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Government Regulations Authorizing M.andatory Alcohol and Drug Testing of Private Railroad Employees on Less Than Individualized Suspicion to Enhance Safety Are Constitutional

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CASENOTES

CONSTITUTIONAL LAW—Search and Seizure—Government Regulations Authorizing Mandatory Alcohol and Drug Testing of Private Railroad Employees on Less Than Individualized Suspicion To Enhance Safety are Constitutional.

Skinner v. Railway Labor Executives' Ass'n,
__ U.S. __, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

In 1985, the Federal Railroad Administration ("FRA") established regulations authorizing blood, breath, and urine tests of railroad employees in certain well-defined circumstances.[1] Subsequent to adoption, the Railway Labor Executives' Association filed suit to enjoin the FRA from enforcing the regulations alleging they violated both federal constitutional and statutory provisions.[2] The district court found that although the employees'

1. 49 C.F.R. §§ 219.201-.309 (1988)(testing mandatory in certain situations, permissive in others). The FRA regulations require that blood and urine tests be administered when a major train accident causes a death or results in a hazardous material being released causing an evacuation or reportable injury, or resulting in $500,000 or more damage to railroad property. *Id.* § 219.201(a)(1). The same tests are required if an impact accident occurs causing a reportable injury or $50,000 or more damage to railroad property. *Id.* § 219.201(a)(2). An impact accident occurs when a train is involved in a "head-on collision, a rear-end collision, a side collision, a switching collision, or impact with a deliberately placed obstruction." *Id.* § 219.5(m). Likewise, if an on-duty employee is killed due to any train incident, the tests are mandatory. 49 C.F.R. § 219.201(a)(3) (1988). A train incident occurs when "the movement of railroad on-track equipment . . . results in a casualty but in which railroad property damage does not exceed the reporting threshold." *Id.* § 219.5(x). Breath and urine tests are authorized when an employee is involved in a reportable accident or incident or the employee has committed an operating rule violation or error. *Id.* § 219.301(b)(2)(3), (c)(1). A breath test is also authorized when a supervisor has a reasonable suspicion of an employee's alcohol and/or drug impairment. *Id.* § 219.301(b)(1). Urine tests are also permitted when two supervisors have a reasonable suspicion of employee impairment, and one of the supervisors has been trained to detect such impairment. 49 C.F.R. § 219.301(2)(i)(ii) (1988).

2. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 577, 591-92 (9th Cir. 1988), *rev'd*, __ U.S. __, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). The Railway Labor Executives' Association challenged the regulations on grounds that they violated the fourth

fourth amendment right to bodily integrity was legitimate, the government's interest in railway safety outweighed this right.[3] As a result, the court granted the government a summary judgment.[4] The Railway Labor Executives' Association appealed the grant of summary judgment to the United States Court of Appeals for the Ninth Circuit reasserting the unconstitutional nature of the regulations.[5] The appellate court, which reversed the district court, held that a reasonable suspicion of alcohol or drug impairment was a prerequisite to testing railway employees.[6] The United States Supreme Court granted certiorari to determine whether the FRA regulations violate an individual's fourth amendment right to be free from unreasonable searches.[7] Held—*Reversed*. Government regulations authorizing mandatory alcohol and drug testing of private railroad employees on less than individualized suspicion to enhance safety are constitutional.[8]

The fourth amendment of the United States Constitution protects individuals from unreasonable searches conducted by the government or its agents.[9]

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and fifth amendments, an employee's right to privacy, the Federal Railroad Safety Act, the Federal Rehabilitation Act, and the Railway Labor Act. *Id.* The court of appeals' opinion primarily focused on the fourth amendment challenge. *Id.* at 579-89.

3. Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1410, 103 L. Ed. 2d 639, 656 (1989). The district court entered judgment for petitioners after weighing the parties' respective interests. *Id.* Specifically, the court weighed the employees' fourth amendment interests in bodily integrity against the government's interest in railway safety. *Id.*; *see also Burnley*, 839 F.2d at 583 (district court relied on administrative search law to review regulations).

4. *Skinner*, __ U.S. at __, 109 S. Ct. at 1410, 103 L. Ed. 2d at 656 (summary judgment granted for defendants).

5. *Burnley*, 839 F.2d at 577. The Railway Labor Executives' Association alleged again that the regulations violated the employees' fourth and fifth amendment rights and their right to privacy. *Id.* at 579, 591-92.

6. *Id.* at 592 (using reasonableness test requiring a balancing of parties' interests). The court of appeals determined that a reasonable suspicion of impairment was needed to test after balancing the government's interest in railway safety against the employee's interest in privacy. *Id.* at 586, 592. The court of appeals held that the district court was wrong in applying the administrative search exception to the warrant requirement in the area of employee drug testing because the exception applies only to property in a pervasively regulated industry. *Id.* at 583-85.

7. Burnley v. Railway Labor Executives' Ass'n, 486 U.S. __, 108 S. Ct. 2033, 100 L. Ed. 2d 618 (1988).

8. *Skinner*, __ U.S. at __, 109 S. Ct. at 1422, 103 L. Ed. 2d at 670-71.

9. U.S. CONST. amend. IV. The first clause of the fourth amendment provides: "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." *Id.*; Burdeau v. McDowell, 256 U.S. 465, 474-75 (1921)(fourth amendment applies to federal government and its agencies); *see also* Walter v. United States, 447 U.S. 649, 656 (1980)(fourth amendment not applicable to private party); Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)(fourth amendment not applicable to private party unless agent of state). *See generally* Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1481 (1985)(proposing model of fourth amendment

To ensure this protection, the fourth amendment requires that the government obtain a warrant based upon probable cause before conducting a search.[10] This probable cause requirement guarantees the reasonableness of a government search.[11] The United States Supreme Court requires that the government request the warrant from a neutral and detached magistrate who may issue the warrant after determining whether the facts and circumstances indicate that a government search will occur, and that probable cause to search exists.[12] The magistrate's approval of a warrant request focuses on whether the government's action will invade an expectation of pri-

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analysis based on reasonableness clause); Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M.L. REV. 33, 43-47 (1979-80)(tracing downfall and reemergence of reasonableness clause).

10. U.S. CONST. amend. IV. The fourth amendment's second clause provides: "[N]o 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." *Id.*; *see also Coolidge*, 403 U.S. at 454-55 (warrant requirement is basic constitutional rule); Chimel v. California, 395 U.S. 752, 763 (1969)(must have warrant if exception does not apply); Katz v. United States, 389 U.S. 347, 357 (1967)(warrantless searches are unreasonable per se). *But see generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1966)(discussing Court's various interpretations of how fourth amendment's two clauses interact). Three views as to the application of each clause have emerged: (1) for a search to be reasonable, it must be accompanied by a warrant; (2) the reasonableness clause is an additional restriction so that a search conducted pursuant to a warrant might still be unreasonable; or (3) the reasonableness clause is an additional power so that a warrantless search might be reasonable. *Id.* The courts appear to favor the third approach. *See* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a) (2d ed. 1987)(clear that reasonableness clause provides additional power); *see also* Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231, 231-32 (1983)(despite warrant requirement Supreme Court has leaned toward reasonableness clause of fourth amendment); Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691, 697-707 (1982)(history of friction between warrant and reasonableness clauses traced). *See generally* Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 108-14 (1986-87)(historical purposes behind warrant clause discussed).

11. *See* Dunaway v. New York, 442 U.S. 200, 213 (1979)(probable cause supplies reasonableness required by constitution); *see also* Camara v. Municipal Court, 387 U.S. 523, 534 (1967)(probable cause standard used to determine search's reasonableness); Carroll v. United States, 267 U.S. 132, 149 (1925)(search based on probable cause valid). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a) (2d ed. 1987)(probable cause requirement for warrants discussed); Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 764 (1979)(discussing Court's reliance on probable cause).

12. *See Katz*, 389 U.S. at 357-58 (search without judge or magistrate approval and determination of probable cause unreasonable); *see also* Jones v. United States, 357 U.S. 493, 498 (1958)(impartial magistrate must determine if search justified by probable cause); Johnson v. United States, 333 U.S. 10, 13-14 (1948)(magistrate's determination of probable cause is fourth amendment's protection); Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1178 (1987)(review by magistrate prevents overzealous law enforcement). *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE

vacy that society recognizes as reasonable.[13]

The Court has not required the government to obtain a search warrant when the requirement of a warrant frustrates the government's purpose for the search or when the government's interest is compelling.[14] The government's warrantless search, however, must be reasonable as determined by the particular facts and circumstances surrounding the search.[15] The above

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FOURTH AMENDMENT § 4.2 (2d ed. 1987)(discussing neutral and detached magistrate requirement).

13. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring)(search occurs when reasonable expectation of privacy invaded); *see also* United States v. Jacobsen, 466 U.S. 109, 113-14 (1984)(infringement of individual's reasonable expectation of privacy is search and requires warrant); Terry v. Ohio, 392 U.S. 1, 9, 20 (1968)(protection through warrant requirement). By requiring judicial approval of a search in advance, the warrant clause protects an individual's reasonable expectation of privacy and prevents unreasonable searches. *Terry*, 392 U.S. at 9, 20. *See generally* Comment, *Defining A Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 194-200 (1986)(criticizing *Katz* standard as too arbitrary); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 168-71 (1977)(expectation reasonable if reasonable person would take precautions to preserve expectation).

14. *See* Camara v. Municipal Court, 387 U.S. 523, 533 (1967)(factor weighed in determining if warrant is necessary is warrant's frustration of search's purpose); *see also* O'Connor v. Ortega, 480 U.S. 709, 720 (1987)(quoting *Camara*, 387 U.S. at 533)(recognizing frustration of governmental purpose as exception to warrant requirement); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)(government's interest in maintaining public order justifies warrantless search). School authorities were permitted to search a student's purse for cigarettes based upon a reasonable suspicion of possession because the government's interest in maintaining discipline was compelling. *T.L.O.*, 469 U.S. at 341; Donovan v. Dewey, 452 U.S. 594, 602-03 (1981)(Congress recognized Federal Mine Safety and Health Act would be frustrated by warrant requirement); Terry v. Ohio, 392 U.S. 1, 28-29 (1968)(pat down search of individual believed to be carrying a weapon). An officer's pat down of a suspect for weapons based on reasonable suspicion is justified in the absence of a warrant by the government's interest in preventing harm to the officer and the public. *Id.* at 23-24; Schmerber v. California, 384 U.S. 757, 770 (1966)(warrantless search valid to prevent blood alcohol level from diminishing). Requiring a warrant for a search to determine a suspect's level of alcohol impairment would frustrate the government's purpose for the search because the body begins to eliminate the evidence after drinking stops. *See generally* Williamson, *The Supreme Court, Warrantless Searches, and Exigent Circumstances*, 31 OKLA. L. REV. 110, 116-23 (1978)(discussing development of warrantless searches based upon exigency); Comment, *The Constitutionality of Federal Employee Drug Testing:* National Treasury Employees Union v. Von Raab, 38 AM. U.L. REV. 109, 119 (1988)(warrantless searches permitted when warrant would frustrate government purpose or when government interest is compelling).

15. *See O'Connor*, 480 U.S. at 725-26 (search judged according to reasonableness under circumstances); *T.L.O.*, 469 U.S. at 341 (surrounding circumstances determine reasonableness of search); *see also* United States v. Sharpe, 470 U.S. 675, 682 (1985)(fourth amendment proscribes unreasonable searches); Elkins v. United States, 364 U.S. 206, 222 (1960)(not all searches forbidden by constitution, only unreasonable ones); New York v. Burger, 482 U.S. 691, 702-03 (1987)(warrantless search of pervasively regulated business must meet three criteria to be reasonable). The first requirement is that a substantial governmental interest exists. *Burger*, 482 U.S. at 702. Secondly, inspections without warrants must be necessary to aid the

exceptions to the warrant requirement are available[16] if the search is based either upon probable cause,[17] reasonable suspicion,[18] or a greatly diminished standard of suspicion.[19]

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regulations. *Id.* The last requirement is that the regulations provide a sufficient warrant substitute. *Id.*; Bell v. Wolfish, 441 U.S. 520, 558-59 (1979)(test of reasonableness applied to warrantless body cavity searches of prison inmates); *Terry*, 392 U.S. at 20 (warrantless search for weapons must be judged by reasonableness clause of fourth amendment). *See generally* McDermott & Jones, *Mandatory Random Drug-Testing in the United States Department of Transportation—A Fourth Amendment Analysis*, 17 TRANSP. L.J. 1, 5 (1988)(limited, warrantless search must be reasonable); Comment, *The Constitutionality of Federal Employee Drug Testing*: National Treasury Employees Union v. Von Raab, 38 AM. U.L. REV. 109, 119 (1988)(discussing how to determine if warrantless searches are reasonable).

16. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)(border searches); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976)(inventory searches); Schneckloth v. Bustamonte, 412 U.S. 218, 227-34 (1973)(consent searches); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971)(plain view searches); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970)(administrative searches); Chimel v. California, 395 U.S. 752, 762-63 (1969)(search incident to arrest); *Terry*, 392 U.S. at 30 (stop and frisk); Warden v. Hayden, 387 U.S. 294, 299 (1967)(hot pursuit); Carroll v. United States, 267 U.S. 132, 149 (1925)(vehicle searches). *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1(a) (2d ed. 1987)(reasons for warrantless searches covered); Bradley, *Two Models Of The Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-75 (1985)(reason for exceptions is rule that warrant is required in all cases); Williams, *Institute on Exceptions to the Warrant Requirement Under the Fourth Amendment*, 29 OKLA. L. REV. 659, 660-79 (1976)(general discussion of several exceptions).

17. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291, 296 (1973)(probable cause to believe suspect's involvement in murder justified scraping of fingernails); Schmerber v. California, 384 U.S. 757, 770 (1966)(taking of suspect's blood to determine intoxication); Carroll v. United States, 267 U.S. 132, 162 (1925)(belief that suspect was transporting alcohol based on prior encounter justified search). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a) (2d ed. 1987)(discussing requirement of probable cause for warrants and warrantless searches); Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 767-76 (1979)(defining probable cause).

18. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 879-80 (1987)(search of probationer's home based on reasonable suspicion); New Jersey v. T.L.O., 469 U.S. 325, 345-46 (1985)(search of student's purse based on reasonable suspicion); Terry v. Ohio, 392 U.S. 1, 27 (1968)(search to determine if suspect armed was reasonable); *see also* Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063, 1073-74 (1987)(most courts require reasonable suspicion for administrative searches); Note, *Employee Drug Testing-Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969, 976-77 (1988)(search based on reasonable suspicion of impairment does not violate constitution).

19. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1422, 103 L. Ed. 2d 639, 670-71 (1989)(testing of railway employees for alcohol and drug impairment without suspicion); *see also* Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir.)(random selection of jockeys for testing for alcohol and drug impairment), *cert. denied*, 479 U.S. 986 (1986); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976)(stop and questioning at checkpoints without individualized suspicion). *See generally* Comment, Shoe-

Administrative searches by the government undertaken to inspect businesses for compliance with administrative regulations are also subject to the fourth amendment's warrant requirement.[20] The Court, however, has eliminated the warrant requirement for administrative searches when the property subject to regulation and inspection is used in a pervasively regulated industry.[21] As a result, the Court incorporated the pervasively regulated industry argument into its decisions to justify warrantless searches when the government establishes a special need because both situations involve a substantial government interest in supervision.[22]

Created under common law, the "special needs" exception is applicable when the government's obtaining a warrant is impractical because of circumstances beyond law enforcement's usual needs.[23] When applying this

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maker v. Handel: *Alcohol and Drug Testing and the Pervasive Regulation Exception to the Fourth Amendment's Administrative Search Warrant Requirement*, 14 HASTINGS CONST. L.Q. 173, 177-78 (1986)(testing upheld on less than individualized suspicion under exception to warrant requirement); Note, United States v. Martinez-Fuerte: *The Fourth Amendment—Close to the Edge?*, 13 CAL. W.L. REV. 333, 341 (1977)(border patrol stops upheld on less than individualized suspicion).

20. *See* See v. Seattle, 387 U.S. 541, 545-46 (1967)(search of commercial warehouse for fire code violations); *see also* Camara v. Municipal Court, 387 U.S. 523, 540 (1967)(search of private residence by building inspectors). *See generally* Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 264-67 (1989)(discussing development of administrative search).

21. *See* Donovan v. Dewey, 452 U.S. 594, 596-98 (1981)(regulatory scheme authorizing mine searches); *see also* United States v. Biswell, 406 U.S. 311, 315-16 (1972)(searches of firearm dealer pursuant to statute); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970)(search pursuant to regulation of liquor industry). *See generally* Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 267-88 (1989)(highlights caselaw creating exception to administrative search warrant requirement).

22. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1418-19, 103 L. Ed. 2d at 666-67 (one justification for special need is established regulation of industry); *see also* Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)(probation system is special need similar to regulated industry); New York v. Burger, 482 U.S. 691, 702 (1987)(regulated industry treated as special need). *See generally* Note, *Applying A Reasonableness Standard To Government Office Searches*—O'Connor v. Ortega, 19 U. TOL. L. REV. 755, 759-62 (1988)(discussing warrant requirement's exceptions and how they are related).

23. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)(Blackmun, J., concurring)(ability to respond to behavior threatening school environment). A court should balance the applicable government interests against an individual's fourth amendment interests when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.*; *see, e.g.*, *Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (government supervision of railroad employees to guarantee safety); National Treasury Employees Union v. Von Raab, __ U.S. __, __, 109 S. Ct. 1384, 1390-91, 103 L. Ed. 2d 685, 702-03 (1989)(prevent drug-using employees from promotion to safety sensitive positions within custom's service); *Griffin*, 483 U.S. at 873-74 (supervision of state probation system); O'Connor v. Ortega, 480 U.S. 709, 725 (1987)(ensuring workplace runs in proper and efficient manner). *See generally* Note, Griffin v. Wisconsin: *Warrantless Probation Searches—Do The*

"special needs" analysis, the court balances the applicable governmental interests against the intrusion upon an individual's privacy interests.[24] Under this analysis, the court attempts to determine whether a warrant requiring probable cause, or a warrantless search requiring probable cause or some lesser level of suspicion, is necessary to render a search reasonable.[25] Along with the "special needs" analysis, the court must also determine that the search is justified at its inception and related in its scope.[26]

In the past, courts have attempted to utilize existing exceptions to the warrant requirement to justify the testing of public employees for alcohol and drug impairment.[27] Several courts have applied the pervasively regu-

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State's Needs Warrant Such Strict Measures?, 21 J. MARSHALL L. REV. 921, 927-29 (1988)(court concluded that special needs made warrant requirement impractical); Note, *Applying A Reasonableness Standard to Government Office Searches*—O'Connor v. Ortega, 19 U. TOL. L. REV. 755, 767 (1988)(court used special needs to validate search on less than probable cause).

24. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702, 708-11 (1987)(balancing privacy interest in junkyard against government interest in fighting automobile theft); *O'Connor*, 480 U.S. at 719-20 (balancing public employee's privacy interest in desk and files against government's interest in supervision); *T.L.O.*, 469 U.S. at 337-38 (balancing student's privacy interest in purse against school's interest in maintaining order); *see also* Note, *Applying A Reasonableness Standard to Government Office Searches*— O'Connor v. Ortega, 19 U. TOL. L. REV. 755, 761-62 (1988)(special needs requires balancing to determine what level of suspicion will justify search).

25. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661-62 (1989)(railway safety is special need which may permit search without warrant or probable cause); *see also O'Connor*, 480 U.S. at 724 (probable cause too great a burden for office searches); *T.L.O.*, 469 U.S. at 340-41 (warrant and probable cause not required for search of student). *See generally* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 765 (1979)(reasonableness of search does not depend on presence of warrant); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 214-16 (1986)(discussing various standards by which search can be declared reasonable).

26. *See* Terry v. Ohio, 392 U.S. 1, 19-20 (1968)(to determine if search is unreasonable look to its scope and its inception); *see also O'Connor*, 480 U.S. at 726 (underpinning of search's reasonableness is *Terry* standard); *T.L.O.*, 469 U.S. at 342 (standard applied to search of student's purse). *See generally* W. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 84-91 (1968)(discussing evidence justifying search and limits placed upon search); Comment, *An Emerging New Standard for Warrantless Searches and Seizures Based On Terry v. Ohio*, 35 MERCER L. REV. 647, 653-54 (1984)(reasonableness established by questioning initial stop and scope of search).

27. *See, e.g.*, Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266 (7th Cir.)(testing of bus drivers), *cert. denied*, 429 U.S. 1029 (1976); Capua v. City of Plainfield, 643 F. Supp. 1507, 1510-11 (D.N.J. 1986)(urinalysis of fire fighters); Allen v. City of Marietta, 601 F. Supp. 482, 489 (N.D. Ga. 1985)(urinalysis of city electrical workers). *See generally* Ayers, *Constitutional Issues Implicated By Public Employee Drug Testing*, 14 WM. MITCHELL L. REV. 337, 341-56 (1988)(discussing how courts are analyzing employee testing cases); Felman & Petrini, *Drug Testing and Public Employment: Toward A Rational Applica-*

lated industry exception to such testing,[28] while others engage in a balancing identical to that of the "special needs" analysis.[29] Courts, however, vary on the level of suspicion required to ensure that alcohol and drug testing is reasonable under the fourth amendment.[30]

In *Skinner v. Railway Labor Executives' Association*,[31] a majority of the United States Supreme Court held that regulations authorizing alcohol and drug testing of railway employees are reasonable in the absence of an individualized suspicion that the employee is under the influence of alcohol or drugs.[32] The Court determined that the fourth amendment was applicable

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tion of the Fourth Amendment, 51 LAW & CONTEMP. PROBS. 253, 288-91 (1988)(discussing recent analyses in alcohol and drug testing caselaw).

28. *See* Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 566-67 (8th Cir. 1988)(holding nuclear power industry is pervasively regulated after balancing competing interests); McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987)(interest in keeping prisons secure as great as interest in protecting integrity of horse racing industry); Shoemaker v. Handel, 795 F.2d 1136, 1142-43 (3d Cir.)(applying pervasively regulated industry exception to horse racing industry), *cert. denied*, 479 U.S. 986 (1986). *But see* Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1545 (6th Cir.)(amount of regulation of industry has nothing to do with employee privacy interests), *vacated*, 861 F.2d 1388 (1988); Penny v. Kennedy, 846 F.2d 1563, 1566 (6th Cir.)(rejecting analogy of drug testing to pervasively regulated industry), *vacated*, 862 F.2d 567 (1988); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 735 (S.D. Ga. 1986)(*Shoemaker* decision against bulk of caselaw). *See generally* Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307, 338-44 (1987)(discussing pervasively regulated industry exception as possibility for upholding drug testing); Comment, *Body Searches and the Administrative Search Exception to Fourth Amendment Restraints*, 18 CUMB. L. REV. 233, 257-62 (1987)(discussing caselaw applying exception to drug testing).

29. *See* Transport Workers' Local 234 v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1118-22 (3d Cir. 1988)(reasonableness analysis applied), *vacated on other grounds*, __ U.S. __, 109 S. Ct. 3208, 106 L. Ed. 2d 560 (1989); *see also* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 586 (9th Cir. 1988)(balancing of interests to determine reasonableness), *rev'd*, __ U.S. __, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). *See generally* McDermott & Jones, *Mandatory Random Drug-Testing in the United States Department of Transportation—A Fourth Amendment Analysis*, 17 TRANSP. L.J. 1, 8-12 (1988)(discusses Court's move away from warrant-probable cause requirement towards balancing of interests).

30. *Compare Transport Workers'*, 863 F.2d at 1120 (detection not required to be limited to impaired employees) *and Rushton*, 844 F.2d at 567 (individualized suspicion not required) *with* McDonnell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987)(urinalysis tests not performed by systematic random selection must be based on reasonable suspicion) *and* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 739 (S.D. Ga. 1986)(reasonable suspicion required). *See generally* Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063, 1072-81 (1987)(discusses balancing and recent caselaw).

31. __ U.S. __, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

32. Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1422, 103 L. Ed. 2d 639, 670-71 (1989). Writing for the majority, Justice Kennedy determined that searches pursuant to the FRA regulations were reasonable under the fourth amendment because of the government's substantial interest in railway safety and the employee's diminished

because of the government's influence on the regulations.[33] Also, the Court recognized that, under its prior decisions, the taking and testing of blood, breath, and urine samples are searches under the fourth amendment.[34] The majority classified railway safety as a "special need,"[35] and balanced the government's interest in railway safety for the public and railroad employees against the employees' interests in bodily integrity.[36] After balancing the respective interests of the parties, the Court found that the purposes of a warrant were not furthered under the circumstances, and therefore, warrantless searches were permissible.[37] The majority decided that probable cause was unnecessary to render the search reasonable.[38] The Court also acknowl-

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interest in privacy. *Id.* An employee's privacy interests are diminished because the government's safety interest requires that employees remain physically able to perform their duties. *Id.* at __, 109 S. Ct. at 1418, 103 L. Ed. 2d at 666.

33. *See id.* at __, 109 S. Ct. at 1411, 103 L. Ed. 2d at 658 (discussing government's involvement with regulations). The Court stated that compliance with the mandatory blood and urine tests was imposed by sovereign authority. The government's involvement was apparent from the face of the regulations. *Id.* The regulations pre-empted state law, superceded labor agreements, allowed the FRA to obtain samples and results, forbade the FRA from compromising its authority, and made employee cooperation with breath and urine tests mandatory. *See id.* at __, 109 S. Ct. at 1411-12, 103 L. Ed. 2d at 658-59.

34. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1412-13, 103 L. Ed. 2d at 659-60 (procurement of physical evidence involves fourth amendment). The Court reasoned that the physical intrusion required to obtain blood was a reasonable privacy interest involving the fourth amendment. *See id.* at __, 109 S. Ct. at 1412, 103 L. Ed. 2d at 659. Similarly, the fourth amendment is offended by the requirement of breath tests. *Id.* Although urine testing involves no physical intrusion, the bulk of caselaw has held it to be a search for fourth amendment purposes. *See id.* at __, 109 S. Ct. at 1413, 103 L. Ed. 2d at 659-60; *see also* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th. Cir. 1987)(urinalysis is fourth amendment search), *aff'd in part, vacated in part*, __ U.S. __, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). Urine tests are searches because society regards urination as a private activity. *Id.*; Burnett v. Municipality of Anchorage, 806 F. 2d 1447, 1449 (9th Cir. 1986)(breath test is fourth amendment search). The court relied on a prior Supreme Court decision classifying blood tests as searches to hold that breath testing also involved a search under the fourth amendment. *Burnett*, 806 F.2d at 1449.

35. *See Skinner*, __U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661.

36. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414-21, 103 L. Ed. 2d at 661-70 (government's need to prevent railway employees' alcohol and drug use is special need requiring balancing against privacy interest of employees).

37. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1415-16, 103 L. Ed. 2d. 639, 663-64 (1989)(warrant would not further purposes of warrant requirement in this situation). The Court stated that a warrant was not necessary because the circumstances and limits of testing were narrowly defined, and the tests were standardized and conducted by personnel with little discretion to choose who is tested. *Id.* The Court also found that the reasons for the search would be frustrated by requiring a warrant because evidence would be destroyed. Similarly, requiring a warrant would hinder the government's purpose for the search because the government relies on private railroads that are unfamiliar with fourth amendment law to initiate testing. *Id.*

38. *Skinner*, __ U.S. at __, 109 S. Ct. at 1416-17, 103 L. Ed. 2d at 664 (although probable

edged that if probable cause is not a requirement, then individualized suspicion is normally required before a search is reasonable.[39] The majority reasoned, however, that because the government interests are substantial,[40] and the intrusion on an individual's privacy is minimal, individualized suspicion is too burdensome and therefore unnecessary.[41]

Justice Stevens concurred in the majority's decision, but disagreed with their reasoning because he did not believe that the regulations would deter employees from alcohol and drug use.[42] Justice Stevens would have validated the regulations based upon the government's interest in ascertaining the causes of railway accidents alone.[43]

Justice Marshall, joined by Justice Brennan, dissented claiming that the majority's analysis ignored the fourth amendment's textual requirements and its history.[44] Justice Marshall would require that probable cause exist in

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cause is usually required in absence of a warrant, government's interests outweighed need for probable cause). The government's interest in railway safety is so great that probable cause is not needed to render the employee searches reasonable under the fourth amendment. *Id.*

39. *Id.* at __, 109 S. Ct. at 1417, 103 L. Ed. 2d at 664 (individualized suspicion usually needed where probable cause not required to justify search).

40. *See Skinner* __ U.S. at __, 109 S. Ct. at 1419-20, 103 L. Ed. 2d at 667-69 (government's interest substantial). The Court determined that the government's interest in safety was substantial because of the inherent danger of the job, the difficulty of detecting the impairment of an employee, the regulations acted as a deterrent to alcohol and drug use, and testing information about an accident. *Id.*

41. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1417-19, 103 L. Ed. 2d at 664-67 (individualized suspicion not lowest standard for judging search's reasonableness). The FRA's intrusions were limited because the tests were conducted during work hours, were commonplace, and would be used only to determine impairment. *Id.* at __, 109 S. Ct. at 1417, 103 L. Ed. 2d at 664-65. The regulations also sought to minimize the intrusiveness associated with urine testing by requiring collection take place in a medical environment by persons not related to the railroad and by not requiring direct observation. *Id.* at __, 109 S. Ct. at 1418, 103 L. Ed. 2d at 665-66. Employees working in a safety regulated industry also had a diminished expectation of privacy. *Id.* The government's interests were weighty because the covered employees' duties involved great risks to others, impairment is rarely detectable, and the regulations are a deterrent to alcohol and drug use. *Id.* at __, 109 S. Ct at 1419, 103 L. Ed. 2d at 667-68. The government's interest was made more substantial by the fact that information regarding the cause of accidents could be gathered and wreck scenes are so chaotic that such information would be difficult to gather if individualized suspicion were required. *Id.* at __, 109 S. Ct. at 1420, 103 L. Ed. 2d at 668-69.

42. Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1422, 103 L. Ed. 2d 639, 671 (1989)(Stevens, J., concurring). Justice Stevens believed that few employees expect to be involved in a major accident, and therefore testing predicated upon an accident's occurrence would not deter. *Id.* Furthermore, even those employees who expect to be in an accident are not deterred by job loss because the threat of personal harm does not deter. *Id.*

43. *Skinner*, __ U.S. at __, 109 S. Ct. at 1422, 103 L. Ed. 2d at 671.

44. *See id.* at __, 109 S. Ct. at 1422-23, 103 L. Ed. 2d at 671-72 (Marshall, J., dissenting)(cannot ignore text and history of fourth amendment). Justice Marshall argued that the

order to ensure searches retain an element of reasonableness in light of their highly intrusive nature with respect to an individual's privacy.[45] According to Justice Marshal, the results of an employee's alcohol and drug test might assist criminal prosecutors and, therefore, exacerbate the intrusiveness of the searches.[46] Justice Marshall also believed a warrant based on probable cause was necessary before testing the samples because no exigent circumstances existed once the samples were obtained.[47]

In *Skinner*, the United States Supreme Court correctly held that regulations authorizing alcohol and drug testing of railroad employees were constitutional even though less than an individualized suspicion of use existed.[48] The majority's decision permits future mandatory alcohol and drug testing without a warrant because of the evanescent nature of the evidence.[49] If the Court had required the government to obtain a warrant, the employee's blood alcohol or drug level would dissipate in the time it took to obtain the warrant which would frustrate the search's purpose.[50] After obtaining the

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special needs balancing should only replace the warrant-probable cause standard when searches are minimally intrusive. *Id.* at __, 109 S. Ct. at 1424-26, 103 L. Ed. 2d at 673-75.

45. *See id.* at __, 109 S. Ct. at 1427-29, 103 L. Ed. 2d at 676-80 (full-scale searches require probable cause). Justice Marshall's fourth amendment analysis would inquire if a search had taken place; was it based on a warrant or exception; was it based on probable cause or less if a minimally intrusive search; and was the search reasonable? *See Skinner*, __ U.S. at __, 109 S. Ct. at 1426, 103 L. Ed. 2d at 676.

46. *Id.* at __, 109 S. Ct. at 1431, 103 L. Ed. 2d at 682.

47. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1426, 103 L. Ed. 2d 639, 676 (1989)(Marshall, J., dissenting)(destruction of evidence not possible after samples obtained).

48. *Skinner*, __ U.S. at __, 109 S. Ct. at 1422, 103 L. Ed. 2d at 670-71; *see also* 49 C.F.R. §§ 219.201-.309 (1988)(regulations authorize blood, breath, and urine testing).

49. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1416, 103 L. Ed. 2d at 663-64 (evidence of impairment steadily eliminated from bloodstream); *see also* Cupp v. Murphy, 412 U.S. 291, 296 (1973)(warrantless search justified to prevent destruction of evanescent evidence under suspect's fingernails); Chimel v. California, 395 U.S. 752, 763 (1969)(reasonable to seize evidence to prevent its destruction); Schmerber v. California, 384 U.S. 757, 770-71 (1966)(blood test reasonable because blood alcohol level begins to drop after drinking stops). *See generally* Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 292-93 (1988)(discussing *Schmerber* and inability of police to stop destruction of evidence when evidence is individual's degree of impairment).

50. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1416, 103 L. Ed. 2d at 663-64, 676 (if evidence lost in time taken to obtain warrant then government's purpose for search would be frustrated); *see also* United States v. Place, 462 U.S. 696, 701 (1983)(authorities may seize object to be searched and then obtain warrant if exigencies mandate); Schmerber v. California, 384 U.S. 757, 770 (1966)(blood alcohol level diminished at constant rate); Preston v. United States, 376 U.S. 364, 367 (1964)(warrantless search justified to prevent destruction of evidence). *See generally* Williamson, *The Supreme Court, Warrantless Searches and Exigent Circumstances*, 31 OKLA. L. REV. 110, 124 (1978)(discussing search incident to arrest to prevent destruction of evidence).

sample, however, the government should be required to obtain a warrant based on a reasonable suspicion of impairment to test the evidence because the alcohol or drugs cannot then be processed by the body, and lost.[51]

In its opinion, the majority overlooks the probable cause level of suspicion despite acknowledging that probable cause is normally required in valid warrantless searches.[52] The majority's analysis should have included an explanation of why probable cause is unnecessary under the FRA regulations when the Court's own precedent requires probable cause to exist in other warrantless searches.[53] The majority's failure to explain their departure

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51. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1426, 103 L. Ed. 2d at 676 (Marshall, J., dissenting)(evidence cannot be destroyed once samples are taken). Once the sample is obtained, it loses its evanescent nature which satisfies the government's interest in preserving evidence. *Id.*; *cf. Chimel*, 395 U.S. at 763 (reasonable to search area only within immediate control); Sibron v. New York, 392 U.S. 40, 67 (1968)(search must be limited in scope by its purposes); Preston v. United States, 376 U.S. 364, 367 (1964)(justification of preserving evidence not applicable where search is distant from when and where arrest was made). *See generally* Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 287 (1988)(Court has not definitely stated when suspicion of evidence destruction will justify warrantless search); Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063, 1073-74 (1987)(majority of courts require reasonable suspicion to search).

52. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1416-17, 103 L. Ed. 2d 639, 664 (1989)(warrantless searches generally must be based upon probable cause). The Court also assumes the balancing of interests "precludes insistence on a showing of probable cause." *See id.* at __, 109 S. Ct. at 1417, 103 L. Ed. 2d at 664. As a result, probable cause is not required to make the searches reasonable under the fourth amendment. *Id.*; *see also* United States v. Ortiz, 422 U.S. 891, 896 (1975)(probable cause protects privacy from random intrusion); Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973)(probable cause must exist for warrantless search of automobile); Chambers v. Maroney, 399 U.S. 42, 51 (1970)(probable cause is minimum requirement). *See generally* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT L. REV. 201, 215-16 (1986)(probable cause usually required for warrantless search).

53. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291, 296 (1973)(existence of probable cause justified limited intrusion involving scraping of subject's fingernails); Davis v. Mississippi, 394 U.S. 721, 726-28 (1969)(detention and fingerprinting without probable cause violated fourth amendment); Schmerber v. California, 384 U.S. 757, 768-70 (1966)(probable cause to arrest provided justification for blood test); Brinegar v. United States, 338 U.S. 160, 176 (1949)(probable cause is compromise between competing government and individual interests, anything less would provide officers too much discretion). *But see* Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)(operation of probation system is special need which allows assessment of warrant-probable cause standard's necessity); New York v. Burger, 482 U.S. 691, 702 (1987)(closely regulated industry as special need permits balancing to determine practicality of warrant-probable cause standard); O'Connor v. Ortega, 480 U.S. 709, 725 (1987)(special need of efficient government office operation does not require warrant or probable cause); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)(probable cause is not lowest level of suspicion that will justify search). *See generally* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees:*

from this requirement results in the absence of any meaningful guidance for future courts that undertake a "special needs" balancing in the area of probable cause.[54] However, the Court did illustrate the balancing analysis future courts should utilize in its treatment of individualized suspicion.[55]

Because of the danger of accidents involving the public,[56] the government's substantial interest in public safety when balanced against the individual's right to privacy minimizes the intrusiveness of the searches.[57] As a

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Toward a General Rule of Legality Under the Fourth Amendment, 48 U. PITT. L. REV. 201, 215 (1986)(search can be based on lesser standards).

54. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1417, 103 L. Ed. 2d 639, 664 (1989)(majority merely states balancing does not require probable cause without any actual application of balancing to determine need for probable cause). *But see Griffin*, 483 U.S. at 878-79 (1987)(Court specifically applies special needs analysis to probable cause standard); *O'Connor*, 480 U.S. at 722-24 (1987)(special needs analysis determined probable cause standard too great a burden for work-related searches). *See generally* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 778-86 (1979)(balancing of interests effect on probable cause discussed).

55. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1417-21, 103 L. Ed. 2d at 664-70 (individualized suspicion not needed because intrusions are limited, employees work in regulated industry, and governmental interests are substantial). The government's interest in railway safety is balanced against the individual's right to be free from unreasonable searches. *Id.* at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661-62.

56. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1419, 103 L. Ed. 2d at 667 (employees have potential to cause injury and death); *see also* Transport Workers' Local 234 v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1119 (3d Cir. 1988)(public safety in mass transit more important than smooth operation of government office and drugs are significant problem), *vacated on other grounds*, __ U.S. __, 109 S. Ct. 3208, 106 L. Ed. 2d 560 (1989); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 565-66 (8th Cir. 1988)(impairment causes great potential for accident in nuclear power industry affecting public and employees); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.)(blood and urine tests of bus drivers justified because ensures public safety), *cert. denied*, 429 U.S. 1029 (1976); Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (urinalysis of employees in hazardous positions justified by need for safety). *See generally* Felman & Petrini, *Drug Testing and Public Employment: Toward A Rational Application of the Fourth Amendment*, 51 LAW & CONTEMP. PROBS. 253, 274 (1988)(government interest in stopping drug use in jobs where public is at risk is significant); Lewis, *Drug Testing in the Workplace—Drug Screening in the Public Sector: Municipalities and Government Workers*, 2 J.L. & HEALTH 39, 54-57 (1987-88)(strength of government's interest depends upon type of job individual holds).

57. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1417-19, 103 L. Ed. 2d at 664-67 (intrusions due to testing are limited); *cf.* Winston v. Lee, 470 U.S. 753, 755 (1985)(*Schmerber* indicates surgical removal of bullet is substantial intrusion); Schmerber v. California, 384 U.S. 757, 770-71 (1966)(involuntary blood test to determine intoxication minor intrusion). The intrusion required for a blood test is minimal because evidence is preserved, probable cause exists, the test is performed in a hospital, and is common. *Schmerber*, 384 U.S. at 770-71. Breithaupt v. Abram, 352 U.S. 432, 435-36 (1957)(blood taken from unconscious suspect does not shock conscience because test is tolerable to all and routine). *See generally* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 766 (1979)(protection of individual interests). Certain interests of an individual under the fourth amendment demand greater protection, while some searches conducted pursuant to a substan-

result, the searches are justified even in the absence of an individualized suspicion.[58] The dissent's attack on this minimization ignores the employment context in which the searches take place.[59] Moreover, the dissent overlooks the nature of a balancing analysis which weighs the government's and individual's competing interests.[60] Although previous decisions of the Court justify searches on less than probable cause or individualized suspicion only when they are minimally intrusive,[61] public safety has never been threatened

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tial government interest require a lesser standard of review. *Id.*; *see also* Comment, *Analyzing the Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130, 137 (1984)(proposing analysis based upon reasonableness for searches that involve bodily intrusions); Note, *Fourth Amendment Balancing and Searches Into the Body*, 31 U. MIAMI L. REV. 1504, 1513 (1977)(suggesting analysis for nonconsensual searches involving surgery).

58. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1422, 103 L. Ed. 2d at 671 (searches reasonable without individualized suspicion). The searches do not require an individualized suspicion because the government interest in safety outweighs the employee's diminished interest in privacy. *Id.*

59. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661 (1989)(goal of regulations is employee safety); *see also* Griffin v. Wisconsin, 483 U.S. 868, 879 (1987)(ongoing supervisory relationship); New York v. Burger, 482 U.S. 691, 702 (1987)(warrant-probable cause standards are less applicable in heavily regulated industry); O'Connor v. Ortega, 480 U.S. 709, 717-18 (1987)(assess employee expectation of privacy in employment context which requires case-by-case determination in view of varying work environments). *See generally* Note, *Constitutional Law: Urinalysis and the Public Employer—Another Well-Delineated Exception to the Warrant Requirement?*, 39 OKLA. L. REV. 257, 259 (1986)(discussing possible emergence of exception to warrant requirement for searches of public employees).

60. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661 (1989)(balancing permits assessment of need for warrant and probable cause); *see also* National Treasury Employees Union v. Von Raab, __ U.S. __, __, 109 S. Ct. 1384, 1398, 103 L. Ed. 2d 685, 712 (1989)(Scalia, J., dissenting) (reasonableness of search dependent upon social need for search); *Griffin*, 483 U.S. at 873-74 (variance from warrant and probable cause standards justified by existence of special need); Bell v. Wolfish, 441 U.S. 520, 559 (1979)(balance need for search against intrusion on personal rights considering scope of search, how and where it was conducted, justification for search); United States v. United States Dist. Court, 407 U.S. 297, 323 (1972)(government interest may cause warrant requirement to vary); Transport Workers' Local 234 v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1119 (3d Cir. 1988)(government interest may override intrusive searches under balancing), *vacated on other grounds*, __ U.S. __, 109 S. Ct. 3208, 106 L. Ed. 2d 560 (1989). *See generally* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT L. REV. 201, 213-14 (1986)(reasonable search depends on strength of government and individual interests implicated).

61. *See* United States v. Place, 462 U.S. 696, 703 (1983)(minimally intrusive search may be justified by something less than probable cause); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976)(checkpoint stop is minimal intrusion and may be performed without individualized suspicion); Terry v. Ohio, 392 U.S. 1, 25-26 (1968)(search without probable cause must be less than full search). *See generally* Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. REV. 691, 721 (1982)(limited intrusion implicates reasonableness clause); Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10

by anything so pervasive and difficult to detect as alcohol and drug impairment.[62]

As Justice Stevens' concurrence illustrates, the majority is mistaken when it claims that the threat of job loss is a deterrent to employee alcohol and drug use because this threat is contingent upon the occurrence of an accident.[63] If an employee is not deterred by the possibility of injury or loss of life because of an accident, that same employee probably would not be deterred by the threat of job loss due to alcohol or drug use.[64] As a result, the threat of job loss provides little if any deterrence to employee alcohol or drug use, and the majority's reliance on this premise is unfounded.[65] Because the government's goal is railway safety, employee testing should be required prior to employment and/or prior to performance of duties to prevent potentially hazardous situations from occurring rather than testing after the fact to determine whether the accident resulted from alcohol or drug use.[66]

N.M.L. REV. 33, 47-48 (1979-80)(reasonableness clause used to judge minimally intrusive searches while warrant clause is standard for full-scale searches).

62. *See Von Raab*, __ U.S. at __, 109 S. Ct. at 1392-93, 103 L. Ed. 2d at 704-05 (discussing difficulties in detecting drugs and public's need for detection). The Court stated that advanced techniques of smuggling, violence, and drug traffickers' ability to bribe law enforcement officials have all contributed to the difficulty in detecting drugs. *Id.* Therefore, the government's interest in preventing drug users from advancing to positions in the Customs Service requiring the use of a firearm and involving drug interdiction justifies drug testing. *Id.*; *see also Griffin*, 483 U.S. at 879 (probation agency must be allowed to intervene on less than probable cause when drugs are involved). *See generally* Felman & Petrini, *Drug Testing and Public Employment: Toward A Rational Application of the Fourth Amendment*, 51 LAW & CONTEMP. PROBS. 253, 256-58 (1988)(discussing seriousness of drug problem in workplace).

63. *See Skinner*, __ U.S at __, 109 S. Ct. at 1422, 103 L. Ed. 2d at 671 (Stevens, J., concurring)(job loss does not deter because people do not expect accident to occur); *see also Skinner*, __ U.S. at __, 109 S. Ct. at 1419-20, 103 L. Ed. 2d at 668 (employees knowledge that accident triggered test will expose impairment and cause job loss provides deterrent effect); 49 C.F.R. § 219.201 (1988)(listing events that authorize testing).

64. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1422, 103 L. Ed. 2d at 671 (Stevens, J., concurring)(employee does not expect to be involved in accident). *See generally* F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 98-99 (1973)(people not "future-oriented" are not deterred by threats separated by time and probability from urge to act); Miller & Anderson, *Updating the Deterrence Doctrine*, 77 J. CRIM. LAW & CRIMINOLOGY 418, 421-22 (1986)(certainty of punishment necessary for deterrence).

65. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1432, 103 L. Ed. 2d 639, 683 (1989)(Marshall, J., dissenting)(fear of accident deters whereas threat of job loss does not.). Testing and subsequent job loss due to impairment will not deter employee alcohol or drug use as long as it is performed after an accident because an employee never expects to be in an accident and, therefore, subjected to testing. *Id.*

66. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1415, 103 L. Ed. 2d at 662 (interest in public and employee safety allows regulation of employee drug and alcohol use while on duty or on call). Testing after an accident will not deter alcohol or drug use because discovery of employee impairment depends upon the occurrence of an accident. *See id.* at __, 109 S. Ct. at 1432, 103 L. Ed. 2d at 683 (Marshall, J., dissenting); *see also* Rushton v. Nebraska Pub. Power

Although the majority's decision is correct, its failure to address the possibility that prosecutors may obtain test results presents a formidable problem for other courts.[67] By failing to address this possibility, the majority also ignores the nature of a balancing analysis which is to ensure that the weightier of the government's or individual's interests determines what level of suspicion is required prior to undertaking a search.[68] A court should perform a subsequent balancing of interests if criminal prosecutions are aided by test results because the possibility of an employee's incarceration makes that employee's fourth amendment interest weightier.[69] A court should require a higher level of suspicion before the test results can be used in a criminal context to ensure that the search is reasonable and in accordance with an individual's fourth amendment rights.[70]

Dist., 844 F.2d 562, 564, 567 (8th Cir. 1988)(upholding "preemployment, pretransfer, annual, and for-cause testing" of nuclear power plant employees on less than individualized suspicion because of damage impaired employee might cause); McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987)(urinalysis testing of prison guards to ensure safety permitted under uniform or systematic random selection); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.)(interest in bus and train operators' ability to perform is important and employees have no expectation of privacy as to blood and urine tests), *cert. denied*, 429 U.S. 1029 (1976).

67. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1415 n.5. 103 L. Ed. 2d at 662 n.5 (tests designed for administrative purposes, not to promote prosecution). *But see* 49 C.F.R. § 219.211(d) (1988)(litigant can obtain sample by compulsory process of service on custodian). Under the FRA regulations, criminal prosecutors could argue that the term "litigant" allows them to obtain and use the test results in a criminal trial. *Id.*

68. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (balancing of interests in criminal context usually requires that warrant be issued); *see also* Bell v. Wolfish, 441 U.S. 520, 559 (1979)(must consider intrusion on person's rights); Terry v. Ohio, 392 U.S. 1, 19-20 (1968)(search must be justified in scope). *See generally* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 213-14 (1986)(must weigh governmental interests against individual's interests).

69. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)(reasonableness of search determined by looking at all circumstances); *see also* Johnson v. United States, 333 U.S. 10, 14 (1948)(although crime is societal concern so is right to privacy); Weeks v. United States, 232 U.S. 383, 393 (1914)(using illegally seized evidence against accused would nullify fourth amendment). *But see* New York v. Burger, 482 U.S. 691, 716 (1987)(administrative inspection for regulation's violation which produces evidence of crime is not illegal search).

70. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661 (1989)(balance of interests favors warrant requirement in criminal situations); *see also* O'Connor v. Ortega, 480 U.S. 709, 724 (1987)(public employers need not be familiar with probable cause standard unless evidence will be used for criminal prosecution); Camara v. Municipal Court, 387 U.S. 523, 537 (1967)(administrative search intrusion limited because not designed to obtain criminal evidence); *Johnson*, 333 U.S. at 14 (magistrate must determine if privacy is to yield to law enforcement's needs). *See generally* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 766 (1979)(some privacy interests deserve greater protection than others).

The Court in *Skinner* established "special needs" balancing as the predominant analysis for future government searches and clarified the guidelines for fourth amendment review of such searches.[71] Although the Court originally applied the "special needs" balancing test as an exception to the warrant requirement,[72] the "special needs" test by its terms[73] has become the Court's general rule for analyzing the constitutionality of searches under the fourth amendment.[74] The reasonableness of warrantless searches, and

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71. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (special needs balancing used to assess practicality of warrant-probable cause requirement); *cf.* National Treasury Employees Union v. Von Raab, __ U.S. __, __, 109 S. Ct. 1384, 1390, 103 L. Ed. 2d 685, 702 (1989)(government's special needs permit balancing of interests to determine if warrant or lesser suspicion is required for search); *Bell*, 441 U.S. at 559 (test to determine reasonableness of search requires that need for search be balanced against intrusion upon individual's rights).

72. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)(Blackmun, J., concurring)(special needs balancing used only in exceptional circumstances); *see also Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (special needs is recognized exception); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)(exceptions to warrant requirement permitted when special needs present). *See generally* Note, *Constitutional Law—The Supreme Court Extends the Reasonableness Standard to Work-Related Searches*, 22 SUFFOLK U.L. REV. 1241, 1246-47 (1988)(special needs is exception to warrant requirement); Note, *Applying A Reasonableness Standard to Government Office Searches*—O'Connor v. Ortega, 19 U. TOL. L. REV. 755, 768-69 (1988)(dissent supported analyzing searches under special needs exception).

73. *See T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)(circumstances of special needs set forth). "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* Therefore, by definition, when a special need exists, a court may balance the interests involved to determine whether a warrant or some lesser standard of suspicion will make a search reasonable. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (Court balanced interests to determine warrant's practicality in face of special needs); *see also Von Raab*, __ U.S. at __, 109 S. Ct. at 1390, 103 L. Ed. 2d at 702 (intrusion serving special need requires balancing to determine search's reasonableness). *Compare Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (special needs require balance between governmental interest and individual's right to be free from unreasonable searches) *with* Bell v. Wolfish, 441 U.S. 520, 559 (1979)(reasonableness tested by balancing intrusion on individual's fourth amendment rights against need for search).

74. *See T.L.O.*, 469 U.S. at 337 (balancing determines reasonableness of any search); *Bell*, 441 U.S. at 559 (reasonableness determined by balancing in each case). The establishment of "special needs" balancing as the predominant mode of fourth amendment analysis is supported by the case-by-case definition of a "special need." *See, e.g.*, *Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (regulating railroad employee conduct for safety reasons is special need); *Von Raab*, __ U.S. at __, 109 S. Ct. at 1390, 103 L. Ed. 2d at 702 (keeping drug users out of safety sensitive positions in Customs Service presents special need); *Griffin*, 483 U.S. at 873-74 (operation of probation system requires special needs analysis); O'Connor v. Ortega, 480 U.S. 709, 725 (1987)(operation of government office constitutes special need); *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring)(operation of school is special need); *see also Skinner*, __ U.S. at __, 109 S. Ct. at 1425, 103 L. Ed. 2d at 675 (Marshall, J., dissenting)(probable cause requirement eliminated from civil searches); *T.L.O.*, 469 U.S. at 352

those conducted pursuant to a warrant, currently is judged by balancing the government's interests against the individual's interests.[75] The Court has not completely eliminated the warrant requirement, but requiring a warrant is now one of several results the "special needs" balancing can produce.[76] The majority's transition to a reasonableness standard of review for searches has prompted some confusion due to the Court's prior emphasis on the fourth amendment's warrant clause.[77] This confusion is evidenced by the

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(Blackmun, J., concurring)(court implies balancing is rule). *See generally* Bloom, *The Supreme Court and Its Purported Preference For Search Warrants*, 50 TENN. L. REV. 231, 232 (1983)(expanding exceptions to warrant requirement lends support to reasonableness approach); Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307, 330-33 (1987)(discussing Court's preference of warrant and reasonableness clauses). Recent cases dealing with the Court's preference for either the warrant clause or the reasonableness clause, indicate Justice Rehnquist is of the opinion that the reasonableness clause now predominates over the warrant clause in fourth amendment analysis. Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307, 332-33 (1987).

75. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661 (1989)(balancing determines permissibility of search); *see also Bell*, 441 U.S. at 559 (fourth amendment reasonableness requires balancing of interests); United States v. Rabinowitz, 339 U.S. 56, 63-66 (1950)(fourth amendment's reasonableness requirement applies to all searches), *overruled on other grounds*, 395 U.S. 752 (1969). *See generally* Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 213-14 (1986)(to determine reasonableness must balance interests involved).

76. *See* O'Connor v. Ortega, 480 U.S. 709, 719 (1987)(balance to determine what standard applies to search); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979)(reasonableness test normally requires some level of suspicion for search whether it be probable cause or less); *see also Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (balance requires warrant in most criminal cases); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976)(no individualized suspicion required for checkpoint stops); United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975)(border stops must be based upon reasonable suspicion); Schmerber v. California, 384 U.S. 757, 770 (1966)(probable cause to arrest permitted blood test). *See generally* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 1.4 (2d ed. 1989)(rule that warrantless searches are per se unreasonable is one result of reasonableness clause balancing test); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 214-16 (1986)(balancing of interests). When a court balances competing interests, the balancing can result in the requirement of a warrant, probable cause, reasonable suspicion, or a lesser standard to make the search reasonable. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 214-16 (1986).

77. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (circumstances of search will determine reasonableness). *But see* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971)(search requires warrant); Katz v. United States, 389 U.S. 347, 357 (1967)(warrant needed to make search reasonable absent exception). *See generally* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 1.4 (2d. ed. 1989)(confusion caused by per se unreasonable rule); Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472-75 (1985)(Court's theoretical use of warrant requirement has spread confusion).

majority's opinion in *Skinner* and the Court's prior decisions.[78] The majority's use of the pervasively regulated industry exception to the warrant requirement has compounded this confusion because of the exception's previously limited applicability to personal searches.[79]

The dissent correctly stated that the pervasively regulated industry exception is limited to property within the industry—not employees.[80] The majority avoids this limitation by making the pervasively regulated industry exception a "special need" which requires the Court to undertake a balancing analysis.[81] The Court then balances the government's interest in safety

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78. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d 661 (balancing of interests to determine permissibility of search and balancing of same interests to determine practicality of warrant-probable cause requirement). Apparently, the Court balances the government's interests against the individual's fourth amendment interests to determine the reasonableness of a search made under normal circumstances and for a search made pursuant to special needs. *Id.*; *see also*, National Treasury Employees Union v. Von Raab, __ U.S. __, __, 109 S. Ct. 1384, 1390, 103 L. Ed. 2d 685, 702 (1989)(generally search must be supported by warrant); O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987)(reasonableness under all the circumstances); Camara v. Municipal Court, 387 U.S. 523, 528 (1967)(translating reasonableness clause in fourth amendment has long divided the Court); Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472-75 (1985)(fourth amendment law is confusing).

79. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1418-19, 103 L. Ed. 2d at 666-67 (employees participation in pervasively regulated industry diminishes expectation of privacy). Confusion exists because the Court's past decisions involving industries subject to heavy regulation have involved searches of commercial property, not employees. *Id.* at __, 109 S. Ct. at 1429, 103 L. Ed. 2d at 680 (Marshall, J., dissenting); *see also* New York v. Burger, 482 U.S. 691, 702 (1987)(treat closely regulated industry as special need). *See generally* Comment, Shoemaker v. Handel: *Alcohol and Drug Testing and the Pervasive Regulation Exception to the Fourth Amendment's Administrative Search Warrant Requirement*, 14 HASTINGS CONST. L.Q. 173, 192 (1986)(pervasively regulated industry does not reduce employees' expectation of privacy); Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 281-84 (1989)(definition of substantial government interest used in balancing expanded beyond scope of that used in previous pervasively regulated industry cases).

80. *See* Skinner v. Railway Labor Executives' Ass'n, __ U.S. __, __, 109 S. Ct. 1402, 1429-30, 103 L. Ed. 2d 639, 680 (1989)(Marshall, J., dissenting)(such searches have never been interpreted to reduce employee expectation of privacy); *see also* Donovan v. Dewey, 452 U.S. 594, 598 (1981)(distinction between searches of private homes and commercial property highlighted); Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978)(entrepreneur in heavily regulated business has no expectation of privacy in stock); Camara v. Municipal Court, 387 U.S. 523, 537 (1967)(searches not personal). *See generally* Felman & Petrini, *Drug Testing and Public Employment: Toward A Rational Application of the Fourth Amendment*, 51 LAW & CONTEMP. PROBS. 253, 285-88 (1988)(criticizing application of exception to public employee drug testing); Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 267-72 (1989)(history of exception discussed).

81. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (interest in railway safety like regulated industry is special need requiring balancing of interests); *see also* Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)(probation system's operation is special need like regulated industry requiring balancing of interests); New York v. Burger, 482 U.S. 691, 702

regulation against the individual's rights in the area of personal searches to determine whether a warrant is practical.[82] The impact of the majority's application, however, is lessened by using the exception as a consideration under the Court's balancing to determine the search's reasonableness.[83] Actually, the Court has avoided direct application of the pervasively regulated industry exception in the area of employee alcohol and drug testing by utilizing this balancing analysis.[84] Therefore, other courts should not justify such testing solely on the grounds that a pervasively regulated industry is involved because *Skinner* requires that the "special needs" balancing only consider pervasive regulation as a factor and not as an exception to the warrant requirement.[85]

(1987)(closely regulated industry is special need); *cf. Donovan*, 452 U.S. at 602-03 (similar balancing of interests in pervasively regulated industry). *See generally* Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 281 (1989)(discussing problems associated with balancing performed in *Burger*).

82. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (balancing determines if warrant based on probable cause is practical); *see also Griffin*, 483 U.S. at 873-74 (special need may justify search without warrant and probable cause); O'Connor v. Ortega, 480 U.S. 709, 721 (1987)(balance workplace realities against employee's right to privacy in objects brought to work to determine warrant's feasibility).

83. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1418-19 103 L. Ed. 2d at 666-67 (pervasively regulated railroad industry considered as circumstance surrounding search). The Court treats the railway industry's history of regulation not as an exception to the warrant requirement, but as a factor to be balanced when determining the reasonableness of a search. *Id.* According to the Court in *Skinner*, not all persons employed in a pervasively regulated industry have a diminished expectation of privacy, only those in industries regulated for safety have this diminished expectation. *Id.*

84. *See* Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.)(applying pervasively regulated industry exception to jockeys), *cert. denied*, 479 U.S. 986 (1986). A state's strong interest in revenue produced by the horse racing industry justifies the testing of jockeys to keep the public's confidence in the industry high. *Id.*; *see also* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 582, 586-87 (9th Cir. 1988)(court applied special needs balancing and determined individualized suspicion was necessary), *rev'd*, __ U.S. __, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)(Court reversed using same analysis to hold searches were justified on less than individualized suspicion). *Compare Skinner*, __ U.S. at __, 109 S. Ct. at 1410, 103 L. Ed. 2d at 656 (stating district court's holding based on balancing of interests) *with Burnley*, 839 F.2d at 583 (stating district court found railway regulations covered by pervasively regulated industry exception). *See generally* Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307, 341 (1987)(discussing why application of pervasively regulated industry exception to employee drug testing is improper).

85. *See Skinner*, __ U.S. at __, 109 S. Ct. at 1414, 103 L. Ed. 2d at 661 (special needs requires balancing of interests and safety is government interest to be weighed); *see also* New York v. Burger, 482 U.S. 691, 702 (1987)(owner of property used in pervasively regulated industry has lessened interest in privacy); Camara v. Municipal Court, 387 U.S. 523, 537 (1967)(administrative search's impersonal nature limits privacy invasion). *See generally* Comment, Shoemaker v. Handel: *Alcohol and Drug Testing and the Pervasive Regulation Exception to the Fourth Amendment's Administrative Search Warrant Requirement*, 14 HASTINGS CONST. L.Q. 173, 192 (1986)(exception does not apply to employees in the regulated industry).

The United States Supreme Court correctly upheld the FRA's policy of testing employees for alcohol and drug impairment because of the government's substantial interest in maintaining safety in the railway system. Although probable cause to suspect alcohol or drug use should not be required to test an employee, the majority's analysis fails to state why probable cause should not be required under the "special needs" balancing. This failure could ultimately lead to misapplication of the "special needs" balancing by other courts. In light of the risk to public safety, the Court's dismissal of the individualized suspicion requirement is proper because the searches are minimally intrusive on individual rights when compared to the government's substantial interest in public safety. The Court's argument that the regulations are a deterrent to on-the-job alcohol and drug impairment overlooks the fact that the accident is more likely to deter the employee from use. As a result, this argument provides minimal justification for the Court's decision. Similarly, the Court's failure to address the use of test results in criminal prosecutions causes a great deal of concern for the preservation of a tested employee's fourth amendment rights in the criminal context. If used in a criminal trial, the individuals involved deserve another balancing of their fourth amendment interests from the perspective of a criminal defendant's fourth amendment right to be free from unreasonable government searches. The Court in *Skinner* was able to avoid the impersonal nature of the pervasively regulated industry exception by classifying the exception as a "special need," thereby factoring into the balance the railway industry's status as a pervasively regulated industry. Because of the Court's decision in *Skinner*, the reasonableness of future searches appears destined for a balancing of government and individual interests in fourth amendment jurisprudence.

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