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COMMENTS

DRUG TESTING: IS PREEMPTION THE ANSWER?

I. INTRODUCTION

The drug testing controversy has been difficult to resolve partly because the discussions have been tinged with hysteria and extreme reactions from policy makers and members of the judiciary. Edwin Meese, Attorney General in the Reagan administration, suggested that investigators for employers should frequent bars or clubs in which employees gather after work to see whether there is drug use.\(^1\) Robert DuPont, the former director of the National Institute on Drug Abuse and now a consultant to corporations on drug testing, has advocated universal, mandatory drug testing, parental drug testing of children, and the use of civil commitment statutes to incarcerate repeat drug users.\(^2\) Judge Silberman of the D.C. Circuit Court of Appeals, a judge who was reputedly on President Bush's short list of Supreme Court Justice nominees, called any drug use among Justice Department prosecutors the equivalent of "an open display of fealty to Nazi tenets or symbols [during World War II]."\(^3\) He accused a judge who disagreed with him of "judicial guerrilla warfare"\(^4\) and stated that anything less than a full commitment to the drug war "would risk the nation's survival."\(^5\)

As a reaction to pronouncements such as these and to recent Supreme Court and appellate court decisions, a number of states have adopted strategies to protect the privacy rights of their citizens against what some perceive as increasing federal erosion of these rights. States which have recognized a right to privacy in their con-


\(^{4}\) Id. at 500.

\(^{5}\) Id. at 497.
stitions\(^8\) are seeing an increasing number of litigants relying on adequate and independent state grounds in drug testing cases in order to avoid review by the United States Supreme Court.\(^7\) By the end of 1990, eighteen states\(^8\) and a number of local governments\(^9\) had enacted drug testing legislation to address the problems of invasion of privacy, confidentiality of testing, and unreliable tests.\(^10\)

Perceiving state legislation as an attempt to undercut federal drug programs, President Bush publicly criticized some states’ drug testing legislation as “counterproductive.”\(^11\) His spokesman said that

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10. In a House Subcommittee hearing, Rep. Gary Ackerman, Committee Chair, cited a Journal of the American Medical Association report on a survey that was conducted by the Center for Disease Control on thirteen private drug testing labs. The survey found error rates as high as 69 percent. Drug Testing Federal Employees: Hearings Before the Subcomm. on Post Office and Civil Service of the House Comm. on Human Resources, 99th Cong., 2d Sess. 1 (1986) [hereinafter Drug Testing Federal Employees] (statement of Rep. Gary Ackerman, Chair of the Subcommittee). See also Mark Rothstein, Screening Workers for Drugs: A Legal and Ethical Framework, 11 Employee Rel. L.J. 422, 426-27 (citing Hugh J. Hansen et al., Crisis in Drug Testing, 253 JAMA 2382 (1985) (discussing the Center for Disease Control’s study of drug testing laboratories)). Representative Ackerman also noted that the Defense Department had to reconsider punitive actions taken against 70,000 soldiers who had been disciplined on drug charges, because their drug tests had been faulty. Drug Testing Federal Employees, supra.


Iowa, Montana, Rhode Island, and Vermont were among the states to which President Bush referred. These four states have passed laws that prohibit random testing and contain some of the strongest protections of employee rights in the area of drug testing.

Under President Bush's direction, the Office of National Drug Control Policy has prepared model state legislation. States have not been eager to adopt this model. However, federal legislation introduced in the 1990 session of Congress by Senator Orrin Hatch would have dealt with the problem more directly. The Senate bill would have preempted all state drug testing legislation, and a House bill would have preempted state legislation only in the area of regulation of drug testing laboratories.

The problem faced by legislators in the drug testing area is the necessity to carefully balance the needs of employees and employers. This comment examines whether it is possible to attain that balance through preemption and proposes a more desirable solution. Section II explores the background of the problem by looking briefly at existing federal legislation, United States Supreme Court and federal appellate court decisions, and state responses to the perceived erosion of privacy rights. This section provides an overview of state legislation but will focus primarily on the legislation of Iowa, Montana, Rhode Island, and Vermont, states targeted and criticized by President Bush. Section II also examines the model state legislation proposed by President Bush and the Office of National Drug Control Strategy and concludes that this model fails to achieve the President's objective. This section also considers proposed legislation that adopts a direct preemption approach and proposed legislation that adopts a more limited preemption approach and discusses the implied preemption of a state statute. Section III considers the inadequacies of the proposed legislation and assesses the Iowa, Montana, Rhode Island, and Vermont drug testing legislation.

12. Id. at 1.
13. See infra notes 168-82 and accompanying text.
16. Id. § 2611.
18. See infra notes 25-164 and accompanying text.
19. See infra notes 165-82 and accompanying text.
20. See infra notes 183-225 and accompanying text.
21. See infra notes 226-83 and accompanying text.
22. See infra notes 284-302 and accompanying text.
also rejects preemption of state legislation and state constitutional safeguards as a meaningful solution to the drug testing problem. Section IV proposes a more desirable solution and more effective legislative provisions in a number of critical areas.

II. BACKGROUND

A. Federal Legislation

1. Executive Order 12,564

In 1986, President Reagan issued Executive Order 12,564, which mandates testing of all federal job applicants and all federal employees in "sensitive positions." As part of the supplemental appropriations bill which Congress enacted to permit the testing contemplated by the order, Congress required federal agencies to develop drug testing plans. In August 1987, the Department of Health and Human Services (hereinafter HHS) issued guidelines for collection of specimens, laboratory analysis, chain of custody verification, and confirmatory tests. The guidelines set forth detailed qual-
ity assurance and laboratory proficiency testing measures. Dr. James Mason, the Assistant Secretary for Health, Public Health Service, Health and Human Services has described the standards as "state-of-the-art." 29

2. Omnibus Drug Bill 5210 and the Drug-Free Workplace Act

The massive 1988 Omnibus Drug Bill, House Bill 5210, contained provisions entitled The Drug-Free Workplace Act of 1988 which required employers or contractors procuring government contracts of $25,000 or more from any federal agency to certify the workplace would be drug free. 30 On May 25, 1990, the Office of Management and Budget (hereinafter OMB) published final regulations for implementing the Drug-Free Workplace Act of 1988. 31 The questions and answers that accompany the regulations make it clear that testing is a possible component of the program. 32 An employer may institute a program consisting of reasonable suspicion and post accident drug testing, counseling and/or rehabilitation, and random unannounced testing for employees in health and safety or national security sensitive positions. 33 These regulations do not preempt state or local laws. 34

B. Union Response

Federal employee unions generally responded to federal drug testing legislation by filing lawsuits. 35 Red Evans, a spokesman for laboratories to perform drug testing in carrying out Executive Order 12,564.

Id. at 30,638.


33. Id.

34. Id. at 21,687.

35. Judith Havemann, Drug Testing Deadline Won't Be Met Today, WASH. POST,
the National Federation of Federal Employees, stated: "This has been a costly effort on the part of all the unions to litigate these issues case by case." However, the unions felt that the effort was justified. In testimony before a House subcommittee, Kenneth T. Blaylock, President of the American Federation of Government Employees, called the program a "McCarthy-like witch hunt . . . which is morally repugnant and repulsive to a free society," and a spokesman for the National Federation of Federal Employees described the proposal as "smack[ing] of a police state" and a "gross violation of . . . privacy." Although national drug policy director, William J. Bennett, set January 5, 1990, as the deadline for full implementation of a certified drug testing plan within the government, plans had not been fully implemented by that date. J. Michael Walsh, who oversees the federal drug testing program for the National Institute of Drug Abuse (hereinafter NIDA), attributed some of the delay to legal attacks. He also acknowledged that "this was clearly a major public policy that was very unpopular and invoked great uncertainty even at the highest levels of government."

36. Id.
37. Id.
38. Hearings Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 99th Cong., 2d Sess. 33 (1986) (statement of Kenneth Blaylock, National President, American Federation of Government Employees). Blaylock was concerned with the erosion of Fourth Amendment rights, inaccuracy of the tests, and the huge cost of the drug testing program. He stated that the program "at the minimum would conservatively cost $54 million, $11 per initial screening with an experience factor of 20 percent testing positive, and $75 for follow up tests . . . ." Id. at 32. At the same hearing, Robert Tobias, President of the National Treasury Employees Union, also protested the prohibitive cost of implementation of the drug testing program. Using figures from Mr. Claude Buller, President of CompuChem, a drug testing company, Tobias estimated that "the cost of conducting a single screening test for drugs for all federal civilian workers would cost the taxpayers between $295,019,900.00 and $265,517,910.00." Id. at 45. See also Jane Baird, Firms Mull High Cost of Drug Tests, Hous. Post, Dec. 31, 1989, at D1. According to Baird, the Federal Highway Administration estimated that drugs would cost truck and bus companies $1.7 billion over the next ten years. Id. Jim Johnson, president of the Owner-Operator Independent Drivers Association of America, stated: "The regulation will be the biggest, most expensive boondoggle ever passed down." Id. at D4. Richard Manchester, vice president of marine operations at Lykes Bros. Steamship Co., calculated that "pre-employment testing of its seamen turned up only 0.7-0.8 percent positive." Id. He complained: "If you take the entire dollar value of all the tests, that amounts to $7,000 to $8,000 for each positive." Id. at D4.

40. Id. at 40.
42. Id.
43. Id.
C. United States Supreme Court Challenges

The United States Supreme Court decisions in *Skinner v. Railroad Labor Executive Association*44 and *National Treasury Union v. Von Raab*,45 decided the same day, upheld programs that were established by the Federal Railway Administration (hereinafter FRA) and the U.S. Customs Service.46 The unions argued that the testing programs violated the Constitution’s Fourth Amendment ban on unreasonable search and seizure.47

The Court stated that individualized suspicion is not an indispensable component of the reasonableness of a search where there are “special needs.”48 Although the Court found drug testing to be a “search” within the meaning of the Fourth Amendment, the “special needs” exception justified a departure from the usual warrant and probable cause requirements.49

In *Skinner*, the Court found “special needs” in the safety-sensitive nature of the railroad employees’ work,60 and in the long history of drug and alcohol-related problems in the industry.51 In *Von Raab*, the government conceded that drug use was not a problem at all in the Customs Service.52 However, the Court found that the government had a special need to ensure that “front-line interdiction personnel . . . have unimpeachable integrity and judgment,”53 and that those who carry firearms do not pose a hazard because of “impaired perception and judgment.”54 The Court also approved testing of personnel receiving access to “sensitive information” but remanded the case to the lower court to determine which classified material was “sensitive information.”55 In both cases, the Court “assess[ed] the practicality of the warrant and probable cause requirements in the particular context” by balancing individual and governmental interests.56

47. *Skinner*, 489 U.S. at 612; *Von Raab*, 489 U.S. at 663.
51. Id. at 608.
52. *Von Raab*, 489 U.S. at 660.
53. Id. at 670.
54. Id. at 671.
55. Id. at 677-78.
The Court justified its result by noting that drugs are "one of the greatest problems affecting the health and welfare of our population," and that compelling governmental interests in ensuring the safety and integrity of the workforce outweighed the minimal intrusion on an employee's privacy.

In a dissenting opinion in *Skinner*, Justice Marshall, with whom Justice Brennan joined, acknowledged that the goal of safe railways was a worthy end but also stated that the end must be reached within constitutional boundaries. He decried the fact that the majority bent "time-honored and textually-based principles of the Fourth Amendment" designed by the framers of the Bill of Rights. Marshall wrote: "The Court today takes its longest step yet toward reading the probable-cause requirement out of the Fourth Amendment." He accused the majority of succumbing to what Justice Holmes called the "hydraulic pressure" of popular opinion which "appeals to the feelings and distorts the judgment." Finally, Justice Marshall warned that this decision would "reduce the privacy all citizens may enjoy, for . . . principles of law, once bent, do not snap back easily."

In a strong dissent in *Von Raab*, Justice Scalia condemned the decision because there was no evidence of drug use, not "even a single instance in which any of the speculated horribles actually occurred." He stated that "the Custom Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to

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59. *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting). In his dissenting opinion in *Skinner*, Justice Marshall warned of the dangers of succumbing to the drug hysteria:

Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases are . . . reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency we invariably come to regret it.

Id.

60. Id. at 655.
61. Id. at 636.
62. Id. at 654 (citing Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)).
63. Id. at 654.
64. Id.
65. National Treasury Employees v. Von Raab, 489 U.S. 656, 683 (1989). "The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that." Id. at 682.
drug use" and that the real purpose of the Custom Service rules was to set an example that the government is serious about the drug war. He felt that such symbolism was not sufficient to justify a constitutionally defective search.

Justice Scalia warned that in extending drug testing to those who carry firearms "the Court exposes vast numbers of public employees to this needless indignity." He stated that "if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others - automobile drivers, operators of other potentially dangerous equipment, construction workers, [and] school crossing guards." He cautioned that the "sensitive information" exception could be read broadly to extend to all federal employees with access to confidential information. Justice Scalia also cautioned that the public safety and sensitive information categories need not be limited to public employees. He stated that under a "super-protection against harms arising from drug use [rationale] . . . [,] a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information, would also be constitutional." Quoting the memorable words of Justice Brandeis, he warned that it was "immaterial that the intrusion was in aid of law enforcement . . . The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding."

Although Joe Goldberg, staff counsel for the American Federation of Government Employees, stated that the "muddled logic" of these decisions "will be difficult . . . to apply to other drug testing situations," other union commentators have disagreed. Alan C.

66. Id. at 681.
67. Id. at 686.
68. Id. at 687.
69. Id. at 685.
70. Id.
71. Id. at 685-86.
72. Id. at 686.
73. Id.
74. Id. at 687 (citing Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).
76. Id.
77. Alan C. Davis & Diane Ravnik, Drug Testing Developments, 8 CAL. LAB. & EMPLOYMENT L. Q. 1, 3 (1990). "Therefore, even though these two cases supposedly limit drug-testing to unusual 'special needs' situations, we can unfortunately anticipate a 'trickle-down' effect with other types of employers." Id.
Davis and Diane Ravnik, labor lawyers for unions, stated:

The Supreme Court majority clearly feels that drug use is such a significant menace that constitutionally-enshrined principles must take a back seat . . . . Since hypothetical speculation was enough to overrule the constitutional rights of Customs Service employees, one could imagine a worse-case scenario, in which every possible hypothetical which could arguably justify drug-testing will be used to do so.\textsuperscript{78}

Assistant Attorney General Richard Willard pointed to the fact that the majority did not dispute Justice Scalia's broad analysis and predicted that random testing would be approved "in jobs that are sensitive because of safety or integrity requirements."\textsuperscript{79} One commentator wrote:

The majority could have made a more narrow ruling and upheld drug testing. All could have done was uphold drug testing for those involved in drug enforcement. It chose instead to write broadly. Many more millions of Americans may now be subjected to drug testing as a condition of employment.\textsuperscript{80}

D. \textit{First Lower Federal Court Decision After Skinner and Von Raab Expands Rationale to Random Testing}

Lower federal court decisions have justified Justice Scalia's worst fears. Although \textit{Skinner} and \textit{Von Raab} did not deal with random testing, court of appeals decisions have extended the "special needs" analysis to random testing.\textsuperscript{81} In the first court of appeals de-
cision after Von Raab and Skinner, Harmon v. Thornburgh, the influential panel of the Court of Appeals for the District of Columbia expanded court approval of drug testing further than the Supreme Court had. Although the court did not permit the Justice Department to impose random tests on regular government lawyers, it approved warrantless and suspicionless searches of those who have access to top secret information. While recognizing that the random testing of employees in Harmon was "somewhat more intrusive" than the testing of applicants in Von Raab, Judge Wald concluded that "[a] different result is not compelled."

The court identified three governmental interests which might be sufficient to justify mandatory testing without individualized suspicion. These categories are: (1) maintenance of workforce "integrity"; (2) enhancement of public safety; and (3) protection of "truly sensitive information." Although Judge Wald approved the testing of prosecutors of drug cases because they are "closely tied to enforcement of federal drug laws," she did not approve the Justice Department’s plan because a line was not drawn between drug prosecutors and other prosecutors. Judge Silberman, in dissent, stated that the success of the anti-drug effort depended on "convincing all Americans that drug use is as much a danger to them and to our country as is an external enemy" and, in a Nazi analogy, compared drug use among prosecutors to the display of Nazi symbols during World War II.

Paul J. Boudreaux, currently an attorney at the U.S. Department of Justice, called Judge Wald’s opinion "especially disturbing to civil libertarians" in light of Justice Scalia’s "thoughtful dis-

83. Id.
84. Id. at 492.
85. Id.
86. Id. Judge Wald also noted that there was a difference between a one-time test and random testing, but did not feel that this difference was significant. Id. at 489.
87. Id. at 488.
88. Id.
89. Id. at 493.
90. Id. at 495.
91. Id. at 497.
92. Id.
sent"\textsuperscript{94} in \textit{Von Raab}. He found Judge Silberman's dissent so astounding in its use of Nazi analogies that "it seems almost silly to try to argue against it with traditional legal tools."\textsuperscript{95} However he warned: "[If] his declaration of war hysteria is heeded by other courts, civil libertarians and average Americans alike may have to barricade themselves in their cellars to avoid the resulting blitz against [F]ourth [A]mendment rights."\textsuperscript{96} Boudreaux saw this case as an example of the way in which the war on drugs can lead both "traditionally liberal and conservative judges to scuttle their legal logic to reach conclusions expedient to the war effort."\textsuperscript{97}

However, one commentator saw the decision in \textit{Harmon v. Thornburgh}, as consistent with Supreme Court rulings.\textsuperscript{98} He stated: "The Supreme Court rulings, while not specifically dealing with random testing, were written in very broad language. No doubt Judge Wald read the decisions as the Supreme Court meant them . . . . Indeed, the Supreme Court refused to grant \textit{certiorari} in the case."\textsuperscript{99}

E. Lower Court Decisions Further Expand Random Testing

After \textit{Harmon v. Thornburgh}, there was an avalanche of lower court decisions which expanded random testing to many categories of employees.\textsuperscript{100} In \textit{Railway Labor Executives Association v. Skinner},\textsuperscript{101} the court approved random drug testing of railroad workers. The court supported its conclusion by citing the landslide of rulings in the two years since \textit{Skinner} and \textit{Von Raab} in which various circuit courts have upheld random testing of jail employees,\textsuperscript{102} local police who are armed or involved in drug interdiction,\textsuperscript{103} mass transit workers,\textsuperscript{104} federal employees with top national security clearances,\textsuperscript{105} and army employees working with chemical weapons.\textsuperscript{106}

\textsuperscript{94} Id. at 702.
\textsuperscript{95} Id. at 708.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 708-09.
\textsuperscript{98} ZEESE, supra note 7, § 5.01(3)(b).
\textsuperscript{99} Id.
\textsuperscript{100} See supra note 81.
\textsuperscript{101} Railway Labor Executives Ass'n v. Skinner, 934 F.2d 1096 (9th Cir. 1991).
\textsuperscript{102} Id. at 1099 (citing Taylor v. O'Grady, 888 F.2d 1189, 1198-99 (7th Cir. 1989)).
\textsuperscript{103} Id. at 1100 (citing Guiney v. Roache, 873 F.2d 1557, 1558 (1st Cir. 1989)).
\textsuperscript{104} Id. at 1099 (citing Transport Workers' Union v. Southeastern Pa. Transp. Auth., 884 F.2d 709, 713 (3d Cir. 1989)).
\textsuperscript{105} Id. at 1100 (citing Harmon v. Thornburgh, 878 F.2d 484, 486 (D.C. Cir. 1989) \textit{cert. denied}, 493 U.S. 1056 (1990)).
\textsuperscript{106} 934 F.2d at 1099 (citing Thomson v. Marsh, 884 F.2d 113, 115 (4th Cir. 1989)).
In *International Brotherhood of Teamsters v. Department of Transportation*,\(^\text{107}\) the court upheld random testing of commercial motor vehicle operators but decried, in dictum, the erosion of constitutional rights:

Today we uphold a massive drug testing program that will touch the lives of literally millions of citizens. We do not do so lightly. We share many of the Unions' concerns about the substantial inroads drug testing makes on our precious [F]ourth [A]mendment freedoms. But we do not write upon a clean slate in this area. Much of our decision is compelled by prior decisions of the Supreme Court and this circuit. Unless and until Congress or the Supreme Court reconsiders the enormous constitutional cost, in terms of lost privacy, dignity, and autonomy, resulting from the "war on drugs," we are bound to apply the law as it exists.\(^\text{108}\)

F. Adequate and Independent State Grounds

As the Supreme Court has narrowed constitutional protections, plaintiffs have been forced to litigate under state constitutions and to rely on adequate and independent state grounds.\(^\text{109}\) Eleven states have recognized a right to privacy in their respective constitutions.\(^\text{110}\) For example, the California Constitution guarantees protection against governmental and private invasions of privacy.\(^\text{111}\) In Massachusetts, a person has the statutory right to be free of unreasonable, substantial, or serious interference with his privacy.\(^\text{112}\) The superior court of that state has jurisdiction in equity to enforce such a right

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107. *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991).
108. *Id.* at 1309.
109. *Zeese, supra* note 7, § 5.01(3)(c).
110. *See supra* note 6.
111. *Cal. Const.* art. 1, § 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy." The seminal case defining the scope of this constitutional right to privacy is *White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975). *See also Pipkin v. Board of Supervisors*, 147 Cal. Rptr. 502, 601 (1978) (stating that nonexistence or nonexpression of a fundamental right under the federal Constitution does not preclude a finding of such a right under the California Constitution); *People v. Disbrow*, 545 P.2d 272, 283 (Cal. 1976) (reaffirming "the independent nature of the California Constitution and [the court's] responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal constitution")
and award damages, if necessary.\textsuperscript{113}

In the drug testing context, plaintiffs have paid close attention to the U.S. Supreme Court’s pronouncement in \textit{Michigan v. Long}\textsuperscript{114} that “[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”\textsuperscript{115} The Supreme Court of Vermont emphasized the importance of litigating under the state constitution, saying that failure to present “substantial analysis or argument”\textsuperscript{116} under the state constitution constitutes “inadequate briefing.”\textsuperscript{117} In \textit{Horsemen’s Benevolent Association v. State Racing Commission},\textsuperscript{118} the Supreme Judicial Court for Suffolk held that testing jockeys was unconstitutional based on the Massachusetts, not the Federal, constitution:

We need not consider this case in the context of the [F]ourth [A]mendment, because we now conclude that the drug testing program, in both the testing at random and “reasonable suspicion,” is unconstitutional under art. 14 of the Massachusetts Declaration of Rights. We cite and make reference to [F]ourth [A]mendment cases only by way of analogy.\textsuperscript{119}

In California, the courts of appeal have also relied on the state’s constitutional privacy right, but decisions reflect a conflict concerning whether to apply the federal standard or stricter scrutiny than federal constitutional analysis would require.\textsuperscript{120} Courts of appeal

\begin{enumerate}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Michigan v. Long}, 463 U.S. 1032, 1041 (1983). In order to avoid the federal court’s review of a state court decision, the state court must “[m]ake clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result.” \textit{Id.}
\item \textsuperscript{115} \textit{Id.} at 1041.
\item \textsuperscript{116} \textit{State v. Jewett}, 500 A.2d 233, 234 (Vt. 1985). Oregon Justice Hans Linde has stated: “’A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice.’” \textit{Id.} (quoting Welsh & Collins, \textit{Taking State Constitutions Seriously}, 14 CENTER MAG. 12 (Sept.-Oct. 1981)). In \textit{Jewett}, Justice Hayes also emphasized “the resurgence of federalism that is sweeping across the country.” \textit{Id.} at 234. He wrote: “[S]ince 1970 there have been over 250 cases in which state appellate courts have viewed the scope of rights under state constitutions as broader than those secured by the federal constitution as interpreted by the United States Supreme Court.” \textit{Id.}
\item \textsuperscript{117} \textit{Jewett}, 500 A.2d at 234.
\item \textsuperscript{118} \textit{Horsemen’s Benevolent Ass’n v. State Racing Comm’n}, 532 N.E.2d 644 (Mass. 1989)
\item \textsuperscript{119} \textit{Id.} The court used the compelling need test and concluded that “art. 14 [of the state constitution] prohibits random (without cause) drug testing by urinalysis of licensees under the human drug regulation.” \textit{Id.} at 652.
\item \textsuperscript{120} Davis & Ravnik, \textit{supra} note 77, at 4.
\end{enumerate}
adopted the stringent "compelling interest" test for determining violations of the state constitution's privacy right in Luck v. Southern Pacific Railroad\textsuperscript{121} and Hill v. National Collegiate Athletic Association\textsuperscript{122} but adopted the lower threshold of justification used in Skinner and Von Raab. in Wilkinson v. Times Mirror Corporation,\textsuperscript{123} a case that involved applicant testing. However, in Soroka v. Dayton Hudson Corporation,\textsuperscript{124} a case that also involved applicant screening tests, the court of appeal explicitly rejected the reasoning in Wilkinson and applied the "compelling interest" test.\textsuperscript{125}

In Luck, a computer programmer who had been employed by the railroad for six years was instructed to submit a urine sample and consent to testing.\textsuperscript{126} She was terminated when she failed to comply with the test.\textsuperscript{127} The Court of Appeal for the First District, Division Four, acknowledged that drug testing would be governed by the privacy interests protected by the California Constitution\textsuperscript{128} and endorsed a stricter scrutiny than federal constitutional analysis would demand.\textsuperscript{129} The court stated: "Southern Pacific urges us to use the Fourth Amendment test. We see no reason to depart from existing precedent applying the compelling interest test . . . . This test places a heavier burden on Southern Pacific than would a Fourth Amendment privacy analysis . . . ."\textsuperscript{130}

In Wilkinson, the Court of Appeal for the First District, Division Three, justified using the less stringent federal balancing test

\begin{itemize}
  \item \textsuperscript{121} Luck v. Southern Pac. R.R., 267 Cal. Rptr. 618 (Ct. App. 1990).
  \item \textsuperscript{123} Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Ct. App. 1989).
  \item \textsuperscript{124} Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77 (Ct. App. 1991).
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} Luck v. Southern Pac. R.R., 267 Cal. Rptr. 618, 620 (Ct. App. 1990).
  \item \textsuperscript{127} \textit{Id.} at 621.
  \item \textsuperscript{128} \textit{Id.} at 625.
  \item \textsuperscript{129} \textit{Id.} at 629.
  \item \textsuperscript{130} \textit{Id.} The court found that the employer committed a contractual breach of the covenant of good faith and fair dealing by terminating Luck for her refusal to submit to the drug test. \textit{Id.} at 634. The court refused, however, to find that the termination constituted a violation of public policy because it did not meet established criteria that the termination must affect a duty that benefits the public. \textit{Id.} at 635 (citing Foley v. Interactive Data Corp. 765 P.2d 373 (Cal. 1988)). The right to privacy was held to be a private right, not a public right. \textit{Id.} However, in Semore v. Pool, the court held that an employee terminated for refusing to take a random drug test may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right of privacy. Semore v. Pool, 266 Cal. Rptr. 280, 285 (Ct. App. 1990) ("We think, however, that there is a public policy concern in an individual's right to privacy."). On May 31, 1990, the California Supreme Court denied review in both cases, leaving the question of whether the right to privacy is a private right or a public right unresolved.
\end{itemize}
because, as an applicant and not as an employee, the plaintiff had a diminished expectation of privacy.\textsuperscript{131} In \textit{Soroka}, however, the Court of Appeal for the First District, Division Four, explicitly rejected the distinction made in \textit{Wilkinson} between the privacy rights of job applicants and employees.\textsuperscript{132} The court stated that "any violation of the right to privacy of job applicants must be justified by a compelling interest."\textsuperscript{133} The court reasoned that this conclusion was consistent with the voters' intent in amending the California Constitution to make privacy an inalienable right.\textsuperscript{134}

In \textit{Hill}, the Court of Appeal for the Sixth District also elected to use the "compelling interest" test in the context of National Collegiate Athletic Association (hereinafter NCAA) drug testing rules which require urinalysis testing of athletes in post-season championship competition.\textsuperscript{135} The NCAA contended that drug testing was necessary to protect the health and safety of student athletes.\textsuperscript{136} The court rejected this argument because the program was not effective in reaching its stated goals of protecting student health and safety.\textsuperscript{137} The court also held that the NCAA did not meet another component of the "compelling need" test, whether there was a less intrusive means of furthering the NCAA's stated goals.\textsuperscript{138} Since the NCAA had not attempted drug education as a deterrent to drug use or testing based on reasonable suspicion, there was no way to know if less intrusive means would have been effective in achieving the goal of the NCAA.\textsuperscript{139}

The confusion over which test to use was reflected in an opinion by the California Unemployment Insurance Appeals Board (hereinafter UIAB) which denied benefits to a housekeeper employed on an offshore oil rig, who was fired for refusing to take a urinalysis test.\textsuperscript{140} The majority applied the test used by the \textit{Wilkinson} court,\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{131} Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194, 204 (Ct. App. 1989).
  \item \textsuperscript{132} Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 83 (Ct. App. 1991).
  \item \textsuperscript{133} \textit{Id}.
  \item \textsuperscript{134} \textit{Id}.
  \item \textsuperscript{135} Hill v. National Collegiate Athletic Ass'n, 273 Cal. Rptr. 402 (Ct. App. 1990), \textit{rev. granted} Dec. 20, 1990 (No. 5018180). The court stated that claims under art. 1, § 1 required "the state to show a compelling interest before it can invade a fundamental privacy right . . . . The weight of governmental interest that must be shown is not simply that the regulation has some rational relationship to the effectuation of a proper state purpose . . . ." \textit{Id} at 410. The California Supreme Court granted review in \textit{Hill} on Dec. 20, 1990.
  \item \textsuperscript{136} \textit{Id} at 417.
  \item \textsuperscript{137} \textit{Id} at 418.
  \item \textsuperscript{138} \textit{Id} at 421.
  \item \textsuperscript{139} \textit{Id} at 422.
  \item \textsuperscript{140} Hayes v. SHRM Catering Servs., UIAB Dec. No. P-B-470.
\end{itemize}
and the dissent contended that the proper test was the more stringent Luck "compelling interest" test.\textsuperscript{142} The employee filed suit in superior court in January, 1991.\textsuperscript{143}

G. State and Local Legislation

Drug testing legislation has increased dramatically at the state level in recent years.\textsuperscript{144} In 1986, only seven states considered drug testing legislation, and no statutes were enacted.\textsuperscript{145} By the end of 1989, twelve states regulated drug testing.\textsuperscript{146} By 1990, eighteen states\textsuperscript{147} and a number of cities\textsuperscript{148} had enacted drug testing legislation.

Most state laws and local ordinances are designed to address the problems of invasion of privacy, confidentiality of results, and unreliable testing facilities.\textsuperscript{149} The exception is Utah, the first state to pass drug testing legislation\textsuperscript{150} and the state which provides the least employee safeguards.\textsuperscript{151} One commentator has called the Utah legislation a law "to facilitate drug testing."\textsuperscript{152}

1. Utah

The Utah legislation allows the employer to randomly test employees for the presence of drugs or alcohol.\textsuperscript{153} The employer who takes disciplinary steps in compliance with the Utah drug testing statute is immune from civil liability if his actions are based on a valid test result.\textsuperscript{154} All test results are presumed valid if they comply

\begin{itemize}
  \item \textsuperscript{141} Id. at 8.
  \item \textsuperscript{142} Id. at 6 (Walker, L., dissenting).
  \item \textsuperscript{144} ZESEE, supra note 7, § 1.05(3).
  \item \textsuperscript{145} See Thomas McGovern, Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs, 39 STAN. L. REV., 1453, 1470 (1987) (listing California, Maine, Maryland, Massachusetts, Michigan, New Jersey, and Oregon as the states that had considered drug testing legislation).
  \item \textsuperscript{147} See supra note 8.
  \item \textsuperscript{148} See supra note 9.
  \item \textsuperscript{149} ZESEE, supra note 7, § 1.05(3).
  \item \textsuperscript{150} See Note, Drug and Alcohol Testing, 149 UTAH L. REV. 284 (1988).
  \item \textsuperscript{151} See UTAH CODE ANN. § 34-38-1-15 (1987).
  \item \textsuperscript{152} ZESEE, supra note 7, § 1.05(3).
  \item \textsuperscript{153} UTAH CODE ANN. § 34-38-7 (West 1987).
  \item \textsuperscript{154} Id. § 34-38-10.
\end{itemize}
with the collection and testing requirements of the Utah drug testing statute.\textsuperscript{155}

A commentator complained that the testing standards in the Utah statute are defined in broad and vague terms and “participating labs are not required to meet any standards of professional competence or to be certified or monitored in any way.”\textsuperscript{156} In addition, this commentator stated that a further shortcoming of the Utah statute is that it does not specifically define a “positive” test result.\textsuperscript{157} There are also no standards for “sanitary” conditions or chain of custody safeguards.\textsuperscript{158}

2. Berkeley, California

The most restrictive legislation comes from Berkeley, California.\textsuperscript{159} As part of the “Labor Bill of Rights,” the Berkeley City Council adopted a resolution on October 25, 1988 that prohibits drug testing within the city limits because “mandatory testing presupposes an employee’s guilt until proven innocent, and violates an employee’s constitutionally guaranteed right to privacy.”\textsuperscript{160}

3. San Francisco, California

The first local drug testing ordinance ever passed,\textsuperscript{161} the San Francisco ordinance, took effect on Dec. 29, 1985.\textsuperscript{162} The purpose of the ordinance was to permit “all citizens to enjoy the full benefit of the right of privacy in the workplace guaranteed to them by . . . the California Constitution . . . [and] to protect employees against unreasonable inquiry and investigation into off-the-job conduct . . . not directly related to the . . . job.”\textsuperscript{163} The ordinance prohibits employers from testing unless the employer has reasonable grounds to believe

\begin{itemize}
  \item 155. \textit{Id.} § 34-38-10.
  \item 156. \textit{Supra} note 150, at 289.
  \item 157. \textit{Supra} note 150, at 289-90.
  \item 158. \textit{Supra} note 150, at 289-90.
  \item 159. Berkeley, Cal., Resolution No. 54,533 (Oct. 25, 1988).
  \item 160. \textit{Id.} at 3.
\end{itemize}
that the employee is impaired, the impairment presents a clear and present danger, and the employee has the opportunity to explain the results and to have the sample evaluated by an independent lab.164

4. The Iowa, Vermont, Rhode Island, and Montana Drug Testing Statutes

President Bush has expressed his concern about drug testing laws passed in Iowa, Rhode Island, Montana, and Vermont.165 These state statutes expressly prohibit all random drug testing.166 In a speech announcing his updated drug control strategy, President Bush criticized the states by saying:

[A] number of states have enacted legislation limiting or restricting drug testing. Not only can such legislation be counterproductive to the goal of a drug-free workplace, but because these laws are rarely consistent, the task of developing comprehensive employee assistance programs is made more difficult for large corporations whose operations cross state lines.167

The drug testing statutes that President Bush objected to in his speech have many common features. Iowa, Montana, Rhode Island, and Vermont allow drug testing only upon a showing of probable cause.168 Rhode Island and Vermont permit probable cause testing only when the employer has a bona fide rehabilitation program available.169 In Iowa and Vermont, an employee may not be terminated if the test result is positive and the employee agrees to participate in, and then successfully completes, an employee assistance program.170 If the employee has a positive test subsequent to completing a rehabilitation program, then he or she may be terminated.171 The Iowa and Vermont statutes contain provisions which require the employer to use only a laboratory designated by the Department of Health.172 Vermont establishes a chain of custody procedure.173

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164. *Id.*
165. *See supra* note 11.
167. *See supra* note 11.
Rhode Island and Vermont require a confirmatory test by gas chromatography with mass spectrometry (hereinafter GC/MS) or an equivalent scientifically accepted method;\textsuperscript{174} Iowa requires verification by two or more testing procedures.\textsuperscript{176} All four states provide the employee or applicant with an opportunity to retest the sample and explain the results.\textsuperscript{176} Rhode Island requires that the test sample be provided under conditions that maximize privacy.\textsuperscript{177} In Iowa, the employer must ensure that the tests only measure, and the records only reflect, information regarding chemical substances likely to affect the ability of the employee to perform safely.\textsuperscript{178} In all three states, violation of the statute by an employer is a misdemeanor.\textsuperscript{179} In addition, there are civil penalties for violation of the statute in Vermont, Rhode Island, and Iowa.\textsuperscript{180} Rhode Island permits awards of punitive damages;\textsuperscript{181} Vermont and Iowa award attorney's fees and court costs in addition to damages.\textsuperscript{182}

urine collection and continues until test results are reported to the client. At each step the chain of custody procedures require documentation that proper standards have been met and that the security of the sample has not been breached. Any breach in the chain of custody raises serious questions about the validity of the test results. Zeese, supra note 7, § 2.01(20).


Leading forensic toxicologists stress that a urine sample which is positive by an immunoassay method must be tested by an alternative method such as GC/MS to obtain accurate results. Arthur J. McBay, et al., Urine Testing for Marijuana Use, 249 JAMA 881 (1983) ("[D]rug identification . . . must be confirmed by adequate alternative chemical analyses . . . . Gas Chromatography-mass spectrometry assays . . . are available and proved accurate and sufficiently sensitive."). In a January 27, 1987 letter to manufacturers of devices for drugs of abuse screening tests, the Food and Drug Administration included the following statement: "All positive tests should be confirmed by an independent and more specific method. Gas chromatography/mass spectrometry (GC/MS) is the confirmatory method of choice." Kurt Dubowski, Drug Testing Scientific Perspectives, citing Letter of K. Mohan, Office of Device Evaluation, Food and Drug Administration (Jan. 27, 1987), 11 NOVA L. REV. 415, 484 (1987). Although GC/MS screening is very accurate, it does not, however, "eliminate the possibility of false positives due to inaccurate adjustment of the mass spectrometer, contaminated instruments, temperature changes, insufficient skill or training of the laboratory technicians, or problems with the validity or chain of custody of the sample." Horsemen's Benevolent Ass'n v. State Racing Comm'n, 532 N.E.2d 644, 647 (Mass. 1989).

175. IOWA CODE ANN. § 730.5 (3)(d) (West 1989).


177. R.I. GEN. LAWS § 28-6.5-1(B) (1987).

178. IOWA CODE ANN. § 730.5(4) (West 1989).

179. IOWA CODE ANN. § 730.5(11) (West 1989); MONT. CODE ANN. § 39-2-304(5) (1991); R.I. GEN. LAWS § 28-6.5-1(F); VT. STAT. ANN. tit. 21, § 519(d) (1987).

180. IOWA CODE ANN. § 730.5(9) (West 1989); R.I. GEN. LAWS § 29-6.51(F) (1987); VT. STAT. ANN. tit. 21, § 519(a) (1987).


182. IOWA CODE ANN. § 730.5(9)(a) (West 1989); VT. STAT. ANN. tit. 21 § 519(a) (1987).
H. The Federal Response to State Legislation

1. The Model State Legislation of the Office of National Drug Control Strategy

In order to encourage states to adopt statutes that reflect the administration's policy on drug testing, the Office of National Drug Control Strategy has proposed four separate model state bills. The first is a Workforce Drug Testing Act that is designed "to aid private sector employers who wish to adopt drug testing plans, by protecting these employers from litigation if their plans meet the standards in the plan." The second is a Workforce Drug Use Prevention Act which requires corporations which receive contracts or grants from the state government to institute an anti-drug plan. The third is an Anti-Drug Use State Licensing Act which requires all state-licensed professionals who are convicted of a drug-related crime to participate in a drug treatment program or face the prospect of having their professional licenses suspended. The final bill is a State Employee Drug-Free Workforce Act which subjects employees holding sensitive positions in state government to drug testing.

2. The Model Workforce Drug Testing Act

Like the Utah statute, the model Workforce Drug Testing Act prohibits any cause of action against the employer unless the employer's reliance on a test result was unreasonable or in bad faith. However, the model legislation provides that an employer's compliance with the model bill creates a rebuttable presumption that his reliance was reasonable. The model Workforce Drug Testing Act also prohibits any cause of action for defamation, libel, slander, or damage to reputation unless the employer knowingly disclosed erroneous test results with malice.

The model Workforce Drug Testing Act requires a written plan with a description of legal sanctions, standards of conduct,
a drug counseling or rehabilitation program, sanctions imposed by the employer, and a list of the drugs tested. The model bill also contains provisions for confidentiality except in proceedings taken by the employer or in workplace accidents where it is probable that drugs played a role.

The model Workforce Drug Testing Act addresses privacy concerns and problems related to testing accuracy and standards. However, the protections are limited. Although the bill provides for private sample collection, privacy is not required where the employer may believe the employee may alter or substitute the sample. Chain of custody procedures are to be followed and verification by GC/MS or a comparable method is to be used. However, rigorous NIDA standards are not required for sample testing. Instead, the model bill specifically authorizes testing in a lab certified by NIDA or by a body designated by the State Department of Health.

3. The Model State Employee Drug-Free Workplace Act

The State Employee Drug-Free Workplace Plan explicitly provides for random testing of employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing are to be determined by the heads of each executive branch agency. In the commentary, the authors of the legislation warn that random testing is only to be performed where it is consistent with current legal decisions. The authors, however, advise legislators to specifically authorize random drug testing. The commentary also warns that "reasonable suspicion and post-accident testing are areas of considerable litigation." Legislators are advised to re-

196. Id. § 4(A)(10), TAB A, 4.
197. Id. § 4(C), TAB A, 4.
198. Id.
199. Id. § 4(D), TAB A, 5.
200. Id. § 4(E), TAB A, 5.
201. Id. § 4(E), TAB A, 5.
202. Id. § 4(E), TAB A, 5.
203. Id. § 6(A), TAB D, 5.
204. Id.
205. Id. § 6(A), TAB D, 13.
206. Id.
207. Id. § 6(B), TAB D, 13.
view court cases to get a sense of court opinion in this area.  

Although no specific supervisorial training is required to detect employee drug use, an agency may determine that an employee uses illegal drugs by the use of any appropriate evidence including direct observation, a criminal conviction, or the results of an authorized testing program.

Like the Workforce Drug Testing Act, the State Employee Drug Free Workplace Plan does not define a "positive" result, set cut-off levels, or require state-of-the-art regulation of testing. However, unlike the private sector bill, the state bill permits random testing of employees in "sensitive" positions. The term "employee in a sensitive position" is defined as follows:

1. Appointees serving at the pleasure of the Governor or whose appointment required confirmation by the State Legislature;
2. All elected officials;
3. Law enforcement officers . . . ;
4. Other positions that the Governor or agency head determines involve law enforcement, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.


In November, 1990, the Office of National Drug Control Policy produced a State Drug Control Status Report which analyzed sev-
eral state drug control indicators. In its discussion of drug control policies, the status report praised private sector drug testing programs which have instituted random testing at all levels. The status report focused on two programs of private companies that it called "commendable." Both "subject all employees to random testing, including upper level managers." One of the programs is that of Texas Instruments; the company's program includes plans to randomly test all of its 52,000 United States employees by the end of 1993. The status report also praised Motorola, Inc. because it has plans to institute a similar program. Like the model state legislation, the status report urged states to issue guidelines to ensure that testing procedures recognize generally acceptable laboratory standards in order to "remove the threat of costly employee litigation which deters many companies from implementing even a limited testing program."

In its discussion of drug testing for public sector employees, the status report suggested that public officials who serve as role models in the fight against drugs and other state employees who hold safety-sensitive positions "should be held to an even higher standard." However, it warned that many courts have limited the extent to which public employees can be tested. State legislatures were, therefore, urged to "ensure that the State executive branch is encouraged, empowered, and, if necessary, required to employ drug testing within the State workplace." States were also urged to act promptly to ensure the passage of legislation necessary to implement drug testing. However, both the model state legislation and the status report have failed to have much of an impact on the states in the area of random testing. The status report conceded that "[o]nly a handful of States have passed legislation that would explicitly allow companies to implement random testing of all employees

214. Id. at 17.
215. Id.
216. Id.
217. Id.
218. Id.
219. Id.
220. Id. at 18.
221. Id.
222. Id.
223. Id.
224. Id.
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[and a] few States have prohibited such testing." 225

I. Proposed Federal Legislation

1. Senate Bill 2695 - The Hatch Bill

Senate Bill 2695 was a more direct attack on states that prohibit random drug testing. 226 On May 24, 1989, Senator Hatch introduced this bill "to eliminate the scourge of illegal drugs and fight drug abuse." 227 The bill explicitly preempted "state and local laws and such other requirements that frustrate, conflict with, interfere with, or are inconsistent with the standards established by this Act." 228 The bill would have permitted random testing of employees in "sensitive" positions. 229 "Sensitive" was defined in the same broad terms as it was in the model state legislation produced by the Office of National Drug Control Strategy. 230 A "sensitive" position was one "whose duties, as defined by the employer, involve responsibilities affecting such matters as national security, health, or safety, environment, or other responsibilities requiring a high degree of trust and confidence." 231

225. Id.
227. Id.
The bill also required certification for all laboratories performing drug tests. However, it did not state a particular standard, and its requirements were even weaker than those of the model state legislation. The rigorous NIDA standards were not even mentioned as an option. Instead the Secretary of Health and Human Services was urged to "take into consideration the practices, procedures, and experiences of the basic drug testing programs conducted by private, non-profit accrediting bodies." 

Senate Bill 2695 placed severe limitations on the legal remedies available to employees disciplined or terminated under the provisions of the bill. It established a statutory scheme whereby complaints were to be filed with the Secretary of Health and Human Services who would conduct an investigation of the violation. The bill permitted such suitable remedies as the Secretary would deem appropriate, but remedies were limited to contract remedies such as reinstatement, promotion, and the payment of lost wages and benefits. An employer or employee could obtain review of the Secretary's decisions in the federal appeals court in the circuit in which the violation occurred. If an employer or employee failed to comply with an order, a civil action could be filed in federal district court to enforce the order. This statutory scheme with appellate court review was the exclusive remedy for violation of the bill.Senate Bill 2695 was referred to the Judiciary Committee during the 101st Congress and died there.

2. House Bill 33

A 1988 General Accounting Office (hereinafter GAO) survey showed that "there is no uniform nationwide regulation of all laboratories that can do employee drug testing." According to the

232. Id. § 2601(b).
233. Id. § 2601(c).
234. Id.
235. Id. § 2610(b)(1).
236. Id. § 2610(b)(1).
237. Id. § 2610(2)(B)(3).
238. Id. § 2610(2)(B)(4).
239. Id. § 2610(5).
240. Id. § 2610(5)(C).
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study, employee drug testing laboratories are not controlled by statute or regulation in twenty-four states. Only eleven states have specific employee drug testing laboratory statutes, and fifteen states have statutes and regulations that control general or clinical laboratories. Seven of the eleven states with specific employee drug testing laboratory regulations require the most accurate GC/MS confirmatory tests, and eight of the eleven require that chain of custody procedures be followed. Only one of the fifteen states with general regulations requires a confirmatory test, and none of these states have chain of custody requirements to control specimens. In 1989 hearings before a House Subcommittee, Dr. Richard Hawks of NIDA testified that he "wouldn't want to see [his] urine at the far majority of those [drug testing labs] . . . knowing what we know about the need to be very stringent." On January 3, 1991, Rep. John Dingell (D-Mich.) and Rep. Thomas Bliley, Jr. (R-Va.) introduced House Bill 33, a bill that would provide uniform regulation of drug testing laboratories. The purpose of the bill was "to establish standards for the certification of laboratories engaged in urine drug testing." The bill adopts the mandatory guidelines for federal workplace drug testing programs. These standards are more precise and more rigorous than the industry's standards adopted in Senate Bill 2695. The remedies provided are also broader than those of Senate Bill 2695. House Bill 33 authorizes criminal sanctions, administrative reme-

243. Id. at 2.
244. Id. at 3.
245. Id.
246. Id.
248. H.R. 33, 102d Cong., 1st Sess. (1991). House Bill 33 was introduced on January 3, 1991, and referred to the Energy and Commerce Committee of the House of Representatives. On February 11, it was sent to the Subcomm. on Health and the Environment, and, on July 29, it went to the full committee. On Sept. 25, H.R. 33 was sent to the House and ordered to be reported. The bill was reported and placed on the calendar on November 12, 1991. Telephone Interview with Dave Allen, Staff Aide to Representative Thomas Campbell (R-Stanford) (Jan. 23, 1992).
249. H.R. 33, 102d Cong., 1st Sess., 1 (1991). This bill explicitly authorizes the Secretary of Health and Human Services to establish appropriate cutoff levels for each drug or class of drugs for both initial and confirmatory tests, id. § 552(b)(5), provides for blind performance testing, id. § 552(b)(6)(B), and allows no interim certification procedures. Id. § 552(b)(7).
250. Id. at 2. NIDA regulates federal drug testing programs. NIDA restricts the number of labs which can provide test results, and its standards are considered to be the current state-of-the-art. See supra note 188, § 7, TAB D, 13.
dies, and civil action for violation of the statute. House Bill 33 would preempt any state or local government legislation relating to "(1) the certification of laboratories which perform drug testing, or (2) requirements for the conduct of drug testing under the certification program established under this part which is different from such certification program." Because this bill addresses only the problem of lack of regulation of drug testing labs and limits preemption only to certification of laboratories and requirements for the conduct of drug testing, state legislation protecting privacy rights and confidentiality of testing remains untouched.

J. Implied Preemption and State Legislation

1. French v. Pan Am Express

Even without the express preemption of legislation such as Senate Bill 2695 or House Bill 33, courts have found that federal regulations impliedly preempt state drug testing laws. Absent express language, preemption may be implied where Congress occupies a given field with a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Even where Congress has not entirely superseded state regulation in a specific area, state law is still preempted "to the extent that it actually conflicts with federal law." Preemption may also be implied if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The question of whether federal law preempts a state statute is one of congressional intent. The Supreme Court, however, is "reluctant to infer preemption from the comprehensiveness of regulations." There is a presumption that state laws related to health or safety matters are not preempted.

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252. Id. § 555(b).
253. Id. § 555(c).
254. Id. § 557(a).
255. See, e.g., French v. Pan Am Express, 869 F.2d 1, 6 (1st Cir. 1989).
261. Id. at 715.
Despite this presumption, the court of appeals in *French v. Pan Am Express*\(^ {262} \) found that the Federal Aviation Act impliedly preempts the Rhode Island drug testing statute that prohibits random testing.\(^ {263} \) In *French*, a pilot claimed that he was ordered to submit to a drug test without probable cause in violation of a Rhode Island statute.\(^ {264} \) Despite the fact that the court characterized implied preemption as a "subtle creature . . . [with] a certain protean quality, which renders pigeonholing difficult,"\(^ {265} \) it had no difficulty in finding that Congress intended to occupy the field of pilot regulation related to air safety.\(^ {266} \) At the time the pilot filed suit, there was no federal drug testing program in effect.\(^ {267} \) However, the court found that the federal regulation prohibiting individuals using drugs from serving as crewmembers on civil aircraft impinged directly on the Rhode Island state drug testing statute.\(^ {268} \) The court appeared to echo President Bush’s concerns about the effect of inconsistent state drug testing legislation on large corporations.\(^ {269} \) The court stated:

Moreover, a patchwork of state laws . . . some in conflict with each other, would create a crazyquilt effect. It is simply unreasonable to hypothesize that Congress intended a commercial pilot on a Providence-to-Baltimore-to-Miami run to be subject to drug testing, say, in Maryland, but not in Rhode Island or in Florida.\(^ {270} \)

The court also inferred preemption from the goals of the federal statute.\(^ {271} \) Relying on legislative history, the court found that the primary objective of the Act was the establishment of a single uniform system of regulation in the area of air safety.\(^ {272} \) The court rejected the argument that there was no implied preemption because the objectives of the Federal Aviation Act and Rhode Island Gen. Laws

\(^{262}\) *French v. Pan Am Express*, 869 F.2d 1 (1st Cir. 1989); R.I. GEN. LAWS § 28-6.5-1(A) (1987).

\(^{263}\) *French*, 869 F.2d at 7.

\(^{264}\) Id. at 1.

\(^{265}\) Id. at 2.

\(^{266}\) Id. at 6. The court rejected the argument that Congress intended to limit preemption to "rates, routes, or services" of the carrier since the statute specifically prohibited states from enacting or enforcing laws related to "rates, routes, or services." Id. at 3. The court stated that the naming of specific areas is no basis for concluding that Congress intended to permit states to regulate in other areas related to airline safety, such as drug testing. *Id.*

\(^{267}\) Id. at 5.

\(^{268}\) Id. at 4.

\(^{269}\) See supra note 11.

\(^{270}\) *French*, 869 F.2d at 6.

\(^{271}\) Id. at 5.

\(^{272}\) Id.
section 28-6.5-1 were "not adverse"\(^{273}\) and that the "requirement of reasonableness at the inception of a drug test . . . is echoed by the . . . Act's own safety rules."\(^{274}\) While not disputing that the objectives were complementary, the court stated that once Congress has occupied the field, state law must yield "notwithstanding that it may fit neatly within or alongside the federal scheme."\(^{276}\)

2. **Associated Industries of Massachusetts v. Snow**

In *Associated Industries of Massachusetts v. Snow*,\(^ {276}\) however, the court held that there was no implied preemption of state workplace safety statutes where rules were not adverse and where it was not physically impossible to comply with both the federal Occupational Safety and Health Administration (hereinafter OSHA) regulations and state law.\(^ {277}\) The court emphasized that a state's police powers are not displaced by federal law absent "compelling evidence that this was the manifest purpose of Congress."\(^ {278}\) The court stated:

The burden of overcoming the presumption, in favor of state law is heavy in those cases that rely on implied preemption which rests in turn on inference. Inference and implication will only rarely lead to the conclusion that it was the "clear and manifest purpose" of the federal government to supersede the states' historic power to regulate health and safety.\(^ {279}\)

The court reasoned that a provision that increased the regulatory burden on employers was not contrary to congressional intent and that, in protecting the public, the Massachusetts statute was strengthening, rather than threatening, the protection afforded workers by Congress.\(^ {280}\) The court rejected arguments that the Massachusetts law blocked congressional objectives by upsetting the balance of safety, health, technological, and economic concerns struck by Congress.\(^ {281}\) The critical question for the court was not whether a con-

\(^{273}\) Id. at 6.
\(^{274}\) Id.
\(^{275}\) Id.
\(^{277}\) Id. at 283.
\(^{278}\) Id. at 282.
\(^{279}\) Id. (quoting Environmental Encapsulating Corp. v. New York City, 855 F.2d 48, 58 (2d Cir. 1988) (citation omitted)).
\(^{280}\) Id. at 283.
\(^{281}\) Id. at 282. The court distinguished the case from Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987) and Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir. 1988). In *Palmer*, the court found that Congress' purpose in enacting the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340, was to balance the competing
gressional balancing was altered by state law but, if altered, whether the change obstructed the purpose of Congress. Since the effect of Massachusetts health and safety regulations was to protect the public, the court found that the state statute did not obstruct congressional objectives.

III. ANALYSIS

A. Senate Bill 2695

It is important to analyze whether such bills as Senate Bill 2695, that explicitly preempt state legislation in the drug testing area, will adequately balance the needs of employees and employers. Senate Bill 2695 failed to achieve this balance in many critical areas. In the important area of regulation of laboratories, the bill would not have implemented the rigorous NIDA standards but would have relied instead on the "practices, procedures, and experiences" of private laboratories. According to one commentator, "[t]he industry seems to be encouraged to loosely regulate itself. Indeed, under this scheme, volunteer inspectors from one private laboratory would test another lab, and vice versa." The reluctance to adopt the NIDA standards may reflect the reasoning of industry groups such as the California Chamber of Commerce, the most vocal opponent of a proposed California drug testing statute, California Assembly Bill 4242. The Chamber of Commerce opposed the Assembly bill because it feared that restrict-

policies of health protection and protection of the national economy. The court held that a suit for negligent failure to warn about the harmful effects of smoking would obstruct Congress's purpose. Palmer, 825 F.2d at 626. In Hyde Park, the court held that a Massachusetts disclosure rule related to take-over bids altered a balance set by the federal Williams Act, 82 Stat. 454, amended by 15 U.S.C. § 78 (m)(d) - (e) and § 78 (n)(d) - (f), between managers and offerors. However, the fact that the state rule altered the balance was not the critical factor for the court. The question was whether the rule altered the balance in a way that subverted the purposes of the federal statute. The court held that the shift would work against the shareholders and obstruct the purpose of the Act. Hyde Park, 839 F.2d at 853. In contrast, the Massachusetts workplace standards in Associated Industries strengthened rather than threatened the protections offered by OSHA, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678), standard and shifted the balance between employer and employee in a way that did not obstruct the purpose of the statute. Hyde Park, 839 F.2d at 853.

282. Associated Indus., 898 F.2d at 283.
283. Id. at 284.
285. Zeese, supra note 7, § 1.05(1).
286. McGovern, supra note 145, at 1474. The bill was vetoed, apparently because Governor Deukmejian opposed the bill's provision that required employers to use a state-licensed laboratory. Id. at 1472 n.93. Governor Deukmejian was concerned that the bill would not permit law enforcement laboratories to conduct tests or employers to use field test kits. Id.
tions on the use of inexpensive testing kits would freeze employer options by preventing them from using the kits even if they later become acceptably reliable.287 Such reasoning is obviously flawed. The Chamber of Commerce was asking the state to forego state-of-the-art laboratory standards for inferior ones because of the possibility that currently unreliable, but less expensive, technology may someday prove reliable. It is more probable, however, that the failure to implement rigorous NIDA standards was the result of intense lobbying efforts by the large number of drug testing facilities that are not NIDA certified. One commentator even argued that the Senate bill "seems to be using the need for regulation of drug testing laboratories as a guise to prevent states from adopting legislation that provides protection from abusive drug testing practices."288

The statutory scheme that Senate Bill 2695 would have established as the exclusive remedy for violation of the Act was also inadequate. This remedial scheme resembled that of the National Labor Relations Act (hereinafter NLRA) where weak remedies do not effectively deter violations.289 The provisions failed to provide adequate redress for employees who were being asked to submit to a search and to perhaps jeopardize their future careers. These employees at least have a right to insist on the reliability and confidentiality of the drug testing process. They should also have a right to adequate recourse to the courts in a civil action for violations and to remedies not within the scope of Senate Bill 2695.

The bill would also have expanded random testing to a large category of "sensitive employee positions."290 "Sensitive" positions would have included those "affecting such matters as national security, health, or safety, environment, or other responsibilities requiring

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287. Letter from Kirk West, President of the California Chamber of Commerce, to California Assembly Member Klehs (July 21, 1986) (noted in Thomas McGovern, Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs, 39 STAN. L. REV. 1453, 1474 n.101 (1987)).

288. ZESEE, supra note 7, § 1.05(1).

289. See AMERICAN LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT (Charles J. Morris ed., 1985). Morris stated that "the Board's dismal record in failing to provide meaningful remedies in the cases where violations are found, supports the conclusion that the Board has failed in its primary mission." Id. at 350. See also Morris Kleiner, Unionism and Employer Discrimination: Analysis of 8(a)(3) Violations, 23 INDUS. REL. 234, 240 (1984). Kleiner's study, which was based on a regression analysis of National Labor Relations Board case data from 1970 to 1980, determined that "firms that committed past violations were twice as likely to commit further violations." Id. Kleiner observed that weak remedies did not deter repeat violations. Id. He noted that illegal tactics may "be a cost effective strategy because the significant benefits in the chilling effect on union organization effort," id. at 327, may outweigh "marginal costs" of penalties, id.

a high degree of trust and confidence." 291 Reference to such broad job categories as those that affect the "environment" 292 and require a "high degree of . . . confidence" 293 seem to evoke Justice Scalia's dire warning that drug testing could spread to employees of every level who come in contact with "sensitive" information. Legislation such as Senate Bill 2695 is ill-advised; it fails to adequately balance the rights of employees and the needs of employers.

B. House Bill 33

House Bill 33, on the other hand, provides much needed federal legislation in the area of regulation of drug testing laboratories. Unlike Senate Bill 2695, the requirements adopted in the House bill are "more rigid and more precise than the industry's self-regulatory standards." 294 Although this bill provides rigorous testing standards, its major defect is that it preempts state legislation. The existence of federal standards should not preclude states from exceeding these standards. Federal regulatory standards should be a floor, not a ceiling for the states. 295

C. Iowa, Vermont, Rhode Island, and Montana Drug Testing Laws

The drug testing legislation enacted in Iowa, Vermont, Rhode Island, and Montana attempts to protect employees' privacy rights and to address quality control problems. 296 The legislation in these states, however, merely requires probable cause for testing but does not establish any requirements for supervisor training and documentation. 297 Daniel Boone, a San Francisco labor lawyer for unions, stated: "One of the biggest problems we have experienced with drug testing programs [is that] employees are required to submit a urine sample based on the vague and unsubstantiated allegations of some untrained supervisor." 298 The drug testing legislation in the four

291. Id. § 2614(g).
292. Id.
293. Id.
294. ZEES, supra note 7, § 1.05(1).
295. See infra notes 330-42 and accompanying text.
296. See supra notes 168-82 and accompanying text.
297. See supra note 168.
298. Letter from Daniel Boone, partner of Van Bourg, Weinberg, Roger & Rosenfeld, to David Aroner, Executive Director, Social Services Union, Local 535 (Nov. 3, 1989) (on file with SANTA CLARA LAW REVIEW). In his letter, labor lawyer Daniel Boone provides scientific background, legal analysis, and bargaining advice for union representatives dealing with the drug testing issue. The letter also contains a draft of a model union proposal on drug and
states fails to establish safeguards which eliminate this problem. Documentation and training are important if management is to withstand employee disciplinary challenges and if employees' rights are to be protected. Boone stated:

[T]he people empowered to demand drug testing [should] be trained about the signs of drug use, and . . . be required to write down the specific reasons supposedly justifying the drug testing . . . . In practice, the biggest disputes . . . [in] drug related discipline, or drug testing cases, are questions of the conduct, behavior or symptoms of the individual employee. It is for this reason that we cannot stress too much the importance [of including] in any drug testing program . . . a requirement that information concerning the individual employee be written down at the time, or shortly after, the observations.

The drug testing legislation enacted in Iowa, Vermont, Rhode Island, and Montana also fails to establish cut-off levels for a positive test. These levels can vary widely. The lower the cut-off point, the more likely it is that there will be an inaccurate result. The higher the cut-off point, the less likely it is that a test will measure positive because of passive inhalation of marijuana. The failure to include specific cut-off points for each drug tested is a major flaw in the legislation of the four states.

C. Implied Preemption

1. French v. Pan Am Express

State drug testing statutes and constitutional provisions that afford heightened protection for workers should not be impliedly preempted by federal legislation, absent compelling evidence of congressional purpose. The reasoning in cases such as French v. Pan Am Express, which find implied preemption despite compelling evidence of congressional objectives, is flawed and its implications are disturbing. In a breathtaking leap of logic, the court in French found that a Rhode Island statute prohibiting random drug testing was preempted by a federal regulation prohibiting individuals who use alcohol testing. Id.

299. Id.
300. ZEES, supra note 7, § 2.01(4).
301. Id.
302. Id. Each test has a cut-off point. When the concentration of a substance tested is below the cut-off point it will register negative. If the substance tests equal to or above the cut-off point it will register positive. Id.
drugs from serving as crew members on civil aircraft. Instead of demonstrating how the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," actually conflicts with federal law, or occupies the drug testing field, the court relied on policy arguments that echo the Bush administration's fears of inconsistent state drug laws. Although the court did acknowledge that the objectives of the state and federal law were not in conflict and were, in fact, complementary, it did not arrive at the logical conclusion that there was no implied preemption. Having made the leap from the federal statute to the congressional objective of eliminating inconsistent state drug testing laws, the court had no difficulty concluding that there was implied preemption even though there was no inconsistency between the state "just cause" provision for drug testing and the federal statute. This case represents some of the worst aspects of result-oriented decisions where logic is sacrificed on the altar of expediency.

2. Associated Industries v. Snow

A much more reasoned approach to implied preemption is reflected in Associated Industries of Massachusetts v. Snow. In Associated Industries, the court refused to find implied preemption of a state's police powers absent "compelling evidence that this was the manifest purpose of Congress." Unlike the court in French, the court in Associated Industries focused on the "states' historic power to regulate health and safety" and applied a presumption in favor of state law in these areas. The court in Associated Industries also recognized that implied preemption rests on inference and that the clear and manifest purpose of Congress can rarely be deduced from inference. The court in French was willing to find implied pre-

304. Id. at 7.
308. French, 869 F.2d at 6.
309. Id.
310. Id. at 7.
312. Id. at 282.
313. Id. (quoting Environmental Encapsulating Corp. v. New York City, 855 F.2d 48, 58 (2d Cir. 1988) (citation omitted)).
314. Id.
315. Id.
emption on much more tenuous evidence of congressional intent than
the clear and manifest purpose required by the Associated Industries
court. The French court found implied preemption despite an ab-
sence of conflicting state and federal laws; the Associated Indus-
tries court found no preemption because there was no conflict be-
tween state and federal laws.

The reasoning in Associated Industries is much more persua-
sive than that in French. In the drug testing area where employee
privacy concerns are implicated, where drug testing labs are largely
unregulated, and where an employee's career can be permanently
destroyed by error, implied preemption of protective state statutes
should not be found, absent compelling evidence of a clear and mani-
fest congressional purpose.

D. Express Preemption

1. The Problem of Inconsistent Legislation

The court in French relied on the specter of inconsistent state
legislation to find implied preemption of a state's drug testing law.
The problem of inconsistent state legislation looms large to pro-
ponents of express preemption and critics of state drug testing laws that
contain heightened protection for employees. President Bush, a critic
of these statutes, argues for consistent legislation because of the diffi-
culty for large corporations that cross state lines. In its Proposed
Model Substance Abuse Testing Act, the Institute of Bill of Rights
Law of The College of William and Mary echoes the President's
concerns: "The uneven patchwork of state and federal legislation
creates a maze of conflicting regulations, placing a considerable bur-
den on corporations doing business in interstate commerce." Bur-
dens on businesses, however, have not deterred corporations from
conducting interstate commerce. Lack of uniformity has not caused a
problem for business in the area of tort, contract, insurance, or even
regulations that govern incorporation. State OSHA coexists with fed-
eral OSHA and often provides greater protection for employees in
the area of workplace safety. State fair employment practices stat-

316. French, 869 F.2d at 6.
317. Associated Indus., 898 F.2d at 283.
318. See supra note 11.
the Task Force on the Drug-Free Workplace, Institute of Bill of Rights, 33 WM. & MARY L.
320. See, e.g., Associated Indus., 898 F.2d at 274.
UTES can provide wider protection from discrimination and stiffer penalties than Title VII. California has a state law that requires an employer to make a good faith effort to put a pregnant employee back in the same job or in a comparable job when she returns to work. This law affords more protection for a pregnant employee than is required under Title VII, places a burden on the employer, and impinges on management rights. Yet laws such as this do not prevent corporations from doing business in the state.

Moreover, the Employee Retirement Income Security Act (hereinafter ERISA) experience teaches that preemption might cause the very problem it was designed to eliminate. Differing interpretations of the federal statute have created conflicts in the circuits that have gone unresolved since the legislation was enacted in 1974. The Supreme Court has yet to step in to resolve the conflicts. At least one circuit permitted a return to state common law rules of construction, "either as a matter of congressional intent, or as a matter of sound judicial policy," in order to avoid confusion.

322. Id. at 275. California's Fair Employment and Housing Act (hereinafter FEHA), CAL. GOV'T. CODE ANN. § 12900 - 12906 (West 1980 and Supp. 1986), is a comprehensive statute that prohibits discrimination in employment and housing. In September 1978, California amended the FEHA to proscribe certain forms of employment discrimination on the basis of pregnancy by adding subsection (b)(2) to § 12945. Guerra, 479 U.S. 275. This section requires California employers to reinstate an employee returning from such pregnancy leave to the job she previously held, unless it is no longer available due to business necessity. In the latter case, the employer must make a reasonable good-faith effort to put the employee in a substantially similar job. Id. at 276. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17., prohibits various forms of employment discrimination, including employment discrimination based on sex. In 1978 Congress passed the Pregnancy Discrimination Act (hereinafter PDA), 42 U.S.C. § 2000e(k). The PDA added subsection (k) to § 701, the definitional section of Title VII. Discrimination on the basis of pregnancy was added to the definition of sex discrimination. Guerra, 479 U.S. at 277. There is no provision in Title VII concerning reinstatement of employees after pregnancy leave. Id. In Guerra, the Court found that Title VII did not preempt the California statute because it is not inconsistent with the purposes of the federal statute and it does not require the employer to do any act which is unlawful under Title VII. Id. at 292.
323. Id.
326. Kunin, 898 F.2d at 1427. Although ERISA provides in sweeping terms for the preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Id. at 1426 (citing 29 U.S.C. § 1144(a)), the Ninth Circuit Court of Appeals in Kunin was convinced that "Congress meant to leave state laws regulating insur-
achieve statewide uniformity for insurance contracts, and not frustrate the settled expectations of the parties.\textsuperscript{327} The Institute of Bill of Rights Law advocates federal legislation because of the current "volatile legal picture in which it is impossible to predict with confidence what types of drug-testing programs courts will or will not approve."\textsuperscript{328} Federal drug testing legislation might create such chaos that we long for a return to the "volatile legal picture"\textsuperscript{329} of today where at least state laws afford protection and reliability.

2. \textit{States Serve as Social Laboratories}

Even if federal legislation is enacted that is clear and unambiguous, preemption is not the appropriate way to deal with the drug problem. Drugs are a relatively new social problem and state legislation is fairly recent. Justice Brandeis wrote:

\begin{quote}
To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risks to the rest of the country.\textsuperscript{330}
\end{quote}

One commentator argues that "when something new like drug testing comes into American society, our states should be used as laboratories for how social policy and law should respond. To have the federal government step in at this stage would be imprudent as it would prevent the development of drug testing policies."\textsuperscript{331} In an area such as drug testing that involves a careful balancing of individual rights and governmental interests, the state is the proper place to attain the right balance.

\textsuperscript{327} Id.
\textsuperscript{328} Id.
\textsuperscript{329} Smolla, \textit{supra} note 319.
\textsuperscript{330} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
\textsuperscript{331} ZEESE, \textit{supra} note 7, § 1.05(1).
3. States Encourage Participatory Decision Making

In his discussion of federalism and environmental policy, Professor Richard Stewart identifies four positive features of decision making at the state level:

The greater accuracy with which a local decision maker can operate as utilitarian calculator of costs and benefits; the greater protection of liberty which the state's decentralized decision making affords by making it harder for any one group to seize total national power; the greater degree of community fostered by the opportunity for political participation that decentralization makes possible; and the greater diversity which decentralization fosters.888

Another commentator insists that "the existence of participatory politics on the state level [is] by no means a fiction."333 He argues that the "most traditional American mechanism of participatory democracy - the town meeting - is very much alive . . . [as is the referendum,] the most powerful tool of direct government . . . ."334

Even employer oriented groups see the advantages of decentralized decision making at the state level in the area of drug testing. If forced to choose between state and federal drug testing legislation, Detroit corporate attorney Henry Saad stated: "I'd rather it be the state - which is closer to the people, and where employers through their political arms like the Chamber [of Commerce] can have more of an impact on what the state legislature is doing."336 Drug testing is also an area where a utilitarian calculation of costs and benefits must be made. A major concern with urine tests is their cost.336 State lawmakers can more effectively determine whether the results justify the high cost of drug testing.

4. State Constitutions and Statutes Safeguard Rights

In an article in the Harvard Law Review,337 Justice William Brennan emphasized the importance of state constitutional protection


334. Id.

335. McClenahen, supra note 228, at 53.

336. See supra note 38.

of individual rights. He contended that without the independent protective force of state constitutions the full realization of our liberties cannot be guaranteed. He argued that states have a responsibility to separately define and protect the rights of their citizens. Justice Brennan emphasized that states are more and more "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions." He attributed this development to the erosion of rights in recent Supreme Court decisions and urged state courts to interpret their common law, statutes, and constitutions to guarantee and protect individual rights.

In the drug testing area, states have reacted to a perceived inadequacy of federal safeguards by enacting statutes and constitutional provisions that protect employees' rights. Justice Brennan stated that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." When state drug testing statutes and constitutional safeguards are preempted, the state half of that protection is hobbled.

Because of the hysteria that surrounds the drug testing issue, it is critical that programs be implemented in an environment where diverse opinions are weighed and balanced rationally. It is easy to forget the high price we may be paying in the erosion of rights when the dialogue is couched in military metaphors and when no price is too high to pay for victory. At the local level, the opportunity for participation is greater and voices can be heard that may be able to focus the dialogue on the most effective means to deal with the social problem that confronts us. Moreover, since this is something we must all tackle together, the greater degree of community fostered by local participation may lead to a co-operative effort to eradicate the drug problem. Prohibition teaches that it is impossible to eradicate a social problem from the top down when the people do not have the will to change.

If states determine that drug testing is desirable and opt for a reasonable cause prerequisite to testing, legislation must contain provisions that require supervisor training and adequate documentation. In order to achieve adequate quality control in the collection and testing of urine, rigorous laboratory standards must be maintained,
cut-off levels must be made explicit, and collection and transportation procedures must maintain the integrity of the specimen. We cannot afford to permit employees to be victims of inaccurate testing and haphazard procedures.

IV. PROPOSAL

Bills such as Senate Bill 2695 which expressly preempt state legislation in the drug testing area are ill-advised. Moreover, state drug testing statutes and constitutional privacy provisions that afford heightened protection to workers should not be impliedly preempted absent compelling evidence of congressional purpose. Instead, the state should, in the words of Justice Brandeis, "serve as a laboratory" for the development of public policy and law to solve social and economic problems.

Legislators at the state level can deal more effectively with the drug testing problem and determine the best way to balance the needs of employees and employers without eroding fundamental liberties. In the past, states have balanced competing interests by developing such innovations as "sunset legislation, zero based budgeting, equal housing, no fault insurance and the senior executive service" and by "pioneering actions in gun control, pregnancy benefits for working women, limited access highways, education for handicapped children, auto pollution standards and energy assistance for the poor."

Narrowly tailored federal legislation regulating drug testing laboratories is needed. According to one commentator, there are "probably more government regulations to open a hot dog stand than to open a drug testing laboratory."

But, any legislation in this area should not preclude more rigorous state standards.

The legislation enacted in Iowa, Vermont, Montana, and Rhode Island attempts to safeguard employee rights and the integrity of the testing process. All four states contain general provisions that permit testing only for reasonable cause. However, such pro-

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345. Id.
346. See supra notes 168-82 and accompanying text.
347. See supra note 168.
348. Daniel Boone, supra note 298. The language on supervisor training is based on § 11 of the model Union Proposal Regarding Drug and Alcohol Abuse and Drug Testing
visions may mean that employees are subjected to drug testing based on vague allegations by untrained supervisors. Legislation must establish safeguards so that all parties know the basis for any testing. Drug testing legislation should contain the following provision on supervisor training:

The employer shall develop a program of training to assist all supervisors in identifying factors which constitute reasonable cause for drug testing. The employer shall provide supervisors with a detailed explanation of the drug policy with emphasis on the terms and conditions of the policy. Supervisors shall also receive instruction in completing an incident report form.\textsuperscript{340}

The following definition of reasonable cause should also be contained in drug testing legislation:

Reasonable Cause—Reasonable cause shall exist only when two supervisors, who are trained in detection of drug use, articulate and can substantiate in writing specific behavioral, performance, or contemporaneous physical indicators of being under the influence of drugs or alcohol on the job. The objective indicator shall be recognized and accepted symptoms of intoxication or impairment caused by drugs or alcohol, and shall be indicators not reasonably explained as resulting from causes other than the use of such controlled substances (such as, but not by way of limitation, fatigue, lack of sleep, side effects of prescription or over-the-counter medications, reaction to noxious fumes or smoke). Cause is not reasonable, and thus not a basis for testing, if it is based solely on the observations and reports of third parties. The grounds for reasonable cause must be documented by the use of an Incident Report Form. The incident report form shall contain the date, time, location of the incident, the supervisor's observations, the employee's explanation, and the names of witnesses. The following may constitute reasonable cause to believe that an employee is under the influence of drugs or alcohol:

1. Incoherent, slurred speech;
2. Odor of alcohol on the breath;
3. Staggering gait, disorientation, or loss of balance;
4. Red and watery eyes, if not explained by environmental causes;
5. Paranoid or bizarre behavior;

\textsuperscript{340} Id. Union Proposal Regarding Drug and Alcohol Abuse and Drug Testing, § 5(C).
6. Unexplained drowsiness.\textsuperscript{350}

Legislation must also be designed to assure that all appropriate safeguards are followed once the urine sample is given. The following procedures should be contained in drug testing legislation to ensure the reliability and integrity of the collection and testing of samples:

A. The testing shall be done by a laboratory licensed and certified by the state department of health as a medical and forensic laboratory which complies with the Scientific and Technical Guidelines for Federal Drug Testing Programs and the standards for certification of laboratories engaged in urine drug testing for Federal Agencies issued by the Alcohol, Drug Abuse, and Mental Health Administration of the United States Department of Health and Human Services.

B. At the time the urine specimens are collected, three separate samples shall be placed in separate containers. All samples must be immediately sealed in the presence of the employer, an employee, and a witness, and the tape signed by the employer, the employee, and the witness. Two samples, each in a separate container, shall be sent to the laboratory to be tested at the employer's expense. In order to be considered positive, both samples shall be tested separately in separate batches and show positive results on the GC/MS confirmatory test. The third sample shall be collected in a separate container and made available to the employee for testing by a licensed laboratory at the employee's expense.

C. Urine shall be obtained directly in a tamper-resistant urine bottle.

D. If the sample must be collected at a site other than the drug testing laboratory, the specimen shall then be placed in a transportation container. The container shall be sealed in the employee's presence and the employee asked to initial or sign the container. The container shall be sent to the designated testing laboratory on that day or the earliest business day by the fastest available method.

E. A chain of possession form shall be completed by the hospital, laboratory and/or clinic personnel during the specimen collection and attached to and mailed with the specimen.\textsuperscript{351}

Cut-off levels for positive tests must be provided for all drugs tested.

\textsuperscript{350} Id. Union Proposal Regarding Drug and Alcohol Abuse and Drug Testing, § 8(A),(B).

\textsuperscript{351} Id. Union Proposal Regarding Drug and Alcohol Abuse and Drug Testing, § 8(C). The measurements are in nanograms per milliliter.
The following standards should be contained in drug testing legislation:

<table>
<thead>
<tr>
<th>SUBSTANCE</th>
<th>SCREENING TEST</th>
<th>CONFIRMATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMPHETAMINE</td>
<td>500 ng/ml amphetamine</td>
<td>500 ng/ml GC/MS</td>
</tr>
<tr>
<td>GROUP</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COCAINE</td>
<td>300 ng/ml metabolite</td>
<td>300 ng/ml GC/MS</td>
</tr>
<tr>
<td>OPIATES</td>
<td>300 ng/ml morphine</td>
<td>300 ng/ml GC/MS</td>
</tr>
<tr>
<td>PHENCYCLIDINE (PCP)</td>
<td>75 ng/ml</td>
<td>75 ng/ml GC/MS</td>
</tr>
<tr>
<td>MARIJUANA</td>
<td>100 ng/ml</td>
<td>100 ng/ml GC/MS (delta 9-THC)</td>
</tr>
<tr>
<td>BARBITURATES</td>
<td>300 ng/ml</td>
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</table>

Drug testing legislation can never safeguard employees' rights or ensure reliability without provisions that maintain the integrity of the collection and testing procedures and require screening and confirmatory tests with cut-off levels that decrease the likelihood of inaccurate results.

V. CONCLUSION

There is certainly a need for comprehensive regulation of drug testing laboratories such as House Bill 33 which proposes state-of-the-art standards. But like Title VII and OSHA legislation, federal laboratory regulation should not preclude state legislatures from exceeding those standards. However, federal legislation such as the Hatch Bill will merely exacerbate the problems we are facing in the drug area because the bill adopts inadequate laboratory regulation, defines sensitive positions broadly, introduces a toothless statutory scheme to redress violations, and then preempts state safeguards. The lack of uniform legislation is a small sacrifice to make in an area where we are still trying to create the right balance between individual privacy rights and governmental interests. The states can provide a valuable laboratory for determining the most effective way to eliminate this serious social problem without undermining important social values and individual rights. But state legislation can only be effective if adequate safeguards and rigorous standards are maintained. The hysteria surrounding drug testing should not obscure the fact that we may be paying too high a price to win the war on drugs.

Ruth Silver Taube