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Fourth Amendment--The Reasonableness of Suspicionless Drug Testing of Railroad Employees

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FOURTH AMENDMENT—THE “REASONABLENESS” OF SUSPICIONLESS DRUG TESTING OF RAILROAD EMPLOYEES

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

I. INTRODUCTION

In *Skinner v. Railway Labor Executives' Ass'n*,¹ the United States Supreme Court held that the Federal Railroad Administration (FRA) drug testing program did not violate the fourth amendment prohibition against unlawful searches and seizures.² The Court held that drug and alcohol testing of railroad employees constituted a reasonable search even though the FRA regulations do not require a warrant, probable cause, or a reasonable suspicion that an employee is impaired by the use of alcohol or drugs. To reach this conclusion, the majority balanced government interests in conducting the testing program against employee interests in privacy. This Note agrees with the dissent's position that the proper analysis of the reasonableness of the drug testing search should proceed according to the literal requirements of the fourth amendment.

The analysis in this Note will focus on the flaws in the majority opinion which is founded on a broad, manipulable “balancing of interests” test. First, this Note discusses the majority's questionable use of, what this Note terms, the “special needs balancing test.”³ Next, the Note examines the majority's failure to properly weigh the privacy side of the balancing test by its blanket acceptance of the highly intrusive FRA drug testing program. Accordingly, this Note advocates Justice Marshall's belief that under the majority's subjective balancing test one can easily achieve whichever outcome one desires. Finally, this Note demonstrates how the majority's analysis and holding in *Skinner* will continue to do damage to the fourth

¹ 109 S. Ct. 1402 (1989).

² For the text of the fourth amendment, see *infra* note 48.

³ See *infra* notes 172-175 and accompanying text for an explanation of the “special needs balancing test.”

amendment as it is applied to future extensions of drug testing programs.

II. FACTUAL BACKGROUND

In July, 1983, the FRA began a two-year process to formulate rules to control the use of alcohol and drugs by on-duty railroad employees.⁴ The Secretary of Transportation of the United States and, by delegation, the FRA, are authorized to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety."⁵ Based on this authorization and on its belief that alcohol and drug abuse by the nation's railroad employees poses a serious threat to safety, the FRA promulgated regulations that require covered employees⁶ involved in certain train accidents to submit to blood and urine tests. The FRA also promulgated regulations that authorize (but do not require) "railroads to administer breath and urine tests to employees who violate certain safety rules."⁷

The regulations were, in part, a response to a 1979 study that found that "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year."⁸ The study showed that "23% of operating personnel were 'problem drinkers'" and that "[o]nly 4% of problem drinkers were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures."⁹ The study also revealed that "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year," and "13% of workers reported to work at least 'a little drunk' one or more times during [the study year]."¹⁰ Further, the FRA found, based on the 1979 study and other research, that between 1972 and 1983 at least 21 significant train accidents on our nation's railroads involved alco-

⁴ Brief for the Petitioners at 2, *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989) (No. 87-1555).

⁵ The Federal Railroad Safety Act, 45 U.S.C. § 431(a) (1982).

⁶ Covered employees are those employees who are assigned to perform service under the Hours of Service Act, 45 U.S.C. §§ 61-66 (1982), and employees performing the same services as covered employees. 49 C.F.R. § 219.5(d) (1988). The Hours of Service Act defines "employee" as "an individual actually engaged in or connected with the movement of any train, including hostlers." 45 U.S.C. § 61(b)(2) (1982). Webster's dictionary defines hostler as "2: one who services a vehicle (as a locomotive or truck) or machine (as a crane)." WEBSTER'S NEW COLLEGIATE DICTIONARY 553 (8th ed. 1977).

⁷ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1407 (1989).

⁸ 48 Fed. Reg. 30,724 (1983). The study, prepared by the Railroad Employee Assistance Project, examined alcohol abuse on seven major railroads during 1978.

⁹ *Id.*

¹⁰ *Id.*

hol or drug use as a probable cause or contributing factor.¹¹ The FRA observed that these accidents resulted in twenty-five fatalities, sixty-one non-fatal injuries and approximately nineteen million dollars in property damage (twenty-seven million in 1982 dollars).¹² Thus, the FRA concluded that alcohol and drug abuse by railroad employees poses a serious safety threat.¹³

In addition, the FRA found that previous efforts to curb alcohol and drug abuse by railroad employees had been unsuccessful.¹⁴ Specifically, the FRA had issued Rule G, an industry wide regulation which prohibits railroad employees from using or possessing certain drugs while on duty.¹⁵ The customary sanction for violation of Rule G is dismissal.¹⁶ Due to the problems noted in the 1979 study and other research, the FRA solicited comments from interested parties on various regulatory measures designed to curb the problem of alcohol and drug abuse throughout the nation's railroad system.¹⁷ The FRA received responses that indicated that Rule G was ineffective in large part because of the reliance on observations of supervisors and co-workers to report violations and enforce the rule.¹⁸ These reports indicated that railroads were able to detect only a relatively small number of Rule G violations.¹⁹ Thus, after reviewing further comments from representatives of the railroad industry, labor groups, and the general public, the FRA in 1985 began promulgating rules to address the problem of alcohol and drugs on the railroads.²⁰

The final regulations apply to covered employees subject to the Hours of Service Act of 1907.²¹ The only sections of the regulations challenged in *Skinner* as violative of the fourth amendment are Subparts C and D.²² Subpart C, entitled "Post-Accident Toxicological Testing," requires railroads to take steps to acquire blood and urine

¹¹ *Id.* at 30,726.

¹² *Id.*

¹³ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1407 (1989).

¹⁴ *Id.*

¹⁵ Rule G of the Association of American Railroads Standard Code of Operating Rules provides: "The use of alcoholic beverages or narcotics by employees subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty, or their possession while on duty, is prohibited." 49 Fed. Reg. 24,266 (1984).

¹⁶ *Skinner*, 109 S. Ct. at 1407.

¹⁷ *Id.* at 1408.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 45 U.S.C. § 61(b)(2) (1982). See *supra* note 6 for a definition of covered employees.

²² 49 C.F.R. §§ 219.201-309 (1988). See *infra* notes 23-25, 32, 34-37 for portions of the text of Subparts C and D.

samples of railroad employees directly involved in certain specified events.²³ The events which precipitate testing are 1) a "major train accident,"²⁴ 2) an "impact accident,"²⁵ and 3) "[a]ny train incident that involves a fatality to any on-duty railroad employee."²⁶ After the occurrence of one of the specified events, the railroad must transport all the crew members and other specified employees to an independent medical facility where the blood and urine samples will be taken.²⁷ An employee may be excepted from testing "if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident."²⁸ The exception does not apply in the case of a "major train accident."²⁹

The employee is asked to complete a form that discloses what medications the employee has taken during the preceding thirty days.³⁰ This information is acquired in order to help determine if a positive test result is due to the employee's lawful use of

²³ 49 C.F.R. § 219.203(a) (1988) provides:

Employees tested. (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 FRA.

(2) Such employees shall specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees shall also be required to provide samples.

(3) An employee is excluded from testing under the following circumstances: (i) In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) of this subpart (an "impact accident") or § 219.201(a)(3) ("fatal train incident"), if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident. (ii) The following provisions govern accidents/incidents involving non-covered employees: (A) Surviving non-covered employees are not subject to testing under this subpart. (B) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

²⁴ 49 C.F.R. § 219.201(a)(1) (1988) provides:

Major train accident. Any train accident that involves one or more of the following:

(i) A fatality; (ii) Release of a hazardous material accompanied by—(A) An evacuation; or (B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or (iii) Damage to railroad property of \$500,000 or more.

²⁵ 49 C.F.R. § 219.201(a)(2) (1988) provides: "*Impact Accident.* An impact accident resulting in—(i) A reportable injury; or (ii) Damage to railroad property of \$50,000 or more."

²⁶ 49 C.F.R. § 219.201(a)(1) (1988).

²⁷ 49 C.F.R. § 219.203(c) (1988).

²⁸ 49 C.F.R. § 219.203(a)(3)(i) (1988); see *supra* note 23.

²⁹ *Id.*

³⁰ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1418 n.7 (1989); 49 C.F.R. § 219.205(b) (1988).

medication.³¹

If an employee refuses to provide the blood or urine samples, the employee is dismissed from covered service for nine months.³² The employee is entitled to a hearing concerning his or her refusal to take the test.³³ The FRA must notify employees of their test results and allow the employees to respond in writing before the preparation of any final investigative report.³⁴ Finally, the regulations in Subpart C provide that the FRA may release positive test results to prosecutors.³⁵

Subpart D, entitled "Authorization to Test for Cause," authorizes railroads to require employees to submit to breath and urine toxicological testing under the following specified circumstances:³⁶

³¹ *Id.*

³² 49 C.F.R. § 219.213(a) (1988) provides:

Disqualification. (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months. (2) The disqualification required by this paragraph shall apply with respect to employment in covered service by any railroad with notice of such disqualification. (3) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

³³ 49 C.F.R. § 219.213(b) (1988).

³⁴ 49 C.F.R. § 219.211(a)(2) (1988) provides:

FRA notifies the railroad and the tested employee of the results of the toxicological analysis and permits the employee to respond in writing to the results of the test prior to preparing any final investigation report concerning the accident or incident. Results of the toxicological analysis and any response from the employee are also promptly made available to the National Transportation Safety Board on request.

³⁵ 49 C.F.R. § 219.211(d) (1988) provides:

Each sample provided under this subpart is retained for not less than six months following the date of the accident or incident and may be made available to the National Transportation Safety Board (on request) or to a party in litigation upon service of appropriate compulsory process on the custodian of the sample at least ten (10) days prior to the return date of such process. It is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation unless a copy of the subpoena, order, or other process is contemporaneously served on the Chief Counsel, FRA, Washington, D.C.

³⁶ The regulations also provide that breath tests may be required when a supervisor has a "reasonable suspicion" that an employee is intoxicated and urine tests may be required when two supervisors have determined that an employee is under the influence of or impaired by alcohol or drugs. 49 C.F.R. §§ 219.301(b)(1), (c)(2) (1988). When requiring a urine test, however, one of the supervisors making the determination to test must have received specialized training in detecting the signs of drug intoxication. The training involves a three-hour course in signs of drug intoxication. 49 C.F.R. § 219.301(c)(2)(ii) (1988).

The Court did not address the issue of whether these sections of Subpart D violated the fourth amendment because they are based on a finding of individualized suspicion before testing. The Respondent's brief did take issue with these sections because they felt these other sections serve as a further example of the excessive aspects in the FRA's program and because they felt that the "training" of the supervisors was inadequate.

1) a reportable accident or incident occurs and the supervisor has "reasonable suspicion" that the employee is involved in the event; and 2) the employee is involved in specific rule violations, including non-compliance with a signal and excessive speeding.³⁷ The regulations under Subpart D require the railroad to provide detailed notice to the employees that the railroad will consider any positive breath and/or urine test results as a sign of impairment; thus, the employee has the right to submit a blood sample, at the same time he or she is required to produce the breath and/or urine sample, in order to rebut the presumption of current impairment.³⁸ Similar to Subpart C, Subpart D specifies procedures for the collection and analysis of samples.³⁹

The respondents, Railway Labor Executives' Association (RLEA), brought this action in the United States District Court for the Northern District of California to enjoin the FRA from enforcing

Brief for the Respondents at 34, *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989) (No. 87-1555).

³⁷ 49 C.F.R. § 219.301(b) provides:

Reasonable cause for breath tests. The following circumstances constitute reasonable cause for the administration of breath tests under this section: (1) *Reasonable suspicion.* [See *supra* note 36 for discussion of toxicological testing based on a reasonable suspicion that the employee is under the influence.] (2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or (3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors: (i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves—(A) Occupancy of a block or other segment of track to which entry was not authorized; (B) Failure to clear a track to permit opposing or following movement to pass; (C) Moving across a railroad crossing at grade without authorization; or (D) Passing an absolute restrictive signal or passing a restrictive sign without stopping (if required); (ii) Failure to protect a train as required by a rule consist [sic] with § 218.37 of this title; (iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less; (iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train; (v) Failure to apply or stop short of derail as required; (vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or (vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

⁴⁹ C.F.R. § 219.301(c) (1988) provides:

Reasonable cause for urine tests. (1) *Accident/incident and rule violation.* Except as provided in paragraph (c)(2) of this section, each of the conditions set forth in paragraphs (b)(2) ("accident/incident") and (b)(3) ("rule violation") of this section as constituting reasonable cause for breath testing also constitutes reasonable cause with respect to urine testing. (2) *Reasonable suspicion.* [See *supra* note 36 for discussion of toxicological testing based on a reasonable suspicion that the employee is under the influence.]

³⁸ 49 C.F.R. § 219.309 (1988).

³⁹ 49 C.F.R. § 219.307 (1988).

the above described regulations.⁴⁰ The district court granted summary judgment to the petitioner, the Secretary of Transportation of the United States, under whose authority the regulations were promulgated.⁴¹ The Court of Appeals for the Ninth Circuit reversed the district court, finding, *inter alia*, that a search under the fourth amendment is not reasonable unless there is a finding of "particularized suspicion."⁴² The Supreme Court granted certiorari⁴³ to consider whether the regulations violate the fourth amendment and set the oral argument date to coincide with arguments for the companion case of *National Treasury Employees' Union v. Von Raab*.⁴⁴

III. SUPREME COURT OPINIONS

A. MAJORITY OPINION

In *Skinner*, the Court held that regulations which mandate or authorize drug and alcohol tests of railroad employees are reasonable under the fourth amendment even though there is no requirement of a warrant, probable cause or a reasonable suspicion that any particular employee is under the influence of alcohol or drugs.⁴⁵ Writing for the majority,⁴⁶ Justice Kennedy reasoned that the alcohol and drug testing of covered employees after certain triggering incidents was reasonable: 1) the regulations gave the railroad employers limited discretion when applying the regulations; 2) the government has a compelling interest in the safety of the nation's railroads; and 3) railroad employees have a diminished expectation of privacy over information about their fitness on the job.⁴⁷

1. *Drug Testing is a Search to Which the Fourth Amendment Applies*

Justice Kennedy first addressed the question of whether the fourth amendment is applicable to the testing of railroad employees by private railroads and, if the amendment is applicable, whether the alcohol and drug testing constitutes a search.⁴⁸ First, the Court

⁴⁰ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

⁴¹ *Railway Labor Executives' Ass'n v. Dole*, No. C85-7958-CAL, (N.D. Cal. Dec. 9, 1985).

⁴² *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

⁴³ *Burnley v. Railway Labor Executives' Ass'n*, 108 S. Ct. 2033 (1988).

⁴⁴ 109 S. Ct. 1384 (1989) (drug testing of Customs Service employees).

⁴⁵ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

⁴⁶ Justice Kennedy was joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, and Scalia.

⁴⁷ *Skinner*, 109 S. Ct. at 1422.

⁴⁸ The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects,

ascertained that the amendment applies to searches or seizures taken by a private party who is acting as an instrument or agent of the government.⁴⁹ The Court found that, clearly, Subpart C of the regulations, which requires private railroads to test employees after certain train accidents and incidents, was attributable to the government and thus implicated the fourth amendment.⁵⁰ Likewise, the Court determined that the fourth amendment was applicable to the testing authorized by Subpart D because of the “[g]overnment’s encouragement, endorsement and participation” in adopting the regulations.⁵¹

Next, the majority held that the collection and analysis of the blood, urine, and breath samples constituted a search under the fourth amendment.⁵² Justice Kennedy cited a long line of cases that have held that each of the above tests of an employee’s body fluids constitutes a search.⁵³ The majority declined to consider whether the tests constitute a seizure, except to the extent that any limit on an employee’s freedom of movement in order to procure the blood, urine or breath samples, bears on the assessment of the intrusiveness of the searches under the FRA’s regulations.⁵⁴ Hence, Justice Kennedy turned to the critical question of whether the searches prescribed by the FRA regulations are reasonable under the fourth amendment.

2. *A Reasonable Search Does Not Depend Upon a Warrant or Probable Cause When a “Special Need” Exists*

The majority observed that, except in certain well-defined cir-

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

⁴⁹ *Skinner*, 109 S. Ct. at 1411.

⁵⁰ *Id.*

⁵¹ *Id.* at 1412.

⁵² *Id.* at 1413.

⁵³ *Id.* at 1412-13 (citing *California v. Trombetta*, 467 U.S. 479, 481 (1984) (breath); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (blood); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1542 (6th Cir.) (urine), *vacated and reh’g granted*, 861 F.2d 1388 (6th Cir. 1988); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1143 (3d Cir. 1988) (urine), *cert. denied*, 109 S. Ct. 1636-37 (1989); *Railway Labor Executives’ Ass’n v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988) (case below); *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987) (urine); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987) (urine), *vacated and remanded*, 109 S. Ct. 1633 (1989); *National Treasury Employees’ Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987) (urine), *aff’d in part, rev’d in part and remanded*, 109 S. Ct. 1384 (1989); *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987) (urine); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 (7th Cir.) (urine), *cert. denied*, 429 U.S. 1029 (1976)).

⁵⁴ *Skinner*, 109 S. Ct. at 1413.

cumstances, a search is not reasonable unless it is made pursuant to a warrant issued upon probable cause.⁵⁵ The Court noted that one exception to the warrant and probable cause requirement of the fourth amendment arises when there exists “special needs, beyond the normal need for law enforcement.”⁵⁶ The majority held that the government’s interest in “regulating the conduct of railroad employees to ensure safety” is a “special need” beyond normal law enforcement.⁵⁷

The majority found that the “governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty.”⁵⁸ Thus, Justice Kennedy wrote that the remaining question for the Court to consider was whether the government’s need to monitor compliance with the regulations justifies the intrusion into the employees’ privacy absent a warrant or individualized suspicion.⁵⁹

a. The Warrant Requirement Is Not Necessary to Make the Drug Testing Search Reasonable

The majority examined the reasons for having the warrant requirement in the fourth amendment and concluded that these reasons would not be advanced by requiring a warrant in the case of alcohol and drug testing of railroad employees.⁶⁰ The Court stated that “[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents.”⁶¹ Justice Kennedy noted that a warrant allows for the objective determination by a neutral magistrate as to whether or not the search is justified.⁶² The Court felt that the circumstances justi-

⁵⁵ *Id.* at 1414 (citing *Payton v. New York*, 445 U.S. 573, 586 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)).

⁵⁶ *Id.* at 1414 (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

⁵⁷ *Id.* at 1414. The majority analogized the “special need” to search in *Skinner* to the “special need” found in the following cases: *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (a search of probationer’s home); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of premises of certain highly regulated businesses); *O’Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (work-related search of employees’ desks and offices); *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985) (search of student property by school officials); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (visual body cavity searches of prison inmates).

⁵⁸ *Skinner*, 109 S. Ct. at 1415.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

fyng the testing of employees under the FRA regulations and the scope of the tests are narrowly defined and well known to the covered employees.⁶³ Thus, Justice Kennedy stated, given "the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate."⁶⁴ In addition, Justice Kennedy observed that the requirement of a warrant may hinder the objectives of the regulations as valuable evidence may be destroyed while procuring a warrant.⁶⁵ Lastly, the majority felt that it would be unfair to impose the burdensome warrant procedure requirements on the railroad supervisors.⁶⁶ Justice Kennedy concluded the Court's consideration of a warrant requirement by writing, "In sum, imposing 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 Government's testing program."⁶⁷

b. Drug Testing Is a Limited Intrusion on an Employee's Privacy

The majority held that neither probable cause nor even the presence of individualized suspicion that a search will turn up evidence is a requirement when determining that a search is reasonable under the fourth amendment.⁶⁸ Using a balancing of interests test, Justice Kennedy wrote that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."⁶⁹

The Court found that the FRA regulations are a limited intru-

⁶³ *Id.*

⁶⁴ *Id.* at 1415-16.

⁶⁵ *Skinner*, 109 S. Ct. at 1416. The Court noted that "alcohol and other drugs are eliminated from the bloodstream at a constant rate." *Id.* Thus, in order to facilitate the judgment of whether the railroad employees were impaired at the time of the accident/incident in question, the employees should be tested as soon as possible following the "triggering event." *Id.*

⁶⁶ *Id.* at 1416.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1417. The majority noted that its precedent indicates that when a search may be performed without a warrant, a showing of probable cause to believe that the person to be searched has violated the law is still required. *Id.* Furthermore, the majority noted that when a balancing of interests indicates that a showing of probable cause is not required some degree of individualized suspicion has still been required for a reasonable search. *Id.*

⁶⁹ *Id.*

sion on the employees' privacy. First, Justice Kennedy observed that the transportation of employees to the medical facilities was reasonable as employees ordinarily consent to restrictions in their freedom of movement on the job.⁷⁰ To illustrate, he noted that employees are not allowed to come and go as they please during working hours.⁷¹ Similarly, the Court observed that the time spent obtaining a sample is not a significant infringement on an employee's privacy expectations.⁷² Next, the Court considered, in turn, the processes of obtaining a blood sample, a breath sample, and a urine sample in order to determine if the procedures were an intrusion on the employee's privacy.⁷³

Citing *Schmerber v. California*,⁷⁴ the majority found that society does not consider blood tests an infringement on significant privacy interests.⁷⁵ Instead, Justice Kennedy read *Schmerber* as confirming Court precedent that indicates that the taking of blood is a routine, safe, and painless procedure that does not "constitute an unduly extensive imposition on an individual's privacy and bodily integrity."⁷⁶

The majority found that breath tests are even less intrusive than blood tests and, therefore, breath tests are not a significant intrusion on an individual's privacy.⁷⁷ Justice Kennedy distinguished breath tests from blood tests by pointing out that breath tests do not require the skin to be pierced nor do such tests require a hospital environment.⁷⁸ Further, he stated, whereas blood tests will be used to detect alcohol and other drugs, breath tests are only used to detect alcohol.⁷⁹

Finally, Justice Kennedy addressed the process of collecting a urine sample and again concluded that this process does not infringe on significant privacy interests. Justice Kennedy noted that, like the breath test, a urine test does not require the piercing of skin.⁸⁰ Further, Justice Kennedy continued, like the blood and breath tests, the urine toxicological test may not be used to inquire

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1417-18.

⁷⁴ 384 U.S. 757 (1966) (state may have a physician in a hospital environment take a blood sample from a motorist suspected of driving under the influence even though the motorist does not consent).

⁷⁵ *Id.* at 1417.

⁷⁶ *Id.* (citing *Winston v. Lee*, 470 U.S. 753, 762 (1983); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957)).

⁷⁷ *Skinner*, 109 S. Ct. at 1417.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1417-18.

⁸⁰ *Id.* at 1418.

into private facts unrelated to alcohol and drug use.⁸¹ The Court did recognize that the act of urination in our society is "traditionally shielded by great privacy."⁸² However, the Court noted that the regulations are designed to minimize the intrusion by not requiring direct observation of the production of the urine sample.⁸³ Justice Kennedy also noted that the required urine test is similar to that required during a regular physical examination as medical personnel (and not railroad personnel) will collect the samples.⁸⁴

Having considered the privacy concerns implicated in the collection of the biological samples, the majority turned to the argument that the regulations are a minimal intrusion on an employee's privacy because of the employee's participation in an industry highly regulated to ensure safety. The Court emphasized that the railroad industry has long been governed by several regulations which are directed toward safety concerns.⁸⁵ Thus, the Court felt that "logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees."⁸⁶ Therefore, the majority concluded that the testing procedures under Subparts C and D pose only limited threats to an employee's justifiable expectation of privacy.⁸⁷

c. The Government's Interest in Drug Testing Employees Is Compelling

The majority considered the other side of the balancing test and concluded that the government presented a compelling interest to justify testing employees without a showing of individualized sus-

⁸¹ *Id.* at 1418 n.7. The majority explained that the private medical information that the employee must disclose when submitting to toxicological testing is not a significant invasion of privacy because "there is no indication that the Government does not treat this information as confidential, or that it uses the information for any other purpose." *Id.* See *supra* notes 30-31 and accompanying text for reasoning behind requiring employees to fill out form disclosing private medical information.

⁸² *Skinner*, 109 S. Ct. at 1418.

⁸³ *Id.* However, Justice Kennedy noted that direct observation would be desirable in order to assure the integrity of the samples. *Id.*

⁸⁴ *Id.* at 1418.

⁸⁵ The majority cited the following: The Hours of Service Act, 45 U.S.C. §§ 61-66 (1982) (limiting the amount of hours a covered employee may work); The Federal Railroad Safety Act, 45 U.S.C. § 437(a) (1982) (authorizing the Secretary of Transportation to test "railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary" in order to fulfill the mandate to provide for safety on the railroads); state laws that require physical examinations of certain railroad employees; and Rule G, 49 Fed. Reg. 24,266 (1984) (industry wide acceptance and enforcement of prohibition against use of alcohol or drugs by on-duty employees). *Skinner*, 109 S. Ct. at 1418 & n.8.

⁸⁶ *Skinner*, 109 S. Ct. at 1419.

⁸⁷ *Id.*

picion.⁸⁸ Justice Kennedy expressed the majority's concern that impaired employees in the railroad industry, like those in the nuclear power plant industry, can be the cause of disastrous accidents.⁸⁹ Furthermore, Justice Kennedy postulated that many human lives could be lost before a supervisor has detected any signs of impairment in an employee.⁹⁰ The majority noted that, although the regulations do not describe a perfect and easy means of detecting impaired employees, the tests do serve the purpose of deterring employees from using alcohol or drugs in the first place.⁹¹ According to Justice Kennedy, employees will be deterred because they know that they will be tested upon the unpredictable occurrence of certain events.⁹²

The majority declined to consider any alternative methods to address the problem of alcohol and drugs in the railroad industry. Justice Kennedy pointed to the failure of Rule G to stop the use of alcohol and drugs by railroad employees.⁹³ The majority found that the FRA regulations were "reasonable" and, thus, did not wish to second-guess the solution provided by the FRA after many years of research and study.⁹⁴

The majority noted that the government's interest in testing is strong because testing will provide valuable information as to the causes of an accident or safety violation.⁹⁵ Justice Kennedy found that a positive test result would establish that an accident was either caused by an impaired employee or perhaps made worse by an impaired employee's inability to respond to the accident promptly.⁹⁶ The Court also found that negative test results will provide valuable information, because then authorities may focus on the significance of other factors such as equipment failure or inadequate training of employees.⁹⁷ In order to achieve this important government aim of determining cause, the majority found that it would be impracticable to require a showing of individualized suspicion.⁹⁸ The Court noted that, at the chaotic scene of an accident, it would be very diffi-

⁸⁸ *Id.*

⁸⁹ *Id.* (citing *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988); *Alverado Washington Pub. Power Supply Sys.*, 111 Wash. 2d 424, 436, 759 P.2d 427, 433-34 (1988), *cert. denied*, 109 S. Ct. 1637 (1989)).

⁹⁰ *Skinner*, 109 S. Ct. at 1419.

⁹¹ *Id.*

⁹² *Id.* at 1420.

⁹³ *Id.* at 1419-20.

⁹⁴ *Id.* at 1419 n.9.

⁹⁵ *Id.* at 1420.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

cult (if not impossible) to objectively determine if any particular employee is impaired by alcohol or drugs.⁹⁹

Also, the majority found that after a safety violation under Subpart D of the FRA regulations, an objective determination of employee impairment would be difficult. The difficulty in determining whether or not there is enough individualized suspicion to test an employee, the majority continued, may result in a loss of valuable evidence.¹⁰⁰ Thus, the majority concluded that “[i]t would be unrealistic, and inimical to the Government’s goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances.”¹⁰¹

The majority criticized the appellate court’s opinion that the regulations constitute an unreasonable search because the blood and urine tests cannot measure an employee’s current degree of drug impairment.¹⁰² With the requirement of both blood and urine tests, Justice Kennedy argued that the regulations are an effective means of determining on-duty impairment as well as deterring drug use.¹⁰³ Justice Kennedy explained that, even if the tests only show evidence of a recent use of drugs (and not the specific time when the drugs were ingested), then this evidence is useful because it provides the basis for further investigation as to “whether the employee used drugs at the relevant times.”¹⁰⁴ Further, the majority noted that the FRA regulations place principal reliance on the blood tests which can detect recent drug use.¹⁰⁵

3. *Summary of Majority Opinion*

Thus, the Court reversed the Court of Appeals’ decision that the regulations are an unreasonable search under the fourth amendment. The majority concluded that the government’s compelling interests outweigh the employee’s privacy concerns because the regulations give the railroad supervisors administering the tests limited discretion, the employees have diminished privacy expectations regarding their fitness, and the government has surpassing safety interests.¹⁰⁶ Justice Kennedy emphasized the evils of drug and alcohol use while performing sensitive tasks that could endanger the

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* The appellate court’s decision is reported in *Railway Labor Executives’ Ass’n v. Burnley*, 839 F.2d 575, 588 (9th Cir. 1988).

¹⁰³ *Skinner*, 109 S. Ct. at 1421.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1422.

lives of others.¹⁰⁷ Because the nature of the evil lies hidden in bodily fluids, the majority held that blood, breath, and urine tests of railroad employees, without a warrant or reasonable suspicion that any particular employee is impaired, is a reasonable search under the fourth amendment.¹⁰⁸

B. CONCURRING OPINION

Justice Stevens concurred in the judgment of the Court, but disagreed with the majority's position that deterring employees from using alcohol or drugs would be a product of the regulations. Justice Stevens contended that the argument of deterring employees from drug use was neither necessary nor sufficient to justify the regulations. He stated, "[I]f the risk of serious personal injury does not deter [employees'] use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior."¹⁰⁹

C. DISSENTING OPINION

Justice Marshall¹¹⁰ dissented from the majority's opinion on the ground that the majority manipulated its legal reasoning in order to respond to the public policy of declaring war on drugs.¹¹¹ According to the dissent, just as past cases of "urgency" have resulted in decisions that pose a threat to the liberties of United States citizens, so this case sacrifices constitutional freedoms.¹¹² More specifically, Justice Marshall argued that the majority erred in using a "special

¹⁰⁷ *Id.* at 1421.

¹⁰⁸ *Id.* at 1421-22.

¹⁰⁹ *Id.* at 1422 (Stevens, J., concurring).

¹¹⁰ Justice Brennan joined Justice Marshall's dissent.

¹¹¹ *Skinner*, 109 S. Ct. at 1422 (Marshall, J., dissenting).

¹¹² *Id.* (Marshall, J., dissenting) (citing *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (holding as constitutional a statute which forbade advocating the overthrow of the United States Government by force or violence because the "conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger'"); *Korematsu v. United States*, 323 U.S. 214, 217 (1944) (holding as constitutional that a Civil Exclusion Order directing the exclusion from a described West Coast military area of all persons of Japanese ancestry because "the successful prosecution of the war requires every possible protection against espionage and against sabotage."); *Hirabayashi v. United States*, 320 U.S. 81, 95 (1943) (holding an Executive Order requiring persons of Japanese ancestry to observe a curfew constitutional because the curfew was applied as "a protective measure necessary to meet the threat of sabotage and espionage"); *Schenck v. United States*, 249 U.S. 47, 48 (1919) (affirming a conviction of defendants for distributing a leaflet encouraging men to oppose the draft as not violative of the Constitution because the leaflet was used in such a circumstance—the United States was at war with the German Empire—as to "create a clear and present danger that they [the leaflets] will bring about substantive evils which Congress has a right to prevent").

needs" balancing of interests test. Justice Marshall explained that, based on the text and doctrinal history of the fourth amendment, the majority's comparison of the employees' privacy interests versus the government's interest in safety was inappropriate.¹¹³ The dissent reasoned further that even if the balancing test were appropriate, the majority erred in its application of the test by "trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws in, the FRA's testing program."¹¹⁴

1. *The Majority's Dismissal of the Probable Cause Requirement Ignored Precedent*

Justice Marshall argued that the probable cause requirement in the fourth amendment should not be dismissed as "impracticable" by the majority's finding of a "special need" beyond the normal need for law enforcement.¹¹⁵ The dissent referred to an unbroken line of cases that upheld the probable cause requirement for a full-scale search whether or not the search was conducted with a warrant or as one of the recognized exceptions to the warrant requirement.¹¹⁶ Furthermore, Justice Marshall noted that the probable cause requirement has only been relaxed in those cases where the government action was not a full-scale search, and even in those cases individualized suspicion was still required.¹¹⁷ In the few cases where individualized suspicion was not required, explained Justice Marshall, the searches involved "routinized, fleeting, and nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person."¹¹⁸

Justice Marshall noted that the Court has only recently devised the "special needs" test which makes the requirement of probable cause "impracticable" when there exists a "special need" beyond the normal need for law enforcement.¹¹⁹ The dissent noted that,

¹¹³ *Skinner*, 109 S. Ct. at 1423 (Marshall, J., dissenting).

¹¹⁴ *Id.* (Marshall, J., dissenting).

¹¹⁵ *Id.* (Marshall, J., dissenting).

¹¹⁶ *Id.* at 1424 (Marshall, J., dissenting) (citing *New Jersey v. T.L.O.*, 469 U.S. 325 358-59, n.3 (1985); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970), *reh'g denied*, 400 U.S. 856 (1970)).

¹¹⁷ *Id.* at 1424 (Marshall, J., dissenting).

¹¹⁸ *Id.* at 1424 (Marshall, J., dissenting) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (brief interrogative stop at permanent border checkpoint to ascertain motorist's residence status); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (routine annual inspection by city housing department)).

¹¹⁹ 109 S. Ct. at 1423 (Marshall, J., dissenting). The cases prior to *Skinner* where the Court has used the special needs test include the following: *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of a probationer's home without a warrant or probable cause was reasonable); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (search of a government

“tellingly,” whenever the Court has used the “special needs” test instead of the literal requirements of the fourth amendment, the Court has deemed the contested search reasonable under the fourth amendment.¹²⁰ Justice Marshall has dissented in all of these “special needs” cases, as they have resulted in doing away with a standard found in the text of the fourth amendment (probable cause) for one that is easily manipulable by the Court.¹²¹ The dissent attacked the majority’s reliance on *New Jersey v. T.L.O.*,¹²² *O’Connor v. Ortega*,¹²³ and *Griffin v. Wisconsin*¹²⁴ as calling for the extension of the “special needs” test to the case at hand, because those cases all involved some degree of individualized suspicion.¹²⁵ Justice Marshall asserted that the *Skinner* majority has eviscerated the probable cause requirement of the fourth amendment by authorizing “searches of the human body unsupported by any evidence of wrongdoing.”¹²⁶ Justice Marshall warned that the majority’s holding endangers “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”¹²⁷

2. *The Dissent’s Fourth Amendment Analysis*

Justice Marshall believed the proper analysis—and the traditional method until the recent “special needs” cases—of whether the regulations violate the fourth amendment should consider the following four-pronged criteria. First, the Court should determine

employee’s office without a warrant or probable cause was reasonable); and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of a student’s purse without a warrant or probable cause was reasonable).

¹²⁰ *Skinner*, 109 S. Ct. at 1424-25 & n.3 (Marshall, J., dissenting). Justice Marshall quoted *Griffin v. Wisconsin*, 483 U.S. 868, 878 (1987) (“special needs” equal “the need to preserve ‘the deterrent effect of the supervisory arrangement’ of probation”); *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987) (“special needs” equal “‘the efficient and proper operation of the workplace’”); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (“special needs” equal “‘the substantial need of teachers and administrators for freedom to maintain order in the schools’”).

¹²¹ *Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting).

¹²² 469 U.S. 325 (1985).

¹²³ 480 U.S. 709 (1987).

¹²⁴ 483 U.S. 868 (1987).

¹²⁵ *Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting) (citing *T.L.O.*, 469 U.S. at 346 (teacher’s report that student had been smoking provided reasonable suspicion that purse contained cigarettes); *O’Connor*, 480 U.S. at 726 (charges of specific financial improprieties gave employer individualized suspicion of misconduct by employee); *Griffin*, 483 U.S. at 879-80 (tip to police officer that probationer was storing guns in his apartment provided reasonable suspicion)).

¹²⁶ *Id.* at 1425 (Marshall, J., dissenting).

¹²⁷ *Id.* at 1426 (Marshall, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled on other grounds*, *Katz v. United States*, 389 U.S. 347, 352 (1967)).

whether a search has taken place. Second, the Court should determine whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement. Third, the Court should ask whether the search was based on probable cause or on a lesser suspicion because the search was minimally intrusive. Fourth, the Court should determine whether the search was conducted in a reasonable manner.¹²⁸ If the Court finds that all four criteria are answered in the positive, only then may the Court deem the search reasonable under the fourth amendment.

As to the first prong of the criteria, the dissent agreed with the majority's position that the FRA testing program entails a search of the covered employees.¹²⁹ However, any agreement between the two opinions ended there as Justice Marshall applied the remaining prongs of his fourth amendment analysis. Justice Marshall found that as to the second prong—the warrant requirement—the “exigent circumstances” exception may apply to the present case due to destruction of evidence while a warrant is being obtained.¹³⁰ Nonetheless, stated Justice Marshall, the railroads should be required to obtain a warrant before the blood and urine samples are *tested* as the samples can be properly preserved to prevent the destruction of evidence.¹³¹

Justice Marshall found that the FRA regulations also failed to comply with the third prong requiring a showing of probable cause. This failure, Justice Marshall reasoned, accounts for the majority's resort to the “special needs” test.¹³² The dissent explained that the FRA's highly intrusive collection and testing procedures constitute a full-scale personal search which requires a showing of probable cause.¹³³ Justice Marshall adamantly argued throughout his opinion that the FRA testing procedures are extremely intrusive.¹³⁴

Just as the majority relied on *Schmerber*¹³⁵ to explain that collecting a blood sample is a minimal intrusion on an employee's privacy, Justice Marshall also relied on *Schmerber* to show that such intrusion is not justified without a finding of individualized suspicion. Quoting from that case, Justice Marshall wrote:

“The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that de-

¹²⁸ *Skinner*, 109 S. Ct. at 1426 (Marshall, J., dissenting).

¹²⁹ *Id.* (Marshall, J., dissenting).

¹³⁰ *Id.* (Marshall, J., dissenting).

¹³¹ *Id.* (Marshall, J., dissenting).

¹³² *Id.* at 1427 (Marshall, J., dissenting).

¹³³ *Id.* (Marshall, J., dissenting).

¹³⁴ *Id.* (Marshall, J., dissenting).

¹³⁵ *Schmerber*, 384 U.S. at 757 (see *supra* note 74 for majority's use of *Schmerber*).

sired 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.”¹³⁶

Justice Marshall found that the urine tests under the FRA regulations were an even greater intrusion into an individual's expectation of privacy. Justice Marshall stated that “[u]rination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion.”¹³⁷ The dissent pointed out that although the regulations do not “require” direct observation, they do emphasize that “observation is the most effective means” of ensuring the integrity of the sample.¹³⁸ Furthermore, continued Justice Marshall, the FRA Field Manual instructs supervisors that the covered employees must provide urine samples “under direct observation by the physician/technician.”¹³⁹ Justice Marshall stated that it was naive for the majority to suggest that “officials monitoring urination will disregard the clear commands of the Field Manual.”¹⁴⁰

As a final argument that the urine tests are intrusive, the dissent examined the majority's own words when they were determining that the urine test is a search.¹⁴¹ Justice Marshall criticized the majority for describing the sacredness of passing urine in order to rule that there had been a search under the fourth amendment without considering these same reasons when determining whether the search intrudes on an individual's privacy expectations.¹⁴² This discontinuity, reasoned Justice Marshall, reemphasizes the “shameless manipulability of [the majority's] balancing approach.”¹⁴³

The dissent continued its analysis of the third prong question of whether or not the search was minimally intrusive by finding that the testing of the samples itself implicates strong privacy concerns. Justice Marshall explained that technology enables the state to discover not only what drugs the employee has been consuming but also whether an employee is pregnant, has epilepsy, clinical depres-

¹³⁶ *Skinner*, 109 S. Ct. at 1427 (Marshall, J., dissenting) (quoting *Schmerber*, 384 U.S. at 769-70.).

¹³⁷ *Skinner*, 109 S. Ct. at 1428 (Marshall, J., dissenting).

¹³⁸ *Id.* at 1428 & n.8 (Marshall, J., dissenting).

¹³⁹ *Id.* at 1428 n.8 (Marshall, J., dissenting) (citing FEDERAL RAILROAD ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, FIELD MANUAL: CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATIONS D-5 (1986) [hereinafter FIELD MANUAL]).

¹⁴⁰ *Skinner*, 109 S. Ct. at 1428 n.8 (Marshall, J., dissenting).

¹⁴¹ *Id.* at 1429 (Marshall, J., dissenting).

¹⁴² *Id.* (Marshall, J., dissenting).

¹⁴³ *Id.* (Marshall, J., dissenting).

sion, and a number of other medical disorders.¹⁴⁴ Also, noted the dissent, the regulations require an employee to disclose what medications he or she has taken within the preceding thirty days.¹⁴⁵ Justice Marshall reasoned that both these factors add up to a large encroachment on the privacy of personal health secrets.¹⁴⁶

Next, the dissent rejected Justice Kennedy's assertion that an employee has relinquished his or her privacy concerns by participating in the railroad industry.¹⁴⁷ Justice Marshall observed that the Court's regulated industry decisions have never allowed (until this case) for the searches of persons without a showing of probable cause.¹⁴⁸ For emphasis, Justice Marshall cited the Court's position in *O'Connor* that "individuals do not lose Fourth Amendment rights at the workplace gate."¹⁴⁹

In addition, the dissent argued with Justice Kennedy's suggestion that workers concede their right to privacy in their bodies by undergoing periodic physical examinations.¹⁵⁰ Justice Marshall reasoned that the fact that railroad workers must sometimes undergo tests of eyesight, hearing, skill, intelligence, and agility does not indicate their consent to undergo the extraction of their blood, the supervision of their excretion, or the testing of these bodily fluids for the "physiological and psychological secrets they may contain."¹⁵¹ Justice Marshall likened this presumption to a finding that employees who release basic information about their financial and personal history in order for an employer to make a determination about their "ethical fitness" also consent to allowing the government to examine their personal letters, diaries, and bankbooks.¹⁵²

Justice Marshall concluded that, due to the intrusiveness of the FRA regulations, the drug testing program amounts to a full-scale search justified only by a showing of probable cause. Thus, the

¹⁴⁴ *Id.* (Marshall, J., dissenting).

¹⁴⁵ *Id.* (Marshall, J., dissenting).

¹⁴⁶ *Id.* (Marshall, J., dissenting).

¹⁴⁷ *Id.* (Marshall, J., dissenting).

¹⁴⁸ *Id.* (Marshall, J., dissenting). Instead, the regulated industry cases have only permitted searches of an employer's property. *New York v. Burger*, 482 U.S. 691, 700 (1987); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978).

¹⁴⁹ *Skinner*, 109 S. Ct. at 1430 (Marshall, J., dissenting) (citing *O'Connor v. Ortega*, 480 U.S. 709, 716-18 (1987) ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.")).

¹⁵⁰ *Skinner*, 109 S. Ct. at 1430 (Marshall, J., dissenting).

¹⁵¹ *Id.* (Marshall, J., dissenting). Justice Marshall confined his discussion to the collection and testing of blood and urine samples although he noted that breath tests are also subject to constitutional safeguards. *Skinner*, 109 S. Ct. at 1426 n.6 (Marshall, J., dissenting).

¹⁵² *Skinner*, 109 S. Ct. at 1430 (Marshall, J., dissenting).

third prong of the fourth amendment criteria was not satisfied.¹⁵³ Justice Marshall acknowledged that imposing the fourth amendment's probable cause requirement on the FRA regulations may hinder the government's laudable purpose of trying to make rail transit as safe as humanly possible.¹⁵⁴ However, Justice Marshall defended his position by noting that "constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well-intentioned, must always be pursued within constitutional boundaries."¹⁵⁵

3. *The Employee's Privacy Concerns Outweigh the Government's Interest in Drug Testing*

Even though Justice Marshall believed the FRA regulations are unconstitutional without a showing of probable cause, he temporarily adopted the majority's "multifactor balancing test" to show that even under this test he still finds the FRA drug testing program unconstitutional.¹⁵⁶ As Justice Marshall had explained previously in his opinion, the suspicionless testing of railroad employees constitutes an intrusion on privacy that is far from minimal.¹⁵⁷ Further, he argued, the cost of this invasion on personal liberty is not outweighed by any benefit of such testing.¹⁵⁸

Justice Marshall found that "several aspects of the FRA's testing program exacerbate the intrusiveness of these procedures."¹⁵⁹ According to the dissent, the primary indication of the excessiveness of the drug testing program was the fact that the regulations do not prohibit, and actually provide for, turning over test results to prosecutors.¹⁶⁰ Additionally, as the dissent notes, the FRA testing program is needlessly intrusive by requiring the mandatory collection of urine samples when, as the agency has conceded, urine tests, un-

¹⁵³ *Id.* at 1429 (Marshall, J., dissenting). Justice Marshall did not specifically address the fourth prong question of whether the search was conducted in a reasonable manner. Given his third prong analysis and conclusion that the drug testing program is highly intrusive, it is very likely that Justice Marshall would conclude that the FRA regulations also fail the fourth prong of his analysis.

¹⁵⁴ *Id.* at 1430 (Marshall, J., dissenting).

¹⁵⁵ *Id.* (Marshall, J., dissenting).

¹⁵⁶ *Id.* (Marshall, J., dissenting).

¹⁵⁷ *Id.* at 1431 (Marshall, J., dissenting); *see supra* note 134 and accompanying text.

¹⁵⁸ *Skinner*, 109 S. Ct. at 1431 (Marshall, J., dissenting).

¹⁵⁹ *Id.* (Marshall, J., dissenting).

¹⁶⁰ *Id.* (Marshall, J., dissenting). The majority held that the possibility of criminal prosecution does not factor into the balancing test unless it is shown that the searches which turned up the evidence were simply a "pretext" for obtaining the evidence. *Skinner*, 109 S. Ct. at 1415 n.5. *But see* *National Treasury Employees' Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989) (Customs Service drug-testing program prohibits use of test results in criminal prosecutions).

like blood tests, do not measure current impairment.¹⁶¹ Thus, Justice Marshall asserted that the majority trivialized the impact the regulations would have on a worker's privacy while at the same time it endorsed the government's claim that the regulations will help to further the government's interests in deterrence and in determining the cause of an accident.¹⁶²

Justice Marshall agreed with Justice Stevens' logic in his concurring opinion that the regulations will not serve to deter employees from using alcohol and drugs.¹⁶³ Additionally, Justice Marshall noted, the record contained no empirical evidence to support the FRA's deterrence claim.¹⁶⁴ Thus, the dissent concluded that the only remaining governmental interest to support suspicionless testing—discerning the cause of an accident—is “a slender thread from which to hang such an intrusive program.”¹⁶⁵

Justice Marshall closed his opinion by quoting Justice Oliver Wendell Holmes in his first dissenting opinion as a Member of the Court: “‘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 judgement.’”¹⁶⁶ Justice Marshall reiterated his accusation that the majority has succumbed to the popular interest of the day, namely drug prohibition, while sacrificing the “time-honored and textually-based principles of the Fourth Amendment.”¹⁶⁷ The majority's decision, warned Justice Marshall, will “reduce the privacy all citizens may enjoy.”¹⁶⁸

IV. DISCUSSION AND ANALYSIS

The majority's opinion in *Skinner* constitutes an unprecedented erosion of protection under the fourth amendment. The majority has found for the first time that a suspicionless search of arguably the most private aspect in a citizen's life, the body, is “reasonable” and not violative of the fourth amendment. Justice Kennedy's fourth amendment analysis used broad, ill-defined tests to conclude

¹⁶¹ *Skinner*, 109 S. Ct. at 1431 (Marshall, J., dissenting).

¹⁶² *Id.* at 1432 (Marshall, J., dissenting).

¹⁶³ *Id.* (Marshall, J., dissenting). See *supra* note 109 and accompanying text for a summary of the concurrence.

¹⁶⁴ *Id.* (Marshall, J., dissenting).

¹⁶⁵ *Id.* (Marshall, J., dissenting).

¹⁶⁶ *Id.* at 1433 (Marshall, J., dissenting) (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting.)).

¹⁶⁷ *Id.* at 1433 (Marshall, J., dissenting).

¹⁶⁸ *Id.* (Marshall, J., dissenting).

that neither a warrant, probable cause, nor individualized suspicion are necessary for a reasonable search. Further harm to the fourth amendment was caused by the majority's broad approval of the sweeping and intrusive FRA regulations. This erosion of our fourth amendment rights clears the way for further, inevitable extensions of drug testing of United States citizens under the guise of the war on drugs.¹⁶⁹

A. THE MAJORITY'S USE OF THE "SPECIAL NEEDS BALANCING TEST" IS INAPPROPRIATE

Justice Marshall's primary criticism of the Court's opinion is the majority's use of, what this Note terms, the "special needs balancing test."¹⁷⁰ Justice Marshall urged that the proper analysis of the fourth amendment should be based on the text of the fourth amendment.¹⁷¹ Instead, Justice Marshall asserted, the majority continued a trend begun in *T.L.O.*¹⁷² of recognizing a "special needs" exception to the fourth amendment precedent that "probable cause" is a prerequisite to a full-scale search.¹⁷³ According to Justice Kennedy's opinion in *Skinner*, the "special needs balancing test" works as outlined below.

The majority argued in *Skinner* that the government has a "special need" beyond the normal need for law enforcement" when it comes to regulating the conduct of railroad employees—to ensure safety.¹⁷⁴ According to the majority, when a "special need" exists, the Court should apply a balancing test to determine if the warrant and probable cause requirements of the fourth amendment are "impracticable" standards of reasonableness.¹⁷⁵ Therefore, the *Skinner* majority applied the balancing test, weighing the government's interest in ensuring safety on the railroads against the employee's in-

¹⁶⁹ Even as the Court was handing down this decision, it was extending suspicionless drug testing to Customs Service agents in *National Treasury Employees' Union v. Von Raab*, 109 S. Ct. 1384 (1989). Contrary to *Skinner*, in *Von Raab* there had been no evidence of drug abuse in the Customs Service department. *Id.* at 1398 (Scalia, J., dissenting).

¹⁷⁰ See *supra* notes 115-127 and accompanying text for a summary of Justice Marshall's criticism of the "special needs balancing test."

¹⁷¹ *Skinner*, 109 S. Ct. at 1423 (Marshall, J., dissenting). Justice Marshall wrote, "Without the content which those provisions [warrant and probable cause] give to the Fourth Amendment's overarching command that searches and seizures be 'reasonable,' the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term." *Id.* (Marshall, J., dissenting).

¹⁷² 469 U.S. 325 (1985).

¹⁷³ *Skinner*, 109 S. Ct. at 1424 (Marshall, J., dissenting).

¹⁷⁴ *Id.* at 1414.

¹⁷⁵ *Id.*

terest in privacy, and found that neither a warrant, probable cause, nor individualized suspicion were necessary requirements for a reasonable search.¹⁷⁶ Hence, the FRA drug testing program was deemed a reasonable search.¹⁷⁷

This Note finds two flaws with the majority's analysis in addition to Justice Marshall's overriding complaint that the analysis ignores the literal requirements of the fourth amendment. First, the prerequisite that the Court find "special needs" before they can apply the balancing test is a gratuitous step in the majority's analysis: 1) the Court has given no guidance as to when "special needs beyond the normal need for law enforcement" will be found; and 2) it appears from prior "special needs" cases that "special needs" are actually just another way of stating the governmental interest side of the balancing test. Second, once the majority applied the balancing of interests test to determine that the warrant and probable cause requirements are "impracticable" standards of reasonableness, the opinion did not provide a substitute standard of reasonableness as prior "special needs" cases would suggest.

1. *The "Special Needs" Test Is a Subjective, Unnecessary Step in the Court's Analysis*

The *Skinner* majority cited five cases to support its finding that the government had a "special need beyond the normal need for law enforcement."¹⁷⁸ The Court first articulated its "special needs" prerequisite to applying the balancing test in Justice Blackmun's concurring opinion in *T.L.O.*¹⁷⁹ Justice Blackmun wrote, "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."¹⁸⁰ In *T.L.O.*, the "special need" was the need for school officials to have flexibility in maintaining order in the school.¹⁸¹

According to Justice Marshall, since *T.L.O.* the Court has found "special needs beyond the normal need for law enforcement" when

¹⁷⁶ *Id.* at 1414, 1421.

¹⁷⁷ *Id.* at 1422.

¹⁷⁸ *Id.* at 1414. See *supra* note 57 and accompanying text for the majority's "special needs" analysis.

¹⁷⁹ 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). In *T.L.O.*, the Court held that a school official's search of a student's purse was reasonable because he had reasonable grounds for suspecting that the search would turn up evidence and because the scope of the search was not excessively intrusive. *Id.* at 344-47.

¹⁸⁰ *Id.* at 351 (Blackmun, J., concurring).

¹⁸¹ *Id.* at 353; see *supra* note 120.

1) the government had an interest in ensuring the efficient and proper operation of the workplace,¹⁸² and 2) the government had an interest in ensuring that probation restrictions are observed.¹⁸³ In its “special needs” analysis the majority cited to the above cases as well as to two cases where “special needs” equaled the following: 1) the need to supervise automobile junkyards as a regulated industry,¹⁸⁴ and 2) the need to preserve internal order and discipline in prisons.¹⁸⁵

As Justice Marshall observed, “special needs” have now been found in a “patchwork quilt of settings.”¹⁸⁶ Indeed, it is to the above wide variety of searches that the *Skinner* majority, in one sentence, analogizes the drug testing search by stating:

The Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, “likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.”¹⁸⁷

The only apparent analogy between these “special needs” cases is that in each case the Court’s finding of a “special need beyond the normal need for law enforcement” is synonymous with the Court’s finding of a substantial government interest in the search.¹⁸⁸ Ac-

¹⁸² *O’Connor v. Ortega*, 480 U.S. 709 (1987) (search of a government employee’s office while he was on an administrative leave pending the outcome of an investigation into charges of improprieties was a reasonable search).

¹⁸³ *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (warrantless search of a probationer’s home based only on information provided by an informant that probationer might have guns in his home was a reasonable search).

¹⁸⁴ *New York v. Burger*, 482 U.S. 691, 702 (1987). The *Burger* opinion never made a specific finding of “special needs.” Instead, the Court found that since the government interests outweigh the privacy interests a “special need” existed. The only mention of “special needs” in this case was in the following sentence: “[W]e conclude that, as in other situations of ‘special need,’ see *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (opinion concurring in judgment), where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable.” *Id.*

¹⁸⁵ *Bell v. Wolfish*, 441 U.S. 520, 544-48 (1979). Again, the Court made no finding of “special needs” per se. The Court found that body-cavity searches of prison inmates after contact visits with persons outside the prison were constitutional as “[m]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.” *Id.* at 546.

¹⁸⁶ *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402, 1424 (1989) (Marshall, J., dissenting).

¹⁸⁷ *Id.* at 1414 (quoting *Griffin*, 483 U.S. at 873-74).

¹⁸⁸ See *supra* note 184 for an example of the Court directly equating “special needs” with the government’s interest in conducting the search.

cordingly, if the government has a substantial interest in conducting a search, then there exists a "special need beyond the normal need for law enforcement."¹⁸⁹

Indeed, as Justice Marshall noted in his dissent, the past "special needs" cases cited by the majority are clearly distinguishable from *Skinner* because in those cases the government's search was both aimed at a person's belongings and not at their body¹⁹⁰ and based on some degree of reasonable suspicion.¹⁹¹ These distinctions lead to the inference that the majority felt that the "special need" in *Skinner* was an even stronger "special need" than in the other cases and thus the majority was warranted in extending "special needs" analysis to a suspicionless search of the human body. However, the *Skinner* majority did not draw these distinctions. Instead, as Justice Marshall noted, "[W]ith nary a word of explanation or acknowledgment of the novelty of its approach, the majority extends the 'special needs' framework to a regulation involving compulsory blood withdrawal and urinary excretion, and chemical testing of the bodily fluids collected through these procedures."¹⁹²

Given the indeterminate criteria by which the Court determines that "special needs" exist, and the resultant broad range of searches where "special needs" have been found, Justice Blackmun's well-intentioned rule that "special needs" must be found before applying

¹⁸⁹ The reverse is also true: whenever a "special need" exists, the government has a strong interest in conducting the search. Cf. *National Treasury Employees' Union v. Von Raab*, 109 S. Ct. 1384 (1989). In *Von Raab*, the majority found that "the Customs Service's drug testing program is not designed to *serve the ordinary needs of law enforcement*" because, in part, the test results may not be turned over to prosecutors—a point where *Skinner* is clearly distinguishable. *Id.* at 1390 (emphasis added). The *Von Raab* majority wrote, "These *substantial interests* [detering drug use in the Customs Service department], no less than the *Government's concern* for safe rail transportation at issue in [*Skinner*], present a special need that may justify departure from the ordinary warrant and probable cause requirements." *Id.* at 1390-91 (emphasis added).

¹⁹⁰ An exception is the *visual* inspection of prisoner's body-cavities in *Bell v. Wolfish*, 441 U.S. 520 (1979). However, the second distinguishing feature—a reasonable suspicion that a search will turn up evidence—does exist in *Bell* as the search in question takes place after prisoners engage in contact visits with a person from outside the institution. *Id.* at 558.

¹⁹¹ *Skinner*, 109 S. Ct. at 1425 (1989) (Marshall, J., dissenting). See *supra* note 125 for examples of suspicion that gave rise to a search. Justice Marshall wrote:

Until today, it was conceivable that, when a Government search was aimed at a person and not simply the person's possessions, balancing analysis had no place. . . . And until today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. . . . In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process [of eliminating the probable cause requirement] begun in *T.L.O.*

Id. (Marshall, J., dissenting).

¹⁹² *Skinner*, 109 S. Ct. at 1425 (1989) (Marshall, J., dissenting).

the balancing test is an unnecessary, gratuitous step in the Court's analysis. Rather than confusing the analysis with a forced finding of "special needs," the Court may as well have proceeded directly to the multifarious balancing of interests test. However, once the majority did proceed to the balancing test, they misapplied this test as well.

2. *The Balancing of Interests Test Should Have Provided a Substitute Standard of Reasonableness*

The *Skinner* majority applied the balancing test to determine that the warrant, probable cause, and individualized suspicion standards of reasonableness are not necessary in order to have a reasonable search under the fourth amendment.¹⁹³ The majority did not replace these usual standards with another standard of reasonableness. Rather, it seemed to argue that since, based on the balancing of interests test, the lack of warrants, probable cause, and individualized suspicion did not make the search unreasonable, then the search must necessarily be reasonable. However, in prior cases of "special needs balancing analysis," the Court used the balancing test more as a threshold test to see if a warrant or probable cause is necessary in order to have a reasonable search. Once the Court determined that the warrant and probable cause requirements were "impracticable," the balancing of interests analysis has been used to help determine a new standard of reasonableness.

For example, the majority in *T.L.O.* only used the balancing of governmental interests versus privacy interests when they were determining the "threshold" question of whether they could do away with the warrant and probable cause requirement.¹⁹⁴ The majority did not use the balancing test in that case to determine whether or not a search was reasonable.¹⁹⁵ Instead, the majority used a standard of reasonableness that considered whether the search was both "justified at its inception" and, as conducted "reasonably related in scope to the circumstances which justified the interference in the first place."¹⁹⁶ The *Skinner* majority disregarded this standard,

¹⁹³ *Id.* at 1422.

¹⁹⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

¹⁹⁵ Justice Blackmun, in his concurring opinion in *T.L.O.*, used the balancing test to help determine what the new standard of reasonableness should be. Justice Blackmun wrote, "The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable cause requirement, and in applying a standard determined by balancing the relevant interests." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring) (emphasis added).

¹⁹⁶ *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). In *T.L.O.*, the Court

which required some suspicion prior to testing. The RLEA had asserted that the *T.L.O.* standard was the proper test to be used to determine the reasonableness of the drug testing.¹⁹⁷

Likewise, in *O'Connor*, the Court used the balancing of the government's interests in the search versus the privacy interests of the employee only when it held that the warrant and probable cause requirements of the fourth amendment do not apply.¹⁹⁸ The Court held that "public employer intrusions on the constitutionally protected privacy interests of government employees . . . should be judged by the standard of reasonableness under all the circumstances."¹⁹⁹ The Court then went on to enunciate the criteria found in *T.L.O.* as the standard of reasonableness by which the search in *O'Connor* was to be judged.²⁰⁰

Whether or not the *T.L.O.* criteria is the applicable test of reasonableness in *Skinner*, these previous Supreme Court cases imply that the balancing test is used to help determine a standard of reasonableness (when warrant and probable cause are no longer the standards), and not employed as the standard itself.²⁰¹ Despite this precedent, the *Skinner* majority has boiled the fourth amendment analysis down to the following: a search is reasonable if the government interests in the search outweigh the individual interests in the

found that the search was justified at its inception because the school official had reasonable grounds for suspecting his search of the student's purse would turn up evidence. *T.L.O.*, 469 U.S. at 344-47. The *T.L.O.* Court also found that the scope of the search was reasonably related to the reason for conducting the search because the search was not excessively intrusive. *Id.*

¹⁹⁷ Brief for the Respondents at 15-20, *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989) (No. 87-1555).

¹⁹⁸ *O'Connor v. Ortega*, 480 U.S. 709, 719-25 (1987).

¹⁹⁹ *Id.* at 725-26.

²⁰⁰ *Id.* at 726. See *supra* note 196 and accompanying text for *T.L.O.* standard of reasonableness.

²⁰¹ In *O'Connor v. Ortega*, Justice Blackmun described his understanding of how the balancing analysis should proceed:

Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practical alternative. Through the balancing test, they then try to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances. The warrant and probable-cause requirements, however, continue to serve as a model in the formulation of the new standard. It is conceivable, moreover, that a court, having initially decided that it is faced with a situation of "special need" that calls for balancing, may conclude after application of the balancing test that the traditional standard is a suitable one for the context after all.

O'Connor v. Ortega, 480 U.S. 709, 744 n.8 (1987) (Blackmun, J., dissenting).

Despite Justice Blackmun's above reasoning, one must consider whether a replacement standard of reasonableness (as defined by a balancing of interests analysis) will be any less manipulable than the balancing test itself. Just as the "special needs" finding is an unnecessary step in the Court's analysis as explained *supra*, perhaps developing another reasonableness standard would likewise be surplusage.

right to be free from the search.²⁰²

B. THE *SKINNER* MAJORITY DID NOT GIVE THE PROPER WEIGHT TO THE PRIVACY SIDE OF THE BALANCING TEST

The *Skinner* majority's opinion, which adopted the broad, manipulable "special needs balancing test," continued to be unnecessarily broad as it unequivocally approved the highly intrusive FRA drug testing program.²⁰³ Although the most excessive aspect of the whole drug testing program is testing without any degree of suspicion, the Court could at least have conditioned its approval of the FRA program upon a modification of the following three aspects of the regulations which are particularly intrusive: 1) requiring both blood and urine tests²⁰⁴ when blood tests suffice to show current impairment; 2) allowing for direct observation of collection of the urine sample;²⁰⁵ and 3) handing over positive test results to prosecutors.²⁰⁶

First, the FRA regulations are unnecessarily intrusive as they require the taking of both blood and urine samples despite the FRA's concession that only the blood tests measure current impairment.²⁰⁷ The majority found that urine tests, which show off-duty impairment, are still valuable because "this information [that employees used drugs during their off-duty hours] provide[s] the basis for further investigative work designed to determine whether the employee used drugs at the relevant times."²⁰⁸ If the employee has

²⁰² In Justice Brennan's partial concurrence and dissent in *T.L.O.* (with whom Justice Marshall joined), he noted that the "government's side" of the balancing test is really a misnomer because "[t]he government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law." *New Jersey v. T.L.O.*, 469 U.S. 325, 362 n.5 (1985) (Brennan, J., concurring in part and dissenting in part). Thus, the balance of interests should not be "between the rights of the government and the rights of the citizen, but between opposing conceptions of the constitutionally legitimate means of carrying out the government's varied responsibilities." *Id.*

²⁰³ As Justice Marshall summarized, the majority erred in its application of the balancing test by "trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws in, the FRA's testing program." *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1423 (1989) (Marshall, J., dissenting).

²⁰⁴ 49 C.F.R. § 219.203(a) (1988).

²⁰⁵ FIELD MANUAL, *supra* note 139, at D-2, D-5.

²⁰⁶ 49 C.F.R. § 219.211(d) (1988). See *supra* note 35 for text of regulation.

²⁰⁷ *Skinner*, 109 S. Ct. at 1431 (Marshall, J., dissenting); 49 C.F.R. § 219.309(b)(2) (1988) (The statute requires railroads to issue a presumption of impairment notice warning employees that urine tests may reveal the use of certain drugs within the recent past and in rare cases up to 60 days before the sample is collected. "As a general matter, the [urine] test cannot distinguish between recent use off the job and current impairment.").

²⁰⁸ *Skinner*, 109 S. Ct. at 1421.

submitted both a blood and urine sample, as the regulations require, and the blood test is negative while the urine test is positive, then that indicates that the employee was very likely not impaired "at the relevant time." Yet the majority would allow an investigation into the employee's past activities.²⁰⁹ Such an investigation only serves to further the intrusive "big brother" aspect of the FRA program.²¹⁰ Given that the blood tests are, arguably, less intrusive than urine tests,²¹¹ and given that they more closely achieve the railroads' objective of deterring on-duty use of alcohol or drugs, the majority could have conditioned its approval of the FRA drug testing program on an elimination of urine testing without taking away from the program's objectives.²¹²

Second, not only are the mandatory urine tests a needless intrusion, but, as the dissent noted, the majority in all practicality allows for the direct observation of urination.²¹³ The majority found that

²⁰⁹ *Id.* The majority cited the FRA Field Manual which stated, "[T]he presence of drugs in the urine may provide the basis for investigative leads that may establish drug use contemporaneous with the accident." FIELD MANUAL, *supra* note 139 at B-4. Neither the Court nor the FRA attempts to define how this investigation will take place or what limits, if any, will be placed on the investigation.

²¹⁰ One district court judge faced with a drug testing case wrote:

Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" Society come to life. . . .

. . . . We do not permit a search of every house on the block merely because there is reason to believe that *one* contains evidence of criminal activity. No prohibition more significantly distinguishes our democracy from a totalitarian government than that which bars warrantless searches and seizures.

Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (1986) (mass urine testing of firefighters unconstitutional).

²¹¹ The majority found that blood tests are not a significant intrusion because such "tests are commonplace in these days of periodic physical examinations and . . . the quantity of blood extracted is minimal, and . . . for most people the procedure involves virtually no risk, trauma, or pain." *Skinner*, 109 S. Ct. at 1417 (citing *Schmerber v. California*, 384 U.S. 757, 771 (1966)). The majority also found that urine tests "raise concerns not implicated by blood or breath tests." *Skinner*, 109 S. Ct. at 1418.

²¹² Justice Marshall found that "[a]t the very least, the FRA could limit its use of urinalysis to confirming findings of current impairment suggested by a person's blood tests." This approach would still require employees to provide urine samples, but it would disallow the possibility for abusive investigations as provided in the Field Manual. *Skinner*, 109 S. Ct. at 1432 (Marshall, J., dissenting).

²¹³ See *supra* notes 138-140 and accompanying text. The regulations themselves provide that the FRA program is a "minimum Federal safety standard[] for [the] control of alcohol and drugs use" and that the railroads are not restricted from enforcing additional or more stringent requirements not inconsistent with the program. 49 C.F.R. § 219.1(b) (1988). A railroad's requirement of direct observation is not inconsistent with the FRA drug testing program. In the absence of strong dicta from the Court forbidding direct observation, there is nothing to suggest that the individual railroads will not refrain from requiring direct observation.

the regulations tried to be minimally intrusive by not requiring direct observation.²¹⁴ Yet, in the same sentence the majority endorsed the “desirability” of direct observation.²¹⁵ This “wish” of the majority that direct observation be used to insure the integrity of the urine sample is particularly unnecessary given their familiarity in *Von Raab* with alternative methods of monitoring the urine sample.²¹⁶ The Court’s approval of direct observation of collection of urine samples is even more egregious when one considers the unlikely possibility both that employees are carrying substitute samples of urine with them on the unpredictable day of an accident/incident and that employees would be able to produce and substitute the false sample, especially given that the employee may just have experienced the trauma of a major train accident. Thus, the Court’s encouragement of direct observation results in an increase of costs on the privacy side of the balancing test, which the Court ignores.

Lastly, the dissent found that the most striking example of the excessiveness and intrusiveness of the FRA regulations was the allowance for positive test results to be turned over to criminal prosecutors.²¹⁷ The majority accepted the FRA’s explanation that this section of the regulations is primarily for the agency’s purposes—

²¹⁴ *Skinner*, 109 S. Ct. at 1418.

²¹⁵ *Id.*

²¹⁶ The Court summarizes the urine collection procedures in *Von Raab* as follows:

On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

National Treasury Employees’ Union v. *Von Raab*, 109 S. Ct. 1384, 1388 (1989).

The procedures in *Von Raab* also provided another example of reducing the intrusiveness of the drug testing program. In *Von Raab*, the parties stipulated that the Customs Service’s drug testing program would conform to recently enacted legislation that governs certain federal employee drug testing programs. *Von Raab*, 109 S. Ct. at 1388 n.1. The new law required the Secretary of Health and Human Services to promulgate regulations to govern federal drug testing programs. Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 503, 101 Stat. 391, 468-71. The final regulations require employees to fill out a medical disclosure form *only* if the employee is notified that his or her sample tested positive. 53 Fed. Reg. 11,979, 11,985-86 (1988). Although the *Skinner* majority is aware of this simple reduction in the intrusiveness of the drug testing procedures, the majority simply discounted (without taking notice of *Von Raab* or the new regulations) the intrusiveness of the FRA requirement that employees disclose what medications they have taken during the 30 days preceding testing. *Skinner*, 109 S. Ct. at 1418 n.7. See *supra* note 81 for the *Skinner* majority’s reasoning.

²¹⁷ *Skinner*, 109 S. Ct. at 1431 (Marshall, J., dissenting). See *supra* note 35 for text of the relevant regulation.

for example, to reanalyze a sample.²¹⁸ The majority found that the section is not a “ ‘pretext’ to enable law enforcement authorities to gather evidence of penal law violations.”²¹⁹ The majority preferred to address the question of the constitutionality of the provision that the positive test samples may be turned over to prosecutors only after there has been a “routine use in criminal prosecutions of evidence obtained pursuant to [this regulation].”²²⁰ Unfortunately, the majority’s desire to wait for a persuasive showing that the blood, breath and urine samples have been used in criminal proceedings leaves open the “possibility of criminal prosecutions based on suspicionless searches of the human body.”²²¹ As the RLEA points out, the decision allowing suspicionless blood and urine testing of railroad workers gives criminals greater protection under the fourth amendment than that provided to law abiding citizens.²²²

Justice Marshall wrote that “if the prospects of prosecutions would lead the majority to reassess the validity of the testing program with prosecutions as part of the balance,” then the majority should say so. Justice Marshall contended that the majority in the alternative, should “condition its approval of that program on the nonrelease of test results to prosecutors.”²²³ Allowing this highly intrusive aspect of the regulations to stand unchanged once again demonstrates the majority’s willingness to approve drug testing no matter what the cost is to an individual’s constitutional protections.²²⁴ Given the above examples of excessiveness of the FRA’s testing program, it is hard to fathom how Justice Kennedy could suggest that “[b]y and large, intrusions on privacy under the FRA regulations are limited.”²²⁵ It is clear that the majority failed to give the proper weight to the employees’ privacy side of the balancing

²¹⁸ *Skinner*, 109 S. Ct. at 1415 n.5.

²¹⁹ *Id.* (citing *New York v. Burger*, 482 U.S. 691, 716-17 n.27 (1987)).

²²⁰ *Id.*

²²¹ *Id.* at 1431 (Marshall, J., dissenting).

²²² Brief for the Respondents at 35, *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402 (1989) (No. 87-1555).

²²³ *Skinner*, 109 S. Ct. at 1431 (Marshall, J., dissenting).

²²⁴ The regulations in *Von Raab* prohibit the use of test results in criminal prosecutions. *National Treasury Employees’ Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989). However, *Von Raab* is distinguishable from the current case because in *Skinner* a positive test result could mean that an employee was operating a train while under the influence of alcohol or drugs, which is analogous to drunk driving. In contrast, in *Von Raab* the determination of whether the customs agent was under the influence of drugs while on-duty is not as crucial of a question. Thus, in *Von Raab* the chance of someone pressing charges against a customs agent is very slight, while in *Skinner* the chance of liability is much higher.

²²⁵ *Skinner*, 109 S. Ct. at 1417.

test as the FRA regulations are extremely and unnecessarily intrusive.

IV. CONCLUSION

The *Skinner* decision adopted a fourth amendment analysis that is, in the words of the dissent, "unprincipled and dangerous."²²⁶ The analysis is unprincipled because the majority ignored precedent as well as the literal requirements of the fourth amendment and instead based its decision on the manipulable "special needs balancing test." The Court's analysis is dangerous because it allowed the majority to justify its position that suspicionless searches of the human body are constitutional just as easily as it allowed the dissent to justify its position that the searches are unconstitutional.

The *Skinner* majority used the "special needs balancing test," not only to hold that the warrant and probable cause requirements of the fourth amendment are "impracticable," but also, for the first time, to hold that no suspicion at all is needed in order to have a reasonable search. In addition, the majority used the balancing of interests test to proceed directly to the conclusion that the drug testing search in *Skinner* is reasonable. This unprecedented holding fulfilled Justice Marshall's prophecy, found in his first dissent against the use of the "special needs balancing test," that use of the balancing test portends "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens."²²⁷

Thus, the Court's holding that mass suspicionless drug testing of railroad employees is a reasonable search combined with its unquestioning acceptance of the FRA regulations sets a dangerous precedent. The holding in *Skinner* clears the way for extensions of suspicionless drug testing programs to all segments of society²²⁸ as well as extensions of the intrusiveness of drug testing programs themselves.²²⁹ The majority's eagerness to approve the drug testing program in *Skinner* sets an ill-conceived precedent for the many drug

²²⁶ *Id.* at 1426 (Marshall, J., dissenting).

²²⁷ *Id.* at 1425 (Marshall, J., dissenting) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 357-58 (1985)).

²²⁸ Conceivably, suspicionless drug testing will be allowed in any area where the government can find a "special need beyond the normal need for law enforcement." See *supra* notes 170-192 and accompanying text for an analysis of when "special needs" may be found.

²²⁹ Indeed, even as *Skinner* was being considered by the Courts, the FRA promulgated and passed new regulations which allow for random drug testing of railroad employees. 49 C.F.R. §§ 219.601-.609 (list of CFR sections affected from October 3 through November 30, 1988) (adding Subpart G—Random Drug Testing Program).

testing cases that are already in the courts and the many cases that are likely to be brought into the courts.²³⁰ As Justice Marshall predicted:

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, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily.²³¹

Unfortunately, it appears as though Justice Marshall's prediction will once again be fulfilled.

HEIDI P. MALLORY

²³⁰ Executive Order No. 12,564, 51 Fed. Reg. at 32,889 (1986), requires the heads of all federal agencies to promulgate drug testing programs. The agency heads must test employees who hold "sensitive" positions. *Id.* at 32,890. The Executive Order's definition of "sensitive" is broad and it includes a very substantial portion of the federal work force, including professional and non-professional staff and secretarial and clerical positions. *Id.* at 32,892-93.

²³¹ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1433 (1989) (Marshall, J., dissenting).