

SUSPICIONLESS DRUG TESTING: THE TUITION FOR ATTENDING PUBLIC SCHOOL?*

I. INTRODUCTION

In addition to the usual rituals of high school—pop quizzes, football games, and trying to beat the tardy bell—an increasing number of public school students find themselves facing another rite of passage in their public school experiences: the random urinalysis.

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹ The amendment applies to the states through the Fourteenth Amendment.² For a search to be constitutional under the Fourth Amendment it must be reasonable.³ While the Fourth Amendment usually requires a warrant or the existence of probable cause for a search or seizure to pass constitutional muster, the United States Supreme Court has recognized that at times the existence of “special needs” makes the requirement of individualized suspicion for a search to be reasonable unnecessary.⁴

In *Vernonia School District 47J v. Acton*, the Supreme Court upheld a school district’s random, suspicionless drug screening of student athletes as permissible under the “special needs” exception to the Fourth Amendment.⁵ The decision prompted public school systems throughout the nation to implement drug testing policies that include nonathletes as well.⁶ Since *Vernonia*, decisions from federal and state courts reveal

* The title is taken from a statement by the Seventh Circuit in *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052, 1067 (2000) (stating that “the case has yet to be made that a urine sample can be the ‘tuition’ at a public school”).

1. U.S. CONST. amend. IV.
2. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).
3. *Vernonia*, 515 U.S. at 652.
4. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989).
5. 515 U.S. 646, 665 (1995).
6. Jodi Wilgoren, *Court Rulings Signal a Shift on Random Drug Tests in Schools*, N.Y. TIMES, Mar. 25, 2001, at 30, available at <http://query.nytimes.com/search/abstract?res=F20D15FC38580C768EDDAA0894D9404482> (last visited Mar. 27, 2002) (on file with the author).

conflicting results concerning the constitutionality of suspicionless drug testing programs extending beyond student athletes.⁷ Likely as a result of these conflicting opinions, the Supreme Court has granted certiorari in *Earls v. Board of Education*,⁸ a case in which the Tenth Circuit invalidated a drug testing program that included all students involved in extracurricular activities.⁹

This Comment considers the constitutionality of suspicionless drug testing programs that reach students not involved in athletics. Part II traces the development of the "special needs" exception to the Fourth Amendment. Part III discusses the *Vernonia* decision, which upheld the suspicionless drug testing of student athletes. Part IV considers whether the Supreme Court's recent decisions concerning the "special needs" exception indicate a trend to limiting exceptions recognized under the doctrine. Part V discusses the Tenth Circuit's decision in *Earls v. Board of Education*. Part VI examines other decisions by federal courts of appeals considering suspicionless drug testing programs applicable to non-athletes, and Part VII looks at decisions by federal district and state courts. Part VIII analyzes the conflicting results reached by federal and state courts as well as the implications of allowing expanded suspicionless drug screening programs. The Comment concludes that expanded drug screening policies face significant hurdles in passing Fourth Amendment scrutiny under the "special needs" exception.

II. THE EVOLUTION OF THE "SPECIAL NEEDS" EXCEPTION

The doctrine that special needs could permit the relaxation of the usual standards of the Fourth Amendment grew out of the Supreme Court's decision in *New Jersey v. T.L.O.*¹⁰ The case involved the search of a student's purse conducted after a school official caught her smoking in a school bathroom.¹¹ A vice principal handling the matter demanded to see the student's purse.¹² Looking for cigarettes, the vice principal found material he believed indicated marijuana use.¹³ A further search of the purse revealed marijuana and other drug paraphernalia suggesting the student was dealing drugs at school.¹⁴ The vice principal informed the police of the incident, and the student later confessed

7. See *infra* Part V, Part VI, and Part VII.

8. 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (Nov. 8, 2001) (No. 01-332).

9. For further discussion of *Earls*, see *infra* Part V.

10. 469 U.S. 325 (1985).

11. *T.L.O.*, 469 U.S. at 328.

12. *Id.*

13. *Id.*

14. *Id.*

to dealing drugs at school to the police.¹⁵ The confession and evidence seized by the vice principal resulted in the student's prosecution on delinquency charges.¹⁶

The Supreme Court considered the permissibility of the search under the Fourth Amendment.¹⁷ Justice White's majority opinion stated that "[a]lthough the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place."¹⁸ Within the school environment, the majority determined that a Fourth Amendment search required no warrant¹⁹ with "the legality of a search of a student . . . depend[ant] simply upon the reasonableness, under all the circumstances, of the search."²⁰ Under such a "reasonableness" standard, the Court found the search of the student's purse permissible under the Fourth Amendment.²¹

In the context of drug and alcohol testing, the Supreme Court held the use of suspicionless drug and alcohol testing of railroad employees permissible under the Fourth Amendment's "special needs" exception in *Skinner v. Railway Labor Executives Ass'n*.²² In *Skinner*, the Court noted that urine testing triggers privacy concerns based on the information revealed in such tests and because urine testing involving "visual or aural monitoring . . . itself implicates privacy interests."²³ Justice Kennedy's majority opinion cited the Fifth Circuit for the proposition that:

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 cus-

15. *Id.* at 328-29.

16. *T.L.O.*, 469 U.S. at 329.

17. As a threshold issue, the Court established that the Fourth Amendment applies to searches by school officials. *Id.* at 333. The majority opinion, written by Justice White, rejected the concept of in loco parentis exempting school officials from the Fourth Amendment because "public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336.

18. *Id.* at 337.

19. *Id.* at 340-41 (noting that at times no probable cause is required for a permissible search under the Fourth Amendment).

20. *T.L.O.*, 469 U.S. at 341. The majority asserted that the reasonableness standard protected the privacy rights of students while "spar[ing] teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343.

21. *Id.* at 347.

22. 489 U.S. 602, 634 (1989).

23. *Skinner*, 489 U.S. at 617.

tom.²⁴

Due to the intrusive nature of urine testing, the Court stated that urine testing constituted a search under the Fourth Amendment.²⁵

Though recognizing that urine testing results in a search for purposes of the Fourth Amendment, the majority found the drug testing of railway employees constitutionally permissible.²⁶ The Court determined that railway employees enjoy diminished expectations of privacy because they participate in an industry where safety often depends "on the health and fitness" of workers²⁷ and emphasized the hazards posed by workers impaired by drug or alcohol use.²⁸ The opinion stated that drug and alcohol use by railway employees resulted in injuries (including fatalities) and property damage and discussed the failure of other efforts to curb the problem.²⁹

In *National Treasury Employees Union v. Von Raab*,³⁰ the Supreme Court upheld a suspicionless drug testing program by the United States Customs Service for employees involved directly with drug interdiction or enforcement and those carrying firearms.³¹ In upholding the suspicionless drug testing of certain employees, the Court noted that the agency used the results only for employment purposes and not for criminal prosecution.³² The majority opinion stated that the government demonstrated a "compelling interest" in having employees screened for drug use who were directly involved with drug interdiction or who carried firearms.³³ The drug testing program proved constitutionally acceptable even though the agency failed to show a widespread pattern of drug use and even though petitioners argued that employees using drugs could escape detection.³⁴

24. *Id.* (quoting *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

25. *Id.* ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.").

26. *Id.* at 634.

27. *Id.* at 627 (noting that rail employees were also required to undergo routine physical examinations).

28. *Skinner*, 489 U.S. at 628-30.

29. *Id.* at 607-08. In his dissent, Justice Marshall warned that, when societal problems result in a call to meet a perceived exigency, "the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Id.* at 635.

30. 489 U.S. 656 (1989).

31. *Von Raab*, 489 U.S. at 660-61. The Court remanded the issue of testing employees who dealt with classified materials for further consideration. *Id.* at 664-65.

32. *Id.* at 666.

33. *Id.* at 670-72 (stating that these employees enjoyed a diminished expectation of privacy).

34. *Id.* at 673-76.

III. *VERNONIA* SANCTIONS THE SUSPICIONLESS DRUG TESTING OF STUDENT ATHLETES

In a footnote in *New Jersey v. T.L.O.*, the majority noted that its decision left unanswered the question of when a school search unsupported by individualized suspicion would not offend the Fourth Amendment.³⁵ The Court wrestled with the issue in *Vernonia School District 47J v. Acton*³⁶ where it upheld the random drug testing of student athletes.³⁷ As a threshold matter, the majority opinion noted that when “no clear practice, either approving or disapproving the type of search at issue, [existed] at the time the constitutional provision was enacted,” the reasonableness of the search is determined by balancing the “intrusion on the individual’s Fourth Amendment interests against its [the search’s] promotion of legitimate governmental interests.”³⁸

In addressing the permissibility of the search under the “special needs” doctrine, Justice Scalia’s majority opinion stated that “[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate.’”³⁹ According to the Court, expectations of privacy vary in different contexts.⁴⁰ The majority found it significant that the policy targeted children under the control and care of school officials.⁴¹ While acknowledging that public school officials exercise less authority over students than their private school counterparts, Justice Scalia wrote that the “power [of public school officials] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”⁴²

After articulating the unique circumstances affecting the reasonableness of a search in the school environment, the majority considered the extent to which the search intruded upon the privacy interests of the student athletes.⁴³ Justice Scalia first discussed the diminished privacy expectations enjoyed by public school students, especially in regards to medical examinations.⁴⁴ Student athletes enjoy even less of an expectation of privacy because sports participation is “not for the bashful” and “require[s] ‘suing up’ before each practice or event, and showering and changing afterwards.”⁴⁵

35. 469 U.S. at 342 n.8.

36. 515 U.S. 646 (1995).

37. *Vernonia*, 515 U.S. at 665.

38. *Id.* at 652-53.

39. *Id.* at 654.

40. *Id.*

41. *Id.*

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

43. *Id.* at 654.

44. *Id.* at 656.

45. *Id.* at 657 (“Public school locker rooms . . . are not notable for the privacy they af-

The majority also found the voluntary nature of participation in school athletics important to its analysis because the student athletes in *Vernonia* were freely subjecting themselves to a level of regulation not imposed on the general student population.⁴⁶ Justice Scalia compared student athletes to a “closely regulated industry” and described them as possessing a diminished expectation of privacy.⁴⁷ In addition, the Court noted the prestige students received from sports participation, the limited substances screened for during the testing, the limited dissemination of the results, and the fact that law enforcement officials received no information concerning results of screenings.⁴⁸ When considered in light of the diminished expectation of privacy enjoyed by student athletes as well as the circumscribed use of the test, the majority found “the privacy interests compromised by the process of obtaining the urine sample . . . negligible.”⁴⁹

Following its analysis of the privacy interests at stake, the Court examined the governmental interest in conducting the suspicionless drug screenings of student athletes. The majority determined that the lower courts misinterpreted precedent from previous cases for the proposition that the government had to show a “compelling need” for the program:

It is a mistake . . . to think that the phrase “compelling state interest,” in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.⁵⁰

Justice Scalia wrote that regardless of whether the school system needed to demonstrate a compelling state interest to test the student athletes, “[d]eterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs, which was the governmental concern

ford.”).

46. *Id.* The Court noted that student athletes in the school system had to undergo a physical exam, “acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any ‘rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal’s approval.’” *Vernonia*, 515 U.S. at 657 (quoting Record, Exh. 2, p.30, ¶ 8).

47. *Id.*

48. *Id.* at 658.

49. *Id.* (characterizing the conditions under which the samples were produced as “nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily”).

50. *Id.* at 661.

in *Von Raab*.⁵¹ The decision mentioned the general harm visited upon students abusing drugs and noted that the impact reverberated to other students and the faculty.⁵² Additionally, drug use represented a particular danger to student athletes, and the district's testing program "more narrowly" targeted drug use by athletes "where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."⁵³

Another element weighed by the majority involved the actual seriousness of the problem within the school district, a problem in which student athletes appeared to serve as the ringleaders.⁵⁴ The Court held that a policy seeking to alleviate an immediate crisis "largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."⁵⁵ The opinion rejected the idea that suspicion-based searches represented a less intrusive method to achieve the school district's policies and stated the Fourth Amendment does not require that "only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."⁵⁶ In upholding the suspicionless drug testing program, the majority stated that "[t]he most significant element in this case is . . . 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."⁵⁷

Justice Ginsburg concurred in the holding in *Vernonia* but wrote separately to stress that she "comprehend[ed] the Court's opinion as reserving the question whether the [School] District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."⁵⁸ In a dissent joined by Justices Stevens and Souter,⁵⁹ Justice O'Connor argued that the majority's focus on the benefits of a random testing approach "sidestep[ped] powerful, countervailing privacy concerns."⁶⁰ She noted that "[f]or most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffec-

51. *Vernonia*, 515 U.S. at 662.

52. *Id.*

53. *Id.*

54. *Id.* at 663.

55. *Id.*

56. *Vernonia*, 515 U.S. at 663.

57. *Id.* at 665.

58. *Id.* at 666.

59. *Id.*

60. *Id.* at 667.

tual."⁶¹ Justice O'Connor also contended that what "the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches."⁶²

While the Court in *Vernonia* considered a number of issues, the decision left unclear the specific weight the Court afforded to each factor. The conflicting results from lower courts over suspicionless drug screening in schools, discussed in Parts V, VI, and VII, demonstrate uncertainty as to the factors considered most consequential by the majority in *Vernonia*. While noting the harmful effects of drug use in schools, especially on student athletes,⁶³ the Court's decision offers limited guidance as to how immediate the threat of a drug problem must be to justify a suspicionless screening program and raises the question of whether a school district could implement a testing program as a prophylactic measure.⁶⁴ The opinion also leaves open whether voluntary participation in extracurricular activities serves as the legal trump card to validate the constitutionality of a suspicionless drug screening program.

The decision fails to articulate if the testing of student athletes is per se permissible under all circumstances.⁶⁵ In *Vernonia*, the Court stressed that student athletes appeared to form the center of the school's drug culture.⁶⁶ In other circumstances, students involved in extracurricular activities, including athletics, may actually demonstrate less of a disposition to engage in drug use than the rest of the student population.⁶⁷ As discussed in Part VIII, the uncertainty as to the significance of the particular factors discussed by the majority has created questions as to the constitutional boundaries of the suspicionless student drug testing.

61. *Vernonia*, 515 U.S. at 667-68.

62. *Id.* at 669.

63. *Id.* at 662.

64. One author suggests that in suspicionless drug testing cases under the special needs exception the existence "of an actual and imminent problem is the group equivalent of individualized suspicion." Michael Book, Comment, *Group Suspicion: The Key to Evaluating Student Drug Testing*, 48 U. KAN. L. REV. 637, 650 (2000).

65. As noted by one commentator, *Vernonia* may not automatically sanction the drug testing of all student athletes. Ian Messerle, Note, *Trinidad School District No. 1 v. Lopez: The Fourth Amendment, Drug Testing, and the High School Marching Band*, 61 U. PITT. L. REV. 819, 838 (2000).

66. *Vernonia*, 515 U.S. at 663.

67. Peter A. Veytsman, Comment, *Drug Testing Student Athletes and Fourth Amendment Privacy: The Legal Aftermath of Vernonia v. Acton*, 73 TEMP. L. REV. 295, 324 (2000). Veytsman also suggests that testing students involved in extracurricular activities could actually result in some students becoming less inclined to participate in extracurricular activities and, thus, deprive them of the positive benefits of extracurricular activity such as less proclivity to use drugs. *Id.* at 325-27.

IV. PUTTING THE BRAKES ON THE "SPECIAL NEEDS" EXCEPTION

The Supreme Court's most recent decisions concerning the "special needs" exception indicate a potential inclination to restrict the doctrine. In *Chandler v. Miller*,⁶⁸ the Supreme Court held unconstitutional a Georgia law requiring all individuals seeking state-wide political office to undergo and pass a drug test.⁶⁹ The majority found that the law failed to satisfy the Fourth Amendment and did "not fit within the closely guarded category of constitutionally permissible suspicionless searches."⁷⁰ Despite invalidating the statute, the Court reaffirmed its continued commitment to the "special needs" doctrine.⁷¹

Justice Ginsburg's majority opinion stated that assessing the permissibility of a suspicionless search under the "special needs" doctrine requires a court to "undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."⁷² The Court found the testing at issue in *Chandler* non-intrusive because a candidate could produce the sample at his or her private physician's office and could control the release of the results.⁷³ Even though the statute intruded only minutely on the candidates' privacy interests, the majority found the state unable to demonstrate that "the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity."⁷⁴

The decision also listed other factors that argued against allowing the testing. A candidate could hide an illicit drug habit by abstaining from drug use long enough to pass the test.⁷⁵ Unlike the student population in *Vernonia*, no immediate crisis of drug use by politicians prompted the need for the test, and the majority questioned why ordinary law enforcement methods failed to suffice.⁷⁶ Finally, the Court noted that public scrutiny of political candidates served as an effective means to reveal drug use by a political candidate.⁷⁷

In recent decisions, the Supreme Court considered two cases potentially helpful in providing additional guidance concerning the constitutional limits of suspicionless drug screening of students. In *Ferguson v.*

68. 520 U.S. 305 (1997).

69. *Chandler*, 520 U.S. at 309. Under the law, the candidate had the option of providing a urine sample at the office of the candidate's personal physician, which would then forward the sample to an approved laboratory for testing. *Id.* at 309.

70. *Id.* at 309.

71. *Id.* at 314.

72. *Id.*

73. *Chandler*, 520 U.S. at 318. An individual testing positive could decide not to run for office and thereby withhold release of the results. *Id.*

74. *Id.* at 319.

75. *Id.* at 320.

76. *Id.* at 319-320.

77. *Chandler*, 520 U.S. at 321.

City of Charleston,⁷⁸ the Court considered the constitutionality of a program in which a public hospital tested pregnant women for cocaine use.⁷⁹ Under the policy, which had been developed in consultation with law enforcement officials, the hospital shared information concerning positive test results with law enforcement authorities.⁸⁰ In the policy's initial implementation, the police immediately arrested any woman testing positive for cocaine use after delivery of her baby.⁸¹ Drug use detected during pregnancy resulted in police notification and arrest if the woman failed a subsequent test or failed to attend a scheduled visit with a substance abuse counselor.⁸² A change in the policy allowed women testing positive for cocaine use following labor to undergo drug treatment instead of arrest.⁸³

The trial court upheld the testing as valid based on a factual determination by the jury that the women consented to the searches.⁸⁴ The court, however, rejected the argument that the test was permissible based on the Fourth Amendment's "special needs" doctrine.⁸⁵ The Fourth Circuit Court of Appeals upheld the policy as permissible under the "special needs" exception to the Fourth Amendment.⁸⁶

Justice Stevens' opinion for the Court stated that the Supreme Court had traditionally "employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program" when analyzing a case under the "special needs" doctrine.⁸⁷ The hospital's drug testing policy constituted a greater invasion of privacy than in previous cases because a third party received results of a positive test and because medical patients in particular enjoy a "reasonable expectation of privacy" concerning distribution of medical tests results to third parties.⁸⁸ The most important distinguishing factor from previous cases cited by the opinion concerned the use of test results for law enforcement purposes.⁸⁹ The Court rejected the claim that the program could withstand scrutiny because the program ultimately sought to end substance abuse by the identified women rather than by targeting criminal conduct, and the majority noted that law enforcement activity always seeks to promote some so-

78. 532 U.S. 67 (2001).

79. *Ferguson*, 532 U.S. at 70.

80. *Id.* at 70-71.

81. *Id.* at 71-72.

82. *Id.*

83. *Id.*

84. *Ferguson*, 532 U.S. at 73.

85. *Id.*

86. *Id.* at 74. The court did not consider whether the women consented to the searches. *Id.*

87. *Id.* at 78.

88. *Ferguson*, 532 U.S. at 78.

89. *Id.* at 80-81.

cial good.⁹⁰

In *City of Indianapolis v. Edmond*,⁹¹ the Supreme Court held that a drug interdiction checkpoint program violated the Fourth Amendment.⁹² The city program designated checkpoint locations where officers stopped and searched a predetermined number of vehicles.⁹³ The search of each car consisted of asking the driver for license and registration, examining the driver for signs of impairment, and having a police dog walk around the vehicle.⁹⁴ The officers could further search vehicles based on consent or "particularized suspicion."⁹⁵

Writing for the majority, Justice O'Connor first noted that the Fourth Amendment mandates that a search be reasonable—which usually requires "individualized suspicion of wrongdoing"—with "only limited circumstances in which the usual rule does not apply."⁹⁶ Specific factors such as the need of police officers to detect drugs and illegal aliens near the border⁹⁷ and the immediate danger posed by intoxicated drivers⁹⁸ made previous suspicionless searches of motor vehicles constitutional.⁹⁹ The majority found that the search at issue sought "to detect evidence of ordinary criminal wrongdoing" rather than targeting a particular purpose such as highway safety.¹⁰⁰ The Court rejected the city's argument that the "severe and intractable nature of the drug problem" justified the program even though "[t]here is no doubt that traffic in illegal narcotics creates social harms of the first magnitude."¹⁰¹ The majority declined to allow an exception to individualized suspicion when the government sought to target general criminal activity rather than targeting a specific evil or problem.¹⁰²

While not in the school context, *Chandler*, *Edmond* and *Ferguson* indicate a willingness by the Court to scrutinize suspicionless search programs. At a minimum, *Edmond* and *Ferguson* suggest that a suspicionless drug testing program by a school district that forwarded information to law enforcement officials would face severe constitutional hurdles. However, the two decisions may apply little to searches with-

90. *Id.* at 83-84.

91. 531 U.S. 32 (2000).

92. *Edmond*, 531 U.S. at 48.

93. *Id.* at 35.

94. *Id.*

95. *Id.*

96. *Id.* at 37.

97. *Edmond*, 531 U.S. at 38 (discussing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

98. *Id.* at 39 (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)).

99. *Id.* at 38-39.

100. *Id.* at 41.

101. *Id.* at 42.

102. *Edmond*, 531 U.S. at 47.

out a law enforcement component.¹⁰³ *Chandler* hints that the Court may inquire if the proponent of the search demonstrates the existence of an actual problem, question the effectiveness of the search in alleviating the problem, and consider the availability of other means to counter the problem. However, while they demonstrate a commitment by the Supreme Court to deny wholesale approval of suspicionless searches, the trio of decisions fails to answer the questions raised in *Vernonia* concerning the permissibility of suspicionless searches of non-athletes in the unique context of the school environment.

V. *EARLS V. BOARD OF EDUCATION*

The Supreme Court will have an opportunity to address the issues left unresolved in the area of suspicionless drug testing of students when it hears *Earls v. Board of Education*.¹⁰⁴ In *Earls*, the Tenth Circuit held that a school district's drug testing policy that included students in all extracurricular activities was not warranted under the "special needs" exception.¹⁰⁵ As an initial matter, the court noted that it would consider the program in the context of the school environment, where children are subject to greater control than adults.¹⁰⁶ The Tenth Circuit interpreted *Chandler* as setting forth an analysis under the special needs doctrine in which the court must determine the existence of a special need and, if one exists, proceed to a balancing of the governmental versus the individual interests at stake.¹⁰⁷ In a footnote, the court noted that the "Supreme Court's special needs cases have engendered some criticism for failing to adequately define what a special need is."¹⁰⁸ Based on its understanding of the factors in *Vernonia*, the Tenth Circuit concluded that the school district demonstrated the existence of a special need based on concerns about student drug use that warranted balancing the policy against the privacy interests at stake to determine the permissibility of the testing policy.¹⁰⁹

Discussing *Vernonia*, the court noted that "[o]ne cannot read the majority opinion [in *Vernonia*] and not appreciate that those factual findings regarding the existence of a documented drug problem among students subject to the drug testing were very important to the majority."¹¹⁰ The decision stated that the *Vernonia* opinion left unclear

103. In *Edmond*, the Court specifically noted that its decision only dealt with suspicionless searches in the criminal context. *Id.* at 47-48.

104. 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (Nov. 8, 2001).

105. *Earls*, 242 F.3d at 1267.

106. *Id.* at 1268-69.

107. *Id.* at 1269.

108. *Id.* at 1269 n.3.

109. *Id.* at 1270.

110. *Earls*, 242 F.3d at 1271 n.5.

whether the Supreme Court's determination of a special need in the case depended simply on the special nature of the school environment, or if the drug problem in the district also contributed to the finding of a special need.¹¹¹

The Tenth Circuit, in its consideration of *Vernonia*, observed that the Supreme Court had considered the immediacy and severity of the problem, the general importance of deterring drug use in schools, the fact that the program narrowly targeted a student group already subjected to a high degree of regulation and who faced particular risks from drug use, and that student athletes constituted the core cause of the drug problem.¹¹² The court found it significant that the Tecumseh school district failed to show the existence of a drug problem of a severe nature in the district and that "the evidence of actual drug usage, particularly among the tested students, is minimal."¹¹³ The level of drug usage by students in the Tecumseh district "was vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*."¹¹⁴

In analyzing the privacy expectations of the students subjected to the testing program, the court found the nature of communal dress and undress engaged in by students in extracurricular activities of minor importance.¹¹⁵ Instead, the court focused on "whether the voluntariness of the participation in the activity reduces a student's legitimate expectation of privacy while participating in that activity."¹¹⁶ The Tenth Circuit refused to accept that "voluntary participation in an activity, without more, should reduce a student's expectation of privacy in his or her body. Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights."¹¹⁷ Additionally, the court discussed how extracurricular activities form an important part of the educational process, with the Supreme Court having warned against "minimiz[ing] the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience."¹¹⁸

While the voluntariness of the activity failed to create a diminished expectation of privacy, students in the district engaging in extracurricular activities nonetheless submitted to certain regulations not applicable

111. *Id.* at 1271 n.6.

112. *Id.* at 1271-72.

113. *Id.* at 1272 (pointing out that the testimony of school administrators and teachers failed to demonstrate a severe drug problem).

114. *Id.* at 1275.

115. *Earls*, 242 F.3d at 1275.

116. *Id.* at 1275-76.

117. *Id.* at 1276.

118. *Id.* (alteration in original) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000)).

to other students, which resulted in a lessened privacy expectation.¹¹⁹ The additional determination that the nature of the testing represented a minimal intrusion appeared to shift the balance in favor of the school district.¹²⁰ The court held, however, that the policy failed because other considerations, the nature and immediacy of the concern and the efficacy of the solution, "tip[ped]the balancing analysis decidedly in favor of the plaintiffs."¹²¹

In addressing these deciding factors, the court first noted that the policy included a number of students engaged in extracurricular activities that posed little safety risk:

It is difficult to imagine how participants in the vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs. On the other hand, there are students who are not subject to the testing Policy but who engage in activities in connection with school, such as working with shop equipment or laboratories, which involve a measurable safety risk. Thus, safety cannot be the sole justification for testing all students in competitive extracurricular activities, because the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students.¹²²

The lack of evidence concerning a drug problem in the district also meant that "the immediacy of the District's concern is greatly diminished."¹²³ In addition, the program demonstrated little efficacy because it targeted students not among the student population with a drug problem.¹²⁴ While refusing to draw a bright line or requiring a school district to identify a drug problem of "epidemic proportions," the Tenth Circuit stated that:

[A]ny district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem. . . . Unless a district is required to demon-

119. *Id.* at 1276.

120. *Earls*, 242 F.3d at 1276.

121. *Id.*

122. *Id.* at 1277. The court also rejected the proposition that students involved in extracurricular activities are subject to more reduced supervision than students in ordinary classes, since students not subject to the policy also were subject to reduced supervision at various times. *Id.*

123. *Id.*

124. *Earls*, 242 F.3d at 1277.

strate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school.¹²⁵

VI. OTHER CIRCUITS' INTERPRETATIONS OF THE FACTORS IN *VERNONIA*

In *Todd v. Rush County Schools*,¹²⁶ the United States Court of Appeals for the Seventh Circuit found the random, suspicionless drug testing of students engaged in extracurricular activities constitutional under the Fourth Amendment.¹²⁷ The Seventh Circuit concluded that:

[T]he reasoning compelling drug testing of athletes [applied in *Vernonia*] also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students. While the testing in the present case includes alcohol and nicotine, that is insufficient to condemn it because those substances may also affect students' mental and physical condition.¹²⁸

The opinion, relying on the reasoning of the district court, found it significant that voluntary participation in an activity triggered the testing.¹²⁹ The court also noted that students in extracurricular activities gain increased status in the community.¹³⁰ In upholding the testing policy, the opinion declared that "[t]he linchpin of this drug testing program is to protect the health of the students involved."¹³¹

The Seventh Circuit has not approved of all suspicionless searches. In *Willis v. Anderson Community School Corp.*,¹³² the court declared the drug testing of all students suspended for fighting unconstitutional.¹³³ In addition to finding the search unsupported by reasonable suspicion,¹³⁴ the court found that the policy failed to meet the criteria of the "special needs" doctrine.¹³⁵ Suspicionless searches that were previously ap-

125. *Id.* at 1278.

126. 133 F.3d 984 (7th Cir. 1998).

127. *Todd*, 133 F.3d at 985. The court noted that because no student objected to the policy's provisions concerning students who drove to school, it did not address whether such drug testing was allowable under the Fourth Amendment. *Id.* at 986 n.1.

128. *Id.* at 986.

129. *Id.*

130. *Id.*

131. *Id.*

132. 158 F.3d 415 (7th Cir. 1998).

133. *Willis*, 158 F.3d at 417.

134. *Id.* at 419.

135. *Id.* at 424.

proved of in the school environment involved students engaged in voluntary activities or behavior, and the court dismissed arguments that the student “voluntarily”—for purposes of the *Vernonia* standard—engaged in misbehavior.¹³⁶ The Seventh Circuit admitted that the desire to combat drug abuse among students created an “almost overwhelming temptation” to decide the issue.¹³⁷ The court noted, however, that “we cannot focus solely on the benefits of deterrence. If this were the only relevant consideration, *Vernonia* might as well have sanctioned blanket testing of all children in public schools. And this it did not do.”¹³⁸

The Seventh Circuit again considered a school drug testing policy in *Joy v. Penn-Harris-Madison School Corp.*¹³⁹ The court upheld the drug, alcohol, and nicotine testing of students engaged in extracurricular activities only because of stare decisis considerations from its holding in *Todd*.¹⁴⁰ While also allowing the drug and alcohol testing of students who drove to school, the court invalidated the nicotine testing of such students.¹⁴¹ In its decision, the court stated that students engaged in extracurricular activities other than sports and students who drive to school enjoy a greater expectation of privacy than student athletes.¹⁴² The school system failed to demonstrate “that any immediate problem with drugs or alcohol exist[ed] for its students in extracurricular activities.”¹⁴³ The panel for the Seventh Circuit declared that “[t]he scope of *Vernonia* remains undecided today” and “the case has yet to be made that a urine sample can be the ‘tuition’ at a public school.”¹⁴⁴

Though later vacated as moot, the Eighth Circuit would have upheld a suspicionless drug testing policy for students in extracurricular activities in *Miller v. Wilkes*.¹⁴⁵ The program sought to detect illegal drugs, prescription drugs taken illicitly, and alcohol.¹⁴⁶ The opinion emphasized that students in public schools enjoyed a diminished expectation of privacy.¹⁴⁷ Students in extracurricular activities, and not just athletics, enjoy an expectation of privacy even less than students not engaged in extracurricular activities.¹⁴⁸

The Eighth Circuit found the testing minimally intrusive, noting the

136. *Id.* at 422.

137. *Id.*

138. *Willis*, 158 F.3d at 422.

139. 212 F.3d 1052 (7th Cir. 2000).

140. *Joy*, 212 F.3d at 1063.

141. *Id.*

142. *Id.*

143. *Id.* at 1065.

144. *Id.* at 1067.

145. 172 F.3d 574, 582 (1999) (issuing an order vacating the judgment as moot because the only plaintiff challenging the school's policy no longer attended the school).

146. *Miller*, 172 F.3d at 576.

147. *Id.* at 579.

148. *Id.*

closely controlled dissemination of results and their unavailability to law enforcement authorities.¹⁴⁹ In approving the policy, the court acknowledged that the drug problem in the instant case demonstrated less immediacy than the situation in *Vernonia*.¹⁵⁰ The court, however, took judicial notice that drugs and alcohol represent a serious problem in schools throughout the nation.¹⁵¹ No reason existed to make school districts "wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in *Vernonia*."¹⁵² The challengers to the policy also produced no evidence contradicting the efficacy of the program.¹⁵³

VII. FEDERAL DISTRICT AND STATE COURTS

In *Tannahill v. Lockney Independent School District*, the plaintiffs successfully challenged a plan by a school district to implement mandatory drug testing of all students.¹⁵⁴ Initially, the district treated a student refusing to submit to testing the same as one testing positive.¹⁵⁵ The first refusal to submit to testing allowed the suspension of the student from extracurricular activity for twenty-one days and assignment to in-school suspension for at least three days.¹⁵⁶ Continued refusal by a parent to consent to the testing of her child, "result[ed] in escalation of the aforementioned punishments, up to placing the child in alternative school and disqualifying him from participating in any activity or receiving any honors for the year."¹⁵⁷ The school district later amended the policy to ban students who refused to consent to testing from all extracurricular activities rather than treating them as testing positive for drug use.¹⁵⁸

Within the school environment, the district court stated that "a school district can prove the existence of a special need by showing exigent circumstances and continued failure in attempts to alleviate the problem."¹⁵⁹ The testing program created an impermissible extension of *Vernonia* by implementing the policy based on general fear of drug use

149. *Id.*

150. *Id.* at 580.

151. *Miller*, 172 F.3d at 580-81.

152. *Id.* at 581.

153. *Id.*

154. 133 F. Supp. 2d 919, 921-22 (N.D. Tex. 2001).

155. *Tannahill*, 133 F. Supp. 2d at 922.

156. *Id.* at 922-23.

157. *Id.* at 923.

158. *Id.*

159. *Id.* at 928.

among students¹⁶⁰ with the court noting that “numerous cases . . . [have demonstrated] that general concerns about maintaining drug-free schools or desires to detect illegal conduct are insufficient as a matter of law to demonstrate the existence of special needs.”¹⁶¹ The court also found it significant that the program sought to extend drug testing to non-athletes, who enjoyed a higher expectation of privacy than the student athletes in *Vernonia*.¹⁶²

While “the method of testing impos[ed] a low intrusion on students’ privacy interests,”¹⁶³ the school district failed to produce enough evidence demonstrating “a compelling state interest” for the drug testing program.¹⁶⁴ The court noted that the district had not subjected any students to its suspicion-based drug testing policy and found unpersuasive the drug arrest of nine local residents as an acceptable rationale for the policy.¹⁶⁵ Evidence also indicated overall lower levels of drug use by students in the system than in other Texas school districts and that the program failed to test for those substances that students in the district abused at a higher rate—tobacco and inhalants.¹⁶⁶

In prohibiting the testing program, the court also rejected an argument that the need “to highly regulate drugs in schools” created conditions analogous to the situations in *Skinner* and *Von Raab*:

Attending school is not akin to participation in a highly regulated industry as is the work place for railway employees, customs agents, residents who practice medicine, or even elementary school custodians. Moreover, the academic studies of a student, while very important, do not embody the immediate and severe life and death repercussions as do the decisions of these employees.¹⁶⁷

While acknowledging that the drug testing policy represented a good faith attempt by school officials to eradicate drug use by students, the goal came at “a great price to citizens’ constitutionally guaranteed rights to be secure in their ‘persons, houses, papers, and effects.’”¹⁶⁸

In an earlier decision, *Gardner v. Tulia Independent School District*,¹⁶⁹ another federal court from the Northern District of Texas in-

160. *Tannahill*, 133 F. Supp. 2d at 930.

161. *Id.* at 928.

162. *Id.* 928-29.

163. *Id.* at 929.

164. *Id.* at 929.

165. *Tannahill*, 133 F. Supp. 2d at 929.

166. *Id.*

167. *Id.* at 930.

168. *Id.*

169. No. CIV.A.2:97-CV-020-J, 2:97-CV-041-J, 2000 WL 33680258 (N.D. Tex. Dec. 7, 2000).

validated a drug testing policy that included all students in grades seven through twelve involved in extracurricular activities.¹⁷⁰ The court wrote a brief opinion with little discussion but appeared to find it significant that the school district failed to demonstrate the existence of a “widespread or above-average problem with drug usage by students.”¹⁷¹ Stating that *Vernonia* applied only to the random drug testing of student athletes, the court held that the program violated the Fourth Amendment.¹⁷²

In *Trinidad School District No. 1 v. Lopez*, the Supreme Court of Colorado held that the suspicionless drug testing of band members violated the Fourth Amendment to the United States Constitution.¹⁷³ The court found that several factors distinguished the case from the testing program at issue in *Vernonia*¹⁷⁴ and contended that “one can hardly argue that the marching band is ‘not for the bashful’” because band members did not engage in “the type of public undressing and communal showers required of student athletes.”¹⁷⁵ The band director testified that band members—compared to the general student population—displayed superior academic and behavioral attributes and that in more than two decades “no band member had ever been injured due to alcohol or drug use.”¹⁷⁶

In addition, the school district also failed to show a “risk of immediate physical harm to members of the marching band.”¹⁷⁷ Another significant difference cited by the court involved the lack of voluntariness at issue in *Vernonia* when applied “to students who want to enroll in a for-credit class that is part of the school’s curriculum,” such as band members.¹⁷⁸ The opinion also questioned the equivalency of a urinalysis to using a public restroom for purposes of considering the privacy intrusion involved in the program.¹⁷⁹ Based on the *Vernonia* factors and the differences present in *Trinidad*, the court invalidated the testing

170. *Tulia*, 2000 WL 33680258, at *4.

171. *Id.* at *2.

172. *Id.* at *3-4.

173. 963 P.2d 1095, 1097 (Colo. 1998). The Colorado Supreme Court stated that since it decided the case on federal constitutional grounds it did not need to address if such searches violated the state constitution. *Id.* at 1097 n.5. It should be noted that state constitutional grounds could also cause problems for drug testing policies. *See, e.g.*, *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 661 (Pa. 2000) (holding that a policy testing all students in extracurricular activities and those driving to school violated the Pennsylvania constitution).

174. The court stated that it addressed the policy “only as applied to the marching band” and not to other activities. *Trinidad*, 963 P.2d. at 1098 n.6.

175. *Id.* at 1107 (rejecting also that taking a physical education class amounts to a lessened expectation of privacy).

176. *Id.* at 1099.

177. *Id.* at 1109.

178. *Id.* at 1107.

179. *Trinidad*, 963 P.2d at 1108.

program.¹⁸⁰

VIII. ANALYSIS

While school districts have taken the decision in *Vernonia* as a green light to implement expansive drug testing policies, it remains unclear what direction the Supreme Court will ultimately take in *Earls*. Justice Brennan, in his *New Jersey v. T.L.O.* dissent, warned that the "reasonableness" standard lacked clarity because its "only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment."¹⁸¹ In considering the acceptability of suspicionless searches, one cannot doubt the sincerity of school officials in seeking to combat the destructive impact that drug use causes and the disruption it brings to the learning environment. Comments by courts indicate that such a laudable goal represents an almost overwhelming temptation to end the analysis of suspicionless drug testing based on the goals of such programs.¹⁸² However, the Supreme Court's decision in *Vernonia* failed to articulate definitive guidelines to allow courts to assess uniformly the constitutionality of expanded drug testing policies beyond non-athletes.

Several threshold issues concerning the implementation of a drug screening program face the Court when it reviews *Earls*. One issue involves whether a school district must make a requisite showing of an actual drug problem before enacting a suspicionless drug screening program. A clarification of the exact privacy interests implicated by drug testing also needs resolution. While the majority in *Vernonia* found that athletes engaging in communal dress and undress supported the testing policy (by reducing privacy expectations),¹⁸³ the decision left unclear the significance of this factor in relation to determining the intrusiveness of a urinalysis.¹⁸⁴

180. *Id.* at 1110.

181. *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Marshall, J., joining). A student author, in an analysis of the special needs exception in public schools, asserts that the special needs doctrine has been applied unevenly by courts in regards to the school context with inconsistent decisions that "have failed to create comprehensible guidelines for school districts to follow, forcing many districts to invest significant resources defending their policies against lawsuits" and argues that the Supreme Court should, at least require individualized suspicion for warrantless searches. Jennifer E. Smiley, Comment, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protection*, 95 NW. U. L. REV. 811, 836 (2001).

182. See, e.g., *Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415, 422 (7th Cir. 1998) (confessing "to the almost overwhelming temptation, given the effect that drugs have on the children who use them and on the educational process in general, to make the importance of deterring drug use among schoolchildren the beginning and end of our analysis").

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

184. While the Supreme Court has described "the privacy interests compromised by the process of obtaining urine samples [as] negligible," *Vernonia*, 515 U.S. at 658, such matters could

A seemingly more important issue concerning the analysis of the privacy expectations of students appears to revolve around the voluntary decision to engage in extracurricular activities. The majority in *Vernonia* discussed the voluntary nature of sports participation as important in sanctioning the testing program.¹⁸⁵ If the voluntariness of an activity trumps as the most significant factor in weighing the reasonableness of a suspicionless search in schools, how far does the voluntary principle extend? The implementation of testing policies of students who drive to school illustrates the extension of the voluntary principle. A school could easily fashion numerous other activities as voluntary in nature in an attempt to shepherd additional students into a suspicionless drug testing program.¹⁸⁶ In *Earls*, the Tenth Circuit warned, citing the Supreme Court's decision in *Santa Fe Independent School District v. Doe*,¹⁸⁷ that participation in school activities forms an integral part of the educational experience and that students should not enjoy diminished privacy expectations simply because of their participation in such activities.¹⁸⁸

A testing policy grounded in voluntary participation could also fail to include those students that may statistically be more likely to use drugs than students participating in extracurricular activities.¹⁸⁹ An advocate of testing might argue that such arguments support the testing of all students. However, stripping away the voluntary requirement places a testing program on thin constitutional ice, especially because of the compulsory nature of school attendance. Such a policy would require a reformulation of previous arguments highlighting voluntariness as a key component of drug testing programs.

The substances a school may seek to detect in its testing program represents another open issue. School systems testing for tobacco, for

assume greater importance when considering such questions as whether the taking of a blood sample constitutes a significantly greater invasion of privacy than a urinalysis or if the use of hair sampling creates less of one.

185. *Id.* at 657.

186. A school could structure the school environment to design a drug system based on voluntariness to include virtually every student. Students desiring to have a locker, wishing to attend school functions such as dances, or freedom to choose where to sit in the cafeteria could all be structured to condition students to submit to drug tests to voluntarily enjoy them. For an article that supports the constitutionality of suspicionless drug testing of all students involved in extracurricular activities based on their voluntary nature, see James M. McCrary, Note, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387 (2000).

187. 530 U.S. 290, 316 (2000).

188. 242 F.3d 1264, 1276 (10th Cir. 2001).

189. As demonstrated in *Earls*, such a situation might make it difficult for a school system to demonstrate the efficacy of its program. While the Supreme Court in *Vernonia* noted that students athletes were the center of the drug culture, statistical data may show otherwise in other school districts for students engaged in extracurricular activities, including sports. Veysman, *supra* note 67, at 324-25.

example, appear to face several hurdles. While no one would deny the harmful effects of using tobacco products, an immediate health threat of the kind caused by other drugs does not appear present with tobacco use, even for student athletes. With tobacco, the school seeks to alleviate a drug that causes serious health consequences but with a limited immediacy as to the impact on the student's health. If a product such as tobacco survives constitutional scrutiny, what other kinds of searches would then survive constitutional muster under the rationale of insuring a student's health and well-being? Diseases such as AIDS and other sexually transmitted diseases represent a serious threat to the safety of students. A sexually transmitted disease would appear to represent a threat at least equal to nicotine use. Should a school be able to initiate suspicionless testing of students for sexually transmitted diseases?

A larger issue involves how the expansion of suspicionless drug testing policies could reverberate in other areas of student rights. School teachers and administrators must often sort out responsible parties when wrongdoing takes place in the school environment. A simple solution to such time-consuming disciplinary chores would be to train a school administrator in the use of a polygraph machine. One only has to allow the imagination to wander and other possibilities emerge.

In his dissent in *Skinner v. Railway Labor Executives' Ass'n*, Justice Marshall counseled against sacrificing constitutional guarantees to perceived exigencies.¹⁹⁰ Despite the dangers posed by drug use and violence in the school context, Justice Marshall sounded a prudent warning. If one purpose of the public schools centers on preparing citizens for participation in our democratic society, then what is lost by wholesale denial of constitutional rights to schoolchildren? While the treatment of schoolchildren by school officials should be considered in the context of the special nature of the school environment, what price might society eventually pay for the stripping away of Fourth Amendment protections to school students? The expansion of suspicionless drug testing programs raises serious questions concerning the extent to which schools are able to make students check their constitutional rights at the schoolhouse door.

IX. CONCLUSION

As school officials seek to implement widespread drug testing policies, they should be wary of reading too much into *Vernonia*. In determining what constitutes a reasonable search in the school environment, the Supreme Court in *New Jersey v. T.L.O.* declared itself unwilling,

190. 489 U.S. 602, 635 (1989).

for purposes of the Fourth Amendment, to equate schools with prisons.¹⁹¹ In his *T.L.O.* dissent, Justice Brennan argued against pitting societal interests versus individual expectations of privacy to determine the permissibility of a search under the Fourth Amendment.¹⁹² He predicted a balancing test would likely erode constitutional protections afforded under the Fourth Amendment.¹⁹³

Justice Brennan's admonition not to sacrifice constitutional protections for the exigency of the moment appears especially relevant in the context of suspicionless drug testing of students. While the use of suspicionless drug testing programs represents a good-faith effort by school officials to combat drug use among students, the expansion of such programs has mushroomed since *Vernonia*, a decision that does not explicitly sanction such expansion. Hopefully the Supreme Court's decision in *Earls* will offer more specific guidelines concerning the permissible parameters of suspicionless drug testing policies in schools that respect the constitutional rights of students.

Neal H. Hutchens

191. 469 U.S. 325, 338-39 (1985).

192. *T.L.O.*, 469 U.S. at 356-62.

193. *Id.* at 361-62 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

