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Sometimes You Have to go Backwards to go Forwards: Judicial Review and the New National Security Exception¹

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I. ABSTRACT

National security concerns have historically provided a strong basis for non-justiciable Executive Branch action; however, post 9/11, such actions have grown to encompass a greater number of American citizens' civil liberties. The federal judiciary's deferential treatment of national-security related conduct, particularly in the realm of suspicionless searches, occurs with dangerous frequency, and any semblance of meaningful review has been nearly eviscerated. The stakes involved in national security are weighty and, in many instances, present the courts with an artificial choice: uphold a potentially over-zealous suspicionless-search program but avoid danger, or strike down such a program in favor of civil liberties only to risk causing mass tragedy.

Instead of being confined by two extreme choices, the courts should instead implement a more robust review process akin to the federal courts' institutional reform practice in the school desegregation and prison reform

¹ Beginning in summer 2001, the New York City Transit Authority placed signs bearing this "somewhat apologetic" phrase throughout the subway system to assist passengers in their commute during weekend track work. See Posting of Hugh Son to Wired New York Forum, <http://www.wirednewyork.com/forum/showthread.php?t=4555> (Feb. 15, 2004, 12:41 EST).

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cases, which would allow remedial flexibility with programs that are constitutionally problematic. This paper demonstrates the way in which the courts could structure such remedial decrees to monitor and maintain a program's constitutionality by using as a sample the suspicionless-search program instituted in July 2005 by the New York City Police Department,

In lieu of creating yet another exception to the Fourth Amendment, the federal courts should heed the lessons from their own experience to avoid the potentially limitless extension of a new national security exception into civil liberties.

II. INTRODUCTION

On July 7, 2005, terrorists—using concealed weapons—attacked the London subway and bus systems, killed fifty-two people, and wounded over 700 others.² On July 21, 2005, terrorists launched a second, but unsuccessful wave of concealed explosive attacks on London's subway system.³ On that same day, the New York City Police Department ("NYPD") initiated the Container Search Program,⁴ in which the police search backpacks and bags of subway riders as they entered the City's subway system.⁵ Immediately, five citizens and the New York Civil Liberties Union ("NYCLU") challenged this Program in the United States District Court for the Southern District of New York and the Court upheld

² In Depth: *London Attacks*, BBC.com, http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm (follow "7 July: What happened" hyperlink) (last visited September 18, 2008).

³ *Id.* (follow "21 July: What happened" hyperlink) (last visited September 18, 2008).

⁴ See Charles J. Keeley, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 *FORDHAM L. REV.* 3231, 3263–64 (2006) (internal quotations omitted).

The Police Commissioner promised that the program would take a systematic approach and that officers in the field would receive instruction on how to conduct the searches in accordance with the law and the Constitution.

The New York City subway system runs twenty-four hours a day and consists of twenty-six interconnected lines and 468 passenger stations, many of which have multiple entrances Each weekday it carries upwards of 4.7 million passengers.

Under the Container Inspection Program, the NYPD establishes daily checkpoints at the entrances of selected subway stations, setting up tables in front of the entrances' turnstiles to conduct inspections just before riders enter the system.

Officers select riders according to a numerical formula. For instance, every twelfth, fifteenth, or twentieth rider carrying a container large enough to conceal an explosive device is selected for a search. Officers have been instructed that the inspections [which last seconds, not minutes] must be limited in scope to determine whether a backpack or bag contains an explosive device and have been trained to recognize explosive devices. Officers may not inspect containers too small to hold an explosive device. The determination of what size container may be subject to inspection is left to the discretion of the officers. Officers also may not intentionally look for other contraband or attempt to read any printed material in the container.

⁵ See *id.* at 3264.

the searches under the special needs doctrine.⁶ On appeal, the Second Circuit affirmed the district court's decision by underscoring the importance of national security and the necessary limitations on traditional Fourth Amendment protections.⁷

Although *Macwade v. Kelly*⁸ is one of the first cases that challenges the constitutionality of a suspicionless search program instituted by a state to combat terrorism, the Second Circuit's decision was not so peculiar when considered as representative of a deferential pattern in the federal judiciary respecting national security.⁹ The distinction between *Macwade* and many of these earlier decisions is that the former decisions relate more to the plenary foreign affairs power held by the political branches,¹⁰ whereas *Macwade* touches on American citizens' most quotidian domestic activities. The more attenuated connection to the foreign affairs powers makes cases similar to *Macwade* ones in which the judiciary has the duty to be involved in a more robust way, as it affects constitutional rights.¹¹

Currently, the panic in our society concerning future terrorist attacks makes it imperative that the courts do not abdicate their important role as constitutional guardians. The courts must be present and aware of the many nuances in the national security debate to strike the delicate balance between governmental needs and civil liberty intrusions. Changing the role of the judiciary in this context is not an easy task, as many courts likely feel they do not have a choice but to facilitate governmental needs over individual rights because of the great fear of terrorist attacks. This article proposes a solution that grants greater flexibility to the district courts in order to conduct a more meaningful review of suspicionless search programs.

Combining the strengths of the special needs framework and reinforcing its weaknesses, this article proposes that the Supreme Court grant certiorari to a case like *MacWade*. If the Court holds the program unconstitutional under the special needs framework, then it should remand the case to the district court with a more nuanced remedial decree. The

⁶ *Macwade v. Kelly*, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005), *aff'd*, 460 F.3d 260 (2d Cir. 2006).

⁷ *Macwade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

⁸ *Id.*

⁹ See *infra* notes 54–57 and accompanying text.

¹⁰ See, e.g., *United States v. Nixon*, 418 U.S. 683, 710–11 (1974) (noting that “[t]he President . . . [is] the Nation’s organ for foreign affairs . . .” and the Court does not have the authority to trammel on the executive branch in that respect) (internal quotations omitted); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations— a power which does not require as a basis for its exercise an act of Congress. . .”).

¹¹ See U.S. CONST. art. III, § 2, cl. 1; *Curtiss-Wright*, 299 U.S. at 315–16 (reiterating “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers . . . [with] respect . . . [to] our internal affairs”).

Court should also instruct the district court to condition the program's continuation on periodic court supervision to ensure the program's constitutionality, reasonableness, and efficacy. To that end, the district courts should have the authority to institute broad remedial measures designed for the extended review of suspicionless search programs relating to national security—particularly of urban mass-transit systems—that courts hold unconstitutional. This article's proposal would allow such a program to proceed on the condition of extended judicial review to monitor its constitutionality, instead of striking down the program and risking a terrorist attack due to the program's absence.

By utilizing familiar tools from the federal courts' institutional reform practice in the school desegregation and prison reform cases, the extended review would include factual inquiries into the needs, efficacy, and reasonableness of the program under the circumstances, with *in camera* review when necessary to protect privileged or classified material. This extended review could effectively counteract the underlying deferential trend toward national security within the federal judiciary, which, in the post-9/11 climate, has raised separation of powers and individual liberty issues. If the federal courts have the leeway to condition the continuation of such programs on the maintenance of an extended supervisory period to determine a program's constitutional boundaries, they are more likely to conduct a meaningful review. This will ensure the continued reasonableness and efficacy of the program, allow citizens to acclimate to the particular intrusion, and support the legitimacy of the federal judges' neutral magisterial role. Thus, if the federal courts take a step back to meaningfully consider such a program, instead of reacting to societal panic and blindly racing forward to uphold the program, the courts may vindicate the interests of all of the relevant players—law enforcement authorities, citizens, and the judiciary. In fact, taking this step back provides the best way to ensure that judiciary continues to move forward.

In Part I, this article begins with a brief overview of *Macwade* at both the trial and appellate levels. Part II of this article discusses the threshold issue of whether the judicial branch, namely, federal judges, are in the best position to review the constitutionality of national security programs¹² administered by state and local governments. Part III briefly outlines the development of the special needs doctrine and other warrant exceptions within Fourth Amendment jurisprudence, and expounds on the strengths and weaknesses of this doctrine in the context of national security. It

¹² Throughout this article, I refer to national security search programs, which in this article are defined broadly to include any search programs relating to the prevention and detection of terrorism. For example, the stated purpose of NYPD's Container Search Program was to "increase deterrence and detection of potential terrorist activity and to give greater protection to the mass transit riding public." *Macwade*, 2005 WL 3338573, at *5 (internal quotations omitted).

concludes by demonstrating that the current Fourth Amendment exceptions, in particular the special needs doctrine, are insufficient for reviewing cases involving search programs justified on national security grounds. Part IV proposes this Article's solution for reviewing the constitutionality of national security programs involving potential Fourth Amendment violations. It summarizes the Supreme Court's institutional reform practice in the areas of school desegregation and prison reform, then examines the way the Court attempted to achieve its objectives for each, and what tools and methods were utilized in furthering the Court's initiatives. Part V applies a hypothetical institutional reform practice to New York City's Container Inspection Program to demonstrate how this type of review could work in practice. Part VI presents and addresses potential criticisms and alternatives to this article's proposal, by reiterating why ongoing judicial review of national security search programs is the necessary and superior solution to counter hyper-deference and imbalance in the federal judiciary respecting national security.

III. THE NEW YORK CITY CONTAINER SEARCH PROGRAM

A. *U.S. District Court for the Southern District of New York*

Five individuals, Brendan MacWade, Andrew Shonebaum, Joseph Gehring, Jr., Partha Banerjee, and Norman Murphy ("Plaintiffs"), represented by the NYCLU, filed a complaint seeking a declaratory judgment and preliminary and permanent injunctive relief against Raymond Kelly ("Kelly"), Commissioner of the NYPD, and the City of New York ("City") alleging that Defendants' "policy and practice of searching those seeking to use the New York City subway system without any individualized suspicion of wrongdoing violates the Fourth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983."¹³ Plaintiffs later withdrew the injunction request and the case proceeded to a bench trial on the merits.¹⁴

During the two-day trial, the court heard eight witnesses testify for the Plaintiffs and five witnesses testify for the Defendants.¹⁵ The Plaintiffs' witnesses included the five original plaintiffs; Maggie Gram, NYCLU employee who conducted an informal monitoring of the Container Search Program to determine checkpoint frequency; Gene Russianoff, staff attorney from the New York Public Interest Research Group's Straphangers Campaign, testifying in his individual capacity regarding the particularities of the City's subway system; and Charles Pena, a policy

¹³ *Id.* at *1 (internal quotations omitted).

¹⁴ *Id.* at *2.

¹⁵ *Id.*

analyst for the Tauri Group (security consultants to the Government), testifying regarding the Program's ineffectiveness.¹⁶ The Defendants' witnesses included David Cohen, the NYPD's Deputy Commissioner for Intelligence and Michael Sheehan, the NYPD's Deputy Commissioner for Counter-Terrorism, both of whom testified regarding the terrorist threat to the City and the effectiveness of the Program; Kerry Sweet, NYPD's Executive Officer of the Legal Bureau, who testified about the Program's creation; Deputy Chief Owen Monaghan, NYPD's Executive Officer of the Transit Bureau, who testified about the Program's implementation; and Termaine Garden, Director of Customer Communications for the Department of Subways of the City's Transit Authority, who testified regarding passenger notice.¹⁷ Relying on the witness testimony, the parties' proposed findings of fact and conclusions of law, and various amicus curiae briefs, the court found that the "need for implementing counter-terrorism measures is indisputable, pressing, ongoing, and evolving."¹⁸ The Program, as implemented by the NYPD, is "not impermissibly intrusive," and is effective in its purpose of deterring and detecting terrorist activity.¹⁹ Relying almost exclusively on the Defendants' witnesses, the court indicated that the threat of terrorist attacks on the City's subway is "real and substantial."²⁰

The court then reviewed the Program's background and determined that the Program was effective and minimally intrusive based on the Program's purpose, methods to control police over-discretion, search frequency (random selection of subway entrances) duration ("seconds not minutes"), passenger notice, and opportunity to refuse the inspection.²¹ Finally, the court surveyed the witness testimony heavily downplaying the Plaintiffs' witnesses' testimony as "anecdotal," non-expert, and weakly supported, in favor of Defendants' witnesses' testimony, characterized as being highly qualified, well-substantiated, and persuasive.²² The court concluded by stating that "[b]ecause the threat of terrorism is great and the consequence(s) of unpreparedness may be catastrophic, it would seem foolish not to rely upon those qualified persons in the best position to know."²³

The court's conclusions of law reviewed basic Fourth Amendment jurisprudence and easily slotted the Program as constituting a special governmental need, thus exempting it from the traditional Fourth

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *1.

¹⁹ *Id.*

²⁰ *Id.* at *4

²¹ *Id.* at *19.

²² *Id.* at *8-9.

²³ *Id.* at *11.

Amendment individualized suspicion requirement.²⁴ Citing the compelling government interest of the “highest order” in protecting citizens against terrorist attacks, the court again relied heavily on the Defendants’ witnesses to deem the Program as reasonably effective.²⁵ Finally, the court found the Program to be minimally intrusive because it provided adequate notice to passengers, the inspections were openly viewable at fixed checkpoints, passengers could refuse inspection, and the searches were limited in scope and duration.²⁶

B. Court of Appeals for the Second Circuit

The Second Circuit immediately reiterated the district court’s factual determinations, which heavily weighed in favor of the Defendants.²⁷ The court then reviewed the basic principles behind the special needs doctrine in the context of national security and public transportation by citing airport searches.²⁸ Noting that the doctrine requires at the threshold that the search must “serve as its immediate purpose an objective” that is unrelated to criminal law enforcement, the court set forth the competing interests—“the weight and immediacy of government interest, the nature of the privacy interest allegedly compromised by search, the character of intrusion imposed by the search, and the efficacy of the search in advancing the government interest”—which must then be balanced.²⁹

First, the court addressed the Plaintiffs’ contention that the special needs doctrine requires the search subject to possess a reduced expectation of privacy by stating that the privacy interest at stake is not dispositive to the Program’s constitutionality.³⁰ Second, the court determined that the Program served a special need in its primary purpose to prevent terrorist attacks on the subways and concluded that the Program accords with long-standing principles supporting the special needs doctrine, which recognized the government’s need to “prevent and discover . . . latent or hidden hazards in order to ensure the safety of mass transportation mediums, such as trains, airplanes, and highways.”³¹

Third, the court balanced the four factors and concluded that the Program was ultimately constitutional.³² The court determined that the government interest was immediate and substantial given the “enormous dangers to life and property from terrorists bombing the subway;” the court

²⁴ *Id.* at *16.

²⁵ *Id.* at *17.

²⁶ *Id.* at *19.

²⁷ *Macwade v. Kelly*, 460 F.3d 260, 265–67(2d Cir. 2006).

²⁸ *Id.* at 268.

²⁹ *Id.* at 268–69.

³⁰ *Id.* at 269.

³¹ *Id.* at 270–71 (internal quotations omitted) (citation omitted).

³² *Id.* at 271–75.

articulated that it did not need to “labor the point with respect to need.”³³ The court held that although subway riders have a full expectation of privacy in their containers, which the Program’s search invaded, the search—based on the notice given, the manner, the duration, and the limited police discretion—is minimally intrusive.³⁴ Finally, the court held that the Program is reasonably effective, highlighting that the courts should not “wrest from politically accountable officials the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.”³⁵ Additionally, the court further reiterated its deferential attitude regarding the effectiveness of the search methods employed by stating that “[w]e will not peruse, parse, or extrapolate four months’ worth of data in attempt to divine how many checkpoints the City ought to deploy in the exercise of its . . . power.”³⁶

IV. THE ROLE OF THE JUDGE AS A NEUTRAL ARBITER

There are two general schools of thought on the judiciary’s appropriate role: the interventionist view and the non-interventionist view.³⁷ The interventionist view asserts that, in a constitutional democracy, the federal “judiciary is best-positioned to safeguard against constitutionally protected liberties from tyranny of the majority because it is insulated from political pressures.”³⁸ This view is especially important during times of national threat or crisis when fears and prejudices are aroused and the system of democracy is most vulnerable.³⁹ The non-interventionist view argues that “decisions affecting liberties of individuals should be left to the majoritarian and politically accountable Executive and [Legislative] Branches.”⁴⁰ According to this view, the judiciary should be especially deferential in the context of national security—i.e., uphold the laws of the land without taking active part in shaping them.⁴¹ This article rejects the non-interventionist position and argues that if the judiciary abdicates its role with respect to national security the democratic foundations of our country will be at risk.⁴² In this context, the federal courts must protect the integrity of the constitutional framework “[by] granting more structural

³³ *Id.* at 271–72 (internal quotations omitted) (citation omitted).

³⁴ *Id.* at 273.

³⁵ *Id.* (internal quotations omitted) (citation omitted).

³⁶ *Id.* at 274.

³⁷ See Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When “Fears and Prejudices Are Aroused,”* 2 SEATTLE J. FOR SOC. JUST. 129, 153–54 (2003).

³⁸ *Id.* at 153.

³⁹ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124 (1866).

⁴⁰ Cruz, *supra* note 37, at 154.

⁴¹ See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981) (upholding Secretary of State’s power to revoke passports of individuals considered national security threats); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding military ban on civilian political speech in unrestricted areas within military bases).

⁴² See Cruz, *supra* note 37, at 171.

relief that promises to correct systemic failures during future emergencies.”⁴³

The inception of judicial review in 1803 brought with it a burden of trust in the ability of the judiciary to make constitutional determinations in a dispassionate and neutral manner.⁴⁴ Specifically, at the root of Fourth Amendment jurisprudence is the societal belief that a judge acting as a neutral arbiter is in the best position to ascertain the reasonableness of liberty intrusions justified by governmental needs.⁴⁵ It is especially when “passions of men are aroused and the restraints of law are weakened . . . [that constitutional liberties need and] should receive the watchful care of those intrusted [sic] with the guardianship of the Constitution and laws”—the courts.⁴⁶ The very trust the Framers placed in the reasoning capacity of judges led to the development of the many Fourth Amendment exceptions, such as the special needs doctrine.⁴⁷

V. THE SPECIAL NEEDS DOCTRINE AND NATIONAL SECURITY

A. *The Genesis of the Special Needs Doctrine and Other Fourth Amendment Exceptions*

The special needs doctrine is rooted in the Supreme Court’s recognition of the unique character of civil searches⁴⁸ as being an exception to the traditional Fourth Amendment warrant and probable cause requirements for criminal searches.⁴⁹ The Court began to craft exceptions to the Fourth Amendment when it deemed the traditional warrant and

⁴³ See Bruce Ackerman, *This Is Not a War*, 113 YALE L. J. 1871, 1895 (2004).

⁴⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). “[I]f a law be in opposition to the Constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.” *Id.*

⁴⁵ *Entick v. Carrington*, 19 How. St. Tr. 1030, 1066 (1765).

⁴⁶ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124 (1866).

⁴⁷ See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 103–04 (1979) (arguing that the source of judicial legitimacy comes from human obsession with the trappings associated with titles and societal perceptions about judicial process as being a “uniquely reflective, dispassionate, considered process in a world of heated and hasty judgments”).

⁴⁸ See *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (civil searches generally related to the public safety and health, such as the enforcement of housing codes, often required broad, suspicionless searches by regulatory authorities to uncover latent defects; such searches were difficult to administer under the traditional requirements of the Fourth Amendment.). *But see New York v. Burger*, 482 U.S. 691, 717–18 (1987) (searches conducted by law enforcement for primarily administrative purposes are constitutional).

⁴⁹ The Fourth Amendment declares the following:

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

U.S. Const. amend. IV.

probable cause requirements inappropriate in a specific context, substituting instead a balancing analysis.⁵⁰

Prior to the Supreme Court's decision in *Camara v. Municipal Court* in 1967, civil searches had not been subjected to Fourth Amendment scrutiny.⁵¹ In *Camara*, the Court determined that the Fourth Amendment's warrant clause should apply to civil searches, though in a more limited manner than in criminal searches.⁵² The Court "imported a reasonableness balancing test into Fourth Amendment analysis that has since offered a competing model to the traditional warrant and probable cause requirement . . . [by] couch[ing] probable cause itself within a reasonableness standard."⁵³ Although government agents would have to obtain a warrant for civil searches, the standard would be reduced from probable cause to reasonable suspicion.⁵⁴

Post-*Camara*, "[i]ndividualized suspicion prove[d] problematic when the government [sought] to protect the public from a harm not ordinarily foreshadowed by observable suspicious activity"— e.g., intoxicated employees, intoxicated drivers, or illegal entrants into the United States.⁵⁵ To resolve this apparent dichotomy between the needs of civil and criminal searches, the Court developed the administrative search doctrine, which subjected certain civil searches to the Fourth Amendment's Reasonableness Clause, while limiting the warrant requirement to criminal searches.⁵⁶ The Court ultimately extended the administrative search doctrine to warrantless searches of business premises and activities in highly regulated industries,⁵⁷ border searches,⁵⁸ and temporary sobriety

⁵⁰ Keeley, *supra* note 4, at 3257.

⁵¹ *Camara*, 387 U.S. 523.

⁵² *Id.* For example, in *Camara*, although the warrant requirement applied, it was met by a standard lower than the probable cause requirement for searches related to criminal law enforcement because the search's very nature (searches for latent housing defects) required a laxer standard to accommodate the government's needs. *Id.* at 538–39.

⁵³ Keeley, *supra* note 4, at 3239.

⁵⁴ Additionally, although the Court has recognized that both the 'reasonable suspicion' and 'probable cause' standards are fluid concepts, it is accepted that the probable cause standard— based on whether there is a fair probability that the area or object searched contains evidence of a crime— is higher than the reasonable suspicion standard. See *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996); *Alabama v. White*, 496 U.S. 325, 330 (1990). Justice Brennan later rationalized this decision, which contravened the Fourth Amendment's Warrant Clause probable cause requirement, by arguing that the entire procedure in *Camara* could have been handled by an administrative court, so that particular reduced-standard warrant could have been issued. See *New York v. Burger*, 482 U.S. 691, 722 (1987) (Brennan, J., dissenting).

⁵⁵ Keeley, *supra* note 4, at 3245.

⁵⁶ Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1227 (2004).

⁵⁷ Examples include federally licensed liquor dealers, gun dealers and auto junkyards. See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (holding warrantless search of liquor distributor's business premises constitutional); *United States v. Biswell*, 406 U.S. 311, 316–17 (1972) (holding warrantless search of gun dealer's pawn shop constitutional); *Burger*, 482 U.S. at 691 (holding warrantless search of auto junkyard premises constitutional).

checkpoints on highways.⁵⁹

As civil searches became more individualized and personal, the Court developed a more flexible test to address situations in which suspicionless searches were necessary to meet a significant, non-criminal law enforcement objective: the special needs doctrine.⁶⁰ The special needs doctrine provides that, “when a special need beyond the normal need of law enforcement exists, courts will determine Fourth Amendment reasonableness by balancing the competing governmental and private interests at stake.”⁶¹ In *New Jersey v. T.L.O.*, Justice Blackmun formulated a three-part balancing test for determining whether a special need exists, with the caveat that “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interest for that of the Framers.”⁶² “Under the first factor, special need, courts ask whether a legitimate governmental interest, apart from criminal detection exists.”⁶³ The second factor, impracticability, requires courts to ask “whether a warrant or individualized suspicion requirement would frustrate the non-criminal governmental interest.”⁶⁴ Finally, the third factor, balancing, asks “whether the governmental interests at stake outweigh the private interests in order to decide the ultimate issue of whether the search was reasonable under the Fourth Amendment.”⁶⁵ An answer in the negative to one or more of these three factors “renders a civil search unconstitutional under the Reasonableness Clause.”⁶⁶

In practice, the balancing test has proven both a blessing and a curse. Under the special needs framework, the Court has upheld the following:

⁵⁸ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976) (holding searches at permanent border checkpoints constitutional).

⁵⁹ See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding suspicionless sobriety tests at roadblock constitutional); *Delaware v. Prouse*, 440 U.S. 648, 663 n.26 (1979) (stating in dicta that the Court’s holding of suspicionless spot-checks for licensing and registration as unconstitutional did not “cast doubt on the permissibility of roadside . . . inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others”). But see *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding unconstitutional roadblock to conduct suspicionless vehicle searches for primary purpose of drug interdiction).

⁶⁰ The Court officially adopted the doctrine in *O’Connor v. Ortega*, 480 U.S. 709, 724, 728 (1987) (finding that a state hospital official could lawfully conduct a warrantless search of physician-employee’s office and seize his effects because government employers have special need in effective and efficient operation of governmental agencies).

⁶¹ Arcila, *supra* note 56, at 1228.

⁶² *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

⁶³ Arcila, *supra* note 56, at 1228.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1228–29.

⁶⁶ *Id.* at 1229.

suspicionless employee and student drug-testing,⁶⁷ suspicionless sobriety checkpoints,⁶⁸ search of commercial premises for stolen items,⁶⁹ and most recently, as interpreted by the Second Circuit, suspicionless backpack searches of mass-transit passengers for national security.⁷⁰ Thus, the special needs doctrine has facilitated the federal courts' molding of the doctrine to many situations; however, this flexibility has its drawbacks.

The primary drawback of such flexibility is that it also could be easily manipulated by the Legislative and Executive Branches in an attempt to circumvent traditional Fourth Amendment requirements.⁷¹ The Supreme Court recognized the potential danger of this in *Ferguson v. City of Charleston*,⁷² but effectively provided an imprimatur for this practice, via dicta, in *Indianapolis v. Edmond*,⁷³ which invalidated suspicionless searches of cars for the *primary* purpose of drug interdiction. This invalidation notwithstanding, the Court in the same breath suggested that such searches would be upheld as constitutional if drug interdiction were the *secondary* purpose.⁷⁴ Therefore, it seems the Court implied that the Government could permissibly craft a suspicionless search program that would withstand constitutional scrutiny by substituting the impermissible main purpose with the permissible secondary purpose.

The special needs doctrine suffers similar infirmities as any balancing test—not in the least being lack of predictability and risks of boundless constitutional decision-making.⁷⁵ The Supreme Court's reliance on the reasonableness clause as the touchstone for constitutionality of special needs searches makes the doctrine an inherently subjective test.⁷⁶ The Court has sought to mitigate these deficiencies in the special needs cases by considering other factors to protect against government over-

⁶⁷ See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *T.L.O.*, 469 U.S. 325; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

⁶⁸ *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

⁶⁹ *New York v. Burger*, 482 U.S. 691 (1987).

⁷⁰ *Macwade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

⁷¹ See *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (explaining in striking down state hospital policy of testing pregnant women for drug use and reporting positive test results to law enforcement, that “[b]ecause law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.” *But see City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (Court’s apparent imprimatur of this very action—allowing secondary purpose, if primary is administrative).

⁷² *Ferguson*, 532 U.S. 67.

⁷³ *Edmond*, 531 U.S. 32.

⁷⁴ *Id.* at 48 (“Our holding also does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose.”) *Id.*

⁷⁵ See *Arcila*, supra note 56, at 1229–30.

⁷⁶ *Id.* at 1231.

zealousness, including the following: whether the individual has diminished privacy interests in the context presented,⁷⁷ the search regime's invasiveness,⁷⁸ the degree of governmental discretion allowed,⁷⁹ the immediacy of the government's interest,⁸⁰ the search regime's efficacy,⁸¹ and its deterrence value.⁸² Additionally, in *Chandler v. Miller*,⁸³ the Court invalidated the suspicionless drug-testing of candidates for public office by adding a fourth prong to the special needs analysis, which requires the government's justification to be "important enough to override the individual's acknowledged privacy interest [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."⁸⁴ It is not yet certain whether this addition is merely a tautology on an already esoteric inquiry, or a potent obstacle in the way of government over-discretion.⁸⁵

B. Finding a Place for National Security Searches Within the Fourth Amendment Exceptions

The most recent candidates for "special needs" status are national security search programs, which employ suspicionless searches of mass-transit passengers.⁸⁶ Reducing domestic citizens' civil liberties in the name of national security is not a novel concept in American history, as guarding

⁷⁷ See e.g., *New York v. Burger*, 482 U.S. 691 (1987) (closely regulated industries— arms, liquor, pawnshops); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (schools); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (profession— customs employees involved in drug interdiction or that are required to carry firearms); *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987) (probationer).

⁷⁸ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658–60 (1995); *Von Raab*, 489 U.S. at 672 n.2.

⁷⁹ See, e.g., *Von Raab*, 489 U.S. at 667.

⁸⁰ See, e.g., *Vernonia*, 515 U.S. at 662–63 (indicating that the immediacy of the drug problem, especially amongst the youth in the area, justified a suspicionless search of student-athletes).

⁸¹ See *id.* at 663.

⁸² See *id.* at 658–59 n.2 (discussing value of "protecting student athletes from injury and deterring drug use in the student population").

⁸³ *Chandler v. Miller*, 520 U.S. 305 (1997).

⁸⁴ *Id.* at 318.

⁸⁵ Compare Ross H. Parr, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241, 275–76 (1998) (arguing that *Chandler* added to already muddied waters and the decision illustrates "how difficult it is to render consistent decisions when relying on the special needs exception to the Fourth Amendment. *Chandler*, *Vernonia*, *Von Raab*, and *Skinner* all cannot exist concurrently as coherent examples of Supreme Court suspicionless drug testing doctrine; the inconsistencies are simply too great. *Chandler* may require a different result than its predecessors, but the Court must find a way to distinguish the *Chandler* rationale, particularly with respect to the *Vernonia* and *Von Raab* decisions.") with Joseph S. Dowdy, *Well Isn't That Special? The Court's Immediate Purpose of Restricting the Doctrine of Special Needs in Ferguson v. City of Charleston*, 80 N.C. L. REV. 1050, 1058–59 (2002) (arguing that "*Chandler* represent[ed] a significant departure from the previous special needs cases because it became the first case to limit the doctrine by increasing the required need and by making the usefulness of the search an issue").

⁸⁶ *Macwade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

our Nation's security has generally been considered a unique, perhaps even sacred, governmental duty.⁸⁷ The Foreign Intelligence Surveillance Act (FISA), for example, allows the Fourth Amendment requirement to function with reduced potency in the national security context.⁸⁸ That distinction, however, exists because FISA searches largely involved foreign intelligence gathering, which makes them arguably permissible under the President's plenary foreign affairs power.⁸⁹ The more modern suspicionless search programs, by contrast, potentially involve more overt infringements of American citizens' civil liberties with only a tenuous link to foreign affairs.⁹⁰ In an attempt to argue that the latter searches are constitutional, some courts and commentators have characterized the programs as falling under the special needs doctrine.⁹¹

The Government first recognized the unique needs of national security searches in the mass transportation context beginning in the late 1960s, when an increase in skyjacking incidents led the Federal Aviation Agency (FAA) to devise screening procedures for airlines.⁹² These procedures

⁸⁷ See Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 214 (1968) (codified as amended at 18 U.S.C. §§2510-20 (2002)) ("Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.").

⁸⁸ FISA created an Article III special court, the Foreign Intelligence Surveillance Court (FISC), which may issue warrants if "there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power . . ." 50 U.S.C. § 1805(a)(3)(A). See also John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 443 (2003) (arguing that "FISA... seeks to convince the courts to abandon the usual de novo review and adopt a standard of review that accommodates both national security needs and the option for use by law enforcement and prosecutors . . . under a standard below that used for Fourth Amendment warrants").

⁸⁹ See *supra* notes 54-56.

⁹⁰ See e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (holding that "perhaps in no other area has the Court afforded Congress greater deference" than national defense and military affairs), *Korematsu v. United States*, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring) (holding constitutional domestic Japanese internment camps because the United States was at war with the Japanese empire and Congress deemed it necessary).

⁹¹ *Illinois v. Caballes*, 543 U.S. 405, 425 (Ginsburg, J., dissenting) (concluding that the "immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine"); *id.* at 417 n.7 (Ginsburg, J., dissenting) (arguing that "what is a reasonable search depends in part on demonstrated risk"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . ."); *United States v. Karo*, 468 U.S. 705, 718 (1984) (recognizing that exceptions to warrant requirement may exist in "truly exigent circumstances"); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (noting that given the "enormous dangers to life and property from terrorists," a demonstration of danger as to any particular airport or airline is not required); *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) (leaving open question whether the Fourth Amendment warrant requirement has a more limited application with respect to national security); *United States v. Truong*, 629 F.2d 908, 913-14 (4th Cir. 1980) (holding that the Executive need not always obtain a warrant for foreign intelligence). *But see* *United States v. United States District Court (Keith)*, 407 U.S. 297, 328-29 (1972) (Douglas, J., concurring) (holding there is no warrant exception for domestic security).

⁹² Keeley, *supra* note 4, at 3259.

included creating a hijacker profile and searching all individuals who set off a metal detector, all of which were designed to prevent people from boarding with explosives and weapons.⁹³ From the earliest cases involving such searches, federal courts generally did not consider traditional Fourth Amendment requirements as an appropriate analytical framework to determine the searches' constitutionality. Initially, some courts upheld the FAA screening procedures as constitutional under the reasonable suspicion standard promulgated in *Terry v. Ohio*.⁹⁴ Most suspicious airport activities would not justify a *Terry search*, however, because individuals' conduct typically does not create reasonable suspicion that they had committed or were about to commit a crime, or that they posed a threat of harm or death to others.⁹⁵ In 1973, when the FAA made it mandatory to search all passengers and luggage, thereby eviscerating the need for *any* suspicion, the *Terry* doctrine was inapposite.⁹⁶ Thereafter, the Court settled upon a more lax reasonableness framework in which to analyze searches relating to national security.⁹⁷

Following the upsurge of terrorist attacks on passenger rail systems worldwide beginning in the mid-1990s, implementing suspicionless search programs on urban mass transit and determining their constitutionality became the next logical step.⁹⁸ Urban mass transit systems, particularly passenger railways, have certain characteristics making them inherently vulnerable to terrorist attacks and are therefore even more difficult to

⁹³ *Id.* at 3259–60.

⁹⁴ See *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968) (allowing protective frisks of citizens if there was a reasonable suspicion that crime had occurred or would occur with specific and articulable facts); *United States v. Bell*, 464 F.2d 667, 673 (2d Cir. 1972) (holding airport search reasonable under *Terry* doctrine because individual set off metal detector, could not provide identification, and attested to a serious criminal history).

⁹⁵ *United States v. Moore*, 483 F.2d 1361, 1363–64 (9th Cir. 1973) (rejecting justifying airport procedures under *Terry* because suspicious behavior, like nervousness, confusion, and fatigue, did not provide reasonable suspicion to conduct a search beyond stopping the passenger to inquire into possible criminal activity).

⁹⁶ See WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 10.6(c) (3d. ed. Supp. 2004).

⁹⁷ See, e.g., *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (finding that “[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air” and search’s validity does not “necessarily turn” on its success in exposing piracy attempts) (citation omitted). See also *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as reasonable”) (internal quotations omitted).

⁹⁸ According to a report conduct by the United States General Accounting Office (GAO), over 250 attacks upon rail systems between 1995 and 2005 have claimed nearly 900 lives and injured over 6,000 people. U.S. GEN. ACCOUNTING OFFICE, GAO-05-851, PASSENGER RAIL SECURITY: ENHANCED FEDERAL LEADERSHIP NEEDED TO PRIORITIZE AND GUIDE SECURITY EFFORTS 10 (2005), available at <http://www.gao.gov/htext/d06181t.html>.

secure than airplanes.⁹⁹ By design, passenger rail systems are open, with multiple access points, serve multiple carriers, and in some cases contain no barriers in order to move large numbers of people quickly.¹⁰⁰ In contrast, the United States' commercial aviation system is lodged in closed and controlled locations with few entry points.¹⁰¹ The combination of "openness, high ridership [volume], expensive infrastructure, and economic importance" have made mass transit systems attractive targets for terrorists because an attack can quickly "produce high casualties and cause economic disruption to an entire metropolitan area."¹⁰² Therefore, in many ways, the efficacy of urban mass-transit search programs relating to national security may uniquely require conducting suspicionless searches.¹⁰³

As national security concerns continue to grow in response to technological developments and geo-political ennu, the potential increase in programs, such as the Container Search Program, likewise emphasizes the need for a workable framework to analyze the programs' constitutionality.¹⁰⁴ The City of Boston preceded the New York City Container Search Program by implementing a subway search program during the 2004 Democratic National Convention at Boston's Fleet Center.¹⁰⁵ The American-Arab Anti-Discrimination Committee sued the City of Boston, requesting a temporary injunction against the search program.¹⁰⁶ The district court, relying on circuit court decisions applying the administrative search doctrine to airport searches, denied the injunction and held that the subway search program to be analogously situated within that Fourth Amendment exception.¹⁰⁷ Given the temporary nature of the risk, analyzing the search program under the administrative search doctrine worked quite well for the court. The question arises, however, whether the administrative search exception and its doctrinal progeny, the special needs

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*; Keeley, *supra* note 4, at 3263.

¹⁰³ *See generally*, Keeley, *supra* note 4.

¹⁰⁴ *See id.* at 3287. The lower courts will continue to see new fact situations and will need consistency and wisdom to determine into which framework national security should fit.

¹⁰⁵ *Id.* at 3267.

¹⁰⁶ *American-Arab Anti-Discrimination Comm. v. Massachusetts Bay Transp. Auth.*, 2004 WL 1682859, at *1 (D. Mass. July 28, 2004).

¹⁰⁷ *See id.* at *2-4 (finding that a particularized suspicion is unnecessary when the magnitude of risk reaches a certain level, "[w]hile the [c]ourt is advised that there is no specific intelligence information suggesting that . . . the Fleet Center is an identified target, there is also no reason to believe that specific information is necessarily, or even frequently, available before a terrorist attack, so its absence cannot be taken to indicate that the facilities are *not* likely targets. With respect to airport security measures, the absence of specific threat information about a particular flight or even a particular airport does not vitiate either the authority or the wisdom of conducting security screenings generally for *all* flights. When the threat is to *any* flight, *every* flight may be protected by the security searches."). *Id.* at *2.

exception, is the best analytical framework to analyze more boundless search programs, such as the Container Search Program in New York City.

Traditional Fourth Amendment requirements are inappropriate in this context because obtaining a warrant for each passenger, if even possible, would thwart both private interests in the mass transit system and the government's interest in the program's objective. Additionally, such searches are generally unrelated to criminal law enforcement, instead focusing on the broader social objective of public safety. The administrative search doctrine is similarly inappropriate because it is meant to encompass highly regulated industries in which individuals legitimately have a reduced expectation of privacy.¹⁰⁸ Although urban transport is highly regulated, it is the operators—not the passengers—that have the reduced expectation of privacy.¹⁰⁹ The special needs doctrine theoretically provides a better fit; however, the main drawback has been the deference afforded to political branches by the courts in the interest of national security.¹¹⁰ Therefore, unless the courts are willing to engage in a meaningful review of the search program's efficacy, the compelling interest in national security will invariably trump private interests under the special needs framework.¹¹¹ This being said, some have argued that folding national security search programs into a Fourth Amendment exception might call the general wisdom of the Fourth Amendment into question.¹¹²

Some commentators have argued for a *sui generis*¹¹³ approach to searches justified by national security issues, which essentially argues that national security is a unique context requiring its own particularized rules and standards.¹¹⁴ This article proposes a fortified special needs framework in which the federal courts conduct a *de novo* review of national security search programs, rather than starting at a constitutional presumption of reasonableness with deference to executive wisdom.¹¹⁵ This article

¹⁰⁸ *Macwade v. Kelly*, 460 F.3d 260, 271–72 (2d Cir. 2006).

¹⁰⁹ Keeley, *supra* note 4, at 3273.

¹¹⁰ *See supra* Part II.

¹¹¹ Posting of Daniel J. Solove, to Concurring Opinions, http://concurringopinions.com/archives/2005/12/nyc_subway_scar.html (Dec. 5, 2005, 12:01 EST) (arguing that there is no public interest in an ineffective program, and that, in determining the constitutionality of such programs, the court should “distinguish rational responses from merely symbolic ones”); *see also* *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting) (stating that “the impairment of individual liberties cannot be the means of making a point; that symbolism . . . cannot validate an otherwise unreasonable search”).

¹¹² *See* *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). ([The] warrant requirement [has] become so riddled with exceptions that it [is] basically unrecognizable.”).

¹¹³ ‘*Sui generis*’ is a Latin phrase meaning, ‘of its own kind,’ unique, or particular. An example of one type of search falling into this category as held by the Supreme Court is drug-dog searches. *See e.g.*, *Illinois v. Caballes*, 543 U.S. 405 (2005).

¹¹⁴ *See generally*, Keeley, *supra* note 4, at 3291–95.

¹¹⁵ *Cruz*, *supra* note 42, at 157 (suggesting that the solution to hyper-deferential judicial review in the national security context is a two-tiered heightened review to account for the Executive's attempts

proposes a completely new cast on the review of national security search programs that involves a more active presence for the federal judiciary. Combining the strengths of the special needs framework and reinforcing the weaknesses, this article argues that the Supreme Court certify a case, such as *MacWade*, on appeal, and remand the case to the district court, authorizing the continued supervision over the program to ensure its efficacy.

VI. THE SUPREME COURT'S INSTITUTIONAL REFORM PRACTICE: DESEGREGATION AND PRISON REFORM

The Supreme Court is no novice to institutional reform. At the height of its practice, the federal courts had their hands in changing the conditions of state employment facilities, prisons, and schools, to monitor the facilities until they operated constitutionally. The capacity of the Supreme Court to change the world, however, is often dependent on its ability to take on tasks upon which it is not ordinarily in the business of acting.¹¹⁶ Along this vein, it is often imperative for the Court to remain involved until its objective is achieved, rather than waiting for individuals to act on their own accord. A bittersweet example of this occurred in the case of public school desegregation.

A. Public School Desegregation

In 1954, the Supreme Court achieved a victory in social change in *Brown v. Board of Education of Topeka (Brown I)*,¹¹⁷ by striking down *Plessy v. Ferguson*¹¹⁸ and holding unconstitutional the paradoxical “separate but equal” truism, at least in the educational context. The Court was then faced with the difficult task of determining how, and to what extent, the decree would be implemented. Instead of mandating that separate facilities were unconstitutional and requiring the schools to immediately integrate the students, the Court, in *Brown v. Board of Education of Topeka (Brown II)*,¹¹⁹ suggested that the schools should do so “with all deliberate speed.”¹²⁰ Thus, the initial victory was chimerical, as more than a decade after *Brown I* had called for school desegregation few

to subterfuge meaningful review. Cruz applies her solution to the problem of preliminary designations— such as ‘enemy combatant’, ‘material witness’, and ‘special interest’— which the Executive can use to immunize its action from heightened judicial scrutiny, and argues that the courts should review this preliminary designation with the same vigor as it would any other potential constitutional violation.)

¹¹⁶ Cf. James E. Pfänder, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 48–49 (2006).

¹¹⁷ *Brown v. Bd. of Educ. of Topeka (Brown I)*, 347 U.S. 483 (1954).

¹¹⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹¹⁹ *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1955).

¹²⁰ *Id.* at 301.

schools were even marginally integrated.¹²¹

The lack of specificity in the Supreme Court's directive may have "encouraged Southern intransigence, just as it may have enabled the Court to insist on a principle that it lacked the administrative capacity to enforce" until the 1960s when it re-entered the field.¹²² Subsequently, the civil rights movement took hold, and by the mid-1960s, especially following Martin Luther King's assassination in April 1968, race relations had exploded into violence and widespread urban unrest as black Americans began more vehemently pushing for active reform to solve race and poverty issues.¹²³ As political attitudes began to shift respecting civil rights reform and minority issues, the federal courts took charge by revisiting the interpretation of integration.¹²⁴ Leading this important doctrinal change was Judge John Minor Wisdom, who authored four circuit court opinions¹²⁵ and set the groundwork for the Supreme Court's adoption of integration as the primary goal in school cases.¹²⁶ In *Singleton I*, Judge Wisdom stated that "the time [had] come for foot-dragging public school boards to move with celerity toward desegregation," and the only way this would work was by developing a plan that completely eradicated the existing dual system of education.¹²⁷

The Supreme Court officially validated this sentiment in *Green v. County School Board*¹²⁸ by holding that school authorities had the affirmative duty, under federal court supervision, "to take whatever steps might be necessary to convert to a unitary system in which racial

¹²¹ J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 101 (1979).

¹²² Pfander, *supra* note 116, at 47–48.

¹²³ RICHARD POLENBERG, ONE NATION DIVISIBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938 at 234 (1980); Stokely Carmichael, *What We Want*, The New York Review of Books (1966), reprinted in THE AGE OF PROTEST 132–40 (Walt Anderson, ed., 1969) (noting that "Black Power . . . begin[s] with the basic fact that black Americans have two problems: they are poor and they are black [I]ntegration, moreover, speaks [not at all to the problem of poverty, only to race] . . . in a despicable way. As a goal, it has been based on complete acceptance of the fact that [to] have a decent house or education, blacks must move into a white neighborhood or send their children to a white school. The reality is that this nation, from top to bottom, is racist The economic foundations of this country [have to be] shaken if black people are to control their lives.").

¹²⁴ See Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education*, 32 AKRON L. REV. 471, 478–89 (1999).

¹²⁵ See *Singleton v. Jackson Mun. Separate Sch. Dist. (Singleton I)*, 348 F.2d 729 (5th Cir. 1965); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 355 F.2d 865 (5th Cir. 1966); *United States v. Jefferson County Bd. of Educ. (Jefferson I)*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967) (en banc) (per curiam). See also Zelden, *supra* note 124, at 483.

¹²⁶ Noting that the "only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." *Jefferson I*, 372 F.2d at 869.

¹²⁷ *Singleton I*, 348 F.2d at 729; Zelden *supra* note 124, at 483.

¹²⁸ *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

discrimination would be eliminated root and branch.”¹²⁹ Effectiveness was the new objective, so even though school boards had the freedom to choose their own plans, “freedom of choice [was] not a sacred talisman; it [was] only a means to a constitutionally required end . . . [and] [i]f the means prove[d] effective, it [would be] acceptable, but if it fail[ed] to undo segregation, other means [had to] be used to achieve this end.”¹³⁰

Making an affirmative commitment to promote racial mixing in the schools, however, was distinct from making it actually happen. The Supreme Court had made a call to arms for the district courts, one that required constant effort and innovation in the face of practical and procedural problems, including continuing jurisdiction over the final judgment, developing workable plans based on school board particularities, and ensuring compliance with decrees.¹³¹ Additionally, “given the public nature of these matters, their extended time frame, the large number of people involved, and the general support government officials had in opposing integration,” schools boards often ignored threats of punishment with impunity.¹³²

Many courts recognized that for integration to work hands-on court oversight was necessary.¹³³ Thus, in response to the practical difficulties of complying with the Court’s directives, the courts created and applied a model for a system of group-based remedies to enforce immediate integration.¹³⁴ This model,¹³⁵ “based in large part on enforcement tools found in the federal courts’ traditional economic caseload and powers, . . . provided the district courts with a familiar set of procedures capable of satisfying the Supreme Court’s demands for immediate action and the minority community’s demands for visible results.”¹³⁶

School integration involved many of the same issues as economic reorganization because it was typically a long-term process involving large

¹²⁹ *Id.* at 437–38.

¹³⁰ *Id.* at 440 (internal quotations omitted) (citation omitted).

¹³¹ Zelden, *supra* note 124, at 488.

¹³² *Id.* at 496.

¹³³ *Id.*

¹³⁴ *Id.* at 482.

¹³⁵ An example of this was the equity and bankruptcy receivership model that the Court created in the late Nineteenth century in response to economic necessity of some forms of property (e.g., railroads) for economic development. The model emphasized long term productivity over immediate disposal of the property to pay off creditors. The court, via an appointed trustee or receiver, would protect it from creditors, raise new capital through selling the receiver’s bonds and generally trim debt. The objective was to return the company to its creditors renewed and financially sound. To this end, federal courts resulted into partners with the failing company, overseeing the day to day operation of the company for extended periods of time. Zelden, *supra* 124, at 498. See also Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 482–86 (1980).

¹³⁶ Zelden, *supra* note 124, at 482.

numbers of litigants and interveners.¹³⁷ Thus, similar to the school integration cases, the courts involved in economic reorganization routinely retained jurisdiction following the final judgment and then implemented a mandatory injunction demanding compliance with the Court's reorganization plan, which outlined the penalties for non-compliance.¹³⁸ This injunction was often part of a "detailed and sweeping decree outlining the basic premises of the reorganization plan."¹³⁹ The court could then either return enforcement to those involved by using its final decree to set policies that a trustee, chosen by the creditors or stockholders, would follow in completing the actual reorganization, or by utilizing independent experts to help in enforcing remedial plans.¹⁴⁰ These experts usually came in the form of a special master appointed directly by the judge, "but could also come from expert witnesses and special interveners brought in to help in the formation of appropriate decrees, orders, and oversight" of the school board.¹⁴¹

Two cases illustrate the point of how this model was put into practice in the context of school integration in the district courts: *United States v. Texas*¹⁴² and *Swann v. Charlotte-Mecklenburg Board of Education*.¹⁴³ *United States v. Texas* demonstrates the enforcement problems faced by a district judge who lacked the proper remedial tools, and some of the solutions implemented to resolve the issues. *United States v. Texas* initially involved two neighboring school districts, Daingerfield and Cason.¹⁴⁴ Daingerfield's student population was mostly white, while Cason's was predominantly black.¹⁴⁵ For years, Daingerfield had been accepting white student transfers from Cason.¹⁴⁶ In the 1960s, investigations by the Department of Health, Educations, and Welfare's Office of Civil Rights collaborated with the Justice Department uncovered many other examples of segregation by transferring between districts.¹⁴⁷ The Department of Justice lawyers thought that a case-by-case approach to accomplish their goals would be unsuccessful, therefore they executed a novel approach by consolidating the cases into a single action and suing the State of Texas in the Eastern District of Texas before Judge William

¹³⁷ *Id.* at 499. See also David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 325–28 (1981).

¹³⁸ Zelden, *supra* note 124, at 499.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970).

¹⁴³ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265 (W.D.N.C. 1970), *vacated*, 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1 (1971).

¹⁴⁴ *Texas*, 321 F. Supp. at 1046 n.3.

¹⁴⁵ *Id.* at 1049.

¹⁴⁶ *Id.*

¹⁴⁷ See Zelden, *supra* note 124, at 490.

Wayne Justice.¹⁴⁸

Judge Justice was extremely committed to following the Court's decree in *Green*, and fashioned a broad remedy to achieve statewide integration.¹⁴⁹ The remedy had two parts: first, Judge Justice ordered those school districts named in the original suit to collaborate with the Texas Education Agency ("TEA") and the United States Office of Education to produce an integration plan that would assure both faculty and staff desegregation and the nondiscriminatory assignment of students; second, Judge Justice placed the primary responsibility for assuring school desegregation in all Texas school districts with the TEA.¹⁵⁰ By placing the punishment in the hands of the punished, so to speak, Judge Justice made a fateful decision. The TEA had no interest in enforcing the order and the court lacked the power to force the agency into compliance beyond the final decision.¹⁵¹ He made this decision because he believed that the DOJ would stay more involved in monitoring the TEA, however, as politics shifted in Washington, D.C., so did the Government's aggressive emphasis on school integration.¹⁵²

On the other hand, *Swann* represents how effectively a court can implement social change when buttressed with the proper tools.¹⁵³ In 1965, when the case was first filed, only 490 of the 20,000 black students in the district attended schools with white students and the school board only implemented a "freedom of choice" plan in which students could transfer if they could provide their own transportation.¹⁵⁴ Beyond that, the school district was extremely large, spanning twenty-two miles east to west and thirty-six miles north to south.¹⁵⁵ Additionally, the students were unevenly distributed across the district, with most blacks living in the city and most whites spread out across the rural parts of the county.¹⁵⁶ To resolve these issues, the court appointed an outside expert, Dr. John A. Finger, as receiver to outline an integration plan.¹⁵⁷ Dr. Finger's plan ultimately included gerrymandering geographic zones (attendance zones were shaped in pie slices to give inner city students access to outlying schools), school pairing between predominantly white and black schools,

¹⁴⁸ *Id.* at 490–93.

¹⁴⁹ *Id.* at 492–93.

¹⁵⁰ *United States v. Texas*, 321 F. Supp. at 1056–57.

¹⁵¹ *See Zelden*, *supra* note 124, at 494–95.

¹⁵² *Id.* at 495–96.

¹⁵³ *See United States v. Swann*, 402 U.S. 1 (1971).

¹⁵⁴ *See Zelden*, *supra* note 124, at 519.

¹⁵⁵ *See Swann*, 402 U.S. at 6.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.* at 8. *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1299, 1313 (W.D.N.C. 1969) (noting that "[a] consultant will be designated by the court to prepare immediately plans and recommendations to the court for desegregation of the schools. The legal and practical considerations outlined in detail in earlier parts of the opinion and order are for his guidance.").

requiring race-based ratios, mandatory district-wide busing to solve problem of district size, and setting deadlines for target integration percentages to evaluate effectiveness.¹⁵⁸ The Supreme Court eventually approved every aspect of Finger's plan, holding that "in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition."¹⁵⁹ The Supreme Court's decision in *Swann* gave constitutional backing to "race-based standards for integration, school pairings, and mandatory busing on a wide scale."¹⁶⁰ In the months and years that followed *Swann*, district courts across the South successfully implemented similar plans.¹⁶¹

Although examples of how these enforcement tools functioned in practice varied, the result was that between 1969 and 1973 the federal courts increased the number of black schoolchildren attending integrated schools to over ninety percent.¹⁶² From busing to orders for remedial education to decrees for new construction and beyond, the impact was explosive.¹⁶³ The federal courts played a significant role as the creators of nearly all legal standards governing school desegregation.¹⁶⁴

However, the Court recognized that there was a point when federal courts eventually had to relinquish control over the school boards regardless of whether the school had achieved unitary status.¹⁶⁵ In reality, this decision likely had much more to do with the changing politics of the Court, with newly appointed Chief Justice Rehnquist, a states' rights activist, determined to rein in what he perceived as the judicial excesses of the Earl Warren era.¹⁶⁶ As a result, the present situation in many our

¹⁵⁸ See *Swann*, 402 U.S. at 9-10.

¹⁵⁹ *Id.* at 26.

¹⁶⁰ See Zelden, *supra* note 124, at 523.

¹⁶¹ See, e.g., *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 330 F. Supp. 1377, 1392-97 (S.D. Tex. 1971) (employing a plan involving school pairing, restructured attendance zones, and busing to address the school district's tri-ethnic composition); *Clark v. Bd. of Dir. of Little Rock Sch. Dist.*, 328 F. Supp. 1205, 1215-19 (E.D. Ark. 1971) (ordering school board to utilize school pairings and mandatory busing); *Dandridge v. Jefferson Parish Sch. Bd.*, 332 F.Supp. 590, 594-95 (E.D. La. 1971) (ordering school board to draw up new integration plan emphasizing school pairing and revised geographical attendance zones).

¹⁶² See Mark Chadsey, *Federal Courts and Southern School Desegregation: The Courts Lead A Social Change 217-18* (1996) (unpublished Ph.D. dissertation, S.U.N.Y. Buffalo) (on file with UMI Dissertation Services).

¹⁶³ *Id.* at 209-47.

¹⁶⁴ *Id.* at 261.

¹⁶⁵ See *Bd. of Educ. of Oklahoma City Public Sch. v. Dowell*, 498 U.S. 237, 249-50 (1991) (noting that the district court should address "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination [have] been eliminated to the extent practicable," and if so, to consider relinquishment of judicial control).

¹⁶⁶ JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA*, 180 (2007); see also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 565 (2006).

Nation's schools, particularly those in urban areas, are not much better than they were fifty years ago. But, one thing is certain: the federal courts affected positive change within American schools at a time when, perhaps, no other Government branch had similar initiative.

B. Prison Reform

This section briefly explores another example of the Court's institutional reform practice: state prison facilities. The *Swann* results echoed beyond the educational context, inspiring prisoners and federal courts to take similar initiative in changing state prison conditions.¹⁶⁷

In the early 1960s, three jurisprudential shifts spurred judges to intervene in civil cases evaluating prison conditions or institutional rules to which federal and state inmates were subjected.¹⁶⁸ In 1961, the Supreme Court held that 42 U.S.C. § 1983 created a private cause of action if a state actor, by color of state law, violated an individual's constitutional rights.¹⁶⁹ One year later, the Court incorporated the Eighth Amendment,¹⁷⁰ which prohibits cruel and unusual punishment against the states.¹⁷¹ Finally, in 1964, the Court recognized that a state prisoner's complaint that prison officials were depriving him of a constitutionally guaranteed liberty stated a claim upon which relief could be granted.¹⁷²

The first of these cases required facilities to implement behind bars the legal rights generally applicable on the outside—e.g., “free exercise of religion, equal protection of the laws, and free speech.”¹⁷³ In 1970, the first case of wholesale reform of a state's prison system occurred in

¹⁶⁷ Margo Schlanger, *Feeley & Rubin: Judicial Policy Making and the Modern States: How the Court Reformed America's Prisons*, 97 MICH. L. REV. 1994, 1994–95 (1999) (book review).

¹⁶⁸ *Id.* at 2001.

¹⁶⁹ See *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658 (1978) (holding that allegedly illegal actions by state police officers constituted actions “under the color of” state law for § 1983 purposes).

¹⁷⁰ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” U.S. CONST. amend. VIII.

¹⁷¹ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁷² *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam). A year prior, in *United States ex. rel. Lawrence v. Ragen*, the Seventh Circuit upheld the district court's dismissal of a prisoner's claim that being denied medical care constituted cruel and unusual punishment, noting that “[i]t is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law.” 323 F.2d 410, 412 (7th Cir. 1963).

¹⁷³ *Schlanger, supra* note 166, at 558. See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (holding whipping of prisoners to be unconstitutional); *Bolden v. Pegelow*, 329 F.2d 95, 96 (4th Cir. 1964) (requiring integration of District of Columbia's Lorton Prison barber shops); *Sostre v. Rockefeller*, 312 F. Supp. 863, 871–73 (S.D.N.Y. 1970) (requiring various procedural safeguards before inmates could be confined in disciplinary segregation); *Jordan v. Fitzharris*, 257 F. Supp. 674, 680 (N.D. Cal. 1966) (finding that conditions in isolation constituted cruel and unusual punishment); *Washington v. Lee*, 263 F.Supp. 327, 333 (M.D. Ala. 1966) (desegregating penal and detention facilities in Alabama); *Fulwood v. Clemmer*, 206 F. Supp. 370, 374 (D.D.C. 1962) (requiring District of Columbia jail officials to allow Black Muslims to hold religious meetings).

Arkansas,¹⁷⁴ which “augured a nationwide flood of class-action lawsuits leading to major court orders requiring reform in areas such as housing conditions, security, medical care, mental health care, sanitation, nutrition, and exercise.”¹⁷⁵ In fact, by 1984, twenty-four percent of the nation’s 903 state prisons reported to Federal Bureau of Justice Statistics that they were operating under court order.¹⁷⁶ The court orders reflected many of the practices employed in the school desegregation cases. One instructive example is from the Southern District of Indiana when, after holding that the Indiana Reformatory’s conditions of confinement constituted cruel and unusual punishment, the court issued a comprehensive order including multiple remedies: requiring a twenty-month phased reduction in prison population from over 2000 to 1375; eliminating double-celling and -bunking; bringing kitchen and dining rooms in compliance with Indiana Board of Health standards; requiring all buildings needing structural changes to be in compliance with Indiana State Fire Marshal standards.¹⁷⁷

The most difficult aspects of such structural reform were financial, as many of the prisons simply lacked the resources to correct constitutional infirmities.¹⁷⁸ Ultimately, the prisons would simply request larger budgets from the state legislatures to finance the various court orders—such as paying the court appointed monitors’ salaries, hiring more guards, and purchasing necessary supplies and equipment.¹⁷⁹

In *Wolff v. McDonnell*,¹⁸⁰ the Supreme Court reached the high water mark of its prison reform practice, by stating, “there is no iron curtain drawn between the Constitution and the prisons of this country.”¹⁸¹

¹⁷⁴ In *Holt v. Sarver*, prisoners brought class action suit challenging all aspects of prison conditions—including trusty system whereby trustees ran prison, open barracks system, conditions in isolation cells, and absence of meaningful rehabilitation program—as violating Eight Amendment. 309 F. Supp. 362 (E.D. Ark. 1970). The district court agreed and afforded relief by way of extended authority over the prison’s elimination of ‘existing unconstitutionality.’ *Id.* at 383. The court, recognizing many of the practical difficulties the prison authorities faced (e.g. financial support and limited staff), required the prison to come forward with a plan outlining the manner in which it would proceed. *Id.* Additionally, the court laid down minimum requirements and guidelines for the prison officials to follow, including, changing the authority structure within the prison away from a trusty system and requiring food to be served in a more sanitary way. *Id.* at 384–85.

¹⁷⁵ Schlanger, *supra* note 167, at 2004. See, e.g., *Taylor v. Perini*, 413 F. Supp. 189, 194–97 (N.D. Ohio 1976) (Ohio prison litigation); *Battle v. Anderson*, 376 F. Supp. 402, 407, 420 (E.D. Okla. 1974) (Oklahoma prison litigation); *Inmates of the Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 690 (D. Mass. 1973) (Suffolk County, Massachusetts jail litigation); *Breneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972) (Alameda County, California jail litigation); *Rhem v. McGrath*, 326 F. Supp. 681, 682, 691 (S.D.N.Y. 1971) (Manhattan jail litigation).

¹⁷⁶ Schlanger, *supra* note 167, at 2004.

¹⁷⁷ *French v. Owens*, 538 F. Supp. 910, 927–28 (S.D. Ind. 1982).

¹⁷⁸ See generally, Schlanger, *supra* note 166.

¹⁷⁹ *Id.*

¹⁸⁰ *Wolff v. McDonnell*, 418 U.S. 539, 540 (1974) (holding that prisoners must still be afforded a certain degree of due process, though not the “full panoply of rights due a defendant in [a criminal] proceeding”).

¹⁸¹ *Id.* at 555–56.

However, as the Court's politics shifted, so did authority over prisons, and in 1979, *Bell v. Wolfish*¹⁸² started the effective roll-back of prison inmates' rights as being exclusive to states—the federal courts would no longer monitor prison facilities in such a rigorous manner.¹⁸³ Nonetheless, the Court's supervision of prison conditions had many positive effects on both inmate and prison officials' lives, which arguably could not have occurred otherwise.¹⁸⁴

C. Concluding Remarks on Institutional Reform Litigation

The federal courts' desegregation and prison reform efforts accustomed the nation's litigants, lawyers, and judges to extended court oversight of compliance in public institutions.¹⁸⁵ However, the Court ultimately invalidated institutional reform practices in both the areas of school desegregation and prison reform. Nonetheless, it is undeniable that federal courts achieved some level of positive social change in both areas.¹⁸⁶ Thus, the question remains whether it was necessary and appropriate for the Supreme Court to authorize the district courts to take such an active role in societal change. The *United States v. Texas* case is instructive as it shows the obstacles that the federal courts confronted in

¹⁸² *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Bell*, the Court, noting the cost to both the federal judiciary and the states, reined in broad federal court application of equitable remedies by positing that institutional restrictions were constitutional if “reasonably related to the Government’s interest in maintaining security and order and operating the institution in a manageable fashion” and required courts to defer to prison staff. *Id.* at 540 n.23.

¹⁸³ Consider the shift in review standards and deference before and after the *Wolfish* era: compare *Turner v. Safley*, 482 U.S. 78, 81 (1987) (ruling that institutional regulations restricting the exercise of religion should be upheld if they are reasonably related to institutional goals—rational basis review), with *Procunier v. Martinez*, 416 U.S. 396, 413–14 (1974) (ruling that institutional regulations restricting correspondence with persons outside prison must advance important and substantial governmental interest in least restrictive manner—near strict scrutiny).

¹⁸⁴ See BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS (1991). Chilton discusses *Guthrie v. Evans*, which sought to improve Georgia State Prison conditions:

The inhuman practices and conditions at [the prison] that the special monitor described in 1979 no longer exist. The reign of terror against the inmates has ended. Today, guards do not routinely beat, mace, and shoot inmates. . . . [Today,] Guards can walk the cells without having to carry illegal knives and pickax handles to protect themselves. The medical, mental, nutritional, educational, and recreational needs of inmates are now provided for.

Id. at 108; see also, *Guthrie v. Evans*, 93 F.R.D. 390 (S.D. Ga. 1981); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (affirming a district court’s order mandating a massive crackdown on overall violence in the prison). This “paved the way for the allocation of money, manpower, and sophisticated electronic equipment,” reduced sexual violence and made the prison “safe for the average youngster coming [in]. . . .” Wilber Rideau, *The Sexual Jungle*, in *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 73, 94 (1992).

¹⁸⁵ Schlanger, *supra* note 167, at 1995 (noting that “institutional reform litigation developed as civil rights plaintiffs and their lawyers began to seek and obtain litigated reform and continuing injunctive relief not only against schools, but also against prisons, jails, mental health and mental retardation facilities, and many other types of institutions.”) (internal quotations omitted).

¹⁸⁶ See *supra* notes 136–37, 151, and accompanying text.

issuing standard decisions.

Faced with counter-majoritarian views, the federal courts were left with a difficult choice, not unlike the famous decision which ignited judicial review,¹⁸⁷ to either accept their impotence and rule against private parties knowing that there would be limited compliance or risk overextending the scope of their authority by enforcing continued post-judgment review. As some commentators argue, perhaps this was the only way to get the wheels in motion at that particular time in our society.¹⁸⁸

VII. PROPOSAL FOR A NEW CAST ON NATIONAL SECURITY

This article proposes that the Supreme Court give the federal courts a familiar alternative to the current deferential standard toward national security search programs by allowing extended remedial programs to monitor a program's constitutionality. As Chief Justice John Marshall once said, "[w]ith whatever doubts, with whatever difficulties, a case may be attended, [the federal judges] must decide it, if it be brought before [them] Questions may occur which [they] would gladly avoid, but [they] cannot avoid them."¹⁸⁹ Accordingly, this article suggests that the Court employ a continuing review model similar to that used in the school desegregation and prison reform cases upon declaring a suspicionless search program unconstitutional.

The proposed review process would function in two stages. At the first stage, the court would review the program to determine its constitutionality under the special needs doctrine. If the program is held unconstitutional,¹⁹⁰ the second stage would provide a multi-step comprehensive remedy (e.g., special master/expert appointment, structuring remedy, financing, implementation, and review) in which the district courts would work with the parties to appoint special masters and experts to aid in determining the reasonableness and efficacy of the program in the past and present, as well as the need to ensure future continuation.

This section will initially address the general theories underlying institutional reform practice, and then it will apply the above-proposed model to the NYPD's Container Search Program.

¹⁸⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁸⁸ See Pfander, *supra* note 116, at 49 (arguing that *Brown I* could only be imagined by restricting the courts' remedial implications, at least initially).

¹⁸⁹ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

¹⁹⁰ This proposal seeks to address only unconstitutional programs, but recognizes that even programs held constitutional presently, may not remain so. Therefore, if a previously constitutional program is later held unconstitutional, it should be subjected to the more fortified remedial decree proposed in this article.

A. *Introduction to the Judicial Bargaining Model*

The typical function of the federal courts is the adjudicative model, which has the fundamental characteristic of one participant securing the agenda, as compared to multiple parties being involved in a bargaining process.¹⁹¹ This model is not well-suited to the exchange of ideas necessary in structural reform.¹⁹² “Courts as adjudicators act neither to promote any set of interests within society nor to find strategic solutions to social problems but rather to vindicate individual legal rights.”¹⁹³ Institutional reform practice, rather, requires a more dynamic bargaining model, in which the result is more about mutual accommodation of conflicting interests, none of which “a priori enjoys a higher status than the others.”¹⁹⁴

In the bargaining model, the promulgation of the decree begins, rather than ends, the process of enforcement, and the judge, acting as playmaster, determines the various roles each party plays, to whom to delegate the many details and tasks, and the major objectives leading towards the end result.¹⁹⁵ To have this type of authority over the parties, the judge requires three tools: knowledge, time, and power.¹⁹⁶ First, “the judge must have access not only to social facts but also political facts—information about principal players and their respective agendas, power, and bargaining skills.”¹⁹⁷ Second, framing and administering a decree imposes an enormous temporal burden on the judge, requiring the judge to appoint special masters to extend the courts’ physical capacity to participate in the complex and time-consuming process of political negotiation.¹⁹⁸ Finally, the judge requires the power to force compliance with the decree, beyond just negative sanctions. Some examples of ways the judge can influence conduct include awarding attorney’s fees, closing an institution, halting a program, removing an officer, or appointing a receiver.¹⁹⁹

Even with these tools at the judge’s disposal, however, “the capacity of the judiciary to achieve results through extrajudicial political processes rests, ultimately, on its legitimacy as a social institution. Judicial action

¹⁹¹ See Diver, *supra* note 47, at 48–49.

¹⁹² *Id.* at 53.

¹⁹³ *Id.* at 47.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 52.

¹⁹⁶ *Id.* at 95–103.

¹⁹⁷ *Id.* at 95. This need for information was also recognized in the adjudicative model with cases involving health and welfare. In *Muller v. Oregon*, 208 U.S. 412 (1908), Louis Brandeis acted as litigator to collect empirical data regarding health impacts of long working hours on women. Dubbed the “Brandeis Briefs,” such collections of factual data have been used in many Supreme Court cases since, such as the famous *Brown I*, 347 U.S. 483 (1954), to demonstrate the impacts of educational segregation on black schoolchildren.

¹⁹⁸ Diver, *supra* note 47, at 97.

¹⁹⁹ *Id.* at 99–100.

will have no impact upon the stakes, the positions, [or] the behavior of players . . . unless that action has credibility.”²⁰⁰ This legitimacy is mostly found in societal perceptions of the judicial role; however, as that role is considered via the adjudicative model, the judge cannot easily shift between roles within the traditional and political models.²⁰¹

B. *Application of the Bargaining Model to Macwade*

Because this is a rather novel marriage of concepts, this section will provide a hypothetical application of extended review to the NYPD’s Container Search Program (“Program”).

1. *The Program is unconstitutional*

As stated above, and explained further in the school desegregation and prison reform cases, the Supreme Court would have to provide the district court with a judicial imprimatur for extended review.²⁰² This could occur in one of two ways. Under the first option, the Court would certify a case, like *Macwade*, and if it was held unconstitutional, it would be remanded back to the district court with authorization to implement a remedy in which the Program need not be enjoined entirely, but rather monitored into constitutionality.²⁰³ The second option is that the district court judge would, upon holding a program unconstitutional, *sua sponte*, enforce the remedy of continued review, which would be appealed to, and affirmed by, the Supreme Court. Inasmuch as *Macwade* involved a civil suit for an injunction, there would be no need to recompense the plaintiffs’ harm. If there had been identifiable harm, however, the Court could also authorize the district court to enforce a compensatory remedy for the harmed individuals.

2. *Appointing the special masters*

On remand to the district court, the first step for the judge would be to

²⁰⁰ *Id.* at 103.

²⁰¹ *Id.* at 104.

²⁰² See Section IV. The federal courts would have jurisdiction over this case by virtue of constitutional issues involving the Fourth Amendment. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .”).

²⁰³ This article contends that a constitutional suspicionless search program justified by national security would be primarily related to promoting public safety, reasonable in time and scope to an immediate threat, and effective in meeting its objectives of deterrence and safety. Indeed, this is the same standard suggested by the Second Circuit in *Macwade v. Kelly*, 460 F.3d 260 (2d Cir. 2006). However, I argue that the court articulated the standard more symbolically, as they did not meaningfully apply it to the facts on hand. See *Macwade*, 460 F.3d at 268–69 (discussing the special needs doctrine as requiring that the search serve an immediate purpose distinct from law enforcement and that an appropriate balance be struck between four factors: (1) the weight and immediacy of the government interest, (2) the nature of the privacy interests allegedly compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing government interest).

convene the parties to discuss the appointment of special masters to aid in monitoring the program. Unless the parties are unwilling to cooperate with the decree, the parties should be involved in the appointing process, as they may likely be more compliant with individuals they themselves have had a hand in choosing. The parties may each decide whether they would like a special master with expertise well-suited to their needs, e.g., the plaintiffs may want a risk analyst who works outside the government to determine how effective the search is in confronting the actual risk of terrorist attacks on mass transit, whereas the defendants will likely want an expert in national security, perhaps from the Department of Homeland Security (or another governmental agency) to determine the program's efficacy.²⁰⁴ Nonetheless, the judge would be intimately involved in appointing the special masters to ensure the appointed individuals are sufficiently experienced to conduct the necessary fact-finding.²⁰⁵ The primary purpose of the judge's participation would be to counteract the lack of witness parity between the two sides, which occurred in *Macwade* at the trial level.²⁰⁶ As the success of this extended review hinges, to a large extent, on the availability and reliability of information, appointing two special masters—one to each party—with disparate, although presumably accurate, data, would provide the judge with greater information as he conducts his review; the judge would then ultimately serve as the tie-breaker between the two special masters' fact findings and conclusions.

It is important to note the concern that the special masters and experts would have the same knee-jerk reactions to national security that this article's proposal aims to control. Individuals who would act as special masters, monitors, or experts are human, and would thus be susceptible to similar fears and prejudices regarding national security. However, by allowing the parties to assist in choosing the special masters, it will be more likely that the selected individuals, mirroring the parties' differences, will have varying political interests, knowledge, background, and experience. Therefore, it is unlikely that all of them will have identical reactions to the search programs, and if so, perhaps similar reactions would be a good indication to the judge that the program is, in fact, necessary and effective. Ultimately, the special masters' reactions will simply add to the arsenal of evidence to be collected throughout the review process to aid the judge in making an informed and meaningful decision.

To aid the special masters in their fact-finding process, the judge

²⁰⁴ Note that at the trial court level, the testimony of three such experts—two from the NYPD and one from the National Security Council—was used to determine the Program's efficacy; however, these experts all weighed in favor of the defendant. For the bargaining model to be successful there must be a balance between experts that have the greatest interest in the Program's maintenance and those that do not. See *Macwade v. Kelly*, 460 F.3d 260, 265–67 (2d Cir. 2006).

²⁰⁵ See generally *supra* Part V.A.

²⁰⁶ *Id.*

should detail what constitutional issues the Supreme Court found in the Program. For example, the Program directors indicated that the police officers were all trained in conducting constitutional searches and had very limited discretion in whom they chose to search.²⁰⁷ However, the Court may also be concerned that the numerical formula is insufficient to deter abuse of discretion or that individuals have inadequate notice of their opportunity to refuse consent.²⁰⁸ The appointed special masters should then be required to respond to these issues by soliciting information from the parties and conducting their own investigations and hearings into the particularities of the program, the city in which it is being implemented, and the risk of terrorist attacks. To ensure compliance with the decree, in this instance, the district court need only threaten the NYPD with the Program's termination. In other circumstances, though, as stated above, more direct and forceful measures may need to be taken to secure compliance, such as removing a recalcitrant director. It is important to note that the trial judges' discretion is not limitless, and the appellate court will have jurisdiction to entertain objections to particular orders or decrees that may exceed a judge's authority.

3. *Financial support*

A very important factor, the absence of which often proved fatal to the success of some extended review programs,²⁰⁹ is determining how the extended review would be financed. Again, the manner of financing will likely depend on the cooperation of the parties in the process. Here, it benefits the defendants, if they truly believe in the Program's necessity, to try to do whatever it takes to maintain it; however, the issue is who will pay for the special masters, expert analyses, and attorneys' fees. However, it similarly benefits the plaintiffs to ensure that that the Program, if continued, is cured of its constitutional infirmities, as the initial complaint concerned the Program's constitutionality. Thus, here, since the ultimate objective could potentially benefit both parties, perhaps a shared financial

²⁰⁷ See *Macwade v. Kelly*, 2005 WL 3338573, at *6–7 (S.D.N.Y. Dec. 7, 2005).

²⁰⁸ Cf. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (reiterating the unconstitutionality of granting unfettered discretion to state officials authorized to restrict citizens' constitutional liberties).

²⁰⁹ See, e.g., John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. MARSHALL L. REV. 1, 5 (2001) ("Although [institutional reform] litigation is couched in terms of prospective equitable relief, the financial impact upon the state may be staggering. There are 'hidden' administrative costs involved with the state's compliance with interim and final decrees or consent judgments, and direct costs that include both defense and plaintiffs' attorneys' fees. Attorneys' fee awards in reform litigation run well into the millions of dollars, and it is a fiction bordering upon fantasy to say that such awards are not money judgments against the state."); *id.* at 5 n.29 ("Institutional reform class actions in New Mexico have consumed an inordinate amount of time and resources. *Duran v. Carruthers*, 678 F. Supp. 839, 841 n.2 (D.N.M. 1988), resulted in federal oversight of the state penitentiary through a consent decree for over twenty years. . . . [and] cost the state \$13,600,000 in plaintiffs' attorneys' fees.").

arrangement could be proposed, in which both parties split the cost of everything associated with reaching that end, perhaps to the exclusion of attorneys' fees, as those were privately chosen prior to the institution of the district court's remedy. Although it would be difficult for state entities and small, non-profit organizations representing plaintiffs in these cases to financially contribute given often limited resources, it may be the only way to achieve their objectives. Perhaps as occurred in the school desegregation and prison reform cases, the federal government would step in and contribute.²¹⁰ Although national security search programs do not have the same social stigma attached to them as segregation efforts, i.e., it is an interest, the continuance of which the federal government has a less questionable stake in allowing, the federal executive should still be concerned with rogue state suspicionless search tactics that are completely unaligned with the actual risk of terrorist attack.

4. *Structuring a unique remedy, implementation, and continued review*

Once appointed, the special masters must address how they will proceed respecting the basic constitutional issues, as determined by the Court, and the factors involved in the extended review process. First, the special masters must address the basic constitutional issues detailed by the Court, which are threshold considerations—e.g., even if the suspicionless search program was reasonable, if the searches were considered arbitrary, as applied, they would likely be invalid. In *Macwade*, there were concerns with abuse of police discretion and lack of opportunity to refuse consent. The defendants would be required to supplement, with empirical data, their assertions that the Program was administered to limit the scope of police discretion and that individuals had opportunity to refuse consent. For example, the data could include demographic information on each searched individual to assure that the police are, in fact, following the numerical quota. Additionally, the data should include statistics on how many individuals actually refuse consent, and perhaps, testimony of individuals on whether they understand that they could, and whether they would, refuse consent. Some possible remedies to ensure that there is no abuse of

²¹⁰ See David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1067–68 (2004) (noting that “[u]ntil recently, the government provided funding for many of the organizations that brought these lawsuits. Beginning in the 1960s, the federal subsidies were nothing less than seed money for institutional reform litigation networks. By 1967, the Office of Economic Opportunity had provided funding for three hundred legal services organizations and a dozen national law reform centers. This funding took on particular importance before fee-shifting statutes passed in the 1970s and 1980s made it more likely that the lawsuits themselves could help to sustain a plaintiffs’ bar. Moreover, the source of the money, and the attendant oversight by the government of the use of its funds, created a link between the disparate organizations it financed.”).

discretion would be to enforce a different numerical quota, change the number and location of checkpoints, require each officer to fill out a demographic report on each searched person, or propose an entirely different search protocol. To ensure that individuals know that they can refuse consent, the special masters could require the police to inform individuals of that right prior to the search.

Second, the Special Masters must address the greater objective of ensuring that the suspicionless search program is justified by the national security risk.²¹¹ Appropriate questions to consider are what the likelihood is that the Program reduces terrorist attacks, what the actual potential is for terrorist attacks on New York City mass transit, and what the quantifiable liberty intrusions are on individuals. These considerations should be weighed, using empirical data when possible, to ascertain what a reasonable standard of efficacy should be. This is an area in which experts would prove extremely useful, as they can provide the Special Masters, though experts themselves, with additional information to aid in determining a reasonable standard. From that point, the Program administrators should provide reports of the above-specified data to the Special Masters for a bi-weekly review as long as the Program is necessary. There may be periods in which the Program is found ineffective and unnecessary, given the risk balance, and the Special Masters would have to mandate suspension. Instead of being permanent injunctions, the Program administrators would have access to an expedited process in which they could reinstitute the Program, if certain pre-determined risk factors existed.

When the Program was initiated the terrorist threat in this country and abroad was at a high level, following the London Tube bombings.²¹² The District Court for the Southern District of New York and the Second Circuit both agreed that at that time, the risk was high enough to justify a suspicionless search program.²¹³ However, the courts neglected to meaningfully discuss the Program's efficacy.²¹⁴ Granted, the adversarial model provides limited options in this respect, such that the court had only two choices: either enjoin the Program or uphold it. Furthermore, in an

²¹¹ This article acknowledges that there may be serious issues of information asymmetry in assessing the national security risk involved as the federal government will be loathe to express the particularities of the information upon which it relied to make its decisions. The federal courts have recognized that in such situations the judges can conduct *ex parte*, *in camera* hearings on highly classified information to temper security concerns. *See, e.g.*, *United States v. Scarfo*, 180 F. Supp. 2d 572, 574–76 (D.N.J. 2001).

²¹² *See Macwade*, 2005 WL 3338573, at *4.

²¹³ *Macwade v. Kelly*, 460 F.3d 260, 267 (2d Cir. 2006). “[W]e must remember not to wrest from politically accountable officials . . . the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.” *Id.* at 273 (internal quotations omitted) (citation omitted).

²¹⁴ *Id.* at 273–75.

emergency situation, the court most likely did not want to risk mass catastrophe while conducting a cost-benefit analysis of the Program. In contrast, the bargaining model allows greater flexibility,²¹⁵ especially when addressing emergency programs to assess the Program's efficacy over time, without forcing the decision-maker between the proverbial rock and a hard place— one choice could lead to mass catastrophe, while the other could lead to numerous civil liberty intrusions.

VIII. ALTERNATIVES AND CRITICISM TO THE APPLICATION OF INSTITUTIONAL REFORM PRACTICE TO NATIONAL SECURITY

This section seeks to address the major criticisms of and alternatives to this article's proposal. Subsection A will answer the question of why the courts could not achieve a similar result through the traditional judicial approach by arguing that this article's proposal will lead to greater uniformity in objectives, efficiency, and meaningful review. Subsection B will address the separation of powers concerns that the article's proposal raises in requiring a more active judicial role and will answer why the Judicial Branch would provide a more democratic solution than the Executive or Legislative Branches. Finally, subsection C will review several commentators' alternative approaches to national security concerns and explain why this article's proposal is the superior solution.

A. The Traditional Model is Inappropriate in the National Security Context

Initially, it is important to explore why the traditional process— i.e., the adjudicative model— would not provide a better solution. There are three main issues with the adjudicative model in the context of national security: inconsistency, inefficiency, and lack of meaningful review. First, although the adjudicative model hinges on private party goals,²¹⁶ in the context of national security, individual rights have consistently been secondary to government needs.²¹⁷ In doing so, the courts' decisions were grounded in varying sources— Fourth Amendment exceptions, the President's plenary foreign affairs powers, general emergency— none of which set forth a uniform foundational objective respecting national security and individual rights.²¹⁸ If the Supreme Court authorizes the district courts to fashion remedial measures designed to ensure the reasonableness of suspicionless search programs, invariably the first few cases will be appealed back to the Court for its approval. Once the Court

²¹⁵ See *supra* Part V.A.

²¹⁶ See *id.*

²¹⁷ See generally *supra* Part III.

²¹⁸ *Id.*

reviews several district court remedial programs, the expectations of both American citizens and state and local government seeking to institute suspicionless search programs will be much clearer.

Arguably, this article's proposal would lead to inconsistent decisions, as well. This may be particularly true in varying jurisdictions—i.e., perhaps a district court located in a conservative region would be more likely to consider a suspicionless program reasonable than a similarly situated court in a more liberal region. However, this article's proposal does not seek perfect consistency in remedies, rather a threshold consistency in objectives.²¹⁹ As in the Supreme Court's desegregation efforts, the Court declared the objective to be integration, and then it was left to the varying district courts to achieve that objective using whatever means necessary. Ultimately, as the Court reviewed various district court remedies, it provided greater wisdom as to which remedies were constitutional; however, the most important factor was that the objective was consistently achieved. With respect to national security's suspicionless search programs, the constitutional end is to ensure such programs are reasonable—i.e., to be related in scope to any immediate threat, to be effective, and to avoid overly intruding on civil rights. The manner in which the district courts implement remedies to achieve this end may vary, but if the program is reasonable, inconsistency in means should not matter.

Second, this would, in turn, lead to greater efficiency in enforcement, as suspicionless search programs would have more discernable boundaries and individuals would have a clearer sense of their civil rights in the context of national security. Ultimately, this could potentially reduce the number of cases that are brought before the federal courts for review.

Third, the Court's response to national security threats, actual and potential, has been generally deferential.²²⁰ As explored above in Part III, this response is dangerous to American citizens' civil rights.²²¹ A

²¹⁹ Ultimately, this article's proposal is not a panacea to the problem of judicial deference in the context of national security. There will likely always be some regions of the country whose courts will be unwilling to meaningfully review the constitutionality of suspicionless search programs justified by national security, but this article's proposal seeks to address those courts who, with hesitation, have been deferential toward national security because the judges believed deferential review was better than complete invalidation at the risk of catastrophe.

²²⁰ See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1042 (2004) (“*Korematsu v. United States* provides a revealing example of both the strengths and limits of [the judiciary in the context of national security] . . . Justice Hugo Black— that great civil libertarian— was wrong in upholding the wartime concentration camps for Japanese Americans. But the fact that Justice Black was a great libertarian suggests how dangerous the emergency appeared at the time to the right-thinking people.”).

²²¹ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (holding constitutional an all-male draft by explaining that in perhaps no other area has the Court afforded Congress greater deference than national defense and military affairs); *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (holding constitutional domestic Japanese internment camps because the United States was at war with

deferential approach is problematic because “factual and empirical evidence plays an enormously influential role in the interpretation of the Constitution,”²²² “[so when] [c]ourts accept uncritically the factual and empirical evidence of the government supporting its laws and policies . . . [it] has a drastic effect on the outcomes of cases.”²²³ Thus, although this article’s proposal certainly does not advocate absolute protection of civil rights, it does require precision determining when it is appropriate to reduce American citizens’ civil liberties. Such precision will not be easily found by the courts simply accepting decisions that were often made under panicked and rash circumstances. “Governments should not be permitted to run wild even during the emergency,”²²⁴ “[and] [u]nless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity.”²²⁵

The fault, however, is not entirely within the judiciary. Although the traditional defense against the Government’s exploitation of our baser impulses has been the federal courts, they have not protected us sufficiently in the past because the judges speaking for the courts are just as susceptible to panic as regular citizens.²²⁶ Unfortunately, the model within which the Court currently functions does not allow the Court the flexibility to alternatively respond. Therefore, faced with the option of striking down a potentially unconstitutional suspicionless search program and risking a terrorist strike on one hand, or upholding the program and potentially risking some civil rights violations on the other, the Court almost has no choice. This article’s proposal allows, and in fact requires, the Court to meaningfully review Government action justified by national security.²²⁷

Japanese empire and Congress deemed it necessary). *See also* *Illinois v. Caballes*, 543 U.S. 405, 425 (2005) (Ginsburg, J., dissenting) (concluding that the “immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine”), *id.* at 417 n.7 (Souter, J., dissenting) (arguing that “what is a reasonable search depends in part on demonstrated risk”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“[T]he Fourth Amendment would almost certainly would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . .”); *United States v. Karo*, 468 U.S. 705, 718 (1984) (recognizing that exceptions to warrant requirement may exist in “truly exigent circumstances”); *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) (leaving open the question of whether the Fourth Amendment warrant requirement has a more limited application with respect to national security); *Macwade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006) (holding constitutional, under the special needs exception, the suspicionless search of mass-transit passengers justified by national security); *United States v. Truong*, 629 F.2d 908, 913–14 (4th Cir. 1980) (holding that the Executive need not always obtain a warrant for foreign intelligence surveillance).

²²² Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 953–54 (1999).

²²³ *Id.* at 953.

²²⁴ Ackerman, *supra* note 220, at 1030.

²²⁵ *Id.*

²²⁶ *See id.* at 1066 (noting that “[w]ith the country reeling from a terrorist strike, it simply cannot afford the time needed for serious judicial review.”).

²²⁷ *See generally* Part V.

B. Separation of Powers Issues

This article proposes that the Court take a more active stance against policy decisions made by the political branches. This raises potential separation of powers issues because the proposal seems to allow the federal courts' to encroach upon the politically accountable branches. This characterization is not entirely accurate, however, because the judges will still be limited to reviewing the constitutionality of existing programs. In this context, the judges would be performing their authorized role within the government by ensuring that constitutional violations by other governmental branches do not go unchecked.²²⁸ Moreover, some commentators have argued that the present state of affairs makes the Judicial Branch the more democratic branch because its traditional role as the great constitutional interpreters has best-positioned it to protect the constitutional will of the people.²²⁹ In this way, the federal courts are also limited by the public concurrence, which "sets an outer boundary for judicial policy making."²³⁰

Further, any political choices—such as changing search protocol or quotas—will be made either entirely, or by suggestion of, extra-judicial experts and, in most cases, will be authorized by all involved parties. It may be argued that putting such choices in the hands of extra-governmental actors is even less democratic, but, as both parties would be involved in choosing those actors, this authority does not go unchecked. Thus, the courts will not go any further than addressing the constitutionality of the program and offering any suggested modifications thereto, both of which are actions falling squarely within their authority.²³¹

Additionally, this proposal seeks to remedy the courts' abdication of their role with respect to national security. Because the other governmental branches broaden the scope of their authority in the context

²²⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

²²⁹ See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 3 (2006). Rosen states, "[i]n our new, topsy-turvy world, it [is] the elected representatives who [are] thwarting the will of the people, which [is] being channeled instead by unelected judges." Additionally, he notes that the success of many of the most influential decisions depended on public sentiment regarding the issue. *Id.* at 8–9. For example, in arguing that the Court should practice democratic constitutionalism—deferring to the constitutional views of the majority—Rosen notes that decisions based in law, such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *New York Times v. Sullivan*, 376 U.S. 254 (1964) (recognizing right to criticize government), reflected the majoritarian views and were thus less controversial. *Id.* On the other hand, more political decisions with a weaker legal grounding, such as *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (holding that Congress has no right to ban slavery in the federal territories), and *Roe v. Wade*, 410 U.S. 113 (1973) (striking down laws banning mid- and late-term abortions), were publicly lambasted. *Id.* at 8.

²³⁰ ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 14 (4th ed. 2005). He also notes, "[i]n truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment. It has worked with the premise that constitutional law, like politics itself, is a science of the possible." *Id.*

²³¹ See U.S. Const. art. III, § 2, cl. 1.

of national security, the courts likewise should extend their authority so as not to erode the foundational checks and balances of our Government. As Alexander Hamilton noted in the Federalist Papers, judicial authority “supposes that the power of the people is superior to both [the Legislature and the Judiciary]; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.”²³²

C. *Alternative Proposals*

Several commentators have proposed different alternatives for the judicial role in the context of national security. For example, Bruce Ackerman²³³ similarly believes that the current judicial trend is insufficient to achieve the dual objectives of allowing the Government reasonable flexibility to prevent a second terrorist attack while maintaining the integrity of civil liberties. His solution, however, involves a more limited role for the judiciary, as he does not believe that our Constitution, standing alone, is adequate in the face of real emergency. He proposes an Emergency Constitution that is three-phased, with the judiciary taking the final role of maintaining the objectives initiated by the political branches.²³⁴ As he says, “[a]lthough judges cannot themselves construct an adequate emergency regime, they play a vital role in sustaining it.”²³⁵ Thus, this article’s proposal can be reconciled with Ackerman’s Emergency Constitution, as he similarly suggests that the courts should conduct a meaningful review of the other branches’ decisions regarding national security. Additionally, this article’s proposal does not argue that judges can, by themselves, fashion effective national security measures, but rather, with a cadre of experts, can assist the parties into developing a more constitutional balance between national security needs and civil liberty protection.

Charles Keeley offers a different approach by suggesting that the Court should recognize national security as a *sui generis* exception to the Fourth Amendment.²³⁶ He argues that there is clearly a need for some balance between governmental needs and individual rights.²³⁷ However, no current Fourth Amendment exception sufficiently addresses the unique characteristics of national security as an issue.²³⁸ His proposal involves a

²³² THE FEDERALIST No. 78, at 524–25 (Alexander Hamilton).

²³³ Sterling Professor of Law and Political Science, Yale University.

²³⁴ Ackerman, *supra* note 220, at 1031.

²³⁵ *See id.* at 1066.

²³⁶ *See* Keeley, *supra* note 4, at 3287–92.

²³⁷ *Id.* at 3294.

²³⁸ *Id.* at 3292.

balancing test similar to this article's proposal, in which the courts play an active role;²³⁹ however, his solution falls short because it does not address the major issue with judicial deference. Under the Keeley approach, "the courts [would first] scrutinize general search programs to ensure that they are tailored to meet a genuine terrorist threat and that they do not serve merely as a pretext for ordinary criminal law enforcement."²⁴⁰ Second, the courts would "make sure that statutory or administrative safeguards that limit the discretion of officials are enforced lest the random search devolve into one subjecting individuals to the unbridled discretion of the police."²⁴¹ These inquiries would be applicable to searches for explosives or other weapons for the purpose of preventing terrorism— for determining the constitutionality of urban mass transit search programs.²⁴² There are three major problems with his solution. First, his solution does not assist in providing the lower courts with wisdom and consistency, and as new fact situations originate in the lower courts, judges may not know into which exception certain programs fit.²⁴³ Second, by continuously expanding exceptions, the solution calls into question the Fourth Amendment's general wisdom.²⁴⁴ Finally, the proposal does not really answer the question of whether creating a new exception in the mold of similar Fourth Amendment exceptions would somehow change judicial attitudes toward national security search programs.

This article argues that creating a new exception would be nothing more than a tautology, as it would not change judicial behavior in the slightest. In fact, allowing a national security exception to our constitutional rights further risks judicial abdication by giving national security programs a presumption of constitutionality.²⁴⁵ The burden will be much higher on the aggrieved party to prove that the program was not justified by national security, as opposed to requiring the courts to conduct a meaningful balancing test of both individual rights and governmental needs. In contrast, this article's proposal combats judicial abdication by requiring court involvement. This, in turn, prevents ex-post rationalization of security measures and allows for a balancing of interests between individual rights and the understandably biased needs of law enforcement officers.

²³⁹ *Id.* at 3293–94.

²⁴⁰ *Id.* at 3294.

²⁴¹ *Id.*

²⁴² *See generally id.* at 3291–92.

²⁴³ *Id.* at 3288.

²⁴⁴ *Id.* at 3287.

²⁴⁵ *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 127–33 (2005) (arguing that the courts can breach adjudicative duty by (1) abdicating their role, (2) deciding the case precisely as parties have defined it, or (3) not deciding the matter as defined by the party— e.g., failing to consider the troubling aspects of party's argument).

IX. CONCLUSION

This article's proposal for extended review will slow the judicial process, which may appear to make it more difficult for the Government to respond to emergencies. However, taking a step back is in fact necessary in order to move forward, as it will ensure that such search programs remain effective in their deterrence and safety objectives, while also protecting individual liberties. Thus, existing programs will likely be more effective at deterring terrorism while reasonably intruding on individual rights. As Bruce Ackerman says, "[t]he attack of September 11, [2001] is the prototype for many events that will litter the twenty-first century."²⁴⁶ Therefore, he continues, "[w]e should be looking at it in a diagnostic spirit: What can we learn that will permit us to respond more intelligently the next time around?"²⁴⁷ The Second Circuit was correct to cast national security within the special needs framework, because national security certainly *is* a special governmental need; however, the court should not have stopped there. The danger that national security justifications pose to American citizens' civil liberties, requires a more fortified review. The federal courts, as our Nation's great mediators, are in the best position to conduct this review. Although judges are not immune from panicked majoritarian pressures, there is no branch of government that is better-suited to attempt this type of neutral decision-making than the judiciary.

²⁴⁶ Ackerman, *supra* note 220, at 1029.

²⁴⁷ *Id.*