

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—RANDOM, WARRANTLESS, AND SUSPICIONLESS SEARCHES OF STUDENT ATHLETES THROUGH URINALYSIS DRUG TESTING BY PUBLIC SCHOOL OFFICIALS DOES NOT VIOLATE FOURTH AMENDMENT—*Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386 (1995).

“Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays.”¹

The primary purpose of the Fourth Amendment² is to secure the rights of individuals³ from unreasonable searches⁴ and

¹ Akhil Reed Amar, Article, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

² See U.S. CONST. amend. IV. The Fourth Amendment provides:

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

Id.

The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Ker v. California*, 374 U.S. 23, 30 (1963); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). The Fourth Amendment guarantees to an individual privacy, dignity, and security against arbitrary acts by officers of the government. See *Camara v. Municipal Ct.*, 387 U.S. 523, 528 (1967). Although there are many opinions as to what is reasonable within the meaning of the Fourth Amendment, “the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.” *Oliver v. United States*, 466 U.S. 170, 178 (1984) (citations omitted).

The Supreme Court established the exclusionary rule which provides for the suppression of evidence obtained unlawfully under the Fourth Amendment. See Keith A. Fabi, Comment, *The Exclusionary Rule: Not the “Expressed Juice of the Woolly-Headed Thistle,”* 35 BUFF. L. REV. 937, 937 (1986). In *Weeks*, the Court first recognized the exclusionary rule. See *Weeks v. United States*, 232 U.S. 383, 398 (1914). Moreover, 50 years later, the *Mapp* Court extended the exclusionary rule to apply to state governments as well. See *Mapp v. Ohio*, 367 U.S. 643, 657, 660 (1961). Because a discussion of search and seizure law is beyond the scope of this article, see generally THOMAS J. GARDNER & VICTOR MANIAN, *PRINCIPLES AND CASES OF THE LAW OF ARREST, SEARCH, AND SEIZURE* (1974); MICHELLE G. HERMANN, *SEARCH AND SEIZURE CHECKLISTS* (1996); 3 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2d ed. 1987); 2 WILLIAM E. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* (2d ed. 1993) [hereinafter *ARRESTS AND CONFESSIONS*]; RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS* (1985); BRADFORD P. WILSON, *ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY* (1986); Anne Clark, *The Exclusionary Rule*, 84 GEO. L.J. 873 (1996); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); Scott E. Sundby, *“Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994).

³ See U.S. CONST. amend. IV. The Fourth Amendment protects an individual as

seizures⁵ by the government.⁶ Specifically, the Fourth Amendment sets forth two distinct clauses: a prohibition against unreasonable searches and seizures and a requirement that warrants be supported by probable cause.⁷

well as his property. *See id.* Moreover, the Fourth Amendment provides protection to people, rather than places. *See Katz v. United States*, 389 U.S. 347, 351 (1967).

⁴ *See* BLACK'S LAW DICTIONARY 1349 (6th ed. 1990). A search is defined as: [a]n examination of a person's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged.

Id.; *see also* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (holding that a search occurs when a reasonable expectation of privacy is infringed upon).

⁵ *See* BLACK'S LAW DICTIONARY 1359 (6th ed. 1990). A seizure of a person is defined as "the taking of one physically or constructively into custody and detaining him, thus causing a deprivation of his freedom in a significant way, with real interruption of his liberty of movement." *Id.*; *see also* *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (explaining that a person has been seized as defined by the Fourth Amendment only if "a reasonable person would have believed he was not free to leave."). The *Mendenhall* Court's test is the current standard against which personal, nonphysical seizures are gauged. *See* 2 ARRESTS AND CONFESSIONS § 13.2 (a), *supra* note 2, at 13-11. In addition, a seizure of property is defined as a profound interference with an individual's interest in property. *Soldal v. Cook County, Ill.*, 113 S. Ct. 538, 543 (1992).

⁶ *See* U.S. CONST. amend. IV. The state action doctrine applies to the concept that individual constitutional rights are restrictions on government actors as opposed to private individuals, businesses, or groups. *See* Donald Crowley, *Student Athletes and Drug Testing*, 6 MARQ. SPORTS L.J. 95, 100 (1995). Therefore, the Fourth Amendment only affords protection to individuals against searches and seizures made by government officials. *See* *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921). For example, if someone other than a government official wrongfully seized papers and afterwards the government came into possession of them, the papers could legally be used in evidence. *See id.*; *see also* *Elkins v. United States*, 364 U.S. 206, 213 (1960) (explaining that the Fourth Amendment applies to officials acting on behalf of the federal government); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the Fourth Amendment limits action of the federal government as opposed to individual misconduct of federal officials).

The Fourth Amendment, however, is not applicable to government action taken against nonresident aliens outside of United States borders. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990); *United States v. Aikins*, 946 F.2d 608, 613 (9th Cir. 1991) (holding that Fourth Amendment protections were not available in international waters to nonresident aliens).

⁷ *See* U.S. CONST. amend. IV. Many argue that the Fourth Amendment has two separate clauses: the Reasonableness Clause and the Warrant Clause. *See* Cathy A. Cox et al., *An Emerging New Standard for Warrantless Searches and Seizures Based on Terry v. Ohio*, 35 MERCER L. REV. 647, 649 (1984). Confusion tends to arise over the two separate clauses because they may be construed independently or dependently. *See id.* at 649-50. Moreover, legal scholars argue over whether the probable cause, i.e. suspicion, element of the warrant clause also applies to the Reasonableness Clause. *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 488 (1995).

The Reasonableness Clause explicitly states that the Fourth Amendment only ap-

Throughout much of the Fourth Amendment's jurisprudence, the Court has acknowledged the tension between government authority and individual liberties.⁸ Originally, the Fourth Amendment was narrowly defined by the Supreme Court as encompassing a per se rule requiring searches and seizures to be accompanied by a warrant granted upon a showing of probable cause.⁹ In the past

plies to unreasonable searches and seizures. See *United States v. Sharpe*, 470 U.S. 675, 682 (1985). Moreover, the Fourth Amendment restricts unreasonable searches and seizures that are conducted in an improper method. See *Schmerber v. California*, 384 U.S. 757, 768 (1966). The test for what is reasonable "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985)). Hence, the judiciary is afforded great latitude as to what is a reasonable search or seizure. See PLOVIOU G. PLOVIOU, *SEARCH & SEIZURE: CONSTITUTIONAL AND COMMON LAW* 131 (1982).

Of the two clauses, the Warrant Clause is more stringent and its primary purpose is to protect individuals' privacy interests from random searches and seizures or arbitrary acts of the government. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989). A warrant confirms to the individual that the search has been authorized and that it is limited in scope. See *id.* at 622; *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Camara v. Municipal Ct.* 387 U.S. 523, 532 (1967). The Court, however, has recognized that when there is a burden of obtaining a warrant that frustrates the government's purpose, the warrant requirement may be suspended. See *Donovan v. Dewey*, 452 U.S. 594, 603 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972); *Camara*, 387 U.S. at 533.

⁸ See *Camara*, 387 U.S. at 528. "Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of . . . unreasonable searches and seizures into workable guidelines . . . has for many years divided the members of this Court." *Id.* at 528. See Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 583-84 (1989). The Supreme Court acknowledged the potential battle between balancing government power and individual rights early in the Fourth Amendment's history. See *id.* at 584 n.4. In *Burdeau v. McDowell*, the Court stated:

The Fourth Amendment gives protection against unlawful searches and seizures. . . . Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than government agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property. . . .

256 U.S. 465, 475 (1921); see also Christopher S. Hagge, Note, *The Demise of Individualized Suspicion in Fourth Amendment Searches and Seizures*, 31 TULSA L.J. 559, 559 (1996) (asserting that there has been substantial legal debate over the meaning of the Fourth Amendment since its ratification).

⁹ See *Katz v. United States*, 389 U.S. 347, 357 (1967). Except under exigent circumstances, most searches and seizures must be accompanied by a warrant issued upon probable cause. See *id.*; *Payton v. New York*, 445 U.S. 573, 586 n.25 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Warden v. Hayden*, 387 U.S. 294, 298 (1967). In those situations where a warrant is not required, however, ordinarily probable cause or reasonableness must exist. See *United States v. Santana*, 427 U.S. 38, 42 (1976); *United States v. Watson*, 423 U.S. 411, 423 (1976); *Carroll v. United States*, 267 U.S. 132, 155-56 (1925).

two decades, however, the Court has broadened the government's authority under the Fourth Amendment by continuously emphasizing that neither warrants nor probable cause are "irreducible requirement[s] of a valid search"¹⁰ under the Fourth Amendment.¹¹

The Court has upheld both warrantless and suspicionless searches in private dwellings,¹² automobiles,¹³ school-house environments,¹⁴ work-related locales,¹⁵ and highly regulated industries¹⁶ by reasoning that the decreased expectation of privacy in these settings affords such an allowance.¹⁷ Specifically, the Supreme Court has held that where there is an existence of a "special need"¹⁸ by the state, the warrant and probable cause require-

¹⁰ *T.L.O.*, 469 U.S. at 340; *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976).

¹¹ See *T.L.O.*, 469 U.S. at 340. Although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, though in certain limited circumstances neither is required." *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (Powell, J., concurring); see also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (explaining that "neither a warrant nor probable cause, nor indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance").

¹² See, e.g., *United States v. Biswell*, 406 U.S. 311, 317 (1972) (upholding warrantless administrative inspection of pawn shop handling sporting weapons); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (upholding warrantless administrative search of liquor facility); *United States v. Cobb*, 975 F.2d 152, 156 (5th Cir. 1992) (upholding warrantless administrative search of trucking company because part of the business was highly regulated due to motor vehicle salvage operation). Cf. *Camara*, 387 U.S. at 534, 538 (warrant was required for administrative searches of private residences concerning safety inspections; however, probable cause was not a requisite). But see *See v. City of Seattle*, 387 U.S. 541, 544 (1976) (warrant was required for administrative search of business for purposes of conducting a fire inspection).

¹³ See, e.g., *Michigan Dep't of State Police v. Sitz*, 469 U.S. 444, 455 (1990) (upholding sobriety checkpoint stops without a warrant or probable cause); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (upholding police-administered checkpoints without a warrant or probable cause). But see *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (finding that reasonable suspicion must be present in order for vehicles to be randomly stopped by police).

¹⁴ See, e.g., *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2391 (1995) (holding that warrant and probable cause requirements were not necessary to conduct random drug urinalysis tests on student athletes); *T.L.O.*, 469 U.S. at 326 (noting that the warrant and probable cause requirements were not necessary in a school setting).

¹⁵ See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 722, 724 (1987) (holding that neither a warrant nor probable cause was necessary in order for an employer to search an employee's office).

¹⁶ See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (observing that a warrant and probable cause were not required before mandatory drug tests were conducted); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (holding that neither a warrant nor probable cause was necessary to conduct drug tests on custom officials).

¹⁷ See cases cited *supra* notes 12-16.

¹⁸ See *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring) (holding that a high

ments may be dispensable in search and seizure cases.¹⁹ If the state's circumstances are based on this "special needs" category, a court will determine the reasonableness of the search or seizure under the Fourth Amendment by balancing the government's interest in enforcement against the individual's right to privacy.²⁰

Recently, drug testing cases have been afforded this "special needs" status.²¹ Thus, searches through mandatory urinalysis drug testing have been deemed constitutional absent a warrant or probable cause.²² The Supreme Court, in an effort to curb drugs and violence in schools, has taken an activist role by allowing student drug testing.²³ Some scholars, however, have suggested that the

school's interest in asserting order and discipline constituted a "special need" allowing a warrantless search of a student's purse by school administration).

¹⁹ See *Skinner*, 489 U.S. at 620; *Von Raab*, 489 U.S. at 665-66; *American Fed'n of Gov't Employees v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993); see also *Wildauer v. Frederick County*, 993 F.2d 369, 373 (4th Cir. 1993) (state's "special need" to protect foster children justified warrantless search of foster home); *Dunn v. White*, 880 F.2d 1188, 1196-97 (10th Cir. 1989) (per curiam) (state's "special need" to curb the spread of AIDS in prison justified the testing of prisoners).

²⁰ See *T.L.O.*, 469 U.S. at 341; *United States v. Place*, 462 U.S. 696, 703 (1983); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967).

²¹ See *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2397 (1995) (upholding mandatory drug testing due to "special needs" present in the school setting); *Skinner*, 489 U.S. at 620 (explaining that drug testing was constitutional due to "special needs" in the railroad setting); *Von Raab*, 489 U.S. at 665-66 (articulating that drug testing constituted "special needs" because of a custom official's unique job responsibilities).

²² See *Vernonia*, 115 S. Ct. at 2396; *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988). But see *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 766 (S.D. Tex. 1989) (expressing that urinalysis testing for drugs was unconstitutional without individualized suspicion); *University of Colo. v. Derdeyn*, 863 P.2d 929, 935 (Colo. 1993) (maintaining that the University's random drug testing program conducted on student athletes was unconstitutional under the Fourth Amendment).

The Supreme Court has held that the collection of urine constitutes a search under the Fourth Amendment. See *Skinner*, 489 U.S. at 617. Moreover, the *Von Raab* Court acknowledged:

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 customs.

Id.; *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1542 (6th Cir. 1988); *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987).

²³ See *Vernonia*, 115 S. Ct. at 2395. Moreover, circuit courts have even upheld student strip searches. See *Cornfield v. Consolidated High Sch.*, 991 F.2d 1316, 1322 (1993) (strip search of male student suspected of "crotching" drugs was reasonable under Fourth Amendment); *Williams v. Ellington*, 936 F.2d 881, 883 (6th Cir. 1991) (upholding search requesting a female, who was suspected of drug possession, to remove her T-shirt and drop her jeans to her knees). But see *Tarter v. Raybuck*, 742 F.2d

Court has unabashedly pushed aside individual rights by allowing warrantless and suspicionless searches through random drug testing of student athletes.²⁴

In the recent decision of *Vernonia School District v. Acton*,²⁵ the United States Supreme Court reviewed the validity of a student's claim that the Student Athletic Drug Policy (the Policy),²⁶ which required random drug testing for all student athletes, violated the

977, 983 (7th Cir. 1984) (noting that a strip search was never justifiable because a student's privacy interest would outweigh the school's interest in discipline).

²⁴ See generally Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 513, 515 (1991) (arguing that warrantless searches are presumptively unreasonable due to current technology that allows the expeditious obtainment of warrants); Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 49 (1995) (proffering that the Supreme Court has severely diminished Fourth Amendment protection of individual privacy rights); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (suggesting that the Supreme Court has bypassed the purpose of the Fourth Amendment, which is to protect the public from the unfettered discretion of the government); Serr, *supra* note 8, at 584 (articulating that the Court has begun to tip the balance in favor of the government as opposed to the individual); Shannon B. Blair, Comment, *Testing the Fourth Amendment: Random, Suspicionless Urinalysis Drug-Testing of Student-Athletes is [an] Unconstitutional Search*, 28 SUFFOLK U.L. REV. 217, 226 (1994) (explaining that there is a struggle to balance the state's interest in the welfare of students against the individual's Fourth Amendment rights); Robert C. Farley, Jr., *Suspicionless, Random Urinalysis: The Unreasonable Search of the Student Athlete*, 68 TEMP. L. REV. 439, 459 (1995) (advocating that the Court should not sacrifice students' privacy rights in an attempt to alleviate society's drug problem); John A. Hamilton, Note, *The United States Supreme Court's Erosion of Fourth Amendment Rights: The Trend Continues*, 30 S.D. L. REV. 574, 574 (1985) (stating that the Court has abraded individual rights under the Fourth Amendment); Leading Cases, *Drug Testing-Student Athletes*, 109 HARV. L. REV. 220, 229 (1995) [hereinafter *Student Athletes*] (arguing that the Supreme Court has a right to protect our children's constitutional rights under the Fourth Amendment).

²⁵ 115 S. Ct. 2386 (1995).

²⁶ See *Vernonia Sch. Dist. v. Acton*, 23 F.3d 1514, 1516 (9th Cir. 1994). The school board adopted the policy in 1989. See *id.* The school required any student who wished to participate in athletics to sign a form agreeing to a random urinalysis drug test on a weekly basis. See *id.* The school suspended from the athletic season any student who refused to sign the form or take the drug test. See *id.* at 1517.

Girls who were chosen for the drug test went to the director of the girls' athletics office to produce the urine specimen and boys went to the locker room. See *id.* at 1516-17. While boys produced a specimen, a faculty monitor was seated approximately 12 feet away listening for typical sounds of urination. See *id.* at 1517. The school sent urine samples to a lab that tested for the following: LSD, cocaine, marijuana, amphetamines, and creatinine. See *id.* The lab then reported results of the test to district personnel and positive tests were mailed to the district superintendent. See *id.*

Upon receiving a positive test, the student was required to take a second test. See *id.* If the student received two positive tests, parents were notified and the student had to either: (1) elect to attend drug counseling for six weeks including weekly drug tests, or (2) take suspension from athletics for the remainder of the current year and following year. See *id.* The second offense entailed an automatic suspension for the

Fourth and Fourteenth Amendments.²⁷ The Court concluded that due to the diminished expectation of privacy by student athletes, the limited nature of the search, and the compelling state interest at stake, the school district did not overstep its constitutional authority by implementing the Policy.²⁸

When James Acton, a seventh-grade student, and his parents declined to sign a drug testing consent form, the school declared Acton ineligible to play football.²⁹ In addition to their Federal Constitutional claims, the Actons sought declaratory and injunctive relief from the Policy on the grounds that it violated Article I, Section 9³⁰ of the Oregon Constitution.³¹ In denying Acton's claim, the district court held that in the context of the Fourth Amendment, Acton's privacy interest was less important than the compelling need of Oregon to maintain order and protect students.³²

On appeal, the Actons claimed that random drug testing was not justifiable because it was not proven in the district court that a severe drug problem existed in the Vernonia school system.³³ The Ninth Circuit found that there was a drug problem in the Vernonia school system; however, it held that the Policy violated the Fourth Amendment and Article I, Section 9 of the Oregon Constitution.³⁴

current athletic season and next year's athletic term. *See id.* The third offense demanded suspension for the current athletic period and the next two seasons. *See id.*

²⁷ *See Vernonia*, 115 S. Ct. at 2390.

²⁸ *See id.* at 2396.

²⁹ *See id.* at 2390.

³⁰ *See OR. CONST.* art. I, § 9. The Oregon Constitution, Article I, § 9 states:

No law shall violate the right of the people to be secure in their persons, house, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

Id.

³¹ *See Vernonia*, 115 S. Ct. at 2390.

³² *See Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354, 1368 (D. Or. 1992). The district court examined the following issues often used by Oregon courts when analyzing such circumstances: (1), did an important state interest exist; (2), the level of intrusiveness caused by the procedure; (3), efficiency of the method used to reach the designating goal; and (4), the amount of discretion afforded to school officials. *See id.* at 1367-68.

³³ *See Acton v. Vernonia Sch. Dist.*, 23 F.3d 1514, 1519 (9th Cir. 1994).

³⁴ *See id.* at 1519, 1527. The court of appeals noted that language in Article I, § 9 of the Oregon Constitution was nearly the same as the Fourth Amendment. *See id.* at 1519. Because the constitutional provision would not likely offer less protection, the court determined that it would apply the Fourth Amendment to decide the case. *See id.* at 1518, 1519. Moreover, the court disagreed with Acton's claim that a drug problem did not exist and found that drug use appeared to be on the rise. *See id.* at 1519.

In deciding the constitutional basis of the allegation, the court asked: (1) was there a search; (2) was there authority to conduct the search; and (3) was the search

The court reversed and remanded the case because the government's interest in curtailing drug abuse was not compelling enough to outweigh the student athletes' Fourth Amendment rights.³⁵

Due to the significance of the issue involved, the Supreme Court of the United States granted certiorari to decide whether the Policy enacted by the school district transgressed the Constitution.³⁶ Relying on several past cases that confronted the issue of Fourth Amendment warrantless and suspicionless search and seizure issues,³⁷ the Court held that the Policy was constitutional.³⁸ Subsequently, the Court remanded the case to the court of appeals for further proceedings.³⁹

The Supreme Court has considered warrantless and suspicionless search and seizure cases on several occasions.⁴⁰ In *Camara v. Municipal Court*,⁴¹ the Court departed from the normal strictures of the warrant and probable cause requirements by employing the reasonableness standard under the Fourth Amendment and for the first time upheld suspicionless searches.⁴² In *Camara*, the plain-

justifiable? *See id.* First, the court explained that collection of urine constituted a search. *See id.* at 1520. Second, the court enunciated that there was authority to conduct the search because the Policy was "properly authorized" when the Board adopted it. *See id.* at 1521. Third, the court found, however, that the procedure was unreasonable because the government interest was not compelling enough to allow suspicionless searches. *See id.* at 1526.

³⁵ *See id.* at 1526, 1527. Although the court agreed that the goal of drug-free athletes was laudable, the court explained that students' constitutional liberties were at stake. *See id.* at 1527. The court criticized the Seventh Circuit decision in *Schaill v. Tippecanoe* for minimizing the privacy liberties of student athletes by allowing random drug testing. *See id.* (citing *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988)). Moreover, the court asserted that living with displeasure and even danger in order to sustain constitutional safeguards was necessary. *See id.*

³⁶ *Vernonia*, 115 S. Ct. at 2388.

³⁷ *See id.* at 2390-91 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

³⁸ *See Vernonia*, 115 S. Ct. at 2396. The Court emphasized that random drug testing would not be constitutional in all settings. *See id.* Moreover, Justice Scalia reiterated that the most persuasive factor was "that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Id.* In addition, the majority explained that because the Fourth Amendment was not violated, neither was Article I, § 9 of the Oregon Constitution. *See id.* at 2397.

³⁹ *See id.*

⁴⁰ *See Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656; *T.L.O.*, 469 U.S. at 325.

⁴¹ 387 U.S. 523 (1967).

⁴² *See id.* at 534, 538. Justice White contended that "'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.*

tiff refused to allow a housing inspector into his dwelling without a warrant and was subsequently arrested for violating a municipal code.⁴³ Although the Court agreed that administrative searches were significant intrusions that must be accompanied by a warrant, the Court determined that probable cause would be assumed if a reasonable government interest existed.⁴⁴ Justice White emphasized that the reasonableness requirement determined the validity of the government interest, which gave rise to blanket probable cause.⁴⁵ Subsequently, the Court balanced California's need for the search against the plaintiff's privacy interest and found that because the search was reasonable, probable cause was inferred under the Fourth Amendment.⁴⁶

The Supreme Court again recognized an expansion in state government authority by applying the reasonableness standard of the Fourth Amendment in *United States v. Martinez-Fuerte*,⁴⁷ where the Court held that police-administered checkpoint stops need not be accompanied by a warrant or probable cause.⁴⁸ In *Martinez-Fuerte*, the police stopped the defendant at a permanent checkpoint

at 538; see also Hagge, *supra* note 8, at n.4 (recognizing that *Camara* was the first case to uphold suspicionless searches).

⁴³ See *Camara*, 387 U.S. at 525, 527. The inspector returned at a later date, again without a warrant, and the plaintiff refused to let him inside. See *id.* at 526. The plaintiff received a citation to appear in the district attorney's office, which he ignored. See *id.* Thereafter, the inspector filed a complaint against the plaintiff for refusing to allow a lawful examination of his premises, which eventually led to his arrest. See *id.* at 527.

⁴⁴ See *id.* at 534, 538. Justice White determined that administrative searches were serious infringements upon the interests preserved by the Fourth Amendment and without a warrant, traditional safeguards would be extinguished. See *id.* at 534. Further, the Court explained that the inspectors could maintain their goals within the prescribed search warrant requirements. See *id.* at 533. Finally, the Justice concluded that if the inspection conducted by the state was reasonable, probable cause existed and the Court would provide a search warrant. See *id.* at 539.

⁴⁵ See *id.* Justice White articulated that the test for reasonableness was the balance between the need for the search against the invasion of an individual's privacy. See *id.* at 536-37.

⁴⁶ See *id.* at 538. First, Justice White highlighted that the public and the judiciary had long embraced inspection programs. See *id.* at 537. Second, the Court stated that inspections were the only means of preventing dangerous violations of building codes. See *id.* Third, Justice White opined that a limited invasion of privacy was involved because the inspections were not criminal or personal. See *id.*

⁴⁷ 428 U.S. 543 (1976).

⁴⁸ See *id.* at 545. Justice Powell explained that the point agent visually screened the vehicles as they passed through the checkpoint. See *id.* at 546. In a small number of cases, the Justice stated, the point agent directed cars to a secondary inspection zone where the motorist and passengers were asked about their immigration status. See *id.* Moreover, the Court asserted that the average inquiry at the second stop lasted between three and five minutes. See *id.* at 546-47.

operated by the border patrol, where he was subsequently arrested for smuggling illegal Mexican aliens across the border.⁴⁹ Relying upon the reasonableness test proffered in *Camara*, the Court balanced the individual's interests against California's and concluded that the checkpoint was constitutional.⁵⁰ Justice Powell reasoned that California's checkpoint stations, which the government defined as a critical traffic-checking operation, were necessary to control the influx of illegal aliens.⁵¹ The Court also articulated that while the need for checkpoints was crucial to the State, the intrusion upon motorists' Fourth Amendment rights was minor.⁵² Accordingly, the Court held that the checkpoint stop could be made without satisfying the warrant or individualized suspicion requirement.⁵³

⁴⁹ See *id.* at 547. Martinez-Fuerte was a legal resident of the United States but his passengers were illegal aliens. See *id.* at 547-48. The defendant moved to suppress the evidence obtained by the border patrol on the grounds that the checkpoint violated his Fourth Amendment rights. See *id.* at 548.

⁵⁰ See *id.* at 560-62. At the outset, Justice Powell submitted that individualized suspicion was ordinarily essential to a valid search or seizure. See *id.* at 560. The Court contended, however, that suspicion was not an irreducible requirement under the Constitution. See *id.* at 561. Relying on the *Camara* Court's reasonableness test, the Justice concluded that California's concern to stop illegal aliens from entering the country outweighed the interests of the individual. See *id.* Justice Powell stated that one's expectation of privacy in an automobile was less than the level of privacy an individual would anticipate in a residence. See *id.*; *United States v. Ortiz*, 442 U.S. 891, 896 n.2 (1975); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring). Moreover, the Court conceded that intrusion on the motorist was minimal and the interest of the State was legitimate. See *Martinez-Fuerte*, 428 U.S. at 562. Accordingly, Justice Powell found that the checkpoint stops were valid absent individualized suspicion. See *id.*

⁵¹ See *Martinez-Fuerte*, 428 U.S. at 556.

⁵² See *id.* at 557-58. The Court reasoned that the checkpoint stop did limit the motorists right to "free passage without interruption." See *id.* at 557-58 (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)). Justice Powell explained, however, that the visual inspection was confined to what the border patrol could see and neither the vehicle nor the motorists were searched. See *id.* at 558. Furthermore, the Court compared routine checkpoints to those found on random highway stops and articulated the following: (1) interference with average traffic was minor, and (2) checkpoint stops involved less discretionary activity on the part of the police officers. See *id.* at 559. The Court also pointed out that the checkpoint stops were neither intimidating nor frightening as compared to random individual stops by police officers. See *id.* at 558 (quoting *Ortiz*, 442 U.S. at 894-95).

⁵³ See *id.* at 562. The Court emphasized that the holding was limited to the type of stop illustrated in this case and that normally consent or probable cause was necessary to conduct a checkpoint search. See *id.* at 567.

The Supreme Court has also decided cases involving random police and sobriety checkpoint stops under the Fourth Amendment. See *Michigan Dep't of State Police v. Sitz*, 469 U.S. 444, 455 (1990); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). In *Delaware v. Prouse*, the Court constricted the government's power by holding that reasonable suspicion must be present before a patrol officer could randomly stop a vehicle.

In *New Jersey v. T.L.O.*,⁵⁴ the Supreme Court held that warrant and probable cause stipulations did not apply and that a reasonableness test under the Fourth Amendment should be employed in the school setting.⁵⁵ Because individualized suspicion was present

See 440 U.S. at 663. The *Prouse* Court considered whether it was reasonable under the Fourth Amendment to pull over automobiles without suspicion. See *id.* at 650. Balancing the intrusion of the motorists' interests against those of the state, Justice White held that the law enforcement practice was not justifiable in light of Fourth Amendment guarantees. See *id.* at 659-61. Justice White espoused that random stops did not significantly contribute to roadway safety and that alternative mechanisms existed. See *id.* at 659-63. Therefore, the Court held that police officers could not interfere with motorists on public highways without reasonable suspicion. See *id.* at 663. See, e.g., *United States v. Montgomery*, 561 F.2d 875, 877 (D.C. Cir. 1977) (explaining that because the stop of the vehicle was not based on suspicion, evidence must be suppressed); *Commonwealth v. Swanger*, 307 A.2d 875, 879 (Pa. 1973) (articulating that the officer must have probable cause to stop a vehicle before pulling a driver over to determine if the vehicle complies with state statutes). But see *United States v. Jenkins*, 528 F.2d 713, 714 (10th Cir. 1975) (holding that patrolman's stop for routine registration papers was constitutional absent suspicion); *Leonard v. State*, 496 S.W.2d 576, 577 (Tex. Ct. App. 1973) (finding that the police may constitutionally stop a vehicle without suspicion to determine the validity of a driver's license).

In *Michigan Dep't of State Police v. Sitz*, however, the Court afforded the government broad authority to conduct routine checkpoints without meeting the warrant or probable cause requirements of the Fourth Amendment. See 496 U.S. 444, 447 (1990). In *Sitz*, the Court granted certiorari to decide whether sobriety checkpoints were constitutional. See *id.* at 448, 450. Reiterating the Fourth Amendment's reasonableness test, Justice Rehnquist asserted that a motorist's right must be balanced against the government's interest in preventing drunk driving. See *id.* at 455. The Court opined that as in *Martinez-Fuerte*, the intrusion on the individual's Fourth Amendment rights were slight. See *id.* at 451-52. Moreover, Justice Rehnquist distinguished *Prouse* by reasoning that the police in *Prouse* randomly pulled over motorists, while the Michigan Police in the instant matter had routine sobriety checkpoints that stopped every vehicle. See *id.* at 453, 454. Therefore, the Court held that Michigan's interest in protecting the general public from drunk drivers outweighed the intrusion upon the individual motorists who were stopped at the sobriety checkpoints. See *id.* at 455.

⁵⁴ 469 U.S. 325 (1985).

⁵⁵ See *id.* at 340-41. The Court for the first time promulgated that school officials were representatives of the state and were not immune from the Fourth Amendment. See *id.* at 336. See, e.g., *Tarter v. Raybuck*, 742 F.2d 977, 981 (6th Cir. 1984) (explaining that public school officials were agents of the state); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982) (articulating that school authorities paid by the state are constrained under the Fourth Amendment); *Bellinier v. Lund*, 438 F. Supp. 47, 52 (N.D.N.Y. 1977) (reasoning that the regulation of public school teachers by the state constituted state action). But see *D.R.C. v. State*, 646 P.2d 252, 256 (Alaska Ct. App. 1982) (finding that school officials were not agents of the government and not governed by state or federal constitutional constraints); *State v. Baccino*, 282 A.2d 869, 871 (Del. Super. Ct. 1971) (determining that school teachers act in *loco parentis* of the students); *State v. D.T.W.*, 425 So. 2d 1383, 1386 (Fla. Dist. Ct. App. 1983) (advocating that school officials' *loco parentis* status broadens their authority and decreases students' expectation of privacy); *R.C.M. v. State*, 660 S.W.2d 552, 553-54 (Tex. App. 1983) (holding that the vice principal and school security guard were not governmental actors). First, the Court proclaimed that the Fourth Amend-

in *T.L.O.*, the Court left open the question of whether such suspicion was required under the reasonableness standard.⁵⁶ In *T.L.O.*, a student claimed that a school administrator's search of her purse for cigarettes violated her Fourth Amendment rights.⁵⁷ Stressing the existence of "special needs" for discipline in the school setting, the majority questioned: (1) whether there was a reasonable belief that the search would prove the student violated school policy or the law, and (2) whether the search was reasonably related to the circumstances that caused the initial interference.⁵⁸ Applying this

ment's unreasonable search and seizure prohibition had never been limited to conduct of police but, rather, to government action. *See T.L.O.*, 469 U.S. at 335. Second, the Court posited that school officials were more than surrogates for parents; they were representatives of the state. *See id.* at 336. Finally, the Court recounted, "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.*

⁵⁶ *See id.* at 342 n.8.

⁵⁷ *See id.* at 328-29. A teacher found T.L.O. and another student smoking in the lavatory and escorted them to the principal's office. *See id.* at 328. T.L.O. met with the assistant vice principal and denied that she had been smoking in the lavatory. *See id.* The assistant vice principal asked to see her purse and found cigarettes and rolling papers. *See id.* The vice principal proceeded to search for marijuana and found a small amount of marijuana in T.L.O.'s purse, along with a pipe, plastic bags, a significant amount of money, and a list of people who owed T.L.O. money. *See id.* The assistant vice principal gave the police all of the confiscated materials found in T.L.O.'s purse. *See id.* The police brought T.L.O. to the police station where she confessed to selling marijuana at the school. *See id.* at 329.

The State charged T.L.O. with delinquency in juvenile court. *See id.* The juvenile court found for the State and held that the search was reasonable. *See id.* The New Jersey Superior Court, Appellate Division, affirmed, *inter alia*, the juvenile court's holding that the search was reasonable and did not violate T.L.O.'s Fourth Amendment rights. *See id.* at 330. The New Jersey Supreme Court, however, reversed the appellate division and found that the search of T.L.O.'s purse was unreasonable. *See id.* The court agreed that a warrantless search would not violate the Fourth Amendment if a school official had reasonable grounds to suspect illegal activity or if a student interfered with school discipline. *See id.* at 330-31. The majority determined, however, that the search of T.L.O.'s purse was not reasonable because possession of cigarettes was neither illegal nor violated school rules. *See id.* at 331. Moreover, the court concluded that the evidence of drug use found by the assistant vice principal did not justify the extensive search of T.L.O.'s bag. *See id.*

⁵⁸ *See id.* at 341-42. The Court declared that the initial search of T.L.O.'s purse was valid because the school administrator had reasonable suspicion to believe that T.L.O. had been smoking against school policy. *See id.* at 345-46. Moreover, the Justice stated, "[t]he relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary 'nexus' between the item searched for and the infraction under investigation." *Id.* at 345 (citing *Warden v. Hayden*, 387 U.S. 294, 307 (1967)). Furthermore, Justice White asserted that the discovery of rolling papers indicated that T.L.O. may have had marijuana in her bag, which justified continued exploration. *See id.* at 347.

test, the Court found the initial search for cigarettes reasonable because a teacher had reported that T.L.O. was smoking in the school lavatory against school policy.⁵⁹ The Court further determined that the continued search, which ultimately yielded marijuana, was reasonably related to a finding of rolling papers in T.L.O.'s purse.⁶⁰ Accordingly, Justice White balanced the individual's interest of privacy against the school's need to maintain order and ruled that the search passed the reasonableness test of the Fourth Amendment.⁶¹

Two years later, in *Schaill v. Tippecanoe School Corp.*,⁶² the United States Court of Appeals for the Seventh Circuit first addressed the issue of school-conducted, random, warrantless, and suspicionless drug-urinalysis searches under the Fourth Amendment.⁶³ Relying on the Supreme Court's decision in *T.L.O.*, the court reasoned that neither a warrant nor probable cause was necessary under the Fourth Amendment and applied a reasonableness standard to the school setting.⁶⁴ Employing the balancing test, the court emphasized the following: (1) suspicionless searches were often permitted when there was a decreased privacy interest such as in the case of an athlete;⁶⁵ (2) urinalysis testing was the least intrusive manner of serving the government's end of drug-free students;⁶⁶ and (3) because the search was not for criminal purposes,

⁵⁹ See *id.* at 345-46.

⁶⁰ See *id.* at 347. Moreover, the Court observed that further exploration of T.L.O.'s purse turned up a pipe, a small amount of marijuana, and little bags that were normally used to store marijuana. See *id.* In addition, Justice White found that it was not unreasonable for the assistant vice principal to unzipper the pockets of T.L.O.'s purse in an attempt to uncover more evidence of wrongdoing. See *id.* In sum, the Court concluded the search for cigarettes and marijuana in T.L.O.'s purse was not unreasonable under the Fourth Amendment. See *id.*

⁶¹ See *id.* at 347-48.

⁶² 864 F.2d 1309 (7th Cir. 1988).

⁶³ See *id.* at 1310. Tippecanoe County School (TCS) operates two high schools located in Indiana. See *id.* Due to rumors of drug abuse among athletes, a coach insisted that 16 members of the baseball team submit to a urinalysis test. See *id.* Five of the students tested positive for marijuana. See *id.* In response, TCS instituted a mandatory urinalysis drug testing program for all athletes and cheerleaders. See *id.*

⁶⁴ See *id.* at 1315.

⁶⁵ See *id.* at 1317. First, the court reasoned that there was a diminished expectation of privacy for athletes because of the tradition of communal undress and physical examinations. See *id.* at 1318. Second, the court stated that there were other requirements expected of the athletes such as minimum grade point average and residency. See *id.* Third, due to the highly publicized drug testing initiative of professional athletes, the court posited that student athletes were aware of the routine nature of urinalysis testing. See *id.* at 1319.

⁶⁶ See *id.* at 1322. The Seventh Circuit reasoned that warrantless and suspicionless searches may be justified when unlawful conditions cannot be surmised by other

it was likely to adhere to the reasonableness standard.⁶⁷ Accordingly, the court held that because the interest of the school was greater than the athletes' individual privacy expectations, the urinalysis tests were constitutional.⁶⁸

Foreshadowing the Supreme Court's resolution of random drug testing in the school setting, the Court in *Skinner v. Railway Labor Executives' Ass'n*,⁶⁹ declared that the Federal Railroad Administration's (FRA) regulations, which required railway workers to submit to mandatory drug and alcohol testing, were constitutional.⁷⁰ The FRA advanced regulations under the Federal Railroad Safety Act of 1970⁷¹ in response to evidence indicating that drug use by employees was a contributing factor in many major accidents.⁷² The Court noted that a reasonableness standard ap-

methods. *See id.* at 1318. The court noted, however, that government representatives must not abuse warrantless searches and their discretion must be confined. *See id.* For example, the court stated that there must be objective criteria why a student was singled out for the search. *See id.*

⁶⁷ *See Schail*, 864 F.2d at 1322. The judge stated that many times a warrantless and suspicionless search may be valid for civil purposes but not for criminal purposes. *See id.*

⁶⁸ *See id.* The court found the following: students voluntarily choose to participate in athletics; athletes have a lesser expectation of privacy; the school had a substantial interest in curtailing drugs in athletics; the urinalysis program was the least intrusive means of collecting information; discretion of school officials was limited because the search was random; and information was not used for a criminal purpose. *See id.*

⁶⁹ 489 U.S. 602 (1989).

⁷⁰ *See id.* at 634. The Railway Labor Executives' Association first brought suit in the Northern District of California in an effort to prohibit the Federal Railroad Administration's (FRA) mandatory drug testing initiative. *See id.* at 612. The district court held in favor of the FRA and reasoned that although the railway workers had valid Fourth Amendment rights at stake, the compelling interest of the state to secure safety needs for the public surpassed any statutory and constitutional arguments. *See id.* The Court of Appeals for the Ninth Circuit reversed the district court and held that particularized suspicion was necessary in order to drug test the railway employees. *See id.* at 612-13. The Ninth Circuit asserted that the suspicion requirement would make the test reasonable within the Fourth Amendment without imposing an undue burden on the FRA. *See id.* at 613.

⁷¹ *See* 45 U.S.C. § 431 (1983).

⁷² *See Skinner*, 489 U.S. at 606. In 1985, the FRA announced regulations regarding drug and alcohol testing of railway employees. *See id.* at 608. The FRA concluded that 21 major train accidents involved alcohol or drug abuse as the probable cause. *See id.* at 607. Moreover, the FRA reported that accidents resulted in 25 deaths, property damage of \$19 million, and over 60 non-fatal injuries. *See id.* In response, the FRA prohibited railway employees from utilizing or possessing alcohol or any illegal substance under the 1987 Code of Federal Regulations. *See id.* at 608. Two parts of the regulation also addressed drug testing. *See id.* at 609. The regulations mandated toxicological testing if a railway employee was involved in a major train accident. *See id.* Under the regulations, a major train accident is defined as one which involves: "(i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000 or more." 49

plied because both the warrant and probable cause requirements frustrated the government's purpose.⁷³ Conducting the reasonableness test of the Fourth Amendment, the *Skinner* Court determined that the public's need for safety outweighed the employees' privacy interests, which were diminished due to the nature of the highly regulated industry and the performance of life or death tasks.⁷⁴ Justice Kennedy therefore held that the FRA's regulations served a compelling government interest in providing safety and were reasonable under the Fourth Amendment.⁷⁵

C.F.R. § 219.201(a)(1) (1995). Moreover, all employees involved in an accident are to be transported to a hospital where blood and urine specimens are taken. *See Skinner*, 489 U.S. at 609. The Regulations also authorized the FRA to demand employees to submit to breath or urine tests: (1) "after a reportable accident or incident, where a supervisor has a reasonable suspicion that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident, § 219.301(b)(2); or (2) in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding, § 219.301(b)(3)." 49 C.F.R. § 219.301(b) (1995). Also, if two railroad managers suspect impairment due to alcohol or drugs, an employee may be required to submit to breath or urine tests. *See* 49 C.F.R. § 219.301(c)(2)(i) (1995).

⁷³ *See Skinner*, 489 U.S. at 624. As an initial matter, the *Skinner* Court expressed that (1) even though the railroad was a private entity, the searches under the FRA's new regulations were for the purpose of public safety needs and therefore were government action, and (2) breath and urine tests constituted a search under the Fourth Amendment. *See id.* at 614, 616, 617. Next, the Court declared that the reasonableness test was applicable due to the "special needs" of law enforcement to guarantee the public's safety. *See id.* at 620. Justice Kennedy contended that the imposition of a warrant requirement would frustrate the government's objective in maintaining alcohol and drug-free railway employees. *See id.* at 624. Requiring supervisors to become familiar with the details of the Fourth Amendment, Justice Kennedy posited, would be unreasonable and stifle the objectives of drug testing. *See id.* at 623-24. Similarly, the probable cause requirement, the Court asserted, would also provide an imposition on law enforcement. *See id.* at 624. For example, the Justice stated that an employee under the influence of drugs or alcohol infrequently displayed signs that a layperson or even medical doctor could detect. *See id.* at 628. Therefore, the Court found that individualized suspicion would be an unrealistic endeavor under the circumstances. *See id.* at 631.

⁷⁴ *See id.* at 633-34. First, Justice Kennedy stressed that the breath test permitted by the regulations did not significantly impinge on an individual privacy's interest. *See id.* at 626. Due to both the ability to conduct the breath test outside of a hospital setting and the limited information ascertained, the Justice determined that the intrusion was minimal. *See id.* at 625-26. Second, the Court concluded that urine testing was reasonable due to the diminished expectation of privacy in the highly regulated railroad industry. *See id.* at 627-28. Justice Kennedy, citing to the regulations, noted that railroads mandated physical examinations for certain employees. *See id.* at 627.

⁷⁵ *See id.* at 634. Because of the possible critical consequences arising from drug-induced train operators, the Court found that a compelling government interest existed. *See id.* at 628. Justice Kennedy explained that an idle locomotive becomes deadly when carelessly operated by drug or alcohol induced employees. *See id.* Moreover, the Justice asserted that a momentary lapse in judgment by a train operator could lead to a catastrophe. *See id.* Therefore, the Court held that the FRA's regula-

Similarly, in *National Treasury Employees Union v. Von Raab*,⁷⁶ the Court held that drug testing of custom officials without a warrant or probable cause was reasonable under the Fourth Amendment.⁷⁷ In *Von Raab*, the United States Customs Service enacted a program requiring employees who transferred into jobs that entailed drug interdiction or required the use of firearms to undergo a drug-urinalysis test.⁷⁸ The Court justified departure from the ordinary warrant and probable cause requirements by emphasizing that when the search or seizure involved a governmental "special need," a court should balance the government's interest against the individual's expectation of privacy.⁷⁹ Justice Kennedy asserted

tions were reasonable and constitutional under the Fourth Amendment. *See id.* at 634.

⁷⁶ 489 U.S. 656 (1989).

⁷⁷ *See id.* at 677. The Petitioners, union employees, initiated suit in the Eastern District of Louisiana alleging that drug testing violated Fourth Amendment privacy rights. *See id.* at 663. The district court held that the drug testing violated the employees' Fourth Amendment rights because there was no probable cause or suspicion required. *See id.* Therefore, the court enjoined the Custom Service's drug testing program. *See id.* A divided Fifth Circuit reversed the district court's holding that the mandatory drug tests were constitutional under the Fourth Amendment. *See id.* at 663-64. The Fifth Circuit ruled that the drug testing procedures involved minimal intrusiveness and emphasized that the government had a grave interest in the morality of the custom's officials for purposes of national security. *See id.*

⁷⁸ *See id.* at 659, 660-61. The Court observed that the Commissioner of Customs established that drug urinalysis tests were reliable and should be employed on custom officials involved with drug interdiction or firearms. *See id.* at 660. The Justice further noted that drug testing was made a prerequisite for employment positions if one or more of the following criteria applied: (1) candidate involved with drug enforcement; (2) candidate required to carry firearms; (3) candidate worked with classified material. *See id.* at 660-61. The Court explained the test was conducted once the employee was selected for a position that met one of the three criteria, and final employment was contingent upon a successful completion of a drug test. *See id.* at 661. The Justice articulated that to ensure against a substitution or alteration of the urine sample, a same sex person stood close by while the potential employee provided the urine sample. *See id.* Justice Kennedy stated that the lab disclosed positive results to a Medical Review Officer who verified and passed on the results to the agency. *See id.* at 662-63. If the employee failed to offer a valid reason for the positive results, the Court explained that the employee's job was subject to termination. *See id.* at 663. The Justice emphasized, however, that disclosure to criminal agencies was not possible without the employee's consent. *See id.*

⁷⁹ *See id.* at 665-66. The Justice recognized that a warrant requirement would divert the Custom Service's energy from the laudable goal of drug-free employees. *See id.* at 666-67. Justice Kennedy also noted that a warrant would not provide any more protection because under the current structure, an employee was not subject to the unfettered discretion of an official. *See id.* at 667. Instead, the Justice asserted that the intrusion was limited and that custom employees were constantly on notice of the drug-testing requirement. *See id.* Likewise, the Court concluded that probable cause was not necessary because that standard was normally required for criminal investigations. *See id.* Moreover, the Justice averred that the government's need to carry out suspicionless searches outweighed the custom employees' privacy interests. *See id.* at

that the Customs Service had a compelling interest not to promote drug users to positions that entailed drug interdiction or the use of firearms because the lives of citizens were at risk.⁸⁰ Moreover, the Justice reasoned that employees in these fields have a diminished expectation of privacy due to their duties, which required good judgment and agility.⁸¹ Therefore, the Court held that employee drug testing met the reasonableness standard and was constitutional under the Fourth Amendment.⁸²

Amid this foundation of precedent that afforded numerous interpretations of the Fourth Amendment's protection, the United States Supreme Court decided *Vernonia School District v. Acton*.⁸³ Justice Scalia, writing for the majority, questioned the constitutionality of the Policy, which permitted random urinalysis drug testing of student athletes.⁸⁴ Finding in favor of the school district, the Court held the Policy constitutional under the Fourth Amendment.⁸⁵

Justice Scalia began by emphasizing that the drug problem in the Vernonia school district had reached epidemic proportions.⁸⁶

668. Hence, Justice Kennedy declared that the reasonableness test under the Fourth Amendment applied. *See id.* at 665-66.

⁸⁰ *See id.* at 671. Justice Kennedy pronounced that the first line of defense in the prevention of smuggling narcotics was the Customs Service. *See id.* at 668. The Court explained that a drug-user's indifference or complicity to illegal activities at the border could irreparably harm the public. *See id.* at 670.

⁸¹ *See Von Raab*, 489 U.S. at 672. Justice Kennedy stated that the custom employees involved in drug interdiction should reasonably expect an inquiry into their wellness and integrity. *See id.* Similarly, the Justice concluded that the same reasoning was true for custom officials who carried firearms. *See id.* Because successful performance of their duties hinged on deftness, the Court agreed that the Custom Service should have access to facts that bear on the employees' suitability. *See id.*

⁸² *See id.* at 679. The Justice noted that the Court did not decide the reasonableness of the drug testing program towards employees who handled classified information. *See id.* Justice Kennedy insisted that it was unclear which employees fell under the classified information category: employees who had confidential information or employees who had access to confidential information. *See id.* at 678. Therefore, the Justice remanded the case to the appellate court for clarification and assessment under the reasonableness standard. *See id.* at 679.

⁸³ 115 S. Ct. 2386 (1995). Chief Justice Rehnquist and Justices Kennedy, Thomas, Ginsburg, and Breyer joined Justice Scalia in the majority. *See id.* at 2388.

⁸⁴ *See id.*

⁸⁵ *See id.* at 2396.

⁸⁶ *See id.* at 2388-89. Justice Scalia explained that the school faculty noticed an increase in drug use in the Vernonia schools in the mid-to-late 1980s. *See id.* at 2388. The students taunted school officials, the Court stated, by promoting the use of drugs and threatening that the schools had no control over the situation. *See id.* In the late 1980s, the number of disciplinary cases nearly doubled in the Vernonia schools when compared to the early 1980s. *See id.* Moreover, the Justice articulated that student athletes seemed to be the leaders of the drug phenomenon. *See id.* at 2388-89. The school district became concerned, the majority stated, because one of the coaches

The Court then examined the testing procedures⁸⁷ of the students and determined that the collection of urine constituted a search under the Fourth Amendment.⁸⁸ Moreover, the Court stressed that a warrantless and suspicionless search may be constitutional when "special needs" make such requirements impractical.⁸⁹ Because the public school setting had "special needs," the Court employed the reasonableness standard and balanced the government's intrusion against the individual's privacy expectations.⁹⁰

In applying the reasonableness test, Justice Scalia initially considered the nature of the intrusion set forth by the search.⁹¹ Upon evaluating the infringement, the Court emphasized that the Policy applied to children committed to the state for temporary custody.⁹² Justice Scalia articulated that school officials served a custodial role

believed that football players and wrestlers were involved in sports-related injuries due to poor judgment caused by drug use. *See id.* at 2389. Justice Scalia explained initially that the schools fought back by providing classes and lectures to deter drug use by the students, but disciplinary problems continued to rise. *See id.* Subsequently, the school district held a parents' night and discussed the mandatory drug testing initiative, which the Court asserted was unanimously approved. *See id.* Ultimately, the Vernonia schools implemented the Policy, which was meant to deter drug use, prevent sport injuries, and provide support programs to students with drug problems. *See id.*

⁸⁷ *See id.* at 2389-90; *supra* note 26.

⁸⁸ *See Vernonia*, 115 S. Ct. at 2390; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

⁸⁹ *See Vernonia*, 115 S. Ct. at 2391; *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

⁹⁰ *See Vernonia*, 115 S. Ct. at 2391. The majority explained that a warrant was normally required if used for criminal purposes. *See id.* at 2390. Moreover, the Court stressed that a warrant could not be issued without probable cause. *See id.* at 2391. The Justice explained that when "special needs" are present, as in the public school arena, a warrant was not required. *See id.* Therefore, Justice Scalia determined that a reasonableness standard should be used in cases where no clear standard to determine the type of search existed. *See id.* at 2390. The majority thus asserted that the reasonableness test balanced the invasion of an individual's Fourth Amendment rights against the government's interest in upholding the law. *See id.*

⁹¹ *See id.* at 2391. Justice Scalia opined that the Fourth Amendment only protected legitimate privacy expectations. *See id.* Moreover, the Court explained that the definition of legitimate varied depending on whether the individual "is at home, at work, in a car, or in a public park." *Id.*

⁹² *See id.* The Court purported that parents constricted the liberty rights of minors to the extent they were not free to come and go at their own resolution. *See id.* Moreover, the Justice insisted that when parents placed their children in a private school setting, the school officials became in *loco parentis*. *See id.* Justice Scalia pointed out that a parent:

may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, viz.

and had control over students in a manner that could not be exercised with adults.⁹³ Moreover, the majority suggested that privacy expectations of student athletes were lower because athletics were not for the timid.⁹⁴ The Justice further stressed that students had a decreased expectation of privacy when they chose to participate in athletics because athletes were subject to a high standard of regulation by school officials.⁹⁵ Therefore, the Court reasoned that the

that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Id. (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1897)).

In contrast, the majority explained that public school officials do not merely exercise parental authority but rather act as agents on behalf of the state. *See id.* at 2391-92. To hold public school officials in the same manner as private school officials, the majority asserted, would be inconsistent with the Supreme Court's prior rulings that treated school authorities as state agents "for purpose of the Due Process and Free Speech Clauses." *Id.* at 2392 (citing *T.L.O.*, 469 U.S. at 336).

⁹³ *See id.* The majority suggested that productive educational surroundings required management of schoolchildren and enforcement of rules that would be allowable if conducted by parents. *See id.* Thus, the Justice proclaimed that while school children did not relinquish their constitutional rights upon entering the school, appropriate school behavior limited their liberties. *See id.*; *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school officials may censor student publication as long as it is reasonably related to justifiable academic concerns); *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (explaining that due process for a student merely required school authorities to informally review the allegation with the student minutes after its development); *Davenport v. Randolph County Bd. of Educ.*, 730 F.2d 1395, 1398 (11th Cir. 1984) (upholding a school rule that required athletes to be clean-shaven); *Humphries v. Lincoln Parish Sch. Bd.*, 467 So. 2d 870, 872 (La. App. 1985) (upholding the removal of a school athlete for violating rule of no facial hair during the football season); *Braesch v. DePasquale*, 265 N.W.2d 842, 843, 847 (Neb. 1978) (upholding a school rule that athletes could not drink, smoke, or use drugs on school grounds).

⁹⁴ *See Vernonia*, 115 S. Ct. at 2392. The Court suggested that the changing process for athletes in an open locker room where students undressed and showered was notorious for lack of privacy. *See id.* at 2392-93; *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988). Moreover, the Court noted that the locker rooms in the Vernonia schools contained no separate dressing facilities, students showered in a communal setting, and some toilets had no doors. *See Vernonia*, 115 S. Ct. at 2393.

⁹⁵ *See id.* The majority highlighted numerous regulations, which the school required student athletes to comply with; student athletes must: (1) undergo a physical examination that required a urine sample; (2) obtain insurance; (3) achieve a specific grade point average; and (4) comply with the rules of conduct set forth under each sport. *See id.* Justice Scalia compared student athletes to employees who worked in highly regulated fields. *See id.* The Justice concluded that like adults working in these industries, student athletes should expect intrusions on their privacy due to the nature of the environment. *See id.* *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (purporting that railway employees have a diminished expectation of privacy because they work in a highly regulated industry); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (explaining that custom officials have a decreased expectation of privacy due to the nature of their work).

invasion, through mandatory drug testing, was not severe in scope given the lesser expectation of privacy by the athletes.⁹⁶

Justice Scalia explained how the school collected urine samples and concluded that students' privacy interests were negligible.⁹⁷ Next, the Court examined the nature of information disclosed after the administration of the urinalysis and found it restrictive because the test only determined drug use.⁹⁸ In addition, the majority explained that the results were released to a limited number of school personnel, rather than law-enforcement officials.⁹⁹

The Court acknowledged that the Policy was somewhat intrusive because students had to disclose to school officials any medication they currently used.¹⁰⁰ Justice Scalia contended, however, that the Court had never held prior disclosure of medications unreasonable.¹⁰¹ Moreover, the majority indicated that because the practice of taking medical history was not stated in the Policy, students could have given pertinent medical narratives in confidence to the lab as opposed to the school.¹⁰² In sum, the Justice deemed the invasion of privacy insignificant.¹⁰³

Finally, Justice Scalia averred that the government's concern for drug-free student athletes was a compelling state interest.¹⁰⁴

⁹⁶ See *Vernonia*, 115 S. Ct. at 2393.

⁹⁷ See *id.* Justice Scalia stated that the grade of intrusion depended on the monitoring process of the urinalysis. See *id.* For a discussion of how school officials monitored the collection of urine, see *supra* note 26. The majority emphasized that such testing conditions were similar to the scenario encountered daily in public restroom facilities. See *id.*

⁹⁸ See *id.* The Justice explained that the tests were limited to detection of drug use and would not be used to decipher whether a student was pregnant or diabetic. See *id.* The Court further noted that screening of the various drugs did not vary with each student. See *id.*

⁹⁹ See *id.* The majority emphasized that the school gave the tests for the nonpunitive purpose of preventing drug use and shielding athletes from injury. See *id.* n.2. Because the searches were not for evidentiary purposes, the Court determined that probable cause was not required. See *id.*

¹⁰⁰ See *id.* at 2394. Justice Scalia admitted that unlike *Von Raab*, where the railway employer gave employees' medical history to medical personnel, the school required student athletes to provide medical history to school officials who knew them personally. See *id.* The majority reasoned, however, that although the students' invasion of privacy was greater because of the close relationship, the argument was not persuasive. See *id.*

¹⁰¹ See *Vernonia*, 115 S. Ct. at 2394.

¹⁰² See *id.* Justice Scalia noted that the Policy stated: "[s]tudent athletes who . . . are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." *Id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 2395. The majority explained, however, that the test mandated more than a compelling state interest. See *id.* at 2394-95. The Court articulated that the test

The Court stated that deterring school children from drugs was an immediate concern, especially because narcotics imposed the greatest risk to athletes.¹⁰⁵ Refuting the argument for drug testing based upon suspicion, the Court asserted that the least intrusive method was not the only reasonable means under the Fourth Amendment.¹⁰⁶ In closing, Justice Scalia held that the Policy was constitutional due to an athlete's lesser expectation of privacy, the limited nature of the search, and the compelling state interest.¹⁰⁷ Accordingly, the Court reversed and remanded the case to the Ninth Circuit.¹⁰⁸

Concurring in the judgment, Justice Ginsburg emphasized that the Policy affected students who voluntarily participated in athletics and that the most severe punishment was suspension from the activity.¹⁰⁹ The Justice also noted that the Court specifically left open the issue of whether it would be constitutional to impose ran-

required that the state's interest be justifiable even though the search intruded upon a legitimate privacy interest. *See id.* In comparison to *Skinner and Von Raab*, in which employees were subjected to mandatory drug testing, Justice Scalia concluded that the need to deter drug use by student athletes was equal. *See id.* Justice Scalia explained that children grow chemically dependent faster than adults. *See id.* at 2395. The Court also asserted that all children in the school setting are affected by the drug users. *See id.*

¹⁰⁵ *See id.* The majority emphasized that the drugs screened by the laboratory were dangerous to student athletes both psychologically and physically. *See id.* The immediacy of the need for such a Policy was apparent, the Justice explained, because the promotion of the drug culture by student athletes caused disciplinary problems to reach grave proportions. *See id.* The Justice asserted that there was an immediate need to curb drug use among students, unlike *Skinner* and *Von Raab* where the government's drug testing programs were initiated based upon nationwide statistics and concern for public safety. *See id.* Therefore, the majority concluded that the immediacy of the program was confirmed. *See id.*

¹⁰⁶ *See Vernonia*, 115 S. Ct. at 2396. Justice Scalia reasoned that drug testing based upon suspicion was not plausible for several reasons. *See id.* First, Justice Scalia explained that many parents would not allow suspicion-based testing due to its accusatory nature. *See id.* Second, the Court articulated that teachers may abuse their discretion and test troublemakers who were not drug users, which may bring law suits to the forefront. *See id.* Third, Justice Scalia determined that suspicion-based testing would burden teachers who are unprepared to effectively handle such issues. *See id.*

¹⁰⁷ *See id.* The majority pointed out that suspicionless drug testing may not pass the Fourth Amendment reasonableness test in other situations. *See id.* Further, Justice Scalia emphasized that the most compelling factor was the government's desire to take responsibility for schoolchildren committed to its care. *See id.*

¹⁰⁸ *See id.* at 2397.

¹⁰⁹ *See id.* (Ginsburg, J., concurring). Justice Ginsburg suggested that student athletes could easily avoid drug testing by removing themselves from interscholastic activities. *See id.* Moreover, Justice Ginsburg compared the instant case to *United States v. Edwards*, in which the Court reasoned that airport searches of passengers and luggage could be avoided by seeking other means of transportation. *See id.* (citing *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)).

dom drug testing on all students, regardless of participation in athletics.¹¹⁰

Justice O'Connor, joined by Justices Stevens and Souter, dissented from the Court's holding.¹¹¹ Justice O'Connor opined that the majority's decision to dispense with the individualized suspicion requirement subjected millions of student athletes across the country to an intrusive body search without any suspicion of wrongdoing.¹¹² Further, the dissent argued that blanket suspicionless searches were acceptable under the Fourth Amendment only when suspicion-based regimes were proven ineffective, which the majority failed to establish.¹¹³

The dissent also declared that the Framers of the Constitution strongly opposed general searches, as evidenced by the Warrant Clause¹¹⁴ of the Fourth Amendment.¹¹⁵ Justice O'Connor articulated that the Framers did not approve of general evenhanded searches but instead chose to implement the individualized suspicion requirement.¹¹⁶ Thus, Justice O'Connor contended that the

¹¹⁰ See *id.*

¹¹¹ See *Vernonia*, 115 S. Ct. at 2397 (O'Connor, J., dissenting).

¹¹² See *id.* Justice O'Connor declared that the majority's decision to allow mandatory drug testing would affect 18 million public school student athletes. See *id.*

¹¹³ See *id.* at 2398 (O'Connor, J., dissenting). Justice O'Connor reiterated that blanket searches threatened citizens in greater numbers than individualized suspicion-based searches. See *id.* at 2397 (O'Connor, J., dissenting) (citing *United States v. Krull*, 480 U.S. 340, 365 (1987)). Moreover, the Justice reasoned that the suspicion requirement afforded individuals an opportunity not to act suspiciously and consequently not be searched. See *id.* Justice O'Connor posited that judges should not determine search issues based on individualized suspicion-based versus non-suspicion-based regimes. See *id.* at 2398 (O'Connor, J., dissenting). Instead, the dissent advocated that under the Fourth Amendment, courts have declared blanket searches unreasonable and exceptions applied only when other avenues were ineffective. See *id.* The dissent cited *Carroll v. United States* for the proposition that blanket searches were intolerable. See *id.* (citing *Carroll v. United States*, 267 U.S. 132, 153-54 (1925)). In *Carroll*, the Court held that citizens using public highways were free from searches unless probable cause existed that the vehicle was carrying illegal alcohol. See *Carroll*, 267 U.S. at 155-56, 162. The *Carroll* Court explained that although obtaining a warrant was impractical because of time, individualized suspicion was necessary to preserve Fourth Amendment rights. See *id.* The *Carroll* Court concluded that: "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.* (citing *Carroll*, 267 U.S. at 153-54).

¹¹⁴ See U.S. CONST. amend. IV. The Fourth Amendment provides: "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.*

¹¹⁵ See *Vernonia*, 115 S. Ct. at 2399 (O'Connor, J., dissenting).

¹¹⁶ See *id.* The dissent emphasized that a recent analysis of the Founding Fathers' original intent of the Fourth Amendment revealed that "what the Framers of the

original Fourth Amendment standard was not evenhandedness but protection of privacy.¹¹⁷

In furtherance of the dissent's opinion, Justice O'Connor explained that suspicionless searches in the criminal context were generally unconstitutional when exceedingly intrusive.¹¹⁸ Moreover, the dissent asserted that urinalysis testing was one of the most personal searches that triggered Fourth Amendment protection.¹¹⁹ Continuing, Justice O'Connor recognized that outside the criminal context, the Court had upheld blanket searches that were distinguishable from the instant case because the searches either were not personally intrusive or took place in a unique context.¹²⁰ The dissent stressed that in cases in which the courts upheld suspicionless searches, the Court has continuously concluded that a suspicion-based procedure was ineffective.¹²¹ For example, the Justice explained that the *Skinner* Court upheld suspicionless searches that required drug and alcohol testing of train operators because testing at an accident scene proved unworkable.¹²² Similarly, the dissent observed that in *Von Raab* the individualized suspicion requirement for drug testing custom officials was insufficient due to the nontraditional job setting and public safety issues involved.¹²³ Likewise, Justice O'Connor insisted that in *Camara* the suspicion requirement for in-home searches was impractical because the violation of building codes were undetectable from outside the home.¹²⁴ Furthermore, the Justice explained that in

Fourth Amendment most strongly opposed . . . were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Id.* at 2398 (O'Connor, J. dissenting) (citing W. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 1402, 1499, 1555 (1990)). The dissent acknowledged that not all searches required individualized suspicion at the ratification of the Fourth Amendment. *See id.* at 2399 (O'Connor, J., dissenting). For example, Justice O'Connor explained that searches performed after arrests did not require suspicion. *See id.* The dissent articulated, however, that suspicion-based searches only affected individuals unlike blanket searches, which touched millions of people. *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 2400 (O'Connor, J., dissenting).

¹¹⁹ *See id.* The Justice recognized that the Court has declared monitoring of excretory functions highly intrusive. *See id.* Moreover, Justice O'Connor noted that urinalysis testing was more personal than other searches that received Fourth Amendment protection. *See id.*

¹²⁰ *See Vernonia*, 115 S. Ct. at 2400; *see also* *New York v. Burger*, 482 U.S. 691, 703 (1987) (upholding warrantless search of commercial premises); *Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (allowing visual body cavity searches after prison visits).

¹²¹ *See Vernonia*, 115 S. Ct. at 2401 (O'Connor, J., dissenting).

¹²² *See id.*; *supra* notes 69-75 and accompanying text.

¹²³ *See id.*; *supra* notes 76-82 and accompanying text.

¹²⁴ *See id.*; *supra* notes 41-46 and accompanying text.

the preceding cases, the lack of an individualized suspicion requirement was outweighed because a single instance of wrongdoing could harm many people.¹²⁵

The dissent asserted that instead of using the least intrusive means test, the majority incorrectly allowed the state to circumvent the suspicion requirement if the state policy interests were deemed greater than the intrusion.¹²⁶ First, Justice O'Connor refuted the school district's finding that suspicion-based searches were outweighed because of potential abuses by school faculty.¹²⁷ Second, the dissent argued that the suspicion standard's adversarial nature was no different than other disciplinary schemes enacted by school officials.¹²⁸ The Justice further proffered that while overstating the concerns for suspicion-based searches, the school failed to address the critical constitutional factor that suspicion-based searches were less intrusive for millions of students who participated in school athletics.¹²⁹

Continuing, Justice O'Connor reiterated that the individualized suspicion requirement may not be cast aside unless the suspicion-based standard was proven ineffective.¹³⁰ The dissent observed that most of the instances of drug use in the Vernonia schools were based upon individualized suspicion that would meet the reasonable suspicion requirement.¹³¹ Thus, the Justice proclaimed that school officials could test suspicious students for

¹²⁵ See *Vernonia*, 115 S. Ct. at 2402 (O'Connor, J., dissenting).

¹²⁶ See *id.*

¹²⁷ See *id.* Justice O'Connor proclaimed that the potential for faculty abuse was limited because searches in the school setting required reasonable suspicion. See *id.* For example, the Justice explained that in *New Jersey v. T.L.O.*, the Court found reasonable suspicion existed to search a student's purse for cigarettes when the school official caught the student smoking in the bathroom. See *id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985)). Moreover, the dissent noted that anguish concerning false accusations could be minimized by confidential testing. See *id.*

¹²⁸ See *id.* Because teachers constantly decided whether to investigate wrongdoings by students, the dissent reasoned that the custodial nature of school officials already existed. See *id.* The Justice proclaimed that suspicionless searches were a trivial addition to the existing disciplinary scheme. See *id.*

¹²⁹ See *id.* at 2403 (O'Connor, J., dissenting). Justice O'Connor articulated that suspicion-based searches were less intrusive because fewer students were affected and had control over whether they were picked for a search. See *id.*

¹³⁰ See *Vernonia*, 115 S. Ct. at 2403. Justice O'Connor alleged that the majority never fully addressed whether a less intrusive method was practical. See *id.*

¹³¹ See *id.* The Justice declared that the instances of student behavior in the Vernonia schools would have met the individualized suspicion requirement. See *id.* The Justice illustrated that: (1) students were viewed smoking marijuana; (2) students participated in drug activity while truant; (3) students admitted using illegal substances; and (4) students were intoxicated during class. See *id.*

drugs while protecting Fourth Amendment privileges.¹³²

While acknowledging the majority's argument that students' privacy rights were decreased in the school setting, the Justice declared that discarding the individualized suspicion requirement left students with no Fourth Amendment protection.¹³³ Moreover, the dissent explained that although in the past public school officials had broad constitutional leeway to carry out discipline, blanket searches of innocent students without evidence of wrongdoing was not a traditional practice.¹³⁴ Furthermore, Justice O'Connor rebutted the majority's analogy to physical examinations by explaining that unlike the urinalysis tests, there was neither an accusatory nature nor punitive consequences to the examinations.¹³⁵

Aside from the belief that suspicionless drug testing was not justified by the facts, Justice O'Connor set forth two other Fourth Amendment defects in the Policy.¹³⁶ First, the dissent contended that there was no evidence a drug problem existed in James Acton's grade school.¹³⁷ Second, the dissent argued that the school's choice in targeting athletes was unreasonable because insufficient evidence existed that drug abuse caused sports injuries.¹³⁸ Justice O'Connor asserted that a better alternative, which provided a connection to drug use, was to test students who caused disruptions.¹³⁹ This standard, the Justice articulated, allowed dramatically fewer students to be tested and provided students the opportunity to control the likelihood of a test through their behavior.¹⁴⁰ Finding fault with the majority's rationale, Justice O'Connor pronounced that the Policy was too broad and imprecise to survive Fourth

¹³² See *id.* at 2403-04 (O'Connor, J., dissenting).

¹³³ See *id.* at 2404 (O'Connor, J., dissenting).

¹³⁴ See *id.* at 2405 (O'Connor, J., dissenting).

¹³⁵ See *Vernonia*, 115 S. Ct. at 2405.

¹³⁶ See *id.* at 2406 (O'Connor, J., dissenting).

¹³⁷ See *id.* Justice O'Connor pointed out that three of the four witnesses who testified were high school teachers or coaches. See *id.* Moreover, the dissent stressed that the principal of the grade school who testified was formerly the high school principal during the implementation of the Policy. See *id.* The dissent noted, however, that the grade school principal alleged that the drug abuse problems did not begin at the high school level. See *id.* Justice O'Connor asserted that this single piece of testimony from the principal should not serve as the foundation for testing elementary school students. See *id.* Furthermore, the dissent posited that from the record, no evidence of drug problems at the grade school level existed. See *id.*

¹³⁸ See *id.* The dissent claimed that the Policy chose athletes because the district believed that it would survive constitutional scrutiny. See *id.* Justice O'Connor alleged that the actual intention of the Policy was to combat drug use school wide. See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *Vernonia*, 115 S. Ct. at 2406.

Amendment scrutiny.¹⁴¹ The dissent therefore concluded that the school's suspicionless searches under the Policy were not within the realm of reasonableness under the Fourth Amendment.¹⁴²

The *Vernonia* decision marks the first time that the United States Supreme Court allowed random, warrantless, and suspicionless drug testing of student athletes.¹⁴³ The *Vernonia* Court faced Fourth Amendment precedent that repeatedly deferred to school officials.¹⁴⁴ The Court's decision, however, allows public school officials to egregiously overstep their authority by conducting random urinalysis drug tests on innocent student athletes across the country.¹⁴⁵

¹⁴¹ See *id.* at 2407 (O'Connor, J., dissenting).

¹⁴² See *id.* Justice O'Connor reasoned that in times of crisis, intrusion on one's constitutional rights was permitted when a compelling government interest existed. See *id.* The dissent emphasized, however, that the Court needed to "stay close to the record" and make judgments based on the facts alone. See *id.*

¹⁴³ See *id.* at 2396; *supra* notes 83-142 and accompanying text.

¹⁴⁴ See *Student Athletes*, *supra* note 24, at 225 (explaining that school officials have received judicial deference from the Court in the past). See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (finding that school officials have prior restraint over student-written newspapers); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that school administration may determine what speech is appropriate in the school setting); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (recognizing that individualized suspicion may not be necessary in the school setting); *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (advocating that students' due process rights are decreased in disciplinary suspension situations).

The Court has stated that the Nation's schoolchildren are the obligations of "parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist.*, 484 U.S. at 272. Moreover, the *T.L.O.* Court declared that states and school authorities may control student conduct in public schools. See *T.L.O.*, 469 U.S. at 348-49. In *Vernonia*, the majority emphasized deference to school authorities by stating: "We find insufficient basis to contradict the judgment of *Vernonia's* parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances." *Vernonia*, 115 S. Ct. at 2397. This reasoning is flawed given that "what constitutes a 'reasonable search' is a question of law and therefore a question on which the Supreme Court owes a district court [or the school board or parents] no deference." *Student Athletes*, *supra* note 24, at n.47 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181-82 (1989)).

¹⁴⁵ See *supra* note 24 and accompanying text; see also Ellen M. Alderman, Note, *Drag-net Drug Testing in Public Schools and the Fourth Amendment*, 86 COLUM. L. REV. 852, 853 (1986) (asserting that mandatory drug tests are not justifiable in the school setting under the reasonableness standard); *Drug Testing-Student Athletes*, 109 HARV. L. REV. 220, 229 (1995) (maintaining that the *Vernonia* Court's decision stretches the meaning of the Fourth Amendment); Hagge, *supra* note 8, at 583 (articulating that the *Vernonia* decision has disabled citizens from maintaining uniform protection of privacy rights under the Fourth Amendment); Darrel Jackson, *The Constitution Expelled: What Remains of Student's Fourth Amendment Rights?*, Note and Comment, 28 ARIZ. ST. L.J. 673, 697 (1996) (declaring that the Court's holding in *Vernonia* weakens the Constitution's ability to preserve individual privacy rights from the government); Recent Case, Search and Seizure—*Suspicionless Drug Testing—Seventh Circuit Upholds Drug Test-*

Although it seems that public school administrations can declare a victory in *Vernonia*, Fourth Amendment jurisprudence is far from resolved. Analysis of the Court's opinion illustrates the divergence between the majority and dissent concerning the critical issue of whether the individualized suspicion requirement should apply. The majority concluded that the suspicion requirement was not always necessary under the reasonableness standard of the Fourth Amendment.¹⁴⁶ The dissent, however, advocated that the Framers' intent of individualized suspicion was paramount and should be implemented in *Vernonia's* Policy.¹⁴⁷ Although Justice Scalia admitted that there was no recognizable Fourth Amendment standard in the school setting regarding the suspicion requirement, the majority chose to look at past cases for guidance in lieu of the Framers.¹⁴⁸ Moreover, Justice Scalia dishonored the constitutional concerns of minors by incorrectly claiming that suspicion-based drug testing of students may be impossible.¹⁴⁹ Thus, the Jus-

ing of Student Athletes in the Public Schools, 103 HARV. L. REV. 591, 596 (1989) [hereinafter *Suspicionless Drug Testing*] (proffering that random, suspicionless drug testing of student athletes was unconstitutional in the school setting); Samantha Elizabeth Shutler, *Random, Suspicionless Drug Testing of High School Athletes*, 86 J. CRIM. L. & CRIMINOLOGY 1265, 1302 (1996) (advocating that random drug testing regimes are performed at the expense of childrens' Fourth Amendment rights).

¹⁴⁶ See *Vernonia*, 115 S. Ct. at 2396; *supra* note 106 and accompanying text.

¹⁴⁷ See *id.* at 2398-99 (O'Connor, J., dissenting); *supra* note 116 and accompanying text.

¹⁴⁸ See *id.* at 2390. Justice Scalia, however, has not always overlooked the Framers intent in conjunction with the Fourth Amendment. See *California v. Avecedo*, 11 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring) (asserting that a warrant requirement was not necessary because the Fourth Amendment resonates the Framers' intent to "preserve the jury's role in regulating searches and seizures"); see also Hagge, *supra* note 8, at 583 (explaining that the *Vernonia* decision "represents the final blow to the intent of the Framers regarding individualized suspicion").

¹⁴⁹ See *Vernonia*, 115 S. Ct. at 2396. Justice Scalia's reasons for not applying the suspicion-based test were illusory as noted by Justice O'Connor in the dissent. See *id.* at 2402-03 (O'Connor, J., dissenting); *supra* note 126-135 and accompanying text. First, the majority's reasoning that suspicion-based drug testing would not be accepted by parents is unfounded because if individualized suspicion existed, public school officials would have a constitutional right under the Fourth Amendment to conduct the test. See *Vernonia*, 115 S.Ct. at 2396. Second, Justice Scalia's accusation that teachers could purposefully test troublesome students is degrading to school officials nationwide. See *id.* Moreover, teachers could not abuse their power to test troublesome students because under the suspicion-based regime, individualized suspicion must be proven. See *id.* at 2402. (O'Connor, J., dissenting). Third, the Justice asserted that teachers were "ill-prepared" to look for drug abuse in conjunction with their daily duties. See *id.* at 2396 (Scalia, J., concurring). This notion by Justice Scalia is unconvincing because no one is better equipped to detect suspicious behavior than teachers who see the students everyday. See Alderman, *supra* note 145, at 873. Moreover, teachers have daily contact with the students and are often able to detect even the slightest changes in their "emotional, physical, and academic behavior." See *id.*

tice disregarded the heralded tradition of looking to the authors of the Constitution and improperly approached the case in a utilitarian manner.¹⁵⁰

Without a suspicion-based test, courts will have *carte blanche* authority to determine the Fourth Amendment balancing test in the school setting, which will promote unnecessary judicial activism.¹⁵¹ The majority's reasonableness test is too easily tipped in favor of school officials.¹⁵² After all, the balancing test purported by the Court is biased against the individual student athletes whose privacy rights are unequivocally overshadowed by society's aggregate needs.¹⁵³ Therefore, a suspicion-based regime for drug testing disruptive and suspicious students would achieve Vernonia's goal to eliminate drug use without denying innocent students' privacy rights.¹⁵⁴

Although few would disagree that the war on drugs is fought

Furthermore, school authorities have the opportunity to observe suspicious students for a long period of time to help discern if drug abuse is occurring. *See id.* Thus, school officials are in the absolute best position to determine suspicious activity among students. *See id.*; *see also* Jackson, *supra* note 145, at 690 (explaining that teachers must be able to detect drug use because the Vernonia schools believed, due to reported incidents by teachers, that drug abuse was a problem).

¹⁵⁰ *See* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 608 (1985). Although Tribe does not address drug testing in the school setting, his analysis of the Court's reasoning applies to the *Vernonia* decision. *See id.* at 606-07. For example, Tribe illustrates the Court's unconvincing utilitarian approach to Fourth Amendment jurisprudence by noting the decision in *United States v. Leon*, 104 S. Ct. 3405 (1984). *See id.* In *Leon*, the Court held that suppressed evidence under the exclusionary rule was admissible if a good-faith belief existed as to the validity of the warrant. *See id.* at 3415-16. Tribe concludes that the Court merely looked at the cost of enforcing the Fourth Amendment, which would allow criminals to go free, and weighed it against the benefit of "vindicating the Bill of Rights and avoiding judicial complicity in denying the 'security' from 'unreasonable searches and seizures' promised by the Fourth Amendment." Tribe, *supra*, at 607. Moreover, Tribe astutely acknowledges: "[A]ny means of enforcing the [F]ourth [A]mendment will necessarily lead to the capture and punishment of fewer criminals—for although the exclusionary rule does indeed deprive the courts of some highly probative evidence, so too does police compliance with [the] amendment's warrant and probable cause requirements." *See id.* at 608. Because drug testing student athletes is good for the society as a whole (it may decrease drug abuse and ultimately crime), the Court decided that the cost of protecting students' individual constitutional rights was too high. Thus, the Court applied a utilitarian approach and found that society would best be served if random, suspicionless drug testing was performed.

¹⁵¹ *See* Alderman, *supra* note 145, at 862 (alleging that the reasonableness test affords too much judicial discretion to the courts); Hagge, *supra* note 8, at 565 (maintaining that the reasonableness test diminishes individuals' protection under the Fourth Amendment).

¹⁵² *See Employee Drug Testing*, 103 HARV. L. REV. 269, 278 n.78 (1989).

¹⁵³ *See id.*

¹⁵⁴ *See* Jackson, *supra* note 145, at 690.

everyday in our schools, the issue is to what extent government may be involved.¹⁵⁵ In the instant case, the majority's argument that Vernonia's drug testing initiative was necessary because of dire circumstances is unconvincing.¹⁵⁶ As asserted by the dissent, the majority required neither an evidentiary showing that drug use reached epidemic proportions at Acton's grade school level,¹⁵⁷ nor compelling statistics that athletic injuries were caused by drug abuse.¹⁵⁸ This blatant disregard of critical issues provokes the question of whether the majority aimed its decision at curbing overall student drug use as opposed to preventing athletic injuries.¹⁵⁹ Although the state does have responsibility of minors in the public school setting, the Court has the more consequential obligation to look out for the well-being of the Nation's children under the Constitution.¹⁶⁰ Individual liberties come at a price and society inevitably pays the bill.¹⁶¹ It is critical, however, to teach children respect

¹⁵⁵ See *Suspicionless Drug Testing*, *supra* note 145, at 597.

¹⁵⁶ See *supra* note 86 and accompanying text.

¹⁵⁷ See *id.* at 2406; *supra* note 137 and accompanying text.

¹⁵⁸ See *id.* at 2389. The Court acknowledged the following to prove athletes were being injured by drug use: "The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in [*their*] belief to the effects of drug use." *Id.* (emphasis added). Although more evidence was included in the district court's transcripts, such evidence was still meek. See *Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354, 1357 (D. Or. 1992). Specifically, the only other purported evidence of drug use by student athletes was that alcohol was consumed on a bus after a sporting event, and in another instance, some student athletes after a track meet stole alcohol from a grocer. See *id.*

¹⁵⁹ See *Vernonia*, 115 S. Ct. at 2395. The majority consistently cited to the compelling interest as "detering drug use by our Nation's schoolchildren," instead of focusing on preventing student athletic injuries. See *id.* Moreover, when determining the efficacy of the issue, Justice Scalia incorrectly compared the government interest in *Vernonia* to *Skinner* and *Von Raab*. See *id.* In *Von Raab*, the Court held that custom officials in drug interdiction and firearms could be drug tested absent a warrant or probable cause. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989). Unlike the situation in *Vernonia* where only several students were allegedly injured by drug use, the *Von Raab* Court explained that the lives of all Americans were at stake if custom officials abused drugs. See *id.* at 671. Similarly, the potential amount of people injured by drug-induced train operators in *Skinner* amounted to thousands, while student athletes that were hurt in comparison was minimal. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633-34 (1989). Likewise, Shutler asserts that "none of the justifications for random, suspicionless testing enunciated in *Skinner* and *Von Raab* exist in the public school setting." Shutler, *supra* note 145, at 1291. Moreover, "school activities do not pose risks to national security or public safety comparable to [*Skinner* and *Von Raab*]." *Id.*

¹⁶⁰ See *Student Athletes*, *supra* note 24, at 229.

¹⁶¹ See *Arizona v. Hicks*, 480 U.S. 321, 329 (1987); see also Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 821 (1994) (noting that critics are questioning the price society pays for Fourth Amendment protections).

for the personal rights of the next generation.¹⁶² Sadly, a major casualty in the war against drugs are our children's personal liberties.

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¹⁶² See Alderman, *supra* note 145, at 863 (proffering that constitutional freedoms should be carefully assessed in the school context because schools are educating students for citizenship); *Suspicionless Drug Testing*, *supra* note 145, at 597 (advocating that society must teach children constitutional safeguards to ensure respect for future generations); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (proposing that in order for students to respect the Constitution, school boards must protect students' constitutional rights).