

COMMENTS

THE VIABILITY OF AREA WARRANTS IN A SUSPICIONLESS SEARCH REGIME

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It is said that prior to the Third Punic War, whenever Cato the Elder addressed the Roman Senate he would finish his statement, no matter the subject matter, with the following exhortation: “*ceterum censeo Carthaginem esse delendam*,” or “in my opinion, Carthage must be destroyed.”¹ During Justice Stewart’s later years on the Supreme Court, his spirited Fourth Amendment dissents evinced comparable resolve in his quest to maintain the vitality of the warrant requirement.² History has proven more charitable to Cato’s objective.

The vigor of the warrant requirement has waned considerably since Justice Stewart’s departure from the Court.³ Meanwhile, the Court has found searches⁴ devoid of the other conventional Fourth Amendment protection, probable cause, to be increasingly acceptable. Unlike most areas of Fourth Amendment jurisprudence where

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1 PLUTARCH, *Marcus Cato*, in 2 PLUTARCH’S LIVES 383 (Bernadotte Perrin trans., Macmillan Co. 1914). Other sources confirm Cato’s frequent references to Carthage although considerable doubt remains as to the exact phrasing. See Charles E. Little, *The Authenticity and Form of Cato’s Saying “Cathago Delenda Est,”* 29 CLASSICAL J. 429 (1934) (summarizing the various sources).

2 See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 609 (1981) (Stewart, J., dissenting) (disagreeing with the authorization of warrantless inspections of mines and stone quarries); *Cardwell v. Lewis*, 417 U.S. 583, 596 (1974) (Stewart, J., dissenting) (disagreeing with upholding a warrantless inspection of an automobile); see also William W. Greenhalgh & Mark J. Yost, *In Defense of the “Per Se” Rule: Justice Stewart’s Struggle to Preserve the Fourth Amendment’s Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1075–83 (1994) (examining Justice Stewart’s vigorous dissents in defense of the Warrant Clause).

3 Greenhalgh & Yost, *supra* note 2, at 1083–96 (describing the gradual weakening of the warrant requirement in the years after 1982 when Justice Stewart left the bench).

4 In an effort to avoid needless repetition, the term “search” will hereinafter be used to refer to either a “search” or a “seizure” unless the distinction is somehow relevant in context.

the Warrant Clause still operates, albeit subject to liberal exceptions, the Warrant Clause has almost never been applied to “suspicionless searches.”⁵ The time has come to reconsider this position.

The current state of suspicionless search law embodies a bizarre paradox: because one of the two conventional Fourth Amendment protections (probable cause) is already absent in suspicionless searches, the other conventional protection (the warrant requirement) must be inapplicable as well. Common sense suggests that these are the searches for which the warrant requirement remains most important. This Comment argues that, subject to existing exceptions, the Warrant Clause should presumptively apply to suspicionless searches as it does in other areas of Fourth Amendment jurisprudence.

I. INTRODUCTION

In many ways, suspicionless search jurisprudence represents the Wild West of the Fourth Amendment: chaotic, sparsely populated, and yet positioned for rapid expansion. The Supreme Court’s ad hoc development of suspicionless search doctrine⁶ has predictably led to a disjointed area of law in search of practicable rules.⁷ The lack of clarity, in turn, has highlighted the absence of any defined upper-limit to such expansions.⁸ The rise of exceptions to the individualized suspi-

⁵ For background on the relationship between individualized suspicion and searches, as well as a strong critique of the move away from the requirement of individualized suspicion, see Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995).

⁶ The distinction between suspicionless searches and “special needs” searches merits a brief explanation at the outset. “Special needs” searches technically represent a subset of suspicionless searches approved by the Supreme Court, although the distinction has become muddled at best. See *infra* Part III.C. The term “special needs” was coined by Justice Blackmun in his concurrence to *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing interests for that of the Framers.”). In this Comment, I reserve use of the term “special needs” to a meaning consistent with this definition. For broader application to searches lacking individualized suspicion, I use the term “suspicionless searches.”

⁷ This is a frequently leveled criticism of the “special needs” cases. For an overview of the difficulties posed in reconciling and synthesizing the Supreme Court’s jurisprudence in this area, see Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419 (2007).

⁸ See, e.g., Jennifer Y. Buffalo, Note, *“Special Needs” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 563 (1997)

cion requirement has thus prompted concern that further encroachments upon privacy and liberty interests lie ahead.⁹

The Supreme Court has found justifications for suspicionless searches under circumstances such as sobriety checkpoints,¹⁰ searches for contraband in schools,¹¹ and mandatory drug testing policies.¹² These manufactured exceptions to conventional Fourth Amendment doctrine largely represent responses to perceived public perils, perils that might not have been adequately provided for under existing jurisprudence.¹³ Yet, these search procedures have been traditionally disfavored because they are so invasive of individual rights. They should remain solutions of last resort. This does not mean, however, that suspicionless searches are necessarily undesirable. Rather, it suggests that they should be limited and, when justified, optimized to balance their benefits with the costs of their accompanying intrusions.

Beyond the inherently invasive nature of suspicionless searches, significant problems exist within the current framework by which they are implemented. This framework at once over-encourages the

(expressing concern that the move towards a mere reasonableness standard in the “special needs” cases might foreshadow a general move towards a reasonableness standard in evaluating all searches).

- ⁹ See, e.g., Clancy, *supra* note 5, at 634 (claiming that unless the Supreme Court returns to a requirement of individualized suspicion, the “number and intrusiveness of exemptions from the requirement of individualized suspicion will continue to grow”).
- ¹⁰ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (concluding that brief detentions of drivers at sobriety checkpoints were consistent with the Fourth Amendment and the government’s interest in highway safety).
- ¹¹ See *T.L.O.*, 469 U.S. 325 (determining that a suspicionless search of a student by a school official was permissible under the Fourth Amendment).
- ¹² See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding a program of mandatory drug testing for high school athletes under the auspices of a “special need”); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (permitting the drug testing of government employees engaged in narcotic interdiction without individualized suspicion); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (determining that individualized suspicion was not required in order to mandate railway employees to submit to alcohol and drug testing in the wake of an accident).
- ¹³ A number of commentators have thus suggested that the political process is generally a sufficient safeguard in such cases. See Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 100–09 (2007) (proposing that political process protections should allow legislatures to enact suspicionless searches subject only to rational basis review); Charles J. Keeley III, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 *FORDHAM L. REV.* 3231, 3293–94 (2006) (arguing that the political process is sufficiently protective of individual rights in suspicionless search cases as long as the search affects the privacy interests of the majority equally).

use of suspicionless searches by law enforcement, and, at the same time, potentially hampers the primary purposes of these searches. Government actors have incentives to use these procedures more often than is justified by the underlying need alone. Meanwhile, the efficacy of suspicionless searches may be undermined by uncertainty as to the legality of the methods employed, promoting suboptimal methodology.¹⁴ Ultimately, however, the invasiveness of searches lacking individualized suspicion is likely their most troubling characteristic.

Despite the problems with the convoluted suspicionless search regime currently in place, the relative infrequency of such cases has limited the urgency of reform. This situation appears to be ripe for change. An allusion to a “special needs” case that has yet to reach the Supreme Court demonstrates the possibility that such exceptions will become increasingly important.¹⁵ A suspicionless search procedure designed to prevent a legitimate threat of a terrorist attack would almost certainly be upheld by courts under this doctrine.¹⁶ The nearly unlimited extent of the harm threatened by a terrorist attack encourages the understanding that a “special needs” search would be both reasonable and desirable, even to one who believed that other exceptions to the individualized suspicion requirement were unwarranted. A suspicionless search regime is needed that will be flexible enough to encompass such contingencies, while still providing meaningful limits on governmental discretion.

This Comment proposes a rethinking of a Fourth Amendment principle marked by an ever-shrinking purview: the warrant requirement. There is no valid reason why the Warrant Clause should not be applied to suspicionless searches in the same way as it is to

14 See, e.g., *MacWade v. Kelly*, 460 F.3d 260, 273 (2d Cir. 2006) (upholding random suspicionless subway searches in part because the policy protected privacy interests by allowing passengers the option of simply leaving the station rather than submitting to a search).

15 A number of other federal courts have, however, dealt with such situations and upheld such policies under the “special needs” doctrine, even though these cases present clear law enforcement interests. See, e.g., *id.* at 275 (upholding New York City’s policy of random suspicionless subway searches to prevent terrorism); *Am.-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth.*, No. 04-11652-GAO, 2004 U.S. Dist. LEXIS 14345, at *10 (D. Mass. 2004) (upholding random subway searches in Boston to protect the convention center from a terrorist attack).

16 Justice O’Connor hypothesized about such an attack in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). She concluded that the “Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.” *Id.* at 44.

other areas of Fourth Amendment jurisprudence.¹⁷ However, a question naturally follows: how could a government agency, lacking suspicion of any one individual, obtain warrants ahead of time to search as of yet unidentified persons? The answer lies in area warrants—judicial warrants that specify the location and timing of a search without specifying the persons or objects to be searched. This Comment argues that within the suspicionless search context, area warrants are both constitutional and desirable.

Regardless of seeking consistency in the Fourth Amendment, the *ex ante* application of the Warrant Clause to suspicionless searches offers substantial advantages. The addition of the warrant requirement could optimize suspicionless searches in at least three ways. First, it could better restrict the use of suspicionless searches to those truly serving important government needs. Second, it could promote concurrent oversight of these searches by the judiciary, and in the process it could potentially provide greater legitimacy to the searches. Third, by encouraging more selective use of the suspicionless search doctrine pursuant to additional oversight, the proposal seeks to provide counterbalances which should decrease *ex post* concerns. This, in turn, may actually encourage courts to allow more invasive search procedures when necessary. In sum, a drastic departure from conventional Fourth Amendment protections merits experimentation with innovative counterbalances to compensate.

Part II of this Comment outlines the text of the Fourth Amendment, providing background for the discussion to follow. Part III describes the current state of jurisprudence on suspicionless searches and seizures. Part IV explains the primary problems embedded within this jurisprudence. This section also suggests why these problems will likely only be exacerbated over time. Part V explains why upholding the warrant requirement for suspicionless searches is both consistent with the meaning of the Fourth Amendment and desirable in practice. Part VI summarizes the discussion and concludes that the adoption of area warrants represents a potential solution worth attempting.

¹⁷ This does not mean that the warrant requirement will always be practicable for suspicionless searches. As with other areas of search and seizure law, there will be situations when exigencies preclude the acquisition of a warrant prior to a suspicionless search. The Fourth Amendment already has various exceptions to account for such exigencies. There is no reason to suspect that these exceptions would be insufficient in the context of suspicionless searches, or that new exceptions could not be created.

II. TEXTUAL UNDERPINNINGS

The story of “sub-probable cause” searches begins with the text of the Fourth Amendment itself. The Fourth Amendment to the U.S. Constitution reads:

The right of the people to be secure in their persons, house, 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.¹⁸

The text is generally interpreted as containing both a Reasonableness Clause and a Warrant Clause. The interplay between the two clauses, accompanied by differing historical interpretations thereof, has engendered tremendous debate over the nature of the warrant requirement.¹⁹ Clearly, arguments as to the proper understanding of the warrant requirement in broader Fourth Amendment jurisprudence are beyond the purview of this Comment. More importantly, though, they are not particularly relevant.

Regardless of the strength of the so-called “warrant preference” today, or whether such a preference should even exist, warrants are still a prominent feature of Fourth Amendment doctrine.²⁰ Although replete with exceptions, the warrant preference has stubbornly endured. The changes proposed in the following pages simply represent an effort to bring suspicionless searches back in line with mainstream Fourth Amendment doctrine, from which they have inexplicably been separated. In order to appreciate the current state

18 U.S. CONST. amend. IV.

19 See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991). The most powerful advocate for a Fourth Amendment interpretation that subjugates the Warrant Clause to the Reasonableness Clause has been Akhil Amar. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). For arguments interpreting a vigorous warrant requirement in the Fourth Amendment, see Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Greenhalgh & Yost, *supra* note 2; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994).

20 Whether a true “warrant requirement” exists within the Fourth Amendment is, perhaps, the central issue of controversy within the text of the Amendment. Compare *California v. Acevedo*, 500 U.S. 565, 566 (1991) (referencing “the warrant requirement of the Fourth Amendment”), with *id.* at 581–85 (Scalia, J., concurring) (disavowing any “requirement” for warrants in the Fourth Amendment, arguing that “it merely prohibits searches and seizures that are ‘unreasonable’”). Despite the ongoing debate, this Comment still makes use of the term “warrant requirement” to remain consistent with the prior academic literature.

of law, however, we must consider how and why suspicionless search doctrine deviated from broader Fourth Amendment jurisprudence in the first place.

III. THE DEVELOPMENT OF MULTIPLE NUANCED APPROACHES TO SUSPICIONLESS SEARCHES AND SEIZURES

The current state of suspicionless search and seizure jurisprudence presents a tolerated mess. A comprehensive understanding of the doctrine has been undermined by the development of varied, and often incongruous, pockets of law. In order to appreciate the difficulties posed by current doctrine, as well as the likely impact of any remedy, we must first ask the question: how did we ever get here?

A. *Camara and the Waning of Probable Cause*

The first significant step towards a regime permitting suspicionless searches and seizures is generally considered to have occurred in *Camara v. Municipal Court of San Francisco*.²¹ The city ordinance at issue in *Camara* permitted housing inspectors acting in furtherance of their duties to enter any building (and residence therein) during reasonable hours.²² The petitioner in *Camara* repeatedly refused entrance to a housing inspector and was subsequently prosecuted for his actions.²³ At issue before the Supreme Court was whether the warrantless administrative searches provided for under the city ordinance violated the petitioner's Fourth Amendment rights and, if so, exactly how the rights were implicated.²⁴ The Court determined that administrative searches such as those authorized under the ordinance "are significant intrusions upon the interests protected by the Fourth Amendment" and that the safeguards of the warrant requirement cannot be circumvented merely due to the administrative nature of a search.²⁵

The ruling in *Camara* was noteworthy for a number of reasons. First, it held that Fourth Amendment protections are fully applicable to administrative inspections. Second, and more importantly for the current inquiry, *Camara* redefined probable cause in terms of reason-

21 387 U.S. 523 (1967).

22 *Id.* at 526 n.1.

23 *Id.* at 526.

24 *Id.* at 534.

25 *Id.*

ableness, injecting a balancing test into the analysis in the process.²⁶ In so doing, the *Camara* Court opened a breach in the conventional lines of the Fourth Amendment that would only expand in the years to follow.

The redefinition of probable cause, however, belied another issue. In *Camara*, the Court exemplified a new willingness to radically reshuffle traditional Fourth Amendment jurisprudence in favor of desirable public policy outcomes. To support the sudden vicissitude of probable cause, the Court suggested a distinction between searches that are primarily administrative in nature and those that are conducted pursuant to a criminal investigation.²⁷ However, even though the decision contrasted searches with a criminal purpose against administrative searches, it failed to offer any concrete justification for distinguishing them.²⁸ Within the confines of the new reasonableness test for probable cause it remained unclear how to evaluate the purpose behind a search.

In the forty years since *Camara*, the Court has repeatedly returned to the law enforcement distinction when it has scaled back Fourth Amendment protections.²⁹ Amidst continual attempts to define the proper balance between public policy considerations and individual rights, the law enforcement distinction has become the touchstone of suspicionless search jurisprudence.³⁰ *Camara* may have been the genesis of suspicionless search and seizure jurisprudence, but the doctrinal change it embodied was decoupled from substantive guidance on how interests were to be balanced.

B. *Camara's Flotsam: The Early Suspicionless Search Cases Conducted by Law Enforcement*

Suspicionless search exceptions developed in an ad hoc manner following *Camara* as different policy goals were identified urging searches that could not be supported under prevailing Fourth Amendment jurisprudence. Although searches devoid of individualized suspicion had been upheld prior to *Camara*, these cases were es-

²⁶ See *id.* at 537–38.

²⁷ See *id.* at 535, 538–39.

²⁸ See Butterfoss, *supra* note 7, at 429 (examining unsettled matters after *Camara*).

²⁹ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985) (Powell, J., concurring) (distinguishing law enforcement officers from teachers due to the investigatory nature of their positions).

³⁰ See *infra* Part III.D.

entially limited to stops at border crossings.³¹ In the wake of *Camara*, however, distinct pockets of “sub-probable cause” law began developing.

1. Searches at the National Border

Searches at the national border had been exempted from traditional Fourth Amendment protections even prior to *Camara*.³² The justification for the exemption, however, has shifted over time. In *Boyd v. United States*,³³ the Court upheld warrantless customs inspections of goods entering the country.³⁴ The Court noted that the same Congress which had adopted the Fourth Amendment also adopted the first customs statute, the Collection Act of 1789, which disavowed the warrant requirement for customs searches.³⁵ The language of the statute, however, seemed to affirm the requirements of individualized suspicion for even these searches.³⁶ The language of the statute also indicated that beyond the practical difficulties of requiring warrants for customs searches, the primary justification for disavowing the requirement was to ensure the collection of due revenue.³⁷ Nearly one hundred years later, to the extent that it examined the question of

³¹ See *infra* Part III.B.1.

³² See *United States v. Ramsey*, 431 U.S. 606, 616–19 (1977) (offering an overview of the relevant history and precedents); see also Keeley, *supra* note 13, at 3242–43 (providing detailed factual background).

³³ 116 U.S. 616 (1886).

³⁴ *Id.* at 638.

³⁵ *Id.* at 622–24.

³⁶ Section 24 of the Act of July 31, 1789, ch. 5, § 24 1 Stat. 29, 43 (repealed 1790), reads as follows:

And be it further enacted, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods

See also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 671 (1995) (O’Connor, J., dissenting) (referring to the Collection Act of 1789 to illustrate the First Congress’s desire to maintain individualized suspicion as a requirement even where the warrant requirement would be inapplicable); Keeley, *supra* note 13, at 3242 n.79 (explaining that “it is not entirely clear that the Collection Act discussed in *Boyd* contemplated suspicionless searches”).

³⁷ Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (repealed 1790).

border searches, the *Boyd* Court similarly focused on the revenue-gathering purposes of customs searches.³⁸

In 1925, the Court supplemented the understanding of border searches with dictum from *Carroll v. United States*,³⁹ suggesting why automobile passengers entering the country could not avail themselves of conventional Fourth Amendment protections.⁴⁰ Perhaps demonstrating a broadening concern over both contraband, in this case alcohol, and illegal entrances by individuals at the national borders, the Court concluded that: "Travellers may be stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."⁴¹ The Court affirmed this position in *United States v. Ramsey*,⁴² finding that probable cause was not required for a customs agent to open mail suspected of containing drugs.⁴³

Yet, it was not until 1985, in *United States v. Montoya de Hernandez*,⁴⁴ that the Court explicitly authorized routine searches absent any individualized suspicion at the borders.⁴⁵ Although the Court referenced *Ramsey* and *Carroll* to support the proposition that the permissibility of routine suspicionless searches at the border was well established, neither of these decisions went that far.⁴⁶ Indeed, the *Ramsey* Court was careful not to discuss any requirement of suspicion as it eschewed the requirement of probable cause.⁴⁷ The *Montoya* Court, meanwhile, seems to have garnered support from a distinct group of post-*Camara* cases involving suspicionless stops at roadway checkpoints.⁴⁸ Whether

38 See *Boyd*, 116 U.S. at 623. According to the Court:

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment [sic] thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not.

Id. Interestingly, the distinction the Court drew between impermissibly held goods and private papers hints at later tests focusing on the criminal purposes of a search.

39 267 U.S. 132 (1925).

40 *Id.* at 154.

41 *Id.*

42 431 U.S. 606 (1977).

43 *Id.* at 624–25.

44 473 U.S. 531 (1985).

45 *Id.* at 538.

46 See *id.* at 538 n.1.

47 See *Ramsey*, 431 U.S. at 620–25.

48 In particular, the Court referenced *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–63 (1976), in support of the permissibility of routine suspicionless searches at the border.

or not routine suspicionless searches were being conducted at the borders prior to this time, *Montoya* finally settled the permissibility of such searches. While the Court noted the unique sovereignty interests implicated by border crossings to support its conclusion,⁴⁹ *Camara* and its recent progeny provided the framework and context that made the decision appear to be so obviously correct.⁵⁰

Border searches serve as an apt entry point for a discussion on suspicionless searches. Although the warrant requirement and the (full) probable cause requirement had never been applied to such searches, the gradual codification of an exception to individualized suspicion illustrates a Court reacting to newly perceived threats at the borders. Cross-border vehicular rum-running during prohibition, illegal immigration, and the rise of international narcotics trafficking are examples of difficult-to-curtail twentieth century threats for which the national borders are the logical enforcement point. Although national security concerns have clearly paralleled other border control concerns during the twentieth century, the specter of terrorism in the twenty-first century presents a novel concern that may force changes in suspicionless search jurisprudence *within* the national borders.⁵¹ Just as revealing, the early post-*Camara* border search cases first demonstrated the difficulties inherent in maintaining separate and viable pockets of law for suspicionless searches.

2. Checkpoint Stops

More than any other category of suspicionless searches, roadway checkpoint cases have illustrated the difficulty of shaping workable rules for application to an entire category of suspicionless searches, let alone to suspicionless searches more broadly. Within the broader penumbra of roadway checkpoints, a number of distinct sub-categories have been litigated. Checkpoints targeting illegal immigrants,⁵² intoxicated drivers,⁵³ and unlicensed drivers⁵⁴ have all been upheld as searches exempt from the traditional requirement of indi-

Montoya, 473 U.S. at 538. *Martinez-Fuerte* upheld a series of suspicionless checkpoint stops on highways just beyond the United States-Mexico border which sought to apprehend illegal immigrants. 428 U.S. at 562–63.

49 *Montoya*, 473 U.S. at 537–38.

50 *See id.* at 537.

51 *See supra* note 14 and accompanying text.

52 *See, e.g., Martinez-Fuerte*, 428 U.S. 543.

53 *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

54 *See Delaware v. Prouse*, 440 U.S. 648 (1979).

vidualized suspicion. Such cases foreshadowed the inherent tension that would develop with the primary purpose test expounded in *City of Indianapolis v. Edmond*.⁵⁵

Roadway checkpoints, specifically those targeting illegal immigrants, were among the first suspicionless search cases to reach the Court in the wake of *Camara*.⁵⁶ The Court has generally upheld the use of such checkpoints, despite their obvious law enforcement purpose, as long as certain safeguards exist.⁵⁷ The limits of these checkpoints were explored in a series of cases during the 1970s. In the earliest checkpoint cases, the Court distinguished roadway checkpoints from roving vehicle patrols near the border, which require reasonable suspicion based on articulable facts for a stop.⁵⁸ The key distinction between checkpoints and roving stops is the availability of checkpoint procedures to limit the otherwise unlimited discretion of law enforcement officers in selecting individuals for stops.⁵⁹ Even checkpoint searches are impermissible if established procedures fail to meaningfully limit officers' discretion in selecting vehicles for a search.⁶⁰ However, the Court has proven less concerned about the discretion to merely *stop* individual vehicles in the context of a checkpoint. In *United States v. Martinez-Fuerte*,⁶¹ the Court found that a brief detention for questioning at immigration checkpoints required no quantum of individualized suspicion.⁶² This holding paved the way for checkpoint stops targeting additional classes of individuals.

A few years after *Martinez-Fuerte*, the Court addressed the constitutionality of discretionary "spot checks" on roadways targeting unlicensed drivers and unregistered vehicles in *Delaware v. Prouse*.⁶³ *Prouse* applied the holdings of the immigration checkpoint cases in this ad-

55 See *infra* Part III.D.

56 See, e.g., *Martinez-Fuerte*, 428 U.S. 543; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

57 See, e.g., *Martinez-Fuerte*, 428 U.S. at 557 n.12 (referring to the "particular law enforcement needs served by checkpoints"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000) (acknowledging the law enforcement purpose at work in *Martinez-Fuerte*, but distinguishing it as not aimed at preventing "ordinary criminal wrongdoing").

58 See *Brignoni-Ponce*, 422 U.S. at 884 (finding that only reasonable suspicion is required for a roving immigration patrol to stop a vehicle near the border); *Almeida-Sanchez*, 413 U.S. at 273 (holding that roving immigration searches near the border must still be predicated on probable cause).

59 See *Brignoni-Ponce*, 422 U.S. at 882.

60 See *United States v. Ortiz*, 422 U.S. 891 (1975) (invalidating an immigration checkpoint in which officers retained full discretion to select vehicles for stops).

61 428 U.S. 543.

62 *Id.* at 556-64.

63 440 U.S. 648 (1979).

ditional context, essentially creating a new checkpoint exception to the Fourth Amendment in the process. As with the roving patrols in *Almeida-Sanchez*, the “spot checks” were held to be unreasonable under the Fourth Amendment as they failed to place any limits on officer discretion.⁶⁴ Nonetheless, the Court explained that it was not forestalling less invasive methods or techniques that did not involve “the unconstrained exercise of discretion.”⁶⁵ In particular, it explained that “[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative.”⁶⁶

The decision also shed light on how governmental interests should be balanced against privacy interests. The decision suggested that the safety benefits of the license and registration “spot checks” were sufficiently important to support checkpoint stops in the absence of individualized suspicion. That this justification could not support discretionary “spot checks” may not have been surprising;⁶⁷ however, the reasoning offered by the Court was. The Court analyzed whether, in furtherance of the state’s goal, the “spot check” was a “sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests.”⁶⁸ While the unbridled discretion of enforcing officers was still determinative, that consideration was more explicitly placed within the confines of a balancing test.

The immigration checkpoint cases did not affect the requirement of probable cause prior to a full-blown vehicle search, even for those conducted in conjunction with a checkpoint stop. However, *Prouse* quietly expanded the permissible scope of brief seizures at checkpoint stops to include affirmative demands that drivers produce certain documentation.⁶⁹ A decade later, the balancing test at the heart of the decision was readdressed in the context of sobriety checkpoints.⁷⁰ The checkpoints at issue in *Michigan Department of State Police*

64 *Id.* at 663.

65 *Id.*

66 *Id.*

67 *See Ortiz*, 422 U.S. at 896–97 (finding that discretionary checkpoints do not sufficiently protect individuals from arbitrary invasions of privacy).

68 *Prouse*, 440 U.S. at 659.

69 *Id.* at 663.

70 In the wake of *Prouse*, the balancing test for seizures less intrusive than full arrests was re-examined in *Brown v. Texas*, 443 U.S. 47 (1979), a case involving the seizure of a pedestrian on less than reasonable suspicion. The holding applied the reasoning of *Prouse* and the immigration checkpoint cases to seizures more broadly, finding that in balancing the public interest against the intrusion to individual liberty a central concern is limiting “unfettered discretion of officers in the field.” *Brown*, 443 U.S. at 51. Thus, later suspicionless search and seizure cases, including checkpoint cases, often refer to the balancing

*v. Sitz*⁷¹ were part of a pilot program which authorized sobriety checkpoints. Seeking to promote highway safety, the program implemented checkpoints requiring all passing drivers to stop and be “briefly examined for signs of intoxication.”⁷² Acknowledging the powerful state interest at work, the Court next evaluated the intrusiveness of the checkpoints in question. It found the objective intrusion of the brief questioning to be minimal, as it had with the immigration checkpoints in *Martinez-Fuerte*.⁷³

The Court also elaborated on language from *Martinez-Fuerte* to explain the relevance of “subjective intrusion” in the balancing, holding that only “the fear and surprise engendered in law-abiding motorists” need be considered.⁷⁴ *Sitz* further repudiated the need for a “searching examination of ‘effectiveness’” as an element of the balancing test, holding that it is enough that law enforcement choose amongst “reasonable alternatives” in selecting a suspicionless search technique.⁷⁵ The decision thus elaborated on the application of the balancing test for checkpoint cases, while still failing to provide any meaningful limitation on the use of checkpoints.

C. The Development of the “Special Needs” Doctrine

On March 7, 1980, a high school teacher in Middlesex County, New Jersey brought two girls to the principal’s office for smoking in a school restroom. After one of the girls denied the allegation, the assistant vice principal searched her purse, finding marijuana and other evidence of drug dealing in the process. Nearly five years later, Justice White, writing for a majority of the Court, upheld the search of the student’s purse in *New Jersey v. T.L.O.*⁷⁶ Amidst considerable con-

test from *Brown* rather than from *Prouse* or the immigration checkpoint cases. See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 448–49 (1990).

71 496 U.S. 444.

72 *Id.* at 447.

73 *Id.* at 451–52.

74 *Id.* at 452.

75 *Id.* at 453–54. The Michigan Supreme Court had read the Court’s decision in *Brown*, 443 U.S. 47, to require an “effectiveness” prong in the balancing test, gauging the ability of the seizure procedure to promote the state’s interest. *Sitz v. Dep’t of State Police*, 429 N.W.2d 180, 183–85 (Mich. Ct. App. 1988). The U.S. Supreme Court agreed that the balancing test should contain such an inquiry, but found that deference to law enforcement was appropriate on this question as long as the procedure chosen was a reasonable alternative to other techniques. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990).

76 469 U.S. 325 (1985).

fusion, the decision paved the way for a new suspicionless search analysis, commonly referred to as the “special needs” analysis.

The term “special needs” was actually coined by Justice Blackmun in his concurring opinion.⁷⁷ He explained, “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”⁷⁸ The majority opinion had no such “special need” requirement. Rather, the majority found that “a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”⁷⁹ In essence, the majority found that, given the unique demands and constraints of a school environment, the relaxation of Fourth Amendment protections was reasonable.⁸⁰

Nonetheless, it was Justice Blackmun’s opinion, and in particular his terminology, that resonated beyond the facts of *T.L.O.* A majority of the Court soon adopted his “special needs” language, although not his accompanying interpretation of the language.⁸¹ Yet, rather than providing an encompassing framework to evaluate all searches and seizures devoid of probable cause or a warrant, the “special needs” doctrine came to define a distinct category of searches and seizures conducted by non-law enforcement officials.

A plurality of the Court initially adopted the “special needs” language in *O’Connor v. Ortega*⁸² to uphold a public employer’s search of an employee’s office in the absence of probable cause or a warrant. The plurality recognized a “special need” to allow public employers to intrude upon employees’ privacy interests in the furtherance of work-related matters and investigations of misconduct.⁸³ Instead of considering whether this need exceeded the “normal need for law en-

77 See *id.* at 351 (Blackmun, J., concurring).

78 *Id.*

79 *Id.* at 341 (majority opinion).

80 Note that unlike in most of the “special needs” cases to follow, individualized suspicion was present in *T.L.O.* Based on the attending teacher’s report that the girls had been smoking in the restroom, the assistant principle had reasonable suspicion that cigarettes would be found in the purse. *Id.* at 345–46.

81 See Butterfoss, *supra* note 7, at 449–50 (explaining that Justice Blackmun understood the “special needs” threshold to apply to all suspicionless search and seizure situations, including those serving a law enforcement need, in contrast to the ensuing application of the concept by the Court).

82 480 U.S. 709 (1987) (plurality opinion).

83 *Id.* at 725.

forcement,”⁸⁴ the plurality compared the ability of public employers and law enforcement officers to meet the demands of probable cause.⁸⁵ So began the creation of a niche for “special needs” cases, to be distinguished from those searches conducted by law enforcement officials.

The boundaries of the “special needs” analysis were further tested in *Griffin v. Wisconsin*.⁸⁶ In *Griffin*, the majority recognized a “special need” for the supervision of parolees within Wisconsin’s probation system. This need, in turn, justified the search of a probationer’s residence in the absence of probable cause or a warrant, pursuant to statute.⁸⁷

Even though he recognized that the supervision of probationers represented a “special need,” Justice Blackmun vehemently dissented in *Griffin*. He concluded that the presence of a “special need” merely justified “an application of the Court’s balancing test and an examination of the practicality of the warrant and probable-cause requirements.”⁸⁸ In Justice Blackmun’s view, the probationer’s status as a recent criminal offender only justified lessening the probable cause standard to that of reasonable suspicion. Citing the traditionally heightened protections afforded private dwellings, he also refused to accept the necessity of discarding the warrant requirement for the search of a probationer’s house.⁸⁹ His interpretation, however, was not to prevail.

The public officials in *T.L.O.*, *O’Connor*, and *Griffin* had all possessed individualized suspicion of wrongdoing before engaging in a search. Any supposition that this would become an inexorable requirement within the “special needs” analysis was soon dispelled in two cases decided the same day in 1989, *Skinner v. Railway Labor Executives’ Association*⁹⁰ and *National Treasury Employees Union v. Von Raab*.⁹¹ In *Skinner*, Justice Kennedy, writing for the majority, applied the “special needs” rationale to a federal regulation mandating suspicionless drug testing of railroad employees after train accidents. Referencing *Martinez-Fuerte*, Justice Kennedy explained that “a showing

84 *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (emphasis added).

85 *O’Connor*, 480 U.S. at 724.

86 483 U.S. 868 (1987).

87 *Id.* at 875–80.

88 *Id.* at 881 (Blackmun, J., dissenting).

89 *Id.* at 883–84.

90 489 U.S. 602 (1989).

91 489 U.S. 656 (1989).

of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.”⁹²

The holding in *Martinez-Fuerte*, however, was limited to brief stops and accompanying questioning. The limited invasiveness of the seizures was a crucial consideration.⁹³ In general, the checkpoint cases relied on the distinction between searches and seizures as a primary limitation on law enforcement activity. *Skinner*, in contrast, authorized suspicionless searches of a person’s body.⁹⁴ Outside of the highway checkpoint context, the Court was finding that a search/seizure distinction was incompatible with the policy tradeoffs it sought to uphold. The distinction simply could not be rationalized with the more invasive techniques that the Court thought were necessary to combat evils such as school violence.

This point was soon reemphasized in the context of drug screening. *Von Raab* involved a challenge to the Customs Service’s proposed drug-screening program for employees holding certain sensitive positions, such as those tasked with drug interdiction.⁹⁵ Justice Kennedy, again writing for the majority, determined that the deterrence of drug-use within sensitive governmental positions represented a “special need” at least as important as the promotion of railway safety in *Skinner*.⁹⁶ Again, the majority found that the absence of individualized suspicion, let alone probable cause or a warrant, did not make the searches presumptively unreasonable.⁹⁷ Unlike in *Skinner*, the preemptive nature of the drug-testing in *Von Raab* may have made the searches more difficult to disentangle from a “normal need” of law enforcement.⁹⁸ However, the federal program seemed to account for this. As Justice Kennedy explained, “[t]est results may not be used in a criminal prosecution of the employee without the employee’s consent.”⁹⁹

A final point of interest in *Von Raab* was how the border search cases supported the recognition of a “special need.”¹⁰⁰ Even though

92 *Skinner*, 489 U.S. at 624.

93 *Id.*

94 *Id.* at 625–33.

95 489 U.S. at 665–66.

96 *Id.* at 666.

97 *Id.* at 668.

98 *Id.* at 660.

99 *Id.* at 666.

100 See *id.* at 668–70 (citing *Carroll v. United States*, 267 U.S. 132 (1925), *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), and *United States v. Ramsey*, 431 U.S. 606 (1977)), to support the position that the “national interest in self-protection could be irreparably

the search in *Von Raab* ultimately shared a commonality of purpose with these cases (promoting the integrity of border control operations), the appropriate analysis remained distinct. Indeed, the border search rationale, even if it were applicable in *Von Raab*, would have been insufficient to uphold the Court's finding. While the Court in *Montoya de Hernandez* considered routine searches at the border to be obviously permissible in the absence of probable cause, it found that reasonable suspicions was still a prerequisite to a seizure of an individual at the border.¹⁰¹ It is highly unlikely that the *Montoya de Hernandez* Court would have considered the collection of urine for drug-testing to be a "routine border search"¹⁰² within the meaning of its decision. This presents another example of the growing divide between "special needs" cases and other sub-probable cause cases. As with the search in *Griffin* of the probationer's home, a location usually entitled to heightened Fourth Amendment protection, the employer searches in *Skinner* and *Von Raab* did not seem as troubling to the Court as those conducted by law enforcement officers in other areas.

The Court has more recently applied the "special needs" analysis to random drug-testing of public school students. A decade after *T.L.O.*, the Court returned to a school environment in *Vernonia School District 47J v. Acton*.¹⁰³ Writing for six Justices, Justice Scalia found that the randomized drug testing of students voluntarily participating in extracurricular athletics was permissible under the reduced burdens of the analysis.¹⁰⁴ Referencing *T.L.O.*'s previous application of the "special needs" doctrine to public schools, Justice Scalia omitted a discussion on the practicality of applying the warrant or probable cause requirements.¹⁰⁵ Under Justice Scalia's analysis, the "special needs" requirement apparently only asked whether it would be practical to apply the warrant and probable cause requirements to a search under the circumstances.¹⁰⁶ After deciding that it would be, the balancing of interests presented a separate issue. Surprisingly, this approach essentially divorced the importance of the purpose be-

damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics").

101 473 U.S. at 541.

102 *Id.* at 540.

103 515 U.S. 646 (1995).

104 *Id.* at 664-65.

105 *Id.* at 653.

106 *Id.* at 655-56.

hind the search from the determination that a “special need” was present.

The decision in *Acton* also signaled an expansion of the “special needs” doctrine. Unlike in *T.L.O.*, no individualized suspicion was required in *Acton*.¹⁰⁷ *Skinner* and *Von Raab* had previously upheld searches devoid of individualized suspicion, but the decision in *Acton* went farther, as Professor Wayne LaFave has explained.¹⁰⁸ Professor LaFave has recognized three key departures from prior “special needs” cases.¹⁰⁹ First, the nature of the intrusion is more severe in situations where supervised provision of a urinalysis sample is required.¹¹⁰ Second, the drug-testing of student athletes was not responding to a risk of the same magnitude as any of the prior “special needs” cases (or, arguably, any other category of cases authorizing searches in the absence of probable cause).¹¹¹ Referencing virtually all of these categories, Professor LaFave explained, “[a]lthough a drug-free educational environment is a significant governmental interest, it is quite obviously not of the same order as those just mentioned.”¹¹²

Another crucial distinction in *Acton* was the absence of a valid explanation as to why a requirement of individualized suspicion would be either infeasible or impractical prior to drug testing student athletes.¹¹³ As Justice O’Connor noted in her dissent, the school environment, entailing close supervision of students, is actually rather well-suited to a requirement of individualized suspicion.¹¹⁴ Ultimately, by discarding an analysis considering the feasibility of heightened Fourth Amendment protections, the opinion may have signaled the most radical departure from prior cases. The middle ground be-

107 *Id.* at 661.

108 See Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2577–79 (1996).

109 *Id.* at 2577.

110 *Id.* As Professor LaFave points out, the Court in *Skinner* emphasized the greater concern over the invasiveness of urinalysis tests and the procedures for procuring the samples. *Id.* at 2577–78. However, both *Skinner*, 489 U.S. 602, 634 (1989), and *Von Raab*, 489 U.S. 656, 679 (1989), ultimately upheld these tests despite the heightened intrusiveness. As such, while this distinction may represent a departure from the earlier “special needs” cases, the nature of the intrusion was not the great departure in *Acton*. Instead, the great departure was this heightened intrusion combined with the weaker justification for the search procedure.

111 LaFave, *supra* note 108, at 2577.

112 *Id.* at 2578.

113 *Id.* at 2578–79.

114 *Vernonia Sch. District 47J v. Acton*, 515 U.S. 646, 679 (1995) (O’Connor, J., dissenting).

tween probable cause-based searches and suspicionless searches had apparently disappeared.

D. Edmond and Ferguson: Substantive Checks on the Expansion of Suspicionless Searches or Mere Speed Bumps?

T.L.O. and its progeny left a serious question about how the expansion of suspicionless search doctrine could be reasonably contained. If the Court was having difficulty providing an integrated understanding that encompassed all of the various sub-probable cause categories, it seemed unlikely that it could create a workable doctrinal boundary to distinguish these cases from the greater mass of search and seizure law. Still, in the past decade the Court has, with limited success, made a number of attempts to do just that.¹¹⁵

An initial indication of the Court's concern with expanding suspicionless searches appeared in *Chandler v. Miller*.¹¹⁶ In *Chandler*, eight Justices determined that Georgia's drug testing requirement for certain elected officials did not fit within a permissible suspicionless search category.¹¹⁷ While the majority's language seemed to limit the purview of suspicionless searches, the facts of *Chandler* left doubt as to its greater applicability.¹¹⁸

The first meaningful attempt to limit the permissible purposes for suspicionless searches occurred in *City of Indianapolis v. Edmond*.¹¹⁹ In the summer of 1998, the City of Indianapolis instituted a series of roadway checkpoints with the expressed goal of interdicting narcotics.¹²⁰ Similar to previously upheld checkpoints, applicable checkpoint guidelines limited officer discretion in the selection of vehicles.¹²¹ Once a vehicle was stopped, a canine trained in the detection of narcotics would circle the vehicle and signal if narcotics were detected.¹²² No further search would be conducted in the absence of

115 See Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501, 521 (2004) (finding that although the Court has recently embraced the role as a more discerning "policy magistrate" in suspicionless search and seizure cases, it is uncertain whether it will retain this role).

116 520 U.S. 305 (1997).

117 *Id.* at 309.

118 See Sundby, *supra* note 115, at 517–18 (noting that *Chandler* was a relatively easy case for the Court to decide and its impact was questionable in light of the "special needs" cases).

119 531 U.S. 32 (2000).

120 *Id.* at 34–35.

121 *Id.*

122 *Id.*

suspicion.¹²³ Nonetheless, a majority of the Court determined that a crucial line had been crossed.

Justice O'Connor, writing for the majority, held that the checkpoint violated an implicit understanding from the accumulated case law: that a "general interest in crime control" was not a sufficient justification for a departure from individualized suspicion.¹²⁴ In developing a new distinction to separate *Edmond* from all prior suspicionless jurisprudence, Justice O'Connor focused her analysis on the "primary purpose" of the checkpoint.¹²⁵ She concluded, "[w]e decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes."¹²⁶

Absent from the decision was a clear explanation of how courts should determine a search procedure's primary purpose. Narcotics interdiction was easily categorized as its purpose implicated a general interest in crime control, presenting an easy case in which to establish the new rule. Clearly, previously upheld suspicionless searches had, at least facially, been conducted for law enforcement purposes.¹²⁷ By explicitly reiterating the holdings of these past decisions, *Edmond* emphasized the lack of a viable distinction.¹²⁸ Even if the decision had provided clear guidance on which purposes were permissible, it still failed to explain how to adequately distinguish a primary purpose from an ancillary one. As Indianapolis had explicitly stated the narcotics-interdiction purpose of its checkpoints, there was little question as to its primary purpose.¹²⁹ However, a simple counterfactual indicates the difficulty of making such determinations. If Indianapolis had *not* stated the purpose of these checkpoints, or if it had masked the checkpoints as attempts to regulate other lawful purposes (such as verifying driver licenses), the judicial determination of the checkpoint's primary purpose might well have come out differently.

The most recent applications of the primary purpose test have heightened the stubborn mystery that encompasses suspicionless searches and the Fourth Amendment. In *Ferguson v. City of Charles-*

123 *Id.*

124 *Id.* at 41 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)).

125 *Edmond*, 531 U.S. at 40.

126 *Id.* at 44.

127 *See Edmond*, 531 U.S. at 42 (acknowledging that the goals in *Martinez-Fuerte* and *Sitz*, securing the border and arresting drunk drivers, respectively, are law enforcement activities implicating criminal proceedings).

128 *See id.* at 48.

129 *See id.* at 35.

ton,¹³⁰ the Court invalidated a public hospital's policy of reporting to police the prenatal use of cocaine, determined by drug-screens, by expectant mothers.¹³¹ The Court held that the situation was distinguishable from prior "special needs" cases due to the immediate law enforcement objectives of the program and the use of the drug-screens in criminal prosecutions.¹³² In so doing, the majority found that the ultimate purpose of the hospital policy was not controlling. The majority admitted that the hospital's ultimate purpose may have been to encourage the women in question to seek treatment.¹³³ In this case, however, the immediate purpose of the program was held to be indistinguishable from its "primary purpose."¹³⁴ As the immediate purpose of the program was to collect evidence for a criminal prosecution, the majority found that the program violated the *Edmond* test.¹³⁵ Any distinction between the impermissible purpose in *Ferguson* and the permissible purposes in prior highway checkpoint cases is dubious at best.¹³⁶

IV. THE IMPLICATIONS OF THE FAILED ATTEMPTS TO RATIONALIZE SUSPICIONLESS SEARCH AND SEIZURE DOCTRINE

The prevailing suspicionless search regime is at once too broad and too restrictive. It is too broad in that it fails to demarcate clear boundaries between permissible and impermissible searches based on the purposes of the searches. It is too restrictive in that it limits the techniques available to law enforcement in the furtherance of permissible goals. Such limitations have proven manageable (if not coherent) under the narrow circumstances in which the Court has examined law enforcement searches. New demands for suspicionless searches, however, are demonstrating the difficulties of applying current case law to a broader spectrum of cases. Considering the past forty years of suspicionless search jurisprudence, anyone anticipating a doctrinal solution to such challenges should not hold his breath.

130 532 U.S. 67 (2001).

131 *Id.* at 86.

132 *Id.* at 79–85.

133 *Id.* at 82–84.

134 *Id.*

135 *Id.* at 84.

136 *See, e.g.,* Butterfoss, *supra* note 7, at 479–80 (examining the similarity between the immediate law enforcement purpose of the hospital in *Ferguson* and the immediate law enforcement purposes at work in *Sitz* and *Martinez-Fuerte*).

A. *A Problem of Purpose*

The range of permissible purposes for suspicionless searches is not meaningfully restricted by the current state of the law. The confusion suggests at least two undesirable consequences. First, and most obviously, searches that actually represent an undesirable trade-off between public policy and an invasion of individual liberties are likely to be permitted under the current regime. Second, the confusion may actually discourage other searches that actually reflect a desirable tradeoff.

By grafting the primary purpose test onto the existing balancing test, the Court apparently sought to limit the permissible rationales for suspicionless searches. While the primary purpose test, on its face, proscribes a vast range of overt law enforcement conduct, its clarity is limited to those law enforcement techniques supported by an evident primary purpose. The ability of the test to restrict undesirable search techniques with multiple or uncertain purposes is highly suspect.¹³⁷ Indeed, the test has added an entirely new element of confusion to suspicionless search jurisprudence.¹³⁸ Assuming that the Court continues to examine suspicionless search cases so as to promote perceived desirable outcomes on a case-by-case basis, this confusion is likely to persist. Presumably, the primary purpose test also serves as a limit on the Court by restricting the spectrum of permissible purposes. As with purported limits placed on law enforcement, however, any such restriction is superficial and prone to gamesmanship.¹³⁹

The primary purpose test fails to adequately restrict the use of suspicionless searches by law enforcement in two ways. First, despite the protections of *Edmond* and *Ferguson*, there is a heightened risk of entirely pretextual claims in “special needs” cases that cannot be checked by the test.¹⁴⁰ Second, even when law enforcement agencies possess suitable “non-law enforcement” justifications for a “special needs” search, such as the interdiction of drunk drivers, they will like-

137 See generally Brooks Holland, *The Road 'Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293 (2006) (discussing the application of *Edmond* in multi-purpose checkpoints).

138 See Butterfoss, *supra* note 7, at 484–85 (examining the problems introduced by the test).

139 See *id.* at 485.

140 See *id.* at 484 (concluding that based on the Court’s track record with pretext inquiries, it is unlikely that post-*Edmond* cases would be subjected to careful scrutiny for a pre-textual purpose).

ly overuse such procedures.¹⁴¹ Whenever a law enforcement agency considers a suspicionless search, it cannot fail to consider the possibility that the otherwise impermissible procedure will reveal unrelated evidence of criminality. Under such circumstances, law enforcement agencies will be encouraged to engage in these procedures more frequently than in the (purely theoretical) situation where the promotion of the policy-driven “special need” is the only goal. Presuming that some optimal level of searches or seizures exists to promote the “special needs” interest at stake, the inherent weight of traditional law enforcement objectives in an agency’s decision to conduct a “special needs” search threatens to severely over-encourage such procedures.¹⁴²

Consider, for example, the difficulty of determining the primary purpose of a license-and-registration checkpoint purportedly regulating the congestion caused by an open-air drug market.¹⁴³ Despite the inherent difficulty of parsing apart the purpose at hand, in some situations well-defined “programmatic purposes” may be evident, assisting the task.¹⁴⁴ However, a number of concerns suggest that a “programmatic purposes” analysis will not provide an adequate solution. First, it is unlikely that the information required to make such an examination will often be present. Second, even when such information is apparently present, these *ex post* inquiries into law enforcement intent are inherently difficult affairs, decreasing confidence in outcomes. Finally, determinations of “programmatic purposes” are necessarily fact-intensive and time-consuming judicial efforts.¹⁴⁵ Even

141 See, e.g., *United States v. Davis*, 270 F.3d 977 (D.C. Cir. 2001) (noting that police officers had instituted the traffic safety stops at issue following complaints about speeding, as well as complaints about drug dealing, gun violence, robberies, and assaults); Holland, *supra* note 137, at 321 (discussing *Davis* and the difficulty of uncovering secondary purposes under the *Edmond* primary purpose test).

142 Holland, *supra* note 137, at 322–23.

143 The United States Court of Appeals for the District of Columbia was presented with this situation in *United States v. McFayden*, 865 F.2d 1306 (D.C. Cir. 1989). Although decided before *Edmond* established the primary purpose test, the court nonetheless found that the “principal purpose” of the roadblock was to conduct license-and-registration checks and that “[w]hatever advantage was gained in drug enforcement was coincidental.” *Id.* at 1312–13; cf. *United States v. Davis*, 270 F.3d 977, 981 (D.C. Cir. 2001) (finding that *Edmond* requires a more exhaustive analysis of potential “programmatic purposes” in the determination of a similar checkpoint’s primary purpose (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46 (2000))).

144 See Holland, *supra* note 137, 346–47 (arguing that a discerning examination for “programmatic purposes” can effectively apply the basic *Edmond* test for highway checkpoints and protect against abuses).

145 See *id.* at 347.

if such purposes could be found, both the judiciary and law enforcement would be burdened by the search. The guidelines that generally accompany roadway checkpoints would certainly assist in this task, but there is no requirement that the purposes of a procedure be clearly delineated. Indeed, the prevalence of a “programmatic purposes” inquiry might actually create a perverse incentive for law enforcement agencies to stop offering clear explanations of the purposes behind checkpoints.

Suspicionless searches are permitted with the understanding that they are unusually offensive to individual liberties. Whether a valid non-law enforcement objective exists for a suspicionless procedure, the over-application of these procedures remains a significant concern. This concern is likely to only grow as Fourth Amendment exceptions are authorized under new circumstances and increasingly embraced by law enforcement.¹⁴⁶ The primary purpose test cannot adequately separate desirable and undesirable search procedures on its own. The standard is plagued by uncertainty and a significant potential for abuse. Realistically, however, we must accept that a comprehensive regime effectively rationalizing the disjointed facets of suspicionless search law is unlikely to develop organically from the primary purpose test.

1. An Insufficient Balancing Test

While the current state of the law inadequately limits the purposes which can support suspicionless searches, conversely, it also unduly restricts the techniques permissible in achieving these purposes. Again, the absence of judicial guidance is largely responsible. The enacting agency has incentives to select sub-optimal techniques in order to guarantee that the search procedure will be found reasonable on review. The problem is aggravated by certain considerations that the Court has emphasized in the balancing test. Some of the elements that the Court has found to support the reasonableness of searches, in fact, undermine their efficacy without tangibly protecting individual rights.

These problems have not affected all of the sub-probable cause search categories equally. The techniques employed by law enforcement officers have received much greater scrutiny than those em-

¹⁴⁶ See, e.g., *supra* note 14 and accompanying text.

ployed by other public officials.¹⁴⁷ This makes sense for two reasons. First, to the extent that such scrutiny seeks to limit the discretion of officers during search and seizure procedures, it seems to be justified. Second, in situations where other public officials conduct the search or seizure, there is usually some additional link between the party searched and the body conducting the search.¹⁴⁸ Arguably, the connection between the parties makes the search more reasonable (or perhaps the lack of an external connection to the party searched makes law enforcement searches appear *less* reasonable).

Based on these considerations, the additional scrutiny has been fairly easy to justify for the extant categories of suspicionless law enforcement searches, like those at checkpoints. Most of the restrictions imposed on these procedures have been appropriately justified to limit discretion and selective enforcement. However, the rise of new categories of desirable law enforcement searches lacking individualized suspicion has emphasized the need for greater safeguards than in the checkpoint cases.¹⁴⁹

On its face, the reasonableness balancing test derived from *Camara* seems to account for situations where more invasive techniques are warranted by a greater public need. As the extent of the need increases, so will a court's willingness to authorize more invasive techniques. However, the variable application of the balancing test also limits the ability of a governmental agency to predict which techniques will be upheld *post facto* by the judiciary. This uncertainty may result in the self-selection of sub-optimal methods by governmental agencies.

147 Indeed, at times it has appeared that the techniques chosen by non-law enforcement officials have received virtually no scrutiny whatsoever. Consider, for example, Justice Scalia's opinion in *Acton*. The opinion upheld a technique for the suspicionless drug testing of student athletes without examining whether a technique utilizing individualized suspicion requirement would even be practical. See *supra* Part III.C.

148 Consider, for example, the connection between a student and a school (*T.L.O.*) or a public employer and an employee (*Skinner*).

149 Compare *Delaware v. Prouse*, 440 U.S. 648 (1979) (requiring sufficient safeguards to prevent officer discretion and suggesting that there must be some affirmative indication that the search procedure in question would promote the public good), with *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (requiring no such restrictions). While it is true that *Prouse's* apparent requirement of provable utility was eschewed in *Sitz*, in many ways the policy justifications for sobriety checkpoints place them closer to "special needs" cases than traditional checkpoint cases. As such, *Sitz* is better understood as a transitional case that foreshadowed policy-focused "special needs" to come. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990).

Compounding the problem, in evaluating the invasiveness of a technique, courts often emphasize the importance of factors which directly undermine its efficacy. Accepting that certain suspicionless searches can be justified while still being offensive to privacy interests, a painful irony results. In order to limit the invasiveness of searches, courts encourage methods that may undercut the purposes justifying the procedures in the first place. Consequently, individuals may unnecessarily endure suspicionless search techniques which inadequately promote the underlying goals. The incremental invasion of rights produced by a more invasive technique must be weighed against the possibility that the primary invasion of rights occasioned by the initial search or seizure will be rendered ineffectual in the absence of the technique.

2. *Black Sails on the Horizon: Why the Situation Will Get Worse Sooner Rather than Later*

For reasons described above, these restrictions primarily hamper search procedures conducted by law enforcement officials. Although such restrictions may be justifiable—or at least understandable—in the context of the cases that have reached the Court to date, new threats are challenging the desirability of such restrictions. In particular, contemporary concerns over terrorist attacks and other catastrophic events are beginning to prompt new categories of suspicionless searches and seizures in lower courts.¹⁵⁰ The potential gravity of the harm implicated by these events sets them apart from prior cases. It also distinguishes them from new categories of suspicionless searches that are currently being litigated in lower courts.¹⁵¹

The expansion of suspicionless search categories and the growing disparity in the harms sought to be prevented by such searches present serious challenges to the coherent and comprehensive regulation of the varied categories as a whole.¹⁵² Assuming that increased

¹⁵⁰ See *supra* note 14 and accompanying text.

¹⁵¹ Consider, for example, the application of the “special needs” doctrine and its corollaries to mandatory DNA sampling from arrestees. See D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 489–98 (2001) (examining differing opinions in lower courts as to whether DNA sampling may be permissible under the “special needs” or related doctrines).

¹⁵² For example, rising concerns over terrorism have prompted proposals to establish special approaches for terrorism-related searches. See, e.g., Kyle P. Hanson, Note, *Suspicionless Terrorism Checkpoints Since 9/11: Searching for Uniformity*, 56 DRAKE L. REV. 171, 210 (2007) (recommending reviews of proposed terrorism-related checkpoints by the Department of Homeland Security as a check against unfettered law enforcement discretion).

deference to law enforcement is justified under certain circumstances, an additional problem follows: if increasingly invasive techniques are permitted, there will be a correspondingly heightened concern over potential abuses.

V. FACING THE FACTS: THE ADVANTAGES OF APPLYING THE WARRANT REQUIREMENT TO SUSPICIONLESS SEARCHES AND SEIZURES

The rise of the contemporary suspicionless search and seizure regime threatens to imprint a great irony into the Fourth Amendment: the less that you are suspected of committing a crime, the more likely it is that you can be searched without a warrant. This section proposes to dismantle that irony and to significantly mend suspicionless search and seizure doctrine in the process.

With limited exceptions,¹⁵³ the Court has found that the warrant requirement does not extend into the realm of sub-probable cause. One proffered justification for this predicament is that the purposes of the warrant requirement are not furthered in situations where individualized suspicion is lacking.¹⁵⁴ Justice Scalia has gone even farther by concluding for the majority in *Griffin* that the warrant procedure would be unconstitutional in its application under such circumstances.¹⁵⁵ This section argues that neither of these conclusions holds true. First, the constitutionality of area warrants lacking individualized suspicion will be addressed. Next, the utility of area warrants in the context of suspicionless searches will be examined.

A. *The Constitutionality of Area Search Warrants*

1. *The 1970s and Early Support for Area Searches*

There are two potential constitutional obstacles to applying the Warrant Clause to suspicionless searches. The first potential obstacle is met at the start of the Warrant Clause: “and no Warrants shall is-

153 The primary exception is for administrative searches. The warrant requirement may still apply in such cases, even though there is a reduced standard for probable cause. *See* *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 532–33 (1967) (requiring a warrant prior to a housing inspector’s search of a building even under a relaxed standard for probable cause).

154 *See, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 564–65 (1976) (refusing to apply the warrant requirement to a checkpoint search as the purposes of the warrant requirement would not be served).

155 *Griffin v. Wisconsin*, 483 U.S. 868, 877–78 (1987).

sue, but upon probable cause.”¹⁵⁶ A literal reading of the Warrant Clause, then, apparently requires that any and all warrants be supported by probable cause.¹⁵⁷ The second potential obstacle appears later in the Warrant Clause in the so-called particularity requirement, which requires that a warrant describe “the place to be searched, and the persons or things to be seized.”¹⁵⁸ A close textual reading of the particularity requirement arguably restricts the application of warrants to those searches where a threshold of particularity can be met with respect to the persons, or items, sought. Area warrants would likely not be able to individually identify the persons to be searched or seized.¹⁵⁹ Further, even if an area warrant could identify a class of individuals to be targeted, the identification of a group as a search target would still arguably be insufficient.

However, the Court has not interpreted the Warrant Clause literally as suggested above. First, *Camara* explicitly rejected the requirement of probable cause for administrative area warrants.¹⁶⁰ Rather than applying the traditional understanding of probable cause to such warrants, the Court evaluated the housing inspection program before it by looking purely for reasonableness.¹⁶¹ Within this test, the governmental interest was held to be the determinative factor: “If a valid public interest justified the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.”¹⁶² *Ca-*

156 U.S. CONST. amend. IV.

157 See, for example, Justice Scalia’s majority opinion in *Griffin*, which explained: While it is possible to say that Fourth Amendment reasonableness demands probable cause without a judicial warrant, the reverse runs up against the constitutional provision that “no Warrants shall issue, but upon probable cause.” The Constitution prescribes, in other words, that where the matter is of such a nature as to require a judicial warrant, it is also of the nature as to require probable cause.

Griffin, 483 U.S. at 877 (citation omitted).

158 U.S. CONST. amend. IV.

159 This, however, is not necessarily true. It may often be the case that the individual members of a class targeted by a suspicionless search or seizure are fully identifiable beforehand. In the context of administrative inspections this has generally proven true. See, e.g., *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537 (1967) (authorizing warranted area-inspections of buildings). Virtually all of the “special needs” searches and seizures to reach the Court have similarly provided a targeted class of individuals identifiable beforehand. See, e.g., *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (finding railroad employees involved in a rail accident); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (providing for certain treasury employees); *Griffin*, 483 U.S. 868 (discussing probationers); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (applying to students).

160 *Camara*, 387 U.S. at 534–35.

161 *Id.* at 536–37.

162 *Id.* at 539.

marra's promulgation of a reasonableness analysis for determinations of probable cause represented a tremendous paradigm shift in Fourth Amendment jurisprudence. That the same decision applied this analysis within the context of a warranted search supports the conclusion that the *Camara* Court did not intend to create a threshold below which a warrant could not be issued. Rather, the decision suggests that the new reasonableness analysis for probable cause should inform the warrant requirement as well.

Subsequent cases involving administrative searches support this conclusion. Consider, for example, the "closely-regulated" business exception to the Fourth Amendment. As in *Camara*, administrative searches of "closely-regulated" businesses are subject to a reduced standard for probable cause that does not require individualized suspicion.¹⁶³ In such cases, the Court has developed an exception to the warrant requirement to allow for warrantless searches where: (1) a substantial governmental interest existed; (2) the warrantless inspections were necessary to further the regulatory scheme; and (3) the search contained a constitutionally adequate substitute for a warrant.¹⁶⁴

Yet, where the Supreme Court has required a warrant for an administrative search, it has made clear that it will not apply a rigorous understanding of the particularity requirement. Consider *Marshall v. Barlow's Inc.*,¹⁶⁵ in which the Court upheld the warrant requirement for work-place inspections under the Occupational Safety and Health Act of 1970.¹⁶⁶ Unlike the typical warrant for a search of a location, a warrant for an administrative search lacking the traditional level of probable cause generally cannot provide much detail beyond the address that is to be searched. Indeed, such a search is usually premised on the fact that the government *does not* know exactly what it is looking for.¹⁶⁷ The same is true for suspicionless searches. For such a warrant, the government will likely be able to provide an address, a stated purpose, and general parameters for a search. This should be

163 See, e.g., *New York v. Burger*, 482 U.S. 691, 699–702 (1987) (applying a reduced standard of probable cause for the administrative inspection of a vehicle dismantling business); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (applying the lower standard to inspections of mines).

164 *Burger*, 482 U.S. at 702–03.

165 436 U.S. 307 (1978).

166 *Id.* at 325.

167 See *Camara*, 387 U.S. at 535 (noting that the inspection at issue was aimed at ensuring city-wide compliance and was not based on evidence of specific problems at the address in question).

sufficient to satisfy the particularity requirement under the unique circumstances of these searches. Moreover, even if only a modicum of particularity could be specified in a suspicionless search warrant, this modest amount of particularity must be contrasted against the alternative. In the absence of a warrant, suspicionless searches have no particularity requirement whatsoever.

Still, in the context of suspicionless searches, the Supreme Court has generally proven divided on the constitutionality of area searches, although it has never addressed the issue in any depth. Justice Powell was perhaps the most vociferous supporter of their constitutionality. Early in the Court's suspicionless search jurisprudence, he concluded that "the determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights."¹⁶⁸ Justice Powell would have analyzed the necessity for warrants in situations lacking individualized suspicion, as in *Almeida-Sanchez*, by examining the standard Fourth Amendment exceptions to the warrant requirement, namely exigency.¹⁶⁹ Beyond the classic exceptions, Justice Powell's concurrence in *Almeida-Sanchez* also analyzed the feasibility of the warrant requirement under the particular circumstances of the case.¹⁷⁰ Such an analysis was fully compatible with his focus on reasonableness. Indeed, it seemed to parallel the consideration of less invasive alternative means in mainstream Fourth Amendment jurisprudence.

Until Justice Scalia's opinion in *Griffin*, the Court appeared to be divided as to the constitutionality of area warrants. However, in at least one of the early suspicionless search cases—*Almeida-Sanchez*—a majority of the Court appeared to accept their constitutionality.¹⁷¹

168 *Almeida-Sanchez v. United States*, 413 U.S. 266, 284 (1973) (Powell, J., concurring).

169 *Id.* at 281–82.

170 *Id.* at 282–83.

171 *Id.* at 270 n.3 ("The Justices who join this opinion are divided upon the question of the constitutionality of area search warrants such as described in Mr. Justice Powell's concurring opinion."). Although the split within the *Almeida-Sanchez* majority on the issue is uncertain, both Justice Powell's concurrence and Justice White's dissent (with which three additional justices joined) accepted the constitutionality of such area warrants. *See id.* at 279–81 (Powell, J., concurring) (arguing that the warrant requirement is fully applicable to searches lacking probable cause); *id.* at 288 (White, J., dissenting) ("I agree with Mr. Justice Powell that such a warrant so issued would satisfy the Fourth Amendment . . ."). On this basis, it is more likely than not that, at the time, a majority of the Court did not view probable cause as a prerequisite for a warrant. As to the ongoing nature of the divide, the Court appeared to be unwilling to settle the issue through the checkpoint cases, even when the issue was implicated in lower courts. *See, e.g., United States v. Martinez-*

Since then, the Court appears to have gone out of its way to avoid having to rule on the issue. When the issue finally reappeared in *T.L.O.*, the majority simply held that a warrant would be impractical under the circumstances, failing to note any potential constitutional issues.¹⁷² Focusing on the practical concerns of the setting, the Court analogized to its *Camara* opinion.¹⁷³ By relying on the unsuitability of a warrant to the school environment, the majority appeared to presume that a warrant based on less than probable cause could be constitutional under the circumstances. Further, the examination closely paralleled Justice Powell's concurrence in *Almeida-Sanchez*, emphasizing the reasonableness of the search under the practical circumstances.¹⁷⁴

In sum, the Court's prior jurisprudence hints that area warrants are, in fact, constitutionally permissible. The continuing Fourth Amendment focus on reasonableness in the wake of *Camara* only further suggests this. Indeed, the reasonableness of such searches is only more evident when the theoretical underpinnings of the alternative understanding are scrutinized.

2. *The Fallacy of the (Apparently) Prevailing Understanding*

While a strict textual analysis may support Justice Scalia's interpretation of the invalidity of area searches, it cannot explain the permissibility of such searches in other circumstances.¹⁷⁵ More egregiously, this interpretation of the Fourth Amendment creates a distressing paradox. On the one hand, suspicionless searches and seizures bear an uncomfortable resemblance to the general warrants that so vexed the Framers, albeit absent the warrant procedure.¹⁷⁶ In at least one situation, the Court has even authorized suspicionless searches of homes,

Fuerte, 428 U.S. 543, 562 n.15 (1976) (determining that since no warrant was needed, the issue need not be addressed even though it had been the principle issue before the Ninth Circuit below).

172 See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

173 *Id.*; see also *id.* at 356 (Brennan, J., concurring) (presuming the constitutionality of warrants in "special needs" cases where probable cause is absent).

174 *Almeida-Sanchez*, 413 U.S. at 283 (Powell, J., concurring).

175 See *supra* Part III.A.

176 See *Davies*, *supra* note 19, at 576. Although *Davies* recounts that the Framers' primary concern was with searches of homes under general warrants, he explains that the Framers' "larger purpose" was "to curb the exercise of discretionary authority by officers." *Id.* at 556. But see *Amar*, *supra* note 19, at 771 (arguing that the Framers were more concerned with judicial abuses than with warrantless intrusions by government agents).

the very intrusion with which the Framers were most concerned.¹⁷⁷ In contrast, the warrant requirement, which could serve as a potential restraint on abuses of official discretion, has almost never been applied in the suspicionless search context.¹⁷⁸ Thus, paradoxically, while suspicionless searches and seizures resemble general warrants, they are not constrained by the requirement of actually obtaining a warrant. They are, in a sense, just general searches and general seizures lacking any substantive oversight.

Regardless of the type of searches that the Framers were most concerned with, the warrant requirement can potentially serve to limit official discretion and define permissible governmental activity.¹⁷⁹ Ironically, under Justice Scalia's view of the Fourth Amendment, the less one is suspected of wrongdoing by the government, the more likely it is that the government will avoid judicial oversight for searching that person.¹⁸⁰ This interpretation enfeebles the Warrant Clause to the point of nullity. Under any understanding of Fourth Amendment history, this cannot represent the Framers' intent. The real question then is what, if any, compelling reasons exist *not* to unify suspicionless search doctrine with the rest of Fourth Amendment jurisprudence.

B. Potential Benefits of Applying the Warrant Requirement to Suspicionless Searches

The Supreme Court has never articulated a clear exception to the warrant requirement for suspicionless searches and seizures. Although Justice Scalia has opined a view suggesting their unconstitutionality, the Court's prevailing approach in these cases has been to bypass the warrant requirement through an unparalleled solicitude

177 *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *see also* *Davies*, *supra* note 19, at 642–49 (explaining the unique concern in the colonies over intrusions into homes).

178 The sole exception exists in the administrative search context where searches of closely regulated industries may still require warrants even though no individualized suspicion exists. *See* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323–24 (1978).

179 *See, e.g., Johnson v. United States*, 333 U.S. 10, 14 (1948) (holding that the Fourth Amendment's "protection consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

180 This predicament bears a certain resemblance to the point that Justice Stewart made of closely regulated industries in *Donovan*, when he criticized the Court's reasoning for suggesting that "the scope of the Fourth Amendment diminishes as the power of governmental regulation increases." *Donovan v. Dewey*, 452 U.S. 594, 612 (1981) (Stewart, J., dissenting).

with reasonableness. Time and time again, the Court has found that the maintenance of the warrant requirement under the specific circumstances in suspicionless search cases would prove unworkable.¹⁸¹ Alternatively, the Court has at times suggested that a warrant procedure would prove superfluous in the case before it.¹⁸² Presuming that area search warrants on less than probable cause can be constitutional, neither of these arguments can explain why the warrant requirement has *never* been applied in any of the contexts examined except for administrative searches.

More importantly, these arguments cannot account for persuasive justifications encouraging the application of area warrants under more expansive circumstances. The traditional benefits of the warrant requirement are fully applicable to searches on less than probable cause. However, where law enforcement lacks the traditional requirement of probable cause, the application of a warrant requirement has unique benefits. First, the warrant procedure requires (or could require) law enforcement to clearly delineate the goals of a search and the methods to be used in furtherance of those goals. Second, to the extent that the warrant procedure serves as an obstacle to law enforcement, it may encourage law enforcement agencies to self-prioritize the most important (or effective) of these privacy-infringing searches. Third, by reducing *ex ante* uncertainty, a warrant procedure may actually encourage more effective methods to be used during these searches.

Such steps are all the more important because the primary purpose test likely over-encourages the use of suspicionless searches. Once a valid special need is identified, the enforcing governmental agency has a powerful alternative reason to conduct a suspicionless search no matter the importance of the need. The desire to detect, or obtain evidence of, criminality unrelated to the “special need” is difficult, if not impossible, to separate from a valid interest in promoting the “special need” itself. Although the Supreme Court has attempted to limit the use of suspicionless search doctrine in support of pre-textual stops,¹⁸³ such limits fail to ensure that governmental

181 *See supra* Part V.A.

182 *See id.*

183 The Supreme Court has, for example, refused to allow random roving car stops as these are perceived to grant too much discretion to individual officers and increase the risk of abuse. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558–59 (1976) (distinguishing routine checkpoint stops from random roving-patrol stops).

agencies are not over-enforcing these privacy-infringing procedures for general crime prevention purposes.

The warrant requirement could limit such over-enforcement, however. During the warrant application process, an over-enforcing agency would have to provide the underlying purpose that supported the search, opening the door to at least some judicial scrutiny. Moreover, the process would likely encourage closer involvement by District Attorney offices and state Attorney General offices with local law enforcement agencies. In addition to the potential benefits of judicial oversight, such involvement would hopefully encourage stronger internal controls and oversight within state governments. Indeed, if a disingenuous purpose were at work, the reporting requirement would potentially open a state actor to public scrutiny as well (although not necessarily immediately). This risk, along with the additional time and resources required, would discourage suspicionless search applications that were not actually urgent (i.e. those that lacked a sufficiently compelling purpose in the first place).

At the same time, when circumstances so demand, the warrant process might actually allow for more invasive techniques than would otherwise be imposed. By detailing exactly what procedures are permissible, warrants could eliminate any uncertainty in law enforcement's selection of procedures.¹⁸⁴ In essence, law enforcement officers would know exactly how far they could reach in promoting the search's purpose. Thus, when in doubt, law enforcement agencies would not have to worry about utilizing less effective methods just to ensure that the search would later be upheld by a court.

VI. CONCLUSION

Suspicionless search and seizure doctrine may represent an incoherent mess, but it is nevertheless understandable. The confusion of tangent Fourth Amendment fields has been compounded in this particular area by the great variability of purposes and methods presented in suspicionless search cases. Solutions have remained elusive. While doctrinal changes are undoubtedly necessary, pragmatically, the most important step toward a viable suspicionless search regime lies with procedural changes. Regardless of the shifting doctrinal borders of suspicionless search jurisprudence, a more effective pro-

¹⁸⁴ See, e.g., *MacWade v. Kelly*, 460 F.3d 260, 273 (2d Cir. 2006) (upholding random suspicionless subway searches in part because the policy protected privacy interests by allowing passengers the option of simply leaving the station rather than submitting to a search).

cedural framework promises to elucidate the analysis and to promote better results in individual cases.

This Comment proposes that a return to a conventional Fourth Amendment principle in the guise of the warrant requirement will at least improve the situation. A further implication is that area warrants are both constitutional and desirable in effecting this result. As new demands on law enforcement develop in the Twenty-first Century, the existing relationship between public-need and private-liberty will likely be further challenged. The ultimate conclusion of this Comment is that the promulgation of area warrants to suspicionless searches will clarify the balancing of interests, promoting net-desirable searches and seizures while limiting net-undesirable ones. At the very least, the preceding discussion suggests that the time has come to consider a multi-faceted approach to demystifying suspicionless search doctrine.