
2004

Pee-to-Park: Should Public High School Students Applying for on-Campus Parking Priviledges Be Required to Pass a Drug Test

Jared M. Hartman

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PEE-TO-PARK: SHOULD PUBLIC HIGH SCHOOL STUDENTS
 APPLYING FOR ON-CAMPUS PARKING PRIVILEGES BE
 REQUIRED TO PASS A DRUG TEST?

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I. INTRODUCTION

High school can be a challenging time for many teenagers. They are faced with the challenge of developing into independent young adults, while being subjected to constant authoritative control and scrutiny. Teenagers are even subject to authoritative supervision outside of the home by such figures as schoolteachers, guidance counselors, athletic coaches, and student group advisors. In many cases,

these adult authority figures are in a relationship of trust and confidence with the students, often to a degree where the adult is seen as a surrogate parent or role model.

In such relationships, how would most students react if asked by these authority figures to submit to a suspicionless¹ drug test? Would the students feel that someone they trust and admire is accusing them of wrongdoing, and feel that they must vindicate themselves by passing the test?² Would the students be afraid to assert their right not to take the test out of fear of being seen as deceptive?

In an effort to battle adolescent drug use, many school districts have implemented drug-testing programs that focus on certain groups of students without any particularized suspicion of drug use by any of the individual students. Schools obtain consent to these programs by conditioning participation in certain activities on passing the drug test. For example, many schools condition participation in interscholastic athletics on passing a drug test.³ Some schools also condition participation in any competitive, interscholastic activity, such as band or choir, on passing a drug test.⁴

Although the Supreme Court of the United States⁵ has specifically addressed and upheld these latter examples,⁶ schools have implemented drug-testing programs in other contexts as well. For example, Groveport Madison, a public high school in Groveport, Ohio, recently adopted a policy that requires all students applying for an on-campus parking permit to pass an initial drug test, and to also submit to a monthly random drawing of students to be tested.⁷ This program requires students to pay an

¹BLACK'S LAW DICTIONARY (8th ed. 2004) defines suspicion as "the apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence, or possibly even no evidence." Therefore, public school drug-testing programs are referred to as suspicionless because they are preventive in nature; they do not focus on individual students based on any particularized suspicion of wrongdoing. Instead, they focus on a large group of students, such as athletes, and test for multiple illicit drugs and alcohol in order to deter drug use before it even begins.

²FATEMA GUNJA, ALEXANDRA COX, MARSHA ROSENBAUM, PHD & JUDITH APPEL, J.D., MAKING SENSE OF STUDENT DRUG TESTING: WHY EDUCATORS ARE SAYING NO (2004) available at <http://www.drugtesting-fails.org/pdf/drug-testing-booklet.pdf>. This publication argues that student-teacher relationships can be undermined when teachers or coaches "act as confidants in some circumstances, but as police in others," which may circumvent trust and cause students to feel "ashamed and resentful." *Id.* at 8.

³*See Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

⁴*See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

⁵Hereinafter referred to as "Supreme Court."

⁶*See Vernonia*, 515 U.S. 646; *Earls*, 536 U.S. 822. The balancing test established by the Supreme Court to determine the legality of a particular school's drug-testing program will be discussed under Section II: Case-Law Background.

⁷Bill Bush, *Groveport Madison; Students Must Pass Drug Test to Park*, COLUMBUS DISPATCH, Aug. 28, 2004, at 1A; Mike Harden, *Principal Takes Wrong Turn in Instituting Drug-Test Rule*, COLUMBUS DISPATCH, Aug. 31, 2004, at 1B [hereinafter Harden, *Drug-Test Rule*]; Mike Harden, *Parking Policy Doesn't Deserve Bad Reputation, Principal Says*, COLUMBUS DISPATCH, Sept. 5, 2004, at 1B [hereinafter Harden, *Parking Policy*].

annual fee of \$26, and has been attributed with causing the number of students applying for on-campus parking permits to decrease by 25% from the previous year.⁸ The school's first random test yielded three positive results for marijuana out of 37 samples.⁹ Students who fail the test are punished with a three-week suspension of parking privileges and are required to undergo counseling.¹⁰

The Groveport Madison program has produced mixed feelings among the local community. Columbus Dispatch reporter Mike Harden quoted Groveport Madison Principal Mike Beck as saying that, early in the program's existence, he estimated parental support for the program as being "70-30 for."¹¹ However, the program has upset at least one parent. Ken Dustheimer, whose daughter attended Groveport Madison at the time, lodged a complaint concerning the program's legality with the American Civil Liberties Union (ACLU) of Ohio.¹² Although the ACLU of Ohio has not taken any formal legal action regarding the program, Gary Daniels, Litigation Coordinator and spokesman for the ACLU of Ohio, stated that "[the program] definitely raises constitutional concerns."¹³

This note will address the concerns raised by suspicionless drug-testing programs in public high schools by ultimately arguing that public policy considerations should be factored into the Supreme Court's balancing test,¹⁴ and that such considerations will weigh the balance against expanding drug-testing programs to contexts beyond those already upheld by the Supreme Court.¹⁵ At the least, this note will argue that the Groveport Madison drug-testing program, imposed on students applying for on-campus parking privileges, should not be upheld. However, before this argument can be properly asserted, a number of pertinent topics must be discussed.

Section II of this note will begin by discussing the primary Supreme Court cases¹⁶ that address certain legal issues relevant to drug-testing programs.¹⁷ This

⁸Bush, *supra* note 7.

⁹Harden, *Parking Policy*, *supra* note 7.

¹⁰ Bush, *supra* note 7; Harden, *Drug-Test Rule*, *supra* note 7.

¹¹Harden, *Drug-Test Rule*, *supra* note 7.

¹²Harden, *Parking Policy*, *supra* note 7.

¹³Bush, *supra* note 7; Harden, *Drug-Test Rule*, *supra* note 7.

¹⁴As previously stated, the Supreme Court's balancing test, which is used to determine the legality of public high school drug-testing programs, will be fully discussed under Section II: Case-Law Background, *infra*.

¹⁵The contexts already considered and upheld by the Supreme Court involve programs imposed on interscholastic athletics and competitive extra-curricular activities. *See generally Vernonia*, 515 U.S. 646; *Earls*, 536 U.S. 822.

¹⁶This note focuses only on federal case law developed by the Supreme Court of the United States. Individual states retain the authority to impose their own guidelines, provided they do not conflict with the guidelines established by the Supreme Court. In doing so, states are allowed to be more expansive of individual rights, and can provide greater restrictions on school drug-testing programs than what federal case law does. *See GUNJA et al.*, *supra* note 2, at 11.

¹⁷Such legal issues include: 1) whether the protections afforded in the Bill of Rights apply to public high school students; 2) whether a drug test conducted via urinalysis constitutes a

section will also discuss the cases specifically addressing drug-testing programs, including those implemented by public high schools.¹⁸ Section III of this note will apply the Supreme Court's balancing test to the Groveport Madison program. Section IV of this note will analyze certain public policy considerations according to their relevant factors in the Supreme Court's balancing test.¹⁹ In conclusion, this note will argue that such public policy considerations weigh the Supreme Court's balancing test against the program implemented by Groveport Madison, and that high school drug-testing programs should be limited to those contexts already specifically upheld by the Court.

II. CASE-LAW BACKGROUND

Some preliminary issues must be addressed before directly discussing the Supreme Court's treatment of public high school drug-testing programs. First, this Section will discuss the applicability of the Bill of Rights and, specifically, the Fourth Amendment to the U.S. Constitution,²⁰ to public high school students. Second, this Section will review certain areas of a Fourth Amendment analysis. These areas include: 1) the types of privacy expectations protected by the Fourth Amendment; 2) whether a drug test conducted via urinalysis constitutes a search and seizure that is covered by the Fourth Amendment; and 3) the standards of suspicion that must be met in particular instances for the government to justify a search. Finally, this Section will review the Supreme Court's analysis of suspicionless drug-testing programs, including those implemented by public high schools.

A. Public High School Students Retain Constitutional Rights

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that three high school students' right to freedom of expression was violated by the school district when it indefinitely suspended the students for wearing black armbands to school in protest of the Vietnam War.²¹ In dicta, the Court stated that students do not "shed their constitutional rights to freedom of

search and seizure that must satisfy a Fourth Amendment analysis; and 3) the standards of suspicion that the government must satisfy in order to justify a search.

¹⁸See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding a suspicionless drug-testing program imposed on certain railway employees); *Nat'l Treasury Employees' Union v. Von Raab*, 589 U.S. 656 (1989) (upholding a suspicionless drug-testing program imposed on certain U.S. Customs service employees); *Vernonia*, 515 U.S. 646; *Chandler v. Miller*, 520 U.S. 305 (1997) (striking a mandatory drug-testing program on all candidates for State office); *Earls*, 536 U.S. 822.

¹⁹These public policy considerations will be categorized according to their relevant factor(s) in the Court's balancing test because it is the format in which they should be considered when formally applying the test to a particular drug-testing program.

²⁰Hereinafter referred to as the "Fourth Amendment."

²¹*Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 513-14 (1969). The Court found that the students' manner of expression did not substantially disrupt or materially interfere with school activities or the rights of other students, which is the standard applicable to determining whether school officials may exercise a content-based restriction. The failure to satisfy this standard mandates a strict scrutiny analysis, which finds content-based restrictions presumptively unconstitutional. *Id.*

speech or expression at the schoolhouse gate.”²² Further, “state-operated schools may not be enclaves of totalitarianism,”²³ and “students . . . are ‘persons’ under our Constitution . . . [t]hey are possessed of fundamental rights which the State must respect.”²⁴ Additionally, the Court stated that one objective of our nation’s schools is to educate students for citizenship, which is “reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to . . . teach the youth to discount important principles of our government as mere platitudes.”²⁵

Subsequently, in *New Jersey v. T.L.O.*, the Supreme Court applied a Fourth Amendment analysis when it upheld a school official’s search of a female student’s purse.²⁶ Before concluding that this search was reasonable,²⁷ the Court inquired as to whether the Fourth Amendment applies to searches conducted by public school officials.²⁸ The Court declared that it is an indisputable proposition that the Fourteenth Amendment to the U.S. Constitution²⁹ “prohibits unreasonable searches and seizures by state officers,”³⁰ and it is “equally indisputable . . . that the Fourteenth Amendment protects the rights of students against encroachment by public school officials.”³¹ In support of this proposition, the Court stated that schools act according to “publicly mandated educational and disciplinary policies;”³² and, therefore, “school officials act as representatives of the State, not merely as surrogates for the parents.”³³

²²*Id.* at 506.

²³*Id.* at 511.

²⁴*Id.*

²⁵*Id.* at 507 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

²⁶*New Jersey v. T.L.O.*, 469 U.S. 325 (1984). After a female high school student was discovered smoking cigarettes in the girls’ restroom, the assistant vice principal conducted a search of her purse in pursuit of evidence of this school violation. The search revealed a pack of cigarettes, a pack of rolling papers, a small amount of marijuana, a smoking pipe, some empty plastic bags, a large sum of money, and an index card displaying a list of other students that were indebted to her. The school subsequently turned this evidence over to the police, and juvenile delinquency charges were brought against her. *Id.* at 328-29.

²⁷The Supreme Court’s analysis in concluding that the search was reasonable will be fully discussed in Section II, Subsection B, Part 4, which specifically addresses the standard used for reviewing school searches based on reasonable suspicion.

²⁸*Id.* at 333-37.

²⁹The Fourteenth Amendment has provided the means for particular Amendments contained in the Bill of Rights to directly regulate state action that undermines those rights seen as “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Fourth Amendment was made applicable to the states by *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁰*T.L.O.*, 469 U.S. at 334 (quoting *Elkins v. United States*, 364 U.S. 206, 213 (1960)).

³¹*T.L.O.*, 469 U.S. at 334.

³²*Id.* at 336.

³³*Id.*

B. The Fourth Amendment Scrutiny

The Text of the Fourth Amendment reads:

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.

Despite the apparent clarity of this language, its application in particular instances has been quite controversial. For example, it is not always clear what types of expectations of privacy are protected, or what types of searches must satisfy a Fourth Amendment scrutiny. Additionally, case law has created some exceptions to the requirement of a warrant based on probable cause, thereby allowing a search to be supported by either reasonable suspicion or less in certain circumstances.³⁴ Accordingly, this subsection will discuss the types of privacy expectations protected by the Fourth Amendment, whether a urinalysis constitutes a search and seizure that must pass constitutional muster, and the relevant standards of suspicion that officials must have in particular instances before conducting a search.³⁵

1. Privacy expectations that society recognizes as reasonable

The Supreme Court has stated that the Fourth Amendment does not protect all expectations of privacy, but instead only protects reasonable expectations of privacy.³⁶ In *Smith v. Maryland*,³⁷ the Court adopted a two-part rule, originally addressed by Justice Harlan's concurrence in *Katz*,³⁸ which is to be utilized in determining whether an asserted expectation of privacy is reasonable. First, one must show an actual, subjective expectation of privacy by attempting to protect something as private.³⁹ Second, one must show that the subjective expectation of

³⁴*See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968), (allowing police officers to conduct a brief frisk of an individual's clothing when circumstances give the officer reasonable suspicion that the individual is carrying a weapon that may be used to harm the officer, regardless of whether the officer has probable cause to arrest the individual).

³⁵This discussion is by no means exhaustive of the particular instances in which the Fourth Amendment applies. This discussion only covers those areas most relevant to the main topic of the note—suspicionless drug-testing programs in public high schools.

³⁶*See Katz v. United States*, 389 U.S. 347, 352 (1967) (finding a reasonable expectation of privacy in a public telephone booth) (“One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world”); *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (finding no reasonable expectation of privacy in one's prison cell) (“We hold that society is not prepared to recognize as legitimate any expectation of privacy that a prisoner might have in his prison cell”).

³⁷442 U.S. 735 (1979).

³⁸*Katz*, 389 U.S. at 361 (Harlan J., concurring).

³⁹*Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 351, 361) (Harlan, J., concurring)).

privacy is one the public is prepared to accept as reasonable, which is satisfied when, viewed objectively, the expectation is justifiable under the circumstances.⁴⁰

In *Smith*, the Court found that the defendant did not allege a reasonable expectation of privacy in the telephone numbers dialed from his home telephone. This information was not the subject of an actual, subjective expectation of privacy because, as the Court found to be obvious to all telephone subscribers, the telephone company recorded the information for legitimate business purposes.⁴¹ Additionally, the Court found that society would not accept this expectation of privacy as reasonable because the information was voluntarily turned over to the telephone company.⁴²

2. Urinalysis constitutes a search and seizure

In *Skinner v. Railway Labor Executives' Association*, the Supreme Court upheld a Federal Railway Administration policy of imposing mandatory blood and urine tests on employees involved in certain train accidents and based on a supervisor's reasonable suspicion, and discretionary breath and urine tests for employees who violate certain safety rules.⁴³ As a preliminary matter, however, the Court addressed whether a urinalysis test constitutes a search and seizure that must satisfy a Fourth Amendment analysis.⁴⁴ The Court found that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," which mandates the conclusion that urinalysis testing be subject to Fourth Amendment scrutiny.⁴⁵

3. Warrants and probable cause

The Fourth Amendment does not protect the people against all searches, but only against unreasonable searches.⁴⁶ Therefore, government officials can conduct a

⁴⁰*Id.* (quoting *Katz*, 389 U.S. at 353, 361) (Harlan, J., concurring)).

⁴¹*Id.* at 742-44.

⁴²*Id.*

⁴³*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989). The Court's analysis in upholding the FRA policy will be discussed under Section II, subsection C, Part 1, which specifically addresses the standard used for reviewing suspicionless searches.

⁴⁴*Id.* at 613-17.

⁴⁵In reaching this conclusion, the Supreme Court quoted *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987) (upholding a U.S. Customs Service policy of testing all employees that apply for, and are appointed to, certain positions), *aff'd*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) where the Fifth Circuit stated that:

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

⁴⁶*See Vernonia*, 515 U.S. at 652 ("The Fourth Amendment . . . 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.'" (quoting the text of the Fourth Amendment) (emphasis added)).

search if it qualifies as reasonable, according to a Fourth Amendment analysis. However, different circumstances lead to different determinations of what constitutes a reasonable search.

Ordinarily, searches conducted by law enforcement agents in pursuit of evidence of criminal activity require a judicial warrant based on probable cause, unless exigent (emergency) circumstances exist that excuse the warrant requirement.⁴⁷ The few exigent circumstances that justify a warrantless search include such situations as when officers are in hot pursuit of a fleeing felon,⁴⁸ and when officers have a reasonable belief that evidence is being destroyed.⁴⁹ Even in the absence of such exigent circumstances, police officers are permitted to conduct a warrantless search of automobiles when they have probable cause to believe the automobile contains evidence of criminal activity.⁵⁰ However, the Court has stated that the probable cause requirement is “‘peculiarly related to criminal investigations’ and may be unsuited to determining the reasonableness of administrative searches where the ‘Government seeks to *prevent* the development of hazardous conditions.’”⁵¹ High school drug-testing programs fall under this category—school searches are administrative searches, and the drug-testing programs aim to deter drug abuse before it becomes an epidemic. Therefore, school officials are not imposed with the burden of having to obtain either a judicial warrant or probable cause before conducting a search.

4. Reasonable suspicion in public schools

In *T.L.O.*, the Supreme Court upheld the assistant vice principal’s search of a female high school student’s purse even though the official did not have probable cause and a warrant was not secured prior to conducting the search.⁵² First, the Court held that “school officials need not obtain a warrant before searching a student who

⁴⁷See *Terry*, 392 U.S. at 20 (“[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances”).

⁴⁸See *Warden v. Hayden*, 387 U.S. 294 (1967) (upholding the police officers’ entrance into a home while in pursuit of a robbery suspect who, only a few minutes before the officers’ entrance, had entered the home himself); *United States v. Santana*, 427 U.S. 38 (1976) (upholding the police officers’ entrance into a suspected drug dealer’s home immediately after the officers witnessed her retreat into the home only minutes after they arrested an individual who provided an undercover agent with drugs that the arrestee alleged to have obtained from the female suspect).

⁴⁹See *Vasquez v. United States*, 454 U.S. 975 (1981) (upholding the police officers’ entrance into an apartment out of fear that individuals inside the apartment would destroy any and all evidence of drug trafficking after the officers had just arrested several others outside of the apartment for their involvement in drug activity).

⁵⁰See *California v. Carney*, 471 U.S. 386 (1985) (upholding the police officers’ warrantless search of a mobile home when the officers had probable cause that contraband was contained therein).

⁵¹*Earls*, 536 U.S. at 828 (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-68 (1989)) (emphasis in original).

⁵²*T.L.O.*, 469 U.S. at 347-48.

is under their authority.”⁵³ In support of this, the Court stated that search warrants are unsuited to the school environment because they “interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”⁵⁴

Further, 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.⁵⁵ Instead, “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”⁵⁶ Such an inquiry mandates the application of a two-pronged test.⁵⁷

The first prong demands a determination of whether the search was initially justified, which is satisfied when the school official has reasonable suspicion the search will reveal evidence of a violation of either the law or school rules.⁵⁸ In this case, the assistant vice principal actually conducted two searches that the Supreme Court had to consider: the initial search of the student’s purse in pursuit of evidence that she had been smoking on school grounds, which was a violation of school rules, and the subsequent search for evidence of drug possession, which was a violation of the law.⁵⁹ The assistant vice principal’s initial search for cigarettes was justified because the student was observed smoking cigarettes in the girls’ restroom, which provoked a reasonable suspicion that a search of her purse would reveal cigarettes, possession of which would constitute evidence of violating school rules.⁶⁰ The Court found the subsequent search for evidence of drug possession to be justified because the initial search uncovered rolling papers, which provoked a reasonable suspicion that a more extensive search of the student’s purse would uncover drugs, possession of which would constitute a violation of the law.⁶¹

The second prong inquires as to whether the search as actually conducted was reasonably related in scope to the circumstances that initially justified the search,

⁵³*Id.* at 340.

⁵⁴*Id.*

⁵⁵*Id.* at 341.

⁵⁶*Id.*

⁵⁷*T.L.O.*, 469 U.S. at 341.

⁵⁸*Id.* at 341-42.

⁵⁹While looking for evidence of cigarette smoking, the Assistant Vice Principal discovered rolling papers, which he knew to be popular for rolling marijuana cigarettes. This discovery prompted the Assistant Vice Principal to search further for evidence of drug use. *Id.* at 328.

⁶⁰*Id.* at 345-46. “A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave [the official] reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them.”

⁶¹*Id.* at 347. “The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying 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 . . . under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse.”

which requires the search to not be excessively intrusive in light of the age and sex of the student and the nature of the alleged violation.⁶² Without explanation, the Court did not specifically address this prong. Instead, the Court only addressed the inconsistency between its analysis of the first prong and the lower court's ruling regarding the reasonableness of the search, without any comment as to why it failed to apply the second prong.⁶³

C. *The Supreme Court's Analysis of Suspicionless Drug-Testing Programs*

1. Suspicionless drug-testing programs in general

The Supreme Court has reviewed the constitutionality of drug-testing programs imposed by certain governmental agencies without any particularized suspicion of drug use by the individuals being tested. In *Skinner*, the Court upheld a Federal Railway Administration (FRA) policy of imposing mandatory blood and urine tests on employees involved in certain train accidents and based on a supervisor's reasonable suspicion of substance abuse, and discretionary breath and urine tests for employees who violated certain safety rules.⁶⁴ First, the Court stated that a search does not require a warrant or probable cause when the government can show "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable cause requirement impracticable."⁶⁵ In this case, the FRA possessed special needs to dispense with the warrant and probable cause requirements for two reasons. First, FRA employees are involved in a highly safety-sensitive profession, which creates an extreme need to prevent drug and alcohol impairment by the employees.⁶⁶ Second, requiring either a warrant or probable cause would place a heavy burden on obtaining this type of evidence because of the constant rate at which drugs and alcohol are eliminated from the bloodstream.⁶⁷

The Court conceded that, even when a warrant or probable cause is not required, "some quantum of individualized suspicion" might be required.⁶⁸ However, "in limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion

⁶²*Id.* at 341-42.

⁶³This author cannot offer any explanation or accurate speculation for the Court's failure to specifically address the second prong in its analysis of whether the assistant vice principal's search of the student's purse was constitutional.

⁶⁴*Skinner*, 489 U.S. at 609-12.

⁶⁵*Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351) (Blackmun, J., concurring) (internal quotation marks omitted) (upholding a probation officer's search of a probationer's home based on less than probable cause, because of the special needs of operating a system of supervision over probationers)).

⁶⁶*Id.* at 619-24.

⁶⁷*Id.*

⁶⁸*Id.* at 624 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (upholding the government's practice of stopping cars at reasonably located checkpoints along the border and questioning their occupants about immigration status without any individualized suspicion)).

would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”⁶⁹

In this case, the Court found that FRA employees had a minimal expectation of privacy because of their “participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.”⁷⁰ Further, the toxicology samples were collected in a medical environment under conditions similar to a regular physical examination, and the information was obtained for the limited purpose of detecting substance abuse.⁷¹ Each of these factors contributed to the Court’s finding that the program implicated only upon limited expectations of privacy.⁷²

Regarding the governmental interest furthered by the intrusion, the Court stated, “[the] Government interest in testing without a showing of individualized suspicion is compelling.”⁷³ This is because “a requirement of particularized suspicion of drug or alcohol use would seriously impede an employer’s ability to obtain this information [evidence of impairment due to substance abuse], despite its obvious importance.”⁷⁴ Because the Court found that the interests served by the drug-testing program outweighed the employees’ privacy concerns, the Court held that the FRA’s policy did not require any particularized suspicion in order to impose a drug and alcohol test on employees who violated certain safety rules or were involved in certain train accidents.⁷⁵

The same day the Supreme Court decided *Skinner*, the Court decided *National Treasury Employees Union v. Von Raab*.⁷⁶ This case involved a U.S. Customs Service policy of imposing a mandatory drug test on employees holding, applying for, or being appointed to any position that satisfied one of three criteria: those directly involved in drug interdiction or enforcement of related laws, those required to carry a firearm, and those required to handle classified material.⁷⁷

In following the principle utilized in *Skinner*, the Court in *Von Raab* stated that, where the government can show special needs, “beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion.”⁷⁸ In this case, the Government did present a special need to justify dispensing with such requirements because of its substantial interest to “deter drug use among those eligible for promotion to sensitive positions within the [U.S. Customs] Service and to prevent the promotion of drug

⁶⁹*Skinner*, 489 U.S. at 624.

⁷⁰*Id.* at 627.

⁷¹*Id.* at 626.

⁷²*Id.* at 628.

⁷³*Id.*

⁷⁴489 U.S. at 631.

⁷⁵*Id.* at 633.

⁷⁶*Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

⁷⁷*Id.* at 660-61.

⁷⁸*Id.* at 665-66.

users to those positions.”⁷⁹ Further, the Service’s “mission would be compromised if [the Service] were required to seek search warrants in connection with routine, yet sensitive, employment decisions.”⁸⁰

After finding that the government possessed special needs that dispense with the warrant and probable cause requirements, the Court found that “the Government’s need to conduct the suspicionless searches required by the Customs program outweigh[ed] the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise [were] required to carry firearms.”⁸¹ The Court first found that the Government had a compelling interest to prevent “front-line interdiction personnel” from engaging in drug use because the “national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics.”⁸² Regarding those employees required to carry a firearm, the Court found that “the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.”⁸³

Next, the Court balanced these legitimate governmental interests against the employees’ privacy interests implicated by the search.⁸⁴ The Court found that U.S. Customs Service employees directly involved with drug interdiction, as well as those who carry a firearm, “reasonably should expect effective inquiry into their fitness and probity . . . because successful performance of their duties depends uniquely on their judgment and dexterity.”⁸⁵ Therefore, such employees have a diminished expectation of privacy. Based on the foregoing, the Court concluded that the Government’s compelling interests in the safety and integrity of our nation’s borders outweighed the relevant employees’ diminished expectations of privacy, which justified imposition of a drug-testing program in the absence of individualized suspicion.⁸⁶

In *Chandler v. Miller*,⁸⁷ the Supreme Court struck down as unconstitutional a drug-testing program imposed by the State of Georgia on all candidates seeking

⁷⁹*Id.* at 666.

⁸⁰*Id.* at 667.

⁸¹*Von Raab*, 489 U.S. at 668.

⁸²*Id.* at 670.

⁸³*Id.* at 671.

⁸⁴*Id.*

⁸⁵*Id.* at 672.

⁸⁶489 U.S. at 679. The Court failed to analyze the drug-testing program as applied to employees in positions that required handling of classified information because the record was found to be inadequate for that purpose. *Id.*

⁸⁷*Chandler v. Miller*, 520 U.S. 305 (1997). This case was decided after the Supreme Court decided its first case reviewing the constitutionality of a high school drug-testing program, *Vernonia*. Some confusion might arise because of the placement of this case out of chronological order. However, in order to clearly present the principles established for reviewing the constitutionality of high school drug-testing programs, the two cases that

nomination or election to state office. The Georgia statute required each candidate to present a certificate from a state-approved laboratory indicating that the candidate submitted to and passed a urinalysis drug test within the 30 days prior to qualifying for nomination or election.⁸⁸

In beginning its analysis, the Court reinforced the principle that some searches do not require a warrant or probable cause when the Government can show “special needs, beyond the normal need for law enforcement,” that dispense with these requirements.⁸⁹ After showing that it has such special needs, the Government is not obliged to show any individualized suspicion when it can satisfy a context-specific inquiry that examines the competing private and public interests advanced by the parties.⁹⁰

In addressing the preliminary inquiry, the State of Georgia contended it had the requisite special needs solely because of its sovereign power, reserved to the states under the Tenth Amendment to the U.S. Constitution, to establish qualifications for state office candidates.⁹¹ The Court rejected this contention, however, after finding that “no precedent [existed] suggesting that a State’s power to establish qualifications for state offices—any more than its power to prosecute crime—diminishes the constraints on state action imposed by the Fourth Amendment.”⁹² Consequently, the Court used the principles established in *Skinner*,⁹³ *Von Raab*,⁹⁴ and *Vernonia School District v. Acton*⁹⁵ in determining whether the State of Georgia possessed such special needs.⁹⁶

In analyzing this factor, the Court found the Government’s need to be merely symbolic, as opposed to special, for two reasons. First, the Government did not present any evidence of a specific drug problem among the State’s elected officials.⁹⁷ The Court conceded that a showing of a specific drug problem is not required in all cases, but such a showing “may help to clarify—and to substantiate—the precise hazards posed by [drug] use.”⁹⁸ Second, the Court found that the State’s needs were

specifically address them. *Vernonia* and *Earls* have been placed in a subsequent section independent from the rest of the cases concerning other suspicionless drug-testing programs.

⁸⁸*Id.* at 309.

⁸⁹*Id.* at 313-14.

⁹⁰*Id.*

⁹¹*Id.* at 317.

⁹²520 U.S. at 317.

⁹³489 U.S. 602.

⁹⁴489 U.S. 656.

⁹⁵515 U.S. 646. As previously stated in note 87, *Vernonia* will be discussed under Section II, Subsection C, Part 2, which specifically addresses the Supreme Court’s treatment of public high school drug-testing programs. This explains why *Vernonia* is mentioned during the discussion of *Chandler* without having first discussed *Vernonia* in full.

⁹⁶*See Chandler*, 520 U.S. at 317.

⁹⁷*Id.* at 321.

⁹⁸*Id.* at 319. *Compare Vernonia*, 515 U.S. 646. *Chandler* found that an “immediate crisis [was] prompted [in *Vernonia*] by a sharp rise in students’ use of unlawful drugs, [which]

not special because the subjected state officials were not performing “high-risk, safety-sensitive tasks, and the required certification immediately aid[ed] no interdiction effort.”⁹⁹ Because the State of Georgia’s drug-testing program was merely symbolic and the public safety was not “genuinely in jeopardy, the Fourth Amendment preclude[d] the suspicionless search.”¹⁰⁰

2. Suspicionless drug-testing programs in public high schools

In *Vernonia*, the Supreme Court upheld a mandatory drug-testing program for all middle school and high school student athletes, which was imposed without any individualized suspicion of drug use by any particular student(s).¹⁰¹ The Court first stated that a search conducted by school officials does not require either a warrant or probable cause when the government can show “special needs, beyond the normal need for law enforcement,”¹⁰² that would render the probable-cause requirement impracticable. Once this threshold question is answered, schools are permitted to implement a search based on less than probable cause. However, in order for schools to be permitted to impose a search without any requirement of individualized suspicion, courts must balance the competing interests of the school officials and the students based on three factors. First, courts must review the strength of the privacy interest upon which the search intrudes.¹⁰³ Second, the intrusive character of the search must be determined.¹⁰⁴ Third, courts must consider the nature and immediacy of the government’s concerns that led to the imposition of a suspicionless drug-testing program, along with the effectiveness of the imposed means for addressing these concerns.¹⁰⁵

In this case, the Court found that special needs that make the probable cause requirement impracticable exist in the public school context.¹⁰⁶ This is because the probable cause requirement would “unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,” and because of the “substantial need of teachers and administrators for freedom to maintain order in the schools.”¹⁰⁷ After satisfying this threshold inquiry, the Court applied the relevant factors of the balancing test.

bolstered the government’s and school official’s arguments that drug-testing programs were warranted and appropriate.”

⁹⁹520 U.S. at 321-22. Compare *Skinner*, 489 U.S. 602 (dealing with railway employees involved with the high-risk, safety-sensitive tasks incumbent upon railroad safety); *Von Raab*, 489 U.S. 656 (dealing with U.S. Customs Service employees directly involved with drug interdiction efforts, and those required to carry firearms).

¹⁰⁰*Chandler*, 520 U.S. at 323.

¹⁰¹515 U.S. 646, 664-65.

¹⁰²*Id.* at 653. (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

¹⁰³*Vernonia*, 515 U.S. at 654.

¹⁰⁴*Id.* at 658.

¹⁰⁵*Id.* at 660.

¹⁰⁶*Id.* at 653.

¹⁰⁷*Id.* at 653 (quoting *T.L.O.*, 469 U.S. at 340, 341) (brackets in original).

In addressing the first factor, the Court found that schoolchildren have a diminished expectation of privacy because they are placed under the school's authority, the nature of which is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."¹⁰⁸ Even though students have a diminished expectation of privacy in general, student athletes in particular have an even lower expectation of privacy because they voluntarily submit to a degree of control greater than what is imposed on other students.¹⁰⁹ Athletes submit to such a degree of regulation because they are required to undergo preseason physical examinations, either obtain health insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with other rules imposed by the team coaches and the school's athletic director.¹¹⁰ Further, athletes engage in communal undress and showering.¹¹¹

In addressing the second factor, the Court found the invasive nature of the drug-testing program to be negligible.¹¹² The Court first noted, "the degree of intrusion depends upon the manner in which production of the urine sample is monitored."¹¹³ In this case, the conditions in which the urine samples were furnished were "nearly identical to those typically encountered in public restrooms."¹¹⁴ Further, the Court addressed the invasiveness according to the manner in which the information obtained from the search was used. This was not excessively invasive because the information was used solely to detect illicit drug use in order to screen students from participation in athletics.¹¹⁵ Additionally, the information was furnished only to a limited class of school officials on a need-to-know basis, and the information was not passed on to law enforcement personnel for law enforcement purposes.¹¹⁶

Third, the Court addressed the nature and immediacy of the government's concerns and the effectiveness of the search at reaching them.¹¹⁷ The nature of the government's concerns—combating drug use by schoolchildren—was important because of the adverse effects that drugs have on the physical and psychological maturation processes, and because such effects pose an immediate threat of physical harm to athletes that are under the stress of physical competition.¹¹⁸ Regarding the immediacy of the government's concerns, the Court found the need to combat drug

¹⁰⁸*Vernonia*, 515 U.S. at 655.

¹⁰⁹*Id.* at 656-67.

¹¹⁰*Id.* at 657.

¹¹¹*Id.*

¹¹²*Id.* at 658.

¹¹³515 U.S. at 658.

¹¹⁴*Id.* Male students furnished their samples by urinating into a cup while standing at a urinal, and female students furnished their samples by urinating into a cup while in individual stalls. *Id.*

¹¹⁵*Id.*

¹¹⁶515 U.S. at 658.

¹¹⁷*Id.* at 660.

¹¹⁸*Id.* at 661-62.

use in this particular school district was great because the school was in a “state of rebellion . . . fueled by alcohol and drug abuse,” and the athletes served as the role models for this rebellious subculture.¹¹⁹ Regarding the program’s efficacy, focusing the search on the leaders of the rebellious subculture, who were also subjected to the more immediate threat of physical harm, effectively addressed the school’s concerns.¹²⁰ Because the balancing test favored the school’s interests in implementing a suspicionless drug-testing program over the students’ privacy interests, the Supreme Court upheld the program as “reasonable and hence constitutional.”¹²¹

Almost seven years later, the Supreme Court reviewed the constitutionality of another suspicionless drug-testing program implemented by a public high school. In *Earls*,¹²² the Court applied the factors established in *Vernonia*.¹²³ Consequently, the Court upheld the suspicionless drug-testing program imposed on all high school students participating in competitive extra-curricular activities, such as band and choir.¹²⁴

As a threshold matter, the Court considered whether the school had special needs that made the probable cause requirement impracticable, which would justify the imposition of a search based on less than probable cause.¹²⁵ The Court stated that schools have special needs to dispense with the probable cause requirement because of the impracticality of requiring such a stringent standard in the school setting.¹²⁶ The Court relied primarily on precedent by stating, “this Court has previously held that ‘special needs’ inhere in the public school context.”¹²⁷ For further support, the Court stated that a Fourth Amendment inquiry “cannot disregard the schools’ custodial and tutelary responsibility for children.”¹²⁸ Subsequently, the Court applied the relevant factors of the balancing test.

The first consideration was the nature of the students’ privacy interests implicated by the search.¹²⁹ The Court found that students enjoy a diminished expectation of privacy in the public school context, “where the State is responsible for maintaining discipline, health, and safety.”¹³⁰ In general, schoolchildren have a lowered expectation of privacy, but those who compete in competitive extra-curricular activities voluntarily submit to even greater control than what the rest of

¹¹⁹515 U.S. at 662-63.

¹²⁰*Id.*

¹²¹*Id.* at 664-65.

¹²²*Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

¹²³*Id.* at 830; *see also Vernonia*, 515 U.S. 646.

¹²⁴*Earls*, 536 U.S. at 838.

¹²⁵*Id.* at 829.

¹²⁶*Id.* at 828-29.

¹²⁷*Id.* at 829 (quoting *T.L.O.*, 469 U.S. at 339-40; *Vernonia*, 515 U.S. at 653).

¹²⁸*Id.* at 829-30 (quoting *Vernonia*, 515 U.S. at 656).

¹²⁹*Earls*, 536 U.S. at 830.

¹³⁰*Id.* (referencing *Vernonia*, 536 U.S. at 656).

the student body is subjected to.¹³¹ Therefore, the students enjoyed a limited expectation of privacy.¹³²

The Court next addressed the character of the intrusion of the search.¹³³ The Court began by stating that the “‘degree of intrusion’ on one’s privacy caused by collecting a urine sample ‘depends upon the manner in which production of the urine sample is monitored.’”¹³⁴ In considering the manner of production of the urine sample, the character of the intrusion in this case was minimal because the urinalysis test was not physically invasive and was furnished in the privacy of a restroom.¹³⁵ Additionally, the Court addressed the minimally invasive manner in which the information yielded from the search was used. The results obtained from the drug tests were “kept in confidential files separate from a student’s other educational records and released to school personnel only on a ‘need to know’ basis.”¹³⁶ Further, the information was used solely for detecting illicit drug use, and was “not turned over to law enforcement [personnel].”¹³⁷

Third, the Court addressed “the nature and immediacy of the government’s concerns.”¹³⁸ In finding the nature of the school’s concerns to be pressing and important, the Court began by stating that it “has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren.”¹³⁹ However, the importance of the government’s concern in preventing drug use by schoolchildren was found by the Court to be the same, if not greater, in this case because “the drug abuse problem . . . has hardly abated since *Vernonia* was decided in 1995.¹⁴⁰ In fact, evidence suggests that it has only grown worse.”¹⁴¹ Additionally, the “health and safety risks identified in *Vernonia*¹⁴² apply

¹³¹*Id.* at 831-32. “[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes . . . All of them have their own rules and requirements for participating students that do not apply to the student body as a whole.” *Id.*

¹³²*Id.* at 832.

¹³³*Id.*

¹³⁴*Earls*, 536 U.S. at 832 (quoting *Vernonia*, 515 U.S. at 658).

¹³⁵*Id.* at 833. The Court found the test as conducted in this case was “even less problematic” than the test in *Vernonia* because, with everything else being equal, the male students in this case were allowed to furnish their samples in the privacy of individual stalls, whereas the male students in *Vernonia* were required to furnish their samples while standing at urinals.

¹³⁶*Id.*

¹³⁷*Id.* at 833.

¹³⁸*Id.* at 834.

¹³⁹*Id.* (referencing *Vernonia*, 515 U.S. at 661-62).

¹⁴⁰*Earls* was decided in 2002, seven years after *Vernonia*.

¹⁴¹*Earls*, 536 U.S. at 834. “The number of 12th graders using any illicit drug increased from 48.4 percent in 1995 to 53.9 percent in 2001. The number of 12th graders reporting that they had used marijuana jumped from 41.7 percent to 49.0 percent during that same period” (referencing DEP’T OF HEALTH AND HUMAN SERVICES, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE, OVERVIEW KEY FINDINGS (2001) (Table 1)).

with equal force to Tecumseh's¹⁴³ schoolchildren."¹⁴⁴ Therefore, "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."¹⁴⁵ The School District had also presented "specific evidence of drug use at Tecumseh schools."¹⁴⁶

Regarding the immediacy of the government's concerns, the Court found the necessary immediacy in the "need to prevent and deter the substantial harm of childhood drug use."¹⁴⁷ Further, the evidence of increased drug use in the school district compounded the immediacy of the government's concerns in combating drug use by its students.¹⁴⁸

Finally, the Court was satisfied that the school's drug-testing program was effective at meeting the school's concerns.¹⁴⁹ The Court conceded that, in *Vernonia*, there "might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was 'fueled by the "role model" effect of athletes' drug use.'"¹⁵⁰ However, the Court stated that this finding was not essential to the holding in *Vernonia*, and that schools are not required to test the group[s] of students most likely to use drugs.¹⁵¹ Instead, the *Vernonia* test considers a program's constitutionality according to the school's custodial responsibilities over its students.¹⁵² In reviewing the drug-testing program in this case according to the School District's custodial responsibilities, the Court found that "the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the

¹⁴²515 U.S. at 661-62. These risks concern the inhibiting effects on an adolescent's healthy psycho-social development and maturation processes.

¹⁴³The Tecumseh School District is the one that implemented the drug-testing program under scrutiny in *Earls*.

¹⁴⁴*Earls*, 536 U.S. at 834.

¹⁴⁵*Id.*

¹⁴⁶*Id.* "Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the 'drug situation.'" *Id.* at 834-35.

¹⁴⁷*Id.* at 836.

¹⁴⁸*Id.* Respondents argued that there was not an immediate drug epidemic facing the school district, as was found in *Vernonia*, 515 U.S. at 662-63. However, in *Earls*, the Court stated that "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program," and that the Court "refuse[d] to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'"

¹⁴⁹*Earls*, 536 U.S. at 837.

¹⁵⁰*Id.* at 837-38 (quoting *Vernonia*, 515 U.S. at 663).

¹⁵¹*Id.* at 838.

¹⁵²*Id.*

School District's interest in protecting the safety and health of its students."¹⁵³ Ultimately, the Court found that the school's interests in implementing the suspicionless drug-testing program outweighed the students' privacy expectations, and held that the school's "policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."¹⁵⁴

Even though the Supreme Court established this balancing test to determine the constitutionality of high school drug-testing programs, some ambiguities remain. The Court has applied the test only to programs involving competitive extra-curricular activities, athletic and otherwise; therefore, it is unclear whether drug-testing programs imposed in other contexts will be upheld. In response to this ambiguity, the next section will apply the factors of the Court's balancing test to the program imposed by Groveport Madison High School.

III. *VERNONIA* FACTORS APPLIED

The Groveport Madison drug-testing program is subject to scrutiny under the test established by the Supreme Court in *Vernonia*. This section will apply the requisite factors of the test to the Groveport Madison drug-testing program.¹⁵⁵ As will be seen, after a strict application of the balancing test, the Groveport Madison program is likely to be found constitutional. It will be argued later, however, that public policy considerations weigh the balance against expanding drug-testing programs to contexts beyond those already addressed by the Supreme Court, including programs imposed on students applying for on-campus parking privileges.

A. *Special Needs*

Before application of the balancing test, the threshold inquiry of whether the circumstances require either a search warrant or probable cause, or whether special needs exist that would render the warrant and probable cause requirements impracticable, must be satisfied.¹⁵⁶ The Supreme Court has held that such special needs do exist in the public school context because the requirement that a search be based on probable cause would unduly interfere with the need to maintain order and to exact swift discipline.¹⁵⁷ Because Groveport Madison is a public school in Ohio, courts are highly likely to find that the school has special needs that would justify imposition of a search based on less than probable cause. Subsequent to satisfaction of this inquiry, the balancing test must weigh in favor of the school in order for its suspicionless drug-testing program to be upheld.

¹⁵³*Id.* at 837. The Court failed to offer any substantive analytical or evidentiary support for this finding without any explanation or reasoning for this failure.

¹⁵⁴*Id.* at 838.

¹⁵⁵The application of the factors in this section may not be exactly the same as applied by a court in formal litigation proceedings because of this author's lack of access to exhaustive facts. Therefore, this application is primarily speculative and is based on the Court's dicta and holdings in *Vernonia*, 515 U.S. 646 and *Earls*, 536 U.S. 822.

¹⁵⁶*See Vernonia*, 515 U.S. at 653; *Earls*, 536 U.S. at 828.

¹⁵⁷*T.L.O.*, 469 U.S. at 340-41; *Vernonia*, 515 U.S. at 654; *Earls*, 536 U.S. at 828-30.

B. The Privacy Interests Implicated by the Search

After the threshold inquiry has been satisfied, the first factor in the balancing test considers the nature of the privacy interests implicated by the search.¹⁵⁸ The Supreme Court has previously stated that students possess a lower expectation of privacy than the rest of society, at least while under a school's authority.¹⁵⁹ This is due to the "custodial and tutelary" functions that schools exercise over their students.¹⁶⁰ Further, the Court has recognized circumstances where, through participation in certain organizations, some students voluntarily diminish their expectations of privacy even further.¹⁶¹

In the Groveport Madison case, the subjects of the drug-testing programs are public high school students. Because of the custodial and tutelary functions that the school exercises over the students, their expectations of privacy are highly likely to be perceived as diminished. Further, the drug-testing program in question is imposed as a condition on obtaining an on-campus parking permit. The Supreme Court has previously held that owners/operators of automobiles enjoy a lesser degree of privacy expectations than the rest of society.¹⁶² Therefore, the students subject to the Groveport Madison drug-testing program have likely volunteered to decrease their already diminished expectations of privacy simply by applying for an on-campus parking permit.

C. The Invasiveness of the Drug-Testing Program

The second factor in the balancing test commands a consideration of how invasive the drug-testing program is into the privacy of the subjects.¹⁶³ The Groveport Madison drug-testing program is conducted via urinalysis. In both *Vernonia* and *Earls*, the drug-testing programs in question were also conducted via urinalysis. In each of these cases, the Supreme Court found that the programs were

¹⁵⁸*Vernonia*, 515 U.S. at 654; *Earls*, 536 U.S. at 830.

¹⁵⁹*Vernonia*, 515 U.S. at 655; *Earls*, 536 U.S. at 830-32.

¹⁶⁰*Vernonia*, 515 U.S. at 655; *Earls*, 536 U.S. at 830-32.

¹⁶¹*Vernonia*, 515 U.S. at 656-57 (student athletes voluntarily submit to physical examinations, are required either to obtain health insurance coverage or to sign an insurance waiver, maintain a minimum grade point average, abide by other team and school rules, and also engage in communal undress and showering); *Earls*, 536 U.S. at 830-32 (students participating in competitive extra-curricular activities voluntarily submit to rules and regulations that are particularized to their group(s) and not imposed on the student body as a whole).

¹⁶²*See* *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence.") (upholding the government's practice of stopping and questioning motorists at reasonably located checkpoints on the borders absent any individualized suspicion); *California v. Carney*, 471 U.S. 386 (1985) (holding that privacy interests in automobiles are diminished for two reasons: first, vehicles are readily movable, which makes a warrant impracticable because the vehicle could flee the location before a warrant is obtained; second, there are strict governmental regulations on vehicle ownership and use).

¹⁶³*Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 832.

not invasive because of the conditions in which the urine samples were furnished, and because of the limited purpose for which the information was used.¹⁶⁴

This factor may be more questionable in the Groveport Madison case than in the others, but it is still likely to be satisfied. For example, the urine samples are likely furnished under conditions similar to those in the cases that have already met the Supreme Court's approval because, presumably, they are provided in school restrooms.¹⁶⁵ Arguably, however, the company used by Groveport Madison to conduct the urinalysis tests may have undermined the minimally intrusive character of the program. The company allegedly allowed a male employee to monitor the girls' samples by positioning him so that he could see into the girls' restroom and observe the stalls.¹⁶⁶ On the other hand, the courts will likely dismiss this as one instance of an error in judgment, which likely will not jeopardize the program in its entirety.¹⁶⁷

The Groveport Madison program is also likely to be viewed as minimally intrusive because the information obtained by the tests is used for limited purposes. One purpose for which the information is used is to prevent students from driving while under the influence of illicit drugs and/or alcohol.¹⁶⁸ Another purpose is to help wayward youth by diverting students that test positive into counseling.¹⁶⁹ However, arguably, these purposes may be pre-textual. The Groveport Madison Principal has been quoted as saying, "we have some kids who have problems. Parents want to know if their kids are using or not."¹⁷⁰ Informing parents of their children's drug activity may not be a legitimate purpose for imposing a drug-testing program because it appears merely to be an attempt at side-stepping the constraints

¹⁶⁴*Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 832-33. In both cases, the urine samples were furnished in restrooms, and the information was used solely to detect alcohol and/or illicit drug use to determine candidacy for the respective activities; further, the information was not turned over to law enforcement authorities.

¹⁶⁵This author states that the samples are "presumably" furnished in school restrooms, similar to the situations in *Vernonia*, 515 U.S. 646 and *Earls*, 536 U.S. 822, because one newspaper article hints that the urine samples were furnished in restrooms exclusive to each gender. Bush, *supra* note 7 ("the testing firm had a man in the women's restroom while girls were urinating into cups in the stalls").

¹⁶⁶*Id.*; Harden, *Parking Policy*, *supra* note 7. The Groveport Madison Principal countered this allegation by showing Columbus Dispatch journalist Mike Harden where the monitors' table was situated, which was reportedly in a position where the monitor could possibly observe some of the stalls.

¹⁶⁷See *Earls*, 536 U.S. at 833 (when addressing the allegation that the Choir teacher had inadvertently left a list of one student's current prescription drugs in a position where other students were able to discover the information, the Supreme Court stated, "this one example of alleged carelessness hardly increases the character of the intrusion").

¹⁶⁸Bush, *supra* note 7 (referring to school officials as saying, "the measure is to discourage students from driving while under the influence of drugs or alcohol").

¹⁶⁹Harden, *Drug-Test Rule*, *supra* note 7 (quoting principal Mike Beck as saying, "I want to help kids, and we have some kids who have problems . . . [t]he idea is not disciplining them, but educating them. If they're impaired, we're trying to get them into a treatment program").

¹⁷⁰Harden, *Drug-Test Rule*, *supra* note 7.

imposed on state officials' policing powers. Despite this, the program will likely be viewed as minimally intrusive into the students' expectations of privacy because it is conducted under conditions that the Supreme Court has already viewed as similar to those in which the bodily function is ordinarily performed.

D. The Nature and Immediacy of the School's Concerns

The next factor in the Supreme Court's balancing test considers the nature and immediacy of the school's concerns that initially led to the imposition of a drug-testing program.¹⁷¹ In each of the previous cases, the Supreme Court found that the nature of the government's concerns was important, and that the immediacy of the concerns was great.¹⁷² The Groveport Madison program is likely to receive similar treatment.

The nature of the Groveport Madison School District's concerns will most likely be seen as important because the adverse health and safety risks that drugs have on schoolchildren, both physically and psychologically, remain just as dangerous as they were in the previous cases. Additionally, the Court in *Vernonia* highlighted the fact that the nature of the school district's concerns were increased because the focal points, student athletes, were threatened with an even greater risk of immediate physical harm due to the high stress of physical competition.¹⁷³ In Groveport Madison, the focal point is on student drivers, who are likely to be seen as facing a greater risk of immediate physical harm from drug use because students who drive under the influence are inflicted with impaired driving abilities, which increases the risk of automobile accidents. Finally, in *Earls*, the Court placed some emphasis on the fact that the "nationwide drug epidemic makes the war against drugs a pressing concern in every school."¹⁷⁴ Because the war against drugs has not abated much, if at all, since the Court made this statement, the government's concern is likely to be seen as just as pressing in the Groveport Madison case.

Based on precedent, it is unclear whether the immediacy of the concerns of the Groveport Madison School District will also be seen as great. When addressing this prong of the balancing test, the Court in *Vernonia* only discussed the fact that the school district was in a "state of rebellion . . . fueled by alcohol and drug abuse as well as by the student's [sic] misperceptions about the drug culture."¹⁷⁵ Although the Court did not discuss any other evidentiary facts in addressing the immediacy of

¹⁷¹*Vernonia*, 515 U.S. at 660; *Earls*, 536 U.S. at 834.

¹⁷²*Vernonia*, 515 U.S. at 661-63 (the nature of the concerns was important because of the adverse effects that drugs have on the development processes, compounded with the threat of physical harm to athletes; the immediacy was great because the school district was experiencing an increase in drug use, which was fueled by student athletes); *Earls*, 536 U.S. at 834-36 (the nature of the concerns was important because of the nationwide epidemic of drug use, and because of the health and safety risks that face schoolchildren who abuse drugs; the need to prevent and deter the substantial harm of childhood drug use, as well as the increased drug use in the particular school district, provided the necessary immediacy).

¹⁷³*Vernonia*, 515 U.S. at 662.

¹⁷⁴*Earls*, 536 U.S. at 834.

¹⁷⁵*Vernonia*, 515 U.S. at 663 (quoting *Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

the school's concerns, the Court in *Earls* stated that this "finding was not essential to the holding," and also stated that the Court "did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities."¹⁷⁶ Although the Court in *Earls* interpreted this factor to only require a consideration of the school's custodial responsibilities over its students, the opinion in *Vernonia* does not state this proposition at all. Therefore, it is unclear whether the opinions are inconsistent and unclear as to which interpretation future cases should rely upon. If the *Vernonia* interpretation¹⁷⁷ is applied, then it is unclear whether this factor is satisfied because this author has no facts indicating that the Groveport Madison School District is experiencing an increase in drug use or is under threat of a drug epidemic. Alternatively, if the *Earls* interpretation¹⁷⁸ is applied, then the school's concerns will likely be seen as immediate because of the custodial responsibilities that the school exercises over its students.

E. The Efficacy of the Drug-Testing Program

The final factor in the balancing test is to consider the effectiveness of the imposed drug-testing program at achieving the government's concerns.¹⁷⁹ In *Vernonia*, the Court found the program to be effective at meeting the school's concerns because it was narrowly focused on student athletes, who were the leaders of the rebellious subculture and who were also subjected to a more immediate threat of physical harm.¹⁸⁰ In *Earls*, the Court found that the drug-testing program effectively addressed the school's concerns "in protecting the safety and health of its students."¹⁸¹

Based on precedent, the Groveport Madison program is likely to be viewed as effective at addressing the school's concerns. Although the *Vernonia* analysis appeared to have relied on the fact that the program was narrowly focused on student athletes, the *Earls* analysis¹⁸² stated that this factor, like the former, is to be considered according to the school's custodial responsibilities over its students. If the *Earls* analysis is relied upon, the effectiveness of the Groveport Madison case will likely be found simply because the school is exercising its custodial responsibilities over the students. The Groveport Madison school officials imposed this drug-testing program in order to prevent students from driving while under the influence of illicit drugs and also to divert wayward youth into counseling.¹⁸³ This

¹⁷⁶*Earls*, 536 U.S. at 837-38.

¹⁷⁷This interpretation appears to rely upon a showing that the particular school district involved is under a threat of student rebellion fueled by alcohol and/or drug use.

¹⁷⁸*Earls*, 536 U.S. at 837-38. This interpretation requires only that the constitutionality of the program be determined by considering the context of the school's custodial responsibilities over its students.

¹⁷⁹*Vernonia*, 515 U.S. at 660; *Earls*, 536 U.S. at 837.

¹⁸⁰*Vernonia*, 515 U.S. at 663.

¹⁸¹*Earls*, 536 U.S. at 837-38.

¹⁸²*Id.* at 838.

¹⁸³Bush, *supra* note 7; Harden, *Drug-Test Rule*, *supra* note 7.

will likely lead to the conclusion that the school is “protecting the safety and health of its students,”¹⁸⁴ which would lead to the conclusion that the program is effective at achieving the school’s concerns.

IV. PUBLIC POLICY CONSIDERATIONS

This section discusses several public policy considerations that ought to be addressed when applying the pertinent factors in the Supreme Court’s balancing test. Arguably, these public policy considerations weigh the balance in favor of limiting public school drug-testing programs to the contexts already considered by the Court, and inhibit expanding such programs to other contexts, such as the program imposed by Groveport Madison.

A. *Special Needs*

The threshold inquiry that must be satisfied before applying the balancing test is whether schools can show special needs to impose a search without securing a judicial warrant or possessing probable cause.¹⁸⁵ The Supreme Court has found that schools satisfy this inquiry because of their custodial and tutelary responsibility over the students, and because strict adherence to these requirements would unduly interfere with the substantial need for schools to maintain order.¹⁸⁶ However, one public policy concern counteracts these justifications.

Despite the substantial need for schools to maintain order while exercising their custodial and tutelary responsibilities over students, the Supreme Court has held that schools, acting as state agents, must respect students’ constitutional rights.¹⁸⁷ For example, in *Tinker*, the Court stated that “state-operated schools may not be enclaves of totalitarianism,” and that “[s]chool officials do not possess absolute authority over their students.”¹⁸⁸ Further, when the Court found that schoolchildren retain a legitimate expectation of privacy, it declared that it was not ready to hold that “the schools and the prisons need be equated for purposes of the Fourth Amendment.”¹⁸⁹

Because schools ought to respect students’ legitimate expectations of privacy, they should not be able to dispense with the constraints ordinarily imposed on state agents—such as requiring a warrant, probable cause, or some kind of particularized suspicion—simply because they have decided to impose a drug-testing program on its students. Instead, the school whose drug-testing program is in question should be obligated to show that it had been experiencing some kind of epidemic with drug abuse or student rebellion before it implemented the program. This would provide the school with the requisite special needs to dispense with the warrant and probable

¹⁸⁴*Earls*, 536 U.S. at 838.

¹⁸⁵*T.L.O.*, 469 U.S. at 340-41; *Vernonia*, 515 U.S. at 652; *Earls*, 536 U.S. at 828.

¹⁸⁶*Vernonia*, 515 U.S. at 653; *Earls*, 536 U.S. at 830.

¹⁸⁷See *Tinker*, 393 U.S. at 511; *T.L.O.*, 469 U.S. at 340-41.

¹⁸⁸393 U.S. at 511.

¹⁸⁹*T.L.O.*, 469 U.S. at 338-39. The Court was referring to *Ingraham v. Wright*, 430 U.S. 651 (1977), wherein it held that the need to maintain order in prisons leads to inmates enjoying no legitimate expectation of privacy. The Court stated that this need for order is not parallel in the school systems to the extent that students should not be given a legitimate expectation of privacy.

cause requirements because its custodial responsibilities and maintenance of order would be threatened, and the school would be forced to impose the drug-testing program as a means of rebuilding order and integrity in its school district.

B. The Nature of the Privacy Interests Implicated

After satisfaction of the threshold inquiry, the first factor in the Supreme Court's balancing test is the nature of the individual privacy interests implicated by the drug-testing program.¹⁹⁰ In addressing this factor, the Court has stated that students in general have a diminished expectation of privacy because of the custodial and tutelary functions that schools have over students.¹⁹¹ Additionally, students involved in competitive extra-curricular activities voluntarily subject themselves to an even greater degree of control than other students, which erodes their privacy interests even further.¹⁹² However, two public policy considerations support the students' privacy interests.

The first public policy consideration concerns one of the primary objectives of our nation's schools. Schoolchildren are at such a tender age that they may be ignorant as to what constitutional rights are afforded to our nation's citizens. Additionally, they may be ignorant as to the functioning of our government, and especially ignorant as to the interaction of the government with its citizenry. Because of this, the Supreme Court has found that one of the most important functions of schools is to prepare students for citizenship, and, therefore, should not teach students to "discount important principles of our government [including constitutional rights] as mere platitudes."¹⁹³ This suggests that students have to be taught to recognize and respect our government's important principles, including constitutional rights. One such important principle of our government is that the citizenry retains a right to privacy, which includes the right to be protected from unreasonable governmental interference.¹⁹⁴ However, when schools impose suspicionless drug-testing programs based on general concerns about drug use—instead of in response to an actual epidemic or problem with drug use in its particular school district—students learn that their constitutional rights are flexible under the weight of governmental pressure, and their privacy should be stripped away whenever the government expresses some abstract, generalized concern.¹⁹⁵ Further, the students are learning that, in the eyes of authority, they are guilty until proven innocent, even in the absence of any particularized suspicion.¹⁹⁶

¹⁹⁰*Vernonia*, 515 U.S. at 654; *Earls*, 536 U.S. at 830.

¹⁹¹*See Vernonia*, 515 U.S. at 654-57; *Earls* 536 U.S. at 830-32.

¹⁹²*See Vernonia*, 515 U.S. at 654-57; *Earls* 536 U.S. at 830-32.

¹⁹³*Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637).

¹⁹⁴*See Mapp*, 367 U.S. at 660 ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him").

¹⁹⁵*See GUNJA et al.*, *supra* note 2, at 17.

¹⁹⁶*Id.*

Instead, students should be taught that their rights are inalienable, and that, as citizens, their privacy interests should not be swept aside at the government's pleasure. In order for students to understand and respect their right to privacy as against the government, they must have their right respected by the authority figures that are in a position to strip the right away. If school officials deprive students of their right to privacy by imposing a suspicionless drug-testing program based on abstract, generalized concerns, the students will not be taught how important this right is, and will most likely discount it as a "mere platitude."¹⁹⁷

Of equal importance, students should learn to understand and respect the important governmental principle that one who is accused of wrongdoing is afforded a presumption of innocence.¹⁹⁸ The accusing party must rebut this presumption of innocence before the accused can be deemed responsible for any wrongdoing, rather than the accused having to bear the burden of establishing his/her innocence.¹⁹⁹ If students are not granted this presumption of innocence, then its importance will be lost, and the students will most likely discount it as a "mere platitude."²⁰⁰

The second public policy consideration under this factor is that students' privacy interests should be respected so that the relationships between the students and their mentors are not tarnished. When teachers and coaches serve as mentors, students begin to trust and confide in them. These relationships are vital to the students' learning environment and maturation processes. These relationships provide the students with role models that may help them follow a healthy path of maturation and psycho-social development, as well as fostering a more positive and productive learning environment.²⁰¹ However, when these officials are compelling students to choose between either exposing their privacy or forfeiting a particular benefit or privilege, the relationship is damaged.²⁰² Consequently, the students might harbor negative attitudes toward school in general, and to the school official in particular, thereby jeopardizing the student's educational and developmental processes. Accordingly, Drs. Gunja, Cox, Rosenbaum, and Appel argue, "drug testing can undermine student-teacher relationships by pitting students against the teachers and

¹⁹⁷*T.L.O.*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637).

¹⁹⁸*See Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, a thought not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

¹⁹⁹*See BLACK'S LAW DICTIONARY* (8th ed. 2004) (A presumption of innocence is "[t]he fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.").

²⁰⁰*Id.*

²⁰¹*See GUNJA et al.*, *supra* note 2, at 8. This publication notes that "student-teacher trust helps create an atmosphere in which students can address their fears and concerns, both about drug use itself and the issues in their lives that can lead to drug use, including depression, anxiety, peer pressure, and unstable family lives."

²⁰²*Id.* "Trust is jeopardized if teachers act as confidants in some circumstances but as police in others."

coaches who test them, [thereby] eroding trust, and leaving students feeling ashamed and resentful.”²⁰³

C. Invasiveness

The second factor in the Supreme Court’s balancing test is to consider how invasive the search is.²⁰⁴ In *Vernonia* and *Earls*, the Court found the drug-testing programs were not excessively invasive because of the manner in which production of the urine samples were monitored, and because of the limited purpose for which the information obtained from the drug tests was used.²⁰⁵ In considering the manner in which production of the urine samples were monitored, the Court stated that the nature of the urinalysis process was not very different from the normal process of urination.²⁰⁶ In both cases, the urine samples were furnished in the privacy of restrooms, with the girls in stalls, and the boys in either a stall or standing at a urinal.²⁰⁷

However, the Court did not address the fact that the students furnishing urine samples were being observed by adult monitors, whose job was to ensure that the urine samples were not tampered with in any way, which is abnormal to the urination process and may produce anxiety and embarrassment on behalf of the students.²⁰⁸ Adding insult to injury, the Groveport Madison case involved a male monitor overseeing the girls’ samples by positioning himself so that he could see into the girls’ restroom.²⁰⁹ Needless to say, this is not normal to the ordinary function and also produced some discomfort and embarrassment on behalf of the girls providing the urine samples.²¹⁰ Further, the students urinate into plastic cups and the monitor then tests the urine for any abnormal characteristics, which also is not a part of the ordinary urinary function and may produce anxiety or embarrassment on behalf of the students. Because these conditions are not part of the normal urination process, and may be the source of anxiety or embarrassment for students, courts should be more hesitant to find that a urinalysis sample is furnished in conditions similar to those in which the function is ordinarily performed. Consequently, courts should

²⁰³*Id.*

²⁰⁴*Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 832.

²⁰⁵*Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 832-33

²⁰⁶*Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 832-33.

²⁰⁷*Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 832-33. In *Vernonia*, males provided their samples while standing at urinals, whereas females provided their samples while in individual stalls. In *Earls*, however, males were allowed to provide their samples while in individual stalls as well, which the Court found to provide greater protection of privacy interests.

²⁰⁸See Brief of Respondents at 3, *Earls*, 536 U.S. 822 (No. 01-332) (“One of the faculty monitors joked that the process seemed like an exercise in ‘potty training,’ which produced embarrassment on behalf of Respondent.”).

²⁰⁹Bush, *supra* note 7; Harden, *Parking Policy*, *supra* note 7.

²¹⁰Columbus Dispatch reporter Bill Bush quoted student Shannon Partlow as saying, “there was a man sitting in our bathroom while we were trying to take our drug test, trying to do our business . . . that made me extremely uncomfortable.” Bush, *supra* note 7.

recognize that such abnormal conditions heighten the invasiveness of drug-testing programs.

Another condition of drug-testing programs that should be considered when analyzing their invasiveness, which also tends to weigh in favor of the students' privacy interests, is how consent to the programs is obtained. Schools obtain consent to drug-testing programs by requiring students to submit to, and pass, a drug-test in order to participate in some extracurricular activity, or to receive some other privilege not conferred on all students. However, this consent may not be meaningful enough to be valid, which would increase the invasiveness of the drug-testing programs on students' privacy interests, possibly to the point where they are not justified in the balancing test.

Participation in extracurricular activities is vital to students' schooling. They assist students in gaining acceptance into an institution of higher education and in obtaining jobs after graduation; they provide memorable experiences of the school years; they foster healthy peer relationships; and they teach important life, social, and vocational skills, such as teamwork, responsibility, dedication, and perseverance. For these reasons, students might seriously consider allowing their privacy to be violated just so they do not lose the privilege of participating in such important activities. If a student succumbs to the required drug-testing program primarily for this reason, then one may argue that the consent is not meaningful and, therefore, is not valid.

This argument can be extended to on-campus parking privileges as well. For some students, their ability to drive to school may be their only means of transportation. However, some of these students may not be able to drive to school at all if they are not able to park on campus, because of a possible inability to park in the area surrounding campus. Consequently, students who must rely on their own, independent mode of transportation, such as students who live in rural areas, may not be able to secure a ride to and from school on a daily basis, or at least a ride that will get them to school on time regularly. Further, the student's parent(s) may not be able to provide transportation because of obligations with work and/or younger siblings. Therefore, a student who depends on being able to provide for his/her own transportation to and from school would be forced to consent to a drug test just so s/he does not have to face the undue hardship of having to find alternative transportation, if any is to be found at all. Therefore, consent to the drug-testing program would not be meaningful and would therefore be invalid. Consequently, the invasiveness of the drug-testing program for students applying for on-campus parking permits would be too great to justify.

Additionally, some students who participate in extracurricular activities may also depend on being able to provide their own transportation during weekend and after school hours because of an inability to secure alternative transportation from other students or parents. If these students are forced to give up their on-campus parking privileges, and, consequently, their ability to drive to and from school, then they would also be forced to forfeit participation in extracurricular activities. By forfeiting participation in extracurricular activities, the students would be denied the benefits and skills normally obtained through such involvement, as previously

discussed.²¹¹ Therefore, the students would likely forfeit their privacy interests in order to maintain participation in such important extracurricular activities. Therefore, consent to the program will not be meaningful and will thus be invalid.

High school students are at such a tender age that they are likely to take for granted their constitutional rights and the functioning of government, and, if forced to choose, are likely to favor participation in certain activities or receiving certain privileges over the preservation of constitutional rights. As previously discussed, students may be ignorant as to what rights are afforded to them in particular, and what rights are afforded to our nation's citizens in general. For this reason, the Supreme Court has stated that one primary objective of our nation's schools is to prepare students for citizenship, and that schools should not teach students to "discount important principles of our government as mere platitudes."²¹² As previously discussed, this suggests that students have to be taught to respect governmental principles, including constitutional rights. Because students have to be taught to respect their constitutional rights, they are not likely to favor them over participation in extracurricular activities or receipt of parking privileges. Participation in extracurricular activities and receiving parking privileges cause immediate, empirical effects when they are either granted or denied, whereas dismissing a constitutional right is likely to have only abstract effects that are not easily recognized by individual students. Consequently, when faced with having to choose between forfeiting an abstract constitutional right that the student may not even be fully educated about, or a privilege or benefit that is highly desired or important to the student, the student is likely to choose to dismiss the abstract constitutional right. However, this may not qualify as an informed decision, and may not be meaningful consent to the drug-testing program. Therefore, when considering the lack of meaningful consent, drug-testing programs may actually be much more invasive of students' privacy interests than the Supreme Court had originally considered.

D. The Efficacy of Drug-Testing Programs

The final factor²¹³ considered in the Supreme Court's balancing test is the efficacy (the effectiveness) of the imposed drug-testing program at achieving the government's concerns.²¹⁴ The Court has found that this factor weighs in favor of a drug-testing program when there is a factual showing of an increase in drug use by students in the particular school district under scrutiny, and/or by the particular group of students being tested.²¹⁵ However, in *Earls*, the Court emphasized that schools

²¹¹Such benefits and skills include gaining acceptance into an institution of higher education, obtaining a job, creating memorable experiences, fostering healthy peer relationships, and instilling various important life, social, and vocational skills.

²¹²*Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637).

²¹³This author has not discussed the previous two factors of the Court's balancing test—the nature and immediacy of the government's concerns—because of an inability to find any public policy considerations that counteract their force in the test.

²¹⁴*Vernonia*, 515 U.S. at 660; *Earls*, 536 U.S. at 837.

²¹⁵*Vernonia*, 515 U.S. at 663-64 (the school district was found to be in a state of rebellion led by student athletes, which made drug-testing the district's athletes particularly effective at reaching the government's concerns).

are not required to test the particular group(s) of students most likely to use drugs, but, instead, “[the] constitutionality of the program [should be considered] in the context of the public school’s custodial responsibilities.”²¹⁶ Therefore, it is not completely clear whether this factor requires a finding that the school district, or the particular group being tested, is experiencing an increase in drug use. However, numerous public policy considerations beg that not every drug-testing program be considered effective at meeting the government’s concerns, regardless of whether the program targets an at-risk group.

One public policy consideration in this area concerns the funds used to implement and sustain the programs. This consideration argues that schools are wasting much-needed resources in implementing and sustaining drug-testing programs, because empirical studies have shown that they are not effective at deterring drug use. In conducting one of the first empirical studies that analyzed the effectiveness of drug-testing programs at combating student drug use, Drs. Johnston, O’Malley, and Yamaguchi found no significant differences in marijuana or other illicit drug use by students in schools that implemented any kind of drug-testing program.²¹⁷ Another study surveyed student athletes’ attitudes and behavior regarding drug use and found that health concerns were the most common reason for abstinence.²¹⁸ Most notably, this study found that detection of illicit drug use was not a concern of the students.²¹⁹ Because of the overall ineffectiveness of drug-testing programs at deterring drug use, schools that implement such programs are wasting necessary resources that could be diverted to more beneficial uses.²²⁰

²¹⁶*Earls*, 536 U.S. at 838.

²¹⁷ROYOKO YAMAGUCHI PHD, LLOYD D. JOHNSTON PHD, & PATRICK M. O’MALLEY PHD, *DRUG TESTING IN SCHOOLS: POLICIES, PRACTICES, AND ASSOCIATION WITH STUDENT DRUG USE* (2003), at 15. This study used cross-sectional data for a 12-month period to analyze the effect that drug-testing programs had on marijuana and other illicit drug use by middle school and high school students. The study focused on schools that utilized a drug-testing program of any kind, a drug-testing program based on individual suspicion or cause, or a drug-testing program that focused solely on student athletes. As stated above, there were no significant differences in marijuana or other illicit drug use by students attending the respective schools. Additionally, the study found no significant differences in drug use when comparing students labeled as heavy users against other students in the schools that implemented a program based on individualized suspicion or random drawing. These findings were consistent for subjects containing controls as well as those without controls.

²¹⁸J. C. WALKER, *The Substance Use Habits and the Perceptions of the Effectiveness of Drug Testing of Lynchburg City Schools’ High School Athletes*, 53 DISSERTATION ABSTRACTS INT’L 9-A (1993). Other reasons included: a) not desiring the effects of drugs, b) not enjoying the use of illicit drugs, and c) not finding a need to use illicit drugs.

²¹⁹*Id.*

²²⁰See GUNJA et al., *supra* note 2, at 9 (“Drug testing costs schools an average of \$42 per student tested, which amounts to \$21,000 for a high school that tests 500 students. This figure is for the initial test alone and does not include the costs of other routine components of drug testing, such as additional tests throughout the year or follow-up testing for positive results.”); see also YAMAGUCHI et al., *supra* note 217, at 1 (“Testing for steroid use costs \$100 per test, and a test that satisfies the National Collegiate Athletic Association standards for accuracy costs over \$200 per test.”).

Another public policy consideration is that drug-testing programs deter students from engaging in extracurricular activities or seeking other privileges contingent upon passing a drug test out of fear of being tested.²²¹ To corroborate this proposition, Drs. Gunja, Cox, Rosenbaum, and Appel pointed out that one school district under legal scrutiny for its drug-testing program “has seen a dramatic reduction in student participation in extracurricular activities since implementing drug testing.”²²² One female student from the Tulia Independent School District²²³ who was interviewed regarding the drug-testing program stated that she “know[s] lots of kids who don’t want to get into sports and stuff because they don’t want to get drug tested; [t]hat’s one of the reasons [she was] not into any [activity].”²²⁴ The deterrence of students from engaging in extracurricular activities is dangerous because studies have shown the benefits and positive correlations of participation in such activities. For example, one study shows that students who participate in extracurricular activities are less likely to develop substance abuse problems; are less likely to engage in violent crime and other dangerous behavior; and are more likely to stay in school, achieve higher grades, and aim for, and receive, more ambitious educational goals.²²⁵ Therefore, students denied from participation in extracurricular activities due to their choice of respecting their privacy may experience some very harsh consequences that may negatively affect their future. Consequently, drug-testing programs may actually have a negative effect for students who choose to respect their right to privacy.

Whatever merit these arguments have in weighing against drug-testing programs imposed as a condition on extracurricular activities, they may not have a similar effect when applied to the Groveport Madison program because it involves on-campus parking privileges, which may not have any direct effect on the educational and maturation processes. However, as previously discussed, some students denied from receiving on-campus parking privileges may not be able to participate in such extracurricular activities at all. Some students denied on-campus parking privileges may not be able to drive to school if there are no alternative areas in which the students may park. These students may not be able to rely on any alternative mode of transportation either, because they may live in areas that are too far to walk to a bus stop or are too far out of the way for a friend to provide a ride. Further, the

²²¹See GUNJA et al., *supra* note 2, at 12-13; J. Wald, *Extracurricular Drug Testing*, 21 EDUCATION WEEK 34, 36 (2002).

²²²GUNJA et al., *supra* note 2, at 13 (referring to Affidavit of Plaintiff Nancy Cozette Bean, p. 3, *Bean v. Tulia Indep. Sch. Dist.*, No. 2-01CV-0394J (D. Tex. Filed February 18, 2003) (“In 1990-1991 participation of black seniors was 100% in extracurricular clubs and activities and 100% in sports; while the 2000-2001 participation rates of black seniors fell to 0% within both [after implementation of a drug-testing program]”)).

²²³The Tulia Independent School District was the one under scrutiny in *Bean v. Tulia Independent School District*, No. 2-01CV-0394J (D. Tex. Filed February 18, 2003), referred to in note 222.

²²⁴*Id.* The student expressed concern that she would always test positive and have to explain that she is on medication, which would embarrass her. The student expressed additional concern over embarrassment should she be “on [her] period” at the time of testing.

²²⁵Maureen Glancy, F.K. Willits & Patricia Farrel, *Adolescent Activities and Adult Success and Happiness: Twenty-four Years Later*, 242 SOCIOLOGY AND SOC. RES. 70.3 (1986).

students' parent(s) may not be able to provide a ride to and from school because of obligations with work and/or younger siblings. If these students are not able to obtain transportation to and from school on a regular basis, then, additionally, the students will likely be precluded from obtaining regular transportation to and from activity sites after school hours. Therefore, some students denied on-campus parking privileges may be deterred from participating in the extracurricular activities that have a positive impact on the students' educational and maturation processes.

Another public policy consideration in this area is that students may abstain from using drugs that are known to be tested, or drugs that are easily detected, and simply switch to using harder drugs that are either more difficult to test or are not tested at all by the imposed program.²²⁶ For example, urinalysis tests are not very effective at detecting alcohol, amphetamines, barbiturates, cocaine, opiates, methamphetamines (a derivative of amphetamines), and methaqualone (Quaaludes) because they pass through the body within a few days.²²⁷ Urinalysis tests are also not very effective at detecting lysergic acid diethylamide (LSD) because of its extreme sensitivity to heat above room temperature and direct exposure to light.²²⁸ Alternatively, marijuana and phencyclidine (PCP) both have a much more prolonged stay in the body, ranging from one day to several weeks.²²⁹ Consequently, marijuana and PCP are the drugs most easily detected by drug-testing programs, unless the subject(s) have used one of the other substances, excluding LSD, within the previous one to three days before providing a urine sample. Therefore, students may simply refrain from abusing marijuana and PCP so as to avoid detection, and instead abuse the harder drugs that are not as easily detected.

E. Slippery Slope

One final public policy consideration deals with the future of drug-testing programs as a whole, and is not restricted to any one factor in the Supreme Court's balancing test. Although this particular consideration does not apply to any of the factors in the test, it is an important concern that must be considered when discussing the impact of any constitutional issue. The Supreme Court has already upheld two types of high school drug-testing programs, and the possibility is left open to uphold programs in other contexts as well. If drug-testing programs continue to be upheld, eventually every student group is in danger of being subjected to a suspicionless drug-testing program. Conceivably, schools may reach the point where they require every student in school to submit to a drug test, regardless of student group affiliation.

²²⁶See GUNJA et al., *supra* note 2, at 16 ("Because Marijuana is the most detectable drug, students may switch to drugs they think the test will not detect, like Ecstasy (MDMA) or inhalants.").

²²⁷RICHARD L. HAWKS, PHD, & C. Nora Chiang, PhD, *Examples of Specific Drug Assays, Urine Testing for Drugs of Abuse*, 73 NAT'L INST. ON DRUG ABUSE RES. MONOGRAPH SERIES 84 (1986).

²²⁸See HAWKS & CHIANG, *supra* note 227.

²²⁹See *id.*

Since the early-to-mid-1990s, around the time that the Gun Free School Zones Act²³⁰ was signed into law, schools have begun to implement strict zero tolerance policies.²³¹ Although zero tolerance policies were initially implemented to combat possession of weapons in schools, with the intended consequence of making schools safer, such policies have expanded to include other behavior viewed as disruptive or dangerous, such as drug and alcohol use.²³² Such zero tolerance policies have led to students being subjected to interference by school officials for conduct that many would consider trivial.²³³ Some schools have even begun to require every student entering the school to pass through a metal detector in order to screen out those attempting to bring weapons into the school.²³⁴ If the trend of schools imposing suspicionless drug-testing programs on students is not halted at some point, then schools may see them as a routine attempt at maintaining order and discipline. Consequently, schools may begin to impose them on any and all groups of students, including non-competitive extracurricular activities such as multi-cultural club or peer mentor programs, with the eventual step of imposing suspicionless drug tests on every student in attendance at the school, much like subjecting every student entering the school to a metal detector search.

V. CONCLUSION

Public schools have begun to implement drug-testing programs that students are required to pass before they are allowed to participate in certain extracurricular activities or receive some other privileges. The schools receive consent to the drug-testing programs because participation in the activities and receipt of the privileges is voluntary and is contingent upon passing the test. One controversial example of such a drug-testing program has been implemented by Groveport Madison High School in Groveport, Ohio. This program requires students to pass a drug test in order to receive, and subsequently maintain, on-campus parking privileges.

²³⁰20 U.S.C. § 8921.

²³¹ A zero tolerance policy is “a policy that mandates predetermined consequences or punishments for specified offenses.” Brief of *Amici Curiae, Earls*, 536 U.S. 822, at 27, Footnote 17 (referencing National Center for Education Statistics report, *Violence & Discipline Problems in U.S. Public Schools: 1996-1997*).

²³²See Brief of *Amici Curiae, Earls*, 536 U.S. 822, at 27.

²³³*Id.* This Brief refers to several “absurd consequences of this one-size-fits-all mentality.” For example, a seventh grader in West Virginia was suspended for three days for giving a cough drop to a classmate because the cough drop was not approved by the school; a six-year-old was suspended for one day in North Carolina for kissing a female classmate, after being asked by the recipient of the kiss to do so, because the school deemed this conduct to be unwarranted and unwelcome touching; and a Louisiana second-grader was suspended and ordered to attend an alternative school for a month because the watch that he brought to school for show and tell had a one-inch-long pocketknife attached to it.

²³⁴See Robert S. Johnson, *COUNTERPOINT: Metal Detector Searches: An Effective Means to Help Keep Weapons out of Schools*, 29 J. L. & EDUC. 197 (2000). This Law Journal Note refers to the U.S. Departments on Education and Justice, Annual Report on School Safety 4 (Oct. 1998) when stating that four percent of schools report using random metal detector searches on students, and one percent report daily use of metal detector searches.

In order to determine the legality of high school drug-testing programs, the Supreme Court of the United States has established a balancing test to be applied in every case. Through a strict application of the Court's balancing test, the Groveport Madison drug-testing program is likely to be upheld. However, this article has set forth several public policy considerations that should be addressed when applying the relevant factors in the test and has argued that, after factoring the public policy considerations into the test, the balance should weigh against expanding drug-testing programs to contexts other than those already upheld by the Court. Therefore, should the Groveport Madison program be challenged in formal litigation, it should be struck down due to its implication of so many important public policy concerns.

JARED M. HARTMAN