United States Code Annotated
Constitution of the United States
Annotated
Amendment IV. Searches and Seizures (Refs & Annos)

U.S.C.A. Const. Amend. IV-Search and Seizure

Amendment IV. Search and Seizure

Currentness

<Notes of Decisions for this amendment are displayed in four separate documents. Notes of Decisions for subdivisions I to XI are contained in this document. For Notes of Decisions for subdivisions XII to XXIV, see the second document for Amend. IV-Search and Seizure. For Notes of Decisions for subdivisions XXV to XXXIV see the third document for Amend. IV-Search and Seizure. For Notes of Decisions for subdivisions XXXV to end, see the fourth document for Amend IV-Search and Seizure.>

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

U.S.C.A. Const. Amend. IV-Search and Seizure, USCA CONST Amend. IV-Search and Seizure
Current through P.L. 114-49 approved 8-7-2015

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Constitution of Kentucky
Bill of Rights (Refs & Annos)

KY Const § 10

Ky Const § 10 Security from search and seizure; conditions of issuance of warrant

Currentness

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Credits
HISTORY: Adopted eff. 9-28-1891; Source--Const 1850, Art 13, § 11

Const § 10, KY Const § 10
Current through the end of the 2015 regular session

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Title XIII. Education
Chapter 160. School Districts (Refs & Annos)
Boards of Education

KRS § 160.290

160.290 General powers and duties of board

Effective: July 15, 2010
Currentness

(1) Each board of education shall have general control and management of the public schools in its district and may establish schools and provide for courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the administrative regulations of the Kentucky Board of Education. Each board shall have control and management of all school funds and all public school property of its district and may use its funds and property to promote public education. Each board shall exercise generally all powers prescribed by law in the administration of its public school system, appoint the superintendent of schools, and fix the compensation of employees.

(2) Each board shall make and adopt, and may amend or repeal, rules, regulations, and bylaws for its meetings and proceedings for the management of the schools and school property of the district, for the transaction of its business, and for the qualification and duties of employees and the conduct of pupils. The rules, regulations, and bylaws made by a board of education shall be consistent with the general school laws of the state and shall be binding on the board of education and parties dealing with it until amended or repealed by an affirmative vote of a majority of the members of the board. The rules, regulations, and bylaws shall be spread on the minutes of the board and be open to the public. The rules, regulations, and bylaws may include the use of reverse auctions as defined in KRS 45A.070 in the procurement of goods and leases.

(3) Local boards of education electing to enter into agreements pursuant to the Interlocal Cooperation Act, KRS 65.210 to 65.300, with other local boards of education to establish consortia to provide services in accordance with the Kentucky Education Reform Act of 1990, 1990 Ky. Acts Ch. 476, may transfer real or personal property to the consortia without receiving fair market value compensation. The joint or cooperative action may employ employees transferred from employment of a local board of education, and the employees shall retain their eligibility for the Kentucky Teachers' Retirement System. The chief state school officer, under administrative regulations of the Kentucky Board of Education, may allot funding to an interlocal cooperative board created by two (2) or more local school districts pursuant to KRS 65.210 to 65.300 to provide educational services for the mutual advantage of the students in the representative districts. All statutes and administrative regulations that apply to the use of these funds in local school districts shall also apply to cooperative boards.

Credits

HISTORY: 2010 c 63, § 11, eff. 7-15-10; 1996 c 362, § 6, eff. 7-15-96; 1990 c 476, § 74, eff. 7-13-90; 1978 c 52, § 1, c 155, § 82; 1942 c 208, § 1; KS 4399-20, 4399-33

KRS § 160.290, KY ST § 160.290
Current through the end of the 2015 regular session

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Title XIII. Education
Chapter 158. Conduct of Schools; Special Programs (Refs & Annos)
Conduct of Schools

KRS § 158.150

158.150 Suspension or expulsion of pupils

Effective: July 12, 2006
Currentness

(1) All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools:

(a) Willful disobedience or defiance of the authority of the teachers or administrators, use of profanity or vulgarity, assault or battery or abuse of other students, the threat of force or violence, the use or possession of alcohol or drugs, stealing or destruction or defacing of school property or personal property of students, the carrying or use of weapons or dangerous instruments, or other incorrigible bad conduct on school property, as well as off school property at school-sponsored activities, constitutes cause for suspension or expulsion from school; and

(b) Assault or battery or abuse of school personnel; stealing or willfully or wantonly defacing, destroying, or damaging the personal property of school personnel on school property, off school property, or at school-sponsored activities constitutes cause for suspension or expulsion from school.

(2) (a) Each local board of education shall adopt a policy requiring the expulsion from school for a period of not less than one (1) year for a student who is determined by the board to have brought a weapon to a school under its jurisdiction. In determining whether a student has brought a weapon to school, a local board of education shall use the definition of "unlawful possession of a weapon on school property" stated in KRS 527.070.

(b) The board shall also adopt a policy requiring disciplinary actions, up to and including expulsion from school, for a student who is determined by the board to have possessed prescription drugs or controlled substances for the purpose of sale or distribution at a school under the board's jurisdiction, or to have physically assaulted or battered or abused educational personnel or other students at a school or school function under the board's jurisdiction. The board may modify the expulsion requirement for students on a case-by-case basis. A board that has expelled a student from the student's regular school setting shall provide or assure that educational services are provided to the student in an appropriate alternative program or setting, unless the board has made a determination, on the record, supported by clear and convincing evidence, that the expelled student posed a threat to the safety of other students or school staff and could not be placed into a state-funded agency program. Behavior which constitutes a threat shall include but not be limited to the physical assault, battery, or abuse of others; the threat of physical force; being under the influence of drugs or alcohol; the use, possession, sale, or transfer of drugs or alcohol; the carrying, possessing, or transfer of weapons or dangerous instruments; and any other behavior which may endanger the safety of others. Other intervention services as indicated for each student may be provided by the board or by agreement with the appropriate state or community agency. A state agency that provides the service shall be responsible for the cost.

(3) For purposes of this subsection, "charges" means substantiated behavior that falls within the grounds for suspension or expulsion enumerated in subsection (1) of this section, including behavior committed by a student while enrolled in a private or public school, or in a school within another state. A school board may adopt a policy providing that, if a student is suspended or expelled for any reason or faces charges that may lead to suspension or expulsion but withdraws prior to a hearing from any public or private school in this or any other state, the receiving district may review the details of the charges, suspension, or expulsion and determine if the student will be admitted, and if so, what conditions may be imposed upon the admission.

(4) School administrators, teachers, or other school personnel may immediately remove or cause to be removed threatening or violent students from a classroom setting or from the district transportation system pending any further disciplinary action that may occur. Each board of education shall adopt a policy to assure the implementation of this section and to assure the safety of the students and staff.

(5) A pupil shall not be suspended from the common schools until after at least the following due process procedures have been provided:

(a) The pupil has been given oral or written notice of the charge or charges against him which constitute cause for suspension;

(b) The pupil has been given an explanation of the evidence of the charge or charges if the pupil denies them; and

(c) The pupil has been given an opportunity to present his own version of the facts relating to the charge or charges.

These due process procedures shall precede any suspension from the common schools unless immediate suspension is essential to protect persons or property or to avoid disruption of the ongoing academic process. In such cases, the due process procedures outlined above shall follow the suspension as soon as practicable, but no later than three (3) school days after the suspension.

(6) The superintendent, principal, assistant principal, or head teacher of any school may suspend a pupil but shall report the action in writing immediately to the superintendent and to the parent, guardian, or other person having legal custody or control of the pupil. The board of education of any school district may expel any pupil for misconduct as defined in subsection (1) of this section, but the action shall not be taken until the parent, guardian, or other person having legal custody or control of the pupil has had an opportunity to have a hearing before the board. The decision of the board shall be final.

(7) (a) Suspension of exceptional children, as defined in KRS 157.200, shall be considered a change of educational placement if:

1. The child is removed for more than ten (10) consecutive days during a school year; or

2. The child is subjected to a series of removals that constitute a pattern because the removals accumulate to more than ten (10) school days during a school year and because of other factors, such as the length of each removal, the total amount of time the child is removed, and the proximity of removals to one another.

(b) The admissions and release committee shall meet to review the placement and make a recommendation for continued placement or a change in placement and determine whether regular suspension or expulsion procedures apply. Additional evaluations shall be completed, if necessary.

(c) If the admissions and release committee determines that an exceptional child's behavior is related to his disability, the child shall not be suspended any further or expelled unless the current placement could result in injury to the child, other children, or the educational personnel, in which case an appropriate alternative placement shall be provided that will provide for the child's educational needs and will provide a safe learning and teaching environment for all. If the admissions and release committee determines that the behavior is not related to the disability, the local educational agency may pursue its regular suspension or expulsion procedure for the child, if the behavior so warrants. However, educational services shall not be terminated during a period of expulsion and during a suspension after a student is suspended for more than a total of ten (10) days during a school year. A district may seek temporary injunctive relief through the courts if the parent and the other members of the admissions and release committee cannot agree upon a placement and the current placement will likely result in injury to the student or others.

(8) Suspension of primary school students shall be considered only in exceptional cases where there are safety issues for the child or others.

(9) Any action under this section related to students with disabilities shall be in compliance with applicable federal law.

Credits

HISTORY: 2006 c 139, § 1, eff. 7-12-06; 2001 c 95, § 1, eff. 6-21-01; 1998 c 493, § 12, eff. 4-10-98; 1996 c 51, § 1, eff. 7-15-96; 1992 c 378, § 1, eff. 7-14-92; 1990 c 476, § 401

KRS § 158.150, KY ST § 158.150
Current through the end of the 2015 regular session

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105 S.Ct. 733
Supreme Court of the United States

NEW JERSEY
v.
T.L.O.

No. 83–712. | Argued March 28, 1984. | Reargued Oct. 2, 1984. | Decided Jan. 15, 1985.

State brought delinquency charges against student in New Jersey juvenile court, 178 N.J.Super. 329, 428 A.2d 1327 which after denying student's motion to suppress evidence found in her purse, held that the Fourth Amendment applied to searches by school officials but that the search was a reasonable one and adjudged student to be delinquent. On appeal, the Appellate Division of the New Jersey Superior Court, 185 N.J.Super. 279, 448 A.2d 493, affirmed the trial court's finding that there had been no Fourth Amendment violation but vacated adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court, 94 N.J. 331, 463 A.2d 934, reversed and ordered suppression of evidence found in student's purse holding that search of purse was unreasonable, and writ of certiorari was granted. The Supreme Court, Justice White, held that: (1) Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, and (2) search of student's purse was reasonable.

Reversed.

Justice Powell, with whom Justice O'Connor joined, filed a concurring opinion.

Justice Blackmun filed an opinion concurring in the judgment.

Justice Brennan with whom Justice Marshall joined, filed an opinion concurring in part and dissenting in part.

Justice Stevens with whom Justice Marshall joined and with whom Justice Brennan joined in Part I, filed an opinion concurring in part and dissenting in part.

**734 *Syllabus* *

*325 A teacher at a New Jersey high school, upon discovering respondent, then a 14-year-old freshman, and her companion smoking cigarettes in a school lavatory in violation of a school rule, took them to the Principal's office, where they met with the Assistant Vice Principal. When respondent, in response to the Assistant Vice Principal's questioning, denied that she had been smoking and claimed that she did not smoke at all, the Assistant Vice Principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and also noticed a package of cigarette rolling papers that are commonly associated with the use of marihuana. He 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 respondent money, and two letters that implicated her in marihuana dealing. Thereafter, the State brought delinquency charges against respondent in the Juvenile Court, which, after denying respondent's motion to suppress the evidence found in her purse, held that the Fourth Amendment applied to searches by school officials but that the search in question was a reasonable one, and adjudged respondent to be a delinquent. The Appellate Division of the New Jersey Superior Court affirmed the trial court's finding that there had been no Fourth Amendment violation but vacated the adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse, holding that the search of the purse was unreasonable.

Held:

1. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren. In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the **735 parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures. Pp. 739–741.

*326 2. Schoolchildren have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school

grounds. But striking the balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Thus, school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction. Pp. 741–744.

3. Under the above standard, the search in this case was not unreasonable for Fourth Amendment purposes. First, the initial search for cigarettes was reasonable. The report to the Assistant Vice Principal that respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse, and thus the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation of the no-smoking rule. Second, the discovery of the rolling papers then gave rise to a reasonable suspicion that respondent was carrying marihuana as well as cigarettes in her purse, and this suspicion justified the further exploration that turned up more evidence of drug-related activities. Pp. 745–747.

94 N.J. 331, 463 A.2d 934, reversed.

Attorneys and Law Firms

*327 *Allan J. Nodes*, Deputy Attorney General of New Jersey, reargued the cause for petitioner. With him on the brief on reargument were *Irwin J. Kimmelman*, Attorney General, and *Victoria Curtis Bramson*, *Linda L. Yoder*, and *Gilbert G. Miller*, Deputy Attorneys General. With him on the briefs on the original argument were Mr. Kimmelman and Ms. Bramson.

Lois De Julio reargued the cause for respondent. With her on the briefs were *Joseph H. Rodriguez* and *Andrew Dillmann*.*

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Deputy Solicitor General Frey*, and *Kathryn A. Oberly*; for the National Association of Secondary School Principals et al. by *Ivan B. Gluckman*; for the National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*; for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar*; and for the New Jersey School Boards Association by *Paula A. Mullaly* and *Thomas F. Scully*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Mary L. Heen*, *Burt Neuborne*, *E. Richard Larson*, *Barry S. Goodman*, and *Charles S. Sims*, and for the Legal Aid Society of the City of New York et al. by *Janet Fink* and *Henry Weintraub*.

Julia Penny Clark and *Robert Chanin* filed a brief for the National Education Association as *amicus curiae*.

Opinion

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to *328 the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule,

the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking **736 in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At *329 the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County.[1] Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. *State ex rel. T.L.O.*, 178 N.J.Super. 329, 428 A.2d 1327 (1980). Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that

> "a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." *Id.*, 178 N.J.Super., at 341, 428 A.2d, at 1333 (emphasis in original).

Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T.L.O. had violated the rule forbidding smoking in the lavatory. Once the purse *330 was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T.L.O.'s drug-related activities. *Id.*, 178 N.J.Super., at 343, 428 A.2d, at 1334. Having denied the motion to suppress, the court on March 23, 1981, found T.L.O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether T.L.O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. *State ex rel. T.L.O.*, 185 N.J.Super. 279, 448 A.2d 493 (1982). T.L.O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T.L.O.'s purse. *State ex* **737 *rel. T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent the use in juvenile proceedings of evidence unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id.*, 94 N.J., at 341, 463 A.2d, at 939 (footnote omitted).

With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal *331 activity or activity that would interfere with school discipline and order." *Id.*, 94 N.J., at 346, 463 A.2d, at 941–942. However, the court, with two justices dissenting, sharply

disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. According to the majority, the contents of T.L.O.'s purse had no bearing on the accusation against T.L.O., for possession of cigarettes (as opposed to smoking them in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T.L.O.'s claim that she did not smoke cigarettes could not justify the search. Moreover, even if a reasonable suspicion that T.L.O. had cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion, as no one had furnished him with any specific information that there were cigarettes in the purse. Finally, leaving aside the question whether Mr. Choplick was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive "rummaging" through T.L.O.'s papers and effects that followed. *Id.*, 94 N.J., at 347, 463 A.2d, at 942–943.

We granted the State of New Jersey's petition for certiorari. 464 U.S. 991, 104 S.Ct. 480, 78 L.Ed.2d 678 (1983). Although the State had argued in the Supreme Court of New Jersey that the search of T.L.O.'s purse did not violate the Fourth Amendment, the petition for certiorari raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement.

***332** Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question.[2] Having heard argument ****738** on ***333** the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.[3]

II

[1] In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

[2] ***334** It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins v. United States*, 364 U.S. 206, 213, 80 S.Ct. 1437, 1442, 4 L.Ed.2d 1669 (1960); accord, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, ****739** delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.[4]

***335** It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using

general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. See *United States v. Chadwick*, 433 U.S. 1, 7–8, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977); *Boyd v. United States*, 116 U.S. 616, 624–629, 6 S.Ct. 524, 528–531, 29 L.Ed. 746 (1886). But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967), Occupational Safety and Health Act inspectors, see *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312–313, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978), and even firemen entering privately owned premises to battle a fire, see *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486 (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court, supra*, "[t]he 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." 387 U.S., at 528, 87 S.Ct., at 1730. Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," *Marshall v. Barlow's, Inc., supra*, 436 U.S., at 312–313, 98 S.Ct., at 1820, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court, supra*, 387 U.S., at 530, 87 S.Ct., at 1732.

***336** Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth ****740** Amendment by virtue of the special nature of their authority over schoolchildren. See, *e.g., R.C.M. v. State*, 660 S.W.2d 552 (Tex.App.1983). Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. *Ibid.*

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment, see *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and the Due Process Clause of the Fourteenth Amendment, see *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." *Ingraham v. Wright*, 430 U.S. 651, 662, 97 S.Ct. 1401, 1407, 51 L.Ed.2d 711 (1977). Today's 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. See, *e.g.*, the opinion in *State ex rel. T.L.O.*, 94 N.J., at 343, 463 A.2d, at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. 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 ***337** cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III

[3] To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although 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. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court, supra*, 387 U.S., at 536–537, 87 S.Ct., at 1735. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. *Terry v. Ohio*, 392 U.S. 1, 24–25, 88 S.Ct. 1868, 1881–1882, 20 L.Ed.2d 889 (1967). We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross*, 456 U.S. 798, 822–823, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982). A search of a child's person or of a closed purse or other bag carried on her person, [5] no less ***338** than a ****741** similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

[4] Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." See, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate." *Hudson v. Palmer*, *supra*, 468 U.S., at 526, 104 S.Ct., at 3200. The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright*, *supra*, 430 U.S., at 669, 97 S.Ct., at 1411. We are not ***339** yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools—Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and ****742** sometimes require immediate, effective action." *Goss v. Lopez*, 419 U.S., at 580, 95 S.Ct., at 739. Accordingly, we have recognized ***340** that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.*, at 582–583, 95 S.Ct., at 740; *Ingraham v. Wright*, 430 U.S., at 680–682, 97 S.Ct., at 1417–1418.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school

environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara v. Municipal Court,* 387 U.S., at 532–533, 87 S.Ct., at 1733, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. See, *e.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 273, 93 S.Ct. 2535, 2540, 37 L.Ed.2d 596 (1973); *Sibron v. New York,* 392 U.S. 40, 62–66, 88 S.Ct. 1889, 1902–1904, 20 L.Ed.2d 917 (1968). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required." *Almeida-Sanchez v. United States, supra,* 413 U.S., at 277, 93 S.Ct., at 2541 (POWELL, ***341** J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. See, *e.g., Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975); *Delaware v. Prouse,* 440 U.S. 648, 654–655, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); cf. *Camara v. Municipal Court, supra,* 387 U.S., at 534–539, 87 S.Ct., at 1733–1736. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

[5] **[6]** **[7]** **[8]** We join the majority of courts that have examined this issue [6] in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether ****743** the ... action was justified at its inception," *Terry v. Ohio,* 392 U.S., at 20, 88 S.Ct., at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official [7] will be ***342** "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. [8] Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. [9]

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools ***343** nor authorize unrestrained intrusions upon the privacy of schoolchildren. 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 and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

[9] There remains the question of the legality of the search in this case. We ****744** recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the

search was in no sense unreasonable for Fourth Amendment purposes. [10]

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second *344 the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. [11] Second, even assuming that a search of T.L.O.'s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that *345 T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had "a good hunch." 94 N.J., at 347, 463 A.2d, at 942.

[10] Both these conclusions are implausible. T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable **745 or less probable than it would be without the evidence." Fed.Rule Evid. 401. The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. See *Warden v. Hayden*, 387 U.S. 294, 306–307, 87 S.Ct. 1642, 1649–1650, 18 L.Ed.2d 782 (1967). Thus, if Mr. Choplick in fact had a reasonable suspicion that T.L.O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation. *Ibid.*

[11] Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and *346 if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch,' " *Terry v. Ohio*, 392 U.S., at 27, 88 S.Ct., at 1883; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). Of course, even if the teacher's report were true, T.L.O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment ...." *Hill v. California*, 401 U.S. 797, 804, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971). Because the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes. [12]

[12] *347 Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick's belief that the

rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying **746 marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence *348 from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

115 S.Ct. 2386
Supreme Court of the United States

VERNONIA SCHOOL DISTRICT 47J, Petitioner,
v.
Wayne ACTON, et ux., etc.

No. 94–590. | Argued March 28, 1995. | Decided June 26, 1995.

Student and his parents brought action against school district, challenging random urinalysis requirement for participation in interscholastic athletics. The United States District Court for the District of Oregon, Malcolm F. Marsh, J., upheld policy, 796 F.Supp. 1354, and student appealed. The Court of Appeals, Fernandez, J., 23 F.3d 1514, reversed and remanded, and certiorari review was sought. The Supreme Court, Justice Scalia, held that public school district's student athlete drug policy did not violate student's federal or state constitutional right to be free from unreasonable searches.

Vacated and remanded.

Justice Ginsburg, concurred and filed opinion.

Justice O'Connor dissented and filed opinion in which Justice Stevens and Souter, joined.

**2387 *Syllabus* *

*646 Motivated by the discovery that athletes were leaders in the student drug culture and concern that drug use increases the risk of sports-related injury, petitioner school district (District) adopted the Student Athlete Drug Policy (Policy), which authorizes random urinalysis drug testing of students who participate in its athletics programs. Respondent Acton was denied participation in his school's football program when he and his parents (also respondents) refused to consent to the testing. They then filed this suit, seeking declaratory and injunctive relief on the grounds that the Policy violated the Fourth and Fourteenth Amendments and the Oregon Constitution. The District Court denied the claims, but the Court of Appeals reversed, holding that the Policy violated both the Federal and State Constitutions.

Held: The Policy is constitutional under the Fourth and Fourteenth Amendments. Pp. 2390–2397.

(a) State-compelled collection and testing of urine constitutes a "search" under the Fourth Amendment. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639. Where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, the "reasonableness" of a search is judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests. Pp. 2390–2391.

(b) The first factor to be considered in determining reasonableness is the nature of the privacy interest on which the search intrudes. Here, the subjects of the Policy are children who have been committed to the temporary custody of the State as schoolmaster; in that capacity, the State may exercise a degree of supervision and control greater than it could exercise over free adults. The requirements that public school children submit to physical examinations and be vaccinated indicate that they have a lesser privacy **2388 expectation with regard to medical examinations and procedures than the general population. Student athletes have even less of a legitimate privacy expectation, for an element of communal undress is inherent in athletic participation, and athletes are *647 subject to preseason physical exams and rules regulating their conduct. Pp. 2391–2393.

(c) The privacy interests compromised by the process of obtaining urine samples under the Policy are negligible, since the conditions of collection are nearly identical to those typically encountered in public restrooms. In addition, the tests look only for standard drugs, not medical conditions, and the results are released to a limited group. Pp. 2393–2394.

(d) The nature and immediacy of the governmental concern at issue, and the efficacy of this means for meeting it, also favor a finding of reasonableness. The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted. Moreover, the Policy is directed more narrowly to drug use by athletes, where the risk of physical harm to the user and other players is high. The District Court's conclusion that the District's concerns were immediate is not clearly erroneous, and it is self-evident that a drug problem largely caused by athletes, and of particular danger to athletes, is effectively addressed by ensuring that athletes do not use drugs. The Fourth Amendment does not require that the "least intrusive" search be conducted, so respondents' argument that the drug

testing could be based on suspicion of drug use, if true, would not be fatal; and that alternative entails its own substantial difficulties. Pp. 2394–2396.

23 F.3d 1514 (CA9 1994), vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, *post*, p. 2397. O'CONNOR, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 2397.

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***648** Thomas M. Christ, Portland, OR, for respondents.

Opinion

Justice SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I

A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. ***649** Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District ****2389** Court found, athletes were the leaders of the drug culture. 796 F.Supp. 1354, 1357 (Ore.1992). This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. According to the District Court:

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

At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss ***650** the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the ***651** request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

****2390** If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

C

In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 9, of the Oregon ***652** Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. 796 F.Supp., at 1355. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments and Article I, § 9, of the Oregon Constitution. 23 F.3d 1514 (1994). We granted certiorari. 513 U.S. 1013, 115 S.Ct. 571, 130 L.Ed.2d 488 (1994).

II

[1] The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins v. United States*, 364 U.S. 206, 213, 80 S.Ct. 1437, 1441–1442, 4 L.Ed.2d 1669 (1960), including public school officials, *New Jersey v. T.L.O.*, 469 U.S. 325, 336–337, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 (1985). In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989), we held that state-compelled collection and testing of urine, such as that required by the Policy, constitutes a "search" subject to the demands of the Fourth Amendment. See also *Treasury*

Employees v. Von Raab, 489 U.S. 656, 665, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685 (1989).

[2] As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, [1] whether a particular search meets the reasonableness standard " 'is judged by balancing *653 its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *Skinner, supra*, at 619, 109 S.Ct., at 1414 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979)). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant, *Skinner, supra*, at 619, 109 S.Ct., at 1414. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the **2391 reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987) (internal quotation marks omitted).

We have found such "special needs" to exist in the public school context. There, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *T.L.O.*, 469 U.S., at 340, 341, 105 S.Ct., at 742. The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, " 'the Fourth Amendment imposes no irreducible requirement of such suspicion,' " *id.*, at 342, n. 8, 105 S.Ct., at 743, n. 8 (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 560–561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976)). We have upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, see *Skinner, supra;* to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, *654 see *Von Raab, supra;* and to maintain automobile checkpoints looking for illegal immigrants and contraband, *Martinez–Fuerte, supra*, and drunk drivers, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).

III

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T.L.O.*, 469 U.S., at 338, 105 S.Ct., at 741. What expectations are legitimate varies, of course, with context, *id.*, at 337, 105 S.Ct., at 740, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin, supra*, we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendmen[t]," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." 483 U.S., at 873, 875, 107 S.Ct., at 3168, 3169. Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. See 59 Am.Jur.2d, Parent and Child § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster *655 is the very prototype of that status. As Blackstone describes it, a parent "may ... delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer

the purposes for which he is employed." 1 W. Blackstone, Commentaries on the Laws of England 441 (1769).

[3] In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, **2392 which of course is not subject to constitutional constraints. 469 U.S., at 336, 105 S.Ct., at 740. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,' " *ibid.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 662, 97 S.Ct. 1401, 1407, 51 L.Ed.2d 711 (1977)), and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses, *T.L.O., supra*, at 336, 105 S.Ct., at 740. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." 469 U.S., at 339, 105 S.Ct., at 741. While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," see *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200, 109 S.Ct. 998, 1005–1006, 103 L.Ed.2d 249 (1989), we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 3165, 92 L.Ed.2d 549 (1986), with the power and indeed the duty to "inculcate the habits and manners of civility," *id.*, at 681, 106 S.Ct., at 3163 (internal quotation marks omitted). Thus, while children assuredly do not "shed their constitutional *656 rights ... at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969), the nature of those rights is what is appropriate for children in school. See, *e.g.*, *Goss v. Lopez*, 419 U.S. 565, 581–582, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975) (due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred"); *Fraser, supra*, 478 U.S., at 683, 106 S.Ct., at 3164 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); *Ingraham, supra*, 430 U.S., at 682, 97 S.Ct., at 1418 ("Imposing additional administrative safeguards [upon corporal punishment] ... would ... entail a significant intrusion into an area of primary educational responsibility").

[4] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks.... Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991–1992 school year, all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio. U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991–1992, p. 1. Particularly with regard to medical examinations and procedures, *657 therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O., supra*, 469 U.S., at 348, 105 S.Ct., at 746 (Powell, J., concurring).

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites **2393 for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (1988).

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students

generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App. 17), they must 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." Record, Exh. 2, p. 30, ¶ 8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner*, 489 U.S., at 627, 109 S.Ct., at 1418–1419; *United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972).

***658 IV**

Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." 489 U.S., at 626, 109 S.Ct., at 1418. We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. *Ibid.* Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. See *id.*, at 617, 109 S.Ct., at 1413. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function. 796 F.Supp., at 1364; see also 23 F.3d, at 1521.[2]

****2394 *659** Respondents argue, however, that the District's Policy is in fact more intrusive than this suggests, because it requires the students, if they are to avoid sanctions for a falsely positive test, to identify *in advance* prescription medications they are taking. We agree that this raises some cause for concern. In *Von Raab*, we flagged as one of the salutary features of the Customs Service drug-testing program the fact that employees were not required to disclose medical information unless they tested positive, and, even then, the information was supplied to a licensed physician rather than to the Government employer. See *Von Raab*, 489 U.S., at 672–673, n. 2, 109 S.Ct., at 1394–1395, n. 2. On the other hand, we 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." 489 U.S., at 626, n. 7, 109 S.Ct., at 1418, n. 7. It can be argued that, in *Skinner*, the disclosure went only to the medical personnel taking the sample, and the Government personnel analyzing it, see *id.*, at 609, 109 S.Ct., at 1408–1409, but see *id.*, at 610, 109 S.Ct., at 1409 (railroad personnel responsible for forwarding the sample, and presumably accompanying information, to the Government's testing lab); and that disclosure to teachers and coaches—to persons who personally *know* the student—is a greater invasion of privacy. Assuming for the sake of argument ***660** that both those propositions are true, we do not believe they establish a difference that respondents are entitled to rely on here.

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I ... authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." App. 10–11. While the practice of the District seems to have been to have a school official take medication information from the student at the time of the test, see *id.*, at 29, 42, that practice is not set forth in, or required by, the Policy, which says simply: "Student athletes who ... are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." *Id.*, at 8. 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. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we reach the same conclusion as in *Skinner*: that the invasion of privacy was not significant.

V

[5] Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. In both *Skinner* and *Von Raab*, we characterized the government interest motivating the search as "compelling." *Skinner, supra*, 489 U.S., at 628, 109 S.Ct., at 1419 (interest in preventing railway accidents); *Von Raab, supra*, 489 U.S., at 670, 109 S.Ct., at 1393 (interest *661 in insuring fitness of customs officials to interdict drugs and handle firearms). Relying on these cases, the District Court held that because the District's program also called for drug testing in the absence of individualized suspicion, the District "must demonstrate a 'compelling need' for the program." 796 F.Supp., at 1363. The Court of Appeals appears to have agreed with this view. See 23 F.3d, at 1526. It is a mistake, however, 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 **2395 search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring 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 in *Von Raab, supra*, 489 U.S., at 668, 109 S.Ct., at 1392, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra*, at 628, 109 S.Ct., at 1419. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." Hawley, The Bumpy Road to Drug-Free Schools, 72 Phi Delta Kappan 310, 314 (1990). See also Estroff, Schwartz, & Hoffmann, Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects, 28 Clinical Pediatrics 550 *662 Dec. 1989); Kandel, Davies, Karus, & Yamaguchi, The Consequences in Young Adulthood of Adolescent Drug Involvement, 43 Arch. Gen. Psychiatry 746 (Aug. 1986). And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an "artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them a "very dangerous drug when used during exercise of any type." Hawkins, Drugs and Other Ingesta: Effects on Athletic Performance, in H. Appenzeller, Managing Sports and Risk Management Strategies 90, 90–91 (1993). Marijuana causes "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.*, at 94. Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction." *Ibid.*

As for the immediacy of the District's concerns: 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 *663 in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,' " and that "the rebellion was being fueled

by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F.Supp., at 1357. That is an immediate crisis of greater proportions than existed in *Skinner*, where we upheld the Government's drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. See *Skinner*, 489 U.S., at 607, 109 S.Ct., at 1407–1408. And of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs officials. See *Von Raab*, 489 U.S., at 673, 109 S.Ct., at 1395; *id.*, at 683, 109 S.Ct., at 1400 (SCALIA, J., dissenting).

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by **2396 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. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45–46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. *Skinner*, *supra*, at 629, n. 9, 109 S.Ct., at 1420, n. 9 (collecting cases). Respondents' alternative entails substantial difficulties—if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug *664 testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. Cf. *Skinner*, *supra*, at 628, 109 S.Ct., at 1419 (quoting 50 Fed.Reg. 31526 (1985)) (a drug impaired individual "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.' "); *Goss*, 419 U.S., at 594, 95 S.Ct., at 746 (Powell, J., dissenting) ("There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature ...") (footnote omitted). In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.[3]

VI

Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met *665 by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: 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.[4] Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's **2397 desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, see *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987); so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this districtwide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

*666 * * *

The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9, of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, concurring.

The Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics. *Ante,* at 2389, 2392–2393 (reduced privacy expectation and closer school regulation of student athletes), 2395 (drug use by athletes risks immediate physical harm to users and those with whom they play). Correspondingly, the most severe sanction allowed under the District's policy is suspension from extracurricular athletic programs. *Ante,* at 2389. I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school. Cf. *United States v. Edwards,* 498 F.2d 496, 500 (CA2 1974) (Friendly, J.) (in contrast to search without notice and opportunity to avoid examination, airport search of passengers and luggage is avoidable "by choosing not to travel by air") (internal quotation marks omitted).

Justice O'CONNOR, with whom Justice STEVENS and Justice SOUTER join, dissenting.

The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. See U.S. Dept. of ***667** Education, National Center for Education Statistics, Digest of Education Statistics 58 (1994) (Table 43). 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.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing whom to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket searches, because they can involve "thousands or millions" of searches, "pos[e] a greater threat to liberty" than do suspicion-based ones, which "affec[t] one person at a time," *Illinois v. Krull,* 480 U.S. 340, 365, 107 S.Ct. 1160, 1175, 94 L.Ed.2d 364 (1987) (O'CONNOR, J., dissenting). Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying ****2398** wrongdoing, the costs of such a regime, one would think, are minimal.

But whether a blanket search is "better," *ante,* at 2396, than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy grounds which is better and which is worse. For 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 ***668** in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.

I

A

In *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court explained that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Id.,* at 147, 45 S.Ct., at 283. Applying this standard, the Court first held that a search of a car was not unreasonable merely because it was warrantless; because obtaining a warrant is impractical for an easily movable object such as a car, the Court explained, a warrant is not required. The Court also held, however, that a warrantless car search *was* unreasonable unless supported by some level of individualized suspicion, namely, probable cause. Significantly, the Court did not base its conclusion on the *express* probable cause requirement contained in the Warrant Clause, which, as just noted, the Court found inapplicable. Rather, the Court rested its views on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted" and "[what] will conserve public interests as well as the interests and rights of individual citizens." *Id.,* at 149, 45 S.Ct., at 283–284. With respect to the "rights of individual citizens," the Court eventually offered the simple yet powerful intuition that "those lawfully within

the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 154, 45 S.Ct., at 285.

More important for the purposes of this case, the Court clearly indicated that evenhanded treatment was no substitute for the individualized suspicion requirement:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on *669 the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.*, at 153–154, 45 S.Ct., at 285.

The *Carroll* Court's view that blanket searches are "intolerable and unreasonable" is well grounded in history. As recently confirmed in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken, see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (Ph.D. Dissertation at Claremont Graduate School) (hereinafter Cuddihy), what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority. See *id.*, at 1402, 1499, 1555; see also Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 Mem.St.U.L.Rev. 483, 528 (1994); Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S.Cal.L.Rev. 1, 9–12 (1994); L. Levy, Original Intent and the Framers' Constitution 221–246 (1988). Although, ironically, such warrants, writs, and statutes typically required individualized suspicion, see, *e.g.*, Cuddihy 1140 ("Typical of the American warrants of 1761–76 was Starke's 'tobacco' warrant, which commanded its bearer to 'enter any *suspected* Houses' ") (emphasis added), such requirements were subjective and largely unenforceable. Accordingly, these various forms of authority led in practice to "virtually unrestrained," and hence "general," searches. J. Landynski, Search and Seizure and the Supreme Court 20 (1966). To be **2399 sure, the Fourth Amendment, in the Warrant Clause, prohibits by name only searches by general warrants. But that was only because the abuses of the general warrant were particularly vivid in the minds of the Framers' generation, Cuddihy 1554–1560, and not because the Framers viewed other kinds of general searches as any less unreasonable. "Prohibition of the general warrant was part of a *670 larger scheme to extinguish general searches categorically." *Id.*, at 1499.

More important, there is no indication in the historical materials that the Framers' opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to *every* person in a given group. See *Delaware v. Prouse*, 440 U.S. 648, 664, 99 S.Ct. 1391, 1401–1402, 59 L.Ed.2d 660 (1979) (REHNQUIST, J., dissenting) (referring to this as the " 'misery loves company' " theory of the Fourth Amendment). On the contrary, although general searches were typically arbitrary, they were not invariably so. Some general searches, for example, were of the arguably evenhanded "door-to-door" kind. Cuddihy 1091; see also *id.*, at 377, 1502, 1557. Indeed, Cuddihy's descriptions of a few blanket searches suggest they may have been considered *more* worrisome than the typical general search. See *id.*, at 575 ("One type of warrant [between 1700 and 1760] went beyond a general search, in which the searcher entered and inspected suspicious places, by requiring him to search entire categories of places whether he suspected them or not"); *id.*, at 478 ("During the exigencies of Queen Anne's War, two colonies even authorized searches in 1706 that extended to entire geographic areas, not just to suspicious houses in a district, as conventional general warrants allowed").

Perhaps most telling of all, as reflected in the text of the Warrant Clause, the particular way the Framers chose to curb the abuses of general warrants—and by implication, *all* general searches—was not to impose a novel "evenhandedness" requirement; it was to retain the individualized suspicion requirement contained in the typical general warrant, but to make that requirement meaningful and enforceable, for instance, by raising the required level of individualized suspicion to objective probable cause. See U.S. Const., Amdt. 4. So, for example, when the same Congress that *671 proposed the Fourth Amendment authorized duty collectors to search for concealed goods subject to import duties, specific warrants were required for searches on land; but even for searches at sea, where warrants were impractical and thus not required, Congress nonetheless limited officials to searching only those ships and vessels "in which [a collector] *shall have reason to suspect* any goods, wares or merchandise subject to duty shall be concealed." The Collection Act of July 31, 1789, § 24,

1 Stat. 43 (emphasis added); see also Cuddihy 1490–1491 ("The Collection Act of 1789 was [the] most significant [of all early search statutes], for it identified the techniques of search and seizure that the framers of the amendment believed reasonable while they were framing it"). Not surprisingly, the *Carroll* Court relied on this statute and other subsequent ones like it in arriving at its views. See *Carroll*, 267 U.S., at 150–151, 154, 45 S.Ct., at 284, 285; cf. Clancy, *supra*, at 489 ("While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures").

True, not all searches around the time the Fourth Amendment was adopted required individualized suspicion—although most did. A search incident to arrest was an obvious example of one that did not, see Cuddihy 1518, but even those searches shared the essential characteristics that distinguish suspicion-based searches from abusive general searches: they only "affec[t] one person at a time," *Krull*, 480 U.S., at 365, 107 S.Ct., at 1175 (O'CONNOR, J., dissenting), and they are generally avoidable by refraining from wrongdoing. See *supra*, at 2397–2398. Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment.

**2400 The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context, see *672 *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (invalidating evenhanded, nonaccusatory patdown for weapons of all patrons in a tavern in which there was probable cause to think drug dealing was going on), at least where the search is more than minimally intrusive, see *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (upholding the brief and easily avoidable detention, for purposes of observing signs of intoxication, of all motorists approaching a roadblock). It is worth noting in this regard that state-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, see, e.g., *Bell v. Wolfish*, 441 U.S. 520, 558–560, 99 S.Ct. 1861, 1884–1885, 60 L.Ed.2d 447 (1979) (visual body cavity searches), is still "particularly destructive of privacy and offensive to personal dignity." *Treasury Employees v. Von Raab*, 489 U.S. 656, 680, 109 S.Ct. 1384, 1398, 103 L.Ed.2d 685 (1989) (SCALIA, J., dissenting); see also *ante*, at 2393; *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989). We have not hesitated to treat monitored bowel movements as highly intrusive (even in the special border search context), compare *United States v. Martinez–Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (brief interrogative stops of all motorists crossing certain border checkpoint reasonable without individualized suspicion), with *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (monitored bowel movement of border crossers reasonable only upon reasonable suspicion of alimentary canal smuggling), and it is not easy to draw a distinction. See Fried, Privacy, 77 Yale L.J. 475, 487 (1968) ("[I]n our culture the excretory functions are shielded by more or less absolute privacy"). And certainly monitored urination combined with urine testing is more intrusive than some personal searches we have said trigger Fourth Amendment protections in the past. See, e.g., *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003–2004, 36 L.Ed.2d 900 (1973) (Stewart, J.) (characterizing the scraping of dirt from under a person's fingernails as a " 'severe, though brief, intrusion upon cherished personal security' ") (citation omitted). Finally, the collection and testing of urine is, of course, a search of a person, one of only four categories of suspect *673 searches the Constitution mentions by name. See U.S. Const., Amdt. 4 (listing "persons, houses, papers, and effects"); cf. Cuddihy 835, 1518, 1552, n. 394 (indicating long history of outrage at personal searches before 1789).

Thus, it remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime. 3 W. LaFave, Search and Seizure § 9.5(b), pp. 551–553 (2d ed. 1987) (hereinafter LaFave). And this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods. Nor could it be otherwise, for if being evenhanded were enough to justify evaluating a search regime under an open-ended balancing test, the Warrant Clause, which presupposes that there is *some* category of searches for which individualized suspicion is nonnegotiable, see 2 LaFave § 4.1, at 118, would be a dead letter.

Outside the criminal context, however, in response to the exigencies of modern life, our cases have upheld several evenhanded blanket searches, including some that are more than minimally intrusive, after balancing the invasion of privacy against the government's strong need. Most of these cases, of course, are distinguishable insofar as they involved searches either not of a personally intrusive nature, such as searches of closely regulated businesses, see, e.g., *New York*

v. Burger, 482 U.S. 691, 699–703, 107 S.Ct. 2636, 2642–2644, 96 L.Ed.2d 601 (1987); cf. Cuddihy 1501 ("Even the states with the strongest constitutional restrictions on general searches had long exposed commercial establishments to warrantless inspection"), or arising in unique contexts such as prisons, see, *e.g., Wolfish, supra*, 441 U.S., at 558–560, 99 S.Ct., at 1884–1885 (visual body cavity searches of prisoners following contact visits); cf. Cuddihy **2401 1516–1519, 1552–1553 (indicating that searches incident to arrest and prisoner searches were the only common personal searches at time of founding). This certainly explains why Justice SCALIA, in his dissent in our recent *Von Raab* decision, found it significant that "[u]ntil *674 today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrong doing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Von Raab, supra*, 489 U.S., at 680, 109 S.Ct., at 1398 (citation omitted).

In any event, in many of the cases that can be distinguished on the grounds suggested above and, more important, in *all* of the cases that cannot, see, *e.g., Skinner, supra* (blanket drug testing scheme); *Von Raab, supra* (same); cf. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (area-wide searches of private residences), we upheld the suspicionless search only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented. In *Skinner*, for example, we stated outright that " 'some quantum of individualized suspicion' " is "usually required" under the Fourth Amendment, *Skinner, supra*, at 624, 109 S.Ct., at 1417, quoting *Martinez–Fuerte, supra*, at 560, 96 S.Ct., at 3084, and we built the requirement into the test we announced: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion*, a search may be reasonable despite the absence of such suspicion," 489 U.S., at 624, 109 S.Ct. at 1417 (emphasis added). The obvious negative implication of this reasoning is that, if such an individualized suspicion requirement would *not* place the government's objectives in jeopardy, the requirement should not be forsaken. See also *Von Raab, supra*, at 665–666, 109 S.Ct., at 1390–1391.

Accordingly, we upheld the suspicionless regime at issue in *Skinner* on the firm understanding that a requirement of individualized suspicion for testing train operators for drug or alcohol impairment following serious train accidents would be unworkable because "the scene of a serious rail *675 accident is chaotic." *Skinner*, 489 U.S., at 631, 109 S.Ct., at 1420–1421. (Of course, it could be plausibly argued that the fact that testing occurred only *after* train operators were involved in serious train accidents amounted to an individualized suspicion requirement in all but name, in light of the record evidence of a strong link between serious train accidents and drug and alcohol use.) We have performed a similar inquiry in the other cases as well. See *Von Raab*, 489 U.S., at 674, 109 S.Ct., at 1395 (suspicion requirement for searches of customs officials for drug impairment impractical because "not feasible to subject [such] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments"); *Camara, supra*, 387 U.S., at 537, 87 S.Ct., at 1735 (suspicion requirement for searches of homes for safety code violations impractical because conditions such as "faulty wiring" not observable from outside of house); see also *Wolfish*, 441 U.S., at 559–560, n. 40, 99 S.Ct., at 1884–1885, n. 40 (suspicion requirement for searches of prisoners for smuggling following contact visits impractical because observation necessary to gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford"); *Martinez–Fuerte*, 428 U.S., at 557, 96 S.Ct., at 3082–3083 ("A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); *United States v. Edwards*, 498 F.2d 496, 500 (CA2 1974) (Friendly, J.) (suspicion-based searches of airport passengers' carry-on luggage impractical because of the great number of plane travelers and "conceded inapplicability" **2402 of the profile method of detecting hijackers).

Moreover, an individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people. See, *e.g., Camara, supra*, at 535, 87 S.Ct., at 1734 (even one safety code *676 violation can cause "fires and epidemics [that] ravage large urban areas"); *Skinner, supra*, 489 U.S., at 628, 109 S.Ct., at 1419 (even one drug- or alcohol-impaired train operator can lead to the "disastrous consequences" of a train wreck, such as "great human loss"); *Von Raab, supra*, at 670, 674, 677, 109 S.Ct., at 1393, 1395, 1397 (even

one customs official caught up in drugs can, by virtue of impairment, susceptibility to bribes, or indifference, result in the noninterdiction of a "sizable drug shipmen[t]," which eventually injures the lives of thousands, or to a breach of "national security"); *Edwards, supra,* at 500 (even one hijacked airplane can destroy " 'hundreds of human lives and millions of dollars of property' ") (citation omitted).

B

The instant case stands in marked contrast. One searches today's majority opinion in vain for recognition that history and precedent establish that individualized suspicion is "usually required" under the Fourth Amendment (regardless of whether a warrant and probable cause are also required) and that, in the area of intrusive personal searches, the only recognized exception is for situations in which a suspicion-based scheme would be likely ineffectual. See *supra,* at 2401–2402. Far from acknowledging anything special about individualized suspicion, the Court treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative—that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability.

As an initial matter, I have serious doubts whether the Court is right that the District reasonably found that the lesser intrusion of a suspicion-based testing program outweighed its genuine concerns for the adversarial nature of such a program, and for its abuses. See *ante,* at 2395–2396. For one thing, there are significant safeguards against abuses. The fear that a suspicion-based regime will lead to the testing of "troublesome but not drug-likely" students, ***677** *ante,* at 2396, for example, ignores that the required level of suspicion in the school context is objectively *reasonable* suspicion. In this respect, the facts of our decision in *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), should be reassuring. There, we found reasonable suspicion to search a ninth-grade girl's purse for cigarettes after a teacher caught the girl smoking in the bathroom with a companion who admitted it. See *id.,* at 328, 345–346, 105 S.Ct., at 735–736, 744–745. Moreover, any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential.

For another thing, the District's concern for the adversarial nature of a suspicion-based regime (which appears to extend even to those who are *rightly* accused) seems to ignore the fact that such a regime would not exist in a vacuum. Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition. The District's own elaborate disciplinary scheme is reflected in its handbook, which, among other things, lists the following disciplinary "problem areas" carrying serious sanctions: "DEFIANCE OF AUTHORITY," "DISORDERLY OR DISRUPTIVE CONDUCT INCLUDING FOUL LANGUAGE," "AUTOMOBILE USE OR MISUSE," "FORGERY OR LYING," "GAMBLING," "THEFT," "TOBACCO," "MISCHIEF," "VANDALISM," "RECKLESSLY ENDANGERING," "MENACING OR HARASSMENT," "ASSAULT," "FIGHTING," "WEAPONS," "EXTORTION," "EXPLOSIVE DEVICES," and "ARSON." Record, Exh. 2, p. 11; see also *id.,* at 20–21 (listing rules regulating dress and grooming, public displays of affection, ****2403** and the wearing of hats inside); cf. *id.,* at 8 ("RESPONSIBILITIES OF SCHOOLS" include "To develop and distribute to parents and students reasonable rules ***678** and regulations governing student behavior and attendance" and "To provide fair and reasonable standards of conduct and to enforce those standards through appropriate disciplinary action"). The high number of disciplinary referrals in the record in this case illustrates the District's robust scheme in action.

In addition to overstating its concerns with a suspicion-based program, the District seems to have *understated* the extent to which such a program is less intrusive of students' privacy. By invading the privacy of a few students rather than many (nationwide, of thousands rather than millions), and by giving potential search targets substantial control over whether they will, in fact, be searched, a suspicion-based scheme is *significantly* less intrusive.

In any event, whether the Court is right that the District reasonably weighed the lesser intrusion of a suspicion-based scheme against its policy concerns is beside the point. As stated, a suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.

But having misconstrued the fundamental role of the individualized suspicion requirement in Fourth Amendment analysis, the Court never seriously engages the practicality of such a requirement in the instant case. And that failure is crucial because nowhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms. See *T.L.O.*, 469 U.S., at 339, 105 S.Ct., at 741 ("[A] proper educational environment requires close supervision of schoolchildren").

*679 The record here indicates that the Vernonia schools are no exception. The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision. See *id.*, at 340–342, 105 S.Ct., at 742–743 (warrant and probable cause not required for school searches; reasonable suspicion sufficient). Small groups of students, for example, were observed by a teacher "passing joints back and forth" across the street at a restaurant before school and during school hours. Tr. 67 (Apr. 29, 1992). Another group was caught skipping school and using drugs at one of the students' houses. See *id.*, at 93–94. Several students actually *admitted* their drug use to school officials (some of them being caught with marijuana pipes). See *id.*, at 24. One student presented himself to his teacher as "clearly obviously inebriated" and had to be sent home. *Id.*, at 68. Still another was observed dancing and singing at the top of his voice in the back of the classroom; when the teacher asked what was going on, he replied, "Well, I'm just high on life." *Id.*, at 89–90. To take a final example, on a certain road trip, the school wrestling coach smelled marijuana smoke in a motel room occupied by four wrestlers, see *id.*, at 110–112, an observation that (after some questioning) would probably have given him reasonable suspicion to test one or all of them. Cf. 4 LaFave § 10.11(b), at 169 ("[I]n most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test").

In light of all this evidence of drug use by particular students, there is a substantial basis for concluding that a vigorous regime of suspicion-based testing (for which the District appears already to have rules in place, see Record, Exh. 2, at 14, 17) would have gone a long way toward solving Vernonia's *680 school drug problem while preserving the **2404 Fourth Amendment rights of James Acton and others like him. And were there any doubt about such a conclusion, it is removed by indications in the record that suspicion-based testing could have been supplemented by an equally vigorous campaign to have Vernonia's parents encourage their children to submit to the District's *voluntary* drug testing program. See *id.*, at 32 (describing the voluntary program); *ante*, at 2396 (noting widespread parental support for drug testing). In these circumstances, the Fourth Amendment dictates that a mass, suspicionless search regime is categorically unreasonable.

I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be *as* effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. "But there is nothing new in the realization" that Fourth Amendment protections come with a price. *Arizona v. Hicks*, 480 U.S. 321, 329, 107 S.Ct. 1149, 1155, 94 L.Ed.2d 347 (1987). Indeed, the price we pay is higher in the criminal context, given that police do not closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause.

The principal counterargument to all this, central to the Court's opinion, is that the Fourth Amendment is more lenient with respect to school searches. That is no doubt correct, for, as the Court explains, *ante*, at 2391–2392, schools have traditionally had special guardian-like responsibilities for children that necessitate a degree of constitutional leeway. This principle explains the considerable Fourth Amendment leeway we gave school officials in *T.L.O.* In that case, we held that children at school do not enjoy two of the Fourth Amendment's traditional categorical protections against unreasonable searches and seizures: the warrant requirement *681 and the probable cause requirement. See *T.L.O.*, 469 U.S., at 337–343, 105 S.Ct., at 740–744. And this was true even though the same children enjoy such protections "in a nonschool setting." *Id.*, at 348, 105 S.Ct., at 746 (Powell, J., concurring).

The instant case, however, asks whether the Fourth Amendment is even more lenient than that, *i.e.*, whether it

is *so* lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people. It is not at all clear that people in *prison* lack this categorical protection, see *Wolfish*, 441 U.S., at 558–560, 99 S.Ct., at 1884–1885 (upholding certain suspicionless searches of prison inmates); but cf. *supra*, at 2401 (indicating why suspicion requirement was impractical in *Wolfish*), and we have said "[W]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *T.L.O., supra*, at 338–339, 105 S.Ct., at 741. Thus, if we are to mean what we often proclaim—that students do not "shed their constitutional rights ... at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969)—the answer must plainly be no.[1]

**2405 *682 For the contrary position, the Court relies on cases such as *T.L.O., Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), and *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). See *ante*, at 2391–2392. But I find the Court's reliance on these cases ironic. If anything, they affirm that schools have substantial constitutional leeway in carrying out their traditional mission of responding to *particularized* wrongdoing. See *T.L.O., supra* (leeway in investigating particularized wrongdoing); *Ingraham, supra* (leeway in punishing particularized wrongdoing); *Goss, supra* (leeway in choosing procedures by which particularized wrongdoing is punished).

By contrast, intrusive, blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise. As James Acton's father said on the witness stand, "[suspicionless testing] sends a message to children that are trying to be responsible citizens ... that they have to prove that they're innocent ..., and I think that kind of sets a bad tone for citizenship." Tr. 9 (Apr. 29, 1992).

I find unpersuasive the Court's reliance, *ante*, at 2392, on the widespread practice of physical examinations and vaccinations, which are both blanket searches of a sort. Of course, for these practices to have *any* Fourth Amendment significance, the Court has to assume that these physical exams and vaccinations are typically "required" to a similar extent that urine testing and collection is required in the instant case, *i.e.*, that they are required regardless of parental *683 objection and that some meaningful sanction attaches to the failure to submit. In any event, without forming any particular view of such searches, it is worth noting that a suspicion requirement for vaccinations is not merely impractical; it is nonsensical, for vaccinations are not searches *for anything in particular* and so there is nothing about which to be suspicious. Nor is this saying anything new; it is the same theory on which, in part, we have repeatedly upheld certain inventory searches. See, *e.g., South Dakota v. Opperman*, 428 U.S. 364, 370, n. 5, 96 S.Ct. 3092, 3097, n. 5, 49 L.Ed.2d 1000 (1976) ("The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions"). As for physical examinations, the practicability of a suspicion requirement is highly doubtful because the conditions for which these physical exams ordinarily search, such as latent heart conditions, do not manifest themselves in observable behavior the way school drug use does. See *supra*, at 2403.

It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive. These facts may explain the absence of Fourth Amendment challenges to such searches. By contrast, although I agree with the Court that the accusatory nature of the District's testing program is *diluted* by making it a blanket one, any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student's perspective, the motives for the program notwithstanding; and for the same reason, the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably—and quite reasonably—understood as punishment. The best proof that the District's testing program is to *some* extent accusatory can be found in James Acton's own explanation on the witness stand as to why he did not want to submit to drug testing: "Because I feel that they have no *684 reason to think I was taking drugs." Tr. 13 (Apr. 29, 1992). It is hard to think of a manner of explanation that resonates more intensely in our Fourth Amendment tradition than this.

**2406 II

I do not believe that suspicionless drug testing is justified on these facts. But even if I agreed that some such testing were reasonable here, I see two other Fourth Amendment flaws in the District's program.[2] First, and most serious, there is virtually no evidence in the record of a drug problem at the Washington Grade School, which includes the seventh and eighth grades, and which Acton attended when this litigation began. This is not surprising, given that, of the four witnesses who testified to drug-related incidents, three were teachers and/or coaches at the high school, see Tr. 65; *id.*, at 86; *id.*, at 99, and the fourth, though the principal of the grade school at the time of the litigation, had been employed as principal of the high school during the years leading up to (and beyond) the implementation of the drug testing policy. See *id.*, at 17. The only evidence of a grade school drug problem that my review of the record uncovered is a "guarantee" by the late-arriving grade school principal that "our problems we've had in '88 and '89 didn't start at the high school level. They started in the elementary school." *Id.*, at 43. But I would hope that a single assertion of this sort would not serve as an adequate basis on which to uphold mass, suspicionless drug testing of two entire grades of student athletes—in Vernonia and, by the Court's reasoning, in other school districts as well. Perhaps there is a drug problem at the grade school, but one would not know it from this *685 record. At the least, then, I would insist that the parties and the District Court address this issue on remand.

Second, even as to the high school, I find unreasonable the school's choice of student athletes as the class to subject to suspicionless testing—a choice that appears to have been driven more by a belief in what would pass constitutional muster, see *id.*, at 45–47 (indicating that the original program was targeted at students involved in any extracurricular activity), than by a belief in what was required to meet the District's principal disciplinary concern. Reading the full record in this case, as well as the District Court's authoritative summary of it, 796 F.Supp. 1354, 1356–1357 (Ore.1992), it seems quite obvious that the true driving force behind the District's adoption of its drug testing program was the need to combat the rise in drug-related disorder and disruption in its classrooms and around campus. I mean no criticism of the strength of that interest. On the contrary, where the record demonstrates the existence of such a problem, that interest seems self-evidently compelling. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *T.L.O.*, 469 U.S., at 350, 105 S.Ct., at 747 (Powell, J., concurring). And the record in this case surely demonstrates there was a drug-related discipline problem in Vernonia of " 'epidemic proportions.' " 796 F.Supp., at 1357. The evidence of a drug-related sports injury problem at Vernonia, by contrast, was considerably weaker.

On this record, then, it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus, see Record, Exh. 2, at 9, 11—disruption that had a strong nexus to drug use, as the District established at trial. Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior, *686 over the likelihood that they would be tested. Moreover, there would be a reduced concern for the accusatory nature of the search, because the Court's feared "badge of shame," *ante*, at 2396, would already exist, due to the antecedent accusation and finding of severe disruption. In a lesser known aspect of *Skinner*, we upheld an analogous testing scheme with little hesitation. See *Skinner*, 489 U.S., at 611, 109 S.Ct., at 1410 (describing " 'Authorization to Test for Cause' " scheme, according to which train operators would be tested "in the event of certain specific rule violations, including noncompliance **2407 with a signal and excessive speeding").

III

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

All Citations

515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564, 63 USLW 4653, 101 Ed. Law Rep. 37, 95 Daily Journal D.A.R. 8335, 95 Daily Journal D.A.R. 8341, 95 Daily Journal D.A.R. 8342

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Not until 1852 did Massachusetts, the pioneer in the "common school" movement, enact a compulsory school-attendance law, and as late as the 1870's only 14 States had such laws. R. Butts, Public Education in the United States From Revolution to Reform 102–103 (1978); 1 Children and Youth in America 467–468 (R. Bremner ed. 1970). The drug problem, and the technology of drug testing, are of course even more recent.

2 Despite the fact that, like routine school physicals and vaccinations—which the dissent apparently finds unobjectionable even though they "are both blanket searches of a sort," *post*, at 2405—the search here is undertaken for prophylactic and distinctly *non*punitive purposes (protecting student athletes from injury, and deterring drug use in the student population), see 796 F.Supp., at 1363, the dissent would nonetheless lump this search together with "evidentiary" searches, which generally require probable cause, see *supra*, at 2390, because, from the student's perspective, the test may be "regarded" or "understood" as punishment, *post*, at 2405. In light of the District Court's findings regarding the purposes and consequences of the testing, any such perception is by definition an irrational one, which is protected nowhere else in the law. In any event, our point is not, as the dissent apparently believes, *post*, at 2405, that *since* student vaccinations and physical exams are constitutionally reasonable, student drug testing must be so as well; but rather that, by reason of those prevalent practices, public school children in general, and student athletes in particular, have a diminished expectation of privacy. See *supra*, at 2392.

3 There is no basis for the dissent's insinuation that in upholding the District's Policy we are equating the Fourth Amendment status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the "categorical protection" of a "strong preference for an individualized suspicion requirement," *post*, at 2404. The case on which it relies for that proposition, *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), displays no stronger a preference for individualized suspicion than we do today. It reiterates the proposition on which we rely, that " 'elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.' " *Id.*, at 559, n. 40, 99 S.Ct., at 1884–1885, n. 40 (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 556–557, n. 12, 96 S.Ct. 3074, 3082–3083, n. 12, 49 L.Ed.2d 1116 (1976)). Even *Wolfish* 's *arguendo* "assum[ption] that the existence of less intrusive alternatives is relevant to the determination of the reasonableness of the particular search method at issue," 441 U.S., at 559, n. 40, 99 S.Ct. at 1884–1885, n. 40, does not support the dissent, for the opinion ultimately rejected the hypothesized alternative (as we do) on the ground that it would impair other policies important to the institution. See *id.*, at 560, n. 40, 96 S.Ct., at 3084, n. 40 (monitoring of visits instead of conducting body searches would destroy "the confidentiality and intimacy that these visits are intended to afford").

4 The dissent devotes a few meager paragraphs of its 21 pages to this central aspect of the testing program, see *post*, at 2404–2405, in the course of which it shows none of the interest in the original meaning of the Fourth Amendment displayed elsewhere in the opinion, see *post*, at 2398–2400. Of course at the time of the framing, as well as at the time of the adoption of the Fourteenth Amendment, children had substantially fewer "rights" than legislatures and courts confer upon them today. See 1 D. Kramer, Legal Rights of Children § 1.02, p. 9 (2d ed. 1994); Wald, Children's Rights: A Framework for Analysis, 12 U.C.D.L.Rev. 255, 256 (1979).

1 The Court says I pay short shrift to the original meaning of the Fourth Amendment as it relates to searches of public school children. See *ante*, at 2396, n. 4. As an initial matter, the historical materials on what the Framers thought of official searches of children, let alone of public school children (the concept of which did not exist at the time, see *ante*, at 2390, n. 1), are extremely scarce. Perhaps because of this, the Court does not itself offer an account of the original meaning, but rather resorts to the general proposition that children had fewer recognized rights at the time of the framing than they do today. But that proposition seems uniquely unhelpful in the present case, for although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had *greater* rights then than now. At the time of the framing, for example, the fact that a child's parents refused to authorize a private schoolmaster's search of the child would probably have rendered any such search

unlawful; after all, at common law, the source of the schoolmaster's authority over a child was a delegation of the parent's authority. See *ante,* at 2391–2392. Today, of course, the fact that a child's parents refuse to authorize a public school search of the child—as James Acton's parents refused here—is of little constitutional moment. Cf. *Ingraham v. Wright,* 430 U.S. 651, 662, n. 22, 97 S.Ct. 1401, 1408, n. 22, 51 L.Ed.2d 711 (1977) ("[P]arental approval of corporal punishment is not constitutionally required").

2 Because I agree with the Court that we may assume the District's program allows students to confine the advanced disclosure of highly personal prescription medications to the testing lab, see *ante,* at 2394, I also agree that *Skinner* controls this aspect of the case, and so do not count the disclosure requirement among the program's flaws.

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383 S.W.2d 677
Court of Appeals of Kentucky.

BOARD OF EDUCATION OF HARRODSBURG, Kentucky, et al., Appellants,
v.
Joy Burgin BENTLEY, Appellee.

Oct. 30, 1964.

Action was brought to test validity of school board regulation requiring that any student who marries shall withdraw from school, subject to being readmitted after one year. The Circuit Court, Mercer County, Gilbert M. Wilson, J., entered a judgment adjudging the regulation invalid, and an appeal was taken. The Court of Appeals, Davis, C., held that the regulation is arbitrary and unreasonable and therefore void.

Judgment affirmed.

Attorneys and Law Firms

*678 W. Earl Dean, Harrodsburg, for appellants.

John L. Keller, Harrodsburg, for appellee.

Opinion

DAVIS, Commissioner.

This appeal tests the validity of a school board regulation requiring that any student who shall marry shall withdraw from the school, subject to being readmitted after one year. The trial court adjudged that the regulation is invalid and granted a permanent injunction against enforcement of the regulation as applied to appellee.

The Board of Education of Harrodsburg Independent School District (hereinafter designated as the Board) duly adopted the questioned resolution in 1957; the text of the resolution is: 'Any student, either boy or girl, who marries, automatically must withdraw immediately from school and cannot re-enter school for one full year, and then only as a special student with permission of the principal. A special student cannot attend home room or study halls or enter into any class activities, social events or athletics. If, upon re-entering school after the year has elapsed, the student becomes pregnant, she will automatically withdraw until after the birth of the child.'

The record reflects that the Board's policy, as enunciated by the resolution, was widely publicized, and was known to the appellee prior to the time of her marriage. Although the text of the resolution remained unchanged, it is admitted that the Board had uniformly followed the policy of permitting a student to complete the six-week term in progress at the time of the marriage.

Appellee was a regularly enrolled student at Harrodsburg High School and a member of the junior class when she married April 10, 1964. The six-week term then current lacked one and a half weeks of completion. Appellee was permitted to remain as a student until the close of that six-week period; she was required to withdraw from school and dropped from its rolls April 24, 1964.

*679 Appellee then enrolled in Mercer County High School, but remained there only a day and a half. Her mother withdrew her from that school, and sought to have her reinstated in Harrodsburg High School. The Board, at a specially called session, heard the request of appellee and her parents, but expressed the view that it could not make an exception as to appellee since it had uniformly invoked the rule theretofore. This suit resulted.

Certain fundamental precepts were recognized by the trial court, and are acknowledged by the litigants:

[1] The Board is vested with the duty and power to control and manage the Harrodsburg High School. The Board is authorized to enforce reasonable regulations, including disciplinary rules. KRS 160.160; 160.290; 160.370.

[2] The Board is empowered to suspend or expel pupils for violations of lawful regulations of the school. Other grounds for suspension or expulsion are prescribed. KRS 158.150.

[3] The government and conduct of public schools, in general, is committed to the discretion of the school board. Courts will not interfere with the board's exercise of such discretion unless it appears the board has acted arbitrarily or maliciously. Casey County Bd. of Ed. v. Luster, Ky., 282 S.W.2d 333, and authorities therein discussed.

It is also recognized by all that KRS 158.100 mandatorily directs that each board of education shall provide public educational facilities for residents of its district who are under twenty-one years of age. There is no specific statutory provision dealing with the matter of married pupils under age twenty-one.

With these accepted principles in mind, we turn to the specific controversy at bar. The appellee was sixteen years old at the time of her marriage. The marriage ceremony was publicly performed in a Harrodsburg church. The marriage must have been approved by appellee's parents, pursuant to the provisions of KRS 402.210, although the record is silent as to that.

There is no suggestion that any sensationalism or scandal preceded or followed the wedding. It is admitted that appellee is now, and has been throughout her lifetime, a moral and respectable person. There has been no complaint of misbehavior or misconduct on her part. She has maintained a creditable, above average scholastic record.

For the Board, it was shown that the 1957 regulation had been adopted, upon public demand of parents and patrons, by reason of an 'epidemic' of marriages of high school students. Moreover, the Board predicated its policy upon its belief, from experience and counsel of its superintendent, that such marriages during school term cause discussion and excitement, thereby disrupting school work and leading to dropping out of school. The Board expressed its view that student marriage is detrimental to the best interests and welfare of a good and successful school system.

It is recalled that the regulation in question provides for readmission of a married student after 'one full year, and then only as a special student with permission of the principal.' However, the record reflects that it has been the uniform policy in enforcement of the rule that the married student be permitted to complete the current six-week term. It was explained that the disruptive impact of student marriage is by reason of widespread student body discussion and excitement just prior to and just following the marriage. Apparently, the regulation as originally promulgated sought to alleviate the disruption generally said to be attendant at the time just before and just following the marriage. As noted, however, quite the opposite practice has been consistently followed. The pupil (including the present appellee) is allowed to remain actively in full school routine during the immediate time following the marriage ***680** —but no longer than the end of the then current six-week term.

[4] It is accepted, of course, that marriage is favored by public policy. 35 Am.Jur., Marriage, § 3. The General Assembly has imposed various requirements looking toward preservation of the institution of marriage. KRS Chapter 402. Specifically, Kentucky's legislature has placed its sanction upon marriage of a female who has attained age sixteen. KRS 402.020(5). The safeguard of written consent from one in *loco parentis* is demanded for marriage participants under age twenty-one. KRS 402.210.

On the other hand, no question arises as to the sincerity of purpose of the Board here. It has acted upon the counsel of its superintendent and its own experience in administration of the affairs of the school under its jurisdiction. We have neither the right nor the inclination to substitute our view for the Board's view as to the exercise of its sound discretion as it relates to matters within the province of the Board's responsibilities. It does become our function to examine the regulation and determine whether it is unreasonable or arbitrary, and therefore illegal. (There is no suggestion that the Board has acted maliciously.) In 47 Am.Jur., Schools, § 155, it is said:

'However, a pupil may not be excluded from school because married, where no immorality or misconduct of the pupil is shown, nor that the welfare and discipline of the pupils of the school is injuriously affected by the presence of the married pupil.'

In support of that text is cited McLeod v. State ex rel. Colmer, 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161. Our attention has been directed to other decisions from sister jurisdictions as touching upon the question at bar. See Nutt v. Bd. of Ed. of City of Goodland, 128 Kan. 507, 278 P. 1065; Cochrane v. Bd. of Ed. of Mesick, 360 Mich. 390, 103 N.W.2d 569; Kissick v. Garland Independent School Dist., Tex.Civ.App., 330 S.W.2d 708; State ex rel. Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E.2d 250; State v. Chamberlain (Com.Pl.Ct. of Ohio), 175 N.E.2d 539; State ex rel. Baker v. Stevenson, (Com.Pl.Ct. of Ohio), 189 N.E.2d 181; State ex rel. Thompson v. Marion County Bd. of Ed., 202 Tenn. 29, 302 S.W.2d 57. It may be observed that the Tennessee decision just cited is the only one which may be said to lend support to the position of the Board here. In most of the cases just cited the courts upheld regulations prohibiting married students from certain cocurricular and extracurricular activities. In so doing, the courts adverted to the factor that the particular board was not making marriage, *ipso facto*, the basis for denial of the student's right to obtain an education.

For the appellee it is pointed out that all persons meeting the residence, moral and mental qualifications are entitled to an opportunity for publicly furnished education until attaining age twenty-one. In today's economy we judicially

note the increasing demand for education as a prerequisite for employment. Certainly, there is no reason to suppose that the marriage of a student will diminish the need of that student for an education—indeed, just the contrary would appear the case.

[5] It is our conclusion that the decision of the trial court is correct; the instant regulation is arbitrary and unreasonable, and therefore void. The fatal vice of the regulation lies in its sweeping, advance determination that every married student, regardless of the circumstances, must lose at least a year's schooling. Moreover, the manner of enforcement of the regulation accentuates the fact that the regulation is not realistically related to its purported purpose. It is asserted for the Board that the most intense disruptive impact of a student marriage occurs during the time just preceding and just following the marriage. Yet, under the uniformly *681 followed pattern of administration of this regulation, the married student is permitted to remain in school during all of the time preceding the marriage, and may remain for a maximum of six weeks thereafter. Such procedure, even though premised on the Board's commendable desire to permit the student to complete the current term, effectively frustrates the prime purpose of the regulation. Additionally, after it may be reasoned that the disturbing influence of the event has subsided, the situation is returned to the 'spotlight' of student attention by compelling withdrawal of the married student; after a year, assuming the principal is willing, the student is to be reinstated, thus injecting another occasion for student body agitation.

The regulation has a further inherent weakness in that it merely provides that a married student *may* by permitted to resume school if, but only if, the principal permits it. Of course, we will not assume that the principal would arbitrarily deny permission—but there is a complete absence of any standard or guideline for the principal; neither has the ousted student any gauge by which to estimate whether the principal's consent will be forthcoming after a year.

Implicit in this record is the desire of the Board to permit this appellee to 'work something out' so that her education would not be interrupted. A review of the Board's minutes warrants the conclusion that the Board felt that its hands were tied—principally because it never had made any previous exception in such cases. The unreasonable and arbitrary effect of the regulation is thus demonstrated, since it imposes the identical result in every case, without regard to the circumstances of any case. The Board's discretion is foreclosed in advance, no matter what the facts. Such prejudgment is unreasonable and arbitrary.

We are not to be understood here as deciding that some reasonable and appropriate regulation in this area may not be adopted; we do hold the instant regulation invalid.

Without undertaking to restate the arguments which may be advanced in support of either side of the question, we state that we are persuaded that the view quoted (47 Am.Jur., Schools, Sec. 155) is sound. Consequently, it is our holding that the regulation here is an arbitrary and unreasonable one.

The judgment is affirmed.

All Citations

383 S.W.2d 677, 11 A.L.R.3d 990

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878 S.W.2d 810
Court of Appeals of Kentucky.

Phillip SWIFT, Appellant,
v.
BRECKINRIDGE COUNTY BOARD OF EDUCATION, Appellee.

No. 93-CA-0333-MR. | July 1, 1994.

Father of student brought suit against school board challenging constitutionality of attendance area and transportation policies. The Breckinridge Circuit Court, Sam Monarch, J., entered summary judgment in favor of school board. Father appealed. The Court of Appeals, Howerton, J., held that policy, which imposed conditions on students who wished to attend schools outside their attendance areas, was not arbitrary, capricious, or unreasonable.

Affirmed.

Attorneys and Law Firms

***810** Robert D. Meredith, Leitchfield, for appellant.

Thomas Brite, Brite & Butler, Hardinsburg, for appellee.

Before HOWERTON, JOHNSTONE and SCHRODER, JJ.

Opinion

***811** HOWERTON, Judge.

Phillip Swift challenges the constitutionality of the attendance area and transportation policies of the Breckinridge County Board of Education. He appeals from a summary judgment granted in favor of the Board on August 11, 1992, and from the denial of his motion for reconsideration. Swift prosecutes this appeal questioning whether the attendance area/transportation policies operate to deny his child equal protection under the United States and Kentucky constitutions. We find no constitutional infirmity or other error, and we affirm the ruling of the circuit court.

On May 8, 1990, the Board adopted attendance area/transportation policies for the purpose of enforcing class size limits within the school district. This action by the Board was taken only after months of discussing the issue at monthly Board meetings which were open to the public. Prior policy was that students were allowed to attend schools outside their attendance areas, but within the district, and bus transportation was provided. The new policy, designed to enforce statutory class size limits via implementation of a revised transportation policy, continued to permit students to attend schools within the district outside their attendance areas on three conditions: (1) the student's presence did not result in a violation of the class size limit, (2) if the child's attendance created a class size violation, the child would be removed and placed in a school which had room for him, and (3) the student utilized private transportation to get to and from school.

The new policy became effective for the 1990–91 school year. Those students who were already attending school under the "old" policy were not affected. Only those students entering the system for the first time, or those students electing for the first time to attend a school outside of their area, were affected. The plan contemplated equalization when those students who were "grandfathered" in either moved out of the district, returned to the schools in their attendance areas, or, through the course of matriculation, left the system to attend junior-high and high school.

In July 1990, Michael Swift, through his father, Phillip Swift, requested the Board's permission to attend a school outside his attendance area. On behalf of Michael, his grandmother signed a policy statement acknowledging and agreeing that private transportation would be furnished Michael. With that understanding, the Board granted Michael's request. This lawsuit followed in September 1990, when Michael, pursuant to the new policies in effect, was denied transportation by bus to his new school outside his attendance area.

[1] [2] [3] [4] "It is not a proper judicial function for the courts to interfere with the administration of the internal affairs of a school system except in extraordinary circumstances." *Skinner v. Board of Education of McCracken County, Ky.*, 487 S.W.2d 903, 905 (1972). Nor may a court substitute its judgment for that of a school board unless that board has acted arbitrarily, capriciously, and unreasonably. *See Coppage v. Ohio County Board of Education*, Ky.App., 860 S.W.2d 779 (1992). School boards are afforded wide discretion in the management of their school systems, which management includes the creation of attendance areas and transportation policies to effect or enforce attendance area plans. *See Skinner, supra.* The discretion of a school board is limited only by the requirement that any actions taken be "in good faith, upon a sound, just and reasonable basis, [with]

due regard for the public interest and consequences of its actions upon the children affected." *Coppage*, 860 S.W.2d at 783 (citing *Wells v. Board of Education of Mercer County, Ky.*, 289 S.W.2d 492, 494 (1956)). Thus the only issue before us is whether the Board's adoption and implementation of attendance area and transportation policies were arbitrary, capricious, or unreasonable. We agree with the trial court that they were not, and we therefore affirm.

The purpose for the Board's adoption of a new attendance area/transportation policy was to satisfy two statutory mandates, one relating to class size maximum and the other permitting students to be enrolled in the public schools nearest their homes. The affidavit of Huston DeHaven, Superintendent of Breckinridge County Board of Education, indicates *812 that the former attendance area policy had become increasingly difficult to enforce and, upon considering all options, the present (and disputed) policies were the most effective and fair means of meeting the statutory requirements. We cannot say as a matter of law that the Board abused its discretion in this regard, nor do we find the Board's actions to be arbitrary, capricious, or unreasonable. Swift's constitutional "rights" were in no way violated. Due process of law was provided.

First, the policy changes were discussed on numerous occasions in a public forum. Indeed, the meeting during which the new policies were finally adopted was attended by some 35 people, parents included. Second, the new policy was not implemented without notice and did not operate retroactively. To the extent any negative impact can be found, such impact only affects those students seeking for the first time to attend a school outside their area subsequent to adoption of the new policies. However, any disparity of application created by the policy will be extinguished as students move from the district and/or matriculate through the system. Finally, we find that the adopted policies of the Board are rationally related to achieve statutory means and are not designed to discriminate against any one student or any particular class of persons. We note that *any* change to enforce school policies would have an impact on *someone*—such could simply not be avoided.

For the foregoing reasons, we affirm the summary judgment in favor of the Breckinridge County Board of Education.

All concur.

All Citations

878 S.W.2d 810, 92 Ed. Law Rep. 1042

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655 S.W.2d 28
Court of Appeals of Kentucky.

Brad RONE, By and Through his mother and next friend, Ramona PAYNE, Appellant,
v.
DAVIESS COUNTY BOARD OF EDUCATION, Glenn Duncan, Helen Walker Mountjoy, Leonard Worth, Frank G. Riney, III, Vickie Smith Stovall, Charles Dawson, Jr., Waymond Morris, Gene Crume, Kenny Baughn, and Larry Martin, Appellees.

July 22, 1983.

High school student and his mother sued school officials for injunctive relief and damages arising out of search of the student's person on school property. The Daviess Circuit Court, Robert M. Short, J., rendered summary judgment for school officials, and student and mother appealed. The Court of Appeals, Cooper, J., held that there was reasonable grounds for strip search of student to determine whether he was carrying drugs and that student was never offensively touched.

Affirmed.

Attorneys and Law Firms

*29 Marvin P. Nunley, David Yewell, Owensboro, for appellees.

Scott T. Wendelsdorf, Ogden, Robertson & Marshall, Louisville, David W. Lamar, Owensboro, for appellant.

Before HAYES, C.J., and COOPER and McDONALD, JJ.

Opinion

COOPER, Judge.

This is an appeal from a summary judgment for the appellees, defendants below, in an action for both damages and injunctive relief. On appeal, the issue is whether the trial court acted correctly in determining that there was no genuine issue as to any material fact, and that the appellees were entitled to judgment as a matter of law. CR 56.03. Reviewing the record below, we affirm.

In February of 1982, the appellant, Brad Rone, by and through his mother and next friend, Ramona Payne, filed this action against the appellees, Daviess County Board of Education, its members, and assistant principals of Daviess County High School, seeking both injunctive relief and compensatory and punitive damages arising out of a search conducted of the appellant's person on school property. The action alleged that the search violated the appellant's Fourth Amendment rights of the United States Constitution, and that the appellee Board of Education had either implicitly or explicitly adopted a policy of strip-searching students. Subsequent to discovery by both parties, the appellees filed a motion for summary judgment. Additionally, the appellant filed a motion for summary judgment. The trial court subsequently issued an opinion entering summary judgment for the appellees. It is from such judgment that the appellant now appeals.

[1] On appeal, the issue is whether the trial court acted correctly in determining that there was no genuine issue as to any material fact and that the appellees were entitled to judgment as a matter of law. *Bennett v. Southern Bell Telephone & Telegraph Co.*, Ky., 407 S.W.2d 403 (1966). If a trial court determines that the controlling material facts are not in dispute even though a dispute exists as to immaterial facts, it may enter a summary judgment. *See Bennett.* Here, material facts not disputed by the parties are as follows:

1. During the school year 1981–82, the appellant was a fifteen-year-old male high school student at Daviess County High School.

2. On January 7, the appellant gave two fellow students prescription medication, causing one student to feel dizzy and confused.

*30 3. On January 27, the appellant distributed a quantity of marijuana to two female students on the school bus.

4. On January 28, the day of the search in question, the appellant subsequently admitted passing marijuana to another student. He further admitted that he had grown marijuana himself and had smoked it frequently.

5. Only after the appellant had told the administrators that he had smoked marijuana, had possession of it, and had transferred it to another student was he requested to submit to a search. At no time during the search did the appellant object to it. Rather, the evidence establishes that he voluntarily submitted to it and cooperated with the school officials throughout.

6. The search itself was conducted in the principal's office with only appellees Crume and Baughn present. No law enforcement authorities were present.

7. Although the appellant was requested during the search to lower both his trousers and undershorts, those articles of his clothing were never removed. Additionally, the appellant was never offensively touched during any part of the search. The only clothing completely removed from the appellant was his jacket and shoes.

8. The avowed purpose of having the appellant lower his shorts and undershorts to his thighs was to determine if either contained drugs or marijuana, underclothing being a prime hiding place for controlled substances.

9. No criminal charges were ever brought against the appellant, the previous incidents remaining entirely within the realm of school discipline.

10. The search involved a single student for a single specific reason. No systematic searches of other students were conducted.

Although the appellant argues that the trial court erred, as a matter of law, in not granting his request for injunctive relief, given the arbitrary and unreasonable strip-search policy of the Daviess County School System, we reject such an argument. There was no evidence that either the appellee Board of Education or the Superintendent had instituted a de facto strip-search policy. On the contrary, the record reflects the fact that such searches were infrequent, and only conducted after the school administrators had substantial reason to believe that the student possessed illegal drugs. Consequently, there is no evidence to support the appellant's claim that the appellees were operating under a de facto policy of conducting illegal and unreasonable searches. As such, the trial court properly entered summary judgment for the appellee Board of Education.

[2] [3] [4] Furthermore, the record indicates that the search, conducted by school officials with no law enforcement officials present, met the test of "reasonable suspicion" established by courts in other jurisdictions. *See Picha v. Wielgos*, 410 F.Supp. 1214 (N.D.Ill.1976); *Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y.1977); *Bilbrey v. Brown*, 481 F.Supp. 26 (D.Or.1979). That standard allows search if conducted by school officials in a school setting without the presence of law enforcement officials. Stated differently, school authorities need only possess "reasonable suspicion" rather than probable cause in order to conduct such a search. The logic behind this standard is that probable cause is necessary only if the evidence in question is to be used in a criminal prosecution.

Here, the school officials stood *in loco parentis* to the students within the school system, including the appellant. *See Casey County Board of Education v. Luster*, Ky., 282 S.W.2d 333 (1955). As such, the school had the authority and discretion to formulate any necessary rules which, in their judgment, promoted the public good, provided that such rules were neither arbitrary nor maliciously promulgated. *See Luster*, at p. 334. Here, there is no evidence of either arbitrariness or maliciousness on the part of the school officials in searching the appellant. On the contrary, the school officials had a number of "articulable facts" which, when taken together, provided reasonable *31 grounds for the search. *See Bellnier, supra.* Such facts included the appellant's age; his history and record within the school system—namely passing prescription drugs to other students and passing marijuana to two students the day before the search; and the appellant's own admission that he had possessed, passed, and smoked marijuana. Given such facts, we cannot say that the officials lacked the requisite "reasonable suspicion." Taken as a whole, their actions were responsible and sensible as they sought to safeguard the welfare of all the children within the school system, and they are to be commended in their attempt to prevent the appellant from entering the criminal justice system.

In its opinion and judgment, the trial court stated, in part, as follows:

> Under the circumstances of this case, the Court is of the opinion the search was not unreasonable and Defendants are entitled to Judgment as a matter of law. This is true whether viewed in the context of probable cause for the search, the "reasonable suspicion" rule, or the *in loco parentis* doctrine. The common sense view that school officials stand in the same relationship as parents during school hours is a necessary and compelling one so long as they do not act unreasonable. (Sic). How many times must a child be caught distributing illegal controlled substances before a reasonable minded parent or school principal would conclude he is presenting a daily problem to himself and other students...
>
> The court is of the opinion the school officials were far more reasonable and justified in their actions in this case than most cases relied on by the Plaintiffs. The matter

could have been turned over to the legal authorities for investigation and appropriate action. Surely neither Brad nor his mother would have wanted that. Once caught up in the criminal justice system, too many youngsters seem never to escape it.

With such an analysis, we agree.

The judgment of the trial court is affirmed.

All concur.

All Citations

655 S.W.2d 28, 13 Ed. Law Rep. 172

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364 S.W.3d 97
Supreme Court of Kentucky.

Joseph A. SINGLETON, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2010–SC–000078–DG. | April 26, 2012.

Synopsis
Background: Defendant who was charged with driving under the influence (DUI) and drug-related offenses filed a motion to suppress evidence obtained at a traffic checkpoint. The Circuit Court, Casey County, granted the motion. The prosecution appealed, and the Court of Appeals, 2010 WL 45917, reversed and remanded. Defendant filed a motion for discretionary review, which the Supreme Court granted.

[Holding:] The Supreme Court, Venters, J., held that the traffic checkpoint violated the Fourth Amendment under the *Edmond* rule against checkpoint stops with the primary purpose of general crime control.

Reversed and remanded.

Attorneys and Law Firms

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Jack Conway, Attorney General, Christian Kenneth Ray Miller, Michael Louis Harned, Assistant Attorney General, Office of Attorney General, Office of Criminal Appeals, Frankfort, KY, Counsel for Appellee.

Opinion

Opinion of the Court by Justice VENTERS.

Appellant, Joseph A. Singleton, was charged in the Casey Circuit Court with driving under the influence, trafficking in marijuana, eight ounces or less (second or subsequent offense), and possession of drug paraphernalia (second or subsequent offense). All of these charges were based on evidence obtained by police officers of the City of Liberty after they stopped Appellant at a traffic checkpoint and searched his vehicle. Appellant moved to suppress the evidence and the Casey Circuit Court granted his motion. The Commonwealth subsequently brought an interlocutory appeal to the Court of Appeals. [1]

The Court of Appeals reversed the circuit court's order, concluding that the evidence was properly obtained. We granted Appellant's motion for discretionary review to determine whether the police traffic checkpoint that led to the seizure of Appellant and the search of his vehicle were permissible under the Fourth Amendment of the United States Constitution. [2] We *100 reverse the Court of Appeals and reinstate the order of the Casey Circuit Court suppressing the evidence.

I. FACTUAL AND PROCEDURAL BACKGROUND

The essential facts of the case are not disputed. The Casey Circuit Court found that an ordinance of the City of Liberty, Kentucky, requires that persons who either live or work within the city limits must obtain a "city sticker," and display the sticker upon any motor vehicle they operate in the city. The stickers are obtained from the city upon payment of a ten dollar fee. After receiving complaints that several teachers employed at a local school had failed to obtain a city sticker, the Liberty Police Department set up a traffic checkpoint at an intersection leading to the school to catch offenders. The checkpoint was established using a protocol previously adopted by the police department. Advance notice of the checkpoint was published in the local newspaper.

Each automobile that approached the checkpoint was stopped by a police officer. If a city sticker was observed, the vehicle was waved through the checkpoint. If no sticker was observed on the vehicle, the police detained it long enough to ask the driver if he or she lived or worked within the Liberty city limits. Those found in violation of the ordinance were issued a warning.

Appellant approached the checkpoint in his truck and stopped as commanded. The officers at the checkpoint asked him to roll down his window so they could talk with him. He readily complied. Although the police determined that Appellant was not in violation of the sticker ordinance, while conducting the inquiry, they detected the aroma of marijuana emanating from the vehicle. When questioned about the odor, Appellant admitted that he had smoked marijuana an hour earlier. He was then removed from his truck for a sobriety check. A

warrantless search of the truck followed, resulting in the discovery of a partially smoked marijuana cigarette, a bag of marijuana, hand scales, and some clear plastic bags. Appellant was then arrested and charged with the above described offenses.

Appellant moved to suppress the evidence obtained at the checkpoint, arguing that his detention at a traffic checkpoint set up to enforce the vehicle sticker ordinance was a seizure of his person without probable cause or articulable suspicion in violation of the Fourth Amendment of the United States Constitution. He argued that the unconstitutional seizure of his person and the ensuing search of his truck tainted the evidence and rendered it inadmissible.

The trial court granted Appellant's motion and suppressed the evidence. Relying primarily upon the United States Supreme Court decision in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) and this Court's opinion in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky.2003), the trial court reasoned that stopping a motorist at a traffic checkpoint without any individualized suspicion of wrongdoing cannot be justified under the Fourth Amendment when the purpose of the checkpoint was unrelated to highway safety or border security.

However, the Court of Appeals reversed the trial court. It concluded that the use of a traffic checkpoint to verify compliance with the City of Liberty's sticker ordinance was similar in purpose to the checkpoints set up to ascertain compliance with driver's licensing and vehicle registration laws previously approved by the United States Supreme Court in ***101** *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)[3] and by the Court of Appeals in the unpublished opinion of *Salmon v. Commonwealth*.[4] We granted discretionary review to examine these competing views and determine whether a traffic checkpoint established to detect violations of city ordinances such as the one involved here unreasonably intrudes upon the liberty interests protected by the Fourth Amendment.

II. ANALYSIS

A. The Constitutionality of Traffic Checkpoints

[1] It is appropriate to begin our analysis with a review of the constitutional underpinnings of a traffic checkpoint (sometimes referred to as a police roadblock) in which government authorities briefly detain persons occupying vehicles who have exhibited no suspicious behavior and without an individualized determination of probable cause to believe that illegal conduct is occurring. In pertinent part, the Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated[.]" "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the United States Supreme Court] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.' " *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

1. Even a brief restraint by a police officer is a "seizure" under the Fourth Amendment which must be justified with an objective, articulable suspicion of wrongdoing.

[2] In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court established that even a brief detention of a person for questioning by a police officer, known as a "stop and frisk", constitutes a "seizure" within the meaning of the Fourth Amendment of the United States Constitution, and therefore may properly be undertaken only if the police officer has a reasonable suspicion based upon objective, articulable facts that the subject of the inquiry may be involved in some criminal activity. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16, 88 S.Ct. 1868.

[3] Our predecessor court, in *Phillips v. Commonwealth*, 473 S.W.2d 135 (Ky.1971), concluded that *Terry* 's requirement for objective, articulable suspicion applied to automobile stops: "[T]he search of an individual regardless of whether he is in his home, in an automobile, or walking on the street is governed by the Fourth Amendment." The Unites States Supreme Court reached the same conclusion in *United States v. Brignoni–Ponce*, 422 U.S. 873, 881–82, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975):

> We hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the ***102** circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation."

It is now well established that "stopping an automobile and detaining its occupants is a 'seizure' within the meaning of the Fourth and Fourteenth Amendments, even when the purpose of the stop is limited and the resulting detention quite brief." *Prouse*, 440 U.S. at 653, 99 S.Ct. 1391; *see also Buchanon*, 122 S.W.3d at 568.

2. Brief traffic stops without individualized suspicion may be constitutional in limited circumstances where the governmental need is sufficiently important.

A traffic checkpoint inherently generates tension between an individual's legitimate privacy interests under the Fourth Amendment and the state's responsibility for law enforcement and public safety concerns. Thus, while the Fourth Amendment generally bars police officers from effecting a search or seizure without individualized suspicion, nevertheless, some searches and seizures conducted without specific grounds to suspect particular individuals of wrongdoing have been upheld. The United States Supreme Court has recognized exceptions to the general rule in cases where the government has "special needs" that are "important enough to override the individual's acknowledged privacy interest, [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 311–18, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997);

[4] Accordingly, in the context of a traffic checkpoint, the United States Supreme Court has recognized certain limited circumstances in which an individual's liberty must yield to the sufficiently compelling concerns of the government such that a stop may be effectuated without individualized suspicion. These circumstances include:

- A brief, suspicionless detention of motorists at a fixed border patrol checkpoint designed to insure border security and intercept illegal aliens. *See United States v. Martinez–Fuerte*, 428 U.S. 543 [96 S.Ct. 3074, 49 L.Ed.2d 1116] (1976).
- A roadblock to check each passing vehicle for the purpose of verifying drivers' licenses and vehicle registrations. *See Prouse*, 440 U.S. 648 [99 S.Ct. 1391].
- A sobriety checkpoint aimed at removing drunk drivers from the road. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 [110 S.Ct. 2481, 110 L.Ed.2d 412] (1990).
- A carefully tailored information-seeking highway checkpoint briefly stopping vehicles to request public assistance in solving a recent, specifically identified crime that occurred on the same highway (as opposed to discovering unknown crimes of a general sort) *See Elinois* [*Illinois*] *v. Lidsier* [*Lidster*], 540 U.S. 419 [124 S.Ct. 885, 157 L.Ed.2d 843] (2004).

In *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–38, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), the Supreme Court determined that a primary purpose of general crime control, i.e., "interdicting illegal narcotics," was not sufficiently vital to justify a checkpoint program that stopped motorists with no indicia of individualized suspicion. The Court noted that it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 41, 121 S.Ct. 447.

We hasten to note here that the United States Supreme Court in *Edmond* explicitly recognized that emergency circumstances ***103** in grave situations would substantially alter the analysis. "For example ... the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.... While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, *we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control*." *Edmond*, 531 U.S. at 44, 121 S.Ct. 447 (emphasis added).

3. Even when established for a valid purpose, a traffic stop conducted without individualized suspicion must be reasonable—the Brown v. Texas balancing test.

[5] [6] The Fourth Amendment protects a person from *unreasonable* searches and seizures.

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions...." Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Prouse, 440 U.S. at 653–654, 99 S.Ct. 1391 (citations and footnotes omitted).

[7] The reasonableness of intrusions into Fourth Amendment protections, and hence, the constitutionality of intrusions such as a brief traffic checkpoint seizure, involves a balancing test described in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). This test is stated as a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 51, 99 S.Ct. 2637.

In *Buchanon*,[5] we offered our most comprehensive review of the "limited circumstances" that may justify a traffic checkpoint and we recognized the applicability of the *Brown v. Texas* balancing test. *Buchanon*, 122 S.W.3d at 568. We suggested that to assess the constitutionality of a traffic checkpoint, a court should first determine the primary purpose of the checkpoint. If the court finds that the purpose behind the checkpoint has previously been held to violate the Constitution, then there is no need to perform the balancing test prescribed in *Brown*. Otherwise, the balancing test should be applied to the facts.

We also set forth in *Buchanon* a non-exclusive set of factors to guide the analysis when the reasonableness of a checkpoint must be determined. We need not apply that criteria to the checkpoint in the instant case, nor do we now consider the balancing test of *Brown*, or address the arguments of the parties pertaining thereto, because, for the reasons explained below, we conclude that the roadblock subject to this review lacked a valid, constitutional purpose.

B. The City of Liberty's Checkpoint to Promote Compliance with the City's Sticker Ordinance

*104 [8] Mindful of the aforementioned principles, we now review the purpose the checkpoint in this matter was intended to serve. The Court of Appeals concluded, as did the trial court, that the checkpoint's purpose was "to regulate compliance with a local ordinance requiring residents of Liberty and non-residents working in the city to purchase and display a city sticker." The Court of Appeals found the checkpoint to be constitutionally valid because it was sufficiently similar to the purpose approved by the United States Supreme Court in *Delaware v. Prouse*,—i.e., checking motorists for driver's license and vehicle registration violations. The Court of Appeals then upheld Liberty's checkpoint because it was established and conducted according to the kind of systematic and non-discretionary plan outlined in *Buchanon*. However, the Court of Appeals misreads the relevant cases.

Appellant vigorously contends that checking for city sticker ordinance violations is not an acceptable purpose for a traffic checkpoint that stops and detains motorists without any individualized suspicion of wrongdoing. He argues that the use of the checkpoint to root out city sticker law violators suffers from the same deficiency as the drug interdiction checkpoint found unconstitutional in *Edmond*. Appellant asserts that in both cases, the checkpoints were designed for the sole purpose of catching lawbreakers, or "detect[ing] evidence of criminal wrongdoing," with no direct concern for highway safety or border security. *Edmond*, 531 U.S. at 41, 121 S.Ct. 447.

1.A checkpoint established for the purpose of general crime control, or detection of ordinary criminal wrongdoing includes violations of a city ordinance.

The Commonwealth posits the view that Liberty's checkpoint did not run afoul of *Edmond* because a city ordinance violation is not a "crime" as defined in KRS 500.080(2),[6] and therefore, a roadblock detaining motorists to verify compliance with a city ordinance is not for the purpose of ordinary "crime" control. We need not parse the definition of "crime," and in any case it is unlikely that the United States Supreme Court in *Edmond* took into account Kentucky's statutory definition of "crime." The Commonwealth views *Edmond* too narrowly and overlooks the principle upon which *Edmond* is based.

[9] *Edmond* noted that "each of the checkpoint programs that we have approved [referring to *Sitz*, *Prouse*, *and Martinez–Fuerte*] was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety." *Edmond*, 531 U.S. at 42, 121 S.Ct. 447. "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.* at 44, 121 S.Ct. 447.

[10] The rule established in *Edmond* does not depend upon the classification of the offense that a checkpoint was set

up to discover. It turns upon the principle that a checkpoint set up to stop vehicles without individualized indicia of suspicion on the random chance of catching a law breaker is too great a breach in the wall of protection provided by the Fourth Amendment. ***105** The United States Supreme Court in *Edmond* condemned the highway checkpoint set up for general crime control (and specifically for drug law violations) because, if roadblocks so established were approved by the courts:

> there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.

Id. at 42, 121 S.Ct. 447.

The concern voiced by the United States Supreme Court as the rational underpinning of *Edmond* is in no way lessened when the roadblock is used to detect violations of a city ordinance rather than a felony or misdemeanor. The threat to individual liberty is the same.

[11] Indeed, a city ordinance would appear to be of lesser stature than a "crime" as used in *Edmond*, and thus rather than distinguishing *Edmond*, the better assessment would appear to be that *Edmond* would apply with even more force against a roadblock set up solely to detect violations of a city ordinance. We also recall that the initial concern that sparked the need for the checkpoint was the report that some teachers had failed to pay the sticker fee. That concern could have been addressed by means far less intrusive than a traffic checkpoint. For example, police officers could have simply walked through the school parking lot and cited cars without a sticker. An appropriate factor to consider when assessing the validity of a traffic checkpoint is whether an alternate, less intrusive means is available to achieve the same objective.

2. A traffic checkpoint to monitor compliance with laws regulating vehicle licensing and operation is valid only if rationally related to the need for highway safety.

[12] The Commonwealth argues that *Prouse* should be read as approving traffic checkpoints designed to verify compliance with vehicle registration and operator licensing laws which have no impact upon highway safety. We must disagree. In *Prouse*, the checkpoint's purpose was found valid only because the licensing and registration requirements advanced the public interest in highway safety:

> We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle. The registration requirement and, more pointedly, the related annual inspection requirement in Delaware are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway safety program.

Prouse, 440 U.S. at 658, 99 S.Ct. 1391 (footnotes omitted).

This point was expressly confirmed in *Edmond*, "Not only does the common thread of highway safety thus run through *Sitz* and *Prouse*, but *Prouse* itself reveals a difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control." *Edmond*, at 40, 121 S.Ct. 447.

***106** As the trial court found, the City of Liberty's sticker ordinance "does not have as its purpose anything remotely connected to border patrol or highway safety." We find nothing in the record to refute that finding. It is also apparent that the checkpoint had no information-seeking function of the sort approved in *Lidster*. The checkpoint's only purpose was to enforce a revenue-raising tax upon vehicles in the city. Thus, the checkpoint to enforce the sticker ordinance comports with none of the purposes which the United States Supreme Court has found to be important enough to override the individual liberty interests secured by the Fourth Amendment.

III. CONCLUSION

For the reasons set forth above, we conclude that Appellant's detention at the checkpoint unduly infringed upon his Fourth Amendment right to be free from unreasonable seizures of his person and searches of his property. The evidence procured as a result of his unconstitutional detention was properly suppressed by the trial court. Accordingly, we reverse the opinion of the Court of Appeals in this matter, and remand this cause to the Casey Circuit Court for further proceedings consistent herewith.

All sitting. All concur.

All Citations

364 S.W.3d 97

Footnotes

1 The procedural route by which the Commonwealth appealed the suppression order is not clear. KRS 22A.020(4) provides for an appeal "by the state in criminal cases from an adverse decision or ruling of the Circuit Court," but along with other conditions, the statute requires "that the record on appeal shall be transmitted by the clerk of the Circuit Court to the Attorney General; and if the Attorney General is satisfied that review by the Court of Appeals is important to the correct and uniform administration of the law, he may deliver the record to the clerk of the Court of Appeals within the time prescribed by the above-mentioned rules." KRS 22A.020(4)(b). We find in the record no indication of review by the Attorney General. However, since no question was raised here or in the Court of Appeals regarding compliance with KRS 22A.020(4), we proceed on the merits.

2 The Fourth Amendment of the U.S. Constitution, as applied to the states under the Fourteenth Amendment, and Section 10 of the Kentucky Constitution provide safeguards against unreasonable searches and seizures. Neither of the parties, nor the Court of Appeals, made any reference to Section 10 of the Kentucky Constitution so our analysis rests entirely upon the Fourth Amendment.

3 While the Supreme Court in *Prouse* held that the state's purpose for establishing the highway checkpoint was constitutionally valid, it sustained the suppression of the evidence obtained during the roadblock because police officers conducting the checkpoint had unfettered discretion to decide which automobiles would be stopped for a license and registration check. *Prouse*, 440 U.S. at 655, 99 S.Ct. 1391.

4 2007 WL 3227039 (Ky.App.2007).

5 In *Buchanon*, we examined the validity of a traffic checkpoint ostensibly established as a sobriety checkpoint, but which in reality was designed to interdict illegal drugs. Because that purpose could not withstand scrutiny under *Edmond*, we held it to be invalid under the Fourth Amendment.

6 KRS 500.080(2) defines "crime" as a misdemeanor or a felony. A city ordinance violation is neither a misdemeanor nor a felony.

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197 S.W.3d 89
Supreme Court of Kentucky.

William RAINEY, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2005–SC–000185–DG. | May 18, 2006. | Rehearing Denied Aug. 24, 2006.

Synopsis

Background: Defendant filed motion to suppress evidence of handgun police obtained from his vehicle after arrest. The Circuit Court, Jefferson County, granted the motion, and Commonwealth appealed. The Court of Appeals affirmed, and Commonwealth appealed. The Supreme Court vacated and remanded. On remand, the Court of Appeals reversed, and the Supreme Court granted defendant's request for discretionary review.

[Holding:] The Supreme Court, Scott, J., held that defendant, who was stopped after he exited vehicle and walked 50 feet, was a "recent occupant" of vehicle such that warrantless search of vehicle was lawful.

Affirmed.

Cooper, J., concurred separately with opinion in which Johnstone, J., joined.

Roach, J., concurred separately with opinion in which Lambert, C.J., joined.

Attorneys and Law Firms

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Opinion

Opinion of the Court by Justice SCOTT.

This case comes to us on discretionary review of the Court of Appeals' opinion, reversing the Jefferson Circuit Court's order suppressing the introduction of a handgun found in Appellant William Rainey's vehicle following his arrest. Appellant, William Rainey, had sought to suppress the evidence obtained by the police from his vehicle without a warrant and argued that no valid exception to the search warrant requirement was proven. The Jefferson Circuit Court agreed and suppressed the evidence. The Court of Appeals initially affirmed, and the Commonwealth sought review in this Court. However, at that time, the United States Supreme Court had just issued its opinion in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004). Thus, we vacated and remanded the case back to the Court of Appeals to consider the issue in light of *Thornton, supra.* Accordingly, the Court of Appeals then reversed the trial court's order suppressing the evidence, finding Appellant to have been a "recent occupant" of the vehicle and that the search was lawful as being incident to arrest. We granted Appellant's subsequent request for discretionary *91 review, and for the reasons set forth below, we affirm the Court of Appeals.

I. Facts

On January 29, 2002, Louisville Metro Police Officers Steven Glauber and Kenneth Wilkins were on foot patrol in the Beecher Terrace Housing Project in Louisville, Kentucky, when they observed Appellant Rainey's vehicle traveling at a high rate of speed over several speed bumps in the vicinity. From a distance, the officers watched Appellant park his vehicle and then exit, shouting loudly at nearby residents.

By the time the officers initiated contact with Appellant, he had crossed the street and was approximately fifty feet away from his vehicle. Upon approaching Appellant, the officers noticed the smell of alcohol and observed that Appellant was unsteady on his feet and was slurring his speech. Appellant told the officers he had been drinking and had just been thrown out of a local bar. The officers attempted to conduct a field sobriety test, but Appellant refused. He was subsequently arrested and charged with operating a motor vehicle under the influence of intoxicants (DUI) pursuant to KRS 189A.010 and with reckless driving pursuant to KRS 189.290.

After handcuffing Appellant, the officers walked him back to his vehicle and proceeded to unlock the vehicle and search the passenger compartment. A .38 caliber handgun was found under the driver's seat. Appellant was then charged with illegal possession of a handgun by a convicted felon (KRS

527.040) and with being a persistent felony offender in the first degree (KRS 532.080).

Appellant Rainey then filed a motion to suppress the handgun seized from his vehicle, the history of which has been previously recounted.

II. Analysis

[1] [2] Our analysis in the context of the Fourth Amendment to the United States Constitution must begin with the understanding that "section 10 of the Kentucky Constitution provides no greater protection than does the Federal Fourth Amendment." *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky.1996). That being said, the analysis for this particular case involves case law as it has developed in both our state courts and federal courts concerning Fourth Amendment jurisprudence.

> [T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative.' " "[T]he burden is on those seeking the exemption to show the need for it." ... [T]he values [inherent in the Fourth Amendment] were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won —by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

Coolidge v. New Hampshire, 403 U.S. 443, 454–55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (citations omitted). Most relevant ***92** to our review of the issue at bar is the search incident to arrest exception. [1]

[3] A search incident to an arrest is an exception to the general rule requiring a warrant prior to searches and seizures pursuant to the Fourth Amendment of the United States Constitution and applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

> This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 471, 38 L.Ed.2d 427 (1973).

In analyzing the rationale behind this exception, the United States Supreme Court has stated:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.... In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule*.... There is ample justification, therefore, for a search of the arrestee's person *and the area 'within his immediate control'-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.*

Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969) (emphasis added). Although *Chimel* involved the search of the defendant's home incident to his arrest, the United States Supreme Court has extended its holding to the warrantless search of an automobile.

[4] [5] In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the defendant was pulled over pursuant to a lawful traffic stop and was then arrested for possession of marijuana. After placing Belton (and three others with him) under arrest, the lone officer, with the arrested men standing next to the car, searched the vehicle and found other contraband inside the defendant's jacket pocket, which had been left in the back seat of the vehicle. The pocket had been zipped, and thus the evidence was only discovered

after the officer unzipped the pocket. It was only after the search that Belton and the others were placed in the patrol car and transported to the police station. The United States Supreme Court held that the reasoning behind the search incident to arrest exception announced in *Chimel* could be applied to allow the warrantless search of an automobile made contemporaneously to the lawful arrest of its occupant.

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the *93 probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. *A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.*

Robinson, 414 U.S. at 235, 94 S.Ct. at 476, *quoted in Belton*, 453 U.S. at 461, 101 S.Ct. at 2864 (emphasis added).

Finally, in *Thornton, supra*, the rule of *Belton* was applied to a defendant who was not in the vehicle at the time of his arrest (i.e. he was not an "occupant"). In *Thornton*, the defendant had avoided pulling along side a police cruiser as the two traveled down the road. The officer became suspicious after running the license plate on the car and discovering that the vehicle did not match the vehicle to which the license plate was registered. The officer saw the defendant then pull into a parking lot and exit the vehicle before the officer initiated contact. Upon approaching the defendant, the officer noticed his nervousness and asked to pat down the defendant. The defendant agreed, and the search yielded narcotics. The officer then arrested Thornton and placed him in the back of the patrol car. The search of the vehicle after his arrest revealed a handgun under the driver's seat.

In its decision, the United States Supreme Court once again extended the rationale of *Belton*, holding that once an officer lawfully arrests an automobile's "recent occupant," the officer may search the automobile's passenger compartment as a search incident to arrest. *Thornton*, 541 U.S. at 621–23, 124 S.Ct. at 2131–32. In so ruling, the Supreme Court noted that

> while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.

Id. at 622, 124 S.Ct. at 2131–32. The Supreme Court declined to address whether *Belton* should be limited to circumstances where the recent occupant was within "reaching distance" of the vehicle or its passenger compartment. However, on the issue of the arrestee's proximity to the vehicle, the Supreme Court acknowledged:

> It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

Id. at 622–23, 124 S.Ct. at 2132. Moreover, prior to the United States Supreme Court's holding in *Thornton*, our Court of Appeals aptly held that "in the search incident to arrest context, the distance between the arrestee and the area to be searched is not dispositive of the issue. Whether a search is reasonable as incident to a lawful arrest depends on the particular circumstances involved." *Davis v. Commonwealth*, 120 S.W.3d 185, 194 (Ky.App.2003).

[6] Similarly, the Sixth Circuit Court of Appeals has also recognized that the *94 accessibility of the arrestee to items

in his vehicle is not a basis for justifying or denying the search.

> [T]he right to search an item incident to arrest exists even if that item is no longer accessible to the defendant at the time of the search. *So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to search incident to an arrest.*

Northrop v. Trippett, 265 F.3d 372, 379 (6th Cir.2001) (citing *Belton*, 453 U.S. at 461–63, n. 5, 101 S.Ct. at 2864–65, n. 5) (emphasis added). Under this same line of reasoning, the Sixth Circuit has also held that even though a search may not be authorized under *Belton*, *i.e.* as a search of a passenger compartment of a vehicle incident to the arrest of the occupant of that vehicle, it may nonetheless be a valid search incident to arrest because such a search "encompasses the search of anything within the area which is, *or was*, within the 'immediate control' of the defendant." *United States v. Hatfield*, 815 F.2d 1068, 1071 (6th Cir.1987), *quoted in United States v. White*, 131 Fed.Appx. 54, 58 (6th Cir.2005) (emphasis in original).

[7] Thus, while temporal and spatial proximity to the automobile are certainly factors to be considered in determining the arrestee's status as a "recent occupant" for purposes of *Belton* and *Thornton*, they are not necessarily dispositive. Indeed, the defendant in *Thornton, supra*, was handcuffed and placed in the back of a squad car at the time of the search. Appellant urges this Court to find that his spatial proximity to the vehicle was such that the concerns of *Belton* are not applicable. In essence, Appellant makes the same argument here that the defendant in *Thornton* made, to wit, that the right of an arresting officer to search the passenger compartment of a vehicle terminates when the arrestee cannot access the vehicle to destroy evidence or access a weapon. We cannot accept such a proposition.

There may be times when officers do not immediately approach a suspect, either for safety concerns for the public in the area or because it would be more effective to conceal their presence. Officers should be free to make these decisions. If officers were required to initiate contact while the suspect was still in the vehicle or after the suspect had just exited the vehicle in order to ensure their ability to search the automobile for discarded contraband or weapons, their safety may be compromised or incriminating evidence may be placed at risk for concealment or destruction. The United States Supreme Court has noted identical concerns. *See Thornton*, 541 U.S. at 621–22, 124 S.Ct. at 2131 (finding "[t]he Fourth Amendment does not require such a gamble").

In any event, we note that the Court in *Thornton* declined to define the term "recent occupant" and stated that whether someone could be considered such for purposes of *Belton* "*may* turn on his temporal or spatial relationship to the car at the time of the arrest and search." *Id.* at 622, 124 S.Ct. at 2131–32 (emphasis added). Thus courts are left with little guidance in determining an arrestee's status as a "recent occupant." However, the Commonwealth notes, and we agree, that when the United States Supreme Court chose the words "temporal *or* spatial," the Court must have meant that whether a person was a "recent occupant" would not be determined only on his spatial relationship to the vehicle at the time of the arrest and search, but could also be based solely on his temporal relationship to the vehicle.

[8] Although no evidence was offered in this case concerning Appellant's temporal relationship to his vehicle, and although officer testimony revealed that the officers *95 did not fear for their safety and conceded that Appellant was so far from his vehicle that it was unlikely he could have accessed it, we are not persuaded that the search was unlawful. The officers here observed Appellant as he drove past them at an excessive rate of speed for the circumstances. The officers observed him exit the vehicle and walk as far as fifty feet from the vehicle before they were able to reach him to initiate contact. While there is no hard and fast definition of what constitutes "recent" both in time and distance,[2] on the facts of this case, Appellant was a "recent occupant" and was sufficiently close to the vehicle, in both time and space, for the concerns of *Belton* and *Thornton* to be applicable. We see no reason to distinguish *Thornton* on the facts of this case. Accordingly, we affirm the Court of Appeals in finding that the suppression of the evidence was erroneous.

GRAVES and WINTERSHEIMER, JJ., concur.

COOPER, J., concurs by separate opinion, with JOHNSTONE, J., joining that concurring opinion.

ROACH, J., also concurs by separate opinion, with LAMBERT, C.J., joining that concurring opinion.

Concurring Opinion by Justice COOPER.

In *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the United States Supreme Court essentially held that a search incident to a lawful arrest includes a search of any vehicle in which the arrested person was a "recent occupant." *Id.* at 623–24, 124 S.Ct. at 2132. In my view (and that of five members of the Court that decided *Thornton*), the reasoning supporting this departure from previously settled law with respect to automobile searches is seriously flawed. Nevertheless, *Thornton* is on all fours with the facts of this case. As I stated in my concurrence in *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky. 2006), because (and only because) I consider it important for law enforcement purposes that consistency be maintained between Kentucky and federal law on Fourth Amendment issues, I reluctantly concur in the majority opinion.

JOHNSTONE, J., joins this concurring opinion.

Concurring Opinion by Justice ROACH.

I concur in the result reached by the majority. I write separately, however, to express my concern with the majority's reliance on *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky.1996), for the proposition that Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment. *LaFollette* does indeed include such a statement. *Id.* at 748. For the reasons expressed herein, however, I would be willing to reconsider *LaFollette* in the appropriate case.

To begin, *LaFollette*'s cited authority does not stand for the claimed proposition. *LaFollette* notes that Section 10 and the Fourth Amendment are similar, thus the United States Supreme Court's interpretation of the Fourth Amendment, though not binding, is certainly informative and persuasive in our interpretation of Section 10. **96** *LaFollette* follows this rather unremarkable proposition with the following language:

> Stated otherwise, Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment. *Estep v. Commonwealth*, Ky., 663 S.W.2d 213 (1983).

915 S.W.2d at 748.

However, *Estep* does not actually state that Section 10 of the Kentucky Constitution provides no greater protection than the Fourth Amendment. In fact, it makes no statement that would even approach that proposition. *Estep* simply adopted the rule of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), concerning searches of vehicles and their compartments and contents. *Id.* at 215. Rather than stating the broad proposition that Section 10 provides protection identical to federal Fourth Amendment jurisprudence, this Court simply observed that the rule of *Ross* was "in harmony with Section 10...." *Id.* In essence, *Estep* held that in a particular instance, Section 10 provided the same protection as the Fourth Amendment. But nowhere does *Estep* state that Section 10 is only coextensive with the Fourth Amendment. As we had only recently noted when *LaFollette* was rendered, "this Court's decisions have not been entirely consistent as to whether Section 10 and the Fourth Amendment are parallel...." *Crayton v. Commonwealth*, 846 S.W.2d 684, 687 (Ky.1992). *Crayton* then noted three cases, including *Estep*, where the Court had held in specific situations, and again without stating a broad proposition, that the relevant federal rule was in accord with Section 10. *LaFollette* committed the error of deriving an absolute, general rule from a specific situation. Such generalization, absent further explication, does not withstand scrutiny. *Cf. Commonwealth v. Cooper*, 899 S.W.2d 75, 77–78 (Ky.1995) (holding that Ky. Const. § 11 provides no more protection than the Fifth Amendment, but doing so with extensive explanation of why the two provisions provide only coextensive protection).

While it is likely that Section 10 of the Kentucky Constitution provides no greater protection than the Fourth Amendment to the United States Constitution, I do not necessarily believe that we are bound to interpret Section 10 in the same manner as the United States Supreme Court has interpreted the Fourth Amendment. Our case law clearly contemplates the possibility that our own constitutional protections could diverge from those in the federal constitution. *See Cooper*, 899 S.W.2d at 77–78 ("From time to time in recent years this Court has interpreted the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States. However, when we have differed from the Supreme Court, it has been because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent."). Obviously, the United States Supreme Court's interpretation of the Fourth Amendment represents a minimum amount of protection to which criminal defendants are entitled. And I acknowledge that given the linguistic similarity between the Fourth Amendment and Section 10, we should give great weight to the United States Supreme Court's

interpretation of the federal amendment. *See Crayton*, 846 S.W.2d at 687. We have even stated what might amount to a preference for not recognizing different protection under the state constitution. *See Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky.1992) (noting in the context of determining whether our constitutional protections are only coterminous with those of the federal constitution that "[w]e have no intention that such cases should encourage lawsuits espousing novel theories to revise well-established legal practice and principles").

*97 However, if we were to determine that Section 10 of the Kentucky Constitution, as applied to a specific case, contained more protections than the United States Supreme Court had declared is provided by the Fourth Amendment, I believe that we should honor our own constitution. The issue could arise in a situation where the United States Supreme Court has interpreted the Fourth Amendment in such a way as to formulate a legal rule that is inconsistent with the original understanding of Section 10 of the Kentucky Constitution. In such a case, we should decline to defer to the United States Supreme Court's interpretation of the Fourth Amendment when interpreting our own constitutional provision, which is an independent legal protection with a different, albeit related, history and origin. To do otherwise would violate our oath of office by which we are bound to "support the Constitution of the United States *and* the Constitution of this Commonwealth...." Ky. Const. § 228 (emphasis added). Our obligation to engage in independent analysis under our own constitution is even more apparent where the relevant federal precedent is weak.

Thus, on the particular issue before us, I note that there is some question whether *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), is a constitutionally sound decision. I agree with Justices Scalia, O'Connor, and Ginsburg that *Thornton* is on shaky ground. *See id.* at 624, 124 S.Ct. at 2133 (O'Connor, J., concurring) (writing "separately to express [her] dissatisfaction with the state of the law in this area" and noting that *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), on which Thornton was premised, already had a "shaky foundation"); *id.* at 628–29, 124 S.Ct. at 2135 (Scalia, J., concurring, joined by Ginsburg, J.) ("[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find. I agree entirely with that assessment." (internal citation and quotation marks omitted)). Moreover, *Thornton* is not the strongest precedent to begin with, as only four justices—a minority of the Court—joined all of the reasoning of the opinion of the Court. Though we are bound by the Court's plurality opinion insofar as it creates a minimum amount of protection, to blindly attach its rule to our own Section 10, given the disparate approaches urged by the members of the Court, makes little sense. If Section 10 charts a clearer course, we should follow it.

However, with all this said I concur in the result of the majority opinion. The parties have only argued within the parameters of *Thornton*'s plurality rule, in effect, agreeing that Section 10 provides only as much protection as the Fourth Amendment. While I welcome the day that we might revisit *LaFollette*, I simply cannot do so without full briefing and argument of such an important issue. *See Thornton*, 541 U.S. at 625, 124 S.Ct. at 2133 (O'Connor, J., concurring) ("I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit."). This case simply does not squarely present the issue of whether Section 10 requires a rule as to recent occupants of automobiles different from that which the United State Supreme Court has applied under the Fourth Amendment. For that reason, I concur.

LAMBERT, C.J., joins this concurring opinion.

All Citations

197 S.W.3d 89

Footnotes

1 Another exception, though not addressed by the parties and not utilized by the officers in this case, is the warrantless "inventory" search under the inevitable discovery doctrine. Seventh Circuit Judge Posner discussed this exception in *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir.2005), wherein he stated that "[w]arrantless inventory searches of vehicles are lawful if conducted pursuant to standard police procedures aimed at protecting the owner's property and protecting the police from the owner's charging them with having stolen, lost, or damaged his property." (Citation omitted).

2 Justice Stevens, in his dissenting opinion in *Thornton v. United States,* 541 U.S. 615, 636, 124 S.Ct. 2127, 2140, 158 L.Ed.2d 905 (2004), recognized the majority's failure to provide such a definition, wherein he stated that "we are not told how recent is recent, or how close is close, perhaps because in this case 'the record is not clear.' " (Citation omitted).

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163 Wash.2d 297
Supreme Court of Washington,
En Banc.

Hans YORK and Katherine York, parents of Aaron E. York and Abraham P. York; and Sharon A. Schneider and Paul A. Schneider, parents of Tristan S. Schneider, Appellants,
v.
WAHKIAKUM SCHOOL DISTRICT NO. 200; W. Robert Garrett, in his official capacity as superintendent of Wahkiakum School District No. 200; Frank Webb, Kari Kandoll, David Smith, Lee Tischer, Cathy Turgeon, in their official capacities as members of the Board of Directors of Wahkiakum School District No. 200; Wahkiakum County Department of Health; Anne Ozment, in her official capacity as director of the Wahkiakum County Department of Health; Wahkiakum County Board of Health; Ron Ozment, Dick Marsyla, and Esther Gregg, in their official capacities as members of the Wahkiakum County Board of Health, Respondents.

No. 78946–1. | Argued May 8, 2007. | Decided March 13, 2008.

Synopsis

Background: Parents of public school students sued school district, claiming that random drug testing program for student athletes violated state constitution. The Superior Court, Wahkiakum County, Joel Penoyar, J., denied parents' motion for preliminary injunction pending trial, and parents sought discretionary review. The Court of Appeals, 110 Wash.App. 383, 40 P.3d 1198, dismissed petition as moot and remanded. On remand, the Superior Court, Douglas E. Goelz, J., found that the testing was constitutional. Parents sought direct review of summary judgment order.

[Holding:] The Supreme Court, En Banc, Sanders, J., held that school district's policy allowing for random and suspicionless drug testing of student athletes violated provision of State Constitution prohibiting the invasion of private affairs or the home without authority of law.

Reversed.

Madsen, J., concurred and filed a separate opinion.

Chambers, J., concurred and filed a separate opinion.

J.M. Johnson, J., concurred and filed a separate opinion.

**997 Aaron Caplan, American Civil Liberties Union of Washington Foundation, for plaintiffs/appellants.

Attorneys and Law Firms

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David Zuckerman, Seattle, Daniel N. Abrahamson, Theshia Naidoo, Tamar Todd, Drug Policy Alliance, Berkeley, CA, for Amicus Curiae (Washington Education Assoc. and Drug Policy Alliance).

Opinion

SANDERS, J.

*299 ¶ 1 The question before us is whether random and suspicionless drug testing of student athletes violates article I, section 7 of the Washington State Constitution. [1]

¶ 2 The Wahkiakum School District (school district) randomly drug tests all student athletes under the authority of Wahkiakum School Board Policy No. 3515 (policy 3515). Aaron and Abraham York and Tristan Schneider played sports for Wahkiakum High School, agreed to the policy, and were tested. Their parents (York and Schneider parents) sued the school district alleging its drug testing policy violated article I, section 7 of the Washington State Constitution. The school district claims random drug testing, without any individualized suspicion, is constitutional. The superior court agreed. We accepted direct review.

¶ 3 The school district asks us to adopt a "special needs" exception to the warrant requirement to allow random and suspicionless drug testing. But we do not recognize such

an exception and hold warrantless random and suspicionless drug testing of student athletes violates the Washington State Constitution.

**998 *300 *FACTS*

¶ 4 Wahkiakum requires its student athletes to refrain from using or possessing alcohol or illegal drugs. Beginning in 1994, the school district implemented myriad ways to combat drug and alcohol use among the student population. Nevertheless, drug and alcohol problems persisted. Acting independently of the school district, the Wahkiakum Community Network (community network) began surveying district students. From these surveys, the community network ranked teen substance abuse as the number one problem in Wahkiakum County. As reiterated by the trial court, the community network's surveys showed that in 1998, 40 percent of sophomores reported previously using illegal drugs and 19 percent of sophomores reported illegal drug use within the previous 30 days, while 42 percent of seniors reported previously using illegal drugs and 12.5 percent reported illegal drug use within the previous 30 days. Clerk's Papers (CP) at 484–85 (Undisputed Facts 10(c), (d)). In 2000, 50 percent of student athletes self-identified as drug and/or alcohol users. *Id.* (Undisputed Fact 10(e)).

¶ 5 As a result, the school district decided to implement random drug testing where all students may be tested initially and then subjected to random drug testing during the remainder of the season. The school district formed the Drug and Alcohol Advisory Committee (now the "Safe and Drug Free Schools Advisory Committee") to help deal with the student substance abuse problems. CP at 485 (Undisputed Fact 15). The committee evaluated the effectiveness of its previous programs, such as D.A.R.E. (Drug Abuse Resistance Education) and support groups, and contemplated adopting policy 3515, which would require random drug testing of student athletes.[2] The trial court found:

> *301 Based upon the evidence of substantial alcohol and drug use among students and pursuant to the School District's statutory authority and responsibility to maintain order and discipline in its schools, to protect the health and safety of its students, and to control, supervise and regulate interschool athletics, the Board of Directors adopted the policy.
> CP at 486 (Undisputed Fact 16).

¶ 6 As part of the policy, all student athletes must agree to be randomly drug tested as a condition of playing extracurricular sports. The drug testing is done by urinalysis, with the student in an enclosed bathroom stall and a health department employee outside. The sample is then mailed to Comprehensive Toxicology Services in Tacoma, Washington.[3] If the results indicate illegal drug use, then the student is suspended from extracurricular athletic activities; the length of suspension depends on the number of infractions and whether the student tested positive for illegal drugs or alcohol. Also, the school district provides students with drug and alcohol counseling resources. The results are not sent to local law enforcement or included in the student's academic record. And the student is not suspended from school, only extracurricular sports.

¶ 7 During the 1999–2000 school year, Aaron York and Abraham York played sports and were tested under the policy. And Tristan Schneider was tested under the policy during the 2000–2001 year. The York and Schneider parents brought suit arguing the school district's policy violated the Washington State Constitution.[4] Their motion for a **999 preliminary *302 injunction was denied by superior court Judge Penoyar, and the Court of Appeals dismissed the petition as moot. *See York v. Wahkiakum Sch. Dist. No. 200,* 110 Wash.App. 383, 40 P.3d 1198 (2002). The trial court then held that while the school district's policy "approached the tolerance limit" of our constitution, the policy was nevertheless constitutional and narrowly tailored to reach a compelling government end. CP at 497.

¶ 8 The York and Schneider parents sought and obtained direct review in our court of a summary judgment order and ask us to determine whether the school district's policy 3515 is constitutional.

STANDARD OF REVIEW

[1] [2] [3] ¶ 9 We review summary judgment de novo. *W. Telepage, Inc. v. City of Tacoma,* 140 Wash.2d 599, 607, 998 P.2d 884 (2000). We construe the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Reid v. Pierce County,* 136 Wash.2d 195, 201, 961 P.2d 333 (1998). Finally, we review questions of constitutional construction de novo. *State v. Norman,* 145 Wash.2d 578, 579, 40 P.3d 1161 (2002).

ANALYSIS

[4] [5] ¶ 10 We are aware there are strong arguments, policies, and opinions marshaled on both sides of this debate, but we are concerned only with the policy's constitutionality. And while we are loath to disturb the decisions of a local school board, we will not hesitate to intervene when constitutional protections are implicated. *Millikan v. Bd. of Dirs.*, 93 Wash.2d 522, 527, 611 P.2d 414 (1980). No matter the drawbacks or merits of the school district's random drug ***303** testing, we cannot let the policy stand if it offends our constitution. Students "do not 'shed their constitutional rights' at the schoolhouse door." *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)).

¶ 11 The question before us is narrow: Whether Wahkiakum School District's blanket policy requiring student athletes to submit to random drug testing is constitutional. The United States Supreme Court has held such activity does not violate the Fourth Amendment to the federal constitution. *Vernonia Sch. Dist.*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564. But we have never decided whether a suspicionless, random drug search of student athletes violates article I, section 7 of our state constitution. Therefore, we must decide whether our state constitution follows the federal standard or provides more protection to students in the state of Washington.

I. May Wahkiakum School District Perform Suspicionless, Random Drug Tests of Student Athletes?

a. Federal cases concerning public school searches

[6] ¶ 12 The school district argues we should follow federal cases and allow suspicionless, random drug testing of its student athletes. Two federal cases are apposite to our consideration. These cases, while helpful, do not control how we interpret our state constitution. *City of Seattle v. Mighty Movers*, 152 Wash.2d 343, 356, 96 P.3d 979 (2004). There are stark differences in the language of the two constitutional protections; unlike the Fourth Amendment, article I, section 7 is not based on a reasonableness standard.

¶ 13 The United States Supreme Court has held public school searches presented a "special need," which allowed a departure from the warrant and probable cause requirements. ***304** *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).[5] The *T.L.O.* Court held school teachers and administrators could search students without a ****1000** warrant if: (1) there existed "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school," and (2) the search is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 341–42, 105 S.Ct. 733.

¶ 14 Next, in *Acton*, a public school district implemented a random drug testing of school athletes, similar to the one at issue here. *Vernonia Sch. Dist.*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564. Each student athlete was tested at the beginning of the season and then each week 10 percent were randomly selected for testing. Most critics of *Acton* are not persuaded the majority's analysis justifies a suspicionless search of the student athletes. But the *Acton* majority claimed individualized suspicion would unduly interfere with the government's goals and might actually make the situation worse. Its reasoning was based primarily on three rationales: (1) individualized suspicion would "transform[ ] the process into a badge of shame," *id.* at 663, 115 S.Ct. 2386 where teachers could claim any troublesome student was abusing drugs; (2) teachers and student officials are neither trained nor equipped to spot drug use; and (3) individualized suspicion creates an unnecessary loss of resources in defending claims and lawsuits against arbitrary imposition, when students and parents will inevitably challenge whether reasonable suspicion did indeed exist. *Id.* at 664, 115 S.Ct. 2386 ("In many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse.").[6]

***305** ¶ 15 But these arguments were unpersuasive several years earlier when the Court applied an individualized suspicion standard to public schools in *T.L.O.* The *Acton* majority never adequately explained why individual suspicion was needed in *T.L.O.* but not in *Acton*. Justice O'Connor spent much of her dissent taking issue with this standard:

> [N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms....
>
> ... The great irony of this case is that most (though not all) of the evidence the District introduced to justify

its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision.

Acton, 515 U.S. at 678–79, 115 S.Ct. 2386 (O'Connor, J., dissenting).[7]

¶ 16 The Wahkiakum School District modeled its policy after the one used by the Vernonia School District. But simply passing muster under the federal constitution does not ensure the survival of the school district's policy under our state constitution. The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Therefore, a Fourth Amendment analysis hinges on whether a warrantless search is reasonable, and it is possible in some circumstances for a search to be reasonable without a warrant. *See Acton*, 515 U.S. at 652, 115 S.Ct. 2386 ("As the text of the Fourth Amendment indicates, ****1001** the ultimate measure of the constitutionality ***306** of a governmental search is 'reasonableness.' "). But our state constitutional analysis hinges on whether a search has "authority of law"—in other words, a warrant. WASH. CONST. art. I, § 7.

b. Search and seizure analysis under article I, section 7

[7] ¶ 17 Our state constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. It is well established that in some areas, article I, section 7 provides greater protection than its federal counterpart—the Fourth Amendment. *State v. McKinney*, 148 Wash.2d 20, 29, 60 P.3d 46 (2002); *State v. Myrick*, 102 Wash.2d 506, 510, 688 P.2d 151 (1984) ("[T]he unique language of Const. art. I, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally."). When determining whether article I, section 7 provides greater protection in a particular context, we focus on whether the unique characteristics of the constitutional provision and its prior interpretations compel a particular result. *State v. Walker*, 157 Wash.2d 307, 317, 138 P.3d 113 (2006). We look to the constitutional text, historical treatment of the interest at stake, relevant case law and statutes, and the current implications of recognizing or not recognizing an interest. *Id.*

[8] ¶ 18 This requires a two-part analysis. First, we must determine whether the state action constitutes a disturbance of one's private affairs. Here that means asking whether requiring a student athlete to provide a urine sample intrudes upon the student's private affairs. Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The "authority of law" required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions. Because the Wahkiakum School District had no warrant, if we reach the second prong of the analysis we must decide whether the school district's activity fits within an exception to the warrant ***307** requirement. Relying on federal law, the school district claims there is a "special needs" exception to the warrant requirement that we should adopt. The York and Schneider parents point out we have not adopted such an exception and urge us not to do so here.

II. Suspicionless, Random Drug Testing Disturbs a Student Athlete's Private Affairs.

[9] [10] ¶ 19 When inquiring about private affairs, we look to " 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.' " *State v. Young*, 123 Wash.2d 173, 181, 867 P.2d 593 (1994) (quoting *State v. Myrick*, 102 Wash.2d 506, 511, 688 P.2d 151 (1984)). This is an objective analysis.

¶ 20 The private affair we are concerned with today is the State's interference in a student athlete's bodily functions. Specifically, does it intrude upon a privacy interest to require a student athlete to go into a bathroom stall and provide a urine sample, even against that student's protest? Federal courts and our court both agree the answer is an unqualified yes, such action intrudes into one's reasonable expectation of privacy. *Robinson v. City of Seattle*, 102 Wash.App. 795, 813 n. 50, 10 P.3d 452 (2000) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *In re Juveniles A, B, C, D, E*, 121 Wash.2d 80, 90, 847 P.2d 455 (1993); *State v. Olivas*, 122 Wash.2d 73, 83, 856 P.2d 1076 (1993); *State v. Meacham*, 93 Wash.2d 735, 738, 612 P.2d 795 (1980); *State v. Curran*, 116 Wash.2d 174, 184, 804 P.2d 558 (1991)). Indeed, we offer heightened protection for bodily functions compared to the federal courts. *Robinson*, 102 Wash.App. 795, 10 P.3d 452.

¶ 21 But the school district claims student athletes have a lower expectation of privacy. Certainly, students who choose

to play sports are subjected to more regulation. For example, RCW 28A.600.200 provides, "Each school district board of directors is hereby granted and shall exercise the authority to control, supervise and regulate the conduct of ***308** interschool ****1002** athletic activities." [8] And certainly there is generally less privacy in locker rooms than in other parts of a school. But the district does not link regulations and the communal atmosphere of locker rooms with a student's lowered expectation of privacy in terms of being subjected to suspicionless, random drug testing. We do not see how what happens in the locker room or on the field affects a student's privacy in the context of compelling him or her to provide a urine sample. [9] A student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily functions. The urinalysis test is by itself relatively unobtrusive. Nevertheless, a student is still required to provide his or her bodily fluids. Even if done in an enclosed stall, this is a significant intrusion on a student's fundamental right of privacy. *See Robinson*, 102 Wash.App. at 822, 10 P.3d 452.

¶ 22 This analysis should in no way contradict what we have previously said about students' privacy interests. Generally we have recognized students have a lower expectation of privacy because of the nature of the school environment. Courts have held a school official needs some "reasonable" or "individualized" suspicion in order to protect students from arbitrary searches, yet still give officials sufficient leeway to conduct their duties. *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733; *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (1977). Our court discussed student searches and student rights under the Fourth Amendment prior to the United States Supreme Court's holding in *T.L.O.* In *McKinnon*, we said:

> ***309** Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order.

McKinnon, 88 Wash.2d at 81, 558 P.2d 781. And in *Kuehn*, we also opined in dicta that although a warrant or probable cause might be unnecessary to search a student's backpack, the school nevertheless needed to articulate some reasonable suspicion to justify a search of a student under both the Fourth Amendment and article I, section 7. *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wash.2d 594, 694 P.2d 1078 (1985); *State v. Slattery*, 56 Wash.App. 820, 823, 787 P.2d 932 (1990) ("Under the school search exception, school officials may search students if, under all the circumstances, the search is reasonable."); *State v. B.A.S.*, 103 Wash.App. 549, 554 n. 8, 13 P.3d 244 (2000). [10]

¶ 23 We decided these cases before the United States Supreme Court decided *T.L.O.*, which cited *McKinnon* when it also held reasonable suspicion was necessary to search a student. *T.L.O.*, 469 U.S. at 333 n. 2, 105 S.Ct. 733. Nevertheless, in *State v. Brooks*, 43 Wash.App. 560, 568, 718 P.2d 837 (1986), the Court of Appeals analyzed *McKinnon* and *Kuehn* and said, "Accordingly, since the holding in *T.L.O.* is consistent ****1003** with our Supreme Court's holding in *McKinnon*, we conclude that article 1, section 7 affords students no greater protections from searches by school officials than is guaranteed by the Fourth Amendment." The school district points to this one sentence to say we should adopt whole cloth the federal ***310** analysis with regards to both student searches and student drug testing. But *Brooks* did not involve drug testing and was decided before *Acton*. Nor are we bound to the Court of Appeals' broad language.

¶ 24 Because we determine that interfering with a student athlete's bodily functions disturbs one's private affairs, we must address the second prong of the article I, section 7 analysis: does the school district have the necessary authority of law to randomly drug test student athletes?

III. Under Article I, Section 7 There Is No Authority of Law That Allows a School District to Conduct Random Drug Tests.

[11] **[12]** ¶ 25 We have long held a warrantless search is per se unreasonable, unless it fits within one of the " 'jealously and carefully drawn exceptions.' " *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996) (internal quotation

marks omitted) (quoting *State v. Houser*, 95 Wash.2d 143, 149, 622 P.2d 1218 (1980)). These exceptions include exigent circumstances, consent, searches incident to a valid arrest, inventory searches, the plain view doctrine, and *Terry*[11] investigative stops. *Robinson*, 102 Wash.App. at 813, 10 P.3d 452. Any exceptions to the warrant requirement must be rooted in the common law. *State v. Ladson*, 138 Wash.2d 343, 979 P.2d 833 (1999); *Robinson*, 102 Wash.App. at 813, 10 P.3d 452. And it is always the government's burden to show its random drug testing fits within one of these narrow exceptions. *City of Seattle v. Mesiani*, 110 Wash.2d 454, 457, 755 P.2d 775 (1988). Today the school district asks us to accept an analog to the federal special needs doctrine to justify its drug testing policy. The York and Schneider parents point out we have never formally adopted a special needs exception and therefore claim no exception to the warrant requirement exists here.

*311 ***a. Federal special needs exception***

[13] ¶ 26 Before addressing whether we have adopted or will adopt such a special needs exception, it is helpful to briefly examine the federal exception to understand both its requirements and its breadth. The United States Supreme Court has held there are certain circumstances when a search or seizure is directed toward " 'special needs, beyond the normal need for law enforcement" and "the warrant and probable-cause requirement [are] impracticable.' " *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (quoting *T.L.O.*, 469 U.S. at 351, 105 S.Ct. 733 (Blackmun, J., concurring in judgment)).[12] For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).[13] The Court has applied such reasoning to administrative searches,[14] border patrols,[15] and prisoners **1004 and probationers.[16]

*312 ¶ 27 The United States Supreme Court has also held drug testing presents a special need and may be done under certain circumstances without a warrant or individualized suspicion. In *Skinner*, 489 U.S. at 634, 109 S.Ct. 1402, the Court upheld warrantless and suspicionless blood and urine testing of railroad employees following major train accidents. The Court applied similar reasoning in *Von Raab* when it held immigration officials may be subjected to random drug testing. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).[17]

b. Is there a Washington State special needs exception?

¶ 28 We have never adopted a special needs exception but have looked to federal special needs cases when dealing with similar issues. In cases concerning administrative searches,[18] border patrols,[19] and prisoners and probationers, *313 [20] our courts have departed from the warrant requirement in similar, but not always identical, ways.

¶ 29 In *Juveniles A, B, C, D, E*, 121 Wash.2d 80, 847 P.2d 455, we held convicted sex offenders could be tested for HIV (human immunodeficiency virus). But because neither party briefed nor asked for an independent construction of the state constitution, we relied exclusively on federal cases when deciding *Juveniles A, B, C, D, E. Id.* at 91 n. 6, 847 P.2d 455. In *Curran*, 116 Wash.2d 174, 804 P.2d 558, we held taking blood pursuant to former RCW 46.20.308(3) (1987) did not violate article I, section 7 if there was a clear indication it would reveal evidence of intoxication and was performed in a reasonable manner. In *Olivas*, 122 Wash.2d 73, 856 P.2d 1076, after we analyzed the federal reasoning in *Skinner*, 489 U.S. 602, 109 S.Ct. 1402 and *Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685, we held the State may conduct blood tests of violent sex offenders without a warrant, probable cause, or individualized suspicion under both the United States and Washington State Constitutions.

¶ 30 In *Robinson*, 102 Wash.App. at 827–28, 10 P.3d 452, the Court of Appeals held the city of Seattle could require a preemployment urinalysis test of police officers, firefighters, **1005 and any other city position where public safety is in jeopardy. In its analysis, the Court of Appeals claimed our court had accepted a variation of the federal "special needs" analysis:

> Although the special needs analysis appears to be an established part of Fourth Amendment jurisprudence, the Washington Supreme Court has developed a different approach for article I, section 7 analysis of governmental searches outside the context of law enforcement.

Id. at 816–17, 10 P.3d 452 (footnote omitted). The *Robinson* court examined several of our cases, including *Juveniles A, B, C, D, E,* and said:

> ***314** "[The Washington State Supreme Court has] recognized two types of privacy: the right to nondisclosure of intimate personal information or confidentiality, and the right to autonomous decisionmaking. The former may be compromised when the State has a rational basis for doing so, while the latter may only be infringed when the State acts with a narrowly tailored compelling state interest."

Id. at 817, 10 P.3d 452 (quoting *Juveniles A, B, C, D, E,* 121 Wash.2d at 96–97, 847 P.2d 455). But aside from what *Robinson* claims we did, we have not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement. In the context of randomly drug testing student athletes, we see no reason to invent such a broad exception to the warrant requirement as such an alleged exception cannot be found in the common law. *See Ladson,* 138 Wash.2d at 350, 979 P.2d 833 (finding no common law exception for a pretextual warrantless traffic stop).

c. Washington State cases concerning suspicionless searches

¶ 31 Though we have not considered drug testing in public schools, we have a long history of striking down exploratory searches not based on at least reasonable suspicion. *State v. Jorden,* 160 Wash.2d 121, 127, 156 P.3d 893 (2007) ("[T]his court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition."); *Robinson,* 102 Wash.App. at 815, 10 P.3d 452 ("Our Supreme Court has thus not been easily persuaded that a search without individualized suspicion can pass constitutional muster."). In *Mesiani,* this court held a random roadblock sobriety checkpoint program initiated by Seattle police was "highly intrusive" search and violated "the right to not be disturbed in one's private affairs guaranteed by ***315** article I, section 7." *Mesiani,* 110 Wash.2d at 458–60, 755 P.2d 775.[21] In *Kuehn,* this court held a search of student luggage required by school officials as a condition of participation in a school-sponsored trip to Canada violated both the Fourth Amendment and article I, section 7. *Kuehn,* 103 Wash.2d at 595, 694 P.2d 1078. We opined, "[i]n the absence of individualized suspicion of wrongdoing, the search is a general search. '[W]e never authorize general, exploratory searches,' " (alteration in original) and such searches are "anathema to the Fourth Amendment and Const. art. I, § 7 protections." *Id.* at 599, 694 P.2d 1078 (quoting *State v. Helmka,* 86 Wash.2d 91, 93, 542 P.2d 115 (1975)); *id.* at 601–02, 694 P.2d 1078.

¶ 32 The few times we have allowed suspicionless searches, we did so either relying entirely on federal law or in the context of criminal investigations or dealing with prisoners. In *Meacham,* 93 Wash.2d at 738–39, 612 P.2d 795, we upheld mandatory blood tests of putative fathers. In *Juveniles A, B, C, D, E,* 121 Wash.2d at 90, 847 P.2d 455, we upheld mandatory HIV tests of convicted sexual offenders. In *Olivas,* 122 Wash.2d at 83, 856 P.2d 1076, we upheld blood tests of convicted felons without individualized suspicion. And recently in *State v. Surge,* 160 Wash.2d 65, 156 P.3d 208 (2007), we held a DNA sampling of convicted felons did not ****1006** violate article I, section 7. That case allowed for warrantless testing without individualized suspicion because we asserted such testing did not disturb a reasonable right to privacy. But these cases present far different factual situations from drug testing student athletes. A felon has either already pleaded guilty or been found guilty beyond a reasonable doubt of a serious crime; a student athlete has merely attended school and chosen to play extracurricular sports. Most troubling, however, is that we can conceive of no way to draw a principled line permitting drug testing only student athletes. If we were to allow random drug testing here, ***316** what prevents school districts from either later drug testing students participating in any extracurricular activities, as federal courts now allow, or testing the entire student population?

¶ 33 We cannot countenance random searches of public school student athletes with our article I, section 7 jurisprudence. As stated earlier, we require a warrant except for rare occasions, which we jealously and narrowly guard. We decline to adopt a doctrine similar to the federal special needs exception in the context of randomly drug testing student athletes. In sum, no argument has been presented that would bring the random drug testing within any reasonable interpretation of the constitutionally required "authority of law." *See Mesiani,* 110 Wash.2d at 458, 755 P.2d 775.

¶ 34 Accordingly, we hold the school district's policy 3515 is unconstitutional and violates student athletes' rights secured by article I, section 7. Therefore we reverse the superior court. The York and Schneider parents shall recover their costs.

WE CONCUR: GERRY L. ALEXANDER, C.J., SUSAN OWENS, TOM CHAMBERS, JJ.

MADSEN, J. (concurring).

¶ 35 While I agree with the majority's holding that the school's drug testing program does not withstand constitutional scrutiny, I disagree that article I, section 7 of the Washington Constitution categorically prohibits our adoption of the "special needs" exception. The majority's analysis sweeps far too broadly, casting doubt on the validity of even suspicion-based school searches. As noted by Justice J.M. Johnson in his concurring opinion, even before the United States Supreme Court issued *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), this court sanctioned school searches on less than probable cause in view of the unique responsibilities of school officials and the diminished privacy interests of students. Concurrence (J.M. Johnson, J.) at 16. I believe that a narrowly drawn special needs exception also is consistent with Washington law. However, I concur in the result reached by the majority because on *317 this record there is no special need that justifies suspicionless drug testing of Wahkiakum School District's student athletes. In particular, the school district has failed to show that a suspicion-based regime of drug testing is inadequate to achieve its legitimate objectives.

¶ 36 Article I, section 7 prohibits the government from intruding on a citizen's "private affairs" without "authority of law." WASH. CONST. art. I, § 7. As this court has held, "authority of law" may be supplied by an exception to the warrant requirement that is rooted in " 'well-established principles of the common law.' " *State v. Ladson*, 138 Wash.2d 343, 350, 979 P.2d 833 (1999) (quoting *City of Seattle v. McCready*, 123 Wash.2d 260, 273, 868 P.2d 134 (1994)). One such well-established common law principle is that a warrantless search may be permissible when the purpose of the search is other than the detection or investigation of a crime. For example, a warrantless inventory search of an automobile is permissible under article I, section 7 for the purposes of preventing property loss and protecting the police from liability. *State v. Houser*, 95 Wash.2d 143, 155, 622 P.2d 1218 (1980). Similarly, under the community caretaking exception, a warrantless search may be permissible when necessary for the purpose of rendering aid or performing routine health and safety checks. *State v. Thompson*, 151 Wash.2d 793, 802, 92 P.3d 228 (2004); *State v. Acrey*, 148 Wash.2d 738, 754, 749, 64 P.3d 594 (2003) (police justified in detaining 12–year–old shortly after midnight in an isolated area and transporting **1007 him home at mother's request) (citing and quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (enunciating "community caretaking function[ ]" exception to warrant requirement); *State v. Kinzy*, 141 Wash.2d 373, 386, 5 P.3d 668 (2000) (same), *cert. denied*, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001)).

¶ 37 Another well-established common law principle is that a warrantless search may be permissible when adherence to the warrant requirement would be impracticable under the circumstances. Thus, we have recognized that warrantless searches may be permissible under *318 article I, section 7 when certain exigent circumstances require immediate action to avoid the destruction of evidence or the flight of a suspect. *State v. Cardenas*, 146 Wash.2d 400, 405–07, 47 P.3d 127, 57 P.3d 1156 (2002) (warrantless entry to motel room in hot pursuit of armed robbery suspects); *State v. Johnson*, 128 Wash.2d 431, 454, 909 P.2d 293 (1996) (exigency created by ready mobility of vehicles supports warrantless automobile search); *State v. Stroud*, 106 Wash.2d 144, 147, 151, 720 P.2d 436 (1986) (same); *State v. Baldwin*, 109 Wash.App. 516, 523, 37 P.3d 1220 (2001) (exigent circumstances may justify warrantless blood drug test of DUI (driving under influence) suspect).

¶ 38 Contrary to the majority's view, the "special needs" exception is rooted in these well-established common law principles. *See In re Juveniles A, B, C, D, E*, 121 Wash.2d 80, 100, 847 P.2d 455 (1993) (recognizing the " 'special needs' " exception is among the " 'few specifically established and well-delineated exceptions' " to the warrant requirement (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991))). We recently addressed the special needs exception in *State v. Surge*, 160 Wash.2d 65, 156 P.3d 208 (2007). In that case, we held that suspicionless DNA (deoxyribonucleic acid) testing of convicted felons is permissible under the Fourth Amendment to the United States Constitution, applying either the special needs exception or

the exception for minimally intrusive searches. *Id.* at 81, 156 P.3d 208. Because we concluded such testing does not intrude on a convicted felon's "private affairs," we had no need to address whether the special needs exception would have provided the necessary "authority of law" under article I, section 7. However, nothing in the plurality and concurring opinions suggests the special needs exception to the warrant requirement is inconsistent with article I, section 7, although the plurality suggests the scope of the exception must be narrowly drawn. *See also State v. Olivas*, 122 Wash.2d 73, 856 P.2d 1076 (1993) (recognizing special ***319** needs exception to warrant requirement allows suspicionless DNA testing of convicted felons under the Fourth Amendment, while declining to decide the issue under article I, section 7 for inadequate briefing).

¶ 39 The special needs exception encompasses a "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 520 U.S. 305, 309, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). There are two threshold requirements to establish a "special need." First, the need must be "special" in the sense that it serves a purpose other than the ordinary need for effective law enforcement. *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402; *see, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (special need to detect drug use by armed customs officials to deter malfeasance where test results may not be used in a criminal prosecution absent employee's consent); *cf. Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (no special need for nonconsensual drug testing of pregnant hospital patients where results are conveyed to law enforcement); *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (no special need for suspicionless highway checkpoint stops where primary purpose was crime control). Second, and more importantly, the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search. *Von Raab*, 489 U.S. at 665–66, 109 S.Ct. 1384; *see, e.g., United States v. Martinez–Fuerte*, 428 U.S. 543, 556–61, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (inability to detect ****1008** contraband in passing vehicles justifies suspicionless border stop); *cf. Chandler*, 520 U.S. at 321, 117 S.Ct. 1295 (no special need for drug-testing political candidates who are subject to intensive public scrutiny). In determining whether a special need justifies a warrantless search, courts evaluate the nature of the privacy interest involved, the character of the governmental intrusion, the need and immediacy of the government's concerns, and the efficacy of the means chosen to meet those concerns.

***320** ¶ 40 Remarkably, the term "special needs" first appeared in a Supreme Court opinion adopting the view of *this court* (among others) that "the special needs of the school environment" justify warrantless searches by school authorities who have a reasonable suspicion the search will unearth a student's illicit activity. *T.L.O.*, 469 U.S. at 332 n. 2, 105 S.Ct. 733 (citing *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (1977)). In *McKinnon, id.* at 80, 558 P.2d 781, we recognized school officials must be free "to maintain order and discipline" in the school environment in order to carry out their duties of both educating and protecting the children in their care. We observed that maintaining discipline and order often requires immediate action, which is incompatible with a warrant requirement. Accordingly, this court adopted a flexible approach to evaluating the propriety of a school search, involving a fact-intensive inquiry that takes into account the child's age, history, and school record; the seriousness of the illicit activity; the need for immediacy; and the reliability of the information provided. And, in *Kuehn v. Renton School District No. 403*, 103 Wash.2d 594, 694 P.2d 1078 (1985), although we disallowed suspicionless searches of the personal luggage of student band members, we held that such searches would be permissible based on a reasonable belief of wrongdoing.

¶ 41 Thus, we have recognized the school setting requires some modification of the level of suspicion of illicit activity needed to justify a search based upon the "special needs" in this environment. Of course, a suspicionless search is qualitatively different from a search based on individualized suspicion. Nevertheless, I agree with Justice J.M. Johnson that suspicionless drug testing may be permissible if the requirements necessary to meet the special needs exception are met.

¶ 42 However, I disagree with the test he proposes for evaluating whether a special need justifies a suspicionless search. According to Justice J.M. Johnson, "a constitutional program of random suspicionless drug testing of student athletes should advance compelling interests, show narrow ***321** tailoring, and employ a less intrusive method of testing." Concurrence (J.M. Johnson, J.) at 1019. Although a special needs analysis is similar to such strict scrutiny, it differs in important ways. In particular, an indispensable component of the special needs analysis is the impracticality of adherence to the traditional requirements. Regardless of

the strength of the government's need for a search, or the closeness of the fit of the means chosen to achieve the state's legitimate goals, a search cannot be justified under the special needs exception absent a showing that adherence to the requirement of a warrant and probable cause would be impracticable under the circumstances. *See, e.g., Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) (nonconsensual HIV (human immunodeficiency virus) test of man who bit police officer unjustifiable as a "special need" because there was no immediate need to test without a warrant).

¶ 43 A balancing test that omits this requirement threatens to turn "special needs" into an exception that swallows the general rule prohibiting warrantless searches. "[B]alancing tests without carefully prescribed limits can be inherently dangerous because 'when an individual's suspected harmful conduct is balanced against societal interests, individual privacy losses will appear negligible in relation to government's efforts to protect society.' " *Olivas*, 122 Wash.2d at 105 n. 88, 856 P.2d 1076 (Utter, J., concurring) (quoting Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L.REV. 89, 95 (1992)). Thus, in *Juveniles*, Justice Utter warned that recognizing a special need for a suspicionless search without first finding an individualized **1009 suspicion standard unworkable in the particular context would create a potentially unlimited exception. *Juveniles*, 121 Wash.2d at 102, 847 P.2d 455 (Utter, J., concurring in part, dissenting in part). Similarly, in *Olivas*, Justice Utter took issue with the majority's application of the special needs test in the context of DNA testing of convicted felons, reasoning a search must be truly divorced from ordinary law enforcement *322 purposes to fall within the exception. *Olivas*, 122 Wash.2d at 107–08, 856 P.2d 1076 (Utter, J., concurring).

¶ 44 In *Surge*, 160 Wash.2d at 81, 156 P.3d 208, we indicated our agreement with Justice Utter ("Certainly the concurring opinion in *Olivas* is more consistent with our cases interpreting article I, section 7." (citing *Olivas*, 122 Wash.2d at 107–08, 856 P.2d 1076)). Consistently with our decisions relating to other warrant exceptions, we suggested the scope of the special needs exception is more narrowly drawn under article I, section 7 than under the Fourth Amendment. *See, e.g., Thompson*, 151 Wash.2d 793, 92 P.3d 228 (limiting scope of community caretaking function); *Kinzy*, 141 Wash.2d at 395, 5 P.3d 668 (police exceeded scope of community caretaking function by detaining minor longer than necessary to assure her safety); *State v. Ferrier*, 136 Wash.2d 103, 114, 960 P.2d 927 (1998) (scope of consent search); *State v. White*, 135 Wash.2d 761, 768, 958 P.2d 982 (1998) (limiting automobile inventory searches to unlocked compartments); *State v. Williams*, 102 Wash.2d 733, 689 P.2d 1065 (1984) (limiting scope of community caretaking function); *Stroud*, 106 Wash.2d 144, 720 P.2d 436 (scope of exigent circumstances as applied to automobile searches); *State v. Chrisman*, 100 Wash.2d 814, 676 P.2d 419 (1984) (scope of search incident to arrest).

¶ 45 The reasonableness clause of the Fourth Amendment permits a balancing approach as an alternative to a warrant under a broader range of circumstances than does article I, section 7. *State v. Chenoweth*, 160 Wash.2d 454, 463–64, 158 P.3d 595 (2007). Thus, in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), a majority of the United States Supreme Court reasoned that a random, suspicionless drug test would be better than a suspicion-based test as a policy matter, not that an individualized suspicion requirement was unworkable in the school context. Instead of examining the impracticality of a suspicion-based search, the Court asked only whether the government's interest was important enough to justify the privacy invasion at issue. And in *Board of Education of Independent School District No. 92 v.* *323 *Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), the Supreme Court expanded the special needs exception even further. Rather than requiring that a school demonstrate an actual problem with student drug abuse, the Court essentially took judicial notice of the issue, observing that the "war against drugs" is a "pressing concern" in every school. *Id.* at 834, 122 S.Ct. 2559. Moreover, the court justified suspicionless drug testing for the purpose not of protecting others, but of protecting the drug-abusing student from his or her own illicit conduct. *Id.* at 836, 122 S.Ct. 2559.

¶ 46 In contrast to the Fourth Amendment, article I, section 7 protects privacy interests without express limitation and exceptions to the warrant requirement must be narrowly applied. *Chenoweth*, 160 Wash.2d at 463–64, 158 P.3d 595. In particular, a warrant exception applies only when the reason for the search "fall[s] within the scope of the reason for the exception." *Ladson*, 138 Wash.2d at 357, 979 P.2d 833 (article I, section 7 prohibits pretextual traffic stops); *see also Houser*, 95 Wash.2d at 154, 622 P.2d 1218 (inventory searches must be conducted in "good faith," not as a pretext for criminal investigation). Thus, article I, section 7 does not necessarily require us to follow the lead of the United States Supreme Court in expanding the scope of the special needs

exceptions to encompass a broad range of applications where the State has failed to establish the traditional requirement of individualized suspicion is impracticable.

¶ 47 As Justice O'Connor stated in her forceful dissent in *Acton*:

> [A] suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a **1010 legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.

Acton, 515 U.S. at 678, 115 S.Ct. 2386 (O'Connor, J., dissenting).

¶ 48 A requirement of individualized suspicion may be unworkable because the purpose of the search is so unrelated *324 to criminal activity as to render the concepts of probable cause and reasonable suspicion inapt. *See, e.g., Acrey*, 148 Wash.2d at 748–49, 64 P.3d 594 (individualized suspicion not required when police officers are engaged in noncriminal, noninvestigative "community caretaking functions"); *O'Hartigan v. Dep't of Pers.*, 118 Wash.2d 111, 119–20, 821 P.2d 44 (1991) (allowing suspicionless polygraph testing to evaluate honesty and integrity of Washington State Patrol applicants). Alternately, individualized suspicion may be unworkable because the object of the search is hidden or latent, or otherwise presents inadequate opportunities for detection. *Von Raab*, 489 U.S. at 674, 109 S.Ct. 1384 (lack of opportunities to observe armed field agents responsible for interdicting drugs); *United States v. Davis*, 482 F.2d 893 (9th Cir.1973) (airport searches); *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir.1972) (allowing suspicionless searches upon entrance to federal courthouse; requiring individualized suspicion "would as a practical matter seriously impair the power of government to protect itself against ruthless forces bent upon its destruction").

¶ 49 In deciding whether individualized suspicion is unworkable, courts consider both the opportunities for developing the requisite individualized suspicion and the severity of the consequences that may ensue by failing to detect illicit conduct. Thus, in *Skinner*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639, the Supreme Court upheld suspicionless drug testing for train operators involved in a train wreck, taking into account the chaos following a serious rail accident, the ephemeral nature of the evidence to be obtained, and the magnitude of the danger to public safety posed by drug or alcohol impaired railway workers. Likewise, in *Von Raab*, 489 U.S. at 668, 109 S.Ct. 1384, the Court concluded suspicion-based drug testing of customs officials would be unworkable considering such employees often work unsupervised, carry firearms, and are the "first line of defense" against breaches of our national borders. *See also Martinez–Fuerte*, 428 U.S. at 557, 96 S.Ct. 3074 (suspicion-based traffic stops in border areas unworkable because flow of traffic impedes observation).

*325 ¶ 50 Some courts have found the special needs exception applicable in the context of locker searches or metal detectors for the purpose of protecting students from violence in the schools. For example, the Wisconsin Supreme Court permitted random locker searches for the purpose of deterring students from bringing weapons to school in response to a series of gun-related incidents that created " 'an atmosphere of tension and fear.' " *In re Interest of Isiah B.*, 176 Wis.2d 639, 642, 500 N.W.2d 637, *cert. denied*, 510 U.S. 884, 114 S.Ct. 231, 126 L.Ed.2d 186 (1993). Similarly, the California Court of Appeals approved suspicionless searches using metal detectors for the purpose of keeping weapons off campus. *In re Latasha W.*, 60 Cal.App.4th 1524, 70 Cal.Rptr.2d 886 (1998). In finding a requirement of individualized suspicion unworkable, the California court reasoned that schools have "no feasible way to learn that individual students have concealed guns or knives on their persons, save for those students who brandish or display the weapons. And, by the time weapons are displayed, it may well be too late to prevent their use." *Id.* at 1527, 70 Cal.Rptr.2d 886; *see also People v. Dukes*, 151 Misc.2d 295, 580 N.Y.S.2d 850 (Crim.Ct.1992) (approving suspicionless searches of high school students using a metal detector for purposes of deterring students from bringing weapons to school).

¶ 51 In this case the school has failed to show a suspicion-based testing regime is not a feasible means of maintaining student order, discipline, and safety. Students, unlike train operators, customs officials, or highway motorists, are under almost constant surveillance by teachers, coaches, peers, and others. **1011 Drug and alcohol use often involves observable manifestations that would supply the

particularized suspicion necessary to support a search. *Cf. Von Raab*, 489 U.S. at 674, 109 S.Ct. 1384 (finding a suspicion-based search unworkable where field officers are not subject to daily supervision); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974) (suspicion-based searches of airline passengers unworkable where profile-method of detection is unreliable).

*326 ¶ 52 Moreover, the record is devoid of evidence that drug use actually interferes with the school's ability to maintain order, discipline, and student safety. *Cf. Acton*, 515 U.S. at 649, 115 S.Ct. 2386 (discipline problems caused by rampant drug use; student athletes the "leaders of the drug culture"; open use of drugs); *Skinner*, 489 U.S. at 606–07, 109 S.Ct. 1402 (high percentage of railway workers are problem drinkers). The school's statistical evidence of drug use by students does not adequately establish a special need for suspicionless testing. *See City of Seattle v. Mesiani*, 110 Wash.2d 454, 458 n. 1, 755 P.2d 775 (1988) (finding statistical probability that sobriety checkpoints will intercept drug-impaired motorists inadequate to justify suspicionless investigative stops).

¶ 53 If drug use does not result in observable manifestations that adversely impact the school's ability to provide a safe, orderly environment, the school's interest in detecting drug use does not justify nonconsensual drug testing.[1] On the other hand, if drug use is an actual problem, school officials likely will have the individualized suspicion necessary to require a drug test, particularly given the relaxed standard of suspicion applicable in the school context. *See McKinnon*, 88 Wash.2d at 81, 558 P.2d 781. Thus, it is difficult to see how a suspicionless drug testing program is necessary.

¶ 54 In addition, the record shows that the selection of student athletes was not because athletes as a class are responsible for drug-related harm, as in *Acton* (athletes were leaders of the drug culture, responsible for discipline problems), but because they had reduced expectations of privacy vis-a-vis the other students, making it more likely the district's drug-testing program would pass constitutional *327 muster. Nothing in the record suggests athletes account for a disproportionate number of drug users or that drug-related sports injury is a particular problem. Article I, section 7 does not permit the pretextual use of a warrant exception. *Ladson*, 138 Wash.2d 343, 979 P.2d 833; *cf. Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Stroud*, 106 Wash.2d 144, 720 P.2d 436; *cf. New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

¶ 55 Even if the district could demonstrate that a suspicion-based testing regime is unworkable, the balance of interests at stake weighs against allowing suspicionless drug testing, taking into account the student's privacy interest, the nature of the intrusion, and its limited efficacy as compared with a search regime based on individualized suspicion.

¶ 56 First, as to the interest involved, student athletes undoubtedly have a strong privacy interest in their excretory functions. A state-compelled urine test is "particularly destructive of privacy and offensive to personal dignity." *Von Raab*, 489 U.S. at 680, 109 S.Ct. 1384 (Scalia, J., dissenting). In *Acton*, the Court found urine testing a minimal intrusion in view of the diminished expectations of privacy held by student athletes, who undress and shower in communal locker rooms. Although students generally have a diminished expectation of privacy in the school setting, the privacy interests of student athletes are not substantially lower than those of students in general. Most students, **1012 not just athletes, must share communal locker rooms (physical education classes) and restroom facilities. However, it is difficult to understand how the necessity to share locker rooms and restrooms diminishes a student's expectation that their excretory functions will not be subject to governmental intrusion absent particularized suspicion of wrongdoing.

¶ 57 Next, considering the nature of the intrusion, the *Earls* court reasoned that compelled urine testing is minimally intrusive, stating "the invasion of students' privacy *328 is not significant." *Earls*, 536 U.S. at 834, 122 S.Ct. 2559. This dubious premise is inconsistent with Washington law. Certainly monitored urine collection and urine testing is more intrusive than the pat-down search or brief interrogative stop that we have found highly intrusive in the past. *See Mesiani*, 110 Wash.2d at 458, 755 P.2d 775 (finding brief interrogative stop of highway travelers "highly intrusive"); *Jacobsen v. City of Seattle*, 98 Wash.2d 668, 673, 658 P.2d 653 (1983) (characterizing a pat-down search of concert-goers as a "high degree of intrusion"); *cf. Surge*, 160 Wash.2d at 78–79, 156 P.3d 208 (compelled DNA blood testing of convicted felons is not highly intrusive in view of diminished privacy interests and limitations on use).

¶ 58 A suspicionless testing regime must also be likely to actually accomplish its goals. One of the district's goals is to protect student athletes who may be harmed by those who engage in athletic competitions while impaired by drugs. But testing a student athlete weeks or months before an athletic

event does little to prevent that from happening. A urine test remote in time from the event does not detect present drug use that might affect performance. In contrast, the school could intercept those most likely to pose a threat to others by applying a suspicion-based drug-testing policy at the time of the athletic competition.

¶ 59 Another goal of the drug-testing program is general deterrence of drug use by students. Yet by focusing on student athletes, the school has targeted a group less likely to use drugs than students generally. Moreover, a student who wishes to continue using drugs merely needs to forego participation in athletic activities. As pointed out by the Washington Education Association and Drug Policy Alliance in their amicus brief, drug testing may actually be counterproductive, as participation in athletic activities is itself an important factor in discouraging drug use and the drug testing program may actually discourage such participation, isolating students from healthy activities. The district has failed to show that suspicionless drug testing would be significantly more effective in achieving its stated *329 goals than a suspicion-based regime. The limited effectiveness of the drug testing policy does not justify the indignity visited upon students who must submit to it. Indeed, suspicionless drug testing jeopardizes other important educational objectives, including preparing students to become responsible citizens who share a common understanding and appreciation of our constitutional values.

¶ 60 On this record the district has failed to demonstrate that its suspicionless drug testing program justifies application of the special needs doctrine.

Conclusion

¶ 61 The majority errs in categorically rejecting the special needs exception to the warrant requirement. Under limited circumstances, a suspicionless search may be permissible when the requirement of individualized suspicion would jeopardize an important governmental interest beyond the ordinary interest in law enforcement. The special needs exception is consistent with well-established common law principles governing warrantless searches and, thus, comports with article I, section 7. However, while I believe there may be circumstances that justify suspicionless drug testing of students, I agree that this case does not present them. Thus, I concur in the result.

WE CONCUR: CHARLES W. JOHNSON, MARY E. FAIRHURST, JJ., BOBBE J. BRIDGE, J. Pro Tem.

CHAMBERS, J. (concurring).

¶ 62 I concur fully in the well reasoned majority opinion. I write separately to observe that on this day a majority of my **1013 colleagues has found a greater privacy interest in a person's urine than they recently found in a person's saliva and the DNA (deoxyribonucleic acid) it contains. *See State v. Athan*, 160 Wash.2d 354, 374, 158 P.3d 27, 37 (2007); *cf. State v. Surge*, 160 Wash.2d 65, 156 P.3d 208 (2007). I find the juxtaposition of these two opinions paradoxical.

J.M. JOHNSON, J. (concurring).

¶ 63 I concur with the majority's holding that the random suspicionless drug *330 testing of middle and high school athletes as conducted in this case is not constitutional. The majority correctly notes that "[t]he question before us is narrow," and its analysis is limited to this particular drug testing program. Majority at 999. I write to emphasize, however, that a minor student's right to privacy, in the secondary school context, is not absolute and thus not all drug testing programs are invalid. After all, a middle and high school drug testing program does not impinge on the jealously guarded private affairs of adult citizens, but on those of adolescents, whose privacy expectations and rights are not the same as those of adults. [1]

¶ 64 Washington's constitution and laws necessarily recognize the special situation in public schools based on the age of students and the fact it is constitutionally the "paramount duty of the state" to provide for the education of minors. WASH. CONST. art. IX, § 1. Thus, a school drug testing program based on individualized reasonable suspicion offends neither the United States Constitution Amendment IV nor article I, section 7 of the Washington Constitution. Under carefully defined circumstances, a random suspicionless drug testing program for high school student athletes, in my opinion, might also be implemented that will meet applicable constitutional requirements. [2]

STANDARD OF REVIEW

¶ 65 When resolving a question of first impression concerning the scope of article I, section 7, we may consider *331 well-reasoned precedents from federal courts and sister

jurisdictions. *See State v. Chenoweth*, 160 Wash.2d 454, 470–71, 158 P.3d 595 (2007) (citing *State v. Murray*, 110 Wash.2d 706, 709, 757 P.2d 487 (1988)). Although not binding on this court, such precedents may provide persuasive authority and analysis. *Id.* at 471, 158 P.3d 595 (citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wash.2d 343, 356, 96 P.3d 979 (2004)).

ANALYSIS

A. *Defining The Nature of a Secondary Student's Privacy Interest*

¶ 66 First, we must consider a high school student's asserted privacy interest. The United States Supreme Court has repeatedly held that school children do retain some rights but do not enjoy the full extensive constitutional protections of adults in our society. If school children had all the same rights as adults, the administration of our schools would creak to a halt under the twin burdens of due process and probable cause. For example, a teacher-ordered school detention would cease to be an effective disciplinary measure and instead be converted into a lawsuit for tortious imprisonment.

¶ 67 Although Washington's Constitution does contain an enhanced right of privacy in article I, section 7, this strict provision was written by our founders with the understanding that the affairs of school children are not so private as those of adults and may be treated differently from those of adults.[3] **1014 Common sense dictates this outcome and our jurisprudence supports it.

¶ 68 The separate and important constitutional provision in article IX that basic (K–12) education "is the paramount *332 duty of the state" also supports the conclusion of lower privacy expectations for school children. WASH. CONST. art. IX, § 1. A student in a regulated educational environment, where the school stands in loco parentis, clearly does not have the same reasonable expectation of privacy as an adult. The majority acknowledges this proposition: "[g]enerally we have recognized students have a lower expectation of privacy because of the nature of the school environment." Majority at 1002. School districts have the statutory authority and responsibility to maintain order and discipline in their schools and to protect the health and safety of their students.[4] In my view, the majority does not fully recognize the necessary corollary; school districts are allowed tools and programs to combat rising drug problems and to fulfill their responsibility as protector of students.

¶ 69 Additionally, in addressing the nature of these student's privacy interests, we should recognize that athletes, whether at the middle school, high school, college, or professional level, have a lower expectation of privacy.[5] Secondary school athletes here, with their parents' consent, *333 have voluntarily subjected themselves to rules and regulations that are not enforced against the general student body. The record shows, for example, these students (also with their parents' consent) who play sports in Wahkiakum District agree to an annual invasive physical examination to determine their health status before participating. Indeed, the appellants conceded at argument that these examinations are valid requirements by schools. Wash. State Supreme Court oral argument at 8:50, *York v. Wahkiakum Sch. Dist. No. 200*, No. 78946–1 (May 8, 2007), *audio recording by* TVW, Washington State's Public Affairs Network, *available at http://www.tvg.org*. As the Court in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) observed, "[s]chool sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." The majority acknowledges that male athletes at Wahkiakum High School have less expectation of privacy "since there are no dividers between urinals, or between the showers, and athletes routinely undress in each other's presence." Majority at 1002 n. 8. "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate **1015 in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Acton*, 515 U.S. at 657, 115 S.Ct. 2386; *see Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972).

¶ 70 The nature of athletic competition also supports the conclusion that athletes have a lower expectation of privacy in regards to drug testing. Athletes face enormous pressure to excel in competition and may turn to performance-enhancing drugs such as steroids.[6] Taking performance- *334 enhancing drugs, or "doping," is not only dangerous to the user, but potentially to out-matched opponents. Such drugs also undermine the integrity of athletic competitions. Even the taking of recreational drugs while playing sports raises safety issues. Certain drugs may keep athletes from awareness

of pain from injury, allowing severe—even career-ending or life-threatening—problems. The *Acton* Court recognized that in athletic competitions, "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." 515 U.S. at 662, 115 S.Ct. 2386. Justice Ginsburg in her dissent in *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822, 846, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), similarly noted that "[s]chools regulate student athletes discretely because competitive school sports ... expose students to physical risks that schools have a duty to mitigate." The legislature has expressly entrusted school districts with responsibility "to control, supervise and regulate the conduct of interschool athletic activities...." RCW 28A.600.200. Our constitution allows school districts adequate avenues for proper programs to fulfill these responsibilities and to thereby protect students and avoid potential school liability.

B. *Is There an Intrusion into Private Affairs of Students?*

¶ 71 Even in light of the lower privacy interest of students and the even lower privacy interest of minors as student athletes, there is little doubt that requiring this urinalysis test is a significant invasion of privacy. In *Robinson v. City of Seattle*, 102 Wash.App. 795, 818, 10 P.3d 452 (2000), the Court of Appeals opined that "[i]t is difficult to imagine an affair more private than the passing of urine." The United States Supreme Court similarly observed in reference to urination, " '[m]ost people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, ***335** its performance in public is generally prohibited by law as well as social custom.' " *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402 (quoting *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir.1987), *aff'd in part and vacated in part*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)).

¶ 72 There is "no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass." *Robinson*, 102 Wash.App. at 819, 10 P.3d 452. As an indisputable invasion of privacy,[7] requiring a urinalysis test without probable cause of drug use must be authorized by the authority of law under our constitution.

C. *Does Washington Recognize a Special Needs Exception in Schools?*

¶ 73 We now turn to whether there is a special needs exception to the constitutional authority of law requirement. In Washington, warrantless searches of free adults are per se unreasonable unless fitting within one of the " 'jealously and carefully drawn' exceptions." *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996) (internal quotation marks omitted) (quoting ****1016** *State v. Houser*, 95 Wash.2d 143, 149, 622 P.2d 1218 (1980)); *see also* majority at 1002–03. However, where the state demonstrates a "special need," the "authority of law" requirement may be satisfied in select cases. Washington common law recognizes "special needs" in certain areas and has impliedly identified a "special environment" in public schools, albeit different from that recognized by federal courts.

¶ 74 Blood testing is arguably more invasive than urinalysis, yet we have held that those convicted of sexual crimes (or in the case of juveniles, those adjudicated to have committed sexual offenses) can be tested for HIV due to a special need. *See In re Juveniles A, B, C, D, E*, 121 Wash.2d 80, 847 P.2d 455 (1993); *see also* ***336** *State v. Olivas*, 122 Wash.2d 73, 856 P.2d 1076 (1993) (warrantless blood tests of violent and sex offenders are valid under both the United States and Washington Constitutions). Additionally, in *State v. Curran*, 116 Wash.2d 174, 804 P.2d 558 (1991) (*abrogated on other grounds by State v. Berlin*, 133 Wash.2d 541, 548, 947 P.2d 700 (1997)), this court held that blood testing a motorist for intoxication does not violate article I, section 7 if the test is performed in a reasonable manner and there is an indication that it would reveal evidence of intoxication. While the Court of Appeals in *Robinson*, 102 Wash.App. at 813 n. 50, 10 P.3d 452, recognized that Washington offers higher protection for bodily functions compared to the federal courts, that same court held that the City of Seattle could test those individuals responsible for public safety for drug use without a warrant or individualized suspicion. *Id.* at 827–28, 10 P.3d 452. This court has not addressed such programs.

¶ 75 In *State v. Surge*, 160 Wash.2d 65, 156 P.3d 208 (2007), we allowed warrantless DNA sampling of prisoners without individualized suspicion. The majority observes that students are not convicted criminals. Majority at 1005. This is true but not determinative. Clearly, the definitions of constitutional protection and the privacy expectations ("private affairs") are different between students and criminals. These distinctions do not determine the entire constitutional analysis, but both groups do have a lowered reasonable expectation of privacy. *See* Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 SEATTLE U.L.REV.

467, 687 (2005) (recognizing a "special environments" category of searches applicable to public schools, prisons, the international border, and administrative searches). The current statute providing for search of school lockers exemplifies the lower expectation of privacy recognized in schools. RCW 28A.600.220 specifically states:

> No right nor expectation of privacy exists for any student as to the use of any locker issued or assigned to a student by a school and the locker shall be subject to search for illegal drugs, weapons, and contraband as provided in RCW 28A.600.210 through 28A.600.240.

*337 ¶ 76 This statute is just one example of the special environment that Washington has recognized in the school setting.[8] Although the parameters of the public school special environment have not been clearly defined in all areas, the following section concludes a drug testing program based on individualized suspicion is sustainable under article I, section 7.

D. *Individualized Suspicion Justifies Testing*

¶ 77 The United States Supreme Court's jurisprudence holds that the Fourth Amendment, with its "unreasonable search" protections, allows public schools to randomly drug test student athletes. *Acton,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564; *Earls,* 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735. I agree with the majority that the protections of article I, section 7 are greater. I find **1017 persuasive a prior case in that Court that required individualized suspicion before the search could take place, thereby articulating a standard more deferential to privacy rights (more analogous to our constitution's). *See New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

¶ 78 In my opinion, the *T.L.O.* deferential standard for suspicion searches could pass Washington's stricter privacy test. As mentioned *infra* note 3, article I, section 7 and the Fourth Amendment are structurally different and the Washington Constitution protects "private affairs" and not only against "unreasonable searches." Still, the *T.L.O.* reasoning is persuasive because it balances the privacy rights of minor students and the administrative responsibilities of school officers.

¶ 79 The *T.L.O.* Court reasoned that searches in a school environment are analogous to those conducted in a similar *338 administrative context, relying on its previous analysis in *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). *See T.L.O.*, 469 U.S. at 340–41, 105 S.Ct. 733. The *T.L.O.* Court held that school teachers and administrators could initiate a search if: (1) there existed "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school"; and (2) the search is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342, 105 S.Ct. 733. The Washington Legislature adopted our current statute governing searches of students and students' possessions that mirrors this "reasonable grounds" test from *T.L.O.* RCW 28A.600.230.[9]

¶ 80 In *Acton,* the majority took issue with the *T.L.O.* Court's use of individualized suspicion, arguing that requiring individualized suspicion would interfere with the school's drug prevention goals and possibly worsen the situation. *See* 515 U.S. at 663–64, 115 S.Ct. 2386 (suggesting that teachers and school officials are not trained to detect drug use, teachers might claim any problematic student is using drugs, using individualized suspicion would turn the drug testing process into a badge of shame, and individualized suspicion creates a needless loss of resources in defending against claims of arbitrary imposition). Justice O'Connor in her forceful dissent in *Acton,* however, addressed the effectiveness of a drug program based on reasonable suspicion:

> *339 [N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms.
>
> ... The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision.

Id. at 678–79, 115 S.Ct. 2386 (O'Connor, J., dissenting) (citation omitted).

¶ 81 The implementation of a school drug testing program based on individualized suspicion is undoubtedly improved with training of teachers, counselors, and/or staff to detect **1018 signs of drug use. Many drugs have easily recognizable physical manifestations: glazed appearance of eyes, dilated pupils, slurred speech, distinct odors on breath, etc. [10] Justice O'Connor observed in her dissent in *Acton:*

> Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition.

515 U.S. at 677, 115 S.Ct. 2386 (O'Connor, J., dissenting).

¶ 82 Justice O'Connor also emphasized that, "The [majority's] fear that a suspicion-based regime will lead to the testing of 'troublesome but not drug-likely' students ... ignores that the required level of suspicion in the school context is objectively *reasonable* suspicion." *Id.* at 676–77, 115 S.Ct. 2386 *340 (O'Connor, J., dissenting). In *State v. McKinnon*, 88 Wash.2d 75, 81, 558 P.2d 781 (1977), this court outlined factors relevant to determining whether a school official in fact had reasonable suspicion: "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search."

¶ 83 Admittedly, a drug program based only on individualized reasonable suspicion is not without problems, but such a program would result in a greater protection of constitutional rights. [11] Furthermore, a program based on individualized reasonable suspicion might often provide more deterrence to student drug use than a random suspicionless program. Under a random regime, students might take their chances that they will not be one of the very few unlucky students selected for drug testing. But under a reasonable suspicion regime, if students show signs of drug use, there is a higher probability of getting tested. As in *Acton*, "there is a substantial basis for concluding that a vigorous regime of suspicion-based testing ... would have gone a long way toward solving [the District's] school drug problem while preserving the Fourth Amendment rights of [students]." 515 U.S. at 679–80, 115 S.Ct. 2386 (O'Connor, J., dissenting).

¶ 84 Thus, the United States Supreme Court and prior cases in this court have held that requiring "reasonable" or "individualized" suspicion before commencing a search is sufficient to protect a student's right to privacy and still allow school officials to do their job. *T.L.O.*, 469 U.S. at 341–42, 105 S.Ct. 733; *McKinnon*, 88 Wash.2d at 81, 558 P.2d 781 ("We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order."). While *341 *McKinnon* was decided before *Acton*, we have never revisited the case and it remains a correct statement of Washington law. *See also State v. Slattery*, 56 Wash.App. 820, 823, 787 P.2d 932 (1990) ("Under the school search exception, school officials may search students if, under all the circumstances, the search is reasonable."); *State v. B.A.S.*, 103 Wash.App. 549, 554 n. 8, 13 P.3d 244 (2000) (specifically adopting a reasonableness search standard).

¶ 85 Thus, our decisions allow a reasonable search or test using the *T.L.O.* individualized reasonable suspicion standard. The legislature could further define the factors to be considered by law in a similar fashion as they have previously specified school interests in statute. For example, RCW 28A.600.210 notes the important policy considerations favoring a reasonable search standard and applies **1019 that standard to school lockers. [12]

¶ 86 A student may be drug tested if a coach or school administrator can articulate a reasonable suspicion of drug use. In my view, Washington has implicitly accepted this view of private affairs through a special environments exception under article I, section 7.

E. *Random Suspicionless Drug Testing of Athletes*

¶ 87 Although I believe that the random testing program as conducted here was invalid, I do not think that random suspicionless drug testing of middle and high school athletes is categorically unconstitutional even under Washington's protective constitution article I, section 7. [13] Many *342 drugs, especially performance-enhancement drugs, present substantial risks but are not easily detected under an individualized reasonable suspicion scheme. Some physical manifestations of these drugs, e.g., increase in muscle mass and acne, also occur naturally among some high school and middle school students. [14] As mentioned *infra*, drug use among athletes not only affects the integrity of athletic

competition but also entails safety concerns not inherent in other activities and for which the district has some responsibility. A steroid or methamphetamine-using athlete may pose both a much higher risk of harm to himself and threat of injury to others, including his opponents.

¶ 88 Although random suspicionless drug testing is a significant invasion of privacy, the privacy expectations of minor school students, of minor student athletes, are less than those of adults. Under certain circumstances, the balance between the government's interest in suspicionless drug testing and student athletes' privacy rights might weigh in favor of testing. It is premature, and the record is insufficient, to articulate the specific circumstances when a suspicionless test would be upheld. We leave the important issue unresolved.[15] The Washington Legislature may be the appropriate place to consider this issue at length; the drug testing arena would benefit from legislative consideration and fact finding.

¶ 89 In my view, a constitutional program of random suspicionless drug testing of student athletes should advance compelling interests, show narrow tailoring, and employ a less intrusive method of testing.[16] The United *343 States Supreme Court in *Acton* recognized the test for a compelling interest is not some "fixed, minimum quantum of governmental concern" but rather whether the government's interest is "important enough" to justify the specific invasion of the constitutional right at issue. 515 U.S. at 661, 115 S.Ct. 2386 (emphasis omitted). (Though *Acton* discusses the different federal constitutional protections, this test is also appropriate under our constitution's enhanced privacy protections.) Thus, the greater the intrusion into constitutional rights, the more compelling **1020 the interests must be. Since we have established that random mandatory urinalyses here are significant invasions of privacy,[17] even of minor students, the standard to prove compelling interest is high, although not impossible.

¶ 90 The *Acton* Court noted that the importance of deterring drug use by our nation's school children can hardly be doubted. *Acton*, 515 U.S. at 661, 115 S.Ct. 2386. I agree. But in addition to evidencing a general drug problem among minor students nationally, findings of a local school drug problem are likely required to meet the compelling threshold. Some factors relevant to determining whether a compelling interest in suspicionless drug testing of athletes exists include an abnormally high rate of or a sharp increase in drug use, and a higher drug rate or impact among athletes. In *Acton*, there was even evidence that the athletes were the "leaders of the drug culture." 515 U.S. at 649, 115 S.Ct. 2386. Objective evidence of the school's drug problem, through student surveys or reports by teachers and other school officials of student drug use, and also evidence of the drug problem's effect on the functioning of the school might prove compelling.[18]

¶ 91 Although the Supreme Court in *Earls*, 536 U.S. at 836, 122 S.Ct. 2559, suggested that it makes little sense to insist a drug problem become severe before it is addressed, that is not *344 proposed for our schools. Drug problems can be addressed early through means other than suspicionless drug testing. Because of its invasive nature, alternative programs such as individualized suspicion possibly may need to be supplemented by a proper program of random suspicionless drug testing.

¶ 92 Narrow tailoring is also likely required. There must be a close fit between the testing proposed and the drug problem. Determining whether the tailoring is sufficiently narrow requires looking beyond the formal justification to the actual reason for the drug testing program.[19]

¶ 93 Although Wahkiakum District did present evidence of a school-wide drug problem, there was no showing that athletes used drugs at a higher rate than other students or that testing the athletes would address the drug problem among the general student body. CP at 486 (the district alleged only that "athletes are involved in the use of illegal drugs and alcohol at least to the same level as are non-athletes.") The district also acknowledged that there is "no evidence that student athletes were leaders in [any] 'drug culture' in its school." CP at 25, ¶ 1.119; *cf. Acton*, 515 U.S. at 649, 115 S.Ct. 2386. In the instant case, the district subjected the athletes to random suspicionless testing not because of a higher incidence of drug use, but merely because athletes have lower expectation of privacy. Wahkiakum's random suspicionless drug program was not narrowly tailored to a compelling government interest.

¶ 94 Although some federal courts seem unconcerned with the indignity of urine collection, Washington courts recognize our heightened protections from Washington Constitution's article I, section 7 explicit safeguard for "private affairs." *See Acton*, 515 U.S. at 664, 115 S.Ct. 2386; *Robinson*, 102 Wash.App. at 822, 10 P.3d 452 (decrying that "all of the citizens who apply for employment ... must submit to a humiliating procedure *345 in order for the City to learn

the chemical content of their urine"). As this case indicates, how a drug test is administered is one important aspect of its constitutionality and a showing of a less intrusive method should be required. *See, e.g., Jacobsen v. City of Seattle*, 98 Wash.2d 668, 675, 658 P.2d 653 (1983) (finding warrantless pat-down searches of patrons attending rock concerts unconstitutional but noting that "the City might establish less instrusive and more formal procedures for determining the presence of contraband"). Wahkiakum District's drug **1021 program was more intrusive and humiliating than necessary to achieve its stated goals. A randomly selected student athlete was publicly removed from class, sometimes by having his or her name called over the intercom, and transported by a school official to the Wahkiakum County Health Department for a sample. CP at 39, 91. Although the urine sample was given in a closed bathroom stall, a health department employee stood outside the stall aurally monitoring the process. CP at 39–40.

¶ 95 There are less intrusive ways of conducting a drug test. Schools (or the legislature) might even consider other technology for drug testing such as saliva samples or sweat patches, which are significantly less intrusive and humiliating.[20]

CONCLUSION

¶ 96 I concur with the majority's decision in striking down this drug testing program given the record in this particular case. Washington's public schools already have the authority to engage in drug testing where based on individualized reasonable suspicion, and such a program is fully constitutional. I conclude that random suspicionless drug testing may also be devised and conducted under *346 carefully defined circumstances. The legislature may be the appropriate body to consider such a program, I concur.

All Citations

163 Wash.2d 297, 178 P.3d 995, 230 Ed. Law Rep. 425

Footnotes

1 Article I, section 7 of the Washington Constitution provides:
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

2 Originally, the school district planned to test any student involved in extracurricular activities but later confined the testing only to student athletes.

3 If a student athlete receives a positive result and believes the result is wrong, he or she may submit a list of prescription medications or past medical history to explain the false positive. This information is transmitted to the health department employee and not to the school district. The York and Schneider parents seem to press the argument the district's policy requires all students to reveal their medications. The trial court found, however, "the policy clearly does not require disclosure of other medications in the first instance. It is only if a positive result is obtained that a student must decide whether or not to reveal other medications or forfeit his or her right to participate in extracurricular activities." CP at 487–88 (Court's Mem. Decision, Disputed Facts).

4 The York and Schneider parents abandoned one of their original claims—the policy also violated the Fourth Amendment to the United States Constitution—in light of the Supreme Court's decisions in *Acton* and *Earls*. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (holding random drug testing of public school athletes is permissible); *Bd. of Educ. v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (holding random drug testing of any public school student involved in an extracurricular activity is permissible).

5 The federal special needs exception is discussed, *infra*, in part II, section 1.

6 Professor Wayne LaFave criticizes the majority's defense of suspicionless searches: "The most objectionable aspect of this passage ... is the violence that it does to established Fourth Amendment doctrine. The *Acton* majority treats random testing and testing upon reasonable suspicion as being essentially the same, perhaps slightly different in *degree*, but not different in *kind*. But in point of fact, the two are quite different in kind, which is why the Supreme Court and the lower courts had theretofore required at least individualized suspicion to justify a search, except in exceedingly rare instances in which circumstances much more compelling than those in the instant case were present." 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(c), at 516 (4th ed.2004) (footnotes omitted).

7 The Court then expanded on *Acton* and allowed random drug testing of students participating in extracurricular activities of any kind. *Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735.

8 Specifically, the Washington Interscholastic Activities Association requires all member schools to adopt rules to discourage use of drugs and alcohol. CP at 112. Also, all student athletes must undergo a physical examination prior to participating in athletics. *Id.* at 111. The school district also points out the male athletes at Wahkiakum High School should expect even less privacy since there are no dividers between urinals, or between the showers, and athletes routinely undress in each other's presence.

9 Furthermore, even the United States Supreme Court has apparently put less emphasis on these arguments as they now allow public school districts to randomly drug test any student engaged in any extracurricular activity. *Earls*, 536 U.S. at 831, 122 S.Ct. 2559 (stating it was not dispositive to their analysis in *Acton* whether the students' expectation of privacy was altered because they were subjected to "regular physicals or communal undress").

10 A search is reasonable if (1) it is justified at its inception, (2) is reasonably related in scope to the circumstances that justified the search, and (3) there is a nexus between the item sought and the infraction being investigated. *State v. B.A.S.*, 103 Wash.App. 549, 553–54, 13 P.3d 244 (2000).

11 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

12 The school search cases previously discussed, *T.L.O.* and *Acton*, were also decided under the Supreme Court's special needs exception.

13 As one commentator has noted, "the line between ... a criminal investigation and ... searches and seizures designed primarily to serve noncriminal law enforcement goals, is thin and, quite arguably, arbitrary. Yet, it is a line of considerable constitutional significance." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 323 (3d ed.2002).

14 *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). When the Court balanced the interests in *T.L.O.*, it relied on its analysis of administrative searches promulgated in *Camara*. *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733.

15 *United States v. Ramsey*, 431 U.S. 606, 616, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); *United States v. Brignoni–Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).

16 *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

17 But the Court has not always allowed drug testing without some individualized suspicion. In *Chandler*, the Court held a Georgia law requiring candidates for state office pass a drug test was unconstitutional because the Court could not identify a "sufficiently vital" special need to override the candidates' privacy interests. *Chandler v. Miller*, 520 U.S. 305, 318, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Then in *Ferguson* the Court held a public hospital could not test any maternity patient suspected of drug use without her consent. *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). While the ultimate goal—"protecting the health of both mother and child"—was laudable, the invasion of privacy was more substantial here because positive test results were given to the police for prosecution purposes. *Id.* at 81, 121 S.Ct. 1281.

18 Our courts have adopted an approach to administrative searches similar to those enunciated in *Camara*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930. *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wash.App. 171, 183, 931 P.2d 208 (1997); *Murphy v. State*, 115 Wash.App. 297, 62 P.3d 533 (2003).

19 *State v. Almanza–Guzman*, 94 Wash.App. 563, 972 P.2d 468 (1999) (relying only on federal case law for its border analysis). In *State v. Quick*, 59 Wash.App. 228, 232, 796 P.2d 764 (1990), the Court of Appeals held probable cause was needed to search persons at places other than the actual border. This is a higher reasonable suspicion standard than that articulated by the United States Supreme Court in *Brignoni–Ponce*, 422 U.S. at 884, 95 S.Ct. 2574. Also, before the United States Supreme Court decided *Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412, we held sobriety checkpoints violated both the federal and state constitutions. *City of Seattle v. Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988).

20 *State v. Baker*, 28 Wash.App. 423, 623 P.2d 1172 (1981). Our court has recognized a "warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects." *State v. Campbell*, 103 Wash.2d 1, 22, 691 P.2d 929 (1984) (citing *Hocker v. Woody*, 95 Wash.2d 822, 826, 631 P.2d 372 (1981)). *See also State v. Lucas*, 56 Wash.App. 236, 783 P.2d 121 (1989).

21 Additionally, in *Jacobsen v. City of Seattle*, 98 Wash.2d 668, 658 P.2d 653 (1983), this court held warrantless patdown searches conducted as a condition admission to concerts at the Seattle Center Coliseum were not allowed. However, the court relied entirely on federal Fourth Amendment cases and not our state constitution.

1 The school argues that some performance enhancing drugs may be undetectable yet offers no evidence of an actual problem with drug-related sports injuries. The school also argues that detecting the use of performance enhancing drugs is necessary to protect the integrity of athletic events. However, the harm threatened by the unfair use of performance-enhancing drugs is simply not great enough to justify nonconsensual suspicionless drug testing. *Cf. Skinner*, 489 U.S. at 628, 109 S.Ct. 1402 ("disastrous consequences" of a train wreck); *Rushton v. Neb. Pub. Power Dist.*, 844 F.2d 562 (8th Cir.1988) (danger posed by drug-impaired nuclear power plant operators); *Edwards*, 498 F.2d 496 (a single hijacked airline can destroy hundreds of lives and millions of dollars of property).

1 That it was the parents of the minor students who brought this action illustrates one substantial difference between the rights of minors and the rights of adults. Juveniles also have an entirely separate justice system, Title 13 RCW. Violations otherwise criminal if committed by an adult are not criminal if committed by a minor. RCW 13.04.240. Minors are treated differently under many other Washington laws, e.g., contract laws, labor laws, and voting laws. Clearly, the rights of minors are not coextensive with those of adults.

2 If these juveniles may not be tested, current drug testing for Washington college athletes under NCAA (National College Athletic Association) programs is problematic, since those athletes have the full constitutional protections of adults. See note 5, *infra*.

3 United States Constitution Amendment IV declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" whereas Washington Constitution article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." In addition to being structurally different, the Washington Constitution is notably not based on a reasonableness standard.

4 In addition to statutory responsibilities for student discipline and safety such as those found in RCW 28A.150.240(2), for example, the Washington Interscholastic Activities Association requires all member schools to adopt rules to discourage use of drugs and alcohol. Clerk's Papers (CP) at 112.

5 While the issue is not raised in our current case, we should be mindful of possible unintended consequences that may spring from the majority's holding. If secondary school student athletes, with their attendant lower expectation of privacy, are free from random suspicionless drug searches, it follows that college athletes, who assert full constitutional rights, must also be free from random suspicionless drug testing. *See Univ. of Colo. ex rel. Regents of Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 930 (Colo.1993) (construing Colorado Constitution article II, section 7 and finding suspicionless searches by the University of Colorado were unconstitutional).

Under the majority's analysis, NCAA testing, which is fairly invasive, is likely per se unconstitutional. The consequence of this holding may be that college athletes in Washington State are not allowed to compete in NCAA competitions. Am. Br. of State of Wash. as Amici Curiae Supp. Resp'ts at 2 n. 1 (citing NCAA Division I Manual, Bylaw 3.2.4.7, htt p:// goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home) (failure to consent to the NCAA testing program will result in a student being ineligible to play). *But cf. Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 645, 658–59, 26 Cal.Rptr.2d 834 (1994) (upholding NCAA's random suspicionless drug testing policy, finding that athletes have a diminished expectation of privacy and that private organizations do not have to show a compelling state interest for its programs to be valid).

6 One study of nearly 5,000 secondary school students reported that "5.4% of boys and 2.9% of girls had used steroids in the past year." Tracy Hampton, *Researchers Address Use of Performance–Enhancing Drugs in Nonelite Athletes*, 295 J. Am. Med. Ass'n 607 (2006) (citing L.M. Irving et al., 30 J. ADOLESCENT HEALTH 243 (2002)).

7 We further note below that technology improvements allow much less invasive techniques; both saliva testing and "sweat patches" are now available to test for drugs.

8 Another example of a student's lowered expectation of reasonable privacy contrasted with a compelling state need is the issue of compulsory vaccinations. The state may enact reasonable regulations to protect the public health and public safety of school children, and compulsory immunization is a permissible exercise of the state's police power. *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25, 25 S.Ct. 358, 49 L.Ed. 643 (1905). While this issue is rarely analyzed in a Fourth Amendment context, it also illuminates a special environment and lowered privacy expectation within the educational context.

9 "(1) A school principal, vice principal, or principal's designee may search a student, the student's possessions, and the student's locker, if the principal, vice principal, or principal's designee has reasonable grounds to suspect that the search will yield evidence of the student's violation of the law or school rules. A search is mandatory if there are reasonable grounds to suspect a student has illegally possessed a firearm in violation of RCW 9.41.280.

"(2) Except as provided in subsection (3) of this section, the scope of the search is proper if the search is conducted as follows:

"(a) The methods used are reasonably related to the objectives of the search; and

"(b) Is not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction.

"(3) A principal or vice principal or anyone acting under their direction may not subject a student to a strip search or body cavity search as those terms are defined in RCW 10.79.070."

10 *See* Nat'l Inst. on Drug Abuse, *Commonly Abused Drugs available at* http://www.nida.nih.gov/DrugPages/DrugsofAbuse.html (last modified Jan. 2, 2008) (listing the intoxicating effects of different drugs).

11 Justice O'Connor also noted that "any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential." *Acton*, 515 U. S at 677, 115 S.Ct. 2386 (O'Connor, J., dissenting).

12 "The legislature finds that illegal drug activity and weapons in schools threaten the safety and welfare of school children and pose a severe threat to the state educational system. School officials need authority to maintain order and discipline in schools and to protect students from exposure to illegal drugs, weapons, and contraband. Searches of school-issued lockers and the contents of those lockers is a reasonable and necessary tool to protect the interests of the students of the state as a whole."

13 Although there is no Washington case law as of yet upholding random suspicionless searches in the school context, suspicionless searches of lockers are statutorily authorized in schools. "RCW 28A.600.240 **School locker searches —Notice and reasonable suspicion requirements.** (1) In addition to the provisions in RCW 28A.600.230, the school principal, vice principal, or principal's designee may search all student lockers at any time without prior notice and without a reasonable suspicion that the search will yield evidence of any particular student's violation of the law or school rule."

14 Identifying adolescents and children who use performance-enhancing substances can even be difficult for physicians. Hampton, *supra*, at 607.

15 *See, supra,* note 2 regarding drug testing of college athletes.

16 Of course, random suspicionless drug tests could be implemented based on parental consent without meeting these requirements. During the 1999–2000 school year, 184 out of 280 students in grades 7–12 in Wahkiakum School District participated in at least one sport. All of the students signed consent forms, and only six forms were signed under protest by a student or a parent. CP at 486. I recognize the claim that some consent forms were not truly voluntary.

17 *But see* note 20, *infra,* discussing less invasive saliva and "sweat patch" tests.

18 Here again, the legislature could address an issue to which it is suited by the fact-finding hearings, deliberative process, and constitutional role.

19 "Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one." *State v. Ladson*, 138 Wash.2d 343, 353, 979 P.2d 833 (1999).

20 *See, e.g.,* Office of Nat'l Drug Control Policy, *Developing a Testing Program: Pros and Cons of the Various Drug Testing Methods, available at* http://www.whitehousedrugpol icy.gov/publications/drug_ testing/testing.html (last modified Sept. 20, 2002) (contrasting different methods of drug testing).

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763 N.E.2d 972
Supreme Court of Indiana.

Rosa J. LINKE, Reena M. Linke (By their next friends and parents), Scott L. Linke and Noreen L. Linke, Appellants (Plaintiffs below),
v.
NORTHWESTERN SCHOOL CORP., Appellee (Defendant below).

No. 34S05–0103–CV–151. | March 5, 2002.

Students and their parents brought action challenging constitutionality of school's policy of conducting random drug testing on students participating in athletics, extracurricular and co-curricular activities, and those students wishing to drive themselves to and from school. The Howard Circuit Court, Lynn Murray, J., concluded that school's drug testing policy was reasonable under state and federal constitutions, and entered judgment in favor of school. Students appealed. The Court of Appeals, 734 N.E.2d 252, reversed and remanded. On petition to transfer, the Supreme Court, Sullivan, J., held that drug testing of students did not violate the searches and seizures clause, nor the privileges and immunities clause, of the state constitution.

Judgment of the trial court affirmed.

Boehm, J., dissented and filed opinion, in which Ruckers, J., concurred.

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ON PETITION TO TRANSFER

SULLIVAN, Justice.

Rosa and Reena Linke, students in the Northwestern School Corporation in Howard County, contend that the school's random drug testing program violates their rights under the Indiana Constitution to be free from unreasonable searches and seizures. After weighing the students' privacy interests and the character of the search against the nature and immediacy of the governmental concern at issue, we conclude that the drug-testing program here is constitutional.

Background

Northwestern School Corporation (NSC) is a public school system covering rural and suburban areas of Howard County near Kokomo. It operates two elementary schools, one middle school, and one high school.

In the mid–1990s, drug usage in middle and high schools became a concern to the administrators at NSC. In the spring of 1995, the Indiana Prevention and Resource Center released a survey regarding drug, alcohol, and tobacco usage by students in grades seven through ten at NSC schools. The survey showed higher than average use of gateway drugs among some students. Specifically, it found that NSC's eighth graders used amphetamines at a rate higher than state prevalence rates; ninth graders used drugs, alcohol, and cigarettes at higher than the state prevalence rates; and tenth graders reported a higher daily use of alcohol than state prevalence rates.

*975 Drug abuse continued to be a problem at NSC high and middle schools. During the 1998–99 school year, there were two suspensions and two expulsions in the high school and five suspensions and five expulsions in the middle school because of student drug usage. Beginning in 1987, three Northwestern High School students (including a recent graduate) died in drug related incidents. The most recent death, in 1996, occurred after a student overdosed on morphine pills acquired from a fellow student while at school. These contraband pills passed through a chain of student hands before finding their final resting place.

The 1996 death caused serious concern. In response, a task force consisting of administrators, teachers, staff, and interested parents was formed to examine NSC's approach to drugs. In order better to fulfill NSC's zero tolerance policy towards drug abuse, the task force addressed three primary

areas: anti-drug curriculum; incorporation of special anti-drug programs; and development of a student drug testing policy.

The task force created the Northwestern School Corporation Extra Curricular Activities and Student Driver Drug Testing Policy ("Policy") effective January 12, 1999. Its purpose is "(1) to provide for the health and safety of students; (2) to undermine the effects of peer pressure by providing a legitimate reason for students to refuse to use illegal drugs; and (3) to encourage students who use drugs to participate in drug treatment programs." The Policy is explicitly not a punitive enterprise. Under the Policy, testing positive for banned substances does not result in academic penalty, results of drug test are not documented in any student's academic records, and information regarding the results is not disclosed to criminal or juvenile authorities absent binding legal compulsion.

The Policy applies to all middle and high school students, grades 7–12, participating in school athletics, specified extra-curricular and co-curricular[1] activities, as well as to all student drivers who wish to park their vehicles on campus. The activities included by the Policy are athletics, academic teams, student government, musical performances, drama, Future Farmers of America, National Honor Society, and Students Against Drunk Driving. Students wishing to engage in one of these activities are required to sign a form consenting to the testing and must also obtain written consent from a parent or guardian.[2] Students participating in co-curricular activities who choose not to participate in the testing program are given an opportunity to prepare alternative assignments, for academic credit, in lieu of participating in public performances.

A computer-based system, designed specifically for the purpose of randomly selecting individuals for drug testing, is used to pick the students. Midwest Testing, a testing firm that notifies the school principals who will be tested, currently handles this process. Students are not given advance warning of the testing.

Upon selection, a student is escorted to a trailer that is driven to the school by Midwest Testing. Only one student is taken to the trailer at a time. The student is *976 given a specimen bottle and is allowed to enter the restroom facility in the trailer unattended. The facility has a commode containing blue dye and all water faucets are turned off so that water cannot be used to dilute a specimen. Once inside the restroom facility, the student is separated from the monitor by a closed door. After producing a specimen, the student leaves the restroom, hands the specimen to the Midwest Testing employee to be sealed, initials the sealed bag, and returns to class.

The specimens are sent to Witham Laboratories, an independent laboratory, where they are tested only for the substances banned by the Policy.[3] The testing laboratory does not know the identity of the students tested and NSC follows strict procedures regarding the chain of custody and access to test results. Negative test results are mailed to the designated authority. Positive specimens, on the other hand, are retested. If the re-test is positive, Witham communicates the specimen number of the positive result to a building administrator who alerts the student's school principal. The principal is then able to determine the identity of the student by reference to the specimen number. In such instances, the principal holds a conference with the student and his or her parents and at that time the student is given the opportunity to submit documentation that would justify a positive result, e.g., prescription medication. Failure to provide a satisfactory explanation for a positive test results in further action by the school.

Athletes testing positive are governed by an athletic code of conduct. Students participating in all other activities are governed by a student activities code of conduct. Under both codes, a student may be barred from participating in an activity for up to 365 days. However, the consequences vary based upon the activity and substance.

A student is entitled to be re-tested, at the school's expense, when the drug for which the student tested positive would be expected to have disappeared from the student's body. A negative test at this time allows the student to return to full participation in the activity but a positive re-test is deemed to constitute reasonable suspicion, such that NSC reserves the right to re-test the student throughout the remainder of the school year. A positive re-test also bars the student from returning to the activity until such time as the student tests negative. Beyond the first re-test, the Policy does not require the school to pay for additional tests requested by the student.

Rosa and Reena Linke ("the Linkes") were both students at Northwestern High School, a part of NSC, when this lawsuit was filed. At the time of the suit, Rosa was a junior who participated in track, National Honor Society, Students Against Drunk Driving, the Prom Committee, and Academic Competition. She also had a driver's license and wanted

to drive to school. Reena was a freshman participating in choir, track, Academic Competition, Sunshine Society, and Fellowship of Christian Athletes. Their claim was that the Policy violated the Search and Seizure Clause, art. I, § 11, and the Privileges and Immunities Clause, art. I, § 23, of the Indiana Constitution.

The trial court granted summary judgment in favor of NSC. The Court of Appeals *977 reversed, holding that, in regard to school children, the Search and Seizure Clause, art. I, § 11, of the Indiana Constitution implicitly contains "a general requirement of individualized suspicion," which was not met by the Policy. *See Linke v. Northwestern School Corp.*, 734 N.E.2d 252, 259 (Ind.App.2000). We granted transfer. *Linke vs. Northwestern School Corp.*, No. 34S05-0103-CV-151, 2001 Ind. LEXIS 229 (Mar. 5, 2001).

Discussion

I

The Search and Seizure Clause, art. I, § 11, of the Indiana Constitution ("Section 11") provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Although Section 11 is almost identical to the Fourth Amendment of the United States Constitution, this court's analysis of claims arising under Section 11 is separate and distinct from Fourth Amendment analysis. *See Moran v. State*, 644 N.E.2d 536, 538 (Ind.1994). However, in this regard federal law and the law of sister states may have persuasive force. *Id.*

A

[1] [2] The Linkes correctly contend that urinalysis drug testing constitutes a search under Section 11. "In the law of searches and seizures, the term 'search' implies prying into hidden places for that which is concealed." *Moran*, 644 N.E.2d at 540 (citing *Lindsey v. State*, 246 Ind. 431, 439, 204 N.E.2d 357, 362 (1965)). In finding that urinalysis testing constitutes a search under the Fourth Amendment, the United States Supreme Court has noted, "chemical analysis of urine .... can reveal a host of private medical facts." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Similarly, Judge Friedlander has written that "the taking of bodily samples [for evaluation] constitutes a search." *Cutter v. State*, 646 N.E.2d 704, 711 (Ind.Ct.App.1995), *transfer denied*; *cf. DeVaney v. State*, 259 Ind. 483, 487, 288 N.E.2d 732, 735 (1972) (holding that the taking of a blood sample constituted a Section 11 search).

Given that NSC is a public school corporation and that its drug testing policy is a Section 11 search, it is necessary to determine whether the search violates Section 11.

B

[3] In *Moran* and *Brown v. State*, 653 N.E.2d 77 (Ind.1995), we held that the measure of whether a government search violated Section 11 is whether the process is "reasonable." *Id.* at 80. Here, the Linkes and NSC advance differing views as to the appropriate measure of reasonableness. The Linkes argue that in order to be reasonable under Section 11, a school drug testing policy must be based on the element of individualized suspicion. Under this conception, random drug testing of students would violate Section 11 since, by definition, a random program is not based on individualized suspicion. On the other hand, NSC argues that the appropriate measure of reasonableness under Section 11 is substantially similar to the one expounded in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), where the Supreme Court balanced the intrusion of the search on the individual's Fourth Amendment interests with its promotion of legitimate *978 governmental interests. *Id.* at 653-654, 115 S.Ct. 2386 (*quoting Skinner*, 489 U.S. at 619, 109 S.Ct. 1402, and *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). Under this approach, NSC maintains, the Policy meets the reasonableness requirement of Section 11.

The Linkes point out that we have held "that a police officer may not stop a motorist in Indiana for a possible seat belt violation unless that officer reasonably suspects that the driver or a passenger in the vehicle is not wearing a seat belt as required by law." *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind.1999). From this proposition, they argue, and the Court of Appeals held, that for any search to meet Section 11 muster,

it must be based on "individualized suspicion." *Linke*, 734 N.E.2d at 259.

We do not think the individualized suspicion requirement of *Baldwin v. Reagan* is so readily transferable to this case. *Baldwin v. Reagan*—and *Moran* and *Brown* before it—focused on the role of Section 11 in protecting those areas of life that Hoosiers regard as private "from unreasonable *police* activity." *See Moran*, 644 N.E.2d at 540 (emphasis added); *Brown*, 653 N.E.2d at 79 (noting that protection from unreasonable searches and seizures plays a uniquely important role in the context of criminal procedure). Preventing unreasonable *law enforcement activity* was a key factor motivating our holding in *Baldwin v. Reagan* that individualized suspicion of a seatbelt violation is required in order to stop a motorist for that purpose. 715 N.E.2d at 337.

A search conducted by a school corporation is substantively different than a search conducted to enforce the law. This is in no small part due to the different role played by law enforcers and teachers.

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils.

New Jersey v. T.L.O., 469 U.S. 325, 349–350, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

Under the Policy, test results are not volunteered to law enforcement, nor are they used for any internal disciplinary function. Absent such consequences, we do not believe the rationale for individualized suspicion is as strong here as in the seat belt enforcement context. *Cf. Oman v. State*, 737 N.E.2d 1131, 1146–47 (Ind.2000) (holding that under the Fourth Amendment the results of an employee's administrative drug test can be used in a criminal prosecution, but only if obtained by valid legal process externally initiated from the employment setting), *cert. denied*, 534 U.S. 814, 122 S.Ct. 38, 151 L.Ed.2d 12 (2001).

While *Brown* emphasized that reasonableness was the touchstone of Section 11 analysis, it framed the question as "whether, in the totality of these circumstances," the police conduct at issue was reasonable. 653 N.E.2d at 79–80. We believe that balancing the students' interests against the school corporation's better comports with this totality of the circumstances framework than a per se requirement of individualized suspicion.

There is precedent for this approach. In determining that the totality of the circumstances allows consideration of police officer safety, we stated that "[i]n construing and applying 'unreasonable' under Section 11, we recognize that Indiana citizens have been concerned not only with *979 personal privacy but also with safety, security, and protection from crime." *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind.2001); *see also Carter v. State*, 692 N.E.2d 464, 466 (Ind.App.1997) ("[A]n individual's rights protected under Article I, § 11 are not absolute. We must balance competing rights and 'look to the reasonableness of the intrusion and permit brief investigatory stops based upon reasonable suspicion of criminal activity.' " (citations omitted)).

We adopt the analytical approach of *Vernonia School District 47J v. Acton* in these circumstances. Broadly stated, we will weigh the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of, and the nature and immediacy of the governmental concern to determine whether the Policy is reasonable under the totality of these circumstances. 515 U.S. at 658–660, 115 S.Ct. 2386.

C

C–1

In weighing the nature of the privacy interest upon which a search under the Policy intrudes, the first—and chief—consideration influencing our analysis is the Linkes' status as middle and high school students.

[4] [5] Our law does not accord students the same privacy interests as adults. "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination." *Acton*, 515 U.S. at 654, 115 S.Ct. 2386. The United States Supreme Court has taken the view that while public schools are state actors subject to constitutional oversight, the nature of a school's role "is custodial and tutelary, permitting a degree of supervision

and control that could not be exercised over free adults." *Id.* at 655, 115 S.Ct. 2386; *T.L.O.*, 469 U.S. at 333, 105 S.Ct. 733. Indiana law codifies this view. For example, in passing compulsory education laws that mandate the availability of public elementary education for its citizenry, the State "has recognized that public schools stand 'in the relation of parents and guardians to the students' .... regarding [all] matters of discipline and conduct of students." *Higginbottom v. Keithley*, 103 F.Supp.2d 1075, 1080 (S.D.Ind.1999), *quoting* Ind.Code § 20–8.1–5.1–3(b) (1988).

The Linkes concede that the privacy interest of juveniles is not the same as adults' but argue that minors are actually accorded greater protection. However, the authority relied upon by the Linkes does not stand for the notion that a student's privacy interest should be granted greater weight. To the contrary, it stands for the proposition that, under certain circumstances, the State plays an active role in dictating the course of children's lives. *See Manners v. State*, 210 Ind. 648, 5 N.E.2d 300 (1936) (upholding statute making it a felony for a father to fail to provide for a child on the reasoning that "[m]inor children are the subject of the solicitude of the law because it is assumed that until maturity they are not capable of protecting themselves."); *see also Adams v. State*, 244 Ind. 460, 465, 193 N.E.2d 362, 364 (1963) (stating that juvenile courts exercise parental supervision and may properly restrain a minor's liberty in the exercise of discipline, rehabilitation, and training). Rather than bolster their argument, the Linkes' cited authority reinforces the principle that a minor's liberty interest is sometimes less than that of an adult.

[6] [7] In light of the fact that minors in school are subject to supervision and control that could not be exercised over free adults and in view of the legislature's codification of the custodial and protective role of Indiana public schools, we find that *980 students are entitled to less privacy at school than adults would enjoy in comparable situations. *Cf. T.L.O.*, 469 U.S. at 348, 105 S.Ct. 733 ("In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.").

[8] A second factor influencing a student's privacy interest is consent. A voluntary decision to submit to random drug testing further decreases the student's legitimate expectation of privacy, increasing the likelihood of a testing policy's Section 11 reasonableness. Of course, a coerced decision is not consensual. For this reason "[t]he consent, and the circumstances in which it was given, bear upon the reasonableness" of the Policy. *See Ferguson v. City of Charleston*, 532 U.S. 67, 91, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (Kennedy, J., concurring).

NSC maintains that the Policy's requirement that student participants submit to random drug testing does not compel consent because it only applies to privileged activities. The Linkes take issue with this characterization. Citing the Supreme Court of Colorado in *Trinidad School District No. 1 v. Lopez*, the Linkes argue that it is necessary to participate in extracurricular activities to be successful in today's world. (Br. of Appellants at 26, *quoting Lopez*, 963 P.2d 1095, 1109 (Colo.1998) ("[T]he reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in the extracurricular activities is that they must engage in such activities. .... [I]nvolvement in a school's extracurricular offerings is a vital adjunct to the educational experience.")).

The Policy is different from that at issue in *Lopez*. The *Lopez* court noted, "two for-credit classes that are part of the regular curriculum of course offerings are inextricably linked to the 'extracurricular' activity of marching band. .... The record reflects that the consequence of enrolling in a class and failing to participate in the marching band is severe: the student will receive a failing grade." 963 P.2d at 1105. Thus, the policy under review in *Lopez* effectively gave failing grades to students who refused to submit to a drug test. The Supreme Court of Colorado found this to be unreasonable, in part because it applied to students taking the normal curriculum.

[9] We are sensitive to the issue raised by the Supreme Court of Colorado. Students do not forfeit their privacy interest simply by virtue of attendance at school. "Today's public school officials .... act in furtherance of publicly mandated educational and disciplinary policies," *T.L.O.*, 469 U.S. at 336, 105 S.Ct. 733, and statutes on the books compel school attendance. *See* Ind.Code § 20–8.1–3–17 (1998). However, the Policy does not require drug testing for students enrolled in compulsory regular classes. Rather, students in voluntary activities for which they receive academic credit (co-curricular activities) are given the option of providing alternative for-credit assignments. The Policy is different from the one reviewed by the Supreme Court of Colorado in that NSC students are not deprived of the opportunity to receive academic credit from co-curricular activities if they choose not to submit to drug testing. They are only

deprived from participating in the extra-curricular portion of the activities.

[10] [11] We acknowledge that this does alter the usual voluntariness calculus because, in all likelihood, at least some adverse consequences may attach to the inability to so participate. We further acknowledge that, while schools are not the only outlet for extracurricular activities, participation in school sponsored extracurricular *981 activities may benefit some students who wish to pursue post-secondary educational or professional training. However, in order for consent to be voluntary in this context, it does not follow that there be absolutely no disadvantage to a refusal to give consent. *See Ferguson,* 532 U.S. at 91, 121 S.Ct. 1281 ("[t]he person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.") (Kennedy, J., concurring); *Acton,* 515 U.S. at 650, 115 S.Ct. 2386 (1995) ("[s]tudents wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents."). The fact that refusal to agree to drug testing results in forfeiture of the opportunity to obtain certain benefits is not so weighty as to constitute forced consent. *See Todd v. Rush County Schools,* 133 F.3d 984, 986 (7th Cir.), *cert. denied* 525 U.S. 824, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998).

[12] A third factor influencing the privacy interests of students is whether they have volunteered for an already regulated activity. *See Acton,* 515 U.S. at 657, 115 S.Ct. 2386 ("[b]y choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation even higher than imposed on students generally."). There can be little doubt that student athletics are highly regulated. *See Schaill v. Tippecanoe County Sch. Corp.,* 864 F.2d 1309, 1318 (7th Cir.1988) ("the Indiana High School Athletic Association has extensive requirements which it imposes upon schools and individuals participating in interscholastic athletics."). To a lesser extent, non-athletic extracurricular activities are also regulated in that various activities or clubs impose rules and requirements to which participants must comply. *See Earls v. Tecumseh Pub. Sch. Dist. No. 92,* 242 F.3d 1264, 1276 (10th Cir.) ("students participating in non-athletic extracurricular activities .... agree to follow the directives and adhere to the rules set out by the .... director of the activity."), *cert. granted,* 534 U.S. 1015, 122 S.Ct. 509, 151 L.Ed.2d 418 (2001).[4] The extent to which a voluntary activity is already regulated can further influence a student's Section 11 privacy interest.

C–2

[13] The character of the intrusion that is complained of provides another element contributing to reasonableness in the school context. The Linkes view urinalysis testing "as extremely intrusive, demeaning, and embarrassing." Urinalysis implicates an "excretory function traditionally shielded by great privacy." *See Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 626, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Acton,* 515 U.S. at 658, 115 S.Ct. 2386. However, the manner in which the sample is acquired influences the ultimate weight given to the Linkes' embarrassment. *See Acton,* 515 U.S. at 658, 115 S.Ct. 2386; *Schaill,* 864 F.2d at 1318.

In *Acton,* the Supreme Court found urinalysis testing reasonable when students urinated in plain view of attendants, in part because it was no more intrusive than a visit to a standard public restroom. *See* 515 U.S. at 577, 115 S.Ct. 2338. In contrast, NSC students are escorted to a testing facility in a manner such that only one *982 student is present at a time. The student then enters a private room and is allowed to close the door. Attendants do not watch the student. In this case, the Policy is much less intrusive than the one examined by the Supreme Court in *Acton.*

Other important factors to consider in evaluating the character of the intrusion are what the test searches for, the amount of discretion given to the testers, and to whom results are disclosed. The Policy restricts the test to a pre-set list of banned substances. No student is compelled to provide additional private information (such as medications used). Even after a positive test, the choice of whether to disseminate additional explanatory information is left to the student. At no point in the process do school officials have discretion to choose whom to test or for what to test. Various measures are taken throughout the process to insure both the integrity of the tests and the privacy of the students, including limiting the persons privy to test results to the greatest possible extent.

[14] A final factor to consider in evaluating the character of the intrusion is whether the test is punitive or preventative and rehabilitative. A punitive testing regime by a school corporation is a more severe intrusion upon a student's Section 11 privacy interest than a non-punitive search conducted in furtherance of a school's custodial and protective role. *See Acton,* 515 U.S. at 658 n. 2, 115 S.Ct. 2386; *Lopez,* 963 P.2d at 1116 (Scott, J., dissenting).

[15] Section 11 protects those areas of life that Hoosiers regard as private "from unreasonable *police* activity." *See Moran*, 644 N.E.2d at 540 (emphasis added). We have also noted that protection from unreasonable searches and seizures plays a uniquely important role in the context of criminal procedure. *See Brown*, 653 N.E.2d at 79. The emphasis on preventing unreasonable law enforcement activity was a factor motivating our holding in *Baldwin v. Reagan* that reasonable suspicion of a seatbelt violation is required in order to stop a motorist for that purpose. 715 N.E.2d 332, 337 (Ind.1999).

However, a preventative or rehabilitative search conducted by a school corporation is substantively different than a search conducted to enforce the law. A preventative or rehabilitative search is inherent to a school corporation's function. Students generally understand that the "preservation of .... a proper educational environment requires close supervision" and thus the intrusion on privacy is less severe. *See T.L.O.*, 469 U.S. at 339, 105 S.Ct. 733.

In the present matter, the record shows that test results are not volunteered to law enforcement, nor are they used for any internal disciplinary function. Students are merely barred, for varying periods of time, from participating in privileged activities. As a result, the Policy must be viewed as preventative or rehabilitative. A policy involving a disciplinary function, such as suspension or expulsion from school, could be punitive and is not implicated here. The care exhibited by NSC to protect student privacy and to create a non-punitive test mitigates against the Linkes' privacy concern. A drug testing policy not so carefully crafted might not. *Cf. Ferguson*, 532 U.S. at 68, 121 S.Ct. 1281 (noting the "critical difference" between drug tests conducted without a warrant or individualized suspicion when law enforcement provides a central and indispensable feature of the policy and when drug testing is conducted for a purpose distinct from the State's general interest in law enforcement).

***983 C–3**

We last evaluate NSC's interest in drug testing certain students. NSC proffers the need to fight and deter drug abuse among its students in general and its students who act as role models and representatives of the school in particular. It also asserts a related interest in insuring the health and safety of its students. The Linkes counter that NSC's only legitimate interest is in stopping abuses that may occur on campus, something they argue that the Policy does not properly achieve.

That NSC has the responsibility of supervising its students and enforcing desirable behavior in carrying out school purposes is not questioned. Ind.Code § 20–8.1–5.1–3;[5] *see also* Ind. Const. art. VIII, § 1.[6] In the mid–1990s, drug usage in NSC's middle and high schools caused administrators to worry that they were not properly fulfilling this function. Most notably, a 1995 study of drug usage in NSC schools showed higher than average use of gateway drugs in the middle and high schools. A year later, an NSC student acquired morphine pills from a fellow student at school and subsequently died from an overdose. In response, NSC commissioned the task force of school officials and parents that created the Policy.

Deterring drug abuse by children in school is an important and legitimate concern for our schools. Drug abuse severely harms youths and impacts on a school's educational mission. " 'Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound'; 'children grow chemically dependent more quickly than adults and their record of recovery is depressingly poor.' " *Acton*, 515 U.S. at 661, 115 S.Ct. 2386. What is more, "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty." *Id.* at 662, 115 S.Ct. 2386. NSC's interest in deterring drug use is further enhanced by the fact that three of its students have died of drug related causes since 1987, that it had scientific data illustrating a burgeoning drug problem on its middle and high school campuses, and that drug use continues to be an identifiable problem at the middle and high schools. *See Skinner*, 489 U.S. at 607, 109 S.Ct. 1402 (upholding a Government drug-testing program based on findings of drug use by railroad employees nationwide without proof that a problem existed on the particular railroads whose employees were subject to the test).

***984** NSC's interest in testing the included students is further heightened by the fact that the relevant extracurricular activities all have off campus components. NSC needs a broader range of tools to insure compliance with its rules when activities occur off campus. This is due, in large part, to the fact that greater ranges of activities occur during extracurricular activities than during normal school hours. *See Webb v. McCullough*, 828 F.2d 1151, 1157 (6th Cir.1987)

(affirming grant of summary judgment upholding a public school principal's search of the private hotel room of a high school student during a voluntary, off campus, school sponsored field trip). There are many more ways for a student to be injured, to endanger fellow students, to transgress school rules, or to violate the law while participating in an extracurricular off campus event (such as a band competition in another city or a non-curricular field trip) than during the relative order of school hours. *See Id.* Indeed, parents may be reluctant to allow their children to participate in voluntary school activities if schools are not permitted to take the reasonable steps taken here by NSC to prevent drug use. *See Id.*

If drug abuse increases the physical danger of participation in a school-sponsored activity, a school corporation's interest in deterring drug abuse becomes stronger. This is undoubtedly the case with school athletics. *See Acton,* 515 U.S. at 662, 115 S.Ct. 2386 ("[a]part from psychological effects .... the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes."). Likewise, we note that driving while intoxicated presents significant physical risks to drivers, their passengers, and pedestrians. *See Todd v. Rush County Schools,* 983 F.Supp. 799, 806 (S.D.Ind.1997), *aff'd* 133 F.3d 984 (7th Cir.), *cert. denied,* 525 U.S. 824, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998).

While the risk of physical injury seems remote in the other activities covered by the Policy, NSC argues that its interest in promoting the health and safety of these students is equivalent to that of student athletes and student drivers. It is true that "successful extracurricular activities require healthy students," *see Todd v. Rush County Schools,* 133 F.3d 984, 986 (7th Cir.1998), but the absence of increased physical danger means that NSC's general interest in health and safety is not increased in these situations. After all, healthy students are important to most of what a school does and the need does not grow simply because a student chooses to participate in an activity. NSC further maintains, however, that its interest in deterring student drug abuse is increased by the facts that student athletes and student participants in extracurricular activities are role models for other students and are representatives of their schools in the community. The Linkes respond that there is "nothing in the record to demonstrate that band members are viewed as role models or student leaders."

The record does not address whether their peers view students participating in the tested activities as role models. NSC's interest in testing may well be heightened were such a fact shown. *See Acton,* 515 U.S. at 662–663, 115 S.Ct. 2386. Nonetheless, it is evident that NSC holds the participants out as role models by submitting the participants to additional rules above and beyond "normal," and by sending participants to community functions as school representatives. The fact that NSC has identified a drug problem at its middle and high schools gives it an interest in experimenting with methods to deter drug use. This aspect of the Policy supports NSC's interdiction efforts by giving students who represent the school in an organized activity ***985** a valid response to peers who may pressure them into using drugs.

Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1995), in which the Supreme Court invalidated a program of suspicionless drug testing of Georgia political candidates, does not suggest a different conclusion. In *Chandler,* the Supreme Court determined that suspicionless drug testing of candidates was solely symbolic because (1) the tests were not based on evidence of a drug problem among the State's elected officials, (2) those officials typically do not perform high risk, safety sensitive tasks, and (3) the tests immediately aided no interdiction effort. *Id.* at 321–322, 117 S.Ct. 1295. The circumstances creating context for the Policy under our review are different. In addition to the fact that it is public school students who are tested here, the Policy has been prompted by concrete evidence of drug abuse by NSC junior and high school students (some of whom engage in safety sensitive tasks) and all testing is merely a component of a broader interdiction effort created by local officials in conjunction with interested parents. *Chandler* acknowledged the "critical" importance of context, stating that school drug tests are different because "a local government bears large 'responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.' " *Id.* at 316, 117 S.Ct. 1295. It also emphasized that "[a] demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program." *Id.* at 319, 117 S.Ct. 1295 (citation omitted).

D

[16] In light of the totality of the circumstances, the Policy does not violate Section 11. Our constitution does not forbid schools from taking reasonable measures to deter drug abuse on their campuses but they must do so with due regard for the rights of students.

We reiterate that our evaluation of this matter is particularly influenced by the facts that students' privacy interests are less than those of adults and that both students and their parents or guardians must give consent. We have also been influenced in general by schools' custodial and protective interest in their students and in particular by the fact that the Policy was created with parent involvement as an element of a comprehensive interdiction program. Furthermore, the higher than average rate of drug use at NSC middle and high schools, the recent drug related deaths, and the continued presence of illegal drugs on campus strengthens NSC's legitimate interest in this matter. We do note that the strength of NSC's interest in deterring drug abuse is not uniform for all students. In this regard, the Policy is most defensible in regard to athletes and student drivers. The school's interest in protecting these students is increased by the risk of physical danger and, in the case of student athletes, by the fact that they represent the school as role models. While the rationale for testing students involved in co-curricular activities is not so strong, for the reasons already stated, it does not violate Section 11 in this case.

II

[17] The Linkes also argue that the Policy violates the Privileges and Immunities Clause, art. I, § 23, of the Indiana Constitution ("Section 23"). Section 23 provides:

> The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the *986 same terms, cannot equally belong to all citizens.

In the watershed case of *Collins v. Day*, 644 N.E.2d 72 (Ind.1994), we held that the analytical framework required to resolve Section 23 claims examines whether "the disparate treatment ... [is] reasonably related to inherent characteristics which distinguish the unequally treated classes." *Id.* at 80. *Collins* requires that the challenger bear the burden "to negative every reasonable basis for the classification." *Id.* at 81. This is because of the substantial deference due the enactment. *Id.* at 80. In addition, "the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Id.*

The Linkes contend that Section 23 is violated because a class of students who participate in certain extracurricular activities[7] are subjected to random drug testing while students who participate in other extracurricular activities[8] are not.

We find that the Linkes have not carried their burden to "negative every reasonable basis" for random drug testing imposed upon the class of which they are a member. Under *Collins*, we determine whether there are inherent distinctions between the activities subject to the Policy and those not. Largely for the reasons set forth in Part I–C–3 *supra*, we find the "reasonable relationship" test met.

The Policy focuses on those activities in which the participating students represent the school outside of the normal school day hours, receive special privileges as a result of their participation, or place the participating student in a leadership or role model position. The school activities not covered are strictly in-school activities that take place during school hours. Consequently, the students who engage in the school activities not covered by the Policy do not represent the school by publicly performing or working within the community. While the Linkes argue that the newspaper and yearbook are extracurricular activities requiring students to "engage in activities outside of the school day," Brief of Appellant 30, these activities are purely curricular. (R. at 76.) These classes are taken for a grade and do not require any activity outside the normal school day. (*Id.*)

We agree with NSC that testing those students who are at an increased risk of physical harm or are role models and leaders by virtue of their participation in certain extracurricular activities is "reasonably related to achieving the school's purpose in providing for the health and safety of students, and undermining the effects of peer pressure by providing a legitimate reason for students to refuse to use illegal drugs and by encouraging students who use drugs to participate in drug treatment programs." (Trial Court's Conclusions of Law, R. at 509). We find no violation of Section 23.

Conclusion

Having previously granted transfer, we now affirm the judgment of the trial court.

SHEPARD, C.J., and DICKSON, J., concur.

BOEHM, J., dissents with separate opinion in which RUCKER, J., concurs.

*987 BOEHM, Justice, dissenting.

I respectfully dissent. The majority adopts the methodology of *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), and concludes that NSC's drug testing fits within a very narrow exception to the general probable cause requirement, the so-called "special needs" exception. However, assuming it is proper to analyze Indiana constitutional claims in the *Vernonia* framework, I do not agree that NSC has carried its burden of proving that its program meets the standard of reasonableness the "special needs" doctrine requires. Rather, this program amounts to imposition of a general random testing program with no sound footing in concern for the educational mission of the school corporation, as opposed to general law enforcement. Nor is there a justification for selecting these students from the general school population.

For many of the same reasons, I conclude that NSC's program violates the requirement of Article I, Section 23 of the Indiana Constitution that a classification must be reasonably related to the characteristics—in this case, participation in certain school activities—that define the class.

I. What it Means to Have "Special Needs"

Three cases, in particular, are important to understanding why NSC's random drug testing program violates Article I, Section 11 of the Indiana Constitution.

A. *New Jersey v. T.L.O.*

The "special needs" doctrine, in the context of searches by school officials, has its roots in *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), where the United States Supreme Court held that the Fourth Amendment's usual probable cause standard should not apply in a school setting. In *T.L.O.*, a teacher discovered two students smoking in a school lavatory in violation of school rules. The teacher took the pair to the assistant principal's office, where T.L.O., in response to the assistant principal's questioning, denied having ever smoked. Searching T.L.O.'s purse, the assistant principal found a pack of cigarettes along with various drug paraphernalia. T.L.O. was later adjudged a delinquent.

T.L.O. claimed that the search violated the Fourth Amendment. The Court agreed that the Fourth Amendment applied to searches conducted by school officials, but nevertheless concluded that school officials may conduct searches in the absence of the requirements imposed by the Fourth Amendment on other governmental searches. *Id.* at 340, 105 S.Ct. 733. The Court offered this explanation why a level of suspicion lower than that of probable cause is required for searches conducted by school officials, at least in the context of searches for evidence of school rule violations:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," *Terry v. Ohio*, 392 U.S. [1], at 20 [88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of *988 the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 341–42, 105 S.Ct. 733. However, the Court also emphasized that there were limits to the authority of school officials to conduct a search under this lowered constitutional bar. Specifically, "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343, 105 S.Ct. 733.

Justice Blackmun's concurring opinion introduced the phrase "special needs" into the public discourse on school searches. He expressed concern that a balancing test might become the rule rather than the exception. To curb this potential, he wrote, "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for

that of the Framers." *Id.* at 351, 105 S.Ct. 733 (Blackmun, J., concurring). Searches in a school setting based on a lower standard are appropriate, he concluded, because of the need for immediate action on the part of teachers attempting to maintain order in the classroom.

B. *Vernonia School District 47J v. Acton*

The next principal case is *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), on which the majority relies to justify its conclusion that NSC's drug testing program is reasonable. In *Vernonia,* the United States Supreme Court upheld a random drug testing program instituted by an Oregon school district. The plan called for testing of athletes only. In upholding this plan, the Court specifically endorsed Justice Blackmun's concurrence in *T.L.O.* and found that, on the facts presented, the Vernonia school district established a "special need" justifying the imposition of drug testing on a specific group of students. The Court relied heavily on the facts found by the district court that the Vernonia school district was faced with an "immediate crisis" and had been able to target the instigators as coming from the student-athlete population. *Id.* at 663, 115 S.Ct. 2386. [1] The Court relied on *T.L.O.* for the proposition that, in the public school context, a search unsupported by probable cause can be constitutional when the district demonstrates "special needs," i.e. where strict adherence to the probable cause requirement would undercut " 'the substantial need of teachers and administrators for freedom to maintain order in the schools.' " *Id.* at 653, 115 S.Ct. 2386 (quoting ***989** *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733). The Court cited three factors supporting the reasonableness of the Vernonia program—the decreased expectation of privacy of the student athletes, the relative unobtrusiveness of the search, and the severity of the need met by the search.

None of these three is present in force to support NSC's plan. NSC's program applies to athletes, student drivers, and participants in a wide range of extra-curricular and co-curricular activities from Future Farmers of America to the school band. NSC's evidence of substance abuse in its schools is a survey conducted by the Indiana Prevention Resource Center in 1995 and given to students in grades seven through ten. Notably absent from the results is any data suggesting that students who claimed to have used a given substance also participated in one of the activities covered by NSC's testing program. The testing intrudes on students who in no way qualify for the lessened expectation of privacy some cases, like *Vernonia,* have attributed to athletes.

C. *Chandler v. Miller*

In *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), the United States Supreme Court explained in further detail when it is appropriate to apply the "special needs" doctrine. The Court in *Chandler* found unconstitutional Georgia's policy of requiring certain candidates for public office to submit to drug testing. Justice Ginsburg, writing for an eight-member majority, explained that to successfully make the case that a "special need" exists, a government actor must demonstrate a "concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 319, 117 S.Ct. 1295.

Georgia argued that its testing policy passed constitutional muster based on the Court's earlier decisions upholding suspicionless testing of student athletes, *Vernonia,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564, certain United States Treasury employees, *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and certain railroad employees, *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The Court explained that the employees subject to testing in *Von Raab* were "directly involved [in] drug interdiction," [2] *Skinner* offered "evidence of drug and alcohol abuse by railway employees engaged in safety-sensitive tasks," and *Vernonia* responded to an "immediate crisis prompted by a sharp rise in students' use of unlawful drugs." Georgia's plan to screen candidates for public office failed to address a "concrete danger," the Court explained, because: (1) the record did not suggest that the hazards argued by the state were "real and not simply hypothetical for Georgia's polity"; (2) the requirement was not well designed to identify drug users; (3) it was feasible, within the environment of public office, to note erratic conduct that would lead to a suspicion of drug use; and (4) the risk to public safety was neither substantial nor real. 520 U.S. at 319–23, 117 S.Ct. 1295.

Although this case and *Vernonia* both address school programs, for several reasons NSC's plan is closer to Georgia's plan for wanna-be officeholders than the Vernonia plan for its students. First, the survey and other evidence relied upon by NSC may establish a drug problem, but not ***990** among the categories of students tested. Second, the testing, though intended to prevent school-wide drug use, identifies only drug users among the population of students who submit to the program. Third, it is feasible, as NSC's own policy makes clear, for NSC officials to determine when a

reasonable suspicion of drug use exists. Fourth, NSC has not shown any evidence, of the type presented in *Vernonia*, of drug use as a source of significant problems in conducting the school's educational program.

II. Applying the "Special Needs" Analysis to NSC's Program

I agree with the majority that the relevant inquiry under Article I, Section 11 of the Indiana Constitution is whether, given the totality of the circumstances, the searches conducted by NSC are reasonable. *Brown v. State*, 653 N.E.2d 77, 79–80 (Ind.1995). In this respect, the Indiana Constitution is very similar, if not identical, to the formulation adopted for the Fourth Amendment in *Vernonia:* reasonableness under all the circumstances. 515 U.S. at 652, 115 S.Ct. 2386 ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.' "). The majority concludes that the appropriate "circumstances" to examine are the same as those balanced by the Court in *Vernonia:* the nature of the privacy interest; the character of the intrusion; and the nature and immediacy of the governmental concern. So far, so good. But, in applying the reasoning of *Vernonia* in light of *Chandler*, I arrive at a different conclusion from the majority's.

A. *Overcoming the Linkes' Privacy Interests*

The majority finds the Linkes' privacy interests of minimal weight based on three propositions: (1) students' privacy interests are less than those of adults; (2) students "consent" to the searches; and (3) the tested students are held out by NSC as "role models." I think the first is true only to a limited extent, and the other two are not true at all.

1. *Extent of Control Over Students*

The majority contends that the Linkes' privacy interests deserve lesser protection than Article I, Section 11 would normally demand because schools are allowed a degree of "supervision and control that could not be exercised over free adults." I agree that Indiana law generally supports that view. However, a school's "degree of supervision" is not without its limits. The majority relies on the notion that schools stand in the relation of parents and guardians to its students in matters of conduct and discipline. This may justify the imposition of drug testing when matters of conduct and discipline are at issue. But it does not carry equal weight when suspicionless searches are conducted as a matter of routine. Indeed, in *T.L.O.*, the United States Supreme Court cautioned against such a laissez-faire view of the role of school officials who conduct searches:

> If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." *Ingraham v. Wright*, 430 U.S. 651, 662 [97 S.Ct. 1401, 51 L.Ed.2d 711] (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated ***991** educational and disciplinary policies.... 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....

469 U.S. at 336, 105 S.Ct. 733. It is also noteworthy that, although the education of Indiana's students is one of the most highly regulated enterprises of our state government, nowhere in the specifically enumerated powers and duties of this state's school corporations has the legislature given explicit authority for random drug testing of students. [3]

2. *"Consent" to Searches and "Already Regulated Activities"*

Among the categories of students affected by the NSC program are those enrolled in some for-credit courses whose activities take place off school premises. The majority concludes that, because alternative for-credit assignments are available to take the place of the portion of the course that triggers the testing requirement, the decision whether to

submit to testing is "voluntary." But the effects of refusing to submit to drug testing in those courses may be quite harsh. Consider, for example, a member of the choir who hopes to enter a performing arts program in college. He or she is permitted, as the majority points out, to participate in "alternative for-credit assignments," but is denied the opportunity to perform in public with the rest of the chorus. When the time comes to apply to the performing arts program, if that student refuses to participate in the "voluntary" program, he or she may be able to document a high grade in choir, but has a gaping void in performance experience.

The majority identifies one set of for-credit coursework as "compulsory regular classes," and describes participation in everything else "voluntary." But the aspiring vocalist's appearance in public concerts is no more a "voluntary" activity than the future math major's electing calculus, when algebra will satisfy the high school diploma requirements. *Cf. Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo.1998) (extra-curricular activities are a "vital adjunct to the educational experience"). That the student receives academic credit from the alternative program does not change the fact that the student is essentially given a different course from the one provided his or her peers, because of a "voluntary" decision not to take a drug test.

I agree that participation in certain extra-curricular activities may open the door to some fashion of drug testing. Athletics have traditionally been the primary target of such programs. *See, e.g., Vernonia* (student-athletes subject to testing because they were the "leaders" of the drug culture and instigators of severe discipline problems). There may well be some basis for drug testing as a safety measure in activities accompanied by significant physical stress. I find far less tenable the notion that participation in non-athletic extracurriculars also opens the door to such an intrusive practice. There is nothing peculiar about National Honor Society, for instance, that suggests that its members must "subject themselves, by virtue of their participation ... to regulations that further reduce their expectation of privacy." *Joy v. Penn–Harris–Madison Sch. Corp.*, 212 F.3d 1052, 1063 (7th Cir.2000). As more fully developed in Part II.C, I believe that in order to be reasonable under all the circumstances, the scope of the *992 testing program must bear some relation to the identified issue the program is meant to address. The NSC plan fails that test.

3. *The "Role Model" Theory*

The majority concedes that the record "does not address whether their peers view students participating in the tested activities as role models," but finds persuasive the fact that NSC holds the affected students out as such. This writer is further removed from high school than his colleagues. But even a casual reviewer of pop culture must view with extreme skepticism the undocumented claim that participants in this broad list of activities are all, or even predominantly, viewed by their peers as role models.[4] In any event, whether the affected party is or is not held out as a "role model" is not adequate to justify NSC's program on a "special needs" basis. As the U.S. Supreme Court put it, "[I]f a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as 'special' wasted many words in entirely unnecessary, perhaps even misleading, elaborations." *Chandler*, 520 U.S. at 322, 117 S.Ct. 1295. Rather than supporting the need for testing, the fact that NSC advances its "role model" theory underscores the paucity of evidence that testing of the affected students has any relation to NSC's drug problem.

B. *Character of the Intrusion*

1. *Article I, Section 11 Applies Equally to All Government Agencies*

I disagree with the majority to the extent it suggests that a search is less intrusive if conducted by school officials, rather than police. I am aware of no authority suggesting that Article I, Section 11 applies more stringently to police activity than that of other government agencies. Nor does the text of Article I, Section 11 support such a result. The majority emphasizes the words "police" and "law enforcement" in the cited portions of *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind.1999), *Brown*, 653 N.E.2d 77 (Ind.1995), and *Moran v. State*, 644 N.E.2d 536 (Ind.1994) to suggest that Article I, Section 11 carries greater weight in those situations than when school officials' conduct is at issue. Those cases referred to police activity because the seizures in those cases were conducted by police officers. There is nothing in those cases to suggest a different result if the seizure were conducted by a different arm of government. Indeed, other cases frequently refer to the constraint on searches by government in general, not just by the police. *See Moran*, 644 N.E.2d at 540 ("The protection afforded [by Article I, Section 11] is against official and not private acts."); *Hutchinson v. State*, 477 N.E.2d 850, 853 (Ind.1985) ("The constitutional prohibitions against unreasonable searches and seizures provide protection

from such acts by the government."); *Torres v. State*, 442 N.E.2d 1021, 1023 (Ind.1982) (same); *cf. New Jersey v. T.L.O.*, 469 U.S. at 335, 105 S.Ct. 733 ("[T]his Court has never limited the [Fourth] Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police.").

I agree with the majority that, in some cases, suspicionless searches conducted by schools have been upheld under circumstances ***993** that would preclude a search by law enforcement. But it is not the identity of the searching government agents that makes this so. It is the nature of the intrusion and the reasons justifying it. That a school, rather than the police, is charged with the unreasonable conduct is not an automatic invitation to apply the mandate of Article I, Section 11 with less force.

2. ***Preventative/Rehabilitative versus Punitive Purposes***

I do not place much stock in the fact that the results of NSC's drug tests are not routinely volunteered to law enforcement authorities. Regardless of the stated purpose of the testing, I do not agree with the majority that "[a] preventative or rehabilitative search is inherent to a school corporation's function." Indeed, I find no support for such a notion. A school corporation's inherent function is to educate, not to monitor an arbitrarily defined category of students for the use of drugs, alcohol or nicotine, or compliance with other laws. The testing conducted in *Vernonia* was necessary to that school's inherent educational function because the education of the students was severely affected by the "immediate crisis prompted by the sharp rise in students' use of unlawful drugs." *Chandler*, 520 U.S. at 319, 117 S.Ct. 1295. This crisis included severe disruption of classroom activities.

In any case, NSC's program is not the method of preserving a proper educational environment envisioned by *T.L.O.*, on which the majority relies. *T.L.O.* dealt with smoking in the school and the ability of teachers and principals to respond swiftly to address conduct in the educational environment without adhering to the formal requirements of the Fourth Amendment. These situations certainly may require immediate action. But that is not the case presented by NSC. Nor does NSC argue that its students have run amok, as was the case in *Vernonia*. Finally, there is no claim that the testing of these groups of students, distinct from the population as a whole, has any relation to NSC's perceived drug problem. The Tenth Circuit, in *Earls v. Tecumseh Pub. Sch. Dist. No. 92*, 242 F.3d 1264 (10th Cir.2001), *cert. granted*, 534 U.S. 1015, 122 S.Ct. 509, 151 L.Ed.2d 418 (Nov. 8, 2001), invalidated a drug testing program for that reason. The majority distinguishes *Earls* based on differences between its policy and NSC's. But Earls turned not on the nature of the school district's policy, but on the classification of students subjected to the searches. The Tenth Circuit saw "little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem." 242 F.3d at 1277. Finally, the "preventative" nature of NSC's program proves too much. If it is a legitimate objective, it gives reason for NSC to test every student. *Willis v. Anderson Cmty. Sch. Corp.*, 158 F.3d 415, 422 (7th Cir.1998), *cert. denied*, 526 U.S. 1019, 119 S.Ct. 1254, 143 L.Ed.2d 351 (1999) ("If [deterrence] 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."). Of course, such testing is not permissible. *Cf. Joy*, 212 F.3d at 1067 ("[T]he case has yet to be made that a urine sample can be the 'tuition' at a public school.").

As T.L.O. reminded us: "[T]he reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." The rights of NSC's students —or at least the ones NSC has chosen to test—should be subject to no more of an intrusion than necessary to achieve NSC's interest in preserving order in its schools. ***994** In my view, the issue is not, as the majority's reasoning suggests, whether NSC's policy is comparable to those imposed at other schools and documented in other cases. Rather it is whether NSC's program, and its suspicionless testing of broad categories of students, is justified at all. It is incumbent upon NSC to prove this, and its failure to do so leaves its program well short of complying with Article I, Section 11.

C. NSC's Governmental Concern and Efficacy of its Program

1. ***NSC Presents No "Concrete Danger" as to the Students it Tests***

The final factor in the "special needs" balance is the nature and immediacy of NSC's concern and the efficacy of its testing program in addressing it. *Vernonia*, 515 U.S. at 660, 115 S.Ct. 2386. The majority's treatment of *Vernonia* suggests that the phrase "special need" means nothing more than that a school may identify a "drug problem" and thereafter impose random drug testing on any student engaged in an extra- or co-curricular activity. I do not read *Vernonia*

that broadly. NSC carries the burden of proving why its searches fall within the "special needs" doctrine, as applied in *Vernonia*, and later clarified in *Chandler*. In my view, it fails to establish the "concrete danger" to which its program responds, or—assuming the presence of a concrete danger—that the program in its present form is tailored to address it.

In *Chandler*, the United States Supreme Court explained that "the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." 520 U.S. at 318, 117 S.Ct. 1295. To invoke the "special needs" doctrine, the proponent of such a testing program must demonstrate a "concrete danger." *Id.* at 319, 117 S.Ct. 1295. In *Vernonia*, the "concrete danger" with regard to the school's student athletes was evident and described as a "state of rebellion." 515 U.S. at 662–63, 115 S.Ct. 2386. A variety of problems in the school environment were cited. NSC argues that the survey results and the deaths of two students in a ten-year period justify the program it has put into place. But neither of these circumstances involved the classroom disruption cited in *Vernonia*, and NSC's superintendent could not point to any increase in discipline problems attributable to substance abuse. It may not take an "epidemic" before a school justifiably institutes a drug testing program. But it must take more than the evidence presented by NSC. If not, Article I, Section 11 may fairly be said to provide little, if any, protection to Indiana's students.

The concerns cited by NSC are of course significant. But even if they rose to the level sufficient to support some testing program, NSC's program is not justified by its evidence. In *Joy*, the Seventh Circuit addressed an Indiana school's testing policy similar to NSC's. Although the particulars of the policy are unimportant to the present case, the Seventh Circuit's analysis is instructive.[5] The court assessed the nature of the government's interest, in part, by examining whether a *995 correlation existed between the defined test population and the abuse. NSC's evidence of substance abuse in its schools is a survey given to students in grades seven through ten. However the results do not suggest a correlation between the percentage of students claiming to have used a given substance and those students who participate in an activity covered by NSC's testing program. The survey cited by NSC may indeed "demonstrate a ... 'correlation' between student drug use and a need to test." What it does not do is demonstrate a correlation between drug use among the general student population and a need to test the students who are subject to the program. *Cf. id.* at 685, 115 S.Ct. 2386 (O'Connor, J., dissenting) (criticizing the school district's decision to test student athletes as "a choice that appears to have been driven more by a belief in what would pass constitutional muster ... than by a belief in what was required to meet the District's principal disciplinary concern."). NSC cites *Joy* and *Vernonia* in support of its claim that "[u]nder a reasonableness standard the federal courts have found that findings like this do in fact provide a basis for testing." The majority appears to accept this argument. I think this misses the point of *Joy* and *Vernonia*.

Here, as in *Joy*, NSC "has not proven, or even attempted to prove, that a correlation exists between drug use and those who engage in extracurricular activities or drug use and those who drive to school." 212 F.3d at 1064. Thus, NSC's program amounts to "dividing the students into broad categories and drug testing on a category-by-category basis, which allows for drug testing for all but the most uninvolved and isolated students." *Id.* (citing *Willis*, 158 F.3d at 423). *Willis* appropriately described such a program as "one insidious means toward blanket testing." 158 F.3d at 423.

2. *Suspicion–Based Testing is Feasible*

One driving force in the United States Supreme Court's opinion in *Vernonia* was the Court's conclusion that a program based on individualized suspicion would entail "substantial difficulties—if it [were] indeed practicable at all" in order to handle the "immediate crisis" present in the Vernonia school district. As explained in Part II.C.1, NSC does not proffer evidence of a "concrete danger" of an immediate nature as to the students it tests. Further, as the majority points out, NSC's program not only entails random testing of the selected groups of students, but also provides that "[s]tudents may also be entered into the testing program at the request of their parent ... *when a student shows signs of drug use that provides reasonable suspicion to search a student.*" (emphasis added). By its own terms, NSC's policy purports to have the ability to determine when a "reasonable suspicion" is present for a given student.

I recognize and agree that suspicion-based searches can lead to abuses if the grounds for suspicion are not sufficiently articulable. As noted in *State v. Gerschoffer*, a scheme of random searches may be less subject to abuse in the form of profiling or arbitrary enforcement than one that requires reasonable suspicion. 763 N.E.2d 960 (Ind.2002) (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107

Harv. L.Rev. 757, 809 (1994)). Nevertheless, the broader the net cast, and the weaker the case for any program at all, the less persuasive this consideration becomes. Thus airport searches of everyone or of randomly selected passengers may be very reasonable under current circumstances. But NSC's program subjects nearly eighty percent of its middle and high school students to random tests, based on this very tenuous claim of a "concrete danger."

***996** In *Willis*, 158 F.3d at 421, the Seventh Circuit Court of Appeals stated, "Under the *Vernonia* formulation, courts consider the feasibility of a suspicion-based search when assessing the efficacy of the government's policy." The testing program in *Willis* required students who were suspended for three or more days to submit to urinalysis upon their return. Willis was suspended for fighting, but refused to undergo testing upon his return. The Anderson policy, like NSC's policy, was implemented "to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately." *Id.* at 417. The Seventh Circuit, holding the program violated the Fourth Amendment, found it significant that "the Corporation has not demonstrated that a suspicion-based system would be unsuitable, in fact would not be highly suitable." *Id.* at 424–25. The court noted:

> As a practical matter, it may be that when a suspicion-based search is workable, the needs of the government will never be strong enough to outweigh the privacy interests of the individual. Or, stated slightly differently, perhaps if a suspicion-based search is feasible, the government will have failed to show a special need that is "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."

Id. at 421 (quoting *Chandler*, 520 U.S. at 318, 117 S.Ct. 1295). Whether a suspicion-based system is feasible is just one factor in our totality of the circumstances analysis, but I believe—as *Willis* illustrates—it is a significant one in the balance of whether the system is reasonable. Given the fact that NSC's own policy contemplates suspicion-based testing for some students, what is practicable for some is practicable for all.

III. Article I, Section 23 Concerns

Article I, Section 23 of the Indiana Constitution states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." I agree with the majority's recitation of the standard in *Collins v. Day*, 644 N.E.2d 72 (Ind.1994). However, for many of the reasons stated in Part II, I believe NSC's testing program runs afoul of Article I, Section 23.

Section 23 requires that governmental classifications be based on inherent characteristics of the classified group and that the classifications be reasonably related to the characteristics that define the group. *Collins*, 644 N.E.2d at 79. Like many legislative classifications, this is one that defines a group that has individuals entering and leaving all the time as students join and drop out of various activities. As the majority points out, defining the group by membership in these activities meets the *Collins* requirement of "inherent characteristics which distinguish" NSC students who are tested from NSC students who are not tested. However, the stated purpose of NSC's testing is to "provid[e] for the health and safety of students, and undermin[e] the effects of peer pressure by providing a legitimate reason for students to refuse to use illegal drugs and ... encourag[e] students who use drugs to participate in drug treatment programs." Nothing in that stated purpose signifies that NSC is more concerned about the health and safety of the students who participate in the regulated activities than those who do not. Nor is there anything about the covered categories of students to suggest that those students are more susceptible to the effects of peer pressure than their non-tested colleagues. Therefore, ***997** I cannot agree that the disparate treatment of requiring testing of some students rather than others is in any way "reasonably related" to the distinction NSC makes between them.

Conclusion

In conclusion, I would find NSC's testing program, in its current form, invalid under both Article I, Section 11 and Article I, Section 23 of the Indiana Constitution. NSC has not presented significant evidence of a concrete danger requiring the implementation of its policy, as it currently stands. At the very least, NSC has not presented any evidence of a severe drug or discipline problem among the tested categories of students. NSC's distinction between the tested and untested students has no rational basis, and its testing program (a) fails to overcome the Linkes' privacy interest, under the *Vernonia* analysis, for substantial lack of efficacy, and (b) fails the *Collins* equal rights and privileges analysis because

the distinction is not "reasonably related" to the policy's stated purpose.

The majority contends that, having "identified a drug problem ... gives [NSC] an interest in experimenting with methods to deter drug use." I agree that, if a drug problem is present at NSC, it certainly has the right to experiment and determine the most effective method of combating the problem. However, that experimentation must have a constitutionally valid form.

RUCKER, J., concurs.

All Citations

763 N.E.2d 972, 162 Ed. Law Rep. 525

Footnotes

1 Co-curricular activities are activities, participation or membership in which are an extension of and outside the normal school day and for which academic credit or grades are earned, such as band and choir.

2 Students may also be entered into the testing program at the request of their parent or guardian or with the permission of the parent or guardian when a student shows signs of drug use that provides reasonable suspicion to search a student.

3 The Policy permits testing for alcohol, amphetamines, anabolic steroids, barbiturates, benzodiazepines, cocaine metabolites, LSD, marijuana metabolites, methadone, methaqualone, nicotine, opiates, phencyclidine, and propoxyphene. Although the Policy allows for testing of "other specified drugs," no other drugs are tested for.

4 We note that the *Earls* court found that a random drug testing policy violated the Fourth Amendment. The policy it reviewed differs from the one before us in three principal respects: (1) it did not take the same care in protecting student privacy; (2) there was much less evidence of drug abuse than has been presented here; and (3) students were required to pay for tests, thus creating a fee requirement for public school extracurricular activities.

5 Ind.Code § 20–8.1–5.1–3 provides:

"(a) Student supervision and the desirable behavior of students in carrying out school purposes is the responsibility of a school corporation and the students of a school corporation.

(b) In all matters relating to the discipline and conduct of students, school corporation personnel stand in the relation of parents and guardians to the students of the school corporation. Therefore, school corporation personnel have the right, subject to this chapter, to take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system.

(c) Students must follow responsible directions of school personnel in all educational settings and refrain from disruptive behavior that interferes with the education environment."

6 Ind. Const. art VIII, § 1, provides:

> "Knowledge and learning, general diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all."

7 Those activities are academic teams, drama, Future Farmers of America, National Honor Society, student government, and Students Against Drunk Driving.

8 Activities not subject to the Policy include the Euchre Club, New Student Q & A, Ecology Club, Fellowship of Christian Athletes, Foreign Language Club, Peer Helpers, Sunshine Society, Newspaper, Yearbook, Science Club, Teen Issues, Sports Memorabilia, and Chess Club.

1 Specifically, the Supreme Court cited district court findings that:

> Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language were common.
>
> Not only were student athletes included among the drugs users but, ... athletes were the leaders of the drug culture. ....
>
> > "[A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, ... [d]isciplinary actions had reached 'epidemic proportions,' and ... the

> rebellion was being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture."

515 U.S. at 649, 662–63, 115 S.Ct. 2386.

2 The Court rejected the argument that *Von Raab* carried greater weight, and admonished, "*Von Raab* must be read in its unique context." *Chandler,* 520 U.S. at 321, 117 S.Ct. 1295.

3 By contrast, the legislature has specifically spelled out the procedure for locker searches. Ind.Code § 20–8.1–5.1–25 (1998).

4 I cite the recent motion picture "American Pie II," which I confess to having viewed by reason of friendship with the parents of its director, whom I have known from childhood. I believe most of us could provide more persuasive authority from our own experiences in high school.

5 The court in *Joy* upheld the policy at issue as to its testing of students participating in extra-curricular activities, but the only apparent reason for that conclusion was the panel's compulsion, under stare decisis, to follow the Seventh Circuit's earlier holding in *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir.1998), *cert. denied,* 525 U.S. 824, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998), upholding a similar policy. For the reasons expressed throughout this opinion, I disagree with the reasoning in *Todd.*

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