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Well Isn't That Special--The Supreme Court's Immediate Purpose of Restricting the Doctrine of Special Needs in Ferguson v. City of Charleston

Joseph S. Dowdy

Well Isn't That Special? The Supreme Court's Immediate Purpose of Restricting the Doctrine of Special Needs in *Ferguson v. City of Charleston*

The Fourth Amendment prohibits unreasonable searches and seizures;[1] unfortunately, it does not address the United States Supreme Court's unreasonable Fourth Amendment jurisprudence. In the absence of this latter prohibition, the Court created the special needs exception[2] to the requirement that searches must be conducted pursuant to a warrant and probable cause.[3] After approving several searches as justified by the existence of " 'special needs, beyond the normal need for law enforcement, [making] the warrant and probable-cause requirement impracticable,' "[4] the Court encountered a number of searches that it did not sanction.[5] The opinions that struck down those searches implicitly curtailed the applicability of the doctrine.[6] The most recent and most fatal denial of the doctrine of special needs came in *Ferguson v. City of Charleston.*[7]

In *Ferguson*, the Court struck down a state hospital's policy of screening pregnant women for the presence of cocaine and reporting

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1. U.S. CONST. amend. IV.

2. *See generally* George M. Dery III, *The Coarsening of Our National Manners: The Supreme Court's Failure to Protect the Privacy Interests of Our Nation's Schoolchildren*—Vernonia School District 47J v. Acton, 29 SUFFOLK U. L. REV. 693 (1995) (critiquing the special needs doctrine); Sean Anderson, Comment, *Individual Privacy Interests and the "Special Needs" Analysis for Involuntary Drug and HIV Tests*, 86 CALIF. L. REV. 119 (1998) (discussing the evolution of the doctrine).

3. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("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.' " (quoting Katz v. United States, 389 U.S. 347, 357 (1967))).

4. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

5. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (upholding random drug testing of student athletes); *Skinner*, 489 U.S. at 620 (upholding urinalysis of railway employees); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 679 (1989) (upholding urinalyses of drug interdiction officers); Griffin v. United States, 483 U.S. 868, 880 (1987) (upholding a search of a probationer's home for a weapon).

6. *See* Ferguson v. City of Charleston, 532 U.S. 67, 78–96 (2001) (striking down urine screenings of pregnant women when evidence of cocaine use was turned over to police); Chandler v. Miller, 520 U.S. 305, 322–23 (1997) (striking down mandatory drug testing of candidates for state political offices in Georgia).

7. 532 U.S. 67 (2001).

positive results to the police in order to protect their offspring.[8] In doing so, the Court departed from its usual practice of analyzing the ultimate goal of a search[9] and, for the first time ever, explicitly considered the immediate purpose of a search.[10] Concerned with the extensive involvement of police and prosecutors in the drafting and implementation of the hospital's search policy, five justices defined the immediate aim of the program as the collection of evidence for law enforcement purposes, thereby disqualifying the searches from special needs protection.[11] This Recent Development posits that the Court's decision in *Ferguson v. City of Charleston* effectively signals the end of liberal applications of the doctrine of special needs, especially where it is used as a justification for law enforcement searches.

At least two persuasive reasons support the assertion that *Ferguson* curtailed the doctrine of special needs. First, the immediate purpose inquiry developed in *Ferguson* explicitly changed the law by making suspect any warrantless searches related to law enforcement.[12] Second, *Ferguson*, read in context, highlights two important trends that are narrowing the doctrine. The first trend is a more scrutinous

8. *Id.* at 70–73.

9. *Id.* at 86–87 (Kennedy, J., concurring in judgment). Prior cases did not distinguish between the immediate purpose and the ultimate goal of a search; however, the Court always considered the ultimate goal of the searches. *See* Vernonia Sch. Dist. 47J v. United States, 515 U.S. 646, 661 (1995) (identifying the governmental concern as deterring drug use by our nation's school children); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (identifying the relevant need as regulating the conduct of railway employees to promote the safety of the traveling public); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 666 (1989) (identifying the compelling government need as deterring drug use among potential promotion candidates in the United States Customs Service and preventing promotion of drug users to these positions); Griffin v. Wisconsin, 483 U.S. 868, 875 (1986) (identifying the governmental need as running and maintaining a probation system to promote the protection of the probationer and the safety and welfare of the public).

10. There is a significant difference between the ultimate goal and immediate purpose. As the majority notes, "[w]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal." *Ferguson*, 532 U.S. at 82–83. The threat of law enforcement was "a means to an end." *Id.* at 84. Thus, the majority's inquiry focused on the way in which the defendants achieved their ultimate goal. *See id.*

11. *See id.* at 82–83.

12. The involvement of law enforcement proved especially bothersome to the *Ferguson* majority. *See id.* at 82–86 (expressing displeasure that law enforcement was so heavily involved in the *Ferguson* search). Certainly, if one takes nothing else from *Ferguson*, one should pay close attention to the cautionary language of footnote twenty. *Id.* at 83 n.20 ("[T]he extensive entanglement of law enforcement cannot be justified by reference to legitimate needs.").

analysis of the recent searches ruled upon by the Court—in *Ferguson* and *Chandler v. Miller*,[13] the most recent special needs cases, the majorities implicitly redefined the doctrine of special needs.[14] The second trend is the shifting opinions of the personnel of the Court; the doctrine of special needs is presently unpopular with enough members of the Court to render it dormant. When one considers these express and implied changes in special needs jurisprudence, it is evident that the doctrine is much weaker after *Ferguson*.

Ferguson involved the arrest and prosecution of several pregnant drug users.[15] In South Carolina, one who mistreats a viable fetus commits a crime,[16] and is subject to prosecution under the state child abuse statute.[17] Accordingly, a woman who ingests cocaine during the third trimester of her pregnancy can be prosecuted for child neglect.[18] Staff members from the Medical University of South Carolina learned of such prosecutions and contacted the Charleston County Solicitor to inquire whether he anticipated similar prosecutions in Charleston and to offer the hospital's assistance.[19] Responding to this inquiry, the Solicitor organized a "joint interagency task force" that included representatives from the Solicitor's office, the Charleston

13. 520 U.S. 309 (1997).

14. *Ferguson* added the immediate purpose analysis. *The Supreme Court, 2001 Term—Leading Cases*, 115 HARV. L. REV. 306, 334 (2001). While some believe that this new analysis is unworkable, *see id.*, this author respectfully disagrees. *Chandler* required the governmental need to be more substantial than had previous cases. *Chandler*, 520 U.S. at 318 (requiring that the special need be "substantial"); *see also Skinner*, 489 U.S. at 619 (requiring the government to show a "special" need beyond the normal need for law enforcement); George M. Dery III, *Are Politicians More Deserving of Privacy than Schoolchildren? How* Chandler v. Miller *Exposed the Absurdities of the Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 87–88 (1998) (arguing that *Chandler* required a more substantial need than previous cases); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (writing before *Chandler* and arguing that a low level of scrutiny applied to special needs searches); Joy L. Ames, Note, Chandler v. Miller: *Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 289 (1997) (indicating that *Chandler* eliminated much of the subjectivity that previously existed in special needs jurisprudence).

15. *Ferguson*, 532 U.S. at 73.

16. South Carolina law recognizes a viable fetus as a person. *See* S.C. CODE ANN. § 20-7-50 (Law. Co-op. 2001); Whitner v. South Carolina, 492 S.E.2d 777, 779–81 (S.C. 1997) (holding that the term "person" in the South Carolina's child abuse statute includes a viable fetus).

17. § 20-7-50.

18. *Whitner*, 492 S.E.2d at 779–83 (holding that a woman who ingested cocaine during the third trimester of pregnancy could be charged with child neglect).

19. Brief for Petitioners at 3, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936).

Police Department, and the hospital.[20] The task force adopted a policy designed to compel pregnant drug users to seek substance abuse education and treatment by threatening them with arrest and prosecution.[21] According to proponents of the policy, the "threat of law enforcement intervention . . . provided the necessary 'leverage' to make the policy effective."[22]

The hospital reported several pregnant women who sought obstetrical care and tested positive for cocaine in an urinalysis conducted pursuant to the policy; these women were arrested and some were prosecuted.[23] Ten of the women who were arrested brought an action in federal court against the hospital officials who drafted and implemented the policy,[24] alleging that the policy violated their Fourth Amendment[25] right against unreasonable searches.[26] The defendants argued that the searches were reasonable as a matter of law because they served a special non-law-enforcement need.[27]

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20. *Id.* The task force also included representatives from the Department of Social Services and the Charleston County Substance Abuse Commission. Brief for Respondents at 7, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936).

21. Brief for Respondents at 7–10, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936).

22. *Id.* at 8. The hospital tested women who met the following criteria: no prenatal care, lack of prenatal care after twenty-four weeks gestation, incomplete prenatal care, abruptrio placentae, intrauterine fetal death, preterm labor (of no obvious cause), IUGR (intrauterine growth retardation of no obvious cause), previously known drug or alcohol abuse, and unexplained congenital anomalies. *Ferguson*, 532 U.S. at 71 (citing Brief for Petitioner at A-53 to A-54). The policy further established a chain of custody to follow when obtaining and testing the urine samples, "presumably to make sure that the results could be used in subsequent criminal proceedings." *Id.* at 72. Whether law enforcement became involved depended on when a particular patient tested positive. If the patient tested positive while pregnant, she was advised to seek substance abuse counseling, and reported to the police only if she failed to follow up with that treatment. *Id.* If she tested positive while in labor, she was immediately reported to the police and arrested shortly after giving birth. Brief for Respondents at 8, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99–936).

The policy also sets forth the offenses with which a woman who tested positive might be charged. *Ferguson*, 532 U.S. at 72. For the first twenty-seven weeks of the pregnancy, the State could charge the mother with simple possession; after twenty-eight weeks the charge became possession and distribution to a person under the age of eighteen; and if the woman tested positive during labor, she could be charged with child neglect. *Id.*

23. *Ferguson*, 532 U.S. at 73.

24. *Id.*

25. U.S. CONST. amend. IV ("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 . . . .").

26. *Ferguson*, 532 U.S. at 73.

27. *Id.* at 81–83 (reporting the ultimate goal of the program to be "to get the women in question into substance abuse treatment and off drugs").

Although the district court judge rejected this defense, the jury returned a verdict in favor of the defendants because it found that the plaintiffs had consented to the searches.[28] With one judge dissenting, the Fourth Circuit affirmed the verdict without reaching the question of consent because it believed that the searches were reasonable as a matter of law under the "special needs" doctrine.[29]

The United States Supreme Court held that the Fourth Amendment prevented the hospital from reporting the urinalysis results to the police when the hospital conducted the urinalysis without a warrant or probable cause, pursuant to the policy developed by the task force.[30] In striking down the policy, however, the majority did not resort to the traditional special needs balancing test that the Court used in previous cases involving searches conducted without a warrant and probable cause.[31] The traditional test balanced the government's interests against the privacy interests of the individuals searched.[32] Instead, the majority did something that the Court had never done before: it distinguished between the immediate purpose and the ultimate goal of the search.[33] Five

28. *Id.* at 73–74.

29. Ferguson v. City of Charleston, 186 F.3d 469, 477–79 (4th Cir. 1999). Specifically, two of the three judges found that determining the number of pregnancies affected by cocaine use constituted a "special need beyond normal law enforcement goals," that testing the urine of expecting mothers was an "effective method" of advancing this need, and that the intrusion suffered by the women was "minimal." *Id.* at 479.

30. *Ferguson*, 532 U.S. at 85–86.

31. *Id.* at 76–81; *see* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 660–64 (1995) (holding that a school's interest in curbing school-wide drug related misconduct in student-athletes outweighed the privacy expectations of student-athletes, which were diminished as a result of participation in a highly-regulated school athletic program); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 679 (1989) (holding that the government has a compelling interest in testing drug enforcement officials where individualized suspicion would not be possible); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (holding that the government's interest in ensuring the safety of the traveling public outweighed the privacy interest of railway workers, which were diminished as a result of working in a highly-regulated industry).

32. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–64 (1995) (applying this test to uphold a random urine screening program in a public school). The rationale and effectiveness of the search comprise the government's interests. *See id.* at 661–64. The intrusiveness of the search factors into the privacy of the individual. *See id.* at 658–60; *see also* Ferguson v. City of Charleston, 186 F.3d 469, 476 (4th Cir. 1999) (applying the traditional test).

33. *Ferguson*, 532 U.S. at 82–83 (recognizing the ultimate goal was to get the women into drug treatment, but the immediate objective was to generate evidence for law enforcement purposes); *id.* at 87 (Kennedy, J., concurring in judgment) ("The distinction [between ultimate goal and immediate purpose that] the Court makes . . . lacks foundation in our special needs cases."). Hence, the majority made a distinction between the end and the means to achieve that end. *Id.* at 83–84. If the end could be described as the protection of the woman and the unborn child, the majority expressed concern with the

Justices decided that because "the immediate objective of the searches was to generate evidence *for law enforcement purposes*,"[34] deciding the case on the basis of special needs was inappropriate.[35]

Ferguson's restriction of the special needs doctrine followed a trend of judicial decisions that supported the doctrine. The doctrine is a judicially created exception[36] to the general rule that searches require a warrant[37] to be constitutional under the Fourth Amendment.[38] In a special needs situation, the Court balances the public and private interests.[39] Special needs exist where the privacy

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means—arrest and prosecution—by which the state achieved its end. *Id.* The policy developed by the hospital and law enforcement primarily addressed the means. *Id.* The majority viewed this distinction as critical because "law enforcement involvement always serves some broader social purpose or objective" and defining a search in terms of its ultimate, rather than immediate, goal would immunize "virtually any nonconsensual suspicionless search." *Id.* at 84. However, if the Court examines means, which will usually be a search, rather than ends, which will usually be the broad reason for conducting the search, as the relevant needs, then very few needs are likely to appear special. *See infra* notes 81–86 and accompanying text; *The Supreme Court, 2001 Term—Leading Cases*, 115 HARV. L. REV. 306, 329 (2001) (noting that the majority opinion distinguishes between the immediate purpose and ultimate goal of the search in *Ferguson*).

34. *Ferguson*, 532 U.S. at 82–83.

35. *Id.* at 79–85.

36. *See, e.g.*, *Skinner*, 489 U.S. at 619 (recognizing an exception to the warrant and probable cause requirement where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable").

37. The Fourth Amendment has two clauses: the first clause prohibits unreasonable searches and seizures, and the second clause lists some general requirements for warrants. U.S. CONST. amend. IV; RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 324 (2001). The Court's Fourth Amendment jurisprudence has been an ongoing exercise in determining which of the clauses governs the other. *See* 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, 1471–75 (1985); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terr, 72 MINN. L. REV. 383, 383–85 (1998). The Court has, however, traditionally expressed a preference for a warrant. *See* Minnesota v. Dickenson, 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 v. United States, 389 U.S. 347, 357 (1967). Therefore, it is often stated that the general rule is that a warrant is required absent an exception to the warrant rule. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("[I]t is a cardinal principle that 'searches conducted outside of the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions."); *see also* Schmerber v. California, 384 U.S. 757, 768 (1966) ("Search warrants are ordinarily required for searches of dwellings, no less could be required where intrusions into the body are concerned").

38. U.S. CONST. amend. IV. The Fourteenth Amendment's Due Process Clause makes the Fourth Amendment applicable to the states. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that state government searches must comply with the Fourth Amendment).

39. *Skinner*, 489 U.S. at 619 (holding that such special needs did exist where privacy interests were minimal because railway employees work in a highly regulated industry

interests implicated by the search are minimal, and where the requirement of individualized suspicion places some important[40] governmental interest in jeopardy.[41]

Prior to 1997, the Court applied the special needs balancing test[42] to both traditional searches of homes and people.[43] For example, in *New Jersey v. T.L.O.*,[44] Justice Blackmun's concurring opinion emphasized that a school principal could search the purse of a student

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with a diminished expectation of privacy and the public interest in a safe transit system is high).

40. The specific definition of "important" governmental interest has changed over time. This Recent Development asserts that the Court in *Chandler v. Miller* raised the standard necessary for finding a special need. *See infra* notes 55–61 and accompanying text; *see also* Dery, *supra* note 14, at 87–88 (arguing that the *Chandler* majority imposed a higher burden on the government by requiring a "substantial" need instead of merely the traditional "special" need).

41. Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989) (holding that urinalysis drug-screening of U.S. Customs employees was reasonable under the Fourth Amendment given the government's compelling interest in patrolling the country's borders and the need to ensure the integrity of its agents who constantly interact with drug smugglers).

42. The merits of resolving Fourth Amendment issues on the basis of a case-by-case balancing test remain the subject of dispute. Perhaps balancing tests are inadequate to ensure constitutional liberties. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) (arguing that this places too much power in police, whom the courts trust). Additionally, it is questionable whether courts should undertake balancing tests given that a court is ill-suited to balance competing interests. *See* Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 49 (1988) (arguing that courts are ill-suited to balance competing interests). On the other hand, courts may use flexible balancing tests to provide appropriate guidance for law enforcement. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 256 (1984) (arguing that static bright-line tests are unnecessary in Fourth Amendment cases and that case-by-case rulings can establish an effective "dialogue" between courts and the police). One may hypothesize that the difficulties presented in balancing the high interests involved in *Ferguson* led to the Court's reluctance to conduct a special needs balancing test. *See* Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) ("[W]e note that the invasion of privacy is far more substantial than in those [previous] cases."); *see also* Evans McMillon, *The Case Against Mandatory HIV Testing of Pregnant Women: The Legal and Public Policy Implications*, 5 DUKE J. GENDER L. & POL'Y 227, 230–32 (1998) (discussing the serious privacy implications of urinalysis and blood testing of pregnant women and identifying concern for the child as a serious interest); Warren Richey, *Women's Privacy v. Safety of Unborn*, CHRISTIAN SCI. MONITOR, Oct. 4, 2000, at 2 (discussing the competing interests in *Ferguson*).

43. *See* New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985) (upholding a search of student's purse); O'Connor v. Ortega, 480 U.S. 709, 711, 724–26 (1987) (plurality opinion) (upholding a search by a government hospital administrator of a doctor-employee's office files); Griffin v. Wisconsin, 483 U.S. 868, 875–77 (1987) (upholding the search of a probationer's home by a probation officer); New York v. Burger, 482 U.S. 691, 702 (1987) (upholding two police officers' searches of a junkyard for stolen cars while enforcing a general business licensing requirement).

44. 469 U.S. 325 (1985).

for drug paraphernalia without reasonable suspicion because the need for discipline and order in schools gives rise to special needs beyond the normal need for law enforcement.[45] Likewise, in *O'Connor v. Ortega*,[46] a plurality held that government employers and supervisors could conduct warrantless searches of employees' desks and offices without probable cause because of the special need for government employers and supervisors to complete work in a prompt and efficient manner.[47] Similarly, in *Griffin v. Wisconsin*,[48] the Court upheld the constitutionality of a probation officer's search of a probationer's home following a tip by a police officer, despite the officer's lack of a warrant or probable cause. The Court determined that supervising a probationer for the safety and welfare of the public constituted a special need that outweighed the diminished privacy expectations of a person under the state's supervision.[49]

Moreover, the Court has applied the doctrine of special needs in cases that involved the screening of urine for the presence of illegal drugs.[50] The collection and testing of urine by the government constitutes a search under the Fourth Amendment.[51] The Court, however, has upheld warrantless urine testing of customs officials,[52] railway employees,[53] and student athletes[54] for the presence of illegal drugs under the special needs doctrine.

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45. *Id.* at 351 (Blackmun, J., concurring in judgment); *see Ferguson*, 532 U.S. at 74–75 n.7 (indicating that the Court subsequently adopted Justice Blackmun's language and rationale in O'Connor v. Ortega, 480 U.S. 709, 720 (1987) (plurality opinion); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); and Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).

46. 480 U.S. 709 (1987) (plurality opinion).

47. *Id.* at 728–29.

48. 483 U.S. 868 (1986).

49. *Id.* at 875.

50. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53, 665 (1995) (upholding random, suspicionless drug testing of student athletes); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 679 (1989) (upholding random, suspicionless drug testing of candidates for promotion in U.S. Customs Service); Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 620 (1989) (upholding drug testing for rail workers involved in accidents).

51. *See, e.g., Skinner*, 489 U.S. at 617 ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.") (footnote omitted).

52. Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 679 (1989) (holding that the government has a compelling interest in testing drug officers where individualized suspicion would not be possible).

53. *Skinner*, 489 U.S. at 620 (holding that the government interest in ensuring the safety of the traveling public outweighed the privacy interests of rail workers, which were diminished as a result of working in a highly regulated industry).

After upholding all of these searches under the doctrine of special needs, the Court, in *Chandler v. Miller*,[55] signaled that the doctrine has limits.[56] In *Chandler*, the Court struck down mandatory drug screening for candidates of certain state political offices in Georgia.[57] The Court held that the government had the burden of proving a "substantial need" for the drug testing.[58] According to the Court, the State failed to demonstrate a substantial need because the testing could not achieve its stated goals of detecting drug use among office holders and preventing them from irresponsibly discharging their political duties.[59] Moreover, the *Chandler* court deviated from past special needs cases because it forced the government to show a "substantial need."[60] Thus, *Chandler* represents a significant

54. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (holding that a school's interest in curbing school-wide drug-related misconduct led by student athletes outweighed the privacy expectations of student athletes, which were diminished because of participation in a highly regulated school program such as extramural athletics).

55. 520 U.S. 305 (1997).

56. Commentators have suggested that before *Chandler*, the Court allowed the doctrine of special needs to get out of control by applying it in situations where it should not have applied. *See* Jennifer Y. Buffaloe, *"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 the "special needs" balancing test permits distortion of Fourth Amendment strictures); Dery, *supra* note 14, at 103 (arguing that the "special needs" balancing test invaded traditional privacy rights); David J. Gottlieb, *Drug Testing, Collective Suspicion, and a Fourth Amendment Out of Balance: A Reply to Professor Howard*, 6 KAN. J.L. & PUB. POL'Y 27, 27–28 (1997) (arguing that *Acton* is inconsistent with the intent of the Fourth Amendment); Michael W. Kier, Comment, Jones v. Murray: *Allowing the Government to Get Blood From a Stone*, 42 CASE W. RES. L. REV. 635, 635 (1992) (arguing that the court has recently drained the lifeblood from the Fourth Amendment) (citations omitted); Jennifer L. Malin, Comment, Vernonia School District 47J v. Acton: *Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469, 489 (1996) ("[T]he Court has engaged in ad hoc balancing which has failed to guard against arbitrary searches and has expanded this 'special needs' doctrine beyond its intended scope.").

57. *Chandler*, 520 U.S. at 318–23. Specifically, the *Chandler* majority struck down the drug screens for two reasons. First, the government could allege no existing drug problem among officeholders; therefore, there was no special need to conduct warrantless blanket searches. *Id.* at 318–19. Second, assuming *arguendo* that a special need existed to detect drug use among candidates for political office, the search could not achieve detection because (1) it took place sixty days before a candidate qualified to be placed on the ballot, and (2) it screened for drugs that exit the body within thirty days.

58. *Id.* at 318.

59. *Id.* at 318–19. The requirement failed to identify drug-using candidates because most illegal drug users could merely abstain for a month prior to the drug screens in order to avoid detection. *Id.* at 320.

60. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (noting that a search unsupported by probable cause can be constitutional if special needs exist that make the warrant and probable cause impractical); Dery, *supra* note 14, at 87–88 (" 'Special' no longer meant a justification 'apart from the regular needs of law

departure from the previous special needs cases because it became the first case to limit the doctrine by increasing the required need and by making the usefulness of the search an issue.[61]

Ferguson further limits the doctrine of special needs. Unlike previous courts, the *Ferguson* court analyzed the immediate and ultimate goals of the testing policy.[62] Upon identifying the "immediate purpose" of the program as the generation of evidence for law enforcement purposes, the Court held that the special needs balancing test did not apply and that the Fourth Amendment should be applied strictly.[63] This departure from precedent represented a significant addition to the law: the immediate purpose inquiry.

Ferguson creates two implications. First, *Ferguson* creates a new test. Courts must now analyze the immediate and ultimate goals of a warrantless search and declare the search unconstitutional if one of those goals is to aid law enforcement. The doctrine of special needs was thus severely limited in cases involving law enforcement.[64]

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enforcement' .... 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.' "). Writing for the majority, Justice Ginsburg claimed that the Court's "precedents establish that the proffered need 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." *Chandler*, 520 U.S. at 318–19.

61. In *Chandler*, the Court purported to apply the traditional special needs balancing test. *Id.* at 313–14 (explaining that the Court was applying the test used in *Skinner*). Accordingly, the search would only be constitutional where the privacy interests were minimal and the governmental interest would be placed in jeopardy by a requirement of individualized suspicion. *Id.* (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989)). The Court found the governmental interest lacking because Georgia could assert no reasonable rationale for a special needs search because it could allege no drug problem among office holders, *id.* at 319, and because the search policy employed would be ineffective at identifying the targeted drug users given that the drug could be easily eliminated from the candidate's system prior to the screening. *Id.* at 320. The Court did, however, note that the testing method was "relatively noninvasive" and, therefore, unintrusive. *Id.* at 318. Accordingly, the testing policy in *Chandler* would have withstood scrutiny but for the lack of governmental need. *Id.*

62. Ferguson v. City of Charleston, 532 U.S. 67, 82–83 (2001) ("While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.") (footnote omitted).

63. *Id.* at 86.

64. Prior to *Ferguson*, the Court had approved the search in *Griffin*. Although that search was termed an administrative search, it undoubtedly served a law enforcement end. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987) (identifying the search as an administrative search). A police officer reported a probationer's possession of a gun in his home to probation officers who were not assigned to that probationer. *Id.* at 871. The probation officers searched the probationer's home and found the gun. *Id.* at 872. The state

Second, the doctrine's inability to command a majority in two consecutive cases indicates that the once common doctrine is now disfavored.[65]

The new "immediate purpose" test introduced in *Ferguson* limits the application of the special needs doctrine in future cases involving law enforcement.[66] In addition to the heightened burden the government need must meet, *Ferguson* adds that the need may not serve a law enforcement end.[67] The Court's recent displeasure with special needs searches involving law enforcement is best understood when the *Ferguson* holding is contrasted with the holding in *Griffin v. Wisconsin*.[68] In *Griffin*, two probation officers conducted a warrantless search of a probationer's home pursuant to the state's probation statute requiring "reasonable grounds."[69] Undoubtedly, the *Griffin* search served a law enforcement end as evidenced by the facts that neither of the searching officers served as the probationer's assigned probation officer,[70] and they devised the search in close collaboration with police officers, who informed the probation officers that the paroled felon possessed a gun in his home.[71] Moreover, they gave the gun to law enforcement officials, who used it as evidence to prosecute the probationer.[72] Nevertheless, the Court held that supervision of the probationer constituted a special need that permitted the State to infringe upon his individual privacy rights.[73]

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ultimately used the gun as evidence to arrest and prosecute the probationer for violating his parole. *Id.* Ergo, the search served the law enforcement ends of identifying, detaining and prosecuting a lawbreaker. *See also* Michael R. Beeman, Comment, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 COLUM. L. REV. 1034, 1049 (1989) (stating that the purpose of the specific search was obtain evidence of criminal activity); Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV 1013, 1035 (1990) (arguing that narrow application of the phrase "need for law enforcement" allows for broad application of the special needs doctrine).

65. *See* Anderson, *supra* note 2, at 129–37 (discussing relevant special needs cases).

66. *See The Supreme Court, 2001 Term—Leading Cases*, 115 HARV. L. REV. 306, 332 (2001) (indicating that after *Ferguson* a special needs case must arise from a purpose other than law enforcement and that *Ferguson* "adds bite" to this requirement).

67. The Court was not always so unwilling to afford special needs protection to a law enforcement search. *See infra* notes 70–75 and accompanying text.

68. 483 U.S. 868 (1986).

69. *Id.* at 871.

70. *Id.*

71. *Id.*

72. *Id.* at 870.

73. *Id.* at 875. Furthermore, the Court decided that, given the need to monitor recently released felons efficiently, requiring a warrant would be completely impractical to the functioning of the probation system. *Id.* at 877–80.

If *Griffin* indeed permitted special needs to serve a law enforcement end, *Ferguson* very likely reversed this holding, at least partially.[74] A hypothetical also underscores this point: what if *Griffin* was decided under *Ferguson*'s reasoning instead of fifteen years earlier? As evidenced by the officers' search for a firearm, the immediate goal of the search was to obtain evidence for law enforcement purposes.[75] Once the Court made that threshold determination, a special needs analysis would be inappropriate under *Ferguson*, and the search would be deemed unreasonable without a warrant or probable cause.[76] As this hypothetical demonstrates, in the wake of *Ferguson*, before balancing the competing interests, a

74. The Court did not characterize the search in *Griffin* as a criminal search; rather, the majority deemed it an administrative search. *See id.* at 872–73 (discussing the law applicable to regulatory schemes and the regulatory scheme in *Griffin*). However, the search sought to investigate a lead from the police and to obtain evidence for the arrest and prosecution of the probationer. The majority reasoned that because the probationer was a felon being punished in an alternative manner to incarceration, he was subject to the rules governing searches conducted by the department of corrections. *Id.* at 873–75. Further, because a probation officer conducted the search, the administrative rules of the department of corrections governed. *See id.* at 875 (discussing how the search's reasonableness depended on Wisconsin's interpretation of its probation statute). However, this reasoning does not take account of the fact that probation officers, not including the officer assigned to the probationer, searched the probationer at the behest of law enforcement. *See id.* at 871–72 (indicating that the probation officers acted pursuant to a tip by police). When one considers these facts, the search seems much less like a routine search by the department of corrections, and much more like a typical law enforcement search.

75. *See supra* notes 64, 74; *see also* Beeman, *supra* note 64, at 1049 (describing the search in *Griffin* as a law enforcement search).

76. *Griffin* can be distinguished from *Ferguson* because *Griffin* involved the search of a convicted felon who was still under state supervision, whereas the women in *Ferguson* were not. This distinction is immaterial, however, because the immediate purpose inquiry does not take privacy expectations into account. Of course, the women in *Ferguson* enjoyed a higher expectation of privacy than convicted felons still under state supervision. *See* Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) (noting that the privacy interest implicated in *Ferguson* is greater than in other urinalysis cases). This observation is beside the point because an immediate purpose analysis occurs before the privacy interests of the individual are balanced against the state's interest. The *Ferguson* majority did not expressly address privacy expectations, but rather addressed the purpose for which the State collected the evidence. *See id.* at 82–84 (discussing the immediate and ultimate goals of the urine screenings in *Ferguson*). Because the State designed a search with the immediate purpose of arresting and prosecuting the women, the majority struck down the search. *Id.* at 82–86. However, it is unlikely that law enforcement contributed any more searches that resulted in the arrests in *Ferguson* than did the police officer who encouraged probation officers not assigned to a particular probationer to search the probationer's house without a warrant and probable cause. *See* Griffin v. Wisconsin, 483 U.S. 868, 871 (1987) (discussing the facts of the *Griffin* search). The distinction might be more significant if the Court had actually conducted a balancing test. *See, e.g.*, Chandler v. Miller, 520 U.S. 305, 309 (1997) (holding a search unreasonable where no special needs were present).

court must consider whether an immediate goal of the program is to obtain evidence for law enforcement purposes.[77]

Similar to the special needs analysis, the "immediate purpose" analysis is fact intensive, and the result turns on how a court weighs the evidence.[78] Depending upon which facts are emphasized or downplayed, a court decides how heavily law enforcement affected the search at hand. For example, the dissent in *Ferguson* asserted that the immediate goal of the defendants in *Ferguson* was to obtain substance abuse treatment for drug-abusing pregnant women.[79] In fact, the district court found that the relevant goal of the search "was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child."[80] The Supreme Court majority, on the

77. *Ferguson*, 532 U.S. at 82–83. Of course, an argument exists that *Ferguson* did nothing to limit the "special needs" doctrine. *See The Supreme Court, 2001 Term—Leading Cases*, 115 HARV. L. REV. 306, 334 (2001) (positing that *Ferguson* might not hinder the involvement of law enforcement as much as it first appears because the distinction between an ultimate goal and an immediate purpose is exceptionally flimsy); *see also* Charles F. Williams, *Return of the Fourth Amendment*, 8 PREVIEW U.S. SUP. CT. CAS. 442, 444–45 (2001) (focusing on *Ferguson*'s holding that the hospital's interest in using the threat of criminal sanctions to deter drug use in pregnant women did not justify a departure from the general requirement of a warrant and not mentioning any other detrimental effects to law enforcement searches). Such an argument presumes that the presence of law enforcement in the implementation and enforcement of the drug testing policy presents the only significant difference between *Ferguson* and previous cases. *See Ferguson*, 532 U.S. at 88–89 (Kennedy, J., concurring in judgment). However, such an argument conflicts with the decision in *Griffin*. *See id.* at 100–01 (Scalia, J., dissenting) (citing Griffin v. Wisconsin, 483 U.S. 868 (1987)). The immediate purpose of the search in *Griffin* undoubtedly was to serve the needs of law enforcement. *Id.* at 101 (Scalia, J., dissenting) ("[I]n *Griffin*, even more than [in *Ferguson*] police were involved in the search from the very beginning."). Moreover, as Justice Scalia's dissent points out, the special needs doctrine "was developed and is ordinarily employed, precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective." *Id.* at 100 (Scalia, J., dissenting). Therefore, *Ferguson*, likely indicates an erosion in the acceptable uses of the "special needs" doctrine.

78. The district court found that the *Ferguson* searches were not conducted for independent reasons, but were instead intended to be shared with the police. *Ferguson*, 532 U.S. at 73–74. Hence, to the district court, the presence of law enforcement was emphasized. *See id.* The Fourth Circuit majority, on the other hand, concerned itself with the benevolent goals of the search and viewed the law enforcement involvement as an acceptable means to an end. *See* Ferguson v. City of Charleston, 186 F.3d 469, 477–79 & n.7 (4th Cir. 1999) (emphasizing the pregnancy complications caused by maternal cocaine use). The Supreme Court majority emphasized facts demonstrating the heavy involvement of the police. *See Ferguson*, 532 U.S. at 72 (discussing how the policy provided notification of the police when patients tested positive, procedures for maintaining a chain of custody, and the range of possible criminal charges).

79. *Ferguson*, 532 U.S. at 98 (Scalia, J., dissenting) (noting the district court's finding of fact that the goal of the search was to promote substance abuse treatment in order to protect the mother and unborn child).

80. *Id.* (Scalia, J., dissenting) (citing the district court's findings).

other hand, emphasized different facts in deciding that the immediate purpose of the search was to facilitate the arrest and prosecution of the pregnant women.[81] Specifically, the Court examined the hospital's policy, devoting significant attention to establishing a chain of custody, the range of possible criminal charges, the logistics of police notification of arrests, and the fact that police and prosecutors were heavily involved in the administration of the policy.[82] Marshalling the facts in a way that indicated heavy law enforcement objectives, the majority opened the door to the argument that if *any* evidence indicates that a search may result in an arrest, the policy has the "immediate purpose" of obtaining evidence for law enforcement purposes.[83]

Since most searches aim to find some kind of illegal activity, the fact-specific immediate purpose inquiry could be used to strike down searches that traditionally were approved.[84] Consider, for example, *Skinner v. Railway Labor Executives' Association*,[85] in which the Court found that the governmental special need of protecting the travelling public outweighed the privacy interests of rail workers implicated by urinalysis drug screenings.[86] The dissent argued that the drug testing policy in *Skinner* failed to prevent prosecutors from obtaining the urine samples drawn from rail workers and using them to prosecute illegal drug cases; but rather, the regulations "appear[ed] to invite" such conduct.[87] Thus, if certain facts were emphasized, a court could characterize the immediate purpose of urine screens as obtaining evidence for law enforcement purposes. If the Court viewed the immediate purpose of the search as obtaining evidence for the arrest and prosecution of the rail workers, then a special needs balancing test would be inappropriate. Hence, *Ferguson* represents a significant departure from prior cases because it added a subjective, fact-intensive inquiry that can be used to subvert the application of the doctrine. A special needs balancing test may never be conducted

81. *Id.* at 83–85 (Scalia, J., dissenting).

82. *Id.* (Scalia, J., dissenting).

83. *Id.* at 100 (Scalia J., dissenting) (arguing that the only possible rationale for the Court's holding is that "the *addition* of law-enforcement-related purposes *to* a legitimate medical purpose destroys applicability of the 'special-needs' doctrine").

84. *Id.* (Scalia, J., dissenting) (arguing that the special needs doctrine is typically employed by law enforcement officials with law enforcement objectives).

85. 489 U.S. 602, 634 (1989).

86. *Id.*

87. *Id.* at 650 (Marshall, J., dissenting) (arguing that the possibility of arrest and prosecution was significant).

when the immediate goal of a search is linked to the goals of law enforcement.

Moreover, *Ferguson* could extend beyond the law enforcement arena. The *Ferguson* majority analyzed the immediate purpose of the search and moved away from prior cases that looked to the ultimate goal of the search in question. This change is significant because the ultimate goal of a given search will often appear much more laudable than the immediate purpose. Consider Justice Kennedy's examples: he claims that under the majority's immediate purpose analysis, the immediate purpose in *Vernonia* would be gathering evidence of drug use in the Nation's school children.[88] Clearly, the goal of gathering evidence is far less compelling that the goal of deterring drug use. Accordingly, a relevant need defined in terms of the immediate purpose of the search is less likely to survive the Court's scrutiny than the benevolent ultimate goals the Court accepted in the past.[89]

Furthermore, the weakening of the doctrine is apparent in the tone and dicta of the recent cases. The Court is implicitly moving away from the special needs doctrine as the doctrine falls into disfavor with several members of the Court. *Ferguson* is the second consecutive case[90] that struck down a special needs search. Determining whether these cases represent a narrowing of the doctrine or simply an abstention requires an analysis of the language in *Chandler* and *Ferguson*.

The doctrine of special needs has been altered both times it has faced the Court.[91] Prior to *Chandler*, the government only needed to

88. *Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring in judgment).

89. *Skinner*, 489 U.S. at 620–22 (identifying the relevant need as the government's interest in regulating the conduct of railway employees for safety reasons); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 674 (1989) (identifying the relevant need as deterring drug use among U.S. customs officials in sensitive and potentially compromising situations); *Vernonia*, 515 U.S. at 646 (identifying the relevant need as deterring drug use among the Nation's school children).

90. *Chandler v. Miller*, 520 U.S. 307 (1997) was the first case to strike down a special needs search.

91. *See id.* at 318 (rejecting drug screenings of candidates for Georgia's state political offices where the government could not show a substantial need); *Ferguson*, 532 U.S. at 82–84 (using the immediate purpose analysis to reject urine screening of pregnant women seeking obstetrical care at a state hospital); Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 281 (2000) (arguing that the current Justices are willing to tighten the requirements for a finding of special needs as evidenced in *Chandler v. Miller*); *The Supreme Court, 2001 Term—Leading Cases*, 115 HARV. L. REV. 306, 332 (2001) (indicating that *Ferguson* conducted an immediate purpose analysis).

show a special need.[92] *Chandler*'s holding, however, demanded the showing of a "substantial need."[93] This distinction is quite significant because it requires a higher showing by the government.[94] Furthermore, the Court struck down the statutorily mandated search, partly because it could not achieve its ultimate goal,[95] broadly defined as preventing political officeholders in Georgia from "jeopardizing the discharge of public functions."[96] In *Ferguson*, the Court considered the immediate purpose,[97] whereas prior to *Ferguson* only the ultimate goal of the search was relevant.[98] Once an expansive doctrine, the notion of a special need emerged from *Chandler* and *Ferguson* in a much weaker form.[99] Hence, after *Chandler*, a search actually had to achieve its goal in order to be constitutional.[100] *Ferguson* further deflated the doctrine by requiring a questionable search to pass an additional test. Now, not only must the need be substantial as well as substantially addressed by the search, but the

92. *See, e.g., Skinner*, 489 U.S. at 621–22 (stating that the government needed to show a special need); *see also* Dodson, *supra* note 91, at 259 (identifying the pre-*Chandler* special needs cases as sweeping); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (arguing that the doctrine of special needs requires such a low showing by the government that any search that is not "outrageous" is deemed "reasonable" under the Fourth Amendment).

93. *Chandler*, 520 U.S. at 318 (stating that the government must show a "substantial need" that outweighs both the candidate's interest in privacy and the "Fourth Amendment's normal requirement of individualized suspicion").

94. Ames, *supra* note 14, at 291. Specifically, the government must show an actual problem that is not merely symbolic such as having a tough stance on drugs, and public safety must genuinely be at risk. *Id.* at 291–93.

95. The *Chandler* majority did not distinguish between the immediate purpose and the ultimate goal of the search. It accepted the State's argument that the goal of the program was to prevent officeholders from engaging in conduct injurious to the public, and struck down the search because it could not achieve that goal. *Chandler*, 520 U.S. at 319–20. However, this type of analysis may have opened the door to a *Ferguson*-type immediate purpose analysis. After all, the Court looked at the ultimate goal of the drug screens and then struck down a search poorly designed to achieve that goal. *Id.* Perhaps the Court believed that the search was designed to serve another purpose.

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

97. Ferguson v. City of Charleston, 532 U.S. 82–84 (2001).

98. *See, e.g., Skinner*, 489 U.S. at 621–22 (identifying the relevant need as the government's interest in promoting railway safety).

99. *See* Dodson, *supra* note 91, at 259 (identifying the pre-*Chandler* special needs cases as sweeping); Stuntz, *supra* note 92, at 554 (arguing that the doctrine of special needs requires such a low showing by the government that any search that is not "outrageous" is deemed "reasonable" under the Fourth Amendment); Ames, *supra* note 14, at 289 (indicating that pre-*Chandler* cases allowed much subjectivity in the application of the doctrine of special needs); *see also supra*, note 60.

100. *Id.*

immediate purpose of search in question is subject to review as well.[101]

Furthermore, it is reasonable to conclude that the current Supreme Court disfavors the doctrine of special needs, such that it is unlikely to command future majorities. Although the doctrine has its proponents on the current court, the support of certain justices has waivered.[102] Justices Ginsburg, Breyer and O'Connor once supported

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101. *See* Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001).

102. Chief Justice Rehnquist and Justices Scalia and Thomas are still willing to vote in favor of the doctrine of special needs. *See Ferguson*, 532 U.S. at 98–104 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.) (arguing that there was a special need); *Chandler*, 520 U.S. at 323–28 (Rehnquist, C.J., dissenting, not joined by Scalia, J. and Thomas, J.) (arguing that there was a special need); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (Rehnquist C.J., Scalia, J., and Thomas, J., joining in the opinion of the Court) (analyzing the need to curb the problem of drug abuse in the nation's schools is a special need); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (identifying the need to prevent drug interdiction officers from using drugs and impracticability of monitoring them all); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (need to protect traveling public); Griffin v. Wisconsin, 483 U.S. 868 (1986) (Scalia, J., delivering the opinion of the Court in which Rehnquist, C.J., joined) (finding that the need to monitor paroled felons is a special need); O'Connor v. Ortega, 480 U.S. 709, 720 (1986) (Rehnquist, C.J., joining in the plurality opinion) (finding the need for government employers to monitor employees is a special need). Justices Scalia and Thomas voted against the search in *Chandler*, 520 U.S. at 307, but voted in favor of special needs in *Ferguson*. 532 U.S. at 98–104 (Scalia, J., dissenting). Justice Scalia also dissented in *Von Raab* because he did not believe that the government had shown an existing problem that warranted extreme measures. *Von Raab*, 489 U.S. at 680–87 (Scalia, J., dissenting).

Justice Stevens rarely joins in an opinion that endorses "special needs." *See Ferguson*, 532 U.S. at 69 (Stevens, J., delivering the opinion of the Court) (striking down a special needs search); *Chandler*, 520 U.S. at 308–23 (joining in the majority opinion striking down the special needs search); *Vernonia School District*, 515 U.S. at 666–86 (O'Connor, J., dissenting, joined by Stevens, J.) (dissenting from a finding of special needs); *Griffin*, 483 U.S. at 890 (Stevens, J., dissenting) (dissenting from a finding of special needs); *O'Connor*, 480 U.S. at 732–48 (Blackmun, J., dissenting, joined by Stevens, J.) (dissenting from a finding of special needs); *Von Raab*, 489 U.S. at 680–87 (Scalia, J., dissenting, joined by Stevens, J.), *Skinner*, 489 U.S. at 634–35 (Stevens, J., concurring in part and concurring in judgment) (refusing to join in a finding of special needs).

Justice Souter never votes in favor of the doctrine of special needs. *See Ferguson*, 532 U.S. at 69 (joining in an opinion that struck down a special needs search); *Chandler*, 520 U.S. at 308–23 (joining in an opinion that struck down a special needs search); *Vernonia*, 515 U.S. at 666–86 (O'Connor, J., dissenting, joined by Souter, J.).

Justice Kennedy still believes in the doctrine of "special needs" so long as the search achieves its ultimate goal and does not involve law enforcement. *Ferguson*, 532 U.S. at 86 (Kennedy, J., concurring in judgment) (striking down the search because of the involvement of law enforcement but disagreeing with the majority's special needs analysis); *Chandler*, 520 U.S. at 308–23 (striking down the search); *Vernonia*, 515 U.S. at 647 (upholding the special needs search); *Von Raab*, 489 U.S. at 666–67 (Kennedy, J., delivering the opinion of the Court) (finding special needs); *Skinner*, 489 U.S. at 618–34 (Kennedy, J., delivering the opinion of the Court) (finding special needs).

the doctrine but have retracted that support. Consequently, the doctrine can no longer command five votes in its favor.[103]

Given her lengthy tenure on the Court, Justice O'Connor's retreat from her original position in favor of the doctrine is both noticeable and significant. She agreed that special needs existed in *O'Connor*,[104] *Griffin*,[105] *Skinner*,[106] and *Von Raab*,[107] however, she withdrew her support from the special needs doctrine in *Vernonia*, arguing that a warrant requirement would not jeopardize the search. Additionally, she expressed discomfort with the broad nature of the "blanket search" in question.[108] She also joined the majorities in *Chandler*[109] and *Ferguson*[110] that struck down searches predicated upon the special needs doctrine.

Moreover, there is an even better reason to believe that Justice O'Connor no longer supports the doctrine of special needs. Namely, she voted for the search in *Griffin*.[111] As previously discussed, the search in *Ferguson* is not distinguishable from the search in *Griffin* in as much as law enforcement was heavily involved in both searches.[112] Justice O'Connor voted to strike down the search in *Ferguson*.[113] Therefore, it is likely she changed her position on the doctrine.

Given that the doctrine has fallen into disfavor, it is doubtful that the doctrine can command a majority in future cases. The skepticism of the Justices on the Court and the drastic narrowing of the doctrine in the previous two cases indicates that the special needs exception to the Fourth Amendment's warrant and probable cause requirements is probably limited to circumstances directly analogous to cases where special needs have been determined. Thus at present, no new special needs are likely to emerge.

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103. Justices Ginsburg and Breyer agreed that the search in *Vernonia* was justified on the basis of special needs, but that the searches in *Chandler*, 520 U.S. at 307, and *Ferguson*, 532 U.S. at 75–77, were not. Justice Ginsburg wrote a concurring opinion in *Vernonia* in which she emphasized that her vote hinged on the fact that the urinalysis searches for drugs only occurred if students participated in certain extracurricular activities.

104. O'Connor v. Ortega, 480 U.S. 709, 720 (1986).

105. Griffin v. Wisconsin, 483 U.S. 868, 870–80 (1986).

106. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

107. Nat'l Treasury Employees v. Von Raab, 489 U.S. 656 (1989).

108. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666–86 (1995) (O'Connor, J., dissenting) (arguing that applying the doctrine would subject millions of school children to warrantless, blanket searches without any need for suspicion).

109. Chandler v. Miller, 520 U.S. 305, 307 (1997).

110. Ferguson v. City of Charleston, 532 U.S. 67, 69 (2001).

111. Griffin v. Wisconsin, 483 U.S. 868, 869 (1986).

112. *See supra* notes 64 and 70–75.

113. *Ferguson*, 532 U.S. at 69.

Hence, *Ferguson* should not be taken lightly by those who study or practice Fourth Amendment law. While the Court did not expressly announce that it was weakening the doctrine of special needs, it did so in a very meaningful way by creating the immediate purpose inquiry. Moreover, the subtle changes in tone and the votes in *Ferguson* confirm an ongoing erosion in the support for the doctrine among the members of the Court. Policymakers who devise search policies predicated on the doctrine of special needs would be wise to scrutinize the immediate purpose of their policies and eliminate any clear links to law enforcement because the Court is searching for ways to quietly eliminate the doctrine of special needs.

JOSEPH S. DOWDY