*, the Court in *Terry* justified its abandonment of the traditional safeguards by contrasting the significant government interests involved (officer safety) with the limited intrusion upon the individual (pat down of the outer surfaces of a person's clothing for weapons).[28]

The reasonableness approach finally received its doctrinal fig leaf in *New Jersey v. T.L.O.*, with the introduction of the "special needs" doctrine.[29] In *T.L.O.*, Mr. Choplick, a high school vice principal, learned that a teacher had seen T.L.O. and another student violate school rules by smoking in the girl's bathroom.[30] When confronted by the vice principal, T.L.O. denied smoking.[31] Mr. Choplick searched her purse wherein he discovered not only cigarettes, but marijuana, smoking paraphernalia, and evidence of marijuana dealing.[32] Mr. Choplick gave the evidence of drug dealing to the police.[33]

Thus, *T.L.O.* presented a unique question; rather than the actions of a law enforcement officer pursuing a criminal investigation, at issue were the actions of

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23. 392 U.S. 1 (1968).
24. *Id.* at 7–8.
25. *Id.* at 20.
26. *Id.*
27. *Id.* at 22–31.
28. *Id.* at 29–30.
29. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985). Justice Blackmun placed the majority's analysis in the following context:

> I believe the Court omits a crucial step in its analysis of whether a school search must be based upon probable cause. The Court correctly states that we have recognized limited exceptions to the probable-cause requirement "[w]here a careful balancing of the governmental and private interests suggests that the public interest is best served" by a lesser standard. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with "a special law enforcement need for greater flexibility."

Id. at 351 (Blackmun, J., concurring) (citation omitted) (quoting Florida v. Royer, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).
30. *Id.* at 328.
31. *Id.*
32. *Id.*
33. *Id.*

a school administrator attempting to maintain school discipline. The Court readily recognized that an administrator's search of a student's closed purse constituted a "severe violation" of privacy expectations.[34] Yet, the Court also acknowledged that the "substantial interest of the teachers and administrators in maintaining discipline in the classroom and on school grounds" required a "certain degree of flexibility" in disciplinary procedures.[35]

Given the competing interests, the Court struck a balance "easing...the restrictions" of a warrant and probable cause.[36] In their place, the Court applied a test based "simply on reasonableness, under all the circumstances."[37] Good to its word, the Court then meticulously weighed all the facts in the case and ultimately determined that Mr. Choplick's search, based as it was upon reasonable suspicion, was constitutional.[38]

T.L.O. shows the Court in transition; the decision balances special needs but still adheres to an individualized suspicion standard, albeit at the lower level of reasonable suspicion. In future cases, even this requirement would be abandoned.[39]

C. The Warrant Wall Crumbles

The few protections remaining in the Court's early special needs test gave way to an onslaught of government intrusions. The balancing test, lacking the resiliency of an explicit rule, allowed the line defining reasonableness to be redrawn with each new state intrusion. The result was a cluster of cases that allowed the government to compel people to provide urine samples, sometimes under observation, without requiring even a modicum of individualized suspicion of drug abuse.[40]

In *Skinner v. Railway Labor Executives' Ass'n*, the Court reviewed Federal Railroad Administration regulations that required toxicological testing of railroad employees.[41] Justice Kennedy, writing for the majority, began his analysis cautiously enough: "The Amendment guarantees the privacy, dignity, and security

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34. *Id.* at 338.
35. *Id.* at 339–40.
36. *Id.* at 340.
37. *Id.* at 341.
38. *Id.* at 343–48.
39. *See infra* Part II.C.
40. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995).
41. *Skinner*, 489 U.S. at 608–12. Two "subparts" of the regulatory scheme related to employee testing. Subpart "C," the "Post-Accident Toxicological Testing," mandated that employees directly involved in a "major train accident" provide blood and urine samples for toxicological testing. Subpart "D," the "Authorization to Test for Cause," allowed railroads to require employees to provide breath or urine samples following events such as rule violations. *Id.*

of persons against certain arbitrary and invasive acts by officers of the Government...."[42] Further, he recognized the Court's traditional preference for warrants.[43]

But, Justice Kennedy then explicitly categorized "the Government's interest in regulating the conduct of railroad employees to ensure safety" as a "special needs" exception to the general warrant preference.[44] He stated: "We have recognized exceptions to this rule, however, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[45] What made these railroad regulations "special" was their *non*-law enforcement purpose; railroad safety, like schools and other closely regulated businesses, presented "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."[46]

Once within the realm of special needs, the Court in *Skinner* determined the warrant requirement was an unnecessary hindrance.[47] Even more significantly, when considering the probable cause requirement, Justice Kennedy felt that weighing the interests merited the abandonment of *any* level of individualized suspicion altogether. He asserted:

> 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

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42. *Id.* at 613–14.

43. Justice Kennedy noted:

> In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.

Id. at 619 (citations omitted).

44. *Id.* at 620.

45. *Id.* at 619.

46. *Id.* at 620. Specifically, the Court noted: "The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather to 'prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" *Id.* at 620–21.

47. Justice Kennedy opined:

> In sum, imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.

Id. at 624.

> despite the absence of such suspicion. We believe this is true of the intrusions in question here.[48]

The Court arrived at this dubious conclusion by first minimizing the citizen's interests in his own bodily integrity. It deemed the taking of blood as "not significant," indeed, "routine in our everyday life."[49] Further, breath tests were determined to be "even less intrusive" than those for blood.[50] But compelled urinalysis gave the Court pause: "We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests."[51] The Court allowed that in "most contexts," this kind of intrusion would not be characterized as minimal.[52] Nonetheless, Justice Kennedy identified several factors that mitigated the intrusiveness of railroad employee urine tests: the urinalysis involved no penetration of the body, could not be used to learn any information unrelated to drug or alcohol use, and did not require a monitor's "direct observation" of the furnishing of the sample.[53] Notably, Justice Kennedy likened the testing to a visit to a doctor's office: "The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination."[54]

More important to the Court than the method of government intrusion was the diminution of the employees' privacy expectations by their own choosing to participate in a pervasively regulated industry.[55] In this vein, Justice Kennedy observed that the obvious safety issues inherent in the railroad business had long made its employees "a principal focus of regulatory concern."[56]

After deflating the individual's interests, the *Skinner* Court inflated those of the government. The public interest in testing without individualized suspicion was "compelling" because railroad employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have

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48. *Id.*
49. *Id.* at 625.
50. *Id.*
51. *Id.* at 626.
52. *Id.*
53. *Id.*
54. *Id.* at 627.
55. *Id.*
56. The Court in *Skinner* stated:

> Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information.

Id. at 628.

disastrous consequences" akin to the dangers surrounding nuclear reactors.[57] Moreover, requiring individualized suspicion within the chaos of a train wreck would be "unrealistic[] and inimical to the Government's goal of ensuring safety in rail transportation."[58] Thus, the balancing of interests in *Skinner* favored government monitoring of one of the "most private of activities," without individualized suspicion, the most rudimentary of Fourth Amendment protections.[59]

The same day *Skinner* was announced, the Court decided another special needs case, *National Treasury Employees Union v. Von Raab*.[60] In *Von Raab*, Justice Kennedy wrote the opinion sustaining a United States Custom Service program that required a negative drug test before placement in positions directly involved in drug interdiction or that required the agent carry a firearm.[61] Here, Justice Kennedy managed to gut the warrant requirement in the same breath he reaffirmed the judicial preference for it. He stated: "our decision in...[*Skinner*] reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[62] Justice Kennedy then expended little effort in establishing the Customs Service program as one of special needs, because it was "not designed to serve the ordinary needs of law enforcement."[63] Thus, before balancing a single factor in its "special needs" analysis, the Court had freed itself of all meaningful Fourth Amendment constraint.

In weighing the competing concerns, the *Von Raab* opinion highlighted the government's interest in the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics."[64] Individual agents were themselves casualties of this drug war, for some had been targeted for bribery and several had been removed for "integrity violations."[65] The public, therefore, had a "compelling interest" in monitoring "front-line interdiction personnel" in three areas: physical fitness, integrity, and judgment.[66] Likewise, the government needed to be able to rely on the perception and judgment of those Customs Service agents who carried firearms.[67]

Against these societal needs, the Court weighed the intrusiveness of drug testing on individual Customs Service employees. Although it acknowledged that compelled urinalysis could constitute a "substantial" interference with privacy "in

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57. *Id.*
58. *Id.* at 631.
59. *Id.* at 645 (Marshall, J., dissenting).
60. 489 U.S. 656 (1989).
61. *Id.* at 660–61, 667–77.
62. *Id.* at 665.
63. *Id.* at 666.
64. *Id.* at 668.
65. *Id.* at 669.
66. *Id.* at 670.
67. *Id.* at 670–71.

some circumstances," the Court in *Von Raab,* as it had in *Skinner*, considered the invasion within an occupational context.[68] The Court stated: "We have recognized, however, that the 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts."[69] Like the people who work for the United States' mints, military, and intelligence services, Customs Service employees involved in fighting the drug trade or who carry firearms, have chosen to diminish their privacy expectations, even with respect to searches as personal as urine tests.[70] Under *Von Raab*, the enormity of society's concerns outweighed the individual's interests that were diminished by the individual herself when she sought promotion to a sensitive government position.[71] The Customs Service's mandatory suspicionless urinalysis drug testing thus satisfied Fourth Amendment reasonableness.[72]

The most recent special needs case handed down by the Court before *Chandler* was *Vernonia School District 47J v. Acton.*[73] In *Acton*, the Court sustained, against Fourth Amendment challenge, two regimes that drug tested grade school students who participated in interscholastic sports.[74] The first program tested all athletes at the beginning of each season, regardless of the existence or absence of any individualized suspicion of drug use.[75] In addition, the student athletes were compelled to submit to random testing; each week ten percent of the students had to provide a urine sample at school.[76] According to the random testing procedure, a selected student, after disclosing prescription medications he or she was taking, would proceed to an empty locker room with an adult monitor of the same gender.[77] As the faculty monitor stood twelve to fifteen feet behind him, each boy produced his urine sample while standing at a urinal.[78] The monitor could watch the student and listen for normal sounds of urination.[79] The boy then gave his sample to the monitor, who checked it for temperature and

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68. *Id.* at 671.
69. *Id.*
70. *Id.* at 671–72.
71. *Id.* at 679.
72. *Id.*
73. 515 U.S. 646 (1995). I discuss *Acton* more fully in my article, *The Coarsening of Our National Manners: The Supreme Court's Failure to Protect Privacy Interests of Schoolchildren*—Vernonia School District 47J v. Acton, 29 SUFFOLK U. L. REV. 693 (1995).
74. Although the Vernonia School District's program tested all students participating in interscholastic athletics, the particular testing before the Court involved the seventh grade at Washington Grade School. *Acton*, 515 U.S. at 651.
75. *Id.* at 650.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

tampering.[80] The procedure for the girls was the same, except that girls produced their samples in enclosed bathroom stalls.[81] The samples were labeled so as not to reveal the identity of the student and sent to an independent lab. Results were released to the school "superintendent, principals, vice-principals, and athletic directors."[82] A student who received two positive results was given the option of attending an "assistance program that includes weekly urinalysis," or suspension from athletics.[83]

Identifying *Acton* as a special needs case, Justice Scalia, writing for the majority, constructed an elaborate formula to balance the interests implicated by the school district's drug testing programs.[84] *Acton's* complex balancing test included, as the "most significant element," the government's role in the public schools as "guardian and tutor."[85] In addition, Justice Scalia noted three factors: the student's "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search."[86] Though complex, the test ultimately resembled the analysis typical of all special needs cases: balancing the competing interests of the government against those of the individual.

Among the government's interests, the Court emphasized the dangers caused by drugs. The school district's "sharp increase in drug use" caused Justice Scalia to frame the stakes as no less than "[d]eterring drug use by our Nation's schoolchildren."[87] The school's responsibilities as "guardian and tutor" to address the hazards to children's healthy development, physical safety, and educational environment[88] overshadowed the privacy expectations that the students themselves diminished by "go[ing] out for the team."[89] Weighing these interests, the Court held that compelled suspicionless urinalysis of students satisfied Fourth Amendment reasonableness.[90]

III. *CHANDLER V. MILLER*

A. The Factual Background of Chandler

In 1990, the Georgia Legislature enacted Official Code of Georgia Annotated section 21–2–140, which required candidates for certain state offices to

80. *Id.*
81. *Id.*
82. *Id.* at 651
83. *Id.*
84. *Id.* at 654.
85. *Id.* at 665.
86. *Id.* at 664–65.
87. *Id.* at 648, 661.
88. *Id.* at 653–55, 659–65.
89. *Id.* at 657.
90. *Id.* at 663.

certify that they had taken and passed a drug test.[91] The offices designated in the statute were:

> the Governor, Lieutenant Governor, Secretary of State, Attorney General, 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.[92]

To qualify for the ballot for these offices, a candidate had to present a certificate reporting that he or she had "submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the results were negative."[93] The urinalysis screened for five drugs: marijuana, cocaine, opiates, amphetamines, and phencyclidines.[94] Each candidate was presented with the choice of providing a specimen at a state-approved laboratory or at the office of his or her personal physician.[95] An approved laboratory then tested the sample only for the presence of the five illegal drugs.[96] If the test result was positive for drugs, a candidate could prevent its disclosure to law enforcement by choosing not to file the certificate.[97] Indeed, if the candidate had chosen to provide the sample at his or her own doctor's office, "no state agent need know that the test was administered."[98]

In 1994, the Libertarian Party nominated Walker L. Chandler for Lieutenant Governor, Sharon T. Harris for Commissioner of Agriculture, and James D. Walker as a member of the General Assembly.[99] About one month prior

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91. Official Code of Georgia Annotated section 21–2–140 provided in pertinent part:

> At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate...stating that such candidate has been tested for illegal drugs...and that the results of such test are negative.... No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate....

Chandler v. Miller, 73 F.3d 1543, 1544 (1996), *rev'd*, 117 S. Ct. 1295 (1997).

92. GA. CODE ANN. § 21–2–140(a)(4) (1994); *see* Chandler v. Miller, 117 S. Ct. 1295, 1299 (1997).

93. *Chandler*, 117 S. Ct. at 1299.

94. GA. CODE ANN. § 21–2–140(a)(3) (1994); *Chandler*, 117 S. Ct. at 1299.

95. *Chandler*, 117 S. Ct. at 1299.

96. *Id.* The drug screens collected no information "unrelated to drug use." *Chandler*, 73 F.3d at 1545. Further, "Candidate drug tests [were] to be administered in a manner consistent with the United States Department of Health and Human Services Guidelines..., or other professionally valid procedures approved by Georgia's Commissioner of Human Resources." GA. CODE ANN. § 21–2–140(a)(2) (1994); *see Chandler*, 73 F.3d at 1545.

97. *Chandler*, 73 F.3d at 1547.

98. *Id.*

99. *Chandler*, 117 S. Ct. at 1299.

to the statutory deadline for submission of their drug test certificates, candidates Chandler, Harris, and Walker filed suit in federal district court, seeking declaratory and injunctive relief barring enforcement of Official Code of Georgia Annotated section 21–2–140.[100] The candidates asserted that the drug tests violated their rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution.[101] The district court disagreed, first denying the plaintiffs' motion for preliminary injunction and ultimately entering a judgment for the defendants.[102]

B. The Lower Court Rulings in Chandler

The United States District Court for the Northern District of Georgia ruled against the candidates due to "the importance of the state offices sought and the relative unintrusiveness of the testing procedure."[103] On appeal, the Eleventh Circuit affirmed, striking essentially the same balance of interests.[104] In an opinion authored by Circuit Judge Edmondson, the court readily decided that the case involved "special needs," because the drug tests at issue were "not designed to serve the ordinary needs of law enforcement," as they were "not designed to prosecute crime."[105]

Interestingly, Judge Edmonson began the inquiry by placing Georgia's special needs in the particular context of the deference deserved by each state in "setting qualifications for its own officers."[106] He noted that the Supreme Court itself had cautioned against "external interference" with the independence of the states in this realm unless "plainly provided" by the United States Constitution.[107] As a result, the subsequent evaluation of the government's concerns was viewed through this state's rights prism.

In structuring his analysis, Judge Edmonson isolated two factors used to calculate the government's interests: (1) "the level of documented evidence of a past problem," and (2) "the fundamental inconsistency of drug use with the demands of the position."[108] He did not think it necessary that the state establish the existence of *both* factors; rather, a demonstration of *one* of the interests would suffice. He analogized the Georgia statute to the drug testing scheme in *Von Raab*.[109] As with the Customs Service employees, no evidence existed to link any state elected official to drug abuse. Thus, the weight of the government's interests

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. Chandler v. Miller, 73 F.3d 1543, 1549 (11th Cir. 1996), *rev'd*, 117 S. Ct. 1295 (1997).
105. *Id.* at 1545.
106. *Id.*
107. *Id.* (quoting Taylor v. Beckham, 178 U.S. 548, 571 (1900)) (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).
108. *Id.*
109. *Id.* at 1546.

rose or fell on the single factor of whether drug use was "fundamentally incompatible with high state office."[110] Framed in these terms, the result was determined: "We think that to ask this question is also to answer it. The people of Georgia place in the trust of their elected officials that which the people value most highly: their liberty, their safety, their economic well-being, ultimate responsibility for law enforcement, and so on."[111] The high stakes, the dangers of bribery and blackmail, and the risks inherent in loss of clear thinking, made the government's interests "great."[112]

As was to be expected, the interests of those individuals subjected to drug testing were minimized in comparison to the inflated government concerns. Much like prior decisions of the Supreme Court, the Eleventh Circuit's opinion referred to the significant privacy concerns surrounding urination in general, only to minimize them in this particular case.[113] The court concluded that the urinalysis tests at issue were not so bad for a variety of reasons: candidates could provide a sample at their doctors' offices, the screens tested only for the existence or absence of certain drugs, and results could be kept from law enforcement.[114] Further, the Eleventh Circuit relied on another time-tested special needs concept: the candidates, by running for high office, diminished their own privacy expectations.[115] The balance, therefore, tilted in the state's favor, making Georgia's suspicionless drug testing reasonable under the Fourth Amendment.[116]

C. The Balancing Analysis in Chandler

While Judge Edmonson of the Eleventh Circuit faithfully delivered the standard lines regarding special needs balancing, Justice Ginsburg, writing for the Supreme Court in *Chandler*, threw away the script. Her opinion began predictably enough; she recited the pertinent facts, identified the Fourth Amendment "search" implicated in urinalysis testing, and labeled the case as one of "special needs."[117] Yet, when it came to actually balancing the interests, Justice Ginsburg did not follow the usual analysis.

In considering whether Georgia had established a "special need" for drug testing, Justice Ginsburg, redefined the term "special." "Special" no longer meant

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110. *Id.*
111. *Id.*
112. *Id.*
113. Judge Edmonson quoted Supreme Court language that recognized that drug tests "require employees to perform an excretory function traditionally shielded by great privacy," *id.* at 1547 (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989)), and that such intrusions were "particularly destructive of privacy and offensive to personal dignity." *Id.* (quoting *Skinner*, 489 U.S. at 680 (Scalia, J., dissenting)).
114. *Id.*
115. *Id.*
116. *Id.*
117. Chandler v. Miller, 117 S. Ct. 1295, 1298–1301 (1997).

a justification "apart from the regular needs of law enforcement"; it referred to the measure of the importance of the state's justification.[118] Now, the government's "need" had to be "substantial," indeed, big enough to "override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[119] The Court then found that the candidate urinalysis program could not meet this newly calibrated standard.[120] In fact, the Court found the government's needs to be nearly nonexistent: "Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule."[121] Indeed, "[n]othing in the record" even hinted that the hazards Georgia feared were real.[122] Further, the statute's drug testing scheme was poorly designed to identify drug abusers or to deter them from seeking state office.[123] The only interest advanced by Georgia's mandatory urinalysis of candidates was that of setting a "good example"[124] and the intrusion it caused, however "noninvasive," could not be justified merely for "a symbol's sake."[125] The *Chandler* Court, therefore, held that Georgia's compelled drug testing of candidates for state office failed the special needs test, and hence violated the Fourth Amendment.[126]

IV. *CHANDLER* EXPOSED THE ABSURDITY OF FOURTH AMENDMENT BALANCING

The special needs balancing analysis is not truly an analysis at all. It merely demonstrates whether or not as few as five members of the Court value a particular government action. *Chandler* exemplifies this judicial whimsy; as easily as Justice Ginsburg determined that the balance of interests favored the individual, the special needs test would have allowed her to reach the exact opposite conclusion. Without the Fourth Amendment's threshold requirements, a warrant and probable cause, special needs analysis devolves into a factual tug-of-war "founded on little more than a subjective view regarding the acceptability" of certain government intrusions.[127] Facts can be emphasized or ignored in order to

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118. *Id.* at 1306 (Rehnquist, C.J., dissenting).
119. *Id.* at 1303.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1303–04.
124. *Id.* at 1305.
125. *Id.* at 1303, 1305.
126. *Id.* at 1298.
127. The Court once recognized the danger of such "unconfined analysis":

> It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests.

Chimel v. California, 395 U.S. 752, 764–65 (1969).

reach a preordained result. If the Court determines that a particular government behavior should be permitted, it simply highlights the state's interests and minimizes those of the individual. Conversely, if the Court believes the government invasion is offensive, it places its thumb on the other side of the scale.

This is what occurred in *Chandler*. After years of sustaining ever more intrusive searches of railroad employees, Customs Service officers, and schoolchildren, the Court, for some reason, decided that compelling politicians to urinate into a cup crossed the line. In the process, the Court compounded the harm caused by special needs balancing. Instead of acknowledging the doctrine's lack of standards, the Court employed the test's offensive subjectivity in order to rule for the individuals. The spineless special needs test was bent by the *Chandler* Court in the direction of its latest choosing. Meanwhile, in a lone dissent, Chief Justice Rehnquist, a true believer in the special needs doctrine, took balancing to its logical extreme, as dictated by *Skinner*, *Von Raab*, and *Acton*.[128]

A. Chandler *Uncharacteristically Discounted Georgia's Interests in Drug Testing Its Candidates for State Office*

The *Chandler* Court telegraphed its punch against Georgia by beginning its balancing analysis with a revision of the term "special need":

> 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.[129]

Thus, the Court immediately eased the job of rejecting Georgia's program by emphasizing the high threshold of need required before it could abandon individualized suspicion.[130]

Justice Ginsburg's approach to balancing the interests differs markedly from that of Justice Scalia in *Acton*, the case that sustained a school district's scheme to test students for drugs. Aiming to lower the bar the government had to reach in special needs litigation, Justice Scalia dispelled the notion that the government's need must be "compelling," by substituting for it the diluted "important" standard.[131] Further, unlike *Chandler*, *Acton* not only permitted

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128. *Chandler*, 117 S. Ct. at 1306–07 (Rehnquist, C.J., dissenting). In his dissent, the Chief Justice applied the special needs doctrine to the facts in *Chandler* in a manner consistent with *Skinner*, *Von Raab*, and *Acton*. As with these earlier cases, Chief Justice Rehnquist's analysis inflated the government's interests and deflated the individuals' interests.

129. *Id.* at 1303.

130. *Id.*

131. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 659–62 (1995).

invasion without suspicion, but in the case of schoolchildren, applauded it as a factor weighing in the government's favor.[132]

Chief Justice Rehnquist noted the Court's shift away from *Acton* in his dissent in *Chandler*. He observed that the term "special needs" was used in *Skinner* and *Von Raab* "in a quite different sense than it is used by the Court today."[133] In *Skinner* and *Von Raab*, the phrase "describe[d] a basis for a search apart from the regular needs of law enforcement."[134] Justice Rehnquist continued:

> The "special needs" inquiry...has not required especially great "importan[ce]," unless one considers "the supervision of probationers," or the "operation of a government office" to be especially "important." Under our precedents, if there was a proper governmental purpose other than law enforcement, there was a "special need," and the Fourth Amendment then required the familiar balancing between that interest and the individual's privacy interest.[135]

As Chief Justice Rehnquist's dissent suggested, *Chandler* changed the rules of engagement in the special needs context. Previously, special needs was a question of *kind* of government need—*what* was the state goal? So long as the purpose fell outside of the Fourth Amendment's usual realm of gathering evidence for criminal prosecution, balancing was allowed. Yet *Chandler* altered the inquiry from one of *kind* to one of *degree*; now, the government aim had to be so "substantial" as to "override" traditional Fourth Amendment protections.

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132. Justice Scalia responded to James Acton's call for suspicion-based drug testing by arguing that such a plan would present potential dangers:

> Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." ...Respondents' alternative entails substantial difficulties—if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation.... In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.

Id. at 663–64.

133. *Chandler*, 117 S. Ct. at 1306 (Rehnquist, C.J., dissenting).

134. *Id.* (Rehnquist, C.J., dissenting).

135. *Id.* (Rehnquist, C.J., dissenting) (citations omitted).

Chief Justice Rehnquist argued to return the assessment of government interests to what it had been in prior special needs cases. Indeed, his language echoed the phrasing of earlier case law. The Chief Justice gauged government activity intended to combat drug use as meeting the requisite threshold: "Few would doubt that the use of illegal drugs and abuse of legal drugs is one of the major problems of our society."[136] In *Von Raab*, the Court had noted, "Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today."[137] Similarly, in *Michigan Department of State Police v. Sitz*, a case balancing the government and individual interests implicated by sobriety check points, Chief Justice Rehnquist announced: "No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it."[138]

The Chief Justice adhered to special needs precedent in more than just language. His inflation of the government's need to fight drugs followed the Court's standard line. Drug abuse prevention has consistently proved a winning rational for government intrusion in special needs cases. In fact, prior to *Chandler*, the Court never failed to back the official action in a drug testing case; it allowed the compelled testing of bodily excretions of railroad employees involved in train accidents, agents seeking certain promotions in the Customs Service, and children wishing to participate in school sports.[139] Thus, the special needs doctrine was curiously consistent and therefore predictable prior to *Chandler*. Labeling the state interest in controlling illicit drugs as "reasonable" was virtually automatic.

Chandler broke the pattern. Although drugs were the focus of the government's program, the Court found Georgia's "relatively noninvasive" testing of politicians to be violative of the Fourth Amendment.[140] Finding drug testing to be unconstitutionally invasive, however, was not the only pendulum swing in *Chandler*. In her examination of the government's interests, Justice Ginsburg flatly stated: "Notably lacking...is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule."[141] Indeed, the record contained "nothing" even hinting that the "hazards respondents broadly describe are real and not simply hypothecated for Georgia's polity."[142]

This may have been so. However, such an absence of facts had previously failed to bother the Court in similar cases. In *Von Raab*, Customs Service employees urged that, "the Service's testing scheme was not implemented

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136. *Id.* (Rehnquist, C.J., dissenting).

137. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989).

138. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

139. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 634 (1989); *Von Raab*, 489 U.S. at 679; Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

140. *Chandler*, 117 S. Ct. at 1303.

141. *Id.*

142. *Id.*

in response to any perceived drug problem among Customs employees."[143] The Court responded by noting that drug abuse was among "the most serious" of problems confronting society generally, and, further, there was "little reason to believe that American workplaces are immune from this pervasive social problem."[144] The court of appeals in *Chandler v. Miller* did not miss *Von Raab's* relevance to this issue: "In *Von Raab*, the Customs office did not demonstrate a past of drug abuse among the employees to be tested. The Court approved the search anyway" due to the "physical and ethical demands" facing customs employees.[145]

As in *Von Raab*, the Court in *Acton* shrugged off a lack of evidence of drug use. In dissent, Justice O'Connor alerted the Court to the lack of proof of a drug problem at James Acton's grade school.[146] Despite her protests, the majority sustained the school's compelled urinalysis of schoolchildren. But when confronted with a similar intrusion on adults two years later in *Chandler*, the Court was suddenly sensitive to the lack of facts supporting the government interest. This was all the more curious because the only practical difference between the

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143. *Von Raab*, 489 U.S. at 673.

144. *Id.* at 674.

145. Chandler v. Miller, 73 F.3d 1543, 1546 (11th Cir. 1996), *rev'd*, 117 S. Ct. 1295 (1997). The court of appeals considered the lack of evidence of drug use in conjunction with the strict demands of the customs profession as so relevant to the Supreme Court's holding in *Von Raab* that it structured its own analysis around these circumstances. Since *Von Raab* had considered the two factors of (1) a "past of drug abuse among the employees" and (2) "drug use being totally incompatible with the nature of the position," so too did the court of appeals in *Chandler*. Thus, the court of appeals considered a government showing of one prong to make up for a lack of evidence in the other. *Id.*

146. Justice O'Connor recognized:

> [T]here is virtually no evidence in the record of a drug problem at the Washington Grade School, which includes the seventh and eighth grades, and which Acton attended when this litigation began. This is not surprising, given that, of the four witnesses who testified to drug-related incidents, three were teachers and/or coaches at the high school, and the fourth, though the principal of the grade school at the time of the litigation, had been employed as principal of the high school during the years leading up to (and beyond) the implementation of the drug testing policy. The only evidence of a grade school drug problem that my review of the record uncovered is a "guarantee" by the late-arriving grade school principal that "our problems we've had in '88 and '89 didn't start at the high school level. They started in the elementary school." But I would hope that a single assertion of this sort would not serve as an adequate basis on which to uphold mass, suspicionless drug testing of two entire grades of student-athletes—in Vernonia and, by the Court's reasoning, in other school districts as well. Perhaps there is a drug problem at the grade school, but one would not know it from this record.

Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 684–85 (1995) (O'Connor, J., dissenting) (citations omitted).

facts of *Chandler* and *Acton* was that *Acton's* testing procedure was more intrusive, both in the collection of the sample and in the dissemination of its results.[147]

Thus, the Court demonstrated a willingness to ease up on evidentiary requirements if the occupation or role of the individual at issue fundamentally conflicted with drug use. This analytical tradeoff created yet another logical inconsistency in *Chandler*. Specifically, the *Von Raab* Court approved compelled urinalysis of Customs Service employees in the absence of any proof of a drug problem among the personnel because it was "confronted with evidence that physical and ethical demands on customs agents were so great as to render drug use totally incompatible with the nature of the position."[148] In particular, *Von Raab* isolated three demands of "front-line interdiction personnel": physical fitness, integrity, and judgment.[149] Likewise, with positions in which agents carried firearms, and thus could be called upon to use deadly force, an employee's "perception and judgment" required protection.[150] Essentially, drugs impair physical well-being and sophisticated mental processes—the attributes crucial to officials executing the drug laws or wielding deadly force.

It would seem that qualifications such as physical health, integrity, judgment, and perception would be at least as important in a politician as in a Customs Service agent, if not more so. If, as Justice Ginsburg noted, "illicit drug users" in positions interdicting drugs or carrying firearms "might be unsympathetic to the Customs Service's mission, tempted by bribes, or even threatened with blackmail," could not the same be said of government officials?[151] Elected state officials control not merely what will happen to a particular package of drugs, but the flow of all narcotics into the state. They determine not merely when to fire a pistol, but when to call out the National Guard.

State politicians' positions of power can also make them vulnerable. The bribery and blackmail targeted at a Customs Service agent pales in comparison to

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147. For descriptions of the drug testing procedures in these cases, see *Chandler*, 117 S. Ct. at 1298–99; *Acton*, 515 U.S. at 650–51.

148. *Chandler*, 73 F.3d at 1546 (citing *Von Raab*, 489 U.S. at 669–70).

149. *Von Raab*, 489 U.S. at 670.

150. *Id.* at 670–71.

151. *Chandler*, 117 S. Ct. at 1302. This point was not lost on the court of appeals:

> The Supreme Court has...approved the drug testing of Customs officers in part because "the national interest [in eradicating drug use] could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *That said, it follows even more forcefully, that those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use.*

Chandler, 73 F.3d at 1546 (emphasis added) (alteration in original) (citation omitted) (quoting *Von Raab*, 489 U.S. at 670).

that directed at policy making officials. After all, bribing one governor would be much more efficient than attempting to corral every officer. Further, since the officials subject to drug testing under Georgia's statute run for office, the way in which they gain employment, i.e., campaigning, causes them to be much more sensitive to scandals, and hence, to threats of blackmail. However, *Chandler* abruptly broke with *Von Raab* such that those who actually control the levers of state government, who make drug policy, and who are called upon to exercise judgment in times of crisis are not in positions as incompatible with drug use as "front-line" Customs Service agents.[152]

The distinction between Customs Service agents in the field and high state officials is all the more inexplicable in view of the state offices covered by the statute. Justice Ginsburg noted that Georgia mandated drug tests of "Justices of the Supreme Court, Judges of the Court of Appeals, [and] judges of the superior courts."[153] These officials rule on criminal cases, including drug cases, arising under the laws of the state. Any ruling to be made in superior court, including motions to suppress controlled substances, motions to dismiss, bail determinations, guilty pleas, and trials themselves will be affected by determinations of superior court judges. Their decisions, in turn, can be reversed by the appellate judges. These officials must be detached and impartial for the criminal justice system to function.

Just as Customs Service agents who carry guns must have clear "perception," so too must judges be able to perceive the behavior of those in their courtroom, the facts relevant to the dispute, and the laws which pertain to the case. Just as Customs Service agents must meet the "ethical demands of their profession" so too must jurists follow their codes of professional responsibility.[154] Further, like agents in the field, judges, as their title indicates, must be able to exercise judgment. Certainly, a judge's abilities and integrity could be severely impaired by the pressures inherent in drug abuse. However, the Court in *Chandler* refused to carry special needs precedent to this natural conclusion. Perhaps the prospect of drug testing judges struck too close to home.

What is true for judges may be even more accurate for the attorney general and district attorneys, who were also covered by the Georgia statute.[155] These officials represent the people of Georgia in prosecuting criminal cases, including drug violations. Like drug-interdicting Customs Service agents, the attorney general and district attorneys are regularly exposed to "large amounts of narcotics and to persons engaged in crime" and, therefore, face the same dangers of bribery, blackmail, and a loss of sympathy toward the mission of eradicating drugs.[156] Moreover, in many states, prosecutors are charged with the duty of

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152. *Chandler*, 117 S. Ct. at 1304 (quoting *Von Raab*, 489 U.S. at 670).
153. *Id.* at 1299.
154. *Von Raab*, 489 U.S. at 679.
155. *Chandler*, 117 S. Ct. at 1299.
156. *Id.* at 1302.

seeking and pursuing the death penalty for certain crimes. They have life-and-death responsibilities not unlike Customs Service officers who carry firearms and, therefore, could endanger others if drug use caused "impaired perception and judgment."[157]

In the case of prosecutors, poor judgment due to drug use may be difficult to detect because of their broad discretion in matters such as whether to formally proceed with a case.[158] The Court has determined: "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[159] Further, our adversarial system of justice is structured so that formal challenges to a prosecutor's filing decision usually arise only when the prosecutor pursues a case with charging. After all, no one seeks judicial redress for *not* being charged with a crime. Thus, bribery or blackmail effective enough to stop a case before it starts is hard to detect.

Finally, even if a prosecutor is under pressure to file a case, no amount of monitoring could guarantee a conviction. Jury trials, despite the aid of scientific evidence and jury consultants, are still more art than science. Decisions, such as which jurors to excuse, which witnesses to call, and what questions to ask, are not subject to unfailing review. Therefore, a prosecutor coerced by threats of exposure or a cutoff of bribery money, or who is impaired by drug use, could conceal much of her failure to zealously advocate her case. Prior to *Chandler*, the Court expressed great concern over such hidden drug use: "[Railroad] employees...can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee...will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'"[160] Yet *Chandler* allowed prosecutors, whose drug use might be especially difficult to detect, to be exempted from urinalysis.

Perhaps most galling about the *Chandler* decision is that it found that drug testing of the state school superintendent was unconstitutionally intrusive.[161] Under the Georgia statute, a candidate for school superintendent was given a host of choices over the production of, as well as the use of, his or her urine sample. The candidate could have the urinalysis performed at a private doctor's office of his or her choosing, was given the first look at the results, and was allowed to prevent any further dissemination of the test report.[162] The schoolchild in *Acton*,

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157. *Id.* at 1304.

158. United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982).

159. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

160. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) (quoting Control of Alcohol and Drug Use in Railroad Operations; Final Rule and Miscellaneous Amendments, 50 Fed. Reg. 31,508, 31,526 (1985)).

161. *Chandler*, 117 S. Ct. at 1299.

162. *Id.* at 1303.

on the other hand, was compelled to submit to potentially more than one test.[163] The student had to produce the sample in front of a faculty member at school, who then handled the sample to check for temperature and tampering.[164] Finally, the student had no control over the dissemination of the results to third persons, one of whom was the school superintendent.[165] All in the guise of special needs balancing, the Court struck down the private urinalysis of the superintendent but sustained the much more intrusive testing of students. This has led to an untenable double-standard where the privacy of the student may be invaded yet the privacy of the superintendent of that student may not.

The analytical flaws of special needs balancing are also apparent in the Court's exemption from drug testing of the state's chief executive.[166] The highest of all offices in the state should certainly require "the highest level[] of honesty, clear-sightedness, and clear thinking."[167] Governors are empowered, among other things, to call out the state militia; respond to such "state emergencies" as civil unrest and natural disasters; appoint important administrators; and "direct state law enforcement agencies."[168] Certainly, such responsibility requires the clear judgment considered so weighty in the Court's earlier applications of the special needs doctrine.

The special needs test not only enabled the Court in *Chandler* to minimize Georgia's interest in combating drug abuse among state office holders, it also allowed the Court to undervalue the effectiveness of the state's testing program in meeting this danger. Specifically, Justice Ginsburg, in assessing the efficacy of Georgia's program, found the testing to be "not well designed to identify candidates who violate antidrug laws. Nor is the scheme a credible means to deter illicit drug users from seeking election to state office."[169] This was because the test date was "no secret," and therefore allowed users, "save for those prohibitively addicted, [to] abstain for a pretest period sufficient to avoid detection."[170] This same line of reasoning was *explicitly rejected* by the Court in *Von Raab* when it assessed a strikingly similar government employee drug urinalysis program:

> We think petitioners' second argument—that the Service's testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—overstates the case.... [A]ddicts

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163. Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992), *aff'd*, 66 F.3d 217 (9th Cir. 1995).

164. *Id.* at 1358.

165. *See* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 651 (1995)

166. *Chandler*, 117 S. Ct. at 1299.

167. Chandler v. Miller, 73 F.3d 1543, 1546 (11th Cir. 1996), *rev'd*, 117 S. Ct. 1295 (1997).

168. *Id.*

169. *Chandler*, 117 S. Ct. at 1303–04.

170. *Id.* at 1304.

> may be unable to abstain even for a limited period of time, or may be unaware of the "fade-away effect" of certain drugs. More importantly, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them.... Thus, contrary to petitioners' suggestion, no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned.[171]

What was deemed beyond the reasonable abilities of Customs Service agents was apparently within the control of candidates for state office. Only the slipperiness inherent in special needs balancing could allow the Court to reach a conclusion entirely opposite to one it made on the very same issue, without explanation or acknowledgment of the earlier pronouncement.

Although the most obvious, *Von Raab* is not the only special needs case with which *Chandler's* efficacy analysis conflicts. *Chandler* is an incongruity among a series of cases that approve government programs. Before *Chandler*, the Court shied away from probing the efficacy of a state program and from second-guessing policy makers.[172] Notably, in *Sitz,* the Court cautioned against transferring:

> from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.... [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources....[173]

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171. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 (1989). The court of appeals recognized the relevance of *Von Raab* in weighing the effectiveness of Georgia's drug testing program. *See Chandler*, 73 F.3d at 1546 n.4.

172. See *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990), in which the Court cited *United States Martinez-Fuerte*, 428 U.S. 543 (1976), and *Delaware v. Prouse*, 440 U.S. 648 (1979), as cases in which the Court did not participate in a "searching" effectiveness examination of the state program at issue.

173. *Sitz*, 496 U.S. 453–54. The court of appeals in *Chandler v. Miller* was cognizant of Supreme Court precedent emphasizing deference to legislative and administrative policy making. Judge Edmonson, writing for the court, noted:

> Appellants contend that because the test is administered after substantial notice, drug users may simply discontinue their indulgence for a brief period before testing and, thus, defeat the purpose of the test. They say the testing is just ineffective. But, in balancing the Fourth Amendment interests, there is no requirement that a search be the single most effective one a legislature could design.... Persons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs; these worst cases might be the most dangerous in public office. The testing is not so ineffective as to be unreasonable or irrational in itself.

As *Sitz* demonstrates, courts generally do not determine whether the option at issue is best, but only whether it is reasonable. The special needs approach, if consistently applied, would not empower the courts to second guess Georgia's policy decision to use its resources to test candidates for drugs. Yet the self-restraint of the efficacy-measuring precedent seemed to matter little to the *Chandler* Court.

Justice Ginsburg broadly hinted at the Court's disapproval of the very policy decision Georgia reached in mandating drug testing of its candidates for office: "Georgia was the first, and apparently remains the only, State to condition candidacy for state office on a drug test."[174] The implication of this statement is that Georgia, as the only state to so intrude on its candidates, has suffered a dubious distinction.[175]

The lack of deference shown the state of Georgia was particularly striking, in light of the nature of the government program at issue. *Chandler* was not merely a case considering how best to protect railroad transportation or even schoolchildren. It handled the question of how states choose their own elected officials. Judge Edmonson expressed a special regard for Georgia's interests in this policy making realm:

> American history is especially important in a case like this one; and the Supreme Court observed nearly a century ago: "It is obviously essential to the independence of the States, and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers...should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."[176]

How curious for a Court that had recently championed the importance of state sovereignty to choose to meddle with Georgia's right to determine who will guide

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Chandler, 73 F.3d at 1546 n.4.

174. *Chandler*, 117 S. Ct. at 1299.

175. Indeed, this is the interpretation that Chief Justice Rehnquist gave to this passage. In his dissent, the Chief Justice stated:

> I fear that the novelty of this Georgia law has led the Court to distort Fourth Amendment doctrine in order to strike it down. The Court notes, impliedly turning up its nose, that "Georgia was the first, and apparently remains the only, State to condition candidacy for state office on a drug test." But if we are to heed the oft-quoted words of Justice Brandeis...—"[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"—novelty itself is not a vice. These novel experiments, of course, must comply with the United States Constitution; but their mere novelty should not be a strike against them.

Id. at 1305–06 (Rehnquist, C.J., dissenting) (alteration in original) (citation omitted) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting)).

176. *Chandler*, 73 F.3d at 1545 (quoting Taylor v. Beckham, 178 U.S. 548, 570–71 (1900)).

its own people.[177] By fighting the states-rights tide it set in motion, the Court in *Chandler* demonstrated how the special needs test permits precedent to be disregarded in favor of subjective values.

B. Chandler *Gave Unprecedented Weight to the Individual Privacy Interests of Candidates for State Office*

If calling *Chandler's* treatment of Georgia's interests "consistent reasoning" would be fiction, then saying its weighing of the candidates' individual rights was "legal analysis" would be fantasy. Before *Chandler*, special needs jurisprudence measured (indeed, minimized) an individual's interests against a government search in terms of "reasonable expectation of privacy."[178] In *Skinner*, the Court diminished railway employees' privacy expectations, even for the personal activity of passing urine, "by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."[179] The Court reasoned that those who voluntarily chose to join an industry heavily regulated to ensure safety knowingly gave up their privacy expectations.[180]

Likewise, in *Acton*, students attending school lived in an environment of decreased privacy expectations. They regularly experienced intrusions in the form of vaccines and physical examinations.[181] Further, students who chose to "go out for the team" voluntarily subjected themselves to the "communal undress" of the locker room, thus intentionally submitting to a "degree of regulation even higher than that imposed on students generally."[182] In short, "[s]chool sports [were] not for the bashful";[183] if a student was too modest to stand the heat from the locker room glare of school athletics, he should simply stay out of the kitchen.[184]

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177. See *Printz v. United States*, 117 S. Ct. 2365 (1997), in which the Court held that the federal government could not conscript state officers to enforce a federal program regulating gun sales.

178. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989).

179. *Id.*

180. *Id.* at 606–07, 620.

181. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 656 (1995).

182. *Id.* at 657.

183. *Id.*

184. "If you can't stand the heat, get out of the kitchen." JOHN BARTLETT, FAMILIAR QUOTATIONS 788 (Little Brown & Company 15th ed. 1980). The editors noted:

> President Truman has used variations of the aphorism...for many years, both orally and in his writings. For instance, in his book *Mr. Citizen* [1960], in the chapter entitled "Some Thoughts on the Presidency," he states, "Some men can make decisions and some cannot. Some men fret and delay under criticism. I used to have a saying that applies here, and I note that some people have picked it up."

Id. at 788 n.1 (omission in original).

It is therefore bizarre that the Court did not apply this same logic to the hottest of kitchens—politics. When a person enters public life, his or her personal life becomes fair game for public scrutiny. Just as a railroad employee knowingly submits to the limits of a pervasively regulated industry, a candidate for public office submits to privacy intrusions by the media and opponents. When a student goes out for the team, she exposes herself to the communal atmosphere of a locker room. In the same vein, when a candidate runs for office, she quite literally is attempting to join the state team, and figuratively is exposing herself to the locker room of the tabloids and televisions. Virtually no boundaries to privacy exist for politicians in public office. When he was President of the United States, Ronald Reagan's colon polyps and prostate problems were legitimate news,[185] while New York mayor Rudy Giuliani's marital life has recently been *Vanity Fair* fodder.[186] Private lives have received even greater scrutiny on the topic of drug use. Indeed, the membership of the Supreme Court itself has felt the effects of the drug debate; in 1987, Douglas H. Ginsburg's nomination for the Court was scuttled in part due to disclosures of his marijuana use as a Harvard law professor.[187] Both the current President[188] and Vice President[189] have had to answer questions regarding drug use. Further, the drug issue has visited campaigning on the state level. During the primary of a Texas gubernatorial race, Ann Richards was questioned about whether she had ever used illegal substances.[190] Thus, it would not have been surprising if the Court had used the special needs test to announce that politicians, who foist themselves into the public eye, have voluntarily decreased their own privacy expectations, particularly with regard to drug use.[191]

However, Justice Ginsburg, in applying the malleable special needs analysis, turned the doctrine's "expectation of privacy" reasoning on its head. She agreed that politicians were under the microscope: "Candidates for public

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185. *See Prostate Operation: A Blip on Reagan's Health Screen*, U.S. NEWS & WORLD REP., Dec. 29, 1986, at 7.

186. *See* Gregory Beals & Evan Thomas, *The Mayor's Marriage*, NEWSWEEK, Aug. 18, 1997, at 35 (referring to *Vanity Fair's* coverage of Mayor Giuliani).

187. James Gerstenzang & Karen Tumulty, *Ginsburg Withdraws, Citing Furor over Use of Marijuana: Court Nominee Urges Youth to Learn from His Mistake*, L.A. TIMES, Nov. 8, 1987, at 1; *Byrd Wants Judge to Reconsider*, L.A. TIMES, Nov. 6, 1987, at 1.

188. Eleanor Clift, *Running Against the Past, for Clinton, Everything's an Issue of Integrity*, NEWSWEEK, Apr. 13, 1992, at 30.

189. Gerstenzang & Tumulty, *supra* note 187, at 1.

190. Alison Cook, *Lone Star*, N.Y. TIMES, Feb. 7, 1993, § 6 (Magazine), at 22, 47.

191. The court of appeals did as much: "[M]uch like the Customs agents whose privacy expectations are diminished because physical conditioning and ethical behavior are central to job performance, candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position." Chandler v. Miller, 73 F.3d 1543, 1547 (11th Cir. 1996) (citation omitted), *rev'd*, 117 S. Ct. 1295 (1997). Further, the Supreme Court has recognized this "public official" phenomenon in the free speech context under the First Amendment. *See* New York Times Co. v. Sullivan, 376 U.S. 255 (1964).

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."[192] However, instead of viewing these facts as reason to minimize Fourth Amendment privacy interests, as the Court had done in the past, she argued that the diminution of the politicians' privacy actually cut against government interests; a drug testing program was not necessary because politicians' conduct and work product were subject to intense "day-to-day scrutiny."[193]

In *Chandler,* the Court used the kind of facts to advance privacy interests that in the past it had employed to limit them. The incongruity drains the credibility from the special needs doctrine. Indeed, the Court's analysis of the facts regarding public scrutiny in *Chandler* caused a contrary result in the special needs cases it cited. The school athletes, who the Court considered "role models," must have received constant attention in small town Vernonia, Oregon.[194] Their activities would have been scrutinized by spectators in the stands, admirers in class, and the "stable and closely knit" faculty who maintained contact with parents.[195] Thus, the *Chandler* analysis, if consistently applied, would have invalidated the suspicionless random drug testing at issue in *Acton.*

In his dissent, Chief Justice Rehnquist noted the effect *Chandler's* reasoning would have had on railroad employees and Service Customs agents:

> One might just as easily say that the railroad employees in *Skinner,* or the Customs officials in *Von Raab,* would be subjected to the same sort of scrutiny from their fellow employees and their supervisors. But the clear teaching of those cases is that the government is not required to settle for that sort of a vague and uncanalized scrutiny; if in fact preventing persons who use illegal drugs from concealing that fact from the public is a legitimate

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192. Chandler v. Miller, 117 S. Ct. 1295, 1304 (1997).

193. *Id.* Chief Justice Rehnquist recognized this abrupt shift in reasoning:

> Under normal Fourth Amendment analysis, the individual's expectation of privacy is an important factor in the equation. But here, the Court perversely relies on the fact that a candidate *gives up* so much privacy...as a reason for *sustaining* a Fourth Amendment claim. The Court says, in effect, that the kind of drug test for candidates required by the Georgia law is unnecessary, because the scrutiny to which they are already subjected by reason of their candidacy will enable people to detect any drug use on their part. But this is a strange holding, indeed.

Id. at 1306–07 (Rehnquist, C.J., dissenting) (emphases in original).

194. Those in school sports were at "the very center of activity of the school and community." Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992), *aff'd,* 66 F.3d 217 (9th Cir. 1995). Vernonia, Oregon, was a logging community with a population of about 3000. *Id.* at 1356.

195. *Id.* at 1356–57.

> government interest, these cases indicate that the government may require a drug test.[196]

Thus, *Chandler* managed to flout each of the special needs cases in which the Court had considered the scrutiny issue.

The *Chandler* Court's most peculiar manifestation of the subjectivity of the special needs test was its argument that Georgia's drug testing law was *not sufficiently intrusive* to survive a Fourth Amendment challenge.[197] As previously noted, Justice Ginsburg criticized the testing scheme for failing to keep the testing date a secret.[198] Thus, would-be candidates, at least those who were not hopeless addicts, could cheat the test by temporary abstention, thereby diminishing the test's efficacy. In other words, had the state chosen a procedure *more invasive* of individual rights, such as the random testing in *Acton*, it would have stood on firmer ground. Chief Justice Rehnquist recognized that *Chandler* created a special needs Catch-22. He asserted: "But one may be sure that if the test were random—and therefore apt to ensnare more users—the Court would then fault it for its intrusiveness."[199] And therein lies the essential problem with special needs balancing; because there are no true standards, the significance of particular facts cannot be known until the result of the case is determined.

V. CONCLUSION

Nowhere in the text of the Fourth Amendment is there any mention of "special needs." The Court cut "special needs" balancing out of whole cloth. Such a dubious origin means the doctrine is vulnerable to the Court's shifting values; without an anchor in the Amendment or in common law, it can be manipulated to meet any end. The Court has taken full advantage of the doctrine's paucity of principles by balancing the interests whenever a Fourth Amendment case involved concerns outside of "the normal need for law enforcement."[200] Balancing has enabled the Court to reach conclusions unrestrained by the mandates of the Fourth Amendment. The result has been a steady dilution of privacy rights. The sanctity of individual dignity has deteriorated from where the Court considered the search of a student's purse to constitute a "severe violation of subjective expectations of privacy,"[201] to where a schoolchild being forced to urinate in front of faculty implicated only "negligible" privacy interests.[202]

The diminishment of Fourth Amendment rights eventually alarmed even the Court. In *Chandler*, the Court attempted to correct the balance between the

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196. *Chandler*, 117 S. Ct. at 1307 (Rehnquist, C.J., dissenting).
197. *Id.* at 1304.
198. *Id.*
199. *Id.* at 1307 (Rehnquist, C.J., dissenting).
200. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
201. New Jersey v. T.L.O., 469 U.S. 325, 338 (1985).
202. *Acton*, 515 U.S. at 658.

rights of the government and those of the individual. But within the confines of the special needs doctrine, a shift toward the rights of the citizen could not be accomplished without doing violence to assumptions crafted in the precedent established in *Skinner*, *Von Raab*, and *Acton*. Thus, *Chandler* presented a curious juxtaposition of opinions: Justice Ginsburg's majority opinion distorted conclusions and ignored facts in prior special needs case law in order to reach a holding properly vindicating individual rights while Chief Justice Rehnquist remained faithful to the questionable analysis carved out in special needs precedent in order to reach yet another wrong result.

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 Court could not rationally distinguish state politicians from railroad employees, Customs Service agents, or schoolchildren. Faced with the myriad inconsistencies of the Court's special needs balancing, one cannot help but wonder whether the real reason that the Court finally drew the line against drug testing of state elected officials is that on some level, it feared that in a future case, the Justices of the Court might find themselves handed a cup to fill.