

NOTE

DRUG TESTING WELFARE RECIPIENTS AS A CONSTITUTIONAL CONDITION

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This Note challenges the prior and current scholarship on suspicionless drug testing of welfare recipients, and the Supreme Court's special needs doctrine more broadly, by applying the doctrine of unconstitutional conditions to the cases. It contends that the Fourth Amendment's special needs doctrine is insufficient, because conditioning welfare benefits on drug testing may fail the special needs test but still be a constitutional condition. This Note argues that, where the unconstitutional conditions doctrine could otherwise apply, the doctrine is in fact necessary to apply; that doing so resolves certain contradictions and fictions that currently exist in the Fourth Amendment doctrine, while better explaining some of the Fourth Amendment cases; and that conditioning welfare on drug testing is more likely to be constitutional under the unconstitutional conditions doctrine than under the current Fourth Amendment approach, which would instead stop the inquiry with the special needs doctrine.

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INTRODUCTION

In the past few years, there has been a flurry of legislative proposals in the states to require welfare applicants and recipients to submit to suspicionless drug testing.¹ Florida's recently enacted drug testing program, for example, required all applicants for Temporary Assistance for Needy Families (TANF) to pay for a urinalysis. If the results were negative, TANF funds would reimburse the applicant for the drug test; if the results were positive, applicants would become ineligible to receive TANF benefits for one year.² A federal district court recently granted a preliminary injunction enjoining Florida's program, finding that the plaintiffs were likely to succeed on the merits of a Fourth Amendment claim.³ This decision was upheld by an Eleventh Circuit panel on February 26, 2013, on the ground that the district court did not abuse its discretion in finding the plaintiffs likely to succeed on the merits.⁴ The panel stated explicitly that it was not definitively or finally resolving the constitutional inquiry.⁵ It appears that only the Sixth Circuit has otherwise addressed the constitutional question raised by these testing requirements in a case about a Michigan program whereby all welfare applicants would be drug tested, and every six months twenty percent of existing recipients would also be randomly tested.⁶ In that case, the Sixth Circuit panel disagreed with a trial judge who had also granted a

1. See Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 774-75, 781-90 (2011).

2. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1279-80, 1283 (M.D. Fla. 2011), *aff'd sub nom. Lebron v. Sec'y, Fla. Dep't of Children & Families*, No. 11-15258, 2013 WL 672321 (11th Cir. Feb. 26, 2013).

3. *Id.* at 1275, 1281.

4. *Lebron v. Sec'y*, 2013 WL 672321, at *2, *11-12; *id.* at *13 (Jordan, J., concurring).

5. *Id.* at *2 (majority opinion); *id.* at *13 (Jordan, J., concurring).

6. See Budd, *supra* note 1, at 782.

preliminary injunction on Fourth Amendment grounds, but the full Circuit upheld the trial judge's decision by an equally divided, six-to-six vote.⁷

The constitutionality of these legislative proposals is, therefore, very much open to question. In the past year, two scholarly articles and one student note have been written arguing, as the district courts have ruled, that suspicionless drug testing of welfare recipients is unconstitutional under the Fourth Amendment's "special needs" doctrine.⁸ This doctrine applies where the government can show special circumstances—such as at the border, in schools, or with public safety employees—that may justify dispensing with the warrant and probable cause requirements for conducting a search. Since 1990 but prior to these three pieces, only five notes and comments (and no articles) had been written on the question of suspicionless drug testing of welfare recipients, all coming to the same conclusion that such testing violates or likely violates the Fourth Amendment.⁹

This Note challenges the prior and current scholarship on suspicionless drug testing of welfare recipients, the Eleventh Circuit's recent decision on the question, and the Supreme Court's special needs doctrine more broadly, by applying the unconstitutional conditions doctrine to the cases. This doctrine holds that the government may condition a public benefit on the recipient's forgoing of a constitutional right as long as that condition is "germane," which is another way of asking whether the lesser power of conditioning the benefit is used for the same reason that would justify the greater power to deny the benefit altogether.¹⁰ For example, in *Lyng v. UAW*, the Supreme Court permitted the government to deny food stamps eligibility to any new applicants engaged in striking, or to refuse to increase the allotment for any existing recipient who goes on

7. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *judgment of district court aff'd by an equally divided court on reh'g en banc*, 60 F. App'x 601 (6th Cir. 2003).

8. See Budd, *supra* note 1, at 793-94; Walker Newell, *Tax Dollars Earmarked for Drugs? The Policy and Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215, 215 (2011); Erick Tobias, Keeping the Poor in Their Place: A "Special Need" Under the Fourth Amendment for Mandatory Drug Testing of Welfare Recipients? 2-3 (Dec. 7, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1969673>.

9. See Corinne A. Carey, Comment, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs*, 46 BUFF. L. REV. 281, 282 (1998); Philippa M. Guthrie, Note, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?*, 66 IND. L.J. 579, 582 (1991); Michelle M. Sheidenberger, Comment, *The Constitutionality of Drug Testing the Homeless in the Mather Program: Are Privacy Rights Outweighed by Governmental Interests?*, 27 PAC. L.J. 1699, 1701 (1996); Michael D. Socha, Note, *An Analysis of Michigan's Plan for Suspicionless Drug Testing of Welfare Recipients Under the Fourth Amendment "Special Needs" Exception*, 47 WAYNE L. REV. 1099, 1101 (2001); Tina L. Wilson, Comment, *Please Leave Your Constitutional Protections at the Door: A Challenge to Louisiana's Mandatory Drug Testing Statutes*, 60 LA. L. REV. 585, 602 (2000).

10. See *infra* Part II.B.

strike.¹¹ If the government may legitimately deny the benefit altogether if recipients were to reduce their incomes purposefully, then it may legitimately condition the benefit on a requirement that recipients forgo actions—even constitutionally protected actions—that would result in a loss of income.

This Note contends that the Fourth Amendment's special needs doctrine may conflict with the unconstitutional conditions doctrine, because conditioning welfare benefits on drug testing may very well be a constitutional condition but fail the special needs test. This Note will argue that, where the unconstitutional conditions doctrine could otherwise apply, the doctrine is in fact necessary to apply; that it resolves certain contradictions and fictions in the Fourth Amendment doctrine while better explaining some of the cases; and that conditioning welfare on drug testing is *more likely* to be constitutional under the unconstitutional conditions doctrine.

First, an unconstitutional conditions analysis is in fact *necessary* if the district courts are correct that suspicionless drug testing of welfare recipients violates the Fourth Amendment. The unconstitutional conditions doctrine applies precisely where a person receives a public benefit on the condition of forgoing a constitutional right. Put differently, if the district courts had found the drug testing constitutional, that would be the end of the matter; because they have found the programs unconstitutional, it is necessary also to apply the doctrine of unconstitutional conditions. Yet all of the courts facing the issue have either ignored or given short shrift to the unconstitutional conditions doctrine. Only one note has given the doctrine any treatment in this context.¹²

Second, an unconstitutional conditions analysis applied to the Court's special needs cases resolves two persistent paradoxes in the Court's Fourth Amendment doctrine. First, consent to a search typically nullifies a Fourth Amendment claim, and yet consent does not seem to nullify the Fourth Amendment claim in the drug testing, special needs context.¹³ Second, an invasive, warrantless, and suspicionless home search of a public welfare recipient is not considered a search for Fourth Amendment purposes, yet a potentially less invasive drug test is automatically considered a search.¹⁴ An unconstitutional conditions analysis recognizes that *any* warrantless, suspicionless search—whether of your body or of your house—is almost always unconstitutional. It also recognizes that consent nullifies a Fourth Amendment claim. The question thus becomes whether the government can require you to give up *your right to refuse consent* to such searches as a condition of receiving certain government benefits. Thus, once the question becomes one of unconstitutional conditions, the current doctrinal paradoxes are resolved.

11. 485 U.S. 360, 362, 364 (1988).

12. See Guthrie, *supra* note 9, at 598-602.

13. See *infra* Part II.A.1.

14. See *infra* Part II.A.2.

Although not a paradox, the Court's current doctrine also relies on the fiction that students, public safety employees, and the poor have a lesser expectation of privacy than ordinary citizens.¹⁵ It is unclear why this should be true as a descriptive matter. Under an unconstitutional conditions framework, everyone has the same expectation of privacy. The question simply becomes whether forgoing this privacy right is "germane" to the public benefit the person is receiving. This reasoning is consistent with other special needs contexts where the unconstitutional conditions doctrine does not apply because the government has no power to grant or deny the benefit—such as a citizen's right to enter the country. The border search cases, therefore, can still be explained on expectation of privacy grounds. In those special needs cases involving unconstitutional conditions questions, however, the courts need not rely on a subjective expectation of privacy analysis that arguably discriminates against these groups.

Third and last, the Note concludes that under the unconstitutional conditions doctrine, in which the test is one of germaneness rather than balancing, suspicionless drug testing of welfare applicants and recipients is much more likely to survive constitutional scrutiny. Under the special needs doctrine, if suspicionless drug testing is only justified in cases where "safety" or the public school context requires it—as the Michigan and Florida district courts held (and which the Eleventh Circuit has recently affirmed on deferential review) and as all of the literature maintains—then testing welfare recipients certainly seems unconstitutional. If suspicionless drug testing can only be justified under the broader standard that the warrant and probable cause requirements must be "impractical," then again testing welfare recipients, at least without reasonable suspicion, seems unconstitutional.

This Note does not go so far as to make the claim that a suspicionless drug test of a welfare recipients *must* pass constitutional muster under the unconstitutional conditions doctrine, and certainly the Note does not claim that, as a matter of policy, requiring such tests is a good thing.¹⁶ The claim is only that if the policy rationales for criminalizing drug use in the first instance are valid—such as the argument that drug use decreases productivity—then drug testing as a condition on welfare seems to be *germane*, which is the most basic requirement of the unconstitutional conditions doctrine. If we challenge the germaneness on the ground that there is no evidence to suggest these rationales to be true, then we ought to question why drugs are illegal in the first place. This Note canvasses some of the literature on the relationship between drug use and productivity, and tentatively concludes that while there certainly is a relationship, the economic costs of drug use may be rather insignificant.

Part I discusses the Supreme Court's Fourth Amendment special needs doctrine and its application to welfare recipients and drug testing. In line with

15. See *infra* Part II.A.3.

16. Neither does this Note claim that welfare benefits are a good thing. The normative policy considerations are simply not of concern here.

the two district court cases, the recent Eleventh Circuit decision, and the existing literature, it ultimately concludes that suspicionless drug testing of welfare recipients is likely to be found unconstitutional under this doctrine. Part II contends that the Fourth Amendment doctrine in this area is riddled with fictions and paradoxes, and that an unconstitutional conditions analysis resolves the paradoxes and eliminates the fictions while better explaining the cases. Moreover, it claims that an unconstitutional conditions analysis is in fact necessary if the courts find a Fourth Amendment violation. Part III then applies an unconstitutional conditions analysis to the context of drug testing welfare recipients by looking at the underlying policy rationales for drug criminalization. It concludes that, if these rationales and the evidence supporting them are taken as true, such drug testing is much more likely to be sustained under the unconstitutional conditions doctrine because it is easier to make the case for germaneness than for a special need; but it also concludes that the evidence supporting the criminalization rationales may not be as strong as government studies tend to claim.

I. CONVENTIONAL FOURTH AMENDMENT ANALYSIS

A. *Fourth Amendment Overview*

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and that warrants shall only issue upon probable cause.¹⁷ The first element of a Fourth Amendment analysis is whether the challenged action is a “search” by the government for purposes of the Amendment.¹⁸ A court must then ask whether a warrant is required, as in traditional criminal contexts, and whether probable cause has been met. If a warrant is not required, the question becomes whether the particular search conducted was nevertheless “reasonable” and thus constitutional.¹⁹

The Supreme Court has recognized a class of “special needs” cases falling under the last step of the analysis where a warrant need not issue and probable cause is not required. The Court has explained:

We have recognized exceptions to [the normal Fourth Amendment requirements] when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.²⁰

17. U.S. CONST. amend. IV.

18. *See Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 614 (1989).

19. *See id.* at 618-20.

20. *Id.* at 619 (internal citations and quotation marks omitted).

These special needs cases have, for example, permitted school officials to search students if they have “reasonable grounds” to suspect the students of misbehavior or criminal activity,²¹ probation officers to search probationers if they have “reasonable grounds” to believe the probationers are violating the terms of parole,²² government officials to engage in administrative searches of highly regulated businesses on a reasonableness standard,²³ and public employers to conduct work-related searches on a reasonableness standard;²⁴ the special needs doctrine has even permitted some *suspicionless* searches at the United States border.²⁵

B. *Drug Testing and Special Needs*

In the following special needs drug testing cases, the Court’s analysis typically follows the same path: (1) Is there a special need? (2) What is the expectation of privacy and what is the character of the privacy intrusion? (3) Finally, is the special need compelling, and does the invasion of privacy effectively address the special need?²⁶ The Supreme Court has specifically addressed drug testing in the special needs context of public safety officials, schools, and candidates for public office, but has not yet addressed drug testing welfare recipients. It has permitted dispensing with warrants, probable cause, and reasonable suspicion in the public safety and school contexts, but it has somewhat perplexingly—at least until we recast the cases in terms of unconstitutional conditions²⁷—rejected the special needs argument with respect to candidates for public office. It is notable that in these cases it was completely irrelevant to the Court whether or not a public safety official, student, or candidate had to *con-*

21. *New Jersey v. T.L.O.*, 469 U.S. 325, 341-43 (1985).

22. *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987). Note that the “reasonable grounds” standard the Supreme Court affirmed in *Griffin* was “as defined by the Wisconsin Supreme Court.” *Id.*

23. *New York v. Burger*, 482 U.S. 691, 700-02 (1987).

24. *O’Connor v. Ortega*, 480 U.S. 709, 725-26 (1987).

25. *United States v. Flores-Montano*, 541 U.S. 149, 150 (2004) (holding that border stops to search fuel tanks for illegal drugs did not require reasonable suspicion); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (noting that searches of persons and effects at international borders “are not subject to any requirement of reasonable suspicion”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-63 (1976) (holding that brief motor vehicle stops at reasonably located checkpoints along the border for the purposes of questioning the occupants may be made “in the absence of any individualized suspicion”).

26. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822, 828-34 (2002) (addressing these questions in that order). The Ninth Circuit in *Sanchez v. County of San Diego* also sums up the analysis nicely: courts first look to see whether there is a special need, and then determine whether it is justified. 464 F.3d 916, 925-26 (9th Cir. 2006). In considering the latter, courts consider “(1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; and (3) the importance of the government interest at stake.” *Id.* at 927.

27. *See infra* Part II.C.

sent to a search as a condition of employment, participation in extracurricular activities, or candidacy.

1. *Public safety and public officials*

The Court inaugurated the current special needs drug testing doctrine in *Skinner v. Railway Labor Executives' Ass'n*²⁸ and *National Treasury Employees Union v. Von Raab*,²⁹ which both involved, in a manner of speaking, public safety employees. In *Skinner*, the Federal Railroad Administration required drug testing of railway employees involved in any "major" train accident (as defined by the statute), impact accident resulting in reportable property damage or injury, or train incident involving the fatality of an on-duty railroad employee.³⁰ Those who refused the test could not perform certain services for a period of nine months.³¹ The regulations also permitted drug tests in other circumstances under a reasonable suspicion standard.³²

Even though the tests were conducted by private railroad companies, the Court held that the tests implicated the Fourth Amendment because the railroads acted as instruments or agents of the government.³³ Further, "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment."³⁴ The government must therefore first demonstrate a special need to circumvent the normal procedural requirements.

In the railroad context—as in the government office, school, or prison context—the government's special need is to ensure safety.³⁵ The Court noted studies showing "evidence indicating that on-the-job intoxication was a significant problem in the railroad industry."³⁶ The question thus remained whether the special need outweighed the privacy interest so as to justify the warrantless (and sometimes suspicionless) drug tests. The Court held that the rapidity with which alcohol and drugs might be ingested justified dispensing with a warrant requirement that would delay the tests and frustrate its purpose.³⁷ Further, the Court found that the privacy intrusion caused by each test was minimal. Both the breath and blood tests were "commonplace" and involved "virtually no risk, trauma, or pain," and revealed no more information than the presence of drugs

28. 489 U.S. 602 (1989).

29. 489 U.S. 656 (1989).

30. *Skinner*, 489 U.S. at 609.

31. *Id.* at 610-11.

32. *Id.* at 611.

33. *Id.* at 614-16.

34. *Id.* at 617.

35. *Id.* at 620.

36. *Id.* at 607.

37. *Id.* at 623.

or alcohol in the employee's body.³⁸ And although the Court acknowledged that the urine sampling procedure raises privacy concerns not implicated by the blood and breath tests, the additional intrusions of the urine tests were mitigated because regulations did not require the samples to be furnished under direct observation and they were collected in a controlled medical environment.³⁹

Most significantly, the covered employees had a diminished expectation of privacy "by reason of their participation in an industry that is regulated pervasively to ensure safety," whereas the government's interest in suspicionless testing was "compelling."⁴⁰ Moving on to the final step, the Court held that the testing procedures were "an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place."⁴¹

In *Von Raab*, the Commissioner of Customs established a drug screening program that required employees to undergo urinalysis as a condition of employment in Customs positions involving drug interdiction, use of firearms, or handling classified materials.⁴² The government's special need was "to deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions."⁴³ Some of the Court's most significant discussion was aimed at the drug testing policy as it applied to employees involved in drug interdiction. The Court noted that the "physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service."⁴⁴ The Court held, in short, that "[i]t is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."⁴⁵

Significantly, the Court held that Customs employees had a diminished expectation of privacy, because "employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity."⁴⁶ Unlike in *Skinner*, however, the Court had no evidence before it that Customs officials faced a drug problem. The Court nevertheless noted that "drug abuse is one of the most serious problems confronting our society today" and "[t]here is little reason to believe that American workplaces are immune from this pervasive

38. *Id.* at 625-26.

39. *Id.* at 626-27.

40. *Id.* at 627-28.

41. *Id.* at 629.

42. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 660-61 (1989).

43. *Id.* at 666.

44. *Id.* at 669.

45. *Id.* at 670.

46. *Id.* at 672.

social problem.”⁴⁷ It then held that even though most of those tested would be innocent, that does not undermine the validity of the program or its necessity.⁴⁸ The Court ultimately upheld the drug testing for the drug interdiction personnel as well as employees using firearms, and remanded on the question of testing for employees handling classified information.⁴⁹

2. *Competitive activities in schools*

Several years later, the Court confronted the question of suspicionless drug testing in the school context in *Vernonia School District 47J v. Acton*.⁵⁰ The Vernonia School District in Oregon had instituted a drug screening program for interscholastic athletes due to fears that “athletes were the leaders of the drug culture” and “drug use increases the risk of sports-related injury.”⁵¹ Urinalysis was the testing method, with monitors of the same gender in the room with the students producing the samples; monitors could, but did not always, watch male students while they produced their samples. Women gave their samples in enclosed stalls and so were “heard but not observed.”⁵² If a student tested positive, he or she would be given the option to participate in an assistance program or be suspended from the athletic program.⁵³

The school’s special needs were nothing new: the Court had previously recognized that a warrant requirement “would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed,” while “strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools.”⁵⁴ Further, the governmental concern was “important” and “perhaps compelling”—drug use was damaging to children, the Court noted, and particularly to student athletes “where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”⁵⁵

Significantly, children lacked a reasonable expectation of privacy in this context because the schools were acting *in loco parentis*, and because athletes typically had even less privacy in, for example, the locker rooms.⁵⁶ Further,

47. *Id.* at 674.

48. *Id.*

49. *Id.* at 677-79.

50. 515 U.S. 646 (1995).

51. *Id.* at 649-50.

52. *Id.* at 650.

53. *Id.* at 651. The program also provided that a student who tested positive would be retested to confirm the results before any corrective action was taken. *Id.*

54. *Id.* at 653 (alteration omitted) (internal quotation marks omitted) (discussing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

55. *Id.* at 661-62.

56. *Id.* at 654-57.

much like the adults in the “closely regulated industry” in *Skinner* or *Von Raab*, “[b]y choosing to ‘go out for the team,’ [the student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”⁵⁷ Finally, the Court held that the method of the testing was not particularly more invasive than any normal experience in a public bathroom,⁵⁸ and that the method of testing was effective to meet the government purpose.⁵⁹

A school district in Oklahoma instituted a drug testing policy a few years later that was somewhat broader in scope than Vernonia’s program. In *Board of Education v. Earls*, the Court considered the school district’s policy, which required students to consent to urinalysis in order to participate in *any* competitive extracurricular activity.⁶⁰ Balancing the government’s interests and the privacy invasion, and then examining the immediacy of the government interest and the efficacy of the means of furthering that interest, the Court came to the same conclusion that the testing was constitutional under the Fourth Amendment.⁶¹ It also relied, however, on the *in loco parentis* role of the schools.⁶²

3. *Running for public office*

In *Chandler v. Miller*,⁶³ the Supreme Court struck down, for the first (and so far only) time, a suspicionless drug testing program of this type. The State of Georgia required candidates wishing to be listed on the ballot for elective office to submit to a drug test and provide certification of a negative result. The candidates could provide samples to an approved lab either in person or through their personal physicians, and (if they tested positive) could “choose” not to release the results to law enforcement by forfeiting the opportunity to run for office.⁶⁴ The Court reiterated that it is “uncontested” that a drug test is a search, and that the reasonableness standard governs.⁶⁵ The Court then summarized *Vernonia*, *Von Raab*, and *Skinner*, in each case noting that the covered individuals had a lesser expectation of privacy and describing the nature of the government’s need.⁶⁶

After concluding that the method was “relatively noninvasive,” the Court went on to conduct the special needs balancing.⁶⁷ The state argued that “be-

57. *Id.* at 657.

58. *Id.* at 658.

59. *Id.* at 663-64.

60. 536 U.S. 822, 826 (2002).

61. *Id.* at 826-38.

62. *Id.* at 831.

63. 520 U.S. 305 (1997).

64. *Id.* at 309-10, 312.

65. *Id.* at 313.

66. *Id.* at 314-17.

67. *Id.* at 318.

cause the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials," the state had a special need to test candidates for public office.⁶⁸ The Court, however, rejected these arguments on the grounds that it was merely "hypothetical" that a drug problem existed among candidates for public office and public officeholders.⁶⁹ The Court noted that while not strictly necessary, "[p]roof of unlawful drug use may help to clarify—and to substantiate—the precise hazards posed by such use."⁷⁰

C. *Home Searches of Welfare Recipients: Wyman and Sanchez*

The drug testing cases seem to conflict with another set of special needs cases involving welfare recipients. In *Wyman v. James*, the Supreme Court held that a warrantless, suspicionless search of a welfare recipient's home is not a search within the meaning of the Fourth Amendment.⁷¹ In *Sanchez v. County of San Diego*, the Ninth Circuit recently reaffirmed this principle.⁷² The Supreme Court in *Wyman* acknowledged that one's first reaction to "some type of official intrusion" into the home is to invoke the protection of the Fourth Amendment.⁷³ Indeed, in *Camara v. Municipal Court*, the Court had proclaimed that home searches were paradigmatic Fourth Amendment searches.⁷⁴

The *Wyman* Court held, however, that in the instance of a social worker insisting on a home visit of a welfare recipient, the "protective attitude" of the Fourth Amendment was not relevant "for the seemingly obvious and simple reason that we are not concerned here with any search . . . in the Fourth Amendment meaning of that term."⁷⁵ More specifically,

[T]he visitation in itself is not forced or compelled, and . . . the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.⁷⁶

68. *Id.*

69. *Id.* at 319.

70. *Id.*

71. 400 U.S. 309, 317-18 (1971).

72. 464 F.3d 916, 920-23 (9th Cir. 2006).

73. *Wyman*, 400 U.S. at 316.

74. See 387 U.S. 523, 528-29 (1967) ("[O]ne governing [Fourth Amendment] principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); see also *Wyman*, 400 U.S. at 317.

75. *Wyman*, 400 U.S. at 317.

76. *Id.* at 317-18.

In other words, as long as the recipient can refuse consent to the search, then the Fourth Amendment is not implicated even though he loses his welfare benefits as a result.

The Court held in the alternative that, even if the home visit was a search, it was reasonable and thus constitutional. The Court listed several factors contributing to its finding that the search was reasonable: the concern for children in the home; the social services agency is “fulfilling a public trust” and “has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of th[e] tax-produced assistance are the ones who benefit from the aid it dispenses”; the public has a right to know how its charity is being utilized; the program’s purpose is rehabilitation and creating self-sufficiency; home visits are personal and help effectuate the purposes of the program; the recipient had received several days advance notice of the search; the search would not be for the purpose of obtaining information of criminal activity; there are no easy alternatives to obtaining the relevant information the agency seeks; and the visit is by a social worker and not uniformed authority.⁷⁷

The more recent San Diego program addressed in *Sanchez v. County of San Diego* required all CalWORKS⁷⁸ applicants to submit to searches by investigators to confirm the value of their assets, that they have eligible children, that they live in California, and that an “absent” parent does not live in the residence.⁷⁹ The Ninth Circuit followed *Wyman* to the letter. “The Supreme Court,” it noted, “has held that home visits for welfare verification purposes are not searches under the Fourth Amendment. . . . *Wyman* directly controls the instant case.”⁸⁰ The court held that because there was no penalty for refusing to consent to the home visit—other than the denial of the welfare benefits—the home visit was not a search within the meaning of the Fourth Amendment.⁸¹

Again following *Wyman*, the Ninth Circuit held that even if it were a search, it would be reasonable for Fourth Amendment purposes. There were some differences from *Wyman* worth noting: in San Diego, the searches were conducted by peace officers, who would report any evidence of criminal activity. Still, because such reporting was “not the underlying purpose of the visit,” and because no prosecutions for welfare fraud had taken place, the program satisfied *Wyman*’s analysis.⁸²

The Ninth Circuit also addressed the Supreme Court’s special needs cases, acknowledging that Fourth Amendment doctrine had evolved since *Wyman*.⁸³ The court noted that the home searches were independently valid under a spe-

77. *Id.* at 318-24.

78. California’s welfare-to-work program.

79. *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 918-19 (9th Cir. 2006).

80. *Id.* at 920-21.

81. *Id.* at 921-23.

82. *Id.* at 923-24.

83. *Id.* at 925.

cial needs analysis. The court held that the county did have a special need—namely, the proper and effective administration of its welfare program.⁸⁴ At the second prong of the analysis—inquiring whether the searches were justified in light of the special need—the court weighed the privacy interest, the character of the intrusion, and the importance of the government’s interest.⁸⁵ It concluded that welfare recipients, like probationers who must consent to suspicionless and warrantless searches,⁸⁶ have a diminished expectation of privacy because they expressly consent and because “eligibility depends, in part, upon a person’s physical residence in the state and actual presence at the place designated as their residence.”⁸⁷

D. *Drug Searches of Welfare Recipients: Lebron and Marchwinski*

These two lines of cases collide in the context of drug testing for welfare recipients. The special needs doctrine holds that a drug test is a search with or without consent, and thus far the only time the Court has tended to find a special need justifying such a search has been when there is a concern for safety or in the public school setting. The home search cases described above hold for various reasons—including that the welfare recipient consents—that no search within the meaning of the Fourth Amendment takes place when the government’s purpose is verifying eligibility and not criminal investigation. Further, such searches would in any event be justified under the Fourth Amendment because of the public interest concerns in the proper administration of the welfare program. How can these cases be reconciled in the context of drug testing welfare recipients? Does the more specific drug testing, special needs doctrine apply, or does the more general welfare search analysis of *Wyman* and *Sanchez* govern? Does that matter for the outcome?

Only two district courts—one in Florida and another in Michigan—have addressed the question, and both rejected the applicability of *Wyman* and ruled that welfare recipient drug testing programs were unconstitutional under the special needs doctrine. The recent Eleventh Circuit decision affirmed the result in the Florida case, and the Sixth Circuit panel’s decision reversing the district court in the Michigan case was vacated by the full circuit without an opinion. This Subpart discusses these two cases, and Part II will suggest that both might come out differently under the unconstitutional conditions doctrine.

In 2011, a federal judge enjoined Florida’s suspicionless drug testing program that required all applicants for Temporary Assistance for Needy Families (TANF) to pay for a urinalysis. If the results were negative, TANF would re-

84. *Id.* at 925-26.

85. *Id.* at 926-27.

86. *See Griffin v. Wisconsin*, 483 U.S. 868 (1987).

87. *Sanchez*, 464 F.3d at 927.

imburse the applicant for the drug test; if the results were positive, applicants would be ineligible to receive TANF benefits for one year.⁸⁸

The district court held that the drug test was a search, citing the special needs cases for the proposition that “[i]t is well established that a drug test is considered a search under the Fourth Amendment.”⁸⁹ The dispositive difference between a drug test and the home search in *Wyman*, the court held, “is the nature of the intrusion demanded.”⁹⁰ A home search like that conducted in *Wyman* is different because it is “rehabilitative” in nature and not investigatory; further, home visits are the “heart of the welfare administration.”⁹¹

As for consenting to the search, the court rejected the argument that consent nullifies the Fourth Amendment claims in these cases: “The Supreme Court has routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment, regardless of whether the person subjected to the test has the opportunity to refuse it.”⁹² In short, the court held:

[T]his case does not concern home visits; it concerns the collection of an individual’s urine, an act that necessarily entails intrusion into a highly personal and private bodily function, and the subsequent urinalysis, which can reveal a host of private medical facts about that individual. The intrusion here also extends well beyond the initial passing of urine. Positive drug tests are not kept confidential in the same manner as medical records; they are shared with third-parties, including [the welfare agency], medical reviewers and counselors for the Florida Abuse Hotline. More troubling, positive test results are memorialized, perhaps indefinitely, in a database that the State admits can be accessed by law enforcement.⁹³

Thus, the drug tests are searches within the meaning of the Fourth Amendment.⁹⁴ The court’s reasoning seems to entail two steps: first, under the special needs cases, a drug test is a search, pure and simple; but second, the searches in the Florida program were for an “investigatory” purpose, and under *Wyman*’s reasoning would also be a search for Fourth Amendment purposes.

Florida asserted four special needs to justify the drug tests: (1) “ensuring that TANF funds are used for their dedicated purpose”; (2) protecting children from the evils of drug use; (3) ensuring that the benefits are not used in ways that would render the beneficiaries unsuitable for employment; and (4) “ensuring that the government does not fund the public health risk” and crime associated with the “drug epidemic.”⁹⁵ To sustain these arguments, the state relied on

88. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1279-80 (M.D. Fla. 2011), *aff’d sub nom.* *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, No. 11-15258, 2013 WL 672321 (11th Cir. Feb. 26, 2013).

89. *Id.* at 1281-82.

90. *Id.* at 1282.

91. *Id.* at 1282-83 (internal quotation marks omitted).

92. *Id.* at 1283 (citation omitted) (internal quotation marks omitted).

93. *Id.* (citation omitted).

94. *Id.*

95. *Id.* at 1286 (internal quotation marks omitted).

a few studies that purportedly showed a drug use problem among welfare recipients and that drugs impaired their ability to find work. Suffice it to say, there were several problems with these studies.⁹⁶ The district court ultimately concluded, most likely correctly, that the studies “provide[] no concrete evidence that those risks are any more present in TANF applicants than in the greater population,”⁹⁷ and that positive results on urinalyses of welfare recipients “affected very little their likelihood of working.”⁹⁸ Therefore, the state had not shown a special need to protect the children of welfare recipients more than the children of anyone who receives some public benefit, that there was no special need to prevent public money from funding drug crime more in the welfare context than in other contexts, and that there was no need to prevent them from using drugs to obtain work. The court concluded, in other words, that there was simply no special need at all.⁹⁹ It did not need to get into a balancing analysis.

The district court’s opinion in *Marchwinski v. Howard*,¹⁰⁰ which enjoined a Michigan program of suspicionless drug testing of welfare recipients, was much simpler than the opinion in *Lebron*. The court held that public safety concerns in the drug testing context exhausted the universe of special needs.¹⁰¹ The court relied heavily on dicta in *Chandler v. Miller*, stating that “where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”¹⁰² The court concluded that because the state’s primary justification for the program was not related to public safety but instead intended “to move more families from welfare to work,” no special need had been shown.¹⁰³ Finally, *Wyman* was inapposite because the purpose of the program in Michigan was not to reduce child abuse or neglect; and regardless, a drug test “clearly constitutes a search.”¹⁰⁴ That recipients must consent to a search was irrelevant because consent did not save the drug testing in *Chandler* from constitutional infirmity.¹⁰⁵

96. *Id.* at 1286-87.

97. *Id.* at 1288.

98. *Id.* at 1290 (internal quotation mark omitted).

99. *Id.* at 1284, 1289-92.

100. 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *judgment of district court aff'd by an equally divided court on reh'g en banc*, 60 F. App'x 601 (6th Cir. 2003).

101. *Id.* at 1135, 1139.

102. *Id.* at 1139 (quoting *Chandler v. Miller*, 520 U.S. 305, 323 (1997)).

103. *Id.* at 1140.

104. *Id.* at 1142.

105. *See id.* at 1143. A Sixth Circuit panel initially overturned the district court’s decision, holding that the plaintiffs were not likely to succeed on the merits. *Marchwinski v. Howard*, 309 F.3d 330, 337 (6th Cir. 2002). The panel noted that public safety did not exhaust the universe of special needs, and listed a whole host of special needs ranging from ensuring responsible parenting and economic self-sufficiency to ensuring that public moneys are spent as intended. *Id.* at 335-36. The Sixth Circuit granted a petition for rehearing en banc, 319 F.3d 258 (6th Cir. 2003), and ultimately affirmed the district court’s original holding by an equally divided court. 60 F. App'x 601 (6th Cir. 2003).

The only existing literature on the constitutionality of suspicionless drug testing of welfare recipients follows the reasoning in *Marchwinski*: only a special need related to public safety is valid. One of the two recent articles written on the question argues that where the Court has found drug testing regimes constitutional, “it has, without exception, identified significant public safety concerns”¹⁰⁶ The other claims that “the doctrine has typically involved one of two permissible objectives: the promotion of public safety and the related protection of the health and security of schoolchildren under the state’s *in loco parentis* control.”¹⁰⁷ Under these two categories, suspicionless drug testing is unconstitutional: “Regardless of how distant the two categories may extend, . . . they cannot rationally stretch so far as to justify suspicionless drug testing of the entire population of welfare applicants and recipients—for whom the state has neither *in loco parentis* responsibility nor any encompassing public-safety concern.”¹⁰⁸ A recent unpublished note written on the question likewise concludes that “Florida’s law is much more akin to [the] statute at issue in *Chandler* than the programs upheld in *Skinner*, *Von Raab*, and *Vernonia*.”¹⁰⁹ The older literature makes these same claims.¹¹⁰

Such was the lay of the land on February 26, 2013 when an Eleventh Circuit panel decided *Lebron v. Secretary, Florida Department of Children and Families*, which held that the district court in *Lebron v. Wilkins* did not abuse its discretion in finding the plaintiffs likely to succeed on the merits of a Fourth Amendment claim.¹¹¹ Again, the panel did not resolve the constitutional issues definitively,¹¹² but it did foray into those issues. The panel held that, to succeed, the government had to identify special needs that make the warrant and probable cause requirements impracticable.¹¹³ It also held that the special needs must be “substantial.”¹¹⁴

106. Newell, *supra* note 8, at 222.

107. Budd, *supra* note 1, at 793.

108. *Id.* at 794.

109. Tobias, *supra* note 8, at 26-27.

110. See Sheidenberger, *supra* note 9, at 1718 (“The Court has recognized that only those governmental interests in protecting public safety or national security may be deemed ‘compelling.’ Neither of those interests are implicated [by drug testing homeless welfare recipients].” (footnote omitted)); Socha, *supra* note 9, at 1114 (“Finally, the Court clarified [in *Chandler*] all the previous case law in holding that there must be a public safety risk in order to satisfy the reasonableness requirement”); Wilson, *supra* note 9, at 600 (“Following Supreme Court precedent, . . . it seems there are only two ways that Louisiana’s statutes may be saved. First, they may be limited only to those persons who hold a safety-sensitive position. Second, Louisiana’s statutes may be upheld if there is evidence of a significant drug problem among the segment targeted for testing.”).

111. *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, No. 11-15258, 2013 WL 672321, at *2, *11-12 (11th Cir. Feb. 26, 2013); *id.* at *13 (Jordan, J., concurring).

112. *Id.* at *2 (majority opinion); *id.* at *13 (Jordan, J., concurring).

113. *Id.* at *3 (majority opinion).

114. *Id.*

The court essentially followed the existing literature and summarized that in the drug testing context, only two special needs qualify for the exception: “the specific risk to public safety by employees engaged in inherently dangerous jobs and the protection of children entrusted to the public school system’s care and tutelage.”¹¹⁵ The court reemphasized the point: “Other than the certain well-defined public safety concerns, the [special needs category] includes suspicionless drug testing *only* in one other context—the public school setting.”¹¹⁶

The court seemed to admit in passing that these two categories are not *necessarily* the only “governmental needs that are sufficiently substantial to qualify as a special need.”¹¹⁷ It did not, however, ask what other needs might qualify in the context of drug testing. Rather, it simply concluded that because there was no immediate or direct threat to public safety, no public school setting, no employees involved in drug interdiction, and no risk of imminent physical harm, there was no substantial special need for mandatory suspicionless drug testing.¹¹⁸ The court noted that the state had presented no empirical evidence of a concrete danger of illegal drug use in the particular population,¹¹⁹ but also noted in a footnote that actual evidence of drug use “is neither necessary nor sufficient” to establish a special need warranting suspicionless searches and thus such evidence might not matter at all.¹²⁰

Put simply, though the panel did delve into some of the empirical data on drug use, it found such data ultimately irrelevant to this context. Nor did the panel find the four purported special needs raised in the lower court to be relevant. As long as neither public safety nor public schools was at issue, the state had no need to dispense with the warrant and probable cause requirements.

E. *Conclusion: Drug Testing Welfare Recipients Under the Fourth Amendment*

It seems clear that if *Marchwinski*, the literature, and the Eleventh Circuit in *Lebron* are correct that only public safety or the public school setting can justify a suspicionless drug test, then suspicionless drug testing of welfare recipients is unconstitutional. If we broaden our case law to include the Supreme Court’s special needs doctrine more broadly, and not just the suspicionless drug testing cases, then public safety and public schools are not the only contexts where the law of special needs applies. The special needs doctrine has permitted all sorts of administrative searches in all sorts of contexts, and the Court has

115. *Id.*

116. *Id.* at *5.

117. *Id.* at *6.

118. *See id.*

119. *Id.* at *7.

120. *Id.* at *7 n.7.

never made clear why when it comes to *drug testing* outside of public schools the search can only be justified based on a public safety concern. In *Griffin v. Wisconsin*, the Court upheld searches of probationers' homes supported by reasonable suspicion under the special needs doctrine.¹²¹ The Court held that such "restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."¹²² Further, even if *Chandler* clarified that the state had to demonstrate a public safety concern before permitting suspicionless drug tests, the Court has never addressed drug testing in the welfare context where other case law might also apply.

The district court in *Lebron* was wise to address all of the articulated special needs of the state, and it likely reached the correct doctrinal conclusion, but its reasoning may not have been entirely correct. In rejecting the purported special needs of the state, the court argued that the special needs were invalid as such, because there was no evidence that these needs existed "specially" with respect to the class of welfare recipients as opposed to the general population.¹²³ There is language in the Supreme Court's drug testing cases, however, suggesting that the state need not show evidence of particularly widespread drug use among the class of people targeted by the searches. In *Von Raab*, the Court explicitly rejected the contention that the testing program was invalid because the vast majority of those taking the test would be innocent: "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity," the Court held.¹²⁴ "The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, and of motorists who are stopped at [border] checkpoints"¹²⁵

Further, in *Earls*, the Supreme Court explicitly rejected the proposition that an identifiable drug problem must exist to justify suspicionless drug testing: "[T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing."¹²⁶ It then held:

We reject the Court of Appeals' novel test that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse

121. 483 U.S. 868, 870-71, 875-76 (1987). Although *Griffin* may be distinguishable insofar as the Court addressed a regulatory regime that required reasonable suspicion to justify the searches, the logic is equally applicable in the context of suspicionless searches.

122. *Id.* at 875.

123. *See supra* note 119 and accompanying text.

124. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 674 (1989).

125. *Id.* at 674 (citation omitted) (discussing *Camara v. Mun. Court*, 387 U.S. 523 (1967); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

126. *Bd. of Educ. v. Earls*, 536 U.S. 822, 835 (2002).

problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.”¹²⁷

In short, the district court in *Lebron* was most likely wrong to reject the testing program on the grounds that drug use is not more widespread among welfare recipients than the general public. To be sure, the *Lebron* panel walked away from the district court’s emphasis on the empirical data, suggesting that all the Supreme Court has said on the matter is that “actual evidence of drug use is . . . neither necessary nor sufficient to establish the type of substantial special needs that permit a drug testing regime to fall within the closely guarded category of permissible suspicionless searches.”¹²⁸

The question should rather be whether drug use by a *particular* welfare recipient somehow implicates a special need of the state, or whether drug use by this particular class of individuals somehow implicates a need above and beyond drug use by the general population. Even so, the district court in *Lebron* may still have been right to reject *most* of the state’s claims on the grounds that drug use is not more widespread among welfare recipients than the general public. If the proposition is true, then there may be a need to protect children generally but no *special* need to protect children *specifically of welfare recipients*. Likewise, there is just as much risk of other public money fueling the drug industry, and so there is no *special* need *specifically with respect to welfare money*. Some of the other *Wyman* factors, moreover—such as that the agency is fulfilling a public trust, and the public has a right to know how its charity is being used—also apply generally, but not specially, in this context. Some *Wyman* factors also seem relevant to *home* searches but not to *drug* searches—such as the arguments that home visits are personal and the heart of the welfare administration, and that they are necessary to determine eligibility.

There is only one claim, it seems, where a special need might still be asserted: drugs hinder recipients from finding work or working productively, and therefore there is a special need *specifically* relevant to welfare recipients. The district court in *Lebron* rejected this special need on the ground that the studies on which the state relied showed no evidence that testing positive for drug abuse affected the recipient’s likelihood of working.¹²⁹ The Eleventh Circuit panel briefly highlighted this point in a footnote,¹³⁰ but recall that it also suggested that such evidence may not be relevant at all.¹³¹ Hence, to justify a suspicionless drug search of welfare recipients under the Fourth Amendment, the states could show that drug testing affects the ability of recipients to work

127. *Id.* at 836 (quoting *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1278 (10th Cir. 2001)).

128. *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, No. 11-15258, 2013 WL 672321, at *7 n.7 (11th Cir. Feb. 26, 2013).

129. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1290 (M.D. Fla. 2011).

130. *Lebron v. Sec’y*, 2013 WL 672321, at *7 n.6.

131. Insofar as it would not relate to public safety or public schools, and because evidence of drug use is neither necessary nor sufficient to justify suspicionless searches. See *supra* notes 118-120 and accompanying text.

and that this concern is compelling enough to justify the privacy intrusion, though it is unclear whether even such evidence would have persuaded the Eleventh Circuit under its Fourth Amendment analysis.

Moreover, even if such evidence would be relevant to the special needs analysis, it's hardly clear that such a "need" would be a "special need" inasmuch as the doctrine has been traditionally justified on the *impracticality* of maintaining the warrant and probable cause requirements. In other words, satisfying traditional Fourth Amendment requirements must somehow thwart the government's objectives. In *Skinner*, requiring probable cause and a warrant would thwart the government's legitimate interest in *preventing* accidents before they happened and in determining the party responsible for an actual accident. In *Von Raab*, the government's purported interest was to maintain agents of the highest integrity in a field where they would be constantly exposed to illegal drugs—and requiring probable cause and warrants would, arguably, let too many agents slip through the cracks. In the border search cases, the rationale was likewise that "smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search."¹³² Thus, even with the broader standard articulated in *Skinner*—that the special needs doctrine applies where the warrant and probable cause requirements are impractical¹³³—it does not seem that drug testing welfare recipients would pass that test.

To summarize: it would seem that under conventional Fourth Amendment analysis, suspicionless drug testing of welfare recipients cannot be justified because (1) the courts and the literature claim that only public safety or public school needs provide such justification; and (2) more broadly, the warrant and probable cause requirements may not be impractical. Moreover, even if these two objections could be answered, the courts would still have to weigh the privacy intrusion against the government's interests.

II. UNCONSTITUTIONAL CONDITIONS

There is another doctrine under which suspicionless drug testing is more likely to pass constitutional muster, and a court will have to face this doctrine if the searches are deemed unconstitutional under the conventional Fourth Amendment inquiry described in Part I: the unconstitutional conditions doctrine. The claim is that under the unconstitutional conditions doctrine, the government would *only* need to show the connection between drug testing welfare recipients and lack of productivity or finding work; and it would also require, at most, a finding that the constitutional right is not too significantly burdened (a finding that may very well be part of germaneness as such). The doctrine would not require a court to otherwise weigh the character of the privacy intrusion against the importance of the government's interest. It would not require, more

132. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985).

133. *See supra* text accompanying note 20.

significantly, a showing that the warrant and probable cause requirements are impractical. Further, and most significantly, the germaneness analysis under the unconstitutional conditions doctrine automatically permits many arguments beyond the public safety and public school contexts.

But first, the next Subpart illustrates that several paradoxes and fictions in the special needs doctrine are resolved or corrected by applying the unconstitutional conditions doctrine to the special needs context more broadly. That the unconstitutional conditions doctrine resolves some of the inconsistencies in the current doctrine further supports requiring its application when searches would otherwise be deemed unconstitutional.

A. *Paradoxes and Fictions in the Fourth Amendment Doctrine*

1. *The paradox of consent*

In all the cases involving drug testing welfare recipients, the states have argued that consent nullifies a Fourth Amendment search. This seems to have been the implicit holding of *Wyman*, but this claim is more fundamentally true according to basic Fourth Amendment doctrine. In *Schneckloth v. Bustamonte*, the Court held that it is “well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”¹³⁴ In other words, valid consent nullifies any Fourth Amendment claim.

This tension in the doctrine did not faze the district courts. In *Marchwinski*, the district court did not even explicitly mention the contradiction in doctrine that consent poses. It relied on *Chandler* for the proposition that it does not matter if the drug testing involves a “voluntary activity”—conditioning that activity on a search still falls under the Fourth Amendment’s reach. Because the contradiction did not perturb the Supreme Court in *Chandler* (the Court did not address the question at all), the district court dismissed the argument.¹³⁵

In *Lebron*, the district court recognized the tension but disposed of it in an unsatisfactory paragraph. The court argued that if the plaintiff had consented to the search, “the State’s exaction of consent to an otherwise unconstitutional search in exchange for TANF benefits would violate the doctrine of unconstitutional conditions.”¹³⁶ The court supported this proposition only with citations to quotations stating that the doctrine prohibits conditioning a government benefit on waiver of a constitutional right. Yet the unconstitutional conditions question is far more complicated. As discussed in Part II.B, below, the doctrine

134. 412 U.S. 218, 219 (1973).

135. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1143 (E.D. Mich. 2000), *rev’d*, 309 F.3d 330 (6th Cir. 2002), *judgment of district court aff’d by an equally divided court on reh’g en banc*, 60 F. App’x 601 (6th Cir. 2003).

136. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1284 (M.D. Fla. 2011).

permits just such conditioning as long as that condition is “germane” to the legitimate purpose of the program. The court revealed, in other words, that the issue of consent prompts a contradiction in doctrine that only an unconstitutional conditions analysis might resolve—but the court did not engage in a proper unconstitutional conditions analysis.

The Eleventh Circuit panel in *Lebron* also addressed the issue of consent and tried to resolve it without resorting to the unconstitutional conditions doctrine. First, the panel agreed with the district court that consent to a drug search has never nullified a Fourth Amendment claim in this context.¹³⁷ The panel did, however, attempt to reconcile *Schneekloth v. Bustamonte* and the general notion that consent does nullify a search with the claim that in the drug testing context that is not the case. The court held that in this context there is no “valid consent”—which is consent that is “freely and voluntarily given,” or with the “understanding and intentional waiver of a constitutional right”—but rather consent granted in “submission to authority,” which is invalid.¹³⁸

This attempt at reconciliation is unsatisfying. As a matter of plain meaning, it is hardly clear that consent in such context is *submission to authority* rather than an *understanding and intentional waiver of a constitutional right*. Indeed, I would argue that it sounds far more like the latter. It is hardly a submission to authority when one has the option of walking away and refusing consent. Certainly, it is no more a submission to authority than it is an intentional waiver made with the understanding that something would be given in return.

The cases cited for the court’s propositions are also inapposite. As the court acknowledged, *Johnson v. United States* involved a search of the defendant’s home after entry was demanded “under color of office,” despite the lack of a search warrant.¹³⁹ Similarly, in *Amos v. United States*, again officers had *demande*d entry without a warrant, and in *Bumper v. North Carolina*, the individual searched had merely “acquiesc[ed] to a claim of lawful authority.”¹⁴⁰ These are manifestly instances where the victim *cannot walk away from the threats or demands*, and such instances are easily distinguishable from those in which the individual can choose to refuse.

In short, the *Lebron* panel did not successfully resolve this contradiction in the Fourth Amendment doctrine, which this Part resolves with the doctrine of unconstitutional conditions. To be sure, the panel also addressed the doctrine of unconstitutional conditions in connection with the consent issue—but as with the district court, it misunderstood the thrust of the doctrine. Part II.B will describe this misunderstanding and suggest a solution.

137. *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, No. 11-15258, 2013 WL 672321, at *9 (11th Cir. Feb. 26, 2013).

138. *Id.* (internal quotation marks omitted).

139. *Id.* (citing *Johnson v. United States*, 333 U.S. 10, 13 (1948)).

140. *Id.* (internal quotation mark omitted) (citing *Amos v. United States*, 255 U.S. 313, 317 (1921); *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)).

2. *The paradoxical distinction between home searches and drug tests*

The doctrines raise another contradiction. The distinction between the home searches in *Wyman* and *Sanchez* and the drug tests in *Marchwinski* and *Lebron* defies explanation, assuming the drug testing is not used for a criminal investigation. Almost all of the factors listed by the Court in *Wyman* as justifying a home search could apply to a drug test of a welfare recipient. Distinguishing these cases on the subtle grounds upon which the district courts relied simply adds confusion to the doctrine. The reality is that a drug test is most certainly a “search” in the ordinary meaning of the term and certainly in all Fourth Amendment case law. But a home search is also a search in the ordinary meaning of the term and in essentially all other Fourth Amendment case law.

Neither did the Eleventh Circuit panel in *Lebron* resolve this contradiction. It distinguished *Wyman* by restating that, in that case, the Supreme Court simply found the home search not to be a search at all.¹⁴¹ This is therefore only a restatement of the contradiction. In short, applying a Fourth Amendment analysis in home searches as in *Wyman* as well as in the drug cases (and perhaps the special needs doctrine more broadly) has spawned confusion and incoherence. Realistically, both are searches. The Court can correct some of the confusion if it repudiates the first part of the holding in *Wyman*. After all, *Wyman* could also be analyzed as a special needs case.

But there is a better way to solve the problem: the unconstitutional conditions doctrine can also recognize that both instances are searches. The doctrine additionally resolves, moreover, the contradiction of consent, whereas the special needs test cannot resolve that contradiction. In either instance, if the welfare recipient consents, then there is no search at all and the special needs doctrine should be inapplicable. An unconstitutional conditions analysis would recognize that the question becomes whether the government can require you to give up *your right to refuse consent* to either type of search as a condition of receiving certain government benefits.

3. *The diminished expectation of privacy fiction*

Finally, the entire special needs doctrine in the drug context has relied on a fiction that certain classes of people enjoy a lesser expectation of privacy. There may be very good reason to require that these classes of people, such as public safety employees, undergo drug testing—but it is belittling and disingenuous to claim that by virtue of occupation an individual has a lesser expectation of privacy. The reasonable expectations of privacy test also disproportionately sacrifices the rights of the poorer classes.¹⁴²

141. *Id.* at *10.

142. *See* Budd, *supra* note 1, at 761-65.

If a lack of expectation of privacy is the main justification for the special needs searches, then the Court should have gone the other way in *Chandler*: if a candidate has a lesser expectation of privacy such that he is required to disclose personal financial information, then it's difficult to understand why he should still have an expectation of privacy when the state could nonintrusively obtain information about his possibly engaging in criminal activity. The doctrine of unconstitutional conditions partly helps solve this conundrum by recognizing, again, that the candidates—as well as safety employees, school children, and welfare recipients—all do have an expectation of bodily privacy.

B. *Unconstitutional Conditions: The Doctrine*

1. *Discretionary benefits and constitutional rights*

Kathleen Sullivan has provided a thorough account of the unconstitutional conditions doctrine.¹⁴³ The doctrine arises when the government offers a benefit that it is “permitted but not compelled to provide”—such as direct subsidies or exemptions from regulation or taxation—on condition that the recipient perform or forgo an activity over which he has autonomous choice and which “a preferred constitutional right normally protects from government interference.”¹⁴⁴ The current special needs doctrine does not permit an unconstitutional conditions analysis: as long as the particular searches are not unreasonable, the Fourth Amendment is not implicated, and so there is no constitutionally protected right at all. Yet if we grant that we *ought* to have an expectation of privacy, and that suspicionless, warrantless searches are unreasonable, then the Fourth Amendment is implicated. The question thus becomes whether the government can offer a benefit on the condition that the recipient gives up his Fourth Amendment rights.

The literature on the unconstitutional conditions doctrine typically divides the relevant cases into a few different categories. Sullivan has written that the doctrine has historically been applied in three different kinds of cases: “corporate rights against state regulation, state autonomy from federal encroachment, and individual rights.”¹⁴⁵ Yet the categories of analysis—coercion and germaneness—transcend the differences in the categories of cases and the Court does not apply one or the other particularly consistently.¹⁴⁶ The individual rights cases sometimes also involve the unclear distinction between a penalty

143. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

144. *Id.* at 1421-27.

145. *Id.* at 1428-29.

146. *Id.* at 1419-21.

and a nonsubsidy.¹⁴⁷ These cases may also be divided into categories based on the right being infringed—freedom of religion or speech, property rights, or the right to an abortion, for example—or alternatively, the benefit being conferred, such as public assistance or government subsidies. Most commentators agree that the doctrine as applied by the Supreme Court defies any grand unified theory of unconstitutional conditions.¹⁴⁸

Still, the applicability of the doctrine to suspicionless drug testing of welfare recipients is evident. Once the district courts find that searching in this manner is unconstitutional, an unconstitutional conditions analysis is required. Welfare is a benefit that the government has discretion to grant or withhold, and the recipients have a right to be free of unreasonable searches. Whether the government can grant the benefit on the condition of forgoing the constitutional right is precisely a question of unconstitutional conditions.

This Subpart contends, moreover, that the Fourth Amendment cases in the public welfare context are particularly amenable to resolution under the doctrine of unconstitutional conditions, because the germaneness inquiry in the individual rights cases parallels the reasonableness inquiry in the special needs cases. A germaneness inquiry reduces the complicated balancing to a single, intuitive question: is the reason the government attaches the condition a reason for which the government might withhold the benefit altogether?

This Subpart also contends that the individual rights cases involving coercion and the penalty/nonsubsidy distinction actually make more sense if we assume the Justices who decided them subconsciously applied a kind of germaneness test. In other words, this Subpart will offer a tentative, possible resolution to the Court's apparent incoherence in these cases. Once this step is taken, Fourth Amendment drug searches in the welfare context may appear similar to the unconstitutional conditions cases where the Court permitted the condition.

2. *Germaneness*

Sullivan, citing Robert Hale, explains the germaneness principle that emerged out of ostensibly contradictory corporate privileges cases:

A simple principle, Hale wrote, explained the actual results: the greater power to deny for a good reason includes the lesser power to condition for the same reason, but government cannot impose a condition for a reason not germane to one that would have justified denial. For example, a state could constitutional-

147. *Id.* at 1433; see also Charles R. Bogle, Note, "Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits, 94 COLUM. L. REV. 193, 200-01 (1994).

148. See, e.g., Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1187 (1990); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 11-14 (1988); Sullivan, *supra* note 143, at 1416-17.

ly make acceptance of common carrier liability the price paid by a trucker for permission to use the highways if the condition served to conserve the highways—a purpose that would have justified exclusion of private truckers altogether—but not if it functioned simply to protect existing carriers from competition.¹⁴⁹

Two cases involving a germaneness analysis to individual rights are *Posadas de Puerto Rico Associates v. Tourism Co.*¹⁵⁰ and *Nollan v. California Coastal Commission*.¹⁵¹ The inquiry, again, is intuitive: is the reason the government attaches the condition a reason for which it might refuse to offer the benefit altogether? In *Posadas*, Puerto Rico had permitted gambling—which it had no obligation to permit—but on the condition that there be no casino gambling advertising. The Court upheld the ban on advertising primarily under the commercial speech doctrine, effectively holding that there was no First Amendment violation at all.¹⁵² There would seem to be no unconstitutional conditions problem. The Court also invoked the proposition, however, that “the greater power to completely ban casino gambling necessarily includes the lesser power” to discourage it through the advertising ban; thus, we can understand this case as a species of unconstitutional conditions doctrine had the First Amendment claim been upheld.¹⁵³

The outcome in *Posadas* makes perfect sense. If the reason to ban gambling is that it is an activity unhealthy to the welfare, morals, and productivity of society, then surely it could restrict advertising of the practice in order at least to lower the risk that the activity become commonplace. The restriction on First Amendment rights in this context is a germane condition to permitting the practice in the first place. This was implicit when the Court held that “it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”¹⁵⁴

In *Nollan*, the Court more explicitly invoked the germaneness analysis and the unconstitutional conditions doctrine. California had informed the owners of a beachfront property that the state would only grant their building permit on “the condition that they allow the public an easement to pass across a portion of

149. Sullivan, *supra* note 143, at 1460-61 (discussing Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935)).

150. 478 U.S. 328 (1986).

151. 483 U.S. 825 (1987).

152. *Posadas*, 478 U.S. at 340-44.

153. *Id.* at 345-46.

154. *Id.* at 346; *see also* Sullivan, *supra* note 143, at 1462-63 (“The advertising ban [in *Posadas*] thus operated as if it were a condition exacting surrender of speech in exchange for the privilege of operating a gambling casino. Rejecting the first amendment challenge, Justice Rehnquist’s opinion for the Court echoed Justice Holmes’ rhetoric: ‘the greater power to completely ban casino gambling necessarily includes the lesser power’ to discourage it through the advertising ban.”).

their property,” which “would make it easier for the public to get to [neighboring areas].”¹⁵⁵ The question was whether this was a constitutional condition. As Sullivan explains,

The state indisputably could have denied the building permit altogether, in order to preserve what was left of the public’s visual access to the sea, without running afoul of the takings clause. On the other hand, the state normally could not have granted the public the right to tramp across the Nollans’ backyard without compensation to the Nollans. The question was whether the state could condition the grant of the permit on the uncompensated surrender of a passageway through the backyard.¹⁵⁶

The Court answered that if the state had desired to seize a portion of the property for the purpose of protecting the public’s right to view the ocean—the same reason for which it could legitimately deny the building permit altogether—then the condition would pass constitutional muster:

[I]f the Commission attached to the permit some condition that would have protected the public’s ability to see the beach notwithstanding construction of the new house . . . [and] the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover . . . , the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. . . . [T]he Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.¹⁵⁷

“In other words,” as Sullivan writes, “the greater power to protect the public’s remaining view of the ocean by denying a building permit includes the lesser power to grant the permit on condition that the owner give up some concession of property rights that serves the same end.”¹⁵⁸ But if the purpose was unrelated, the condition would merely be extortion.¹⁵⁹

The individual rights cases involving a coercion/penalty analysis have been difficult for commentators to understand. In a nutshell, the Court has struck down laws or administrative decisions that have denied public assistance benefits or tax exemptions to individuals who would not work on Saturdays due to religious beliefs,¹⁶⁰ to veterans who refused a loyalty oath,¹⁶¹ to residents who had exercised their right to interstate travel and had only recently arrived in the

155. *Nollan*, 483 U.S. at 828.

156. Sullivan, *supra* note 143, at 1463 (footnotes omitted).

157. *Nollan*, 483 U.S. at 836.

158. Sullivan, *supra* note 143, at 1463-64 (alteration omitted) (internal quotation marks omitted).

159. *Id.* at 1464.

160. *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

161. *Speiser v. Randall*, 357 U.S. 513, 515, 529 (1958).

state,¹⁶² and to other cases with similar facts.¹⁶³ On the other hand, the Court has upheld for such recipients bans on striking,¹⁶⁴ Fourth Amendment intrusions in the home (if *Wyman* is recast as an unconstitutional conditions case),¹⁶⁵ and ostensible restrictions on familial association.¹⁶⁶ It has also upheld government refusals to subsidize the exercise of certain rights while encouraging nonexercise of the right, such as the right to an abortion,¹⁶⁷ even though such withholding arguably penalizes the individual who chooses to exercise the right.

Sullivan argues that the Court characterizes the differences in terms of how severely the right is burdened; in those cases where a penalty was not found, the Court reasoned that “a deterrent effect on rights was unlikely.”¹⁶⁸ And in the nonsubsidy cases, the Court has “found coercion conceptually impossible,” because nonsubsidy is merely a way to encourage one outcome over another.¹⁶⁹ Some in the literature have characterized the cases as requiring a compelling interest test.¹⁷⁰

There is perhaps a better explanation for these cases: under a germaneness analysis, these cases would likely come out the way they do but with a coherent explanation for the distinctions among them. Because the cases do not engage in this analysis and commentators have not made this argument before,¹⁷¹ this idea may need to be more fully fleshed out another day. But, in short, the germaneness question may be modified to ask: is the reason to exclude a particular class of people related to the reason for which the program or benefit may be denied altogether?

Under this proposed germaneness test, *Speiser v. Randall*¹⁷² certainly comes out correctly. Veterans are given benefits as a reward for the services they have already rendered. Compelling them to speak in violation of their First

162. *Shapiro v. Thompson*, 394 U.S. 618, 621-22 (1969).

163. *See Sullivan, supra* note 143, at 1433-37.

164. *Lyng v. UAW*, 485 U.S. 360, 362, 371-73 (1988).

165. *See Wyman v. James*, 400 U.S. 309, 310, 326 (1971); *see also infra* Part II.C.3 (recasting it as such).

166. *Lyng v. Castillo*, 477 U.S. 635, 636, 642-43 (1986); *see also Sullivan, supra* note 143, at 1437 n.90.

167. *Harris v. McRae*, 448 U.S. 297, 300-01, 326 (1980).

168. *Sullivan, supra* note 143, at 1439.

169. *Id.*

170. *See Baker, supra* note 148, at 1202; *Bogle, supra* note 147, at 202.

171. Sullivan’s comprehensive theory of unconstitutional conditions focuses on distributive justice. *See Sullivan, supra* note 143, at 1421. Richard Epstein’s theory focuses on preventing the government from redistributing wealth in a socially inefficient manner. *See Epstein, supra* note 148, at 102-04. Philip Hamburger’s theory focuses on the government’s constitutional boundaries and the amount of force it uses when it imposes an otherwise unconstitutional condition. *See Philip Hamburger, Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 543-44 (2012).

172. 357 U.S. 513 (1958); *see supra* note 161 and accompanying text.

Amendment rights is totally unrelated to any reason for which the benefit may be denied generally. The only reason for imposing the loyalty oath is to weed out people with whom the government disagrees politically, just as the common carrier liability was initially and improperly imposed for protectionist purposes rather than for road safety purposes.¹⁷³

Similarly, *Shapiro v. Thompson*¹⁷⁴ likely comes out the same way because when a resident arrives in the state is unrelated to any reason the welfare benefits might be denied generally—for example, were they to be ineffective or too costly. *Sherbert v. Verner*,¹⁷⁵ which struck down a limitation on Sabbatarians receiving benefits, might come out the same way, though it is a harder argument to make. Requiring the payment of welfare benefits to a Hasidic Jew, for instance—currently a very controversial political issue in Israel—would effectively mandate payment to individuals who would never make an effort to find productive work. That surely is a reason why welfare benefits may be denied by the government altogether. But having a Sabbath on Saturday may not be so detrimental to finding work that banning such religious exercise can be a germane condition.

We are now in a position to understand the Eleventh Circuit's discussion of unconstitutional conditions in *Lebron*. The panel restated the district court's holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."¹⁷⁶ This proposition is not, we can now understand, the thrust of the doctrine, which permits *some* denying of benefits even when constitutionally protected interests are at stake. Indeed, the panel quoted a Supreme Court case that should have provided better guidance: "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to [the right]."¹⁷⁷ This is precisely right: the government may not do so *where the benefit sought has little or no relationship to the right*. When the benefit is sufficiently related to the right, the government may, perhaps, withhold the benefit.

The panel cited *Speiser v. Randall* and *Sherbert v. Verner* to buttress its initial statement that the government simply may not condition the benefit on forgoing a constitutional right.¹⁷⁸ But in those cases, as discussed, the issue was either that the germaneness requirement was not met or that the right was too

173. On the common carriers point, see Sullivan, *supra* note 143, at 1460-61.

174. 394 U.S. 618 (1969); see *supra* note 162 and accompanying text.

175. 374 U.S. 398 (1963); see *supra* note 160 and accompanying text.

176. *Lebron v. Sec'y, Fla. Dep't of Children & Families*, No. 11-15258, 2013 WL 672321, at *11 (11th Cir. Feb. 26, 2013) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (internal quotation marks omitted).

177. *Id.* (alterations in original) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)) (internal quotation marks omitted).

178. *Id.*

significantly burdened. It is insufficient to determine the outcome of the unconstitutional conditions analysis by citing only those cases in which the condition was, in fact, found to be unconstitutional, and ignoring those in which a condition was upheld.

The concurring opinion was more forthright that the unconstitutional conditions doctrine is muddled and unclear, and hence emphasized that the panel did no more than hold that the district court did not abuse its discretion by finding a likely violation of the unconstitutional conditions doctrine.¹⁷⁹ The concurring judge seemed to find the Supreme Court's holding in *Perry v. Sindermann* to be particularly determinative, and again quoted *Perry* for the proposition that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."¹⁸⁰ Yet *Perry* is hardly the only case on unconstitutional conditions. True, the Court in *Perry* seemed to be making a blanket statement that any "condition" on a benefit that infringes a constitutional right is an unconstitutional condition—but this is not what the other cases amount to.

Perry may stand for nothing more than the proposition that in the context of public employment of college professors, a requirement that the employee accept an infringement of his rights to free speech is an unconstitutional condition.¹⁸¹ Sullivan surveys *Perry* and other public employment cases, and concludes that the government may sometimes deny First Amendment rights to public employees as a condition of employment, even if it could not do so in *Perry*:

Other conditions on public employee speech also may be upheld because some overriding government purpose justifies them, not because they do not pressure rights. Although the Court has held that the first amendment bars the state from firing public employees for speaking out on matters of public concern, and to bar dismissal from nonpolicymaking government jobs based on political affiliation, it has upheld restrictions on speech or political association that would destroy workplace electoral neutrality, or would impair the efficiency of the public services the state performs through its employees, by, for example, exacerbating labor grievances. . . . [S]uch conditions [in the latter decisions] should be treated as infringing speech and thus in need of strong justification, but as arguably justified by the need for an efficient or depoliticized bureaucracy.¹⁸²

Early cases did in fact permit the government to infringe the First Amendment rights of public employees. As Justice Holmes said in perhaps the most famous of the earlier cases, a policeman "may have a constitutional right to talk

179. *Id.* at *14 (Jordan, J., concurring).

180. *Lebron v. Sec'y*, 2013 WL 672321, at *14 (quoting *Perry*, 408 U.S. at 597) (internal quotation marks omitted). As noted, the majority also quoted this phrase. See *supra* note 176 and accompanying text.

181. See *Perry*, 408 U.S. at 597-98.

182. Sullivan, *supra* note 143, at 1503-04 (alterations in original, footnotes, and internal quotation marks omitted).

politics, but he has no constitutional right to be a policeman.”¹⁸³ Sullivan writes that *Perry* and a long line of other cases have held “that government may not sanction employees for speech on matters of public concern,” and thus tempered Justice Holmes’s notion “that government may condition employment on silence that it could not constitutionally require of ordinary citizens.”¹⁸⁴ In sum, it is an unconstitutional condition to deny *political* speech rights to public employees, but it does not follow that any condition that infringes upon constitutional rights is an unconstitutional condition.

The claim of this Subpart is that under the germaneness analysis of *Posadas* or *Nollan* and the unconstitutional conditions doctrine more broadly, suspicionless drug testing may be constitutional if the reason that the government seeks the drug tests—perhaps that public funds should go to their intended use, or that drug use frustrates the purpose of welfare-to-work programs by making recipients less productive—is a reason for which welfare benefits might be denied altogether. Part III will argue that, although many of the rationales provided by Florida or the Court in *Wyman* may not satisfy the germaneness test, the welfare-to-work argument might. But first, the next Subpart will briefly explain how the other special needs cases are conveniently explained under a germaneness analysis.

C. *Special Needs Reframed*

1. *Constitutional conditions and special needs: Von Raab, Skinner, and Vernonia*

Under the germaneness analysis, we can now assume Fourth Amendment violations in the suspicionless drug testing cases. Even then, *Vernonia* is still justified on the simple ground that participation in competitive sports in public schools is a benefit and not a right. The government may deny the benefit generally if it believes the sport is unsafe, or if fairness demands that students not use performance-enhancing drugs—a concern notably absent from the Court’s holding. Drug testing to ensure both safety and fairness is thus a germane condition.

The outcome in *Skinner* is also justified. The government is not required to provide the benefit of public employment, and it can constitutionally deny private employment in the interstate rail industry entirely, if it so desires, out of concern for public safety. The individual is not compelled to accept the benefit if it is offered. The government thus can impose a condition related to the reason it may deny the benefit entirely. In *Skinner*, the government may thus condition employment in the rail industry on guarantees of safe practices, even if that requires subordinating a constitutional right.

183. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892).

184. Sullivan, *supra* note 143, at 1459 n.192 (citing *Perry* and other cases).

Von Raab is also easy to explain. As with all public safety occupations—police, ambulance drivers, and so on—the government can deny the benefit on the ground that certain individuals, or a certain class of individuals, would not enhance public safety and thus would frustrate the very purpose of the public benefit. In other words, if public safety employees actually endangered the public, then that would be a good reason not to have public safety employees. Therefore, it follows that the government may grant the privilege of such public employment on the condition of an assurance that the individual will not endanger the public. The Fourth Amendment restriction is thus germane.

Under this analysis, none of the cases now relies on the fiction of a diminished expectation of privacy, or the contradiction that consent nullifies a Fourth Amendment claim at some times but not others. The unconstitutional conditions doctrine also more easily explains the holdings in these cases.

2. *Unconstitutional conditions and special needs: Chandler, Earls, and the border search cases*

Not all special needs cases are amenable to unconstitutional conditions analysis. These are cases where either the individual has a right that the government does not have discretion to give or take away—that is, the right is not within the government’s power to confer—or the individual is compelled to accept the government benefit or program. The unconstitutional conditions analysis dictates that the government cannot put conditions on these rights. This means that in *these* cases the Fourth Amendment has to do independent work. The Court must conclude that you actually *don’t* have a constitutional right on either end of the equation—either you don’t have a right to run for office or enter this country, for example, or there is no Fourth Amendment violation.

Chandler is a perfect example. Quite plainly, the government does not have full discretion to decide who can run for public office. Certainly there are innate characteristics that don’t involve personal choice—such as age—that the Constitution can and does require. There may also be physical impossibilities, such as if a candidate is serving a prison sentence. But where the government conditions candidacy on an autonomous choice, it is violating constitutional rights not on the condition side of the equation but on the benefit side. The government simply does not have the constitutional authority to decide what additional requirements to impose without meeting some compelling state interest.¹⁸⁵ Term limits may serve a compelling interest, but it’s hardly clear that

185. The Court held in *Lubin v. Panish*, for example, that “[t]he right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.” 415 U.S. 709, 716 (1974). The Court struck down California’s filing fee as inadmissibly burdening this right. *Id.* at 718. Other courts have affirmed that running for office is a First Amendment right, though it may be limited in several respects. *See, e.g.*, *Randall v. Scott*, 610 F.3d 701, 713-14 (11th Cir. 2010); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977).

drug testing does. *Chandler* is therefore not an unconstitutional conditions case, and the Court was right to analyze it under the Fourth Amendment. The Court was likely right, also, that candidates do not have any different expectation of privacy than the ordinary citizen when it comes to drug testing.

Earls is also not an unconstitutional conditions case. Students are compelled to attend public school. This means they do not have an autonomous choice in the matter and the unconstitutional conditions doctrine cannot apply. If these searches are justifiable for all schoolchildren, it must be justified independently on *in loco parentis* grounds or some other independent Fourth Amendment analysis.

Citizens likewise have a right to enter this country, so suspicionless border searches also do not create an unconstitutional conditions problem. If such searches are to be constitutional, there must be no Fourth Amendment violation.

3. *Constitutional conditions and home searches*

Wyman and *Sanchez* also make much more sense under the unconstitutional conditions doctrine. First, there is now no reason to hold that a home search is not a “search,” a holding that seems flatly to contradict all other Fourth Amendment case law on such searches.¹⁸⁶ Second, we need not engage in a complicated reasonableness analysis under the Fourth Amendment.

The question becomes, rather, whether forgoing a constitutional right to be free of unreasonable searches is germane as a condition to receiving public welfare benefits. If such benefits might generally be denied because there is no chance that the individual will be rehabilitated or find meaningful work, then granting such benefits on a condition that makes it more likely for the recipients to be rehabilitated and find such work would be germane. The Court’s assertion that home visits are the “heart” of the welfare administration makes much more sense, therefore, under an unconstitutional conditions analysis.

III. DRUG TESTING WELFARE RECIPIENTS: A CONSTITUTIONAL CONDITION?

We now see that the unconstitutional conditions doctrine explains the results of the special needs cases in a much simpler analysis than the balancing test the Court currently applies. Moreover, the doctrine reconciles the drug testing, special needs cases with the home search, welfare cases under a unified unconstitutional conditions analysis, and it eliminates the previous doctrinal paradox of consent nullifying Fourth Amendment protection in some cases but not in others. Finally, it does away with the belittling claim that students, the poor, and public safety employees have or ought to have a diminished expecta-

186. See Budd, *supra* note 1, at 766-67.

tion of privacy. They do not.¹⁸⁷ The question is whether it is legitimate for the government to demand that they give up a right they would otherwise have.

What remains to explore is whether drug testing welfare recipients, while perhaps unconstitutional under the Fourth Amendment, might still be germane as a condition for receipt of those benefits and thus constitutional under the unconstitutional conditions doctrine. One case is particularly relevant to this question. In *Lyng v. UAW*, the Supreme Court upheld a 1981 amendment to the Food Stamp Act that denied eligibility to anyone engaged in a strike, and denied increased allotments if a decrease in income resulted from striking.¹⁸⁸ Striking is a First Amendment right, but the Court held that the law did not have a “substantial impact on any fundamental interest” and thus did not unduly coerce individuals to forgo exercising their rights.¹⁸⁹ Rather, the law “merely declines to extend additional food stamp assistance to striking individuals simply because the decision to strike inevitably leads to a decline in their income.”¹⁹⁰ Though the Court did not use the language of germaneness, the conclusion must be that the condition on receiving benefits is germane. Because the government could deny benefits on the ground that a recipient willfully reduces his income, it can grant the benefit on the specific condition that the recipient not take such actions, even if that means forgoing a constitutional right.

The central questions for the drug testing analysis are now clearer: For what purposes may the government deny welfare benefits generally? Does conditioning the receipt of these benefits on drug testing further this purpose? Finally, how severely burdened is the fundamental interest if such conditioning occurs? This last question is relevant because the Supreme Court still asks in the coercion cases—such as *Lyng*—how severely burdened the constitutional right is.¹⁹¹ In *Lyng* the Court concluded that the right to strike was not substantially impacted by the government’s refusal to help pay for such striking with welfare benefits. In the welfare context, it may be helpful to assume germaneness and address this last question first. It is hard to imagine a court finding a substantial burden on Fourth Amendment rights because the Amendment’s protections still apply in every other respect: the welfare recipients don’t give up Fourth Amendment protections in unrelated criminal investigations against them, and they would not give up those protections in related criminal investigations assuming the drug test results are not shared with law enforcement.

The germaneness question is more challenging. As discussed above in Part I.E, it seems that the only plausible argument for denying welfare benefits generally is that they do not succeed in helping the recipient find work, or as in *Lyng* that the recipient takes willful actions to keep income low and thus to stay

187. Unless one still believes that *Earls* is justified on *in loco parentis* grounds.

188. 485 U.S. 360, 362 (1988).

189. *Id.* at 370.

190. *Id.* at 369.

191. *See id.* at 366-68.

on public assistance. Because the district and circuit courts in *Lebron* specifically rejected these arguments on the ground that there was no evidence that drug use affects the program in any way (and thus such a condition would not be germane), litigants and the courts must rely on any evidence indicating the effect (in either direction) of drugs on these outcomes.

There are only two coherent positions one can adopt. Either drugs do have an impact on productivity and do harm the individual, and the condition of a drug search is germane, or they do not have such impacts and are not germane. But if one adopts the latter position, one must also question why drug use is illegal at all. The entire premise of criminalizing drug use is that there is some societal harm caused by that use. The most common arguments for such criminalization are that drug users harm others, that they harm themselves, or that they become less productive members of society.¹⁹² If the aim of public welfare is to help the poor become self-sufficient and productive members of society, then, it seems to this author, all of the stated reasons why drugs should be illegal suggest that the drug search condition is also germane.

One of the studies relied upon by Florida in the *Lebron* litigation was a National Poverty Center report that showed that some 21% of welfare recipients self-reported having used drugs (mostly marijuana) in the previous year.¹⁹³ The district court did not challenge the study but merely held that it was not probative of anything material, because the data were from 1994 to 1995 and the study was not specific to Florida. Thus the “study is not of the same population being considered here, but a much larger recipient, demographic and geographic population than the TANF recipients being tested here.”¹⁹⁴ The second study relied upon by the state showed that in 1992 only 3.8% to 9.8% of national recipients of various welfare programs used drugs, and the third study also claimed a small number.¹⁹⁵ Only one study seems to have mentioned productivity, which concluded that “whether or not a person tested positively for drug abuse on the urinalysis affected very little their likelihood of working.”¹⁹⁶

192. See, e.g., OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 5 (2012), available at http://www.whitehouse.gov/sites/default/files/ondcp/2012_ndcs.pdf.

193. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1286 (M.D. Fla. 2011), *aff'd sub nom. Lebron v. Sec'y, Fla. Dep't of Children & Families*, No. 11-15258, 2013 WL 672321 (11th Cir. Feb. 26, 2013) (citing RUKMALIE JAYAKODY ET AL., NAT'L POVERTY CTR., POLICY BRIEF #2: SUBSTANCE ABUSE AND WELFARE REFORM 2-3 (2004), available at http://www.npc.umich.edu/publications/policy_briefs/brief02/brief2.pdf).

194. *Id.* at 1287.

195. *Id.* (citing Bridget F. Grant & Deborah A. Dawson, *Alcohol and Drug Use, Abuse, and Dependence among Welfare Recipients*, 86 AM. J. PUB. HEALTH 1450, 1453 (1996); Harold Pollack et al., *Drug Testing Welfare Recipients—False Positives, False Negatives, Unanticipated Opportunities*, 12 WOMEN'S HEALTH ISSUES 23 (2002)).

196. *Id.* at 1290 (quoting Robert E. Crew, Jr. & Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits: The Outcome of a Demonstration Project in Florida*, 17 J. HEALTH & SOC. POL'Y 39, 48 (2003)) (internal quotation marks omitted).

Again, the arguments about how many welfare recipients use drugs compared to the general population does not seem relevant as far as an unconstitutional conditions analysis goes, though it does seem relevant for a special needs analysis.¹⁹⁷ The productivity question is more relevant here. It seems that if a state offered more evidence of the purported link between drug use and diminished productivity, it may be able to make the case for a constitutional condition. Numerous studies purport to show this decline in productivity.

Before canvassing these studies (briefly), it is important to point out one glaring issue with their methodologies. Almost all of these studies include in their productivity determination the costs of incarceration and drug-related crime. Presumably, if drugs were legal, these productivity costs would be entirely eliminated.¹⁹⁸ The most germane question is whether drug abuse as such affects the likelihood of users to find work, avoid absenteeism, stay motivated, and the like. An argument could be made, however, that as long as drugs *are* illegal, the other productivity measures should also count. After all, why give welfare benefits to an individual who will involve himself in drug-related crime? Still, because this Note also raises the question of whether drugs as such should be illegal, it will focus on the work-related productivity measures. This Note does not otherwise challenge these studies' methodologies.

One 2011 U.S. Department of Justice report entitled *The Economic Impact of Illicit Drug Use on American Society* maintains that productivity loss per year due to reduced labor participation as a result of drug use is around \$49 billion; premature, nonhomicide mortality as a result of drug use results in an additional economic loss of \$16 billion; and treatment costs and hospitalization costs add another \$3 billion.¹⁹⁹ If one considers them relevant, incarceration- and homicide-related premature mortality costs add about another \$52 billion in economic loss.²⁰⁰ A study analyzing the economic impact of drug use between 1992 and 2002 concluded that, by 2002, "drug abuse"-related illness and hospitalization led to over \$35 billion in lost productivity.²⁰¹

A United Nations Office on Drugs and Crime study that surveyed existing literature also concluded that there is a relationship between drug use and unemployment and lack of productivity. For example, the 1992 British Crime

197. Though even that's not clear. *See supra* notes 119-120 and accompanying text.

198. For an economist's perspective along these lines on this issue, see JEFFREY A. MIRON, A CRITIQUE OF ESTIMATES OF THE ECONOMIC COSTS OF DRUG ABUSE 1-9 (2003), available at http://www.drugpolicy.org/docUploads/Miron_Report.pdf; more specifically, see *id.* at 12 (estimating 2002 nationwide enforcement costs to be about \$33 billion); and *id.* at 12-17 (elaborating on other costs of prohibition, such as increased corruption).

199. U.S. DEP'T OF JUSTICE, NAT'L DRUG INTELLIGENCE CTR., THE ECONOMIC IMPACT OF ILLICIT DRUG USE ON AMERICAN SOCIETY, at ix, 29-54 (2011), available at <http://www.justice.gov/archive/ndic/pubs44/44731/44731p.pdf>.

200. *See id.* at ix.

201. OFFICE OF NAT'L DRUG CONTROL POLICY, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES 1992-2002, at III-14 tbl.III-8 (2004), available at https://www.ncjrs.gov/ondcpubs/publications/pdf/economic_costs.pdf.

Survey “revealed that life-time prevalence of drug abuse among the unemployed was 60 per cent higher than among the employed.”²⁰² A 1993 Colombia survey also showed that the “annual prevalence of drug abuse among the unemployed (4.1 per cent) was almost four times higher than among the employed (1.1 per cent).”²⁰³ Other studies have tried to survey the impact of drug abuse on the workplace environment. A study published in the *Journal of Global Drug Policy and Practice* reported that, of the surveyed companies implementing drug testing programs, 19% experienced increases in employee productivity, 16% experienced reductions in employee turnover, and companies with previously high absenteeism and workers compensation incidence rates saw those rates drop dramatically (reductions of 56% and 57%, respectively).²⁰⁴

These studies are not without their critics. A RAND report from 2009 canvassed the existing literature on substance abuse and occupational injuries,²⁰⁵ and could only conclude that “there is an association between substance use and occupational injury.”²⁰⁶ There is a stronger association for males and in certain industries. The report also concluded, however,

The proportion of injuries *caused* by substance abuse . . . is relatively small. Instead, there is mounting evidence that harmful substance use is one of a constellation of behaviors exhibited by certain individuals who may avoid work-related safety precautions and take greater work-related risks. Thus, we suspect that it is more likely that risk-taking dispositions, often termed *deviance proneness*, and other omitted factors can explain most empirical associations between substance use and injuries at work.²⁰⁷

Another RAND report examining economic losses due to methamphetamine use likewise concluded that it was difficult to determine whether use generally impacts productivity, and it estimated that productivity loss due to unemployment and absenteeism (excluding incarceration time) is only around \$337

202. UNITED NATIONS OFFICE ON DRUGS & CRIME, ECONOMIC AND SOCIAL CONSEQUENCES OF DRUG ABUSE AND ILLICIT TRAFFICKING 16 (1998) (citing JOY MOTT & CATRIONA MIRRLEES-BLACK, SELF-REPORTED DRUG MISUSE IN ENGLAND AND WALES, MAIN FINDINGS FROM THE 1992 BRITISH CRIME SURVEY (Home Office, Research and Planning Unit Paper 89, Dec. 1993)), available at http://www.unodc.org/pdf/technical_series_1998-01-01_1.pdf.

203. *Id.* at 16-17 (citing EDGAR RODRÍGUEZ OSPINA ET AL., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 15, 22 (1993)).

204. Neil A. Fortner et al., *Employee Drug Testing: Study Shows Improved Productivity and Attendance and Decreased Workers' Compensation and Turnover*, J. GLOBAL DRUG POL'Y & PRAC., Winter 2011, at 1.

205. RAJEEV RAMCHAND ET AL., RAND CTR. FOR HEALTH & SAFETY IN THE WORKPLACE, THE EFFECTS OF SUBSTANCE USE ON WORKPLACE INJURIES (2009), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2009/RAND_OP247.pdf.

206. *Id.* at 31.

207. *Id.*

million annually.²⁰⁸ Summarizing the literature, the report concluded, “Although there is a widespread belief that drug use reduces productivity, the scientific literature examining the relationships between drug use and wages is inconclusive.”²⁰⁹

That said, the second RAND report did conclude that meth use impacted the likelihood of working: “we consistently find that self-reported meth use in the past year has a positive and statistically significant association with unemployment in the past year,” to the tune of a 10% increase in unemployment from the baseline unemployment rate.²¹⁰ Yet the study found no statistically significant difference in how *long* meth users were unemployed: “meth users do not have, on average, longer unemployment spells, although there is a lot more variability around their mean. Additional regression analyses confirm that there is no statistically significant difference in average weeks unemployed.”²¹¹

Again surveying the literature, the report also concluded that, while the literature “suggests that employee drug use is associated with increased absenteeism,” the only economic study explicitly examining the causality of the relationship “found no statistically significant effect between past-year drug use and absenteeism.”²¹² Conducting its own analyses of the data sets specifically with respect to meth use, however, the RAND study concluded that users on average were absent from work for three weeks per year due to meth use (excluding time in treatment).²¹³

To conclude, studies tend to show that there is *some* relationship between unemployment and drug use and a relationship between absenteeism and drug use. Thus, the two central questions for germaneness—for what purposes may the government deny welfare benefits generally, and does conditioning the receipt of these benefits on drug testing further this purpose?—could be answered to allow drug testing of welfare recipients on the grounds that the benefit may be denied altogether if recipients were to use the public funds to engage in activities that harm their productivity and employment prospects.

But this answer is not foolproof. There is no clear causation established between drug use and occupational injuries. Moreover, as one of the RAND studies has suggested, much of the literature is also inconclusive as to the impact of drug use on wages. The relationships also ought to be kept in perspective: after all, the 10% increase in unemployment among meth users means only that among such users the unemployment rate is 10.69%, whereas the baseline un-

208. NANCY NICOSIA ET AL., RAND DRUG POLICY RESEARCH CTR., THE ECONOMIC COST OF METHAMPHETAMINE USE IN THE UNITED STATES, 2005, at 43 tbl.5.1 (2009), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG829.pdf (using the “best estimate” figures and subtracting the amount due to incarceration).

209. *Id.* at 43 (citations omitted).

210. *Id.* at 47.

211. *Id.*

212. *Id.* at 48.

213. *Id.* at 51 tbl.5.5.

employment rate is 9.72%.²¹⁴ These studies do tend to show an impact, to be sure, but the billions of dollars in lost productivity cited by the government in its reports seem exaggerated, even after eliminating incarceration- and crime-related costs that would likely mostly disappear if drugs were legalized or decriminalized. The government's methodology has also been criticized by some as unsound.²¹⁵

As the courts begin to address the novel constitutional question posed by suspicionless drug testing of welfare recipients, it may be the right time to start questioning the illegality of some kinds of drug use. The states will have to marshal significant evidence to show the relationship between drug use and unemployment, absenteeism, and workplace injury for either a special needs analysis or an unconstitutional conditions analysis. Whether or not such evidence would meet the special needs test, it seems that it would meet the unconstitutional conditions test for germaneness if the evidence is sound. If no such evidence exists—or if there is no strong evidence—it will be difficult to make the case for suspicionless drug testing under either doctrine. But if that's so, it may also be time for the courts, the people, and the government to ask why drugs are criminalized in the first instance, and whether the relationship between economic loss and drug use not attributable to criminalization warrants a policy of prohibition that also imposes its own significant costs on society.

CONCLUSION

This Note has aimed to show, consistent with the existing literature, that under the special needs doctrine, suspicionless drug testing of welfare recipients is unconstitutional. The Supreme Court's suspicionless drug testing cases have all involved public safety or public school concerns. Under the broader special needs doctrine, the warrant and probable cause requirements of the Fourth Amendment must be impractical. Governments wishing to subject their welfare recipients to suspicionless drug testing will have to make a far greater showing that either public safety is at issue, or that the probable cause and warrant requirements, and even a reasonable suspicion requirement, are impractical.

Still, the literature and the cases have all ignored a second doctrine—the doctrine of unconstitutional conditions. This doctrine applies precisely where a benefit is conditioned on forgoing a constitutional right—in these cases, the right to be free of unreasonable searches and seizures. If under traditional Fourth Amendment doctrine, and under the special needs doctrine, such drug testing is unconstitutional, the unconstitutional conditions doctrine might still justify infringing on the constitutional right. To so justify, drug testing must be germane to the benefit received; in other words, a recipient's refusal to guaran-

214. *Id.* at 47.

215. *See, e.g.,* MIRON, *supra* note 198, at 1-9.

tee that they are drug-free must be a legitimate reason for the state to deny the welfare benefits altogether.

This Note has argued that a state would certainly be justified in denying the benefit altogether to drug users if it could show a relationship between drug use and absenteeism, occupational injury, increased unemployment, or decreased productivity. It would thus also be justified in conditioning receipt of the benefit on submission to a test proving that the recipient is not a drug user. Indeed, some of the primary rationales for drug criminalization are precisely these kinds of effects on productivity. If these rationales are correct—and the empirical literature seems ambiguous on the point—then drug testing welfare recipients appears to be a constitutional condition. If the empirical facts cannot sustain the rationale, then we would need to start questioning whether drugs should still be illegal despite this lack of evidence.