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**I. INTRODUCTION**

In June 1995, some 200 years after the birth of the Constitution, the Supreme Court of the United States held that random, suspicionless drug testing of junior and senior high school athletes was constitutional.\(^1\) On the surface, the Supreme Court's recent decision in *Vernonia School District 47J v. Acton*\(^2\) appears to be a reasonable approach to the onerous problem of drugs in our schools. The Court balanced the promotion of a legitimate governmental interest against the intrusion on individual freedoms. After balancing these conflicting concerns, the Court determined the government's interest in protecting the educational process and deterring drug use outweighed the intrusion on students' privacy rights.

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2. Id.
The reasoning behind the Court's decision to allow random, suspicionless drug testing of junior and senior high school athletes will convince many people. Nevertheless, the Supreme Court's decision to sanction blanket searches of student athletes is shocking. Underlying the Court's decision are complex legal, social, and policy issues that are not immediately apparent. Complicating matters is the fact that modern technology makes available a new level of surveillance and social control that "fundamentally challenges our conceptions of privacy, dignity, and due process of law."\(^3\)

Due to the Supreme Court's green light in \textit{Vernonia}, many schools are likely to consider the implementation of drug testing policies for student athletes. The Millard School District could become one of the first school districts in Nebraska to adopt such a drug testing policy.\(^4\) A Millard School Board member who advocates student testing cited the Supreme Court's ruling as a factor in his decision to push for a drug testing policy.\(^5\) At least one Iowa high school is also exploring drug testing of athletes.\(^6\)

Equally shocking is the number of school administrators who are willing to support such drug testing policies.\(^7\) This Note takes the position that something is terribly wrong here, not only with the Court's decision in \textit{Vernonia} sanctioning suspicionless testing, but also with the public's strong support of these testing policies. The first part of this Note reviews the drug testing policy of the Vernonia School District and the Court's holding regarding the constitutionality of such a policy under the Fourth Amendment.\(^8\) Then, this Note explores some of the issues implicated by the Court's holding and how they have evolved. Finally, this Note examines what appears to be the legacy of the Court's decision in \textit{Vernonia} and how the standards articulated in this case may apply in the context of the Millard School District.

At issue in \textit{Vernonia} is the Fourth Amendment of the Constitution which prohibits unreasonable searches and seizures.\(^9\) The Supreme


\(^4\) Donnette Dunbar & Rich Kaipust, \textit{Millard School Board Studies Drug Tests for Athletes, OMAHA WORLD HERALD, Sept. 9, 1995, at 1.}

\(^5\) \textit{Id. at 10.}

\(^6\) \textit{Iowa School May Test Athletes for Drugs, OMAHA WORLD HERALD, Oct. 18, 1995, at 19.}

\(^7\) \textit{See Dunbar & Kaipust, supra note 4; Tests for Steroid Abuse Worth It, OMAHA WORLD HERALD, Sept. 17, 1995, at 8B; Prep Athletes Should Measure Up, OMAHA WORLD HERALD, June 29, 1995, at 20. \textit{See also GILLIOM, supra note 3, at 3 (attempting to answer why drug testing is spreading so rapidly with such limited and unsuccessful opposition).}

\(^8\) \textit{Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995).}

\(^9\) The Fourth Amendment states: 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, sup-
Court has held that in regard to administrative searches\(^\text{10}\) the ultimate test of constitutionality is reasonableness,\(^\text{11}\) "at least in a case such as [Vernonia], where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted."\(^\text{12}\) What is reasonable under the Court's modern (within the last 25 years) test of Fourth Amendment constitutionality is determined by balancing the intrusion upon an individual's Fourth Amendment interests against the promotion of a legitimate governmental interest.\(^\text{13}\)

II. VERNONIA SCHOOL DISTRICT 47J V. ACTON\(^\text{14}\)

Following the implementation of a drug testing policy in the Vernonia School District (District) where the Actons' son, James, was a seventh grader, the Actons brought suit to challenge the constitutionality of the drug testing policy under the Fourth Amendment. James Acton had signed up to play football at one of the District's grade schools. He was denied participation because he and his parents refused to sign the drug testing consent forms required for participation in the District's athletic programs. The Actons claimed that suspicionless drug testing of all junior and senior high athletes violated their son's constitutional rights.

The District operates a high school and three grade schools in Vernonia, Oregon, a small community where school sports play a prominent role in the town's life. In the mid-to-late 80's, teachers and administrators indicated that they had observed a sharp increase in disciplinary problems which they attributed to student use of drugs.

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\(^{10}\) Reported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

\(^{11}\) Historically, administrative searches were those searches whose main purpose related to legitimate health, safety, and police power regulatory interests, not law enforcement interests. In theory, whenever the main purpose of a search is to investigate a particular crime thought to be committed by a particular individual, then an administrative search rationale will not support the search. In practice, particularly in the past ten years, the line separating health/safety/regulatory and criminal investigations has blurred.” Josephine R. Potuto, *A Practitioner's Primer to the Fourth Amendment*, 70 Neb. L. Rev. 412, 431 (1991).


\(^{13}\) Id.

\(^{14}\) Id. (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)). *See also* Terry v. Ohio, 392 U.S. 1 (1968)(introducing balancing as a test of reasonableness for civil and criminal cases); Camera v. Municipal Ct., 387 U.S. 523 (1967). The use of balancing as a test of reasonableness, although only a modern development in Fourth Amendment jurisprudence, is now well entrenched in the Fourth Amendment as a result of United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

\(^{15}\) 115 S. Ct. 2386 (1995).
and alcohol. Subsequently, the school board concluded that it had a general drug problem among the student body, particularly among student athletes. When drug education and other remedial efforts did not end the disciplinary problems, District officials, with input from parents, adopted a drug testing policy. The policy was directed toward student athletes for two reasons. First, in the view of school administrators, student athletes were leaders of the drug culture; and, second, there was a fear that the drug abuse would cause athletic injuries.

A. The Policy

The drug testing policy applied to all junior and senior high students participating in interscholastic athletics. The student athletes and their parents were required to sign a form consenting to the testing. All athletes were tested at the beginning of their season. Then, once each week of the season, the names of all the athletes were placed in a pool from which a student, with the supervision of two adults, blindly selected 10 percent of the athletes for random testing.

15. "We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court's conclusion that 'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,'... and that 'the rebellion was being fueled by alcohol and drug abuse . . . .'" Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2395 (1995). The brief for the Actons however, reports that there was little evidence of students using drugs, that the evidence consisted almost entirely of complaints by a few teachers and administrators, and that students generally seemed to be less well-mannered than anyone remembered. Respondents' Brief at 2, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995)(No. 94-590). These assumptions were supported, at least in the teachers' minds, by unconfirmed, second-hand reports of off-campus drug use that were received over hearsay objections. Id. at 3. Only one of the teachers who testified at trial reported that she ever actually observed any student taking drugs. Id. at 4.

16. The evidence pointing to athletes in particular was: testimony by the wrestling coach that a student was injured when he failed to react quickly to a hold an opponent put on him and a day later the coach went to the hotel room where four wrestlers, including the injured wrestler, were staying and smelled what he believed to be marijuana; this same coach testified that in 1985 the coach he was an assistant for was called by parents and told that some students had done drugs on a road trip; the football coach testified that he watched some football game films and noticed that some of the students did not react to situations the way he taught them so he wondered if they were under the influence of drugs, Respondents' Brief at 7 n.8, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995)(No. 94-590); it was reported by the principal at trial that four football players had told the football coach that they had used amphetamines. Id. at 4 n.1.


18. The District offered football, basketball, track, cross country, and volleyball starting in the seventh grade and wrestling and golf starting in the ninth grade. "Between 60 to 65 percent of high school students and approximately 75 percent of elementary students participate in interscholastic athletics." Petitioner's Brief 3, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995)(No. 94-590).
Those athletes chosen were retrieved and tested, that same day if possible.

The testing procedures consisted of the student completing a specimen control form and identifying any prescription medications that the student was taking. The student then entered an empty locker room accompanied by an adult monitor of the same sex. The boys selected produced urine samples at a urinal fully clothed. The monitor stood 12 to 15 feet behind the student. Monitors were given authority to watch the student while he produced the sample. Girls produced samples in a bathroom stall while the monitor listened through the stall for "normal sounds of urination." After the sample was produced, it was given to the monitor who checked it for temperature and tampering and then transferred it to a vial. A laboratory later tested the sample for amphetamines, cocaine, and marijuana. The superintendent, principals, vice principals, and athletic directors were granted access to the test results.

B. The Proceedings Below

The Supreme Court in a 6 to 3 decision reversed the Ninth Circuit's unanimous holding that the drug testing program violated James Acton's right to be free from an unreasonable search under the Oregon Constitution. The court of appeals had concluded that the intrusiveness of the search relative to the importance of the policy interest was dispositive. However, unlike the Supreme Court, the

20. Respondents' brief states that at least one male monitor testified that he sometimes watched the boys produce the sample. Respondents' Brief at 9, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995)(No. 94-590).
22. Even though the administration had concluded that the rebellion was being fueled by drug and alcohol use, the tests apparently did not test for the presence of alcohol. Id.
23. Id. at 2397 (O'Connor, Stevens, and Souter, J., dissenting).
24. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994). The court of appeals noted that it was constrained to decide the case on state constitutional grounds to avoid deciding an unnecessary constitutional issue. Id. at 1518. Art. I, § 9, of the Oregon Constitution prohibits "unreasonable" government searches. Id.

Since a state constitution can grant broader protection than the federal constitution, the Actons had argued in their brief opposing a writ of certiorari that the Supreme Court should deny the writ because the decision below rested on state law. Respondents' Brief at 15 n.11, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995)(No. 94-590). In the alternative, the Actons argued that if the Supreme Court found that the District's drug testing policy did not violate the Fourth Amendment, the case should be remanded to the court of appeals to determine, once again, whether the program would violate broader protections under the state constitution. Id. at 15.
25. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994).
court of appeals held that the privacy interests of athletes were not substantially lower than those of students in general.\textsuperscript{26} In addition, while the Ninth Circuit found that the importance of the policy interests—preventing unnecessary athletic injuries, reducing the attractiveness of drugs among other students, and improving discipline—were not "minimal," those interests suffered in comparison to the kinds of dangers that exist when random drug testing has been approved.\textsuperscript{27}

The Supreme Court did not agree with the court of appeal's assessment of the privacy interests at stake. In addition, the Court found that the court of appeals had erroneously decided the case under the federal constitution.\textsuperscript{28} For these reasons, the Supreme Court vacated the Ninth Circuit's judgement and remanded the case for further proceedings consistent with its opinion.

C. Rights in the Balance

The factors the Supreme Court evaluated in weighing the students' Fourth Amendment interests included the students' expectations of privacy and the character of the intrusion itself. The Court concluded that Fourth Amendment rights are different in public schools than elsewhere. The Court stated that, generally, "the nature of those rights is what is appropriate for children in school."\textsuperscript{29} For their own good, and that of their classmates, public schools have routinely required students to submit to various physical examinations and to be vaccinated against various diseases. Accordingly, the Court reasoned that the result of those required examinations was that students within the school environment have a lesser expectation of privacy than members of the population at large.\textsuperscript{30}

In regards to the rights of athletes specifically, the Court's opinion indicated that "[s]chool sports are not for the bashful."\textsuperscript{31} There is "an

\textsuperscript{26} Id. at 1525.
\textsuperscript{27} Id. at 1526.
\textsuperscript{28} The Supreme Court stated that the Ninth Circuit's holding, that the drug policy violated the Oregon Constitution, was largely based on the Fourth Amendment and, therefore, the holding was in error since it rested on a flawed premise. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397 (1995). They vacated the judgment and remanded the case to the court of appeals. \textit{Id.} On remand, the court of appeals affirmed the decision of the district court, finding the drug testing policy constitutional on the basis of the Supreme Court's ruling. Vernonia Sch. Dist. 47J v. Acton, 66 F.3d 217 (1995).
\textsuperscript{30} \textit{Id.} at 2392. \textit{But cf.} Scott E. Sundby, \textit{Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?}, 94 COLUM. L. REV. 1751, 1798 (arguing that there is a difference in kind between the privacy interests at stake when one voluntarily submits to a medical examination as opposed to the government requiring submission).
element of ‘communal undress’ inherent in athletic participation.”32 The Court found that school athletes have a reduced expectation of privacy because they voluntarily subject themselves to a degree of regulation higher than that imposed on other students, including preseason physical exams, adequate insurance coverage or waiver, minimum grade point averages, and any other rules that coaches may establish for each sport. According to the Court, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Likewise, while evaluating the character of the intrusion in a drug testing program, the Court recognized that the test intrudes upon an excretory function traditionally shielded by great privacy. Nonetheless, the Court reasoned that since the testing conditions were nearly identical to those typically encountered in a public restroom, the compromise of privacy interests was negligible.33 The fact that students are required to identify in advance prescription medications was not found to significantly affect the privacy interest of the students. “[W]e have never indicated that requiring advance disclosure of medications is per se unreasonable. Indeed, in Skinner we held that it was not ‘a significant invasion of privacy.’”34 The Court reasoned that since the policy was not specific with regard to the procedures for furnishing prescription information, it was unwilling to assume that the information could not be handled in a confidential manner, thereby reducing the significance of the privacy interest.35

These minimal privacy intrusions were then balanced against the governmental interests that had prompted the testing policy. Those governmental interests were: the nature of the concern, the immediacy of the concern, and the efficacy of the policy for addressing that concern. According to the Court, the nature of the governmental concern was: the importance of the government’s need to deter drug use among school children, the need to ensure that the educational process is not disrupted by drugs, and the special responsibility undertaken by the government through its schools to provide care and direction to school children, especially to athletes where the risk of injury is particularly high. The Court concluded that the immediacy and efficacy of the policy were self-evident and cited the district court’s findings that the student body was in a state of rebellion and that a

32. Id. at 2393 (quoting Schall v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)).
33. Id.
34. Id. at 2394 (citing Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 626 n.7 (1989)).
35. "It may well be that, if and when James was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner - for example, in a sealed envelope delivered to the testing lab." Id.
drug problem fueled by athletes is effectively addressed by making sure that they do not use drugs.\textsuperscript{36} After balancing the student athlete's decreased expectations of privacy and the unobtrusiveness of the search against the severity of the need, the Court concluded that random, suspicionless drug testing of student athletes was reasonable and, hence, constitutional.

III. ANALYSIS

The Court needed to make a deeper analysis of the effect of \textit{Vernonia} on privacy rights. The Court's decision fails to address the legitimacy of its balancing analysis in relation to two separate outcomes. First, what happens if random, suspicionless drug testing of youth is sanctioned by the Court as constitutional? Second, what happens if the Court rejects suspicionless drug testing as unconstitutional? When the Court sidestepped these issues as policy questions better left to school administrators, it completely disregarded fundamental questions of liberty. Much criticism has already been written of the Court's use of the balancing test in Fourth Amendment decisions, specifically, the easy manipulability of the test and the discounting of significant privacy interests.\textsuperscript{37} The purpose of this Note is not to revisit those criticisms. Instead of criticizing the weights assigned to those factors the Court did address, this Note attempts to identify issues that are conspicuously missing from the Court's analysis.

The Court's decision also fails to adequately discuss the uncertain legacy \textit{Vernonia} leaves behind. The Court's decision to reaffirm the use of random, suspicionless testing signifies a profound social change that alters the fundamental power of citizens to avoid arbitrary government control. Consequently, there is an air of unreality behind the Court's analysis of the factors at stake under the Fourth Amendment.\textsuperscript{38} Upon reviewing the Court's reasoning, one is left to wonder whether the members of the Court were ever teenagers\textsuperscript{39} or whether they have ever used a public restroom. The Court's reliance on vari-

\textsuperscript{36} Id. at 2395-96.


\textsuperscript{38} \textit{See} Sundby, supra note 30, at 1790 (asserting that the Court's findings of expectations of privacy are so limited as to seem unreal).

ous assumptions seems greatly misplaced in light of the experiences of ordinary individuals. As a result, the Court appears to be greatly out of touch with the human condition.

Finally, the Court fails to responsibly conduct judicial review. This failure is largely the result of the Court's adherence to form over substance. A review of the Court's failure in Vernonia and the legacy its decision leaves behind suggests that something is terribly wrong here.

A. The Failure of Judicial Review

The Constitution and public policy do not speak to the same interests. The Court's role is to uphold the Constitution when it conflicts with policy. Shortly after the adoption of the Constitution, the Supreme Court of the United States has been the last word on what is constitutional. As a result, the Court is perceived by many to be the champion of our most cherished liberties. As John Marshall once stated, "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?"

The Supreme Court is a powerful institution. Its role as guardian of the Constitution has always been a great source of comfort for many Americans. However, the Court's recent treatment of Fourth Amendment freedoms has become the subject of much legal commentary. While the Court's failure to protect important liberty interests in Vernonia is not without precedent, it has perhaps never been more pronounced or profound. The sheer volume of legal commentary

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40. Professor Josephine Potuto, Address to a constitutional law class, University of Nebraska College of Law (Oct. 3, 1995).
42. Id.
46. Bruce G. Berner, The Supreme Court and the Fall of the Fourth Amendment, 25 VAL. U. L. REV. 383 (1991); Daniel J. Capra, Prisoners of Their Own Jurispru-
criticizing the Court's jurisprudence on Fourth Amendment protections may be unprecedented.47

Arguments about rights have been relatively unsuccessful with the Court recently in regards to administrative searches, and there is good reason to wonder how surveillance without suspicion has so easily become an apparatus of administrative power.48 In Vernonia, the Court sanctioned an approach to law and order in society that views pervasive surveillance and control as a necessary part of modern government.49 Far from being the protector of constitutional liberties, the precedent the Supreme Court laid down in Vernonia and other recent Fourth Amendment cases50 virtually ensures the legitimacy of intrusive surveillance programs as legitimate mechanisms of social control.51

The Court tried to limit the holding in Vernonia as a necessary result of the public school environment and the more limited constitutional rights of minors.52 These distinctions are largely unpersuasive for several reasons. First, the holding in Vernonia is closely tied to the Court's decisions in other Fourth Amendment cases that upheld the constitutionality of suspicionless testing in other contexts.53 Thus, the decision in Vernonia was actually an extension of those holdings. The fate of the student athletes in Vernonia is closely intertwined with other recent Fourth Amendment holdings by the Court and is really part of a much larger issue. The Court has justified intrusions

47. See Sundby, supra note 30, at 1752 ("The Supreme Court's recent Fourth Amendment decisions have drawn increasingly sharp criticism from the legal academy. Article after article documents the Court's transgressions: how it has riddled the Warrant Clause with exceptions, has suffocated individual privacy through an all-encompassing reasonableness standard, and has extended unprecedented powers to law enforcement agencies. If ever a united cry of warning has been made that a basic civil liberty was in danger, this chorus of law review laments is it.").

48. GILLIOM, supra note 3, at 4.

49. GILLIOM, supra note 3, at 2 (asserting that this is the ultimate result of the Court's holdings in Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)).


51. GILLIOM, supra note 3, at 4.


on basic freedoms because of "special needs." Therefore, any discussion of the Court's holding in Vernonia necessarily requires for context the other Fourth Amendment decisions by the Court which provide the foundation for the Vernonia holding. Those who discount the decision in Vernonia by stating that children are different fail to understand the pervasiveness of the erosion of individual privacy rights, as they relate to suspicionless testing.

1. Form Over Substance

The issues in most constitutional cases evoke the usual discussion into the intent and original meaning behind the constitutional right at stake. Attempts to reconstruct the purpose underlying the right involve various authoritative methods of interpretation. The problem is that advocates can almost always find support for any position taken, so ultimately, courts grow weary of attempts to construct the purpose behind the elements of the Constitution and instead will rely on what has gone before. What has gone before is the essence of legal formalism, the rule of stare decisis. The use of precedent serves an important role by ensuring consistency and trust in the application of the law. However, sometimes the result is that the real rights at issue are sacrificed for the sake of form. As a result, by the time the Court reached its holding in Vernonia, it had moved far away from the substance of Fourth Amendment protection. The important rights at stake are treated like second-class citizens.

2. The Substance: Rights as Power

What is at stake in the Court's decision in Vernonia is the equilibrium established by our constitutional system. The essence of our system of government is the balancing of power between the various

54. The Court has described these special needs as those needs beyond the reach of normal law enforcement. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("the substantial need of teachers and administrators for freedom to maintain order in the schools").
56. Id.
57. See Capra, supra note 46, at 1267-68.
58. Id. See Sundby, supra note 30, at 1788 (noting the Court's substitution of words for analysis).
59. See Capra, supra note 46, at 1268 (arguing that the Court uses whatever precedent is at hand without concern for future doctrinal development).
60. The concept of equilibrium as established by the Constitution came from a phrase in Youngstown Sheet & Tube Co. v. Sawyer, in which Justice Jackson described how the Constitution diffuses power to better secure liberty. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
61. See, e.g., id. Even the language of the Declaration of Independence signals the significance of power. "[A]nd to assume among the powers of the earth, the sepa
branches of government and between citizens and the government. The Founders of this nation understood that with power comes the ability to control.62 The extent of power that should be granted to each segment of this nation's government preoccupied the constitutional discussions.63 Nearly every early judicial decision following the adoption of the Constitution that attempted to interpret the meaning and purpose of constitutional provisions mentioned the distribution of power, and the checks on that power, as the root of the provision in question.64 It was the tyranny that the Colonists had suffered at the hands of the British that shaped their vision of democracy and ultimately led to the Declaration of Independence and later to the Constitution.65 When the judiciary and the public sanction the kind of surveillance and social control signaled in the Vernonia case, they alter the balance of power established by the Constitution and the Bill of Rights. The balance in question lies between individual citizens and their government.

Under the Court's current construction of constitutional protections, children are the ultimate example of a subordinate class capable of being dominated by a more powerful group. It was abuses of power over this group that originally lead the Court to hold that children do indeed have constitutional rights.66 However, while the Court has continued to uphold the application of constitutional rights to children,67 the holding in Vernonia signals that those rights are still without any real substance. The Court attempted to justify this lack of substance by noting that at the time of the framing of the Constitution, children had substantially fewer rights than they do today.68 Of course, this reasoning fails when you consider that women and blacks also enjoyed fewer rights at that time, but the Court now recognizes the dubiousness of that earlier treatment and the need to include those groups within the full protection of the Constitution.

Children, especially in a public school setting, have become easy targets for all kinds of groups.69 In many cases, children are already


62. See, e.g., THE DECLARATION OF INDEPENDENCE (U.S. 1776).
63. See, e.g., THE FEDERALIST Nos. 65, 80 (Alexander Hamilton).
64. See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
65. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).
69. See also Tom Shatel, This Testing Fails for Kids, OMAHA WORLD HERALD, June 28, 1995, at 27 (focus on children is a focus on easy target).
the victims of ineffective parenting and ineffective teaching.\textsuperscript{70} With \textit{Vernonia}, their lack of power has cost them their dignity and autonomy as they become this country's latest scapegoats in the war on drugs.\textsuperscript{71}

As \textit{Vernonia} demonstrates, pressing social issues have led to increased social control via the erosion of Fourth Amendment civil liberties and have left us to wonder what is a reasonable use of power. As Justice Thurgood Marshall wrote, "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."\textsuperscript{72}

Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens\textsuperscript{73}—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."\textsuperscript{74}

Ultimately, any characterization of rights for different groups or classes of individuals, whether it be public employees, private employees, railroad workers, or public school children, must be congruent with the equilibrium of power that the Constitution established. Instead, the Court has justified the recharacterization of rights under

\begin{itemize}
\item \textsuperscript{70} In a 1991 survey, 89\% of teachers after their first year of teaching agreed or strongly agreed with the statement that many children come to school with so many problems that it is difficult for them to be good students. Patricia L. Van Dorn, \textit{Proposal for a "Lawful" Public School Curriculum: Preventive Law from a Societal Perspective}, 28 IND. L. REV. 477, 479 (1995).
\item \textsuperscript{71} A scapegoat is: 1. A live goat over whose head Aaron confessed all the sins of the children of Israel and which was sent into the wilderness symbolically bearing their sin on the Day of Atonement. Leviticus 16. 2. A person or group bearing blame for others. The American Heritage Dictionary of the English Language 1159 (New College ed. 1979). See also National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989)(Scalia, J., dissenting) ("I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.").
\item \textsuperscript{73} According to a recent survey, over one-half of workers questioned supported drug testing. \textit{Gilliom, supra} note 3, at 12. "[H]ow do we best explain this support? . . . Americans who followed . . . news . . . were repeatedly told that the nation was crumbling under the impact of illegal drug use. While only partly true, this imagery of crisis worked to create a social context that was widely receptive to drug testing . . . ." Id.
\end{itemize}
the Fourth Amendment on the basis of special needs, largely the result of growing social problems.

3. The Rise of Social Problems and Special Needs

The Fourth Amendment applies in both civil and criminal contexts. However, the Supreme Court's development of special needs exceptions under the Fourth Amendment has actually reduced the protection for the innocent from assertions of search power in civil contexts. Now, the innocent actually have less protection in certain civil contexts than that which is provided in the criminal context. The Court has justified this imbalance on the basis of special needs beyond the need for normal law enforcement. Prior to the development of special needs exceptions, the Court's test of a reasonable search required probable cause. Then, with the advent of administrative searches, the Court held that those searches related to health, safety, and police power regulatory interests could be justified as reasonable on grounds other than probable cause, as long as the intrusion was minimal. However, some standard of suspicion, even in administrative searches, was still required.

Then, in United States v. Martinez-Fuerte, the Court held that brief interrogative stops of all motorists crossing certain border checkpoints were constitutional even though there was no particular reason to believe that particular motorists were involved in any wrongdoing. In arriving at its decision, the Court weighed the public interest in stopping the flow of illegal aliens against the Fourth Amendment interests of the individual. The Court distinguished these "checkpoint" stops from roving-patrol stops. Roving-patrol stops would continue

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75. Camara v. Municipal Ct., 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

76. In fact, some members of the Court see this as reasonable. "For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws." New Jersey v. T.L.O., 469 U.S. 325, 350 (Powell & O'Connor, JJ., concurring).

77. For a detailed sketching of the evolution of the probable cause requirement, see Potuto, supra note 10. Potuto states that probable cause "means that the known facts and circumstances are such that a person of 'reasonable caution' would feel a fair degree of confidence that he knows what is going on and can take action in response." Id. at 416.


79. Id. at 560. "Reasonable suspicion requires a quantum of objective data, less than that necessary to show probable cause, that is reflected in specific, articulable reasons advanced by a law enforcement officer to explain his suspicion." Potuto, supra note 10, at 416.


81. Id. at 558-59.
to require specific, articulable facts that warranted suspicion. However, the Court reasoned that while the need to make routine checkpoint stops was great, the consequent intrusion on Fourth Amendment interests was minimal, and a requirement of reasonable suspicion for the stops on major routes inland would be impractical due to the heavy flow of traffic.

In rejecting the requirement of some level of suspicion, the Court noted that a requirement of suspicion is usually a prerequisite to a constitutional search and seizure under the Fourth Amendment. However, in *Martinez-Fuerte*, the checkpoint stops were held to be so limited in scope as to be reasonable without any level of suspicion. "[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy . . ." The Court carefully limited the scope of the holding and stated that any further detention must be based on consent or probable cause.

*Martinez-Fuerte* marked the first in a long line of strong dissents from Justices Brennan and Marshall regarding the Court's "evisceration" of Fourth Amendment protections by allowing standardless seizures. Justices Brennan and Marshall criticized the Court's use of balancing as the test of reasonableness because it allowed an individual's protections under the Fourth Amendment to be overwhelmed by a governmental interest. The majority saw their dissent as reflecting "unwarranted concern" that the decision marked a radical intrusion on citizens' rights and reiterated its commitment to the standards of probable cause and reasonable suspicion under the Fourth Amendment. Further, the majority repeated that its holding, that no individualized suspicion is needed to exercise search power, was confined to permanent checkpoints.

The Court's commitment, articulated in *Martinez-Fuerte*, to require a suspicion standard in administrative searches was followed in *Delaware v. Prouse*. The Court held that stopping and detaining a driver of a vehicle to check his driver's license and registration was unreasonable under the Fourth Amendment without some articulable reasonable suspicion that the motorist was unlicensed or that the au-

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82. *Id.* at 566-67. See also *Delaware v. Prouse*, 440 U.S. 648 (1979)(holding that stopping and detaining drivers without reasonable suspicion is unconstitutional).
84. *Id.* at 557.
85. *Id.* at 561.
86. *Id.* at 557.
87. *Id.* (Marshall & Brennan, JJ., dissenting).
88. *Id.* at 570.
89. *Id.* at 587 n. 19.
90. *Id.*
tomobile was not registered. The Court held that such stops were seizures under the Fourth Amendment.

In 1990, the level of suspicion required under the Fourth Amendment was again put to the test in *Michigan Department of State Police v. Sitz*. In *Sitz*, a group of motorists brought an action to challenge the constitutionality of a highway sobriety checkpoint program in which all vehicles passing through a checkpoint would be stopped and the drivers "briefly" examined for signs of intoxication. Finding unpersuasive the argument that a balancing test was not the proper method of analysis and that the analysis must proceed from a suspicion standard of probable cause or reasonable suspicion, the Supreme Court held that this case was indistinguishable from *Martinez-Fuerte* where it had upheld the constitutionality of checkpoints for illegal aliens without a suspicion standard.

In upholding the balancing analysis, the Court reasoned that where a Fourth Amendment intrusion serves a special governmental need beyond the normal need for law enforcement, a balancing of interests at stake is the correct test of constitutionality. The Court held that the problem of drunk drivers was so grave that a minimal intrusion was reasonable under a balancing test without a suspicion requirement. Unlike *Prouse*, the Court noted that this case involved neither random stops nor a complete absence of empirical data indicating that the stops would be an effective means of promoting roadway safety.

In the *Sitz* dissent, Justices Brennan and Marshall reiterated their concern about the use of balancing as a test of reasonableness. Their concern was that the lack of a suspicion standard combined with a balancing test allowed the Court to undervalue intrusions protected by the Fourth Amendment so that methods for attending to the special need at stake overwhelmed the Fourth Amendment interests. They argued that some level of individualized suspicion is the core component of Fourth Amendment protections. In addition, they reasoned that this case was not like *Martinez-Fuerte*. In *Martinez-Fuerte*, they noted that suspicionless stops were justified because the flow of traffic was too heavy to allow a particularized study of a given car to identify those that were possible carriers of illegal aliens. Brennan and Marshall pointed out that in *Sitz* there had been no showing of a simi-

92. *Id.*
93. *Id.*
95. *Id.* at 451-52.
96. *Id.* at 449-50.
97. *Id.* at 454.
98. *Id.* at 455-56 (Marshall & Brennan, JJ., dissenting).
99. *Id.* at 456.
100. *Id.* at 458.
lar difficulty in detecting individuals who were driving under the influence of alcohol. Moreover, they stated that stopping every car to prevent drunken driving had never been a sufficient justification for abandoning a constitutional requirement.

The needs of law enforcement stand in constant tension with the constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis. The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some "balancing test" than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the "reasonable" requirements of the probable-cause standard were met. . . .

By 1989, the exercise of search power without suspicion was solidly entrenched in the Court's Fourth Amendment jurisprudence, despite the Court's assurances in Martinez-Fuerte. In two separate holdings, Skinner v. Railway Labor Executive Association and National Treasury Employees v. Von Raab, the Court again reasoned that the exercise of search power may be reasonable without any suspicion, if the privacy interests of the individual were minimal and were outweighed by the governmental interest at stake. In those cases, the Court held that suspicionless testing of government employees was reasonable under the Fourth Amendment because a compelling governmental interest outweighed privacy concerns.

In Skinner v. Railway Labor Executive Association, railway labor organizations filed suit to enjoin drug testing regulations affecting railroad employees. Finding that alcohol and drug abuse by railroad employees posed a serious threat to safety, the Federal Railroad Administration (FRA) had promulgated regulations that mandated blood and urine tests of employees who were involved in certain train accidents. The FRA had also adopted regulations that authorized railroads to administer breath and urine tests to employees who violated certain safety rules. The question presented to the Court was whether

101. Id.
102. Id. at 458-59 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) and Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting)).
105. Id.; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). Today, over 20% of the nation's workforce is subjected to suspicionless drug testing. GILLIOM, supra note 3, at 5. A mix of private and public employers is involved. The Fourth Amendment, of course, does not apply to private employers, only to those working under the color of the government.
the government's need to monitor compliance with restrictions on drug and alcohol use via these regulations violated the Fourth Amendment's protection of privacy intrusions absent any individualized suspicion. The Court reiterated that obtaining and examining evidence is a search under the Fourth Amendment if doing so infringed upon an expectation of privacy that society recognizes as reasonable. The Court also noted that the ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.

Chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. . . . There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.108

However, Skinner pointed out that the Fourth Amendment does not proscribe all searches and seizures that may impact privacy interests, only those that are unreasonable.109

In determining what is reasonable, the Court again evoked the language of Sitz. What is reasonable, the Court said, depends upon the circumstances surrounding the search or seizure.110 When those interests at stake represent special needs beyond the normal need for law enforcement, the correct test of reasonableness balances the nature of the search or seizure itself as it pertains to the intrusion on the individual against the interests at stake.111 The Court pointed out that it had previously recognized the government's interest in dispensing with a warrant or suspicion requirement if those requirements were likely to frustrate the governmental purpose behind the search.112 In balancing the intrusions on privacy for employees, the Court concluded that railroad employees had a diminished expectation of privacy in an industry pervasively regulated to ensure safety.

In their dissent, Justices Brennan and Marshall again refused to agree with the reasoning behind the majority's upholding of suspicionless testing. They stated that permitting the government to force entire railroad crews to submit to invasive tests, without evidence of drug or alcohol use, was shortsighted and allowed basic constitutional

107. Id. at 617.
108. Id. (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).
109. Id. at 619.
110. Id.
111. Id. at 619-20.
112. Id. at 623.
rights to fall prey to momentary emergencies. The dissent claimed that in reaching its result the majority ignored the text and doctrinal history of the Fourth Amendment, which requires that highly intrusive searches be based on probable cause and not cost-benefit calculations of agencies or judges. "The few searches which we upheld in the absence of individualized justification were routinized, fleeting, and nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person." According to the dissent, since the Court first began recognizing special needs exceptions to the Fourth Amendment, Fourth Amendment doctrine has been badly distorted and has jettisoned the only standard that finds support in the text of the Fourth Amendment, thereby dangerously weakening the purpose of the Fourth Amendment to protect the privacy and security of citizens.

In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process... of eliminating altogether the probable-cause requirement for civil searches—those undertaken for reasons "beyond the normal need for law enforcement"... [U]pon the mere assertion of a "special need" even the deepest dignitary and privacy interest become vulnerable to governmental incursion. However, the Fourth Amendment... does not confine its protections to either criminal or civil actions. Instead, it protects generally "the right of the people to be secure."

The dissent found that the majority's characterization of the railroad workers' privacy interests as minimal underscored the easy manipulability of the balancing approach to Fourth Amendment standards. Undeterred by the stinging dissent in Skinner, the Court upheld a similar drug testing program in National Treasury Employees Union v. Von Raab. In Von Raab, the Court held that suspicionless testing of employees applying for promotions to positions involving interdiction of illegal drugs or requiring them to carry firearms was reasonable and did not violate the Fourth Amendment. The Court reasoned that the government's need to conduct suspicionless searches of employees engaged directly in drug interdiction and those who were otherwise required to carry firearms outweighed the privacy interests of those employees. Von Raab differed from Skinner in that there was no evidence of drug use among the group subjected to the testing. In Skinner, the drug testing regulations targeted a class with a demonstrated frequency of drug and alcohol use. There was no such demonstration in Von Raab of drug or alcohol use. Justices

113. Id. at 635 (Marshall & Brennan, JJ., dissenting).
114. Id. at 637-38.
115. Id. at 639.
116. Id. at 640-41.
117. Id. at 647.
119. Id. at 677.
Scalia and Stevens, who had sided with the majority in *Skinner*, dissented. They asserted that based on the lack of evidence regarding drug use by the targeted group, the Customs Service drug testing policy was an “immolation of privacy and human dignity in symbolic opposition to drug use.”

The special needs doctrine was first extended into the public school context in *New Jersey v. T.L.O.* In *T.L.O.*, the Court concluded that students have a legitimate expectation of privacy; therefore, searches of students by school officials fall within the protection of the Fourth Amendment. Additionally, the Court held that reasonable suspicion was the appropriate standard to determine the reasonableness of searches in the school setting.

In *T.L.O.*, a teacher found a 14-year-old freshman smoking in the bathroom in violation of a school rule. The student was taken to the assistant vice principal. When the student denied that she had been smoking, the assistant vice principal demanded to see the student's purse. Upon opening her purse, he found a pack of cigarettes and rolling papers commonly associated with the use of marihuana. The principal then proceeded to search the purse thoroughly and found some marihuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed her money, and two letters implicating her in marihuana dealing. The evidence was turned over to the police. Thereafter, the state brought delinquency charges against her in juvenile court. The court held that the Fourth Amendment applied to the school search; and under the Fourth Amendment, the search was reasonable.

120. *Id.* at 681.
122. *Id.* at 333-34. “We have recognized that even a limited search of the person is a substantial invasion of privacy. . . . A search of a child’s person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.” *Id.* at 337-38 (citations omitted).
123. *Id.* at 333-36. “In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.” *Id.* at 336-37.
124. *Id.* at 341.
Subsequently, the Supreme Court affirmed the juvenile court holding. The court stated that if the vice principal had a reasonable suspicion that the student had cigarettes in her purse, the search was justified. Because the search in this instance was based on individualized suspicion, the Court declined at that time to decide whether individualized suspicion is an essential element of the reasonableness standard for school searches. Instead, the Court again noted that some quantum of individualized suspicion is usually a prerequisite to a constitutional search; however, the Court also noted that the Fourth Amendment imposes no irreducible requirement of suspicion. Exceptions to the requirement of individualized suspicion are generally appropriate only where privacy interests are minimal.

In his dissent, Justice Stevens expressed concern that the Court’s holding in T.L.O. would allow school administrators to search students suspected of violating even the most trivial school regulations or guidelines for behavior. In response, the majority suggested it would be inappropriate for a judge to evaluate the relative importance of various school rules.

We have repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental protections.

126. New Jersey v. T.L.O., 469 U.S. 325, 344-47 (1985)(holding that under the circumstances the search of the student's purse was reasonable).

127. Id. at 345. The New Jersey Supreme Court held that the vice principal had no reasonable suspicion that cigarettes were in the purse. State ex rel. T.L.O., 463 A.2d 934, 944 (N.J. 1983). The Supreme Court held that the requirement of reasonable suspicion is not a requirement of absolute certainty but sufficient probability. New Jersey v. T.L.O., 469 U.S. 325, 346 (1985).


129. Id.

130. Id. at 371 (Stevens, J., dissenting).

131. In some ways, this deference to the states is the only way the Vernonia decision can be reconciled with Fourth Amendment protections. The State of Nebraska
constitutional safeguards, to prescribe and control conduct in the school. . . .”
Absent any suggestion that the rule violates some substantive constitutional

guarantee, the courts should, . . . defer to that judgment and refrain from
attempts to distinguish between rules that are important to the preservation
of order in the schools and rules that are not.132

"By focusing attention on the question of reasonableness, the standard
will spare teachers and school administrators the necessity of schooling
themselves in the niceties of probable cause . . . ."133

In Vernonia, the Court again reiterated that special needs make the probable cause requirement impractical.134 Strict adherence to the probable cause standard, the Court noted, would impede the school's ability to maintain order.135 Vernonia had changed the reasonable suspicion standard in T.L.O. to a requirement of no suspicion. The Court justified this transition by citing other special needs cases where the Court had upheld the constitutionality of searches exercised without suspicion.136 Ultimately, the Court reasoned that the standard in school searches under the Fourth Amendment was whether the search is one that a reasonable guardian and tutor might

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\text{can, of course, insist on a more demanding standard under its own statutes or Art. 1 § 7 of the Nebraska Constitution. Art. 1 § 7 of the Nebraska Constitution has adopted the same language as the Fourth Amendment. In light of the significant erosion of Fourth Amendment protections signaled by the Supreme Court's recent Fourth Amendment decisions, I would argue that the Nebraska Supreme Court should grant broader protection under the Nebraska Constitution. However, the Nebraska Supreme Court has not displayed a tendency to deviate from Supreme Court constructions. See, e.g., State v. Trahan, 229 Neb. 683, 428 N.W.2d 619 (1988); State v. Colgrove, 198 Neb. 319, 253 N.W.2d 20 (1988).
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For cases in which states have departed from the Supreme Court's construction of constitutional protections under the First Amendment where the state wanted to grant greater protection see Attorney General v. Desilets, 636 N.E.2d 239 (Mass. 1994), and State v. French, 460 N.W.2d 2 (Minn. 1990).


133. New Jersey v. T.L.O., 469 U.S. 325, 343 (1985). Consider the absurdity of the Supreme Court's position. The Court is willing to weaken constitutionally protected liberties to avoid imposing cumbersome or complex rules on educational bureaucrats. Yet, Americans are forced to deal with a plethora of complex laws everyday. Consider tax laws, for example. Wouldn't a similar argument in this context seem absurd. "I'm sorry Mr. IRS agent. I know the tax law requires . . . but the Supreme Court recently recognized that the law may just be too cumbersome or complex for some of us. Therefore, we should be entitled to modify the tax code to make compliance easier in our situation.”


135. Id.

undertake, regardless of suspicion.\textsuperscript{137} Based on the findings of need made by the district court, the Supreme Court concluded that in \textit{Vernonia} suspicionless searches were justified.

With the holding in \textit{Vernonia}, the disappearance of the suspicion requirement in administrative searches is complete. Suspicionless searches have been adopted, extended, followed, and firmly entrenched in legal precedent. One can no longer have any sense of what the Fourth Amendment will protect in the context of "social problems." First, in \textit{Martinez-Fuerte}, the Court purported to limit no suspicion searches to brief, minimally intrusive checkpoint stops of persons in automobiles. Later, in \textit{Skinner} and \textit{Von Raab}, the Court purported to limit its holding to safety-sensitive jobs. However, the law once bent does not easily bend back.\textsuperscript{138} Consequently, a new generation of Americans are faced with the specter of widely expanded search power. The Court's characterization of the privacy interests implicated by urine collection as minimal is shocking. Something is terribly wrong here.

**B. The Legacy of \textit{Vernonia}**

One of the legacies of the Court's decision in \textit{Vernonia} is that school districts across the country will consider implementing suspicionless drug testing of students.\textsuperscript{139} As Justice O'Connor noted in the \textit{Vernonia} dissent:

\begin{quote}
The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. By the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.\textsuperscript{140}
\end{quote}

One report estimates that 29,742,000 children were enrolled in public school grades kindergarten through eight and approximately 11,284,000 in grades nine through twelve.\textsuperscript{141} More than 16 percent of the population is in a public elementary or secondary school setting.\textsuperscript{142} While the majority in \textit{Vernonia} was careful to indicate that their holding does not mean that all suspicionless testing will be constitutional,\textsuperscript{143} previous extensions of the special needs doctrine sug-

\begin{itemize}
\item \textsuperscript{137} Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397 (1995).
\item \textsuperscript{138} Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 655 (Marshall & Brennan, JJ., dissenting) (quoting Holmes, J.).
\item \textsuperscript{139} See, e.g., Dunbar & Kaipust, \textit{supra} note 4.
\item \textsuperscript{141} Van Dorn, \textit{supra} note 70, at 479.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995) ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.").
\end{itemize}
gest that there will be some pressing social policy reason that can
justify subjecting all these children to suspicionless testing in the
future.\footnote{144}

Additionally, the Court's limiting language spoke to the extension
of suspicionless testing to contexts outside of the public school system
and did not make any references to limits on suspicionless testing in
public schools. In cautioning against the constitutionality of suspi-
cionless testing in other contexts, the Court stated that "[t]he most
significant element in this case is the first we discussed: that the Pol-
icy was undertaken in furtherance of the government's responsibili-
ties, under a public school system, as guardian and tutor of children
entrusted to its care."\footnote{145}

In \textit{T.L.O.}, the Court articulated a two-prong test for when school
searches are reasonable.\footnote{146} First, whether the action was justified at
its inception and second, whether the search was reasonably related
in scope to the circumstances which justified the intrusion in the first
place.\footnote{147} This two-prong test was not expressly applied in \textit{Vernonia}.
In \textit{Vernonia}, the Court eliminated the requirement of reasonable sus-
picion that it articulated in \textit{T.L.O}. However, the Court's reasoning
displays a kind of indirect application of the same analysis. Therefore,
the first prong of the \textit{T.L.O}. inquiry, whether the search was justified
at its inception, may still provide a useful context for determining
when suspicionless testing policies directed at student athletes will be
constitutional.

1. \textit{Justified at Its Inception}

In \textit{Vernonia}, the Court's justifications for the reasonableness of
suspicionless testing was supported by the testimony of teachers and
administrators that there had been a sharp increase in drug use in the
District and that students had begun to speak out about their attrac-
tion to the drug culture and to boast that there was nothing the school
could do about it.\footnote{148} According to school officials, drugs had doubled
the number of disciplinary problems.\footnote{149} Athletes were identified as
the leaders of the drug culture. Further, because athletics played an
important role in the community, student athletes were admired. The
District initially responded to the perceived drug problem with drug

\footnote{144} When all of the public school children are added to the percentage of the nation's
workforce that is also subjected to random testing, roughly one-third of the na-
tion's population is affected. \textit{See also Gilliom, supra} note 3, at 5.
\footnote{145} \textit{Vernonia Sch. Dist. 47J v. Acton}, 115 S. Ct. 2386, 2396 (1995). However, the
Court has already sanctioned suspicionless testing in other contexts. \textit{National
\footnote{147} \textit{Id.}
\footnote{149} \textit{Id.}
education, but the problems persisted. According to the district court's findings, the administration was at its wit's end. Large portions of the student body, particularly those in athletics, were in a state of rebellion.

In contrast, when it was reported that the Millard School District was considering the implementation of a drug testing policy for student athletes, the need was attributed to the possible use of steroids by student athletes. A Millard School Board member, who was a team physician at Millard North High School, advocated implementing a drug-testing policy for athletes. He claimed he had seen telltale signs of anabolic steroid use among athletes at Millard North, Millard South, and other Omaha-area high schools. These signs included stretch marks on the chest, arms, and back; mood swings; and unusual weight gain. "These guys leave for the summer weighing 150 pounds and come back at 225 pounds," the physician said. "Nobody can gain that kind of weight unless they're doing steroids." Based on his examinations of Millard North players and observations of other teams at sporting events, the physician said he would "guesstimate" that there were one or two athletes in every school throughout the metropolitan area using steroids.

It is not clear from the holding in Vernonia whether suspicionless testing of all student athletes within a school could be justified on the basis of one or two students using steroids. On one hand, the Court has put great reliance on the evidence of drug use among the students at Vernonia and the resultant disciplinary problems. Thus, immediacy was a significant factor in weighing the interest at stake. The interest at stake, the Court said, must appear important enough to justify the search in light of other factors which show the search to be relatively intrusive. On the other hand, the Court has also refused to require any evidence of actual drug use when justifying suspicionless drug testing in other cases.

In Vernonia, the Court seemed to rely on evidence suggesting that drug use was a threat to the educational process in the District. This threat appeared in large part to be the justification for the testing

150. Id. at 2389.
151. Id.
152. Dunbar & Kaipust, supra note 4.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
160. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2395 (1995)("[A] large segment of the student body . . . was in a state of rebellion. . . .").
policy. At the same time, deterrence was also a factor in the weighing of the governmental interest. Consequently, it is unclear after Vernonia whether there must be evidence of drug use to support drug testing as a deterrence factor or how much evidence is needed to justify testing.

Comparing the facts of Vernonia to the circumstances present in the Millard School District suggests that any Millard drug testing policy based on the above information does not raise the governmental interest to the level that justified suspicionless testing in Vernonia. It is unlikely that the Millard School District could show the kind of interference with the educational process that was demonstrated in Vernonia. The question may turn on whether testing can be justified as a largely symbolic device on the war against drugs. Subjecting hundreds of athletes in one school to suspicionless testing to uncover one or two instances of drug use would be largely a symbolic deterrent.

Based on the articulable suspicion of the Millard School Board member pushing for the testing, a search based on individualized suspicion would be constitutional. However, the Millard School District should have a rule prohibiting the use of steroids, should be able to articulate an interest that the school would have in uncovering the use of steroids, and should be able to articulate why it is likely that testing of certain individuals will turn up evidence of steroid use.

Steroid use is a much different application of drug testing. In light of the relative unobtrusiveness of this type of drug abuse, justifications would necessarily center around protection of the individual at risk as opposed to protection for students at large and the integrity of the educational environment. Steroids are the kind of drug likely to be used by only a limited class of individuals; thus, the deterrence factor would be relatively limited.

In addition, some of the reasons for implementing drug testing that were articulated by the Millard School Board member advocating the testing present a problem. "We have to develop sanctions. There has

161. "[This] is an immediate crisis of greater proportions than existed in Skinner . . . ."
162. Id.
163. Much of the criticism of the Court's Fourth Amendment jurisprudence results because the Court has riddled the Fourth Amendment with exceptions on a case by case basis that makes it difficult to develop any workable Fourth Amendment doctrine. See Sundby, supra note 30; Sundby, supra note 44.
164. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680-81 (1989)(Scalia, J., dissenting)(searches are reasonable only when a social necessity prompts the search).
165. Id.
These types of interests may cut too close to the kind of arbitrary punitive sanctions that make the Court uneasy about the role of suspicionless drug testing in the public schools. Punitive sanctions take the Court too far afield from much of the special needs analysis in civil cases that justified the exception to Fourth Amendment requirements in the first place. Punitive purposes are too closely related to the criminal context where Fourth Amendment standards are higher.

Perhaps the dissent in Vernonia shed the greatest light on how to approach the limits of the holding in Vernonia.

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

The majority did not agree with the dissent that the policy swept too broadly and imprecisely. However, the dissent's statement is still instructive as to what may be required by school districts, following in the wake of Vernonia, who are attempting to implement drug testing policies.

2. From Power to Powerless

The Supreme Court's recharacterization of Fourth Amendment rights in special needs situations has dramatically altered the equilibrium established by the Constitution for those individuals who fall within the boundaries of a special needs exception. These individuals are, therefore, powerless to forego the intrusion on their liberties without relinquishment of some right. Prior to the development of special needs exceptions, it was generally accepted that the exercise of search power over an individual required some trigger before the intrusion could be justified. Fourth Amendment protection in the civil

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167. Dunbar & Kaipust, supra note 4.
168. The Court in T.L.O declined to address the role of law enforcement officials in school searches. New Jersey v. T.L.O., 469 U.S. 325, 342 n.7 (1985). Also, searches that may be perceived as too punitive are less likely to receive support from parents. See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995).
170. While school sports have been characterized as a privilege, the distinction between rights and privileges have been largely extinguished under constitutional protections. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 567 (1972).
context no longer requires a discernable event in order to relinquish one's right to be free from arbitrary intrusion.

The idea of the Constitution is that individual citizens are entrusted with certain powers and privileges. "[T]he Constitution can be understood as part of a broader movement that transformed government rule from an aristocratic endeavor to one based upon a recognition of the citizenry as its source of power."171 Without the requirement of some discernable event that triggers the relinquishment of Fourth Amendment protections, those in positions of power are now in the position of aristocrats who exercise power at will over a less dominant class.172

Forcing junior and senior high students to choose between submitting to intrusive, suspicionless drug testing without a trigger or to forfeit the privilege of participating in school sports and suffer the loss of self-actualization, achievement, and belonging that are a part of that experience is a form of coercion.173 Likewise, workers faced with suspicionless drug testing are forced to choose between compliance and lost income and benefits. As American citizens, individuals are entitled to certain privileges and protections. To compromise the rights and privileges of another without articulable reasons that relate responsively to those individuals signals a significant shift in the area of personal freedoms.

Many of the consequences of the Court's holding in Vernonia are not readily apparent and beyond the expertise of jurisprudence. For instance, what will the drug testing of children do to their development of healthy boundaries? In addition, while Vernonia seems to suggest that the drug testing policy implemented in that school district was largely effective, those results may be misleading. When the heat is on, students may change their outward behavior but that does not mean that the policy itself has been effective in deterring drug use. Drug use is only a symptom of a much larger problem. Suspicionless drug testing policies do not force parents, administrators, or judges to deal with the underlying issues. Those policies will be successful only in displacing or repressing the underlying problems. And, what if you

171. Sundby, supra note 30, at 1782.
172. See also Sundby, supra note 44 (proposing model of Fourth Amendment based on whether intrusion is initiatory or responsive).
173. A recent decision by an Arizona district court, prior to the decision in Vernonia, recognized that forcing students to consent to drug testing or to forfeit the right to play school sports was a form of coercion that did not signal voluntary consent. Moule v. Paradise Valley Unified Sch. Dist. N69, 863 F. Supp. 1098, 1103 (D. Ariz. 1994). Unfortunately, the court of appeals held, in light of the Supreme Court's decision in Vernonia, that the youngsters' constitutional rights were not violated by being required to submit to a suspicionless drug test in order to play sports. Moule v. Paradise Valley Unified Sch. Dist. N69, rev'd without opinion, 66 F.3d 335 (9th Cir. 1995).
ask a student to choose between sports and drugs and he chooses drugs?174

Students are now required to prove their innocence. That was reason enough for young James Acton to resent the drug test. James' parents said that they believed their son, who said he was not using drugs, and they did not think he should have to prove it.175

IV. CONCLUSION

"The greatest threats to our constitutional freedoms come in times of crisis."176 When the Constitutional Convention ended, Benjamin Franklin was asked, "[W]hat have you wrought?" He answered, '[A] Republic, if you can keep it."177 Recent history indicates that the challenge will get harder as the technology gets better.178 We cannot know how much courage it took for the founders of our nation to support the ideals which laid the foundation for this republic. However, it is clear that in light of contemporary social problems, it will take courage for us to keep them.

In the final analysis, the Court's holding in Vernonia generates two areas of inquiry: 1) the role of Fourth Amendment freedoms and constitutional principles in general and 2) concern regarding the application of the special needs doctrine to suspicionless drug testing policies in public schools.

At issue is whether pervasive social problems should be allowed to circumvent or suspend basic constitutional freedoms. Inherent in this question is a balancing of the broad choices involved.179 The choice is whether to allow infringements on constitutional freedoms to control

174. See Shatel, supra note 69.
179. As we contemplate the implications of this choice, it is interesting to note the fate of James Acton, the Oregon seventh grader whose lawsuit against the Vernonia School District went all the way to the Supreme Court. Shatel, supra note 69. James Acton was barred from playing junior high football because he refused to take a drug test. He said that because he was one of the smartest kids in his class and had never been in trouble, he felt as though that "was proof enough that [he] wasn't taking drugs." Id. Judy Acton, his mother, told the Associated Press last summer that James was going to computer camp during the summer. Id. She said her son will probably not play school sports. Id.
pressing social problems or to reject as a solution to social problems any action that infringes on constitutional protections. The Court's development of the special needs exception seems to be an acknowledgement that these are indeed the choices. The rhetoric in the Court's Fourth Amendment holdings under the special needs doctrine seems to suggest that the Court does not believe the Fourth Amendment provides the protections that are at stake in special need cases. On the contrary, the Court suggests that these special needs, beyond the normal need for law enforcement, justify a less traditional application of Fourth Amendment protections.

The special needs doctrine which allows Fourth Amendment freedoms to be circumvented is now firmly entrenched in our judicial system. The only way the special needs doctrine can avoid completely eroding constitutional freedoms is to ensure that suspicionless drug testing is, at the least, justified at its inception; that the suspicion evidence weigh heavily against the group in question; and that the number of group members implicated justify the intrusion. Deterrence alone should not be sufficient to trigger random, suspicionless testing. Rather, in the public school setting, the integrity of the educational process must play a role in the justification for a special needs exception.

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