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NOTES

Constitutional Standards for Suspicionless Student Drug Testing: A Moving Target

BY BENJAMIN GERALD DUSING*

I comprehend the Court's opinion as reserving the question whether [a school district] could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.¹

[I]t is necessary to establish some boundaries so as not to sanction "routine drug testing on all students required to attend school."²

INTRODUCTION

Despite persistent debate as to its propriety and effect,³ America continues to wage a "War on Drugs."⁴ Suspicionless drug testing has emerged as a principal weapon in this war and the

* J.D. expected 2001, University of Kentucky. The author would like to thank Professor William H. Fortune for his advice and support, Amy Glenn for her editorial suggestions, and his family for their unwavering love and patience.

¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring).

² *Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415, 425 (7th Cir. 1998) (quoting *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring)), *cert. denied*, 119 S.Ct. 1254 (1999).

³ See Michael Hallam, *A Casualty of the "War on Drugs": Mandatory, Suspicionless Drug Testing of Student Athletes in Vernonia School District 47J v Acton*, 74 N.C.L. REV. 833, 833 (1996) (arguing that "the 'War on Drugs' has been largely unsuccessful on all fronts in the interdiction of drug imports and eradication of drug use").

⁴ See *id.* President Nixon initiated the War on Drugs on a limited scale in 1972. The effort developed to the extent that President Bush appointed a "drug czar" and spent \$40 billion on the program. See *id.* at n.3.

practice has attained a firm foothold in American society.⁵ The average American may now be tested multiple times over the course of a lifetime and for various purposes.

Students have not eluded the drug testing trend. Suspicionless drug testing entered America's public schools⁶—albeit in limited form—by virtue of the Supreme Court's 1995 decision in *Vernonia School District 47J v. Acton*.⁷ In *Vernonia*, the Supreme Court upheld an Oregon school district's drug policy mandating random testing of student-athletes. Justice Scalia's opinion for the Court was narrowly drawn and contained limiting language.⁸ Nevertheless, because the *Vernonia* Court ruled only on the conservative policy before it, and declined to articulate clear constitutional standards for broader suspicionless student policies, the decision has spawned further litigation.⁹ Without clear standards to guide them, lower courts have applied *Vernonia* inconsistently, if not irreconcilably.¹⁰ Five years after *Vernonia*, the outer constitutional contours of suspicionless student drug testing remain very much indefinite.¹¹

Having opened the constitutional door to suspicionless student testing, *Vernonia* has predictably given rise to the implementation of drug testing policies in school districts nationwide.¹² These policies vary in scope, some applicable only to student-athletes as in *Vernonia*, others extending further to include all students participating in extracurricular activities¹³ or students

⁵ Drug testing is particularly prevalent in the workplace. See Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 561 (1988) (reporting that nearly 50% of the Fortune 500 companies test employees for drug use).

⁶ For an (unsuccessful) earlier attempt at imposing suspicionless student testing, see *Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁸ See *id.* at 665.

⁹ See discussion *infra* Part II.

¹⁰ See *infra* notes 178-191 and accompanying text.

¹¹ See *Contradictory court decisions make your rights to test for drug use unclear*, 29 YOUR SCHOOL & THE LAW, Sept. 10, 1999, at 1.

¹² Kentucky is no stranger to student drug testing. See *More Schools in Kentucky Test Athletes for Drugs*, EVANSVILLE COURIER & PRESS, Aug. 22, 1999, at B6 (noting that 17 of Kentucky's 176 school districts have implemented drug testing policies and predicting that this number will increase); Paul Baldwin, *Drug Tests for High School Athletes Become Routine*, COURIER-JOURNAL (Louisville, Ky.), Apr. 28, 1999, at G1 (reporting that more than 1000 Kentucky students had been tested as of February 1999).

¹³ See *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir.), *cert. demed.*, 119 S. Ct. 68 (1998).

involved in physical altercations.¹⁴ Some policies have been enacted to combat demonstrated local drug problems, as in *Vernonia*; others have been adopted without any evidence of a local problem at all. Considering the strong public support for student testing, it is likely that more school districts will enact policies,¹⁵ some of which are sure to test *Vernonia*'s reach.¹⁶

Vernonia's inconsistent application and uncertain boundaries, combined with the expected increase in the number of school districts implementing drug testing policies, punctuate the significance of a lingering, fundamental question: what are the constitutional boundaries of suspicionless student drug testing in America's public schools?¹⁷ Stated differently, what are the constitutional prerequisites to a valid student policy?¹⁸ This Note addresses these questions by examining *Vernonia* and

¹⁴ See *Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1254 (1999).

¹⁵ Popular support for expanded student drug testing is reflected in former presidential candidate Elizabeth Dole's inclusion of broad testing proposals as a central component of her education plan. See Sandra Sobieraj, *Dole Wants Schools to be Safe, Orderly*, DESERET NEWS (Salt Lake City, Utah), Sept. 24, 1999, at A8. Cf. Jessica Portner, *Drug Testing Latest Tactic in Prevention*, EDUC. WK., Apr. 7, 1999, at 1 (noting that more than 100 school districts in 20 states now require drug testing of student-athletes).

¹⁶ At least one Kentucky school district was considering a policy that would have tested *Vernonia*'s limits. See *District Employees and Some Students Could Be Tested*, Associated Press Newswires, Aug. 16, 1999, available in WESTLAW, 8/16/99 APWIRE 22:01:00 (reporting that a proposal to adopt an expansive policy was pending with the Harlan County Board of Education). That proposal is no longer pending, but the Harlan County Board plans to implement a policy this year. See Telephone Interview with Rep. Johnnie Turner, Attorney for the Harlan County Board of Education (Jan. 13, 2000).

¹⁷ A policy could theoretically go so far as to require testing of all students required to attend school. Whether such a policy is constitutional is the question understood to be reserved by the *Vernonia* court. See *supra* notes 56-59 and accompanying text. Testing all students would amount to a virtual evisceration of Fourth Amendment search and seizure protection in the public school context. Though post-*Vernonia* decisions have generally looked favorably upon broader policies, testing all students represents such a radical reading of *Vernonia* that the possibility has attracted only passing scholarly attention. See, e.g., John C. Martin, Note, *Drug Testing All Students: The Wrong Answer to a Difficult Question*, 6 KAN. J.L. & PUB. POL'Y 123 (1997).

¹⁸ The question whether a drug policy is constitutional must be considered on two levels. First, is the search itself constitutional? Second, is the penalty for

its offspring in an effort to deduce the breadth of *Vernonia* as perceived by the lower courts.¹⁹ Part I outlines *Vernonia* itself and considers the decision's significance.²⁰ Part II reviews *Vernonia*'s progeny and identifies the questions posed by the evolution of these cases.²¹ Part III contrasts *Vernonia*'s various interpretations and concludes that lower courts have read *Vernonia* inconsistently, producing incoherent legal standards and rendering the constitutional limits of suspicionless student testing incomprehensible.²²

I. *VERNONIA SCHOOL DISTRICT 47J V ACTON*:
BROADENING THE CLASS OF CONSTITUTIONALLY PERMISSIBLE
SUSPICIONLESS SEARCHES

The Supreme Court's 1995 decision in *Vernonia School District 47J v. Acton*²³ stands as the foundational case in suspicionless student drug testing.²⁴ In *Vernonia*, an Oregon seventh-grader refused to consent to

violating the policy constitutional? This Note is concerned with the first inquiry, which raises questions under the federal Constitution. The second inquiry is largely a question of state law, which may present additional hurdles to a policy's constitutionality. In Kentucky, for example, a policy making school attendance conditional on a passing drug test would seem to conflict with a student's state constitutional right to a public school education. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky 1989). Such a policy could also be read as conflicting with state compulsory education laws. See KY. REV. STAT. ANN. § 159.010 (Michie Supp. 1998).

¹⁹ This Note is concerned with the evolution of *Vernonia* as applicable only to written drug policies that test via urinalysis. The few cases applying *Vernonia* in the context of dog sniffs are omitted, primarily because there is considerable disagreement as to whether a dog sniff constitutes a search for purposes of the Fourth Amendment. Compare *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999) (rejecting the Seventh Circuit's conclusion and adopting the Fifth Circuit's view in holding that a dog sniff is a search under the Fourth Amendment) with *Commonwealth v. Cass*, 709 A.2d 350, 357 (Pa.) (stating that "[c]ase law makes clear that a canine sniff is not a search under the Fourth Amendment"), *cert. denied sub nom. Cass v. Pennsylvania*, 119 S. Ct. 89 (1998).

²⁰ See *infra* notes 23-60 and accompanying text.

²¹ See *infra* notes 61-176 and accompanying text.

²² See *infra* notes 177-195 and accompanying text.

²³ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

²⁴ The *Vernonia* decision has produced voluminous scholarship. See, e.g., Hallam, *supra* note 3; Irene Merker Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV 349 (1996).

random drug testing, as required to participate in athletics under the local school district's drug policy. The district's policy called for suspicionless testing via urinalysis. When the school district denied him authorization to play athletics, the student brought suit in federal district court challenging the policy's constitutionality. The suit alleged that testing under the policy constituted an unreasonable search in violation of the Fourth Amendment to the U.S. Constitution.²⁵ The United States District Court for the District of Oregon dismissed the suit. On appeal, the Ninth Circuit reversed.²⁶

In considering the constitutionality of the school district's drug policy, Justice Scalia, writing for the Court, first outlined why the policy was subject to Fourth Amendment scrutiny.²⁷ As the Fourth Amendment is applicable to the states through the Fourteenth Amendment,²⁸ and because a urinalysis is a search under the Fourth Amendment,²⁹ the district's drug policy was subject to Fourth Amendment restrictions. The Court then announced a balancing test—the hallmark of the *Vernonia* decision—as the standard by which to judge the reasonableness of the challenged search:

At least in a case [challenging a drug test], where there was no clear practice at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard “is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.”³⁰

While acknowledging that “reasonableness” generally requires that a warrant be obtained, and that warrants cannot issue absent probable cause, the Court noted that a warrant is not *always* necessary to establish

²⁵ See *Vernonia*, 515 U.S. at 652. See also U.S. CONST. amend. IV. The Fourth Amendment reads:

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.

Id. The school district's policy was also challenged under an analogous provision of the Oregon state constitution. See *Vernonia*, 515 U.S. at 652.

²⁶ See *Vernonia*, 515 U.S. at 652.

²⁷ See *id.*

²⁸ See *id.* (citing *Elkins v. United States*, 364 U.S. 206, 213 (1960)).

²⁹ See *id.* (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)).

³⁰ *Id.* at 652-53 (quoting *Skinner*, 489 U.S. at 619) (footnotes omitted).

“reasonableness” and that “when a warrant is not required probable cause is not invariably required either.”³¹ The Court further noted that it had recognized the constitutionality of searches on less than probable cause “when special needs make the warrant and probable-cause requirement impracticable,”³² and moreover that it had recognized “‘special needs’ in the public school context.”³³ The Court cited its earlier decision in *New Jersey v. T.L.O.*,³⁴ upholding a public school search lacking probable cause but supported by “individualized suspicion of wrongdoing.”³⁵ The Court reiterated its position that “the Fourth Amendment imposes no irreducible requirement of suspicion.”³⁶ In fact, the Court noted that certain searches have passed Fourth Amendment muster absent any suspicion at all.³⁷ Thus, the fact that the school district’s policy constituted a suspicionless search did not compel the conclusion that the policy was unreasonable.

In assessing the drug testing policy’s intrusion on the student’s Fourth Amendment interests, the Court first considered “the nature of the privacy interest upon which the search intrudes.”³⁸ The Court stated that the Fourth Amendment protects only socially legitimate expectations of privacy,³⁹ that students in public schools were children temporarily in the custody of the state,⁴⁰ and that “for many purposes ‘school authorities ac[t] in loco parentis.’”⁴¹ The Court cited mandatory vaccinations as an example of a necessary intrusion on students’ privacy interests in the public school context⁴² and borrowed language from *T.L.O.* in reasoning that “students within the school environment have a lesser expectation of privacy than members of the population generally.”⁴³ The Court found it significant that

³¹ *Id.* at 653.

³² *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

³³ *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

³⁴ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³⁵ *Vernonia*, 515 U.S. at 653.

³⁶ *Id.* (quoting *T.L.O.*, 469 U.S. at 342).

³⁷ *See id.* at 653-54 (noting that suspicionless searches had been upheld for railroad personnel and federal customs officers, and in the context of automobile checkpoint searches for contraband and illegal immigrants).

³⁸ *Id.* at 654.

³⁹ *See id.* (citing *T.L.O.*, 469 U.S. at 338).

⁴⁰ *See id.*

⁴¹ *Id.* at 655 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)) (alteration in original).

⁴² *See id.* at 656-57

⁴³ *Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348).

the district's policy did not apply to all students but to student-athletes only, who the Court found to possess even lesser expectations of privacy⁴⁴ "By choosing to 'go out for the team,' [student-athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."⁴⁵ Thus, the student-athlete's lowered expectations of privacy tipped the scales toward a finding of reasonableness.

The Court next considered "the character of the intrusion complained of,"⁴⁶ the relevant considerations being the urinalysis procedure and the information it disclosed.⁴⁷ As to the procedure, the policy provided for production of urine samples under limited supervisory conditions—an environment the Court found no more intrusive than that encountered in public restrooms.⁴⁸ Thus, the policy's urine collection process was deemed to compromise privacy interests only "negligibl[y]."⁴⁹ As to disclosure, test results were divulged to a limited number of administrators, and positive tests were not revealed to law enforcement officials. The collection process did require students to reveal any medications they were taking, however, a fact the Court acknowledged as concerning but not "*per se* unreasonable."⁵⁰ Weighing these factors, the Court determined that "the invasion of privacy was not significant."⁵¹

Finally, the Court turned to the last variable demanding consideration: "the nature and immediacy of the governmental concern and the efficacy of [the drug policy] for meeting it."⁵² Regarding the nature of the governmental concern, the Court cited the "severe" effects of drug use during the school years, the impact of drug-infested schools on the entire school community, and the increased risk of injury to student-athletes as supporting the conclusion that "the nature of the concern [was] important—indeed, perhaps compelling."⁵³ On the issue of the immediacy of the governmental concern, the Court deferred to the district court's findings that the student body was in a "state of rebellion" and that widespread drug use among student-athletes was fueling disciplinary problems of "epidemic

⁴⁴ *See id.* ("Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful.")

⁴⁵ *Id.*

⁴⁶ *Id.* at 658.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 659.

⁵¹ *Id.* at 660.

⁵² *Id.*

⁵³ *Id.* at 661-62.

proportions.”⁵⁴ With respect to the efficacy of the means chosen to address the district’s problem, the Court rebuffed the argument that there were more appropriate means to accomplish the same end—namely, testing upon suspicion of drug use—noting that it has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”⁵⁵ The Court thus concluded that both the nature and immediacy of the governmental concern, as well as the policy’s efficacy, strongly supported a finding of reasonableness.

Weighing the various elements under its balancing test, the Court found the policy to meet Fourth Amendment standards: “Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia’s policy is reasonable and hence constitutional.”⁵⁶ But the Court quickly warned that its holding should not be liberally construed, cautioning “against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”⁵⁷ Importantly, the Court emphasized the government’s unique relationship vis-a-vis the students—that of “guardian and tutor”—as “[t]he most significant element in th[e] case.”⁵⁸ Justice Ginsburg’s concurrence explicitly recognized the limited reach of the Court’s decision, emphasizing the voluntary nature of athletic participation, the mild penalty for testing positive (suspension from athletic participation), and the limited nature of the question presented.⁵⁹

Vernonia added random student drug testing to the short list of constitutionally permissible suspicionless searches. The decision stamped suspicionless student testing with the constitutional imprimatur and assured school districts nationwide that random testing was permissible—at least on facts similar to those in *Vernonia*.⁶⁰ Viewed in hindsight, *Vernonia*

⁵⁴ *Id.* at 663 (quoting *Acton v Vernonia Sch. Dist.* 47J, 796 F Supp. 1354 (D. Or. 1992)). The Court noted that the school district did not act haphazardly in implementing its drug policy. *See id.* Investigation produced strong evidence of a drug culture and suggested that use among student-athletes was commonplace. *See id.* at 649.

⁵⁵ *Id.* at 663 (citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 629 n.9 (1989)).

⁵⁶ *Id.* at 664-65.

⁵⁷ *Id.* at 665.

⁵⁸ *Id.*

⁵⁹ *See id.* at 666 (Ginsburg, J., concurring).

⁶⁰ Some commentators have argued that the Vernonia School District’s extensive study and documentation of its drug problem helped persuade the courts

represents the beginning of a constitutional continuum measuring the permissible scope of suspicionless student testing. Despite the Court's inclusion of limiting language, the decision has given rise to a host of questions concerning the decision's reach. If a school district may test student-athletes, may it test a broader class of the student population? For example, may a district test not only athletes but all students participating in extracurricular activities? May testing be a prerequisite to school attendance? How far is too far? Predictably, *Vernonia* gave birth to a short line of cases testing the constitutional limits of suspicionless student testing. Analysis of the decision's progeny follows and compels these conclusions: first, *Vernonia* has been extended; second, its application has been inconsistent; and third, its outer limits are obscure.

II. *VERNONIA*'S PROGENY EXPLORING THE CONSTITUTIONAL LIMITS OF SUSPICIONLESS STUDENT TESTING

As applicable to student drug testing policies, four cases comprise *Vernonia*'s progeny. The cases address the question whether *Vernonia* may be applied to sanction more ambitious policies or policies enacted under different conditions from those faced in *Vernonia*. Individually, the cases raise fundamental questions respecting post-*Vernonia* standards for suspicionless student testing. Collectively, the cases illustrate *Vernonia*'s complexity.

A. *Todd v. Rush County Schools*.⁶¹ *Is Testing Not Restricted to Student-Athletes?*

The Supreme Court's holding in *Vernonia* made clear that schools could constitutionally test student-athletes but reserved the question whether broader policies may be constitutional as well. The absence of clear constitutional limits thus allowed local school districts to test

that its policy was both necessary and reasonable and that the governmental concern at issue was strong. See, e.g., Charles J. Russo & Timothy J. Ilg, *Drug Testing of Students: Suggestions for Sound Policy Development*, 134 Ed. Law Rep. 435 (July 8, 1999). This sentiment is reflected by the fact that most drug testing policy development guides advise school districts to conduct extensive documentation and study before implementing a drug policy. See *id.* at 436.

⁶¹ *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir.), cert. denied, 119 S. Ct. 68 (1998).

Vernonia's outer bounds. The Seventh Circuit was presented with such a test in 1998, in the form of *Todd v. Rush County Schools*. In *Todd*, a high school student brought suit challenging the local school board's drug testing policy, which required submission to random drug testing as a prerequisite to participation in extracurricular activities.⁶² The United States District Court for the Southern District of Indiana granted the school district's motion for summary judgment.⁶³ The student then appealed to the Seventh Circuit.⁶⁴

The drug policy challenged in *Todd* was significantly broader than that upheld in *Vernonia* in three notable respects. First, the policy at issue in *Todd* subjected a greater population of the student body to testing and expanded the list of drugs detected. Most significantly, the policy applied to all students participating in extracurricular activities, not just student-athletes.⁶⁵ Additionally, the policy tested for alcohol and tobacco—not just illegal drugs.⁶⁶ Second, sanctions for failing a drug test were much more severe in *Todd*. Though the consequences for failing a test in *Vernonia* were—at worst—inability to participate in athletics,⁶⁷ under the *Todd* policy a second failed test could result in disciplinary action by the school.⁶⁸ Third, unlike the *Vernonia* policy, which was enacted in response

⁶² See *id.* at 984.

⁶³ See *Todd v. Rush County Schs.*, 983 F. Supp. 799 (S.D. Ind. 1997), *aff'd* 133 F.3d 984 (7th Cir.), *cert. demed.*, 119 S. Ct. 68 (1998).

⁶⁴ See *Todd*, 133 F.3d at 984-85.

⁶⁵ See *id.* at 984. Actually, the *Todd* policy was even broader. The policy also provided that a student failing a drug test could not drive to or from school. See *id.* In *Todd*, all students initially consented to a drug test. If a failing result was reported, the student was not eligible to participate in extracurricular activities and driving privileges to and from school were revoked. See *id.* at 985. By contrast, in *Vernonia* students were subjected to drug tests only if they first elected to participate in athletics. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995). The *Todd* court did not rule on the question of whether revocation of driving privileges after failing a drug test is constitutional. The court simply stated that because plaintiffs were challenging the policy only in order to participate in extracurricular activities, they need not address the issue. See *Todd*, 133 F.3d at 985-86 n.1.

⁶⁶ See *Todd*, 133 F.3d at 984.

⁶⁷ See *Vernonia*, 515 U.S. at 651.

⁶⁸ See *Todd*, 133 F.3d at 985. The *Todd* policy had an indirect relationship to disciplinary action. A failed suspicionless test could not result in disciplinary action but could trigger subsequent suspicion-based testing, which carried penalties such as suspension or expulsion. See *id.*

to a drug problem described as “epidemic,”⁶⁹ the *Todd* policy was implemented with little evidence of a drug problem. The school district relied on an inconclusive research study and scant anecdotal evidence as the basis for its policy.⁷⁰

Despite these differences in the *Vernonia* and *Todd* policies, the Seventh Circuit affirmed. The opinion was brief and cursory. In support of its conclusion, the court noted that extracurricular activities, like athletics, “require healthy students,”⁷¹ that, as in *Vernonia*, the policy mandated drug testing for voluntary activities only, and that extracurricular students, like athletes, were role models who serve as examples to others.⁷² After noting these similarities, the court concluded that the “Rush County Schools’ drug testing program [was] sufficiently similar to the program[] in *Vernonia* to pass muster under the Fourth and Fourteenth Amendments.”⁷³

This conclusion may be attacked on at least two grounds, however. For one, the similarities relied upon between the *Todd* and *Vernonia* policies seem grossly overshadowed by their differences, as outlined above. Undeniably, the *Todd* policy was much broader on its face in that it reached not only athletic participation, but all extracurricular activities. Second—and more importantly—the *Todd* court declined to apply *Vernonia*’s clearly articulated balancing test. Instead, the court in *Todd* limited its brief analysis to a consideration of the similarities between the two policies, the concern for the health of the district’s students, and the voluntary nature of participation in extracurricular activities.⁷⁴ These factors are but a few of the many considerations to be weighed under the *Vernonia* balancing test, however—a point that was not lost upon at least one Seventh Circuit judge.⁷⁵

Thus, the Seventh Circuit extended *Vernonia* in a brief opinion that failed to apply the test announced in the case on which it purported to rely. Despite its assailable outcome, *Todd* expanded the limits of public school drug testing, at least in the Seventh Circuit.

⁶⁹ See *supra* note 54 and accompanying text.

⁷⁰ See *Todd*, 133 F.3d at 985.

⁷¹ *Id.* at 986.

⁷² See *id.*

⁷³ *Id.* at 986-87.

⁷⁴ See *id.* at 986.

⁷⁵ See *Todd v. Rush County Schs.*, 139 F.3d 571, 573 (7th Cir.) (en banc) (Wood, J., dissenting) (denying a petition for rehearing), *cert. denied*, 119 S. Ct. 68 (1998).

B. *Trinidad School District No. 1 v Lopez*:⁷⁶ A “Nexus” Requirement?

Vernonia was next applied in *Trinidad School District No. 1 v Lopez*, decided in 1998 by the Colorado Supreme Court. The question presented in *Trinidad* was akin to that in *Todd*: whether *Vernonia* could be read as sanctioning drug testing not only for student-athletes but for all students participating in extracurricular activities. Though the *Trinidad* policy nominally applied to extracurricular activities only, in practice the policy required testing of students in “regular class[es],” at least in one instance.⁷⁷ In this respect the policy went even further than in *Todd*.⁷⁸

In *Trinidad*, plaintiff Lopez, a high school senior, refused to consent to random drug testing pursuant to the local school district’s drug policy and was subsequently denied authorization to participate in the school’s marching band. As a result, Lopez was precluded from enrolling in a “for-credit” music class.⁷⁹ Lopez sued, challenging the suit on Fourth Amendment grounds.⁸⁰

⁷⁶ *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (en banc).

⁷⁷ See *id.* at 1105. The *Trinidad* policy required all sixth through twelfth-grade students to submit to drug testing before participating in their first extracurricular activity in a given year and at any time thereafter upon reasonable suspicion. See *id.* at 1098. The policy tested only for drugs, not alcohol. See *id.* at 1100. It also required that students disclose any prescription drugs they were taking. See *id.* at 1098. The tests were administered by an independent firm and consisted of a urinalysis drawn in open-stalled bathrooms. Positive test results were released to only a very few persons: the district’s superintendent, the local school principal, and the activity coach or sponsor. See *id.* at 1100.

⁷⁸ In *Todd*, it is impossible to tell from the court’s description of the policy whether it too might have applied to some students taking courses in the regular curriculum. The *Todd* court presumably was not faced with that question since it was not raised. See *Todd*, 133 F.3d at 985-86 n.1.

⁷⁹ See *Trinidad*, 963 P.2d at 1107

⁸⁰ See *id.* at 1097 Lopez challenged the drug testing policy on other grounds as well; specifically, he argued that the policy violated Article II, Section 7 of the Colorado Constitution and was unconstitutionally vague. The trial court ruled that the policy was not unconstitutionally vague. See *id.* However, the Supreme Court of Colorado specifically stated that its decision was predicated on interpretation of the Fourth Amendment and, therefore, they need not decide whether the policy also violated the Colorado Constitution. See *id.* at 1097-98 n.5.

After finding that the case was not moot,⁸¹ the court immediately recognized the broad sweep of the policy:

[W]e first analyze the actual scope of the Policy. Trinidad High School offers two elective band classes, a brass/percussion class and a woodwinds class. Both of these classes are for-credit classes and are graded. A student enrolling in either or both of these classes is required to participate in the marching band and a student's grade depends in part on the student's performance in the marching band. Conversely, in order to participate in the marching band, a student must enroll in one or both of the band classes. *Thus, while a cursory reading of the Policy indicates that it reaches only those students who are participating in voluntary extracurricular activities, the real scope of the Policy is not so limited. Under the Policy, students who are enrolled in a regular class must provide a urine sample for drug testing.*⁸²

The court noted that *Vernonia* established a "framework"⁸³ for analyzing the constitutionality of suspicionless student testing and identified the controlling nature of *Vernonia's* "three factor test."⁸⁴ The court then applied the test by analyzing its three factors: first, the "nature of the privacy interest"⁸⁵ intruded upon; second, the "character of the intrusion";⁸⁶ and third, the nature and immediacy of the "governmental concern" and the efficacy of the policy in meeting it.⁸⁷

With respect to the "nature of the privacy interest"⁸⁸ invaded by the *Trinidad* policy, the court cited two factors as supporting its conclusion that

⁸¹ *See id.* at 1102. The issue of mootness recurs in this line of cases wherein students challenge drug testing policies. Given the long duration of litigation today—two to three years is quite common—it is not surprising that a student may graduate before his or her case can be heard. Here, Lopez had graduated from high school before the time of argument. The court found the case to fit into both the "capable of repetition yet evading review" and "great public importance" exceptions to the mootness doctrine. *See id.*

⁸² *Id.* at 1104-05 (emphasis added).

⁸³ *Id.*

⁸⁴ *Id.* at 1106. The *Trinidad* court thus used different nomenclature in describing *Vernonia's* rule. The *Vernonia* Court had called it a "balancing test." *See Vernonia Sch. Dist. 47J v Acton*, 515 U.S. 646, 652-53 (1995).

⁸⁵ *Trinidad*, 963 P.2d at 1106.

⁸⁶ *Id.* at 1108.

⁸⁷ *See id.* at 1108-10.

⁸⁸ *Id.* at 1106.

“the students tested [under the *Trinidad* policy] had higher privacy expectations than the students in *Vernonia*.”⁸⁹ First, the degree of “communal undress”⁹⁰ required for participation in athletic activities is much higher than that required for participation in the band: “one can hardly argue that the marching band is ‘not for the bashful.’”⁹¹ Second, the *Trinidad* policy covered not only those students voluntarily electing to participate in athletics but, in some cases, students enrolled in “for-credit” courses as well. In the court’s view, “the type of voluntariness to which the *Vernonia* Court referred does not apply to students who want to enroll in a for-credit class that is part of the school’s curriculum.”⁹² Turning then to the test’s second factor—the “character of the intrusion”⁹³—the court found the *Vernonia* policy analogous. While questioning *Vernonia*’s likening of the urinalysis procedure to everyday use of the restroom, the court conceded that “the analysis set forth in *Vernonia* dictates that we treat the intrusion [in *Trinidad*] as negligible.”⁹⁴

The court most significantly distinguished *Vernonia* in considering the test’s third factor: the governmental concern at issue and the efficacy of the district’s policy in addressing it. Though accepting the trial court’s finding that the district’s concern was “important—indeed perhaps compelling,”⁹⁵ the court took exception to its analysis:

[T]he trial court failed to give proper weight to three important facts: 1) that the Policy swept within its reach students who were enrolled in for-credit, instrumental music classes and participated in the marching band, 2) that the Policy included student groups that were not demonstrated to have contributed to the drug problem in the District, and 3) that there was no demonstrated risk of immediate physical harm to members of the marching band.⁹⁶

Unlike the *Vernonia* Court, which attempted to justify testing student-athletes in part by citing their status as role models, the *Trinidad* court found such justification unsatisfactory. From their perspective, “simply

⁸⁹ *Id.* at 1107.

⁹⁰ *Id.*

⁹¹ *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995)).

⁹² *Id.*

⁹³ *Id.* at 1108.

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *Vernonia*, 515 U.S. at 661).

⁹⁶ *Id.* at 1109.

being a role model by virtue of participation in an extracurricular activity is insufficient to support a conclusion that the school's mandated drug testing program was reasonable."⁹⁷ Moreover, *Vernonia's* emphasis on the voluntary nature of extracurricular participation was impliedly questioned. The court noted that though participation in extracurricular activities is "on a technically volunteer basis,"⁹⁸ such thinking is, in fact, misleading; extracurricular participation is necessary to provide experience for those students wishing to matriculate to college or to "pursue professional vocations."⁹⁹

Having evaluated the relevant factors, the court then weighed them. Balancing the respective interests—the higher privacy expectations of band members as compared to athletes, the negligible intrusion upon the band members' privacy, and the overly intrusive drug policy chosen to address the problem—the court found the policy unconstitutional. "Based on our analysis of all of these factors, [the court] conclude[s] that the Policy is not reasonable and thus cannot stand under the United States Constitution."¹⁰⁰

The significance of the *Trinidad* decision transcends its mere affirmation of *Vernonia's* balancing test as the proper analytical framework for assessing the constitutionality of suspicionless student testing policies. To the *Trinidad* court, it was insufficient that there was a well-documented drug problem in the school district; there was no evidence of drug use among *band members*.¹⁰¹ To the contrary, the band director and a school board member testified that drug use was not a problem among band members and that band members were comparatively well-behaved as measured against the general student body.¹⁰² There was no empirical support of any linkage between participation in band and drug use; although the district had commissioned an independent research study that reported high drug use in the district's schools, the study did not "quantify the level of drug use among participants in the various extracurricular activities."¹⁰³ Though the lack of any linkage between band members and the district's drug problem clearly carried weight, the *Trinidad* court confined itself to *Vernonia's* test, placing its implicit linkage requirement

⁹⁷ *Id.* (citing *Chandler v. Miller*, 520 U.S. 305 (1997)).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1110.

¹⁰¹ *See id.* at 1109.

¹⁰² *See id.*

¹⁰³ *Id.* at 1099 n.8.

under the rubric of *Vernonia*'s "governmental concern" factor.¹⁰⁴ However placed, it remains that the *Trinidad* court appears to have read *Vernonia* as requiring consideration of a fourth factor: the requirement that there be some sort of "nexus" linking the documented drug problem with those students tested under the policy.¹⁰⁵

The *Trinidad* decision suggests the possibility that other courts may adopt a similar approach in applying *Vernonia*. Such a judicial embrace of *Trinidad*'s "nexus" requirement would serve to raise the constitutional bar for school districts attempting to establish a policy's constitutionality. As a procedural matter, reading a "nexus" requirement into the *Vernonia* framework would appear to require school districts to conduct pre-implementation drug use studies in order to establish an empirical linkage between a district's drug problem and those students subject to testing. Recent decisions make no mention of a "nexus" requirement, however.¹⁰⁶

C. *Willis v. Anderson Community School Corp.*:¹⁰⁷ *Must a Suspicion-based Regime Be Impractical?*

The next major battle over the constitutionality of suspicionless student testing was *Willis v. Anderson Community School Corp.*, decided by the Seventh Circuit in 1998.¹⁰⁸ Ironically, the Seventh Circuit was presented with *Willis* only one year after rendering the *Todd* decision, the first major extension of *Vernonia* in the lower federal courts.¹⁰⁹

In *Willis*, high school freshman Willis was suspended for fighting and subsequently refused to submit to testing as called for under the drug testing policy of the local school board equivalent (the "Corporation"). Consequently, he was suspended a second time and advised that if he refused to be tested upon his return he would face a third suspension or even expulsion. Willis sued, challenging the Corporation's drug policy on

¹⁰⁴ See *id.* at 1108-09.

¹⁰⁵ See *id.* The label used to describe this requirement is borrowed from Justice O'Connor's dissent in *Vernonia*. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 685 (1995) (O'Connor, J., dissenting) (arguing that "the far more reasonable choice would [be] to focus on the class of students violat[ing] published school rules against severe disruption in class and around campus—disruption that had a strong *nexus* to drug use") (emphasis added) (citations omitted).

¹⁰⁶ See *infra* Parts II.C-D.

¹⁰⁷ *Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1254 (1999).

¹⁰⁸ See *id.*

¹⁰⁹ See *supra* Part II.A.

Fourth Amendment grounds. After the United States District Court for the Southern District of Indiana ruled in favor of the Corporation, Willis appealed to the Seventh Circuit.¹¹⁰

The *Willis* policy was unlike those challenged in earlier cases in that the policy conspicuously targeted a very specific and identifiable student population: disruptive students. Specifically, the policy required drug and alcohol testing via urinalysis for any student who was caught with tobacco, was suspended for three days or more for fighting, was habitually truant, or violated any other school rule resulting in at least a three-day suspension.¹¹¹ The *Willis* policy was also notable—and distinguishable from the *Vernonia*,¹¹² *Todd*,¹¹³ and *Trinidad*¹¹⁴ cases—in two other respects. First, the sanctions for failing to comply with the testing policy were much more severe: refusal to seek counseling after testing positive brought expulsion, and failure to submit to testing was deemed an admission of unlawful drug use.¹¹⁵ Second, there was minimal evidence of a drug problem in the school district.¹¹⁶

The *Willis* court began by addressing the somewhat novel argument that suspicionless searches should be upheld only upon a showing that suspicion-based searches are impractical under the circumstances. The *Vernonia* Court had given little consideration to the matter, noting only that the “[the Court] ha[s] repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable”¹¹⁷ and that, in any event, suspicion-based searches were less advisable under the conditions faced in

¹¹⁰ See *Willis*, 158 F.3d at 417

¹¹¹ See *id.* The policy also provided for testing of any student upon “reasonable suspicion.” Because the drug policy provided for both suspicion-based and suspicionless drug testing, the court supplied a bifurcated analysis. First, the court noted that testing upon reasonable suspicion was constitutional under *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The court rejected the Corporation’s argument that fighting itself was sufficient to establish reasonable suspicion, however, holding instead that this determination must be made on a case-by-case basis. See *Willis*, 158 F.3d at 419 (noting that “while the Corporation’s own statistics suggest some relationship between the use of illegal substances and fighting, the relationship is by no means conclusive”).

¹¹² See *supra* Part I.

¹¹³ See *supra* Part II.A.

¹¹⁴ See *supra* Part II.B.

¹¹⁵ See *Willis*, 158 F.3d at 417

¹¹⁶ See *id.* at 418-20.

¹¹⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995).

Vernonia.¹¹⁸ The Fourth Amendment picture had since been clouded by the Supreme Court's opinion in *Chandler v. Miller*,¹¹⁹ however, which suggested that suspicion-based testing must be shown impractical under the circumstances in order for a suspicionless approach to pass constitutional muster. The *Willis* court determined that the practicality of suspicion-based testing was not to be analyzed independently, but should be assessed within the context of *Vernonia*'s established test.¹²⁰ Significantly—and quite inexplicably—the Seventh Circuit in *Willis* endeavored to apply *Vernonia*'s balancing test, something it had not done in *Todd*.

Considering the nature of the privacy interest at stake,¹²¹ the court reiterated the finding—developed in *Vernonia* and *Todd*—that students in public schools have a lower expectation of privacy as measured against the general population. The court found the facts before it to be distinguishable from *Vernonia*'s in two significant respects, however. First, the targeted students were not exposed to “communal undress,” as in *Vernonia*.¹²² Second, unlike *Vernonia* and *Todd*, where testing was linked to participation in *voluntary* activities (athletic and extracurricular, respectively), the Corporation tested students suspended for fighting—an activity the *Willis* court deemed to be inherently *involuntary*.¹²³ The court reasoned that under the *Willis* policy, students “[could not] be described as voluntarily engaging in misconduct,”¹²⁴ at least not under the terms of the Corporation's policy

[In *Vernonia*], the Court noted a series of steps that an athlete had to take in order to compete. This course of conduct presumably indicates forethought and at least some appreciation of all that participation in an extracurricular activity entails. We doubt that this degree of consider-

¹¹⁸ See *id.* at 663-64.

¹¹⁹ *Chandler v. Miller*, 520 U.S. 305 (1997).

¹²⁰ See *Willis*, 158 F.3d at 421 (“[W]e will not short-circuit the special needs inquiry by focusing *solely* on the practicality of the search. Instead, we examine each of the factors set forth in *Vernonia*.”).

¹²¹ The *Willis* court did not consider the “character of the intrusion” factor in its analysis of the student's privacy interest because *Willis* had not contested the intrusion. The court stated that for this reason, and because the intrusion appeared to be no more intrusive than that in *Vernonia*, it would presume that the intrusion was not significant. See *id.* at n.3.

¹²² See *id.* at 422. The court noted that the *Todd* court “apparently did not consider ‘communal undress’ to be a significant distinction between athletics and other extracurricular activities.” *Id.* (citing *Vernonia*, 515 U.S. at 657).

¹²³ See *id.*

¹²⁴ *Id.*

ation—and certainly this appreciation of the consequences—characterizes the typical fight between fifteen year-olds.

[T]he Corporation does not rely on the proverbial “who started it” in deciding when to suspend after a fight. In other words, the Corporation suspends the victim of the instigator, provided that the victim fights back. Certainly the decision to return a punch—often made in less time than it takes the aggressor to deliver the second blow—cannot be analogized to the sort of measured conduct or degree of control discussed in *Vernonia*.¹²⁵

Due in part to the involuntary nature of the activity linked to testing, the court concluded that, while the targeted student population had a lower expectation of privacy as compared to the general public, “their privacy interest [was] nonetheless stronger than that of the students discussed in *Vernonia* and *Todd*.”¹²⁶

The court then considered the governmental need at issue. Alluding to the general hazards of drug use and the special danger drugs pose in the school context, the court acknowledged an “overwhelming temptation . . . to make the importance of deterring drug use among schoolchildren the beginning and end of [its] analysis.”¹²⁷ But the court resisted the impulse, noting that if deterrence were the only consideration, *Vernonia* might well have sanctioned blanket testing, and “this it did not do.”¹²⁸ Rather, the court cautioned against the possibility of a case-by-case expansion of *Vernonia*, insisting that “deterrence is insufficient”¹²⁹ to justify the Corporation’s drug policy.¹³⁰ Having warned that the drug policy could not be supported on deterrence grounds alone, the court nevertheless found the Corporation’s concern to be substantially similar to that in *Vernonia* and *Todd*.¹³¹ Though the Corporation’s drug problem in no way approached the “epidemic” level

¹²⁵ *Id.* This language is curious because it contradicts—though it attempts to distinguish—Justice O’Connor’s suggestion, voiced in her *Vernonia* dissent, that testing students who had committed severe infractions would be more appropriate because such a policy would “[give] students control, through their behavior, over the likelihood that they would be tested.” *Vernonia*, 515 U.S. at 685-86 (O’Connor, J., dissenting).

¹²⁶ *Willis*, 158 F.3d at 422.

¹²⁷ *Id.*

¹²⁸ *Id.* (citing *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring)).

¹²⁹ *Id.* at 423.

¹³⁰ *See id.*

¹³¹ *See id.*

found in *Vernonia*, the Corporation did “craft[] its policy to target the narrow group of students that it perceived as most at risk for substance abuse.”¹³² The court therefore concluded that, “the nature and immediacy of the Corporation’s concern [was not] meaningfully less than that of the Vernonia School District.”¹³³

The court, however, did find a “sharp contrast”¹³⁴ between the efficacy of the *Willis* policy and the efficacy of the policies in *Vernonia* and *Todd*, reasoning that the Corporation’s failure to show the impracticality of a suspicion-based regime was fatal to its attempt to impose a suspicionless one.¹³⁵ To the *Willis* court, due consideration of the *Vernonia* test’s “efficacy” element required at least some inquiry into the practicality of a suspicion-based policy because, though suspicionless regimes had been upheld in exceptional circumstances, “the Supreme Court has not sanctioned blanket testing” and “has [not] renounced the proposition that the Fourth Amendment normally requires individualized suspicion.”¹³⁶ Having found it necessary to consider the practicality of a suspicion-based regime, the court reasoned that such an approach was indeed practical on the facts of *Willis*.¹³⁷ For one, the court noted that Indiana law generally required a student to meet with school officials before suspension,¹³⁸ a requirement that provided “an opportunity to observe the child and determine whether there is a reasonable suspicion of substance abuse.”¹³⁹ The Corporation’s opportunity to develop suspicion through this mandatory pre-suspension meeting thus frustrated the Corporation’s attempt “to show a special need that warrant[ed] abandonment of the Fourth Amendment’s usual requirements.”¹⁴⁰ In the court’s view, the practicality of a suspicion-based regime under the unique facts of *Willis* outweighed any similarities to the *Vernonia* and *Todd* policies:

The scenario prescribed by state law—an *individual* meeting between the wrongdoer and a high-ranking agent of the school district—distinguishes this case from those in which the Supreme Court has permitted

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.* at 424-25.

¹³⁶ *Id.* at 423.

¹³⁷ *See id.* at 425.

¹³⁸ *See id.* at 423-24.

¹³⁹ *Id.* at 424.

¹⁴⁰ *Id.*

suspicionless drug testing. [W]ith respect to *Vernonia* (and *Todd*), it was of course infeasible for the Dean of Students or a similar disciplinary figure to meet individually with all the students participating in athletics (or other extracurricular activities).

[W]e are convinced that the Corporation's policy addresses a concern that can be tackled by means of a traditional, suspicion-based approach.¹⁴¹

Having considered the various factors under the *Vernonia* test—and finding the nature and immediacy of the government's concern to be analogous to that in *Vernonia* (but both the policy's efficacy and the individual's privacy interest to be very different)—the *Willis* court found the Corporation's drug policy unconstitutional. Recognizing that it might be “precluding suspicionless drug testing for students who [were] far less sympathetic than those in *Vernonia* or *Todd*,”¹⁴² the court nonetheless rationalized that some boundaries must be drawn so as to stay within the constitutional confines of *Vernonia*.

The *Willis* decision is highly instructive. On a lesser level, the Seventh Circuit acknowledged *Vernonia*'s test as the proper analytical framework to be employed in considering the constitutional propriety of suspicionless student drug testing policies. In this sense the Seventh Circuit did an about-face from the *Todd* decision, where its analysis was characterized by hallow comparisons to *Vernonia*'s facts. Of greater importance, *Willis* implied that a suspicion-based regime must be impractical for a suspicionless policy to be constitutional. *Willis* seems to contradict *Vernonia* on this point.¹⁴³ Developments in the suspicionless drug testing case law—notably the *Chandler*¹⁴⁴ decision—may explain the centrality of this “practicality” consideration in the *Willis* opinion.

Willis is most noteworthy, however, in that it represents the first decision to consider the potential “slippery-slope” effects of *Vernonia*. In extending the “closely guarded category of constitutionally permissible suspicionless searches”¹⁴⁵—without articulating clear boundaries—

¹⁴¹ *Id.*

¹⁴² *Id.* at 425.

¹⁴³ *Vernonia* suggested that the practicality of suspicion-based testing has no bearing on the constitutionality of a suspicionless testing policy. *See supra* note 55 and accompanying text.

¹⁴⁴ *Chandler v. Miller*, 520 U.S. 305 (1997).

¹⁴⁵ *Willis*, 158 F.3d at 423.

Vernonia may be said to have nudged the student drug testing ball down an endless constitutional hill. In its balancing test, *Vernonia* provided a ready framework by which to keep the ball rolling: a court seeing fit to extend *Vernonia* need only balance the scales as it may please to reach the desired outcome. The same court could support its conclusion by noting similarities between the challenged policy and the policy upheld in *Vernonia*. To its credit, the *Willis* court explicitly recognized the potential threat of never-ending *Vernonia* extensions to the Fourth Amendment in the school context:

Vernonia might as well have sanctioned blanket testing of all children in public schools. And thus it did not do.

This tips up the related need to carefully examine the group to which the testing policy applies. *For one insidious means toward blanket testing is to divide students into several broad categories ("extracurricularites," troublemakers, etc.) and then sanction drug testing on a category-by-category basis.* (And the very data relied on by the Corporation reports a relationship between "isolating self" and drug and alcohol use, so perhaps we should not be so quick to assume that a school district will not try to clear a path for testing these non-participating students as well.)¹⁴⁶

In tacitly recognizing *Vernonia*'s indefiniteness, the *Willis* court provided a poignant illustration of *Vernonia*'s potential abuse and displayed a heightened sensitivity to its unwarranted extension. Most significantly, the *Willis* court perceived blanket testing to fall clearly outside the constitutional limits of suspicionless student testing.¹⁴⁷

D. *Miller v Wilkes*.¹⁴⁸ *Must There Be Evidence of a Drug Problem?*

The Eighth Circuit's 1999 decision in *Miller v. Wilkes* represents the most recent application of *Vernonia* in the student drug testing context. Though the decision has dubious precedential value—the case was dismissed as moot per order on rehearing¹⁴⁹—the reported opinion is nonetheless informative.

¹⁴⁶ *Id.* at 422-23 (emphasis added) (citations omitted).

¹⁴⁷ *See id.* at 425.

¹⁴⁸ *Miller v Wilkes*, 172 F.3d 574, *vacated as moot*, 172 F.3d 582 (8th Cir. 1999).

¹⁴⁹ *See id.* at 582.

In *Miller*, an Arkansas high school student sued the local school district (Cave City Schools) after he was barred from participating in extracurricular activities. The student had withheld consent to random drug testing, which was required under the district's drug policy. The policy provided for random testing via urinalysis for students in grades seven through twelve. Though sanctions stemming from a failed test were comparatively mild,¹⁵⁰ any student withholding consent was ineligible to participate in extracurricular activities.¹⁵¹ The United States District Court for the Eastern District of Arkansas granted summary judgment to the school district. Miller appealed.¹⁵²

On appeal, the Eighth Circuit identified the controlling nature of *Vernonia*. The court then applied *Vernonia*'s balancing test, weighing "the scope of the legitimate expectation of privacy" and "the character of the intrusion that is complained of" against "the nature and immediacy of the governmental concern" and the efficacy of [suspicionless testing] for meeting it."¹⁵³

The court first considered the "privacy side of the scale."¹⁵⁴ With respect to the expectation of privacy element, the Eighth Circuit reiterated the *Vernonia* Court's holding that "children in the public school setting have a lower expectation of privacy than do ordinary citizens."¹⁵⁵ Though recognizing that the *Miller* policy was more expansive than *Vernonia*'s—it was applicable not only to athletic activities but to all extracurricular activities generally—the court dismissed this difference as insignificant: "[A]s with athletics, there are features of extracurricular but non-athletic

¹⁵⁰ A failing test resulted in a 20-day probationary period during which the student was recommended to seek counseling. After 21 days the student was retested. A second positive test resulted in the student being prohibited from participation in extracurricular activities for one year. *See id.* at 575-76.

¹⁵¹ Some commentators have misconstrued the true scope of the *Miller* policy—reporting that it required testing of all students—and consequently have overstated the decision's significance. It is not entirely accurate to say that *Miller* upheld testing for all students; rather, because a student withholding consent to random testing suffered only loss of the right to participate in extracurricular activities, the policy is similar in scope to the *Todd* and *Miller* policies. *See, e.g., District May Drug Test All Public School Students 8th Circuit Rules*, 29 *YOUR SCHOOL & THE LAW*, May 14, 1999 at 1.

¹⁵² *See Miller*, 172 F.3d at 576-77

¹⁵³ *Id.* at 578 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

school activities that will lower the privacy expectation to a point below that of fellow students.”¹⁵⁶ The *Miller* court’s conclusion on this point thus mirrored those in the earlier opinions.¹⁵⁷ The court’s analysis of the “character of the intrusion” element also followed the earlier opinions. Noting that the policy was “no more intrusive on the privacy rights of students than the one in *Vernonia*,”¹⁵⁸ the court found its intrusive effects “negligible.” Regarding the other aspect of the policy’s intrusive effect—the “information it discloses concerning the state of the subject’s body, and the materials [the person] has ingested”¹⁵⁹—the court found the policy to be “on point” with that in *Vernonia*. In sum, the court found the privacy-invasive elements of the *Miller* policy analogous to those in *Vernonia* and thus weighing in favor of the policy’s constitutionality.

The court then turned its attention to the other side of the scale under *Vernonia*’s test—the “‘nature and immediacy’ of the concern and ‘the efficacy of [random testing] for meeting it.’”¹⁶⁰ Outlining the many ills of drug use in public school systems, the court found the nature of the governmental concern “no different” than that in *Vernonia*.¹⁶¹ Assessing the policy’s immediacy, however, the court stated that the absence of any evidence of a drug problem in the district’s schools significantly distinguished the case from *Vernonia*:

We must acknowledge that there is not the same “immediacy” here as there was in *Vernonia*, and this is where the facts before us differ most significantly from those the Supreme Court faced when declaring *Vernonia*’s drug testing policy to be constitutional. There is no “immediate crisis” in Cave City public schools; indeed, *there is no record evidence of any drug or alcohol problem in the schools*.¹⁶²

¹⁵⁶ *Id.* at 579.

¹⁵⁷ *See supra* Parts II.A-C.

¹⁵⁸ *Miller*, 172 F.3d at 579.

¹⁵⁹ *Id.* at 579-80. The *Miller* court did note, however, that like the policy in *Vernonia*, the *Miller* policy required students to disclose prescription medication they were taking. Here too the court referenced *Vernonia*, stating that they saw no reason why confidentiality could not be maintained. Thus, the court followed *Vernonia* in refusing to find that this aspect of the policy makes it per se unreasonable. *See id.* at n.5.

¹⁶⁰ *Id.* at 580 (alteration in original).

¹⁶¹ *See id.*

¹⁶² *Id.* (emphasis added) (citation omitted).

Nonetheless, the court did not consider this difference to be determinative, as the lack of any evidence of a drug problem “[did] not mean that the need for deterrence [was] not imperative.”¹⁶³ This distinguishing factor, then, did not “necessarily push the *Miller* policy into unconstitutional territory”¹⁶⁴ To the contrary, the court reasoned, drug use in schools is a “serious social problem today in every part of the country”¹⁶⁵ Therefore, a school district need not wait until “there is a demonstrable problem before the district is constitutionally permitted to take measures that will help protect its schools.”¹⁶⁶ The court thus concluded that the absence of a drug problem—that is, the lack of any “immediacy” with respect to the governmental concern—did not by itself invalidate the district’s policy It was enough that “the possible harm against which the [district sought] to guard [was] substantial.”¹⁶⁷ In reaching this conclusion the court relied heavily on *National Treasury Employees Union v. Von Raab*,¹⁶⁸ where suspicionless drug testing of customs officials was held constitutional despite the absence of any evidence of a drug problem.

Having analyzed the various elements, the court then balanced the competing interests—the “minimal intrusion on the lowered expectation of privacy against the district’s concern and the essentially unchallenged efficacy of its policy”¹⁶⁹—and found the *Miller* policy to pass Fourth Amendment scrutiny Like the *Vernonia* Court, the Eighth Circuit explicitly identified the fact that the testing involved children in the public school context as central to its ruling.¹⁷⁰

Given the development of the *Vernonia* line of cases, *Miller* is subtly curious for two main reasons. First, and perhaps most significantly, *Miller* upheld suspicionless student testing though no drug problem existed. While the degree of drug use varied among the earlier decisions (in some cases

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 580-81.

¹⁶⁶ *Id.* at 581.

¹⁶⁷ *Id.* (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674-75 (1989) (emphasis in original)).

¹⁶⁸ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding random drug testing of federal customs officers who carry arms or are involved in drug interdiction).

¹⁶⁹ *Miller*, 172 F.3d at 581. The court presumed that the *Miller* policy was efficacious because *Miller* had not argued to the contrary. This element of the *Vernonia* test thus received only cursory treatment. *See id.*

¹⁷⁰ *See id.* at 581-82 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995)).

being significantly less than that in *Vernonia*), in each instance there was at least *some* evidence of a problem. *Miller*'s negative implication—that a drug problem need not be shown for a policy to be “reasonable” under the Fourth Amendment—completely eviscerates the “immediacy” element under *Vernonia*'s balancing test. Under the *Miller* approach, the ubiquitous nature and severity of drug use in schools insures that “immediacy” of the governmental concern is *always* found. *Miller* in this sense defies logic—certainly *Vernonia* did not intend to articulate a foundational test requiring consideration of an element that is not variable. If the fact of nationwide drug use in public schools is sufficient to show “immediacy,” why consider this factor at all? That a policy may be constitutional even absent a present drug problem also contradicts some of the earlier post-*Vernonia* opinions.¹⁷¹ For example, *Miller*'s “immediacy” analysis flies in the face of *Trinidad*'s “nexus” requirement.¹⁷² Under the *Miller* approach, even where there is no linkage between a student group and a district's drug problem, it would be enough that the group possessed the *potential* for drug use.

Second, given that both *Vernonia* and *Miller* cited the importance of the school context as central to their holdings, *Miller*'s almost exclusive reliance on *Von Raab*¹⁷³ is puzzling. *Von Raab* involved the drug testing of federal customs officers—a different setting altogether. *Miller* simply ignored the school line of cases which, if considered, would have required a more complex analysis.¹⁷⁴ The court would have been forced to grapple with *Trinidad*'s “nexus” requirement,¹⁷⁵ for instance, or *Willis*'s “practicality” consideration.¹⁷⁶ Arguably, consideration of the school line of cases would have produced a different result.

¹⁷¹ The proposition also contradicts at least one decision rendered since *Miller*. See *B.C. v Plumas Unified Sch. Dist.*, 192 F.3d 1260 (9th Cir. 1999) (holding that a suspicionless dog sniff search of high school students was unreasonable under the Fourth Amendment because there was no evidence of a drug problem in the district and because “the government's important interest in deterring student drug use would not have been placed in jeopardy by a requirement of individualized suspicion”); *id.* at 1268 (quoting *Chandler v. Miller*, 520 U.S. 305, 314 (1997)).

¹⁷² See *supra* Part II.B.

¹⁷³ See *supra* note 168 and accompanying text.

¹⁷⁴ Interestingly, *Miller* cited both *Todd* and *Willis* in a footnote as comporting with its decision. This is the sole reference to the school line of cases. See *Miller*, 172 F.3d at 582 n.6.

¹⁷⁵ See *supra* Part II.B.

¹⁷⁶ See *supra* Part II.C.

III. SUSPICIONLESS STUDENT TESTING IN THE WAKE OF *VERNONIA*

As the foregoing review suggests, it is quite difficult to identify definitive standards for suspicionless student drug testing. The glaring uncertainty plaguing this area of the law is largely a consequence of its infancy; after all, suspicionless student testing was unconstitutional before *Vernonia*, a decision not yet five years old. There simply has not been time for the *Vernonia* line of cases to significantly evolve, courts having had but few opportunities to explore *Vernonia*'s outer reach. Also contributing to the confusion is the limited scope of *Vernonia*'s holding; the policy there applied to student-athletes only,¹⁷⁷ whereas later policies applied not only to student-athletes but to extracurricular students generally. In ruling on such a conservative policy, *Vernonia* produced at least as many questions as it answered. The decision in *Vernonia* effectively opened the constitutional door to suspicionless student drug testing while giving no indication as to how far the door was ajar. *Vernonia*'s balancing test has proven to be an inadequate guide: its malleability has seriously hampered its usefulness in producing clear standards by which to gauge the constitutionality of more expansive drug testing policies.

If nothing else, however, it is clear that *Vernonia* has been extended, at least in some jurisdictions.¹⁷⁸ Though *Vernonia* dealt with student-athletes only, both the Seventh and Eighth Circuits upheld policies applicable not only to student-athletes but to all students involved in extracurricular activities.¹⁷⁹ Though the *Vernonia* School District's drug problem was severe, other courts have upheld policies under less "immediate" circumstances.¹⁸⁰ Even the *Trinidad* and *Willis* opinions tacitly concede that *Vernonia* transcends its facts. Thus, its cautionary rhetoric notwithstanding,¹⁸¹ *Vernonia* has been liberally construed.

Vernonia's extension is all the more interesting—and the cause of present uncertainty is better explained—when one considers the varying methodologies by which the lower courts have applied the main case. Faced with drug policies broader in scope, these courts were forced to

¹⁷⁷ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁷⁸ No other conclusion can follow from the review of *Vernonia*'s progeny. See *supra* Part II.

¹⁷⁹ See *supra* Parts II.A, II.C.

¹⁸⁰ See *supra* Parts II.A-D.

¹⁸¹ See *Vernonia*, 515 U.S. at 665 (cautioning against interpreting the decision too broadly).

choose one of three ways by which to apply *Vernonia*: by comparing the specifics of a challenged policy to the policy held constitutional in *Vernonia*, by strictly applying *Vernonia*'s balancing test without regard to factual comparisons between the challenged and *Vernonia* policies, or by somehow combining the two approaches. The first method overlooks *Vernonia*'s larger significance—its balancing test—which stands as the foundation of its holding. The second method is faithful to *Vernonia*'s underlying rationale but potentially misleading: construing *Vernonia*'s test in a contextual vacuum squanders valuable interpretive currency. As evidenced by the cases discussed in Part II, most courts have chosen the hybrid approach, using the balancing test as an analytical foundation while supporting ultimate conclusions by comparing a given policy to *Vernonia*'s. As the two approaches complement one another, this seems the preferable method. The failure of lower courts to universally adopt this approach has contributed to inconsistent results and partly explains the uncertain constitutional status of more expansive policies.¹⁸²

Disagreement as to the proper placement of the school line of cases within the suspicionless search body of case law also contributes to the problem. On the one hand, some courts have conceptualized the school cases as mere descendants of the other suspicionless drug (but non-school) decisions: namely, *Von Raab*,¹⁸³ *Skinner*,¹⁸⁴ and *United States v. Martinez-Fuerte*.¹⁸⁵ The school cases certainly derive from these earlier decisions, as the latter served as the basis for the *Vernonia* decision itself. Perceived this way, *Vernonia* and its progeny (the cases discussed in this Note) are mere extensions of the earlier suspicionless drug testing cases. On the other hand, at least one court has perceived *Vernonia* and its offspring as an entirely new and isolated family of drug policy case law.¹⁸⁶ The significance of the distinction is not merely semantic. To the contrary, categoriz-

¹⁸² With respect to the policies at issue in the cases discussed in this Note, the *Todd* policy falls into the first category, while the *Trinidad*, *Willis*, and *Miller* policies fall into the last. See *supra* Part II.

¹⁸³ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). See *supra* note 168 and accompanying text.

¹⁸⁴ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding suspicionless drug testing of railroad personnel involved in train accidents).

¹⁸⁵ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding suspicionless searches at checkpoints looking for illegal immigrants and drugs).

¹⁸⁶ See *Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1254 (1999).

ing the school cases in one way or the other has proven outcome-determinative.

The *Miller* case is a perfect illustration. There, the Eighth Circuit relied heavily on *Von Raab* in concluding that a district's drug policy may be constitutional even absent a drug problem.¹⁸⁷ *Von Raab* is indeed strong authority for this conclusion. *The Eighth Circuit could have just as easily looked to the school cases, however, precedent that would seem to support the contrary position.* In *Trinidad*, for example, the Colorado Supreme Court struck down a policy in part because the school district failed to demonstrate a sufficient link (that is, "nexus") between the district's drug problem and a class of students tested under the policy (band members).¹⁸⁸ By this reasoning, at least *some* evidence of a drug problem must exist for a policy to be constitutional. Because the school line of cases had emerged by the time of the *Miller* decision—*Trinidad* among them—the Eighth Circuit's decision to look to *Von Raab* misses the mark entirely.¹⁸⁹ The question may rightly be asked: given that *Vernonia* stressed the significance of the school context,¹⁹⁰ why look to *Von Raab* as opposed to the now somewhat mature school line of cases?¹⁹¹ Incongruous perceptions with respect to the lineage of the school cases has generated confusion as to applicable precedent, which in turn has produced inconsistent and unpredictable decisions.

The varying approaches used in applying *Vernonia* and the different ways of perceiving the school line of cases have rendered the post-*Vernonia* decisions collectively incoherent and, at least in some ways, irreconcilable. For example, the Seventh Circuit's *Todd* decision endorsing drug policies applicable to all extracurricular students could be read as

¹⁸⁷ See *supra* Part II.D.

¹⁸⁸ See *supra* Part II.B.

¹⁸⁹ The *Miller* opinion makes reference only to *Todd* and *Willis*, and even then only in a footnote. See *Miller v Wilkes*, 172 F.3d 574, *vacated as moot*, 172 F.3d 582 n.6 (8th Cir. 1999).

¹⁹⁰ See *Vernonia Sch. Dist. 47J v Acton*, 515 U.S. 646, 665 (1995) (making clear that "[t]he most significant element in [*Vernonia*] is the first we discussed: that the [p]olicy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care").

¹⁹¹ A supporter of the *Miller* opinion may well respond that reliance on *Von Raab* as opposed to the school cases is appropriate given that the former was decided by the Supreme Court, whereas of the latter only *Vernonia* was decided at that level. Still, the factual similarities between the school cases and *Miller* would seem to more than offset any such considerations. See *supra* Part II.

conflicting with the Colorado Supreme Court's *Trinidad* holding that at least some such policies are unconstitutional. If nothing else, the *Trinidad* court perceived limitations on such policies that the Seventh Circuit did not. Similarly, *Trinidad*'s inference that a demonstrated drug problem is a prerequisite to a constitutional policy¹⁹² contradicts the Eighth Circuit's holding in *Miller* that a drug policy may be constitutional even absent a drug problem.¹⁹³ The absence of clear standards and analytical consistency in this area of the law suggests that future decisions will further contribute to the confusion.

Present uncertainty requires that any conclusions be cautiously and delicately drawn. At least a few axioms have emerged from the case law, however, notwithstanding the general confusion. For one, the constitutionality of testing student-athletes cannot be doubted, at least on facts and terms similar to those found in *Vernonia*. This was the very question decided there. Second, policies broader in scope than *Vernonia*'s—such as those applicable not only to student-athletes but to all extracurricular activities—are most likely constitutional as well.¹⁹⁴ No court has struck down a policy solely because it covered students other than student-athletes. Third, the uniform approach adopted by the various courts with respect to certain elements of the balancing test allow several definite conclusions to be drawn. For example, it is now conclusively established that school children have a lowered expectation of privacy, and that a basic urinalysis intrudes on a student's privacy interests only negligibly.¹⁹⁵ Because these elements are no longer variable, the conclusions of courts applying the test will differ only if the "nature and immediacy" or "efficacy" elements are dissimilar. Stated differently, the "three-factor" test now has only two factors.

The law's incoherence in this area is attributable to its immaturity. Paradoxically, the absence of clear constitutional standards may well propel a clarification of the post-*Vernonia* picture: school districts will continue to implement policies that test constitutional limits, thereby affording courts more opportunities to articulate lucid standards. The development of the school line of cases will provide additional decisions from which to exact rules and draw conclusions. At present, however, constitutional standards for suspicionless student testing are very much unclear.

¹⁹² See *supra* Part II.B.

¹⁹³ See *supra* Part II.D.

¹⁹⁴ See *supra* Parts II.A, II.D.

¹⁹⁵ See *supra* Part I.

CONCLUSION

Suspicionless student drug testing was unconstitutional before the Supreme Court's decision in *Vernonia School District 47J v. Acton*,¹⁹⁶ decided in 1995. The Court there upheld suspicionless testing for student-athletes under what appeared to be very unique circumstances. In deciding the case the Court announced a foundational test by which to determine the "reasonableness" of a suspicionless search for purposes of the Fourth Amendment. The Court's test requires that the student's Fourth Amendment privacy interests be balanced against the governmental need at stake.¹⁹⁷ The analysis demands consideration of the student's legitimate expectation of privacy, the character of the intrusion, the nature and immediacy of the governmental concern at issue, and the efficacy of a suspicionless policy at meeting this concern. *Vernonia's* balancing test is its legacy

With hindsight, it is clear that *Vernonia* opened a Pandora's Box, posing more questions than it answered. *Vernonia* opened the door to constitutionally permissible suspicionless student searches but did so without articulating clear standards by which to judge more expansive policies. Absent clear constitutional standards and boundaries for suspicionless student testing, school districts nationwide have adopted drug policies that test *Vernonia's* reach. The *Vernonia* decision gave rise to a short line of cases applying its balancing test.¹⁹⁸ *Vernonia's* progeny consists of four cases, three decided by federal appellate courts, one by the Colorado Supreme Court. These courts have read *Vernonia* inconsistently and have adopted various methodologies by which to rule on more expansive drug policies. These decisions are in many ways irreconcilable and give rise to a host of questions. Whether a suspicion-based regime must be impractical for a suspicionless policy to be constitutional, whether some linkage must be demonstrated between a school district's drug policy and those students tested under a policy, and whether a school district must prove the existence of a drug problem before enacting a drug policy are representative questions lingering within the post-*Vernonia* suspicionless drug testing case law

The law's present incoherence in this area is attributable to its infancy. The Supreme Court decided *Vernonia* in 1995, and there has not been sufficient time for a substantial body of case law to emerge. The conflicting

¹⁹⁶ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁹⁷ *See id.*

¹⁹⁸ *See supra* Parts II.A-D.

methodologies by which the lower courts have applied *Vernonia* and the lack of consensus as to the proper placement of the school line of cases within the suspicionless testing case law also contribute to the present incomprehensibility of constitutional standards.

Given the law's infancy and the irreconcilable nature of *Vernonia's* progeny, few definitive conclusions may be responsibly drawn. What is most clear is that constitutional standards for suspicionless student drug testing are very much uncertain.