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Random Suspicionless Drug Testing: Are Students No Longer Afforded Fourth Amendment Protections?

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RANDOM SUSPICIONLESS DRUG TESTING:
ARE STUDENTS NO LONGER AFFORDED FOURTH
AMENDMENT PROTECTIONS?

“As nightfall does not come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.”¹

I. INTRODUCTION

It was a typical day at Haines City High School in Polk County, Florida. Like over 13 million² students who attend public school throughout the United States, the students shuffled through the school house gates with excitement. Their excitement soon turned to confusion when upon entering the building, each student was given a card with his or her name printed on it and instructions to proceed to the school auditorium. It became evident that today was far from a typical day for the students in Haines City. In the auditorium, the principal instructed every student that they had to submit to a mandatory drug testing program to detect the presence of illegal drugs. He continued to explain that the school’s program requires each student to urinate in a cup, to produce a sample while a teacher looks on to verify the sample’s accuracy. Furthermore, any student who refuses to be tested faces immediate suspension from school and all extracurricular activities. Prior to enacting the program, school officials had evidence that certain students used illegal drugs. However, school officials and teachers never suspected that the entire student body was using drugs. Nevertheless, the new program requires the entire student body to provide a urine sample and to comply fully with the program.

1. Letter from William O. Douglas to Young Lawyers Section of the Wash. State Bar Ass’n (Sept. 10, 1976), *in* THE DOUGLAS LETTERS 162 (Melvin Urofsky ed. 1987).

2. The projected number of students attending public high schools in 2001 is 13,626,000. *See* U.S. Department of Education, National Center for Education Statistics, Projections of Education Statistics to 2011, (This table was prepared June 2000), *available at* http://nces.ed.gov/pubs2001/proj01/tables/table08_1.asp (last visited Oct. 20, 2001).

This Note surveys cases that assess the constitutionality of student drug testing programs and argues that the doctrinal policies surrounding these programs are a perversion of students' Fourth Amendment rights. Part II provides a general background on Fourth Amendment principles. It traces the development of the "special needs" exception to the warrant and probable cause requirement used to sanction drug testing programs. Part III addresses the Fourth Amendment's application to students. In particular, this section examines the narrower issue of "suspicionless" drug testing of students who participate in, athletics, extracurricular activities, and certain academic courses. Part IV advocates that a more protective view of students' rights should be taken when random suspicionless drug tests are applied to students. This Part argues that current drug testing programs fail on the doctrinal underpinnings of the "special needs" exception to the warrant and reasonableness requirements of the Fourth Amendment. This Part examines Supreme Court case law where students were held to have a lower expectation of privacy than adults with respect to searches and seizures at school. This case law however was based on a form of individualized suspicion and used the reasonableness interpretation of the Fourth Amendment to sanction the search. In addition, this part examines Supreme Court cases that have found constitutional suspicionless drug testing regimes in limited circumstances where the government had either a demonstrated drug problem with regard to the group tested or a unique governmental concern that necessitated a relaxation of the Fourth Amendment. This Note argues that the combined progression of these cases including the Supreme Court's recent decision in *Board of Education v. Earls*, which upheld the suspicionless drug testing of students in certain extracurricular activities, represents a troubling expansion of drug testing, which moves in the direction of school-wide drug testing of all students in public schools. Furthermore, this Note argues that school-wide drug testing is undesirable because students, as citizens of the United States, are entitled to Fourth Amendment protections.

II. BACKGROUND ON FOURTH AMENDMENT

A. *Basic Fourth Amendment Principles*

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrant 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.³

Composed of a mere 54 words, this provision has historical roots in American, as well as English jurisprudence.⁴ The Fourth Amendment was ratified on December 14, 1791 and is part of the Bill of Rights. Originally, the restrictions against unreasonable searches and seizures were considered inapplicable to the states.⁵ The Supreme Court, through much controversy, concluded that the guarantees of the Bill of Rights applies to the states in exactly the same manner as they apply to the federal government.⁶

The structure of the Fourth Amendment is such that it can be divided into two parts; the “reasonableness clause” and the “warrant clause.”⁷ The relationship between these clauses has fostered consider-

3. U.S. CONST. amend. IV.

4. See J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* ch. 1 (1966). Noting that the Fourth Amendment is “alone among those constitutional provisions which sets standards of fair conduct for the apprehension and trial of accused persons. . .it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.” See also N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

5. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), where the Supreme Court held that the rights guaranteed in the first eight amendments do not apply to the states. See also *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), holding that the first eight amendments are not “privileges or immunities” and therefore not applicable to the states via the Fourteenth Amendment. The Fourteenth Amendment, adopted in 1868, provides that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV § 1. Since its adoption, the Fourteenth Amendment has been the subject of considerable debate, commonly called the “incorporation” debate, on the extent that the Fourteenth Amendment “incorporates” the restrictions of the Bill of Rights so as to make them applicable to the states. See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992); Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 *CHI.-KENT L. REV.* 1197 (1995); Robert L. Cord, *The Incorporation Doctrine and Procedural Due Process Under the Fourteenth Amendment: An Overview*, 1987 *B.Y.U. L. REV.* 867; Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949).

6. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Mapp v. Ohio*, 367 US 643, 655 (1961).

7. The reasonableness clause is phrased in general terms: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . .” The warrant clause provides that “no

able debate among scholars.⁸ One school of thought advocates a “warrant preference” rule which provides that any search or seizure that is not accompanied by a warrant is presumably unreasonable.⁹ Another school of thought advocates a “reasonableness” rule which only requires the balance of an individual’s privacy interests against that of the government.¹⁰ Irrespective of which approach is taken, “individualized suspicion” is generally required by the Fourth Amendment.¹¹ Individualized suspicion, which can include probable cause or reasonable suspicion, is the justification necessary for a Fourth Amendment search.¹²

The Supreme Court has defined probable cause as “a fair probability that contraband or evidence of a crime will be found in a particular place.”¹³ Reasonable suspicion, however, requires less justification than probable cause, and sanctions an intrusion where “specific and articulable facts which, taken together with rational

Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place or thing to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

8. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761-85 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855-56 (1994); Carig Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468-69 (1985); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 383-84 (1988); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1178-84 (1988).

9. See *United States v. Leon*, 468 U.S. 897 (1984). A search warrant “provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime,’” . . . we have expressed a strong preference for warrants and declared that “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.” *Id.* at 914.

10. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, the Court stated that the constitutionality of a search of a student’s purse would depend “on the reasonableness, under all the circumstances, of the search.” *Id.* at 341. Compare Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. AND MARY L. REV. 197 (1993). Criticizing the Supreme Court for engaging in “ad-hoc reasonable standard” to uphold searches. *Id.* at 205-07. See also Strossen, *supra*, note 8, at 1178-80. (noting that “the [reasonableness rule,] holds that the two clauses impose a single, unitary, and overarching standard of reasonableness under which the existence of probable cause or a warrant is simply a constituent factor.”).

11. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (holding that “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.”).

12. See *T.L.O.*, 469 U.S. at 340-42.

13. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

inferences from those facts, reasonably warrant [the] intrusion.”¹⁴ Notwithstanding the general requirement for individualized suspicion, the Court has on several occasions upheld searches with neither form of suspicion.¹⁵

The warrant and reasonableness requirements checks unfettered government intrusions into the private lives of its citizens.¹⁶ Despite the importance of the warrant and probable cause requirements, the Supreme Court has developed various exceptions to them. For example, warrants are not required when the police are in “hot pursuit” of a suspect,¹⁷ when exigent circumstances call for immediate action to prevent the destruction of evidence,¹⁸ during automobile searches and seizures,¹⁹ and when evidence is in “plain view.”²⁰ Also, neither a warrant nor probable cause is required for “inventory searches” of automobiles and other property impounded by the police,²¹ for a search incident to lawful custodial arrest,²² and “administrative searches,” including inspections of certain closely regulated businesses²³ and drug testing of certain government employees.²⁴ In addition, the Supreme Court has required that brief investigative detentions,²⁵ searches of government employees’ desks,²⁶ and public school searches of stu-

14. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

15. *See, e.g.*, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint aimed at removing drunk driving); *Vernonia v. Acton*, 515 U.S. 646 (1995) (drug testing of student athletes not based on individualized suspicion); *Camara*, 387 U.S. 523 (routine inspections by city housing authority not based on individualized suspicion); *Martinez-Fuerte*, 428 U.S. 543 (border checkpoint stops not based on individualized suspicion); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (drug testing of railroad employees not based on individualized suspicion); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing of U.S. Customs officials not based on individualized suspicion).

16. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (noting that the “[t]he basic purpose of the [Fourth Amendment] is to safeguard the privacy and security of individuals against arbitrary invasions by government officials). *See also* LASSON, *supra* note 4, at 79-82.

17. *Warden v. Hayden*, 387 U.S. 294, 310 (1967).

18. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

19. *California v. Carney*, 471 U.S. 386 (1985).

20. *Arizona v. Hicks*, 480 U.S. 321 (1987).

21. *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

22. *Chimel v. California*, 395 U.S. 752, 763 (1969).

23. *New York v. Burger*, 482 U.S. 691 (1987) (automobile junkyard inspections); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mine safety inspections); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealer inspections).

24. *Von Raab*, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602 (1989).

25. *Terry v. Ohio*, 392 U.S. 1, 16-20 (1968).

26. *O’Connor v. Ortega*, 480 U.S. 709 (1987).

dents and their possessions²⁷ be supported by reasonable suspicion and not probable cause.

B. The Development of the "Special Needs" Doctrine

As noted above, the Supreme Court has allowed exceptions to the restrictions of the Fourth Amendment for certain "administrative searches." The "special needs" exception is a significant subset of the "administrative search" exception, where the warrant and/or probable cause requirements are impracticable and beyond the need of normal law enforcement.²⁸ Contemporary "special needs" analysis developed with *Camara v. Municipal Court*,²⁹ where the Court began to examine the Fourth Amendment issues surrounding searches initiated for non-criminal and public purposes.

In *Camara*, the Supreme Court reviewed the constitutionality of a state housing inspection scheme that allowed inspectors to search homes for housing code violations at any time.³⁰ The search was neither supported by probable cause nor accompanied by a warrant.³¹ The Court noted that in certain cases requiring probable cause would unduly "frustrate the governmental purpose" of discovering safety violations.³² The Court concluded that it would be unreasonable to require probable cause as it is required in the criminal context.³³ Accordingly, the Court found that probable cause in the administrative inspections required a lesser showing than that normally required for a criminal warrant.³⁴ The Court balanced "the [government's] need to search against the invasion which the search entails."³⁵ The analysis

27. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Supreme Court has shifted its focus from reasonable suspicion in the public school context to a "suspicionless" standard. See *infra* Part IV, which focuses on this doctrinal shift for assessing the constitutionality of school searches and explores the perverted effects of school wide testing that have resulted from discursive standards.

28. *Griffin v. Wisconsin*, 483 U.S. 868, 881 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (1985) (Blackmun, J., concurring in judgment)).

29. 387 U.S. 523 (1967).

30. *See id.* at 526-27.

31. *See id.*

32. *See id.* at 533.

33. *See id.* at 538.

34. *See id.* at 538-39.

35. *Id.* at 538.

was later expanded to include the balancing of an individual's privacy interest against the governmental interests.³⁶

In *United States v. Martinez-Fuerte*,³⁷ the Supreme Court upheld a brief detention, without individualized suspicion, of vehicle occupants at fixed checkpoints near the Mexican border. The majority opinion, citing *Camara*, employed a balancing test and found that the government's need to prevent illegal immigration, by controlling the border, outweighed the individual's interest in not being detained.³⁸ The Court held that "[A] requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."³⁹ Interestingly, *Martinez-Fuerte* marks a shift in the constitutional analysis because individualized suspicion, as well as the warrant requirement, was considered unnecessary for a "reasonableness" determination.⁴⁰

In 1989, the Supreme Court in *Skinner v. Railway Labor Executives' Ass'n*⁴¹ and *National Treasury Employees Union v. Von Raab*⁴² began its current "special needs" jurisprudence by upholding the constitutionality of warrantless blood⁴³ and urine testing.⁴⁴ In *Skinner*, the Federal

36. See *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse*, a Delaware police officer pulled over a driver and checked his license and registration without suspicion of any wrongdoing. See *id.* at 650. During the search, the officer "smelled marijuana smoke" and saw contraband items in plain view and therefore arrested the driver. See *id.* at 650. The Court examined the nature of the intrusion involved in the search, and questioned the efficacy of the random search in achieving the desired goal. See *id.* at 659. The Court stated that the "incremental contribution to highway safety" achieved through random spot checks did not justify the "physical and psychological" intrusions upon the person being searched. See *id.* at 657-59. But see *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Where the court upheld a brief suspicionless seizures at highway checkpoints for the purpose of combating drunk driving. *Id.*

37. 428 U.S. 543 (1976).

38. See *id.* at 554.

39. *Id.* at 557.

40. *Id.* at 567-68 (Brennan, J., dissenting). Both Justice Brennan and Marshall in dissent recognized the effect of the decision as "consistent with [the majority's] purpose to debilitate Fourth Amendment protections." *Id.* at 568. Justice Brennan noted that the decision "virtually emptie[d] the Amendment of its reasonableness requirement." *Id.* at 567.

41. 489 U.S. 602 (1989).

42. 489 U.S. 656 (1989).

43. See *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, a physician, at the direction of a police officer, extracted blood from a suspect to test for alcohol content. *Id.* at 758. Although the Court found that there was probable cause for the defen-

Railroad Administration (FRA) instituted a standardized drug testing policy.⁴⁵ Under the policy, the FRA required mandatory blood and urine tests for employees involved in train accidents.⁴⁶ The FRA found that from 1972 to 1983 “the nation’s railroad experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,’ and that these accidents ‘resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars).’”⁴⁷ The Court, utilizing the reasonableness test, held that the governmental interest in the safety of the railway industry and its passengers and employees was sufficiently compelling to justify an intrusion of privacy via drug tests without individualized suspicion.⁴⁸ A significant part of the majority’s reasoning was the Court’s proclamation that railroad employees, because they work in an industry that was highly regulated to ensure safety, have a “diminished expectation of privacy” with respect to their

dant’s arrest, there was no warrant for the search and seizure of bodily fluids. *See id.* at 768. Nonetheless, the Court held that search and seizure was justified in light of the fact that the alcohol in the defendant’s bloodstream would have been “destroyed” had they waited to obtain a warrant. *Id.* at 769-70. This is considered an “exigent circumstance,” which is an accepted exception to the warrant requirement. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE §§ 12.01-02 (2d ed. 1997). *See also* Michael G. Rogers, *Bodily Intrusions in Search of Evidence: A Study in Fourth Amendment Decisionmaking*, 62 IND. L.J. 1181 (1987).

44. The *Skinner* decision is significant because it is the first recognition of urine testing as a search under the Fourth Amendment. The Court explains, “It is not disputed. . . that chemical analysis of urine, like that of blood, can reveal a host of private of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.” *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 617 (1989).

45. *See id.* at 606. The Federal Railroad Safety Act of 1973 gave the Secretary of Transportation authority to promulgate regulations prohibiting drug use among railroad workers. *See id.* The Association of American Railroads instituted industry-wide rules for railroad employees who possessed or used certain drugs. *See id.* To no avail, many violations were undetected, which resulted in the federal government’s adoption of the mandatory drug-testing scheme in the case. *See id.* at 608-11.

46. *Id.* at 606.

47. *Id.* at 607.

48. The Court reasoned that “even a momentary lapse of attention” could result in disaster. *Id.* at 628.

physical condition.⁴⁹ Therefore, the *Skinner* decision represents a narrow exception to the warrant and reasonable requirements, where a suspicionless test was upheld “to prevent accidents and casualties in railroad operations that result from [demonstrated] impairment of employees by alcohol or drugs.”⁵⁰

In *Von Raab*, the United States Customs Service required urine tests for its employees that sought promotion or transfer to positions involving drug interdiction, the carrying of a firearm, or the handling of classified information.⁵¹ Utilizing the reasonableness-balancing test, the Court recognized the need of the Customs Service to deter drug use among eligible candidates for promotion to sensitive positions and to prevent the promotion of drug users to those positions.⁵² In addition, the Court disposed of the employees’ expectation of privacy because customs employees should expect that the government would investigate their judgment, fitness and dexterity.⁵³ Interestingly, unlike the FRA in *Skinner*, the Customs Service in *Von Raab* did not have documented proof of significant drug use among its employees. Nevertheless, the Court found the testing “reasonable” in light of the “extraordinary safety and national security hazards” attendant with Customs employees on illegal drugs.⁵⁴ As the Court noted, “the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard.”⁵⁵

In *Chandler v. Miller*,⁵⁶ the special needs doctrine was given some teeth as the Supreme Court, for the first time, struck down a suspicionless drug testing scheme.⁵⁷ *Chandler* involved a Georgia statute

49. *Id.* at 627.

50. *Id.* at 621.

51. *Von Raab*, 489 U.S. 661.

52. *Id.* at 666. In particular, the Court acknowledged the government’s concern that customs employees who interdict drugs should be physically fit and have integrity and judgment. *See id.* at 670. The Court also noted that customs employees that carry firearms should not have an impairment of perception and judgment as a result of drug use. *See id.*

53. *Id.* at 672.

54. *Id.* at 674.

55. *Id.*

56. 520 U.S. 305 (1997).

57. *See* Robert Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 270 (2000) (noting that Justice Ginsburg’s majority opinion “showed concern with the breadth of the special needs doctrine, and the

that required candidates for designated state offices to certify that they had taken a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the test results were negative results.⁵⁸ Notably absent from the record was any proof that indicated that there had been any drug problem among individual's seeking political office in Georgia.⁵⁹ The Court first found that drug testing constituted a governmental search and therefore implicated the Fourth Amendment.⁶⁰ The Court then noted that a search, without individualized suspicion, would be deemed unreasonable unless the "special needs" exception was applicable.⁶¹ In striking down the statute, the Court noted that the "proffered special need for drug testing must be substantial. . . enough to override the individual's. . . privacy interests."⁶² The Court stated that "[a] demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program."⁶³

The Court's holding in *Chandler* has been characterized as an important limitation on the "special needs" doctrine because following its reasoning, it is no longer "sufficient that the government demonstrate some potential problem. It must demonstrate an actual problem or, at the very least, the likelihood that any drug use could be catastrophic."⁶⁴ However, the Supreme Court has held that, in the public school context, a demonstrated drug abuse problem is not always necessary to validate a drug testing program, even though some showing of a problem would shore up the assertion of special need.⁶⁵ As commentators have observed, "special needs," has never been sufficiently

Court's analysis tried to place meaningful limits on the doctrine's ever-widening scope.").

58. *Chandler*, 520 U.S. at 305.

59. *Id.* at 319.

60. *Id.* at 308-09.

61. *Id.*

62. *Id.* at 318.

63. *See id.* (citing *National Treasury Employees Union v. Von Raab*).

64. *See Dodson*, *supra* note 57, at 271.

65. *See Earls*, 122 S. Ct. at 2567-68.

explained.⁶⁶ Nonetheless, the term has been used to sanction significant Fourth Amendment intrusions in the public school context.⁶⁷

III. PUBLIC SCHOOLS & THE FOURTH AMENDMENT

A. *The Beginning: New Jersey v. TLO*

In the last century and especially in the last forty years, the Supreme Court has resolved a myriad of constitutional issues that have arisen in the context of public schools. In *New Jersey v. T.L.O.*,⁶⁸ the Supreme Court, directed its attention to searches and seizures in the public school setting. In *T.L.O.*, a female student was caught smoking in a school lavatory, in violation of school rules.⁶⁹ The student was brought to the vice-principal's office where he demanded her purse.⁷⁰ The vice-principal opened the purse and saw that it contained a package of cigarettes.⁷¹ After removing the cigarettes from the student's bag, the principal discovered cigarette rolling paper typically used to smoke marijuana.⁷² Based on the discovery, the vice-principal conducted a full search of the student's purse and found other evidence which implicated her as a marijuana dealer.⁷³

The Supreme Court held that the search was constitutional⁷⁴ and declared that searches by public school officials are not subject to either the warrant or the probable cause requirements of the Fourth

66. See *id.* (criticizing the "special needs" cases for failing to adequately define the doctrine). See also William Stunz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (noting that "little or no effort has been made to explain what these 'special needs' are; the term turns out to be no more than a label that indicates when a lax standard will apply.").

67. See *infra* Part III (discussing suspicionless urinalysis testing of students in public schools).

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

69. See *id.* at 328.

70. See *id.* at 343.

71. See *id.*

72. See *id.*

73. See *id.*

74. In reaching its conclusion, the Court rejected the state's primary argument that public school officials were outside the scope of the Fourth Amendment based on the premise that teachers and administrators act *in loco parentis* as mere agents of the parents. The Court held that this argument was "in tension with contemporary reality," and inconsistent with its precedent. See *id.* at 336. But see *R.C.M v. State*, 660 S.W.2d 552, 555 (Tex App. 1983) (holding that teachers act *in loco parentis* and thus are not subject to the restrictions of the Fourth Amendment); see also James Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1397 (2000) (arguing that over the years the Supreme Court's jurisprudence "suggest[s] that the Court itself might be acting in

Amendment.⁷⁵ To arrive at its decision, the Court recognized two specific school interests: the need to maintain order and the desire to foster a proper educational environment.⁷⁶ However, the Court also found that public school students possess a privacy interest in their possessions⁷⁷ and should be free from unreasonable searches and seizures.⁷⁸ Justices Powell and O'Connor, in concurrence, noted that "students within the school environment have a lesser expectation of privacy than members of the population generally."⁷⁹ Accordingly, the Court employed the "reasonableness" standard and found that the government's interests outweighed the intrusion on the student's privacy interests.⁸⁰

Interestingly, a significant aspect of *T.L.O.* was the Court's modification of the level of suspicion needed to justify the search.⁸¹ The Court articulated that it has always endorsed the proposition that in certain limited circumstances, a standard that stops short of probable cause is acceptable.⁸² Nonetheless, it is significant to note that *T.L.O.*'s analysis was based in part on the fact that individualized suspicion was present in the case.⁸³

loco parentis, enforcing those policies that most parents would support and questioning those policies that . . . parents would oppose.").

75. See *T.L.O.*, 469 U.S. at 340-41. The Court emphasized that the warrant requirement was particularly "unsuited to the school environment" since requiring a warrant would "unduly interfere with the maintenance of swift and informal disciplinary procedures needed in the schools." *Id.* at 340.

76. See *id.* at 339.

77. The Court defined personal possessions as those related to legitimate scholastic or extracurricular activities. See *id.* at 338-39.

78. See *id.* at 339.

79. *Id.* at 348. (Powell, J., concurring) ("It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally. But . . . children in school—no less than adults—have privacy interests that society is prepared to recognize as legitimate.").

80. See *id.* at 337. The majority articulated 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." *Id.* at 341. Justice Brennan and Marshall emphatically disagreed with the majority, noting that The Court's decision "jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment" and replaced it with a "Rohrschach [sic]-like 'balancing test.'" See *id.* at 357-58.

81. See *id.* at 340.

82. See *id.* at 341.

83. See *infra* Part IV notes 162 -67 and accompanying text (discussing of how individualized suspicion is no longer present in urinalysis searches of students).

B. Vernonia v. Acton

In *Vernonia v. Acton*,⁸⁴ the Vernonia school district, in response to a perceived drug problem,⁸⁵ implemented a drug-testing program.⁸⁶ Under this program, all students who participated in the school district's athletic programs had to subject themselves to random drug testing.⁸⁷ As such, the students and their parents had to sign consent forms, which authorized the school district to perform the drug test through a urine sample.⁸⁸ The Supreme Court held that the school district's drug program was reasonable and thus did not contravene the Fourth Amendment.⁸⁹ Justice Scalia, writing for the majority, concluded that the warrant and probable cause requirements were impracticable due to the "'special needs' [which] exist in the public school context."⁹⁰

The Court considered several factors in applying the reasonableness-balancing test. First, the Court examined the nature of the privacy interest intruded upon.⁹¹ In doing so, the Court considered the fact that the subjects of the program are "(1) children, who (2) have been committed to the temporary custody of the State as school-

84. 515 U.S. 646 (1995).

85. As the District Court stated:

The administration was at its wits end and . . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture.

Id. at 649.

86. *See id.* at 650.

87. *See id.*

88. The urine sample is collected by the student who enters an empty locker room with an adult monitor of the same sex. The student selected "produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may . . . watch the student while he produces the sample, and . . . they listen for normal sounds of urination. . . . After the sample is produced, it is given to the monitor, who checks it for temperature and tampering. . . ." *Id.*

89. *See id.* at 664-65.

90. *See id.* at 653. This phrase has sparked much debate because it is unclear whether special needs are always present in the public school context or some determination has to be made to invoke the exception. *See* discussion *infra* notes 165-66 and accompanying text.

91. *See Acton*, 515 U.S. at 654.

master.”⁹² Consequently, the Court concluded that students in the school environment are afforded a lesser expectation of privacy than the population generally.⁹³ The Court noted that this was evidenced by the fact that students routinely submit to physical examinations and vaccinations against disease.⁹⁴ In addition, the Court found that the legitimate expectation of privacy is even less for student athletes due to the “communal undress” inherent in athletic participation.⁹⁵ Moreover, the Court noted that student athletes, by choosing to “go out for the team,” voluntarily submit to a higher degree of regulation than the general population of students.⁹⁶

The Court then turned to the character of the intrusion.⁹⁷ The Court found the intrusion “negligible” in light of the fact that the urinalysis procedure was nearly identical to use of a public restroom.⁹⁸ Finally, the Court analyzed the nature and immediacy of the government’s concern to determine whether there was a compelling interest that was reasonably related to addressing the harm.⁹⁹ The Court concluded that the school district had a “perhaps compelling” interest in deterring drug use among school children.¹⁰⁰ In doing so, the Court recognized that the school district had an enhanced interest in preventing drug use among athletes due to “the risk of immediate physical harm to the drug user or those with whom he is playing his sport.”¹⁰¹ Moreover, the Court rejected the notion of a suspicion based testing scheme because schoolteachers, who would likely implement such a program, would be “ill prepared” for the tasks of de-

92. *See id.*

93. The Court explains that the “power” that private schools have is “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” *Id.* at 655.

94. *See id.* at 656.

95. The Court observes that “[s]chool sports are not for the bashful. They require ‘suing up’ before each practice or event, and showering and changing afterwards. . . [n]o individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition. . . [and] toilet stalls [do not] have doors.” *Id.* at 657.

96. *See id.* The Court analogizes the voluntary submission in the athletic context with the adults who choose to participate in a “closely regulated industry” like *Skinner*. *See id.*; *see also supra* n. 41-50 (discussing *Skinner*).

97. *See Vernonia*, 515 U.S. at 658.

98. *See id.* at 659.

99. *See id.* at 662.

100. *See id.* at 661.

101. *See id.* at 662.

testing signs of drug use.¹⁰² Balancing the student's diminished expectation of privacy against the severity of the government's interest and the unintrusive nature of the search, the Court found the drug testing scheme "reasonable" under the Fourth Amendment.¹⁰³

Justice Ginsburg wrote a separate concurring opinion where she observed that the *Vernonia* decision, as she understood it, applied only to students who voluntarily participate in athletics.¹⁰⁴ She expressly reserved the question of suspicionless drug testing to other segments of the student population for another day.¹⁰⁵ Nevertheless, scholars and various courts across the country have amorphously extended *Vernonia's* reach to drug test students outside the athletic context.¹⁰⁶

Justice O'Connor along with Justices Stevens and Souter dissented from the *Vernonia* holding. In her dissent, O'Connor observed that the majority decision disregarded "history and precedent" that established individualized suspicion as "usually required" under the Fourth Amendment except in cases where a suspicion-based scheme would be likely ineffectual.¹⁰⁷ According to O'Connor:

The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or sec-

102. *See id.* at 664. In dissent, Justice O'Connor criticizes the majority for dispensing with a suspicion-based approach on considered policy grounds. *See id.* at 667 (O'Connor, J., dissenting). She articulates that historically, "mass suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment." *See id.* (emphasis in original). *See also* Jennifer L. Malin, Comment, *Vernonia School District 47J v. Acton: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469 (1996) (arguing that the special nature of the school environment is particularly suited to a requirement of individualized suspicion).

103. *See id.* at 664-65.

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

105. *See id.*

106. *See* Joanna Raby, Note, *Reclaiming Our Public Schools: A Proposal for School-wide Drug Testing*, 21 CARDOZO L. REV. 999 (1999); George M. Dery, III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 74 (1998); Darrel Jackson, Note & Comment, *The Constitution Expelled: What Remains of Students' Fourth Amendment Rights?*, 28 ARIZ. ST. L.J. 673 (1996); Darren K. Sharp, Note, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 DRAKE L. REV. 149, 152-55 (1997); Irene Merker Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV. 349, 360 (1996) ("A majority of the Court seems to have understood that the majority opinion has or may have a far broader sweep than that suggested by Justice Ginsburg.").

107. *See Vernonia*, 515 U.S. at 676 (O'Connor, J., dissenting).

ond-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus would have justified a drug-related search under our T.L.O. decision.¹⁰⁸

Accordingly, O'Connor argued that in these circumstances, a suspicionless search regime was categorically unreasonable.¹⁰⁹ Since *Vernonia*, numerous lower courts have addressed the issue of extending random drug testing to students who participate in extracurricular activities and certain academic courses.¹¹⁰ Some have ignored the *Vernonia* factors and concluded that extracurricular activity is as compelling as athletic participation.¹¹¹ Others have extended *Vernonia* on the basis of the school district's "substantial" need to prevent the possible harm of drug use.¹¹² While others have rejected the extension of random drug tests to extracurricular activities.¹¹³

C. *Board of Education v. Earls*

Contributing to the post-*Vernonia* melee, the Supreme Court in *Board of Education v. Earls*¹¹⁴ found constitutional a school district's attempt to randomly drug test its students who participated in extracurricular activities. The school district did not have individualized suspicion or proof of a demonstrated drug problem. The case arose out of the Tecumseh School District in Oklahoma and involved a policy that tested all students "in any extracurricular activity" such as the

108. See *id.* at 679 (O'Connor, J., dissenting).

109. See *id.* at 680 (O'Connor J., dissenting).

110. See *Earls v. Bd. of Educ. of Tecumseh Public School Dist.*, 242 F.3d 1264 (10th Cir. 2001), *overruled by* 122 S. Ct. 2559 (2002); *Joy v. Penn-Harris Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000); *Willis v. Anderson Community School Corp.*, 158 F.3d 415 (7th Cir. 1998); *Todd v. Rush County Schools*, 133 F. 3d 984 (7th Cir. 1998); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999); *Tannahill v. Lockney Independent School Dist.*, 133 F.Supp.2d 919 (N.D. Tx. 2001); *Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998); *Theodore v. Delaware Valley School Dist.*, 761 A.2d 652 (Pa. Commw. Ct. 2000); *Linke v. Northwestern School Corp.*, 763 N.E.2d 972 (Ind. Ct. App. 2002).

111. See *Todd*, 133 F.3d at 986; *Joy*, 212 F.3d at 1065; see also Jennifer E. Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 Nw. U. L. REV. 811, 829 (2001) (noting the "brevity and lack of analysis" in the *Todd* decision).

112. See *Miller*, 172 F.3d at 581.

113. See *Earls*, 242 F.3d at 1278; *Trinidad*, 963 P.2d at 1109; *Theodore*, 761 A.2d at 660-61; *Tannahill*, 133 F.Supp. at 930-31.

114. 122 S. Ct. 2559 (2002).

Future Home Makers of America, Future Farmers of America, Academic Team, Band, and Cheerleaders.¹¹⁵

The District Court rejected the claim that the policy violated the Fourth Amendment and granted summary judgment to the School District.¹¹⁶ The Tenth Circuit Court of Appeals reversed, holding that the policy was unconstitutional.¹¹⁷ The Tenth Circuit began its analysis by noting the confusion as to the application of the special needs doctrine in light of *Chandler v. Miller*.¹¹⁸ Nonetheless, the Court noted that *Vernonia* was the “primary guide” to its analysis in that it was the only Supreme Court case that deals with the unique environment of the school setting.¹¹⁹

Although the Court acknowledged that students have a somewhat lesser expectation of privacy, the court took issue with the nature of the governmental concerns and the efficacy of the program employed to redress those concerns.¹²⁰ While noting the importance of drug deterrence, the Court found that testing extracurricular participants on the grounds of “safety” is both over-inclusive and under-inclusive.¹²¹ In addition, the Court considered the “paucity of evidence of an actual drug abuse problem” and concluded that the “immediacy” of the gov-

115. *See id.* at 2562-63. The plaintiff Lindsay Earls is a member of the show choir, the marching band, and the academic team. The co-plaintiff, Daniel James sought to participate in the academic team. *See id.* at 2563.

116. *See* 115 F. Supp. 2d 1281, 1287 (2000).

117. *See Earls*, 242 F.3d 1262.

118. The Court noted that since *Chandler* “a step” has been “added” to the special needs analysis. *See id.* at 1269. The Court defines the special needs inquiry as two fold: “first, ‘whether the proffered governmental concerns were ‘real’ by asking whether the testing program was adopted in response to a documented drug problem or whether drug abuse among the target group would pose a serious danger to the public’; and second, ‘whether the testing scheme met the related goals of detection and deterrence.’” *See id.* at 1268.

119. Thus, the Court found that there is a special needs in the public school context, while expressly noting that the Supreme Court had not articulated that the “special needs bar” has been raised. *See id.* at 1270. In contrast, the dissent criticized the majority for “reneg[ing]” on its holding that school districts “need not demonstrate a special need” by “reimposing” at the end of its opinion a requirement that school districts demonstrate an “identifiable drug problem among a sufficient number of those subject to testing.” *See id.* at 1278, 1283 (Ebel, J., dissenting).

120. *See id.* at 1276.

121. The Court noted that some student activities subject to the testing policy “can hardly be considered a safety risk,” while other activities that are not subject to the policy involves a “measurable safety risk.” *See id.* at 1277.

ernment's was greatly diminished.¹²² Accordingly, the Tenth Circuit struck down the drug testing policy as unconstitutional.¹²³

The Supreme Court, in a 5-4 decision, overruled the Tenth Circuit and found that the School District's drug testing policy was entirely reasonable.¹²⁴ Justice Thomas, writing for the court, noted that a finding of individualized suspicion may not be necessary when a school conducts drug testing.¹²⁵ Applying the first of the *Vernonia* factors, the court concluded that the students affected by the drug testing policy have a limited expectation of privacy.¹²⁶ Next, the Court examined the character of the intrusion and found that it was virtually identical to the "negligible" intrusion it approved in *Vernonia*.¹²⁷ Finally, the Court considered the nature and immediacy of the government's concerns and the efficacy of the testing policy.¹²⁸ The Court held that the health and safety risks identified in *Vernonia* applied in "equal force" to the children in this case.¹²⁹ Moreover, the Court stated that "a demonstrated drug abuse problem is not always necessary to the validity of a testing regime, even though some showing of a problem does shore up an assertion of special need for a suspicionless general search program."¹³⁰ The Court was satisfied that the evidence presented was sufficient to "shore up" the need for the drug testing program.¹³¹ Accordingly, the court concluded that the combination of the nation

122. *See id.*

123. *See id.* at 1278.

124. *See Earls*, 122 S. Ct. at 2569.

125. *See id.* at 2565.

126. The court points out that the distinction between athletes and extracurricular participants is "not essential" because the basis of *Vernonia* was the school's custodial responsibility and authority. *See id.* at 2561. Moreover, the court notes that "students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes." *Id.*

127. *See id.* at 2566; *see Vernonia*, 515 U.S. at 658.

128. *See Earls*, 122 S. Ct. at 2567.

129. *See id.* Justice O'Connor, in dissent, noted that, in this case, the drug problems and the policies to redress them were "distinctly different" from *Vernonia*. She points out that the *Vernonia* drug testing policy screened particular drugs that posed substantial risks to athletes. *See id.* at 2576 (O'Connor, J., dissenting).

130. *See id.* at 2567-68.

131. The Court noted that "[t]eachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the School board president reported that people in the community were calling the board to discuss the 'drug situation.'" *Id.* at 2567.

wide drug epidemic and the evidence of drug use in the school district, made the drug testing policy reasonable.¹³²

IV. A MORE PROTECTIVE VIEW OF STUDENTS' RIGHTS

School districts today educate America's children on the virtues the Constitution while simultaneously disregarding their right to be free from unreasonable searches and seizures. Current suspicionless drug testing schemes demonstrate an unconstitutional perversion of the "special needs" doctrine,¹³³ which has led to a complete diminution of students' Fourth Amendment rights. This conclusion is supported by two main arguments. First, a "special needs" based justification for random suspicionless drug testing fails on two doctrinal underpinnings of the exception. Second, there are strong policy reasons for students, who are obviously protected by the Constitution, to retain some Fourth Amendment freedoms.

Commenting on the protection of students' rights against encroachment by public school officials, the Supreme Court in *West Virginia State Bd. of Educ. v. Barnette* observed:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Board of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.¹³⁴

132. As a result the Court expressly rejected the Tenth Circuit's requirement that "some identifiable drug abuse problem" be present among the students tested. *See id.* at 2568; *see also* *Earls*, 242 F.3d at 1278. Justice Thomas noted that "[the Court] cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for school children, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *See Earls*, 122 S. Ct. at 2568.

133. *See supra* notes 28-66 and accompanying text (explaining the development of the special needs exception).

134. *See* *New Jersey v. T.L.O.*, 469 U.S. 325 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

Indeed, current school polices, under the direction of the Supreme Court's decision in *Vernonia*, have used the "lesser expectation of privacy" principle as a door to subject large segments of students in public school to drug tests.¹³⁵ This part argues that current drug testing schemes lack the demonstrable drug problem and or the likelihood that such a problem could contribute to a disaster or affect public safety. A reading of *Skinner*, *Von Raab* and *Chandler* demonstrate that these principles are crucial to the Court's willingness to endorse suspicionless drug testing. Therefore, this part advocates that, over the years, the Supreme Court's jurisprudence has combined and distorted these two seemingly important principles, under the guise of special needs, to allow schools to virtually drug test every student, thereby extinguishing their rights.¹³⁶

The Supreme Court, in *T.L.O.*, reached significant conclusions on the issue of students' Fourth Amendment rights in public schools. Indeed, the Court noted that in the school setting, there must be some modification of the level of suspicion of illicit activity needed to justify a search.¹³⁷ Applying the reasonableness standard, the Court stated that a search is reasonable only if (1) it was justified at its inception and (2) if the search conducted was reasonably related in scope to the circumstances, which justified the interference in the first place.¹³⁸ In particular, the facts in *T.L.O.* demonstrated that the search by the vice-principal of a student's purse was justified at its inception because there was "reasonable grounds" that the student had violated school rules.¹³⁹ Thus, the balance struck by the court to sanction the search in *T.L.O.* was based on individualized suspicion.¹⁴⁰

Paradoxically, the Supreme Court later used the *T.L.O.* reasonableness analysis in *Vernonia v. Acton* to sanction random suspicionless drug testing when there was clearly no form of individualized suspi-

135. See *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999). "Our analysis in this case is informed at the outset by the Supreme Court's conclusion that children in the public school setting have a lower expectation of privacy than do ordinary citizens." *Id.* at 578. In *Wilkes*, the court did not deem significant, the fact that in *Vernonia* only student athletes were tested. *Id.* at 579. Indeed, the Court took pains to point out that students who participate in extracurricular activities also have "a legitimate expectation of privacy that is diminished to a level below [the general population of students]." See *id.*

136. See *supra* notes 41-55 and accompanying text (explaining the special needs exception to suspicionless drug testing).

137. See *T.L.O.*, 469 U.S. at 340.

138. See *id.* at 341.

139. See *supra* note 68 and accompanying text (noting that T.L.O had been seen in the bathroom with cigarettes and that her accomplice had confessed to smoking).

140. See *T.L.O.*, 469 U.S. at 342; *Vernonia*, 515 US at 653.

cion.¹⁴¹ In *Vernonia*, Justice Scalia pointed out that the Court has “explicitly acknowledged. . . [that] the Fourth Amendment imposes no irreducible requirement of. . . suspicion.”¹⁴² Nonetheless, the school setting is distinguishable from those cases in which the Court found it necessary to uphold the constitutionality a search with absolutely no form of individualized suspicion.

For example, in *Martinez-Fuerte*, the Court held that reasonable suspicion would be “impractical” given the heavy flow of traffic on roads for the interdiction of illegal aliens at borders.¹⁴³ Although the Court held that individualized suspicion was not an “irreducible requirement” of the Fourth Amendment, it did not imply that suspicion was wholly dispensable.¹⁴⁴ The circumstances in *Martinez-Fuerte* presented a practical impediment to suspicion-based justification for a search.¹⁴⁵ Conversely, the school setting does not present such a practical impediment because the teachers and school officials, while not law enforcement agents, interact with students on a daily basis and are more adept at detecting the illicit activity prohibited by school policies and the law.¹⁴⁶ Indeed, the *T.L.O.* case itself is significant because it demonstrates that a suspicion-based search is in fact practical in the

141. The Court stated that “ ‘special needs’ . . . exist in the public school context.” See *Vernonia*, at 653. Next, the Court notes that the warrant requirement would unduly impinge on teachers and administrators ability to maintain order in the schools. See *id.* Then, the Court while recognizing that *T.L.O.* was based on individualized suspicion disposes of the requirement. See *id.*

142. The Court first notes that the warrant requirement would unduly impinge on teachers and administrators ability to maintain order in the schools. See *id.* Then, the Court, while recognizing that *T.L.O.* was based on individualized suspicion notes that the court has sanction suspicionless searches in the past. See *id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

143. See *Martinez-Fuerte*, 428 U.S. at 557.

144. See Michael Book, Comment, *Group Suspicion: The Key to Evaluating Student Drug Testing*, 48 U. KAN. L. REV. 637, 650 (2000) (arguing that the Court in *Martinez-Fuerte* “held only that suspicion need not be individualized”). But see *Indianapolis v. Edmonds*, 531 U.S. 32 (2000) (where Justice Thomas expressed concern that “*Sitz* and *Martinez-Fuerte* were correctly decided.” Justice Thomas expressed doubt that “the Framers of the Fourth Amendment would have considered ‘reasonable’ a program of indiscriminate stops of individuals not suspected of wrongdoing.”).

145. See *Martinez-Fuerte*, 428 U.S. at 557. See also *United States v. Edwards*, 498 F.2d 496, 500 (1974) (Friendly, J.) (holding suspicion-based searches of airport passengers’ carry-on luggage impractical because of the great number of plane travelers and found “inapplica[ble]” the profile method for detecting hijackers).

146. See *T.L.O.*, 469 U.S. at 342.

school setting.¹⁴⁷ Accordingly, *Vernonia* represents a doctrinal failure in that it subverts *T.L.O.*'s rationale, which included individualized suspicion in the school setting, without rationalizing why the school setting presents a circumstance where individualized suspicion would be impractical.¹⁴⁸

In addition, *Vernonia* fails on the doctrinal principles of *Skinner* and *Von Raab*, both of which found suspicionless drug testing policies constitutional. Those decisions, however, were predicated on two fundamental grounds: (1) a serious drug problem that could (2) lead to a disaster or a danger to public safety. Under these constructs, the Court applied the special needs doctrine and disposed of the need for individualized suspicion.

In *Skinner*, there was evidence that the railroad industry had a significant problem of "on-the-job intoxication and train accidents."¹⁴⁹ In addition, it was undisputed that the employees covered by the drug-testing program were engaged in "safety sensitive tasks."¹⁵⁰ Accordingly, the Court held that the employees had a lower expectation of privacy by reason of their participation in an industry that is regulated pervasively to ensure safety.¹⁵¹ The Court further held that the need for drug testing without a showing of individualized suspicion was compelling.¹⁵² "Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."¹⁵³ As a result, the Court held that a requirement of suspicion in this context would significantly hinder the Government's interest in promulgating regulations for the safety of the public.¹⁵⁴

Conversely, the *Von Raab* decision upheld a drug-testing program for Customs Service officers even though there was no documented drug abuse problem among the officers.¹⁵⁵ Nevertheless, the Court

147. *See id.*; *see also Vernonia*, 515 U.S. at 678 (O'Connor, J., dissenting) ("nowhere is it less clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of [students] is under constant supervision by teachers and administrators and coaches, be it in the classrooms, hallways, or locker rooms.").

148. Justice O'Connor, in *Vernonia*, argued that exceptions to the individualized suspicion exception should be allowed "only where it has been clear that a suspicion-based regime would be ineffectual." *See id.* at 668.

149. *See Skinner*, 489 U.S. at 607.

150. *See id.* at 620.

151. *See id.* at 627.

152. *See id.* at 628.

153. *See id.*

154. *See id.* at 633.

155. *See Von Raab*, 489 U.S. at 674.

found that these employees were in high-risk positions, carried firearms, and had access to contraband, and could succumb to bribery by drug smugglers.¹⁵⁶ Therefore, *Von Raab* presented a “unique context” where a demonstrated drug problem was not required and a suspicionless search was more prudent.¹⁵⁷

Notwithstanding *Vernonia*'s dependence on *Skinner* and *Von Raab*,¹⁵⁸ the backdrop of student drug testing schemes present noteworthy distinctions. First, school drug testing schemes lack demonstrable evidence of a drug problem in the schools to warrant an invasion of students Fourth Amendment rights.¹⁵⁹ As discussed above, the Federal Railroad Administration in *Skinner* had evidence of the significant property damages and casualties that resulted from drug use by railroad employees.¹⁶⁰ On the other hand, the public schools have presented very little or no evidence of significant drug use problems in the public schools.¹⁶¹

In *Vernonia*, the school district argued that there was an “immediate crisis” within its schools created by student athletes who were “leaders of the drug culture.”¹⁶² According to the District Court:

[T]he administration was at its wits end and. . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions has reached ‘epidemic proportions.’ The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff’s direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student’s misperceptions about the drug culture.¹⁶³

156. *See id.*

157. *See id.*; *see also Chandler*, 520 U.S. at 307 (reaffirming the unique situation in *Von Raab*).

158. *See Vernonia*, 515 U.S. at 658-664.

159. *See supra* Part III notes and accompanying text.

160. *See Skinner*, 489 U.S. at 607.

161. *See Earls*, 242 F.3d at 1272; *see also* University of Michigan Institute for Social Research, *Monitoring the Future Study* (2001), *available at* <http://www.monitoringthefuture.org/data/data.html> (showing mixed findings across the country with increases in student drug use of ecstasy and a decline with other kinds of drug use such as heroin, LSD, crack and powdered cocaine. The study also found a steady usage of marijuana among school children.).

162. *See Vernonia*, 515 US at 649.

163. *See id.*; *see also* 796 F. Supp. 1354, 1357 (Or. 1992).

The Supreme Court agreed with the school district, holding that “a special need beyond regular law enforcement existed to act aggressively toward [the] students’ drug problem.”¹⁶⁴ The increase in the school district’s disciplinary problems, however, was a far cry from the catastrophic circumstances present in *Skinner*, where there was not only property damage but also human casualty.¹⁶⁵ Moreover, in *Skinner* there was quantifiable evidence that railroad workers were using drugs and alcohol on the job.¹⁶⁶ In *Vernonia*, the evidence of drug use was not only scarce, but also described in a feathery manner that reflected disciplinary problems with the student body and not substantial drug use.¹⁶⁷ Indeed, Justice O’Connor criticized the justification for the drug testing policy and noted the “great irony” of *Vernonia*’s suspicionless drug testing policy was its basis on “first- or second-hand stories of. . . students.”¹⁶⁸ Since *Vernonia*, some courts have gone even further and not even required a showing of a demonstrable drug problem prior to drug testing a group of students.¹⁶⁹

For example, in *Earls*, the District Court emphasized *Vernonia*’s demonstrated drug problem in addition to holding that the special needs exception “justif[ied] suspicionless drug testing. . . without first finding a pervasive drug problem among the group to be tested.”¹⁷⁰ The Tenth Circuit noted that “the evidence of drug use among [the students tested was] far from the ‘epidemic’ and ‘immediate crisis’

164. See Amanda Bishop, Note, *Students, Urinalysis & Extracurricular Activities: How Vernonia’s Aftermath is Trampling Fourth Amendment Rights*, 10 HEALTH MATRIX 217, 221 (2000).

165. See *supra* note 47 and accompanying text.

166. See *id.*

167. See *Vernonia*, 515 U.S. at 649.

168. Justice O’Connor recounts the evidence of drug use as follows:

Small groups of students. . . were observed by a teacher “passing joints back and forth” across the street at a restaurant before school and during school hours. Another group was caught skipping school and using drugs at one of the students’ houses. Several students actually *admitted* their drug use to school officials (some of them being caught with marijuana pipes). One student presented himself to his teacher as “clearly obviously inebriated” and had to be sent home. Still another was observed dancing and singing at the top of his voice in the back of the classroom; when the teacher asked what was going on, he replied, “Well, I’m just high on life.” [O]n a certain road trip, the school wrestling coach smelled marijuana smoke in a motel room occupied by four wrestlers. See *Vernonia*, 515 U.S. at 679 (O’Connor, J., dissenting) (citations omitted) (emphasis in original).

169. See *Earls*, 115 F. Supp. 2d 1281, 1285 (W.D. OK 2000).

170. See *id.*

faced by the Vernonia schools.”¹⁷¹ Nonetheless, the Tenth Circuit proceeded to balance the privacy interests of the students against the school district’s interest in testing students.¹⁷² Ultimately, the Supreme Court clarified its position and proclaimed that a demonstrated drug abuse problem is not always necessary to the validity of a testing regime.¹⁷³ If we are to accord students the Fourth Amendment rights they are afforded under the Constitution we must have, at a minimum, cogent reasons for impinging on those rights. In *Chandler*, the Supreme Court, for the first time, clearly stated circumstances in which the special needs doctrine should apply.¹⁷⁴ Interestingly, the Supreme Court’s holding in *Earls* represents a different test from the clarification given by *Chandler*, at least in the public school context.¹⁷⁵

Another significant distinction between student drug testing policies and the holdings in *Skinner* and *Von Raab* is the absence of a serious safety risk. While commentators have characterized the problems of drugs and violence in the public schools as an incurable social ill,¹⁷⁶ the situation in the public schools are not at the catastrophic level of disaster that was observed in *Skinner*.¹⁷⁷ Even in *Von Raab*, where the issue was not based on catastrophe but the unique safety concerns that Customs employees interdicting illegal drugs might be using drugs.¹⁷⁸ As such, the school context presents distinct differences that should be

171. See *Earls*, 242 F.3d at 1272. Indeed, there was no evidence showing a correlation between students with disciplinary referrals, drugs use and extracurricular activities. See *id.* at 1273.

172. See *id.* at 1275.

173. See *Earls*, 122 S. Ct., at 2568. But see Bishop, *supra* note 164, at 244 (arguing that the appropriate interpretation of Vernonia requires school districts to first show that its drug problem is real and has risen to the level of an immediate crisis).

174. See *supra* notes 56-66 and accompanying text.

175. See *Earls*, 122 S. Ct. at 2568. This is an example of how the Court’s attempt at clarity has created a sea of confusion. In *Chandler*, the Court noted that a demonstrated drug problem was needed to “shore up” an assertion of special need for suspicionless testing. See *Chandler*, 520 U.S. at 318. Conversely, the Court has held that, in the school context, the showing of a demonstrated drug problem is not always necessary to the validity of a testing regime, even though some showing of a problem would “shore up” an assertion of special need. See *Earls*, 122 S. Ct. at 2567-68. See Bradley, *supra* note 8, at 1468. (“The fourth amendment is the Supreme Court’s tarbaby: a mass of contradictions and obscurities that has ensnared the ‘Brethren’ in such a way that every effort to extract themselves only finds them more profoundly stuck.”)

176. See Timothy L. Jacobs, Comment, *School Violence: An Incurable Social Ill That Should Not Lead to the Unconstitutional Compromise of Students’ Rights*, 38 DUQ. L. REV. 617 (2000).

177. See *supra* notes 46-47 and accompanying text.

178. See *Von Raab*, 489 U.S. at 674.

reconciled in order to establish a sound constitutional foundation for suspicionless drug testing policies.

In *Vernonia*, the Court emphasized the general danger of drug abuse to students and the particular danger of “immediate physical harm” to student athletes who were drug users.¹⁷⁹ The Court noted that “[a]part from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District’s Policy have been demonstrated to pose substantial physical risks to athletes.”¹⁸⁰ However, using safety as a justification for testing students has proved problematic due to the over-inclusive and under-inclusive nature of the testing policies, which tests certain segments of the student population.¹⁸¹ As the Tenth Circuit observed, arguing the health care risk of addiction or physical harm from the use of drugs would only permit the testing of all students¹⁸² — an undesirable and unconstitutional solution.

Indeed, there is legal scholarship, which advocates that school-wide drug testing of all students is constitutionally plausible.¹⁸³ Such arguments find support in the tripartite test enunciated in *Vernonia*.¹⁸⁴ One argument begins with *Vernonia*’s first prong, which evaluates privacy interests and proclaims that students have a diminished expectation of privacy generally while student athletes have an even lower expectation of privacy.¹⁸⁵ As discussed above, the Court’s rationale in *Vernonia* was that the openness of student locker rooms resulted in “communal undress,” which reduced such privacy expectations.¹⁸⁶ As such, potentially all students could be tested¹⁸⁷ by the requirement in

179. See *Vernonia*, 515 U.S. at 554.

180. See *id.*

181. As the Tenth Circuit points out: “[T]here are students involved in extracurricular activities. . . who can hardly be considered a safety risk. . . On the other hand, there are students who are not subject to the testing. . . who engage in activities. . . which involve a measurable safety risk.” See *Earls*, 242 F.3d at 1277.

182. See *id.*

183. See Joanna Raby, Note, *Reclaiming our Public Schools: A Proposal for School-Wide Drug Testing*, 21 *CARDOZO L. REV.* 999 (1999); See also, Anthony G. Buzbee, Note, *Who will Speak for the Teachers? Precedent Prevails in Vernonia School District 47J v. Acton*, 33 *HOUS. L. REV.* 1229 (1996); See also Blake W. Martell, Note, *Hitting the Mark: Vernonia School District v. Acton*, 31 *U.S.F. L. REV.* 223 (1996).

184. See *supra* notes 90-102 and accompanying text.

185. See *Vernonia*, 515 U.S. at 657.

186. See *id.*

187. See Martell, *supra* note 183, at 255 (“The holding may also be viewed as opening the door to permit other groups of students to be tested as well.”).

many states that students take physical education classes¹⁸⁸ further demonstrating the skewed nature of Fourth Amendment jurisprudence in this area. How has it come to this? The answer lies in the precarious substitution of the fact of individualized suspicion present in *T.L.O.*, by a watered-down showing of a demonstrable drug problem in the public school setting. As this Note demonstrates, *Skinner* and *T.L.O.* are based on different theories under the Fourth Amendment exception. These theories have been amorphously combined in *Vernonia*, and subsequently expanded by some courts to allow for testing of a broader group of students. The resulting analysis is a nonsequitor that has all but eradicated individualized suspicion and no longer requires that drug use by the tested group is substantial, real or even demonstrated. Despite *Chandler's* refinement on the quantum of "special need" necessary to drug test,¹⁸⁹ school districts are left with a tripartite test that on its face seems balanced, but in reality operates as a vehicle to disregard Fourth Amendment protections.¹⁹⁰ Indeed, it appears that the *Chandler* decision provided little clarification of the special needs doctrine.¹⁹¹

As one commentator stated, "[t]he sanctity of individual dignity has deteriorated from where the Court considered the search of a student's purse to constitute a 'severe violation of subjective expectations of privacy,' to where a schoolchild being forced to urinate in front of faculty implicated only 'negligible' privacy interest."¹⁹² Therefore, a more protective view of students' Fourth Amendment rights must be employed less students will have in practice, even if perhaps not in theory, no rights at all.

If we accept the characterization of students' rights as generally diminished as compared to adult citizens,¹⁹³ one should appreciate that under this maxim students do have some rights. As *Tinker v. Des*

188. See CAL. EDUC. CODE § 51222 (West 1989) (requiring 400 minutes of physical education for every 10 school days); CONN. GEN. STAT. § 10-16b (1996) (requiring schools to provide physical education programs); MASS. GEN. LAWS ch. 71, § 3 (1982) (mandating physical education in all grades); N.J. STAT. ANN. § 18A:35-5 (West 1999) (requiring physical education adapted to the ages and capabilities of the students); N.Y. EDUC. LAW § 803 (McKinney 1988) (requiring physical education classes for students over eight years old).

189. 520 U.S. at 319.

190. See Dery, *supra* note 106, at 102 (concluding that the Supreme Court's balancing "has enabled the Court to reach conclusions unrestrained by the mandates of the Fourth Amendment. The result has been a steady dilution of privacy rights").

191. See *supra* note 183 and accompanying text. See also Smiley, *supra* note 111, at 837 (arguing that the special needs doctrine has progress down a slippery slope.).

192. Dery, *supra* note 106, at 102.

193. *Vernonia*, 515 U.S. at 655.

Moines Independent Community Sch. Dist. instructs, students do not “shed their constitutional rights . . . at the schoolhouse gate.”¹⁹⁴ Why is it then that contemporary constitutional evaluation of drug testing policies provides for a complete diminution of Fourth Amendment rights? Over the years, the Supreme Court’s evaluation of constitutional rights in the public schools has been varied. At best, the high Court’s jurisprudence can be characterized of bipolar.¹⁹⁵ In one extreme, namely in cases involving students’ rights of expression,¹⁹⁶ students’ Fourth Amendment rights,¹⁹⁷ and students’ due process rights,¹⁹⁸ the Court has adopted special constitutional standards for the school context.¹⁹⁹ The other extreme, for example in Equal Protection Clause cases,²⁰⁰ the Court has not altered constitutional standards to take account of the school context.²⁰¹

Nonetheless, the common thread with these cases is that the student retains some rights, however small. For example, in the context of students’ freedom of expression, the Court has curtailed their ability to engage in certain forms of speech deemed lewd and offensive.²⁰² However, students still retain the right to engage in silent protest, so long as it does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”²⁰³ As discussed above, suspicionless drug testing policies represent a substantial doctrinal failure because it would undermine the fundamental safeguards that the special needs doctrine was developed to serve. The fundamental policies of the Fourth Amendment,²⁰⁴ which requires that searches be initiated with a warrant, or at least be “reasonable,” should not be ignored in the school context.

V. CONCLUSION

For many years our nation has been plagued with the problem of drug use in the public schools. As this Note points out, the Court’s deviation from the warrant requirement to the “reasonableness” ap-

194. 393 U.S. 503, 506 (1969).

195. See Ryan, *supra* note 74, at 1345.

196. See *Tinker*, 393 U.S. at 506; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

197. See *supra* Part III.

198. See *Goss v. Lopez*, 419 U.S. 565 (1975).

199. See Ryan, *supra* note 74, at 1345.

200. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

201. See Ryan, *supra* note 74, at 1345.

202. See *Fraser*, 478 U.S. at 687.

203. *Tinker*, 393 U.S. at 509.

204. See *supra* notes 7-12 and accompanying text.

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proach to Fourth Amendment interpretation has provided school districts with a malleable solution devoid of individualized suspicion²⁰⁵ and a requirement that a substantial drug problem be present before subjecting students to tests. This framework is unclear, as seen by the divergent outcomes throughout the United States, and more importantly deprives students of rights that were expressly provided to them by our founding fathers. This has occurred as result of the doctrinal shift that the Court has taken, where two fundamental principles underlying the special needs exception have been removed from the analysis in the school context.

Garth Thomas

205. See Smiley, *supra* note 111, at 840-41 (arguing that the special needs doctrine has failed and the Court should return to its pre-special needs jurisprudence and re-adopt individualized suspicion).

