An Evenhanded Approach to Diminishing Student Privacy Rights Under the Fourth Amendment: Vernonia School District v. Acton

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American hostility to suspicionless searches, as evident in the Fourth Amendment to the United States Constitution, \(^1\) dates back to the colonial period of American history. \(^2\) At that time, English law permitted various warrantless searches and seizures, administrative in nature, \(^3\) with-

\(^1\) U.S. Const. amend. IV. The Fourth Amendment states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

\(^2\) See Leonard W. Levy, *Original Intent and the Framers’ Constitution* 224-29 (1988) (describing the various suspicionless search methods that were used in England and colonial America which angered the citizens and catalyzed the colonists in their movement towards revolution). Specifically, Levy observes that the colonists often resorted to violent measures to prevent the enforcement of general searches and seizures. *Id.* at 228-29. Anarchic crowds frequently intercepted goods seized by enforcement officials. *Id.* at 228. In fact, in some of the colonies, these crowds effectively prevented the use of searches conducted pursuant to general warrants because of the tremendous danger of violent public opposition. *Id.* at 229; see also Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 80-82 (1970) (beginning in 1776 with the Virginia Bill of Rights, the colonial states began to adopt their own Declarations of Rights, providing “freedom from unreasonable search and seizure” and condemning the issuance of general warrants without probable cause).

\(^3\) Levy, *supra* note 2, at 224 (arguing that the King “depended on both the general warrant and warrantless searches as ordinary means of collecting royal revenues”); Telford Taylor, *Two Studies in Constitutional Interpretation* 26 (1969) (observing
out requiring a showing of suspicion. Today, with the growth of the modern administrative state, suspicionless, administrative searches are pervading American society once again. These searches—random drug testing, sobriety checkpoints, border searches, polygraph examinations, and metal detector screenings—while seeking to advance the public good, nevertheless, have extracted severe costs from individuals' wallets.

that one of the earliest search warrants issued was for unlawfully imported tobacco). Additionally, enforcement of duties and taxes often carried supplemental search power. Id. at 29.

4. See Levy, supra note 2, at 224 (listing the different types of warrantless searches and noting that in a sample of 108 warrants issued between 1700 and 1763, 106 of them were general warrants). The executive had authority to issue “writs of assistance” to customs agents, which broadly empowered them to search and seize any uncustomed goods. Id. at 227. These writs could be used without a showing of suspicion because they lacked particularity and “lasted for the life of the sovereign.” Id. For a description of an abusive search performed pursuant to a general warrant, see Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).

5. Charles Fried, Privacy, 77 YALE L.J. 475, 475-76 (1968) (contending that privacy intrusions have multiplied in modern society in part through the invasive aspects of modern electronic devices); Scott E. Sundby, “Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1758-60 (1994) (arguing that privacy rights “must contend with the changing nature of modern society” and noting that both governmental and nongovernmental intrusions on privacy continue to expand).


8. See United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding suspicionless searches that occur at fixed checkpoints near the border); see also infra note 50 (providing an extensive list of Supreme Court cases determining the constitutionality of border and border-related searches).


10. See, e.g., United States v. Vigil, 989 F.2d 337, 340 (9th Cir.) (holding that a metal detector test constitutes state action for purposes of the Fourth Amendment), cert. denied, 114 S. Ct. 205 (1993); United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (upholding airport search of a passenger’s carry-on bag after the bag set off a metal detector); United States v. Bell, 464 F.2d 667, 673 (2d Cir.) (rejecting the argument that a magnetometer search violated the Fourth Amendment), cert. denied, 409 U.S. 991 (1972); Donald L. Beci, School Violence: Protecting Our Children and the Fourth Amendment, 41 CATH. U. L. REV. 817, 830 (1994) (observing that, among other methods, schools are using metal detectors to enhance the policing of schools).
privacy interests in our society. In effect, an inherent conflict exists between the modern state, with its technological advancements, and the privacy interests of the individual. The resolution of this conflict has become one of balancing, attempting to embrace the individual's privacy interest, while simultaneously allowing the government to seek legitimate ends in furtherance of the public good.

In striking this balance, various factors may tilt the scale to one side or the other. For instance, in times of threat and crisis, the balance may tilt in favor of the government because of the perceived exigency facing the government in surmounting a crisis. Of course, by tilting this balance, the other side, the individual's privacy and other civil liberties, necessarily suffers. While in the past threats to national security have weakened individual rights, presently, drugs pose a similar threat. Consequently...

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11. See William J. Stuntz, Privacy's Problem and the Law of Criminal Procedure, 93 Mich. L. Rev. 1016, 1018-19 (1995) (citing regulatory searches as one area where the government is allowed to intrude into individual privacy interests); Sundby, supra note 5, at 1768 (observing that where a court finds a search reasonable, the intrusion of the search does not disappear, but rather becomes justifiable, and thus a part of everyday life).

12. Stuntz, supra note 11, at 1017 (noting that a natural conflict exists between privacy and the administrative state, because criminal law enforcement and government regulation need private information to perform their functions); see Fried, supra note 5, at 475 (noting that sophisticated scientific devices have intruded upon previously private areas); Sundby, supra note 5, at 1758-60 nn.27-32 (describing how technological advancements continue to infringe upon private information).

13. See Winston v. Lee, 470 U.S. 753, 759 (1985) (ruling that a reasonable search may require an “individual [to] give up some part of his interest in privacy and security to advance the community’s vital interests in law enforcement”); Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (concluding that both the private and public interests must be accommodated in the balancing test).

14. See Maclin, supra note 1, at 27-31 (1994) (arguing that government reaction to perceived threats, such as the “War on Drugs,” usually takes its toll on individual liberty).

15. See id.; infra note 197 and accompanying text (stating Justices O'Connor, Marshall, and Brandeis' beliefs that government crises result in contractions of individual liberties).

16. Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans during World War II); Hirabayashi v. United States, 320 U.S. 81, 105 (1943) (same). Subversive political groups within the country also have exacted costs on individual liberty. See Dennis v. United States, 341 U.S. 494, 516-17 (1951) (allowing limitations on an individual’s First Amendment rights because of the perceived threat involving the Communist Party’s presence in this country).

quently, individual liberty and privacy interests have suffered greatly at
the hands of the government during the "War on Drugs."

In *Vernonia School District v. Acton*, the toll that the "War on Drugs"
has extracted became unavoidably clear. In *Acton*, the United States
Supreme Court addressed the constitutionality of a school district’s ran-
dom drug testing program that mandated that all student athletes per-
form monitored urinalyses. The school district gave two reasons for
testing only athletes: their position as role models in the school and com-
community and their alleged role in the school's drug problem. The Court
ruled that the urinalysis minimally intruded upon student's privacy. Af-
after finding that student athletes have a diminished expectation of pri-
vacy, the Court ruled that the government had a compelling interest in
quelling the school district's drug problem and preventing any drug-in-
duced athletic injuries. Balancing these interests, the Court concluded
that the government’s interest outweighed the individual athlete’s, thus
justifying the suspicionless drug test as reasonable and therefore
constitutional.

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activity); see also 55 Fed. Reg. 29,882 (1990) (announcing the date of the Army Science
Board closed meeting to discuss using military technology to aid in the "National War on
Drugs"); Eric G. Zajac, Tenancies by the Entirety and Federal Civil Forfeiture Under the
Crime Abuse Prevention and Control Act: A Clash of Titans, 54 U. PITT. L. REV. 553, 553-
54 (1993) (noting the increased role the Federal government has played in attempting to
prevent the flow of illegal drugs into this country).

18. Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on
Drugs*, 66 S. CAL. L. REV. 1389, 1389-91 (1993) (contending that the Bill of Rights is a
casualty of the War on Drugs and noting the likely continued erosion of civil liberties
under the “semi-martial state” of our nation) (quoting Jerome H. Skolnick, *A Critical
Look at the National Drug Control Strategy*, 8 YALE L. & POL’Y REV. 75 (1990)); Maclin,
supra note 1, at 33-34 (contending that the Fourth Amendment is “the most serious casu-
alty in the ‘War on Drugs’”); Steven Witosky, *Crackdown: The Emerging “Drug Excep-
tion” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987) (contending that all three
constitutional branches have participated in weakening fundamental rights as a result of
fighting illegal drug use).


20. See Tracey Maclin, *Court is Off Base on Student Drug Tests*, NEWSDAY, Aug. 9,
1995, at A32 (arguing that “dragnet searches of innocent student athletes will not solve our
drug problems[ ]” and concluding that the Court “has let the rhetoric of the ‘War on
Drugs’ overtake its good sense”).


22. *Id.* at 2388-89; see infra notes 126-28 and accompanying text (explaining the school
district’s rationale for exclusively testing athletes at Vernonia’s schools).


24. *Id.* at 2392; see infra notes 155-62 and accompanying text (discussing the rationales
the majority employed in concluding that students have a diminished expectation of
privacy).


26. *Id.* at 2396.
Justice O'Conner, joined by Justices Stevens and Souter, dissented, criticizing the majority for disregarding the historical and jurisprudential importance of individualized suspicion in Fourth Amendment analysis. From a historical standpoint, Justice O'Connor asserted that the Framers conceived the Fourth Amendment in reaction to England's abuse of general warrants and other blanket-type searches that lacked individualized suspicion. From a jurisprudential standpoint, Justice O'Connor argued that the Court always has emphasized some requirement of suspicion and has allowed suspicionless searches only in narrowly defined, exceptional cases. Noting the benefits of individualized suspicion, Justice O'Connor rationalized that requiring individualized suspicion would minimize the intrusiveness of the search, while maintaining the school's stated goal of curing the perceived drug problem.

This Note examines the evolution of the balancing test that the Supreme Court has applied in analyzing the constitutionality of administrative searches. First, this Note traces this evolution, beginning with municipal housing inspections and ending with mass, suspicionless drug

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27. Id. at 2397-2407 (O'Connor, J., dissenting).
28. Id. at 2398-99. Noting the broad aspect of the search, Justice O'Connor rebuked the majority for classifying the search as unintrusive. Id. at 2403. She further recounted historical examples supporting her contention that the Framers required individualized suspicion to protect the privacy of the colonists, concluding that, "[p]rotection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment." Id. at 2399; see also Thomas K. Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 U. MEM. L. REV. 483, 528 (1995) (arguing that history demonstrates that individualized suspicion is a necessary element of Fourth Amendment analysis); Maclin, supra note 1, at 9-12 (contending that the historical events before and immediately after the ratification of the Fourth Amendment provide support for the theory that the Framers intended to require individualized suspicion as a prerequisite to a reasonable search).
29. Acton, 115 S. Ct. at 2399 (O'Connor, J., dissenting). Justice O'Connor pointed out that even where the Court did not require some form of suspicion it, nevertheless, built individualized suspicion into the exceptions. Id. at 2401; see Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 624 (1989) (holding "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") (emphasis added); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (repeating the Skinner test).
30. Acton, 115 S. Ct. at 2403 (O'Connor, J., dissenting). Justice O'Connor asserted that a suspicion-based search policy would reduce drastically the number of students tested and also would enable students to alter their conduct and thereby avoid being tested. Id. Accordingly, the aggregate intrusiveness of the search arguably would be much lower. Id.; see infra notes 180-91 and accompanying text (explaining the various criticisms the dissenters presented regarding the majority's disregard for individualized suspicion); cf. infra note 301 and accompanying text (explaining that a suspicionless search forces individuals to forego legitimate activity because the only way to avoid the search is to avoid the activity).
testing. Next, this Note summarizes this jurisprudence, explaining the analytical framework that these cases establish. This Note then analyzes the majority and dissenting opinions in *Acton*. It argues that the elastic definition of "compelling" created by Justice Scalia improperly dilutes the few remaining protections that the Fourth Amendment affords individuals subjected to administrative searches. Noting that privacy protections remain vigorous in other areas of the Fourth Amendment as well as other areas of constitutional law, this Note next proposes the adoption of the balancing test employed in substantive due process and equal protection cases involving the right to privacy. This Note concludes that *Acton* continues the decline of Fourth Amendment rights, by both expanding the definition of compelling and by continuing to minimize individual privacy rights.

I. THE GROWTH OF BALANCING IN THE ANALYSIS OF ADMINISTRATIVE SEARCHES

The Fourth Amendment protects all citizens, both criminals and non-criminals from unreasonable searches and seizures, and thus guarantees all individuals a zone of privacy. While seemingly affording this protection to all citizens, the Court analyzes searches differently under the Fourth Amendment, depending on their criminal or administrative purpose. Administrative searches, because they often present special needs that render the warrant or probable cause requirements impractical, only have to be reasonable to pass constitutional muster. To be

31. See U.S. Const. amend. IV. The Fourth Amendment prohibits only unreasonable searches and seizures by the government and makes no mention of the purposes of such searches. See *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967) (holding that the Fourth Amendment protects individuals from intrusions posed by administrative searches). The *Camara* Court also observed that it would be anomalous to hold that the Fourth Amendment protected individuals only in the context of criminal behavior. *Id.* at 530.

32. *Skinner*, 489 U.S. at 619 (noting that the general rule in criminal cases is that for a search to be reasonable a warrant supported by probable cause must be issued). For a list of cases, supporting the fact that the Court favors a warrant supported by probable cause in criminal cases, see *infra* note 184. Beginning with *Camara*, the Court has consistently noted that administrative searches, while constituting a search under the Fourth Amendment, nevertheless, do not require a warrant supported by probable cause. *Camara*, 387 U.S. at 534-37; *Acton*, 115 S. Ct. at 2391; *Skinner*, 489 U.S. at 619.

33. O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (waiving the warrant and probable cause requirement when exceptional circumstances in which "'special needs, beyond the normal need for law enforcement make the ... probable-cause requirement impracticable' ") (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)). Founded upon the "impractical" rationale, the special needs requirement functions as a threshold—a prerequisite to applying the reasonableness standard. *New York v. Burger*, 482 U.S. 691, 710 (1987) (opining that requiring a warrant would interfere with the state's interest in deterring automobile theft); *T.L.O.*, 469 U.S. at 340 (eliminating
reasonable, these searches must represent a government need that
counterbalances, or outweighs, the intrusion the search inflicts upon the
privacy interest of the individual.\footnote{34}

A. Shifting the Focus to Reasonableness: Regulatory Inspections

1. The Birth of Balancing: Municipal Housing Inspections

In \textit{Frank v. Maryland},\footnote{35} the United States Supreme Court held that a
health inspector’s search of a home, pursuant to the Baltimore City Code,
did not deprive the homeowner of due process of law.\footnote{36} In so holding,
the majority considered the purpose, the intrusiveness, and the need for
the search.\footnote{37} Because the housing inspection was to insure safe community living standards, was based on a justifiable suspicion that a nuisance existed, and was not to seize evidence for criminal prosecution, the Court rationalized that the search did not impinge significantly on Frank’s liberty interests.\footnote{38} Furthermore, the magnitude of the need for safety in-

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the warrant requirement because a warrant would unnecessarily hinder the school's ability to execute swift, responsive disciplinary measures); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (allowing a suspicionless search because of the impracticality of requiring suspicion at a border-related checkpoint search); see infra note 112 (presenting criticisms of the special needs exception).

The special needs exception is one of approximately 20 exceptions to the warrant or probable cause requirements of the Fourth Amendment. Craig M. Bradley, \textit{Two Models of the Fourth Amendment}, 83 Mich. L. Rev. 1468, 1473-74 (1985) (enumerating these 20 exceptions and the cases in which the courts created them).

34. \textit{Camara}, 387 U.S. at 536-37. This case engendered the balancing test. See infra notes 45-108 and accompanying text (analyzing most of the seminal cases that employ the balancing test in evaluating the reasonableness of an administrative search).


36. \textit{Id.} at 373. Frank denied entry to a health inspector who was responding to complaints from petitioner's neighbors regarding the presence of vermin. \textit{Id.} at 361. Upon discovering a large pile of straw, trash, and rodent feces in petitioner's backyard, the health inspector arrested Frank, pursuant to the City's municipal code. \textit{Id.} at 362. The inspector estimated that the pile of trash approximated a “half a ton,” and because of its attractiveness to vermin, constituted a public nuisance. \textit{Id.} at 361.

Frank argued that the City ordinance violated his Fourteenth Amendment right to due process, which guarantees him the right to be free from arbitrary government intrusion. \textit{Id.} at 362. Nonetheless, Frank could have relied on the Fourth Amendment. The Fourth Amendment covers searches that local government officials execute, because the Fourth Amendment right to be free from arbitrary government invasion is implicit in the Due Process Clause of the Fourteenth Amendment, and thus enforceable against the states and their governments. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), \textit{overruled in part by}, Mapp v. Ohio, 367 U.S. 643 (1961).


38. \textit{Id.} at 366-67. Justice Frankfurter, writing for the majority, theorized that Frank had a duty to act in the community’s best interest notwithstanding the city’s ordinance, and thus did not have a liberty interest justifying his refusal of consent to the search. \textit{Id.} at 366.
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spections vitiated the individual's liberty interest.\textsuperscript{39} Thus, in effect, the Court, without labeling it as such, participated in a balancing analysis, weighing the utility of the administrative need against the gravity of the individual liberty.\textsuperscript{40}

The Supreme Court partially overruled \textit{Frank} in \textit{Camara v. Municipal Court},\textsuperscript{41} holding that municipal inspections constituted searches under

\textsuperscript{39} \textit{Frank}, 359 U.S. at 370-72. The Court found that modern urbanization and the growth of populations exacerbated the need for safety and health inspections in urban areas. \textit{Id.} at 371-72.

\textsuperscript{40} \textit{Id.} at 365-66 (observing that the Fourth Amendment guarantees an individual's right to be secure from unwarranted governmental invasion, yet concluding that the non-criminal purpose of the search and the minimal intrusiveness of it overcame \textit{Frank}'s privacy rights); see \textit{infra} note 45 (arguing that the need and intrusiveness factors contained in balancing analysis originated partly from \textit{Frank}).

\textsuperscript{41} 387 U.S. 523 (1967).
the Fourth Amendment, and thus required search warrants. Nevertheless, noting the broad, general nature of an administrative inspection search, the Court ruled that a warrant for an administrative search does not require probable cause. Instead, the Court created the balancing test, weighing individual privacy interests and competing governmental interests, to judge whether the search was reasonable and thus constitu-

42. Id. at 530. Refuting the argument that the Fourth Amendment applies only to criminal searches, the Court stated, "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Id.

43. Id. at 534. Requiring a warrant, the Court, nevertheless, observed that administrative inspection searches differ in nature from searches that seek criminal prosecution, in that, a search made pursuant to criminal prosecution usually is specific, while an administrative search involves a more generalized search covering an entire neighborhood. Id. at 535; see supra note 38 (discussing the relevance of the purpose of the search in regard to the constitutional analysis of the search).

44. Camara, 387 U.S. at 534-35. The Court ruled that the inspectors did not need specific knowledge of the dwelling's condition to conduct the search, and therefore the Court did not require particularized suspicion. Id. at 538. In dismissing the probable cause requirement, the Court rationalized that only periodic building inspections could insure city-wide compliance. Id. at 535-36. Thus, requiring probable cause would slow the inspection process and hamper the deterrent effect. Id. at 536. In this way, the Court recognized the governmental need for the search. But see Frank, 359 U.S. at 373 (arguing that requiring anything less than probable cause creates a "synthetic search warrant"); Clancy, supra note 28, at 546-47. Mr. Clancy argues that the general showing required in Camara was the first departure from the individualized suspicion required in prior case law. Id. at 547. In addition, the author criticized the Court's justification of the elimination of individualized suspicion because of the necessity of universal compliance:

"One might as cogently argue that there is a need for universal compliance with the criminal law and that the public interest demands that all dangerous offenders be convicted and punished. It is certainly not a novel observation that in the field of criminal law this argument has not prevailed, and that instead we are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state."

Id. at 615 (quoting 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.1(b), at 604 (1987)).

45. Camara, 387 U.S. at 539; see Delaware v. Prouse, 440 U.S. 648, 654 (1979) (employing balancing analysis to assess the reasonableness of a search); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (articulating the balancing test as consisting of "the individual's legitimate expectations of privacy" and "the government's need for effective methods to deal with breaches of public order").

Balancing the interests, the Court concluded that the history of the search procedure, the doubtfulness of other techniques rendering acceptable results, and the minimal intrusiveness of the search all amounted to a reasonable search. Camara, 387 U.S. at 537. Note that these factors, specifically the need for the search and the intrusiveness of the search, were part of the analysis in Frank. Frank, 359 U.S. at 366-372. In addition, these factors, or some derivative of them, are used throughout the case law in varying fashions. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 218-19 (2d ed. 1992) (analyzing each factor used in Camara and individually criticizing the rationale supporting each factor).
tional under the Fourth Amendment. Therefore, the Court engendered a new constitutional analysis of the Fourth Amendment.

The balancing test quickly proliferated beyond municipal safety inspections to other areas of search and seizure law. For example, the Supreme Court and various lower courts have since used the balancing analysis to analyze searches involving closely regulated industries, bor-

46. Camara, 387 U.S. at 536-37. The Court determined reasonableness “by balancing the need to search against the invasion which the search entails.” Id. at 537.

Using both the balancing test and the reasonableness standard, Justice White rationalized that, where the Fourth Amendment requires a warrant, probable cause constitutes the test of reasonableness. Camara, 387 U.S. at 534. To follow this rationale, one must read the first and the second clauses of the Fourth Amendment together, adhering to the view that the second clause merely serves as an example of a reasonable search and seizure. See, e.g., California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (noting that the express language of the Fourth Amendment merely forbids unreasonable searches and seizures): Taylor, supra note 3, at 43 (contending that the history of the Fourth Amendment demonstrates that a search does not always have to be justified by a warrant supported by probable cause); Akhil R. Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 761-65 (1994) (adhering to Professor Taylor’s historical analysis and contending that the express language of the Fourth Amendment does not require a warrant or probable cause). Contra Maclin, supra note 1, at 21 (contending that reading the Reasonableness Clause apart from the Warrant Clause could render the Warrant Clause “‘virtually useless’”) (quoting Jacob Landynski, Search and Seizure and the Supreme Court 44 (1966)); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 823-26 (1994) (subscribing to a more dynamic interpretation of the Constitution and noting that only the most pristine originalists fail to consider the effects of modern society in their historical interpretation of the Constitution). For an excellent summary of the two divergent views of interpreting the first two clauses of the Fourth Amendment, see Clancy, supra, not 28, at 517-26 and Silas J. Wasserstrom, The Fourth Amendment’s Two Clauses, 26 Am. Crim. L. Rev. 1389 (1989).

47. See Camara, 387 U.S. at 536-37. Until Camara, balancing analysis did not exist in the Court’s Fourth Amendment jurisprudence; see also Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (upholding the constitutionality of a warrantless pat down and brief seizure of a suspect where the police had reasonable suspicion that the suspect was armed). While Camara engendered the balancing test, Terry applied it in the context of criminal searches. Id. at 21. Therefore, Terry and its progeny have proliferated and substantiated the use of Fourth Amendment balancing analysis. See infra notes 49-53 (providing a summary of cases using balancing analysis to determine the constitutionality of administrative searches).

48. See infra notes 49-53 (providing a summary of cases using balancing analysis to determine the constitutionality of administrative searches).

49. See, e.g., New York v. Burger, 482 U.S. 691, 708-12 (1987) (upholding the constitutionality of warrantless inspections of vehicle dismantling businesses because the automobile junkyards satisfied the closely regulated industry exception of the Fourth Amendment); Donovan v. Dewey, 452 U.S. 594, 600-02 (1981) (upholding the constitutionality of warrantless federal inspections of mines, because of the history of regulating the mine industry and the government’s substantial interest in mine safety); United States v. Biswell, 406 U.S. 311, 317 (1972) (upholding the warrantless search of a gun shop during business hours because the search minimally threatened privacy interests and had limited potential for government abuse); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (holding that Congress has broad authority to create reasonable standards for searches in order to regulate the liquor industry, which has a long history of regulation); see also Marshall v. Barlow’s, Inc., 436 U.S. 307, 313, 324 (1978) (distinguishing Colonnade
nder-related activities,\textsuperscript{50} vehicle use,\textsuperscript{51} and other administrative searches involving the schools\textsuperscript{52} and the workplace.\textsuperscript{53}

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and Biswell as closely regulated industries and holding that this broad, warrantless search authorized by OSHA regulations amounted to an unconstitutional searches).

\textit{50. See, e.g., United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (holding that reasonable suspicion of alimentary canal drug smuggling justified a warrantless, sixteen-hour detention of a suspect at a location equivalent to the border); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (upholding a brief, suspicionless, warrantless stop at a fixed checkpoint located 75 miles from the border); United States v. Ortiz, 422 U.S. 891, 896 (1975) (holding that a random search of a private vehicle at a traffic checkpoint, in which the officers possessed a high level of discretion, was constitutionally impermissible); United States v. Brignoni-Ponce, 422 U.S. 873, 882-84 (1975) (holding that, under the Fourth Amendment, a roving border patrol may not stop a motorist near the border solely on the basis of the Mexican ancestry of the motorist); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that a roving border patrol that conducted a warrantless, suspicionless search of a motorist's automobile 25 miles from the border constituted an unreasonable search under the Fourth Amendment).}

\textit{51. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that a brief detention at a sobriety check point did not violate the motorists' Fourth Amendment rights); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that a warrantless, random stop of a motorist to check whether the driver had a valid license and registration violated the Fourth Amendment).}

\textit{52. See, e.g., Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2396 (1995) (holding that the random, suspicionless drug testing of high school and middle school student athletes is constitutionally permissible); New Jersey v. T.L.O., 469 U.S. 325, 347 (1985) (holding that a principal's search of a student's purse, absent probable cause, did not violate Fourth Amendment); Schail v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318-22 (7th Cir. 1988) (holding that random urinalysis drug testing of student athletes and cheerleaders was reasonable under the standards of the Fourth Amendment); Brooks v. East Chambers Cons. Ind. Sch. Dist., 730 F. Supp. 759, 766 (S.D. Tex. 1989) (finding that suspicionless drug testing of seventh to twelfth grade students who participated in extra-curricular activities, such as the Future Farmers of America, violated the Fourth Amendment).}

\textit{53. See, e.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 (1989) (holding that requiring a Customs agent, who is seeking a promotion that will involve handling firearms and being involved in drug interdiction, to submit to a urinalysis is constitutionally permissible); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (holding that the mandatory drug testing of railway employees after a train accident or fatality is constitutional under the Fourth Amendment); O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987) (applying the reasonableness standard to a search of a state employee's desk and file cabinets for evidence of office misconduct); International Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm'n, 966 F.2d 521, 527 (9th Cir. 1992) (upholding urinalysis of maintenance workers at a nuclear power plant); National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 613 (D.C. Cir. 1989) (holding that the Army's mandatory drug testing policy of civilian employees involved in aviation did not violate the employees' Fourth Amendment rights), cert. denied, 493 U.S. 1056 (1990). For a list of Fourth Amendment cases employing the balancing test, see T. Alexander Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 \textit{Yale L.J.} 943, 965 (1987) (listing the many ways that balancing has been used within Fourth Amendment analysis); Louis G. Alonso, Jr., Project, \textit{Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals, 1993-94}, 83 \textit{Geo. L.J.} 665, 757-76 (1995) (providing a very broad overview of what constitutes a search or seizure under the Fourth Amendment and supporting this overview with a comprehensive list of cases); Greg Knopp
2. Diminishing Expectations of Privacy: Closely Regulated Industry Inspections

The Court, in See v. City of Seattle, a decision delivered the same day as Camara, extended the holding in Camara to workplaces by requiring a warrant for business inspections. In New York v. Burger, however, after ruling that the search involved a closely regulated industry, the Court proceeded to uphold a warrantless, administrative search. The

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54. 387 U.S. 541 (1967).
55. Id. at 545.
57. Id. at 700-02. To determine whether an industry is closely regulated, the Court assesses the duration of government regulation in the industry. Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970). The closely regulated industry exception is often used synonymously with the pervasively regulated industry exception. However, these rationales, while similar in their effect of relaxing Fourth Amendment protections, are actually two different exceptions. See Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973) (describing each rationale and finding each rationale inapplicable to border-related searches). The pervasively regulated industry exception depends on the extent of regulation within the industry. United States v. Biswell, 406 U.S. 311, 315-16 (1972) (finding the gun and ammunition industry to be pervasively regulated).

After reviewing the closely regulated industry cases, the Burger court held that the duration or history of the government’s regulation of the industry supported the conclusion that the junkyard was a closely regulated industry. Id. at 705-06; see also Donovan v. Dewey, 452 U.S. 594, 606 (1981) (ruling that the duration of the regulatory scheme was one factor that indicated whether an industry was closely regulated). Thus, the Court uses the history of the search to explain its reduction of the individual’s expectation of privacy. See Burger, 482 U.S. at 700 (holding that the history of close regulation prevents the business owner from possessing a reasonable expectation of privacy). But see id. at 719, 722 (Brennan, J., dissenting) (arguing that the majority turns the closely regulated industry exception into the rule by improperly concluding that a vehicle dismantling business has a history of close regulation by the government).

58. Burger, 482 U.S. at 702-12. Balancing the expectation of privacy against the government’s interest in regulating the vehicle dismantling industry, the Court held that the State’s interest outweighed the individuals, rendering the search reasonable. Id. More specifically, the Court created a three-part test to analyze reasonableness in closely regulated industry cases. Id. at 702-03. These factors largely reflect the three factors used in Camara: government need, no other means achieving acceptable results, and minimized intrusiveness. See Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

First, the government must show a substantial interest justifying the search. Burger, 482 U.S. at 702. Second, the inspection “must be ‘necessary to further [the] regulatory scheme.’ ” Id. (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)). The Court accepted the State’s argument that regulating the dismantling industry will close markets for stolen vehicles and therefore deter car theft. Id. at 709. Moreover, as in Camara, the Court reasoned that requiring a warrant would unnecessarily hamper the state’s efforts in frustrating automobile theft. Id. at 710. Thus, while Camara argued that requiring probable cause would hinder the State’s interest in deterrence, the Court in Burger argued that requiring a warrant would undermine deterrence. Id.; see supra note 44 (explaining that
closely regulated industry doctrine serves two functions. First, the search need only be reasonable to be upheld. Second, because the business is closely regulated, entrepreneurs in the industry, have a diminished expectation of privacy. Hence, the “close regulation” rationale provided one method for the Court to diminish individual expectations of privacy.

B. Rejecting the Least-Intrusive Means: Checkpoint Searches

Perhaps persuaded by the rationale that individuals entering the country surrender some, if not all, of their Fourth Amendment rights at the requiring probable cause for a housing inspection would vitiate the deterrent effect of the inspection, because it would hinder the government’s ability to inspect such dwellings periodically.

Third, the statute must create “a constitutionally adequate substitute for a warrant.” By requiring an adequate substitute for a warrant, the Court demands that the state limit the intrusiveness of the search by curtailing the discretion of the official executing the search. Thus, the potential for abuse of discretion and the resulting severe intrusiveness that this abuse presents is minimized. See Delaware v. Prouse, 440 U.S. 648, 661 (1979) (explaining that the Court has circumscribed the discretion of the executing official, when a threat of unconstrained discretion existed in the search procedure). But see Clancy, supra note 28, at 620-21 (arguing that the statute in Burger does not offer much guidance; hence, it does not adequately limit the discretion of the inspectors); Lynn S. Searle, Note, The “Administrative” Search from Dewey to Burger: Dismantling the Fourth Amendment, 16 Hastings Const. L.Q. 261, 288 (1989) (noting that under the New York statute a police officer conducting the search may “single out a vehicle dismantler or junk yard dealer and put him out of business, either by harassing him with constant inspections or by arresting him for refusing an inspection”).

59. Burger, 482 U.S. at 700-02.

60. Id. at 702; see United States v. Biswell, 406 U.S. 311, 316 (1972) (ruling that a businessman should expect inspections of his business records, when he enters a pervasively regulated industry, such as the ammunition and gun industry). In effect, the Court portends that the individual impliedly consents to the administrative search by entering the sphere of regulation. See LaFave & Israel, supra note 45, at 221 (criticizing the closely regulated industry line of cases for conveying an assumption of implied consent); Searle, supra note 58, at 267 (noting that implied consent among other rationales has been used by the Court in upholding administrative searches). Searle demonstrates the logical weakness of this “implied consent” theory by extending it to its logical conclusion:

First, if it is the notice provided by pervasive regulation that reduces one’s legitimate expectation of privacy, then any time notice is given, a person’s reasonable expectation of privacy diminishes, and her fourth amendment protections evaporate. Taken to its logical extreme, this argument asserts that any time a legislature passes a statute authorizing warrantless searches . . . the public is on notice that the searches will be made, and consequently has no reasonable expectation of privacy. This is essentially the argument advanced in . . . Burger.

Id. at 280.

61. See infra notes 226-41 and accompanying text (explaining how the “close or pervasive regulation” rationale has been extended to cover not only entrepreneurs, but also workers and athletes).

62. See United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (allowing the warrantless, sixteen-hour detention of an individual suspected of smuggling drugs into the country in her alimentary canal). During this period, the police held the petitioner in
order to monitor her bowel movements, with the hope of discovering smuggled drugs. *Id.* at 534-35. In the end, the petitioner submitted to a rectal examination in which a physician removed a balloon filled with cocaine from her rectum. *Id.* at 535. Despite a painfully valiant effort, the petitioner defecated eighty-eight balloons over the course of four days, and consequently was found guilty of possession with intent to distribute cocaine. *Id.* at 535-36; cf. LAFave & Israel, *supra* note 45, at 221. The authors postulate, that the Court's underlying rationale for diminishing individuals's privacy interest may be that "certain privileges . . . may be conditioned upon the surrender of Fourth Amendment rights." *Id.* The authors criticize the Court for conveying this assumption. *Id.*

63. The border includes not only the physical boundary of the United States, but also its functional equivalent. See United States v. Almeida-Sanchez, 413 U.S. 266, 272-73 (1973) (border search includes searches performed at an international airport); United States v. Dobson, 781 F.2d 1374, 1376-77 (9th Cir. 1986) (border searches include searches performed on a boat originating from international waters which has entered United States territorial waters).

64. 428 U.S. 543 (1976).

65. *Id.* at 566. The Court upheld this search, despite the fact that the checkpoint was located 75 miles inland. *Id.* at 558. But see United States v. Ortiz, 422 U.S. 891, 896 (1975) (disallowing a fixed checkpoint that investigated all cars, yet searched a small number of vehicles based completely on the officials' discretion). *Martinez-Fuerte* is distinguishable from *Ortiz*, in that the officers at the checkpoint in *Martinez-Fuerte* only asked a few questions as part of their search. Hence, the search was less intrusive. See *Martinez-Fuerte*, 428 U.S. at 558.

66. *Martinez-Fuerte*, 428 U.S. at 557-59. Upholding the search, the Court still relied on previously enunciated factors. *Id.* at 554-60. The Court's factors were: the expectation of privacy of the individual, the amount of intrusiveness of the search, the effectiveness of the search method, and the amount of discretion of the officers performing the search. *Id.* The Court balanced these to determine the reasonableness of the search. *Id.* at 566. Following the basic balancing test of *Camara*, the Court concluded that the need for these fixed checkpoints was great, while the intrusion thrust upon the individual's privacy was minimal. *Id.* at 557; see Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990) (adhering to *Martinez-Fuerte*, and holding that the balancing test and reasonableness standard should be used to analyze the constitutionality of a sobriety checkpoint).

67. *Martinez-Fuerte*, 428 U.S. at 559. First, the Court found that the fixed and open nature of these checkpoints works to decrease the individual's expectation of privacy because motorists know the location of these checkpoints and should not be surprised by the officials stopping vehicles at these checkpoints. *Id.* But see Searle, *supra* note 58, at 280 (criticizing the logic of the Court in *Burger*, where the majority reasoned that notice of a search works to reduce an individual's expectation of privacy, because the individual knowingly enters a sphere of regulation).

Second, the Court stated "[t]he regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly
not required to utilize the least-restrictive means in conducting the search.\textsuperscript{68} Third, the Court held that requiring a search to be based on reasonable suspicion was "impractical" because it eradicated the deterrent effect of the search.\textsuperscript{69} Of course, since enunciating these factors, they have become part of the Court's Fourth Amendment jurisprudence.\textsuperscript{70}

authorized and believed to serve the public interest." \textit{Martinez-Fuerte}, 428 U.S. at 559. The regularized manner not only minimizes fright, but also assures the motorist that the search is being performed by authorized officials in a regulated manner. \textit{Id.} As in \textit{Burger}, the Court reasoned that by limiting the discretion of the government official, the government minimizes the intrusiveness of the search because lowering the discretion of the official lowers the chance for abuse of discretion. \textit{See id.; Burger}, 482 U.S. at 711 (theorizing that a constitutionally sufficient statute lowers the discretion of the enforcement official, simultaneously assuring the entrepreneur that the search is conducted pursuant to a valid statute and notifying the entrepreneur that she is subject to a regulatory search). A lower chance for abuse of discretion consequently lowers the chance of a severe intrusion. \textit{See supra} note 58 (noting that the courts generally require some form of limitation on the officials' discretion in upholding the search).

It is important to note that the "limited discretion equals minimal intrusiveness" theory limits only the potential for severe intrusiveness. \textit{See Searle, supra} note 58, at 288. In reality, a search is equally intrusive whether it is performed with broad discretion or executed pursuant to a precisely detailed statute. \textit{See id.} For instance, the intrusiveness to an individual's bodily integrity is the same where a government official forces an individual to submit to a strip search, regardless of whether that official is acting on his own initiative or pursuant to the most exacting state regulation. \textit{See, e.g.,} Joan W. v. City of Chicago, 771 F.2d 1020, 1021 (7th Cir. 1985) (describing a humiliating search conducted pursuant to a Chicago Police Department policy, in which the arrestee was forced to expose her vaginal and anal areas after being arrested for a traffic violation); Levka v. City of Chicago, 748 F.2d 421, 422-23 (7th Cir. 1984) (describing similar search under same Chicago policy); John Does 1-100 v. Boyd, 613 F. Supp. 1514, 1517-18 (D. Minn. 1985) (reporting that local police department performed strip searches pursuant to written policy regardless of level of probable cause that arrestee possessed contraband or weapons). For a detailed description of outrageously invasive strip searches performed pursuant to a municipal ordinance or written policy, see Ellen Alderman & Caroline Kennedy, The Right To Privacy 3-22 (1995).

68. \textit{Martinez-Fuerte}, 428 U.S. at 557 n.12 (stating that forcing the government to utilize less restrictive alternatives could insuperably hamper the state's power to search and seize). But see Nadine Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. Rev. 1173, 1238-67 (1988) (criticizing the Court for its inconsistency in resolving this issue and proposing that the alternative of a lesser intrusive search should be involved in the Court's analysis); \textit{LaFaye} & \textit{Israel, supra} note 45, at 225 (criticizing the Court's rationale as contradictory to the "acceptable results" standard expounded in \textit{Camara}).

69. \textit{Martinez-Fuerte}, 428 U.S. at 557. The Court reasoned that the volume of traffic at these checkpoints inhibited the particularized observance needed to ascertain reasonable suspicion. \textit{Id.} Thus, to retain the required deterrent effect, the search would have to be allowed without reasonable suspicion. \textit{Id.; see Camara}, 387 U.S. at 538 (effectively eliminating the requirement of probable cause in municipal housing inspections because of the incompatibility of such a requirement).

In *Michigan Department of State Police v. Sitz*, the Court adhered to *Martinez-Fuerte*, by further delineating and solidifying the intrusiveness, least-intrusive-means, and effectiveness arguments in *Martinez-Fuerte*. Evaluating the intrusiveness of a drunk-driving checkpoint under *Sitz*, the natural trepidation and surprise sensed by the law-abiding motorist is to be considered in the Court’s analysis, not the fear evoked in a potential offender. Regarding the least-intrusive-means argument, the means chosen are for the legislature to decide, not the judiciary, thus creating a presumption of validity for the state’s checkpoint. Furthermore, the Court utilized statistics showing the arrest rate at the checkpoint, to sustain the reasonableness of the stop. Thus, the Court solidified the

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72. *Id.* at 455.

73. *Id.* at 451-55. *But see id.* at 464-65 (Stevens, J., dissenting) (comparing the increased police discretion in a sobriety checkpoint search to the limited police discretion in a border-related search). “A check for a driver’s license, or for identification papers at an immigration checkpoint, is far more easily standardized than is a search for evidence of intoxication. . . . A ruddy complexion, an unbuttoned shirt, bloodshot eyes, or a speech impediment may suffice to prolong the detention.” *Id.*; *supra* note 28, at 621-22 (arguing that while the Court may maintain that the officials have limited discretion, in reality, these officers increasingly have more discretion in constitutionally permissible searches).

74. *Id.* at 452; *see United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (implying that the fright discussed only referred to “law-abiding motorists”). *Compare Sitz*, 496 U.S. at 452-53 (holding that a sobriety checkpoint should not incite fear or trepidation in a law-abiding motorist) with *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (holding that a random vehicle stop to check for valid license and registration information is unconstitutional, partly because of the substantial anxiety, inconvenience, and interference that a random, suspicionless stop causes).

75. *Sitz*, 496 U.S. at 453-54. The Court deduced from *Brown v. Texas*, 443 U.S. 47 (1979), that *Brown* should not be read “to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.” *Sitz*, 496 U.S. at 453; *see Martinez-Fuerte*, 428 U.S. at 566 (according deference to higher ranking officials in their administrative decisionmaking).

76. *Sitz*, 496 U.S. at 454-55. The Court compared the 1.6% arrest rate at the sobriety checkpoint to the 0.12% arrest rate at the constitutionally permissible immigration checkpoint in *Martinez-Fuerte*. *Id.* This reliance on empirical data approaches cost-benefit analysis. *See Richard A. Posner, Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49 (theorizing that cost-benefit analysis should be utilized to analyze Fourth Amendment issues). For instance, Judge Posner asserts:

A reasonable search is a cost-justified search. The most important cost of a search is the cost to the lawful interests that the search invades. That cost, a function of the intrusiveness of the search, must be weighed against the benefits of the search. The benefits are a function of the probability that the search will turn up incriminating evidence or leads and of the value to law enforcement of such evidence or leads; this value in turn is a function of the gravity of the crime and the importance of the evidence to conviction. Thus, the less intrusive the search, the higher the probability that it will be fruitful, the more vital the evi-
least-intrusive means and effectiveness factors as part of the balancing analysis used to determine reasonableness.\footnote{77}

C. "Special Needs": Searches of Persons and Their Effects

1. Searches Conducted in Public School

In \textit{New Jersey v. T.L.O.}, the Court first applied the reasonableness standard and balancing test to searches of high school students.\footnote{78} After noting that the search of a student's purse violated the student's expecta-

dence obtained, and the graver the crime being investigated, the likelier that the search is reasonable.\footnote{Id. at 74. \textit{But see Sitz}, 496 U.S. at 469-470 (Stevens, J., dissenting) (contending that the Court's use of empirical data is superficial and incomplete: "although the gross number of arrests is more than zero, there is a complete failure of proof on the question whether the wholesale seizures have produced any net advance in the public interest in arresting intoxicated drivers"); Strossen, \textit{supra} note 68, at 1181 (criticizing the Court for indulging in a "utilitarian cost-benefit balancing calculus"); Sundby, \textit{supra} note 5, at 1800 (arguing that the suspicionless intrusion upheld by the \textit{Sitz} Court "had little noticeable impact on the societal problem beyond that which conventional reliance on individualized suspicion had produced, and perhaps had even been counterproductive").}

\footnote{77. \textit{See generally} Clancy, \textit{supra} note 28, at 662 (noting that by simply accepting the government official's decision as evidence of effectiveness and by not exploring less intrusive means, the Court has "eliminated any requirement of need as a precondition for suspicionless intrusions") (footnote omitted).}

\footnote{78. 469 U.S. 325 (1985). In \textit{T.L.O.}, a high school assistant principal discovered marijuana in a concealed compartment of a student's purse, while searching for cigarettes. \textit{Id.} at 328. The principal at first found rolling papers in T.L.O.'s purse, and then suspicious of drugs, searched a small compartment of the purse, finding drugs, a pipe, and a list of students owing T.L.O. money. \textit{Id.}}

The Court found the traditional warrant and probable cause requirement to be impractical and an impediment to school authority, and thus utilized the reasonableness standard. \textit{Id.} at 343. The Court deliberated that requiring a warrant would unduly interfere with the school's need for swift disciplinary procedures. \textit{Id.} at 340. Moreover, without a warrant and probable cause requirement, "the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." \textit{Id.} at 343. The peculiarities of the school environment have caused the Court to relax other constitutional guarantees as well. Ingraham v. Wright, 430 U.S. 651, 680 (1977) (denying the students' procedural due process claim, because requiring public schools to implement extensive procedures would substantially encumber using corporal punishment as an effective disciplinary measure).

Eliminating the warrant requirement, the Court announced the following balancing test: "[o]n one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." \textit{T.L.O.}, 469 U.S. at 337. The \textit{T.L.O.} Court properly articulated the purpose of the balancing test announced in \textit{Camara}. \textit{Camara v. Municipal Court}, 387 U.S. 523, 539 (1967) (reasoning that the balancing test accommodates competing public and private interests).
tion of privacy,\textsuperscript{79} the Court found the student’s privacy interest outweighed by the school’s need for order and security in maintaining the proper educational environment.\textsuperscript{80} Unlike earlier cases, however, where the balancing test determined the reasonableness of a search,\textsuperscript{81} in \textit{T.L.O.}, the balancing test determined whether the reasonableness test should even be applied.\textsuperscript{82} Nevertheless, the Court found the search to be reasonable and established the balancing analysis as the appropriate test for school searches.\textsuperscript{83}

2. \textit{Searches Conducted at the Workplace}

In \textit{O’Connor v. Ortega},\textsuperscript{84} the Supreme Court, in determining whether a public employer’s search of an employee’s office required a warrant supported by probable cause, concluded that this type of search need only be reasonable to be constitutional.\textsuperscript{85} In doing so, the plurality articulated the “special needs” exception, which serves as a threshold requirement.

\textsuperscript{79} \textit{T.L.O.}, 469 U.S. at 337-38. The Supreme Court has previously recognized that students do not “shed their constitutional rights at... the schoolhouse gate” in other areas of constitutional law. \textit{Tinker v. Des Moines Indep. Community Sch. Dist.}, 393 U.S. 503, 506 (1969).

\textsuperscript{80} \textit{T.L.O.}, 469 U.S. at 339-40; see also \textit{Ingraham}, 430 U.S. at 681 (concluding that, while distasteful to some, “corporal punishment serves important educational interests”); \textit{Goss v. Lopez}, 419 U.S. 565, 580 (1975) (recognizing that teachers in public schools require discretion in applying disciplinary sanctions because of the frequency of disciplinary problems that necessitate immediate action).

\textsuperscript{81} \textit{Camara}, 387 U.S. at 536-37 (opining that balancing the need for the search against the intrusiveness of the search determines the reasonableness of the search).

\textsuperscript{82} \textit{T.L.O.}, 469 U.S. at 341. The Court in \textit{Camara} first determined that reasonableness should apply and then utilized the balancing test to answer whether the search was reasonable. \textit{Camara}, 387 U.S. at 534-35. By contrast, in \textit{T.L.O.}, the Court stated, “a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness.” \textit{T.L.O.}, 469 U.S. at 341. Instead of using the balancing test derived from \textit{Camara}, the Court used the test laid out in \textit{Terry v. Ohio}, 392 U.S. 1, 19-20 (1968), to determine reasonableness, despite the fact that \textit{Terry} dealt with a criminal search. \textit{T.L.O.}, 469 U.S. at 341.

\textsuperscript{83} \textit{T.L.O.}, 469 U.S. at 339-40, 343.

\textsuperscript{84} 480 U.S. 709 (1987).

\textsuperscript{85} \textit{Id.} at 719-22. Suspecting Dr. Ortega of possible office improprieties, Dr. O’Connor, the Executive Director of the Hospital, directed several employees to conduct an investigation regarding these charges. \textit{Id.} at 712-713. Richard Friday, a member of the investigation team, decided to search Dr. Ortega’s office, seizing various personal items from his desk and file cabinets. \textit{Id.} at 713. The stated original purpose of the search was “to secure state property.” \textit{Id.} However, the task of separating state from non-state material became too onerous. \textit{Id.} at 713-14. Therefore, State officials placed Dr. Ortega’s belongings in a box for storage without inventorying the items. \textit{Id.} at 714. The items seized included: “a Valentine’s Day card, a photograph, and a book of poetry all sent to Dr. Ortega by a former resident physician. These items were later used in a proceeding... to impeach the credibility of the former resident, who testified on Dr. Ortega’s behalf.” \textit{Id.} at 713.
for the Court to dismiss the warrant and probable cause requirement and proceed with a balancing analysis.\textsuperscript{86} After \textit{O'Connor}, finding special needs became a threshold requirement for employing the reasonableness standard.\textsuperscript{87}


Prior to \textit{Skinner v. Railway Labor Executives' Ass'n},\textsuperscript{88} the Court had used the balancing test and reasonableness standard to uphold the search of a person's home,\textsuperscript{89} papers,\textsuperscript{90} and effects.\textsuperscript{91} The Court extended the

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Analyzing these facts, the Court first ruled that the Fourth Amendment applied to the search of Dr. Ortega's desk and office, because the hospital employees conducting the search constituted government actors. \textit{Id.} at 715; see Alonso, \textit{supra} note 53, at 667 (requiring government action for the Fourth Amendment to apply). Next, the Court, as in each prior case, pointed to some aspect of the government's need which rendered a warrant "impractical." \textit{O'Connor}, 480 U.S. at 721; see \textit{supra} note 33 (discussing the "special needs" exception announced in \textit{O'Connor} and noting the use of the "impractical" rationale in prior cases).

Finally, the Court remanded the case and ordered the lower court to balance the government's overriding interest in office efficiency against the employee's expectation of privacy in his office space. \textit{O'Connor}, 480 U.S. at 725-26. The Court, in instructing the lower court regarding the various weights assigned to these interests, found the privacy interest less than robust because of the frequent intrusion of supervisors, employees, and friends entering an individual's office during a typical business day. \textit{Id.} at 717. In addition, the Court found the governmental interest important because the workplace must be operated efficiently to enable the government agency to "provide myriad services to the public." \textit{Id.} at 723.

\textsuperscript{86} \textit{O'Connor}, 480 U.S. at 720. The Court asserted that " 'exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.' " \textit{Id.} (quoting \textit{T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring)); see \textit{supra} note 33 (providing cases that illustrate the special needs exception).

\textsuperscript{87} See \textit{supra} notes 31-34 and accompanying text (providing an introductory assessment of the Court's administrative search jurisprudence).

\textsuperscript{88} 489 U.S. 602 (1989).

\textsuperscript{89} Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (upholding the validity of a probation officer's search of a probationer's home, performed without probable cause pursuant to a police detective's unverified tip); Wyman v. James, 400 U.S. 309, 318 (1970) (upholding a caseworker's home visit to a welfare recipient as a reasonable search under the Fourth Amendment).

\textsuperscript{90} \textit{O'Connor} 480 U.S. at 725.

\textsuperscript{91} New Jersey v. T.L.O., 469 U.S. 325, 328, 340 (1985) (searching a student's purse); see also \textit{Skinner}, 489 U.S. at 639 (Marshall, J., dissenting) (contending that the balancing test had now been used to cover all explicitly protected areas articulated in the Fourth Amendment and almost always has resulted in the government's search passing constitutional muster); Stephen J. Schulhofer, \textit{On the Fourth Amendment Rights of the Law-Abiding Public}, 1989 \textit{Sup. Cr. Rev.} 87, 107 (observing that the "Court has upheld nearly all the administrative searches it has considered since 1980"); Stuntz, \textit{supra} note 11, at 1035 (arguing that the government always prevails in the regulatory setting).
rationale of closely regulated industries to employees’ urinalyses and concluded that the government has a compelling need where a risk of great loss of human lives exists.92 Skinner upheld federal regulations requiring that public railroad employees submit to a blood, breath, or urine test after a “major train accident.”93 After noting that a person’s excretory functions are “traditionally shielded by great privacy,”94 the Court found that these employees had a diminished expectation of privacy because


The Court relied on other common factors from prior case law. Skinner at 619-20. The search in Skinner did not pertain to criminal prosecution. Id. at 619-20. Additionally, the Court reasoned that the systematic nature of the search regime decreased the official's discretion and lowered the intrusiveness of the search. Id. at 626-27; see United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (ruling that open and systematic nature of highway checkpoint decreased the intrusiveness of the search); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 452 (1990) (same). Furthermore, the Court utilized the special needs exception, announced in O'Connor, 480 U.S. at 720, to justify disregarding the lack of a warrant and probable cause, and proceeding with the reasonableness test. Id. at 619.

93. Skinner, 489 U.S. at 634. The Court upheld the search after determining that the government's compelling interest outweighed the individual's privacy interest. Id. at 633.

Under the Federal Railroad Administration's regulations, five occurrences trigger bodily intrusive tests. Skinner, 489 U.S. at 608-12. In the event of any of the five occurrences, the supervisors must round-up all employees and transport them to a hospital, where these employees must provide blood and urine samples. Id. at 609-10 (citing 49 C.F.R. § 219.201(a)(3) (1987)). In the event of an accident or incident that a supervisor reasonably suspects to be precipitated by an employee's negligence, or in the event of a rule violation, such as speeding, the supervisor may order either a urine or breath test, or both. Id. at 611.

One commentator described the considerable impact of Skinner, observing that “[i]n the transportation industry alone, 4 million workers face random testing.” Schulhofer, supra note 91, at 87-88. In addition, Professor Schulhofer argues that various problems inhere in drug testing, namely, that it is both overinclusive and underinclusive. Id. at 123-27. A test may be overinclusive because of the risk of erroneous results. Id. at 123-25 (stating that an Air Force Base laboratory reported a sixty percent error rate and finding that bagels with poppy seeds may trigger a positive finding of morphine, while Advil may trigger a positive finding of marijuana). A test may be underinclusive because drugs are not the only causes of worker error and unproductivity. Id. at 125 (noting that marital problems or lack of sleep, for example, may impair a worker).

94. Skinner, 489 U.S. at 626. The Court stated:

"There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."

Id. at 617 (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), rev'd, 489 U.S. 656 (1989)); see Fried, supra, note 5, at 487 (asserting that "[i]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem").
they were involved in a close regulated industry. The Court ruled that the government’s interest was compelling and refused to require individualized suspicion because of the risk of a train catastrophe and because of the fact that employee drug use cannot be determined conclusively absent a test. To support its conclusion, the Court relied on empirical data provided by the railway industry that showed that railroad employees had a history of drug and alcohol abuse. Thus, suspicionless, yet invasive searches could be constitutional, so long as the government can justify the intrusion by showing a compelling need outweighing the privacy interest at stake.

In a companion case to Skinner, National Treasury Employees Union v. Von Raab, the Court upheld the Customs Service’s suspicionless drug testing program of any employee who sought a promotion requiring them to carry firearms or participate in the interdiction of drugs. The Court analogized the test to cases involving border and border-related searches, because Customs agents were the “first line of defense.” As in Skinner,

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95. *Skinner*, 489 U.S. at 627-28. *But see* French, supra note 92, at 149 (contending that *Skinner* incorrectly applies the rationale of the closely regulated industry cases, because in those cases the object of the search was the industry, whereas in *Skinner* the object was the employee).

96. *Skinner*, 489 U.S. at 628-29. While the *Skinner* Court found the need supporting the search to be compelling, the Court has required different levels of need in prior case law. *See*, e.g., New York v. Burger, 482 U.S. 691, 702-03 (1987) (requiring a substantial governmental interest); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (requiring a legitimate governmental interest on the government’s side of the scale); Clancy, supra note 28, at 599 (summarizing the different levels of government interest found in this body of case law).

97. *Skinner*, 489 U.S. at 607 n.1 (relying on a 1979 study that “‘estimated one out of every eight railroad workers drank at least once while on duty’”). In addition to specific studies, the Court speculated that the history of “alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago.” *Id.* at 606.

In *Skinner*, the Court employed history in two ways. First, similar to the closely regulated industry cases, the Court, in deducing that the railroad employees have a diminished privacy interest, stated that “the covered employees have long been a principal focus of regulatory concern.” *Skinner*, 489 U.S. at 628. Second, the Court used history to illustrate the need for the governmental intrusion. *Skinner*, 489 U.S. at 628-29. Thus, in effect, the Court used history to both increase the weight on the government’s side of the scale and lower the weight on the individual’s side of the scale in the balancing analysis. *Id.*

98. *See* *Skinner*, 489 U.S. at 633.


100. *Id.* at 679. Balancing the government’s interest against the individual’s, the Court found the government’s more compelling. *Id.* at 677.

101. *Id.* at 668. Thus, it appears that to attain a privilege from the government, in this case a promotion, the individual must surrender some of her Fourth Amendment right to privacy. *See* LAFAVE & ISRAEL, supra note 45, at 221 (contending that this is a possible rationale in the closely regulated industry line of cases). In explaining the employee’s diminished expectation of privacy, the Court in *Von Raab* also stated that “[u]nlike most
ner, the Court did not require individualized suspicion as a basis for conducting a search because drug use and its effects are difficult to detect. However, while Skinner and prior cases utilized empirical data to supplement the governmental need prong of the reasonableness argument, Von Raab relied solely on the government's speculative theory that the Customs Service is not immune from the pervasive drug problem in American society. In fact, because the government's primary objective

private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Von Raab, 489 U.S. at 672. This reasoning relies on the premise that advance notice of the search diminishes an expectation of privacy. But see Searle, supra note 58, at 280 (criticizing the logic of the majority's rationale in Burger, where the Court implied that notice of an administrative search diminishes the individual's expectation of privacy).

102. Von Raab, 489 U.S. at 668-70. Von Raab reflects prior case law, in the sense that individualized suspicion and a warrant requirement are impractical, constituting an expendable impediment to effective government enforcement. See id. at 665 (discussing T.L.O., Skinner, and Martinez-Fuerte as evidence that a warrant, probable cause, or individualized suspicion may not be required for a search to be reasonable). In fact, the Court found it inconsequential that innocent people are tested because of the lack of individualized suspicion: "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." Id. at 674.

Notwithstanding its adherence to this rationale, the Court also introduced a new rationale for not requiring a warrant: its minimal contribution to the protection of the individual's privacy interest. Id. at 667.


104. Von Raab, 489 U.S. at 674. Under the tremendous breadth of this rationale, random drug-testing could be conducted in just about any government workplace. See Schulhofer, supra note 91, at 87-88 (recognizing the tremendous potential effect that Skinner [and presumably Von Raab] could have on increasing drug-testing in government employment).

Moreover, according to the government's argument, drugs could have a damaging effect on the Customs Agency, because employees "may be tempted not only by bribes from the traffickers . . . but also by their own access to vast sources of valuable contraband seized and controlled by the Service." Id. at 669. Again, the breadth of this argument must be noted. See Schulhofer, supra note 91, at 146-47 (criticizing the majority's reasoning because it could apply to any government official and the chance for bribery or blackmail arguably is very low). But see Taylor v. O'Grady, 888 F.2d 1189, 1201 (7th Cir. 1989) (narrowly reading the facts of Von Raab and thus holding that a urinalysis program is unconstitutional as applied to corrections officers who do not carry firearms or have the ability to smuggle drugs to inmates).

Recognizing the dangers in relying on purely speculative generalizations to sustain the reasonableness of the search, Justice Scalia, in the majority in Skinner, dissented in Von Raab. Von Raab, 489 U.S. at 680-82 (Scalia, J., dissenting). He asserted:

I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.
was to deter agents' drug use, the Court reasoned that empirical data showing a low incidence of drug use, would thus demonstrate the effectiveness of drug testing.\footnote{105} Therefore, after Von Raab, the effectiveness of the search, and the need supporting it, became a moot point.\footnote{106} If the empirical data illustrated a low rate of success, the search furthered its objective of deterrence.\footnote{107} If the empirical data illustrated a higher rate of success, the search revealed the effectiveness and need for testing in this area.\footnote{108}

\section*{D. Synthesizing the Case Law and Creating an Analytical Framework}

Taken together, these cases have established an analytical framework. First, the Court determines whether the Fourth Amendment applies by

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The Court’s opinion ... will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees. ... The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that.

\textit{Id.} at 681-82. Justice Scalia also noted that, unlike other cases where the government need is compelling, there existed almost no risk of catastrophic harm in \textit{Von Raab}. \textit{Id.} at 684. Thus, Justice Scalia concluded that justifying a suspicionless, humiliating search with a broad generalization makes a mockery of the protections of the Fourth Amendment. \textit{Id.} \footnote{105} \textit{Von Raab}, 489 U.S. at 676 n.3 (contending that “[w]hen the Government’s interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success”). \textit{But see} Clancy, \textit{supra} note 28, at 600-01 (arguing that deterrence is a proper governmental focus and in fact closely related to the necessity of the search, \textit{only} when the government shows that it can not identify the potential danger in advance). \footnote{106} See Clancy, \textit{supra} note 28, at 605 (contending that \textit{Von Raab} eroded any requirement to show need). Supporting his argument, Professor Clancy noted that the Court admitted that the Customs Service did not present any evidence supporting a drug use problem and failed to show that drug testing would expose substantial employee drug use. \textit{Id.; see also} Sundby, \textit{supra} note 5, at 1800 (arguing that the majority “simply point[ed] to a general societal problem with drugs and claim[ed] a symbolic need for the testing of Customs agents although no evidence existed that the targeted group was engaged in drug use”). \footnote{107} \textit{Von Raab}, 489 U.S. at 676 n.3.

\footnote{108} See Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 454-55 (1990) (holding that a 1.6% arrest rate at a sobriety checkpoint was sufficient to demonstrate the effectiveness of the government’s interest in law enforcement); United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 nn.16-17 (1976) (relying on statistics to demonstrate the effectiveness of the search).
ascertaining whether government action,\textsuperscript{109} regardless of its purpose,\textsuperscript{110} invaded an individual's reasonable expectation of privacy.\textsuperscript{111} Next, under the special needs test, if requiring a warrant, probable cause, or individualized suspicion would interfere with the government's objectives, be otherwise impractical,\textsuperscript{112} or would minimally protect the individual's privacy interest,\textsuperscript{113} the Court uses a reasonableness standard to analyze the search.\textsuperscript{114} To determine reasonableness, the Court, of course, balances the "individual's legitimate expectations of privacy and personal security"

\textsuperscript{109} Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (ruling that government action occurs where private parties act as agents of the state); see New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (holding that an assistant principal at a public school is a government actor); Alonso, supra note 53, at 666 (stating that the actor must constitute a state actor for a Fourth Amendment search to occur).

\textsuperscript{110} See Camara v. Municipal Court, 387 U.S. 523, 530 (1967) (recognizing that the Fourth Amendment protects individuals from unreasonable intrusions posed by searches regardless of whether the purpose of the search was criminal or administrative).

\textsuperscript{111} \textit{E.g.} Von Raab, 489 U.S. at 665; Skinner, 489 U.S. at 616-18; O'Connor v. Ortega, 480 U.S. 709, 715 (1987); Katz v. United States, 389 U.S. 347, 353 (1967). Thus, the first thing the Court must do is determine whether an individual, not his property or effects, has a reasonable expectation of privacy. \textit{See O'Connor,} 480 U.S. at 715-16 (noting that the court must first decide whether the employee had a reasonable expectation of privacy in his office space); \textit{Katz,} 389 U.S. at 351 (observing that "the Fourth Amendment protects people, not places"). If no reasonable expectation of privacy exists, the individual is not afforded the protections of the Fourth Amendment. California v. Greenwood, 486 U.S. 35, 39-41 (ruling that there is no reasonable expectation of privacy in a garbage bag left by the curb). A reasonable expectation of privacy is one that society accepts as objectively reasonable. \textit{Id.} at 39-40.

\textsuperscript{112} \textit{See O'Connor,} 480 U.S. at 725; T.L.O., 469 U.S. at 341; United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976); \textit{see also supra note 33 (discussing the various formulations of the special needs exception and the "impractical" rationale supporting this exception).}

There are various weaknesses to the special needs exception. For example, in \textit{O'Connor} the special need consisted of the "efficient and proper operation of the workplace." \textit{O'Connor,} 480 U.S. at 725. If this rather mundane need reaches the level of "special," the government should rarely have difficulty meeting this exception. Clancy, \textit{supra} note 28, at 597-99 (arguing that the special need is really a special interest and these special interests often are very mundane). There are two consequences trivializing the special needs exception. First, affording mundane governmental interests "special" status could result in the special needs exception enveloping Fourth Amendment analysis. Clancy, \textit{supra} note 28, at 598. Second, characterizing ordinary government administrative needs as "special" facilitates the government in justifying the search. \textit{See Stuntz, supra} note 11, at 1032 (observing that, in administrative searches, the government's need is not the need to engage in the search itself, but really the much broader (and more difficult to overcome) need to maintain the established regulatory regime); Sundby, \textit{supra} note 5, at 1796-97 (arguing that the special needs exception is skewed in the government's favor, because it fails to consider the "special costs" that the individual sustains as a result of the government's special need).

\textsuperscript{113} Von Raab, 489 U.S. at 667.

\textsuperscript{114} \textit{O'Connor,} 480 U.S. at 725. The Court must pass the special needs threshold to use the reasonableness test. \textit{Id.; Skinner,} 489 U.S. at 619; Von Raab, 489 U.S. at 665.
against the "government's need for effective methods to deal with breaches of public order." 115

In weighing both sides of the balance, the Court first analyzes the weight of the individual's expectation of privacy. 116 Next, the Court evaluates the government's side of the balance, primarily analyzing the governmental need and interest in conducting the search. 117 The Court then

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115. T.L.O., 469 U.S. at 337.
116. Skinner, 489 U.S. at 624-28. The Court may look at the history of the search to determine the privacy interest of the individual. Id. at 627-28 (holding that railroad employees, like many closely regulated industries, "have long been a principal focus of regulatory concern"); New York v. Burger, 482 U.S. 691, 705-06 (1987) (imputing a history of regulation to the vehicle dismantling industry, because its commercial predecessor, the junkyard, had a history of government regulation). In addition, the Court may examine whether the individual had notice of the pending search. Von Raab, 489 U.S. at 672 (ruling that Customs agents, because of the fact that they carry firearms, should expect government inquiry to determine their judgment and dexterity). But see Searle, supra note 58, at 267 (criticizing the Court's logic in reasoning that notice of the search diminishes a person's expectation of privacy).

Furthermore, if the individual voluntarily enters a sphere of regulation, such as when a business owner enters a closely regulated industry, the individual's expectation of privacy may be diminished. Burger, 482 U.S. at 702 (ruling that a junk dealer is involved in a closely regulated business, and thus, has a diminished expectation of privacy); United States v. Biswell, 406 U.S. 311, 316 (1972) (ruling that a businessman should expect inspections of his business records, when he enters a pervasively regulated industry, such as the ammunition and gun industry). But see LAFAVE & ISRAEL, supra note 45, at 221 (arguing that by diminishing the individual's expectation of privacy the Court is effectively stating that the individual impliedly consents to these searches by voluntarily entering a known zone of regulation).

117. Von Raab, 489 U.S. at 670; Burger, 482 U.S. at 702; T.L.O., 469 U.S. at 341. Governmental need may be a legitimate interest. Delaware v. Prouse, 440 U.S. 648, 654 (1979). It may be a substantial interest. Burger, 482 U.S. at 702. Or, it may be a compelling interest. Von Raab, 489 U.S. at 670. The most recent Supreme Court opinions appear to favor a requirement that the government show a compelling government interest. Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2394-95 (1995); Von Raab, 489 U.S. at 670; Skinner, 489 U.S. at 628. In support of these interests, the government may use empirical data. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 454-55 (1990) (citing specific apprehension rates at a sobriety checkpoint); Skinner, 489 U.S. at 607 n.1 (citing a 1979 study that estimated that one out of every eight railroad employees drank alcohol at least once on the job); United States v. Martinez-Fuerte, 428 U.S. 543, 553 (citing general statistics of the number of illegal aliens entering the country each year). Or, the government also may argue that there is a history of problematic conduct. Skinner, 489 U.S. at 628-29. Alternatively, the government may support its need for the search by relying on pure theory, shown by the government's articulated objective of deterring conduct that could pose a substantial threat to the public welfare. Von Raab, 489 U.S. at 674-76.

Either way the government's need must be supplemented by a showing that the search method used is effective. Prouse, 440 U.S. at 659 (requiring the government to show productiveness of the search to justify the search's intrusion). Von Raab makes this a superficial factor, however, because the government may show the productiveness of the search by pointing to successful statistics, thus demonstrating the productivity of the search. Von Raab, 489 U.S. at 675 n.3. In contrast, the government also may rely on statistics exemplifying a low rate of success, thereby showing the furtherance of the government objective of
weighs the two interests to determine which is greater, thereby discerning the reasonableness of the search. Other factors, however, such as the amount of discretion afforded the official performing the search, or the nature of the search method chosen by the state, may also serve as factors in judging the reasonableness of the search.

II. **Vernonia School District v. Acton: Random Drug Testing of Middle School and High School Student Athletes**

In *Vernonia School District v. Acton*, the United States Supreme Court determined whether a public school district's suspicionless urinalysis drug testing of middle school and high school student athletes violated the Fourth Amendment. The Supreme Court found that the immediacy and severity of the school's interest in stopping its drug problem combined with the minimal intrusiveness of the urinalysis, outweighed the athletes' privacy interests. Therefore, the Court held that the search was reasonable under the Fourth Amendment.

deterrence. *Id.; see supra* notes 106-08 and accompanying text (explaining that *Von Raab* has eliminated the requirement that the government show that the search method is effective).

Finally, in examining the government need for the search, the Court has held that the search method used to support the government's interest need not be the least intrusive alternative. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976). Furthermore, the government officials and the search method that they elected will be afforded a presumption of validity. *Sitz*, 496 U.S. at 454-55.


In eliminating the warrant and probable cause requirements that constrain the discretion of the government officials, the Court looks for adequate substitutes to similarly restrain the discretion of the officer. *Burger*, 482 U.S. at 703 (requiring that the statute authorizing the challenged search embody a "'constitutionally adequate substitute for a warrant'") (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)). The Court hypothesizes that less discretion causes a reduced chance for abuse of discretion, which consequently diminishes the chance of a severe intrusion occurring. *See supra* note 67 (clarifying that this rationale only serves to decrease the potential for a severe intrusion and does not, in reality, diminish the intrusiveness of the search).

120. Compare *Martinez-Fuerte*, 428 U.S. at 559 (holding that the regularized and open manner of the checkpoint supports the holding that the search is reasonable) and *Sitz*, 496 U.S. at 453 (concluding that the open and non-random nature of a sobriety checkpoint, in part, rendered the search method employed reasonable) *with Prouse*, 440 U.S. at 656-57 (observing that the random stop at issue provided no notice to the motorist, and thus constituted an unreasonable search). The more open and systematic a search is, the less discretion an officer has in the search. *See supra* note 92 (explaining that, in *Skinner* and other prior cases, minimal discretion supports the Court's holding that the search is reasonable).

122. *Id.* at 2388.
123. *Id.* at 2396.
124. *Id.*
In 1988, in response to an increase in disciplinary problems believed to be drug-related, the Vernonia School District, with strong parental support, adopted a random drug testing policy applicable only to student athletes. The school targeted only student athletes because the administration perceived athletes to be heavily involved in the escalating drug activity. The school also rationalized that, as role models for other students, athletes should be tested.

Therefore, the district enacted a detailed testing procedure. If a student tested positive, the school arranged a hearing with the student and...
his parents. At this point, the student could either submit to weekly testing for six weeks, or sit out the remainder of the current and subsequent athletic seasons.

The Vernonia middle school did not permit James Acton, a seventh-grader, to participate on the football team because he declined to submit to the drug testing program. His parents refused to sign the drug testing consent form, and after meeting with school officials, brought an action for declaratory and injunctive relief in the United States District Court of Oregon. The District Court held that the random drug testing program passed constitutional muster under the Fourth Amendment, and therefore denied the Actons' claim for declaratory and injunctive relief.

The Court of Appeals for the Ninth Circuit, without dissent, reversed the District Court, holding that the school's policy violated the Fourth Amendment. The Court of Appeals used a four-part test to evaluate the reasonableness of the search. First, analyzing the efficiency of the search, the court ruled that this factor marginally supported the drug testing policy. Second, in evaluating the discretion of the school officials, the court found that the random and systematic nature of the search eliminated the necessity of a more targeted search. These tests usually are very expensive for school districts. See Amy Piniak, Drug Testing Kids is More than a Drop in the Bucket, ST. PETERSBURG TIMES, July 30, 1995, at 6D (estimating that one high school paid about $50 for each drug test and advocating that this money could be spent on more pressing educational purposes); Anna Varela & Nancy McLaughlin, Drug Tests of Student Athletes Debated, GREENSBORO NEWS & RECORD, July 6, 1995, at B1, B2 (estimating at best each test would cost about $18 per student, and therefore to test all of the student athletes in one county's school system would cost approximately $148,000).

130. Acton, 115 S. Ct. at 2390. If the first test result is positive, a student performs a second urinalysis as soon as possible. Id. If that test is negative, the school pursues no further action. Id.

131. Acton, 796 F. Supp. at 1359. In order to participate again, the athlete must be retested before the next season for which they are eligible. Id.

132. Acton, 115 S. Ct. at 2390. To participate in any sport, the athlete first had to sign a consent form. Id.

133. Id.

134. Acton, 796 F. Supp. at 1365.


137. Acton, 23 F.3d at 1522. The efficiency of the search was only slightly in favor of the constitutionality of the search "because the exact nature of the goal [was] not entirely clear." Id. But see Robert J. Farley, Jr., Recent Decision, 68 TEMP. L. REV. 439, 456 (1995) (noting that if the court could not define the school's goals, it "could not determine
inated the chance of purely discretionary searches.\textsuperscript{138} Third, the court compared the school's interest in testing to other cases and did not find the interest compelling.\textsuperscript{139} Fourth, the court examined the physical and psychological intrusiveness of the search.\textsuperscript{140} Characterizing the athletes' privacy interest as "robust," the court reasoned that athletes should be treated no differently than adults.\textsuperscript{141} After weighing all these factors, the Court concluded that Vernonia's drug testing policy violated the Fourth Amendment.\textsuperscript{142}

The United States Supreme Court vacated the decision of the Court of Appeals, upholding the random, suspicionless drug testing policy of the school district under the Fourth Amendment.\textsuperscript{143} The Court found that student athletes have a diminished expectation of privacy and noted the minimal intrusiveness of the search.\textsuperscript{144} More importantly, in assessing the

\textsuperscript{138} Acton, 23 F.3d at 1522; see supra notes 67, 119 (explaining how the discretion of the official conducting the search impacts the courts' decisionmaking).

\textsuperscript{139} Acton, 23 F.3d at 1526. The court reasoned that the drug danger the high school and middle school athletes presented did not contain the same degree of danger found to be compelling in Skinner. \textit{Id. Compare} Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 628 (1989) (concluding that the danger of a train wreck and the threat of great human loss creates a compelling state interest); International Blvd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm'n, 966 F.2d 521, 525-26 (9th Cir. 1992) (recognizing that the danger of a nuclear catastrophe is compelling) \textit{and} National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989) (recognizing that the government's need in testing aviation employees is compelling because of the possibility that a single mistake might cause an aviation calamity), \textit{cert. denied, 493 U.S. 1056 (1990)} with Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2395 (1995) (holding that the threat of drug use by student athletes at the high school and middle school level is a compelling government interest).

However, the lower courts have ruled that a school district does not show a compelling need by merely speculating that student athletes other students involved in extracurricular activities were more likely to use drugs than other students. \textit{See} Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 764-65 (S.D. Tex. 1989).

\textsuperscript{140} Acton, 23 F.3d at 1525.

\textsuperscript{141} \textit{Id.} The Court of Appeals rejected the school district's contention that the locker room activities involved in athletics diminishes the athlete's expectation of privacy. \textit{Id.} The Court declared, "[n]ormal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination." \textit{Id.} Furthermore, the Court asserted that voluntary participation in athletics was "insufficient to reduce [athletes'] privacy interests to a minimum level." \textit{Id.}

\textsuperscript{142} \textit{Id.} at 1526.

\textsuperscript{143} Acton, 115 S. Ct. at 2396.

\textsuperscript{144} \textit{Id.} at 2394. Justice Scalia held that the "invasion of privacy was not significant." \textit{Id. But see} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (stating that the nature of a urinalysis is "particularly destructive of privacy and offensive to personal dignity").

There are striking similarities between the urinalysis procedure at issue in Von Raab and the one at issue in Vernonia. \textit{Compare} \textit{id. with} Acton, 115 S. Ct. at 2389. In Von Raab,
government's interest in the search, the Court found that the compelling need for the policy cannot be assessed in terms of a fixed, minimum quantum. Therefore, the Court created a new flexible definition of what constitutes "compelling."

A. The Majority: Further Eroding the Fourth Amendment by Expanding the Definition of a Compelling Need

Justice Scalia, writing for the majority, first stated that the Fourth Amendment applied to Vernonia's drug testing policy. Relying on prior cases, the Court ruled that a state-compelled urinalysis conducted by a public school official is a search under the purview of the Fourth Amendment. Next, Justice Scalia reasoned that the language of the Fourth Amendment does not expressly require a warrant. He noted that a warrant or probable cause may not be needed for a search to be reasonable when special needs, such as the quick disciplinary needs of a school, rendered these requirements "impracticable."

Justice Scalia described the urinalysis procedure: "'a monitor of the same sex . . . remains close at hand to listen for the normal sounds,' and . . . the excretion thus produced [is] turned over to the Government for chemical analysis." Von Raab, 489 U.S. at 680 (quoting Id. at 661) (Kennedy, J., majority opinion). The discrepancy in Justice Scalia's opinions may be the fact that adolescents were the object of Vernonia's search. See Lisa Daniels, Vernonia's Day in Court, PORTLAND OREGONIAN, Mar. 29, 1995, at A1 (quoting Justice Scalia: "Students are kids. You're dealing with children. You're not dealing with adults.")

Justice Scalia defined a compelling interest as one "which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." De-ciphering this definition, one can see that, to amount to compelling, the need for the search only has to overcome the privacy interests of the individual.

Id. at 2390; see supra note 109-11 (explaining the Court's methodology in determining that a search has occurred for purposes of the Fourth Amendment).

Id. at 2390-91; Von Raab, 489 U.S. at 665; Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989) (ruling that a state-compelled urinalysis is a search under the Fourth Amendment).

Id. at 2390-91 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)). In addition, because the search was conducted in the context of a public school, the majority could rely on T.L.O., 469 U.S. at 340-41. In T.L.O., the Court did not require probable cause because it interfered with "the substantial need of teachers and administrators for freedom . . . to maintain order in the schools." Id. at 341; see Ingraham v. Wright, 430 U.S. 651, 681 (1977) (concluding that educational disciplinary procedures serve a state interest); Goss v. Lopez, 419 U.S. 565, 580 (1975) (opining that teachers require discretion in ad-
majority ruled that individualized suspicion, a diluted form of probable cause, was not required necessarily.\textsuperscript{152} Therefore, the Court passed the special needs threshold, and proceeded to use the reasonableness standard to analyze the constitutional validity of the search.\textsuperscript{153}

As in prior cases, to ascertain the reasonableness of the school district's policy, the Court balanced the individual's interest in privacy against the government's interest in preventing drug use.\textsuperscript{154} After evaluating the privacy interests involved in this search, the Court found the individual's reasonable expectation of privacy to be minimal.\textsuperscript{155} From a general standpoint, the majority noted that the breadth of a person's privacy interest may depend upon his or her legal relationship to the state.\textsuperscript{156} In ministering their disciplinary actions because of the frequency of events in a public school that necessitate immediate action); see also supra note 33 (discussing the various formulations of the special needs exception).

\textsuperscript{152} Acton, 115 S. Ct. at 2391. In fact, “[d]istrict officials have said they did not suspect James [Acton] of drug use.” Daniels, supra note 144, at A1; see United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (stating that the “Fourth Amendment imposes no irreducible requirement of such suspicion”).

\textsuperscript{153} Acton, 115 S. Ct. at 2390-91. Construing the Fourth Amendment, Justice Scalia concluded that reasonableness is the ultimate measure of a search’s constitutional validity. Id. at 2390; see supra note 46 (presenting the views of Justice Scalia and Professors Taylor and Amar, who argue that reasonableness is the lodestar of the Fourth Amendment).

\textsuperscript{154} Acton, 115 S. Ct. at 2390; see Delaware v. Prouse, 440 U.S. 648, 654 (1979) (opining that the reasonableness standard amounts to a balancing of legitimate governmental interests and individual privacy interests).

\textsuperscript{155} Acton, 115 S. Ct. at 2391-93. Compare California v. Greenwood, 486 U.S. 35, 40 (1988) (holding that an individual has no reasonable expectation of privacy in their garbage after it has been left by the curb) and New York v. Class, 475 U.S. 106, 121-22 (1986) (finding that an individual has a minimal expectation of privacy in her automobile identification number located on the dashboard of her car) with Acton, 115 S. Ct. at 2392-93 (finding that student athletes have a minimal expectation of privacy while urinating in the presence of a state official).

\textsuperscript{156} Acton, 115 S. Ct. at 2391. Referring to the relationship of the state and the student, the majority emphasized that “the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” Id. at 2392. In this way, the student is analogous to the probationer. Compare Griffin v. Wisconsin, 483 U.S. 868, 879 (1987) (finding that the State and the probationer have an “ongoing supervisory relationship”) with Acton, 115 S. Ct. at 2391-92 (noting the supervisory relationship between the state and the student). In other areas of constitutional law, such as procedural due process, the Court has been reluctant to scrutinize severely the school's decisionmaking. See Ingraham v. Wright, 430 U.S. 651, 682 (1977) (ruling that compelling a school to adopt more procedural safeguards concerning corporal punishment would unnecessarily intrude upon the school's educational responsibility and ability to discipline students). But see Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (declaring that “state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students”).
addition, the Court reasoned that historically the common law did not afford minors full fundamental rights.\footnote{157}

More specifically, Justice Scalia analyzed the peculiar nature of high school athletics to support his finding that privacy interests of student athletes are minimal.\footnote{158} First, Justice Scalia noted that athletes undress and usually shower in the presence of one another.\footnote{159} Second, student athletes "voluntarily subject themselves to a degree of regulation" by participating in extracurricular activities.\footnote{160} For example, student athletes must sign insurance waivers, submit to a preseason physical examination, and maintain the proper grade and behavioral standing with the school to participate in athletics.\footnote{161} Therefore, the Court reasoned that, as in the closely regulated industry line of cases, the student athlete impliedly consents to governmental intrusions by subjecting himself to regulation.\footnote{162}

Next, the majority found the intrusiveness of the search to be minimal.\footnote{163} Adhering to \textit{Skinner}, the Court found that excretory functions

\begin{footnotes}

\footnote{157.} \textit{Acton}, 115 S. Ct. at 2391. In the narrow sense of liberty, unemancipated minors lack "the right to come and go at will." \textit{Id.} Nevertheless, in the past, the Court has embraced students' rights because of the importance of maintaining an open-minded, educational environment. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). Justice Jackson stated, "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." \textit{Id.; see Tinker}, 393 U.S. at 511 (1969) (noting that, whether within the confines of school or outside of them, students are "persons" for purposes of the Constitution, and therefore possess recognized fundamental rights).

\footnote{158.} \textit{Acton}, 115 S. Ct. at 2392-93.

\footnote{159.} \textit{Id.} In the Vernonia locker rooms, there were no private changing rooms or individual showers. \textit{Id.; cf. Bell v. Wolfish}, 441 U.S. 520, 557 (1979) (holding that a prison detainee has a diminished expectation of privacy because of the nature of confinement).

\footnote{160.} \textit{Acton}, 115 S. Ct. at 2393; \textit{cf supra} note 60 (explaining the Court's rationale that when individuals voluntarily enter a zone of regulation they diminish their expectation of privacy).

\footnote{161.} \textit{Acton}, 115 S. Ct. at 2393. Acton's preseason physical examination included providing a urine sample. \textit{See id.} The majority added that public schoolchildren, particularly athletes, have a diminished expectation of privacy because they frequently have to undergo vaccinations and physical exams. \textit{Id.} at 2392-93 n.2.

\footnote{162.} \textit{Id.} at 2393; \textit{see LAFAVE \\ ISRAEL, supra} note 45, at 221 (criticizing the Court for using this logic in the closely regulated industry cases).

\footnote{163.} \textit{Acton}, 115 S. Ct. at 2393. \textit{Compare} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (arguing that a state-monitored urinalysis destroyed personal privacy and offended personal dignity), Cupp v. Murphy, 412 U.S. 291, 295 (1972) (quoting \textit{Terry}) (ruling that taking a sample of scrapings from the defendant's fingernails was a severe "intrusion upon cherished personal security"), and \textit{Terry v. Ohio}, 392 U.S. 1, 16-17 (1968) (finding that a brief patdown "of the outer surfaces of a person's clothing" constituted a "serious intrusion upon the sanctity of the person") \textit{with Acton}, 115 S. Ct. at 2393 (finding that a state-monitored urinalysis minimally intruded upon an athlete's privacy).
usually are furnished heightened privacy protection.\textsuperscript{164} Yet, the Court also enumerated various aspects of the drug test, that minimized its intrusiveness.\textsuperscript{165} First, the male athlete, while fully dressed, urinates with his back to the school monitor.\textsuperscript{166} Second, the testing is standardized, conducted in a completely random fashion, and the laboratory tests solely for illegal drugs.\textsuperscript{167} Third, the laboratory released the results of the test only to parents of the athlete and to a "limited class of school personnel," not law enforcement officials.\textsuperscript{168} Lastly, the majority rejected the Actons' argument that these tests were intrusive because they required the athlete to divulge any medications he or she was taking to ensure the test's accuracy.\textsuperscript{169} Therefore, the Court concluded that the search insignificantly intruded upon the athlete's diminished expectation of privacy because of the standardized, and privacy-protecting aspects of the policy.\textsuperscript{170}

The majority next weighed the government's interest, which consisted of the government's need for the search, and the efficacy of the search method employed, against the individual's privacy interest.\textsuperscript{171} Noting that the district court required the school to show a compelling need for the search, Justice Scalia took the opportunity to redefine compelling.\textsuperscript{172} Propounding that compelling may not be reduced to a quantum, Justice Scalia reasoned that compelling "describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."\textsuperscript{173} Under this new test, the Court found the

\textsuperscript{164} \textit{Acton}, 115 S. Ct. at 2393; see supra note 94 (discussing the privacy value our society affords the excretory function).

\textsuperscript{165} \textit{Acton}, 115 S. Ct. at 2393.

\textsuperscript{166} \textit{Id.}; see supra note 129 (explaining the testing procedure and the different procedures for male and female athletes).

\textsuperscript{167} \textit{Acton}, 115 S. Ct. at 2393; see supra note 67 (explaining how courts favor the systematic nature of the search and the resulting decreased discretion of the state officials to demonstrate the minimal intrusiveness of the search).

\textsuperscript{168} \textit{Acton}, 115 S. Ct. at 2393. Adhering to prior case law, the Court weighed the non-criminal purpose of the search. \textit{Id.} Justice Scalia argued that "the search here is undertaken for prophylactic and distinctly nonpunitive purposes." \textit{Id.} at 2393 n.2; see supra note 38 (discussing how the purpose of the search affects the Court's decisionmaking).

\textsuperscript{169} \textit{Acton}, 115 S. Ct. at 2393-94. The school's policy required the student to identify any prescription medications he or she was taking. \textit{Id.} at 2394. Furthermore, the school required that the student provide verification that he or she was actually taking the medications. \textit{Id.} Faced with this, the majority speculated that the school might have allowed James Acton to send the requested information to the laboratory in a confidential manner. \textit{Id.} As Justice Scalia notes, there is no language in the policy supporting this speculation, but the Court, in his words, "will not assume the worst." \textit{Id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.} at 2394-95.

\textsuperscript{173} See \textit{id.}; supra note 146 (deciphering Justice Scalia's definition of compelling).
school’s need, to deter the student body from drug use, compelling, because of the harmful effects drugs have on adolescents and the increased risk of drug-induced injuries to athletes.174

The Court did not accept the Actons’ proposed, less-intrusive alternative—drug testing students individually suspected of drug use.175 The Court reasoned that basing drug testing on suspicion would create a “badge of shame” for the students the school officials chose to test and would divert teachers from their primary role of educating students.176 Furthermore, the Court found exclusive testing of athletes was rational because the school’s evidence supported the theory that athletes were connected strongly to the school’s drug problem.177 Thus, the majority found the suspicionless search method to be efficacious and the search itself to be based on a compelling need.178 Weighing these two government interest factors against the individual’s diminished privacy interests the Court held that the search was reasonable and hence constitutional under the Fourth Amendment.179

174. Acton, 115 S. Ct. at 2394-95 (stating that the concern is compelling in part because “[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe”); cf. Maclin, supra note 1, at 28, 33-34 (arguing that the Court has bowed to public pressure, finding the government need compelling because of the hysteria surrounding the “War On Drugs”); Sundby, supra note 5, at 1797 (arguing that the government’s need is always important, because of the magnitude of social problems facing the government). But see National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680-84 (1989) (Scalia, J., dissenting) (sharply criticizing the majority for merely speculating that the Customs Service has a drug abuse problem simply because American society has a drug abuse problem); Delaware v. Prouse, 440 U.S. 648, 660-61 (1979) (finding mere speculation to be too weak to support the government’s need and effectiveness of search, and thus finding the search unreasonable); Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 764-65 (S.D. Tex. 1989) (holding that a school district does not show a compelling need by merely speculating that students participating in extracurricular activities were more likely to use drugs than other students).

175. Acton, 115 S. Ct. at 2396. The Court argued from prior cases that the reasonableness test of the Fourth Amendment does not demand individualized suspicion and the least intrusive means. Id.; see United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (ruling that less-intrusive means and individualized suspicion would unduly hamper the state’s interest in law enforcement).

176. Acton, 115 S. Ct. at 2396. As in Skinner, the Court found school officials incapable of detecting drug use, because of the hidden effects of drug use and thus found it impractical to incorporate individualized suspicion into the test. Id.; see supra text accompanying note 96 (discussing the underlying rationale of Skinner).

177. Acton, 115 S. Ct. at 2396.

178. Id. at 2395-96.

179. Id. at 2396. The majority supplemented its decision by noting that the policy had the substantial support of the parents of students in the community. Id. at 2397. The Court stated, “[t]he record shows no objection to this districtwide program by any parents other than the couple before us here.” Id.

However, the majority fails to respect the countermajoritarian role of the Court in our constitutional system. See Alexander M. Bickel, The Least Dangerous Branch:
B. The Dissent: What Happened to Individualized Suspicion?

In dissent, Justice O'Connor focused on three weaknesses in the majority's rationale. First, the dissent relied on the history of the Fourth Amendment to contend that broad, blanket-type searches executed by England in the colonies served as the impetus for enacting the Fourth Amendment. The dissent argued that the majority erroneously had upheld the search by basing part of its decision on the fact that the school...
evenhandedly tested athletes.\textsuperscript{182} In other words, the school district’s suspicionless search policy represented exactly the type of search the Framers desired to eliminate.\textsuperscript{183}

Second, the dissent asserted that the history of the Fourth Amendment and the subsequent case law demonstrate that the Framers required some level of suspicion, evidenced by the express reference to probable cause, for a search to be reasonable.\textsuperscript{184} While the dissent noted that some cases have held that individualized suspicion is not always necessary for a search to be reasonable, these searches either involved a threat of great

\textsuperscript{182} Action, 115 S. Ct. at 2398-99 (O’Connor, J., dissenting). The dissent observed that privacy, not evenhandedness is the focus of the Fourth Amendment. Id.; see U.S. Const. amend. IV (failing to mention evenhandedness, yet expressly bestowing upon the people the right “to be secure in their persons . . . against unreasonable searches and seizures”).

\textsuperscript{183} See Action, 115 S. Ct. at 2398-99 (O’Connor, J., dissenting); supra notes 3-5 and accompanying text (observing that, during colonial times, just as now, warrantless, suspicionless, administrative searches flourished).

\textsuperscript{184} Action, 115 S. Ct. at 2399 (O’Connor, J., dissenting); see, e.g., U.S. Const. amend. IV (expressly stating probable cause); The Collection Act of July 31, 1789, § 24, 1 Stat. 43 (requiring reasonable suspicion for a duty collector to search merchants goods); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 638 (1989) (Marshall, J., dissenting) (noting that the Court almost always requires a showing of suspicion by the government to justify the search); Arizona v. Hicks, 480 U.S. 321, 329 (1987) (“adher[ing] to the textual and traditional standard of probable cause”); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that the government must demonstrate some “articulable and reasonable suspicion” in order for a random search to be constitutional); Dunaway, 442 U.S. at 216 (holding that a seizure without probable cause violated the Fourth Amendment); Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (requiring the government to base a search or seizure on particularized probable cause); United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) (noting that “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure”); Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (ruling that there must be articulable facts supporting the government’s intrusion); Beck v. Ohio, 379 U.S. 89, 91 (1964) (stating that the validity of an arrest depends on the officers demonstrating probable cause); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (requiring probable cause to effect an arrest and cautioning against departing from the probable cause standard); Henry v. United States, 361 U.S. 98, 100 (1959) (noting that “probable cause has roots that are deep in our history”); Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (opining that probable cause constitutes more than minimal suspicion); Clancy, supra note 28, at 489 (arguing “[w]hile the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures”).
harm to a large number of persons\textsuperscript{185} or involved a negligible intrusion on the person's privacy.\textsuperscript{186} \textit{Acton} presented neither of these situations.\textsuperscript{187}

In prior cases, impracticability supported disregarding suspicion.\textsuperscript{188} Whereas in \textit{Acton}, the school offered no evidence that searching students suspected of drug use would be impracticable.\textsuperscript{189} In fact to support the need for the search, the school district ironically presented evidence of identifiable students acting in manners that led the school to believe that these students were using drugs.\textsuperscript{190} The dissent further noted that in

\textsuperscript{185} \textit{Acton}, 115 S. Ct. at 2399 (O'Connor, J., dissenting); \textit{see} \textit{Skinner}, 489 U.S. at 631 (finding particularized suspicion impractical because of threat of massive train wreck); Camara v. Municipal Court, 387 U.S. 523, 535 (1967) (involving threat of urban decay and housing structural weaknesses that not only pose threat of nuisance, but also endanger surrounding neighborhood).

\textsuperscript{186} \textit{Acton}, 115 S. Ct. at 2399 (O'Connor, J., dissenting); \textit{see} Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 452-53 (1990) (search consisting of a thirty-second checkpoint stop, in which police observed individuals in their automobiles, did not amount to unconstitutional intrusion); \textit{Martinez-Fuerte}, 428 U.S. at 562 (upholding brief, suspicionless detention of individual while in automobile, in part because the challenged search minimally intruded upon the individual's privacy). These cases involved very brief encounters, in which the State summarily scanned the driver's automobile, whereas in \textit{Vernonia}, the state official monitored a high school student while urinating. \textit{Acton}, 115 S. Ct. at 2390.

\textsuperscript{187} \textit{Acton}, 115 S. Ct. at 2400-02 (O'Connor, J., dissenting).

\textsuperscript{188} \textit{See} supra note 33 (discussing the special needs exception and how it relies on the impracticability rationale to eliminate the requirement of suspicion in executing searches).

\textsuperscript{189} \textit{See} \textit{Acton}, 115 S. Ct. at 2402-03. The school district has an extensive school code which enumerates "problem areas." \textit{Id.} at 2402. In fact, teachers and administrators are required to enforce this code, possibly handing out sanctions. \textit{Id.} Therefore, the dissent reasoned that it would not be impractical for the school to include drug use in this disciplinary list, in that the code already charges teachers with the responsibility of investigating a multitude of offenses, such as possession of tobacco, gambling, vandalism, disorderly conduct, fighting, etc. \textit{Id.}

\textsuperscript{190} \textit{Id.} at 2403. The dissent stated that: "[t]he great irony of this case is that most . . . of the evidence the District introduced to justify its suspicionless drug-testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use . . . ." \textit{Id.} At the oral argument before the Supreme Court the school district relied on individualized suspicion:

MR. VLPERT [representing the school district]: The district court found . . . a startling and progressive increase in the use and glamorization of drugs . . . . Teachers testified about a tremendous difference in the type of behavior than they had seen over the course of the last 16 or 17 years.

QUESTION: None of that sounds like it's confined to athletes.

. . . .

MR. VLPERT: Justice Stevens, the district court found that the athletes were among the leaders of the group . . . causing the disruptions. . . .

QUESTION: How do they know that if they don't have individualized suspicion?

. . . .

. . . They know who the leaders are who are the most frequent users of drugs, but they don't have any individualized suspicion as to particular individuals.
prior cases involving schools, the Court has allowed a search based on at least some form of suspicion.\textsuperscript{191}

Third, the dissent attacked the majority for passively accepting the attenuated and circuitous logic found in the district's justification of its suspicionless drug testing program.\textsuperscript{192} The dissent found that the school district presented no evidence, and did not even speculate, that an alleged drug problem existed in the seventh or eighth grade.\textsuperscript{193} In addition, the

\begin{quote}
MR. VOLPERT: Well, ... the Ninth Circuit said that ... the district officials observed conduct which was so far out of the norm that drug use was a logical conclusion. Now—

QUESTION: Well, that would be individualized suspicion, wouldn't it?

MR. VOLPERT: Well, I don't think so necessarily. If you see in the classroom someone misbehaving, and you're a teacher, you at that point have to make an important choice if you're suggesting that you drug test based on individualized suspicion. You have to decide ... that you're going to make an accusation and drag someone down to the principal's office.

QUESTION: But Mr. Volpert, isn't that pretty much what the Fourth Amendment is designed to require, something based on individualized suspicion, and the school district didn't even try that, did they?

MR. VOLPERT: ... There was no drug testing program based on reasonable suspicion.
\end{quote}

\textit{Vernonia Sch. Dist. v. Acton}, No. 94-590, 1995 WL 353412, at *12-15 (U.S. Mar. 28, 1995) (Transcript of Oral Argument). In addition, the school district justified drug testing middle school athletes, such as James Acton, by speculating that the drug problem that was presently afflicting the high school started at a lower grade level and ascended to the high school as the students did. \textit{Acton}, 115 S. Ct. at 2406.

191. \textit{Acton}, 115 S. Ct. at 2402 (O'Connor, J., dissenting); see \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 346 (1985) (upholding the search of a student's purse, only after school officials suspected that student of smoking in school); see also \textit{Ingraham v. Wright}, 430 U.S. 651, 677-78 (1977) (finding that teachers rarely inflict corporal punishment on students without suspicion and actual evidence of wrongdoing).

192. \textit{Acton}, 115 S. Ct. at 2403 (O'Connor, J., dissenting). Justice O'Connor asserted that even if \textit{Vernonia}'s suspicionless drug testing plan passed constitutional muster, the school's failure to present adequate evidence to support testing athletes would have proved constitutionally fatal to the policy. \textit{Id.} at 2406.

193. \textit{Id.} at 2406. Justice O'Connor concluded:

The only evidence of a grade school drug problem that my review of the record uncovered is a "guarantee" by the late-arriving grade school principal that "our problems we've had ... didn't start at the high school level. They started in the elementary school." But I would hope that a single assertion of this sort would not serve as an adequate basis on which to uphold mass, suspicionless drug testing of two entire grades of student-athletes—in \textit{Vernonia} and, by the Court's reasoning, in other school districts as well.

\textit{Id.} (citations omitted). Of course, this decision has ramifications for public students throughout the United States. Justice O'Connor noted that, pursuant to this case, the portion of the eighteen million public school students in grades seven through twelve in the United States who participate in athletics, or extracurricular activities for that matter, are subject to random, suspicionless drug testing. \textit{Id.} at 2397. Shortly after this decision many public schools began to consider random drug testing their students. \textit{See, e.g., Michael
dissent contended that the school failed to show evidence tying athletes to the reported increase in classroom disruption.\textsuperscript{194} Therefore, the dissent concluded it was both illogical and unreasonable to test student athletes because of an identifiable discipline problem with which they were not specifically associated.\textsuperscript{195}

In conclusion, the dissent found the majority's endorsement of the mass, suspicionless search in a school setting to be unsupported in the case law, unconstitutional, and simply illogical.\textsuperscript{196} Justice O'Connor, referring to the hysteria surrounding the drug problem in this country, closed her dissent by warning: "[i]t cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis."\textsuperscript{197}

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Briggs, Drug Testing OK'd for Student Athletes: High Court Endorses Public School's Rule, CHICAGO SUN-TIMES, June 27, 1995, at 14 (citing a local school spokesman who stated that a her school's drug testing policies "could be revisited as a result of this decision"); Piniak, supra note 129, at 6D (reporting that the Hillsborough school district was considering drug testing all students involved in extracurricular activities); Varela & McLaughlin, supra note 129, at B1 (citing an attorney at a local school who concluded that drug testing may be applied to students who take vocational education classes because of the risk involved with using dangerous equipment). But see Ed Bond, On the Issue: Student Rights vs. Drug Tests for Athletes, L.A. TIMES, July 18, 1995, at B3 (Valley ed.) (noting that members of the Los Angeles Board of Education disfavor random drug testing).

\textsuperscript{194} Acton, 115 S. Ct. at 2406 (O'Connor, J., dissenting); see supra note 190 (demonstrating the difficulty that the school district had at oral argument to point specifically to problematic athletes).

\textsuperscript{195} Acton, 115 S. Ct. at 2406 (O'Connor, J., dissenting). The school presented weak evidence to support its objective of preventing drug-related athletic injuries. \textit{Id.} For example, the only evidence presented by the school in this regard was that of a wrestling coach who suspected that drug use caused a wrestler's misexecution and resulting injury. \textit{Id.} at 2389.

Sports-related injuries, especially at the high school level, occur frequently, regardless of drug use. \textit{See Larry G. McLain, M.D. & Scott Reynolds, Sports Injuries in a High School, 84 PEDIATRICS 446, 446-50, (1989) (reporting that, out of the 1,283 student athletes in a suburban high school, 280 (22\%) suffered injuries, with football having the largest injury rate and wrestling having the third highest injury rate). Of course, besides unfortuitous luck, there are other factors such as physical maturity which lead to sports injuries. Richard E. Kreipe, M.D. & Harry L. Gewanter, M.D., Physical Maturity Screening for Participation in Sports, 75 PEDIATRICS 1076, 1076-80 (1985) (advising that prospective youth athletes should be given maturity tests to determine whether they can participate in contact sports).}

\textsuperscript{196} See \textit{Acton}, 115 S. Ct. at 2407 (O'Connor, J., dissenting).

\textsuperscript{197} Id. Dissenting in an earlier case, Justice Marshall stated: "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." \textit{Skinner v. Railway Labor Executives' Ass'n}, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). Noting the lasting effect of revoking civil liberties, Justice Marshall wisely cautioned that: "when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." \textit{Id.} In a less famed portion of his eminent dissent in \textit{Olmstead}, Justice Brandeis stated:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert
III. Treating The Fourth Amendment as a Fundamental Right Found in the Bill of Rights

A. The Weaknesses of the Present Balancing Test

Like a paper clip that was continuously bent and manipulated, the balancing test was predestined to break. Since its inception in *Camara*, the balancing test constantly has been extended, from one type of search to the next. While this may illustrate the versatility of the balancing analysis, it also demonstrates that the balancing analysis is inherently manipulatable, and thus, somewhat illusory. Furthermore, this analysis has been extended artificially to divergent types of searches and consequently has generated confusing jurisprudence. Therefore, because susceptibility to manipulation is the primary weakness of the current balancing test, a more rigid balancing analysis is needed. This test must be sufficiently to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

198. See Knopp, *supra* note 53, at 692 (summarizing the different types of constitutionally valid, warrantless searches); *supra* notes 45-108 and accompanying text (describing and explaining the types of administrative searches that have used the balancing test and reasonableness standard to evaluate the constitutionality of searches and seizures).

199. See New Jersey v. T.L.O., 469 U.S. 325, 385 (1985) (Stevens, J., dissenting) (criticizing the majority for using the balancing test in an open-ended manner); *LaFave & Israel, supra* note 45, at 218 (contending that the balancing test permits the Court greater freedom from the rigid analytical framework contained in the express language of the Fourth Amendment). Professors LaFave and Israel consequently criticize the *Camara* Court for carelessly and imprecisely using the balancing test. *Id.*; see also Stuntz, *supra* note 11, at 1033-34 (arguing that the transparency of the balancing test results in open-ended reasonableness review of government regulation); Sundby, *supra* note 5, at 1772 (referring to the standards used within the balancing analysis as malleable).

200. Compare *Colonnade Catering Corp.* v. United States, 397 U.S. 72, 77 (1970) (justifying the search because the liquor sale industry, the object of the search, had a long history of government regulation) with *Skinner*, 489 U.S. at 627 (justifying the search because the employee, the object of the search, had a history of heavy regulation). *Cf.* Schulhofer, *supra* note 91, at 107-08 (briefly summarizing the inconsistency of the Court's decisions and how Justices Scalia, Stevens, O'Connor, and Blackmun repeatedly have opined inconsistently in administrative search cases); Stuntz, *supra* note 11, at 1057-58 (contending that the reasonableness standard embodies a perverse double standard—protecting privacy when society's interest outweighs it and forsaking the individual's privacy interest when society's interest is insignificant); *supra* note 117 (listing the different government interests, legitimate, substantial, and compelling, that are used in the balancing analysis).

201. See Strossen, *supra* note 68, at 1187-88 (arguing that the current balancing analysis is too subjective, allowing value judgments of the judges to affect the outcome of the decision). Professor Strossen argues "constitutionally guaranteed individual liberties, should receive the more certain protection resulting from categorical rules rather than the less certain protection resulting from ad hoc balancing." *Id.* at 1176. But see Geoffrey G. Hemphill, Comment, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 257-59 (1995) (arguing that
rigid to prevent judicial manipulation, yet flexible enough to accommodate the competing individual and governmental interests at stake. Before outlining this proposed test, it is important to illustrate the weaknesses of the present test, manipulability and confusion.

1. Mixing Analysis or Balancing Analysis?

a. Mixing the Government's Interest with the Individual's

The courts have manipulated the balancing test to the point where each side's interests now have become hopelessly entangled. The result has been a mixing, rather than a balancing analysis. For instance, in Acton, redefining compelling need, a factor used to evaluate the government's interest in the search, the Acton court defined compelling expansively as any governmental interest which overcomes the individual's privacy interest. In effect, this constitutes a balancing analysis, because for the government's need to be compelling it only must outweigh the individual's interest. In other words, if the privacy interest is insignificant, then the

adding more factors and solidifying those factors in the balancing analysis is not conducive to simplifying and clarifying this area of law).

202. See supra note 13 and accompanying text (introducing the purpose of the balancing analysis and explaining how Camara incorporated both interests in the balancing analysis). But see Sundby, supra note 5, at 1763, 1765-66 (contending that by concentrating on privacy in its Fourth Amendment analysis, the Court allowed reasonableness and the balancing analysis to flourish).

203. Compare Camara v. Municipal Court, 387 U.S. 523, 536-537 (1967) (creating the balancing analysis as a means to determine the reasonableness of a search) with New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (employing balancing analysis to conclude that the reasonableness standard should be used to judge the constitutionality of a school search). See Clancy supra note 28, at 608 (arguing that the balancing test fails to “identify individual suspicion’s proper role” in Fourth Amendment analysis); Strossen, supra note 68, at 1181 (criticizing the Court for employing the balancing test “according to a utilitarian cost-benefit balancing calculus”); infra notes 206-09 and accompanying text (criticizing Acton’s definition of compelling because it uses a balancing analysis to determine if the government’s need is compelling).

204. Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1523 (9th Cir. 1994), vacated, 115 S. Ct. 2386 (1995) (mixing the private and governmental interests together to reach a conclusion). The court ruled that the governmental and individual privacy interests “are intertwined in any analysis to a very high degree, for they are not separate little weights to be put on a chemist’s balance.” Id.; cf. Sundby, supra note 5, at 1790-91 (postulating that in defining a reasonable expectation of privacy, the Court anticipatorily incorporates the government’s need for the search into that definition).

205. Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2394-95 (1995). Justice Scalia held that what constitutes a compelling interest can not be distilled into a “fixed, minimum quantum of governmental concern.” Id. at 2394. But see supra note 139 (comparing instances where the Court found that the government demonstrated a compelling need and instances where the Court found that the government failed to demonstrate a compelling need).

206. Acton, 115 S. Ct. at 2394-95; see Aleinikoff, supra note 53, at 945 (stating his definition of balancing as “a judicial opinion that analyzes a constitutional question by identi-
government's need also may be insignificant, yet still be compelling, as long as it is equal to or greater than the privacy interest. Of course, the converse also is true. Therefore, compelling's floating quantum now is derived directly from the privacy interest at stake. It is a reflection of the privacy interest, as much as it is an indicator of the government's actual need.

Furthermore, this new, elastic definition manifests the serious implication of irreversibly tipping the balancing scale in the government's favor. The Court expands the definition of compelling at a time when
the current trend in jurisprudence and modern society is to diminish the individual's expectation of privacy. 211 Thus, in effect, the Court unnecessarily tips the balance in favor of the government by enlarging the definition of a compelling need, thereby theoretically allowing an insignificant governmental interest to justify the search. 212

Another serious implication of this definition of compelling is that the balancing test, equipped with this definition, embodies circular logic. For a search to be reasonable, the government's need for the search must outweigh the privacy interest of the individual, and thus justify the intrusion that the search presents. 213 Under Acton, a compelling need is one in which the government's need for the search outweighs the individual's

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211. See Sundby, supra note 5, at 1762-63 (arguing that the individual's privacy interest and the government's interest are "dependent variables on a sliding scale: minimizing the level of the privacy intrusion can help compensate for a weaker government justification"). Therefore, minimizing the individual's expectation of privacy necessarily increases the scope of acceptable intrusions. Id. at 1762. He also observes the diminishing effect modernity, technology, and the Court's decisions have had on individuals' expectation of privacy in our society:

Technological and communication advances mean that much of everyday life is now recorded by someone somewhere, whether it be credit records, banking records, phone records, tax records, or even what videos we rent. We may want to be left alone, but we realistically do not expect it to happen in any complete sense.... [Furthermore,] as governmental and nongovernmental intrusions on privacy expand, the scope of what one reasonably expects to be private correspondingly becomes truncated. In other words... Fourth Amendment protections will shrink as our everyday expectations of privacy also diminish. Id. at 1758-61; Strossen, supra note 68, at 1176 (contending that the Court consistently undervalues individual privacy interests, while unnecessarily overstating the countervailing law enforcement interests).

As these professors illustrate, the government can justify the challenged search in three manners. First, the government can diminish the individual's privacy interest and find that the government's interest outweighs it. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 627 (1989) (finding that railway workers have a diminished expectation of privacy because of the history of regulation in the industry). In Skinner, the Court upheld the search because of the government's compelling need to prevent train accidents. Id. at 628.

Second, the Court can inflate the government's interest and find that this interest outweighs the individual's. See Acton, 115 S. Ct. at 2395 (finding a school district's desire to curtail drug-related sports injuries and curb adolescent disruptions in school compelling).

Third, the Court can do both, thus providing a foolproof method of justifying the search and the intrusion that it entails as reasonable under the Fourth Amendment. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 684-85 (1989) (Scalia, J., dissenting) (castigating the majority for making a mockery of the Fourth Amendment by inflating the governmental need while minimizing the intrusiveness of the search and the privacy expectations of the individuals).

212. See Sundby, supra note 5, at 1762-63 (noting that reducing the expectation of privacy can compensate for a weak governmental interest); supra note 211 (explaining the methods that the Court can use to justify a search).

privacy interest and thus justifies the challenged search.\textsuperscript{214} Therefore, the reasonableness standard and the government's compelling need are equated.\textsuperscript{215} After \textit{Acton}, a search is reasonable if the government demonstrates a compelling need,\textsuperscript{216} and a compelling need is one which is in effect reasonable—outweighing the privacy interest, and hence justifying the search.\textsuperscript{217}

\textbf{b. Mixing the Individual's Interest with the Government's}

Similarly mixing the analysis, the \textit{Acton} majority, in evaluating the privacy interest of the individual, considered the intrusiveness of the search.\textsuperscript{218} As in \textit{Skinner}, the \textit{Acton} Court initially recognized the traditional, constitutional privacy protection afforded to an individual in their excretory function.\textsuperscript{219} Nevertheless, the Court diminished this heightened privacy interest both by concluding that the student athlete voluntarily entered a sphere of regulation,\textsuperscript{220} and by finding the intrusiveness of

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\item 214. \textit{Acton}, 115 S. Ct. at 2394-95; \textit{see supra} notes 206-09 and accompanying text (arguing that this definition of compelling includes the privacy interest of the individual).
\item 215. \textit{See supra} text accompanying notes 213-14 (revealing that reasonableness and a compelling need are determined using the same test—whether they outweigh the individual privacy interest).
\item 217. \textit{Acton}, 115 S. Ct. at 2394-95. In effect, reasonableness is collapsed into the government showing a compelling need, because both are defined as outweighing the individual's privacy interest. \textit{Cf. Sundby, supra} note 5, at 1797-98 (asserting that the government should have little difficulty showing a compelling need).
\item 218. \textit{Acton}, 115 S. Ct. at 2394.
\item 219. \textit{Id.} at 2393; \textit{see Skinner}, 489 U.S. at 626; \textit{Fried, supra} note 5, at 487 (indicating the elevated level of privacy that society yields to excretory functions).
\item 220. \textit{Acton}, 115 S. Ct. at 2393; \textit{see supra} note 60 and accompanying text (explaining the Court's rationale that when individuals voluntarily enter a zone of regulation they diminish their expectation of privacy).
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The Court's diminishment of students' rights sends a negative message to students, who at this very formative age, are learning that our country and society are founded on notions of freedom and liberty, notions expressly stated and insured to individuals in the Bill of Rights of the Constitution. \textit{See Doe v. Renfrow}, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting) (order denying petition for certiorari) (arguing that allowing a mass, suspicionless, unannounced dog-sniffing drug search of all students in a school conveys the wrong message to our nation's youth). Justice Brennan stated:

\begin{quote}
We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: . . . that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being
the search minimal. While the athlete does voluntarily "go out for the team," she does not dictate the form of search used by the state. In other words, because the intrusiveness of the search is a variable completely dependent on the government's choice of search methods, this factor should not be used to evaluate the individual's interest in the balancing analysis. Here again, the Court has convoluted the analysis of each side's interest. Therefore, the balancing test remains a balance in form, not substance.

committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

Id.; see also T.L.O., 469 U.S. at 385-86 (Stevens, J., dissenting). Justice Stevens similarly described the possible effect of the T.L.O. majority's opinion:

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth.

Id.; see also Fried, supra note 5, at 479 (explicating that respect embodies an attitude obliging persons to observe the constraints of morality when dealing with each other). Consequently, "[s]elf-respect is, then, the attitude by which a person believes himself to be entitled to be treated by other persons in accordance with the principle of morality." Fried, supra note 5, at 479. Hence, the Court's disregard for student privacy rights reveals a disdain for students' rights: a disdain that could potentially damage student's self-respect.

221. Acton, 115 S. Ct. at 2393;

222. Id. at 2389-90. Athletes could not choose the form or procedure of the drug testing used. Id. Because the school employed random and suspicionless testing, the athlete had no way of altering his or her behavior to avoid being compelled to submit to the drug test. See Sundby, supra note 5, at 1768 (noting that "[o]nce the analysis changes to the reasonableness test's balancing of a proffered government interest against an individual's privacy interest . . . the individual loses much of her ability to control the right to intrude"). Professor Sundby also aptly observes that the only way to avoid the intrusiveness of the search is to "forego[ ] what is otherwise a legitimate activity." Id.

223. See supra note 222 (explaining how the individual, in the circumstance of a suspicionless search, has absolutely no control of the intrusiveness of the search).

224. See supra notes 204-09 and accompanying text (describing the Court's mixing of the government's interest with the individual's, by including the individual's privacy interest in the definition of the government's interest); supra notes 218-23 and accompanying text (explaining how the Court unnecessarily mixes the individual interest with the government's).

225. Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1523-27 (9th Cir. 1994) (mixing the private and governmental interests together to reach their conclusion), vacated, 115 S. Ct. 2386 (1995); see supra notes 204-24 and accompanying text (explaining how the Court tends to mix each side's interests before balancing them).
2. Balancing Analysis Sliding down the Slippery Slope

The Court also has manipulated the balancing test by steadily extending it from one type of search to the next. While this represents a fundamental feature of the common law, the Court ignores the importance of tracing the results involved in extending rationales to analogous, or not so analogous cases.

For example, in ruling that the individual athletes had a diminished expectation of privacy, the Acton court relied heavily on Skinner, which itself had relied heavily on the closely regulated industry line of cases. In the early closely regulated industry cases, to uphold a search, the Court explained that the employer-entrepreneur had a diminished expectation of privacy because he and his business voluntarily entered the sphere of regulation. However, the challenged search concentrated on the industry, not the employee. In Skinner, the Court, analogizing to the closely regulated industries cases, found the individual's privacy interest diminished, despite the fact that the employee, not the industry or employer, was the object of the search. Besides this discrepancy, the Court also did not require a warrant or any form of individualized suspicion in the search in Skinner because of the threat of extensive loss of human life.

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226. See supra notes 45-108 and accompanying text (analyzing the administrative searches cases in which the Court has used the balancing test and reasonableness standard to evaluate the constitutionality of these searches).

227. Compare Camara v. Municipal Court, 387 U.S. 523, 536-39 (1967) (engendering the balancing test and requiring a warrant without probable cause in order to conduct a rather routine municipal housing inspection) with United States v. Montoya de Hernandez, 473 U.S. 531, 537, 544 (1985) (using the balancing test from Camara and holding that no warrant or probable cause was required to detain a woman suspected of alimentary canal smuggling for a sixteen-hour period, in which the police detained her in a small room to monitor her bowel movements).


229. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) (concluding that railroad workers have a diminished expectation of privacy because they constitute a focus of regulatory concern).

230. See United States v. Biswell, 406 U.S. 311, 316 (1972) (ruling that a businessman should expect inspections of his business records when he enters a pervasively regulated industry, such as the ammunition and gun industry); see supra note 55-61 (discussing the closely regulated industry cases and their rationales).

231. See French, supra note 92, at 149 (distinguishing the closely regulated industry cases from Skinner, because in those cases the object of the search was the industry).

232. Skinner, 489 U.S. at 628; see French, supra note 92, at 149 (contending that Skinner incorrectly applies the rationale of the closely regulated industry cases).

233. Skinner, 489 U.S. at 628-33 (ruling that no warrant or any form of suspicion is required to compel a railway worker to submit to a urinalysis). The Court departed from earlier case law by failing to require at least an administrative warrant. See See v. City of
Similarly in Acton, the Court, analogizing the athlete to the employee in Skinner, found the drug testing at issue reasonable without requiring individualized suspicion or a warrant. Acton, however, does not follow logically from these prior cases. First, the Acton Court incorrectly relied on Skinner, when it allowed the search without a warrant or any form of individualized suspicion. Unlike Skinner, the facts in Acton presented no significant chance of a catastrophe resulting in an extensive loss of life. Second, as mentioned, Acton analogized the athlete to the railroad employee in Skinner. This is problematic because Skinner improperly analogized the employee to the employer in the closely regulated industry cases. Therefore, what began with the early closely regulated industry cases allowing the search of an industry for regulatory violations steadily has been manipulated into justifying the search of an adolescent athlete's urine under the close supervision of a state official. While this trend alone is alarming, the fact that these searches usually are founded upon strong publicly-supported objectives compounds the problem.

Seattle, 387 U.S. 541, 545 (1967) (requiring a warrant supported by less than probable cause for a search of a commercial business place).

234. Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2393-94 (1995); see supra notes 158-62 and accompanying text (analyzing the various rationales supporting the Court's ruling that athletes have a lowered expectation of privacy).

235. See infra notes 236-40 and accompanying text (revealing the incongruencies between the closely regulated industry cases, Skinner and Acton).

236. Acton, 115 S. Ct. at 2393-94.

237. Id. at 2400-02 (O'Connor, J., dissenting). Justice O'Connor notes that no great threat of harm existed in Acton and further that the urinalysis presented a significant intrusion to student's privacy. Id. at 2402.

238. Id. at 2393. This analogy objectively is reasonable because the railroad employee and the athlete were similarly the focus of regulation. Id.; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989).

239. Skinner, 489 U.S. at 628.

240. Compare See v. City of Seattle, 387 U.S. 541, 545 (1967) (requiring a municipal inspector to obtain an administrative warrant to inspect a merchant's store) with Acton, 115 S. Ct. at 2396 (upholding a warrantless, suspicionless, state-mandated urinalysis).

241. See Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (warning that threats to liberty often are generated by benevolent purposes); supra note 197 (providing quotes from Supreme Court Justices regarding the fact that civil liberties often suffer during times of perceived crisis in our country).

From an overall Fourth Amendment standpoint, applying the balancing test to any non-criminal search has engendered a perverse double standard within the Fourth Amendment. From an overall Fourth Amendment standpoint, applying the balancing test to any non-criminal search has engendered a perverse double standard within the Fourth Amendment. Stuntz, supra note 11, at 1057-58. Compare Arizona v. Hicks, 480 U.S. 321, 323, 326 (1987) (holding a warrantless search unconstitutional in a criminal investigation context, where a police officer moved stereo equipment several inches to ascertain the registration number on the stereo) with Acton, 115 S. Ct. at 2396 (upholding a school district requiring an adolescent, without a warrant or a modicum of suspicion, to urinate into a container in the presence of a state official).
3. Promoting Confusion: The Ubiquitous Use of Balancing within Fourth Amendment Analysis

Additionally, the multiple uses of the balancing analysis promotes confusion and inconsistency within Fourth Amendment analysis.242 The Court has used balancing to determine "the definition of a search,"243 the reasonableness of a search,244 the reasonableness of a seizure,245 the meaning of probable cause,246 [and] the level of suspicion required to support stops and detentions."247 From this ubiquity, confusion inevitably resulted. To this multitude of uses, the Acton Court added yet another use of balancing: the determination of whether the government established a compelling need for the search.248 Thus, the balancing test's multiplicity fosters confusion and allows the Court to manipulate its analysis.249

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242. E.g., Phyllis T. Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 Vand. L. Rev. 473, 475 (1991) (arguing that the case-by-case decisionmaking of the Court has left it "mired in confusion and contradiction"); Brian J. Serr, Great Expectations of Privacy: A New Model for Fourth Amendment Protection, 73 Minn. L. Rev. 583, 587 (1989) (contending that the Court's Fourth Amendment jurisprudence "is misguided and inconsistent"); Strossen, supra note 68, at 1165 (criticizing the Court for distorting the balancing test).

243. United States v. Place, 462 U.S. 696, 706-07 (1983) (balancing the privacy interest in luggage against the intrusiveness of a "canine sniff" and concluding no search occurred under the Fourth Amendment).

244. Winston v. Lee, 470 U.S. 753, 759 (1985) (balancing the individual's interest in privacy and security against the community's interest in law enforcement to determine reasonableness).

245. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (judging the reasonableness of a seizure by balancing the legitimate government interests against the intrusiveness inflicted by the search).


248. Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2394-95 (1995); see supra notes 204-17 (criticizing the Court for using balancing in this manner).

249. See Hemphill, supra note 201, at 242-46 (contending that the balancing analysis is applied in an ad hoc fashion and enables the executive branch of government to extend the limits of its power); supra note 242 (regarding the inconsistency and confusion caused by the Court's increasing reliance on balancing analysis to resolve Fourth Amendment issues). Theoretically, in analyzing a single search incident, the Court could employ balancing analysis to determine: whether a search had occurred, United States v. Place, 462 U.S. 696, 706-07 (1983), whether to use the reasonableness standard, New Jersey v. T.L.O., 469 U.S. 325, 341 (1985), whether the government demonstrated a compelling need supporting the
B. Consistency of Privacy Treatment under the Bill of Rights: Proposing a Different Test

Despite the Fourth Amendment's position in the Bill of Rights, the Court has been reluctant to treat it like other fundamental rights. While courts use strict judicial scrutiny to review governmental impingements on these rights, they do not necessarily use the same level of scrutiny to protect Fourth Amendment rights. Therefore, to restore its vigor, the Fourth Amendment needs to be treated consistently with other fundamental rights.

250. U.S. CONST. amend. IV; see LASSON, supra note 2, at 83 (contending that the Framers enacted the Fourth Amendment "in response to a wide clamor for a bill of rights" and further contending that the Fourth Amendment represents "one of the more important rights").

251. See Stuntz, supra note 11, at 1016-17 (asserting that criminal procedure is treated as a self-contained system, interrelating minimally with other areas of constitutional law); see generally Amar, supra note 46, at 758 (arguing that law professors add to this erroneous treatment by failing to teach the Fourth Amendment as part of Constitutional Law).

252. See, e.g., Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977) (holding that a state must show that it has a compelling interest in restricting the sale of contraceptives to persons over the age of eighteen and that the means chosen are narrowly tailored to effectuate that interest); Roe v. Wade, 410 U.S. 113, 153 (1972) (deciding that only where a State shows a compelling government interest may a statute banning abortion be upheld); Loving v. Virginia, 388 U.S. 1, 11 (1968) (ruling that a miscegenation statute must pass the "most rigid scrutiny" to be constitutional) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); Griswold v. Connecticut, 381 U.S. 479, 503-04 (1965) (White, J., concurring in judgment) (stating that the Connecticut statute banning the use of contraception by married couples must pass "a substantial burden of justification" by showing an interest "which is compelling"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (subjecting the government's regulations forcing citizens of Japanese descent to relocate "to the most rigid scrutiny"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that a state statute requiring sterilization after a certain number of criminal offenses must pass "strict scrutiny"); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.3 (5th ed. 1995) (explaining the strict scrutiny test).

253. See Hemphill, supra note 201, at 245-46 (arguing that "the government is given great deference in Fourth Amendment cases," whereas in other constitutional cases, the government often must pass strict scrutiny). Therefore, the author concludes that the right of privacy fares better as a fundamental right in the context of other amendments, than it does under the Fourth Amendment. Id.

254. See Amar, supra note 46, at 758 (observing that the Fourth Amendment should be treated as other Amendments because, "unlike the Fifth, Sixth, and Eighth Amendments, which specially apply in criminal contexts, the Fourth Amendment applies equally to civil and criminal law enforcement"); Stuntz, supra note 11, at 1048 (suggesting that criminal procedure may be a vehicle for substantive due process). Indeed, as the Supreme Court has recognized, the Fourth Amendment does apply equally in both the civil and criminal context. Camara v. Municipal Court, 387 U.S. 523, 530 (1967). However, the purpose of the search does, in reality, affect how the Court treats the Fourth Amendment and its constitutional protections. See supra note 38 (observing how the purpose of the search affects the Court's decisionmaking).
The right of privacy is a substantive, fundamental right, and thus should be treated as one under the Fourth Amendment when evaluating the constitutionality of administrative searches.\textsuperscript{255} To promote consistency, courts should apply the balancing analysis used in substantive due process and equal protection cases to determine the constitutionality of Fourth Amendment administrative searches.\textsuperscript{256}

This proposed test, however, should be used only in place of the current balancing test, and should not replace the entire Fourth Amendment analytical framework.\textsuperscript{257} Under this proposed test, the Court still must determine first whether a search falls under the command of the Fourth Amendment's warrant-probable cause requirement.\textsuperscript{258} The insufficient protection the Fourth Amendment provides in administrative search situations becomes evident when compared to other privacy cases under the Fourth Amendment's warrant-probable cause requirement, the Fifth Amendment, or the Fourteenth Amendment. \textit{Compare} Arizona v. Hicks, 480 U.S. 321, 326 (1987) (requiring probable cause, and thus protecting the privacy interest of the defendant after the police moved a stereo several inches to examine the registration number) \textit{and} Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (invalidating a statute that prohibited marriage if an individual failed to satisfy his child support payments, thus protecting the right to marry as inherent in the right of privacy) \textit{with} Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2395 (1995) (justifying the invasion of the privacy interest of adolescent athletes because the Court found the government's interest in preventing high school sports injuries caused by drug use compelling).

255. See O'Connor v. Ortega, 480 U.S. 709, 730 (1987) (Scalia, J., concurring) (stating that “[i]t is privacy that is protected by the Fourth Amendment”); \textit{Griswold}, 381 U.S. at 484-86 (opining that the Fourth Amendment, among other Amendments, has penumbras which collectively constitute a right of privacy); \textit{Mapp} v. Ohio, 367 U.S. 643, 656 (1961) (recognizing that the Fourth Amendment creates a “right to privacy, no less important than any other right carefully and particularly reserved to the people”); \textit{Olmstead} v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (asserting that the Fourth Amendment encompasses “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men”).

256. See Scott E. Sundby, \textit{A Return to Fourth Amendment Basics: Undoing Mischief of Camera and Terry}, 72 \textit{Minn. L. Rev.} 383, 431 (1988) (advocating the use of a strict scrutiny standard, instead of the reasonableness balancing test); \textit{infra} notes 257-303 and accompanying text (explaining the application and the benefits of applying substantive due process balancing test in the context of Fourth Amendment administrative searches).

257. See \textit{supra} notes 109-120 and accompanying text (outlining the Supreme Court's current analytical framework for administrative searches).
Amendment.\textsuperscript{258} If the Fourth Amendment applies, the Court must determine whether the special needs exception applies, because that exception allows the Court to use the reasonableness standard to analyze the constitutionality of the search.\textsuperscript{259} If the reasonableness standard does apply, then the Court should next apply the balancing test used in substantive due process and equal protection cases.\textsuperscript{260} While this approximates the current balancing test, it arguably affords more protection to individual privacy interests.

At this point, the Court must analyze the gravity of the individual's privacy interest implicated by the search, irrespective of the government's need in performing the search.\textsuperscript{261} Because of the breadth of privacy protection under the Fourth Amendment and the Amendment's position

\textsuperscript{258} See Alonso, supra note 53, at 665-69 (stating that a "search is a governmental invasion of a person's privacy"); supra notes 109-11 and accompanying text (explaining the Court's analysis in determining whether government action constitutes a search for Fourth Amendment purposes).

\textsuperscript{259} See supra note 33 (discussing the various formulations of the special needs exception). If the special needs exception is not satisfied, or if the search's purpose is criminal, the warrant and probable cause test should be used, notwithstanding the existence of one of a growing number of exceptions to this rule. See Dunaway v. New York, 442 U.S. 200, 212-13 (1979) (rejecting balancing analysis in the context of a criminal arrest); Bradley, supra note 33, at 1473-74 (providing an extensive list of exceptions to the warrant or probable cause requirements); Knopp, supra note 53, at 692 (listing the prominent exceptions to the warrant requirement). For instance, exigent circumstances, plain view, inventory searches, and border searches all represent exceptions to the warrant requirement. Knopp, supra note 53, at 692.

\textsuperscript{260} See infra notes 261-303 and accompanying text (explaining how this test should work and the benefits it presents in the Fourth Amendment setting).

\textsuperscript{261} See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 625-628 (1989) (evaluating the individual's privacy interest before the government's in ascertaining whether the search violated the Fourth Amendment); Carey v. Population Serv. Int'l, 431 U.S. 678, 685-86 (1977) (determining the individual's privacy right before the government's interest in determining whether government regulation violated the individual's right of privacy). For proper balancing to occur, it is imperative that the Court evaluate each side separately, determining each side's actual weights, and then, only after this is done, balance the factors. Cf. Sundby, supra note 5, at 1791 (criticizing the Court for allowing the government's need to affect the Court's evaluation of the individual's privacy interest).

It should also be noted that at this point in the analysis there must be some quantum of a reasonable privacy interest in existence or the constitutional analysis of the search would not have proceeded to this level. California v. Greenwood, 486 U.S. 35, 39-41 (ruling that there is no reasonable expectation of privacy in garbage left by the curb, and therefore denying the individual the protections of the Fourth Amendment). In other words, the Court has already determined that a privacy interest exists in determining whether the government action constitutes a search under the Fourth Amendment. See supra notes 109-11 and accompanying text (explaining that this is the first step in the analytical framework established by the Supreme Court's Fourth Amendment jurisprudence).
within the Bill of Rights, it could be argued that the Fourth Amendment creates a fundamental right of privacy for individuals. However, assuming that the Fourth Amendment does provide a fundamental right of privacy, this still does not guarantee the protection of strict judicial scrutiny. Instead, the Court applies strict scrutiny only when the government significantly intrudes upon such a right. Therefore, the focus of the Court's analysis should be the intrusiveness of the government's search.

262. U.S. Const. amend. IV. The Fourth Amendment provides the people "security in their persons, houses, papers, and effects against unreasonable searches and seizures." Id. Arguably, these four areas of protection cover every search imaginable.

263. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding that the Fourth and the Fifth Amendments create a zone of privacy "against unreasonable searches and seizures"). Some may criticize this argument because it potentially could produce an unnecessarily broad definition of privacy as a fundamental right, in that the Fourth Amendment and its four express areas of protection cover every search imaginable. See Robert H. Bork, The Tempting of America 99 (1990) (criticizing the Warren Court for creating a right of privacy). The author further criticizes both the Warren Court for failing to provide parameters to this newly created right and the Burger and Rehnquist courts for allowing this right to mature into an established right. Id. at 110; see also Nowak & Rotunda, supra note 252, § 11.7, at 401 n.16 (citing authorities that criticize the Court for recognizing a right of privacy that does not exist in the constitutional text); Robert H. Bork, Neutral Principles and Some First Amendments Problems, 47 Ind. L.J. 1, 8-9 (1971) (asserting that the Court created the right of privacy in an unprincipled manner, thereby creating a fundamental right lacking definition and scope). However, as this Note argues, the key to this analysis is not the right of privacy, which the Court has recognized for the past thirty years, but the degree of intrusiveness inflicted by the government's search. See infra notes 269-73 and accompanying text (arguing that the government must pass strict judicial scrutiny if the government's search significantly interferes with an individual's right of privacy).

264. See Lyng v. Castillo, 477 U.S. 635, 638-39 (1986) (rejecting the heightened scrutiny standard because the challenged food stamp program did not substantially and directly burden a fundamental right); Califano v. Jobst, 434 U.S. 47, 53-54 (1978) (upholding provisions of the Social Security Act as rational because they did not interfere with the right to marry inherent in the right to privacy); Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978) (opining that rigorous judicial scrutiny should only be used to analyze a regulation that substantially and directly interferes with a fundamental right); Whalen v. Roe, 429 U.S. 589, 599-600, 603 (1977) (upholding New York statute because it did not significantly impair the individual's right to privacy).

265. Zablocki, 434 U.S. at 387-91 (applying heightened scrutiny to a statute that significantly interfered with the right to marry inherent in the right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (adhering to a similar definition as in Stanley, except substituting the word "unwarranted" for "unwanted"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (defining fundamental right of privacy as "right to be free... from unwanted governmental intrusions into one's privacy").

266. See supra notes 119-20 (explaining that under the current analytical framework the Court examines the intrusiveness of the search in determining its reasonableness); supra note 261 (explaining that the courts to proceed with their analysis of the search under the Fourth Amendment, some right to privacy must exist); cf. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (ruling that briefly detaining a passing motorist is minimally intrusive).
Under the substantive due process and equal protection cases protecting the right of privacy, the Court determines whether the government "significantly interferes" with the exercise of the privacy right. In doing so, the Court looks at whether the government action directly and substantially interferes with the right of privacy. Thus, the Court should apply this test to the intrusiveness of the search to determine whether the search constitutes significant interference.

If the intrusiveness of the search does constitute significant interference, then the government's search must pass strict judicial scrutiny to be upheld. To satisfy strict scrutiny, the government must meet two requirements. The government must show that it had a compelling interest for performing the search and that the search method used was narrowly tailored to achieve this compelling interest. To determine whether the government's interest in conducting the search constitutes a compelling one, the Court should analyze the government's proffered interest without making any comparisons to the privacy interest of the individual. To satisfy the "narrowly tailored" requirement, the

267. Zablocki, 434 U.S. at 383 (1978) (holding that a Wisconsin statute "significantly interfer[ed]" with the right to marry and therefore must pass strict scrutiny to satisfy constitutional muster). Note that the right to marry inheres in the right to privacy. Id. at 386.

268. Id. at 387. Justice Marshall stated that significant interference does not occur, where the government's regulation does not place a "direct legal obstacle in the path" of individuals seeking to exercise their right to marry. Id. at 387 n.12. The negative implication of this statement is that significant interference occurs where the government does, in fact, erect a direct legal obstacle, preventing the individual from fully exercising a fundamental right. See id. However, this "direct legal obstacle" standard is unsuitable for the Fourth Amendment because any government search poses a direct legal obstacle to an individual's right of privacy.

269. See Korematsu v. United States, 323 U.S. 214, 216 (1944) (acknowledging that government restrictions that "curtail the civil rights of a single racial group" are not per se unconstitutional, but instead must pass "rigid scrutiny").

270. See supra notes 271-72 and accompanying text.

271. See Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977). Justice Brennan concluded that "'[c]ompelling' is of course the key word" and regulations representing alleged compelling interests "must be narrowly drawn to express only those interests." Id. Narrowly tailored also has been stated as "closely tailored." Zablocki, 434 U.S. at 388.

While neither Carey or Zablocki involve searches under the Fourth Amendment, these cases are used to demonstrate how the strict scrutiny test operates in balancing the government's and individual's interests. See supra notes 256-60 and accompanying text (theorizing that the balancing test used in substantive due process and equal protection cases should be used in Fourth Amendment analysis instead of the current balancing analysis).

272. But see Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2394-95 (1995) (ruling that a government interest reaches a compelling level when it justifies the intrusion inflicted upon the individual's privacy interest). Under the proposed test, the Acton Court's definition of compelling will not be used because it improperly mixes the government's interest and the privacy interest, and as such, fails to provide a proper and accurate balance of interests. See supra notes 204-17 and accompanying text (criticizing the Acton Court's new definition of compelling).
government must show that no other less intrusive search alternatives existed, such as using individualized suspicion, in executing its compelling purpose.\(^{273}\) If the intrusiveness of the search does not reach the level of significant interference, then the search merely must pass the rational basis test.\(^{274}\) To do so, the government must only show that it had a legitimate purpose in conducting the search and that the search was rationally related to this purpose.\(^{275}\) Moreover, the government need not be concerned with whether other less intrusive alternatives to the challenged search existed, as this is not a factor in a rational basis analysis.\(^{276}\)

C. Exemplifying the Effects of the Proposed Test: Applying this Test to Acton and Martinez-Fuerte

Applying the proposed test to *Vernonia School District v. Acton* and *United States v. Martinez-Fuerte* demonstrates how this proposed test will work in administrative search cases. If the Court employed the proposed test in *Acton*, the Court would have subjected the school's urinalysis program to strict scrutiny and the urinalysis program arguably would have failed.\(^{277}\) First, James Acton had a fundamental right of privacy protect-

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\(^{273}\) NOWAK & ROTUNDA, *supra* note 252, § 14.3, at 602 (noting that, in demonstrating the close relationship needed to establish the "narrowly tailored" prong of strict scrutiny, the Court usually will only accept means absolutely needed to achieve the alleged compelling purpose). In other words, if the government action is underinclusive or overinclusive, then the government action fails to be narrowly tailored to achieving a compelling purpose. *Zablocki*, 434 U.S. at 390-91 (concluding that the challenged statute was both underinclusive and overinclusive and thus was not narrowly tailored to advance the government's interests).

\(^{274}\) See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978) (holding that, where government regulation does not significantly touch upon a fundamental right, the Court uses the minimum scrutiny standard of review); *Zablocki*, 434 U.S. at 386-87 (implying that if a government regulation does not significantly interfere with the right of privacy, then a legitimate regulation may be imposed by the State); NOWAK & ROTUNDA, *supra* note 252, §§ 11.4, 14.3 (explaining the rational relationship test in the context of substantive due process and equal protection).

\(^{275}\) NOWAK & ROTUNDA, *supra* note 252, §§ 11.4, 14.3.

\(^{276}\) See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990) (affording state officials a presumption of validity in choosing search methods, thereby not requiring them to utilize the least restrictive means); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976) (rejecting defendants' theory that less-restrictive-alternatives could be employed, because requiring the least restrictive means "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers"); see also *infra* notes 292-98 (applying the rational basis test to *Martinez-Fuerte*).

\(^{277}\) See *infra* notes 278-89 (arguing that under the proposed test, the search in *Acton* would have to pass the strict scrutiny test and would have failed because the urinalysis program was not narrowly tailored to achieve its purported objectives of preventing drug related injuries and deterring drug usage).
ing his excretory functions, regardless of his participation in athletics. Second, the search method and the subsequent analysis of the athlete's urine significantly interfered with his right of privacy in his bodily integrity. The state-mandated urinalysis directly interfered with the athlete's excretory function, in that the state both compelled the athlete to urinate in the presence of a state official and consequently possessed the urine for the purpose of drug testing. In addition, the urinalysis substantially interfered with the athlete's right of privacy, because the analyzed urine provided private information regarding the individual to the state.

278. See Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2393 (1995) (noting that the “excretory function [is] traditionally shielded by great privacy”) (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626 (1989)); Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1525 (9th Cir. 1994) (concluding that “[n]ormal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination”), vacated, 115 S. Ct. 2386 (1995); see Fried, supra, note 5, at 487 (observing that American society affords the excretory functions “more or less absolute privacy”).

279. Acton, 115 S. Ct. at 2400 (O'Connor, J., dissenting) (stating “state-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, is still 'particularly destructive of privacy and offensive to personal dignity'”) (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting)); see also Winston v. Lee, 470 U.S. 753, 766 (1985) (holding that state compelled surgery to recover a bullet is severely intrusive and unconstitutional); Bell v. Wolfish, 441 U.S. 520, 576-77 (1979) (Marshall, J., dissenting) (describing the invasive and humiliating nature of a visual body-cavity search in which the prison inmate must “display the anal cavity for inspection by a correctional officer” and must allow officials to inspect their genitals); Cupp v. Murphy, 412 U.S. 291, 295 (1973) (stating that taking a scraping sample from under defendant's fingernails was a severe intrusion); Schmerber v. California, 384 U.S. 757, 772 (1966) (holding that the Constitution does not allow substantial intrusions into an individual’s body); Rochin v. California, 342 U.S. 165, 172 (1952) (concluding that forcing a man to vomit in order to obtain incriminating evidence “shocks the conscience”).

280. Acton, 115 S. Ct. at 2389-90 (noting that a school monitor observes the student while the student is urinating); see Acton, 23 F.3d at 1525 (concluding that “students[ ] do not have to surrender their right to privacy in order to secure their right to participate in athletics”), vacated, 115 S. Ct. 2386 (1995). In other words, the “bare” nature of athletics and high school locker rooms does not negate the invasive and disturbing aspects of urinating in the presence of a state official. Id.; see Fried, supra note 5, at 487 (noting the anguish and loss of self-esteem occasioned by a privacy invasion upon the excretory functions of an individual); Piniak, supra note 129, at 6D (explaining the embarrassing and humiliating aspects of a urinalysis procedure based on her own experiences in a public high school); see also supra note 129 (detailing the testing procedure).

281. Acton, 115 S. Ct. at 2393. Justice Scalia found this to be inconsequential, because the tests aimed at discovering drug traces. Id. at 2393-94. However, other information could easily be obtained from the search, such as pregnancy or diabetes, and in fact, the school's testing policy forced the athlete to disgorge any medications that she was currently taking. Id. at 2393-94.
Because it would constitute a significant interference, the school’s drug testing policy would have to pass the strict scrutiny test.\textsuperscript{282} Under this test, the policy would not have prevailed.\textsuperscript{283} Even assuming that the state’s interest, preventing athletic injuries and deterring drug use amounted to a compelling interest,\textsuperscript{284} the state would not have been able to demonstrate that it narrowly tailored its testing policy to achieve its objectives. First, a search without individualized suspicion necessarily is not the least intrusive alternative possible.\textsuperscript{285} Second, if the school intended to prevent drug-induced injuries and to deter drug use in the schools, the policy the school implemented exhibited both underinclusiveness and overinclusiveness.\textsuperscript{286} Specifically, the policy is underinclusive because it pertains exclusively to athletes and does not include other students, who according to the school’s testimony, contributed to the drug problem.\textsuperscript{287} The policy also is overinclusive because it invades the privacy of an overwhelming majority of student athletes who were not suspected of drug use.\textsuperscript{288} Therefore, Vernonia’s policy failed to be narrowly tailored to deterring drug use, in the sense that, it tested innocent athletes, while it allowed suspected drug users to remain free of testing.\textsuperscript{289}

\textsuperscript{282} See Nowak \& Rotunda, supra note 252, § 14.3 (explaining strict scrutiny); supra notes 269-73 and accompanying text (describing the strict scrutiny test).

\textsuperscript{283} See infra notes 285-89 and accompanying text (explaining how Vernonia’s policy would fail the strict scrutiny test because it exhibited both overinclusiveness and underinclusiveness).

\textsuperscript{284} See Carey v. Population Serv. Int’l, 431 U.S. 678, 686 (1977) (holding that compelling is the “key word”). Under this test, the government rarely has been able to override the individual’s interest. See Korematsu v. United States, 323 U.S. 214, 218-19 (1944) (holding that the government’s interest in national security during a time of war was compelling and outweighed the individual’s interest); Hirabayashi v. United States, 320 U.S. 81, 99-100 (1943) (holding the same).

\textsuperscript{285} Acton, 115 S. Ct. at 2396 (acknowledging that the search used may not have been the least intrusive method possible).

\textsuperscript{286} Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (ruling that because a statute was both underinclusive and overinclusive it was not closely tailored to achieving its stated goals); see infra notes 287-89 (demonstrating how the closely tailored requirement of the strict scrutiny standard would invalidate the search scheme adopted by the school district).

\textsuperscript{287} Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1516 (9th Cir. 1994) (noting that the school reports did not exclusively confine suspected drug use to athletes, but instead included a teacher spotting “students smoking marijuana during the school day at a coffee shop”), vacated, 115 S. Ct. 2386 (1995).

\textsuperscript{288} See Daniels, supra note 144, at A1 (noting that the school “did not suspect James Acton of drug use”).

\textsuperscript{289} See supra notes 286-88 (explaining how the policy fails to be closely tailored). The school district did not test those students who it individually suspected of drug use. Id. at 2403; see supra note 190 and accompanying text (noting the irony that the school district identified specific instances of student drug use in supporting its argument that a drug problem existed at the school and yet implemented a suspicionless drug testing scheme).
Nevertheless, using the proposed test would not drastically change the judicial landscape of the Fourth Amendment. For example, had the Court applied this test to United States v. Martinez-Fuerte the outcome of that case would not have changed. In Martinez-Fuerte, the checkpoint established by the government did not significantly interfere with the motorists right of privacy. Hence, the government would have had to pass the rational basis test, demonstrating a legitimate purpose and a rational relationship between that purpose and the established checkpoint. Preventing illegal aliens from entering the country constitutes a legitimate governmental purpose. Similarly, establishing a checkpoint on a highway on which these aliens entered the country was rationally related to achieving the governmental purpose. Moreover, the government, as was noted in Martinez-Fuerte, did not have to utilize the least intrusive alternative. Thus, using the rational basis test in Martinez-Fuerte, the same result would have been reached: the Court would have upheld the search.

290. See infra notes 292-98 and accompanying text (illustrating that applying the proposed test to the facts in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), would not change the outcome of that case).
292. See supra notes 65-70 and accompanying text (explaining the facts and rationales in this case).
293. Martinez-Fuerte, 428 U.S. at 557-560. The stop in Martinez-Fuerte amounted to a very brief stop, while the motorist remained in her car. Id. at 558. Thus, while the stop directly interfered with the motorist's right of privacy, it did not substantially interfere with the privacy right. Id. at 557-58; see supra note 67 (explaining the small degree of intrusiveness presented by checkpoint stops). Comparing the brief detention in Martinez-Fuerte to a urinalysis accentuates the fact that the search in Martinez-Fuerte did not constitute substantial interference. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (categorizing a urinalysis as a "type of search particularly destructive of privacy and offensive to personal dignity").
294. See supra note 274-76 and accompanying text (explaining the rational basis test).
295. See supra note 65-66 and accompanying text (noting that the Court upheld the checkpoint in Martinez-Fuerte because it served a legitimate government purpose that outweighed the privacy interest implicated by the search).
296. See Martinez-Fuerte, 428 U.S. at 554 (ruling that the record of the checkpoint demonstrates its effectiveness).
297. Id. at 556 n.12.
298. See supra notes 290-97 (hypothesizing that the result would have been no different in Martinez-Fuerte if the balancing test used in substantive due process analysis had been utilized). Obviously, this test will be fairly easy to pass, and therefore will allow the state sufficient latitude to execute effective law enforcement. See NOWAK & ROTUNDA, supra note 252, § 11.4, at 383 (noting that courts defer to legislative decisionmaking under the rational relationship test).
D. Benefits of this Test

This test adequately accommodates both side's interests by providing a more categorical and rigid approach to the Fourth Amendment analysis of administrative searches.\(^{299}\) It adequately protects the individual's interest, by forcing the government to pass the strict scrutiny test, when it significantly interferes with the individual's fundamental right of privacy.\(^{300}\) This balancing test fosters protection because it forces the government to use individualized suspicion, thereby enabling the individual to dictate when he or she will be subjected to a governmental search.\(^{301}\) In turn, this proposed test allows the individual to pursue legitimate activities, such as high school athletics without the threat of unwarranted governmental intrusions.\(^{302}\) Conversely, where the government does not significantly interfere with the individual's privacy right, this test allows the government wide latitude in pursuing legitimate administrative needs inherent in our modern, expansive government.\(^{303}\) Thus, the substantive due process balancing test provides a more accurate balance than the test the Court currently uses and promotes consistency in decisions regarding the fundamental right of privacy.

\(^{299}\) Strossen, *supra* note 68, at 1176 (arguing that the balancing test needs to be more rigid). The proposed test also accommodates the least intrusive alternative as a factor, as Professor Strossen contends it should. *Id.* at 1176-77.

\(^{300}\) Cf. Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (explaining that, when a government regulation significantly interferes with a fundamental right, the regulation must be closely tailored to effectuate its purpose in order to pass constitutional muster). Note, however, that the strict scrutiny test still allows the government to override the individual's interests in some instances; in this way, the government's interest remains accommodated. See Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (concluding that, even under strict scrutiny, the government's interest in national security outweighed the individual's interest in equal protection).

\(^{301}\) Sundby, *supra* note 5, at 1768 (arguing that the only way to avoid a suspicionless search is to avoid pursuing the legitimate activity that the search encompasses); see generally Strossen, *supra* note 68, at 1238-67 (presenting the advantages and disadvantages of including least intrusive means in the constitutional analysis).

\(^{302}\) Cf. Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2389 (1995). The school did not allow James Acton to participate on the football team, until he signed the drug-testing consent form. *Id.*

\(^{303}\) See Stuntz, *supra* note 11, at 1029 (arguing that the modern administrative state requires information, information that is usually private). This test still accommodates the individual's interest, allowing the individual to show that the government's search is not rationally related to its stated objective. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448-50 (1985) (holding that the government failed to meet the rational basis test, because its stated rationale was not rationally related to its alleged objectives); Zobel v. Williams, 457 U.S. 55, 61-64 (1982) (ruling that the Alaska dividend distribution plan failed to satisfy the rational basis test and therefore violated the Fourteenth Amendment).
IV. Conclusion

In Acton, the Court sends the Nation's youth a strong message. While informing student athletes that their privacy rights are diminished, the Court also rules that the performance of state-monitored urinalyses is minimally intrusive. Intensifying this message, the Court, through its new elastic definition of compelling, gives the government broad latitude to inflate its interests in conducting searches. In doing so, the Court ensures the current judicial trend of justifying significant government intrusions upon individual privacy.

To stop this trend, the balancing test used in other areas of constitutional law has been proposed as a worthy alternative to the current analysis. Under this test, the Court will perform an actual balancing analysis, evaluating each side's interests, without mixing the two, and then determining which side's interest outweighs the other. Furthermore, using the proposed test allows individualized suspicion once again to be a factor in the Court's Fourth Amendment analysis. Finally, this test provides sufficient rigidity to insure that the Court will not be able to manipulate it, and thus will not be able to inflate improperly the government's interest, while unfairly minimizing the individual's interest. In this way, the proposed test promotes consistency in the treatment of the right of privacy and frustrates the current assault on the individual's privacy rights that the growing, pervasive administrative state in our society poses.

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