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Chandler v. Miller: No Turning back from a Fourth Amendment Reasonableness Analysis

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COMMENT

CHANDLER V. MILLER: NO TURNING BACK FROM A FOURTH AMENDMENT REASONABLENESS ANALYSIS

INTRODUCTION

The Supreme Court excludes the practice of random, suspicionless drug testing from Fourth Amendment protection in certain circumstances. By allowing the government to conduct such testing, has the Court gone so far as to violate the basic protections guaranteed by the Fourth Amendment?[1] A survey of criticism leveled at the Court for its application of the Fourth Amendment may indeed lead to the alarming conclusion that the Court is in fact a pack of lawbreakers.[2]

This Comment contends that the Court has committed no crime in applying the Fourth Amendment in non-traditional ways to new and changing circumstances, such as the growing problem of illegal drug use. It shows how the Court's actions reflect a legitimate process of constitutional maturation and evolution. This Comment defends the premise that change, even in the understanding and application of core tenets of the law, is natural and necessary.

Such a recognition of the mutability of law opens the door to a broader scope for searches and seizures than the Court has traditionally allowed under the Fourth Amendment. This broader scope allows urine testing of whole classes of persons for the use of illegal drugs without individualized suspicion, a major departure from the traditional requirement for a legal search. The Court has sanctioned these tests by employing a Fourth Amendment reasonableness standard in place of the probable cause standard.[3]

The Court's decision in *Chandler v. Miller*,[4] taken together with the cases leading up to *Chandler* in which the Court endorsed government-

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

2. *See* Joaquin G. Padilla, Comment, Vernonia School District 47J v. Acton: *Flushing the Fourth Amendment—Student Athletes' Privacy Interests Down the Drain*, 73 DENV. U. L. REV. 571 (1996) (asserting that the Court sanctioned illegal government action by holding as constitutional suspicionless drug testing of student athletes).

3. *See infra* notes 7-35 and accompanying text.

4. 117 S. Ct. 1295, 1305 (1997) (finding that suspicionless drug testing of candidates for state offices violated Fourth Amendment protections against unreasonable searches).

ordered suspicionless drug searches,[5] offers a framework in which to analyze the Court's development of a Fourth Amendment reasonableness standard. Accordingly, Part I of this Comment describes the development of Fourth Amendment analysis leading up to *Chandler*, including a comparison of the conjunctive and disjunctive approaches to Fourth Amendment analysis, and presents some of the criticism of the Court's current interpretation of the amendment. Part II outlines the majority and dissenting opinions in *Chandler*. Part III critiques the formalist philosophical basis for a conjunctive reading of the amendment, and offers a pragmatist proposal for a two-tier application of Fourth Amendment probable cause and reasonableness standards.

I. BACKGROUND

A. *The Evolution from Probable Cause to Reasonableness*

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures[6] conducted by the government or its agents.[7] In *Katz v. United States*, the United States Supreme Court announced that the Fourth Amendment protects "people, not places."[8] In so defining the scope of Fourth Amendment protection, the Court moved the amendment's applicability beyond the trespass and property contexts[9] in which the Court traditionally applied it.[10] After *Katz*, the question of whether a person is entitled to protection became not whether the gov-

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5. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995) (allowing suspicionless drug testing of middle school and high school athletes); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (allowing suspicionless drug testing of certain classes of United States Customs Service agents); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633-34 (1989) (allowing suspicionless drug testing of railroad employees).

6. The Fourth Amendment extends an individual's right to security from unreasonable search to "persons, houses, papers, and effects . . . ." U.S. CONST. amend. IV.

7. *Skinner*, 489 U.S. at 614; *see also* United States v. McGreevy, 652 F.2d 849, 851 (9th Cir. 1981) (noting that searches conducted without governmental assistance or encouragement do not come within the scope of Fourth Amendment protection).

8. Katz v. United States, 389 U.S. 347, 351 (1967). In *Katz*, federal agents used an electronic device to listen to a telephone call a criminal suspect made from a public telephone booth. *Id.* at 348. The agents acted without first obtaining a warrant. *Id.* at 354-56. The Court held that a conversation from a public telephone booth is constitutionally protected from warrantless search and seizure, rejecting the government's argument that protection was not required, because agents did not physically enter into the area occupied by the petitioner. *Id.* at 358-59 (citing Katz v. United States, 367 F.2d 130, 134 (9th Cir. 1966)).

9. *Id.* at 353 (stating that the trespass doctrine controlling the governmental right of search and seizure has been "discredited" and "eroded"); *see also* William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 633-34 (1994) (noting that Fourth Amendment protections derive in part from eighteenth century British precedents which limit the government's right to seize a person's property, and especially one's papers).

10. The "person, not place" standard has been criticized for removing the scope of protection from its traditional, physically defined boundaries. For an example of such criticism, see Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993). Cloud criticizes the Court for replacing the established property rights theory with an "an ambiguous formula" which is too subjective to be workable. *Id.* at 249.

ernment intruded upon a citizen's property, but whether the citizen had a reasonable expectation of privacy.[11]

The *Katz* privacy standard was vague, providing no definitive guidance to lower courts regarding the scope of its application.[12] In his concurrence, however, Justice Harlan suggested a means to correct the vagueness. Justice Harlan introduced a two-prong test to determine the legality of a search or seizure under the Court's "person, not place" interpretation of the amendment.[13] To satisfy Harlan's test, a defendant must first show an "actual (subjective) expectation of privacy" and, second, the defendant must then show that the expectation is "one that society is prepared to recognize as 'reasonable.'"[14] Subsequently, the Court adopted Harlan's formulation.[15]

Once a court determines that a search occurred within the scope of Fourth Amendment protection, it must determine whether that search was reasonable.[16] Historically, the Court considered searches conducted without warrants issued upon probable cause unreasonable *per se*.[17] In recent years, however, the Court has backed away from a strict warrant requirement.[18] The Court has identified so many exceptions[19] that critics

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11. *See Katz*, 389 U.S. at 360-61 (Harlan, J., concurring).

12. *See* Cloud, *supra* note 10, at 249.

13. *Katz*, 389 U.S. at 361.

14. *Id.* at 361. The second prong of the test has become increasingly important, focusing the analysis on society's view of what constitutes the reasonable scope of Fourth Amendment protection. Paul R. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605, 618 (1987).

15. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining a search as an action touching on "an expectation of privacy that society is prepared to consider reasonable"); California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding warrantless aerial search of fenced-in yard to be legal); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding constitutional a warrantless registry of all telephone numbers dialed from petitioner's home).

16. *Katz*, 389 U.S. at 361.

17. *Id.* at 357; *see also* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 479 (1991) (stating that "under present law, a warrantless search is *per se* unreasonable unless the search falls into an exception").

18. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2390 (1995) (stating that Fourth Amendment reasonableness *generally* requires judicial issuance of a warrant); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (stating that *generally* a legal search must be supported by warrants issued upon probable cause); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (stating that in *criminal* cases, a search or seizure is unreasonable unless performed pursuant to a warrant, except where cases involve "special needs").

19. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 539-41, 544 (1985) (holding border searches beyond scope of typical customs search valid where customs agents reasonably suspect smuggled contraband); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (discussing police inventory procedures associated with incarceration); United States v. Mendenhall, 446 U.S. 544, 553-55 (1980) (stating that a person is not "seized" due to inoffensive contact with police unless "a reasonable person would have believed that he was not free to leave"); United States v. Biswell, 406 U.S. 311, 317 (1972) (involving administrative searches of closely regulated businesses); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (declaring that where police officers have reasonable basis to fear for their own or others' safety they are entitled to search person's outer clothing for purpose of recovering weapons); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (excepting situations where police officers pursue a suspect and delay would endanger lives).

contend the exceptions have swallowed the rule.[20] While announcing the applicability of the probable cause standard in all cases implicating the Fourth Amendment, the Court in effect has developed a standard of Fourth Amendment reasonableness parallel to the probable cause standard.[21]

The Court severed the probable cause standard from a reasonableness standard in *Terry v. Ohio*,[22] where the Court held that evidence found by a policeman acting without a warrant or probable cause in a "stop and frisk" search was admissible at trial.[23] The Court thus introduced the standard of *reasonable suspicion*,[24] a lower standard than probable cause.[25] In applying the reasonable suspicion standard, the Court required that a law enforcement officer must show only that he based a search on facts reasonably sufficient to warrant the search.[26] The Court adopted a test the Court first employed in an administrative context.[27] The test mandates balancing the government's need for a search or seizure with the level of intrusion the action imposed.[28] The Court stated that, outside the context of a search pursuant to a warrant based on probable cause, there "is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the

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20. *See* Bookspan, *supra* note 17, at 476 (stating a judicial shift from the application of the probable cause requirement to a standard based on common sense debilitates the Fourth Amendment and arguing that the courts have "sacrificed the Fourth Amendment's prohibition against warrantless searches and seizures for a chameleon-like 'reasonableness' approach"). Criticism of the Court's willingness to make exceptions to the warrant requirement is not limited to academics. Justices Marshall and Brennan called the Court to task for doing just that in their dissent in *Skinner*. *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting) ("[T]he Court has eclipsed the probable-cause requirement in a patchwork quilt of settings . . . .").

21. This Comment argues that the Court should acknowledge the fact that it applies a reasonableness standard along with, and not as a subcategory of, the probable cause standard.

22. 392 U.S. 1 (1968).

23. *Terry*, 392 U.S. at 30.

24. *See* Cloud, *supra* note 10, at 231.

25. Christine A. Atkinson, Note, *Mandatory Drug Testing in the Public Work Sector: Erosion of Fourth Amendment Protections*, 12 U. BRIDGEPORT L. REV. 293, 306 (1991).

26. *Terry*, 392 U.S. at 21.

27. Camara v. San Francisco, 387 U.S. 523 (1967). The Court, in the context of an administrative search, defined reasonableness as the balance between the need to search and the invasion the search entails. *Id.* at 537. In the context of a criminal search, reasonableness is aptly defined as "balanc[ing] the strength of an individual's privacy right against the strength of recognized government interests when the two interests clashed." Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 94-95 (1992) (citing *Terry*, 392 U.S. at 9). In *New Jersey v. T.L.O.*, the Court stated that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). In addition, a balancing test of sorts was applied before *Camara* in a criminal case. Schmerber v. California, 384 U.S. 757, 768 (1966). The Court held that evidence of blood alcohol level obtained without a warrant was admissible because: 1) the police had probable cause to believe the suspect was inebriated, and 2) blood tests are minimally intrusive upon privacy interests. *Id.* at 768-72.

28. *Terry*, 392 U.S. at 21.

search (or seizure) entails."[29] By establishing a Fourth Amendment reasonableness standard as applied in a balancing test, the Court acknowledged that the amendment could be read in a way which severs the link between reasonableness and probable cause.[30]

The Fourth Amendment consists of two independent clauses, the first declaring the right of the people to be free from unreasonable searches and seizures, the second prohibiting the issuance of warrants without probable cause.[31] These clauses represent logically, as well as grammatically, distinct rights and prohibitions. Academicians have hotly debated whether they are to be read together, so that a warrant based on probable cause becomes the requisite for a reasonable search (the conjunctive theory), or separately, making a reasonable warrantless search constitutionally sound (the disjunctive theory).[32] A recent, exhaustive analysis of the origins of the Fourth Amendment suggests that the Framers intended to link the concept of a reasonable search with a valid warrant, giving contemporary conjunctive theorists new support grounded in historical precedent.[33] Conjunctive theorists have severely criticized the Court for betraying the intentions of the Framers and eviscerating the Fourth Amendment.[34] Despite the criticism, the Court has adopted the

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29. *Id.* at 20-21 (quoting *Camara*, 387 U.S. at 534-37).

30. *See id.* at 19.

31. U.S. CONST. amend. IV. *See supra* note 1.

32. Academicians have hotly debated the merits of the "conjunctive" and "disjunctive" theories of interpretation of Fourth Amendment interpretation for most of this century. The "conjunctive" theorists have dominated. Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1721-22 (1996) (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services)).

33. *Id.* at 1723-24. The conjunctive interpretation is prominent in Justice O'Connor's dissent in *Vernonia*, in which she frequently refers to Cuddihy's work. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397-2404 (1995). Justice O'Connor's dissent, based on the principle that constitutional searches require individualized suspicion, departs from her position in previous cases in which she joined the majority in upholding the legality of suspicionless searches. Cloud, *supra* note 32, at 1711. *See infra* notes 78, 80, and accompanying text.

34. *See, e.g.*, Cloud, *supra* note 10, at 200-01 (positing that the state of Fourth Amendment search and seizure law is chaotic); Nuger, *supra* note 27, at 134 (concluding that the Supreme Court has taken the Fourth Amendment "perilously close to incomprehensible disarray"); Michael S. Vaughn & Rolando V. del Carmen, *"Special Needs" in Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L. J. 203 (1993) (stating that since 1985 the Supreme Court has emaciated the Fourth Amendment requirements for probable cause); Atkinson, *supra* note 25, at 312-13 (arguing that Fourth Amendment protection against unreasonable government intrusion has become almost a "historical artifact"); William R. Hodkin, Comment, *Rethinking* Skinner *and* Von Raab*: Reasonableness Requires Individualized Suspicion for Employee Drug Testing*, 17 J. CONTEMP. L. 129, 156 (1991) (stating that the Fourth Amendment has "lost all meaning because its application is unpredictable"); Jennifer L. Malin, Comment, Vernonia School District 47J v. Acton*: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469, 517 (1996) (concluding that failure to require individualized suspicion erodes Fourth Amendment principles); Padilla, *supra* note 2, at 571 (alleging that the government broke the law by infringing Fourth Amendment rights of student athletes).

disjunctive approach as its operative approach to Fourth Amendment interpretation.[35]

B. *Criticism of the Reasonableness Standard*

Critics have put forward many reasons why a reasonableness standard, divorced from a probable cause standard and the warrant requirement, fails to protect Fourth Amendment freedoms. For instance, such a standard has been criticized as being too broad and lacking objectivity.[36] Critics contend that because the definition of reasonableness lacks precision, judges may apply it according to their idiosyncratic inclinations, and so apply the law unequally.[37] In particular, critics disapprove of the standard as the Court applies it through the balancing test announced in *Terry*. Some argue that where a federal court employs a balancing test instead of a reasonableness standard governmental interest will inevitably prevail over individual liberties.[38] If this is true, judicial application of the balancing test becomes a serious threat to individuals' rights.[39] Another criticism of balancing is that courts weigh social values rather than apply constant legal principles and so inappropriately politicize the judicial process.[40] Critics also point out that the results of the balancing test offer lower courts no generally applicable guidance because the test applies very specifically to issues and cases.[41]

The Court continues to apply a disjunctive Fourth Amendment approach with no sign of retreat. Apparently, the Court does not fear that its approach to a reasonableness standard threatens freedom and liberty as

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35. *See* Bookspan, *supra* note 17, at 479 (stating that although the Court maintains that the warrant requirement is normative, it has "circumvented" the requirement by creating new exceptions or "shifting the inquiry to the reasonableness of the search or seizure").

36. *See* Nuger, *supra* note 27, at 120.

37. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 973 (1987) (noting that even Roscoe Pound, the pragmatist, after a life's work could produce no mathematically-based, scientific method of balancing competing interests); Bookspan, *supra* note 17, at 511 (vehemently condemning a reasonableness standard, and pointing out that in a balancing test, what is reasonable in one judge's opinion may be unreasonable to another); Cloud, *supra* note 32, at 1723 ("Freed from the constraints of the Warrant Clause, judges applying the increasingly malleable standard of reasonableness can adopt whatever policies they prefer."); Nuger, *supra* note 27, at 120 (arguing that with no objective methodology, the special needs rational results in an uneven application of law because individual judges are free to weigh competing interests at will).

38. *See* Atkinson, *supra* note 25, at 307.

39. *Id.; see also* Nuger, *supra* note 27, at 120 (contending that current Fourth Amendment analysis favors the government).

40. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) (stating that when "the question comes down to whether a particular search has been 'reasonable,' the answer depends largely upon the social necessity that prompts the search").

41. *See, e.g.*, Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1183-94 (1988) (offering a detailed critique of the shortcomings of the balancing test including its lack of judicial guidance); Vaughn & Carmen, *supra* note 34, at 216 ("[T]he 'special needs' exception relies on a case-by-case balancing of individual and governmental interests, resulting in a legal doctrine that is bereft of a definitional conceptual framework for lower courts to follow.").

some contend it does.[42] Indeed, the Court has been willing to expand the reach of Fourth Amendment reasonableness to include searches which require no level of individualized suspicion whatsoever.[43] The Court has been particularly willing to find that suspicionless urine drug testing of certain classes of employees is within the scope of the Fourth Amendment reasonableness standard.[44]

C. *Suspicionless Drug Testing: Pushing the Limits of Fourth Amendment Protection*

Prior to 1989, the Court recognized the requirement for minimal individualized suspicion as the basis for most warrantless searches. For example, the Court approved of a warrantless search of a probationer's home where the search was based on a tip to police that the probationer had violated the terms of his probation.[45] Even in cases in which the Court applied a reasonable suspicion standard, it required individualized suspicion as a prerequisite to any legal search, at least in those cases involving searches of persons not involved in closely regulated businesses, or where the search was minimally intrusive.[46]

The Court changed its stance in a series of three cases beginning in 1989, in which the Court applied the reasonableness balancing test to situations involving urine testing for the use of illegal drugs.[47] In these cases, it allowed testing without requiring individualized suspicion of drug abuse. In each of them, the Court found government-mandated drug tests to be legal on grounds that government needs outweighed the privacy interests of the persons to be tested.

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42. *See supra* note 34 (listing allegations of harm to Fourth Amendment protections due to application of a reasonableness standard).

43. *See supra* note 5 (listing cases in which the Court upheld random suspicionless searches).

44. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633-34 (1989).

45. Atkinson, *supra* note 25, at 306 (citing Griffin v. Wisconsin, 483 U.S. 868 (1987) (discussing search of probationer's home after police were given tip that the probationer possessed firearms)).

46. *Id.* Atkinson states that the government was required to "demonstrate some individualized suspicion." *Id.* However, such individualized suspicion appears not to have been applicable to operators of "pervasively regulated businesses," who may have been subject for some time to suspicionless searches. *See* New York v. Burger, 482 U.S. 691, 702 (1987) (listing three criteria for warrantless searches of pervasively regulated businesses, none of which requires individualized suspicion: 1) a substantial government interest in regulating the business, 2) the necessity of the searches to further a "regulatory scheme," and 3) the searching of businesses with such certainty and regularity so as to give notice and limit the discretion of inspecting officers).

47. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995) (involving junior high and high school athletes); *Skinner*, 489 U.S. 602 (involving railroad workers in private industry); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (involving United States Customs Service employees who carry firearms or handle sensitive information).

1. *Skinner v. Railway Labor Executive's Association*[48]

In *Skinner*, railroad employees filed suit to stop a drug testing program promulgated by the Federal Railroad Administration (FRA) after the FRA determined that industry safeguards against drug abuse by railroad employees were inadequate.[49] The Court found that urine drug testing is a search under the Fourth Amendment.[50] It noted that a urine drug test is no more intrusive than a general physical examination if the test is administered in an environment similar to a general physical examination and without a person monitoring the act of urination.[51] The Court concluded that a urine drug test is not unconstitutionally intrusive to employees who are required to undergo physical examinations as a requirement for employment because those employees have a diminished expectation of privacy.[52] The majority balanced the employees' privacy interests with the government's "compelling" need to ensure railroad safety.[53] It concluded that the government's ability to promote safety would be unreasonably hindered if it were required to test workers only in cases of individualized suspicion.[54] Finally, the Court evaluated the testing regime for its efficacy, finding that it was an effective method of screening workers for drug use.[55]

Justice Marshall dissented, warning that although drug abuse is a hazard to society, impinging on constitutional rights to counter the hazard poses a greater danger.[56] He decried the "incursion" of the balancing test "into the core protections of the Fourth Amendment,"[57] criticizing the malleability of balancing.[58] Marshall faulted the Court for not requiring a warrant for the testing or a showing that it "was based on probable cause or . . . on lesser suspicion because it was minimally invasive."[59] In short, the dissent argued that drug testing without at least a minimal level of individualized suspicion of wrongdoing is unconstitutional.

2. *National Treasury Employees Union v. Von Raab*[60]

In *Von Raab*, employees of the United States Customs Service challenged the legality of a drug screening program for those transferring

48. 489 U.S. 602 (1989). The plaintiff was Samuel K. Skinner, Secretary of Transportation. *Id.*
49. *Skinner*, 489 U.S. at 607-08.
50. *Id.* at 618.
51. *Id.* at 626-27.
52. *Id.* at 627.
53. *Id.* at 633.
54. *Id.*
55. *Id.* at 632.
56. *Id.* at 635 (Marshall, J., dissenting).
57. *Id.* at 640.
58. *Id.* at 641.
59. *Id.* at 642 .
60. 489 U.S. 656 (1989) The respondent in this case was William von Raab, Commissioner of the United States Customs Service. *Id.*

or seeking promotion to positions which involved work in drug interdiction, the carrying of firearms, or the handling of classified materials.[61] The Court weighed the government's "compelling" interest in ensuring that employees charged with drug interdiction have the requisite physical, moral, and intellectual attributes with the employees' privacy interests.[62] It found in favor of the Customs Service, limiting its holding to employees involved directly in drug interdiction and to employees who handle firearms.[63]

Justice Marshall again dissented, stating that a balancing test was an inappropriate Fourth Amendment analysis.[64] Justice Scalia also dissented, but on the grounds that the government failed to prove that its interest outweighed the privacy interests of Customs Service employees.[65] In Scalia's reading of the record, the government did not demonstrate a problem of drug use among employees nor that any harm existed.[66] He noted that he had joined the majority in *Skinner* because in that case the government demonstrated the existence of drug use among the targeted class of employees.[67] Scalia dissented in *Von Raab* because he concluded the government's proposed drug testing program did not respond to a proven problem of abuse, but was instead "symbolic."[68]

3. *Vernonia School District 47J v. Acton*[69]

In *Vernonia*, decided six years after *Skinner* and *Von Raab*, the Court held constitutional a school district's program of using urinalysis to test student athletes for drug use.[70] Having noted that only those privacy interests which "society recognizes as 'legitimate'" are protected under the Fourth Amendment,[71] the Court found that schoolchildren who have been temporarily committed to state custody have a lower expectation of liberty and privacy than do emancipated adults.[72] The Court then concluded that the manner in which the testing was performed[73] and the limited range of information the testing disclosed[74] made the testing proc-

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61. *Von Raab*, 489 U.S. at 660-61.

62. *Id.* at 670-71.

63. *Id.* at 677. The Court could not, based on the record, determine the reasonableness of testing employees who handled classified materials. *Id.*

64. *Id.* at 680 (Marshall, J., dissenting).

65. *Id.* at 686-87 (Scalia, J., dissenting).

66. *Id.* at 681.

67. *Id.* at 680.

68. *Id.* at 681.

69. 115 S. Ct. 2386 (1995). The respondents in this case were Wayne Acton, a student in the Vernonia school district, and his parents. *Id.*

70. *Vernonia*, 115 S. Ct. at 2396.

71. *Id.* at 2391 (quoting New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

72. *Id.* at 2391-92.

73. *Id.* at 2393 (involving conditions similar to those the students were accustomed to encountering in public restrooms in their schools).

74. *Id.* (involving a test narrowly designed to detect only drugs).

ess relatively unobtrusive.[75] The Court found in favor of the government after balancing the children's low expectation of privacy with the government's "immediate" need to curb an "epidemic" of drug-related disciplinary problems.[76]

In a brief concurring opinion, Justice Ginsburg noted that the Court reserved the question whether the school district could require all students, not just those voluntarily participating in athletics, to undergo urine drug testing.[77] In her dissenting opinion, Justice O'Connor criticized the Court's acceptance of a suspicionless, blanket search, arguing that the Framers foreclosed the constitutionality of such general searches by requiring individualized suspicion and probable cause as the basis for Fourth Amendment searches.[78] The dissent recognized the constitutional validity of suspicionless searches in *Skinner* and *Von Raab* on the grounds that individualized suspicion as a basis for drug testing was infeasible (because of the chaotic scene after a train wreck or the disruption of the duties of Customs Service employees).[79] Finally, O'Connor concluded that the government's need to perform a blanket test did not outweigh the privacy interests of students because the same result could have been achieved through testing individual students suspected of drug use, rather than the entire class of athletes.[80]

The opinions in these three cases, majority and dissenting, reflect the spectrum of support and criticism of a reasonableness standard applied through a balancing test. By balancing the interests of government entities with an individual's expectation of privacy, the majority in each case can claim that it responded affirmatively to society's need to curb drug abuse while respecting Fourth Amendment rights. They applied a reasonableness standard which, in their view, was consistent with a conjunctive reading of the amendment because they applied it merely as an exception to the warrant requirement.[81] Justices Marshall and Brennan, in their dissents in *Skinner* and *Von Raab,* criticized the majorities for what amounted to an espousal of the disjunctive approach. They argued that the Court's use of the reasonableness balancing approach was illegitimate because a warrant is the "yardstick against which official searches and seizures are to be measured" and anything less is unconstitutional.[82] Justice Scalia, in *Von Raab,* did not challenge the validity of the reasonableness standard or the practicability of a balancing test, but criticized the Court's attempt to balance values. Thus, he maintained that where no

75. *Id.* at 2396.
76. *Id.* at 2395-96.
77. *Id.* at 2397 (Ginsburg, J., concurring).
78. *Id.* at 2399 (O'Connor, J., dissenting).
79. *Id.* at 2401 .
80. *Id.* at 2403-04.
81. *See supra* note 20 and accompanying text.
82. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (quoting New Jersey v. T.L.O., 469 U.S. 325, 359-60 (1985)).

problem of drug abuse is shown, no need outweighs an individual's right to privacy.[83] Finally, Justice O'Connor relied on historical analysis to reveal the Framers' intent as she argued for a conjunctive reading in her dissent in *Vernonia.*

Chandler v. Miller[84] is the fourth and latest in the line of cases in which the Court analyzes the constitutionality of suspicionless drug testing under a reasonableness standard and balancing test. In 1990, the State of Georgia enacted legislation requiring that persons seeking certain state offices submit to a urine drug test to qualify for nomination or election.[85] The law forbade any candidate who failed a drug test, or who refused to take one, to stand for nomination or election.[86]

II. *CHANDLER V. MILLER*

A. *Facts and Procedural History*

In May, 1994, three members of the Libertarian Party declared their candidacy for the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the State's House of Representatives.[87] They refused to submit to drug testing, and sued in federal court for declaratory and injunctive relief from Georgia's drug testing requirement on the grounds that the law imposed a search in violation of the Fourth Amendment of the United States Constitution.[88] The district court, relying upon *Skinner* and *Von Raab*, decided that the need of the State to screen out drug-abusing officeholders balanced with the "relative unintrusiveness of the testing procedure" weighed in favor of the State's interest.[89] Accordingly, the court declined to grant the plaintiffs' request for preliminary injunction because the court found little likelihood the plaintiffs would prevail on their claim that the testing violated the Fourth Amendment.[90]

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83. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting).

84. 117 S. Ct. 1295 (1997).

85. The statute lists those state offices for which a certificate of drug testing was required: "Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Courts of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission." GA. CODE ANN. § 21-2-140(a)(4) (1993).

86. GA. CODE ANN. § 21-2-140(b) (1993).

87. Chandler v. Miller, 73 F.3d 1543, 1544 (11th Cir. 1996).

88. Chandler v. Miller, 952 F. Supp. 804, 805 (N.D. Ga. 1994).

89. *Id.* at 806.

90. *Id.* The court previously stated that a preliminary injunction would not be granted unless the moving party clearly established, among other elements, that there was a "substantial likelihood" that the moving party would prevail on the merits. *Id.* at 805.

Subsequently, the candidates submitted to testing and their names appeared on the ballot.[91] After all three lost in the election, they moved the district court for final judgment on their plea. The court entered judgment in favor of the defendants.[92] The plaintiffs appealed to the Eleventh Circuit, claiming violations of the First, Fourth, and Fourteenth Amendments of the United States Constitution.[93] The court of appeals affirmed in a two to one decision.[94] Relying on the holdings of *Skinner* and *Von Raab,* the Court found in favor of the State after balancing the need to maintain the competency of high ranking officials and public trust in them with the minimal intrusion drug testing imposed upon the plaintiffs' privacy.[95]

The dissent from the appeals court's decision reasoned that Georgia's drug testing requirement violated Fourth Amendment protections because the same result could be effectively obtained through ordinary law enforcement means by requiring a warrant or individualized suspicion.[96] The dissent distinguished *Chandler* from *Skinner, Von Raab,* and *Vernonia.*[97] As well, it contended that conditioning the holding of public office upon submission to a drug test infringed upon the First Amendment right to free speech of those who wished to challenge prevailing drug policy.[98] The petitioners appealed, inviting the United States Supreme Court to find that suspicionless searches of candidates for political office violate the Fourth Amendment, and that Georgia's law was an illegal restriction of the First Amendment right to free speech.[99]

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

92. *Id.* Named defendants in the case were the Governor, Secretary of State, and Commissioner of the Department of Human Resources of the State of Georgia. *Chandler,* 73 F.3d at 1543.

93. *Chandler,* 73 F.3d at 1545.

94. *Id.* at 1543

95. *Id.* at 1546-47. The court also held that the law did not infringe on candidates' Fourteenth Amendment rights to run for office and the voters' Fourteenth Amendment rights to choose candidates. *Id.* at 1547-48. Regarding petitioners' First Amendment claim, the court found that the State's regulation of conduct implicating First Amendment free speech rights was legal. *Id.* at 1548-49.

96. *Id.* at 1550 (Barkett, J., dissenting).

97. *Id.* at 1550-52. Judge Barkett pointed out that in this case, unlike in *Skinner,* no present physical threat to the public existed nor was there evidence of a history of drug abuse among the population to be tested. *Id.* at 1550-51. Unlike *Von Raab,* this case did not involve direct contact between law enforcement officials and criminals, nor the duty of law enforcement officials to carry firearms. Further, Judge Barkett noted, political candidates are not at risk for physical injuries on the playing field as were the student athletes who abused drugs in *Vernonia. Id.* at 1551. Finally, he stated, *Chandler* is distinguishable from these cases because it involves the right to participate in government, a constitutionally protect right. *Id.* at 1552.

98. *Id.* at 1552.

99. Brief for Petitioners at i, Chandler v. Miller, 117 S. Ct. 1295 (1997) (No. 96-126).

B. *Supreme Court Decision*

1. Majority Opinion

The majority opinion, written by Justice Ginsburg,[100] held that Georgia's drug testing requirement for candidates for state offices violated Fourth Amendment protections against unreasonable search.[101] The Court also found that government-ordered urine drug testing constituted a search under the provisions of the Fourteenth Amendment,[102] and that the Tenth Amendment did not require the Court to relax the reasonableness standard in deference to Georgia's sovereign right to establish qualifications for its officers.[103] The Court declined to address petitioners' First Amendment claims.[104]

The Court began its analysis by reiterating that the Fourth Amendment requires that a search be based on individualized suspicion of wrongdoing. The Court declared, however, that it often exempts special needs, those beyond the normal needs of law enforcement, from the constitutional requirement.[105] The Court then applied the balancing test, first examining the degree of intrusiveness the State's drug testing regime would impose on candidates.[106] It found that the State's method of testing—producing a urine sample in the office of a private physician and limiting dissemination of the test results to the candidate—was relatively non-invasive.[107]

The majority then addressed the question of the significance of the State's interest and whether it was sufficiently important to outweigh a personal privacy interest.[108] They found it was not, for three reasons. First, the State provided no evidence of an immediate or concrete danger which the State intended the drug testing regime to address, such as a drug abuse problem among elected state officials.[109] Though not a prerequisite for a finding of legitimate special need, a demonstrable problem would have supported the State's position that candidates seeking office should submit to urine testing.[110] The Court noted that although it held suspicionless drug testing to be legal in *Von Raab* despite a lack of evi-

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100. *Chandler*, 117 S. Ct. at 1298. Joining in the opinion were Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer. *Id.*

101. *Id.* at 1305.

102. *Id.* at 1300.

103. *Id.* at 1302-03.

104. *Id.* at 1300 n.1.

105. *Id.* at 1301.

106. *Id.* at 1303.

107. *Id.* The Court noted that the drug testing guidelines adopted by the State of Georgia for its candidates were substantially similar to those the Court accepted as relatively unintrusive in *Skinner* and *Von Raab*.

108. *Id.* at 1303.

109. *Id.*

110. *Id.*

dence of actual drug usage among the test target population, it cautioned that *Von Raab* "must be read in its unique context."[111] The Court distinguished *Chandler* by pointing out that *Von Raab* involved direct contact by United States Customs Service agents with drugs, drug dealers, and firearms, as well as the inability of the Service to subject agents to daily scrutiny.[112] The Court pointed out that none of these conditions existed in regard to candidates for political office in Georgia.[113]

Second, the Court noted that the testing regime applied by Georgia's statute would be ineffective in detecting drug use.[114] Because the testing date could be scheduled by a candidate up to 30 days in advance, he or she could easily elude detection by abstaining from drug use during that time.[115] In response to the State's contention that a true addict would be unlikely to abstain and so would be detected, the Court pointed out that the State had offered no evidence to show that such persons were likely to seek office.[116]

Third, the majority found that even if such persons were to seek office, ordinary law enforcement means would likely be sufficient to indict them.[117] Therefore, the Court held that the State's drug testing requirement did not constitute a legitimate exception to the Fourth Amendment's warrant requirement because the goal the statute intended to achieve could be accomplished by ordinary law enforcement means.[118]

The Court then distinguished the importance of "symbolic" need from "special" need in the context of exempting searches from Fourth Amendment protection.[119] It pointed out that the Court took pains in *Skinner*, *Von Raab*, and *Vernonia* to explain why exemptions in those cases rested on particular, practical, and "special" needs.[120] It also noted that the holding in *Von Raab* did not turn on the argument that suspicionless drug testing afforded the benefit of demonstrating a commitment to law enforcement.[121] The Court stated that the action of setting a good example, or making a symbolic gesture to demonstrate a state's commitment to fighting drug abuse, does not rise to the level necessary to warrant a relaxation of constitutional standards protecting individuals

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111. *Id.* at 1304.
112. *Id.* (citing *Von Raab*, 489 U.S. at 674).
113. *Id.*
114. *Id.*
115. *Id.* The Court contrasted the effectiveness of Georgia's testing regime with the regime the Court approved in *Von Raab*. In *Von Raab*, the Court found that the program was effective in part because the test target population "could not know precisely" when they would be tested. *Id.* at n.4.
116. *Id.* at 1304.
117. *Id.*
118. *Id.*
119. *Id.* at 1305.
120. *Id.*
121. *Id.*

from government intrusion.[122] Quoting Justice Brandeis,[123] it concluded that well-meant symbolism is not sufficient reason to exempt a search from Fourth Amendment protection.[124]

Finally, the majority made clear their decision did not touch the issue of a state's requirement of general health screening and financial disclosures for candidates, or the issue of private sector drug testing.[125] The Court reiterated the constitutionality of suspicionless searches where there exists a "substantial and real" danger to public safety, but cautioned that unless public safety is so threatened the Court would not exempt suspicionless searches from constitutional protection.[126]

2. Dissenting Opinion

Chief Justice Rehnquist dissented from the majority's opinion, arguing in favor of the reasonableness and constitutionality of the Georgia statute under the precedents set in *Skinner, Von Raab,* and *Vernonia.*[127] The Chief Justice stated that the Court should determine whether a governmental need to search which goes beyond the normal needs of law enforcement is reasonable and constitutional on the basis of whether it fulfills a proper governmental purpose, not on the basis of its importance.[128] Only after the Court determines that special need exists should it apply a test balancing government interests with individual's privacy interests.[129] At that point, the Court should assess the importance of the government's interest.[130] The Chief Justice criticized the majority for improperly deciding that the State's need for drug testing was not sufficiently important to exempt it from Fourth Amendment protection.[131] He suggested that, in prior cases, governmental needs for searches which the Court found to be legitimate exceptions to Fourth Amendment protection could not all be classified as greatly important.[132]

The Chief Justice contended that Georgia had a reasonable interest in implementing a "prophylactic mechanism" to prevent drug users from attaining high state office.[133] He relied on *Von Raab,* pointing out that the

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122. *Id.*

123. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1306-07 (Rehnquist, C.J., dissenting).

128. *Id.* at 1306.

129. *Id.*

130. *Id.* at 1306-07.

131. *Id.*

132. *Id.* at 1306 (offering as examples the "supervision of probationers" and the "operation of a government office") (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989)).

133. *Id.*

Court in that case held that a drug testing program was constitutional even though it was implemented in response to the "pervasive social problem" of drug abuse, not a proven drug problem among the test target population.[134] He said that the State should not have to wait until a drug addict or illegal drug user achieved elected office to protect its interest.[135]

After arguing that Georgia's drug testing regime represented a legitimate government need, the dissent applied the balancing test, weighing the State's interest with the candidates' privacy interests. The Chief Justice criticized the majority's conclusion that candidates are under such a high level of scrutiny that drug testing is unnecessary to screen them for illicit drug use.[136] He called the Court's decision a "strange holding" in light of the fact that the railroad employees in *Skinner* and customs officials in *Von Raab* were under the same type of scrutiny from supervisors and fellow employees as are elected state officials.[137] In addition, he pointed out, the method of testing in this case posed little invasion of privacy because it could be conducted in the office of a candidate's own physician.[138] He disagreed with the majority's conclusion that because a candidate could schedule the test in advance, a candidate who used drugs would have sufficient time to abstain from drug use to pass the test.[139]

The dissent then revisited *Von Raab*. It compared the handling of classified materials by Customs Service agents, a function which the *Von Raab* Court found was sufficiently significant to warrant suspicionless drug searches,[140] with state executive officers handling sensitive materials.[141] It argued that state officials who abuse drugs pose as much risk as do Customs Service agents who abuse drugs.[142] In sum, the dissent concluded that because Georgia had a reasonable need to test its candidates for drug use, and that such testing was minimally intrusive into candidates' privacy, the State's candidate testing requirement was a special need which should have been exempted from Fourth Amendment protection.[143]

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134. *Id.* (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 673-74 (1989)).

135. *Id.*

136. *Id.* at 1306-07.

137. *Id.* at 1307.

138. *Id.*

139. *Id.*

140. *Id.* Though the Court in *Von Raab* did state that Customs Service employees who sought promotion to positions in which they handled sensitive information might be tested for drug use, the Court held that the record of the case was too ambiguous to justify a finding that the class of employees should be tested. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677-78 (1989).

141. *Chandler*, 117 S. Ct. at 1307.

142. *Id.*

143. *Id.* at 1306-07.

Finally, the dissent questioned the majority's conclusion that a state's right to test a candidate's general health differs so much from urine drug testing that the former is legal, while the latter is not.[144] Such a policy judgment, the Chief Justice stated, is appropriately left to legislatures.[145]

III. ANALYSIS

The holding of *Chandler* may on its face be counted a victory among those who have criticized the courts for whittling away at Fourth Amendment protection. The case represents a halt, at least temporarily, to the expansion of the legality of suspicionless searches. The *Chandler* Court's disjunctive analysis of the amendment, however, severely tempers any solace those critics may take in the Court's decision. The *Chandler* Court does nothing to dismantle the framework which has served as the basis for ever broader applications of the reasonableness standard. That none of the *Chandler* majority chose to question or critique the reasonableness standard indicates that the Court has no intention of reversing its de facto application of a disjunctive approach. Indeed, the lone dissenter argues for an even *broader* application of the reasonableness standard.[146]

Chandler is a tacit declaration that the Court is not going to heed the advice of academicians and return to a conjunctive application of the Fourth Amendment.[147] This Comment proposes that the Court correctly refuses to turn back. It argues that a disjunctive reading of the Fourth

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144. *Id.* at 1307.

145. *Id.* at 1308.

146. *See id.* at 1306-08. Because the holding in *Chandler* limits the expansion of the reasonableness standard, it is logical that any Justice critical of the standard would not choose to dissent from the decision. However, it is interesting to note that in cases in which the standard was applied and resulted in an outcome favorable to the government, at least one Justice criticized the balancing test or the way in which it was applied. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397 (1995) (O'Connor, J., dissenting) (criticizing the Court's acceptance of the constitutionality of suspicionless drug testing); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 462-63 (1990) (Stevens, J., dissenting) (arguing that notice should be a prerequisite to a warrantless search); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 653-54 (1989) (Marshall, J., dissenting) (arguing that suspicionless drug testing is an inappropriate response to an emergency situation); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 683-84 (1989) (Scalia, J., dissenting) (arguing that without a demonstrated history of drug abuse among the class to be tested, a suspicionless drug testing regime is unconstitutional); New York v. Burger, 482 U.S. 691, 718 (1987) (Brennan, J., dissenting) (criticizing the majority for allowing a search of a business in an industry which was not closely regulated); O'Connor v. Ortega, 480 U.S. 709, 732-33 (1987) (Blackmun, J., dissenting) (criticizing the majority for an unwarranted application of the balancing test upon an incorrect finding of special need).

147. Professor Aleinikoff wrote in 1987 that "academia [had] fashioned a truce" regarding the balancing test as the Court applied it to "area after area in constitutional law," with the result that debate over the balancing had practically ceased. Aleinikoff, *supra* note 37, at 944. More recently, however, that truce seems to have been shattered. *See, e.g.*, *supra* note 34 (listing a number of authors who see the Fourth Amendment balancing test as a threat to Fourth Amendment protections).

Amendment is a legitimate basis for constitutional adaptation to situations and trends never contemplated in the world of the Framers, such as the pervasive problem of drug abuse. It contends that the call for judicial return to conjunctive analysis often reflects a mourning of the demise of *Lochner*-era jurisprudence,[148] a philosophy of law which dressed up judicial tradition and paraded it as objective and immutable, untouchable by the changing needs of the nation and its evolving society. Whether rejection of this fallacious viewpoint is labeled "Legal Realism" or something else,[149] it recognizes that constitutional freedoms are not guaranteed by judicial conformation to some Platonic legal form.[150]

The following section briefly describes two suggestions to "salvage" the reasonableness balancing test, and then addresses the argument of some academicians that the courts should abandon the application of a reasonableness standard in favor of a warrant requirement. That argument is analyzed in the framework of *Lochner* era formalist philosophy. Finally, this section offers a pragmatist defense for the development of a reasonableness standard, and proposes a two-tiered application of the Fourth Amendment which preserves the traditional protections afforded by the warrant requirement in criminal contexts while allowing the courts to adapt constitutional principles to changing societal needs.

A. *Suggestions to Fix the Reasonableness Balancing Test*

Some critics of the Fourth Amendment balancing test concede, grudgingly, that the Court is not going to abandon it in the foreseeable future, and so have offered suggestions to save it from fatal subjectivity. One proposal urges the addition of a "least intrusive alternative" analysis to the test, not as the final measure of constitutional sufficiency, but as a sufficient condition of constitutionality.[151] Put in very broad terms, this four-fold recommendation would, first, require the state to adopt any measure that is significantly less intrusive than the one being challenged.[152] Second, the state would be obligated to adopt the least intrusive measure reasonably available.[153] Third, the state would have to

148. It is important to distinguish between the call for a return to a conjunctive regime on the grounds that the warrant requirement is the only correct Fourth Amendment interpretation and the argument that the warrant requirement is the only practical alternative to flaws inherent in a reasonableness balancing test. The first argument is essentially formalist and philosophical, the second is pragmatist and empirical. Though the outcome proposed by both arguments is the same, the framework underlying them is radically different. *See infra* notes 180, 185, and accompanying text.

149. Aleinikoff, *supra* note 37, at 963. Aleinikoff posits that the development of the Fourth Amendment balancing process was not simply a Legal Realist reaction to Lochnerism, but to the nihilistic, relativistic extremes of Legal Realism itself. *Id.*

150. Plato posited that ideas and concepts exist as "forms" that are immutable, timeless, and subject to human discovery. 6 THE ENCYCLOPEDIA OF PHILOSOPHY 332 (1967).

151. Strossen, *supra* note 41, at 1257.

152. *Id.* at 1254.

153. *Id.* at 1255.

make a *prima facie* showing that the measure it adopted was the least intrusive option among those which would reasonably advance the state's goals.[154] Fourth, consideration of the costs of a particular alternative measure would be irrelevant unless the costs were great enough to make the alternative practically impossible.[155] Adoption by courts of the least intrusive search or seizure measure, the theory holds, would help protect personal privacy and liberty which is threatened when courts balance governmental and private interests.

Another proposal would abandon altogether the attempt to establish generally applicable standards for a balancing test in favor of an absolute case-by-case determination of reasonableness under the circumstances of a particular search or seizure.[156] Trial courts would be the locus of such determinations.[157] The rationale for this approach is that any attempt to distill rules from cases in which a court employed the reasonableness balancing test is futile.[158] One suggested advantage of this approach is that it would eliminate the need for appeals courts to craft precedents defining reasonableness and would "extract the Court from the tarbaby of Fourth Amendment law."[159]

Neither of these proposals suggests that the Court *should* retain the Fourth Amendment reasonableness balancing test. Instead, they are founded on the notion that if the Court must insist on using the test, it should find a way to do so that is minimally destructive of Fourth Amendment rights.

Several other critics are more straightforward in contending that any reasonableness standard, certainly including a balancing test, is simply too flawed to be a workable guarantor of the Fourth Amendment's protections of liberty, privacy and property.[160] They argue that a reasonableness standard, separated from the requirement for warrants issued on the basis of probable cause, should be abandoned altogether with only rare exceptions.[161] Whether arguing for a modification of the reasonableness

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154. *Id.*

155. *Id.* at 1256.

156. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1480 (1985). Professor Bradley offers two models aimed at reforming the Court's Fourth Amendment analysis. Model I proposes abandoning current Fourth Amendment analysis which Bradley says results in "incomprehensible rules" in favor of a case-by-case reasonableness analysis. *Id.* at 1491. Model II takes the opposite approach, proposing abandonment of the reasonableness standard altogether in favor of a strict warrant requirement. *Id.* An emergency which absolutely prevents a law enforcement officer from obtaining a warrant would be the only exception to the requirement. *Id.* at 1492. Bradley applies the two models specifically to search and seizure by law enforcement agencies. *Id.* at 1471.

157. *Id.* at 1488.

158. *Id.* at 1491.

159. *Id.* at 1488.

160. *See supra* note 34.

161. *See* Bookspan, *supra* note 17, at 529 (stating that the Court should eliminate all exceptions to the warrant requirement other than exceptions for exigent circumstances); Cloud, *supra* note 10, at

balancing test or writing it off completely, criticism is misguided when it calls for application of a conjunctive reading of the amendment on the grounds that objective standards lie beyond the reach of shifting policy concerns. At its core, this reasoning is an assumption of mistaken philosophical first principles. Such principles find expression in *Lochner* era formalism.[162]

B. *The Philosophical Foundation of* Lochner *Era Formalism*

The *Lochner* era of Fourth Amendment interpretation was developed in a line of cases beginning with *Boyd v. United States*[163] and including *Lochner v. New York*.[164] It extended from the latter quarter of the nineteenth century through the first third of the twentieth. The *Lochner* era's decline is highlighted in the Court's decision in *Olmstead v. United States*[165] in 1928. In that case, the Court held that evidence of criminal activity was admissible in court even though it had been obtained through wiretaps of telephone conversations, without the knowledge or consent of the interlocutors.[166] The Court reasoned that because law enforcement officials committed no physical trespass and made no seizure of physical property, the Fourth Amendment did not protect those

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224 (arguing that warrants are rooted in a rule-based model which provides objective tests against which the constitutionality of a search can be judged); Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996) (advocating a return to theories embraced in the *Lochner* era and a re-dedication to the Fourth Amendment's Warrant Clause); Malin, *supra* note 34, at 488 (contending that individualized suspicion "effectively curtails governmental discretion and arbitrary searches").

162. This is not to say, of course, that everyone who advocates a return to a conjunctive reading of the Fourth Amendment espouses a *Lochner* era philosophy. For instance, Professor Bradley suggests a return to a strict warrant requirement as a practical solution to the problems he believes are inherent in the current state of Fourth Amendment analysis. Bradley, *supra* note 156, at 1472. Nowhere in his article does Professor Bradley argue for the conjunctive theory. Rather, his approach is essentially pragmatist.

163. 116 U.S. 616 (1886) (holding that a subpoena to produce an invoice, in a civil suit by the United States against an importer of merchandise, violated the Fourth Amendment's prohibition of unreasonable search and seizure).

164. 198 U.S. 45 (1905). *Lochner* is not a Fourth Amendment case. It involved the right to contract. The Court held that government-imposed rules limiting bakers to a 60-hour work week were an unconstitutional limitation on the freedom to contract. The case stands as an icon for a legal era which is often characterized as one in which the individualism of capitalist, laissez-faire economics prevailed. For a critique of that characterization, see Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991) (explaining how the *Lochner* era decisions are related to jurisprudential trends before and after that period in history). *See also* Cloud, *supra* note 161, at 601 n.216. (contending that *Lochner* era formalism was designed to promote individual liberty rather than to address economic issues).

165. 277 U.S. 438 (1928).

166. *Olmstead*, 277 U.S. at 464.

charged in the case.[167] It held that Fourth Amendment protections extended only to "material things."[168]

On its face, *Olmstead* appears to be yet another property-law based Fourth Amendment decision. However, the Court's application of property-based principles was so narrow that in effect it excluded a virtual world of human interaction from Fourth Amendment protection, including the expanding world of electronic communication. In *Olmstead*, the Court decided that a person could not expect his or her constitutionally protected privacy to extend beyond spatially limited entities, such as a home or written communication on paper.[169] New relationships between the government and an individual citizen promoted by technological advances and a burgeoning population would outstrip the Court's willingness to extend them traditional search and seizure protections.

Though the Court's holding in *Olmstead* did not divorce Fourth Amendment analysis from its *Lochner* era marriage to property rights, it signaled the beginning of an era in which the relationship would become more and more tenuous, and would ultimately break down.[170] That time was presaged by no less a commanding figure than Justice Oliver Wendell Holmes, who wrote in his dissent in *Olmstead* that "[w]e must first consider the two objects of desire both of which we cannot have and make up our minds which to choose."[171] Holmes' framing of the issue in terms of choice, Professor Morgan Cloud suggests, was a declaration that "[v]alue choices, not deductive application of rules, should control the outcome."[172]

The replacement of "deductive application of rules" with "value choices" in a post-*Lochner* era lies at the heart of much of the criticism of a Fourth Amendment reasonableness standard. Professor Cloud em-

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167. *Id.*

168. *Id.* In his dissent, Justice Brandeis argued that the majority interpreted the amendment's use of the words "persons, houses, papers, and effects" too literally, and that the Constitution applies not merely to "what has been," but also to "what may be." *Id.* at 474 (Brandeis, J., dissenting). Holmes, also dissenting, stated the principle that the Court is free to choose between policies, but that in this case, if the Court confined itself to "precedent and logic," the result must be to conclude that the government's wiretap was illegal. *Id.* at 471 (Holmes, J., dissenting).

169. *Id.* at 465. Cloud contends that the Framers intended written communication, a person's "papers," to be the primary areas afforded protection from unreasonable search and seizure. *See* Cloud, *supra* note 161, at 523, 622.

170. That break is epitomized by the Court's declaration in *Katz* that "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

171. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting). In addition, Holmes' predilection for applying social policy considerations to constitutional analysis is evident in his dissent in *Lochner*, in which he wrote, "general propositions do not decide concrete cases. The decision will depend on a judgment or *intuition* more subtle than any articulate major premise." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (emphasis added).

172. Cloud, *supra* note 161, at 614.

ploys the categories "formalist"[173] and "pragmatist"[174] to describe the differences in these two approaches. The former is characterized by an objective, rule-based analysis, the latter by an intuitive, goal-oriented reaction to a fact situation.[175] The *Lochner* era's warrant-based approach is essentially formalist,[176] while the current era of disjunction between a reasonableness standard and a probable cause standard reflects a pragmatist stance. The critics charge that, cut loose from "objective" moorings, constitutional theory will be tossed about in the storms of social change and political exigency.[177] They argue that the bulwark of Fourth Amendment protection from governmental search and seizure, and indeed the protections of all freedoms embodied in the constitution, will erode in the face of "subjective" pressures brought about by time and circumstance.[178] As evidence, the critics may point to the fact that in a post-*Lochner* era it is perfectly legal for the government to subject citizens to a search in the form of a urine drug test without suspicion of wrongdoing.[179] For some, the fact that whole classes of citizens can be legally subjected to searches without even a degree of individual suspicion may be evidence enough to conclude that the rights afforded by the Constitution are in peril from competing values, such as those embodied in a "war" on drugs.

There is a complex framework to the conclusion that "subjectivist" and "pragmatist" forces are at work to undermine constitutional protections. That framework is essentially philosophical. Professor Cloud tacitly acknowledges the philosophical framework behind formalist, objectivist critiques of contemporary applications of the Fourth Amendment by noting that formalist theory relies heavily on the concept of natural law and natural rights.[180] Such formalism embraces a Kantian view that law and ethics is non-empirical, believing that legal principles exist apart

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173. *Id.* at 565. The attributes of nineteenth century formalism include deductive application of identified legal rules. The rules derive from an "existing corpus" of sources and natural law. *Id.* at 565-66.

174. *Id.* at 598. Professor Aleinikoff provides a succinct history and description of legal pragmatism. Aleinikoff, *supra* note 37, at 956-58. He describes it as a "non-formalist mode of legal reasoning attuned to the way in which law actually function[s] in society," noting that it narrows the distinction of the role of the judiciary and the legislature. *Id.* at 957-58. Among the champions of judicial pragmatism he mentions are Justices Holmes, Brandeis, Cardozo, and Stone as well as Roscoe Pound and Karl Llewellyn. *Id.* at 954-56. Though closely associated with Llewellyn and Legal Realism, judicial pragmatism is distinguishable from Legal Realism. *Id.* at 956-57.

175. *See supra* notes 158, 160, and accompanying text.

176. It is "essentially" formalist, because there are certain pragmatist characteristics in *Lochner* era judicial reasoning. Cloud, *supra* note 161, at 625.

177. *See supra* note 34 and accompanying text.

178. *Id.*

179. A drug testing requirement, such as the one Georgia sought to impose, "effects a search within the meaning of the Fourth and Fourteenth Amendments." Chandler v. Miller, 117 S. Ct. 1295, 1300 (1997).

180. Cloud, *supra* note 161, at 567.

from and *a priori* to "fact-propositions" and are "absolute."[181] It is not surprising, then, that Professor Cloud relates the formalist stance to Christopher Columbus Langdell's view that "law is a science,"[182] and states that effective legal analysis should not rely "upon goals or standards extrinsic to the law."[183] Nor is it remarkable that Professor Cloud's description of formalism includes the notion that "legally authoritative reason . . . usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action."[184] In the formalist, Kantian, Langdellian world, law is to be discovered and deduced from unchangeable, natural principles. According to Professor Cloud, these are the principles which the Framers had in mind as they crafted the Constitution, and which underlie Fourth Amendment theory.[185]

Accepting Professor Cloud's description of formalism's philosophical stance as the basis for *Lochner* era constitutional analysis,[186] one can see why critics of a post-*Lochner*, "pragmatist" approach to Fourth Amendment interpretation distrust a method which applies an outcome-based balancing test. In their eyes, any method which balances "values" (a subjective process) in place of deducing conclusions from principles without regard to the practical outcomes of a particular analysis (an objective process) cannot protect constitutional rights. Critics contend that subjective, case-by-case analysis runs the risk of taking Fourth Amendment analysis out of the realm of deductive, predictable results and throws it open to the uncertain tides of politics and shifting social goals.[187]

The debate over the validity of a conjunctive as opposed to a disjunctive Fourth Amendment approach involves competing fundamental philosophical viewpoints. If one rejects the philosophical first principle that law exists unchanging and immutable, and accepts as a first principle that law is a function of the circumstances of a changing world, then one sees that a reasonableness standard applied in a balancing test does not threaten constitutional freedoms and undermine the rule of law as a formalist may contend it does.[188]

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181. *Id.* at 568 n.48 (quoting EDWIN M. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 472 (1953)).

182. *Id.* at 565 (citing Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 L. Q. REV. 123, 124 (1887)).

183. *Id.* at 566.

184. *Id.* (quoting P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 246 (1987)).

185. *Id.*

186. *Id.* at 567-68.

187. *See supra* note 34 and accompanying text.

188. To say that law is a function of the circumstances of a changing world is different from saying that law has no foundation in rules and precedent. The difference between formalist and pragmatist positions is not necessarily that one applies strict rules and the other discounts rules. The

Outside a formalist framework, the empirical nature of a reasonableness standard and a disjunctive reading of the Fourth Amendment, separating reasonableness from probable cause, are not inherently threatening. "Empirical" need not mean "relativist." "Subjective" need not connote "absent principles." An empirical, pragmatist application of Fourth Amendment protections can be a reasonable response to changing circumstances, needs, and times. If law is dynamic and dialectic, rather than static, then a reasonable balancing of values can offer a workable framework within which law may evolve.

Of course, criticism of the reasonableness balancing test is not limited to formalists. A pragmatist may also contend that reasonableness balancing lacks objectivity and that it is unacceptably idiosyncratic.[189] However, responses to concerns raised from a pragmatist framework differ from responses to a formalist critique. The latter are ultimately philosophical, the former are practical. A pragmatist response to the problem of subjectivity in a reasonableness balancing test seeks to ensure that courts thoroughly analyze the rationale they use in weighing competing interests, and do not content themselves with balancing "inside a black box."[190] A pragmatist approach to Fourth Amendment balancing recognizes that rules distill from individual circumstances in a dialectic process.[191] For that dialectic to work, courts must be clear and conscientious about articulating the reasoning they employ in balancing competing interests.[192] If courts are disciplined in their reasoning, judicial ration-

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relativist aspect of pragmatism is not absolutely relativist. It need not relegate law to the arena of mere arbitrary choice. Rather, it recognizes the development of law as a dialectic process between rules and fact situations. When those situations confront rules and principles, new rules may evolve which retain the core principles of the original rules. The relationship between the original rules and the evolving rules forms an objective basis for legal decision making. Over time law may transmute itself into something different, but the core rules and principles can, and probably do, remain essentially the same. Unlike the formalist, the pragmatist will likely acknowledge this *relative* objectivity of law.

189. *See, e.g.*, Aleinikoff, *supra* note 37, at 975. Aleinikoff argues that value balancing fails to use a common scale, making the process essentially intuitive and subjective. *Id.* at 976. One need not be a formalist to advance this and other practical criticisms of Fourth Amendment balancing. Certainly not all critics of the current trend in Fourth Amendment analysis are proponents of *Lochner* era legal reasoning, nor are they neo- or pseudo-Kantian. Such critics may argue that the reasonableness test is simply impractical. *See, e.g.*, *supra* note 162 (noting that Professor Bradley's proposal to return to a strict warrant requirement is essentially pragmatist). As well, one may press a conjunctive Fourth Amendment reading based on an historical analysis, arguing that the Framers intended to identify reasonableness with a warrant requirement and therefore that the conjunctive interpretation is the legitimate interpretation.

190. Aleinkoff, *supra* note 37.

191. *See* Cloud, *supra* note 10, at 233 (discussing the pragmatist approach to Fourth Amendment analysis).

192. A good example of imprecision in applying a balancing test occurs in the *Chandler* Court's use of the terms "substantial" and "important." Chandler v. Miller, 117 S. Ct. 1295, 1303 (1997). The Court does not define the terms or explain how the government's interest is any more or less substantial or important than the plaintiffs'. The majority simply concludes that the State did not justify the substantial need or importance of its interests vis-à-vis the interests of the plaintiffs. *Id.*

ale will, over time, yield clear rules. This is a "messy" process, however, that will never satisfy the formalist longing for deductive clarity.

C. *A Pragmatist Proposal for Applying a Fourth Amendment Reasonableness Standard*

Despite the many arguments against the use of a reasonableness standard as applied through a balancing test, some scholars remain skeptical of the notion that a warrant requirement based on a probable cause standard provides the only sure basis for protecting Fourth Amendment rights.[193] Alternatives to the *Lochner*-era conjunctive reading of the Fourth Amendment propose that a reasonableness standard can form the basis for workable Fourth Amendment analysis regarding warrantless searches.[194] The concepts of "reasonableness" and "constitutional reasonableness" are not necessarily exclusive.[195]

Professor Akhil Reed Amar offers an interesting but ultimately impractical method of applying a standard of reasonableness to constitutional law. He points out that the locus of "common sense reasonableness" in the Anglo-American judicial system is the jury, but notes that juries do not decide constitutional reasonableness.[196] The locus of constitutional interpretation is the appellate courts.[197] Can the two loci meet? Professor Amar argues that they can, and should.[198] But the historical and practical rationale for doing so is questionable.[199] Constitutional decisions have historically been decided by trained jurists, not juries.[200] Though Amar contends that allowing juries to decide constitutional issues would result in an effective application of a reasonableness standard and a constitutionally literate citizenry,[201] the specter of having jurors untrained in the law handing down legally binding constitutional precedent is one the

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For the Court to develop a workable reasonableness standard, it must carefully explain the criteria it employs. The level of government need sufficient to pass muster in a balancing test has varied from case to case. *See id.* (substantial and important); Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2395 (compelling or important); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (compelling); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989) (compelling); New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (substantial).

193. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801, 817 (1994) (stating that the Fourth Amendment should be based on "constitutional reasonableness" rather than "probability or warrant").

194. *Id.* at 800.

195. *Id.* at 817.

196. *Id.* at 817-19 (advocating moving the decision making process regarding legitimacy of Fourth Amendment searches into the arena of civil litigation).

197. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

198. *Id.* at 817

199. Cloud, *supra* note 32, at 1735-36 ("I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases."). Cloud relies on Cuddihy's historical analysis to critique Amar's conclusion that the Framers intended a disjunctive reading of the Fourth Amendment. *Id.* at 1710, 1742.

200. *Cooper*, 358 U.S. at 18.

201. Amar, *supra* note 193, at 818-19.

American legal system has never embraced, and for good reason. The Anglo-American system of jurisprudence places the responsibility for making findings of fact in the hands of jurors, while charging jurists with the task of making findings of law.[202] The system leaves the role of establishing legal precedents to those trained in the law.[203]

Another approach applies the reasonableness standard to Fourth Amendment analysis while preserving the protections afforded by a warrant-based regime. This way calls for the Court to recognize the distinction between searches and seizures in the criminal context and in an administrative context, and apply the probable cause standard to the former and a reasonableness standard to the latter.[204] Such a judicial adoption of a disjunctive reading of the Amendment would result in a two-tier scale for Fourth Amendment cases, which would yield several benefits.

First, it would help alleviate the threat that expanding application of a reasonableness standard will allow law enforcement agencies to encroach more and more upon traditional constitutionally protected rights in a criminal context.[205] Arguments in favor of preserving the warrant requirement often focus on the criminal context of Fourth Amendment searches and seizures, including the exclusionary rule of evidence,[206]

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202. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 7, 229 nn.29-30 (1985).

203. This is not to say, of course, that the people should not or do not ultimately control their political destiny. Jurists create legal precedent, but the power to correct that precedent is vested in the people through legislative representation and the right to amend the Constitution. *See* Aleinikoff, *supra* note 37, at 960, 984 (discussing generally the court system and legislative function). Though critics of legal pragmatism note that it brings judicial and legislative functions uncomfortably close, nevertheless they remain logically and functionally separate. *Id.* at 958.

204. "Our cases teach . . . that the probable-cause standard is 'peculiarly related to criminal investigations.'" National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987)). Professor Amar points out, however, that the Fourth Amendment makes no distinction between criminal and civil searches. Amar, *supra* note 193, at 770.

205. *See* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549, 554-55, (1990) (criticizing encroachment on Fourth Amendment protections largely in the context of criminal cases); Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 51 (1995) (focusing on law enforcement uses of property and information obtained through a legal seizure). The proposed two-tier Fourth Amendment application does not eliminate all concerns and criticisms regarding the expansion of exceptions to the warrant requirement. It does not address the issue of whether warrantless searches which bring the potential for criminal conviction (such as stop-and-frisk and DUI checkpoint searches) should be curtailed. Rather, it is limited to those situations in which a search would have non-criminal implications, such as affecting a person's employment status.

206. *See* Bookspan *supra* note 17, at 478 ("The evisceration of the warrant requirement and its accompanying erosion of fourth amendment protections derive from judicial dislike of the exclusionary rule."); Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1082 (1995) (analyzing the intersection of the Fourth and Fifth Amendments in the context of informational privacy). The identification of the Fourth Amendment with criminal law, and the exclusionary rule in particular, can be traced to *Boyd v. United States*, 116 U.S. 616 (1886). Cloud, *supra* note 161, at 573. In *Boyd*, the Court interpreted the Fourth and Fifth Amendments together, linking the two "by principles of privacy, property, and liberty." *Id.* at 576. Although the

without distinguishing them from non-criminal contexts.[207] Professor Tracey Maclin notes that supporters of a warrant-based application of the Fourth Amendment "argue that the rule is designed to promote the central premise of the Fourth Amendment, which is to control police discretion."[208] Applying the stricter Fourth Amendment standard in criminal cases would respect the difference between a search which results in the possibility of imprisonment and a criminal record, and one which does not. This distinction between standards applied in criminal and non-criminal cases is analogous to a distinction already firmly rooted in American jurisprudence, the use of separate standards of proof in criminal and civil actions.[209]

The second advantage is correlative to the first. Distinguishing criminal from non-criminal contexts would free the Court to develop a workable standard of Fourth Amendment reasonableness without threatening traditional applications of the warrant requirement in the criminal context. The reasonableness standard is relatively new and immature. As this Comment points out, criticisms of a reasonableness standard frequently point to its vagueness and lack of definition.[210] They contend the probable cause standard is arguably better because it is rule-based and objective.[211] However, there is no internal logic in the warrant require-

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exclusionary rule is the focus of much Fourth Amendment analysis, it does not apply to civil cases, but is intended to exclude illegally obtained evidence from criminal proceedings. Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 776 (1992).

207. Precedent exists for distinguishing Fourth Amendment standards in criminal and administrative contexts. The Court has tended to apply a stricter standard in criminal cases, and the Court has suggested that noncriminal cases are "peripherally" related to the Fourth Amendment. Nuger, *supra* note 27, at 92. Professor Amar criticizes law schools for fostering the identification of the Fourth Amendment with criminal law by teaching it by itself or in criminal procedure courses, rather than in constitutional law classes where it would be put in the context of the Constitution as a whole. Amar, *supra* note 193, at 758. Professor Cloud contends that isolating Fourth Amendment analysis to the area of criminal law "impoverishe[s] both Fourth Amendment theory and general constitutional theory alike." Cloud, *supra* note 10, at 200. *See also* Vaughn & Carmen, *supra* note 34, at 209 (criticizing the Court for confusing application of the special needs exemption from the warrant requirement in administrative and criminal contexts).

208. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 7 (1994). Maclin criticizes Amar's proposal to allow juries constitutional review of searches and seizures in part on the grounds that it is an ineffective way of policing the police. *Id.* at 32.

209. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271-72 (1986) (listing the three accepted standards of proof as proof beyond a reasonable doubt, a preponderance of evidence, and clear and convincing evidence); California *ex rel.* Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 93 (1981) (stating that the Court has never required proof beyond a reasonable doubt in a civil case). The American system of jurisprudence recognizes that criminal prosecution brings with it the potential of greater penalty than does a civil action, such that a higher burden of proof is imposed in criminal actions. Lego v. Twomey, 404 U.S. 477, 493-94 (1971) (Brennan, J., dissenting) (declaring that "[w]e permit proof by a preponderance of evidence in civil litigation because 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor'"and noting that "we do not take that view in criminal cases") (quoting *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)).

210. *See supra* note 36 and accompanying text.

211. Cloud, *supra* note 32, at 1728.

ment or the probable cause standard that makes the warrant requirement inherently more objective than a reasonableness standard.[212] Rather, the warrant requirement's established rules and standards appear more "objective" because they derive from over two centuries of case law which defines its parameters.[213] In contrast, thirty years have passed since *Katz*[214] was decided, and not even fifteen since *T.L.O.*[215] Because the end of the *Lochner* era is still relatively recent, and also because the Court has tried to squeeze the reasonableness standard into exceptions to the warrant requirement, the Court has not had sufficient opportunity to thoroughly define the parameters of a Fourth Amendment reasonableness standard. Given time, the appellate system can produce a constitutional standard of reasonableness which will serve as precedent to lower courts and provide standards for case-by-case analysis.

Third, distinguishing criminal from non-criminal Fourth Amendment criteria would serve to adjust a glaring inequity in the Court's contemporary application of the amendment. Currently, searches which are generally accepted and even lauded in the private sector,[216] such as certain mandatory drug testing of employees, are subject to a much higher degree of scrutiny when conducted by the government of its own employees.[217] Certainly a general testing regime accepted in the private sector for administrative purposes is not by its nature more onerous or more threatening than a test administered under the same circumstances by the gov-

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212. *See* Amar, *supra* note 193, at 770-71 (stating that the foundation of the Fourth Amendment is reasonableness).

213. *See generally* Cloud, *supra* note 32, at 1714, 1725-26 (discussing the development of search warrants).

214. Katz v. United States, 389 U.S. 347 (1967).

215. New Jersey v. T.L.O., 469 U.S. 325 (1985).

216. Though many criticize the use of suspicionless drug testing in the private sector, there is also broad support for it. Businesses may tend to support such testing because of effective results in decreasing costs related to drug abuse, and there are indicators that many employees support work place drug testing. *See* Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON U. L. REV. 491, 543 (1990) (stating that a carefully implemented workplace drug testing regime can boost productivity and employee morale); Stephen M. Fogel *et al.*, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 560 n.23 (1988) (reporting that a 1986 national study showed two-thirds of workers surveyed supported workplace drug testing, while another survey showed 47 percent of adults surveyed supported testing); D. Garrison "Gary" Hill, *The Needle and the Damage Done: The Fourth Amendment, Substance Abuse and Drug Testing in the Public Sector*, S.C. LAW., June 1997, at 19 (noting that by 1990, half the Fortune 500 companies had instituted drug testing policies); Shawn G. Twing, *Drug & Alcohol Testing by Private Employers . . . and Its Relationship to Workers' Compensation Practice in Arkansas*, ARK. LAW., Fall 1996, at 31 (quoting a 1990 study that employers report benefits of drug testing, and that employees register minimal resentment); Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT L. REV. 271, 274-75 (1996) (reporting a survey concluded in 1995 that a large majority of employees supported urine drug testing). Support for random workplace drug testing, however, is by no means universal. *See, e.g.*, Patricia A. Montgomery, *Workplace Drug Testing: Are There Limits?*, TENN. B. J., Apr. 1996, at 32 (listing states that have prohibited or restricted random workplace drug testing).

217. Montgomery, *supra* note 216, at 21.

ernment acting in the role of employer or administrator. Adoption of the reasonableness standard for administrative searches would still subject government-ordered searches to constitutionally-mandated judicial scrutiny, but not to the same degree as searches which might result in criminal penalties.

Finally, a two-tier approach to Fourth Amendment analysis would alleviate a source of criticism and confusion in the existing analytical system. Currently, the Court disingenuously maintains that a conjunctive interpretation is the law of the land, even while carving out more and more exceptions to the warrant requirement.[218] The Court disserves itself and opens itself up to much of the criticism it receives by proclaiming one standard while straining to apply another. By clearly applying the more stringent probable cause standard to criminal contexts and applying the reasonableness standard without any pretense of a warrant requirement to administrative contexts, the Court would eliminate much confusion and concern over the fate of the Fourth Amendment.

A disjunctive reading of the Fourth Amendment, applying a warrant requirement based on probable cause to searches and seizures in a criminal context and a reasonableness standard to non-criminal, administrative searches, preserves traditional curbs to police powers while allowing the courts to meet situations and exigencies not anticipated by the Framers. Such an approach respects the traditional role the warrant requirement has played in protecting Fourth Amendment rights, while sidestepping the erroneous tenet of *Lochner* era formalism which demands the application of a probable cause standard in every situation which implicates the Fourth Amendment. A two-tier Fourth Amendment analysis rejects the philosophy which confuses "what has been" with "what always is and ought to be." At the same time, distinguishing the standards applied to criminal and non-criminal situations respects the pragmatist philosophical principle that law can and should evolve to adapt to new demands, rather than forcing new situations to fit the law. The time is ripe for the Court to acknowledge its tacit disjunctive approach to the Fourth Amendment by adopting a two-tier system which distinguishes criminal from non-criminal application of Fourth Amendment protections.

IV. CONCLUSION

The United States Supreme Court's decision in *Chandler v. Miller* tacitly declares that the Court will not sanction all government-ordered suspicionless drug testing. The *Chandler* ruling will probably come as a relief to those who decry and fear that the Court has sapped the life blood out of Fourth Amendment protections against unreasonable search. Any relief felt will be short lived. *Chandler* does nothing to reverse the

218. *See* Bookspan, *supra* note 17, at 529 (urging that the Court abandon "dishonest application of the *per se* unreasonable" standard and condemning "the enigmatic *post hoc* reasonableness evaluation currently in favor").

Court's use of a reasonableness balancing test. That test, one of the Court's critics contends, has left the Fourth Amendment not only anemic but on the verge of death.[219] Such criticism overstates, however, the probability of the imminent demise of Fourth Amendment rights.

From a pragmatist philosophical perspective, the Court's development of the reasonableness balancing test is a legitimate response to exigencies and situations not envisioned or contemplated by the Framers. It reflects an appropriate disjunctive reading of the amendment, which allows for a reasonableness standard to coexist with a probable cause standard for government-ordered searches and seizures. The reasonableness standard lacks the definition and precision of the probable cause standard in part because it has not had the time and opportunity to ripen and mature.

One approach the Court may take to advance the development of the standard distinguishes its use in criminal and non-criminal contexts. Applying the probable cause standard, with its warrant requirement, in criminal contexts will preserve traditional Fourth Amendment protections which critics of the reasonableness standard fear losing. Applying a reasonableness standard in administrative contexts will allow the Court to develop it free from strained, and disingenuous, connections to the probable cause standard. This two-tier application of the standards set out in the Fourth Amendment will allow the courts, over time and through the dialectic process inherent in the evolution of common law, to shape a reasonableness standard as they have the probable cause standard. *Chandler* is a step in that process.

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219. Bookspan, *supra* note 17, at 474 (stating that it is premature to declare the Fourth Amendment dead, but urging drastic action to save it). Professor Bookspan tempers her declaration, however, by referring to Mark Twain's famous statement that "reports of [his] death have been greatly exaggerated." *Id.* (quoting cable from London to Associated Press, 1897).