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National Treasury Employees Union v. Von Raab: The Fourth Amendment Hangs in the Balance

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NOTES

National Treasury Employees Union v. Von Raab: The Fourth Amendment Hangs in the Balance

The United States Supreme Court has interpreted the fundamental purpose of the fourth amendment's[1] reasonableness requirement as safeguarding "the privacy and security of individuals against arbitrary invasions by governmental officials."[2] Prior to 1967, the Court applied the fourth amendment only in cases involving searches[3] undertaken to enforce criminal laws, protecting against "unreasonable searches and seizures" by requiring warrants based on probable cause in all but a few narrowly defined situations.[4] The Court's decision in *Camara v. Municipal Court*[5] extended the protection of the fourth amendment to civil searches.[6] It also introduced the balancing test as a method of determining whether a search is reasonable under the fourth amendment.[7]

Although initially applied only in cases involving minimal intrusions, this method of balancing the government's interest in a particular search against the privacy interests the search infringes gradually expanded to encompass all civil searches to determine the practicability of requiring probable cause.[8] The fourth amendment protection retained substance during this expansion through the Court's requirement that the searching authority have some reasonable suspicion of wrongdoing in cases in which balancing determined that a probable

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1. 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 . . . ."). The fourth amendment is enforceable against the states through the fourteenth amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

2. Camara v. Municipal Court, 387 U.S. 523, 528 (1967); *see also* Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 n.2 (1988) ("the Court generally identifies the protection of privacy as the fourth amendment's paramount purpose.").

3. An intrusion is a "search" under the fourth amendment when it violates a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). An individual has a reasonable expectation of privacy where he has exhibited an actual (subjective) expectation of privacy and the expectation is one that society is prepared to recognize as reasonable (objective). *Id.* (Harlan, J., concurring).

4. *See Camara*, 387 U.S. at 528-29. Probable cause exists when the facts and circumstances present would warrant a person of reasonable caution to believe that an offense was or is being committed. BLACK'S LAW DICTIONARY 1081 (5th ed. 1979); *see also* Illinois v. Gates, 462 U.S. 213, 238 (1983) ("The task of an issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

5. 387 U.S. 523 (1967); *see infra* notes 44-51 and accompanying text.

6. *Camara*, 387 U.S. at 530-34.

7. *Id.* at 536-37 ("Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."). One commentator has defined balancing technically as "a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests." Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

8. *See infra* notes 99-105 and accompanying text.

cause requirement would be impractical.[9] In *National Treasury Employees Union v. Von Raab*[10] the Court created a new standard for determining reasonableness under the fourth amendment by employing the balancing test to find highly personal drug tests reasonable despite the absence of any suspicion of drug use among the government employees tested.[11]

This Note traces the development of the balancing test from its introduction to fourth amendment jurisprudence through its establishment as the standard of reasonableness for civil searches in *Von Raab*.[12] It analyzes the appropriateness of balancing as a standard and examines the governmental interests and personal privacy rights considered by the Court as well as other factors that the Court either consciously or subconsciously placed on the scales. Following a proposed modification of the *Von Raab* standard requiring individual suspicion and the least intrusive alternative search method available, the Note concludes that the balancing test is uncontrollable and impractical as a standard for determining reasonableness. Consequently, the "indefeasible right"[13] sought to be protected under the fourth amendment is now subject to intrusion for the convenience of government and at the expense of personal liberty.

The United States Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail entering the United States, collecting revenue from imports, and enforcing customs and related laws.[14] A major responsibility of the Customs Service is the interdiction and seizure of illegal drugs and contraband, an often hazardous mission requiring close interaction with criminals and necessitating the possession and possible use of firearms.[15]

In December 1985 the Commissioner of Customs, William Von Raab, established a task force to investigate the possibility of implementing a drug screening program for the Customs Service.[16] No evidence of drug use among the Service's employees existed at that time; indeed, the Commissioner himself expressed his belief that "Customs is largely drug-free."[17] Nevertheless, because the obvious dangers of drug interdiction demanded drug-free and law-abiding officers and because "unfortunately no segment of society is immune from the threat of illegal drug use," the Commissioner announced implementation of a drug-testing program in May 1986.[18]

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9. *See infra* notes 104-05 and accompanying text.

10. 109 S. Ct. 1384 (1989).

11. *Id.* at 1397-98.

12. Although this Note is confined to a discussion of balancing in fourth amendment cases, balancing also has been introduced and employed in cases involving the first, fifth, sixth, eighth, and fourteenth amendments. *See generally* Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 18 (1988) (arguing that the trend of using broad, bright-line rules when balancing should be replaced by narrow, cautious, and incremental decision making).

13. Boyd v. United States, 116 U.S. 616, 630 (1886).

14. *Von Raab*, 109 S. Ct. at 1387.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1388.

The program made urinalysis testing for five illegal drugs[19] a prerequisite for promotion to positions with the Service meeting one of three criteria: direct involvement with drug interdiction, possession and use of firearms, or handling of classified materials.[20] All employees qualifying for covered positions had to pass drug screening as the final condition of promotion, and employees failing the screening without satisfactory explanation became subject to dismissal from the Service.[21] The program required testing only of employees seeking promotions to covered positions; those already working in the covered positions were excluded from the program.[22]

On behalf of current Customs Service employees seeking covered positions, a union of federal employees and a union official brought suit against the Commissioner alleging that the testing program violated the employees' rights under the fourth amendment by permitting searches not based on individual suspicion.[23] The United States District Court for the Eastern District of Louisiana, though recognizing the legitimate interests of the government, granted an injunction, finding the program a "dragnet approach of testing all workers . . . made without probable cause or even reasonable suspicion [that is] repugnant to the United States Constitution" and violative of legitimate expectations of privacy.[24]

The United States Court of Appeals for the Fifth Circuit agreed that the tests were searches,[25] but a divided panel vacated the injunction, finding the searches "reasonable" under the fourth amendment.[26] Noting the Service's efforts to minimize the intrusion into personal privacy, the "pernicious impact" of illicit drugs on American society, and the employees' reduced privacy expecta-

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19. *Id.* at 1389. A laboratory tested the samples for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). *Id.*

20. *Id.* at 1388.

21. *Id.* at 1389. The Service advised employees who qualified for covered positions that their promotions were contingent upon successful completion of drug screening. *Id.* at 1388. An independent contractor conducted the tests, which were carefully monitored to prevent adulteration of samples. *Id.* Protective measures included the presence of a monitor of the same sex to listen for the normal sounds of urination and to secure and seal the sample immediately. *Id.* No actual visual observation occurred. *Id.* The urine sample reached the laboratory through a traceable chain of custody, and enzyme-multiplied-immunoassay technique (EMIT) tests were performed. *Id.* at 1388-89. The laboratory confirmed samples testing positive by a second test using the more accurate gas chromatography/mass spectrometry (GC/MS) method. *Id.* at 1389. Employees testing positive were questioned for possible explanations by a medical review officer. Those not providing satisfactory explanations were subject to dismissal. *Id.* Test results were not turned over to any other agency or to criminal prosecutors, however, without the employee's written consent. *Id.*

22. *Id.* at 1390.

23. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986), *rev'd*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989). The union sought the injunction solely on the ground of violation of the fourth amendment and not on the basis of the penumbral right of privacy developed in Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113 (1973). National Treasury Employees Union v. Von Raab, 816 F.2d 170, 181 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

24. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986), *rev'd*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

25. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

26. *Id.* at 180, 182.

tions,[27] the court found that the government's interest in detecting drug users among employees outweighed the employees' legitimate expectations of privacy.[28] Having so balanced, the court deemed the tests reasonable despite the lack of individualized suspicion.[29] The dissenting judge, also employing the balancing test, considered the program ineffective in achieving the government's goal and therefore not sufficient to outweigh the privacy expectations of the employees.[30]

The United States Supreme Court, balancing for the first time in the absence of some quantum of suspicion, held that suspicionless testing of employees seeking promotion to positions involving drug interdiction and possession of firearms was reasonable under the fourth amendment.[31] Writing for the majority, Justice Kennedy repeatedly emphasized the dangers of illicit drugs.[32] Recognizing the Service's attempts to minimize the test's intrusiveness, the Court held that the government's "compelling interest in preventing the promotion of drug users" outweighed the diminished privacy interests of these employees.[33]

Justice Scalia, joined by Justice Stevens, dissented, recognizing the extreme privacy traditionally afforded the act of urination and criticizing the finding of reasonableness in the absence of any suspicion of employee drug use.[34] Explaining the majority opinion as "symbolic opposition to drug use,"[35] Justice Scalia criticized the lack of proof that the tests would solve the problems that the Service claimed created the need for the program.[36]

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27. *Id.* at 177-79. The court stated that the Service had attempted to minimize the intrusiveness of the searches by providing for aural rather than visual observation and by scheduling the tests in advance rather than conducting them by surprise. *Id.* at 177.

The court explained that the privacy expectations of the employees were diminished because the searches were not performed for the discovery of evidence to be used in criminal prosecutions and because "government employees may be subject to searches or other restraints on their liberties that would be impermissible in the absence of the employment relationship." *Id.* at 178.

28. *Id.* at 179-80.

29. *Id.* at 180.

30. *Id.* at 183-84 (Hill, J., dissenting) ("An important weight in this balance is that the means chosen to accomplish the governmental interest must effectively achieve that goal."). Judge Hill argued that applicants who used drugs could abstain from drug use upon receiving notice and thereby pass their tests. *Id.* at 184 (Hill, J., dissenting). He also noted that the program did not test employees already working in covered positions. *Id.* (Hill, J., dissenting).

31. *Von Raab*, 109 S. Ct. at 1396 (1989). The Court found the record inadequate to determine the reasonableness of testing employees seeking promotions to positions involving handling of classified information and, therefore, remanded this issue for further proceedings. *Id.* at 1396-97.

32. *Id.* at 1392 ("one of the greatest problems affecting the health and welfare of our population"), 1395 ("drug abuse is one of the most serious problems confronting our society today"), 1397 (noting "[t]he Government's compelling interest in preventing promotion of drug users").

33. *Id.* at 1397. The Court found diminished expectations of privacy due to the civil nature of the search, the employment setting, and the "unique" demands of drug interdiction and law enforcement, which required involvement with drugs and possession of weapons. *Id.* at 1393-94.

34. *Id.* at 1398 (Scalia, J., dissenting). Justice Scalia did not criticize the balancing methodology. Instead, he applied the test but struck a different balance, finding that the employees' privacy interests outweighed the government's goal. *Id.* at 1398-99 (Scalia, J., dissenting).

35. *Id.* at 1398 (Scalia, J., dissenting).

36. *Id.* at 1398-401 (Scalia, J., dissenting). Although the majority gave statistics of fatalities, injuries, bribes, and other dangers confronted by employees, *see id.* at 1392-93, there was no evidence that these occurrences were related to drug use. *Id.* at 1400 (Scalia, J., dissenting). At best, the majority only speculated that possible ill effects potentially caused by drug use could be avoided. *Id.* at 1399-400 (Scalia, J., dissenting).

Justice Marshall, joined by Justice Brennan, dissented for the same reasons he enumerated in his dissent in *Skinner v. Railway Labor Executives' Association*,[37] decided the same day as *Von Raab*.[38] Emphasizing the significance of the fundamental right to privacy and the necessity of the probable cause standard in preserving this right,[39] Justice Marshall criticized the expanded application of the balancing test to allow full-scale searches without probable cause or some level of individual suspicion.[40] Charging the majority with being "swept away by society's obsession with stopping the scourge of illegal drugs,"[41] Justice Marshall interpreted its opinion as "eliminating altogether the probable cause requirement for civil searches."[42]

Appreciation of the potential consequences of the Court's unprecedented extension of the balancing test in *Von Raab* requires an analysis of the cases introducing and expanding the application of the balancing test to its present position as the standard for determining reasonableness under the fourth amendment.[43] The Court extended the protection of the fourth amendment to civil searches in *Camara v. Municipal Court*,[44] refusing to find that fourth amendment protections served only those persons suspected of criminal behavior.[45] In *Camara* a lessee faced criminal charges of violating a housing code after he refused to allow an inspection of his apartment by an official who had no search warrant.[46] The inspection was based on an appraisal of conditions of the entire area and was not based on individual probable cause or suspicion.[47] Finding the fourth amendment applicable to inspections of an administrative nature, the Court held that it could only evaluate the reasonableness of the search by "balancing the need to search against the invasion which the search entails."[48] Weighing the governmental and societal interests in preventing the "development of conditions which are hazardous to public health and safety"[49] against the privacy interests of the individual whose dwelling was searched, the Court held that housing inspections were reasonable even absent individual probable

37. 109 S. Ct. 1402 (1989). *Skinner* involved the constitutionality of imposing drug tests on railroad employees involved in train accidents. *See infra* notes 106-19 and accompanying text.

38. *Von Raab*, 109 S. Ct. at 1398 (Marshall, J., dissenting).

39. *Skinner*, 109 S. Ct. at 1423 (Marshall, J., dissenting).

40. *Id.* at 1424 (Marshall, J., dissenting).

41. *Id.* at 1433 (Marshall, J., dissenting).

42. *Id.* at 1425 (Marshall, J., dissenting).

43. The fourth amendment does not expressly require a warrant and probable cause as indispensable elements of reasonableness, *see supra* note 1, and the Court has not required warrants in every circumstance. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 149 (1925) (warrantless search of automobile valid if based on probable cause); Schmerber v. California, 384 U.S. 757, 770 (1966) (warrantless search in exigent circumstances valid if based on probable cause). Nevertheless, prior to the introduction of the balancing test the Court had consistently required probable cause before finding a search reasonable. *See Skinner*, 109 S. Ct. at 1424 n.1 (Marshall, J., dissenting) ("The first and leading case of minimally intrusive search held valid when based on suspicion short of probable cause is *Terry v. Ohio*, 392 U.S. 1 (1963).").

44. 387 U.S. 523 (1967).

45. *Id.* at 530.

46. *Id.* at 525.

47. *Id.* at 536.

48. *Id.* at 536-37.

49. *Id.* at 535.

cause. Among the factors considered by the Court were: 1) the long history of judicial and public acceptance of such inspections; 2) the public interest in ensuring that hazardous conditions did not develop; 3) the lack of acceptable alternative methods of detecting violations; and 4) the limited invasion of privacy due to the inspections being neither personal nor aimed at discovery of criminal evidence.[50] Introducing the balancing test as a new fourth amendment methodology for certain civil searches, the Court approved the search despite the lack of a level of suspicion sufficient to constitute individual probable cause.[51]

In *Terry v. Ohio*,[52] decided only one year after *Camara*, the Court introduced the balancing test to criminal searches under the fourth amendment to justify a police officer's brief "stop and frisk" search based on less than probable cause.[53] The officer, having observed three men and suspecting them of "casing a job," approached the men, identified himself as a police officer, and requested their names and an explanation of the nature of their activity.[54] When the men "mumbled something" in response, the officer, believing the men might be armed, detained them and "patted down" the outside of their clothing. This procedure led to the discovery of two loaded weapons.[55] Stating that "the specific content and incidents of . . . [the fourth amendment] right must be shaped by the context in which it is asserted," the Court enumerated the unsatisfactory results of requiring a warrant and probable cause in this type of situation[56] and invoked the balancing test to determine the reasonableness of these searches.[57] The Court found that the governmental and societal interest in protecting the safety of police officers outweighed the intrusion of privacy necessary to ensure the absence of dangerous weapons.[58] To reach an acceptable balance between the government's interest and the safeguards of the fourth amendment, the Court created a two-step inquiry, finding stop and frisk type searches reasonable when "the officer's action was justified at its inception" and the search "was reasonably related in scope to the circumstances which justified the interference in the first place."[59] This test subsequently came to be recognized as the "rea-

50. *Id.* at 537.

51. *Id.* at 534-35. Although the Court avoided individual probable cause as a requirement of reasonableness, it held that inspectors still must obtain warrants in order to protect citizens from the discretionary judgment of officials in the field. *Id.* at 539-40. The Court also maintained the requirement of probable cause, which in this type of situation would be based on an inspection of an entire area rather than a particular dwelling. *Id.* at 538.

Following *Camara*, the Court recognized the "administrative search" exception in lieu of individual probable cause or individual suspicion when the enumerated criteria were present. *See* James, *The Constitutionality of Federal Employee Drug Testing:* National Treasury Employees Union v. Von Raab, 38 AM. U.L. REV. 109, 126-27 (1988) (analyzing the decision of the United States Court of Appeals for the Fifth Circuit).

52. 392 U.S. 1 (1968).

53. *Id.* at 16, 30-31.

54. *Id.* at 6-7.

55. *Id.* at 7.

56. *Id.* at 8-9.

57. *Id.* at 21 ("there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails" (quoting *Camara*, 387 U.S. at 536-37)).

58. *Id.* at 23-25, 27.

59. *Id.* at 19-20. Although the government's interest was great, the Court still recognized the

sonableness of the circumstances" standard employed by the Court to uphold a search on a level of suspicion less than probable cause.[60]

Under this new exception, a search would be "justified at its inception" if the officer was able to point to "specific and articulable facts"[61] in which "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[62] Because the "sole justification" of the stop and frisk search in *Terry* was the protection of the officer and those nearby, the search was reasonable in scope only if confined "to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[63] Although *Terry* involved a criminal search and was strictly limited to its particular facts,[64] because it was the first decision not requiring probable cause[65] the decision has been cited repeatedly by the Court in developing a methodology for determining the reasonableness of civil searches.[66]

Another exception to the general requirement of probable cause in civil searches resulted from the Court's use of the balancing test in cases involving searches and inspections at the United States border. In *United States v. Brignoni-Ponce*[67] the Court addressed the reasonableness of roving border patrol stops, not based on probable cause or individual suspicion, for brief questioning of the occupants of vehicles as to their residency and immigration status.[68] The Court balanced the government's interest in preventing unlawful entry into the United States and the "absence of practical alternatives"[69] against

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nature and quality of the fourth amendment right. *Id.* at 17. For this reason, the Court "struck a balance" that satisfied the government interest but still protected the rights of the individual with objective standards. *Id.* at 27. The Court also strictly limited its decision to relax probable cause for "stop and frisk" searches to situations in which the police officer's life may be threatened. *Id.* at 16 n.12 & 27.

60. *See* New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 880-82 (1975).

61. *Terry*, 392 U.S. at 21. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18.

62. *Id.* at 27. The level of suspicion necessary in this limited circumstance did not have to reach probable cause, but did require more than a "hunch" or "unparticularized suspicion" that the individual present was armed and dangerous. *Id.* at 21-22.

The Court has interpreted the requirement of "justified at inception" as requiring the presence of a reasonable ground for suspecting that the search will turn up the evidence sought. O'Connor v. Ortega, 480 U.S. 709, 726 (1987); *T.L.O.*, 469 U.S. at 341-42.

63. *Terry*, 392 U.S. at 29.

64. *Id.* at 8-9.

65. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1424 n.1 (1989) (Marshall, J., dissenting).

66. *See O'Connor*, 480 U.S. at 725-26 (probable cause not required for searches occurring in the workplace); *T.L.O.*, 469 U.S. at 341 (probable cause not required for searches in the "special" school environment); United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (probable cause not required to justify brief stops for questioning of residency status by roving border patrols).

67. 422 U.S. 873 (1975).

68. *Id.* at 876. The Court had decided previously that probable cause was required for full-scale searches made by roving border patrols. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

69. *Brignoni-Ponce*, 422 U.S. at 881. The length of the border and the numerous points of entry necessitated the use of roving patrols; fixed checkpoints could not possibly cover this massive area.

the minimal interference to the individual in being stopped to answer questions.[70] Relying on *Terry v. Ohio*, the Court held that brief stops limited to questioning in the immediate proximity of the border satisfied the fourth amendment if based on reasonable suspicion of the presence of illegal aliens.[71] The Court expressly refused "to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving patrol stops"[72] because of the unreasonableness of allowing interference with motorists rightfully using the highway without any grounds for suspecting that they had violated the law.[73]

The Court created another "border search" exception in *United States v. Martinez-Fuerte*,[74] this time addressing the reasonableness of the Border Patrol's operation of permanent checkpoints at or near the nation's borders. At these checkpoints Border Patrol officers slowed and visually screened all vehicles, detaining for brief questioning and possible further action any vehicles arousing suspicion of the presence of illegal entrants.[75] The Court, although not expressly following *Camara*,[76] balanced the history of acceptance of border inspections,[77] the great public interest demanding the inspections,[78] and the lack of acceptable alternatives[79] against the minimal intrusion involved[80] to find the checkpoint procedures reasonable under the fourth amendment without individ-

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The border patrol offered evidence disclosing the effectiveness of the patrols in apprehending illegal entrants and smugglers. *See id.* at 879.

70. *Id.* at 880 ("The Government tells us that a stop by roving patrol 'usually consumes no more than a minute' . . . . '[A]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing the right to be in the United States.' ").

71. *Id.* at 883 ("a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference").

Although the factors weighed by the Court—great government interest, minimal intrusion and absence of alternatives—were similar to those considered in *Camara*, the Court did not attempt to justify the searches under the administrative search exception. The Court chose instead to require the presence of particular suspicion that a vehicle was carrying illegal aliens, thereby avoiding the subjection of those lawfully using the highways to the unnecessary and potentially unlimited interference that would occur without such a requirement. *Id.* at 882-83.

72. *Id.* at 882.

73. *Id.* at 883.

74. 428 U.S. 543 (1976).

75. *Id.* at 546-47.

76. *Id.* at 564-65. The Court relied heavily on *Camara*, but refused to follow it completely because of *Camara*'s requirement of a warrant. *Id.* The Court concluded that a warrant requirement would be impracticable for checkpoint procedures. *Id.* at 565.

77. *Id.* at 556-57.

78. *Id.* at 556.

79. *Id.* at 556-57; *see also id.* at 553-54 (discussing the effectiveness of the checkpoints).

80. *Id.* at 557-59 (noting that most motorists were allowed to resume their progress without oral inquiry or close visual observation). The Court found the privacy intrusion was minimized because the officers searched every passing vehicle instead of randomly searching a few. *Id.* at 558-59. Because the other motorists could plainly see the procedure being implemented, it was not a surprise search for which they could not prepare. *Id.* at 559.

This logic has been criticized, however, under the belief that some individuals may be more upset by massive intrusions than by individualized ones. *See* Strossen, *supra* note 2, at 1197. Professor Strossen also states that advance notice may cause more anxiety due to a longer anticipation of the search. *Id.* Finally, Strossen believes some individuals suffer greater embarrassment when subjected to searches in public view. *Id.* at 1197-98.

ual suspicion.[81] The Court strictly limited this use of the balancing test as a means of avoiding the warrant requirement of the administrative search exception[82] to minimal interference at the checkpoints with " '[a]ny further detention [having to] be based on consent or probable cause.' "[83]

To this point, the Court maintained probable cause as the requisite level of suspicion for reasonableness in civil and criminal cases with certain narrowly limited exceptions in which the Court determined reasonableness by balancing the governmental and individual interests involved. Recognizing the importance of fourth amendment protection, the Court carefully had controlled the balancing test by applying it only in cases involving minimal intrusions of privacy and then by requiring the presence of reasonable suspicion[84] or the existence of certain factors under the administrative search exception. In subsequent cases the Court's control of the test weakened as a result of the adoption of balancing, under the guise of "special needs," into its methodology for determining reasonableness in all civil searches.[85] The early cases recognizing exceptions to the probable cause requirement proved to be the wedge forewarned by Justice Bradley more than 100 years ago in his motto "obsta principiis."[86]

In *New Jersey v. T.L.O.*[87] the Court took a major step toward establishing balancing as the rule for determining reasonableness by declaring that "[t]he determination of the standard of reasonableness governing *any specific class of searches* requires 'balancing the need to search against the invasion which the search entails.' "[88] A school principal discovered marijuana and other drug paraphernalia while searching a student's purse for cigarettes after a teacher caught the student smoking.[89] After finding the fourth amendment applicable to public school officials, the Court weighed the school's legitimate interest in maintaining authority and discipline through immediate action[90] against the student's inter-

81. *Martinez-Fuerte*, 428 U.S. at 562.

82. *Id.* at 564-65.

83. *Id.* at 567 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975)). *But see* United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (applying the border search theory to allow a lengthy detention until a suspect had a bowel movement to check for alimentary canal drug smuggling on less than probable cause).

84. *See* New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., dissenting in part and concurring in part).

85. *See infra* notes 97-120 and accompanying text.

86. Boyd v. United States, 116 U.S. 616, 635 (1886). Justice Bradley stated:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be 'obsta principiis.'

Id.

A nonliteral translation of this latin phrase is "Resist the opening wedge!" LaFave, *The Forgotten Motto of* Obsta Principiis *in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 294 (1986).

87. 469 U.S. 325 (1985).

88. *Id.* at 337 (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967) (emphasis added).

89. Although the teacher caught the student smoking, the student denied the teacher's accusation when confronted by the principal. *Id.* at 328.

90. *Id.* at 339-41.

est in privacy and concluded that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[91] The Court held the method for determining the reasonableness of this and "of any search"[92] was the two-step inquiry set out in *Terry v. Ohio*.[93]

Justice Blackmun concurred, but disagreed with the majority's implication that balancing was the rule rather than the exception for determining reasonableness under the fourth amendment.[94] He stated that probable cause was the rule except "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[95] Justice Brennan, joined by Justice Marshall, strongly dissented from the majority's unprecedented formulation of a reasonableness standard "whose only definite content is that it is not the same test as the 'probable cause' standard."[96]

The Court modified its declaration of balancing as the standard for all fourth amendment searches in *O'Connor v. Ortega*,[97] relying on Justice Blackmun's opinion in *T.L.O.* While investigating possible misconduct of an employee, public hospital officials, claiming to be inventorying state property, discovered items later used against the employee in a hearing for his discharge.[98] Recognizing that a warrant and probable cause were settled as the standard of reasonableness, the Court adopted Justice Blackmun's proposed standard, invoking balancing when " 'special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable.' "[99]

Under this new standard, the Court first found the employer's interest to be "substantially different from the normal needs of law enforcement,"[100] hence a "special need." After finding the existence of a "special need," the Court balanced the government's interest in "the efficient and proper operation of the workplace" against the reduced privacy expectations of employees and found warrants and probable cause to be impracticable.[101] The Court then applied the two-step inquiry set out in *Terry* as the standard for determining the reasonableness of the search.[102]

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91. *Id.* at 341.

92. *Id.*

93. *Id.* For a discussion of the two-step reasonableness standard, see *supra* notes 59-63 and accompanying text.

94. *T.L.O.*, 469 U.S. at 351-52 (Blackmun, J., concurring).

95. *Id.* at 351 (Blackmun, J., concurring). Justice Blackmun's statement seems to imply that all civil searches should be evaluated by balancing because civil searches are based on needs other than law enforcement.

96. *Id.* at 354 (Brennan, J., concurring in part and dissenting in part). Justice Stevens also filed a separate opinion arguing for the application of the exclusionary rule. *Id.* at 370 (Stevens, J., concurring in part and dissenting in part).

97. 480 U.S. 709 (1987) (plurality opinion).

98. *Id.* at 713 (plurality opinion).

99. *Id.* at 725 (plurality opinion) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).

100. *Id.* at 724 (plurality opinion). Although the Court found the employer's need substantially different from that of law enforcement, it held that searches for work-related and *investigatory* purposes was a special need. *Id.* at 725 (plurality opinion).

101. *Id.* at 721-25 (plurality opinion).

102. *Id.* at 725-26 (plurality opinion). Justice Blackmun, who created the special needs analysis

The new standard resulting from *T.L.O.* and *O'Connor* allowed courts to find any civil search reasonable, based on the *Terry* decision's two-step inquiry, if its balancing of interests found a warrant and probable cause impracticable. This reasonableness standard required a search to be "justified at its inception" and "reasonably related in scope" to the circumstances justifying the intrusion.[103] A search would be "justified at its inception" if reasonable grounds existed that justified the suspicion that the search would produce the evidence sought.[104] Although the searches in *T.L.O.* and *O'Connor* had been found justified at their inceptions in the presence of individual suspicion, in both cases the Court expressly denied that *individual* suspicion was an essential element of reasonable suspicion.[105]

The Court decided that reasonable suspicion could be present with less than individual suspicion in *Skinner v. Railway Labor Executives' Association*.[106] Based on evidence of drug and alcohol abuse among a significant number of employees[107] and evidence that such abuse had contributed to a large number of serious accidents,[108] the Federal Railroad Administration promulgated regulations mandating drug and alcohol tests for certain employees by blood and urine analysis.[109] The regulations provided for testing of all employees directly involved in "impact accidents" or "major train accidents" immediately after such accidents ocurred.[110] Because the tests attempted to ensure the safety of the public and other employees, and not the needs of law enforcement, the Court determined the government's interest in testing to be a special need.[111] The Court then balanced the government's interests against the employees' expectations of privacy in their blood and urine and determined that warrants and probable cause were impractical.[112] Following the standard created in *O'Connor*, the Court then employed the two-step inquiry, requiring reasonable suspicion and

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in his concurring opinion in *T.L.O.*, dissented, criticizing the plurality's application of the balancing test to an investigatory search that he clearly found not to be a special need. *Id.* at 732 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, J.J.). Justice Scalia concurred with the plurality's opinion but criticized its creation of a new standard of reasonableness. *Id.* at 729 (Scalia, J., concurring).

103. *Id.* at 726; *see supra* notes 59-63 and accompanying text.

104. *O'Connor*, 480 U.S. at 726 (plurality opinion); *T.L.O.*, 469 U.S. at 341-42.

105. *O'Connor*, 480 U.S. at 726 (plurality opinion); *T.L.O.*, 469 U.S. at 342 n.8.

106. 109 S. Ct. 1402 (1989).

107. Studies by the Federal Railroad Administration found that 1 of 8 employees drank at least once a year while on duty and that at least 23% of railway employees were problem drinkers. *Id.* at 1407 n.1.

108. From 1972 to 1983, 21 significant accidents involving drug and alcohol use resulted in 25 fatalities, 61 injuries and approximately $27 million in property damage. *Id.* at 1407-08.

109. *Id.* at 1408. Courts consistently have held that drug tests are searches subject to the fourth amendment. *See Von Raab*, 109 S. Ct. at 1390; *Skinner*, 109 S. Ct. at 1412-13. *See generally* Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem if Competing Interests of Employer and Employee are Equitably Balanced*, 25 DUQ. L. REV 597, 697 (1987) (extensive examination of employee drug testing programs).

110. *Skinner*, 109 S. Ct. at 1408-09. Superiors also could order tests after a "reportable accident," a violation of specific rules or personal observations giving rise to a "reasonable suspicion" of impairment. *Id.* at 1409.

111. *Id.* at 1414.

112. *Id.* at 1415-17.

an appropriately conducted search.[113]

The Court acknowledged that individual suspicion was "usually required . . . before concluding that a search [was] reasonable."[114] However, the Court cited *United States v. Martinez-Fuerte*[115] for the proposition that minimal searches could be justified on less than individual suspicion if an "important government interest . . . [otherwise] would be placed in jeopardy."[116] To qualify the *Skinner* tests for this exception, the Court considered the regulations' effort to reduce the privacy intrusion on employees and the nature of the regulated industry, and determined that the tests were minimally intrusive.[117] The Court completed its characterization by recognizing that a failure to allow these tests on less than individual suspicion would jeopardize a great government interest.[118] Accordingly, the Court held the tests reasonable on less than individual suspicion, finding reasonable suspicion satisfied by "the demonstrated frequency of drug and alcohol use" and the "demonstrated connection between such use and grave harm."[119]

Justice Marshall, joined by Justice Brennan, dissented, labeling the balancing test " 'a dangerous weakening of the purpose of the fourth amendment' " and interpreting the removal of individual suspicion from the "special needs" analysis as "eliminating altogether the probable cause requirement for civil searches."[120] In the cases from *T.L.O.* to *Skinner* the Court has taken the two-step reasonableness standard, created in *Terry* as a very limited exception applying only to minimal searches, and made it the rule for all civil searches, regardless of intrusiveness, when the balance of interests found a warrant and probable cause to be impracticable. The Court, however, did not use balancing as the final determination of the reasonableness of the search. Reasonableness still required a somewhat objective showing of reasonable suspicion, which, following *Skinner*, could be satisfied by particular suspicion of an individual or group from which the individual to be searched was a member.[121] In *Von Raab* the Court upheld for the first time the constitutionality of a search without *any* suspicion of wrongdoing.

Von Raab's significance lies in its elimination of any level of suspicion as a

113. *Id.* at 1417-21.

114. *Id.* at 1417.

115. 428 U.S. 543 (1976); *see supra* notes 75-84 and accompanying text.

116. *Skinner*, 109 S. Ct. at 1417 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

117. *Id.* at 1417-18. Finding the tests minimally intrusive seems completely inconsistent with the Court's finding the tests were searches because they invaded "an excretory function traditionally shielded by great privacy." *Id.* at 1418.

118. *Id.* at 1419-21.

119. *Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting) (restating the Court's holding in *Skinner*, which Justice Scalia joined).

120. *Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting) (quoting New Jersey v. T.L.O., 469 U.S. 325, 357-58 (1985) (Brennan, J., concurring in part and dissenting in part)). Justice Marshall also filed his dissenting opinion in *Von Raab* based upon the reasons stated in his *Skinner* dissent. *Von Raab*, 109 S. Ct. at 1398 (Marshall, J., dissenting). For further discussion of Justice Marshall's dissent, see *supra* notes 38-43 and accompanying text.

121. *Skinner*, 109 S. Ct. at 1420-21.

prerequisite for finding a search justified at its inception. Thus, courts may find searches reasonable without any indication that the desired evidence will be found. The *Von Raab* decision permits unwarranted intrusions into the privacy of innocent citizens without any suspicion of wrongdoing, although the Court had expressly denounced such intrusions in *United States v. Brignoni-Ponce*.[122] This new standard is apparently unjustified by the years of precedent constituting fourth amendment jurisprudence. Where a probable cause requirement would have yielded unacceptable results, the Court always had limited the government's power to search by requiring some level of suspicion.[123] The requirement of reasonable suspicion adopted for civil searches under the special needs doctrine, although not so demanding as probable cause, had provided an objective safeguard for fourth amendment rights.[124] However, the new *Von Raab* standard, which does not require any level of suspicion, allows for any civil search to be found reasonable, even without suspicion that the search will lead to evidence. Leaving the courts free to determine reasonableness without any suspicion eliminates the consistent protection of citizens' privacy previously maintained by the objective standards of probable cause or reasonable suspicion.

The *Von Raab* Court provided a three-step inquiry to determine reasonableness. First, a court must determine whether the search serves a special need "beyond the normal need for law enforcement."[125] Second, by balancing privacy and governmental interests in the particular context, the court must determine whether a warrant or any level of suspicion is practicable.[126] Finally, the court must determine whether the search is reasonably designed to elicit the information sought.[127]

After labeling a governmental intrusion a search,[128] a court first must determine that the search is not "designed to serve the ordinary needs of law enforcement."[129] This requirement is satisfied when the fruits of the search are intended for purposes other than use in criminal prosecution.[130] In such cases the search represents a "special need" that "may justify departure from the ordinary warrant and probable cause requirements."[131]

Under the special needs doctrine as it existed prior to *Von Raab*, the second step would balance privacy and governmental interests to determine the practicality of warrant and probable cause requirements.[132] If impracticable, the rea-

122. 422 U.S. 873, 882-83 (1975); *see supra* notes 68-74 and accompanying text.

123. Although the border searches in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), allowed searches without any particular individual suspicion, the evidence of frequent illegal entries into the United States weighed heavily in the balance and provided some suspicion that searches would detect illegal aliens. *Id.* at 551-53.

124. For a definition of reasonable suspicion, see *supra* notes 61-62 and accompanying text.

125. *Von Raab*, 109 S. Ct. at 1390.

126. *Id.*

127. *Id.* at 1394.

128. See *supra* note 3 for the Court's definition of a search.

129. *Von Raab*, 109 S. Ct. at 1390.

130. *Id.* at 1390.

131. *Id.* at 1390-91.

132. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989); *supra* notes 103-05 and accompanying text.

sonableness standard would be implemented, requiring the search to be justified at its inception and " 'reasonably related in scope to the circumstances which justified the interference in the first place.' "[133] The *Von Raab* Court, however, balanced to determine whether any level of suspicion was practical and, finding the government's special need so great as to obviate the need for any suspicion, held the intrusion was reasonable although no suspicion was present.[134] Accordingly, the second step of the *Von Raab* standard is a balancing of interests. This allows a court, upon finding the scales descending on the side of the government, to approve a search even though no reasonable grounds exist for believing that evidence sought will be discovered.

Finally, a court must determine whether the intrusion is reasonably designed to elicit the information sought.[135] When "[i]n all the circumstances . . . [the court is] persuaded that the program bears a close and substantial relation" to the government's goal, it should find the intrusion reasonably designed, and the search as conducted will be found to satisfy the reasonableness requirement of the fourth amendment.[136]

The standard created in *Von Raab* eradicated any objective yardsticks for measuring reasonableness and replaced them with the balancing test, criticized by Supreme Court Justices[137] and legal writers.[138] The balancing test would not be the standard for fourth amendment reasonableness, however, if it did not possess positive characteristics justifying its application.

In *Camara v. Municipal Court*[139] and *Terry v. Ohio*[140] the Court employed balancing to create exceptions to the recognized standard of probable cause, but in neither of these decisions did the Court attempt to provide any justification for the new test. Even today, when balancing has become the standard of reasonableness for all civil searches, no discussion of the propriety of the test has ever been offered by the Court, other than the early justification based on low intrusiveness and great public need.[141] Accordingly, for support of the Court's new standard, one must look somewhere other than to the Court.

Examining balancing on a practical level, one federal appellate court judge proposed that balancing was a natural reaction to the "rising tide" of "a wide variety of claims by individuals against the government" that were unique and to which general principles had not been applied.[142] Accordingly, balancing seems

133. O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987) (plurality opinion) (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)); *see supra* notes 102-105 and accompanying text.

134. *Von Raab*, 109 S. Ct. at 1394.

135. *Id.*

136. *Id.* at 1396.

137. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1423 (1989) (Marshall, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part).

138. *See, e.g.*, Aleinikoff, *supra* note 7, at 972-83; Strossen, *supra* note 2, at 1184-1207.

139. 387 U.S. 523 (1967); *see supra* notes 44-51 and accompanying text.

140. 392 U.S. 1 (1968); *see supra* notes 52-66 and accompanying text.

141. *See* Aleinikoff, *supra* note 7, at 948-49; Strossen, *supra* note 2, at 1174-75 & n.5; *see, e.g.*, *Camara*, 387 U.S. at 537.

142. Coffin, *supra* note 12, at 21 (Judge Frank Coffin serves as a Circuit Judge for the United States Court of Appeals for the First Circuit).

to provide a flexible and easily applied method for determining the reasonableness of searches in situations never before encountered by the Court. Also, due to a "backlog of opinions to write and cases to decide," this judge found a resort to balancing a much easier approach than "theoretical . . . investigations of the meaning of [constitutional] language and structure."[143]

On a theoretical basis balancing may be seen as necessary to a practical legal system. Clearly, a balancing of interests must play some part in a fair and democratic system of justice.[144] Because virtually all legal conflicts involve two or more interested parties, two or more outcomes are always possible; "[h]ence it is often said that a 'balancing operation' must be undertaken, with the 'correct' decision seen as the one yielding the greatest net benefit."[145] The mere idea of balancing conjures up an image of the goddess Themis, holding a pair of scales with which she weighs the claims of opposing parties to make fair and just determinations.[146] This goddess, recognized as a symbol of justice, is also blindfolded and remains impartial, unaffected by subjective influences and outside forces. It is this characteristic of justice the balancing test lacks, leading to its most common and most serious criticism.

Without an objective "yardstick" for determining reasonableness, "the [Fourth] Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term."[147] Because probable cause and the reasonable suspicion standard required an identifiable and quantifiable level of suspicion, reasonableness could be found only where that level of suspicion existed. Consequently, in the absence of this determining factor, a judge could only find a search unreasonable and, hence, unconstitutional. Balancing interests to determine the reasonableness of a search involves many factors, however, and the selection of the factors to be weighed, the weight to be given each, and the final determination are all left to the discretion of the judge. Each judge, due to individual observations, training, and experience, inevitably will view each situation and its unique facts from a different perspective. Additionally, no safeguards prevent a judge from manipulating the factors to reach a result he desires. Although advocates of the balancing test have addressed this weakness and offered theoretical remedies,[148] it remains an obvious defect as evidenced by the sharp division of the Court in the cases employing balancing under the "special needs" doctrine.[149]

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143. *Id.* at 22.

144. *See* Aleinikoff, *supra* note 7, at 943 (quoting Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2123-24 (1985)).

145. *Id.*

146. *See* Coffin, *supra* note 12, at 19 ("For it is she [Themis] whom Bulfinch has described as 'holding aloft a pair of scales, in which she weighs the claims of opposing parties.' ") (quoting T. BULFINCH, BULFINCH'S MYTHOLOGY 18 n.1 (1934)).

147. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1423 (1989) (Marshall, J., dissenting).

148. *See, e.g.*, Coffin, *supra* note 12, at 22-26 (recognizing the "subjective bias" element of the balancing test and recommending procedures for opinion writing to minimize its effect).

149. *See, e.g.*, *Von Raab*, 109 S. Ct. at 1387 (four justices dissent from the majority's holding that privacy interests are outweighed even in the absence of any suspicion); *Skinner*, 109 S. Ct. at 1422

The inevitable presence of judges' subjective opinions is evident from the positions of certain justices in the various Supreme Court balancing cases. Chief Justice Rehnquist, for example, consistently gives the greater weight to the government interest, especially where illegal drugs are involved,[150] but Justices Marshall and Brennan consistently give greater weight to individual privacy and the fourth amendment requirement of probable cause.[151] Because the test is open to subjective influences, the Court's determination of reasonableness is neither consistent nor predictable, and thus does not provide meaningful protection for fourth amendment rights.[152]

A second criticism of the balancing test is the impossibility of assigning empirical values to the interests chosen to be weighed. "The problem for constitutional balancing is the derivation of the scale needed to translate the value of

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(Justice Marshall's dissent, joined by Justice Brennan, criticizing balancing and the result); O'Connor v. Ortega, 480 U.S. 709, 711 (1987) (plurality opinion) (four justices dissent from the determination of reasonableness under balancing); New Jersey v. T.L.O., 469 U.S. 325, 326-27 (1985) (five separate opinions filed).

150. *See, e.g., Skinner*, 109 S. Ct. at 1407 (Chief Justice Rehnquist joins majority upholding drug tests); *Von Raab*, 109 S. Ct. at 1384 (Chief Justice Rehnquist joins majority holding in favor of government interest in drug testing case); *O'Connor*, 480 U.S. at 711 (plurality opinion) (Chief Justice Rehnquist joins plurality upholding searches of employee's office by his employer); Colorado v. Bertine, 479 U.S. 367, 368 (1987) (Chief Justice Rehnquist delivers majority opinion holding for the government interest in regard to drugs discovered during police inventory); United States v. Montoya de Hernandez, 473 U.S. 531, 532 (1985) (Justice Rehnquist delivers majority opinion for government interest in body cavity search for drugs at airport); *T.L.O.*, 469 U.S. at 326 (Justice Rehnquist joins majority upholding search of student's purse that contained marijuana); Dunaway v. New York, 442 U.S. 200, 221 (1979) (Rehnquist, J., dissenting) (Justice Rehnquist dissents from holding of unconstitutionality of custodial questioning on less than probable cause); Bell v. Wolfish, 441 U.S. 520, 522 (1979) (Justice Rehnquist delivers majority opinion for government interests in favor of body cavity search of inmates); Delaware v. Prouse, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting) (Justice Rehnquist dissents from holding of unreasonableness of random vehicle stop for registration check). *But see* United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975) (Justice Rehnquist concurs in result finding as unconstitutional roving border patrols stopping cars without reasonable suspicion of the presence of illegal aliens, but asserts that situations exist that do not require probable cause or reasonable suspicion).

151. *See, e.g., Skinner*, 109 S. Ct. at 1422 (Marshall, J., dissenting) (Justices Brennan and Marshall dissent from majority's upholding of drug tests); *Von Raab*, 109 S. Ct. at 1398 (Marshall, J., dissenting) (Justice Marshall, joined by Justice Brennan, dissents from majority's upholding of suspicionless drug tests); *O'Connor*, 480 U.S. at 732 (Blackmun, J., dissenting) (Justices Brennan and Marshall join Justice Blackmun's dissent from majority's allowance of search of state employee's office); *Bertine*, 479 U.S. at 377 (Marshall, J., dissenting) (Justice Marshall, joined by Justice Brennan, dissents from majority's upholding of police inventory procedure); *Montoya de Hernandez*, 473 U.S. at 545 (Brennan, J., dissenting) (Justice Brennan, joined by Justice Marshall, dissents from majority's allowance of lengthy detention at border on less than probable cause to allow check for alimentary canal drug smuggling); *T.L.O.*, 469 U.S. at 370 (Stevens, J., dissenting in part and concurring in part) (Justices Brennan and Marshall join in partial dissent from majority's upholding search of student's purse); *Dunaway*, 442 U.S. at 202 (Justice Brennan writes for majority, holding custodial questioning on less than probable cause unconstitutional; Justice Marshall is in majority); *Wolfish*, 441 U.S. at 563 (Marshall, J., dissenting), 579 (Stevens, J., dissenting) (Justice Marshall dissents and Justice Brennan joins Justice Stevens' dissent from majority's allowance of body cavity search of inmates); *Prouse*, 440 U.S. at 649 (Justices Brennan and Marshall join in majority's rejection as unreasonable random traffic stop for registration check). *But see Brignoni-Ponce*, 422 U.S. at 874 (Justices Brennan and Marshall join majority in allowing as reasonable roving border patrol stops of cars without reasonable suspicion of the presence of illegal aliens).

152. Strossen, *supra* note 2, at 1175-77 ("Fourth Amendment rights, like other constitutionally guaranteed individual liberties, should receive the more certain protection resulting from categorical rules rather than the less certain protection resulting from . . . balancing.").

interests into a common currency for comparison."[153] Even assuming that the personal prejudices of judges could be eliminated, there remains a question of what value to assign each interest to allow balancing on a common scale. Although the government usually can assemble a dizzying amount of statistics and other data in support of its position,[154] the "privacy claim is highly subjective."[155] Each individual values his or her privacy differently and judges cannot perceive accurate empirical values for the privacy interests of different individuals.[156]

The combination of the problems of subjective influence and common scale leads to an uncontrolled standard, as evidenced by the *Von Raab* opinion itself. Although the Court noted the high privacy expectations traditionally afforded the act of urination,[157] when weighing the intrusion on privacy the Court deflated the privacy expectation to reach the desired balance.[158] The Court gave no explanation, however, why a right granted by the Constitution, even if depreciated, would not outweigh the government interest.[159]

In addition to being able to manipulate the values assigned to interests, the courts seem free to exclude important factors from the balance. The lack of effective alternatives figured largely into the formation of the administrative search exception[160] and the reasonableness standard,[161] yet the *Von Raab* Court failed to address this issue. This failure occurred even though the Court cited statistics resulting from investigatory procedures other than drug testing.[162]

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153. Aleinikoff, *supra* note 7, at 973.

154. *See, e.g., Skinner*, 109 S. Ct. at 1407-08 & 1407 n.1 (statistics of drug and alcohol use and the resulting cost in injuries and property damage); United States v. Martinez-Fuerte, 428 U.S. 543, 551-53 (1976) (statistics of illegal entries into the United States); *see also* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 203-04 (1986) (voluminous statistics on effect of drug use on employment relationship); Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1143 (1984) ("[t]he effectiveness of law enforcement is more susceptible to empirical proof than the extent of privacy concerns").

155. Note, *supra* note 154, at 1142.

156. *Id.* at 1142 & n.76.

157. *See Skinner*, 109 S. Ct. at 1413.

158. The Court noted the employment relationship and the nature of certain highly regulated government services as factors weakening the privacy expectations of employees. *Von Raab*, 109 S. Ct. at 1393-94.

159. *See generally* Aleinikoff, *supra* note 7, at 976 (questioning why even a weakened constitutional right does not outweigh the government's interest).

The Constitution is the United States' highest law. Because the Court has interpreted the fourth amendment as granting a right to privacy, *see* Schmerber v. California, 384 U.S. 757, 767 (1966), which it has held "basic to a free society," *see* Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)), it would seem that great weight would be accorded this interest. "Indeed, one may understand the Constitution, from the balancer's point of view, as a document intended to ensure that judges (among others) treat particular interests with respect. It is an honor roll of interests." Aleinikoff, *supra* note 7, at 986.

160. *See Camara*, 387 U.S. at 537.

161. *See* Terry v. Ohio, 392 U.S. 1, 24-27 (1968).

162. *Von Raab*, 109 S. Ct. at 1392-93. In 1987, 24 employees were arrested following internal investigations. Investigations in 1986 resulted in 37 employee arrests and those in 1985 resulted in 15 employee arrests. *Id.*

Although the Court does not state whether these arrests resulted from employee involvement with illicit drugs, the statistics at least reveal the presence of successful alternative investigatory procedures at the Custom Service's disposal.

Following *Von Raab*, courts may find that every government employee whose position may be made potentially dangerous by the use of drugs can be subjected to drug testing without any evidence of drug use by the individual or his or her peers. This will be possible because "the Court does not only resolve individual disputes in constitutional cases; it establishes general principles of governmental and individual rights."[163] Because the influence of such broad balances is significant, the Court should consider the interests of nonparties potentially affected by its decision,[164] yet it failed to do so in *Von Raab*.

Undoubtedly the greatest influence on the Court's decision, however, is the subjective opinion of each Justice toward illegal drugs. The majority opinion is replete with references to the problem of illegal drugs, not only to bolster the weight of the government's interests,[165] but also to deflate the privacy interests of the employees.[166] Because no objective standard exists, the new standard of reasonableness is unable to prevent judges' subjective opinions from entering and affecting the outcome of a balance of nonweighable factors.

The balancing test as employed by the Court is prejudiced insofar as it matches the "individual's privacy expectations against the Government's interests."[167] This statement of competing interests all but determines the outcome. Rarely do individual interests impede the interests of the government and society. Even so, individuals have a constitutional guarantee of individual privacy under the fourth amendment,[168] and "viewing constitutional rights simply as 'interests' that may be overcome by other nonconstitutional interests does not accord with common understandings of the meaning of a 'right.' "[169] Also, public and private interests appear on both sides.[170] In *Von Raab*, for example, each individual has an interest in effective border control and society has an interest in preventing unwarranted governmental intrusions. The definition of balancing as stated by the Court unfairly prejudices the balance in favor of the government.

Yet another criticism of balancing is its lack of precedential value. "New situations present new interests and different weights for old interests."[171] Because each case is based on unique factors and because balancing entails weighing "all the circumstances" present,[172] a court must reconsider the proper balance between governmental interest and privacy rights of individuals in each

163. Aleinikoff, *supra* note 7, at 978.

164. *See id.*

165. *Von Raab*, 109 S. Ct. at 1392-93.

166. *Id.* at 1394-95. Both dissenting opinions criticize the majority's emphasis on illicit drugs. *Id.* at 1398 (Scalia, J., dissenting); Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1433 (1989) (Marshall, J., dissenting).

167. *Von Raab*, 109 S. Ct. at 1390.

168. *See* Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

169. Aleinikoff, *supra* note 7, at 987 (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 194, 269 (1977)).

170. *Id.* at 981.

171. *Id.* at 980.

172. *Von Raab*, 109 S. Ct. at 1396.

case.[173]

> There is only limited precedential value in the decisions, and experience shows that language used in one case in the search and seizure field often has to be qualified or explained away when a different case arises with slightly different facts. The result is an inherent amount of uncertainty, and this uncertainty extends to the lower courts, which have to try to apply the decisions of the Supreme Court.[174]

The uncertainty resulting from the lack of precedential value will leave lower court decisions subject to question, which in turn will lead to a greater number of appeals requiring greater use of already limited judicial resources.

The uncertainty resulting from use of the balancing test not only fails to provide guidance to lower courts but also leaves no workable standard for those officials in the field who have the responsibility of deciding the propriety of a search. Under a balancing standard, officials will be uncertain of the constitutional limits of individual searches until a court balances the specific facts. This is true because it would be all but impossible for each individual to identify and weigh all the factors present. Even after a court has balanced the factors involved in a particular situation, differing fact patterns will continue to cause uncertainty in the field.

In addition to these criticisms of balancing as the standard for determining the reasonableness of searches, the *Von Raab* standard is also weak in its evaluation of the reasonableness of the actual procedure implemented in a search. After balancing determines whether any suspicion is necessary, the *Von Raab* standard requires a search to be "calculated to advance the Government's goal."[175] Under this vague requirement, apparently any test that promotes the government's interests in any manner will be found reasonable in scope. Thus, it appears the search method need not be the most effective or the least intrusive, although it seems consideration of these factors would be integral to a finding of reasonableness.[176] For example, in *Von Raab*, there was no evidence of a drug problem, but the Court found a need for drug testing to further the government's desire to prevent the promotion of drug users. The Court cited instances of injury and employee misconduct,[177] yet it cited no evidence that these incidents resulted from drug use or that drug tests would prevent these occurrences.[178]

Furthermore, urinalysis seems an overly intrusive method for promoting

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173. *See, e.g.*, Note, *supra* note 154, at 1130; *see also* Strossen, *supra* note 2, at 1187 ("Because of their fact-specific nature, balancing decisions provide relatively little guidance concerning the constitutional implications of other fact patterns.").

174. E. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 40 (1975).

175. *Von Raab*, 109 S. Ct. at 1395.

176. *See* Strossen, *supra* note 2, at 1176-77 (the "least intrusive alternative" requirement "reflects the 'basic and ethically powerful notion that government should not gratuitously or unnecessarily inflict harm or costs' ") (quoting Spece, *The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection*, 33 VILL. L. REV. 111, 135 (1988)).

177. *Von Raab*, 109 S. Ct. at 1392-93.

178. *Id.* at 1400 (Scalia, J., dissenting).

the governmental goal. The government's interest is based on the effects of employee performance while on the job, yet the test discloses the employees' activities off the job.[179] As the Court stated, "the time it takes for particular drugs to become undetectable in urine can vary widely depending on the individual, and may extend for as long as 22 days."[180] Accordingly, an employee who consumes marijuana on Saturday night would fail the drug screening and, being labeled a "drug user," would be subject to dismissal from the Service.[181] The government, however, provided no evidence demonstrating the use of drugs while off duty affected the employees' on-the-job performance. An employee's social conduct that remains independent from his work performance is of no concern to the employer; therefore, drug testing, which allows the Service to control the employees' off-the-job conduct by threat of dismissal, seems violative of the employees' "right to be let alone."[182]

Because the tests in some way promote the government's goal of preventing the promotion of drug users, they satisfy the requirement of "advancing the government goal." Consequently, the Court found the drug tests reasonable under the new test despite the fact that they were not justified on the evidence presented and were more intrusive than necessary to achieve the government's goal.

In his essay supporting the use of balancing, Judge Frank Coffin recognizes that "the subjective presuppositions of judges and justices will play a part in decisions and reasonable men and women will continue to disagree."[183] Although he offers procedures for a theoretically practicable balancing test, he criticizes its actual application when judges have taken advantage of the test's susceptibility to manipulation.[184] Balancing may necessarily play a role in justice, but this role must be one of a limited and carefully controlled exception as analysis of balancing's weaknesses and manipulability reveal its unavoidable failure as a standard. Because judges are able to mention the interests involved briefly and then magically arrive at some result, balancing presents a sort of voodoo jurisprudence that provides little or nothing in the way of consistent protection of the individual's right to privacy. While balancing's flexibility and ease of application to new situations are appealing to an overburdened justice system constantly facing new situations, these attributes cannot be enjoyed at the expense of sacrificing constitutional rights.

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179. Note, *Taking the Sting Out of Employee Drug Testing*, 8 HAMLINE J. PUB. L. & POL'Y 527, 535 (1987).

180. *Von Raab*, 109 S. Ct. at 1396.

181. *See* Note, *supra* note 179, at 535 (detection of off-duty drug use as grounds for dismissal).

182. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("They [the framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."), *overruled*, Katz v. United States, 389 U.S. 347 (1967).

Although the Court states its belief that drug users will be less sympathetic toward their mission of drug interdiction, *Von Raab*, 109 S. Ct. at 1393, no evidence was presented that one who uses drugs is any more likely to take a bribe or conspire with drug dealers than an employee who abstains from drugs but who may be enticed by money. *See id.* at 1399 (Scalia, J., dissenting).

183. Coffin, *supra* note 12, at 40.

184. *Id.* at 22.

If balancing is to be used, the *Von Raab* test should be modified to require the presence of individual suspicion when balancing finds probable cause impractical before a court may hold a search "justified at its inception." The lower level of general suspicion upheld in *Skinner*, while presenting some grounds for believing the evidence will be found, is an unsatisfactory safeguard, leaving an individual's right to privacy subject to violation based on the acts of others rather than on his own actions.[185] Additionally, the test should require that the method of search be the least intrusive means available to achieve the government's goal effectively[186] before a court may find the search reasonable in scope and procedure.

For now balancing is the standard of reasonableness for civil searches and "constitutional discourse [will become] a general discussion of the reasonableness of government conduct"[187] rather than an inquiry focusing on the constitutional rights of individuals. In unprecedented fashion, *Von Raab* eliminated, for the convenience of government, the safeguards surrounding the fourth amendment that were meant to limit the government and to protect individual privacy and freedom " 'basic to a free society.' "[188] Although a valid interest, the stand against drugs, or any other perceived public need, cannot be allowed to infringe upon the Constitution, depriving innocent citizens of their right to privacy.[189] The uncontrolled standard sanctioned in *Von Raab*, however, will allow subjective influences to determine the extent of constitutional rights, effectively freeing government from its fourth amendment restraints and depriving each citizen of the full protection intended in the constitutional guarantee of privacy.

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185. Exceptions to this test would require the existence of an identifiable threat of great immediate harm known to exist because of past observations and experiences. This exception would provide for the brief searches of passengers boarding commercial airliners, which the Court refers to in *Von Raab*. *Von Raab*, 109 S. Ct. at 1395 n.3.

186. *See* Strossen, *supra* note 2, at 1208-66 (proposing incorporation of the "least intrusive alternative" requirement and thoroughly analyzing arguments for and against it).

187. Aleinikoff, *supra* note 7, at 987.

188. Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

189. One commentator has noted:

> The damnable character of illicit drugs should not blind our eyes to the mischief which will surely follow any attempt to destroy them by unwarranted methods. "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice."

Comment, *supra* note 109, at 597 (quoting Sir Walter Scott, *The Le Louis*, 2 DODSON. ADM. 210, 257, 165 ENG. REPRINT 1464, 1479).