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# COMMENT

## *CHANDLER v. MILLER*: DRUG TESTING CANDIDATES FOR STATE OFFICE UNDER THE "SPECIAL NEEDS" EXCEPTION

### INTRODUCTION

The drug problem in America is not limited to teenagers, entertainers and athletes—it has infected high public office as well.<sup>1</sup> After Washington, D.C. was devastated in 1990 by an FBI videotape of then-Mayor Marion Barry smoking a pipeful of crack cocaine,<sup>2</sup> the Georgia Legislature passed a statute requiring all candidates seeking qualification for nomination or election to state office to certify that they have tested negative for the bodily presence of illegal drugs.<sup>3</sup>

When the statute was later challenged in *Chandler v. Miller*,<sup>4</sup> the constitutionality of suspicionless drug testing of candidates for state office was addressed by the Supreme Court for the first time.

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<sup>1</sup> *United States v. Barry*, 938 F.2d 1327, 1329 (D.C. Cir. 1991); see also Brief for the Washington Legal Foundation and Parents' Association to Neutralize Drug and Alcohol Abuse, Inc. available in 1996 WL 709329, at \*22 n.29; *Chandler v. Miller*, 520 U.S. 305 (1997) (No. 96-126), available in 1996 WL 709329, at \*22 n.29 (highlighting the indictment of the Mayor of Bradford, Arkansas for possession of 65 pounds of marijuana; the indictment of the Mayor of Cooperhill, Tennessee for illegal drug possession; the conviction of the Mayor of Charlestown, West Virginia for possession of cocaine; the resignation of the Mayor of Asbury Park, New Jersey following drug possession charges; the arrest of a Richmond, Virginia City Councilman for selling heroin; and the conviction of a Hartford, Connecticut City Councilman for selling illegal drugs).

<sup>2</sup> James Carney, *Forgive Me, Voter*, TIME, Sept. 12, 1994, at 43.

<sup>3</sup> GA. CODE ANN. § 21-2-140 (1993), repealed by 1998 GA. LAWS 295, §1 (effective Jan. 1, 1999).

<sup>4</sup> 520 U.S. 305 (1997).

The Court held that Georgia's drug-free certification requirement was unconstitutional, thereby adding further ambiguity to the judicially-created but ill-defined "special needs" exception to the Fourth Amendment.<sup>5</sup> The special needs exception, which has been used to uphold suspicionless drug testing in a variety of contexts,<sup>6</sup> provides that in limited "special" circumstances, a state may constitutionally search an individual despite the absence of grounds for suspecting that person of illegal activity.<sup>7</sup> Only if the special needs threshold is met will the Court continue its Fourth Amendment inquiry by applying a balancing test, weighing an individual's privacy expectations against the government's interests to determine whether the suspicionless search at issue is reasonable.<sup>8</sup>

Commentators have warned that the amorphous special needs exception has created a slippery slope inviting "the continued erosion of the basic principles of the Fourth Amendment."<sup>9</sup> In an unconvincing effort to distinguish *Chandler* from previous cases upholding suspicionless drug testing,<sup>10</sup> the Su-

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<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (finding a special need for suspicionless drug testing of student athletes); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (finding a special need for suspicionless drug testing of United States Customs Service employees whose positions involved the interdiction of illegal drugs or the carrying of a firearm); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619-20 (1989) (decided on the same day as *Von Raab*) (finding a special need for suspicionless drug testing of employees involved in certain train accidents); see also discussion *infra* Part I.B.

<sup>7</sup> See *Vernonia*, 515 U.S. at 653; *Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 619.

<sup>8</sup> See *Vernonia*, 515 U.S. at 653; *Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 619.

<sup>9</sup> Jennifer L. Malin, Comment, *Vernonia School District 47J v. Acton: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469, 517 (1996); see also Jennifer Y. Buffalo, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 563 (1997) (arguing that loosely defining special needs results in a "malleable and unprincipled" Fourth Amendment analysis); George M. Dery III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 103 (1998) (arguing that the special needs exception has resulted in a "steady dilution of privacy rights"); Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV. 1013, 1035 (1990) (arguing that the special needs doctrine has an "unlimited opportunity for broad application").

<sup>10</sup> See cases cited *supra* note 6.

preme Court heeded these concerns by raising the special needs threshold while purporting to apply its familiar analysis.<sup>11</sup> The Court's application of heightened scrutiny and the resulting invalidation of Georgia's candidate drug-free certification requirement was achieved, in fact, only through the direct contradiction of special needs precedent.<sup>12</sup> Moreover, regardless of whether the special needs threshold needed to be raised in order to preserve Fourth Amendment ideals, *Chandler* was certainly not the appropriate case in which to raise it as states have long been afforded great deference when exercising their sovereign powers to establish qualifications for their own state officers.<sup>13</sup>

Part I of this Comment explains basic Fourth Amendment principles and the evolution of the special needs doctrine. Part II discusses the factual and procedural history of *Chandler v. Miller*.<sup>14</sup> Part III explains why the *Chandler* statute should have been upheld. It considers the departure from precedent and faulty reasoning that ultimately led the Supreme Court to conclude that Georgia's need to obtain drug-free certification from candidates for state office ranked as merely "hypothetical" and "symbolic" rather than "special."<sup>15</sup> Finally, the remainder of Part III considers a state's Tenth Amendment powers to establish qualifications for its own officers. It argues that validation of Georgia's drug testing statute would not have diminished traditional Fourth Amendment principles because a finding of special needs could have been limited to the unique context of election qualification statutes where states have long been "exclusive and free from external interference, except so far as plainly provided by the Constitution . . . ."<sup>16</sup>

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<sup>11</sup> See discussion *infra* Parts II.B.3.b, III.

<sup>12</sup> Although this Comment argues that the *Chandler* statute should have been upheld, even those who are pleased with the outcome of the case recognize that the Court "preserved individual privacy by incorrectly distorting special needs reasoning." Dery, *supra* note 9, at 74; see also discussion *infra* Part III.

<sup>13</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); see also discussion *infra* Part III.B.2.

<sup>14</sup> 520 U.S. 305 (1997).

<sup>15</sup> *Id.* at 318-22.

<sup>16</sup> *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900).

## I. THE FOURTH AMENDMENT

### A. Background

The text of the Fourth Amendment consists of two clauses: the Reasonableness Clause, which prohibits unreasonable searches and seizures, and the Warrant Clause, which requires that warrants only be issued upon probable cause and that they be detailed and limited in their scope.<sup>17</sup> Whether the two clauses stand independent of one another, or whether the Warrant Clause modifies the Reasonableness Clause thereby defining what is reasonable, has been the subject of extensive debate among legal scholars.<sup>18</sup> The traditional view is that all searches and seizures are per se unreasonable unless authorized by a warrant issued upon a demonstration of probable cause.<sup>19</sup> However, the Court's more recent opinions suggest

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<sup>17</sup> See U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution 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.

For a history of searches and seizures in England and the Colonies prior to the drafting of the Fourth Amendment, see Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 MEM. ST. U. L. REV. 483, 487-517 (1995).

<sup>18</sup> Compare, JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42 (1966) (noting that the Warrant Clause gives meaning to the Reasonableness Clause); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 396-98, 410-14 (1974) (arguing that history supports the view that searches are unreasonable unless authorized by warrant); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 20-21 (1994) (arguing that the Warrant Clause defines and interprets the Reasonableness Clause); and Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855-56 (1994) (arguing that warrants and probable cause are the "touchstone" of constitutionally reasonable searches) with TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43 (1969) (arguing that the Fourth Amendment was not designed to make most searches covered by warrants), and Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761-85 (1994) (arguing that the "core" of the Fourth Amendment is reasonableness, not the issuance of a warrant or probable cause). For a summary of the two competing views, see Clancy, *supra* note 17, at 517-26; James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103 (1992); and Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389 (1989).

<sup>19</sup> See, e.g., *Payton v. New York*, 445 U.S. 573, 586 (1980).

that the Warrant Clause requirements are not the *sine qua non* of reasonableness.<sup>20</sup> Rather, the Court has emphasized that what is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."<sup>21</sup>

Regardless of how the Supreme Court has interpreted the relationship between the two clauses of the Fourth Amendment, the Court has traditionally required at least some level of individualized suspicion when considering the reasonableness of a search or seizure.<sup>22</sup> When governmental intrusion amounts to a "full" search or seizure, as in the case of an arrest, the level of individualized suspicion required to justify the intrusion is known as "probable cause," defined as "a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>23</sup> When the governmental intrusion is less extensive, as in the case of a mere frisk of a suspect's outer clothing, the Court requires a lesser showing than probable cause known as "reasonable suspicion."<sup>24</sup> However, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."<sup>25</sup>

The Supreme Court first departed from its traditional individualized suspicion requirement in 1967 when it validated warrants issued for area-wide building, health and fire code inspections in *Camara v. Municipal Court*.<sup>26</sup> The Court did not require specific evidence of a code violation in any particular dwelling, but nonetheless concluded that the warrants issued were reasonable within the meaning of the Fourth Amendment by employing an abstract balancing test—"balancing the need to search against the invasion which

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<sup>20</sup> See cases cited *supra* note 6.

<sup>21</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

<sup>22</sup> See *Skinner*, 489 U.S. at 624 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)).

<sup>23</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>24</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1967) (defining reasonable suspicion as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

<sup>25</sup> *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

<sup>26</sup> 387 U.S. 523 (1967).

the search entails."<sup>27</sup> Unlike a search pursuant to a criminal investigation to recover stolen contraband or goods, the inspection programs at issue in *Camara* were "aimed at securing city-wide compliance with minimum physical standards for private property."<sup>28</sup> The primary governmental interest at stake was the prevention of conditions hazardous to public health and safety.<sup>29</sup> The Court found that the only effective way to seek universal compliance with these minimum standards was through routine periodic inspections of all structures.<sup>30</sup> Thus, *Camara* was the "fountainhead" of many factors relied on by the Court in subsequent cases to justify its departure from the requirements of individualized suspicion and use of the reasonableness balancing test.<sup>31</sup> Those factors include the non-criminal nature of the search, the impracticability of a search based on individualized suspicion, the preventative government goals and the relatively non-intrusive nature of the invasion.<sup>32</sup>

#### B. *The Special Needs Exception and Suspicionless Drug Testing*

One category of Fourth Amendment cases that eliminates the requirement of individualized suspicion and triggers the reasonableness balancing test includes those where the Court finds "special needs, beyond the normal need for law enforcement, mak[ing] the warrant and probable cause requirement impracticable."<sup>33</sup> Suspicionless drug testing has often fallen

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<sup>27</sup> *Id.* at 536-37.

<sup>28</sup> *Id.* at 535.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 535-36.

<sup>31</sup> Clancy, *supra* note 17, at 548. The Supreme Court has used the balancing test in a variety of contexts. *See, e.g.,* *Vernonia Sch. Dist. 47 J. v. Acton*, 515 U.S. 646 (1995) (drug testing of student athletes); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of railroad employees); *Von Raab*, 489 U.S. 656 (1989) (drug testing of Customs Service employees); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (supervision of probationers and parolees); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (student searches); *Delaware v. Prouse*, 440 U.S. 648 (1979) (vehicle checkpoints); and *United States v. Ramsey*, 431 U.S. 606 (1977) (border searches).

<sup>32</sup> *See* Clancy, *supra* note 17, at 548.

<sup>33</sup> *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

within this special needs category.<sup>34</sup> Specifically, in a trilogy of cases decided prior to *Chandler*, the Supreme Court recognized a special need for the suspicionless drug testing of railroad employees,<sup>35</sup> Customs Service employees<sup>36</sup> and student athletes.<sup>37</sup>

In *Skinner v. Railway Labor Executives' Association*,<sup>38</sup> the Supreme Court found that the government's interest in regulating railroad safety created a special need for federal regulations mandating the suspicionless drug testing of railroad employees.<sup>39</sup> Writing for the majority, Justice Kennedy based his determination on the fact that railroad employees were engaged in "safety-sensitive tasks,"<sup>40</sup> and that on-the-job intoxication was a significant problem in the railroad industry.<sup>41</sup> Having concluded that a special need existed, Justice Kennedy explained the reasonableness balancing test that it triggered: "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."<sup>42</sup> The *Skinner* Court found that the government had a compelling interest in drug testing railroad employees because of the safety-sensitive nature of their positions, the deterrent effect that testing would provide, and the invaluable information about the causes of accidents that it would help obtain.<sup>43</sup> In contrast, the Court found that the intrusion on the privacy interests of the railroad employees was minimal because those employed in a highly regulated indus-

<sup>34</sup> See *infra* notes 35-60 and accompanying text.

<sup>35</sup> *Skinner*, 489 U.S. at 602.

<sup>36</sup> *Von Raab*, 489 U.S. at 656.

<sup>37</sup> *Vernonia*, 515 U.S. at 646.

<sup>38</sup> 489 U.S. 602 (1989).

<sup>39</sup> See *id.* at 620.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 607. The Federal Railroad Administration "identified 34 fatalities, 66 injuries and over \$28 million in property damage (in 1983 dollars) that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983." *Id.* at 608.

<sup>42</sup> *Id.* at 624.

<sup>43</sup> *Skinner*, 489 U.S. at 628.



try, where "even a momentary lapse of attention can have disastrous consequences," have a diminished expectation of privacy.<sup>44</sup>

Similarly, in *National Treasury Employees Union v. Von Raab*,<sup>45</sup> decided on the same day as *Skinner*, the Court upheld a suspicionless drug testing plan implemented by the United States Customs Service to test those employees seeking transfer or promotion to positions involving drug interdiction or the carrying of a firearm.<sup>46</sup> Writing for the majority again, Justice Kennedy found that the need for deterring drug use among those eligible for promotion to such sensitive positions within the Service, and preventing the promotion of drug users to those positions, amounted to a special need "no less than" the need for safe rail transportation at issue in *Skinner*.<sup>47</sup> Applying the reasonableness balancing test, the Court determined that the government's interest in conducting suspicionless searches outweighed the privacy interests of the Service employees.<sup>48</sup> Because the Customs Service is "our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population," Justice Kennedy opined that the government had a "compelling interest" in ensuring that the employees were physically fit and had "unimpeachable integrity and judgment."<sup>49</sup> Otherwise, Justice Kennedy reasoned, the employees might be tempted to take bribes from the drug traffickers with whom they deal, or to abuse the vast sources of valuable contraband to which they have access.<sup>50</sup> Regarding those employees who were required to carry firearms, Justice Kennedy added that "the public

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<sup>44</sup> See *id.* at 624-27.

<sup>45</sup> 489 U.S. 656 (1989).

<sup>46</sup> See *id.* A third category of employees that were subjected to suspicionless drug testing under the government's plan were those required to "handle classified material." *Id.* at 677. The Court opined that the government did have a special need for requiring those employees likely to gain access to sensitive information to submit to drug testing. See *id.* However, because it was unclear whether this category of employees as defined by the Service's directive encompassed only those individuals who would be likely to gain such access, the Court was unable to address the issue of reasonableness and remanded the case to the court of appeals for clarification of the scope of this category. See *id.* at 677-78.

<sup>47</sup> *Id.* at 666.

<sup>48</sup> See *id.* at 668.

<sup>49</sup> *Id.* at 668-70.

<sup>50</sup> See *Von Raab*, 489 U.S. at 669.

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."<sup>51</sup> Finally, turning to the intrusion on the employees' privacy interests, the majority held, as in *Skinner*, that the infringement was minimal due to a diminished expectation of privacy that results from their position: "Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness."<sup>52</sup>

The last case before *Chandler* to consider special needs for suspicionless drug testing was *Vernonia School District 47J v. Acton*.<sup>53</sup> In *Vernonia*, Justice Scalia authored the majority opinion finding that a special need existed for the school district's Student Athlete Drug Policy<sup>54</sup> because strict adherence to warrant and probable cause requirements would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools."<sup>55</sup> Invoking the reasonableness balancing test, the Court concluded that the government's interest in testing outweighed the privacy interests of the athletes to be tested.<sup>56</sup> The majority reasoned that the government's interest in deterring drug abuse by the nation's schoolchildren was at least as important as the government's interest in deterring drug abuse by railroad employees in *Skinner* and protecting drug interdiction efforts in *Von Raab*.<sup>57</sup> The Court also emphasized the fact that the *Vernonia* testing scheme was narrowly tailored to athletes, who were "the leaders of the drug culture,"<sup>58</sup> but that it would ad-

<sup>51</sup> *Id.* at 671.

<sup>52</sup> *Id.* at 672.

<sup>53</sup> 515 U.S. 646 (1995).

<sup>54</sup> Under the Policy, students desiring to play a sport were required to sign a form consenting to drug testing and obtain the written consent of their parents. *Id.* at 650. The athletes are tested at the beginning of the season for their sport. *Id.* Additionally, once each week 10% of the athletes are randomly selected for testing. *See id.*

<sup>55</sup> *Id.* at 653 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41) (1985). The Policy was implemented after a sharp increase in student disciplinary problems that correlated with a dramatic increase in student drug abuse. *Id.* at 648-49.

<sup>56</sup> *See id.* at 664-65.

<sup>57</sup> *See id.* at 661.

<sup>58</sup> *Vernonia*, 515 U.S. at 649.

dress the "role model" effect" on other students.<sup>59</sup> As for the privacy interests of the student athletes, the Court concluded that "students within the school environment have a lesser expectation of privacy than members of the population generally" and that privacy expectations are even less with regard to student athletes because they voluntarily subject themselves to heightened regulation by trying out for a team.<sup>60</sup>

Based upon the foregoing, it seemed certain that when the Court granted certiorari in *Chandler*,<sup>61</sup> it was going to find a state's interest in having a drug-free governor, and other high ranking state officials,<sup>62</sup> to be no less "special" than the governmental interest in having drug-free railroad employees,<sup>63</sup> Customs Service employees<sup>64</sup> and high school athletes.<sup>65</sup> However, the Court "refused to carry special needs precedent to this natural conclusion."<sup>66</sup> Instead, the special needs scrutiny that the *Chandler* Court applied was much more exacting than it had been in previous cases.<sup>67</sup>

## II. *CHANDLER V. MILLER*

### A. *The Facts*

In 1990 the Georgia Legislature enacted a statute<sup>68</sup> requiring each candidate seeking to qualify for nomination or election to a state office<sup>69</sup> to certify that he or she has tested negative for the bodily presence of illegal drugs<sup>70</sup> within thirty

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<sup>59</sup> *Id.* at 663.

<sup>60</sup> *Id.* at 657.

<sup>61</sup> 520 U.S. 305 (1997).

<sup>62</sup> See *infra* note 69.

<sup>63</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

<sup>64</sup> *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>65</sup> *Vernonia*, 515 U.S. at 649.

<sup>66</sup> See Dery, *supra* note 9, at 94.

<sup>67</sup> See discussion *infra* Parts II.B.3.b, III.

<sup>68</sup> GA. CODE ANN. § 21-2-140 (1993), *repealed by* 1998 GA. LAWS 295, §1 (effective Jan. 1, 1999).

<sup>69</sup> The statute defines state office as the office of any of the following: 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. See *id.*

<sup>70</sup> The prohibited drugs are marijuana, cocaine, opiates, amphetamines or

days prior to qualification. A candidate was required to provide a test specimen, either at a laboratory approved by the State Commissioner of Human Resources or at the office of the candidate's personal physician.<sup>71</sup> When testing was complete, the statute directed the laboratory to prepare a certificate reporting the results only to the candidate.<sup>72</sup> No candidate was permitted to qualify for nomination or election to a State office unless he or she had filed such certificate, indicating negative test results, with the State at the time of qualification.<sup>73</sup>

A challenge to this practice arose in 1994 when the Libertarian Party nominated Walker L. Chandler for the office of Lieutenant Governor, Sharon T. Harris for the office of Commissioner of Agriculture, and James D. Walker for the office of member of the General Assembly.<sup>74</sup> One month before the deadline for submission of the certificates required by the statute, Chandler, Harris and Walker filed an action in the United States District Court for the Northern District of Georgia requesting declaratory and injunctive relief barring enforcement of the statute.<sup>75</sup> The plaintiffs claimed, *inter alia*, that the statute violated their right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution.<sup>76</sup>

## B. *The Courts' Decisions*

### 1. The District Court

The District Court for the Northern District of Georgia explained that a preliminary injunction is an extraordinary

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phencyclidine, "except when used pursuant to a valid prescription or when otherwise authorized by state or federal law." *Id.*

<sup>71</sup> The actual tests are conducted at a State approved laboratory in a manner consistent with the United States Department of Health and Human Services Guidelines or other professionally valid procedures approved by the Commissioner. *See id.*

<sup>72</sup> *See* GA. CODE ANN. § 21-2-140 (1993), *repealed* by 1998 GA. LAWS 295, §1 (effective Jan. 1, 1999).

<sup>73</sup> *See id.*

<sup>74</sup> *See* Chandler v. Miller, 520 U.S. 305, 310 (1997).

<sup>75</sup> *See* Chandler v. Miller, 952 F. Supp. 804 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1543 (11th Cir. 1996), *rev'd*, 520 U.S. 305 (1997).

<sup>76</sup> *See id.* at 805.

remedy that is only granted where the moving party clearly establishes a substantial likelihood that he or she will ultimately prevail on the merits of the claim.<sup>77</sup> Here, the plaintiffs' claim was that it was unreasonable for Georgia to require candidates for state office to certify that they have tested negative for the presence of illegal drugs without a showing of individualized suspicion.<sup>78</sup> However, the district court explained that such suspicionless searches may be reasonable, where there are "special needs, beyond the ordinary needs of law enforcement."<sup>79</sup> Where such special needs exist, the court applies a balancing test, weighing "the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."<sup>80</sup>

The district court found that the State offices of Lieutenant Governor, Commissioner of Agriculture and member of the General Assembly were more than just ordinary government jobs,<sup>81</sup> and that Georgia's interest in their operation gave rise to special governmental needs that triggered application of the reasonableness balancing test.<sup>82</sup> Under the balancing test, the district court concluded that the drug-free certification requirement was reasonable and that Georgia had demonstrated valid, compelling concerns.<sup>83</sup> In particular, the court noted that

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<sup>77</sup> See *id.* The movant must also show: (1) that he or she will suffer irreparable injury unless the injunction issues; (2) proof that the threatened injury to him or her outweighs whatever damage the proposed injunction may cause the opposing party; and (3) that issuing the injunction would not be adverse to the public interest. See *id.* (citing *Cunningham v. Adams*, 808 F.2d 815, 819 (11th Cir. 1987)).

<sup>78</sup> See *Chandler*, 952 F. Supp. at 805.

<sup>79</sup> *Id.* at 806 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (holding that United States Customs Service's suspicionless drug testing of employees whose positions involve the interdiction of illegal drugs or the carrying of a firearm was reasonable); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619-20 (1989) (holding that the Federal Railroad Administration regulation requiring blood testing for employees involved in certain train accidents was reasonable); see also *supra* notes 38-52 and accompanying text.

<sup>80</sup> *Id.* at 806.

<sup>81</sup> See *id.* The court cited the Georgia State Constitution, art. I, § II, cl. I, which provides that "Public officers are the trustees and servants of the people and are at all times amenable to them."

<sup>82</sup> See *Chandler*, 952 F. Supp. at 806.

<sup>83</sup> See *id.*

Georgia was justifiably concerned that those seeking office be drug-free, "both because of the power many elected officials have to influence the effort to interdict the drug trade . . . and because of the negative societal effects . . . which would flow from the revelation that an elected official is a drug abuser."<sup>84</sup> The court further noted that under the statute, the candidate is able to control the date, time, and location where the specimen is produced and that the test results are sent directly to the candidate through the mail.<sup>85</sup> Thus, if the results are positive, the candidate can withdraw from the race without others knowing that he or she did not qualify because of positive drug test results.<sup>86</sup> Finally, the district court concluded that intrusion on the plaintiffs' privacy was *de minimis* and was outweighed by the State's compelling interest in having drug-free state officers.<sup>87</sup> Accordingly, the court held that the statute was unlikely to be found violative of the Fourth Amendment, and the plaintiffs' motion for a preliminary injunction was denied.<sup>88</sup>

## 2. The Court of Appeals

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court, holding that Georgia's drug-free certification requirement did not violate the Fourth Amendment of the United States Constitution.<sup>89</sup> Like the district court, the Eleventh Circuit adopted the reasonableness balancing test based on a similar finding of special needs.<sup>90</sup> However, before assessing Georgia's interests under the balancing test, the court highlighted the considerable deference Georgia was entitled to because of the historical importance that the states be "exclusive and free" to prescribe the

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<sup>84</sup> *Id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 807.

<sup>87</sup> *See Chandler*, 952 F. Supp. at 807-08.

<sup>88</sup> *See id.*

<sup>89</sup> *See Chandler v. Miller*, 73 F.3d 1543, 1549 (11th Cir. 1996), *rev'd*, 520 U.S. 305 (1997).

<sup>90</sup> *See id.* at 1545.

qualifications of their own officers.<sup>91</sup> Setting such qualifications, the court recognized, is "obviously essential to the independence of the states, and to their peace and tranquility."<sup>92</sup>

Interpreting special needs precedent,<sup>93</sup> the Eleventh Circuit concluded that a state's interest under the balancing test is calculated with reference to two factors: "the level of documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position."<sup>94</sup> Since Georgia had not argued that its elected officials had abused drugs in the past, the court focused on whether drug abuse is "fundamentally incompatible with high state office."<sup>95</sup> Noting that the people of Georgia place their liberty, safety, economic well-being and the ultimate responsibility for law enforcement in the trust of their elected officials, the court reasoned that "[t]he nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear-thinking."<sup>96</sup> For example, Georgia law requires that the Governor must respond to state emergencies, direct state law enforcement agencies, appoint important officers and boards, and if necessary call out the state militia.<sup>97</sup> Similarly, the Lieutenant Governor is President of the Senate and is to replace the Governor should the office become vacant.<sup>98</sup> Furthermore, the court noted that illegal drug users holding these high offices might be unsympathetic to Georgia's drug interdiction efforts and highly susceptible to risks of bribery and blackmail.<sup>99</sup> Thus, the court stated, "Simply put, the state's interest in filling these positions with drug-free people is great."<sup>100</sup>

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<sup>91</sup> *Id.* (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)).

<sup>92</sup> *Id.* (quoting *Taylor*, 178 U.S. at 570-71).

<sup>93</sup> See cases cited *supra* note 6.

<sup>94</sup> *Chandler*, 73 F.3d at 1545; see also *supra* notes 41 and 55. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 669-70 (1989), there was no evidence of a prior substance abuse problem, but the Court found a compelling interest in ensuring that "front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.*

<sup>95</sup> *Chandler*, 73 F.3d at 1546.

<sup>96</sup> *Id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> *Chandler*, 73 F.3d at 1546.

Balancing these strong state interests against the plaintiffs' individual privacy expectations, the Eleventh Circuit agreed with the district court that the statute was relatively noninvasive.<sup>101</sup> The court re-emphasized that principles of federalism derived from the Tenth Amendment weighed heavily in favor of the states on matters central to their governance.<sup>102</sup> Accordingly, the Eleventh Circuit affirmed the district court's denial of plaintiffs' motion for a preliminary injunction and held that Georgia's drug-free certification statute was reasonable within the meaning of the Fourth Amendment.<sup>103</sup>

### 3. The Supreme Court's Opinions

#### a. *The Majority Opinion*

The Supreme Court of the United States reversed the Eleventh Circuit's decision, holding that Georgia's requirement that candidates for state office pass a drug test did not fit into the "closely guarded category" of constitutionally permissible suspicionless searches based on special needs.<sup>104</sup> Writing for the majority, Justice Ginsburg emphasized that only "[i]n 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."<sup>105</sup> The majority opined that Georgia had not established a special need because there was neither evidence of prior drug abuse by Georgia's officeholders nor evidence that drug addicts were

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<sup>101</sup> See *Chandler* 73 F.3d at 1547; see also *supra* notes 85-87 and accompanying text.

<sup>102</sup> See *Chandler*, 73 F.3d at 1549.

<sup>103</sup> *Id.*

<sup>104</sup> *Chandler v. Miller*, 520 U.S. 305, 309 (1997). "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." Dery, *supra* note 9, at 87; see also discussion *infra* Part III.

<sup>105</sup> *Chandler*, 520 U.S. at 314 (quoting *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 603, 624 (1989)). The majority then summarized the facts of the cases which it considered to be most directly on point: *Skinner*, *Von Raab*, and *Vernonia*. See discussion *supra* Part I.B.



likely to become candidates for public office, and that the statute was ineffective as a deterrent because potential candidates were made aware of the test date and could simply abstain from drug use during the pre-test period.<sup>106</sup> Hence, the Court concluded that the State's need was not "special," but merely "hypothetical" and "symbolic" of its commitment to the societal war on drugs.<sup>107</sup>

The Court rejected the respondents' argument that the special needs analysis should be viewed through a different lens because the statute implicated Georgia's sovereign power, reserved to it under the Tenth Amendment, to establish qualifications for its own state officers.<sup>108</sup> The respondents had based this argument on *Gregory v. Ashcroft*,<sup>109</sup> where the Supreme Court upheld Missouri's mandatory retirement provision for judges over the age of seventy against the Fourteenth Amendment's Equal Protection Clause and federal statutory claims.<sup>110</sup> The *Chandler* Court conceded that *Gregory* stands for the principle that states "enjoy wide latitude" to establish conditions of candidacy for state office, but the Court warned that "in setting such conditions, they may not disregard basic constitutional protections."<sup>111</sup> Because *Gregory* was a Fourteenth Amendment case, and there was no precedent where a state's power to establish qualifications for its officers had diminished constraints on state action imposed directly by the Fourth Amendment, the Court declined to extend Georgia the "wide latitude" of deference that was afforded in *Gregory*.<sup>112</sup> Before engaging in the special needs analysis, however, the majority indicated that Georgia's drug testing statute was "relatively noninvasive," and that if a special need was shown, the statute could not be faulted for excessive intrusion on the

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<sup>106</sup> See *Chandler*, 520 U.S. at 319-21.

<sup>107</sup> *Id.* at 322.

<sup>108</sup> See *id.* at 317-18.

<sup>109</sup> 501 U.S. 452 (1991).

<sup>110</sup> See *Chandler*, 520 U.S. at 316.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 317.

candidates' privacy interests.<sup>113</sup> Therefore, the "core issue" for the majority was whether Georgia's certification requirement was warranted by a special need.<sup>114</sup>

Attempting to clarify what constitutes a special need, the Court articulated, "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."<sup>115</sup> The Court concluded that Georgia had not made such a showing despite its argument that drug use is incompatible with holding high state office because it "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."<sup>116</sup>

Specifically, the Court explained that Georgia had failed to meet its burden of establishing a special need for its drug testing statute primarily because it offered no evidence of any real "concrete danger."<sup>117</sup> The majority highlighted an admission made by counsel for the respondents at oral argument, namely, that Georgia has had no particular problem with state officeholders being drug abusers in the past.<sup>118</sup> The Court also stressed that the statute would be highly ineffective as a deterrent to drug users seeking office because the candidates were made aware of the test date and could simply abstain for the pre-test period thereby avoiding detection.<sup>119</sup> With respect to addicts who are not capable of abstention, the Court again highlighted the lack of evidence that such individuals were likely to be candidates for public office in Georgia.<sup>120</sup> Finally,

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<sup>113</sup> *Id.* at 318. The Court noted, in particular, that the statute permits a candidate to provide the test specimen in the office of his or her own physician, and that the results are sent directly to the candidate, who can control their further dissemination. *See id.* The details of the statute are discussed in *supra* notes 68-73 and accompanying text.

<sup>114</sup> *Chandler*, 520 U.S. at 318.

<sup>115</sup> *Id.* at 318.

<sup>116</sup> *Id.* (citing Respondent's Brief, *Chandler v. Miller*, 520 U.S. 305 (1997) (No. 96-126) available in 1996 WL 708930, at \*11-18.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See Chandler*, 520 U.S. at 319-20.

<sup>120</sup> *See id.*

the Court reasoned that should a drug addict succeed in obtaining a high state office, the public limelight would be sufficient to uncover such office holder's drug abuse because public officials are subject to relentless scrutiny.<sup>121</sup> Accordingly, the Court found the absence of a genuine threat to public safety and that the statute's singular function was as a "symbolic" gesture of Georgia's anti-drug position.<sup>122</sup> Thus, the Court concluded that "[h]owever well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action."<sup>123</sup>

b. *Justice Rehnquist's Dissent*

Chief Justice Rehnquist dissented arguing that Georgia's drug-free certification requirement for candidates seeking state office was reasonable under the Fourth Amendment.<sup>124</sup> Justice Rehnquist feared that the novelty of the Georgia statute may have unjustifiably led the Court to strike it down.<sup>125</sup> The Chief Justice sharply criticized the majority for distorting precedent and rewriting the special needs exception to the Fourth Amendment's prohibition of unreasonable searches and seizures.<sup>126</sup> Justice Rehnquist also argued that the majority used flawed reasoning in concluding that the statute had only a symbolic purpose and effect, and that the Constitution does not prevent a state from enacting an election qualification statute simply because it may seem misguided or even silly to some members of the Supreme Court.<sup>127</sup>

The Chief Justice was particularly disturbed by the majority's quest to raise the threshold for what constitutes a special need by mischaracterizing precedent.<sup>128</sup> Justice Rehnquist contended that prior to *Chandler*, the class of permissible suspicionless searches had not been described by the

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<sup>121</sup> See *id.*

<sup>122</sup> *Id.* at 322.

<sup>123</sup> *Id.*

<sup>124</sup> See *Chandler*, 520 U.S. at 323-28 (Rehnquist, C.J., dissenting).

<sup>125</sup> See *id.* at 323-24.

<sup>126</sup> See *id.* at 323-27.

<sup>127</sup> See *id.* at 328.

<sup>128</sup> See *id.* at 325.

Court as "closely guarded" or requiring any great importance.<sup>129</sup> Rather, under *Skinner* and *Von Raab*, if there existed a proper governmental purpose beyond the ordinary needs of law enforcement, then a special need existed that triggered the reasonableness balancing test under the Fourth Amendment.<sup>130</sup>

Specifically, Justice Rehnquist's dissent focused on the inconsistencies between the majority's opinion and the Court's decision in *Von Raab*.<sup>131</sup> Citing *Von Raab*, Justice Rehnquist insisted that empirical evidence of a prior drug problem was not an essential element for finding a special need.<sup>132</sup> Furthermore, the Chief Justice attacked the majority's contention that the absence of such evidence rendered Georgia's need hypothetical and merely symbolic. Justice Rehnquist reasoned, "[S]urely the State need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become Governor before it installs a prophylactic mechanism."<sup>133</sup>

The Chief Justice also noted that two of the justifications that the Court used to uphold suspicionless drug testing in *Von Raab* were also applicable to the instant case.<sup>134</sup> The *Von Raab* Court held that the government had a compelling interest in ensuring that Customs Service employees did not use drugs, even when off-duty, because such use would create a risk of bribery and blackmail against which the government was entitled to guard.<sup>135</sup> Justice Rehnquist argued that the risks of bribery and blackmail for high-level officials of state government are at least as significant as those for off-duty Service officials.<sup>136</sup> Moreover, Justice Rehnquist pointed out that one of the three categories of Service employees in *Von Raab* that were subject to testing included those who sought promotion to positions that required the handling of classified

<sup>129</sup> *Chandler*, 520 U.S. at 325 (Rehnquist, C.J. dissenting).

<sup>130</sup> *See id.*

<sup>131</sup> *See id.* at 326-27; *see also supra* notes 45-52 and accompanying text.

<sup>132</sup> *See Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting); *see also supra* note 95.

<sup>133</sup> *Chandler*, 520 U.S. at 324 (Rehnquist, C.J. dissenting).

<sup>134</sup> *See id.* at 326-27.

<sup>135</sup> *See id.* (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989)).

<sup>136</sup> *See id.* at 326.

materials.<sup>137</sup> The *Von Raab* Court reasoned that employees who sought to attain such positions involving sensitive information could expect that background checks and examinations would be required, and they therefore had a diminished expectation of privacy with respect to a urinalysis test.<sup>138</sup> Justice Rehnquist argued that the same reasoning held true for candidates for high state office.<sup>139</sup>

Additionally, the Chief Justice attacked the majority's criticism of the design and effectiveness of Georgia's statute.<sup>140</sup> Justice Rehnquist believed that Georgia had designed one of the least intrusive types of urinalysis drug testing conceivable by allowing candidates to schedule production of the specimen in the office of their own physician any time within thirty days prior to qualifying for the ballot. Ironically, the majority held this against the State by arguing that giving candidates advance notice of the test renders it ineffective by allowing candidates an opportunity to abstain from drug use during the pre-test period.<sup>141</sup> Justice Rehnquist suggested, however, that the non-intrusive aspects of the statute only helped to establish its reasonableness, and he recognized that had the statute prescribed a random testing method, the majority would have faulted it for intrusiveness.<sup>142</sup>

Finally, Justice Rehnquist pointed out that the majority perversely relied on the fact that the relentless scrutiny by the media of candidates on a public stage would be sufficient to detect drug abusers.<sup>143</sup> The dissent argued that such scrutiny by the media exemplifies the diminished expectation of privacy that political candidates have, and that *Skinner* and *Von Raab* clearly establish that state governments need not rely on peer, media or any other type of scrutiny when they, themselves, can design a reasonable, non-invasive drug test.<sup>144</sup>

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<sup>137</sup> See *id.* at 327 (citing *Von Raab*, 489 U.S. at 677); see also *supra* note 47.

<sup>138</sup> See *Chandler*, 520 U.S. at 325-26 (Rehnquist, C.J. dissenting).

<sup>139</sup> See *id.* at 326.

<sup>140</sup> See *id.* at 328.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* at 326.

<sup>143</sup> See *Chandler*, 520 U.S. 326 (Rehnquist, C.J. dissenting).

<sup>144</sup> See *id.*

### III. ANALYSIS

*Chandler* was decided against a trilogy of suspicionless drug testing cases<sup>145</sup> that provided little guidance for the identification of a special need.<sup>146</sup> The only explicit criteria that such opinions offered was that the alleged special need must be non-criminal in nature—"beyond the normal need for law enforcement."<sup>147</sup> Yet, by uniformly upholding the suspicionless drug testing of railroad employees,<sup>148</sup> Customs Service employees<sup>149</sup> and high school athletes,<sup>150</sup> the Supreme Court's application of the special needs doctrine had, in fact, become both consistent and predictable.<sup>151</sup> *Chandler* broke the mold.

#### A. Special Needs versus Symbolic Needs

Although the *Chandler* Court conceded that Georgia's candidate drug testing statute would have survived the reasonableness balancing test if a special need had been shown, the Court erroneously concluded that the statute was unconstitutional and that the Fourth Amendment's traditional requirement of individualized suspicion could not be waived because the special needs threshold had not been met.<sup>152</sup> Justice

<sup>145</sup> See cases cited *supra* note 6.

<sup>146</sup> See Dery, *supra* note 9, at 88-89. Professor Dery argues that:

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 . . . 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.

*Id.* See also *Suspicionless Drug Testing*, 111 HARV. L. REV. 289, 296 (1997) (citing Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2498 (1996) (arguing that special needs is a hazy concept)); and Kenneth Nager, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 98 (1992) (arguing that the special needs doctrine lacks an objective framework).

<sup>147</sup> *Chandler*, 520 U.S. at 313 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

<sup>148</sup> *Skinner*, 489 U.S. 602.

<sup>149</sup> *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>150</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995).

<sup>151</sup> See Dery, *supra* note 9, at 91.

<sup>152</sup> See *Chandler*, 520 U.S. at 318-22.

Ginsburg explained that Georgia had not established a special need because there was neither evidence of prior drug abuse by Georgia's officeholders nor evidence that drug addicts were likely to become candidates for public office, and that the statute was ineffective as a deterrent because potential candidates were made aware of the test date and could simply abstain from drug use during the pre-test period.<sup>153</sup> Hence, the Court concluded that the State's need was not "special,"<sup>154</sup> but merely "hypothetical" and "symbolic" of its commitment to the societal war on drugs.<sup>155</sup>

Despite the Court's rhetoric, Georgia's need for drug-free certification from candidates for State office was far from hypothetical or symbolic, and was indeed, special.<sup>156</sup> Few would doubt that drug abuse is one of the most serious problems confronting our society today.<sup>157</sup> There is no reason to suspect that high public office is immune.<sup>158</sup> In recent years several mayors and city councilmen have been convicted for the possession or sale of illegal drugs including marijuana, heroin and cocaine.<sup>159</sup> The unfortunate reality of a special governmental

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<sup>153</sup> See *id.* at 319-20. Although this section primarily demonstrates the inconsistency between *Chandler* and *Von Raab* with respect to the Court's emphasis on evidence of prior drug abuse, it should also be noted that the *Chandler* Court's efficacy requirement is likewise contradictory to its holding in *Von Raab*, 489 U.S. at 673. In *Von Raab*, the Court was aware that "no more than 5 employees out of 3600 have tested positive for drugs," but it held that "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." *Id.* at 674. The Court further held that "no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned." *Id.* at 676.

<sup>154</sup> *Chandler*, 520 U.S. at 322. "But this term ['special'] as used in *Skinner* and *Von Raab* and on which the Court now relies, was used in a quite different sense than it is used by the Court today." *Id.* at 325 (Rehnquist, C.J. dissenting). Professor Dery explains:

In considering whether Georgia had established a "special need" for drug testing, Justice Ginsburg, redefined the term "special." "Special" no longer meant a justification "apart from the regular needs of law enforcement"; it referred to the measure of the importance of the state's justification. Now, the government's "need" had to be "substantial," indeed, big enough to "override the normal requirement of individualized suspicion." The Court then found that the candidate urinalysis program could not meet this newly calibrated standard.

Dery, *supra* note 9, at 87-88 (footnotes omitted).

<sup>155</sup> *Chandler*, 520 U.S. at 322.

<sup>156</sup> See *Chandler*, 520 U.S. at 325 (Rehnquist, C.J. dissenting).

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *supra* note 1; see also *Chandler*, 520 U.S. at 324 (Rehnquist, C.J. dis-

need for certification that candidates for high public office are drug-free was made all too clear by District of Columbia Judge Thomas Penfield Jackson, who sentenced former D.C. Mayor Marion Barry following his 1990 conviction for possession of cocaine:

Of greatest significance to me in sentencing this defendant is the high public office he has at all relevant times occupied . . . His breach of public trust alone warrants an enhanced sentence . . . By his own unlawful conduct the defendant rendered himself beholden to, and thus vulnerable to influence from anyone who had first-hand knowledge of it . . . [he] has given aid, comfort, and encouragement to the drug culture at large, and contributed to the anguish that illegal drugs have inflicted on this city in so many ways . . . .<sup>160</sup>

In light of the devastating impact that flows from the revelation that a powerful elected official is a drug abuser,<sup>161</sup> a state should not have to wait for a drug abuser to become its governor, secretary of state or school superintendent before it can take preventative measures.<sup>162</sup> To suggest otherwise would be to argue that the government should be precluded from taking air piracy precautions absent proof of a prior catastrophe at the particular airport in question.<sup>163</sup> This was precisely the reasoning that the *Von Raab* Court used to permit a finding of special needs for the suspicionless drug testing of Customs Service employees despite an admission by the Commissioner of Customs that the Service was "largely drug-free."<sup>164</sup> In fact, when the petitioners in *Von Raab* argued that the Service's drug testing program was unjustified because it was not implemented in response to a perceived drug problem among Service employees, the Court explicitly rejected that argument as "unpersuasive" because it took an "unduly

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sentencing) ("It would take a bolder person than I to say that such widespread drug usage could never extend to candidates for public office such as Governor of Georgia.").

<sup>160</sup> *United States v. Barry*, No. 90-0068, 1990 WL 174907, at \*1 (D.D.C. Oct. 26, 1990).

<sup>161</sup> See *id.*; see also Donna Britt, *Sadness and Hurt in a Stunned City: For Young Black Men, Anger and Shame*, WASH. POST, Jan. 20, 1990, at C1; and Rene Sanchez, *Students Voice Betrayal, Pain: Barry's 'Supposed to Be a Role Model'*, WASH. POST, Jan. 20 1990, at A1.

<sup>162</sup> See *Chandler*, 520 U.S. at 324 (Rehnquist, C.J. dissenting).

<sup>163</sup> See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

<sup>164</sup> *Id.* at 660.



narrow view" of the scope of the nation's drug problem as a whole.<sup>165</sup> In *Von Raab* it was sufficient that the government had a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.<sup>166</sup>

In contrast, while the *Chandler* Court initially conceded that demonstrating a prior problem of drug abuse might not be necessary in all cases, it effectively retracted that concession by subsequently holding that such evidence would "shore up" an assertion of special needs, and faulting Georgia for failing to make such a showing.<sup>167</sup> In doing so, the Court held the government to a much higher standard than it had in *Von Raab*.<sup>168</sup> Whereas the *Von Raab* Court allowed the government's program to pass the special needs threshold without any evidence of a drug problem among the employees subject to testing, the government's program in *Chandler* fell short of the special needs threshold despite public knowledge of several instances of illegal drugs infecting high public office throughout the country.<sup>169</sup> The *Chandler* Court's departure from the level of special needs scrutiny applied in *Von Raab* led to the improper characterization of Georgia's very real, special need as merely "hypothetical" and "symbolic."<sup>170</sup>

### B. *The Unique Context of Chandler*

The "unduly narrow view" of special needs that the Court rejected in *Von Raab*<sup>171</sup> was precisely the view that it adopted in *Chandler*.<sup>172</sup> Justice Ginsburg attempted to explain this inconsistency by stating that *Von Raab* was "[h]ardly a decision opening broad vistas for suspicionless searches," and that it must be read in its "unique context."<sup>173</sup> However, the elements that make the context of *Von Raab* unique according to the Court, namely the employees' involvement with drug inter-

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<sup>165</sup> *Id.* at 673-74.

<sup>166</sup> *See id.* at 675 n.3.

<sup>167</sup> *Chandler*, 520 U.S. at 318.

<sup>168</sup> *See Dery, supra* note 9, at 87-88.

<sup>169</sup> *See supra* note 1.

<sup>170</sup> *Chandler*, 520 U.S. at 318-22.

<sup>171</sup> 489 U.S. at 673-74.

<sup>172</sup> *See Chandler*, 520 U.S. at 320.

<sup>173</sup> *Id.*

diction and their potential susceptibility to bribery,<sup>174</sup> are elements similarly faced by high state officers.<sup>175</sup> Indeed, "[t]he bribery and blackmail targeted at a Customs Service agent pales in comparison to that directed at policymaking officials."<sup>176</sup> Moreover, the one significant aspect that truly distinguishes the drug testing statute in *Chandler* from that in *Von Raab* and the other special needs cases<sup>177</sup> only helps to establish its constitutional validity—it was enacted pursuant to Georgia's sovereign Tenth Amendment powers to establish qualifications for its own state officers—an area where states "should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States"<sup>178</sup>

### 1. Tenth Amendment Background

The Constitution created a system of dual sovereignty, whereby both the federal government and the states' governments co-exist.<sup>179</sup> In accordance with that scheme, the Constitution established a federal government of limited power.<sup>180</sup>

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<sup>174</sup> See *id.*

<sup>175</sup> See *id.* at 326 (Rehnquist, C.J. dissenting).

<sup>176</sup> Dery, *supra* note 9, at 93-94. Professor Dery observes:

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." These officials rule on criminal cases, including drug cases arising under the laws of the state. . . . [L]ike agents in the field, judges, as their title indicates must be able to exercise judgment. . . . 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. 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 [drugs and criminals] and, therefore, face the same dangers of bribery, blackmail, and a loss of sympathy toward the mission of eradicating drugs.

*Id.*

<sup>177</sup> See cases cited *supra* note 6.

<sup>178</sup> Taylor v. Beckham, 178 U.S. 548, 570-71 (1900).

<sup>179</sup> See Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

<sup>180</sup> See *id.*

As stated in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>181</sup>

In early Tenth Amendment cases, the Supreme Court addressed issues that arose through challenges to two different types of congressional legislation based upon the power to regulate commerce: economic regulatory laws<sup>182</sup> and "police power" or "moral" regulations.<sup>183</sup> The Court's review of these cases indicated that there were some areas of life which, under the Tenth Amendment, were to be left to state regulation, while others were to be left to the federal government—dual federalism.<sup>184</sup> In the 1930s the Court cited the Tenth Amendment in many cases striking down many of President Roosevelt's New Deal programs.<sup>185</sup> However, Justice Stone's famous 1940 opinion in *United States v. Darby*<sup>186</sup> appeared to

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<sup>181</sup> U.S. CONST. amend. X.

<sup>182</sup> See, e.g., *Houston, E. & W. Texas Railway Co. v. United States*, 234 U.S. 342 (1914) (upholding Interstate Commerce Commission's right to regulate Texas intrastate railroad rates because there was a close and substantial relationship to interstate commerce); and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that Congress could not forbid a monopoly in the manufacturing of sugar because manufacturing was a local activity having only an incidental and indirect relation to commerce).

<sup>183</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a federal child labor law because it exerted authority over a "purely local matter"), *overruled by* *United States v. Darby*, 312 U.S. 100 (1940); and *Champion v. Ames*, 188 U.S. 321 (1903) (upholding the Federal Lottery Act, which prohibited the interstate shipment of lottery tickets).

<sup>184</sup> See *Hammer*, 247 U.S. at 251; *Darby*, 312 U.S. at 100; and *Champion*, 188 U.S. at 321.

<sup>185</sup> See, e.g., *United States v. Butler*, 297 U.S. 1, 69-70 (1936) (invalidating the Agricultural Adjustment Act and holding "[i]t would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936) (striking down the Bituminous Coal Conservation Act and noting that "[w]hile the states are not sovereign in the true sense of that term, but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme — 'as independent of the general government.'"); and *Schechter Poultry Co. v. United States*, 295 U.S. 495, 529 (1935) (striking down the Live Poultry Code promulgated under the National Industrial Recovery Act and holding that "such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment").

<sup>186</sup> 312 U.S. 100 (1940) (upholding the Fair Labor Standards Act which set minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce).

render the Tenth Amendment virtually meaningless by dismissing it as a mere "truism."<sup>187</sup>

Although Justice Stone seemed to "leave the Tenth Amendment for dead,"<sup>188</sup> recent opinions that have revisited the issue of whether the Tenth Amendment is a "[t]ruism, [t]autology, or [v]ital [p]rinciple" have resuscitated it and suggest the latter.<sup>189</sup> These opinions frequently call for a return to "fundamental principles" of our federalist system.<sup>190</sup> One of these principles, and "[p]erhaps the most fundamental attribute of state sovereignty and the element most essential to its existence is the power of the states to structure the processes by which they elect those who will govern."<sup>191</sup>

## 2. A State's Sovereign Power to Establish Election Qualifications

The Supreme Court has long recognized that states retain the power to regulate their own elections under the Tenth Amendment.<sup>192</sup> As explained by Chief Justice Fuller in 1900:

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<sup>187</sup> *Id.* at 124. Justice Stone declared:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

*Id.*

<sup>188</sup> John R. Vile, *Truism Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445, 520 (1997).

<sup>189</sup> *Id.* at 445; see also *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (holding that the Gun-Free School Zones Act of 1990 infringed upon the general police power retained by the states). *Lopez* marked the first time in over 60 years that the Court invalidated a federal statute for interfering with "what is truly local." *Id.*; see also *New York v. United States*, 505 U.S. 144, 161 (1992) (invalidating the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 and holding that Congress is prevented from "commandeering" the legislative process of the states under the Tenth Amendment); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding Missouri constitutional provision mandating retirement of state judges at the age of 70 against federal statutory and Fourteenth Amendment equal protection claims); see *infra* notes 194-205 and accompanying text.

<sup>190</sup> See, e.g., *Gregory*, 501 U.S. at 457.

<sup>191</sup> Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape From the Political Thicket*, 20 T. MARSHALL L. REV. 87, 94 (1994).

<sup>192</sup> See *Boyd v. Thayer*, 143 U.S. 135, 161 (1892) ("Each State has the power to

It is obviously essential to the independence of the states, and to their peace and tranquillity, that their power to prescribe the qualifications for their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.<sup>193</sup>

The Court most recently gave new force to Judge Fuller's characterization of a state's sovereign interest in determining the qualifications for its own officers in *Gregory v. Ashcroft*.<sup>194</sup> In *Gregory*, the Court relied exclusively on principles of state sovereignty to uphold a Missouri constitutional provision mandating the retirement of state judges at the age of seventy against both federal statutory and Fourteenth Amendment Equal Protection claims.<sup>195</sup> Writing for the majority, Justice O'Connor premised her opinion on the notion that determining the qualifications for state officers "is a decision of the most fundamental sort for a sovereign entity."<sup>196</sup> While the Court conceded that the authority of States to determine the qualifications for its officers is not without limits, Justice O'Connor explained that the Fourteenth Amendment may not be applied in "complete disregard for a State's constitutional powers."<sup>197</sup> Rather, a State's power to define the qualifications of its own officers may have force even against an individual's constitutional protections.<sup>198</sup>

The principles of federalism recognized in *Gregory* provide an added element of constitutional validity to the *Chandler* statute that was not present in the drug testing plans that were upheld in *Skinner*,<sup>199</sup> *Von Raab*,<sup>200</sup> and *Vernonia*.<sup>201</sup> "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 its own peo-

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prescribe the qualifications of its officers and the manner in which they shall be chosen . . . .").

<sup>193</sup> Taylor v. Beckham, 178 U.S. 548, 570-71 (1900).

<sup>194</sup> 501 U.S. 452 (1991).

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 460.

<sup>197</sup> *Id.* at 468.

<sup>198</sup> See *id.*

<sup>199</sup> 489 U.S. 602 (1989).

<sup>200</sup> 489 U.S. 656 (1989).

<sup>201</sup> 515 U.S. 646 (1995).

ple."<sup>202</sup> The *Chandler* Court should not only have considered the efficacy of Georgia's drug testing statute but also the autonomy of the State of Georgia as a "viable actor[] in the constitutional system."<sup>203</sup> Gregory provided a rule that "*scrutiny will not be so demanding* where we deal with matters resting firmly within a State's constitutional prerogatives."<sup>204</sup> This rule, the Court reasoned, is simply "a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public officeholders."<sup>205</sup>

Even if one humors the largely insupportable distinctions that the Court drew between *Chandler* and its precedents, those purported inconsistencies should have been viewed under a more deferential assessment of Georgia's special need.<sup>206</sup> A finding of special needs in *Chandler* would not have "open[ed] broad vistas for suspicionless searches,"<sup>207</sup> nor would it have eroded the Fourth Amendment<sup>208</sup> because it would have been rooted in history and precedent emphasizing state sovereignty and the unique context of election qualification statutes. The proper finding of special needs would have then triggered the balancing test, which the *Chandler* Court conceded that Georgia would have easily passed because of the relatively noninvasive nature of its drug testing statute.<sup>209</sup>

## CONCLUSION

Blinded by its staunch determination to grade the slippery slope of special needs, the *Chandler* Court irrationally struck down a statute with greater constitutional merit than any of

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<sup>202</sup> Dery, *supra* note 9, at 98-99. "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." *Id.*

<sup>203</sup> Zywicki, *supra* note 191, at 118.

<sup>204</sup> Gregory v. Ashcroft, 501 U.S. 452, 462 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)) (emphasis added).

<sup>205</sup> *Id.* at 462 (quoting *Sugarman*, 413 U.S. at 648).

<sup>206</sup> See *Chandler v. Miller*, 73 F.3d 1534, 1545 (11th Cir. 1996), *rev'd*, 520 U.S. 305 (1997) ("[W]e regard the states as entitled to considerable deference in the characterization of their own interests.")

<sup>207</sup> *Chandler*, 520 U.S. 305, 321 (1997).

<sup>208</sup> See Malin, *supra* note 9, at 517.

<sup>209</sup> See *Chandler*, 520 U.S. at 317; see also *supra* note 113 and accompanying text.

its predecessors that were upheld. Acting out of its fear of further eroding the traditional protections of the Fourth Amendment through the special needs exception, the Court ignored the factual and constitutional ammunition that would have allowed it to uphold the statute without diminishing the Fourth Amendment's integrity. Instead, the Court threw stare decisis overboard with such disregard that its dissolution muddied the constitutional waters that the Court had sought to protect.

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