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### Life, Liberty, and the Pursuit of Urinalysis: The Constitutionality of Random Suspicionless Drug Testing in Public Schools

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## Notes

### **LIFE, LIBERTY, AND THE PURSUIT OF URINALYSIS: THE CONSTITUTIONALITY OF RANDOM SUSPICIONLESS DRUG TESTING IN PUBLIC SCHOOLS**

*In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.<sup>1</sup>*

#### I. INTRODUCTION

As freshman Guy Good sits in his fourth period Spanish class at Garrison High School on the first day of school, his nerves have settled and he is excited about the various opportunities his school has to offer.<sup>2</sup> Like many high school freshmen, he is insecure about his developing body and is often uncomfortable in social settings. Unlike many of his peers, Guy has been diagnosed with Attention Deficit Hyperactivity Disorder, for which he takes Ritalin on a daily basis. Guy is frustrated by his disorder, but understands that he needs to take Ritalin to function productively and concentrate in school. Because he is self-conscious about his condition, Guy and his parents decided that they would keep this medical information confidential.

Ten minutes before the bell is due to ring for fifth period, the principal enters the class and demands that Guy follow him to his office. Guy is embarrassed by being singled out in front of his classmates, but knows that he has never caused any trouble. Still, he breaks into a nervous sweat when he hears the principal announce his name in front of the class.

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<sup>1</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

<sup>2</sup> The school and people described in this hypothetical are fictional. However, the hypothetical school policy bears a close resemblance to those challenged in *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002), *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995), and *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 931 (N.D. Tex. 2001). See *infra* Part II.C (discussing these cases).

816 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

Unbeknownst to Guy and his parents, over the summer, the school district implemented a random drug testing program and he is one of the students who has been selected. He is led to the restroom where the principal hovers behind him and demands that he produce a urine sample for testing and disclose any medications he is currently taking. Guy's face turns pale and his mouth goes dry. With no choice, he produces the sample, reveals his Ritalin prescription, and leaves the principal's office feeling violated.

Following recent Supreme Court decisions interpreting the Fourth Amendment's application to public school children, random suspicionless drug testing, like that at Garrison High School, has become a reality in American schools. This Note will address the constitutional boundaries of suspicionless drug testing for Guy and other students in public schools who may be subjected to such privacy concerns.

In doing so, Part II will first provide background information describing the structure of the Fourth Amendment and how it has been applied to the states, particularly in the public school setting.<sup>3</sup> Part II.B will then introduce the "special needs" doctrine that the Court has created, which has allowed the government to circumvent the warrant and probable cause provisions of the Fourth Amendment.<sup>4</sup> In addressing how the Fourth Amendment has been applied in the school environment, Part II.C will generally discuss the diminished constitutional rights afforded to students and how these rights differ from those of adult citizens.<sup>5</sup>

Next, Part III of this Note will discuss how these decisions establishing diminished rights have paved the way for school districts to implement suspicionless drug testing for all students enrolled in public school.<sup>6</sup> Part III will also examine the policies that have recently been implemented by school districts and how the Court might apply its previous decisions in determining their constitutionality.<sup>7</sup> Finally, Part IV will propose a new test, which factors in the rights of the students'

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<sup>3</sup> See *infra* Part II.A.

<sup>4</sup> See *infra* Part II.B. While the "special needs" doctrine has traditionally been applied to criminal contexts, this Note will discuss how the Supreme Court has recently applied it to non-criminal conduct, particularly in the public school setting.

<sup>5</sup> See *infra* Part II.C.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> *Tannahill*, 133 F. Supp. 2d at 919. In this case, the school district's drug testing policy was held to be unconstitutional after applying the balancing test that was implemented by the Court in *Vernonia*. *Id.* at 930; see *infra* Part IV.

parents, for courts to apply when addressing the privacy rights of students in public schools.<sup>8</sup>

## II. BACKGROUND

To properly analyze the issue of suspicionless drug testing in public schools, Part II will discuss prior Supreme Court decisions that have led to the gradual erosion of the language of the Constitution and students' constitutional rights. Part II.A will first explore the text of the Fourth Amendment and its subsequent interpretation by the Court.<sup>9</sup> Next, Part II.B will discuss the special needs doctrine that the Court has used to circumvent the language of the Fourth Amendment.<sup>10</sup> Lastly, this Part will interpret how the Court has applied the special needs doctrine in public schools.<sup>11</sup>

While the Supreme Court has held that students do not "shed their constitutional rights . . . at the schoolhouse gate," it has also held that students' expectations of privacy are not the same as those of adults.<sup>12</sup> In the face of the national "War on Drugs," the Supreme Court held school policies implementing mandatory suspicionless drug testing for high school students to be constitutional despite the protections of the Fourth Amendment.<sup>13</sup>

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<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> See *infra* Part II.B. The Court has applied the special needs doctrine in the school setting and in government employment positions where safety is of great concern. See generally *Bd. of Educ. v. Earls*, 536 U.S. 822 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

<sup>11</sup> See *infra* Part II.B. The Court has conclusively held that schools are to be considered state actors in regard to the Fourth Amendment, stating:

If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.

*New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

<sup>12</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). But see *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (holding that "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children"); *T.L.O.*, 469 U.S. at 340 ("The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. . . . [I]n certain limited circumstances neither [probable cause nor the requirement of a warrant] is required.").

<sup>13</sup> U.S. CONST. amend. IV. The Fourth Amendment of the Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

## 818 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

In the wake of these Supreme Court decisions, school districts across the country have implemented drug testing policies that expand their reach to students who are involved in extracurricular activities or who drive to school, or even in some cases, to the entire student population.<sup>14</sup> New Jersey has implemented a state-wide policy mandating that high schools conduct drug testing on their students.<sup>15</sup> In his 2004 State of the Union Address, President George W. Bush proposed the allocation of \$23 million in federal funding to schools that implement drug testing programs for students.<sup>16</sup> However, while a bill requesting this funding was proposed in the House of Representatives, it was never enacted.<sup>17</sup> This federal push to implement drug testing programs for all students is an indication of a future debate that the Supreme Court may have to decide: Is suspicionless drug testing constitutional for all high school students when they are subjected to compulsory attendance?<sup>18</sup> This Note suggests that suspicionless drug testing is a violation of both students'

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violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.* See generally *Earls*, 536 U.S. 822 (upholding a school policy expanding drug testing to students involved in any extracurricular activity, regardless of any previous suspicion of individualized use); *Vernonia*, 515 U.S. 646 (finding it constitutional to drug test student athletes after school had cited specific issues concerning increased drug use in the school); KRIS E. PALMER, CONSTITUTIONAL AMENDMENTS: 1789 TO THE PRESENT 68 (Gale Group, Inc. 2000). In the early 1980s, President Ronald Reagan established a national "War on Drugs" to combat increased drug use. Douglas B. Marlow, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 1025 n.15 (2002). The War on Drugs increased penalties for drug crimes and implemented mandatory prison sentences for various drug offenses. *Id.*

<sup>14</sup> RYOKO YAMAGUCHI, LLOYD D. JOHNSTON & PATRICK M. O'MALLEY, UNIV. OF MICH., INST. FOR SOC. RESEARCH, DRUG TESTING IN SCHOOLS: POLICIES, PRACTICES, AND ASSOCIATION WITH STUDENT DRUG USE 159 (2003), available at <http://www.aclu.org/Files/PDFs/yesoccpaper2.pdf>; Drug Testing Fails Our Youth, <http://drugtestingfails.org/challenge.html> (last visited Dec. 30, 2006) [hereinafter Drug Testing Fails].

<sup>15</sup> Chris Newmarker, *New Jersey To Test High-School Athletes for Drugs*, SEATTLE TIMES, May 6, 2006. The New Jersey testing program was implemented to test for performance-enhancing drugs in the wake of the steroid popularity among athletes. *Id.* Students, athletes, and their parents have to sign consent forms for the testing and a failure to do so will render them ineligible for athletics. *Id.* The tests screen for nearly eighty banned substances, ranging from steroids to amphetamines. *Id.*

<sup>16</sup> George W. Bush, President of the United States of America, 2004 State of the Union Address (Jan. 20, 2004).

<sup>17</sup> Empowering Parents and Teachers for a Drug-Free Education Act of 2004, H.R. 3720, 108th Cong. (2004).

<sup>18</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring) (suggesting that the majority's opinion purposefully saved the question of mandatory testing for all student enrolled in public schools for another day).

2006] *Suspicionless Drug Testing in Public Schools* 819

Fourth Amendment privacy rights and their parents' fundamental rights to control the upbringing of their children.

A. *The Limited Protection of the Fourth Amendment in America's Public Schools*

The Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides for individuals to be secure in their person as against unreasonable search and seizure.<sup>19</sup> The Fourth Amendment contains two distinct clauses that must be considered separately.<sup>20</sup> The first clause states that unreasonable searches and seizures will be unconstitutional.<sup>21</sup> The second states that specific warrants, with a showing of probable cause, are required before the government searches property.<sup>22</sup> The Supreme Court has previously held that the warrant clause is not suited for the school setting, and has only considered the first "reasonableness" clause of the amendment in its application with respect to students.<sup>23</sup>

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<sup>19</sup> U.S. CONST. amend. IV; *see supra* note 13. While the Fourth Amendment has generally been applied to criminal cases, the Court has held that it also applies to government agents, such as public schools and government employers. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). The Court has stated that, "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The Fourth Amendment has not been interpreted by the Court to require a warrant in order for a search to be deemed reasonable. JAMES L. MADDEX, *CONSTITUTIONAL LAW, CASES AND COMMENTS* 167 (1974). "A search implies some exploratory investigation, or an invasion and quest, a looking for or seeking out." 5 AM. JUR. *Trials* § 2 (1966). A search usually requires a government entity to pry into hidden places beyond the ordinary senses. *Id.*

<sup>20</sup> U.S. CONST. amend. IV; PALMER, *supra* note 13, at 69. These two clauses have been labeled the "reasonableness clause," which refers to whether or not such government searches are reasonable, and the "warrant clause," which requires that no warrant shall be issued without probable cause. Garth Thomas, Note, *Random Suspicionless Drug Testing: Are Students No Longer Afforded Fourth Amendment Protections?*, 19 N.Y.L. SCH. J. HUM. RTS. 451, 451 n.7 (2003).

<sup>21</sup> U.S. CONST. amend. IV.

<sup>22</sup> *Id.*; PALMER, *supra* note 13, at 68-69.

<sup>23</sup> *See T.L.O.*, 469 U.S. at 340 (holding that requiring a teacher obtain a warrant before pursuing disciplinary action would interfere with the speed and informality required to successfully maintain discipline in schools, writing, "we hold today that school officials need not obtain a warrant before searching a student who is under their authority"); *see infra* Part II.C. For protection under the Fourth Amendment, the search has to be performed by an "instrument or agent of the government." *Blake W. Martell, Hitting the Mark: Vernonia School District v. Acton*, 31 U.S.F. L. REV. 223, 224 (1996). In deciding whether a search is reasonable, the Court must balance the government's need to conduct the search with the state's interest. *Id.* at 225.

## 820 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

The Court's Fourth Amendment jurisprudence in the public school environment is relatively undeveloped.<sup>24</sup> However, recent Court decisions have established that schools are government agencies and that Constitutional protections will apply to searches administered by school administrators.<sup>25</sup> At the inception of the Fourth Amendment, its fundamental basis was the protection of property interests, but the Court's jurisprudence in the last century has determined that its focus should be interpreted as a protection of individual privacy.<sup>26</sup> While the Supreme Court now recognizes privacy as a constitutional right, it is unclear what level of scrutiny it will use in a constitutional right of privacy challenge.<sup>27</sup>

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<sup>24</sup> See Joanna Raby, Note, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 CARDOZO L. REV. 999, 1000 (1999). Traditionally, Fourth Amendment jurisprudence has focused on searches and seizures in the criminal setting and only within the last fifty years has the Court considered its application in the school setting. *Id.* Prior to 1985, the first time the Fourth Amendment was addressed in the public school context, school officials were not considered to be government agents with respect to Fourth Amendment application. See *T.L.O.*, 469 U.S. at 325; Raby, *supra*, at 1000. The relationship between students and their teachers was analogous to that of a parent and a child. Raby, *supra*, at 1000; see also *supra* note 11.

<sup>25</sup> See generally *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *T.L.O.*, 469 U.S. 325.

<sup>26</sup> PALMER, *supra* note 13, at 69. Palmer concluded that this shift in interpretation indicates that privacy has become a constitutional right. *Id.* Decisions in the last century have accepted privacy as a constitutional right, but have tried to define exactly what level of privacy individuals should enjoy. *Id.*

<sup>27</sup> *Id.* In a line of cases regarding abortion, the Court found the right of privacy to be a fundamental right found in the "penumbras" of the Bill of Rights. *Id.* at 212; see also *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court has identified three levels of scrutiny that it will apply when a law or policy is challenged: strict scrutiny, intermediate scrutiny, and the rational basis test. PALMER, *supra* note 13, at 344. The most rigid of these tests is strict scrutiny, which requires the state to provide both a compelling state interest in the law, and that the law is narrowly tailored to achieve that state interest. *Id.* Strict scrutiny is applied to rights that are enumerated in the Constitution, as well as to unenumerated rights that the Court has found to be fundamental rights. *Id.* Under the intermediate scrutiny test, the state must prove that the law must "serve an important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 345. The rational basis test only requires that the legislature has a reasonable basis for enacting a particular statute. *Id.* As a result, most laws challenged under the rational basis test will be upheld. *Id.* While the Court has recognized the right of privacy as a fundamental right in other contexts, it did not apply any of the three levels of scrutiny described when determining what students' expectations of privacy should be. *Id.* Instead, it focused on the "reasonableness" requirement of the Fourth Amendment, which most closely resembles the intermediate scrutiny test. *Earls*, 536 U.S. at 829; *Vernonia*, 515 U.S. at 652-53.

2006] *Suspicionless Drug Testing in Public Schools* 821

Under the Fourth Amendment, the Court has identified situations where it is “reasonable” to perform the search and seizure of an individual in the absence of individualized suspicion.<sup>28</sup> The Court has self-created these reasonableness exceptions and defined them as “special needs, beyond the normal need for law enforcement.”<sup>29</sup> In these special needs circumstances, the Court created a balancing test that compares the importance of the individual’s privacy interest against the governmental interest of waiving the warrant and probable cause requirements.<sup>30</sup>

*B. The Court-created Special Needs Doctrine and the Court’s Departure from the Language of the Constitution*

In two cases decided on the same day, *Skinner v. Railway Labor Executives’ Ass’n*<sup>31</sup> and *National Treasury Employees Union v. Von Raab*,<sup>32</sup>

<sup>28</sup> See *Chandler v. Miller*, 520 U.S. 305, 313 (1997). The Fourth Amendment requires that searches and seizures be reasonable, and a search or seizure is ordinarily unreasonable in the absence of individualized suspicion or wrongdoing. *Id.* In the criminal context, individualized suspicion is a prerequisite to a constitutional search or seizure, but the special needs doctrine has allowed the government to search individuals in situations with no individualized suspicion of unlawful behavior. *Id.*

<sup>29</sup> *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”).

<sup>30</sup> *Id.* Part of the Fourth Amendment’s guarantee for people to be secure in their persons is that the government is barred from conducting unreasonable searches without some type of individualized suspicion, which requires a showing of probable cause. *Chandler*, 520 U.S. at 308. The Court’s application of the balancing test has been criticized for having a “thumb on the scale,” favoring the schools drug testing policy, as Irene Merker Rosenberg wrote:

Engaging in a reasonableness inquiry completely divorced from the warrant and probable cause requirements of the Fourth Amendment, the majority manipulated the constituent factors in the balancing test, easing the government’s burden of establishing appropriate ends and means and minimizing not just the individual privacy right but also the intrusion on it . . . . [I]n effect, the requirement of a governmental interest of sufficient magnitude, an ends inquiry, has been diluted by allowing the other two balancing factors to be interjected into the government interest analysis before any balancing takes place. . . . Yet the balancing test itself demands that each factor—the private interest, the government interest, and the nature of the intrusion—be viewed in isolation before the balance is made, in order to assess correctly the magnitude of each of these factors.

Irene Merker Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV. 349, 351, 365 (1996).

<sup>31</sup> *Skinner*, 489 U.S. at 619. In these cases, the Court ignored the “probable cause” requirement of the Fourth Amendment and developed the “special needs” doctrine to justify the reasonableness requirement of the Fourth Amendment. *Id.* The Court determined that there were circumstances where an individualized suspicion is not



## 822 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

the Court developed the special needs doctrine and described how it applies in the context of non-criminal drug testing.<sup>33</sup> In both cases, the Court first established that drug testing through urinalysis is a violation of an individual's privacy and constitutes a "search" under the Fourth Amendment.<sup>34</sup> After making this determination, the Court considered the reasonableness of non-criminal urinalysis searches in the government employment context.<sup>35</sup> In doing so, the Court weighed the privacy interests of the individuals against the government's interest in public safety.<sup>36</sup>

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necessary when the government has special needs that outweigh the requirements of probable cause and individualized suspicion. *Id.* at 624. While the Court did not specify what level of scrutiny it would apply, it stated that a search may be reasonable under the Fourth Amendment if the privacy interests involved are minimal and where there is an important governmental interest. *Id.* Although this seems similar to intermediate scrutiny, the Court also concluded that the state had a compelling interest in drug testing its employees, and thus this program would have passed strict scrutiny. *Id.* at 633.

<sup>32</sup> 489 U.S. 656 (1989).

<sup>33</sup> *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656.

<sup>34</sup> *Skinner*, 489 U.S. at 617.

We have long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. . . . The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. . . . [C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or 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.

*Id.* at 616-17.

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

*Von Raab*, 816 F.2d at 175.

<sup>35</sup> *Skinner*, 489 U.S. at 618-19.

<sup>36</sup> *Id.* at 619; *Von Raab*, 489 U.S. at 677. These cases both involved government employees—railroad employees and customs agents. The Court in both cases held that their expectation of privacy was diminished due to their occupations. In *Von Raab*, the Court opined:

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in

2006] *Suspicionless Drug Testing in Public Schools* 823

1. *Skinner v. Railway Labor Executives' Ass'n*: The Introduction of the Special Needs Doctrine and the Start Down the Slippery Slope

In *Skinner*, the Court considered a drug testing program implemented by the Federal Railroad Administration ("FRA") that required blood testing and urinalysis of employees who were involved in train accidents or violated certain safety rules.<sup>37</sup> While there was evidence of a substantial drug and alcohol abuse problem with railroad employees in general, there was no individual suspicion, which the Court had previously required before subjecting an employee to a drug test.<sup>38</sup>

To determine what is reasonable under the Fourth Amendment, the Court administered a balancing test, weighing the governmental interest in requiring drug testing against the individual's right to privacy.<sup>39</sup> The Court determined that the governmental interest and special needs outweighed the individual's right to privacy and that the drug testing in this situation was not a violation of the Fourth Amendment.<sup>40</sup> The Court also reasoned that individualized suspicion was not required to make these searches constitutional; the overarching problem of the employees

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the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity.

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

<sup>37</sup> *Skinner*, 489 U.S. at 606. After evidence showed that drug and alcohol abuse had led to a significant number of train accidents, the FRA adopted safety standards for the railroad industry. *Id.* These standards included breath and urine tests to employees in violation of safety rules. *Id.* The Court cited a drug abuse problem affecting the railroad for over a century, and at trial, the FRA exhibited substantial evidence indicating that the use of alcohol and drugs on the job was a significant concern in the industry. *Id.*

<sup>38</sup> *Id.* at 606. "When the balance of interests precludes insistence on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable." *Id.* at 624.

<sup>39</sup> *Id.* at 618. The Court stated:

What is reasonable . . . "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

*Id.* at 619 (citations omitted).

<sup>40</sup> *Id.* at 633.

in general was sufficient evidence to satisfy the “reasonableness” requirement.<sup>41</sup>

But in his dissenting opinion, Justice Marshall criticized the majority as being “shortsighted” in sacrificing “fundamental freedoms” in light of the national war on drugs, which he described as a “momentary emergenc[y].”<sup>42</sup> Marshall was concerned with the majority’s willingness to stray from the language of the Constitution in favor of a pressing public concern.<sup>43</sup> The Court’s eagerness to stray from the Constitutional language was again put to the test when it was faced with *National Treasury Employees Union v. Von Raab*, a case with similar facts to *Skinner*, but without a reasonable suspicion of employee drug use.<sup>44</sup>

2. *National Treasury Employees Union v. Von Raab*: Slipping Further, the Court Finds Drug Testing Constitutional Without a Showing of Reasonable Suspicion

The Court in *Von Raab* decided the constitutionality of a urinalysis drug testing program designed to test members of the United States

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<sup>41</sup> *Id.* The Court concluded that the usual requirement of individualized suspicion would hinder the Railroad’s regulation program. *Id.* Later, the dissent in *Vernonia v. Acton* questioned that finding, stating:

One searches today’s majority opinion in vain for recognition that history and precedent establish that individualized suspicion is “usually required” under the Fourth Amendment (regardless of whether a warrant and probable cause are also required) and that, in the area of intrusive personal searches, the only recognized exception is for situations in which a suspicion-based scheme would be likely ineffectual.

515 U.S. 646, 676 (1995) (O’Connor, J. dissenting). The Court referred to the holding in *Skinner*, where a suspicionless test was first upheld, stating that, “it could be plausibly argued that the fact that testing occurred only *after* train operators were involved in serious train accidents amounted to an individualized suspicion requirement in all but name, in light of the record evidence of a strong link between serious train accidents and drug and alcohol use.” *Id.* at 675.

<sup>42</sup> *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting). “Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.” *Id.*

<sup>43</sup> *Id.* at 655.

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

*Id.* at 654 (quoting Justice Oliver Wendell Holmes).

<sup>44</sup> *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

2006] *Suspicionless Drug Testing in Public Schools* 825

Customs Service ("Service") when they applied for transfers or promotions.<sup>45</sup> Unlike the testing program in *Skinner*, the Service had not indicated a specific drug problem among its employees and it also conceded that the program had not been successful in discovering users.<sup>46</sup> Additionally, Service employees, unlike most citizens, have a diminished expectation of privacy and bodily intrusions.<sup>47</sup>

Despite a lack of individualized suspicion, or even a specific drug problem with the employees in general, the Court held that the governmental interest in administering drug tests on Service employees outweighed their privacy expectations.<sup>48</sup> The Court also stated that the drug testing program substantially related to the Service's goal of deterring suspect employees from obtaining highly sensitive positions.<sup>49</sup>

Justices Marshall and Brennan dissented in the *Von Raab* holding for the same reasons stated in *Skinner*.<sup>50</sup> However, Justices Scalia and Stevens came on board in the *Von Raab* dissenting opinion and distinguished *Von Raab* from *Skinner*, arguing that there was no

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<sup>45</sup> *Id.* at 660. These tests were required of employees seeking three areas of employment: "drug interdiction or enforcement of related laws," carrying firearms, and the handling of classified material. *Id.* at 660-61. The laboratory specifically tested for marijuana, cocaine, opiates, amphetamines, and phencyclidine. *Id.* at 662. Employees who test positive are subject to dismissal from the Service. *Id.* at 663.

<sup>46</sup> *Id.* at 673. "[N]o more than 5 employees out of 3,600 have tested positive for drugs." *Id.*

<sup>47</sup> *Id.* at 672. The Court reasoned that Service employees have a diminished expectation of privacy compared to the average citizen because "successful performance of their duties depends uniquely on their judgment and dexterity," and they should not be able to keep information from their employers that bears directly on their fitness. *Id.* As a result, their privacy interest did not outweigh the government's compelling interest in the safety and security of protecting our national borders. *Id.*

<sup>48</sup> *Id.* at 677. These tests were upheld as they pertained to employees involved in drug interdiction and carrying firearms, but the testing pertaining to the handling of classified material was remanded because the Court felt that it was too ambiguous to uphold. *Id.* The government interest in this case involved ensuring that the front-line personnel were both physically fit and had "unimpeachable integrity and judgment" when evaluating those who cross the national borders. *Id.* at 670.

<sup>49</sup> *Id.* at 676. The Court noted that Service employees often are exposed to criminal activities in the smuggling of drugs across the nation's borders. *Id.* at 669. They are also tempted by bribes and have been highly involved with dangerous and illegal activity due to the high sensitivity of their position. *Id.* "The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs." *Id.* at 670.

<sup>50</sup> *Id.* at 680. (Scalia, J., dissenting). In his dissent, Justice Scalia criticized the majority for sacrificing fundamental freedoms in light of a temporary war on drugs. *Id.* at 686-87; see *supra* note 44.

## 826 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

connection between the frequency of the use and the harm demonstrated by the Service, which was an essential factor in the *Skinner* decision.<sup>51</sup> Because there was no showing of an actual problem in the field, Justices Stevens and Scalia opined that there was no social necessity like that demonstrated in *Skinner*, and therefore, no governmental interest strong enough to justify the drug testing policy.<sup>52</sup>

Despite strong dissenting opinions, the Supreme Court did not find suspicionless drug testing in the workplace to be an unconstitutional invasion of privacy until it considered such testing for candidates running for political office in *Chandler v. Miller*.<sup>53</sup>

### 3. *Chandler v. Miller*: The State of Georgia Takes the Special Needs Doctrine Too Far

The Court held suspicionless drug testing to be unconstitutional for the first time in *Chandler*.<sup>54</sup> In *Chandler*, nominees for state office challenged a Georgia statute that required each nominee to submit to a drug test within thirty days of being elected or qualifying for election.<sup>55</sup> In determining whether the testing was reasonable, the Court looked to guidance from its previous decisions in *Von Raab* and *Skinner*.<sup>56</sup>

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<sup>51</sup> *Von Raab*, 489 U.S. at 680-81 (Scalia, J., dissenting). The dissenters felt that many of the facts the majority relied upon in *Skinner* were not present in *Von Raab*, stating, "The Court's opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing. . . . To paraphrase Churchill, all this contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true." *Id.* at 681-82.

<sup>52</sup> *Id.* at 683.

What is absent in the Government's justifications—notably absent, revealingly absent . . . is the recitation of *even a single instance* in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.

*Id.*

<sup>53</sup> See generally *Chandler v. Miller*, 520 U.S. 305, 323 (1997); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989); *Von Raab*, 489 U.S. at 660.

<sup>54</sup> *Chandler*, 520 U.S. at 323.

<sup>55</sup> *Id.* at 308. The Court began its discussion by stipulating that urinalysis conducted by state officials has been established as a search under the Fourth and Fourteenth Amendments. *Id.*; see *supra* note 34. The plaintiffs were members of the Libertarian party who challenged a Georgia statute that provided "[e]ach candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs." GA. CODE ANN. § 21-2-140 (1993).

<sup>56</sup> *Chandler*, 520 U.S. at 318.

The issue in *Chandler* was whether the state's interest in a drug testing program qualified as a special need.<sup>57</sup> The Court stated that in order to satisfy the special need requirement, the reason for the test must be substantial enough to outweigh the individual's privacy interest.<sup>58</sup> While the state argued that the drug tests were justified, the Court concluded that there was no concrete danger that would allow a Fourth Amendment exception for suspicionless testing.<sup>59</sup>

More specifically, the Court found that the state had no legitimate purpose behind the statute, which addressed a drug problem that could be dealt with by ordinary law enforcement.<sup>60</sup> But the Court stressed that the decision in *Chandler* could only be read in its narrow context.<sup>61</sup> Consequently, the Court held that the evidence presented by the State was insufficient to outweigh the privacy interest of the candidates.<sup>62</sup> Yet the Court concluded that blanket drug testing policies can be constitutional in some cases, stating, "But where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."<sup>63</sup>

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<sup>57</sup> *Id.* Candidates are given thirty days to be tested, are allowed to be tested by their own physician, and have access to the test results before anyone else. *Id.* at 318, 320. Once the urine specimen is provided, it is tested for five specified illegal drugs and the doctor prepares a certificate reporting the results of the candidate. *Id.* at 310. In the event that the candidate tests positive, he or she would have control over the release of the test results. *Id.* at 312. At that point, he or she could decide not to run for office and avoid anything being released to the public regarding drug use. *Id.* The information would also be kept from law enforcement. *Id.*

<sup>58</sup> *Id.* Georgia based its argument on the incompatibility of drug use in state positions. *Id.* It argued that the candidate's judgment and integrity would be impaired, which would detract from the public's confidence in the candidate. *Id.* It also argued that anti-drug laws would be compromised. *Id.*

<sup>59</sup> *Id.* at 318-19. From the oral argument, when asked if whether there were particular instances of drug use by state officials, counsel for the state answered, "No, there is no such evidence, [and] to be frank, there is no such problem as we sit here today." *Id.* at 319.

<sup>60</sup> *Id.* at 320. The Court found that the statute was not designed to identify candidates who were drug users, nor would it deter drug users from seeking state office. *Id.*

<sup>61</sup> *Id.* at 320-21. The Court stated that there was a telling difference between the duties of the employees in *Von Raab* and the candidates in Georgia. *Id.* Public office candidates are subject to more public scrutiny, while customs employees are not subject to the same scrutiny as those holding traditional jobs. *Id.* The state relied heavily on the precedent established in *Von Raab*. *Id.*

<sup>62</sup> *Id.* at 321-22. Instead of stating that the need of the state was a special need, thus qualifying as reasonable under the Fourth Amendment, the Court termed the need "symbolic." *Id.* at 322. The Court went on to say that if a need only had to "set a good example," then the Court's opinions and descriptions in its previous cases that describe the special needs doctrine, were a waste of words and time. *Id.*

<sup>63</sup> *Id.* at 323.

## 828 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

By 1987, the Court had established the framework of the special needs doctrine of the Fourth Amendment.<sup>64</sup> Nonetheless, when it was first faced with a school district's suspicionless drug testing policy for students, it had to consider the doctrine against prior case law concerning the constitutional rights of students.

C. *The Diminished Constitutional Rights of Students in Public Schools and the Enhanced Power of the State*

The Court has been inconsistent in determining what legal status students have vis-à-vis public schools and how constitutional rights should apply to them.<sup>65</sup> The Court's "reasonableness" inquiry must consider "the schools' custodial and tutelary responsibility for children."<sup>66</sup> At the time of the drafting of the Constitution, and at early common law, public schooling was not compulsory, and school administrators were considered to act *in loco parentis*.<sup>67</sup> Under the *in loco parentis* doctrine, schools act in the role of parents in maintaining discipline in the school setting.<sup>68</sup>

Since that time, with the advent of compulsory education laws in every state, schools have gradually taken on more of a state actor role, thus subjecting the school administrators to the constraints of the Fourth Amendment.<sup>69</sup> Complimenting this change of jurisprudence is a recent, yet somewhat unrelated decision, *Lawrence v. Texas*,<sup>70</sup> in which the Court acknowledged that "our laws and traditions in the past half century are of most relevance" in determining constitutional rights.<sup>71</sup> *New Jersey v.*

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<sup>64</sup> See *supra* Part II.B.

<sup>65</sup> Compare *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), with *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1968) (concerning students' First Amendment constitutional rights).

<sup>66</sup> *Vernonia*, 515 U.S. at 656.

<sup>67</sup> Raby, *supra* note 24, at 1009. *In loco parentis* is defined as "[a]cting as a temporary guardian of a child." BLACK'S LAW DICTIONARY 791 (7th ed. 1999).

<sup>68</sup> See Raby, *supra* note 24, at 1009; *supra* Part II.C.

<sup>69</sup> Raby, *supra* note 24, at 1010.

<sup>70</sup> 539 U.S. 558 (2003).

<sup>71</sup> *Id.* at 571-72. While *Lawrence* was a somewhat unrelated case granting homosexuals a fundamental right of privacy against government intrusion under the due process clause of the Fourteenth Amendment, it was a big step for the Court in expanding the general right of privacy. *Id.* While the right of privacy is not specifically enumerated in the text of the Constitution, it is now said to be a constitutional right found in the "penumbras" of the Bill of Rights. *Id.* at 595; see also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

2006] *Suspicionless Drug Testing in Public Schools* 829

*T.L.O.*<sup>72</sup> was the first case in which the Court considered how the Fourth Amendment should be applied in the school setting.<sup>73</sup>

1. *New Jersey v. T.L.O.*: Limited Student Rights in Public

In *T.L.O.*, a high school teacher caught two female students smoking in the school bathroom, in violation of a school rule, and took them to the principal's office.<sup>74</sup> The vice-principal searched the purse of *T.L.O.*, found evidence of marijuana use, and turned the purse over to police.<sup>75</sup> *T.L.O.* filed suit and the Supreme Court granted certiorari to decide "the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities."<sup>76</sup>

The State of New Jersey's first argument was that the Fourth Amendment was intended to apply to searches and seizures executed by law enforcement, not school officials.<sup>77</sup> To address this issue, the Court considered whether public school officials are considered to function in the capacity of a state actor or that of a parent.<sup>78</sup> The Court concluded that if school officials acted in a parental capacity, students would not be subject to the protections of the Fourth Amendment, which requires the

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<sup>72</sup> 469 U.S. 325 (1985).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 328.

<sup>75</sup> *Id.* The vice-principal was originally searching for cigarettes, but upon further examination, he discovered evidence associated with the use of marijuana and turned it over to police. *Id.* After removing the cigarettes, the vice-principal discovered rolling papers, then proceeded with a more thorough search of the purse, where he found a small amount of marijuana, a pipe, empty plastic bags, a bundle of dollar bills, and a list of other students who owed *T.L.O.* money. *Id.*

<sup>76</sup> *Id.* at 332. Lower federal and state courts have struggled in trying to balance the Fourth Amendment rights of students and the need for schools to provide a safe learning environment. *Id.* at 332 n.2. Some have viewed schools as private parties "acting *in loco parentis* and . . . therefore not subject to the constraints of the Fourth Amendment." *Id.* Other courts have held that the Fourth Amendment does apply in school settings, requiring probable cause before a search is constitutional, and in some courts the special needs doctrine has replaced the need for probable cause. *Id.*

<sup>77</sup> *Id.* at 334.

<sup>78</sup> *Id.* at 336. In addressing this issue, the Court considered previous decisions that have held school officials as state officials when applying the First and Fourteenth Amendments. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. . . . The Due Process Clause also forbids arbitrary deprivations of liberty."); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom . . . at the schoolhouse gate.").



830 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

involvement of state actors.<sup>79</sup> The Court also established that the concept of schools acting in a parental role is not “consonant with compulsory education laws,” and concluded that teachers do not act as surrogates of the parents and thus, do not have the same freedom from the constraints of the Constitution that parents enjoy.<sup>80</sup>

After finding that school authorities are subject to the Fourth Amendment, the Court applied a reasonableness test to the specific facts of the case.<sup>81</sup> The Court determined the reasonableness of the search by balancing the school’s need to search the student against a student’s right to privacy.<sup>82</sup> This balancing test requires weighing a privacy interest that society is “prepared to recognize as legitimate,” against “the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”<sup>83</sup>

In addressing the issue of a student’s legitimate privacy concern, the Court first discarded the need for obtaining a warrant prior to searching a student.<sup>84</sup> The Court next modified the requirement of suspicion and

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<sup>79</sup> *T.L.O.*, 469 U.S. at 336. The Court rejected the notion that public schools exercise control as a parental figure, as they might in private schools. *Id.* The Court stated that such a view “is not entirely ‘consonant with compulsory education laws.’” *Id.*

<sup>80</sup> *Id.* “If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.” *Id.* The Court also stated that, “the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.” *Id.* at 343.

<sup>81</sup> *Id.* at 337. “On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.” *Id.*

<sup>82</sup> *Id.* According to the Court, a two-fold inquiry had to be satisfied: (1) whether the search was justified at its inception; and (2) whether the scope of the search was reasonably related to the circumstances. *Id.*

<sup>83</sup> *Id.* at 338-39. The Court recognized that maintaining order in the classroom is a difficult task and drug use has become a major social problem. *Id.*

<sup>84</sup> *Id.* at 340. The Court held that the warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,” we hold . . . that school officials need not obtain a warrant before searching a student who is under their authority.

*Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967)).

2006] *Suspicionless Drug Testing in Public Schools* 831

rejected the “probable cause” requirement, stating that the school setting requires a reasonableness that “stops short” of probable cause.<sup>85</sup>

The Court applied a two-prong reasonableness test that it had conceived in *Terry v. Ohio*.<sup>86</sup> Under this test, “one must [first] consider ‘whether the . . . action was justified at its inception’ . . . [and] second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”<sup>87</sup> Accordingly, the Court held that the vice-principal did not act unreasonably in his search of T.L.O. regarding the cigarettes or the subsequent search for marijuana.<sup>88</sup> The decision in *T.L.O.* established a diminished right of privacy for students in public schools, setting the precedent for the Court to follow in reviewing a challenge to a school district’s suspicionless drug testing policy.<sup>89</sup>

## 2. *Vernonia School District 47J v. Acton*: Urinalysis of Student Athletes Without Individualized Suspicion

While *T.L.O.* addressed how the Fourth Amendment applies in the school setting, it did not address whether individualized suspicion was a necessary requirement in applying the reasonableness balancing test.<sup>90</sup>

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<sup>85</sup> *Id.* at 341. The Court opined that probable cause is not an irreducible requirement of a valid search, stating, “Where a careful balancing of governmental and private interest 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.*

<sup>86</sup> *Id.*; see *Terry v. Ohio*, 392 U.S. 1, 20 (1962) (a criminal case involving an officer who searched the outer clothing of a criminal suspect and found a pistol in his pocket).

<sup>87</sup> *T.L.O.*, 469 U.S. at 341. The Court stated:

Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when 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.

*Id.* at 341-42.

<sup>88</sup> *Id.* at 346-47.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 342 n.8. However, in other contexts, the Court has held that “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.” *Id.* “Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where ‘other safeguards’ are available ‘to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’” *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

## 832 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

But in *Vernonia School District 47J v. Acton*,<sup>91</sup> the Court was confronted with the issue of a generalized high school drug testing program.

In *Vernonia*, the school district introduced the Student Athlete Drug Policy, which authorized random drug tests for its student athletes.<sup>92</sup> The school district implemented its drug testing program after recognizing a sudden influx of drug use in its schools.<sup>93</sup> Athletes were particularly subject to the drug testing because the school district claimed that the athletes were at the forefront of the school's drug culture.<sup>94</sup>

As a result, the drug testing policy was implemented and applied to all students involved in interscholastic sports.<sup>95</sup> The express purpose of

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<sup>91</sup> 515 U.S. 646, 649 (1995). Respondent, James Acton, was a seventh grader in the Vernonia School District who wanted to play football in the fall of 1991. *Id.* at 657. In order to play, he and his parents were required to sign a form consenting to random drug testing. *Id.* They refused to sign the forms and Acton was denied the right to join the football team as a result. *Id.*

<sup>92</sup> *Id.* at 648. The drug testing in question required student athletes and parents to sign a policy consenting to such random testing where they were tested at the beginning of their sport season, then were subject to random testing throughout the season. *Id.* at 650. Students' names were placed in a pool, from which 10% of the athletes were chosen for random testing. *Id.* Each student who was randomly selected was required to identify any prescription drugs that he or she was taking by showing the doctor's prescription, then they were to enter an empty locker room to produce a urine sample in a bathroom where an adult supervisor of the same sex was present. *Id.* The supervisor was required to stand twelve to fifteen feet behind the student as he produced the urine sample. *Id.* The supervisor was instructed to listen for normal sounds of urination, then to check for tampering and any temperature inaccuracies of the urine sample. *Id.* The sample was then sent to an independent laboratory to be tested for amphetamines, cocaine, and marijuana. *Id.* The test results were then presented to the superintendent, school principal, vice-principal, and athletic director for further action. *Id.* at 650-51. In pertinent part, the policy read, "I . . . authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." *Id.* at 660.

<sup>93</sup> *Id.* at 648. The school district observed that students were speaking out about the appeal of the drug culture and were bragging about how the school could not do anything. *Id.* The school district also reported a rise in disciplinary problems, including use of profane language, rudeness, and student suspensions. *Id.* at 648-49. The school also introduced expert testimony confirming "the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance." *Id.* at 649.

<sup>94</sup> *Id.* According to the district court, "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.'" *Id.*

<sup>95</sup> *Id.* at 650. Such blanket searches are a greater threat to citizens' liberties than one based on individualized suspicion because of the vast population they reach without giving individuals the opportunity to avoid illegal conduct, thus, not subjecting themselves to such an invasion of privacy. *Id.* at 669-70 (O'Connor, J., dissenting). "While the plain

2006] *Suspicionless Drug Testing in Public Schools* 833

the policy was to prevent drug use and to promote safety in the school district.<sup>96</sup> The policy required students to submit to a drug test at the beginning of the season for their sport and also required written consent from both the student and his or her parents to be subjected to random testing throughout the school year.<sup>97</sup> With his parents as co-plaintiffs, James Acton, a seventh-grade student athlete in the Vernonia school district, filed suit seeking declaratory and injunctive relief, claiming that the policy was a violation of his Fourth and Fourteenth Amendment rights.<sup>98</sup>

In reviewing the school district's policy, the Supreme Court first considered the nature of the privacy interest at issue.<sup>99</sup> The Court asserted that "[t]he Fourth Amendment does not protect all subjective expectations of privacy," and an expectation of privacy will differ depending upon the individual's relationship with the state.<sup>100</sup> In regards to the Vernonia School District's policy, the Court determined that it was crucial that the policy pertained to children who were in the temporary custody of the state.<sup>101</sup>

While the Court recognized that minors lack some of the fundamental rights of adults, it reiterated its holding from *T.L.O.* that schools do not act *in loco parentis* over its students.<sup>102</sup> However, the

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language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures." *Id.* at 671 (quoting Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 489 (1995)).

<sup>96</sup> *Id.* at 650 (majority opinion).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 651. Acton also made a claim that the policy violated Article I, § 9 of the Oregon Constitution, which does not pertain to this Note. *Id.* at 652.

<sup>99</sup> *Id.* at 654.

<sup>100</sup> *Id.* (stating that an individual's expectations of privacy will vary depending on whether the individual is "at home, at work, in a car, or in a public park"). The Court made only brief mention of the explicit language of the Fourth Amendment; it instead circumvented the "probable cause" and "warrant" language of the Amendment and quickly jumped into the discussion of the special needs doctrine because this did not concern criminal acts. Rosenberg, *supra* note 30, at 353.

<sup>101</sup> *Vernonia*, 515 U.S. at 654.

<sup>102</sup> *Id.* at 654-55. Despite the view taken by the Court, it also recognized that it "ha[s] acknowledged that for many purposes 'school authorities ac[t] *in loco parentis*,' with the power and indeed the duty to 'inculcate the habits and manners of civility.'" *Id.* at 655 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)). The Court has determined that private schools are *in loco parentis*, and are thus exercising the role of a surrogate parent in regard to its students. *Id.*; *New Jersey v. T.L.O.* 469 U.S. 325, 336 (1985). If a school is said to act *in loco parentis*, it is not considered to be a state actor, and thus, is free to conduct searches outside the scope of the Constitution. *T.L.O.*, 469 U.S. at 336.

## 834 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

Court emphasized the “custodial and tutelary” power of schools that allows for schools to apply a degree of supervision to students that is greater than that imposed on adults.<sup>103</sup> Additionally, the Court stated that the school’s custodial and tutelary responsibility should be taken into account when considering the reasonableness of the Fourth Amendment protection of students.<sup>104</sup> But after recognizing a diminished expectation of privacy for students in general, the Court still held that student athletes have an even lesser expectation of privacy due to the nature of athletics.<sup>105</sup>

After considering the scope of the privacy intrusion, the Court considered the character of the intrusion.<sup>106</sup> Reiterating that drug testing by urinalysis should involve the utmost privacy protection, the Court determined that collecting a urine sample in the manner done by the Vernonia School District was non-invasive and thus created a negligible privacy concern.<sup>107</sup>

The Court also considered whether or not the school had a compelling interest in conducting urinalysis drug testing on student athletes.<sup>108</sup> Specifically, the Court defined this interest as one “that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”<sup>109</sup> The need not be compelling, but

<sup>103</sup> *Vernonia*, 515 U.S. at 654-55 (suggesting that *T.L.O.* emphasized this view, instead of denying it). The Court then limited this protection, stating, “we do not . . . suggest that public schools . . . have such a degree of control . . . to give rise to a constitutional ‘duty to protect.’” *Id.* at 655 (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

<sup>104</sup> *Id.* at 656 (citing to vision, dental, and hearing tests that are routinely performed on students, as well as state required immunizations, which are requirements for all public school students).

<sup>105</sup> *Id.* at 657. “School sports are not for the bashful. They require ‘suining up’ before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.” *Id.*

<sup>106</sup> *Id.* at 658.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 660. Relying on its holdings in both *Von Raab* and *Skinner*, the Court looked to whether or not the school district “demonstrate[d] a ‘compelling need’ for the program.” *Id.* at 661.

<sup>109</sup> *Id.* While the difference between “compelling” and “important” may seem to be of little significance, the language is highly significant when it relates to the level of scrutiny being applied by the Court. Rosenberg, *supra* note 30, at 364. In both *Skinner* and *Von Raab*, the Court found the governmental interests to be “compelling,” which indicates that the regulation was examined under strict scrutiny. *Vernonia*, 515 U.S. at 661. Under strict scrutiny, the law or regulation would be presumptively invalid unless the government could show a compelling state interest and the Court determines that the law was narrowly

2006] *Suspicionless Drug Testing in Public Schools* 835

instead only an “important” need, and the Vernonia School District’s policy satisfied the governmental interest requirement without individualized suspicion because the need to prevent athletes from drug use outweighed the student’s expectation of privacy.<sup>110</sup>

Finally, the Court narrowed its opinion, declaring that its decision applied solely to student athletes because of the immediate threat of physical harm that athletes may face from drug use.<sup>111</sup> The drug testing policy in *Vernonia* was found reasonable, and thus, constitutional, because it fell within the reasonable role that the school takes on as a guardian and tutor.<sup>112</sup>

After the decision in *Vernonia*, district courts were split as to how far the scope of student drug testing should extend, particularly as school districts drafted drug testing policies that reached beyond student

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tailored to achieve its purpose. See PALMER, *supra* note 13. Interestingly, the Court downplayed the significance of the “compelling” language in determining the government’s interest, by stating, “[i]t is a mistake . . . to think that the phrase ‘compelling state interest,’ in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: is there a compelling state interest here?” *Vernonia*, 515 U.S. at 661. Instead of answering this question in isolation, the Court determined that the school district had an important interest “in light of” the other factors involved in the search. *Id.* Additionally, instead of considering each prong of the balancing test individually, and then measuring the competing interests, the Court bolstered its governmental interest here, but injected the other two prongs into its analysis of the governmental interest. Rosenberg, *supra* note 30, at 365.

<sup>110</sup> *Vernonia*, 515 U.S. at 661. The Court interpreted the phrase “compelling state interest” differently than it has in prior cases. *Id.* In the Fourth Amendment context, the Court has interpreted it to “describe[ ] a fixed, minimum quantum of governmental concern.” *Id.* The Court stated, “[w]hether that relatively high degree of government concern is necessary in this case or not, we think it is met.” *Id.* Additionally,

School years are the time when the physical, psychological, and addictive effects of drugs are most severe. “Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound”; “children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.”

*Id.*

<sup>111</sup> *Id.* at 662. “Apart 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.” *Id.* The Court accepted the district court’s finding that there was an immediate threat to safety, that the athletes were rebelling and that the problem had reached “epidemic proportions.” *Id.* at 663 (quoting *Acton v. Vernonia Sch. Dist.* 47, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

<sup>112</sup> *Id.* at 656.

## 836 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

athletes.<sup>113</sup> In 2002, the Court granted certiorari in a case involving a school policy that extended drug testing to all students participating in extracurricular activities.<sup>114</sup>

3. *Board of Education v. Earls*: The Current Urinalysis Standard Extends to Extracurricular Activities

In 1998, the Tecumseh, Oklahoma school district implemented a policy that required all students involved in extracurricular activities to submit to random drug tests.<sup>115</sup> Respondents, who were involved in extracurricular activities at the school and subjected to random drug testing, challenged the constitutionality of the policy under the Fourth Amendment, arguing that the school district failed to identify a special need for the policy.<sup>116</sup> Additionally, respondents argued that the policy should be based on at least a minimum level of individualized suspicion.<sup>117</sup> However, the Court reiterated that individualized suspicion is not always necessary and a search without such suspicion may be constitutional when there are "special [governmental] needs."<sup>118</sup>

First, the Court addressed the privacy interest that the drug testing policy threatened to violate.<sup>119</sup> Respondents argued that students participating in extracurricular activities other than sports were not subjected to the same communal undress and physical examinations as

<sup>113</sup> Compare *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001), and *Tannahill v. Lockney Indep. Sch.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001), and *Gardner v. Tulia Indep. Sch. Dist.*, 183 F. Supp. 2d 854 (N.D. Tex. 2000), with *Willis v. Anderson Cmty. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), and *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998), *reh'g en banc denied*, 139 F.3d 571 (7th Cir. 1998).

<sup>114</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002).

<sup>115</sup> *Id.* at 826. The policy required students to take a drug test prior to participation in an extracurricular activity, and also to be subjected to random testing throughout their involvement in the activity. *Id.* The policy reached to programs "such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pon, cheerleading, and athletics." *Id.*

<sup>116</sup> *Id.* at 826-27. Respondent, Lindsay Earls was involved in show choir, marching band, the Academic Team, and the National Honor Society. *Id.* at 826. Respondent, Daniel James was seeking participation in the Academic Team. *Id.* at 827. Again, the respondents included students who were denied participation and their parents. *Id.* Despite the fact that the parents were parties to the suit, the Court never mentioned the interest the parents have in raising their children as they see fit. *Id.* Petitioners challenged the policy both on its face and as applied to students involved in extracurricular activities. *Id.*

<sup>117</sup> *Id.* at 829. Respondents did not challenge the application of the policy to athletes and did not make a probable cause argument and asked the Court only to consider individualized suspicion. *Id.*

<sup>118</sup> *Id.* "We have long held that 'the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.'" *Id.*

<sup>119</sup> *Id.* at 830.

athletes, and therefore had a greater expectation of privacy.<sup>120</sup> But the Court discarded that argument, stating that “[t]his distinction . . . was not essential to our decision in *Vernonia*, which depended primarily upon the school’s custodial responsibility and authority.”<sup>121</sup> Next, the Court considered the second prong of the balancing test: the level of intrusion imposed on the students by the drug testing policy.<sup>122</sup> The Court emphasized that although urinalysis testing should be afforded substantial privacy, the need to monitor and supervise students must be considered as well. Accordingly, the Court found the drug testing policy in *Earls* to be very similar to that in *Vernonia*, in fact, even less intrusive, and concluded that the invasion of the students’ privacy was insignificant.<sup>123</sup>

The Court’s third and final issue to consider was the “nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them.”<sup>124</sup> Because no individualized concern in the school district existed, the Court addressed the drug abuse problems confronted by youths in general, stating that, “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”<sup>125</sup> The Court

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<sup>120</sup> *Id.* at 831. The *Vernonia* Court decided that students who subject themselves to competitive extracurricular activities subject themselves to the same diminished privacy as student athletes. *Id.* The Court recognized that some of these activities required off-campus travel and the same communal undress experienced by student athletes. *Id.* Further, many of these activities were highly regulated by the policies of the Oklahoma Secondary Schools Activity Association. *Id.* The Court found this regulation to be analogous to the adults who choose to work in a highly regulated industry such as in *Von Raab* and *Skinner*. *Id.* at 832.

<sup>121</sup> *Id.* at 831. The Court then explained that students involved in extracurricular activities also have subjected themselves to limited expectations of privacy similar to those of athletes. *Id.* The Court used the example of clubs and activities that require off-campus travel and communal undress. *Id.* at 832. The Court also placed significance in the fact that the school board’s policy required that the test results remain confidential and access to them was only on a “need to know” basis. *Id.* at 833. The school policy also assured that the outcome of the test would not have any criminal repercussions or any bearing on the student’s academic standing; the only punishment would be a denial of that student’s extracurricular activity and notification of the student’s parents. *Id.*

<sup>122</sup> *Id.* at 832.

<sup>123</sup> *Id.* at 833 (holding that this policy was even less intrusive than that of *Vernonia* because the results were not turned over to law enforcement, there was no academic disciplinary action, and the only discipline applied was limiting the student’s participation in the extracurricular activity).

<sup>124</sup> *Id.* at 834. Again, the Court did not specifically address a standard of review that must be met. *Id.* at 836. The Court found the school district’s concerns to be “legitimate,” but never made any mention of a “compelling” standard that would be required under strict scrutiny. *Id.*

<sup>125</sup> *Id.* at 834. The Court cited studies that showed the rising number of high school seniors reporting they had used drugs since 1995. *Id.* For instance, the number of seniors



## 838 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

relied heavily on the suspicionless policy it upheld in *Von Raab*, noting that drug abuse is a national problem and because the government has a need to prevent this problem, the Court accepts the school district's immediacy argument, making the drug testing necessary under the test established in *Vernonia*.<sup>126</sup> In expanding *Vernonia*, the Court emphasized that the safety interest in deterring drug use is important to all students, not just athletes.<sup>127</sup>

However, Justice Ginsburg, joined by three other justices, wrote a scathing dissenting opinion, stating that, "The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects."<sup>128</sup> The dissenters opined that the lack of suspicion prior to the implementation of the policy was a dispositive factor in distinguishing this case from *Vernonia*,

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using any illicit drug increased from 48.4% in 1995 to 53.9% in 2001. *Id.* The number of seniors reporting they had used marijuana jumped from 41.7% to 49.0% during the same period. *Id.* (internal citations omitted).

<sup>126</sup> *Id.* at 835. The Court stated that, "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." *Id.* at 836. In the criminal context, this is exactly the governmental behavior that the probable cause provision of the Fourth Amendment is intended to protect. *Id.* While the Court relied heavily on *Von Raab* in upholding the drug testing policy, it failed to consider the voluntary nature of working for the United States Custom Service and the mandatory nature of public schooling. *Id.* While participation in extracurricular activities is not mandatory, studies have shown that nearly 80% of high school seniors participate in extracurricular activities. Nicholas A. Palumbo, Note & Comment, *Protecting Access to Extracurricular Activities: The Need To Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 BYU EDUC. & L.J. 393, 394 (2002). It is more fitting to consider extracurricular activities to be a requirement of students who wish to excel beyond the bare minimum high school requirements. *Id.* In fact, former president Ronald Reagan referred to extracurricular activities as "valuable opportunities to discover and develop talent in areas other than those covered within the classroom." *Id.* at 393.

<sup>127</sup> *Earls*, 536 U.S. at 838. However, the dissent points out that, "[h]ad the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words." *Id.* at 845 (O'Connor, J., dissenting). The Court explained that although the policy in *Vernonia* had a closer fit to addressing a specific problem, the school district's policy in *Earls* was still consistent with the school's custodial responsibility. *Id.* at 838 (majority opinion). While the Court upheld the reasonableness of the school district's policy, it did so expressing no opinion as to the wisdom of such policies. *Id.*

<sup>128</sup> *Id.* at 843 (Ginsburg, J., dissenting) (explaining that the school district's special needs "are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install").

2006] *Suspicionless Drug Testing in Public Schools* 839

which cited a specific problem great enough to invoke the special needs doctrine.<sup>129</sup>

The dissent argued that the *Vernonia* decision could not be interpreted to “endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them.”<sup>130</sup> The dissent also pointed out that the *Vernonia* majority conspicuously did not go so far as to permit drug testing of all students enrolled in public schools.<sup>131</sup>

The *Earls* dissenters then addressed each step of the *Vernonia* balancing test, first considering the nature of the privacy intrusion.<sup>132</sup> Specifically, Justice Ginsburg examined the *Vernonia* Court’s specific emphasis on the limited privacy expectations of student athletes, who subject themselves to communal dressing by choosing to “go out for the team.”<sup>133</sup> While the *Vernonia* Court held that athletics are “not for the bashful,” the *Earls* dissent held that other extracurricular activities cater to all types of students, including those who are modest and shy.<sup>134</sup>

In examining the third prong of the balancing test—the immediacy of the governmental concern—the dissenters focused on the stark contrast between the reasoning behind the policy in *Vernonia*, and that in *Earls*, where the school district had consistently reported to the federal government that no drug problem existed in its school district.<sup>135</sup> The dissent agreed with the Tenth Circuit’s conclusion, that “without a demonstrated drug abuse problem among the group being tested, the

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<sup>129</sup> *Id.* at 844.

<sup>130</sup> *Id.* (stating that a student who has a personal privacy interest in the items she brings to school should also have that same privacy expectation regarding the chemical composition of her urine).

<sup>131</sup> *Id.* at 845 (stating that if it had chosen to extend such testing to all students, it “could have saved many words”). As Justice Ginsburg interpreted the Court’s decision in her concurring opinion in *Vernonia*, “the Court’s opinion . . . reserve[s] the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring).

<sup>132</sup> *Earls*, 536 U.S. at 847 (Ginsburg, J., dissenting).

<sup>133</sup> *Id.*; *Vernonia*, 515 U.S. at 657.

<sup>134</sup> *Earls*, 536 U.S. at 848 (Ginsburg, J., dissenting). The dissent next considered the second prong of the *Vernonia* test, “the character of the intrusion . . . complained of,” which is outside the purview of this Note; for a discussion of this topic, see *id.* at 842.

<sup>135</sup> *Id.* at 849 (citing Tecumseh School’s Application for Funds under the Safe and Drug-Free Schools and Communities Program, stating, “types of drugs [other than alcohol and tobacco] including controlled dangerous substances, are present [in the schools] but have not identified themselves as major problems at this time”).

efficacy of the District's solution to its perceived problem is . . . greatly diminished."<sup>136</sup>

Finally, distinguishing the drug testing in *Earls* from the suspicionless testing in both *Skinner* and *Von Raab*, the dissent found that both policies were implemented to save lives rather than to protect the health risks that are associated with drug use.<sup>137</sup> The dissent noted the "sad irony" of the schools tutelary and custodial responsibility, which "require[s] them to 'teach by example' by avoiding symbolic measures that diminish constitutional protections."<sup>138</sup>

According to the dissent, *Vernonia* was a correct decision for two reasons: (1) the "special health risks" of student athletes; and (2) the school district's contention that the athletes "were the leaders of the drug culture" that the policy was intended to punish.<sup>139</sup> Neither of these reasons were present prior to the school district's policy in *Earls*, which the dissenters suggested should be the dispositive factor in holding such a policy unconstitutional.<sup>140</sup> Yet while the dissent attempted to distinguish *Earls* from *Vernonia*, it failed to mention a significant fundamental right, which was present in both cases, but never considered: parents' fundamental right to control the upbringing of their children.<sup>141</sup>

#### D. Do Parents Have a Voice in the Matter?

In both *Vernonia* and *Earls*, the parents of the students also refused to consent to the drug testing and were parties to the suit against the school.<sup>142</sup> Noticeably absent in the Court's discussion in either case was

<sup>136</sup> *Id.* at 850 (quoting *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001)).

<sup>137</sup> *Id.* at 851-52.

<sup>138</sup> *Id.* at 855. "That [schools] 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." *Id.* (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Additionally, in *T.L.O.*, the Court had emphasized that

children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections.

*New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985).

<sup>139</sup> *Earls*, 536 U.S. at 852 (Ginsburg, J., dissenting) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995)).

<sup>140</sup> *Id.* at 849.

<sup>141</sup> *Id.*; *Vernonia*, 515 U.S. 646; see also *Troxel v. Granville*, 530 U.S. 57, 78 (2000).

<sup>142</sup> *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. at 648.

2006] *Suspicionless Drug Testing in Public Schools* 841

any mention of parents' interest in controlling the upbringing of their children.<sup>143</sup> While the Court's standard of review regarding parents' rights to control the upbringing of their children has not always been consistent, it has recognized that a parent's right to control the upbringing of their children is a fundamental right protected under the Due Process Clause of the Fourteenth Amendment.<sup>144</sup>

However, the Court has not consistently applied a level of scrutiny when adjudicating the parental right to control the upbringing of children.<sup>145</sup> The plurality opinion in *Troxel v. Granville* labeled the right

<sup>143</sup> *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. at 648.

<sup>144</sup> *Troxel*, 530 U.S. at 65-66. Summing up its jurisprudence in this area, in the plurality opinion, Justice O'Connor wrote:

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” We explained in *Pierce* that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” We returned to the subject in *Prince v. Massachusetts*, and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”

*Id.*; see William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177 (2000). The Court first recognized the Due Process protection of parents to control the upbringing of their children in two cases decided in the 1920s. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court in *Pierce* held that parents and guardians “have the right, coupled with the high duty, to recognize and prepare [children] for additional obligations.” 268 U.S. at 535. “Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.” *Troxel*, 530 U.S. at 78 (Souter, J., concurring).

<sup>145</sup> *Troxel*, 530 U.S. at 80 (Thomas, J. concurring). “The opinions . . . recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.” *Id.* Most rights that are labeled as “fundamental” by the Court will be analyzed under strict scrutiny. However, even though it is a fundamental right, the Court offers limited protection of parents’ right to control the upbringing of their children. Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 454 (2002). The Court has never applied

## 842 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

of parents to control the upbringing of their children as a fundamental right, but refused to establish an applicable level of scrutiny.<sup>146</sup> Yet in a prior case, *Wisconsin v. Yoder*,<sup>147</sup> the Court demonstrated the flexibility of its application of the parents' fundamental rights, and struck down a state compulsory education law when it combined the plaintiff's First Amendment rights with the parents' right to control the upbringing of their children.<sup>148</sup> The plaintiff's argument in *Yoder* challenging the state's compulsory education law was bolstered by the hybrid challenge.<sup>149</sup>

But the Court's precedent in hybrid cases is still unclear when challenges are made combining the parents' right to control the upbringing of their children with an enumerated constitutional right, but the Court's holdings in *Yoder* and *Troxel* could strengthen a plaintiff's argument when challenging a school district's suspicionless drug testing policy.<sup>150</sup> If the Court were to consider this fundamental right in the future, its outcome may be different from the few limitations school districts now have following the holding in *Earls*.<sup>151</sup>

*E. Limitations on School Districts Post-Earls*

The Supreme Court has not suggested that there is any limitation on how far school districts can expand drug testing policies.<sup>152</sup> Nonetheless, there has recently been a push by some states and the federal government to pursue these policies more aggressively.<sup>153</sup> In his 2004 State of the Union address, President Bush proposed federal funding for such programs, stating:

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strict nor intermediate scrutiny to the parental right and the strength of this fundamental right is still unclear. *Id.*

<sup>146</sup> See *Troxel*, 530 U.S. 57.

<sup>147</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>148</sup> *Id.* at 233.

<sup>149</sup> *Id.* The Court stated, "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." *Id.*

<sup>150</sup> Ross, *supra* note 144, at 185.

<sup>151</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

<sup>152</sup> See generally *Earls*, 536 U.S. 822; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>153</sup> Office of National Drug Control Policy, [http://www.whitehousedrugpolicy.gov/publications/drug\\_testing/index.html](http://www.whitehousedrugpolicy.gov/publications/drug_testing/index.html) (last visited Oct. 8, 2005); Chris Newmarker, *New Jersey to Test High-School Athletes for Drugs*, SEATTLE TIMES, May 6, 2006, available at [http://seattletimes.nwsources.com/html/highschoolsports/2002975668\\_prepjersey06.html](http://seattletimes.nwsources.com/html/highschoolsports/2002975668_prepjersey06.html); ESPN, *Official Wants Texas High School Athletes Tested*, Jan. 27, 2007, available at <http://sports.espn.go.com/sports/news/story?id=2744977>.

2006] *Suspicionless Drug Testing in Public Schools* 843

In my budget, I proposed new funding to continue our aggressive, community-based strategy to reduce demand for illegal drugs. Drug testing in our schools has proven to be an effective part of this effort. So tonight I proposed an additional \$23 million for schools that want to use drug testing as a tool to save children's lives. The aim here is not to punish children, but to send them this message: We love you, and we don't want to lose you.<sup>154</sup>

While a bill was never promulgated,<sup>155</sup> the White House has continued to pursue its aggressive policy toward student drug testing through the Office of National Drug Control, whose director, John P. Walters, has labeled student drug testing as the "silver bullet" in combating student drug use.<sup>156</sup> Despite the strong push by the federal government and the Court's willingness to uphold school district drug testing policies, there has been some restraint shown in not allowing universal drug testing in public schools.<sup>157</sup> In 2001, the Northern District of Texas decided the constitutionality of a suspicionless drug testing program that applied to all students enrolled in a public school.<sup>158</sup>

1. *Tannahill v. Lockney Independent School District: Compulsory Testing Policy Struck Down Under Vernonia*

In 2001, the United States District Court for the Northern District of Texas struck down a school district's drug testing policy that extended to all students.<sup>159</sup> Because this case was decided prior to the *Earls* decision,

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<sup>154</sup> Bush, *supra* note 16.

<sup>155</sup> Empowering Parents and Teachers for a Drug-Free Education Act of 2004, H.R. 3720, 108th Cong. § 2(d) (2004). The bill was introduced in the House of Representatives and proposed \$23 million in funding. *Id.*

<sup>156</sup> JOHN P. WALTERS, OFFICE OF NAT'L DRUG CONTROL POL'Y, WHAT YOU NEED TO KNOW ABOUT DRUG TESTING IN SCHOOLS, available at [http://www.whitehousedrugpolicy.gov/pdf/drug\\_testing.pdf](http://www.whitehousedrugpolicy.gov/pdf/drug_testing.pdf).

<sup>157</sup> *Id.* See generally *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646; *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001).

<sup>158</sup> *Tannahill*, 133 F. Supp. 2d 919.

<sup>159</sup> *Id.* at 920 n.1. Prior to the implementation of the policy in question, Lockney Independent School District had established a suspicion-based testing program for all students and staff members who had a reasonable suspicion of being under the influence at school functions. *Id.* A reasonable suspicion was said to exist when a student or staff member displayed "at risk" behavior. *Id.* The school district discussed a policy that would apply to students involved in extracurricular activities, but, after debate, the school board made a final decision to subject all students to a suspicionless drug testing program that would require mandatory testing for all incoming sixth graders and monthly testing of 10%

## 844 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

the court used the *Vernonia* balancing test and determined that the drug testing policy was unconstitutional.<sup>160</sup> The court reasoned that compulsory attendance is different from the voluntary participation in extracurricular activities and it would not be reasonable to subject all students to suspicionless drug testing.<sup>161</sup>

More specifically, in *Tannahill*, the court recognized that the general student population should enjoy greater privacy than student athletes.<sup>162</sup> Additionally, the court distinguished suspicionless drug testing of students from the testing imposed in highly regulated industries, holding that the government did not have a compelling interest in implementing such drug tests in public schools.<sup>163</sup> Though the district court recognized the good faith attempt of the school district, the court found the privacy rights of students to be more important than the governmental interest.<sup>164</sup>

While this drug testing policy was declared unconstitutional under the *Vernonia* balancing test prior to the Supreme Court's holding in *Earls*, such post-*Earls* policies may withstand constitutional challenges by

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of the school's students. *Id.* at 921-22. The school board cited a significant drug problem in the area as its reason for implementing the program. *Id.*

<sup>160</sup> *Id.* at 930-31. In its interpretation on the *Vernonia* decision, the United States District Court of the Northern District of Texas relied on the Supreme Court's discussion as to why student athletes have a lesser expectation of privacy than the student population in general. *Id.* at 929. The Texas Court said that "compulsory attendance at school is much different than voluntary participation in extracurricular activities." *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* "Every child, at least in Texas, must attend school. School attendance does not trigger an instant diminution of rights." *Id.* at 929 n.22 (quoting *Brooks v. East Chambers Consol. Indep. Sch. Dist.* 730 F. Supp. 759, 766 (S.D. Tex. 1989)).

<sup>163</sup> *Id.* at 930.

[T]he academic studies of a student, while very important, do not embody the immediate and severe life and death repercussions as do the decisions of these employees. A student's tools of pens, notebook paper, and protractors have never been equated with locomotives, the hazardous chemicals and equipment of a custodian, the firearms or interdiction efforts of a customs agent, or the prescription pads and EKG machines used by a physician.

*Id.*

<sup>164</sup> *Id.* The district court stressed that the student body in general has a higher expectation of privacy than the student athletes in *Vernonia*, whom the Supreme Court decided had a lower expectation of privacy. *Id.* The district court also rejected the school district's rationale for the suspicionless drug testing program, which was that the school district had a significant drug and alcohol problem. *Id.* The school district's prior drug testing program had been in place for several years, yet had never encountered a single incident of drug use indicating a drug problem in the school district. *Id.*

2006] *Suspicionless Drug Testing in Public Schools* 845

applying the less restrictive reasoning used in *Earls*.<sup>165</sup> Following the Court's decision in *Vernonia*, district courts were split on the issue of how far student drug testing policies could extend.<sup>166</sup> Now, with the more expansive decision in *Earls*, school districts have again been given no specific limitations as to which students should be subjected to suspicionless drug testing.<sup>167</sup>

In recent years, schools have extended their drug testing policies beyond that of student athletes and students participating in extracurricular activities.<sup>168</sup> Some schools have expanded the reach of their drug testing policies to students who drive to school, while others have expanded the reach to all students enrolled at the school.<sup>169</sup> While the Court has emphasized the importance of limiting students' exposure to suspicionless drug testing to those students who have voluntarily subjected themselves to privileged activities, the Court's holding in *Earls* opened the door to suspicionless testing for an even broader category of students, which could have dangerous implications on students' rights to privacy while also sending a message contrary to the fundamental tenet of American jurisprudence—guilty until proven innocent.<sup>170</sup>

<sup>165</sup> See generally *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Tannahill*, 133 F. Supp. 2d 919.

<sup>166</sup> See *Tannahill*, 133 F. Supp. 2d at 919. See generally *Trinidad Sch. Dist. v. Lopez*, 963 P.2d 1095 (Colo. 1998).

<sup>167</sup> *Earls*, 536 U.S. 822.

<sup>168</sup> See *Drug Testing Fails*, *supra* note 14 (follow "[Alexander \[Ohio\] School District](#)" hyperlink and the "[Katy \[Texas\] School District](#)" hyperlink).

<sup>169</sup> See *id.* (follow "[Alexander \[Ohio\] School District](#)" hyperlink and the "[Tippecanoe \(Ind.\) School Corp.](#)" hyperlink); see also YAMAGUCHI, JOHNSTON & O'MALLEY, *supra* note 14, at 159.

<sup>170</sup> See *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646. The decisions in both *Earls* and *Vernonia* spend a great deal of time discussing how lower expectations of privacy are appreciated by our "students" in our "public schools" before going into an analysis of how it applies specifically to athletes and students involved in extracurricular activities. Rosenberg, *supra* note 30, at 360. Rosenberg states that this general classification of students is telling because there is no reason that a drug testing policy that is made applicable to all students would be given any less deference than that applied to student athletes. *Id.* In assessing the governmental interest in conducting suspicionless drug testing, the Court first considered how drugs can have more damaging and addictive effects on developing minds than on adults. *Id.* The Court also considered the effects of drugs on the school population as a whole, the *parens patriae* interest the school has over the children, and the special need athletes may have in the examination of their physical health and their diminished expectation of privacy. *Id.* As Rosenberg points out, only the last factor, applying to student athletes, would have an application that would not also apply to the student population as a whole. *Id.* In *Earls*, the Court considered the same factors, but made the same exception for students involved in extracurricular activities. 536 U.S. at 838. In reading the Court's reasoning for students involved in extracurricular activities having a



## III. ANALYSIS

Since the introduction of the special needs doctrine in *Skinner* and *Von Raab*, the Supreme Court's subsequent decisions have gradually broadened the doctrine's scope.<sup>171</sup> This Part will first demonstrate how a school-wide drug testing policy would likely be upheld if the Court were confronted with the issue today.<sup>172</sup> Part III will also discuss the negative effects such a policy would have on America's youth.<sup>173</sup>

The cases discussed in Part II of this Note described the route the Court took in diluting the language of the Fourth Amendment to uphold the constitutionality of suspicionless student drug testing.<sup>174</sup> Additionally, Part II demonstrated how the Court has been inconsistent in its application and has given great deference to school policies, which cite society's drug problem with no reference to individualized suspicion in schools.<sup>175</sup> Part III.A will discuss how the *Earls* Court disregarded much of the reasoning it used in *Vernonia* to again broaden the scope of student drug testing.<sup>176</sup>

Part III will look at each element of the Court's reasoning to demonstrate how the same reasoning would apply to all students enrolled in a public school.<sup>177</sup> Part III.B will discuss the social policy of sending a message to schoolchildren that they are guilty until proven innocent, and the importance of preserving the constitutional rights of students in public schools.<sup>178</sup> Finally, Part III.C will discuss the possibility of compulsory drug testing at schools and will discuss how a blanket policy such as the national "war on drugs" should not be adequate to substitute for the individualized suspicion that was previously required before conducting searches in schools under the Fourth Amendment.<sup>179</sup>

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lesser expectation of privacy, it is hard to find a meaningful difference between the communal undress experienced in extracurricular activities to that of a required physical education class. Rosenberg, *supra* note 30.

<sup>171</sup> See *supra* Part II.C.

<sup>172</sup> See *infra* Part III.C.

<sup>173</sup> See *infra* Part III.B.

<sup>174</sup> See *supra* Part II.

<sup>175</sup> See *supra* Part II.

<sup>176</sup> See *infra* Part III.A.

<sup>177</sup> See *infra* Part III.

<sup>178</sup> See *infra* Part III.B.

<sup>179</sup> See *infra* Part III.C.

2006] *Suspicionless Drug Testing in Public Schools* 847A. *The Earls Expansion of Reasonableness and the Flexibility that the Decision Creates for Schools To Impose Drug Testing Policies*

While no court has ruled on the constitutionality of a drug testing program as applied to all students since *Tannahill*, the reasoning in *Earls* suggests that such a policy might be held constitutional if the issue were to arise in the future.<sup>180</sup> When the Court upheld the constitutionality of suspicionless drug testing in *Von Raab*, *Skinner*, *Vernonia*, and *Chandler*, it was careful to suggest that its decisions were only based on the balancing of the unique factors relevant to each case.<sup>181</sup> However, the *Earls* decision again left school districts guessing as to how far they can go in administering suspicionless drug tests to their students.<sup>182</sup> To demonstrate, it is first necessary to examine the erosion of students' privacy interests that occurred between the decision in *Vernonia* and in *Earls*.<sup>183</sup>

## 1. The Nature of the Privacy Interest Intruded Upon

In *Vernonia*, where the constitutionality of suspicionless testing for student athletes was upheld, the Court first discussed how student athletes have a lesser expectation of privacy because of the communal undress they are subjected to on a routine basis.<sup>184</sup> While the *Vernonia* Court spent a significant amount of time explaining the diminished privacy expectations of athletes, it quickly dismissed the significance of the student athlete status in *Earls*.<sup>185</sup> In fact, in *Earls*, the Court stated that the *Vernonia* language regarding student athletes was not central to its decision, and in any event, students involved in extracurricular activities are subject to the same types of intrusions as athletes.<sup>186</sup> After determining that the characteristics of student-athletics were not a central issue, the Court defended its prior reasoning and stated that many clubs and activities participate in off-campus travel and communal undress, which lessens the students' right to privacy.<sup>187</sup> However, as the dissent in *Earls* points out, it does not make sense for the Court to write

<sup>180</sup> Bd. of Educ. v. Earls, 536 U.S. 822, 832 (2002); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 920 (N.D. Tex. 2001).

<sup>181</sup> See *supra* Part II.

<sup>182</sup> *Earls*, 536 U.S. at 844.

<sup>183</sup> *Id.* at 822; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>184</sup> *Vernonia*, 515 U.S. at 657. "By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.*

<sup>185</sup> Compare *id.* at 648, with *Earls*, 536 U.S. at 830.

<sup>186</sup> *Earls*, 536 U.S. at 830.

<sup>187</sup> *Id.* at 832.

## 848 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

extensively on an aspect of its reasoning unless it is central to its holding.<sup>188</sup>

Additionally, the Court's argument that students' rights to privacy are lessened because they are already subjected to health tests such as vaccinations and physical exams also goes unfounded.<sup>189</sup> While students are required to submit to such examinations, these tests are performed by an individual student's family physician and can be done on the student's own time.<sup>190</sup> These tests are not conducted in search of "anything in particular," and thus, there is nothing to give rise to suspicion.<sup>191</sup> Such tests do not violate the student's right of privacy as much as subjecting the student to a random test while at school under the close scrutiny of a supervisor who hovers behind the student providing the urine sample.<sup>192</sup>

While the Court in *Vernonia* and *Earls* opened the door to school district drug testing policies for students involved in athletics and extracurricular activities, it conspicuously omitted discussion as to whether such a policy should apply to all students.<sup>193</sup> However, by its broad rationale, any student participating in physical education class, which is mandatory in many states, could be subjected to suspicionless drug testing.<sup>194</sup> Like the communal undress, which the Court used to justify an eroded privacy interest in the athletic context, students involved in physical education are also required to change clothes and shower for class.<sup>195</sup>

Participation in physical education class also places students in the same health risk category, due to the physical exertion, that the Court heavily relied upon in upholding drug testing in *Vernonia*.<sup>196</sup> Like athletes and students involved in extracurricular activities, all students enrolled in public school are required to receive various vaccines and

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<sup>188</sup> *Id.*

<sup>189</sup> See *supra* Part II.C.3.

<sup>190</sup> *Chandler v. Miller*, 520 U.S. 305, 312 (1997). In *Chandler*, this was a factor added to the balancing test which diminished the argument for an invasion of privacy. *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *T.L.O.*, 469 U.S. at 340.

<sup>193</sup> See generally *Earls*, 536 U.S. 822; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>194</sup> Raby, *supra* note 24, at 1024 (discussing why all students in public schools should be subjected to random drug testing).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

2006] *Suspicionless Drug Testing in Public Schools* 849

physical examinations, again leaving them subject to suspicionless drug testing following the reasoning in *Earls*.<sup>197</sup>

## 2. Character of the Intrusion

The *Earls* Court next determined the nature of the intrusion introduced by the school policy.<sup>198</sup> Neither the *Earls* Court nor the *Vernonia* Court gave much weight to students' rights of privacy, notwithstanding precedent that described privacy as, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>199</sup> Instead, the Court compared the privacy intrusion to conditions "typically encountered in public restrooms, which men, women, and especially schoolchildren use daily."<sup>200</sup>

This comparison fails to consider important differences between typical urination in a public restroom and the method of drug testing that requires a student to urinate under surveillance.<sup>201</sup> One does not typically expect to be monitored while urinating in a public restroom with the expectation of producing a urine sample for inspection.<sup>202</sup> Also, one typically urinating in a public restroom is not required to capture his or her urine in a container, which will later be subjected to scientific drug analysis.<sup>203</sup> Finally, students subjected to such random testing are often removed during class hours and required to urinate in a designated testing area.<sup>204</sup>

The Court's determination of such a limited privacy interest is also contrary to its privacy evaluation in *Skinner*, where it noted that the urinalysis was less intrusive because the urine sample was collected in a medical office and was not subject to close monitoring of a supervisor.<sup>205</sup> Also, the testing in *Skinner* was conducted by an anonymous medical practitioner, as opposed to a familiar teacher whom the students would be interacting with on a daily basis.<sup>206</sup> These factors, which were directly emphasized in prior case law, were not even considered by the Court in

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<sup>197</sup> *Id.*

<sup>198</sup> *Earls*, 536 U.S. at 832.

<sup>199</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

<sup>200</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

<sup>201</sup> Darrel Jackson, *The Constitution Expelled: What Remains of Students' Fourth Amendment Rights?*, 28 ARIZ. ST. L.J. 673, 684 (1996).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

## 850 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

*Vernonia* or *Earls*.<sup>207</sup> As a result, while the Court in *Vernonia* overlooked many factors it could have considered in evaluating the student's privacy interest, it gave even less weight to the student's right of privacy in *Earls*.<sup>208</sup>

### 3. Immediacy of the Governmental Concern

Finally, the *Earls* Court found a pressing concern by meshing the limited evidence of drug use in the school district with the national concern of a drug epidemic.<sup>209</sup> The Court relied heavily on its decision in *Von Raab*, which held drug testing constitutional on a mere showing that drug abuse is a serious societal problem.<sup>210</sup> However, these societal issues were applied in *Von Raab* on the specific facts of the case, which were "installed to avoid enormous risks to the lives and limbs of others, not dominantly in response to the health risks to users invariably present in any case of drug use."<sup>211</sup>

Similarly, the school district in *Vernonia* cited a drug culture in its schools to support the argument for a need to drug test its students without a prior showing of individualized suspicion.<sup>212</sup> It argued that there was substantial evidence of the drug culture among the students, and that the athletes were the leaders of that drug culture; as a result, it also argued that it needed to implement a drug testing policy to identify which students were using drugs.<sup>213</sup> As a result, the *Vernonia* Court allowed the school district to have both sides of the argument—both a justification for the testing by having an identified problem and the burden of identifying the source of the problem.<sup>214</sup> Such an allowance leaves students with no protection against suspicionless searches.

<sup>207</sup> See generally *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

<sup>208</sup> Compare *Vernonia*, 515 U.S. 646, with *Earls*, 536 U.S. 822. The Court determined the invasion to be "negligible" in *Vernonia*, but the *Earls* Court, without defining the interest, gave even less weight to students' privacy interests.

<sup>209</sup> *Earls*, 536 U.S. at 836. The school district, in years prior to the policy's adoption, had reported to the Federal Government that "types of drugs [other than alcohol and tobacco] including controlled dangerous substances, are present [in the schools] but have not identified themselves as major problems at this time." *Id.* at 849.

<sup>210</sup> *Id.* at 850.

<sup>211</sup> *Id.*

<sup>212</sup> *Vernonia*, 515 U.S. at 649.

<sup>213</sup> *Id.* at 649-50.

<sup>214</sup> *Id.* In its argument for the implementation of suspicionless drug testing, the Court discussed the burden placed on teachers who would have to identify students who might have problems with drugs. *Id.* at 648-49. At the same time, the Court justified its decision

2006] *Suspicionless Drug Testing in Public Schools* 851

Despite the Court's insistence that *Von Raab*, *Skinner*, and *Vernonia* were to be interpreted narrowly on the unique facts of each case, the *Earls* Court interpreted these decisions broadly in an effort to combat the national drug epidemic.<sup>215</sup> As Justice O'Connor eloquently wrote in her dissenting opinion:

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone. Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.<sup>216</sup>

In the history of the Constitution, the Court has been wary of blanket suspicionless searches under the Fourth Amendment and the dissent was quick to note that threats such as the "war on drugs" should not have superseded the traditional requirement of individualized suspicion.<sup>217</sup> In fact, prior to the cases discussed in Part II of this Note, suspicionless tests were determined to be per se unreasonable in light of the Fourth Amendment.<sup>218</sup>

The *Vernonia* dissent mocked the majority opinion that individualized suspicion is only "usually required".<sup>219</sup> As Justice O'Connor wrote, "One searches [the *Vernonia* majority's opinion] in vain for recognition that history and precedent establish that individualized

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by the fact that the school boards were within constitutional boundaries by implementing these programs based on observations made by teachers of a perceived drug problem in the school district. *Id.* at 649-50.

<sup>215</sup> See *supra* Parts II.B-II.C.

<sup>216</sup> *Vernonia*, 515 U.S. at 686 (O'Connor, J., dissenting); see *supra* Part II.C.2.

<sup>217</sup> Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

<sup>218</sup> See *supra* Part II.C.2.

<sup>219</sup> *Vernonia*, 515 U.S. at 676.

852 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

suspicion is 'usually required' under the Fourth Amendment (regardless of whether a warrant and probable cause are also required)."<sup>220</sup>

*B. A Message to Our Children: You Are Guilty Until Proven Innocent*

While there is no doubt that the goals of such drug testing policies are well intended, such policies send the wrong message to the youth of America.<sup>221</sup> Constitutional guarantees should sometimes be challenged the most when they are under the guise of working for the benefit of society.<sup>222</sup>

Despite the benevolent intentions of the school districts, these drug tests send a message to children that they are guilty until proven innocent, turning the fundamental American tenet of presumed innocence on its head.<sup>223</sup> Schoolchildren in America are educated at a young age about the freedoms, privileges, and liberties guaranteed by our government, yet are deprived of all of these when they are subjected to suspicionless drug tests in public schools.<sup>224</sup> "[M]any schools, like many parents, prefer to trust their children unless given reason to do otherwise."<sup>225</sup>

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<sup>220</sup> *Id.* The Court recognized that the only exception would be in situations where a suspicion based search would be ineffectual, which it did not consider to be the case in *Vernonia*.

<sup>221</sup> Brief for the Respondent at 26, *Vernonia v. Acton*, 515 U.S. 646 (1995) (No. 94-590).

<sup>222</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).  
Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

*Id.*

<sup>223</sup> Brief for Respondent at 17, *supra* note 221, at 17. This is inconsistent with the Court's view that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)).

<sup>224</sup> Jackson, *supra* note 201, at 695. Adolescents are taught about the values of our society in the home and at school, so it is important for the educators to respect the role they play in preparing students for the responsibilities and expectations of society. Anthony G. Buzbee, *Who Will Speak for the Teachers? Precedent Prevails in Vernonia School District v. Acton*, 33 HOUS. L. REV. 1229, 1230-31 (1996). "The duty to prepare a child for 'additional obligations,' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233.

<sup>225</sup> *Vernonia*, 515 U.S. at 682.

2006] *Suspicionless Drug Testing in Public Schools* 853

The Court in *Chandler* addressed the role of government as a leader by example, quoting prior case law, “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”<sup>226</sup> The government does not play a more important role in teaching by example than it does in the public school environment, where children are first introduced to the values of our government.<sup>227</sup> Constitutional rights should especially be protected in the school environment where we are teaching students the value of citizenship.<sup>228</sup> Otherwise we “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>229</sup>

Although the Court in both *Vernonia* and *Earls* relied heavily on the school’s role as a custodial and tutelary institution that acts *in loco parentis*,<sup>230</sup> it failed to consider the effect of treating students like second-class citizens and the message such treatment conveys to the students.<sup>231</sup> Additionally, though the Court has established that the state has a legitimate interest in maintaining safety in its school districts, subjecting students to suspicionless testing is neither the most efficient nor the most effective means of achieving such a goal.<sup>232</sup>

C. *Compulsory Education Equals Compulsory Drug Testing?*

The Court has already extended its special needs analysis to school districts wishing to drug test athletes and students involved in extracurricular activities, but it has not yet decided the constitutionality of a policy that applies to all students enrolled in public schools.<sup>233</sup> Despite compulsory education laws and the Court’s recognition of the importance of education in our society, the Court has been reticent in recognizing education as a fundamental right.<sup>234</sup> While the Supreme Court has not included education as a fundamental right, and thus does not require strict scrutiny be used when examining state laws, most

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<sup>226</sup> *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead*, 277 U.S. at 485)).

<sup>227</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 373 (1985) (quoting *West Virginia v. Barnette*, 319 U.S. 624, 657 (1943)).

<sup>228</sup> *Id.*

<sup>229</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

<sup>230</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia*, 515 U.S. 646.

<sup>231</sup> Jackson, *supra* note 201, at 695.

<sup>232</sup> See *infra* Part IV.

<sup>233</sup> See *supra* Part II.C.

<sup>234</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).



## 854 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

states have concluded that education is a fundamental right under their respective state constitutions.<sup>235</sup>

The Court, however, in its recognition of the importance of education in the United States, stated that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”<sup>236</sup> While such a right may not be enough to require strict scrutiny of state legislation and school board policies, it might outweigh the school’s need to impede on students’ rights to education when it is combined with the parents’ rights to raise their children and students’ rights to privacy.<sup>237</sup>

In both the *Vernonia* and *Earls* decisions, the Court refers to governmental needs that apply to schoolchildren in general, but makes narrow holdings based on students’ participation in athletics or extracurricular activities.<sup>238</sup> In contrast to the situations in *Skinner* and *Von Raab*, where employees of closely regulated industries were subjected to random drug testing, and had the option to seek another job, public school children would not have any other option if they chose to protect their bodily integrity by refusing to submit to suspicionless drug testing.<sup>239</sup>

While there is no doubt that students benefit from the education they are provided, such education should not be deemed a privilege when examined in light of compulsory education laws. It is an unnecessary invasion of a student’s right to privacy to be subjected to compulsory drug tests without a showing of an individualized suspicion or a compelling state need.<sup>240</sup>

## IV. CONTRIBUTION

While education may be another approach to combating a national drug problem, it is not the role of the federal government to control how school districts deal with their respective disciplinary issues.<sup>241</sup> School

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<sup>235</sup> Palumbo, *supra* note 126, at 397.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See *supra* Parts II.C.2-II.C.3.

<sup>239</sup> See *supra* Parts II.B.1-II.B.2.

<sup>240</sup> See *supra* Part II.C.2.

<sup>241</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). “Providing public schools ranks at the very apex of the function of a State.” *Id.* There is no doubt that the drug testing programs in question are well-intentioned, but the rights we are provided in the Constitution should not be sacrificed merely because the state has a benevolent purpose. As Ben Franklin

districts are permitted to make this decision at their discretion.<sup>242</sup> This Part suggests that the Court should add a fourth factor to its balancing test: parents' rights to control the upbringing of their children. The Court should also implement a strict scrutiny standard of review to apply to the governmental interest prong of the balancing test for suspicionless drug testing policies, which would require the school district to show a "compelling" interest that is narrowly tailored to achieve its stated goal.<sup>243</sup>

#### A. *The Proposed Balancing Test*

The revised balancing test would take into account: (1) the nature of the privacy interest compromised by students who are subjected to such testing; (2) the character of the intrusion imposed by the policy; (3) the compelling governmental concerns and the efficacy of the Policy in meeting them; and (4) the parents' fundamental Fourteenth Amendment Due Process rights to control the upbringing of their children.

##### 1. A Proposed Fourth Prong to the Balancing Test: Parents' Right to Control the Upbringing of Their Children

In both *Vernonia* and *Earls*, the claims challenging the drug testing programs in question were brought by both the students and their parents.<sup>244</sup> Because the parents had concerns about the school district violating the privacy rights of their children, they did not sign the consent form allowing the searches. While they were free to refuse signing the consent form, their children were denied the opportunity to participate in extracurricular activities. At that point, a concerned parent's only option was to file a lawsuit or allow his child to be deprived of the opportunity to participate in extracurricular activities.

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stated in 1755, "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755). The best way to combat the national drug abuse problem may be to use the money that is being channeled into drug testing programs to educate children on the dangers of drug abuse. Such programs would inform children of the potential dangers of drug abuse without imposing an adversarial relationship between students and administrators. Also, such a relationship sends schoolchildren the wrong message that they are guilty until proven innocent.

<sup>242</sup> *Yoder*, 406 U.S. at 235. "[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Id.*

<sup>243</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995).

<sup>244</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia*, 515 U.S. 646.

## 856 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

Pressure to comply with such testing would be even greater in school districts that impose drug testing on all students. Parents would not have a choice in the matter and would have to consent to the testing or send the child to a private school. Despite this concern, the Court's current stance seems to open the door to such testing in public schools, which leaves parents with very little control over the upbringing of their children.

While the parental interest in their children's right of privacy is great, the Court does not even consider this interest in *Vernonia* or *Earls*.<sup>245</sup> This should be another factor considered by the Court in its balancing test, especially when the claim is brought by both the student and the student's parents. The Court's decisions regarding the parents' rights to raise their children against the school's interest in maintaining order have been mixed, but the plurality decision in *Troxel v. Granville* held that it was a fundamental right.<sup>246</sup>

In *Wisconsin v. Yoder*, the Court combined the parents' right to control the upbringing of their children with an enumerated First Amendment right to defeat the state law.<sup>247</sup> The Court may not have come to the same decision had it simply been a First Amendment challenge or a right of the parents to control the upbringing challenge, but by combining the two constitutional rights, the plaintiffs were able to defeat the state's compulsory education laws. This type of hybrid challenge should also be available to parents challenging a school district's drug testing program.

Moreover, the Court needs to be more consistent in its application of the parental right to raise children. Giving such substantial weight to the parents' right in *Yoder* and *Troxel*, then failing to mention that right in *Vernonia* or *Earls*, creates cloudy precedent for lower courts to follow. Such inconsistency supports the argument that the Court simply applies whatever test it deems necessary to reach the predetermined result of its choice. But giving parents a waiver or an option to opt-out would be a sufficient solution. Some parents may welcome the school's assistance in monitoring their children, while others may choose to trust their children or handle such issues within the family.

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<sup>245</sup> *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646.

<sup>246</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>247</sup> *Yoder*, 406 U.S. 205.

## 2. Strict Scrutiny Application to the Governmental Concern Prong

In dealing with the special needs doctrine, the Court has been inconsistent in what standard of review it applies to the governmental concern prong.<sup>248</sup> The two decisions regarding suspicionless drug testing in schools have also been unclear as to what standard the Court will apply.<sup>249</sup> This confusion is understandable considering the competing rights involved in such testing, but to establish a more concrete precedent, the Court must establish a standard of review for such cases. This Note proposes that such drug testing policies be subjected to strict scrutiny.

Under strict scrutiny, the school testing policy would be presumptively invalid, but could be upheld in situations of individualized suspicion and in situations where the school district can establish a prevalent drug problem or individualized suspicion that would require a drug testing program. These situations would give the school district a compelling reason to implement such a program.

Strict scrutiny would be appropriate because of the several rights which are at issue in such testing. A hybrid of both the students' enumerated Fourth Amendment rights and the parents' fundamental rights to control the upbringing of their children should be sufficient enough interests for the Court to trigger its strict scrutiny standard of review.

There is no doubt about governmental concerns with drug use, but that does not justify the Court circumventing the language of the Constitution. There is also a national concern regarding adult drug use, but that does not entitle police officers to search every citizen and use the national drug problem to justify the search. The Court has always had a preference for individualized suspicion in its interpretation of the Fourth Amendment and as a result, blanket policies such as these should not be constitutional under the Fourth Amendment.<sup>250</sup>

An individualized suspicion or at least a demonstrated problem in the school district should be proven prior to implementing drug testing. Such offerings of proof would most likely be sufficient to establish a

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<sup>248</sup> See generally *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>249</sup> *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646.

<sup>250</sup> *Vernonia*, 515 U.S. at 681.

“compelling” government interest. The burden of proof should be on the school district to show that there was a drug problem in the district and it had exhausted its options in combating the problem prior to the implementation of suspicionless drug testing.

#### V. CONCLUSION

With a little more Constitutional protection, well-behaved students like Guy Good may not have to be subjected to such governmental intrusion, and thus, would be more at ease in the school environment. He would not have to sit in nervous anticipation of the next time he will be called to have his privacy violated. His parents would also be assured that their son was in the school’s custody without the threat of having his liberty compromised.

Widespread drug use is undoubtedly a concern among school administrators across the country. In addressing this concern, school districts have implemented policies that threaten students’ privacy rights and also instill the wrong message regarding what expectations all Americans should have of the protections of the Constitution. The Court has manipulated and avoided the language of the Fourth Amendment to reach a result allowing for a diminished constitutional right of privacy for students. This reach can be interpreted to extend to all students who are not only enrolled in school, but are required to attend school due to the state compulsory education laws.

The Court addressed several factors and applied them to a balancing test, but made no consideration of parents’ fundamental right to control the upbringing of their children. Student drug testing has been before the Court twice in the past eleven years, and the Court has broadened the scope of the power of school districts each time. Opposite this broadening of power is the diminishing of our schoolchildren’s constitutional rights. The Court should implement strict scrutiny and consider parents in its balancing test before we rob future generations of the constitutional privileges that define America.

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