CONSTITUTIONAL LAW — FOURTH AMENDMENT — "SPECIAL NEEDS BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT" DOCTRINE EXCUSES TRADITIONAL FOURTH AMENDMENT REQUIREMENTS IN TOXICOLOGICAL TESTING OF RAILROAD EMPLOYEES—*Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989).

Once upon a time the fourth amendment was the law of the land and all of the citizens lived happily, secure in the knowledge that their persons and property were free from unreasonable searches and seizures. This idyllic time has passed and the sanctity of fourth amendment protection has since been undermined by judicially invented balancing tests.[1] Such tests, though well intentioned as an instrument of more effectively punishing the guilty, are manipulable to the point where they pose a very real threat to the privacy interests of the innocent.[2] The United States Supreme Court decision in *Skinner v. Railway Labor Executives' Association*[3] is a recent example of how these balancing tests can compromise the integrity of the fourth amendment. In *Skinner*, the Supreme Court upheld a compulsory drug testing regime as not violative of the strictures of the fourth amendment.[4] This complete ignorance of constitutional reality manifested by the *Skinner* opinion suggests that the Constitution of the United States may indeed be somewhat of a fairy tale.

The fourth amendment has been the subject of much debate between legal and political scholars largely because its broad provisions are often used to exculpate those who are known to be

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[1] New Jersey v. T.L.O., 469 U.S. 325 (1985). Commenting on a decision allowing a search without probable cause, Justice Brennan stated:

> Today's decision sanctions . . . full scale searches on a reasonableness standard whose only definite content is that it is *not* the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems.

Id. at 354 (Brennan, J., concurring in part, dissenting in part) (emphasis in original).

[2] *Id.* at 357-58 (Brennan, J., concurring in part, dissenting in part). Justice Brennan believed that this compromise of the dominion of the fourth amendment "jettisons the probable cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of a Rohrschach-like 'balancing test' [and] portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens." *Id.*

[3] 109 S. Ct. 1402 (1989).

[4] *Id.* at 1411.

guilty.[5] Accordingly, there is a large amount of public sentiment to close the apparent loophole that the fourth amendment affords to criminals. It would be impossible to do this, however, without infringing upon those rights the amendment was designed to protect.[6] Indeed, it is true that the guilty may go free due to a violation of fourth amendment rights, but this unfortunate phenomenon is a societal cost that must be borne in order to protect individual liberty.

Substance abuse on the railway is as old as the steam engine itself.[7] Recognizing this problem, the Federal Railroad Safety Act of 1970 empowered the Department of Transportation to impose appropriate measures for the preservation of railroad safety.[8] In 1985, amid the growing popular crusade against drug and alcohol abuse, and in response to empirical studies allegedly linking such activity to railroad accidents,[9] the Federal Railroad Administration (FRA) promulgated new regulations which addressed the problem of substance abuse on America's railways.[10] Included in these new regulations were provisions authorizing the toxicological testing of railroad employees in certain circumstances.[11] These regulations mandate the collection of blood and urine samples from employees involved in specifically enumer-

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5 *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 1.2, at 21 (2d ed. 1987) (asserting that it is common knowledge that failure of authorities to comply with procedural technicalities of fourth amendment in the collection of evidence may well allow criminals to escape punishment).

6 *Id.* at 24-25.

7 *Skinner*, 109 S. Ct. at 1407.

8 45 U.S.C. § 431(a) (1970). The section provides that "[t]he Secretary of Transportation . . . shall (1) prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety . . . ." *Id.*

9 In reviewing accident reports, the Federal Railroad Agency (FRA) found that between 1972 and 1983 there were at least 21 significant railroad accidents in which drugs or alcohol use was the probable cause or a contributing factor. *Skinner*, 109 S. Ct. at 1407. These accidents caused 25 deaths, 61 injuries and estimated property damage of $19 million. *Id.* at 1407-08.

10 *Id.* at 1408. The purpose of the regulations "is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." FRA Control of Alcohol and Drug Use, 49 C.F.R. § 219.1 (1987).

11 *Skinner*, 109 S. Ct. at 1408 (citing 49 C.F.R. § 219.101(a)(1) (1987)). Employees subject to the testing are employees covered under the Hours of Service Act of 1907. 45 U.S.C. § 61 (1907) (limitation on the amount of hours covered employees could work consecutively, because excessive hours could possibly render them unfit to perform safety sensitive tasks). Covered employees are defined as those "actually engaged in or connected with the movement of any train . . . ." *Id.* at § 61(a)(2).

ated types of accidents[12] regardless of any showing of probable cause or individualized suspicion.[13] The FRA regulations also permit testing of employees at the discretion of the railroad.[14] The testing procedures utilized, under either provision, are also capable of discovering information not related to on the job impairment.[15] Further, the results of these tests may be made available for use in criminal prosecutions.[16]

The *Skinner* litigation commenced when the Railway Labor Executives' Association filed suit in federal court alleging, among other things, that the FRA regulations were void as violative of the fourth amendment.[17] The United States District Court for the Northern District of California acknowledged the fourth amendment implications, yet struck down the challenge.[18] The district court maintained that the railroad employees' interest in bodily integrity was outweighed by the public interest in promot-

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12 49 C.F.R. § 219.201(a) (1987). This section identifies these accidents, in relevant part, as:

> (1) *Major train accident.* Any train accident that involves one or more of the following:
> (i) A fatality
> (ii) Release of hazardous materials accompanied by—
> (A) An evacuation; or
> (B) A reportable injury resulting from the hazardous material release . . . ; or
> (iii) Damage to railroad property of $500,000 or more.
> (2) *Impact accident.* An impact accident resulting in—
> (i) a reportable injury; or
> (ii) Damage to railroad property of $50,000 or more.
> (3) *Fatal train accident.* Any train incident that involves a fatality to any on-duty railroad employee.

Id.

13 49 C.F.R. § 219.203(a) (1987) states: "(1) Following each accident and incident described in § 219.201, the Railroad (or railroads) *shall* take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by the FRA." *Id.* (emphasis added).

14 *Skinner*, 109 S. Ct. at 1409. 49 C.F.R. § 219.301 (1987) states: "A railroad *may*, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or urine testing . . . ." *Id.* (emphasis added).

15 *Skinner*, 109 S. Ct. at 1429 (Marshall, J., dissenting). Such tests are also capable of discovering diabetes, epilepsy, clinical depression and other potentially confidential medical disorders. *Id.*

16 *Id.* at 1431 (Marshall, J., dissenting). *See* 49 C.F.R. § 219.211(d) (1987) ("Each sample . . . may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian of the sample . . . .").

17 *Skinner*, 109 S. Ct. at 1410.

18 *Id.*

ing railway safety.[19] A divided United States Court of Appeals for the Ninth Circuit reversed. The court of appeals posited that the legality of the FRA searches depended on their reasonableness under all the relevant circumstances.[20] The United States Supreme Court granted certiorari[21] to consider if the invalidated FRA regulations were indeed in conflict with the fourth amendment.[22]

The Supreme Court reversed and upheld the regulations.[23] The Court emphasized that the fourth amendment prohibits only unreasonable searches and seizures.[24] The majority asserted that reasonableness is to be judged by balancing the intrusion on an individual's fourth amendment rights against the governmental interest served.[25] Applying this test to the disputed regulations, the *Skinner* Court concluded that the searches were reasonable under the fourth amendment.[26]

The fourth amendment provides:

> 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.[27]

Congress adopted the amendment to protect a general right of privacy.[28] The warrant requirement of the fourth amendment was meant to provide for the detached scrutiny of a neutral magistrate.[29]

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19 *Id.*

20 *Id.* The court of appeals stated that such a requirement imposes "no insuperable burden on the government" and insures that the tests be confined to detecting current impairment rather than discovering "the metabolites of various drugs which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 588-89 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

21 Burnley v. Railway Labor Executives' Ass'n, 108 S. Ct. 2033 (1988).

22 *Skinner*, 109 S. Ct. at 1407.

23 *Id.*

24 *Id.* (citing United States v. Sharpe, 470 U.S. 675, 682 (1985)).

25 *Id.* at 1414 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1975)).

26 *Id.* at 1422.

27 U.S. CONST. amend. IV.

28 *See* United States v. Chadwick, 433 U.S. 1, 9 (1977); *contra* U.S. v. Katz, 389 U.S. 347, 350 (1967).

29 McDonald v. United States, 335 U.S. 451, 455 (1948) ("The presence of a search warrant serves a high function. . . . Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law.")

The standard of probable cause sets a minimum justification needed for a search to be reasonable.[30] Further, some quantum of individualized suspicion has usually been required to validate a fourth amendment search or seizure, though this requirement is not explicitly demanded by the language of the amendment.[31] The Court has sometimes used this textual silence to dispense with the need for individualized suspicion, but had previously limited these digressions to the area of regulatory searches.[32] Though only applicable to searches and seizures performed by the government or its agents,[33] the broad provisions for the protection of persons and property call for liberal construction.[34]

Implicit in the words of the fourth amendment is the understanding that probable cause, or something substantially similar, is necessary to justify reasonableness.[35] Though seemingly straight-

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30 Dunaway v. New York, 442 U.S. 200, 208 (1979).

31 United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976).

32 Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1424 (1989) (Marshall, J., dissenting). *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (involving routine checks at California-Mexico border); Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (building searches need "not necessarily depend upon specific knowledge of the condition of the particular dwelling"); Frank v. Maryland, 359 U.S. 360 (1951) (involving statutory warrantless inspection for locating and dealing with suspected public nuisance).

33 *See* United States v. Jacobsen, 466 U.S. 109 (1984). The *Jacobsen* Court posited that fourth amendment protection "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.' " *Id.* at 113-14 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

34 *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). Justice Stewart, writing for the *Coolidge* Court emphasized this principle by quoting Justice Bradley's opinion in Boyd v. United States, 116 U.S. 616 (1886):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed.

Id. at 453-54 (quoting *Boyd*, 116 U.S. at 635).

35 *See* Dunaway v. New York, 442 U.S. 200 (1979). In *Dunaway*, the Court determined that "the requirement of probable cause . . . was treated as absolute" as it represented " 'the best compromise that has been found for accommodating the often opposing interests' in 'safeguarding citizens from rash and unreasonable interferences with privacy' and in 'seeking to give fair leeway for enforcing the law in the community's protection.' " *Id.* at 208 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949). The *Dunaway* Court further stated: "The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Id.* at 213.

forward, the clarity of this language has eroded over time in the face of judicially created "special needs" exceptions, which have endangered the degree of protection traditionally afforded under the fourth amendment.[36]

The United States Supreme Court ruling in *Terry v. Ohio*[37] represented the first significant retreat from the absolute nature of the probable cause requirement.[38] In *Terry*, the Supreme Court upheld brief "stop and frisk" inspections conducted by police officers which were based on information short of probable cause.[39] To sustain a valid search the Court determined that the searching officer must have an individualized suspicion, reasonable under the circumstances, that the subject is armed and dangerous.[40] Chief Justice Warren, writing for the majority, further held that the search itself *must* be for a weapon and may be no more extensive than a "pat down" of the suspect's outer clothing.[41] The majority arrived at this result by balancing the limited violation of personal privacy involved with the interest in ensuring the safety of police officers and the public at large.[42] The Chief Justice's opinion limited the scope of the decision by purporting to allow only minimal intrusions in specific, narrowly defined situations.[43] Chief Justice Warren's vision of limited applicability was shattered with the birth of the "special

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36 *See Skinner*, 109 S. Ct. at 1423.

37 392 U.S. 1 (1968).

38 *Dunaway*, 442 U.S. at 208-09.

39 *Terry*, 392 U.S. at 27.

40 *Id.* at 20-22. The majority reasoned that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

41 *Id.* at 29-30. The Court stressed that even such a limited pat down of outer clothing "constitutes a severe, though brief, intrusion upon cherished personal security . . . ." *Id.* at 24-25. However, the Court posited that given a "stop and frisk's" relatively minimal intrusiveness, as compared to traditional arrest, and the countervailing government interests, it is reasonable under the fourth amendment. *Id.* at 30.

42 *Id.* at 29. More specifically, the Court opined:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Id. at 27.

43 *Id.* at 30.

needs" doctrine in *New Jersey v. T.L.O.*[44]

Entering through the door opened by *Terry*, the Court in *T.L.O.* substantially broadened the probable cause exception by holding that a high school official's search of a student's purse did not violate the fourth amendment even though probable cause was lacking.[45] In *T.L.O.*, a high school principal searched a female student's purse looking for cigarettes, and in so doing discovered a package of cigarette rolling papers.[46] The principal subsequently conducted an extensive search of the student's purse which yielded narcotics, drug paraphernalia, an unusual number of one dollar bills, and letters implicating the student as a marijuana dealer.[47] Observing that the probable cause requirement is not an irreducible element of a valid search, Justice White reiterated that the primary inquiry must be the "reasonableness" of the search, once again to be determined by a weighing of the competing interests.[48] The majority held that the regulatory interests of the school were more compelling than the privacy interests of the student.[49] The Court, therefore, allowed a relaxation of traditional fourth amendment standards because of the government's "special needs."[50]

Recently, the Court in *Griffin v. Wisconsin*[51] invoked the "special needs" doctrine enunciated in *T.L.O.* to dispense with the necessity for a search warrant where one had previously been required.[52] Traditionally, a search warrant could be excused only in exigent circumstances,[53] but *Griffin* evidenced the Court's willingness to ex-

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44 469 U.S. 325 (1985).

45 *Id.* at 347-48. The Court described situations in which searches and seizures have been held valid when based on suspicions that while reasonable, do not satisfy the requirements of probable cause. Such situations occur "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause . . . ." *Id.* at 341.

46 *Id.* at 328.

47 *Id.*

48 *Id.* at 337-40. Specifically, Justice White stated that the "determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" *Id.* (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).

49 *Id.* at 341-42.

50 *Id.* The essence of the *T.L.O.* decision was captured in Justice Blackmun's concurrence which simply stated that "special needs beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Id.* at 351 (Blackmun, J., concurring).

51 107 S. Ct. 3164 (1987).

52 *Id.* at 3169.

53 Payton v. New York, 445 U.S. 573 (1980) (exigent circumstances that may excuse search warrant are hot pursuit and potential destruction of valuable evi-

pand this exception beyond simple exigency.[54] In *Griffin*, the Court upheld a Wisconsin statute that authorized warrantless searches of a probationer's home by probation officers.[55] While recognizing that probationers are not without fourth amendment rights, Justice Scalia stressed that they enjoy a lesser degree of protection than the ordinary citizen.[56] In weighing the government's interest in a safe society and the rehabilitation of probationers against the probationers' diminished expectation of liberty, the Court called upon the "special needs beyond the normal need for law enforcement" language of *T.L.O.*[57] to strike the balance in favor of the government.[58]

The *Griffin* Court relied on the premise that an integral component of the "reasonableness" analysis is an appraisal of the individual's expectation of privacy.[59] It is axiomatic that this expectation must be societally reasonable, however, the legitimacy of the expectation of privacy often depends on the context in which it is manifested.[60] Some lower federal courts have suggested that certain individuals may enjoy a diminished expectation of privacy merely by virtue of an involvement in a given vocation.[61]

In *Rushton v. Nebraska Public Power District*,[62] the United States Court of Appeals for the Eighth Circuit upheld a mandatory drug testing program in the nuclear power field based on the heavily reg-

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dence). The *Payton* court held that "searches and seizures . . . without a warrant are presumptively unreasonable." *Id.* at 586.

54 Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989).

55 *Griffin*, 107 S. Ct. at 3164. The statute allowed any probation officer to conduct the search provided it was first approved by the supervisor and based on reasonable grounds. *Id.* at 3167. The reasonable grounds, however, are evaluated by the officer himself and not a neutral magistrate. *Id.*

56 *Id.* at 3168. Justice Scalia stated that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' " *Id.* (quoting Morrisey v. Brewer, 408 U.S. 471, 480 (1972)).

57 New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

58 *Griffin*, 107 S. Ct. at 3167-68.

59 *See id.* (citing administrative/regulatory searches, government employee searches and student searches as instances where reasonableness may be influenced by lessened expectations of privacy). Further, Justice Harlan, concurring in Katz v. United States, 389 U.S. 347 (1967), opined that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* at 361 (Harlan, J., concurring).

60 *See* California v. Greenwood, 108 S. Ct. 1625 (1988) (individual did not have legitimate expectation of privacy as to trash left by curb and therefore trash was subject to search and seizure).

61 *See, e.g.*, Rushton v. Nebraska Public Power Dist., 844 F.2d 562 (8th Cir. 1988).

62 844 F.2d 562 (8th Cir. 1988).

ulated nature of the industry and the incalculable potential for harm by impaired workers.[63] Similarly, the Supreme Court, in *National Treasury Employees Union v. Von Raab*[64] held that United States Customs Service employees also have a diminished expectation of privacy.[65] The *Von Raab* Court commented that because of their involvement in the front line on the war against drugs, customs employees are subject to testing that may not be permissible if performed on others.[66]

Another factor fundamental to the balancing of "reasonableness" is the nature and extent of the intrusion.[67] In *Schmerber v. California*,[68] the Court considered the issue of searches involving bodily integrity.[69] In *Schmerber*, the Supreme Court allowed the admission of evidence obtained from a compelled blood test performed on an individual arrested for drunken driving.[70] While holding that the search was reasonable because the procedure involved virtually no risk, pain or trauma, the Court was careful to note the importance of probable cause in such situations.[71] Similarly, urine tests, while not technically invasive of the body, entail privacy implications of a different order that are no less legitimate.[72] The subsequent chemical

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63 *Id.* at 566.

64 109 S. Ct. 1384 (1989) (decided the same day as *Skinner*).

65 *Id.* at 1393. The majority held that the "[g]overnment has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* The Court continued that:

> While these operational realities will rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace, it is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches.

Id. (citations omitted).

66 *Id.*

67 *See* Winston v. Lee, 470 U.S. 753, 760-61 (1985).

68 384 U.S. 757 (1966).

69 *See id.*

70 *Id.* at 771-72.

71 *Id.* at 768-69. The Court set forth that the "importance of informed, detached and deliberate determinations of the issue whether to invade another's body in search of evidence is great." *Id.*

72 National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part and remanded*, 109 S. Ct. 1384 (1989) ("There are few activities in our society more personal or private than the passing of urine. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."). *See also* Fried, *Privacy* 77 YALE L.J. 473, 487 (1968). ("[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.").

analysis is a further invasion of privacy.[73] The Court has previously intimated that the societal interest be more compelling than merely the collection of evidence to justify such an invasion.[74]

Skinner, the Supreme Court's latest interpretation of the fourth amendment, embodies the current trend of sacrificing absolute constitutional protection in the name of law and order.[75] Justice Kennedy, writing for the majority, immediately acknowledged the existence of governmental action, the first necessary ingredient of fourth amendment applicability.[76] The majority reasoned that the government's removal of legal barriers and its desire not only to have the testing performed but also to possibly share in its results was sufficient to characterize the program as governmental.[77] Justice Kennedy then determined, without extensive analysis, that the testing procedures at issue constituted a search within the meaning of the fourth amendment.[78]

After reviewing these threshold inquiries, Justice Kennedy assessed the reasonableness of the searches under the circumstances.[79] In upholding the FRA regulations, the Court summoned

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[73] *Cf.* Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (while conducting search for handgun under exigent circumstances officer discovered evidence of different crime unrelated to exigency. Because new search was unrelated, it was held an additional invasion of privacy and necessitated justification of its own).

[74] *Schmerber*, 384 U.S. at 769-70. The *Schmerber* Court held:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id.

[75] Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1422-23 (1989).

[76] *Id.* at 1411-12. There was no question as to the governmental nature of the mandatory testing performed under the regulations. The Court recognized that this testing is done under "compulsion of sovereign authority." *Id.* at 1411. The permissive testing contemplated by the regulations provided a modicum of doubt. *Id.* Although facially this testing regime is private action, Justice Kennedy concluded that "the government did more than adopt a passive position toward the underlying private conduct." *Id.*

[77] *Id.* The Court articulated the test as "whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities." *Id.* (citing Lustig v. United States, 338 U.S. 74, 78-79 (1949) (plurality opinion)).

[78] *Id.* at 1412-13. Blood tests were determined to be searches in Schmerber v. California, 384 U.S. 757 (1966), and breath tests in California v. Trombetta, 467 U.S. 479 (1984). The *Skinner* Court also expressly adopted the prevailing view in the lower courts that urine tests were fourth amendment searches. *Skinner*, 109 S. Ct. at 1413.

[79] *Id.* at 1414.

up the "special needs" dogma of *T.L.O.* to dispense with the literal requirements of the fourth amendment.[80] The majority also held that where important governmental interests are furthered, and the search implicates only minimal privacy interests, such searches may be reasonable even in the absence of individualized suspicion.[81]

The Court did not find any of the testing methods authorized by the regulations as unduly offensive to personal privacy considerations.[82] In characterizing the blood tests as minimally intrusive, Justice Kennedy alluded to the commonality of the procedure in today's society.[83] The Court interpreted the language of *Schmerber*, that blood tests involve "virtually no risk, trauma or pain,"[84] as evincing a societal judgment that the procedure does not represent an unduly extensive intrusion on an individual's privacy interests or bodily integrity.[85] Breath tests, according to the Court, are significantly less intrusive than blood tests in that they consist of merely breathing into a mechanical device and reveal nothing more than current impairment.[86] Finally, although obvious that urinalysis entails privacy concerns not implicated by the other methodologies, Justice Kennedy noted that the regulations were drafted so as to make the process as minimally intrusive as possible.[87] The Court held this legislative courtesy sufficient to render the urine tests reasonable under the circumstances.[88]

Justice Kennedy next addressed the subjective expectations of privacy attributed to railroad workers.[89] In concluding that rail em-

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80 *Id.* The Court stated that "[w]hen faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirement in the particular context." *Id.*

81 *Id.* at 1417. More specifically, Justice Kennedy stated that a "showing of individualized suspicion is not a constitutional floor." *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

82 *Id.* at 1417-19.

83 *Id.* at 1417.

84 Schmerber v. California, 384 U.S. 757, 771 (1966).

85 *Skinner*, 109 S. Ct. at 1417 (citing Winston v. Lee, 470 U.S. 753, 762 (1985)).

86 *Id.*

87 *Id.* at 1418. The Court noted:

> While we would not characterize these additional privacy concerns as minimal in most contexts . . . [t]he regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure. . . . The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination.

Id.

88 *Id.* at 1421.

89 *Id.* at 1418-19.

ployees are entitled to a diminished expectation of privacy, the Court relied on their voluntary participation in a heavily regulated industry.[90] In the estimation of the majority, the dangers implicit in the industry demand a minimum standard of employee fitness.[91] The Court recognized that the disputed privacy interests may well be significant in other contexts, however, the logic and history of the railroad industry demonstrated that a lessened expectation of privacy attached to information concerning the physical condition of employees.[92] The majority also concluded that the testing procedures contemplated were a reasonable way of obtaining such information.[93]

Justice Kennedy saw no reason for requiring a warrant in this case because doing so would do little in furthering the traditional aims of a warrant.[94] The Court held that the "standardized nature" and "minimal discretion" in the administration of the program adequately protect it from arbitrary intrusions and leave no facts to be evaluated by a neutral magistrate.[95] The majority also emphasized that imposing a warrant requirement in this instance would likely result in the destruction of evidence, thereby frustrating the purpose behind the search.[96] Justice Kennedy asserted that, in light of these considerations, a warrant was not needed to make the testing

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90 *Id.* The Court placed much emphasis on the Hours of Service Act of 1907, 45 U.S.C. § 61 et seq., which sought to enhance rail safety by close regulation of employee physical concerns. *Skinner*, 109 S. Ct. at 1418-19. In previously upholding that act, the Court observed:

> The length of hours of service has a direct relation to the efficiency [of the workers] . . . . In its power suitably to provide for the safety of employees and travelers, Congress . . . was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of . . . persons embraced within the class defined by this act.

Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm'n, 221 U.S. 612, 619 (1911).

91 *Skinner*, 109 S. Ct. at 1418-19. Railroad employees have always been the focus of regulatory concern largely because "[a]n idle locomotive sitting in the roundhouse is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 593 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

92 *Skinner*, 109 S. Ct. at 1419.

93 *Id.*

94 *Id.* at 1415. The Court recognized the traditional purposes of a search warrant as assuring citizens that the intrusion is not a random act of a government agent; that the search is authorized by law; and that there is an objective determination by a neutral party justifying the intrusion. *Id.*

95 *Id.* at 1415-16.

96 *Id.* at 1416 (citing Camara v. Municipal Court, 387 U.S. 523, 533 (1967)).

reasonable.[97]

In appraising the other side of the equation, Justice Kennedy portrayed the governmental interest in testing without individualized suspicion as compelling.[98] In this regard, the Court was influenced by the fact that employees covered under the FRA regulations had the potential to cause significant human loss before any visible signs of impairment.[99] Although respondents asserted that there were less intrusive means of procuring such information, the majority determined this argument to be without merit.[100] The Court also readily dismissed the notion that the methodologies employed cannot measure current impairment from substances other than alcohol.[101] In Justice Kennedy's view, even if the tests revealed nothing more than recent drug use, this information would be helpful in further investigative endeavors.[102]

The *Skinner* Court was also convinced that the drug testing regime would serve as an effective deterrent to substance abuse on the railroads.[103] The majority contended that covered employees would be more likely to forego drug and alcohol use if testing became mandatory upon the occurrence of an event that could happen

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97 *Id.* at 1416. Specifically the Court held:

> [I]mposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations while significantly hindering and in many cases frustrating, the objectives of the testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.

Id.

98 *Id.* at 1419. Justice Kennedy opined that "[e]mployees subject to the test discharge duties fraught with such risks of injury to others that even a momentary lapse of concentration can have disastrous consequences." *Id.*

99 *Id.*

100 *Id.* at 1419 n.9. The Court held the "reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Id.* (quoting Illinois v. Lafayette, 462 U.S. 640, 647 (1983)).

101 *Id.* at 1420-21. For example, urine testing can only measure drug metabolites which may remain in the body for a significant amount of time subsequent to ingestion. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 588-89 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989). The *Skinner* Court posited:

> [It is] universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination [of the point in issue] more probable or less probable than it would be without the evidence."

Skinner, 109 S. Ct. at 1421 (quoting New Jersey v. T.L.O., 469 U.S. 325, 345 (1985) and FED. R. EVID. 401).

102 *Skinner*, 109 S. Ct. at 1420-21.

103 *Id.* at 1419-20.

at any time.[104] In addition, the Court reasoned that the testing procedures would provide invaluable information as to the causes of major accidents.[105] Justice Kennedy advanced the view that such information would inspire appropriate safeguards for the protection of the general public.[106]

In a brief concurrence, Justice Stevens, while supporting the majority opinion, did not find the deterrence rationale necessary or sufficient to uphold the regulatory searches.[107] According to the concurrence, it is a dubious proposition that individuals, aware that drug or alcohol use may cause a major accident occasioning substantial damage, would be in any way affected by the additional threat that they may lose their jobs.[108] In Justice Stevens' estimation, it is almost farcical to suggest that loss of employment may deter substance abuse where the risk of catastrophic personal injury does not.[109]

In a strident dissent, Justice Marshall lambasted the majority's "special needs" rationale as unprincipled and dangerous.[110] The dissent criticized this malleable standard as being justified only by the policy results it allowed the Court to reach.[111] While sympathizing with the Court's laudable concern for rail safety and the drug scourge, Justice Marshall was not nearly as enamored with what he labeled as the majority's "cavalier disregard" for the explicit language of the Constitution.[112] The dissent seemed particularly troubled by the concept of a constitutional protection being discarded as impracticable.[113]

Justice Marshall did not dispute the desirability of a war on drugs, he merely outlined that the weapons deployed must comport with the fourth amendment.[114] He cautioned that the urgency of

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104 Justice Kennedy opined that "customary dismissal sanctions that threaten employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered." *Id.*

105 *Id.* at 1420.

106 *Id.* The Court suggested that positive results would confirm impairment as a cause or aggravating factor of an accident. A negative result would direct attention to factors including equipment failure and inadequate training, as potential causes of the accident. *Id.*

107 *Id.* at 1422 (Stevens, J., concurring).

108 *Id.*

109 *Id.*

110 *Id.* at 1426 (Marshall, J., dissenting).

111 *Id.*

112 *Id.* Justice Marshall postulated that there is "no drug exception to the Constitution, any more than there is a communism exception . . . ." *Id.*

113 *Id.* at 1423 (Marshall, J., dissenting).

114 *Id.* at 1422 (Marshall, J., dissenting).

the drug crisis is precisely the reason why the Court need be extraordinarily vigilant against unconstitutional excess.[115] The dissent attested that "constitutional rights have their consequences,"[116] and thus even the best intentioned programs must be pursued within the limits of the Constitution.[117] Justice Marshall declared that the majority's apparent failure to heed this principle assured that the individual liberties of United States citizens will become a casualty of the war on drugs.[118]

In a cursory review, Justice Marshall observed that even if exigent circumstances excused the warrant requirement for the collection of samples, no such exigency prevented the acquisition of a warrant for the ensuing chemical analysis.[119] The dissent posited that due to technological advances, such analyses can uncover medical information irrelevant to railway accidents, and therefore, entail fourth amendment implications all their own.[120]

Turning his attention to probable cause, Justice Marshall attacked the further compromising of this requirement under the guise of a "reasonableness" analysis.[121] In the dissent's view, such analyses leave the fourth amendment devoid of any real meaning

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115 *Id.* Specifically, Justice Marshall posited that "[g]rave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Id.* As an example of this phenomenon, Justice Marshall pointed to the Japanese relocation camp cases of World War II, *id.* (citing Korematsu v. United States, 323 U.S. 214 (1944)), and the subversion cases of the McCarthy-era, *id.* (citing Dennis v. United States, 341 U.S. 494 (1951)), as a reminder that "when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Id.*

116 *Id.* at 1430 (Marshall, J., dissenting).

117 *Id.* Justice Marshall reasoned:

> [If the] police [were] freed from the constraints of the fourth amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would prevent thousands of fatalities. Our refusal to tolerate this specter reflects . . . that even beneficent governmental power . . . must always yield to "a resolute loyalty to constitutional safeguards."

Id. (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973)).

118 *Id.* at 1431 (Marshall, J., dissenting). Justice Marshall also stated that the "immediate victims of the majority's constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today's decision will reduce the privacy all citizens may enjoy." *Id.* at 1433 (Marshall, J., dissenting).

119 *Id.* at 1426 (Marshall, J., dissenting). The Justice further noted that "blood and urine do not spoil if properly collected and preserved . . . ." *Id.*

120 *Id.* at 1429 (Marshall, J., dissenting). Justice Marshall reasoned "such tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." *Id.* (quoting Jones v. McKenzie, 833 F.2d 335, 339 (D.C. Cir. 1987)).

121 *Id.* at 1423-24 (Marshall, J., dissenting).

and subject to whatever interpretations shifting judicial majorities choose to give it.[122] Justice Marshall admitted that the Court had previously allowed a relaxation of the probable cause standard,[123] but was quick to point out that those situations involved only *de minimis* intrusions on personal privacy and were invariably based on individualized suspicion.[124] Indeed, the dissent contended that *Skinner* represented the "special needs" doctrine's deepest incursion into fourth amendment protection.[125]

In assessing the nature of the intrusion, the dissent accused the Court of reading the "virtually no risk, trauma or pain"[126] language of *Schmerber* out of context.[127] Justice Marshall emphatically contended that *Schmerber* absolutely precluded compulsory blood tests on anything less than on particularized suspicion.[128] The dissent charged that the majority's conclusion permitted the anomalous result of forbidding the testing of a single individual absent a particularized suspicion while allowing the wholesale testing of an entire

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122 *Id.* at 1423 (Marshall, J., dissenting).

123 *Id.* at 1424 (Marshall, J., dissenting). Justice Marshall reasoned that this relaxation occurred "[o]nly where the Government action in question had a 'substantially less intrusive' impact on privacy and thus clearly fell short of a full scale search." *Id.* (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)).

124 *Id.* at 1424 (Marshall, J., dissenting). The dissent stated that only routinized, non-intrusive encounters conducted as part of a regulatory program involving no personal contact have been upheld absent a showing of individualized suspicion. *Id.* Justice Marshall ridiculed the majority's comparison of border stops with the compelled extraction of blood and urine: "Case law and common sense reveal . . . the bankruptcy of this absurd analogy . . . ." *Id.* at 1427 (Marshall, J., dissenting).

125 *Id.* at 1425 (Marshall, J., dissenting). The dissent stated that prior to *Skinner* the balancing analysis was seemingly limited to property searches and inapplicable when applied to searches of a person. *Id.* According to Justice Marshall, proper fourth amendment analysis consists of inquiring: (1) whether or not there was a search, *id.* at 1426 (Marshall, J., dissenting) (citing Katz v. United States, 389 U.S. 347 (1967)); (2) was the search based on a warrant or valid exception to warrant requirement, *id.* (citing Welsh v. Wisconsin, 466 U.S. 740 (1984)); (3) was the search based on probable cause or valid lesser suspicion, *id.* (citing Dunaway v. New York, 442 U.S. 200 (1979)); or (4) was the search conducted in a reasonable manner, *id.*, (citing Winston v. Lee, 470 U.S. 753 (1985)).

126 *Id.* at 1427 (Marshall, J., dissenting) (citing Schmerber v. California, 384 U.S. 757, 771 (1966)).

127 *Id.* at 1427-28 (Marshall, J., dissenting). The dissent continued:

> [The *Schmerber* Court] made this statement only *after* the Court established that the blood test fell within the exigent circumstances exception to the warrant requirement, *and* that the test was supported by probable cause. Indeed, the statement was made only in the context of the separate inquiry into whether the compulsory blood test was conducted in a reasonable manner.

Id. at 1428 n.7 (Marshall, J., dissenting) (emphasis in original).

128 *Id.* at 1428.

class of people without any suspicion whatsoever.[129] Further, Justice Marshall found the Court's trivializing of the privacy interests involved in urine collection "nothing short of startling."[130] The dissent perceived such a characterization as betraying the "shameless manipulability" of the balancing approach.[131]

Justice Marshall was also particularly distressed with the possibility that the results of these tests may be used in criminal prosecutions.[132] The dissent questioned the majority's conspicuous refusal to consider this factor in its analysis.[133] Justice Marshall commented that the possibility of criminal prosecutions casts doubt on the primary justification of the Court's decision that there exists a "special need beyond the normal need for law enforcement."[134] Justice Marshall was similarly unimpressed with the deterrence rationale,[135] and while admitting the abstract attractiveness of the investigative rationale, did not find it compelling enough to justify such an intrusive program.[136]

It is indisputable that drug and alcohol abuse is a tremendous threat to society on many levels and steps must be taken to minimize its consequences. It is equally obvious that all practical steps should be taken to maintain and improve the safety of the American rail system. The problem arises in reconciling these two lofty objectives within the parameters of the Constitution: "The line, often adopted by strong men in controversy, [is] of justifying the means by the end."[137] In justifying the noble end of rail safety by the suspect

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129 *Id.*

130 *Id.* at 1429 (Marshall, J., dissenting). The dissent referred both to the nature of the collection process, and the fact that since urine testing did not measure current impairment, it was "wholly excessive." *Id.* at 1432 (Marshall, J., dissenting).

131 *Id.* at 1429 (Marshall, J., dissenting).

132 *Id.* at 1431 (Marshall, J., dissenting).

133 *Id.*

134 *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). Interestingly, in upholding the drug testing regime in National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989), Justice Kennedy's majority opinion placed considerable reliance on the fact that the test results could not be used for criminal prosecutions. *Id.* at 1390.

135 *Skinner*, 109 S. Ct. at 1432 (Marshall, J., dissenting). In the dissent's estimation "[i]t is, of course, the fear of the accident not the fear of post accident revelation, that deters." *Id.*

136 *Id.* Justice Marshall continued:

> I do not denigrate this interest, but it seems a slender thread from which to hang such an intrusive program, particularly given that the knowledge that one or more workers were impaired at the time of an accident falls short of proving that substance abuse caused or exacerbated that accident.

Id.

137 Saint Jerome Letter 48.

means of compulsory testing, the *Skinner* Court seemingly embraces this Machiavellian credo. *Skinner* epitomizes the struggle between what may be desirable to society and what is demanded by the Constitution.

It has been said that hard cases make bad law.[138] Such cases appeal to the emotional and moralistic instincts which often blind us to the realities of the law. It is, however, elemental to our jurisprudence that the Constitution of the United States must never fall prey to political and ideological expediency. Though well intentioned, the balancing test espoused by the *Skinner* Court is devoid of any meaningful or definable limitations.[139] Though first articulated merely four years ago, the "special needs" doctrine has been significantly expanded by the *Skinner* decision. This vaporous non-standard could conceivably be used in the future to justify egregious violations of constitutional liberties. Given the reasoning of *T.L.O.* and *Skinner*, it is quite possible that on the three-hundredth anniversary of the Bill of Rights, the Court may uphold surveillance cameras in the home as minimally intrusive and serving a compelling government interest. Surely, every time the Court carves another exception into the body of the fourth amendment, it moves one step closer to this Orwellian specter. For "principles of law, once bent, do not snap back easily."[140]

David S. Catuogno

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138 Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). Justice Holmes stated:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Id.

139 Justice Brandeis recognized that "the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

140 *Skinner*, 109 S. Ct. at 1433 (Marshall, J., dissenting).