COMMENTS

Washington Constitution Article 1, Section 7: The Argument for Broader Protection Against Employer Drug Testing

*Ken Davis**

I. INTRODUCTION

As the United States Supreme Court further restricts the civil liberties of individuals through its denial of protection under the United States Constitution, the supreme courts of various states, including Washington, have increasingly been called on to re-extend these liberties through their own constitutions.[1] One example of this restriction of individual rights is reflected in the recent United States Supreme Court Fourth Amendment decisions regarding employer drug testing of employees without a basis of individualized suspicion of drug use.[2] In these decisions, the Court continues to erode the privacy rights of employees against drug testing by adopting a restrictive interpretation of the Fourth Amendment. State courts, in response, should attempt to protect these rights through an independent interpretation of their analogous search and seizure provisions.

To date, the Washington Supreme Court has yet to decide whether random drug testing in the absence of individualized

* B.A. 1989, Whitman College; J.D. 1992 *cum laude*, University of Puget Sound School of Law; Associate, Preston Thorgrimson Shidler Gates & Ellis, Seattle, Washington.

1. *See, e.g.*, Batchelder v. Allied Stores Int'l, 445 N.E.2d 590 (Mass. 1983) (finding state constitutional right to solicit signatures in shopping mall); State v. Schmid, 423 A.2d 615 (N.J. 1980), *appeal dismissed*, 455 U.S. 100 (1982) (finding state constitutional right to distribute political literature on private university); State v. Boland, 115 Wash. 2d 571, 800 P.2d 1112 (1990) (finding state constitutional privacy right in garbage placed outside home for collection); Seattle v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775 (1988) (holding sobriety checkpoints violative of state constitutional privacy right).

2. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

suspicion is constitutionally sound.[3] The issue is ripe for review. The historical basis of the Washington constitutional provision and recently established precedent provide a sound foundation for the Washington court to rule that the Washington Constitution grants greater protection from employer drug testing than its federal counterpart.

This Comment will analyze Article 1, Section 7 of the Washington Constitution, the search and seizure provision, and conclude that this provision should be construed to provide greater protection to employees against employer drug testing absent individualized suspicion than the Fourth Amendment does. The scope of this Comment, however, is limited to the rights of state employees with respect to suspicionless drug testing. The rights of federal employees are not included in this analysis because they are protected against suspicionless drug testing only by the Fourth Amendment, not by the analogous Washington provision. Moreover, Article 1, Section 7, like the Fourth Amendment, only protects individuals against state action, not private action.[4] Thus, the drug testing programs that are germane to the topic of this Comment are those mandated by state government. The scope of this Comment is also limited to employer drug testing of employees after the creation of the employer-employee relationship. That is, this Comment does not specifically address the issue of the constitutionality of pre-employment drug testing as a part of the employee screening process.

Section II briefly summarizes current Fourth Amendment doctrine as to bodily searches not based on individualized suspicion and then presents the most recent decisions of the United States Supreme Court on employer drug testing. Section III discusses the Washington Supreme Court's evolving interpretation of Article 1, Section 7, the Washington Constitution's analogous provision to the Fourth Amendment. From this discussion, Section III concludes that the constitutional

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3. The question of the extent of protection offered by WASH. CONST. art. 1, § 7 against mandatory drug testing was presented to the court in Alverado v. Washington Public Power Supply System, 111 Wash. 2d 424, 759 P.2d 427 (1988), *cert. denied*, 490 U.S. 1004 (1989). The court ruled, however, that state law (and thus the Washington Constitution) was preempted by federal law because the drug testing regulations in question were promulgated by a federally regulated nuclear power plant. *Id.* at 436-37, 759 P.2d at 433-34.

4. *See* Southcenter Joint Venture v. National Democratic Policy Comm., 113 Wash. 2d 413, 427-29, 780 P.2d 1282, 1289-90 (1989) (closing the door on the possibility that non-state action would be covered under the Washington Constitution).

history, contemporary Washington precedent, and particular privacy issues implicated by drug testing support increased protection under the Washington Constitution. Finally, Section IV explores how other states have interpreted their state constitutions with respect to drug testing issues, but concludes that this precedent provides little guidance for the Washington Supreme Court.

II. CURRENT FOURTH AMENDMENT ANALYSIS: *SKINNER*, *VON RAAB*, AND THE DEMISE OF THE INDIVIDUALIZED SUSPICION REQUIREMENT

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[5]

Fourth Amendment jurisprudence as to bodily searches not based on individualized suspicion has undergone a thorough transformation under the reign of the Rehnquist court. Until recently, probable cause has been a prerequisite for a full-scale search, whether the search was conducted under the authority of a warrant or under one of the recognized exceptions to the warrant requirement.[6] Thus, under the Fourth Amendment, individualized suspicion was a fundamental prerequisite to a bodily search by the government.[7] This requirement had been lifted only with respect to prison inmates.[8]

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5. U.S. CONST. amend. IV.

6. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 637-38 (1989) (Marshall, J., dissenting).

7. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 358 (1985) (Brennan, J., dissenting).

8. *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 558-60, (1979)). Furthermore, the established exception for administrative searches did not entirely dispense with the requirement of individualized suspicion. Although it has been stated that the requirements for an administrative search may be less onerous, *see* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBAG, CRIMINAL PROCEDURE ch. 13 (2d ed. 1986), such a search still requires either the existence of reasonable grounds to believe that an administrative violation occurred, Marshall v. Barlow's, Inc. 436 U.S. 307, 320 (1978), or that reasonable legislative or administrative standards for conducting an inspection exist. Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Arguably, the administrative search exception does not completely abolish the requirement of individualized suspicion because there must still be shown a special need for the search based on well-known or well-demonstrated evils within that field, with well-known or well-demonstrated consequences. National Treasury Employees Union v. Von Raab,

However, as a result of two 1989 United States Supreme Court cases decided on the same day, *Skinner v. Railway Labor Executives' Ass'n*[9] and *National Treasury Employees Union v. Von Raab*,[10] the requirement of individualized suspicion to conduct a valid search under the Fourth Amendment seems to have fallen by the wayside. A brief synopsis of these two cases will provide an introduction to current Fourth Amendment doctrine and a brief overview of the current status of the Fourth Amendment as applied to drug testing absent individualized suspicion of drug use.

In *Skinner*, the Court found that the Fourth Amendment was not violated by Federal Railroad Administration regulations providing for mandatory testing of employees involved with serious on the job accidents, or so called "post-accident" testing.[11] Although the tests in question would be administered only after a resulting accident, this program did not require a basis of individualized suspicion because tests were to be made without evidence that the particular employee to be tested was under the influence of drugs or alcohol at the time of the accident.[12] The Court found, however, evidence which indicated that alcohol and drug abuse by railroad employees had previously contributed to a number of significant train accidents.[13] Thus, although the urinalysis required to administer the test was held to be a search for purposes of the Fourth Amendment, the Supreme Court held that the Fourth Amendment protects only against those searches and seizures that are deemed to be unreasonable.[14] In so finding, the Court applied the test for reasonableness, which requires a balancing of the individual's Fourth Amendment interest in a reasonable expectation of privacy[15] against the government's interest in con-

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489 U.S. 656, 684 (1989) (Scalia, J., dissenting). Furthermore, these standards governing the administrative search exception are not binding on the Washington court. In Washington, it is apparent that, even with respect to an administrative search, some form of individualized suspicion is required. *See* Jacobsen v. Seattle, 98 Wash. 2d 668, 658 P.2d 653 (1983) and *infra* text accompanying notes 123-27. *See also* Robert F. Utter, *Survey of Washington Search and Seizure Law*, 9 U. PUGET SOUND L. REV. 1 (1985).

9. 489 U.S. 602 (1989).

10. 489 U.S. 656 (1989).

11. *Skinner*, 489 U.S. at 634.

12. *Id.* at 609.

13. *Id.* at 608.

14. *Id.* at 619.

15. Rakas v. Illinois, 439 U.S. 128, 142 (1978). Thus, the Court will look to the

ducting the search.[16]

Specifically, the Court found that "special needs" such as public safety may justify departure from the normal requirements of a warrant and probable cause.[17] With respect to the railroad's drug testing program, the Court found that employees working in these types of safety-sensitive positions have a diminished expectation of privacy. The government interest, however, to deter drug use in these positions and ensure public safety, was found to be compelling.[18] Therefore, the Court upheld the testing program without addressing the individualized suspicion requirement.[19]

The Court came to a similar conclusion in *Skinner*'s sister case, *Von Raab*.[20] There, the Court considered the validity of the United States Customs Service drug testing program.[21] In contrast to *Skinner*, *Von Raab* goes considerably further toward the elimination of the requirement of individualized suspicion.[22] First, the testing conducted in *Von Raab* was for employees seeking employment, transfer, or promotion within the agency, and the testing was not merely conducted after the occurrence of a serious accident, as in *Skinner*.[23] Second, there was no evidence of a history of drug or alcohol abuse among the employees of the Customs Service, as there was among the railroad employees in *Skinner*.[24] Despite these differences,[25] the Court nevertheless held that the government interest in testing and ensuring that drug users are not promoted within the agency, thereby adding to the safety of the borders and to the integrity of the agency, was sufficiently compelling to validate the search in the absence of individualized suspicion.[26]

Thus, after *Skinner* and *Von Raab*, the United States Supreme Court no longer requires under the Fourth Amend-

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individual's expectation of privacy despite the fact that privacy is not explicitly mentioned in the text of the Fourth Amendment.

16. *Skinner*, 489 U.S. at 619.

17. *Id.* at 619-20.

18. *Id.* at 627-30.

19. *Id.* at 634.

20. *Id.* at 656.

21. *Id.* at 678-79.

22. Because of the differences between the two cases, Justices Scalia and Stevens, who voted with the majority in *Skinner*, voiced a vigorous dissent in *Von Raab*.

23. *Von Raab*, 489 U.S. at 660-61.

24. *Id.* at 660.

25. These differences are articulated in the dissent. *Id.* at 689 (Scalia, J., dissenting).

26. *Id.* at 678-79.

ment that the government suspect a particular individual of drug or alcohol abuse before testing for these substances. As long as the government can show that its need to search outweighs the individual's reasonable expectation of privacy, the search will be upheld. Significantly, the government's required showing is not particularly onerous, as neither a history of past drug or alcohol related incidents within the industry nor an incident in a particular case are prerequisites to a valid search.

III. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF ARTICLE 1, SECTION 7

A. Under Gunwall, *an Independent Interpretation of Article 1, Section 7 is Appropriate With Respect to the Issue of Drug Testing*

Any inquiry regarding the protection of individual rights does not end with an analysis of the federal Constitution. It is a well-established principle that, while the United States Constitution provides the floor of protection of an individual's rights, states are free to expand these rights through an independent interpretation of their own state constitutions.[27] Washington has been among those states that have looked to their own state constitutions to decide constitutional issues. As one Washington Supreme Court justice has commented:

> Washington is one of many states that rely on their own constitutions to protect civil liberties. Since the recent retrenchment of the United State Supreme Court in this area, the appellate courts of a majority of the states have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution.[28]

Possibly the most developed area of independent Washington constitutional jurisprudence is with respect to Article 1, Section 7, the search and seizure provision.[29] This provision provides that "[n]o person shall be disturbed in his private

27. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

28. Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 499 (1984) [hereinafter Utter, *Freedom and Diversity*]. Justice Utter has also stated that "[t]he Washington Declaration of Rights [Article 1] is the primary guarantor of the rights of Washingtonians." *Id.* at 524.

29. *Id.* at 500-502.

affairs, or his home invaded, without authority of law."[30] It is only recently that the Washington Supreme Court has breathed new life into Article 1, Section 7 by interpreting it independently of the Fourth Amendment.[31] The resurrection of Article 1, Section 7 by the Washington Supreme Court correlates to the continued contraction of Fourth Amendment rights by the United States Supreme Court that began in the 1970s.[32]

Two questions still remain, however, with respect to this provision. First, does Article 1, Section 7 provide greater protection than the Fourth Amendment? Second, if it is appropriate to proceed with an independent state constitutional analysis, how is the provision to be applied to the issue of drug testing absent a basis of individualized suspicion of drug use?

Faced with the recurring dilemma of whether it is appropriate to embark on the uncharted journey of adopting an independent state constitutional analysis, the Washington Supreme Court in *State v. Gunwall*[33] established a series of tests to determine whether the ship of independent interpretation should set sail.[34] The *Gunwall* court delineated six "nonexclusive neutral criterion" to determine whether a provision of the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language of the state constitutional provisions; (2) differences in the texts of the federal and state constitutions; (3) the constitutional history of the Washington provision in question; (4) pre-existing Washington law at the time the provision was adopted: (5) structural differences between the federal and state constitutions; and (6) whether the provision touches on matters of particular state or local concern.[35] Thus, the first inquiry in a Washington consti-

30. WASH. CONST. art. 1, § 7.

31. George R. Nock, *Seizing Opportunity, Searching for Theory: Article 1, Section 7*, 8 U. PUGET SOUND L. REV. 331, 333 (1985).

32. *Id.* (citing United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973) as examples of this contraction).

33. 106 Wash. 2d 54, 720 P.2d 808 (1986).

34. The *Gunwall* court noted that set criteria to determine whether an independent state constitutional analysis is appropriate will provide a safeguard against result-oriented decisions, constitution shopping, and courts acting as superlegislatures. *Id.* at 60, 720 P.2d at 811. Thus, these factors ensure that an independent constitutional interpretation be "articulable, reasonable and reasoned." *Id.* at 63, 720 P.2d at 813.

35. *Id.* at 61-62, 720 P.2d at 812-13.

tutional analysis is whether, under the *Gunwall* criterion, resort to an independent state constitutional analysis is appropriate with respect to the issue involved. If so, the the second inquiry is how should the state constitutional provision be applied.[36]

Initially, it should be noted that the analysis concerning the first, second, third, and fifth *Gunwall* criteria remain constant with respect to different issues implicating the same state constitutional provision.[37] These four *Gunwall* criteria as applied to Article 1, Section 7 have already been addressed by the *Gunwall* court itself.[38] Although the *Gunwall* court held that each of these four criteria support an independent state constitutional analysis of Section 7,[39] this Comment will nevertheless analyze each criterion separately to provide a complete analysis of Article 1, Section 7.

1. Textual Language

Under the first *Gunwall* criterion, the state court will examine the textual language of the state constitutional provision.[40] Article 1, Section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[41] The Washington Supreme Court has noted that this provision focuses on the protection of a citizen's private affairs.[42] Thus, the "relevant inquiry for determining when a search has occurred is whether the State unreasonably intruded into the defendant's 'private affairs.' "[43] The court has also had occasion to interpret the meaning of the phrase "authority of law" in Article 1, Section 7. This term may include authority granted by statute, common law, or a rule of the court, and may include search warrants or subpoenas.[44]

Given the court's expansive reading of the "authority of

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36. *Id.* at 67, 720 P.2d at 815.

37. State v. Boland, 115 Wash. 2d 571, 576, 800 P.2d 1112, 1114 (1990).

38. *Gunwall*, 106 Wash. 2d at 65-67, 720 P.2d at 814-15.

39. *Id.* at 61, 720 P.2d at 812.

40. *Id.* at 65, 720 P.2d at 814.

41. WASH. CONST. art. 1, § 7.

42. *Gunwall*, 106 Wash. 2d at 65, 720 P.2d at 814.

43. *Id.* at 65, 720 P.2d at 814 (quoting State v. Myrick, 102 Wash. 2d 506, 510, 688 P.2d 151, 153-54 (1984)).

44. *Id.* at 68-69, 720 P.2d at 816; State v. Fields, 85 Wash. 2d 126, 530 P.2d 284 (1985). However, the exact meaning of "authority of law" has yet to be fully explored by the court. Seattle v. Mesiani, 110 Wash. 2d 454, 462, 755 P.2d 775, 779 (1988) (Dolliver, J., concurring).

law" clause, this section appears to be self-defeating. The literal reading of Article, Section 7 would suggest that any search conducted pursuant to a warrant, statute, or other "authority of law" would constitutionally validate the act.[45] Interpreted in this way, Article 1, Section 7 would essentially preclude judicial review of any legislative act that impinged on a citizen's right of privacy. Such a result is illogical. First, this interpretation of Section 7 would contradict the central purpose of a state constitution: to act as a restriction on the otherwise plenary power of the state. Under such a literal interpretation, Article 1, Section 7 would hardly serve as any real limitation on a state's power. Second, evidence of the historical basis of Article 1, Section 7 suggests that a literal interpretation is inappropriate.[46]

Two other interpretations of the phrase "without authority of law" are more plausible. First, the "authority of law" referred to in Section 7 refers to the common law requirement of a warrant based on probable cause, as in the Fourth Amendment.[47] Alternatively, "authority of law" refers to those principles of property law that were intertwined with the nineteenth century conception of a right to privacy.[48] In either case, it is apparent that the court has rejected a literalist approach given that it has reviewed and invalidated government promulgated rules for violating Article 1, Section 7.[49]

2. Differences Between Federal and State Provisions

Under the second *Gunwall* criterion, the state court will analyze significant differences in the texts of parallel provisions of the federal and state constitutions.[50] It is readily apparent that the wording of the Article 1, Section 7 and the Fourth Amendment are radically divergent.[51] Whereas the Washington Constitution contains an express protection of an individual's "private affairs," the Fourth Amendment contains no such privacy wording.[52] The Washington Supreme Court

45. Nock, *supra* note 31, at 346-52.

46. *See infra* part III.A.3.

47. *See* Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 516-25 (1986).

48. *Id.*

49. *See, e.g.*, Seattle v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775 (1988).

50. *Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

51. *See supra* text accompanying notes 5 and 41.

52. State v. Myrick, 102 Wash. 2d 506, 510-11, 688 P.2d 151, 153-54 (1984).

has noted that the differences between the wording of Article 1, Section 7 and the Fourth Amendment support a distinct interpretation of the Washington provision.[53]

3. Constitutional and Common Law History

Under the third *Gunwall* criterion, the state court will evaluate the state constitutional and common law history of the provision in question.[54] In this inquiry, the Washington Supreme Court has held that the history of Article 1, Section 7 supports an interpretation independent of federal law.[55] As the court has noted: "It suffices to observe that in 1889, our State Constitutional Convention specifically rejected a proposal to adopt language identical to that of the Fourth Amendment, before adopting Const. art. 1, § 7 in its present form."[56] Unfortunately, there is little direct contemporaneous evidence of what the framers intended by the wording of Article 1, Section 7.[57]

The question therefore remains, if the Fourth Amendment is not the source of the wording of Article 1, Section 7, then what is the source of the provision? Surely the words did not originate from the framers' imaginations absent any external influence. This question is important not only for determining whether an independent constitutional analysis is appropriate, but also for applying the provision to the particular issue of drug testing.

Relevant to an examination of the state constitutional history of Article 1, Section 7, as required by the third *Gunwall* criterion, an analysis of the prevailing political ideologies of the time can shed light on the framers' intent. This analysis is especially relevant to the drafting of the Washington Constitution because much of the Washington Constitution has been traced to the direct influence of nineteenth century populism.[58]

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53. *See, e.g., Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1988); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

54. *Gunwall*, 106 Wash. 2d at 65-66, 720 P.2d at 812.

55. *Id.* at 65-66, 720 P.2d at 814-15.

56. *Id.* at 65-66, 720 P.2d at 814 (citing THE JOURNAL OF THE WASHINGTON CONSTITUTIONAL CONVENTION, 1889, 497 (Beverly P. Rosenow ed., 1962) [hereinafter 1889 JOURNAL]).

57. *See* 1889 JOURNAL, *supra* note 56.

58. Robert F. Utter, *The Right to Speak, Write, and Publish Freely; State Constitutional Protection Against Private Abridgement*, 8 U. PUGET SOUND L. REV. 157, 178-79 (1984) [hereinafter Utter, *The Right to Speak*].

The fundamental tenets of the populists, who arose in an era of government corruption and railroad monopolies, were a distrust for government and large corporations and a promotion of labor interests.[59] The influence of populist ideology on the wording of the Washington Constitution was inevitable because a large number of the delegates to the state constitutional convention were supporters of the populist movement.[60] These tenets were chronicled during the state constitutional convention. For example, one delegate proposed a provision protecting the health of those employed in mines and factories.[61] This proposal eventually was adopted as Article 2, Section 35.[62] Another delegate proposed a provision to make unlawful the importation of armed detectives into the state because they had previously been employed to quiet labor strikes.[63] Many of these concerns with corporate exploitation of labor are embodied in Article 12. Thus, under the third *Gunwall* criterion, the unique ideological context of the Washington Constitution supports an independent analysis of Article 1, Section 7 from the Fourth Amendment.

The framers' concerns are directly relevant to an analysis of the constitutionality of employer drug testing absent an individualized suspicion of drug use. The framers expressed a fear that corporations would abuse their control over their employees, and they wished to protect individuals' personal, political, and economic rights.[64] The framers sought to restrict corporate power to indiscriminately disregard employee rights.[65] Of course, the specific issue of employee drug testing was not within the ambit of the framers' imagination; however, there is little doubt that precisely this type of intrusion on an

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59. *See* James Leonard Fitts, The Washington Constitutional Convention of 1889, 8-10 (1951) (unpublished Master's thesis, University of Washington).

60. *Id.*

61. Utter, *The Right to Speak*, *supra* note 58, at 179 (citing TACOMA DAILY LEDGER, July 12, 1889, at 4).

62. "The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same." WASH. CONST. art. 2, § 35.

63. Utter, *The Right to Speak*, *supra* note 58, at 179 (citing TACOMA DAILY LEDGER, July 16, 1889, at 4).

64. *See* Utter, *Freedom and Diversity*, *supra* note 28; Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987) [hereinafter Utter & Pitler, *Presenting a Constitutional Argument*].

65. Fitts, *supra* note 59, at 9.

employee's rights was of foremost importance in the framers' minds. The history of the populist movement, influential in the writing of the Washington Constitution, suggests that Article 1, Section 7 should be interpreted to extend broader rights to Washington citizens under *Gunwall*.

Furthermore, in examining the constitutional history as required by *Gunwall*, a United States Supreme Court opinion delivered shortly before the drafting of the Washington Constitution supports an independent analysis of Article 1, Section 7. From this era of the populist movement came the United States Supreme Court case of *Boyd v. United States*.[66] The drafting of Article 1, Section 7 was heavily influenced by *Boyd*,[67] the first significant Fourth Amendment case to reach the Supreme Court.[68] The *Boyd* Court interpreted the Fourth Amendment in light of the nineteenth century conception of property rights and the rights of an individual to the "privacies of life" against unlawful government action.[69] Thus, under *Boyd*, the Constitution allows an invasion of an individual's privacy only if such an invasion is consistent with the rules of property law.[70] This is consistent with the fact that, by 1886, the time of the *Boyd* decision, American courts and legislatures had already legally recognized an individual's right to privacy in a number of contexts.[71] The scope of this nineteenth century privacy protection has been described as "any physical trespass against the person or into the sanctity of the home."[72] Thus, the original intent of the framers of the Washington Constitution in protecting "private affairs" was to constitutionalize the scope of those privacy rights described in *Boyd*.

Thus, the third *Gunwall* criterion, the state constitutional

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66. 116 U.S. 616 (1886).

67. This theory is espoused in Pitler, *supra* note 47, at 516-25 (1986). It has also been noted that the Oregon Constitution served as a model for the Washington Declaration of Rights, and the Oregon Constitution was, in turn, largely influenced by the Indiana Constitution. *See* 1889 JOURNAL, *supra* note 56, at 497 n.13.

68. Pitler, *supra* note 47, at 520 n.318.

69. *Id.* at 520. The *Boyd* court held that the forced disclosure of papers to be used as criminal evidence violates the Fourth and Fifth Amendments. Thus, the papers were held inadmissible at *Boyd*'s trial. The Court reasoned that both the Fourth and Fifth Amendments provided a broad right of personal privacy.

70. *Id.* at 521 n.320.

71. *Id.* at 521 (citing Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1893-94 (1981) [hereinafter Note, *Nineteenth Century America*]).

72. *Id.* at 521 n.320 (citing Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765)).

and common law history of Article 1, Section 7, supports an independent state constitutional analysis. First, the framers' special interest in protecting the rights of labor against exploitation by business is evident in the Washington Constitution. Second, *Boyd*, the contemporaneous United States Supreme Court case, is indicative that Article 1, Section 7, as originally conceived, was intended to grant a broad protection of privacy to Washington citizens.

4. Pre-existing State Law

Under the fourth *Gunwall* criterion, a state court will evaluate pre-existing state law to determine if resort to a state constitutional analysis independent of the federal constitution is appropriate.[73] This criterion is difficult to apply to the issue of drug testing because drug testing is only a recent development in the workplace. However, an analysis of the common law that existed in the Territory of Washington as to warrantless and arbitrary searches and seizures is nonetheless relevant. As will be extensively discussed, the existing common law required at least some degree of individualized suspicion to conduct a search.[74]

5. Differences in Structure

Under the fifth *Gunwall* criterion, the state court will consider the structural differences between the federal and state constitutions.[75] The Washington Supreme Court has noted that the United States Constitution functions as a grant of limited power to the federal government while the state constitution acts as a limitation on the otherwise plenary powers of the state.[76] This distinction between the separate and independent roles of the federal and state governments was noted by James Madison:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most Sec-

73. *Gunwall*, 106 Wash. 2d at 61-62, 720 P.2d at 812.
74. *See infra* text accompanying notes 99-110.
75. *Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 812.
76. *Id.* at 66, 720 P.2d at 815.

> tion, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[77]

Thus, the difference in functions of the two constitutions supports an interpretation of Article 1, Section 7 distinct from that of the Fourth Amendment.[78]

6. State Interest or Local Concern

Finally, under the sixth *Gunwall* criterion, the state court will consider whether the matter is of particular state or local concern.[79] With respect to drug testing, the privacy of employees in government or government regulated positions satisfies this criterion. Washington has been especially zealous in protecting its citizens' privacy rights.[80] Hence, the court has recognized that the right of a Washington citizen to privacy is an issue of particular interest to this state.[81]

Furthermore, in evaluating the sixth *Gunwall* criterion, the Washington Supreme Court has found it relevant that other states have found a privacy interest based on independent state grounds.[82] Where other states resort to their own constitutions to determine whether their citizens have found such a right of privacy, the Washington Supreme Court has noted that the issue is more likely to be particularly of local, and not only national, concern.[83] As will be discussed in Section IV of this Comment, some states have looked to their own

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77. The Federalist No. 45, at 303 (James Madison) (Bicentennial ed., 1976).

78. Further justification for the *Gunwall* court's use of the difference in structure between the federal and state constitutions in analyzing whether an independent state constitutional analysis is appropriate is found in McCollough v. Maryland, 17 U.S. 316, 400-37 (1819), where Chief Justice Marshall relied on the structures and relationships set up by the Constitution in resolving constitutional issues.

79. *Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 813.

80. *See, e.g.*, State v. Boland, 115 Wash. 2d 571, 578, 800 P.2d 1112, 1116 (1990) (holding privacy interest in curbside garbage protected under Article 1, Section 7); Seattle v. Mesiani, 110 Wash. 2d 454, 458, 755 P.2d 775, 777 (1988) (holding suspicionless automobile checkpoint stops unconstitutional under Article 1, Section 7); Jacobsen v. Seattle, 98 Wash. 2d 668, 674, 658 P.2d 653, 656 (1983) (holding suspicionless pat down searches of rock concert patrons unconstitutional under Article 1, Section 7).

81. *Boland*, 115 Wash. 2d at 576-77, 800 P.2d at 1115.

82. *Id.* at 577, 800 P.2d at 1115. Thus, the fact that some other jurisdictions might have come to a contrary result and held that such a privacy interest did not exist does not necessarily preclude the Washington Supreme Court from holding that the issue is one of local concern under the sixth *Gunwall* criterion.

83. *See, e.g.*, *Boland*, 115 Wash. 2d 571, 800 P.2d 1112.

state constitutions to resolve the issue of employee drug testing.[84]

In addition, Article 1, Section 32 of the Washington Constitution provides that "[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."[85] Hence, the Washington Constitution itself indicates the state's particular interest in protecting the civil rights of its citizens.[86]

As noted, the six *Gunwall* criteria are "non-exclusive."[87] The court leaves the inquiry open to consider other determinative criteria. Another factor that supports an interpretation of Article 1, Section 7 independent of that of the Fourth Amendment with respect to the issue of drug testing is the fact that different standards under the state and federal constitutions will not obscure the status of the law in an adverse manner. For instance, the maintenance of a separate state doctrine under Article 1, Section 7 concerning issues of the ability of police to conduct searches has drawn criticism as hampering the police by making the status of the law uncertain.[88] However, the adoption of a separate state analysis concerning drug testing would not have such an adverse social impact.

Thus, the six *Gunwall* criteria, as applied to an Article 1, Section 7 analysis of drug testing absent individualized suspicion of drug use, support an interpretation of the Washington constitutional provision that is broader than that of the Fourth Amendment.

B. The History of Article 1, Section 7 Supports Protection of Employees Against Drug Testing Absent a Basis of Individualized Suspicion

Application of the six *Gunwall* criteria supports an evaluation of the scope of Article 1, Section 7 independent of federal Fourth Amendment jurisprudence. Once the *Gunwall* criteria

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84. *See infra* part IV.

85. WASH. CONST. art. 1, § 32.

86. *See also* WASH. CONST. art. 1, § 30, which provides that "[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." Justice Utter has pointed to Sections 30 and 32 as evidence that the voters who ratified the constitution must have intended that fundamental principles not expressly stated in the constitution itself would be incorporated to ensure individual rights. Utter, *Freedom and Diversity*, *supra* note 28, at 512.

87. *See supra* text accompanying note 35.

88. *Boland*, 115 Wash. 2d at 593, 800 P.2d at 1123 (Guy, J., dissenting).

have been fulfilled, however, the question still remains of how to interpret the scope of protection afforded by the state constitutional provision and, specifically, whether it protects employees against drug testing absent a basis of individualized suspicion.

A threshold issue is whether Article 1, Section 7 applies to employee drug testing.[89] Article 1, Section 7 protects the "private affairs" of its citizens.[90] The Washington Supreme Court has held that a citizen's private affairs do not lose their status as private simply because the person is in a public place.[91] The right of sanctity in one's private affairs stretches to wherever the individual has the right to be.[92] The Washington Supreme Court has not yet considered whether the giving of a urine sample constitutes a "private affair" protected by Article 1, Section 7. However, it appears that when confronted with the question, the court will find a urinalysis to be a "private affair."[93]

An important interpretational tool in construing the scope of a constitutional provision is the history surrounding the adoption of the provision.[94] This history clearly supports a reading of Article 1, Section 7 as providing greater privacy protection than the Fourth Amendment.

The current wording of Article 1, Section 7 is identical to the provision adopted by the Washington State Constitutional Convention in 1889.[95] The constitutional convention rejected a

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89. The United States Supreme Court has made clear that a drug test in the workplace is a search protected by the Fourth Amendment. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) and discussion *supra* text accompanying notes 9-19. Further, it is equally settled that the Fourth Amendment provides protection in most commercial premises. Marshal v. Barlow's Inc., 436 U.S. 307, 311 (1978).

90. WASH. CONST. art. 1, § 7. *See supra* text accompanying note 52.

91. State v. Gibbons, 118 Wash. 171, 187-88, 203 P. 390, 396, (1922), *quoted in* State v. Ringer, 100 Wash. 2d 686, 700-01, 674 P.2d 1240, 1248 (1983).

92. *Id.*

93. The highly intrusive nature of a typical urinalysis is discussed *infra* part III.D.

The Washington Supreme Court has held that other searches, undoubtedly less intrusive than a urinalysis, are protected "private affairs" under Article 1, Section 7. *See, e.g.*, State v. Boland, 115 Wash. 2d 571, 578, 800 P.2d 1112, 1116 (1990) (holding trash set at curbside for pickup protected by Article 1, Section 7); State v. Meachum, 93 Wash. 2d 735, 612 P.2d 795 (1980) (holding blood drawing protected by Article 1, Section 7). Furthermore, other state courts that have addressed the issue have unanimously held that a urinalysis implicates a constitutional right under their respective state constitutions. *See infra* part IV.

94. State v. Ringer, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1990).

95. *Id.* (citing 1889 JOURNAL, *supra* note 56, at 497).

proposal that contained language identical to the Fourth Amendment.[96] The Washington Supreme Court has acknowledged that there is a lack of evidence to provide insight concerning the specific intent of the framers or the voters who ratified the constitution when they chose the language of Article 1, Section 7.[97] However, as discussed previously, the language of Article 1, Section 7 was most probably based on those "privacies of life" protected by *United States v. Boyd*.[98]

Also relevant in determining the framers' intent are similar prohibitions against searches and seizures that were in effect in the Washington Territory at the time the state constitution was adopted.[99] Those prohibitions also argue for greater protection of Washington citizens under Article 1, Section 7.

These common law principles are directly relevant in determining the scope of the Washington provision because Article 1, Section 7 "is declaratory of the common-law right of the citizen not to be subjected to search or seizure without warrant."[100] This principle follows from Article 27, Section 2 of the Washington Constitution, which states that "[a]ll laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature. . . ."[101]

The Washington Supreme Court has construed the fundamental common law search and seizure principles in existence at the time of the ratification of the Washington Constitution as providing more extensive protection than the Fourth Amendment. The court summarized these common law principles as follows:

> [E]very official interference with individual liberty and security is unlawful unless justified by some existing and specific statutory or common law rule; any search of private property will similarly be a trespass and illegal unless some recognized lawful authority for it can be produced; in gen-

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96. *Id.*

97. *Id.* Unlike some other state constitutional provisions, there is also a lack of contemporaneous newspaper reports to shed light on the meaning of Article 1, Section 7.

98. 116 U.S. 616 (1886). *See supra* text accompanying notes 66-72.

99. State v. Ringer, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983).

100. State v. McCollum, 17 Wash. 2d 85, 96, 136 P.2d 165, 170 (1943) (Millard, J., dissenting), *quoted in Ringer*, 100 Wash. 2d at 691, 674 P.2d at 1243.

101. WASH. CONST. art. 27, § 2.

> eral, coercion should only be brought to bear on individuals and their property at the instance of regular judicial officers acting in accordance with established and known rules of law, and not by executive officers acting in their discretion; and finally it is the law, whether common law or statute, and not a plea of public interest or an allegation of state necessity that will justify acts normally illegal.[102]

Thus, a few basic points concerning the common law principles of search and seizure can be distilled from this passage. First, searches that interfered with one's privacy were unlawful absent valid legal authority. Second, and most important, an invasion of an individual's privacy cannot be maintained merely on the basis of the public or state interest alone. This concept is of paramount importance with respect to the issue of drug testing because the common justification for such programs is that they are validated by a substantial state interest.[103]

At common law, individualized suspicion was required for a valid search. For example, the Washington Supreme Court has noted that, at the time the state constitution was adopted, no statutory provisions authorized warrantless arrests.[104] Even common law exceptions to the warrant requirement did not dispose of the requirement of individualized suspicion. For example, officials could make warrantless arrests where a crime was committed in their presence or where probable cause existed that a felony had been committed.[105] Also, a warrant was not required where the search was made incident to a lawful arrest.[106] Thus, each of these common law exceptions to the warrant requirement maintained an essential degree of individualized suspicion to conduct a search. It would be problematic to fit a drug testing program that tested persons without a basis of individualized suspicion into one of

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102. *Ringer*, 100 Wash. 2d at 691, 674 P.2d at 1243 (quoting POLYVIOS G. POLYVIOU, SEARCH & SEIZURE 9 (1982) (summarizing Entick v. Carrington, 95 Eng.Rep. 807 (KB 1765)). *Entick* is claimed to be a primary source of the United States Supreme Court opinion in *Boyd*, which in turn had a large influence on the wording of Article 1, Section 7. *See supra* text accompanying notes 66-72.

103. Neither is it likely that this state interest could constitute "authority of law" to validate the search under Article 1, Section 7.

104. *Ringer*, 100 Wash. 2d at 691, 674 P.2d at 1243.

105. *Id.* (citing 1 SIR JAMES FITZJAMES STEPHEN, CRIMINAL LAW OF ENGLAND 193 (1883); THOMAS MCINTYRE COOLEY, CONSTITUTIONAL LAW 232 (3d ed. 1898); 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 587 (1st Am. ed. 1847) (1st ed. London 1736)).

106. *Id.* at 692, 674 P.2d at 1244 (citing Weeks v. United States, 232 U.S. 383, 392 (1914)).

these common law exceptions.[107]

Consistent with these common law prohibitions, Article 1, Section 7 "poses an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions . . . ."[108] Any exceptions to the requirement of a warrant "must be 'jealously and carefully drawn,' and must be strictly confined to the necessities of the situation."[109] Those seeking the exemption have the burden of showing that a situation's exigencies made the search imperative.[110] Thus, pre-existing Washington common law prohibitions against warrantless and suspicionless searches argue that Article 1, Section 7 should be interpreted to protect employees against random suspicionless drug testing.

C. Contemporary Article 1, Section 7 Analysis Requires at Least a Basis of Individualized Suspicion to Validate a Search

There remains a problem, however, in applying the intent of the framers of the Washington Constitution in construing Article 1, Section 7 to the issue of random employee drug testing absent individualized suspicion of drug use. Specifically, the question of employee drug testing was assuredly not within the consideration of the framers who drafted the constitution. Furthermore, there were no laws that pre-dated the constitution that concerned the topic of drug testing. However, as the Washington Supreme Court has noted, "[c]onstitutions are designed to endure through the years, and constitutional provisions should be interpreted to meet and cover changing conditions of social and economic life."[111] Thus, a relevant inquiry is whether other Washington cases dealing with search and seizure and privacy issues can shed light on the scope of constitutional protection with respect to employee drug testing.

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107. This does not mean that under the Washington Constitution there is an absolute bar to searches not based on individualized suspicion. An example of a search that might be permitted is an x-ray scanning of luggage at airports. However, these searches should be distinguished because the invasion of privacy involved does not approach the invasion of privacy that results from a drug testing urinalysis.

108. *Ringer*, 100 Wash. 2d at 691, 674 P.2d at 1243.

109. *Id.* at 700, 674 P.2d at 1248 (citing State v. Houser, 95 Wash. 2d 143, 149, 622 P.2d 1218, 1222 (1980)).

110. *Id.* at 702, 674 P.2d at 1249.

111. State *ex rel.* Linn v. Super. Ct., 20 Wash. 2d 138, 145, 146 P.2d 543, 547 (1944). Also, constitutions should not be treated as embodying static concepts, but should be treated as an organic document consistent with current values. Utter, *Freedom and Diversity*, *supra* note 28, at 522.

Contemporary Washington case analysis suggests that Article 1, Section 7 provides greater protection to employees against random, suspicionless drug testing than the Fourth Amendment. The Washington Supreme Court has been highly skeptical of searches not based on individualized suspicion of wrongdoing. The Washington Supreme Court has also repeatedly pointed to the fact that the explicit provision in Article 1, Section 7 protecting the "private affairs" of its citizens justifies a greater privacy protection under the state constitution.[112]

1. General, Suspicionless Searches are Disfavored by the Washington Supreme Court

First, the Washington Supreme Court has suggested that searches not based on individualized suspicion should be conducted only in the rarest of circumstances. A "general search" is one made in the absence of individualized suspicion of wrongdoing.[113] A general search is "anathema" to Article 1, Section 7, and "except for the most compelling situations, should not be countenanced."[114]

The Washington Supreme Court demonstrated its aversion to general searches in *Seattle v. Mesiani*.[115] In *Mesiani*, the court invalidated a sobriety checkpoint program that stopped all oncoming motorists at stops established during the holiday season.[116] The police stopped all motorists without warrants or any basis of individualized suspicion.[117] The court held that this practice was unconstitutional under Article 1, Section 7.[118] The court conceded that the state interest in protecting the public against the danger of drunk drivers was great; however, this interest was held not justified when balanced against the invasion of an individual's right of privacy under Article 1, Section 7.[119]

The *Mesiani* court further distinguished this case from a lower-court decision which held that a roadblock to catch a fleeing felon was constitutional.[120] The court noted that, in the

112. *See supra* text accompanying notes 50-53.

113. Kuehn v. Renton School Dist., 103 Wash. 2d 594, 599, 694 P.2d 1078, 1081 (1985).

114. *Id.* at 601-02, 694 P.2d at 1082.

115. 110 Wash. 2d 454, 755 P.2d 775 (1988).

116. *Id.* at 460, 755 P.2d at 778.

117. *Id.* at 455, 755 P.2d at 776.

118. *Id.* at 460, 755 P.2d at 778.

119. *Id.* at 456, 755 P.2d at 777.

120. *Id.* at 458 n.1, 755 P.2d at 777 n.1.

fleeing felon situation, there was reliable information that a felony had recently been committed.[121] The court stated, however, that such information is far different from a statistical inference that there are inebriated drivers in the area.[122] Thus, *Mesiani* demonstrates that the Washington Supreme Court is highly averse to general searches. Further, *Mesiani* shows that the Washington Supreme Court is committed to the requirement of individualized suspicion as a prerequisite to a valid search under Article 1, Section 7.

A similar principle precipitates from *Jacobsen v. Seattle*.[123] In *Jacobsen*, the court held that routine, warrantless pat-down searches of patrons at rock concerts as a condition of admission violated Article 1, Section 7.[124] The searches involved were "administrative" in nature and were not in furtherance of a criminal investigation.[125] The court determined that the pat-downs of concert-goers did not fall under one of the federally recognized exceptions to the warrant requirement and thus were unconstitutional.[126] The court found persuasive the fact that there were other methods, such as greater surveillance,

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121. *Id.*

122. *Id.* (contrasting State v. Silvernail, 25 Wash. App. 185, 605 P.2d 1279 (1980)).

123. 98 Wash. 2d 668, 658 P.2d 653 (1983).

124. *Id.* at 674, 658 P.2d at 656.

125. Thus, these searches resemble employer drug tests in that they fall under the category of "administrative" searches. An administrative search is a search conducted pursuant to a government administrative inspection program. *See, e.g.*, Camera v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 525 (1967). Although the United States Supreme Court has held that there may be a lower standard of probable cause in an administrative, as opposed to a criminal search, *see supra* note 8, *Jacobsen* and *Mesiani* suggest that such a lowered standard with respect to an administrative search is inappropriate under a Washington constitutional analysis. Furthermore, drug testing programs can be distinguished from the typical administrative search in that, under the Fourth Amendment, no warrant need be obtained to conduct a drug test, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), whereas a warrant is required to conduct an administrative search. *Camera*, 387 U.S. 523.

126. *Jacobsen*, 98 Wash. 2d at 674, 658 P.2d at 656. The federal exceptions to the warrant requirement of the Fourth Amendment are consensual searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), stop and frisk searches, Terry v. Ohio, 392 U.S. 1 (1968), hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967), border searches, United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and airport and courthouse searches, Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972); *see* Gaioni v. Folmar, 460 F. Supp. 10, 13 n.10 (N.D. Ala. 1978).

It should be noted that the court at this point inappropriately equates an Article 1, Section 7 analysis with a Fourth Amendment analysis. Article 1, Section 7 of the Washington Constitution does not have an explicit warrant requirement; rather, there is a less exacting requirement of "authority of law." *See supra* text accompanying notes 40-49.

that could be employed to substantially fulfill the government interest of safety at the concerts.[127]

The principles set forth in *Mesiani* and *Jacobsen* should protect employees from employer drug testing absent a basis of individualized suspicion of drug use. The state interest frequently set forth to justify a drug testing program—public safety—is identical to the state interest claimed to justify the suspicionless stops in *Mesiani*. However, the privacy interests implicated in an urinalysis connected with a drug test are far greater than that of an automobile stop or a pat down search.

Thus, the invasion of private affairs is even more unreasonable in the case of a drug test absent individualized suspicion than an automobile checkpoint, as in *Mesiani*, or a pat-down search, as in *Jacobsen*. With respect to the balancing between the state interest and issues of privacy involved, the state interest used to justify the search in the case of drug testing and in the case of automobile checkpoints is similar; the privacy issues implicated by drug testing, however, are much more severe. If the balancing scale is tipped in favor of privacy in the automobile checkpoint case, *Mesiani*, the scale should weigh even more heavily in the case of drug testing. Hence, an employer drug testing program without a basis of individualized suspicion of drug use violates Article 1, Section 7.

2. The Washington Supreme Court Has Held that the Protection of One's "Private Affairs" Under the Washington Constitution Affords Greater Privacy Protection than the Fourth Amendment

As has been previously discussed, the language of Article 1, Section 7 is substantially different from that of the Fourth Amendment in that the Washington provision explicitly protects the "private affairs" of its citizens.[128] Thus, the Washington Supreme Court has concluded that the relevant inquiry under the Washington Constitution is not whether there exists a legitimate expectation of privacy, as under the Fourth Amendment, but whether the state unreasonably intruded into the defendant's "private affairs."[129] As the Washington

127. *Jacobsen*, 98 Wash. 2d at 675, 658 P.2d at 657.

128. *See supra* text accompanying notes 51-53.

129. State v. Boland, 115 Wash. 2d 571, 580, 800 P.2d 1112, 1116 (1990); State v. Myrick, 102 Wash. 2d 506, 510-11, 688 P.2d 151, 153-54 (1984).

Supreme Court has stated:

> [T]he emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights as a paramount concern is reflected in a line of Washington Supreme Court cases[.] . . . The important place of the right to privacy in Const. art. I, § 7 seems to us to require that *whenever* the right is unreasonably violated, the remedy *must* follow.[130]

The court has also stated that Article 1, Section 7 "is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives."[131]

While this test formulated by the Washington Supreme Court has been criticized as a tautology,[132] it provides useful guideposts for the application of Article 1, Section 7 to the often complex factual settings of search and seizure issues. Whereas the Fourth Amendment looks to the subjective expectation of the individual's privacy, an Article 1, Section 7 analysis focuses on whether, using an objective test, the government acted unreasonably in intruding on the individual's private affairs.[133]

This difference in focus was determinative in *State v. Boland*.[134] The court found in *Boland* that, although an individual has a lessened expectation of privacy with respect to trash that was placed at the curb for disposal, the search of the trash by the police was unconstitutional because it unreasonably invaded the individual's private affairs.[135] The court held the search unconstitutional under Article 1, Section 7 despite its acknowledgment that the United States Supreme Court held to the contrary under the Fourth Amendment on the same issue.[136]

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130. *Boland*, 115 Wash. 2d at 582, 800 P.2d at 1118 (quoting State v. White, 97 Wash. 2d 92, 110, 640 P.2d 1061, 1071 (1982)) (emphasis in original).

131. *Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154.

132. Nock, *supra* note 31, at 345.

133. It has been noted that concepts such as "balancing" and "compelling interest" were developed by federal courts to deal with federal constitutional provisions, and the Washington court is entirely free to adopt novel approaches to the same issues. Utter, *Freedom and Diversity*, *supra* note 28, at 506.

134. 115 Wash. 2d 571, 580, 800 P.2d 1112, 1117 (1990).

135. *Id.*

136. *Id.*

The different analysis is of paramount importance with respect to the issue of drug testing. Recent United States Supreme Court decisions that allow random suspicionless drug testing of employees where a compelling government interest has been demonstrated have largely rested on the finding that employees have a lessened expectation of privacy by virtue of working in a safety-sensitive position.[137] This analysis, however, is inappropriate under the Washington Constitution. An analysis under Article 1, Section 7 would focus on whether drug testing unreasonably violates the "private affairs" of the individual in the objective sense, and not whether the individual has a lowered expectation of privacy. Although it is clear that the individual's expectation of privacy is not wholly irrelevant under a Washington constitutional analysis, the central inquiry is whether the intrusion of that person's private affairs is reasonable.[138]

Thus, the distinction between Article 1, Section 7 and the Fourth Amendment affects the result when the drug testing issue is constitutionally analyzed. In the workplace, an individual's expectation of privacy might be low.[139] However, this lowered expectation of privacy does not drive state court analysis. Rather it is the reasonableness of the violation of the person's private affairs that is important. As will be discussed, a urinalysis conducted pursuant to a drug testing program is an egregious invasion into the private affairs of an individual.[140] Despite the grave invasion of privacy, however, the search still may be held reasonable. This determination turns on whether the government's interest in the search outweighs the privacy interest under the state constitution.[141]

As previously discussed, there exists a greater right to pri-

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137. *See* discussion of Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), *supra* text accompanying notes 9-26.

138. *See, e.g.*, State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986). The line of Washington cases that refer to a reasonable expectation of privacy under Article 1, Section 7 have been criticized as a bastardization of a true independent Washington State Constitutional analysis, tainted with federal reasoning. *See* James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099, 1110-11 (1991).

139. This is especially true in a "safety sensitive" position in which the employee's job function is directly related to public safety. *See supra* text accompanying notes 9-26.

140. *See infra* part III.D.

141. One commentator has stated that the broad privacy protection under the Washington Constitution "virtually settles that in states such as Washington, random

vacy under the Washington Constitution than under the United States Constitution.[142] Thus, under the balancing test to determine whether drug testing is an unreasonable search, the individual's right of privacy is weighed more heavily.

The recent Washington case of *State v. Boland*[143] is helpful by way of analogy in determining the extent of the right to privacy with respect to employee drug testing absent individualized suspicion of drug use. In *Boland*, the court held that the defendant's private affairs under Article 1, Section 7 were unreasonably intruded on by the police when they removed garbage from his trash can and made it available to narcotic agents.[144] Central to the court's reasoning was the fact that a search of an individual's trash may reveal much about that person's personal activities, associations, and beliefs through business records, bills, correspondence, magazines, and similar items.[145]

The result is similar with respect to drug testing. Urinalysis can reveal a myriad of medical information that is irrelevant to the purpose of a drug test.[146] As Justice Marshall has stated, "such tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home."[147]

Another case that is instructive on the Washington Supreme Court's interpretation of the scope of one's private affairs is *Seattle v. Mesiani*,[148] which held unconstitutional a sobriety automobile checkpoint program. *Mesiani* looks at how the focus on an individual's private affairs under the Washington Constitution alters search and seizure analysis. Simply because an industry is pervasively regulated by the government does not deprive an individual within that industry of his or her privacy interests. Under Article 1, Section 7, unlike the Fourth Amendment, the proper inquiry is not whether the

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drug testing is illegal." Douglas Taylor & Margaret K. Taylor, *Random Testing in the Mass Transit Industry*, 12 GEO. MASON U. L. REV. 587, 600 (1990).

142. *See supra* text accompanying notes 115-22.

143. 115 Wash. 2d 571, 800 P.2d 1112 (1990).

144. *Id.* at 578, 800 P.2d at 1116.

145. *Id.* (citing State v. Tanaka, 701 P.2d 1274, 1276-77 (Haw. 1985)).

146. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 649 (1989) (Marshall, J., dissenting).

147. Jones v. McKenzie, 833 F.2d 335, 339 (D.C. Cir. 1987), *quoted in Skinner*, 489 U.S. at 647 (Marshall, J., dissenting).

148. 110 Wash. 2d 454, 755 P.2d 775 (1988). *See* discussion *supra* text accompanying notes 115-22.

individual has a reasonable expectation of privacy (or whether that expectation is diminished given a state regulated industry), but rather whether the State unreasonably intruded on the individual's private affairs.[149]

Hence, contemporary Article 1, Section 7 analysis provides a firm foundation to ensure greater protection against employee drug testing than the current Fourth Amendment interpretation. First, the Washington Supreme Court has been particularly circumspect of general, suspicionless searches. Second, the court has continually held that the Washington Constitution's focus on the protection of an individual's "private affairs" permits an interpretation of Article 1, Section 7 as providing protection beyond the Fourth Amendment.

D. Drug Testing Involves a Grave Invasion of Privacy that Should be Protected Under Article 1, Section 7

The privacy reference in Article 1, Section 7, and the heightened protection this privacy is afforded, suggests that the method of drug testing itself is an invasion of privacy. A compelled urinalysis impinges on an individual's sense of dignity and autonomy.[150]

The privacy issues involved in the administration of an urinalysis are great. As Justice Marshall has stated: "Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion."[151] Furthermore, one commentator has noted that "in 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."[152] The invasion of privacy becomes even more egregious when, during drug testing, observation is required as a safeguard to protect against employee tampering.[153]

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149. *See supra* text accompanying note 30.

150. *Skinner*, 489 U.S. at 647 (Marshall, J., dissenting).

151. *Id.* at 645-46.

152. Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968).

153. Lower federal courts have held that observation of the act of urination, even where observation is limited to reasonable suspicion testing, is invalid. *See, e.g.*, National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) (holding relevant sections of Department of Agriculture regulations invalid); American Fed'n of Gov't Employees v. Sullivan, 744 F. Supp 294 (D.C. Cir. 1990) (holding provision of

The Washington Supreme Court has addressed the issue of when such "invasions of the body" are permissible in *State v. Curran*.[154] In *Curran*, the court held that the forced taking of a blood sample from a motorist arrested for vehicular homicide was valid search.[155] Under *Curran*, a blood test may be performed when a person has been killed and the blood test is authorized by the legislature.[156] The court added, however, that "[b]ecause of the special solicitude of article 1, section 7 for the privacy rights of individuals, [it is doubtful] whether such an invasion of the body would be permissible in less severe circumstances."[157]

Thus, applying the *Curran* analysis to the issue of drug testing, employees are protected by the heightened privacy protection of Article 1, Section 7 against drug testing absent an individualized suspicion of drug use. The government interest in testing for drugs (most commonly public safety) should be given less weight than the stated government interest in *Curran*. The dangers resulting from employee drug use are only speculative in nature, whereas in *Curran* a homicide had already taken place. Because employee drug use suggests a "less severe circumstance" than vehicular homicide, suspicionless drug testing is an unjustified bodily invasion that should be prohibited under Article 1, Section 7.

Random drug testing should be distinguished in this regard from pre-employment drug testing where an applicant for employment might be subject to an urinalysis as part of a required pre-employment physical. Where random drug testing is involved, the taking of a urine sample intrudes on the employee's work routine. Furthermore, an employee subject to a random drug test might be the victim of co-worker scrutiny if co-workers assumed that the test was actually based on suspicion of drug use. That is, despite the fact that all workers might be equally subject to random testing,[158] if a particular individual is tested under "random" testing, fellow employees

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Dep't of Health and Human Services regulations invalid). *But see Skinner*, 489 U.S. 602 (1989) (upholding regulations allowing, but not requiring, observation).

154. 116 Wash. 2d 174, 804 P.2d 558 (1991).

155. *Id.* at 184, 804 P.2d at 564.

156. *Id.* at 187, 804 P.2d at 565.

157. *Id.* at 189, 804 P.2d at 566 (Utter, J., concurring).

158. A drug testing scheme will be subject to special scrutiny where the scheme excludes or includes a disproportionate percentage of individuals in a protected group under Title VII. *See, e.g.*, New York City Transit Authority v. Beazer, 440 U.S. 568 (1979).

will not be able to ascertain whether the individual was indeed being tested under a random basis or for cause. As a result, the individual to be tested suffers an indignity and the invasion of privacy is more severe.

Another problem with drug testing arises when an employee is taking a prescription drug that is proscribed under the employer's drug testing program. Privacy rights would be implicated in two ways. First, it would force the employee to disclose to the employer the medication and the purpose for which it is taken. Second, where an employee must be called back for testing because of the legitimate prescriptive drug, fellow employees might suspect that the individual is being tested on a suspicion, and not on a random basis. Such testing might discourage employees from continuing to take legitimate prescription drugs.

Other important constitutionally protected rights surrounding the right to privacy might be implicated by drug testing as well. For example, the right to procreative choice is a fundamental right covered by the right of privacy.[159] Drug testing that uncovered a woman's pregnancy or birth control use would necessarily impinge on her privacy right.

Thus, because Article 1, Section 7 is especially protective of an individual's privacy right, the highly intrusive nature of a drug testing procedure is especially relevant to a Washington constitutional analysis. Searches that constitute "invasions of the body" have seldom been upheld by the Washington Supreme Court. A drug-test urinalysis is highly invasive to an individual's private affairs. As with other invasions of the body, only in the rarest circumstance should a suspicionless drug testing program be upheld.[160]

E. Problems of Under- or Over-Inclusiveness of Drug Testing Programs

Drug testing programs should be carefully scrutinized because they may very well be either under- or over-inclusive.[161] A program may be under-inclusive if it tests only for illicit drugs and not for alcohol. Where the public interest

159. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965).

160. *See* State v. Curran, 116 Wash. 2d 174, 187, 804 P.2d 558, 565 (1991). Such a search may be appropriate where an accident causing death has occurred.

161. Although the arguments concerning under- and over-inclusiveness are germane to both a Fourth Amendment and an Article 1, Section 7 analysis, the

arguably supporting the program consists principally of safety (either to the public or to other employees), alcohol abuse could be just as dangerous in the workplace as drug abuse. In fact, depending on the industry, alcohol abuse may be more likely to threaten worker safety than drug abuse. Thus, targeting only illicit drugs, and not alcohol, in an urinalysis would not be sufficient to fulfill the compelling government interest of workplace safety.[162]

A drug testing program may be over-inclusive if the test would detect drugs that were only residually in the employee's system but did not have any actual effect on the employee's job performance. It is a medical fact that many types of illicit drugs remain in the bloodstream long after entering the body and may be detected by urinalysis long after the physical effects of such drugs have worn off.[163] Thus, a drug testing program may be impermissibly broad where it would detect drug use that does not affect job performance.

A drug testing program may also be over-inclusive by not being narrowly tailored to fit the government interest sought to be furthered. Where a program indiscriminately affects different employee classes within a given industry, the program may be too broad in scope. This overbreadth would result if the different employee classes subject to testing had varying relationships to the government interest sought to be served by the testing program. For example, if employees of the Sea-Tac Airport were subject to a drug testing program and the stated government interest in testing was public safety, it is clear that some classes of airport employees work in more safety sensitive jobs than other classes of employees. Air traffic controllers greatly affect public safety. Ground flagspersons have a lesser effect on safety. Those who drive baggage carts on the runways may have only a slight effect. Many drug testing programs, however, might not distinguish between those employees who are most directly related to the employer interest and those who are only remotely related to the employer interest.

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arguments are set forth here because they should be cast in the light of heightened privacy protection granted by the Washington Constitution.

162. This discussion, for purposes of organized discussion, tracks the Fourth Amendment test to determine whether a search or seizure is reasonable. *See supra* text accompanying notes 6-26. However, the Washington court need not analyze the issues of under- or over-inclusiveness in such a manner if it adopts an independent interpretation of Article 1, Section 7 with respect to this issue.

163. Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L. REV. 683, 695 (1987).

As such, these programs are over-inclusive if they are not narrowly tailored to fit the interest sought to be furthered.

Another consideration in this regard is whether alternative less intrusive means exist to accomplish the government purpose. An important inquiry is whether, if the drug abuse was sufficiently severe to significantly affect job performance, it is possible to detect the drug abuse by less intrusive means.[164] Greater on the job surveillance of workers might effect the same purpose as drug testing. Although closer supervision might be less cost effective to the employer than drug testing, the privacy rights of employees cannot be measured on such a scale.

Another alternative manner to safeguard the workplace from the influence of drugs is education. Although by no means a perfect method of preventing all drug related problems, a clear policy concerning drug use at the workplace and the use of seminars and other educative tools would be helpful in eradicating the problem. Allowing an employer to indiscriminately drug test would have the adverse affect of providing a disincentive to employers to educate employees of drug abuse because employers could eradicate the problem of drug use through the less costly method of testing. Hence, while drug testing programs might "clean up" the workplace, they might also detract from curing the underlying social problem of drug abuse.

Finally, mandatory employee drug testing is permissible under the Washington Constitution if it is based on employee consent. It is settled law that an individual can waive her privacy rights under Article 1, Section 7.[165] Thus, employees can waive their right of privacy against drug tests at the bargaining table. Either individually or through collective bargaining, an employer can buy the right to test its employees.

In summary, through either closer monitoring, education, or collective bargaining, there exist alternative means for the employer to accomplish the goals served by a drug testing program. Given that a urinalysis is a grave invasion of privacy, a court should weigh heavily these possible alternatives to ensure that there exists no reasonable less inhibitive means of effecting the government interest sought to be furthered by

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164. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 682 (Scalia, J., dissenting).

165. *See* State v. Smith, 72 Wash. 2d 479, 481, 434 P.2d 5, 7 (1967).

the drug testing program. If reasonable alternative means exist, the drug testing program should be held unconstitutional.

IV. HOLDINGS OF OTHER STATES

Although clearly not binding on the Washington Supreme Court, decisons from other states can serve as guideposts as to how the Washington constitutional provisions should be interpreted.[166] The most important sister states in this analysis would be those who have constitutional provisions similar to Article 1, Section 7 of the Washington Constitution.[167] Unfortunately, the state whose constitution was the primary textual source of Article 1, Section 7, Oregon,[168] has yet to confront the issue of drug testing absent a basis of individualized suspicion of drug use. Thus, the Washington Supreme Court must look elsewhere to find analogous state cases addressing this issue.

A comparison of how other state courts have handled this issue is inconclusive. Some states, such as California, have held that the relevant state constitutional provision affords protection to employees against drug testing.[169] The interpretation of California's Constitution is of little assistance to an interpretation of Washington's Constitution because the state constitutional right to privacy guaranteed by Article 1, Section 1 of the California Constitution protects citizens against both governmental and non-governmental conduct, and it places a heavier burden on the proponent of a privacy invasion than does the Fourth Amendment.[170]

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166. State v. Boland, 115 Wash. 2d 571, 577, 800 P.2d 1112, 1115 (1990). *See* Utter & Pitler, *Presenting a Constitutional Argument*, *supra* note 64, at 640-45.

167. *See* Utter & Pitler, *Presenting a Constitutional Argument*, *supra* note 64, at 672-76.

168. 1889 JOURNAL, *supra* note 56, at 497 n.13; OR. CONST. art. 1, § 9.

169. Hill v. National Collegiate Athletic Ass'n, 273 Cal. Rptr. 402 (Cal. Ct. App. 1990) (holding that student athletes at private university could not be required to submit to drug testing by the National Collegiate Athletic Association, a private unincorporated association); Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618 (Cal. Ct. App. 1990) (holding that employee, who held a position not implicating public safety, could refuse a random drug test conducted by a private employer because, under CAL. CONST. art. 1, § 1, employer did not demonstrate a compelling interest to overcome the plaintiff's privacy right); *but see* Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Cal. Ct. App. 1989) (holding that private publishing company could test employees as part of a pre-employment screening).

170. *Luck*, 267 Cal. Rptr. at 627.

Other states, such as Alaska,[171] Hawaii,[172] Louisiana,[173] and West Virginia,[174] have held to the contrary. It is not surprising that Hawaii has interpreted its constitution as allowing the Honolulu Police Department to conduct random drug testing because Article 1, Section 6 of the Hawaii Constitution contains an express limitation to the right of privacy where there is a showing of a "compelling state interest."[175] Furthermore, Hawaii's constitutional search and seizure provision is similar to the Fourth Amendment.[176] Indeed, the Hawaii court cites extensively to United States Supreme Court precedents in *Skinner* and *Von Raab*. But reliance on federal precedent in this area would be less appropriate for a state such as Washington, which employs radically different wording in its provision.

Other states whose courts have decided both ways on the issue given different factual settings include Massachusetts,[177]

171. Luedtke v. Nabors Alaska Drilling, 768 P.2d 1123 (Alaska 1989) (upholding upheld drug testing only with respect to private employers; state action required to invoke the protection of ALASKA CONST. art. 1, § 22 right to privacy).

172. McCloskey v. Honolulu Police Dep't, 799 P.2d 953 (Haw. 1990). In this case, the Hawaii State Supreme Court found that a City of Honolulu drug testing program, which included random drug testing, did not violate either the privacy provision, Article 1, Section 6 of the Hawaii Constitution, *id.* at 957, or the state constitutional protection against unlawful search and seizure, Article 1, Section 7. *Id.* at 959. The court held that the testing program passed strict scrutiny analysis under Article 1, Section 6 because the program was necessary and the least restrictive means to satisfy the legitimate government interests of ensuring safety to individual police officers and the public, and preserving the department's integrity. *Id.* at 958.

173. In Holthus v. Louisiana State Racing Comm'n, 580 So. 2d 469 (La. Ct. App. 1991), the court held that, although the right of privacy under Article 1, Section 5 of the Louisiana Constitution is broader than the protection against unreasonable search and seizure under the Fourth Amendment, the random testing of race track employees was not prohibited by the Louisiana Constitution. *Id.* at 471.

174. In Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990), the court held that drug testing by a private employer does not violate state public policy where the employee's job responsibility involves public safety or safety of others. *Id.* at 55. The court dealt with the applicability of privacy rights under W. VA. CONST. art. 3, § 6 only in dictum, however, and made no attempt to distinguish this state provision from the Fourth Amendment. *Id.* at 56.

175. HAW. CONST. art. 1, § 6.

176. *Id.*

177. In O'Connor v. Police Comm'n of Boston, 557 N.E.2d 1146 (Mass. 1990), the court held that a police cadet's rights under the state prohibition of unlawful search and seizure, Article 14 of the Declaration of Rights of the Massachusetts Constitution, were not violated when he was discharged after testing positive for cocaine, because the state interest in public safety and the integrity of the police force made the search reasonable and because the cadet signed a consent form before beginning employment. *Id.* at 1150-51. However, it should be noted that the court adopted federal precedent in *Skinner* and *Von Raab*, *see supra* text accompanying notes 9-26, and did not embark on any independent interpretation of the Massachusetts Constitution. *Id.* at 1149. Furthermore, only four of the seven judges sitting ruled that the search did not violate

New Jersey,[178] and New York.[179] Courts that held drug testing unconstitutional generally concluded that there was no strong public safety interest[180] or that there was a lack of reasonable suspicion.[181] In many of these cases, it is uncertain whether the respective court truly relied on an independent state constitutional analysis or on established federal precedent. Hence, the precedent of other state courts concerning drug testing is of little help to the Washington Supreme Court in its interpretation of Article 1, Section 7.

V. CONCLUSION

In conclusion, there is a firm basis for the Washington Supreme Court to construe Article 1, Section 7 of the Washington Constitution to provide greater protection to employees against employer drug testing without grounds of individualized suspicion of drug use than the current interpretation of

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Article 14; the remaining three judges concurred in judgment, but did so on the basis of consent and the probationary status of a police cadet, and disagreed concerning the balancing test, believing that a sufficient public interest did not exist. *Id.* at 1152.

In Horsemen's Benevolent and Protective Ass'n, Inc. v. State Racing Comm'n, 532 N.E.2d 644 (Mass. 1989), the court held that the state racing commission's random drug testing of licensees was unconstitutional under Article 14 because the regulation was not sufficiently linked to a legitimate concern of public safety. *Id.* at 652.

178. In International Fed'n of Professional & Technical Eng'rs, Local 194A, AFL/CIO-CLC v. Burlington County Bridge Comm'n, 572 A.2d 204 (N.J. Super. Ct. App. Div. 1990), the court held that public employees whose work included opening and closing bridges across the Delaware River could be subjected to non-random drug testing as a part of an annual physical examination because the New Jersey Constitution does not afford greater rights with respect to this issue than those found in the U.S. Constitution under *Skinner*. *Id.* at 212. It is important to note in this regard that the language of the New Jersey and the federal provisions is identical. *Burlington County Bridge Comm'n*, 572 A. 2d at 212.

In Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 524 A.2d 430 (N.J. Super. Ct. App. Div. 1987), the court held that random testing of police officers violated Article 1, Section 7 of the New Jersey Constitution prohibiting unlawful search and seizure because the testing program did not fit within any special exception to the warrant requirement, nor did it pass the test of reasonableness. In particular, there was no showing of past problems of drug use on the police force or incidents involving drug use that posed a threat to public safety. *Id.* at 437-38.

179. Ritterband v. Axelrod, 562 N.Y.S.2d 605, 610-11 (N.Y. Sup. Ct. 1990) (holding that suspicionless blood testing of hospital personnel for rubella did not constitute an unlawful search and seizure or violate the employees' right to privacy); Wilder v. Koehler, 556 N.Y.S.2d 28, 29 (N.Y. App. Div. 1990) (holding that correctional officer's rights under N.Y. Const. art. 1, § 12 and the Fourth Amendment were violated when she was fired for refusing to submit to a drug test without the presence of reasonable suspicion).

180. *Fraternal Order of Police, Newark Lodge No. 12*, 524 A.2d at 437-38; *Horseman's Benevolent and Protective Ass'n*, 532 N.E.2d at 652.

181. *Wilder*, 556 N.Y.S.2d at 29.

the Fourth Amendment. The issue of protection under Article 1, Section 7 against drug testing is particularly appropriate for an independent state constitutional analysis because the constitutional history of Article 1, Section 7 reveals a strong desire of the framers to protect the rights of citizens, and particularly labor, against government and industry. Also, sound precedent exists in Washington that supports a broader right of privacy under the Washington Constitution than the federal Constitution.

It is also clear that a urinalysis conducted pursuant to a drug test is a private affair protected by Article 1, Section 7, and that a general search, conducted without a basis of individualized suspicion, is seldom tolerated by the Washington Supreme Court. General speculation concerning the promotion of public safety has seldom been held to be a sufficient government interest to justify an invasion into a citizen's private affairs. To the contrary, an invasion of the body, such as a drug test urinalysis, is a grave invasion of an individual's autonomy that the Washington Supreme Court has said merits diligent constitutional protection.

It is not the intent of this Comment to define the detailed contours of the scope of protection of Article 1, Section 7 from drug testing. The possible permutations of facts concerning such variables as pre-employment, post-employment, or post-accident testing, visual and aural monitoring, over- and under-inclusiveness, prior history of problems in the industry, and the various government interests ostensibly served by testing are better left to a case by case analysis. Rather, the central purpose of this Comment is to show that the history of Article 1, Section 7, as well as an analysis of contemporary case law and public policy concerns, support an interpretation of Article 1, Section 7 that would provide greater protection than the Fourth Amendment to employees against drug testing absent an individualized suspicion of drug use.

This issue has yet to be addressed by the Washington Supreme Court. With the proliferation of drug testing programs increasingly impinging on the rights of Washington citizens, however, the time is ripe for the court to address this issue. Instead of attempting to rely on the ever vacillating weather vane of the United States Supreme Court, the Washington Supreme Court will have the opportunity to set out on its own path of analysis based solely on the Washington Consti-

tution. As Justice Marshall has stated: "[A]cceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."[182] There is clear ground under Washington Constitution Article 1, Section 7 for the Washington Supreme Court to secure the continuance of these liberties for Washington citizens.

182. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting).