Journal of Criminal Law and Criminology

Volume 86
Issue 4 *Summer*

Article 4

Summer 1996

Random, Suspicionless Drug Testing of High School Athletes

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0091-4169/96/8604-1265
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 86, No. 4
Printed in U.S.A.

RANDOM, SUSPICIONLESS DRUG TESTING OF HIGH SCHOOL ATHLETES

Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995)

I. INTRODUCTION

In *Vernonia Sch. Dist. 47J v. Acton*,[1] the United States Supreme Court addressed whether a school district could impose random and suspicionless urinalysis drug testing on high school student athletes. The Court held that such testing did not violate students' Fourth Amendment rights and was therefore constitutional.[2] In so deciding, the Court vastly expanded the permissible realm of drug testing contexts beyond the limits defined in two earlier decisions, *Skinner v. National Railway Labor Executives Ass'n*[3] and *National Treasury Employees Union v. Von Raab*.[4] In those cases, the Court previously stated that the government could only transcend the Fourth Amendment requirement of individualized suspicion where it had a compelling interest at stake, namely a threat to public safety or national security.[5] The *Vernonia* Court argued that, because high school athletes have decreased expectations of privacy by virtue of their participation in extracurricular athletics, the suspicionless drug testing was constitutionally justified.[6]

This Note argues that the Supreme Court overstepped the boundaries of the Fourth Amendment in two ways: first, by finding the interest of the Vernonia District in promulgating the drug testing to be "compelling" given the paucity of the evidence of athletes using drugs; and second, by holding that student athletes have diminished privacy expectations solely due to the structure and requirements of the athletic program. This Note concludes that the Supreme Court reached its decision primarily for policy reasons, specifically the eradication of drug use among America's children. Although this reason is

1 115 S. Ct. 2386, 2396 (1995).
2 *Id.* at 2396.
3 489 U.S. 602 (1989).
4 489 U.S. 656 (1989).
5 *Id.* at 670; *Skinner*, 489 U.S. at 638.
6 115 S. Ct. at 2392-93.

a noble one, it does not justify the consequence of eroding constitutional privacy rights of children.

II. BACKGROUND

A. CONSTITUTIONAL ORIGINS OF THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[7]

The Fourth Amendment was drafted in reaction to the "general warrants" used in England, which allowed British officers to capriciously search colonial homes and workplaces for criminal evidence, seditious literature, or illegally imported goods.[8]

Countless Supreme Court cases recognize that the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. These cases harmonize with the well-established idea that the Fourth Amendment gives concrete expression to a right of the people which is "basic to a free society."[9]

As indicated by the wording of the Fourth Amendment, "reasonableness" is the ultimate measure of the constitutionality of a government search.[10] Courts generally determine the "reasonableness" of a search by a balancing test, though the conditions and prerequisites for such a test depend on whether the search is conducted in a criminal or administrative context.

B. INTERPRETATION OF THE FOURTH AMENDMENT IN THE CRIMINAL CONTEXT

When law enforcement officials conduct a search to uncover evidence of criminal wrongdoing, the "reasonableness" requirement of the Fourth Amendment generally requires them to obtain a judicial warrant.[11] Where a warrant is required, the Warrant Clause of the

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7 U.S. CONST. amend. IV.

8 *See generally* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978); Frank v. Maryland, 359 U.S. 360, 363-65 (1959). The *Frank* Court stated, "The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary action by officers of the new union. . . ." *Frank*, 359 U.S. at 363.

9 Wolf v. Colorado, 338 U.S. 25, 27 (1949).

10 Vernonia Sch. Dist., 47J v. Acton, 115 S. Ct. 2386, 2390 (1995).

11 *Id.*

Fourth Amendment[12] mandates that courts may not issue them without probable cause.[13] Whether a warrant is *always* required, however, has been a matter of judicial interpretation. Therefore, the Fourth Amendment case law in the criminal context has delineated several exceptions to the warrant requirement,[14] indicating that the reasonableness of a search does not require a warrant in all instances.[15]

Initially, the Supreme Court required probable cause as a prerequisite for a full-scale search in the criminal context, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement. In the context of warrantless searches, one of the first Supreme Court cases to explicitly articulate this probable cause standard was *Carroll v. United States.*[16] The *Carroll* Court held that a warrantless search of a car was unreasonable unless supported by some level of individualized suspicion, namely probable cause, thus implying that such a search conducted under individualized suspicion would be a valid exception to the warrant requirement.[17] The Court did not base its conclusion on the express probable cause requirement contained in the Warrant Clause of the Fourth Amendment,[18] but rather on the Framers' interpretation of unreasonable searches, the interests of the public, and the interests of individuals.[19] The *Carroll* Court declared further that blanket, warrantless searches are "intolerable and unreasonable."[20]

Later case law relaxed *Carroll's* strict probable cause requirement in the area of warrantless criminal searches indicating that, where a warrant is not required, probable cause is not necessary either.[21] The Supreme Court has stated that a criminal search not based on probable cause will pass Fourth Amendment muster, "when special needs,

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12 The Warrant Clause reads, ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

13 *Id.*

14 Most of the recognized exceptions to the Fourth Amendment warrant requirement arise when an exigent circumstance makes a warrantless search imperative to the safety of the police and the community, McDonald v. United States, 335 U.S. 451 (1948); other possible exceptions include voluntary consent by the individual to be searched, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); the "plain view doctrine" by which an officer can conduct a search if evidence of illegal activity is in "plain view," Coolidge v. New Hampshire, 403 U.S. 449 (1971); and a search conducted incident to an arrest, Chimel v. California, 395 U.S. 752 (1969).

15 *Id.*

16 267 U.S. 132 (1925).

17 *Id.* at 149.

18 For the text of the Warrant Clause, see *supra* note 12.

19 *Carroll,* 267 U.S. at 149.

20 *Id.* at 153-54. *See also* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995).

21 *Vernonia,* 115 S. Ct. at 2398.

beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[22] When deciding whether such "special needs" exist, the Court balances the search's intrusion upon individual interests against its promotion of legitimate governmental interests.[23]

For example, in *Terry v. Ohio*,[24] the Court relaxed the probable cause requirement for a "minimally intrusive search" to something short of probable cause.[25] Specifically, the Court held that if a police officer observes unusual behavior which suggests criminal activity, then he may conduct a careful and limited search of the suspected individual's outer clothing without a warrant.[26] One year later, consistent with its decision in *Terry*, the Court enunciated an exception to the warrant requirement for a criminal search conducted incident to arrest.[27]

C. INTERPRETATION OF THE FOURTH AMENDMENT IN THE ADMINISTRATIVE CONTEXT

While both administrative and criminal searches are constitutional if conducted pursuant to a warrant or probable cause as directed by the Fourth Amendment, criminal searches differ from administrative searches in two important respects. First, criminal searches are conducted for the purpose of uncovering evidence related to criminal activity.[28] Administrative searches, on the other hand, are not conducted with the specific purpose of uncovering criminal evidence, but rather are administered according to a policy established by a politically accountable body that "sufficiently limit[s] official discretion."[29]

Second, criminal searches are only constitutionally justified if conducted pursuant to a warrant or under an exception to the warrant requirement, including probable cause.[30] Thus, the probable cause standard[31] "is peculiarly related to criminal investigations"[32] and is largely unhelpful in assessing the reasonableness of administrative

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22 Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

23 *Id. See also, e.g.*, United States v. Ramsey, 431 U.S. 606, 616-619 (1977); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Cady v. Dombrowski, 413 U.S. 433, 439 (1973).

24 392 U.S. 1 (1968).

25 *Id.* at 30.

26 *Id.*

27 Chimel v. California, 395 U.S. 752 (1969).

28 Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1520 (9th Cir. 1994).

29 *Id.* at 1520-21.

30 *Acton*, 23 F.3d at 1520.

31 *See* discussion *supra* at section I.B.

32 Colorado v. Bertine, 479 U.S. 367, 371 (1987).

searches.[33] This is particularly true where the government conducts a search to prevent the development of hazardous conditions or to detect blanket violations, the existence of which do not generate articulable grounds or probable cause for searching any particular persons.[34] Rather, in the administrative context, courts employ a balancing test which weighs the government interest in conducting the search against the individual privacy interests affected by the search.[35] Hence, courts judge administrative searches by different standards and balancing tests than criminal searches.

The Supreme Court first recognized that a government official possessed the authority to conduct an administrative search in *Camara v. Municipal Court.*[36] In *Camara,* an apartment occupant denied access to a housing inspector investigating housing code violations without a warrant.[37] The Supreme Court applied a balancing test, weighing the public needs furthered by the proposed search, namely the elimination of hazardous housing code violations, against the invasion of the occupant's privacy.[38] The Court then concluded that the inspector's intended search was reasonable, and thus constitutional.[39] The Court based its conclusion on the finding that inspectors could not detect building code violations, such as faulty wiring, from the outside; consequently inspections were necessary to ensure public safety.[40] In rendering its decision, however, the Court emphasized that administrative searches significantly intrude upon individual privacy interests; therefore, where no emergency exists, the Court mandated that the entity conducting the search either procure a warrant or conduct the search pursuant to one of the other recognized exceptions to the warrant requirement.[41]

Twelve years later, in *Delaware v. Prouse,*[42] the Supreme Court clar-

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[33] *Id.*; O'Connor v. Ortega, 480 U.S. 709, 723 (1987). Moreover, this standard has been somewhat relaxed in the criminal context, see discussion *supra* at section II.B.

[34] National Treasury Employees Union vs. Von Raab, 489 U.S. 656, 668 (1989); Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967).

[35] Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 628 (1989). For more on this balancing test, see *supra* section II.D and II.E.

[36] 387 U.S. 523, 535 (1967).

[37] *Id.* at 526. The apartment manager had informed the inspector that the apartment occupant, Camara, was using the ground floor of the building for his personal residence in violation of his occupancy permit. The inspector demanded access to inspect, and Camara refused him access without a search warrant. *Id.*

[38] *Id.* at 537.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 534, 540. The Court stated that the warrant requirement guarantees that the government has a reasonable need to search an individual's home. *Id.* For exceptions to the warrant requirement, see *supra* note 14.

[42] 440 U.S. 648 (1979). *Prouse* involved a police officer who randomly stopped a vehicle

ified the *Camara* balancing test. The Court enunciated four factors for courts to balance when determining the reasonableness of an administrative search: (1) the importance of the governmental interest; (2) the physical or psychological intrusion upon the individual's privacy interests; (3) the amount of discretion exercised by the official conducting the search; and (4) the effectiveness and necessity of the intrusion in reaching law enforcement goals.[43]

As discussed below, courts have consistently applied the four factors in *Prouse* as part of a general balancing test, either in total or in part, when they have assessed the reasonableness of administrative searches in public schools and in the workplace.

D. ADMINISTRATIVE SEARCHES IN PUBLIC SCHOOLS

The Supreme Court has utilized a balancing test approach, similar to that used in *Prouse*, for administrative searches in a public school context. The Court first adopted such a test in *New Jersey v. T.L.O.*[44] In *T.L.O.*, a principal searched a student's purse upon a teacher's report that the student had been smoking cigarettes in the high school bathroom.[45] The search uncovered a small amount of marijuana and drug paraphernalia.[46] In assessing the applicability of the Fourth Amendment warrant requirement, the Court agreed with the school district that a warrant requirement would frustrate the school's "swift and informal disciplinary procedures."[47] The Court reasoned that, in assessing the constitutionality of such a search, courts must balance the student's privacy interests against school officials' interests in maintaining discipline on school grounds.[48] Applying this balancing test, the Court held that, because schoolchildren have legitimate privacy expectations, school officials could not search students without some individualized suspicion of wrongdoing.[49] The Court reached

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even though he lacked reasonable suspicion that anyone in the vehicle had broken a law or committed a traffic violation. Because the officer did not stop the car based on a suspicion of criminal activity, the search clearly was not a criminal search, but rather an administrative search conducted by the police department to check drivers' licenses and automobile registrations. The Court held that stopping the vehicle and detaining the driver was unreasonable because the officer did not have an articulable and reasonable suspicion. The significance of this holding is that, by stating that an administrative search could also be reasonable when based upon an individualized suspicion of wrongdoing, the Court expanded the exceptions to the warrant requirement for administrative searches.

43 *Id.* at 655-60.

44 469 U.S. 325 (1989).

45 *Id.* at 328.

46 *Id.*

47 *Id.* at 340.

48 *Id.* at 339.

49 *Id.*

its holding through a twofold inquiry. First, it asked whether the search was justified at its inception. In other words, the Court investigated whether school officials had reasonable grounds for suspecting that the search would reveal evidence of rule violations. Second, the Court asked whether the search was reasonably related in scope to the circumstances justifying the school's interference in the first place, meaning that the school's measures were not excessively intrusive.[50] The Court concluded that a reasonableness test consisting of the aforementioned inquiry, coupled with the requirement of individualized suspicion, would neither overburden school officials in their efforts to preserve school discipline nor authorize "unrestrained intrusions" into students' realms of privacy.[51]

E. FOURTH AMENDMENT APPLIED TO DRUG TESTING "SEARCHES" IN THE WORKPLACE

The Supreme Court first addressed the constitutionality of workplace drug testing in *Skinner v. Railway Labor Executives' Ass'n*,[52] holding that employers may not bypass the warrant or probable cause requirements of the Fourth Amendment without showing "special needs."[53] In other words, the Court stated that a suspicionless search can only be reasonable where the individual privacy interests affected are minimal and where the intrusion upon those privacy interests furthers a compelling government interest that would be jeopardized by an individualized suspicion requirement.[54] Applying these rules, the *Skinner* Court determined that the government had a "compelling" public safety interest in drug testing railroad employees where evidence linked twenty-one major train accidents to employee drug use.[55] Furthermore, the Court found that railroad employees held significantly lower privacy expectations due to their participation in a highly regulated industry with the potential to seriously impact public safety.[56] The Court therefore held the drug testing constitutional.[57]

Following *Skinner*, the Supreme Court decided *National Treasury Employees Union v. Von Raab*,[58] which involved random urinalysis drug testing of United States Customs employees who carried firearms and investigated drug interdiction. In holding the testing to be constitu-

50 *Id.* at 341.
51 *Id.* at 342-43.
52 489 U.S. 602 (1989).
53 *Id.* at 624.
54 *Id.* at 628.
55 *Id.* at 607.
56 *Id.* at 633.
57 *Id.*
58 489 U.S. 656 (1989).

tional, the Court found that the government had a "compelling" need in drug testing the employees in order to ensure their effectiveness in stopping drug smugglers, as well as to protect national security interests.[59]

F. RANDOM, SUSPICIONLESS DRUG TESTING IN SCHOOLS

After *Skinner* and *Von Raab,* only compelling public safety or national security concerns justified random, suspicionless drug testing in the workplace. Until *Vernonia Sch. Dist. 47J v. Acton,* the Supreme Court had never before addressed the constitutionality of drug testing in the public school setting, and few lower courts had addressed the issue. The few courts that had addressed this issue relied upon the *Skinner, Von Raab,* and *T.L.O.* precedents to hold that combating drug use is not a sufficiently "compelling" interest to make random, suspicionless school drug testing reasonable.[60]

For example, the United States District Court for the Southern District of Texas in *Brooks v. East Chambers Consol. Ind. Sch. Dist.*[61] held a school drug testing program[62] unconstitutional because the school failed to demonstrate a "compelling" need.[63] The court relied upon *Skinner* and *Von Raab* in arguing that students in extracurricular activities do not pose the same risks to public safety or national security as do railroad or customs employees.[64] The court also discussed *T.L.O.* in reasoning that, ordinarily, a school official must have individualized suspicion that a student has engaged in wrongdoing before searching that student.[65] Accordingly, the court balanced the students' privacy interests against the legitimate, but not compelling, interests of the government to combat drug use and found the suspicionless urinalysis testing unreasonable.[66]

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59 *Id.* at 670-71.

60 *See* Moule v. Paradise Valley Unified Sch. Dist. No. 69, 863 F. Supp. 1098 (D. Ariz. 1994) (holding unconstitutional random, suspicionless urinalysis testing of high school athletes); University of Colorado v. Derdeyn, 863 P.2d 929 (Col. 1993), *cert. denied,* 114 S. Ct. 1646 (1994) (holding that random urinalysis testing of college athletes violated the Fourth Amendment).

61 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd.*, 930 F.2d 915 (5th Cir. 1991).

62 The testing program in *Brooks* was similar to that at issue in *Vernonia,* requiring students in extracurricular activities to submit to urinalysis drug testing.

63 *Id.* at 764. The school superintendent knew of only two occasions where substance abuse disrupted an extracurricular activity, and both occasions involved alcohol. *Id.* Moreover, the school had employed a drug-sniffing dog which failed to uncover any drugs at the school. *Id.* at 761.

64 *Id.* at 766.

65 *Id.* at 764.

66 *Id.* at 764-65. The court further asserted that the drug testing policy at issue would essentially provide school officials with an "across the board, eagle eye examination of personal information of almost every child in the school district." *Id.* at 765. This "global goal"

III. FACTS AND PROCEDURAL HISTORY

A. BACKGROUND

The town of Vernonia, Oregon is a small, isolated logging community of approximately 3,000 residents.[67] Petitioner Vernonia School District 47J ("District") consists of one high school and three grade schools with a total enrollment of approximately 690 students.[68] Because of the town's small size and isolated location, school athletics play a prominent role, and the community greatly admires student athletes.[69]

Between sixty and sixty-five percent of high school students and approximately seventy-five percent of elementary students participate in one of the District's seven extracurricular sports activities.[70] To participate in District athletics, students must have a physical examination, medical insurance, and written parental consent.[71] In addition, all students must maintain grade requirements and comply with the athletic program's rules of conduct.[72]

B. THE PERCEIVED DRUG PROBLEM

Prior to the mid-1980s, the District experienced few drug-related problems.[73] In the mid-to-late 1980s, however, the District's teachers and administrators perceived what they believed to be an increase in drug use.[74] Reports accumulated of students using drugs, teachers confiscating drug paraphernalia on school grounds, and student admissions of illegal drug use.[75] This increase in drug use accompanied

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of deterring drug use generally did not justify the random drug testing. *Id.* at 766.

67 Brief for Respondent at 1, Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

68 Brief for Petitioner at 3, Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

69 Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2388 (1995).

70 Petitioner's Brief at 3, *Vernonia Sch. Dist. 47J* (No. 94-590). Sports offered in the Vernonia District include football, basketball, cross-country, track, volleyball, wrestling, and golf.

71 *Id.* at 4.

72 *Id.*

73 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2388.

74 *Id.* Evidence of drug use consisted primarily of second-hand reports by school officials of students romanticizing drugs in writing assignments and hallway conversations. Only one teacher testified at trial that she had actually observed drug use, stating that she had witnessed a student smoking what appeared to be a marijuana joint. Respondent's Brief at 3, *Vernonia Sch. Dist. 47J* (No. 94-590).

75 Petitioner's Brief at 5, *Vernonia Sch. Dist. 47J* (No. 94-590). The District Court found evidence of a "drug culture" consisting of student organizations with names like the "Big Elks" or the "Drug Cartel." Loud "bugling" and "head butting" were the trademark activities of such groups. There was no evidence, however, that any "Elk" or "Cartelian" had actually used drugs or that drugs were the reason why these groups behaved as they did.

a corresponding increase in disciplinary problems.[76] Between 1988 and 1989, the number of disciplinary referrals within the District more than doubled as students became increasingly rude and disruptive in class.[77]

The District perceived that student athletes were significantly involved in the drug problem.[78] School administrators caught student athletes using alcohol and drugs, several athletes admitted to drug use, and administrators noted a glorification of drug use within the athletic program.[79] In the mid-to-late 1980s, the athletic coaches attributed an increase in the number of athletic injuries to drug use.[80] One instance of a suspected drug-related athletic injury involved a high school wrestler who suffered a sternum injury.[81] Additionally, the football coach witnessed several safety procedure omissions and miss-executions by football players, all of which he attributed to drug use.[82]

In the late 1980s, the District concluded that it had a drug problem among the general student body as well as among student athletes.[83] As a result, the District took steps to address the problem.[84] The District first attempted to alleviate the drug problem through special classes and presentations on the dangers of drugs.[85] Second, in conjunction with the City Council, the District hired a police officer to patrol the area near the high school for drug activities.[86] Third, the District brought in a drug-sniffing dog to search student lockers for

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Respondent's Brief at 3, *Vernonia Sch. Dist. 47J* (No. 94-590).

76 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2388.

77 *Id.* at 2388. There was no evidence that drug use caused this increase in disciplinary referrals. Furthermore, one student could have multiple referrals so the reported number of referrals does not necessarily corroborate the number of misbehaving students. Respondent's Brief at 4-5, *Vernonia Sch. Dist. 47J* (No. 94-590).

78 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2389.

79 Petitioner's Brief at 6, *Vernonia Sch. Dist. 47J* (No. 94-590).

80 *Id.* The District never confirmed any drug-related athletic injuries. Respondent's Brief at 6-7, *Vernonia Sch. Dist. 47J* (No. 94-590).

81 The wrestling coach, Pat Svenson, testified that a high school student sustained injury in an "away" match when he failed to react as quickly as the coach would have preferred to a hold that his opponent put on him. Respondent's Brief at 7 n.8, *Vernonia Sch. Dist. 47J* (No. 94-590). The next day, Svenson thought that he smelled marijuana in a hotel room occupied by the injured wrestler and three other students, but he never identified specifically that the injured wrestler had been smoking marijuana. *Id.*

82 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2389. Svenson, who also coaches football, testified that while watching some football game films, he noted that some of the players did not react to situations as he had taught them, making him wonder if drugs were to blame. Svenson never confirmed this suspicion. Respondent's Brief at 7 n.8, *Vernonia Sch. Dist. 47J* (No. 94-590).

83 Respondent's Brief at 1, *Vernonia Sch. Dist. 47J* (No. 94-590).

84 *Id.*

85 Petitioner's Brief at 8, *Vernonia Sch. Dist. 47J* (No. 94-590).

86 *Id.*

drugs.[87] None of these measures proved effective, however, and the drug and disciplinary problems continued.[88] This led the District to investigate drug testing programs by studying such programs in other districts and soliciting legal advice.[89] The District held an "input night" for parents regarding the proposed drug testing, and attending parents gave their unanimous support.[90]

C. THE DRUG-TESTING PROGRAM

As a result of both the District's investigative findings and parental support, the school board approved the implementation of a drug testing policy in the fall of 1989.[91] The policy's express purposes were to prevent drug use among student athletes, to protect athletes' health and safety, and to provide assistance and counseling programs to drug users.[92]

Under the drug testing policy, students wishing to participate in interscholastic athletics must sign a consent form with their parents agreeing to participate in the random, suspicionless drug testing program.[93] School officials initially tested student athletes at the beginning of the athletic season.[94] During the season, the District randomly tested athletes, one each week of the season. The District assigned numbers to all athletes participating in the sport and placed

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87 Respondent's Brief at 1, *Vernonia Sch. Dist. 47J* (No. 94-590).

88 Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2388 (1995). The district court confirmed the Vernonia District's desperation to alleviate the perceived drug problem: "Disciplinary actions had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug or alcohol use led the administration to the inescapable conclusion that . . . unless it took immediate action, the problem was going to get far worse and widespread before it got better. . . ." Acton v. Vernonia Sch. Dist 47J, 796 F. Supp. 1354, 1357 (D. Ore. 1992).

89 Petitioner's Brief at 8, *Vernonia Sch. Dist. 47J* (No. 94-590). The District Superintendent admitted in an interrogatory that the District did not know what percentage of student athletes took illegal drugs, and the District made no effort to find out this statistic before implementing its drug testing policy. Respondent's Brief at 8, *Vernonia Sch. Dist. 47J* (No. 94-590).

90 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2389.

91 *Id.*

92 *Id.* The original drug testing program operated from September 1989 to August 1990 and applied to any student participating in extracurricular activities, athletic or nonathletic. The District later amended the Policy to test only athletes in order to "assure its legality." Respondents assert that this policy change may have been motivated by financial concerns. The District had been receiving $7,500 a year under a 1986 congressional act authorizing federal grants to local schools for, among other things, random drug testing of student athletes. If the District had therefore maintained its original policy, it would not have remained eligible for funds. Respondent's Brief at 9 n.9, *Vernonia Sch. Dist. 47J* (No. 94-590).

93 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2389.

94 *Id.*

those numbers in a "pool," where a student, supervised by two adults, drew 10% of the numbers each week for testing.[95] School officials notified those selected and tested them on that same day, if possible.[96]

In the initial stages of the testing process, a selected student begins the test by completing a specimen control form which assigns him a number.[97] The student must identify any prescription medications that he or she is taking by providing a copy of the prescription or a doctor's note.[98] The student then enters an empty locker room accompanied by an adult testing monitor of the same sex.[99] With male students, each boy selected produces his sample at a urinal, remaining fully clothed and with his back to the monitor, who remains standing twelve to fifteen feet behind the student.[100] Under the Policy as written, the monitor may watch the student while he produces the sample, although at no time are the student's genitals observed by the monitor.[101] The procedure for girls differs in that the student produces the sample in an enclosed bathroom stall, so that the monitor does not observe the sample production but listens for the normal sounds of urination.[102] After producing the sample, the student gives it to the monitor who checks it for temperature and signs of tampering and then seals the sample, instructing the student to initial the seal.[103] The entire procedure takes approximately five minutes.[104]

The samples are then sent to an independent laboratory for testing under security precautions designed to protect the chain of possession and safeguard access to test results.[105] The laboratory tests the samples for amphetamines, cocaine, and marijuana[106] and has an accuracy rate of approximately 99.94%.[107] The District may request screening for other drugs, such as LSD, but the identity of a particular student does not determine which drugs will be tested.[108] The laboratory does not know the names of the students who submit samples. Only the District superintendent, principals, vice-principals, and ath-

95 Petitioner's Brief at 9, *Vernonia Sch. Dist. 47J* (No. 94-590).
96 *Id.*
97 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2389.
98 *Id.*
99 *Id.*
100 *Id.*
101 Petitioner's Brief at 10, *Vernonia Sch. Dist. 47J* (No. 94-590).
102 *Id.*
103 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2389.
104 *Id.*
105 *Id.*
106 Alcohol and steroids are not on the list of tested substances. Respondent's Brief at 9, *Vernonia Sch. Dist. 47J* (No. 94-590).
107 *Id.*
108 *Id.*

letic directors have access to test results and student names, which are kept on file for one year.[109]

If a sample tests positive, the District administers a second test as soon as possible to confirm the result.[110] If the second sample tests negative, the District takes no further action.[111] If the second sample tests positive, the school principal notifies the student's parents and conducts a hearing with the student and his parents.[112] At this hearing, the principal presents the student with two options: (1) participation in a drug assistance program and a weekly drug test for six weeks or, (2) suspension from athletics for the remainder of the current season as well as the following season.[113] Regardless of the chosen option, the student is re-tested prior to the beginning of the next eligible athletic season.[114] A second "offense" mandates automatic suspension for the remainder of the current athletic season as well as the following season. A third "offense" results in suspension for the next two seasons.[115]

D. THE CASE

In the fall of 1991, respondent James Acton, a seventh-grader, signed up for football at a District grade school.[116] The District denied him participation because James and his parents refused to sign the drug testing consent form, believing it to be a violation of James' privacy and civil rights.[117] The Actons filed suit in state court on James' behalf seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violates the Fourth and Fourteenth Amendments of the United States Constitution[118] and Article I, section 9 of the Oregon Constitution.[119]

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109 *Id.* Aside from those officials specifically designated in the Policy, other officials involved in the ensuing due process hearing, counseling programs, and weekly repeat tests could conceivably find out if a student tested positive. Respondent's Brief at 10, *Vernonia Sch. Dist. 47J* (No. 94-590).

110 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2390.

111 *Id.*

112 Petitioner's Brief at 11, *Vernonia Sch. Dist. 47J* (No. 94-590).

113 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2390.

114 *Id.*

115 Respondent's Brief at 10, *Vernonia Sch. Dist. 47J* (No. 94-590).

116 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2390.

117 *Id.* The court of appeals found that, "[n]o evidence suggest[s] that James has ever used drugs or that the District had any reason to suspect that he has." Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1517 (9th Cir. 1994).

118 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2390. The Actons also alleged that the District lacked the statutory authority to adopt and enforce the Policy. The district court, however, held that the District had the requisite authority. Acton v. Vernonia Sch. Dist., 796 F. Supp. 1354, 1367 (D.Or. 1994).

119 Almost identical to the Federal Constitution, the Oregon Constitution provides:

In a bench trial, the district court applied a balancing test that weighed James Acton's right to privacy against the District's interest in adopting the program and concluded that the Policy was reasonable.[120] In support of its holding, the court determined that the District had a "compelling need" for the program because of the following factors: (1) coaches had observed instances of unsafe athletic performance by students presumably under the influence of drugs; (2) insofar as athletes are role models within their schools and within the community, deterring their drug use would deter other students' drug use; (3) the District had attempted to alleviate the drug problem using other means before implementing the Policy; (4) the District narrowly tailored the Policy's scope to effectuate its stated objectives; (5) the District took significant steps to limit the extent of the Policy's intrusion; (6) coaches and administrators do not exercise any discretion under the Policy; and (7) courts have historically deferred to school administrators in disciplinary matters at the middle and high school level.[121] The district court thus concluded that the Policy did not violate either the United States or the Oregon Constitutions and entered an order denying the claims for injunctive and declaratory relief, as well as a judgment dismissing the action.[122]

The Actons appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the judgment of the district court, holding that the Policy violated the Fourth Amendment as well as Article I, Section 9 of the Oregon Constitution.[123] On the merits, the court applied a balancing test and found that student athletes have significant privacy rights.[124] The court concluded that, although the District had "worthy goals" of preventing needless athletic injuries, deterring drug use, and improving discipline, these goals did not amount to the "extreme dangers and hazards" involved in prior cases authorizing random urinalysis testing. Therefore, the court found that the District's interest was not "compelling enough" to support such testing.[125]

The District filed a petition for a writ of certiorari to the United States Supreme Court. On November 28, 1994, the Court granted

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"[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." OR. CONST., art. I, s.9.

120 *Acton*, 796 F. Supp. at 1365.

121 *Id.* at 1363-65.

122 *Id.*

123 Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1526 (9th Cir. 1994).

124 *Id.* at 1525.

125 *Id.* at 1526.

certiorari to determine whether the Vernonia School District's drug testing policy violates the Fourth and Fourteenth Amendments to the United States Constitution.[126]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

The Supreme Court vacated the decision of the Court of Appeals for the Ninth Circuit and remanded the case for further proceedings consistent with the Court's holding. This holding stated that the Vernonia School District's drug testing policy did not violate students' federal or state constitutional rights to be free from unreasonable searches.[127] Justice Scalia,[128] delivering the majority opinion of the Court, began with a discussion of Fourth Amendment precedent.[129] Justice Scalia outlined the two-pronged balancing test for the reasonableness of Fourth Amendment searches developed in *Skinner v. National Railway Labor Executives' Ass'n.*[130] The *Skinner* test balances a search's intrusion on an individual's Fourth Amendment interests against its promotion of legitimate governmental interests.[131] Applying the *Skinner* balancing test, Justice Scalia concluded that the Vernonia School District's drug testing policy was constitutionally reasonable.[132]

1. History of Drug Testing Under the Fourth Amendment

Justice Scalia laid the foundation for his legal analysis by discussing previous Supreme Court cases involving drug testing programs and the Fourth Amendment.[133] He began by stating the Court's prior holdings that the Fourth Amendment extends its constitutional guarantees to searches and seizures by state officers, including public school officials.[134] Justice Scalia noted that this case law supports the idea that the government does not always need a warrant or probable cause to establish the reasonableness of its searches: "[a] search unsupported by probable cause can be constitutional, we have said,

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126 Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2388 (1995).

127 *Id.* at 2396.

128 Justices Rehnquist, Kennedy, Thomas, Ginsburg, and Breyer joined in Justice Scalia's opinion.

129 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2390.

130 Skinner v. National Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989). *See* text, *supra* at section II.E, for a detailed description of *Skinner* and its balancing test.

131 *Id.*

132 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2396.

133 *Id.* at 2390.

134 *Id. See also Skinner*, 489 U.S. at 617; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985).

'when special needs, beyond the need for normal law enforcement, make the warrant and probable-cause requirement impracticable.' "[135] Justice Scalia stated that, under *New Jersey v. T.L.O.*, such "special needs" exist in the public school context where a warrant requirement would significantly impair both the school's ability to impose swift discipline and the teachers' capacity to maintain order.[136]

2. Magnitude of the Privacy Interests Affected By the Policy

Justice Scalia then addressed the *Skinner* test for the reasonableness of a Fourth Amendment search. Under *Skinner*, a court is required to balance the degree of the search's intrusion into an individual's Fourth Amendment interests against the legitimacy of the governmental interest furthered by the search.[137] Justice Scalia first turned his attention to the nature of the privacy interest at stake in *Vernonia.* Justice Scalia stated that prior cases establish that constitutionally protected privacy includes only those privacy interests which society recognizes as "legitimate."[138] Moreover, the legitimacy of an individual's privacy expectation varies within different contexts.[139] Justice Scalia noted that, regarding the legitimacy of the students' privacy expectations impacted by the Vernonia Policy, two factors are dispositive.[140] First, the Policy targets unemancipated minors who have traditionally lacked some fundamental rights of self-determination.[141] Second, these unemancipated minors have been committed by their parents to the temporary custody of the State which consequently acts as schoolmaster *in loco parentis.*[142] Thus, although the case law does not mandate that children "shed their constitutional rights . . . at the schoolhouse gate,"[143] the nature of a school's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[144] Hence, Justice Scalia reasoned, prior Court decisions have recognized that schoolchildren have decreased privacy expectations and, conversely, that school officials have a fairly wide degree of latitude in maintaining discipline.[145]

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135 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2390 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

136 *Id.* at 2391 (quoting *T.L.O.*, 469 U.S. at 340).

137 *Skinner*, 489 U.S. at 617.

138 *T.L.O.*, 469 U.S. at 338.

139 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2391.

140 *Id.*

141 *Id.*

142 *Id.*

143 Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

144 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2392.

145 *Id.*

Justice Scalia continued his inquiry into the privacy expectations in *Vernonia* by contending that student athletes have lower expectations of privacy than do their non-athlete peers.[146] These decreased privacy expectations result from such factors as the "communal undress" in the locker room and the requirement that athletes "suit up" and shower after every game.[147] Furthermore, by choosing to try out for the team, student athletes agree to subject themselves to certain regulations such as maintaining their grades and complying with general "rules of conduct." Therefore, Justice Scalia believed that these athletes have reason to expect intrusions upon their right to privacy.[148]

Having concluded his discussion of the scope of the legitimate privacy expectations at stake, Justice Scalia turned to a discussion of the character of the Policy's intrusion.[149] Justice Scalia stated that prior cases have emphasized that urinalysis testing intrudes upon a bodily function "traditionally shielded by great privacy."[150] He enunciated that the degree of this intrusion depends upon two things: first, the manner in which the production of the urine sample is monitored; and second, the information that the urinalysis discloses concerning the state of the subject's body.[151] Applying the Vernonia School District Policy to the first factor, Scalia emphasized that the conditions for monitoring urine production under the Policy, with male students remaining fully clothed with their backs to the monitors, and female students producing samples in an enclosed stall, are markedly similar to the conditions found in ordinary public restrooms and are therefore unobjectionable.[152]

Regarding the second standard, Justice Scalia emphasized that the Policy does not screen for medical conditions other than drug use, such as epilepsy or diabetes, the types of drugs screened do not vary according to the students' identities, and the lab discloses the results to a limited class of school personnel.[153] Furthermore, Justice Scalia stated that according to precedent, the Policy's requirement that students disclose prescription medications is not per se unreasonable or a "significant invasion of privacy."[154] Taking the aforementioned fac-

146 *Id.*

147 Schaill *ex rel.* Kross v. Tippecanoe County School Corp., 864 F.2d 1309, 1318 (7th Cir. 1988).

148 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2393.

149 *Id.*

150 Skinner v. National Railway Labor Executives' Ass'n, 489 U.S. 602, 626 (1989).

151 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2393.

152 *Id.*

153 *Id.*

154 *Skinner*, 489 U.S. at 626 n.7.

tors into account, Justice Scalia concluded that the invasion of privacy under the Policy was insignificant.[155]

3. Magnitude of Governmental Interests Furthered By the Policy

Finally, Justice Scalia discussed the second prong of the *Skinner* test: the nature and immediacy of the governmental interests at issue and the efficacy of the chosen means for achieving those interests.[156] In *Skinner* and *Von Raab,* the Court stated that the governmental interest motivating a drug testing program must be "compelling."[157] Justice Scalia stated that an interest is "compelling" if it "is important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[158]

Justice Scalia cited several justifications for the "compelling" nature of the District's interests and supported these justifications with expert opinions.[159] First, Justice Scalia stated that school-age children are particularly vulnerable to the physical, psychological, and addictive effects of drugs.[160] Second, he noted that rampant student drug use threatens the entire student body and the educational process.[161] Third, Justice Scalia emphasized that parents entrust their schoolchildren to the District which then has a "special responsibility" to those children.[162] Finally, Justice Scalia pointed to the fact that the District narrowly tailored its Policy to student athletes because of their heightened injury risk resulting from drug use during sports activities.[163]

As to the immediacy of the concerns at issue, Justice Scalia relied on the district court's judgment that the Vernonia School District's concerns are not only "compelling," but are also "immediate."[164] Justice Scalia commented that student drug use is an immediate crisis of even greater proportions than existed in *Skinner,* where the Court upheld the Government's drug testing program based on drug use by railroad workers. Because the *Vernonia* drug problem warranted immediate attention, the Court deferred to the District Court's findings

155 *Vernonia Sch. Dist. 47J,* 115 S. Ct. at 2394.

156 *Id.*

157 *Skinner,* 489 U.S. at 638; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989).

158 *Vernonia Sch. Dist. 47J,* 115 S. Ct. at 2394.

159 *Id.* at 2395.

160 *Id.*

161 *Id.*

162 *Id.*

163 *Vernonia Sch. Dist. 47J,* 115 S. Ct. at 2394.

164 *Id.*

as these findings were not clearly erroneous.[165]

Lastly, Justice Scalia emphasized that the District's chosen means for achieving its goals were sufficiently efficacious to pass constitutional muster. Justice Scalia noted particularly the fact that the general Vernonia student body emulated student athletes. Justice Scalia determined that a drug testing program targeting these role models was likely to positively affect the rest of the student body.[166] Justice Scalia disregarded the possibility that the District could have employed less intrusive means for achieving its goal, namely testing only on suspicion of drug use, because the Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[167]

In conclusion, Justice Scalia stated that the Vernonia Policy is reasonable and therefore constitutional in light of student athletes' decreased privacy expectations, the relative unobtrusiveness of the search, and the importance of the governmental needs addressed by the Policy.[168] Justice Scalia added one caveat cautioning against the assumption that suspicionless drug testing will always pass constitutional muster.[169] Justice Scalia stated that the fact that the District undertook to further governmental responsibilities in the public school context as guardian of the children entrusted to its care tilted the scales in its favor. Hence, Justice Scalia cautioned that lower courts should narrowly interpret the *Vernonia* Court's holding in light of its factual context.[170]

B. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg wrote separately to address the limited nature of the majority holding. Justice Ginsburg noted that Justice Scalia repeatedly referred to the fact that the Vernonia School District's Policy targeted only students who voluntarily chose to participate in interscholastic athletics and thus, the most severe sanction under the Policy was suspension from athletic participation.[171] Cautioning against a broader reading of the holding, Justice Ginsburg cited a Second Circuit case, *United States v. Edwards*,[172] in support of her view that the

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165 *Id.*

166 *Id.* at 2396.

167 *Id.*; Skinner v. National Railway Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989).

168 Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995).

169 *Id.*

170 *Id.*

171 *Id.* at 2397 (Ginsburg, J., concurring).

172 498 F.2d 496, 500 (2d Cir. 1974) (in contrast to a search without notice and opportunity to avoid examination, airplane passengers can avoid baggage searches by choosing not

majority opinion reserves the question of whether a district could impose routine drug tests on all students attending school, given that those students are required by law to attend school and therefore do not act voluntarily.[173]

C. JUSTICE O'CONNOR'S DISSENT

Writing for the dissent,[174] Justice O'Connor stated that the Vernonia School District must require reasonable suspicion in order to maintain the constitutionality of its drug testing program.[175] Justice O'Connor attacked the majority opinion on four fronts: first, the negative policy implications of the majority holding; second, the incongruity between the majority decision and the history of the Court's holdings in the Fourth Amendment context; third, the majority's misapplication of the *Skinner* balancing test; and finally, the paucity of evidence supporting the drug testing program in the first place.

1. Policy Implications of the Majority Opinion

Writing in dissent, Justice O'Connor stated, that according to the reasoning of the majority opinion, the nation's school districts could routinely subject millions of children participating in extracurricular athletics to intrusive bodily searches even when the majority of those children exhibited no symptoms of drug use.[176] Justice O'Connor stated further that the majority based its opinion primarily upon two incomplete and unsatisfactory policy grounds: first, that because every athlete is tested, school officials will not act arbitrarily; and second, that a broad-based search policy dilutes the accusatory nature of the search.[177] Justice O'Connor argued that these narrowly focused justifications obscure countervailing policy concerns supporting the opposite result.[178]

Justice O'Connor provided one such countervailing policy concern: that blanket searches "pos[e] a greater threat to liberty" than do suspicion-based searches because they affect so many people.[179] Justice O'Connor stated that the majority overlooked a distinct benefit of

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to travel by airplane).

173 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2397 (Ginsburg, J., concurring) (citing *Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.)).

174 Justices Stevens and Souter joined in Justice O'Connor's dissent.

175 Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting).

176 *Id.* (O'Connor, J., dissenting).

177 *Id.* (O'Connor, J., dissenting).

178 *Id.* (O'Connor, J., dissenting).

179 *Id.* (O'Connor, J., dissenting) (citing Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting)).

suspicion-based searches, namely that potential search targets exert a substantial degree of control and can essentially avoid being tested by not acting in a suspicious way.[180] Justice O'Connor further explained her dissent by stating that the Court's prior opinions have upheld suspicionless testing only where a suspicion-based regime would be ineffective, a situation that is not present in *Vernonia*.[181]

2. *History of Fourth Amendment Searches*

Next, Justice O'Connor discussed the jurisprudential trend viewing warrantless, blanket searches as intolerable and unreasonable in the criminal context and concluded that the majority holding contradicted historical precedent. In arguing this proposition, Justice O'Connor discussed *Carroll v. United States*.[182] In *Carroll*, the Supreme Court held that blanket, warrantless car searches were unreasonable unless supported by some individualized suspicion, primarily probable cause.[183] The *Carroll* Court supported this holding with the proposition that the government could not substitute evenhanded treatment for the requirement of individualized suspicion.[184] Justice O'Connor bolstered the *Carroll* holding by arguing that the Warrant Clause of the Constitution illustrates that the Fourth Amendment Framers chose to curb the potential abuses of general searches, not by an evenhandedness requirement, but rather by raising the required level of individualized suspicion to one of objective probable cause.[185] Therefore, Justice O'Connor stated, protection of privacy, rather than evenhandedness, is the touchstone of the Fourth Amendment.[186] Further, the search of a person is one of only four categories that the Constitution mentions by name as requiring heightened protection.[187]

Justice O'Connor continued with a discussion of the proposition that urinalysis testing is "particularly destructive of privacy and offen-

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180 Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting).

181 *Id.* at 2698 (O'Connor, J., dissenting).

182 *Id.* at 2698-99 (O'Connor, J., dissenting).

183 Carroll v. United States, 267 U.S. 132, 149-54 (1925).

184 *Id.*

185 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2399 (O'Connor, J., dissenting). In support of this proposition, O'Connor cites to Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 MEM. ST. U. L. REV. 483, 489 (1994) ("While the plain language of the [Fourth] Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures.").

186 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2399-400 (O'Connor, J., dissenting).

187 *Id.* (O'Connor, J., dissenting).

sive to personal dignity."[188] Justice O'Connor stated further that the Court has invoked the Fourth Amendment against less intrusive searches than urinalysis testing.[189]

Justice O'Connor conceded that, outside of the criminal context, the Supreme Court has upheld some evenhanded, blanket searches after balancing the invasion of privacy against the governmental need served by the policy.[190] Most of these cases, however, involved searches that were either not personally intrusive,[191] or that arose in unique contexts such as prisons.[192] Moreover, Justice O'Connor stated that, in all of the cases where the Court affirmed such warrantless searches, it did so only after first reiterating the Fourth Amendment's long-standing preference for suspicion-based searches.[193] After such an affirmation, the Court ultimately found that, in those particular cases, such searches were infeasible or ineffectual due to unusual circumstances.[194] Justice O'Connor proceeded to distinguish the applicability of *Skinner.* While requiring suspicion-based testing of railway workers would be unworkable given that the scene of a serious train accident is chaotic, Justice O'Connor argued that such unworkability is not present with student drug testing.[195]

Furthermore, Justice O'Connor argued that prior cases upholding suspicionless drug testing involved situations in which "one undetected instance of wrongdoing could have injurious consequences for a great number of people."[196] According to Justice O'Connor, the governmental interests at stake for the Vernonia School District are

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188 *Id.* at 2400 (O'Connor, J., dissenting) (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989)).

189 Cupp v. Murphy, 412 U.S. 291, 295 (1973) (Stewart, J.) (characterizing the scraping of dirt from under an individual's fingernails as a "severe, though brief, intrusion upon cherished personal security").

190 *Vernonia Sch. Dist. 47J,* 115 S. Ct. at 2400 (O'Connor, J., dissenting).

191 New York v. Burger, 482 U.S. 691, 699-703 (1987) (holding that a search of a closely regulated business was constitutional).

192 Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (upholding visual body cavity searches in prison).

193 *Vernonia Sch. Dist. 47J,* 115 S. Ct. at 2401 (O'Connor, J., dissenting).

194 *Id.* (O'Connor, J., dissenting). Justice O'Connor cited Skinner v. National Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989). The *Skinner* court noted that, "[i]n limited circumstances where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.*

195 *Skinner,* 489 U.S. at 631.

196 *Id.* at 628 (one instance of drug abuse can lead to a disastrous train accident); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989) (one drug-impaired customs official, because of his impairment, may be susceptible to bribes or indifference resulting in the noninterdiction of a "sizable drug shipment," which can injure the lives of thousands).

much less compelling.

3. *Application of* Skinner *Balancing Test*

In the second half of her dissent, Justice O'Connor criticized the majority's application of the *Skinner* balancing test to the Vernonia School District Policy.[197] Justice O'Connor stated that, in applying the *Skinner* test, the majority cited invalid reasons for not requiring a suspicion-based testing program. Most notably, Justice O'Connor referred to *T.L.O.*, where the Court held that the required level of suspicion in the school context is reasonable suspicion.[198] Finally, Justice O'Connor criticized the District's concern about the adversarial nature of a suspicion-based program as unwarranted given the many adversarial, disciplinary schemes already in operation at schools.[199]

Justice O'Connor further criticized the majority for refusing to seriously consider the practicality of a suspicion-based policy, a refusal which stems from the majority misconstruing the fundamental role of the individualized suspicion requirement in the Fourth Amendment context.[200] In fact, Justice O'Connor argued, of all the conceivable contexts, a school would seem to be an ideal place for a suspicion-based requirement to succeed because the entire pool of potential subjects — students — are under constant supervision by school administrators.[201] Justice O'Connor stated that, ironically, the very evidence adduced in support of the District's blanket search Policy, such as the first- and second-hand stories of particularly identified students acting in manners that would clearly give rise to "reasonable suspicion" for the purposes of a drug-related search in accordance with *T.L.O.*, concretely supports the practicality of searches based on individualized suspicion.[202]

Justice O'Connor also disagreed with the majority's assessment that the Fourth Amendment is more lenient with school searches than with searches in other contexts.[203] Justice O'Connor conceded that this is, in some sense, true because school officials act *in loco parentis*

197 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2402 (O'Connor, J., dissenting).

198 New Jersey v. T.L.O., 469 U.S. 325, 345-46 (1985).

199 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2402 (O'Connor, J., dissenting). Justice O'Connor cited portions of the Vernonia School District's handbook which contains many references to "problem areas" necessitating "sanctions" including, "Defiance of Authority," "Disorderly or Disruptive Conduct Including Foul Language," "Mischief," "Recklessly Endangering," as well as references to "Responsibilities of Schools" including "to provide fair and reasonable standards of conduct and to enforce those standards through appropriate disciplinary action."

200 *Id.* at 2403 (O'Connor, J., dissenting).

201 *Id.* (O'Connor, J., dissenting).

202 *Id.* (O'Connor, J., dissenting).

203 *Id.* at 2404 (O'Connor, J., dissenting).

and, thus, necessitate a degree of constitutional leeway.[204] Justice O'Connor added, however, that the tradition of constitutional leeway applies when school officials respond to particularized wrongdoing, rather than with blanket searches.[205] Justice O'Connor noted that many of the cases cited by the majority support a notion of particularized wrongdoing rather than a blanket search policy and are therefore distinguishable.[206]

Justice O'Connor continued her criticism of the majority by attacking the idea that a school's requirement of physical examinations is similar to a requirement of random urinalysis testing.[207] Physical examinations are not searches for anything specific, so there is nothing about which to be suspicious.[208] Moreover, the practicability of a suspicion requirement for physical examinations is doubtful because these examinations search for medical conditions such as diabetes or heart defects that do not ordinarily manifest themselves in observable behavior as does illegal drug use.[209] Finally, Justice O'Connor stated that physical examinations are entirely nonaccusatory and have no punitive consequences, whereas "any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student's perspective."[210]

4. Evidentiary Record

In the final section of her dissent, Justice O'Connor stated that even if she were to concede the reasonableness of random drug testing, she nevertheless saw two significant flaws in the District's Policy.[211] First, Justice O'Connor maintained that the record reveals only one piece of scant evidence corroborating the alleged drug problem at James Acton's grade school.[212] Second, Justice O'Connor found it unreasonable that the District chose to target student athletes, and she suggested that the District made this choice so that the Policy

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204 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2403 (O'Connor, J., dissenting).

205 *Id.* (O'Connor, J., dissenting).

206 New Jersey v. T.L.O., 469 U.S. 325 (1985) (leeway in investigating particularized wrongdoing); Ingraham v. Wright, 430 U.S. 651 (1977) (leeway in punishing particularized wrongdoing); Goss v. Lopez, 419 U.S. 565 (1975) (leeway in choosing procedures by which to punish particularized wrongdoing).

207 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2405 (O'Connor, J., dissenting).

208 *Id.* (O'Connor, J., dissenting).

209 *Id.* (O'Connor, J., dissenting).

210 *Id.* (O'Connor, J., dissenting).

211 *Id.* at 2406 (O'Connor, J., dissenting).

212 *Vernonia Sch. Dist. 47J*, 115 S. Ct. at 2405 (O'Connor, J., dissenting). Justice O'Connor says the only reference to a grade school problem comes in the form of a "guarantee" by the grade school principal that the District's problems did not begin at the high school level, but rather started in elementary school. *Id.*

would pass constitutional muster.[213] Because of the weak evidence supporting a drug-related sports injury problem specifically, Justice O'Connor regarded the general drug problem within the District to be the primary impetus for the Policy.[214] Based upon the record, Justice O'Connor concluded that the District could have more reasonably focused on the group of students who violated school rules by disrupting class.[215]

Justice O'Connor ended her dissent by iterating that, "the greatest threats to our constitutional freedoms come in times of crisis," intimating that the majority's concerns with the drug crisis as a nationwide problem obscured their assessment of the facts on the record.[216] This led Justice O'Connor to conclude that the breadth and imprecision of the District's Policy rendered it unreasonable under the Fourth Amendment.[217]

V. ANALYSIS

The Supreme Court's decision in *Vernonia Sch. Dist. 47J v. Acton* impermissibly transgresses the constitutional boundaries of the Fourth Amendment. The Court's holding contravenes decades of compelling precedent and opens the door for the future relaxation of Constitutional parameters. If the Court had adhered to its prior decisions in *Skinner* and *Von Raab,* as well as other decisions involving Fourth Amendment issues in public schools, it would have held that the District's interest in addressing the perceived drug "problem" did not override student athletes' privacy interests, rendering its Policy unconstitutional.

In the evolution of standards for Fourth Amendment searches, the Court has enforced a requirement of individualized suspicion in all but the most extreme situations.[218] Given this precedent, the District's goal of addressing student drug use did not rise to the level of a "compelling" interest for Fourth Amendment purposes. Moreover, targeting student athletes is an ineffective means for establishing the goal of a drug-free school, especially considering the existence of viable alternatives to random drug testing. Participation in extracurricular athletics and accordance with rules of conduct do not significantly diminish high school students' privacy interests. Finally, the Court's decision in *Vernonia* attempts to fulfill overreaching policy concerns of

213 *Id.* (O'Connor, J., dissenting).
214 *Id.* (O'Connor, J., dissenting).
215 *Id.* (O'Connor, J., dissenting).
216 *Id.* at 2407. (O'Connor, J., dissenting).
217 *Id.* (O'Connor, J., dissenting).
218 *See* discussion *supra* at section II.D.

combating our nation's drug problem through impermissible means: the virtual eradication of students' Fourth Amendment rights.

A. THE STANDARD OF INDIVIDUALIZED SUSPICION WITH FOURTH AMENDMENT SEARCHES

As discussed in the Background section of this Note, in the evolution of standards for Fourth Amendment searches, the Supreme Court has required individualized suspicion in all but the most extreme situations, even with so-called "minor" cases involving relatively unintrusive searches.[219]

Because individualized suspicion is an integral part of the Fourth Amendment, the Court has only allowed the government to dispense with this requirement in extremely limited circumstances. Suspicionless searches are almost always prohibited in criminal cases.[220] It is only in extremely "limited circumstances where the privacy interests implicated by the search are minimal, and where an important governmental interest . . . would be placed in jeopardy by a requirement of individualized suspicion,"[221] that a suspicionless search passes constitutional muster.

Even if student drug use generally qualified as a compelling government interest, the Court mistakenly upheld Vernonia School District's random, suspicionless drug testing as a means to eradicate the alleged drug problem. The *Vernonia* decision is contrary to the majority of cases mandating that government actions in nearly all contexts rest upon, at the very least, individualized suspicion, if not probable cause.[222]

Within the school context, courts have consistently stated that students do not "shed their constitutional rights . . . at the schoolhouse gate."[223] The Supreme Court has repeatedly emphasized that, although school officials enjoy some latitude in enforcing standards of conduct, they must exercise this authority in comportment with constitutional safeguards.[224] As the Court has stated,

> . . . state-operated schools may not be enclaves of totalitarianism. School

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219 *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); Terry v. Ohio, 392 U.S. 1, 21 (1968).

220 Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("Except in certain well-defined circumstances, a search or seizure in [a criminal case] is not reasonable unless accomplished pursuant to a judicial writ issued upon probable cause.").

221 *Id.* at 624.

222 *See* discussion *supra* at section II.D.

223 Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 505 (1969). *See also* West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

224 Goss v. Lopez, 419 U.S. 565, 574 (1975). *See also* West Virginia State Board of Educ., 319 U.S. at 637.

> officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under the Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[225]

Along these lines, the *Vernonia* majority incorrectly stated that because school officials act *in loco parentis*, courts owe them a greater degree of constitutional leeway and should not hold them to the individualized suspicion standard. This proclamation contradicts the Court's prior discussion defining the relationship between school officials and schoolchildren in *New Jersey v. T.L.O.*: "In carrying out searches and other disciplinary functions . . . school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim parental immunity from the strictures of the Fourth Amendment."[226] Therefore, in *T.L.O.*, the Court squarely held that school officials must fully comply with Fourth Amendment strictures whenever they search students on school grounds.[227]

As interpreted in *T.L.O.*, the Constitution specifies that under ordinary circumstances, school officials searching a student must have an individualized suspicion and belief that the search will reveal evidence of wrongdoing.[228] Bare individualized suspicion, however, is not enough. The *T.L.O.* Court further constrained the actions of school officials by stating that an individualized suspicion requirement can only pass constitutional muster if prompted by "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[229]

Consequently, in order for the Vernonia Policy to pass constitutional muster, the District must have tested only those students who they reasonably suspected had used or were using drugs. Moreover, even if the District could show "extraordinary" circumstances, *T.L.O.* dictates it may not dilute students' Fourth Amendment rights anymore than is necessary to preserve school order. Along these lines, the Court has emphasized that, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be

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225 *Goss*, 419 U.S. at. 510.

226 New Jersey v. T.L.O., 469 U.S. 325, 336 (1989).

227 *Id.* at 333-36.

228 *Id.* at 350 (Powell, J., concurring).

229 *Id.* (Powell, J., concurring); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619-20 (1989); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); State v. Dubois, 821 P.2d 1124, 1126 (Or. Ct. App. 1991).

sustained."[230]

B. THE LACK OF A "COMPELLING" GOVERNMENT INTEREST

The Vernonia District did not have a "compelling" government interest in adopting the urinalysis testing program in light of *Skinner* and *Von Raab*. These cases held that governmental interests served by a random suspicionless drug testing policy must be weighty and compelling, such that the drug problem addressed by the testing policy poses a substantial risk of harm either to the public or to national security.[231]

None of the justifications for random, suspicionless testing enunciated in *Skinner* and *Von Raab* exist in the public school setting. School activities do not pose risks to national security or public safety comparable to the inherent risks posed by customs employees performing drug enforcement duties or railway employees contending with heavy machinery and dangerous cargo.

Ironically, Justice Scalia dissented in *Von Raab*, having decided that even the aforementioned job requirements of United States Customs Employees did not amount to a compelling government interest for Fourth Amendment purposes.[232] Justice Scalia stated that even though customs employees carried firearms and dealt with drug smugglers, their possible drug impairment did not rise to the level of a threat to national security or public safety.[233]

Lower courts have generally followed *Skinner* and *Von Raab*, consistently holding that the government interest furthered by the drug testing program must be "compelling," or "strong."[234] Along these

230 Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside v. Byers, 363 F.2d 744, 749 (5th Cir. 1966)).

231 *Skinner*, 489 U.S. at 624; National Treasury Employees Union v. Von Raab, 489 U.S. 636, 668 (1989).

232 *Von Raab*, 489 U.S. at 685.

233 *Id.* (Scalia, J., dissenting). Justice Scalia expressed concern in his *Von Raab* dissent that allowing testing for customs employees could lead to a snowball effect whereby the realm of permissible drug testing contexts would expand exponentially: "But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, 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 . . . ." *Id.* (Scalia, J., dissenting) (emphasis added).

234 *See, e.g.*, International Board of Electric Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1462-64 (9th Cir. 1990) (finding that the government has a "great" interest in the safety of the natural gas and hazardous liquid pipeline industry, therefore random urinalysis testing of pipeline workers did not violate the Fourth Amendment); Harmon v. Thornburgh, 878 F.2d 484, 491-92 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (approving random drug testing of employees holding top secret national security clearances); National Federation of Fed. Employees v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989), *cert.*

lines, courts have declined to deem a government interest as "compelling" for United States Department of Justice employees who prosecute criminal cases,[235] county correctional officials who do not come into contact with firearms or have opportunities to smuggle drugs to prisoners,[236] civilian laboratory workers at Army Forensic Drug Testing Labs,[237] and police department personnel who do not carry firearms or participate in eradicating drug interdiction.[238] Clearly, these case examples illustrate that the Court's standard for a "compelling" government interest is quite high and not easily satisfied.

Several courts deciding cases involving student athlete drug testing have similarly followed the guidelines in *Skinner* and *Von Raab* and held that drug use among student athletes is not a compelling government interest.[239]

Although drug-impaired athletes could arguably face a greater risk of personal injury if they were to compete while under the influence of drugs, with the exception of a few extremely dangerous sports, that risk is minimal.[240] Furthermore, any individual risk does not justify elevating the government interest furthered by the Vernonia Policy to the level of a compelling national security or public safety concern.

C. TARGETING STUDENT ATHLETES AS A MEANS OF SOLVING THE DRUG "PROBLEM"

The District mistakenly targeted student athletes as a means of

denied, 493 U.S. 1056 (1990) (holding that the government has a "compelling safety interest in ensuring that the approximately 2,800 civilians who fly and service its airplanes and helicopters are not impaired by drugs."); Taylor v. O'Grady, 888 F.2d 1189, 1199, 1201 (7th Cir. 1989) (approving urinalysis testing of county correctional officers with regular access to prisoners and weapons); Thomas v. Marsh, 884 F.2d 113, 114 (4th Cir. 1989) (approving drug testing of employees of a chemical weapons plant who "have access to areas . . . in which experiments are performed with highly lethal chemical warfare agents"); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (allowing drug testing of nuclear power plant workers whose drug-impaired judgment could produce such catastrophic social harm that no risk whatsoever can be tolerated).

235 *Harmon*, 878 F.2d at 496.

236 *Taylor*, 888 F.2d at 1201.

237 *Cheney*, 884 F.2d at 613, 615.

238 Guiney v. Roache, 873 F.2d 1557, 1558 (1st Cir. 1989).

239 Moule v. Paradise Valley Unified Sch. Dist. No. 69, 863 F. Supp. 1098 (D. Ariz. 1994); Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 764 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991); University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993), *cert. denied*, 114 S. Ct. 1646 (1994).

240 Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505, 568 n.452 (1988) ("[F]ew athletic performances, even if affected by drugs, endanger the public. Hence, an interest in public safety rarely justifies involuntary, non-cause testing. Sports is distinguishable on this basis from other public occupations . . . . A possible exception is automobile racing.").

addressing the drug problem, and the Court incorrectly upheld their Policy. Four factors support this conclusion.

First, there is extremely scant evidence of a drug problem among Vernonia athletes justifying intrusive urinalysis testing.[241] To quote Justice Scalia in the *Von Raab* dissent, "The only pertinent points . . . are supported by nothing but speculation."[242] The factual record presents no concrete examples of drug-related athletic injuries. The record consists primarily of teachers' testimony as to their *perceptions* of a drug problem. The District's desire to address the national problem of school drug abuse does not sufficiently justify subordinating students' Fourth Amendment privacy interests. Nor is a generalized suspicion that drug use must be occurring because of the widespread problems in schools sufficient to trump the Fourth Amendment. Justice Scalia himself urged this point in his dissenting opinion in *Von Raab*: "[i]f a generalization suffices to justify demeaning bodily searches, without particularized suspicion . . . then the Fourth Amendment has become frail protection indeed."[243]

Second, the fact that athletes may serve as role models for other students does not justify intrusive urinalysis testing. The record contains no evidence that the Policy, by arguably deterring drug use among athletes, also deterred drug use among non-athletes.[244] In his *Von Raab* dissent, Justice Scalia sardonically argued against this sort of symbolic testing:

> What better way to show that the Government is serious about its 'war on drugs' than to subject its employees on the front line of that war to the invasion of their privacy and affront to their dignity. To be sure, there is only a slight chance that it will prevent some serious public harm . . . but it will show to the world that the Service is 'clean,' and — most important of all — will demonstrate the determination of the Government to

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241 The District was "unable to confirm even one drug-related incident in the sports program . . . . The District concluded that drug use was commonplace in the classroom because of disciplinary problems there. There is no evidence, however, of similar problems on the playing field. It follows that, if students were taking drugs, they were not taking them before competing . . . . Perhaps the most telling evidence of the extent of drugs in the sports program before the drug test is the evidence that only two students, both in high school, have flunked the test." Brief for Respondent at 6-8, Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

242 National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting).

243 *Id.* at 684 (Scalia, J., dissenting). Justice Scalia supported this point with reference to earlier Fourth Amendment decisions: "In *Skinner, Bell, T.L.O.,* and *Martinez-Fuerte,* [the Court] took pains to establish the existence of special need for the search or seizure — a need based not upon the existence of a 'pervasive social problem' combined with speculation as to the effect of that problem in the field at issue, but rather upon well-known or well-demonstrated consequences." *Id.* (Scalia, J., dissenting).

244 University of Colorado v. Derdeyn, 863 P.2d 929, 945 n.30 (Colo. 1993), *cert. denied,* 114 S. Ct. 1646 (1994).

> eliminate the scourge from our society! I think it is obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point . . . .[245]

Third, targeting student athletes for random drug testing is an inappropriate means of deterrence because there is no evidence that drug testing actually prevents drug use among athletes.[246] Unlike drug testing of government employees who face the daunting penalty of losing their job if they test positive, student athletes who test positive are only required to either seek treatment or quit the team. In either instance, they can continue to use drugs so long as they forego athletic activities. Moreover, claims that disciplinary problems have decreased since implementing the Vernonia Policy are inconclusive—students may simply be taking greater pains to hide their drug use because they are aware of the District's heightened observation. Furthermore, the drug testing at issue does not test for the presence of alcohol, the drug most often abused by minors, or steroids, the drug most commonly used by athletes seeking to improve their athletic performances.[247] Hence, alternative substances exist for athletes seeking to use drugs without detection. Thus, the District's Policy is constitutionally unreasonable because its means of deterrence are not properly tailored to its ostensible goals.[248]

Finally, the negative effect that random drug testing has on the relationship among coaches, school officials, and student athletes mitigates the magnitude of government interests at stake.[249] The relationship between students and school personnel should not be on the same adversarial level as the relationship between law enforcement officers and citizens.[250] Having teachers and coaches administer the test rather than neutral third parties negatively impacts student-teacher relations. The Vernonia Policy mandates the involvement of coaches and school officials in its implementation structure. This denies student athletes the opportunity to reap the benefit of a trusting

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245 *Von Raab*, 489 U.S. at 686 (Scalia, J., dissenting).

246 Brooks v. E. Chambers Consolidated Independent Sch. Dist., 730 F. Supp. 759, 765 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

247 Brief for Respondent at 45, Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

248 New Jersey v. T.L.O., 469 U.S. 325, 341 (1969).

249 *See* University of Colorado v. Derdeyn, 863 P.2d 929, 941 (Colo. 1993), *cert. denied*, 114 S. Ct. 1646 (1994) ("[the drug testing policy] transformed what might otherwise be friendly, trusting, and caring relations between trainers and athletes into untrusting and confrontational relations").

250 *T.L.O.*, 469 U.S. at 349 (Powell, J., concurring): ("[o]fficers have the responsibility to investigate criminal activity . . . . Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and pupils . . . . The primary duty of school officials . . . is the education and training of young people.")

and supportive relationship with their coaches because of their constant apprehension about being selected for testing and the impact that such testing could have on their athletic status.[251] Allowing for visual and aural observation of the athlete producing his or her specimen does not foster a feeling of trust in the student. The Policy is therefore fraught with reminders to the student that his school does not trust him to be honest and forthright when providing a specimen. The combination of the District's suspicion and the athletes' embarrassment results in pervasive distrust. Such distrust destroys interschool relationships between athletes, coaches, and school administrators.[252]

D. FAILURE TO CONSIDER ALTERNATIVES TO RANDOM DRUG TESTING

The majority in *Vernonia* incorrectly refused to consider the availability of viable alternatives to random drug testing within the Vernonia School District.[253] While the *Skinner* Court stated that the reasonableness of a Fourth Amendment search does not *necessarily depend* on the existence of less intrusive alternatives,[254] in several cases, the Court has considered such alternatives.

In *United States v. Brignoni-Ponce*,[255] the Court considered practical alternatives to a Border Patrol officer's stop and questioning of a car's occupants without probable cause or consent.[256] The Court held:

> Because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, *and the absence of practical alternatives for policing the border* . . . when an officer's observations lead him reasonably to suspect that a particular vehicle may contain [illegal] aliens . . . he may stop the car briefly and investigate . . . .[257]

Since *Brignoni-Ponce*, the Court also considered the existence of practical alternatives in determining the reasonableness of a search in *United States v. Sharpe*.[258] Although the *Sharpe* Court expressed con-

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[251] *Derdeyn*, 863 P.2d at 941 n.25. The *Derdeyn* court stated that random drug testing would negatively impact the relations between athletes and trainers: "CU's athletic director testified that a 'common' and 'accurate' way to describe the relationship between 'the trainers and their athletes' is that they are friend[s].' He also testified that the trainers take care of 'the overall general well-being of the athlete . . . not only physically but . . . mentally.' However in describing her relation with a trainer after [testing], one student testified . . . 'it was confrontational. It was untrusting . . . . Every time I come to the training room, I have to prove my innocence.'" *Id.*

[252] *T.L.O.*, 469 U.S. at 349.

[253] Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2395 (1995).

[254] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989).

[255] 422 U.S. 873 (1975).

[256] *Id.* at 881.

[257] *Id.* (emphasis added).

[258] 470 U.S. 675 (1985) (holding that, where a Drug Enforcement Administration agent diligently pursued his investigation without unnecessary delay, a twenty minute detention

cern that investigating the existence of alternatives would allow judges to engage in "post hoc evaluation of police conduct," the Court held: "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it."[259]

The school environment provides practical alternatives to the Vernonia Policy that the District should reasonably have pursued. The most notable and effective alternative would have been to compel drug testing only upon reasonable suspicion that a particular student was using drugs in accord with the *T.L.O.* decision. Such a policy would have allowed the teachers who allegedly witnessed student marijuana use and the coaches who suspected drug use among athletes, to take disciplinary action against these students without jeopardizing the constitutional rights of non-offending students.[260]

E. STUDENT ATHLETES' PRIVACY EXPECTATIONS

One of the most cherished values for United States citizens is the right to privacy, which Justice Brandeis memorably described as "the right to be left alone — the most comprehensive of rights and the right most valued by civilized men."[261]

Under the *Skinner* test for assessing the reasonableness of a Fourth Amendment search, student athletes' privacy interests far outweigh the Vernonia District's interests. Student athletes do not have significantly diminished expectations of privacy that justify the Vernonia Policy's intrusion into their realm of privacy. Furthermore, the mere fact that every child must attend school does not trigger an instant diminution of rights, and the school environment does not mandate an automatic forfeiture of privacy expectations as does employment in some government settings.[262] Therefore, the majority in-

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of a suspect did not violate the Fourth Amendment's reasonableness standard).

259 *Id.* at 686-87.

260 Robert J. Farley, Jr., Note, *Constitutional Law—Suspicionless, Random Urinalysis: The Unreasonable Search of the Student Athlete — Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994)*, 68 TEMP. L. REV. 439, 457 (1995). *See also* Delaware v. Prouse, 440 U.S. 648 (1979) (where the Court held that the police could not stop motorists to check for unlicensed vehicles without individualized suspicion of wrongdoing). The Court noted that while these "roving spot checks" do help enforce the motor vehicle code, they nevertheless are not "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests . . . [g]iven the alternative mechanisms available." *Id.* at 659. The Court stated that the "foremost" of these alternatives is acting on observed violations. *Id.* Likewise, the "foremost" method to maintain a drug-free school environment in the Vernonia District would be for school officials to act only upon observed violations. Respondent at 47, *Vernonia School District 47J* (No. 94-590).

261 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

262 "There are few activities in our society more personal or private than the passing of

correctly devalued students' privacy interests because of several faulty assertions.

First, student athletes' privacy expectations greatly differ from the expectations of employees dealing on a daily basis with the possibility of train accidents, drug interdiction, and firearms. Consequently, the majority incorrectly equated the privacy expectations in *Skinner* and *Von Raab* with the student athletes' privacy expectations.

Skinner discussed the decreased privacy expectations of railway workers stating that these workers realize that their safety-sensitive jobs qualify them for drug monitoring because they "participate in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."[263]

The Court in *Von Raab* similarly emphasized that the job at issue, by its very nature, diminished privacy expectations: "[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity."[264] The *Von Raab* Court concluded that suspicionless searches were reasonable under the Fourth Amendment because the "Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions."[265]

Other Supreme Court cases have similarly concluded that certain forms of public employment may diminish privacy expectations, even when those expectations involve Fourth Amendment personal searches. For example, the government subjects members of the United States Mint to daily personal searches, as well as United States military personnel and intelligence agency employees to exhaustive inquiries into their physical and mental fitness.[266] The reasoning supporting such searches does not apply to schoolchildren, even if drug impaired, because their daily activities do not have the potential to threaten public safety or national security. Moreover, schoolchildren

urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom." National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987) *aff'd. in part, rev'd. in part,* 489 U.S. 656 (1989). *See also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989).

263 *Skinner,* 489 U.S. at 627.

264 *Von Raab,* 489 U.S. at 672.

265 *Id.* at 679.

266 *Cf.* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980); Parker v. Levy, 417 U.S. 733, 758 (1974); Committee for GI Rights v. Callaway, 518 F.2d 466, 477 (D.C. Cir. 1975).

do not matriculate with the expectation that their school will subject them to a similar level of testing as government employees in certain contexts.

Second, the general school requirement of annual physical examinations performed in a medical environment by a physician unrelated to the athletic program does not significantly diminish a student athlete's privacy expectations, nor does it compare to random urinalysis testing conducted in a school locker room by a school official.[267] The *Skinner* Court stated that a urinalysis sample collected in a medical environment by an unrelated third party is similar to a routine exam.[268] Unlike the employees in *Skinner*, Vernonia student athletes do not receive the benefit of this "medical environment"[269] because the District compels them to provide their samples in a school locker room with a school official, who is anyone but a disinterested third party.

Third, student athletes do not have diminished privacy expectations merely because they dress together in a locker room and shower after every game. Because of its suspicionless atmosphere, the communal undress in a locker room differs markedly from having a school official watch a student urinating into a specimen jar.[270]

Finally, the fact that student athletes must follow rules such as grade and curfew requirements does not diminish their privacy expectations. The invasion of privacy associated with grade monitoring and the like is nowhere near the caliber of invasion that results when school officials monitor a student's most intimate bodily functions.[271]

The Court has stated that "[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief intrusion upon cherished personal security, and it surely must be an annoying, frightening, and perhaps humiliating experience."[272] Schoolchildren, especially adolescents, are often extremely self-conscious about their

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267 *See* University of Colorado v. Derdeyn, 863 P.2d 929, 940 (Colo. 1993), *cert. denied*, 114 S. Ct. 1646 (1994).

268 Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626-27 (1989).

269 Other courts have accepted this view, stating that only when doctors frequently administer medical exams will these exams significantly affect an individual's privacy expectations. *See* Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1991) (stating that, if an individual's job requires him to undergo "frequent" medical examinations, then that individual will perceive random urinalysis drug testing as less intrusive). Many people and most schoolchildren have annual physical examinations, and the fact that Vernonia athletes have annual physicals would not seem to put them in *Dimeo*'s category of those who must undergo "frequent" medical examinations. *See also Derdeyn*, 863 P.2d at 940 (stating that annual medical examinations do not decrease the privacy expectations of college athletes).

270 *Derdeyn*, 863 P.2d at 941.

271 *Id.*

272 Terry v. Ohio, 392 U.S. 1, 24-25 (1968).

bodies and bodily functions.[273] Therefore, the intrusiveness of monitored urinalysis, certainly among the most extreme forms of Fourth Amendment searches, upon adolescent privacy expectations cannot be overstated.

F. INTRUSIVENESS OF THE VERNONIA POLICY

Justice Scalia incorrectly concluded that the invasion of privacy under the Policy was insignificant. Three aspects of the Vernonia Policy make it highly intrusive. First, the Vernonia Policy heightens the degree of intrusion on student athletes' privacy interests by requiring students to urinate on demand.[274] School officials take students to be tested from class on the same day that their names are drawn, escort them to a locker room, and instruct them to produce a sample. If a student cannot urinate immediately, he must return later in the day to try again.[275] This requirement is a marked contrast to that in *Von Raab* where officials gave employees five days advance notice of the specific time and location for their testing, a requirement the *Von Raab* Court gave some importance to in terms of reducing the overall intrusiveness of the search.[276]

A second significantly intrusive aspect of the Vernonia Policy is the District's requirement that monitors observe male student athletes producing their urinalysis sample. This represents an extreme invasion of the students' privacy expectations.[277] Furthermore, this re-

273 Brief for Respondent at 27, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

274 Urinalysis drug testing is considered by many courts and legislatures to be so intrusive that it has been regulated in at least eighteen states and five cities. *See* Kevin B. Zeese, DRUG TESTING LEGAL MANUAL s. 1.05[3], at 1-38 (release #13, May 1995). Three states require an employer to have probable cause before he or she can compel an employee to submit to urinalysis. *Id.* at 1-43. Six states and two cities specify that an employer can only instigate urinalysis drug testing of his or her employees if he or she has reason to suspect the employee is using drugs. *Id.* at 1-43 to 1-44.1.

275 At least one court has found evidence that some students suffer such stress while standing at the urinal to produce urinalysis samples that they are unable to void their bladder for two to three hours subsequent to the testing. Schaill v. Tippecanoe County Sch. Corp., 679 F. Supp. 833 (N.D. Ind.), *aff'd*, 864 F.2d 1309 (7th Cir. 1988). Moreover, the *Derdeyn* court heard testimony from a student athlete that specimen production had to be "done in front of someone else and . . . in one day. Sometimes my friend and I would be there drinking gallons of water literally after practice trying to go to the bathroom . . . ." *Derdeyn*, 863 P.2d at 941 n.21.

276 National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 n.2 (1989).

277 The *Schaill* court placed great importance on the fact that students were only monitored aurally, not visually, in upholding the urinalysis testing policy at issue. *Schaill*, 864 F.2d at 1318. In its brief, respondents compare the visual monitoring requirement at issue in this case to a scene out of George Orwell's *1984* which involves a world where citizens have lost all rights to privacy and where the government "Big Brother" constantly monitors them through "telescreens" mounted on the walls. These screens are even in the

quirement runs contrary to the testing policies at issue in both *Skinner* and *Von Raab,* which did not require that officials observe the employees producing their samples.[278] The fact that the testing monitors are not impartial outside medical personnel but rather teachers, school officials, and coaches compounds the degree of privacy intrusion. This is an important contrast to the *Skinner* and *Von Raab* policies, both of which required independent contractors or unrelated medical personnel to administer the testing.[279]

A third intrusive aspect of the Vernonia School District's drug testing policy is the requirement that student athletes disclose all prescription medications to school officials before the officials administer the test.[280] This requirement compounds the fact that urinalysis testing "can reveal a host of private medical facts about [an individual], including whether she is epileptic, pregnant, or diabetic."[281] The Policy's disclosure requirement differs from the *Von Raab* policy, which required the disclosure of licit drug use only after an employee had tested positive for illicit drugs. Moreover, the *Von Raab* employees disclosed their medical information only to a licensed physician unrelated to the Customs Service.[282]

VI. MISAPPLICATION OF OVERREACHING POLICY GOALS BY THE *VERNONIA* MAJORITY

Balancing the facts and the strength of the Fourth Amendment precedent, it appears that the Court decided *Vernonia School District 47J v. Acton* primarily for overreaching policy goals. No other explanation exists for the Court's willingness to vastly expand the Fourth Amendment balancing test from *Skinner,* as well as to ignore the sparseness of the District's factual evidence supporting its "drug problem" hypothesis.

Clearly, the "war on drugs" is a national commitment, and the pervasiveness of drug abuse has reached into many of America's

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washrooms: "[t]here was no place where you could be more certain that the telescreens were watched continuously." GEORGE ORWELL, 1984, at 89 (1981).

278 Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 626 (1989); *Von Raab,* 489 U.S. at 672 n.2. The *Von Raab* testing policy went so far as to allow employees to produce their samples in the privacy of a bathroom stall.

279 *Skinner,* 489 U.S. at 609, 626-27; *Von Raab,* 489 U.S. at 661.

280 *See* Loder v. Glendale, 34 Cal. Rptr. 94, 102 (Ct. App. 1994).

281 *Skinner,* 489 U.S. at 617.

282 *Von Raab,* 489 U.S. at 672 n.2. The policy at issue in *Skinner* required employees to disclose at the time they produced their urinalysis samples "whether they had taken any medication during the preceding 30 days." *Id.* at 626 n.7. It is unclear whether the policy required the employees to specify *which* drugs they had taken. Significantly, however, any disclosures were made only to medical personnel unrelated to the Railroad.

schools. This problem alone, however, does not justify trespassing on the Fourth Amendment.[283] As Justice Scalia stated in his *Von Raab* dissent: "the impairment of individual liberties cannot be the means of making a point. . . ."[284]

In fact, it is precisely because the drug problem has reached such epidemic proportions that courts need to employ added vigilance in policing the boundaries of the Constitution. To quote Justice Holmes:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which applies to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[285]

The Supreme Court does not achieve a solution to America's drug problem by subordinating the intentions of the Constitutional Framers regarding basic principles of liberty and autonomy to the immediate concerns of drug abuse in our nation's schools.

Furthermore, the damage that a random drug testing policy could do to impressionable students by forcing them to relinquish their constitutional privacy right could very well be immeasurable. It is vital that, in these troubled times, courts strive to reinforce constitutional ideals rather than decrease their potency. Nowhere is this need more pressing than in our nation's schools where the future leaders are developing their own national and Constitutional identity: "[s]chools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our Constitutional freedom."[286] In

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283 *See Skinner*, 489 U.S. 602, 634 (Marshall, J., dissenting): "[t]he issue in this case is not whether declaring a war on illegal drugs is a good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the government's deployment in that war of a particularly Draconian weapon—the compulsory collection and chemical testing of . . . urine—comports with the Fourth Amendment."

284 *Von Raab*, 489 U.S. 656, 686 (Scalia, J., dissenting).

285 Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904). *See also Skinner*, 489 U.S. at 635 (Marshall, J., dissenting) ("[H]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure"); Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("[T]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

286 Doe v. Renfrow, 451 U.S. 1022, 1027 (1981) (Brennan, J., dissenting). *See also* New Jersey v. T.L.O., 469 U.S. 325, 373 (1969) (Stevens, J., concurring in part and dissenting in part) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities to be a self-governing citizenry."); Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 512 (1969) ("The vigilant protection of

order to preserve Constitutional reverence among a youth that is rapidly losing respect for many of the traditional underpinnings of our society, courts must not assist in eroding what little respect remains for the Constitution and the rights it provides. Children today are already greatly unprotected in the face of such threats as gang violence, sexual abuse, and kidnapping. The Supreme Court made a grave error in assaulting one of the last vestiges of protection possessed by children today: the Constitutional protection bestowed upon them by their Founding Fathers. Winning the "war on drugs" will be a pyrrhic victory indeed if it erodes the constitutional faith and confidence of our nation's youth, the very group which this "war" seeks to protect.

VII. CONCLUSION

In *Vernonia School District 47J v. Acton*, the Court held that random, suspicionless drug testing does not violate high school students' Fourth Amendment rights because the nature of the government interest furthered by the testing was sufficiently compelling to override students' privacy interests. This result contradicts prior Fourth Amendment decisions allowing for suspicionless searches in only the most extreme circumstances. Precedent confirms that the sole governmental interest which is sufficiently compelling to warrant suspicionless drug testing is either public safety or national security. Moreover, extracurricular athletic participation does not significantly diminish students' substantial privacy interests. Finally, the overreaching policy goal of addressing America's drug problem primarily motivated the *Vernonia* decision. No matter how noble the goal, the Court improperly addressed it in *Vernonia*, which contained only marginal evidence of a compelling drug problem. As school districts across the country adopt drug testing policies sanctioned by the *Vernonia* Court, they will do so at the expense of schoolchildrens' constitutional rights. Such an Orwellian result is far too destructive to justify any incremental advancement in the "war on drugs."

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constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting Shelton v. Tucker, 264 U.S. 479, 487 (1960)).