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Vernonia School District 47J v. Acton: The Demise of Individualized Suspicion in Fourth Amendment Searches and Seizures

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VERNONIA SCHOOL DISTRICT 47J v. ACTON: THE DEMISE OF INDIVIDUALIZED SUSPICION IN FOURTH AMENDMENT SEARCHES AND SEIZURES

I. INTRODUCTION

Since its ratification in 1791, the interpretation of the Fourth Amendment has been the subject of substantial legal debate, much of which has focused on whether a search is considered "reasonable" in the absence of individualized suspicion.[1] Suspicionless searches authorized by a legislature, also called blanket searches, are more threatening to an individual's right to privacy because they can number in the "thousands or millions."[2] Therefore, courts have historically required some showing of individualized suspicion,[3] and until recently, had refused to recognize any exceptions to such a requirement.[4] Over the last several decades, however, the Supreme Court has significantly narrowed the scope of protection offered by the Fourth Amendment, holding that individualized suspicion is not necessarily required of every non-criminal search and seizure activity.[5] In these cases, courts have justified such suspicionless searches by claiming that "special needs" exist which render a "suspicion based regime . . .

1. *See generally*, Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995). *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (drug testing of Railroad employees); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of US Customs agents); Griffin v. Wisconsin, 483 U.S. 868 (1987) (search of residence); New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of a student's purse); Delaware v. Prouse, 440 U.S. 648 (1979) (suspicionless stop and search of automobile); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) (administrative inspection to ensure minimum health standards in housing).

2. Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J. dissenting).

3. The Court in *Carroll v. United States* stated, "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile . . . and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." 267 U.S. 132, 153-54 (1925).

4. The first case upholding the validity of a suspicionless search was Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967). The Court there emphasized the administrative nature of the search in justifying its reasonableness. *Camara*, 387 U.S. at 535-37.

5. Clancy, *supra* note 1, at 549.

ineffectual."[6] Instead, a search's reasonableness is determined by implementing a balancing test, weighing the nature of the individual's privacy interest against the promotion of legitimate government interests.[7] A number of cases have been decided in which individualized suspicion was not required. Several cases involved the urinalysis testing of individuals for drug and alcohol abuse, including testing of railroad employees following train accidents,[8] United States customs officials dealing with drugs,[9] and drunk drivers.[10] However, such lenient application of the Fourth Amendment has not gone uncontroverted; one critic has pointed to the ambiguous nature of this narrowing trend, arguing that a mere subjective balancing of interests will inevitably lead to unlimited intrusions in future searches.[11]

Until recently, the Supreme Court had not expressly dealt with the concept of individualized suspicion in cases involving drug testing in public schools.[12] However, in *Vernonia School District 47J v. Acton*,[13] the Supreme Court upheld the constitutionality of a policy designed to test public school student-athletes for drugs on a random and suspicionless basis,[14] continuing what some have called a trend of "unprincipled reasonableness analysis."[15] In analyzing the reasonableness of Vernonia School District's policy, the Court employed a multi-factored balancing test, weighing the nature of the student-athlete's privacy interest, the character of the intrusion itself, the nature and immediacy of the government's concern, and the efficacy of the

6. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)) (Blackmun, J., concurring).

7. Delaware v. Prouse, 440 U.S. 648, 654 (1979). *See, e.g.*, United States v. Ramsey, 431 U.S. 606, 616-619 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976).

8. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). *See infra* notes 113-127 and accompanying text.

9. National Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989). *See infra* notes 128-140 and accompanying text.

10. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding the use of sobriety checkpoints in the absence of any individualized suspicion). The court emphasized the severity of injuries and damage caused by drunk drivers and held that this outweighed the minimal intrusion caused by the checkpoint stops. *Id.* at 451.

11. Clancy, *supra* note 1, at 627. Clancy argues that "[t]here are two primary reasons why individualized suspicion should be considered a component of reasonableness: it recognizes the historical importance of individualized suspicion to the framers of the Constitution, and it provides needed guidance to courts and governmental officials, avoiding the slippery slope of an unprincipled reasonableness analysis." *Id.*

12. In a prior case, the Supreme Court upheld evidence obtained during the search of a student's possessions for drugs, but there was already an element of individualized suspicion present. *See* New Jersey v. T.L.O., 469 U.S. 325, 347-48 (1985).

13. 115 S. Ct. 2386 (1995).

14. *Vernonia*, 115 S. Ct. at 2396.

15. Clancy, *supra* note 1, at 486.

means used for meeting it.[16] The Court concluded that the policy was reasonable despite its random and suspicionless nature.[17] In the process, the Court avoided important constitutional and privacy issues,[18] further clouding an already hazy picture of the historical and intended protections of the Fourth Amendment.

This note examines the Court's analysis in *Vernonia* and demonstrates the potential problems inherent in permitting suspicionless searches and seizures in a public school setting. Section II discusses the facts leading to the *Vernonia* decision. Section III reviews the history of the Fourth Amendment and the development of its application in recent cases involving drug testing. Section IV analyzes the Court's justification for its decision in *Vernonia* and compares it to other cases involving suspicionless testing. Finally, Section V concludes by evaluating the decision and predicting the impact of the Court's decision on both schools and on future Fourth Amendment cases.

II. STATEMENT OF THE CASE

A. *The Drug Problem, Testing Policy, and Constitutional Challenge*

Between 1985 and 1989, the teachers and administrators in the Vernonia School district experienced an increasing amount of disciplinary problems due to student drug use.[19] Students "boasted" about drug use[20] and teachers observed students openly smoking marijuana during school hours.[21] Gangs were created with names such as "Big Elk" and "Drug Cartel."[22] Teachers at Vernonia testified about the students' drug use, expressing feelings of fear and helplessness.[23]

Drug use problems also infiltrated in the school district's athletic programs.[24] Coaches attributed an increase in the number of sports-

16. *Vernonia*, 115 S. Ct. at 2391-96.

17. *Id.* at 2396.

18. *Id.* at 2397 (O'Connor, J., dissenting).

19. *Vernonia*, 115 S. Ct. at 2388. Disciplinary problems increased twofold "in the early 1980's, and several students were suspended. Students became increasingly rude in class; outbursts of profane language became common." *Id.*

20. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1356 (D.Or. 1992).

21. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1516 (9th Cir. 1993). One teacher testified to having seen "students smoking marijuana during the school day at a coffee shop across the street from the high school." *Id.* Another teacher testified that students began submitting essays "describing and glorying in scenes of student drug and alcohol use." *Id.*

22. *Id.* These gangs developed creative, yet disruptive, "calling cards" for themselves, such as "bugling" and "headbutting." *Acton*, 796 F. Supp. at 1356.

23. *Acton*, 796 F. Supp. at 1356.

24. *Vernonia*, 115 S. Ct. at 2388-89.

related injuries to drug use.[25] Other coaches testified about incidents in which "students had, or were suspected to have, used drugs."[26] In fact, student-athletes were not only drug users, but were considered "leaders of the drug culture."[27]

School officials initially attempted to combat the problem by offering lectures and special classes, and by using drug-sniffing dogs.[28] However, these measures proved unsuccessful, causing increased frustration among school faculty and administrators.[29] Administrators proclaimed that the problem had reached "epidemic proportions" and considered implementing a drug-testing program.[30] The school district held a parent input night to determine whether support existed for the implementation of a drug policy[31] Parents in attendance unanimously supported its creation, and the school board quickly implemented a drug policy in the fall of 1989.[32]

The policy was designed to apply to all student-athletes.[33] In order to participate in a sport, student-athletes and their parents were required to sign a release form expressing their consent to drug testing.[34] All student athletes were tested at the beginning of each season and each week throughout the season ten percent of all athletes were randomly selected by a lottery for further testing.[35] Each athlete was required to complete a "specimen control form" which assigned the athlete a random number used to maintain confidentiality.[36] To ensure that the sample was untampered, the student was "accompanied by an adult monitor of the same sex" when providing a urine sample.[37]

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25. *Id.* at 2389. For example, the wrestling coach smelled marijuana in one athlete's hotel room after the athlete had been seriously injured after failing "to perform a well-drilled safety maneuver." *Acton*, 796 F. Supp. at 1357.

26. *Acton*, 23 F.3d at 1516. "They personally saw some of the problems, but were told of others." *Id.*

27. *Vernonia*, 115 S. Ct. at 2388-2389.

28. *Id.* at 2389.

29. *Id.* The court stated that "the administration was at its wits end." *Id.* (citing *Acton*, 796 F. Supp. at 1357).

30. *Id.* (citing *Acton*, 796 F. Supp. at 1357).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* The policy also requires the reporting of any prescription medications taken by the student. *Id.*

37. *Id.* Although the procedures are slightly different between males and females, a monitor accompanied both into the bathroom during provision of the sample. *Id.*

After samples were collected, they were sent to an independent laboratory to be tested for "amphetamines, cocaine, and marijuana."[38] If a particular sample tested positive, a second test on the same sample would soon thereafter be administered to ensure correctness of the first.[39] If the sample proved positive a second time, the athlete's parents were notified and the student could choose between participation in an "assistance program" for six weeks[40] or suspension from the sport for both the current season and the following season.[41] In the event of a second violation, the student would automatically face suspension from the sport for both the current and subsequent seasons.[42] A third violation would result in automatic suspension for the current season and the subsequent two seasons.[43]

James Acton, a Vernonia School District student, wished to participate on the school's football team.[44] However, school officials prohibited him from participating because both "he and his parents refused to sign the . . . consent forms."[45] Acton, a seventh grader, claimed that he did not believe school officials had any reason to "think [he] was taking drugs."[46] Nevertheless, the school stood by its policy, forcing the Actons to seek recourse in the courts.[47]

The Actons initially filed suit in United States District Court of Oregon, seeking declaratory and injunctive relief arguing that the Vernonia's drug testing policy violated their son's Fourth and Fourteenth Amendment rights under both the United States and the Oregon Constitution.[48] The district court found the school district's testing program "justified at its inception and reasonably related in scope to the circumstances that exist[ed] in Vernonia."[49] In so finding, the district court dismissed the action on the merits.[50] On appeal, the

38. *Id.* The results were claimed to be "99.94% accurate;" were only accessible by the "superintendent, principles, vice-principles, and athletic directors;" and were not kept for more than one year after they were collected. *Id.*

39. *Id.* at 2390.

40. *Id.* The assistance program includes weekly urinalysis. *Id.*

41. *Id.* The student would then be retested before the season in which eligibility was regained. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 2405 (O'Connor, J., dissenting). In fact, the Ninth Circuit panel noted that "[n]o evidence suggested that James has ever used drugs or that the District has any reason to suspect that he has." *Acton*, 23 F.3d at 1517.

47. *Acton*, 796 F. Supp. at 1358.

48. *Id.* at 1356.

49. *Id.* at 1365.

50. *Id.* at 1365, 1368.

United States Court of Appeals for the Ninth Circuit reversed, holding the drug policy unconstitutional as violative of the Fourth and Fourteenth Amendments.[51] The United States Supreme Court granted certiorari to determine whether Vernonia's policy was in fact violative of the Fourth and Fourteenth Amendments of the United States Constitution.[52]

B. *Issue*

The Supreme Court reversed the appellate court, holding that the policy was constitutional.[53] The majority justified its decision by asserting that the government's interests far outweighed the diminished privacy expectations of the school's students.[54] However, in so doing, the Court virtually dismissed the requirement of individualized suspicion, and in the process further diluted the protections guaranteed by the Fourth Amendment.[55] A review of the Amendment's creation and subsequent interpretation, paints a picture quite different from *Vernonia*, and demonstrates how the Court's decision can be classified as a blatant overreaction to the perceived problem in public schools.

III. The Fourth Amendment - Historical Origins and Recent Interpretations

> 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.[56]

Since the creation of the Fourth Amendment in 1791, legal minds have engaged in significant debates over interpretation of the Amendment. Specifically, these disputes consider whether the second clause, commonly called the "Warrant Clause," requires certain "substantive

51. *Acton*, 23 F.3d 1514, 1527 (9th Cir. 1994). The Court of Appeals supported its holding that the policy was unconstitutional by conducting the multifactored balancing test. In contrast to the conclusion of the Supreme Court, the Court of Appeals found that the athlete's privacy interests were not diminished by their participation in interscholastic athletics or by normal conditions in locker rooms, and that the school district's desire to reduce drug use by its students was not so compelling as to justify the degree of intrusion required by random tests of students' urine. *Id.* at 1525-26.

52. *Vernonia*, 115 S. Ct. at 2388.

53. *Id.* at 2407.

54. *Id.* at 2396.

55. *Id.* at 2398-99 (O'Connor, J. dissenting).

56. U.S. Const. amend. IV.

requirements on all searches and seizures,"[57] such as probable cause, and therefore individualized suspicion, in determining whether a particular search is "reasonable."[58] An historical analysis of the Amendment demonstrates the Framers' intent to require individualized suspicion for all "reasonable" searches.[59] Nevertheless, over the past several decades the Court has frequently departed from traditional methods of assessing "reasonableness," and has instead applied a more arbitrary balancing test, resulting in diminished protection offered by the Amendment.[60]

A. *Historical Background and the Framers' Intent*

The historical background surrounding the drafting of the Fourth Amendment suggests that the Framers intended to require individualized suspicion for all searches and seizures. Before the Amendment's creation, "warrantless searches were virtually nonexistent,"[61] those warrantless searches which did occur compensated for the lack of a warrant by requiring individualized suspicion.[62] However, problems arose with suspicionless searches both in England and in the colonies just prior to the Revolutionary War, even in situations in which warrants were obtained.[63] For example, the English Parliament began issuing writs of assistance which were supported neither by probable cause nor by individualized suspicion to quell smuggling practices within the American colonies.[64] These writs were general in nature, "unlimited geographically and perpetual temporally,"[65] and offered the holder a practically absolute and unlimited discretion to conduct searches of peoples' houses or stores.[66] Because of their breadth, these writs became quite intrusive and were met with a great deal of resistance.[67] Just before the Revolution, individual colonies began to

57. Clancy, *supra* note 1, at 488.
58. *Id.*
59. *See infra* notes 63-72 and accompanying text.
60. *See infra* notes 76-140 and accompanying text.
61. Clancy, *supra* note 1 at 491. The only warrantless searches permitted were those made in hot pursuit of a suspected felon. *Id.*
62. *Id.* at 493.
63. *Id.* at 501; *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1970).
64. Clancy, *supra* note 1, at 504.
65. *Id.* at 505 (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTION INTERPRETATION 37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965)).
66. *Id.*
67. *See Id.* at 502-08. For example, in Massachusetts, James Otis represented merchants in declaring the writs as "against the fundamental principles of law." *Id.* at 505 (citing TELFORD

adopt legal measures against general searches and seizures and later included provisions in their state constitutions prohibiting such activity.[68]

Soon after the drafting of the Constitution, the need for a Bill of Rights became a leading topic of discussion in newspapers and other printed materials.[69] In 1791, the Framers promulgated the first ten Amendments to the United States Constitution.[70] The Fourth Amendment was designed to prohibit unreasonable searches and seizures, such as those based on general warrants, and required probable cause, or at least individualized suspicion, for a search to be reasonable.[71]

B. *Recent Developments in Interpreting "Reasonableness"*

Initially, the Fourth Amendment applied only to searches and seizures by the federal government.[72] For more than a century after its enactment, the Amendment's protections were not commonly involved because the federal government initially had very few criminal laws and had little difficulty enforcing those laws which were already in effect.[73] Over time, however, the Amendment was used more frequently, especially after the Fourteenth Amendment incorporated the protections of the Fourth Amendment to apply to searches and seizures by state officials.[74]

1. The Balancing Test

As victims of unwarranted searches and seizures relied upon the Fourth Amendment more regularly, disputes over its interpretation also became more common.[75] Based on its historical background,

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TAYLOR, TWO STUDIES IN CONSTITUTION INTERPRETATION 37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125)). Otis attacked the writs as "totally annihilat[ing]" to a man's privilege of privacy in his own house. *Id.* (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTION INTERPRETATION 37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS at 142-43)).

68. *Id.* at 512.

69. LASSON, *supra* note 63, at 88.

70. *See Id.* at 95-105.

71. *See* Clancy, *supra* note 1, at 514-17.

72. ERWIN N. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 3 (1975).

73. *Id.* at 2.

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

75. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Illinois v. Krull, 480 U.S. 340 (1987); Griffin v. Wisconsin, 483 U.S. 868 (1987); United States v. Montoya de Hernandez, 473 U.S. 531 (1985); New Jersey v. T.L.O., 469

there seemed to be little disagreement over the Amendment's requirement of a warrant supported by probable cause.[76] In fact, until 1967, all searches were at least supported by probable cause.[77] However, the Supreme Court has voiced its reluctance to mechanically implement the Amendment based on past application, on the basis that "[t]he Constitution is a living document, and, therefore, while historical analysis is important, it is not dispositive of whether a particular search or seizure is reasonable."[78] In light of this outlook, the Supreme Court has "vacillated between . . . two competing views of the relationship of the clauses,"[79] sometimes ruling that a search is "per se unreasonable" unless there is a warrant,[80] while other times holding the warrant clause independent and that "reasonableness alone" can be used to determine the constitutionality of a search.[81]

Courts have justified this latter approach by requiring "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable."[82] If such needs exist, the reasonableness of a search is determined by balancing

U.S. 325 (1985); Delaware v. Prouse, 440 U.S. 648 (1979); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967).

76. *See supra* text accompanying notes 61-71.

77. "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." Carroll v. United States, 267 U.S. 132, 153-54 (1925). The first case not to require probable cause was Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967). In *Camara*, the Court held that an individualized suspicion requirement on housing inspections would make it impossible to implement such safety inspections. *Id.* at 540.

78. Clancy, *supra* note 1, at 531 (citing Steagald v. United States, 451 U.S. 204, 218 (1981)).

79. *Id.* at 523.

80. *See* California v. Acevedo, 500 U.S. 565 (1991); United States v. Ross, 456 U.S. 798 (1982); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967).

81. Clancy, *supra* note 1, at 524 (quoting *Acevedo*, 500 U.S. at 582 (Scalia, J. concurring)); Texas v. Brown, 460 U.S. 730, 745-746 (1983) (Powell, J. concurring). Although one interpretation views the Warrant Clause as specifically requiring that probable cause, and thus individualized suspicion, exists in order for a search and seizure to be considered "reasonable," a second view holds that the two clauses are independent and that the Warrant Clause only requires probable cause for those searches under a warrant. Under this view the first clause determines whether a search is "reasonable" by weighing the nature of the privacy interest against the governmental interest at issue. In all reasonable searches and seizures, inconsistent interpretations regarding the relation between the Amendment's clauses arose. *See* Clancy, *supra* note 1, at 517-531.

82. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). Situations in which such special needs were found to have existed include searches by governmental employers of desks and offices, O'Connor v. Ortega, 480 U.S. 709 (1987), and those by administrative investigators, Camara v. Municipal Court of San Francisco, 387 U.S. 523, 538 (1967).

the nature of the privacy interest against the importance and immediacy of the governmental concern.[83] The balancing test enhanced a court's flexibility by determining reasonableness not mechanically, but by "the context in which [a search] is asserted."[84] Initially, the balancing test was used only in situations where the infringement was short of an arrest or full search,[85] or where the public interest was sufficient.[86] In time, however, the balancing test began to be applied with increasing frequency, including searches accompanying a lawful arrest,[87] border searches,[88] and searches of vehicles.[89]

The first application of the balancing test by the Supreme Court in a public school setting occurred in *New Jersey v. T.L.O.*[90] In this case, a fourteen year-old freshman was discovered smoking cigarettes in the high school bathroom.[91] Upon being taken to the principal's office for questioning, however, the student denied the incident.[92] The principal proceeded to search the student's purse, finding a pack of cigarettes, cigarette rolling papers, marijuana, a pipe, and other drug paraphernalia.[93] When charges were brought against her in juvenile court, the student attempted to have the evidence suppressed, claiming that the principal's search violated her Fourth Amendment rights because no warrant had been acquired.[94] The United States Supreme Court denied the student's request to suppress the evidence,

83. Clancy, *supra* note 1, at 525. Clancy suggests that if the two clauses are viewed as independent of one another, then reasonableness must be interpreted with an eye toward the framers' intent, which was to prevent the reoccurrence of general, and therefore suspicionless, warrants. *See Id.* at 526-31.

84. Terry v. Ohio, 392 U.S. 1, 9 (1968).

85. The first prominent application of the balancing test in a criminal situation occurred in Terry v. Ohio, 392 U.S. 1 (1968).

86. Maryland v. Buie, 494 U.S. 325, 331 (1990).

87. Clancy, *supra* note 1, at 550. "Searches incident to arrest are viewed as necessary to protect the safety of the officer by disarming the suspect, to prevent frustration of the arrest, and to prevent concealment or destruction of evidence." *Id.* at 551. *See* United States v. Robinson, 414 U.S. 218, 233 n.3 (1973); *see also* People v. Chiagles, 142 N.E. 583, 584 (N.Y. 1923) (tracing origins of search incident to arrest).

88. Clancy, *supra* note 1, at 557. Clancy writes that "[t]his power is grounded solely on national sovereignty; that is, the federal government has both the right and obligation to protect the nation's borders from legally excludable persons and things." *Id. See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

89. Clancy, *supra* note 1, at 579. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979).

90. 469 U.S. 325 (1985).

91. *Id.* at 328.

92. *Id.*

93. *Id.*

94. *Id.* at 329.

holding that although school officials are subject to Fourth Amendment restrictions, they need not necessarily obtain a warrant to conduct a reasonable search.[95] In fact, the Court went even further in stating that school officials do not always even need probable cause,[96] relating the situation at hand to other cases in which the circumstances were such that probable cause was not required.[97] Instead, the Court chose to determine the constitutionality of the search "simply on the reasonableness, under all the circumstances,"[98] achieved by balancing the governmental (school) and individual interests.[99] The Court stated that a search unsupported by probable cause is permissible where "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[100]

2. The Requirement of Individualized Suspicion

While the balancing test was designed to offer more flexibility in determining the constitutionality of a particular search, individualized suspicion was still initially required for a search to be considered reasonable.[101] In *T.L.O.* for example, the Court held that when "ordinary circumstances" existed, it required a degree of suspicion that the

95. *Id.* at 340.

> The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

Id.

96. *Id.* at 341.

97. *Id.*; *see, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The Court stated that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *T.L.O.*, 469 U.S. at 341.

98. *T.L.O.*, 469 U.S. at 341.

99. *Id.*

100. *Id.* at 342. The Court did not believe that application of the balancing test would "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren." *Id.* at 342-43. The balancing test was believed to allow teachers and administrators to refrain from concerning themselves with the technical requirements of probable cause, "permit[ting] them to regulate their conduct *according to the dictates of reason and common sense.*" *Id.* at 343 (emphasis added). This indicates that the Court believed there would be some inherent standard of individualized suspicion in any school search.

101. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (search considered illegal when based on "a person's mere propinquity to others independently suspected of criminal activity"); *see also* Payton v. New York, 445 U.S. 573, 592-97 (1980); United States v. Watson, 423 U.S. 411, 418-19 (1976).

search would uncover a violation of school rules or the law.[102] However, in certain situations, courts have removed individualized suspicion as a necessary ingredient of "reasonableness."[103] In fact, even though individualized suspicion existed in *T.L.O.*, the Court did state that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."[104] Since the first case of a constitutional search in the absence of individualized suspicion occurred in 1967,[105] several others have followed.[106] For an administrative search to be conducted without any degree of individualized suspicion, courts have primarily required that the balancing test be heavily skewed in favor of "compelling government interests."[107] Courts have also required that the privacy interests of the individual be "minimal," and that other safeguards exist to assure the individual's privacy expectations are not "subject to the discretion of the official in the field."[108] With regard to drug testing, there have been several cases, including *Skinner v. Railway Labor Executives' Ass'n*[109] and *National Treasury Employees Union v. Von Raab,*[110] in which the Supreme Court has implemented the balancing test and upheld a search as constitutional even in the absence of any individualized suspicion. The Supreme Court in *Vernonia* relied substantially on these cases to support its decision to uphold the school district's random, suspicionless drug testing.[111] They are, however, distinguishable from the situation presented before the Court in *Vernonia*, as they involved circumstances in which the government's interests were significantly more "compelling" and that a requirement of individualized suspicion would render the particular search ineffectual.

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102. *T.L.O.*, 469 U.S. at 341-42.

103. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), discussed *infra* in text accompanying notes 112-127; National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), discussed *infra* in text accompanying notes 128-141.

104. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976).

105. Camara v. Municipal Court, 387 U.S. 523 (1967).

106. *See e.g.* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990); New York v. Burger, 482 U.S. 691 (1987); New York v. Belton, 453 U.S. 454 (1981); Delaware v. Prouse, 440 U.S. 648 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Robinson, 414 U.S. 218 (1973); Almeida-Sanchez v. United States, 413 U.S. 266 (1973), See v. City of Seattle, 387 U.S. 541 (1967).

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

108. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

109. 489 U.S. 602 (1989).

110. 489 U.S. 656 (1989).

111. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2391-96 (1995).

In *Skinner v. Railway Labor Executives' Ass'n*,[112] the Supreme Court held that drug and alcohol testing mandated by Federal Railroad Administration (FRA) regulations was "reasonable" even in the "absence of a warrant or reasonable suspicion that any particular employee may be impaired."[113] The Court justified its decision not to require a warrant or probable cause by pointing to the existence of "special needs."[114] In 1983, the FRA conducted a survey of accident investigation reports from 1972 to 1983 and found that there had been "21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor."[115] In order to enforce regulations passed in 1985 prohibiting the use or possession of alcohol or drugs by on-duty employees,[116] the FRA included certain provisions in the regulations which imposed a drug testing policy requiring urinalysis testing for alcohol and drug use by employees involved in a "major train accident."[117] The Court held that while a warrant serves to "protect privacy[,]"[118] to "assure[ ] the citizen that the intrusion is authorized by law,"[119] and to "provide[ ] the detached scrutiny of a neutral magistrate,"[120] a warrant would do little to advance these goals in the situation at hand.[121]

In addition to removing the requirement of probable cause, the Court in *Skinner* also dispensed with the requirement of individualized suspicion, claiming that such suspicion is not required in "limited circumstances" where the privacy interests are "minimal" and where the governmental interest would be "jeopard[ized] by a requirement of individualized suspicion."[122] The Court emphasized the importance

112. 489 U.S. 602 (1989).

113. *Id.* at 634. The Court stated that "the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee." *Id.* at 633.

114. *Id.* at 620.

115. *Id.* at 607 (quoting 48 Fed. Reg. 30726 (1983)). These accidents were believed to have "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million." *Id.* The FRA also calculated that there had been 17 fatalities of railroad employees as a result of accidents at least partly caused by alcohol or drugs. *Id.*

116. *Id.* at 608.

117. *Id.* at 609. A major train accident is defined as "any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of $500,000 or more." *Id.* (quoting 49 C.F.R. §219.201(a)(1) (1987)).

118. *Id.* at 621.

119. *Id.* at 622.

120. *Id.* (citing United States v. Chadwick, 433 U.S. 1, 9 (1977)).

121. 489 U.S. at 622.

122. *Id.* at 624.

of the Government's interest in "regulating the conduct of railroad employees to ensure safety,"[123] noting that the goal of the drug testing was not for the purpose of prosecuting railroad employees, but to provide railroad passengers with the safest possible service.[124] With regard to the nature of the privacy interest at stake, the Court held that the test imposed "only limited threats to the justifiable expectations of privacy of covered employees."[125] It also held that railroad employees' "expectations of privacy [were] diminished" based on their participation in an "industry . . . regulated pervasively to ensure safety."[126] Balancing these interests, the Court concluded that the compelling needs of the Government outweighed the privacy concerns and upheld the constitutionality of the suspicionless policy.[127]

In *National Treasury Employees Union v. Von Raab*,[128] the Court upheld another suspicionless drug testing policy, which dealt with United States Customs employees who were seeking promotion to positions involving either the carrying of firearms or illegal drugs.[129] The Court again applied the balancing test to determine whether the policy was "reasonable" under the Fourth Amendment, holding that "a warrant would provide little or nothing in the way of additional protection of personal privacy."[130] It also dispensed with probable cause and individualized suspicion, holding that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."[131] Although there was no historical data linking drug use to

123. *Id.* at 620. The Court compares the Government's interest in *Skinner* to that of "supervis[ing] . . . probationers or regulated industries." *Id.*

124. *Id.* at 620-21.

125. *Id.* at 628. The Court distinguishes the present situation from others, stating that "some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts." *Id.*

126. *Id.* at 627. Examples of the recognition of the "relation between safety and employee fitness" appeared in Congress' passage of the Hours of Service Act in 1907, and Congress' "authoriz[ation] to test . . . railroad facilities, equipment, rolling stock, operations, or persons, as necessary to carry out the provisions of the Federal Railroad Safety Act of 1970." *Id.* (internal quotations and citations omitted).

127. *Id.* at 633. The Court emphasized that while the possession of drugs is a criminal act, "it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances." *Id.*

128. 489 U.S. 656 (1989).

129. *Id.* at 660-61.

130. *Id.* at 667. According to the Court, the primary purpose of a warrant is to "advise the citizen that an intrusion is authorized by law and limited in its permissible scope . . . . [However,] [u]nder the Customs program, every employee who seeks a transfer to a covered position *knows* that he must take a drug test." *Id.* (emphasis added).

131. *Id.* at 668.

the employees in *Von Raab,*[132] as in *Skinner,*[133] the Court looked at several factors to determine whether the Government's interest here was compelling.[134] First, the Court pointed to the fact that the Customs Service represents the "first line of defense" against the problems of smuggled narcotics,[135] therefore causing many employees of the Service to be confronted by criminals and the smuggled illicit substances themselves.[136] It is not uncommon for employees to be "targets of bribery" by these smugglers.[137] The Court next pointed to the fact that employees using firearms represent another immediate risk if engaged in drug use.[138] It held that people should not "bear the risk" of impaired employees who hold positions in which the use of deadly force is mandated. Turning to the individual privacy interests, the Court conceded that urinalysis testing for drug use "could be substantial in some circumstances."[139] However, the Court stated that "operational realities of the workplace" can make reasonable some searches which are unreasonable in another setting.[140] The Court held that Customs employees engaged in interdiction of illegal drugs or carrying firearms "have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test."[141] In summation, the Court concluded that the Government's substantial compelling interests significantly outweighed the privacy expectations of the particular Customs employees in question and held that the testing was reasonable under the Fourth Amendment.[142]

132. *Id.* at 673. The Court dismissed the argument that the search was not justified although there was no historical data supporting the Government's proposition that the testing was in response to any actual drug use by the employees. *Id.*

133. *See supra* text accompanying note 115.

134. *Id.* at 668-70.

135. *Id.* at 668.

136. *Id.* at 669.

137. *Id.* The Court stated that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Id.* at 670.

138. *Id.*

139. *Id.* at 671.

140. *Id.*

141. *Id.* at 672. The Court distinguishes private citizens and governmental employees generally from those engaged in drug interdiction who "reasonably should expect effective inquiry into their fitness and probity." *Id.*

142. *Id.* at 677.

IV. THE *VERNONIA* DECISION

To determine whether Vernonia's suspicionless drug policy was "reasonable" as required by the Fourth Amendment, the Court applied a three-factor balancing test,[143] weighing the "nature of the privacy interest upon which the search . . . intrudes,"[144] the "character of the intrusion,"[145] and the "nature and immediacy of the governmental concern at issue."[146] In so doing, the Court concluded that the policy was constitutional, holding that there was a decreased expectation of privacy by student-athletes, that the search itself was "relatively unobtrusive," and that the school's interest in imposing such a policy was quite significant.[147] While the Court successfully defends Vernonia's drug policy with regards to its lack of any warrant or probable cause requirements, it fails to justify its holding that such a policy is constitutional under the Fourth Amendment in the absence of individualized suspicion.[148] The factors present in *Skinner* and *Von Raab* which supported suspicionless drug testing do not exist in *Vernonia*, yet the majority absolves the school district from requiring any type of individualized suspicion.[149] An analysis of the Court's application of the balancing test and comparison of it to the aforementioned cases involving suspicionless drug testing clearly demonstrates how "the Court dispense[d] with a requirement of individualized suspicion on considered policy grounds."[150] Therefore, the Court created precedent which is quite damaging to those seeking future protection under the Fourth Amendment.

A. *The Nature of the Privacy Interest*

The Court began its application of the balancing test by evaluating "the nature of the privacy interest upon which the search here at

143. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2391-96 (1995). The Court relied on Griffin v. Wisconsin, 483 U.S. 868 (1987), which held that a warrant was not required to establish reasonableness when "special needs" caused the warrant requirement to be unreasonable. *Vernonia*, 115 S. Ct. at 2391 (citing Griffin, 483 U.S. at 873). The Court also relied on New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985), where the Court held that such "special needs" existed in the public school context, because "the warrant requirement . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed." *Vernonia*, 115 S. Ct. at 2391 (quoting T.L.O., 469 U.S. at 340).

144. *See infra* part IV. A.

145. *See infra* part IV. B.

146. *See infra* part IV. C.

147. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396-97 (1995).

148. *Id.* at 2397 (O'Connor, J., dissenting).

149. *See supra* notes 114-41 and accompanying text.

150. *Vernonia*, 115 S. Ct. at 2397 (O'Connor, J., dissenting).

issue intrudes."[151] Past cases have required that this interest be "legitimate."[152] However, the Court qualified the determining factors of a legitimate search by holding that legitimacy depends on "context"[153] and the "legal relationship" between the person seeking protection and the State.[154] The Court in *Vernonia* focused on the fact that the subjects of the controverted drug policy were children, who were under the authority of the state as students in public school.[155]

The Court stated that "unemancipated minors lack some of the most fundamental rights of self-determination - including even the right of liberty in its narrow sense."[156] Although courts have held that school children do not "shed their constitutional rights . . . at the schoolhouse gate,"[157] Courts have also held that the "nature" of school-childrens' rights is "what is appropriate for children in school."[158] Stating that the rights provided by the Fourth Amendment are "different in public schools than elsewhere,"[159] the Court pointed to several factors pertaining to the public school attendance to determine whether the students in Vernonia's schools had a diminished expectation of privacy.[160] First, at Vernonia, all students are required to be physically examined and "vaccinated against various diseases."[161] Second, the Court held that student athletes have an even smaller expectation regarding privacy because interscholastic athletics require "suiting up before each practice or event, and showering and changing afterwards."[162] Also, by "go[ing] out for the team," athletes were required to "acquire adequate insurance coverage," "maintain a minimum grade point average," and abide by rules imposed by the athletic

151. *Id.* at 2391.
152. New Jersey v. T.L.O., 469 U.S. 325, 338 (1985).
153. *Vernonia*, 115 S. Ct. at 2391. An important factor relevant in determining "context" is where the search is conducted, such as at home, at work, at school, in a prison, or in a park. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 2391. This lack of liberty described by the Court includes "the right to come and go at will." *Id.*
157. *Id.* at 2392 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).
158. *Id. See* Goss v. Lopez, 419 U.S. 565, 581-82 (1975) (holding that due process requires only the teacher to "informally discuss the alleged misconduct with the student minutes after it has occurred").
159. *Vernonia*, 115 S. Ct. at 2392.
160. *Id.*
161. *Id.* In studies conducted by the American Academy of Pediatrics, most public schools were found "to provide vision and hearing screening and dental and dermatological checks. . . . Others mandate scoliosis screening at appropriate grade levels." *Id.*
162. *Id.* The locker rooms in Vernonia's schools were found by the Court to be "typical," with "no individual dressing rooms," unpartitioned shower areas, and doorless toilet stalls. *Id.* at 2393.

director and coaches.[163] Relying on these factors, the Court equated such student-athletes with those who choose to participate in a "closely regulated industry,"[164] and concluded that students did in fact have a diminished expectation of privacy.[165]

B. *The Character of the Intrusion*

To determine the significance of the intrusion on the students' privacy, the Court then evaluated the aspects of the drug policy itself.[166] In so doing, the Court looked at three primary factors: the procedure by which urine samples were taken, the breadth of the testing of the sample by the laboratory, and the limited disclosure of the testing results.[167]

With regards to the procedure, the Court emphasized that male students were "fully clothed and . . . only observed from behind, if at all."[168] Female students were completely shielded by a stall, as the monitor stood outside "listening only for sounds of tampering."[169] The Court concluded that the privacy interests "compromised" by the procedure of sample-collection were "negligible,"[170] holding that the procedure was nearly the same as conditions "typically encountered in public restrooms, which men, women, and especially school children use daily."[171]

Second, regarding the extensiveness of the laboratory work, the urinalysis only looked for drug content and not for other detectible states such as pregnancies or diabetes.[172] Finally, confidentiality regarding the results of the testing was strictly maintained; only a limited number of people were authorized to receive result reports.[173] Based on these findings, the Court concluded that "the invasion of the privacy was not significant."[174]

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163. *Id.* at 2393.
164. *Id. See, e.g.,* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989); United States v. Biswell, 406 U.S. 311, 316 (1972).
165. *Vernonia*, 115 S. Ct. at 2393.
166. *Id.* at 2393-94.
167. *Id.* at 2393.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 2394.

C. *The Nature of the Governmental Concern and the Efficacy of the Policy*

In past cases justifying the reasonableness of a particular drug testing policy, the governmental interest was found to be "compelling,"[175] which the Court defined as an interest "*important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."[176] In the present case, the Court concluded that the governmental concern was, in fact, compelling, based on the desire to deter drug use by schoolchildren.[177] The Court stated, "the effects of a drug-infested school are visited not just upon the users but upon the entire student body and faculty, as the educational process is disrupted."[178] The Court also pointed out that the subjects of the drug policy here are athletes, who are at "particularly high" risk of physical harm caused by drugs.[179] With regards to immediacy, the Court viewed the situation in Vernonia's schools as "an immediate crisis of greater proportions than existed in *Skinner*"[180] and "of much greater proportions than existed in *Von Raab*."[181]

The Court then analyzed the "efficacy" of the drug policy for "addressing the problem" in Vernonia's schools,[182] namely, the decision by the Court not to require an element of individualized suspicion. The Court emphasized that it has refused to require that only the "least intrusive search practicable" can be considered "reasonable" under the Amendment[183] and pointed to three factors supporting its decision to dispense with a requirement of suspicion.[184] First, Court held that the imposition of a suspicion-based testing policy might in

175. *Id.* (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989)).

176. *Id.* at 2394-95.

177. *Id.* at 2395.

178. *Id.*

179. *Id.*

180. *Id.* (citing *Skinner*, 489 U.S. at 607). In *Skinner*, a nation-wide testing policy was imposed on railroads in which no drug problem had been proven to exist. *Vernonia*, 115 S. Ct. at 2395 (citing *Skinner*, 489 U.S. at 607).

181. *Vernonia*, 115 S. Ct. at 2395. In *Von Raab* the drug testing was not "implemented in response to any perceived drug problem" and "has not led to the discovery of a significant number of drug users." National Treasury Employees Union v. Von Raab, 489 U.S. 656, 673 (1989) (citing Brief for Petitioners 37, 44).

182. *Vernonia*, 115 S. Ct. at 2395.

183. *Id.* at 2396.

184. *Id.*

fact be "impracticable . . . because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students."[185] Second, a suspicion-based policy would create the "expense of defending lawsuits" claiming "arbitrary imposition" or demanding "greater process before accusatory drug testing is imposed."[186] Finally, a suspicion-based policy would " add[ ] to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse."[187] Based on the aforementioned justifications, the Court held that a suspicion-based policy "would not be better, but worse" than a policy based on suspicion and upheld the current suspicionless policy as "reasonable" in light of the present circumstances.[188]

V. ANALYSIS

In some ways the Court's analysis regarding the reasonableness of Vernonia's drug testing policy is quite convincing. For example, the discussion of the nature of the policy's procedure appears to be accurate.[189] In contrast, however, the Court appeared to have overstated both the diminished nature of the privacy interests and the "compelling" nature of the government's concerns in order to avoid addressing the absence of any individualized suspicion requirement.[190] A review of its analysis clearly demonstrates how the Court "dispense[d] with a requirement of individualized suspicion on considered policy grounds."[191]

A. *The Privacy Interests*

While it cannot be disputed that children, and students especially, enjoy a lesser degree of privacy than do their adult counterparts,[192] it does not seem reasonable to equate their privacy expectations to those of workers in a closely regulated industry.[193] The majority attempts to justify this holding of diminished privacy expectations by

185. *Id.* The Court stated that a suspicion-based testing policy would "transform the process into a badge of shame." *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *See infra* notes 200-02 and accompanying text.
190. *See infra* notes 191-97, 203-14 and accompanying text.
191. *Vernonia*, 115 S. Ct. at 2397 (O'Connor, J., dissenting).
192. *See id.* at 2391-92.
193. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989); United States v. Biswell, 406 U.S. 311, 316 (1972).

claiming that the administration of vaccinations and physical examinations represent intrusions on a student's privacy similar to the drug policy itself.[194] However, the nature of these searches is not a cause for concern as is Vernonia's drug policy, especially with regard to their lack of suspicion. Because "vaccinations are not searches *for anything in particular* . . . there is nothing about which to be suspicious."[195] A suspicion requirement for physical examinations would also not be "practicab[le] . . . because the conditions for which these physical exams ordinarily search, such as latent heart conditions," are not nearly as "observable" as drug use.[196] Additionally, searches such as physical examinations and vaccinations are not designed to "reflect wrongdoing," but are "*wholly* nonaccusatory and have no consequences that can be regarded as punitive."[197]

The Court's argument that Vernonia's facilities offer little or no privacy with its open shower areas and doorless toilet stalls also does not support the premise that the school's children have such diminished privacy expectations as to justify suspicionless urinalysis testing.[198] While such facilities certainly do create a certain intrusiveness into the privacy of the athletes, it is not nearly as intrusive as a drug testing policy which seeks to discover the existence of some wrongdoing by the athlete. The same holds for the Court's argument that "go[ing] out for the team"[199] lessens an athlete's expectations regarding privacy; it cannot be said that a requirement that an athlete maintain a minimum grade point average necessarily diminishes an athlete's expectation of privacy. Athletes, while exposed to a certain amount of privacy intrusions, do not maintain such diminished expectations that a suspicionless drug test would seem to fall within the normal course of high school athletics.

B. *The Nature of the Intrusion*

In contrast to its view of the nature of the athlete's privacy interest, the Court's analysis of Vernonia's drug policy regarding procedures and disclosures appears to be quite accurate. The monitoring procedures behind the policy's implementation were limited by the fact that at no time were the student-athletes physically exposed to the

194. *Vernonia*, 115 S. Ct. at 2392.
195. *Id.* at 2405 (O'Connor, J., dissenting).
196. *Id.* (O'Connor, J., dissenting).
197. *Id.*
198. *Id.* at 2393.
199. *Id.*

accompanying monitors.[200] Also, the test itself only searched for specific instances of drug use, and not for pregnancy, epilepsy, or other maladies capable of being detected through the testing.[201] Finally, the results to the testing were only disclosed to a limited number of people,[202] and were not used for criminal procedural purposes. The procedure of the testing itself, apart from its lack of individualized suspicion, served as a reasonable means for implementing the school's policy.

C. *The Governmental Concern*

Similar to its analysis of the student-athletes' privacy interests, the Court appears to have also overstated its conclusion regarding the governmental interest, holding that it was "of greater proportions" than in *Skinner* or *Von Raab*.[203] While the safety of our nation's school children is a great concern,[204] the concern for "ensur[ing] safety" of railroad passengers,[205] or for protecting the public against drug-using customs agents[206] is certainly far more directly related to the issue of drug testing. The situation at hand is primarily distinguishable from both *Skinner* and *Von Raab* because in those cases, the threat of injury was primarily upon people other than those subjected to the testing.[207] While the majority argues that the effects of drug use will be inflicted on all athletes, not just the user,[208] in reality the primary victims of the drug use are the users themselves. However, just because drug users pose the greatest harm to themselves does not mean that drug testing should not be prohibited *per se* in public schools; it merely means that the interest is not so "compelling" that the Court can relieve the State of individualized suspicion unless doing so would make the search "ineffectual."[209]

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200. *See supra* text accompanying notes 168-71.

201. *See supra* text accompanying note 172.

202. The results were only disclosed to the Superintendent, principals, vice-principals, and athletic directors. *Vernonia*, 115 S. Ct. at 2389.

203. *Id.* at 2395.

204. *See id.* at 2395.

205. *See Skinner*, 489 U.S. at 620. *See also supra* notes 113-27 and accompanying text.

206. *See Von Raab*, 489 U.S. at 677. *See also supra* notes 128-40 and accompanying text.

207. In *Skinner*, a large number of people could have been potentially injured by an employee who was under the influence of drugs or alcohol. *Skinner*, 489 U.S. at 607-08. In *Von Raab*, the threat of a customs employee using drugs is significant, considering the fact that the employee "may need to employ deadly force." *Von Raab*, 489 U.S. at 671.

208. *Vernonia*, 115 S. Ct. at 2395.

209. *See* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

D. *The Necessity of a Suspicionless Search*

Even if the governmental concern had been more "compelling" here, it still would not have been absolutely necessary that the search be suspicionless in order for the government's objectives to be accomplished. In recent opinions in which individualized suspicion has not been required, the Court has been criticized for "cloud[ing] the two distinctly different concepts of governmental interest and necessity."[210] In *Vernonia*, the Court dismisses Acton's argument that the policy should require individualized suspicion by stating that "[w]e have repeatedly refused to declare that only the, least intrusive, search practicable can be reasonable under the Fourth Amendment."[211] However, in lessening the Amendment's protection to its minimum level, the Court failed to both acknowledge the entire history preceding the Amendment's creation and to compare the current situation to those in which a suspicion-based scheme is, in fact, "ineffectual."[212] In most of the cases lacking individualized suspicion, the Court has "upheld [those] searches only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime."[213] Here however, the Court made no such reference and the few arguments which were offered to justify the suspicionless nature of the search are insufficient to attain the level of "ineffectual."[214]

The three arguments set forth by the Court are all based on the adversarial nature of a suspicion-based policy. First, it points to the fact that a suspicion-based test might not be accepted by parents.[215]

210. Clancy, *supra* note 1, at 601. Clancy analyzes the diminishing requisite showing for suspicionless searches and seizures in recent decisions, including New York v. Burger, 482 U.S. 691 (1987) (justifying suspicionless inspections of automobile dismantlers because by claiming it was necessary to further the regulatory scheme); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (citing "impracticality" as basis for testing all crew members following an accident); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (justifying suspicionless testing by the possible harm of employees using drugs); and Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (rejecting idea that comparative effectiveness of a checkpoint program for drunk drivers be considered as part of balancing test). Clancy, *supra* note 1, at 604-05.

211. *Vernonia*, 115 S. Ct. at 2396 (citing *Skinner*, 489 U.S. at 629, n.9).

212. *Id.* at 2397-98 (O'Connor, J., dissenting). The dissent reviews cases emphasizing the importance of individualized suspicion. *See id.* at 2399 (quoting Carroll v. United States, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile . . . .")). The dissent also discusses quite thoroughly the historical intent of the Framers behind individualized suspicion. *Id.* Justice O'Connor stated, "the particular way the Framers chose to curb the abuses of general warrants . . . was not to impose a novel 'evenhandedness' requirement; it was to retain the individualized suspicion requirement contained in the general warrant . . . ." *Id.* at 2398.

213. *Id.* at 2401 (O'Connor, J., dissenting).

214. *See infra* notes 210-213 and accompanying text.

215. *Vernonia*, 115 S. Ct. at 2396.

However, the Court provides no evidence that this was the case. In fact, a suspicion-based policy might receive equal or more support than a suspicionless policy because it would only subject to testing those students who appeared to be using drugs.

Second, the Court argues that a suspicion-based policy would create a greater expense of defending lawsuits.[216] However, this argument also fails because as long as searches are conducted with some evidence of suspicion, these lawsuits will fail. A school with a well-developed policy outlining the steps to leading to the testing of a particular individual faces no greater liability than a school employing a suspicionless policy.

The Court finally attempts to justify the suspicionless nature by arguing that the added adversarial burden of spotting drug use by students would further detract from the teachers' already demanding responsibilities.[217] However, teachers are already required to "investigate student wrongdoing" for such matters as gambling, tobacco use, and forgery or lying,[218] thus an additional responsibility of detecting drug use before deciding to impose urinalysis testing seems quite similar to the responsibilities already undertaken.

In addition to the Court's failure to provide reasons justifying the imposition of a suspicionless policy for the particular set of circumstances at hand, it also failed to equate the *Vernonia* situation to other cases in which a suspicion-based policy was found to be "ineffectual." In past cases such as *Camara*[219] and *Skinner*,[220] it has been evident that a requirement of suspicion would render the particular search "ineffectual."[221] However, as Justice O'Connor points out in her dissent, "[t]he instant case stands in marked contrast,"[222] as most of the evidence introduced at trial by Vernonia to support its policy involved situations in which suspicion was present.[223] Similar to the situation in

216. *Id.*
217. *Id.*
218. *Vernonia* at 2402 (O'Connor, J., dissenting).
219. 387 U.S. 523 (1967).
220. 489 U.S. 602 (1989).
221. In *Skinner*, the Court held that because the scene of a serious train accident was normally very chaotic, it was not practical to determine which crew members contributed to the accident. *Id.* at 631. In *Camara*, the Court held that individualized suspicion would deter housing administrators from properly being able to uncover defects and faulty conditions in public housing, since it is impossible to determine the status of the inside of a building without actually going inside. *Camara*, 387 U.S. at 536-37.
222. *Vernonia*, 115 S. Ct. at 2402 (O'Connor, J., dissenting).
223. *Id.* at 2403 (O'Connor, J., dissenting). Most of the evidence included "first or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use. . . ." *Id.*

T.L.O., in which suspicion led to the search of a student's purse,[224] most of the situations intended to be prevented by the Vernonia school district could be achieved as effectively if attacked by a suspicion-based policy.[225]

VI. CONCLUSION

Although the *Vernonia* Court's decision does not diverge too terribly far from the reasoning displayed in other recent decisions involving suspicionless searches under the Fourth Amendment, it does mark the most liberal interpretation of "reasonableness" in the Amendment's history and appears to have almost completely disabled citizens from forming any consistent basis of protection. The Court's decision represents the final blow to the intent of the Framers regarding individualized suspicion. While the potential legal impact from the *Vernonia* decision will likely not create as much controversy as a case supporting a policy directly involving adults, the flexibility created by the Court in determining "reasonableness" has opened the door to even broader and more intrusive searches in the future.

The ultimate impact of the *Vernonia* decision on interscholastic athletics remains to be seen. Whether student-athletes will be less enthusiastic to participate in their sports because of the testing seems unlikely. In fact, the policy may have a positive impact by preventing certain athletes from using drugs. However, the fact remains that the goal of preventing students from using drugs could have been accomplished just as effectively with a suspicion-based policy.

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224. *See supra* notes 90-100 and accompanying text.

225. *See Vernonia*, 115 S. Ct. at 2403-04 (O'Connor, J., dissenting). For example, the record indicated that a teacher had watched students "passing joints back and forth" at a restaurant across from school. *Id.* at 2403. Another situation involved a student who "presented himself to his teacher as clearly obviously inebriated and had to be sent home." *Id.* Finally, another student, when asked about his "dancing and singing at the back of the classroom" replied that he was "high on life." *Id.*