Constitutional Law - Fourth Amendment - Warrant and Probable Cause Requirements

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—WARRANT AND PROBABLE CAUSE REQUIREMENTS—The United States Supreme Court held that drug urinalysis conducted on student athletes is constitutional despite a lack of individualized suspicion. The Court further held that a search, although not contemplated by the Framers of the Fourth Amendment to the United States Constitution, may be reasonable if on balance the governmental interest it serves outweighs the legitimate privacy interests of its subjects.


Vernonia, Oregon is a community of about 3000 inhabitants where school district activities, especially interscholastic athletics, occupy a prominent position in town life. The Vernonia School District (the "District") is comprised of three grade schools and Vernonia High School. The majority of the District’s students participate in athletics. These student athletes enjoy the attention and admiration of the community.

Historically, student behavior in class and at school-sponsored activities had been noted as cooperative and respectful. Drug and alcohol use was perceived as confined to a limited "fringe" of the student population. However, between 1985 and 1989 teachers and administrators observed a significant increase in disciplinary problems, including drug and alcohol use. Athletic coaches became concerned that drug and alcohol use was compromising the safety of athletes. Teachers witnessed rudeness, profanity

3. Vernonia, 796 F. Supp. at 1356. Sixty to sixty-five percent of high school students and seventy to seventy-five percent of grade school students participated in athletics in 1992. Id.
4. Id.
5. Id.
6. Id.
7. Vernonia, 23 F.3d at 1516.
8. Id. One wrestler was injured after failing to execute a basic maneuver. Id. The coach reported that the student's hotel room smelled of marijuana when the coach went to check on the student's condition. Id.

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and blatant espousal of drug use in class, but often felt helpless to curtail such behavior.\(^9\)

School officials believed that the deteriorating disciplinary situation was the result of substance abuse.\(^{10}\) Students were not especially secretive about their drug use, indeed, they flaunted it, openly challenging the school’s power over them.\(^{11}\) The District’s leading athletes were viewed as leaders of the unruly students.\(^{12}\) The District considered “corruption” of these influential members of the student body particularly troublesome.\(^{13}\)

Initially, the District attempted to combat the drug problem through educational programs.\(^{14}\) The District held special classes on the hazards of drug use.\(^{15}\) Special speakers, seminars, and theatrical presentations were employed and drug-sniffing dogs visited the school.\(^{16}\) However, none of these measures achieved the desired deterrent effect.\(^{17}\)

A meeting was held with the District’s parents to discuss drug testing as a solution to the troublesome student behavior.\(^{18}\) A drug testing plan was presented at a meeting held for the District’s parents and was approved by a unanimous vote of those in attendance.\(^{19}\) The Student Athlete Drug Policy (the “Policy”) was approved by the Vernonia School Board for implementation in the Fall of 1989.\(^{20}\)

Under the Policy, all students had to submit authorization forms signed by the students and their parents as a prerequisite

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9. *Vernonia*, 796 F. Supp. at 1356. An English teacher received several essays portraying drug and alcohol use by students. *Vernonia*, 23 F.3d at 1516. A faculty member with fifteen years of service expressed an inclination to leave the school due to frustration with the changed circumstances of her classroom. *Vernonia*, 796 F. Supp. at 1356.


11. *Id.* at 1356.

12. *Id.* at 1357. The District’s views were formed, in part, through comments elicited from parents and certain “responsible students.” *Id.*

13. *Id.* The district court judge found: “[T]he very center of activity of the school and community was endangered.” *Id.*

14. *Id.*


16. *Id.*

17. *Id.* The day following a play depicting the perils of drug abuse, several athletes were arrested for using intoxicants at a party held during school hours. *Id.*

18. *Id.* at 1358. The school was described as in a state of “open revolt” with student athletes considered central to the conflict. *Id.*

19. *Id.* Drug testing had been considered previously but rejected, in part, due to doubts about its legality. *Id.*

20. Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2389 (1995). The expressed purpose of the Policy was “to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.” *Vernonia*, 115 S. Ct. at 2389.
to participation in interscholastic sports. Every student athlete was tested for drugs at the beginning of the season for the sport in which the athlete was to participate. In addition, students were chosen from a pool of all participants for random testing. Specimen collection was conducted by faculty members, and an independent laboratory conducted the tests and informed authorized administrators of the results. Testing was limited to evidence of drug and alcohol use and positive test results were confirmed by a prompt second test. Upon confirmation of a positive result, the student and parents were summoned to meet with the school principal and disciplinary action was determined.

As a seventh grader in the Fall of 1991, James Acton ("Acton") wanted to participate in his grade school's District-sponsored football program. Upon his parents' refusal to sign a form authorizing a drug urinalysis, the District refused to permit him to participate. Thereafter, Acton's parents filed suit in the United States District Court for the District of Oregon seeking declaratory and injunctive relief based on the claim that the District's testing policy violated Acton's rights under the Fourth

21. Id.
22. Id.
23. Id. Roughly ten percent of student athletes were tested each week. Id.
24. Id. Test subjects first completed a specimen control form bearing a number for anonymous testing identification. Id. The Policy required disclosure, on the form, of all prescription medication the student was taking and authorization for any prescription medication. Id. Males filled sample cups at urinals with monitors standing a short distance behind to watch and listen for tampering. Id. Females produced samples inside stalls with monitors outside listening for sounds of tampering. Id. The monitors collected the sample cups, checked the samples' temperatures, and transferred the samples to vials for laboratory analysis. Id. Strict chain of custody procedures were followed, lab tests were conducted anonymously, and access to test results was limited to the superintendent, principals, vice-principals, and coaches. Id.
25. Vernonia, 115 S. Ct. at 2390. Laboratory procedures were 99.94% accurate. Id. at 2389. Each sample was routinely tested for amphetamines, cocaine, and marijuana, and the District retained an option to test for additional substances. Id. Results were kept for one year. Id.
26. Id. at 2390. First offenders could either submit to a six-week assistance program involving weekly urinalysis or accept a suspension for the balance of the athletic season and the next season. Id. A second offense resulted in automatic suspension and a third resulted in suspension through the next two athletic seasons. Id.
27. Id.
28. Id.
Amendment to the United States Constitution and article 1, section 9 of the Oregon Constitution.

In a bench trial, the district court determined that the mandatory and random drug testing conducted by the District was a reasonable search as permitted by the Fourth Amendment and the Oregon Constitution. The court considered that in order for the search to be reasonable, it must meet a compelling governmental need. The court found that the District's aims of addressing athletic safety concerns and the maintenance of order in classrooms necessitated the search procedure at issue.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the trial court, finding the District's goals proper, but not sufficiently compelling to permit "suspicionless" searches. Furthermore, the court of appeals faulted the district court for not giving due weight to the privacy interests of the affected students.

The United States Supreme Court granted certiorari to determine whether the random drug testing was violative of the Fourth Amendment. The Court began its consideration of the case by reaffirming that the District Policy was a "search" as that term is used in the Fourth Amendment. The Court recognized

29. Id. The Fourth Amendment states:
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
30. Vernonia, 796 F. Supp. at 1354. The Oregon Constitution states:
No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.
32. Id. at 1363.
33. Id.
34. Vernonia, 23 F.3d at 1526-27. The court argued that the Fourth Amendment is not to be molded to fit the exigencies of the moment, but rather, it often requires some tolerance of social turmoil and discomfort to preserve its integrity and purpose. Id. at 1527.
35. Id. at 1525.
36. Certiorari is a common law writ issued by a superior to an inferior court requiring the production of a certified record of a case tried in the inferior court. BLACK'S LAW DICTIONARY 228 (6th ed. 1990).
37. Vernonia, 115 S. Ct. at 2388. Justice Scalia delivered the opinion of the Court in which Chief Justice Rehnquist and Justices Kennedy, Thomas, Ginsburg, and Breyer joined. Id.
38. Id. at 2390 (citing Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602,
that the reasonableness of an intrusion complained of is not to be
determined solely by reference to the Warrant Clause of the
Fourth Amendment.\textsuperscript{39} The Court noted that reasonableness, as
determined by examining the special governmental needs of public
schools in light of the legitimate privacy expectations of the
students affected, was the standard to be employed in assessing
the constitutionality of the Policy.\textsuperscript{40}

To facilitate balancing these competing factors, the Court first
attempted to quantify the interests at stake.\textsuperscript{41} The Court noted
that only privacy expectations that are legitimate are relevant and
these vary with the context of an action and the relationship of an
individual to the state.\textsuperscript{42} School children, the Court observed, are
subject to parental control over their freedom of movement and,
this authority is delegated to school officials by the parents.\textsuperscript{43}
The relationship of school officials to their students, the Court
stated, is a custodial one in which the officials are responsible for
the welfare and intellectual development of their charges.\textsuperscript{44} The
Court recognized that school officials, as state actors, are
constrained by the Constitution, but only to the extent appropriate
in the school setting.\textsuperscript{45} The Court also noted that school children
are subjected to mandatory physical examinations, vaccinations
and other tests designed to promote their general welfare.\textsuperscript{46} The
majority cited these facts in support of the view that school
children, in general, have a lower expectation of privacy than
society at large.\textsuperscript{47} As to athletes, the Court perceived even less
expectation of physical privacy because they typically change

617 (1989) (holding that tests conducted on urine or blood to detect drug or alcohol
use are searches subject to the Fourth Amendment)).

39. \textit{Id.} at 2391. The Warrant Clause provides: "[N]o 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." \textit{U.S. CONST. amend. IV.}
See supra note 29 for the full text of the Fourth Amendment.

40. \textit{Vernonia}, 115 S. Ct. at 2390. The Court stated that searches of a sort not
practiced when the Fourth Amendment was adopted must meet a standard of
reasonableness judged by a balancing of the personal and public interests implicated.
\textit{Id.}

41. \textit{Id.} at 2391-95.

42. \textit{Id.} at 2391.

43. \textit{Id.}

44. \textit{Id.} The Court considered the relationship of school officials to students
central to its decision. \textit{Id.} The Court framed the relevant inquiry as "whether the
search is one that a reasonable guardian and tutor might undertake." \textit{Id.} at 2397.

45. \textit{Vernonia}, 115 S. Ct. at 2392. The Court noted that school officials can
curtail offensive language, impose corporal punishment, and practice limited censorship.
\textit{Id.}

46. \textit{Id.}

47. \textit{Id.}
clothes and shower in common areas.43 Further, the Court stated that athletes voluntarily submit to rules and regulations concerning dress, practice times, and academic performance.49

The Court took notice of the fact that elimination is a body function typically afforded great privacy.50 However, the testing process struck the Court as substantively no different than the use of a public restroom.51 Because school children presumably use such public facilities, the Court viewed the practice of compelling students to provide urine samples in the presence of a faculty member as a “negligible” intrusion on the students’ privacies.52

The other privacy-invasive aspect of the Policy that the Court considered was the potential disclosure of personal information.53 The Court noted in this regard that the urine samples were screened only for the presence of drugs.54 Disclosure of prescription medications on the specimen control form was a legitimate concern, the Court allowed, but not one sufficient to persuade the Court that the Policy was unreasonable.55

The Court disagreed with the district court’s view that the reasonableness of the Policy was dependent on the compelling nature of its underlying purpose.56 Rather, the Court held that the Policy must merely be important enough to justify the action taken.57 The Court expressed no doubt that deterrence of drug use is a strong social need and that it is of particular interest to

48. Id. at 2392-93.
49. Id. at 2393. The Court stated that the privacy expectations of student athletes are similar to those of employees in “closely regulated industries.” Id. See Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 627 (1989) (holding that railroad employees have less expectation of privacy than a typical person by virtue of their participation in an industry subject to extensive governmental regulation).
50. Vernonia, 115 S. Ct. at 2393.
51. Id. Male students provided samples at urinals while fully clothed and observed only from the rear. Id.
52. Id.
53. Id. at 2393-94. The Court noted that urine testing can disclose what the subject has ingested and information about the body such as whether the person is pregnant, diabetic, or epileptic. Id. at 2393.
54. Id. at 2393. The Court distinguished this examination from an “evidentiary search,” which the Court generally permits only upon probable cause, in that it is conducted for “nonpunitive purposes.” Id. at 2393 n.2. The Court’s characterization was not affected by the students’ perception that searches were disciplinary sanctions. Id. The Court insisted that, in consideration of the district court’s finding that the search was “prophylactic,” the students’ views were “irrational” and of no legal significance. Id.
55. Vernonia, 115 S. Ct. at 2394.
56. Id.
57. Id.
educators in their efforts to promote the physical, intellectual and moral growth of their students.\textsuperscript{53}

The Court viewed the Policy's focus on athletes as important in assessing the constitutionality of the scheme.\textsuperscript{59} The Court found that drug use by athletes carries the risk of physical injury.\textsuperscript{60} Because District athletes were conspicuous among the unmanageable students and were considered role models in the community, the Court approved targeting that segment of the student body as calculated to have an effect throughout the school.\textsuperscript{61}

The Court considered that the intractability of the students made it incumbent upon the District to act decisively and, the Court declared, the District did not have to choose the least intrusive means available.\textsuperscript{62} The Court indicated several virtues of mandatory random drug testing of athletes.\textsuperscript{63} First, the Court noted, the Policy's mandatory application to all student athletes removed discretion from administrators, thus constraining them from targeting individuals arbitrarily.\textsuperscript{64} Furthermore, the Court stated, because faculty members had no role in deciding whom to test, mandatory testing did not distract faculty members from their other duties.\textsuperscript{65} Finally, the Court's analysis revealed that blanket testing is the surest means to detect illicit drug use in each individual.\textsuperscript{66}

From the foregoing the Court concluded that the Policy was a reasonable means to maintain order in the school and reduce the possibility of drug-related athletic injuries.\textsuperscript{67} Accordingly, the Court vacated the judgment of the Ninth Circuit.\textsuperscript{68}

\textsuperscript{58} Id. at 2395.
\textsuperscript{59} Id.
\textsuperscript{60} Vernonia, 115 S. Ct. at 2395. Testimony showed that certain chemicals reduce pain perception, suppress fatigue, cause abnormal blood pressure, slow response time, and pose cardiac risks. Id.
\textsuperscript{61} Id. at 2395-96. The Court found that this "role-model effect" was exacerbating the drug problem and that drugs were inextricably connected to the decaying disciplinary atmosphere in the school. Id.
\textsuperscript{62} Id. at 2396.
\textsuperscript{63} Id.
\textsuperscript{64} Id. The Court also noted that this scheme undercut individual protests alleging unfair treatment, thus removing a potential obstacle to the smooth operation of the Policy. Id.
\textsuperscript{65} Vernonia, 115 S. Ct. at 2396.
\textsuperscript{66} Id. at 2395-96.
\textsuperscript{67} Id. at 2396.
\textsuperscript{68} Id. at 2397. The Court declined to quarrel with the endorsement of the Policy by the School Board, the District, parents, and the district court. Id.
Justice Ginsburg filed an opinion explicating her grounds for joining in the decision of the majority. Justice Ginsburg understood the decision to be limited to the particular facts before the Court and sanctioned no more reprisal for a positive drug test than suspension from interscholastic sports.

A lengthy dissent authored by Justice O'Connor asserted that the majority opinion reflected the improper policy decision that it is better to test broadly and without exception than to do so only when an individual is suspected of using illegal drugs. This approach, the dissent claimed, wrongly avoids the true nature of the privacy issue at stake.

The dissent explored the history of Fourth Amendment jurisprudence to demonstrate the majority's underestimation of the gravity of discarding individual cause as a prerequisite to a constitutionally reasonable search. The dissent reminded the majority that reasonableness, as envisioned by the Framers of the Fourth Amendment, necessarily included an element of justification for each individual intrusion of a citizen's rights.

The dissent distinguished the instances when the Court had dispensed with a requirement of individual suspicion by asserting that those exceptions were motivated by the grave consequences inherent in a failure to detect the object of the search and the absence of an alternate means of addressing the need. The majority erred, the dissent maintained, in considering

69. Id. (Ginsburg, J., concurring).
70. Vernonia, 115 S. Ct. at 2397.
71. Id. (O'Connor, J., dissenting). Justices Stevens and Souter joined in the dissent. Id. The majority preferred the blanket scheme because in a suspicionless search no individual can complain of unjustifiable testing because no accusation was implicit in the test. Id. at 2397-98.
72. Id. at 2398-99.
73. Id. at 2398-400. Justice O'Connor rejected the proposition that a search could be made reasonable by expanding its scope to include all of a particular class. Id. at 2398.
74. Id. at 2398 (citing Carroll v. United States, 267 U.S. 132 (1925) (holding a warrant dispensable when impractical to obtain and when an officer conducting a search can demonstrate probable cause)). The dissent stated that the requirement that each individual search be based on demonstrable suspicion of the individual is preservative of personal liberty in that it minimizes the number of people who must suffer intrusion and also guards the integrity and free will of the populace by allowing them to avoid such intrusions by refraining from the objectionable conduct. Id.
75. Vernonia, 115 S. Ct. at 2402. The dissent noted that exceptions have been recognized to prevent airline hijackings, rail disasters, compromise of international borders, and residential fires. Id.
76. Id. at 2405. The dissent indicated that there was ample anecdotal evidence in the record demonstrating numerous occasions for suspicion of particular individuals on which to base a decision to test. Id. Students were observed smoking a marijuana cigarette at a nearby restaurant, students appeared inebriated in class, and a hotel room occupied by four wrestlers smelled of marijuana. Id.
suspicionless searches as a "level alternative" to a suspicion-based regime to be chosen by comparing the relative practicality and ease of execution.\footnote{77}

The dissent did not deny the importance of addressing a drug problem within a school, nor the assertion that school administrators enjoy more latitude under the Constitution than law enforcement officers, but the dissent refused to condone stripping students of at least minimal protection from personally intrusive searches.\footnote{78} In the dissent's view, the District's choice of athletes as subjects of the Policy was based on pretense calculated to pass judicial scrutiny.\footnote{79} No persuasive reason was seen by the dissent to supplant the existing accusatory disciplinary scheme in the school for only a selective portion of students in the hopes of affecting the whole student body.\footnote{80} In sum, the dissent found the Policy too indirect and unjustifiably broad to be considered constitutionally permissible.\footnote{81}

The United States Supreme Court, in \textit{Camara v. Municipal Court},\footnote{82} stated that the "basic purpose" of the Fourth Amendment is to protect the "privacy and security of individuals against arbitrary invasions by government officials."\footnote{83} This protection, the Court stated, takes the form of a prohibition on unreasonable searches or seizures of an individual's person, property, papers, or effects.\footnote{84} The Court further stated that except in a well-defined class of cases, a search not consented to is unreasonable when not conducted under the authority of a valid search warrant.\footnote{85} The Court observed that the Fourth Amendment commands that warrants shall not be issued without probable cause.\footnote{86}

In \textit{Camara}, the Court dealt with a challenge to the constitutionality of a provision of the San Francisco Housing Code (the "Code").\footnote{87} Camara was arrested for refusing to permit an
inspection of his residence as prescribed in the Code to ensure compliance with the Code. Camara contended that the authorized inspections were unconstitutional because they were conducted without a warrant and without probable cause.

In *Camara* the Court reformulated the meaning of probable cause. Although the Court insisted that a warrant and probable cause are still necessary, the Court determined that the measure of reasonableness for a search by an administrative officer varies from that applied in the criminal context. The Court identified reasonableness as the ultimate measure of a search's constitutionality, and what is reasonable varies with the object and the public need it serves. The Court stated that when the object of a search is to uncover evidence of a crime, it is reasonable only when probable cause exists to believe it would be found in the particular place to be searched. The Court considered that probable cause for a search for conditions in structures that pose a threat to the health and safety of those in the community have to be examined in light of the purposes of the search. The Court sanctioned balancing the competing public and private interests at stake to determine the reasonableness of a search. The Court recognized that dangerous structural conditions, such as faulty wiring, often develop unintentionally,
are frequently unobservable from the exterior and often are unknown to the occupants of the structure. Furthermore, the Court noted that the only effective way to detect and deter the development of dangerous conditions is through periodic area-wide inspections. The Court reasoned that insisting on the presence of probable cause to believe violations of the Code will be found in a particular structure before an inspection can proceed would defeat the purpose of the inspection. The Court concluded that area-wide searches were necessary to the enforcement of the Code and that the invasion of privacy was relatively limited. The Court stressed that the inspections were not directed at uncovering criminal activity, nor were the inspections of a personal nature, but rather the searches were directed at the buildings themselves. In balancing the competing interests, the Court held that if a valid public interest justifies a proposed governmental intrusion then probable cause exists to issue a warrant to conduct a search.

In United States v. Martinez-Fuerte, the Court examined permanent checkpoints set up by the United States Border Patrol on major highways leading away from the Mexican border. The Court considered whether these tactics could be employed constitutionally to stop and question each car as to the residency of its occupants without any articulable suspicion that any car passing contained illegal aliens. The Court explained that the suspicionless stops by the Border Patrol were constitutional because the important governmental objective they served outweighed the minimal privacy interests they infringed, and that objective would be jeopardized by a requirement of individualized suspicion. The Court defended its novel approval of a seizure

96. Id. at 537.
97. Id. at 535-36.
98. Camara, 387 U.S. at 536-37.
99. Id. at 537.
100. Id. The Court was careful to state that the Fourth Amendment is just as applicable in a regulatory as in a criminal context. Id. at 530-31. The Court held only that the measure of a reasonable justification for a warrant increases according to the potential legal consequences of a search. Id. at 537-38.
101. Id. at 539.
103. Martinez-Fuerte, 428 U.S. at 545-46. Such inland stops are considered necessary in enforcing United States immigration quotas because efforts at the border are insufficient. Id. at 551. Large numbers of aliens elude border patrols along the 2,000 miles of mostly arid, uninhabited desert that forms the United States-Mexico border, so inland efforts were aimed at preventing highways from becoming "quick and safe route[s] to the interior." Id. at 552, 556-57.
104. Id. at 562.
105. Id. at 556-62. The Court looked to a prior decision, in which it held that a
without individualized suspicion by noting the impracticality of studying each car in an unimpeded traffic flow. The Court also emphasized that the routine nature of these stops limited the discretion of officers in the field and reduced the fear or surprise associated with stops by roving patrols.

In *New York v. Burger*, the State of New York appealed the decision of the New York Court of Appeals which held that a statute authorizing warrantless administrative inspections of automobile junkyards is unconstitutional. Burger was the operator of a junkyard who had been charged with possession of stolen property based on a search of his premises conducted by officers of the New York City Police Department pursuant to the New York statute at issue. The New York Court of Appeals invalidated the search, concluding that the inspection was not conducted merely to enforce a valid regulatory scheme, but rather to uncover evidence of criminal activity.

In *Burger*, the Supreme Court granted certiorari to consider whether warrantless searches conducted as part of a pervasive regulatory scheme for a particular industry are unconstitutional because the searches are directed at deterring and detecting criminal activity. The Court stated that individuals have less expectation of privacy in commercial property than in private homes and that those participating in industries subject to close governmental regulation have even less expectation of privacy than proprietors in general. The Court held that, because of

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106. *Id.* at 555. (citing United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (holding that roving Border Patrol officers could stop vehicles if they possessed articulable facts which warranted a reasonable suspicion that a specific vehicle contained aliens illegally present in the United States)).

107. *Id.* at 559. The Court also considered that any deterrent effect of the checkpoints would be thwarted by a requirement of individualized suspicion due to the ability of experienced smugglers to disguise their operations. *Id.*


110. *Id.* at 693-95. See N.Y. VEH. & TRAF. LAW § 415-a (McKinney 1986) (requiring participants in the vehicle dismantling industry to register as such, maintain records demonstrating ownership and disposition of vehicles and parts passing through the business' possession, and requiring production of records and inventory for inspection by state officers).


112. *Burger*, 482 U.S. at 693, 698.

113. *Id.* at 700 (citing United States v. Biswell, 406 U.S. 311 (1972) (upholding a warrantless search of a pawnshop licensed to sell guns pursuant to the Gun Control
the reduced expectation of privacy possessed by participants in a closely-regulated industry, neither probable cause nor a warrant are required for a constitutionally reasonable governmental search of commercial property. The Court deemed warrantless searches reasonable in this context if three criteria are met: 1) the inspection must serve a "substantial government interest;" 2) the inspection must be necessary to further that interest; and 3) the authorizing statute must adequately apprise the owner of the premises that the property is lawfully subject to such searches and the statute must limit the discretion of the executing officer in the time, place, and scope of the search.

In Griffin v. Wisconsin, the Supreme Court considered whether the search of a probationer's home by probation officers acting without a warrant or probable cause to believe contraband would be found is a reasonable search under the Fourth Amendment. Griffin was on probation when officers of the Wisconsin Department of Health and Social Services discovered a gun in his home. Regulations of the Wisconsin State Department of Health and Social Services, which oversees probationers, provide that its officers may search a probationer's home without a warrant with the approval of a supervisor and "reasonable grounds" to believe prohibited items are present.

The Supreme Court found the search in Griffin to be reasonable based on the consideration that the regulation authorizing the search is itself reasonable under Fourth Amendment principles. The Court found that the regulation serves a

Act of 1968, 18 U.S.C. §§ 921-928 (1988)). In Biswell, the Court observed: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." Id. at 701 (quoting Biswell, 406 U.S. at 316).

114. Id. at 702.
115. Id. at 702-03. Frequent, warrantless inspections were found by the Court to contain an element of "surprise" which serves as a valuable deterrent to the traffic in stolen goods, the prevention of which was the basis for the regulation. Id. at 710.
117. Griffin, 483 U.S. at 870-72.
118. Id. at 870. Griffin was on probation for resisting arrest, disorderly conduct, and obstructing an officer. Id. Griffin had also previously been convicted of a felony and therefore was found guilty of possession of a firearm by a convicted felon and sentenced to two years in prison. Id. at 872. The Wisconsin Supreme Court affirmed the trial court's denial of Griffin's suppression motion concerning the search of his home, holding that by virtue of his probation Griffin had a lowered expectation of privacy and that a warrantless search based on "reasonable grounds" to believe he had a gun was sufficient for Fourth Amendment purposes. Griffin v. Wisconsin, 388 N.W.2d 535 (Wis. 1986), aff'd, 483 U.S. 868 (1987).
120. Griffin, 483 U.S. at 873.
"special need" of state government that extends beyond typical law enforcement. The Court recognized that probation is a form of state custody which represents but one choice of several possible sentences for conviction of a criminal offense. The Court further noted that probation entails close supervision to ensure compliance with its terms.

The Court's analysis did not end with a finding that probation is a special need of states. To justify waiving a warrant and probable cause as prerequisites to a constitutional search, the Court stated that these requirements must have been "impracticable." The Court decided that this test had been met, explaining that the interposition of a judge into the probation system would make it more difficult for a probation officer to tailor supervision to a particular client's situation. Furthermore, the Court indicated that the practice serves a valuable deterrent effect. The Court viewed probable cause as equally problematic for the proper functioning of the probation system. The Court determined that the supervisory relationship established by the probation system calls for a measure of curtailment of the probationer's right to privacy.

121. Id. at 873-74. The Court listed as examples of areas of "special need" the operation of schools, government offices, prisons and regulation of certain industries. Id.

122. Id. at 874. The Court noted that probation is not a fixed punishment, but rather consists of conditions and restrictions which, if violated, can result in incarceration. Id. This circumstance was characterized by the Court as "conditional liberty" as distinguished from the "absolute liberty" enjoyed by other citizens. Id.

123. Id. at 875. The Court opined that this serves the dual purpose of safeguarding the public from the inherent danger posed by known felons and a reduction in recidivism which research suggests is a product of intense supervision. Id.

124. Id. at 875-79.

125. Griffin, 483 U.S. at 875-76. The Court borrowed Justice Blackmun's formulation that exceptions are permitted to the warrant requirement of the Fourth Amendment when "special needs beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable." Id. at 873 (quoting New Jersey v. T.L.O., 469 U.S. 325 (1985) (Blackmun, J., concurring) (holding that, in the context of public schools, warrantless searches could be conducted upon a degree of suspicion less than probable cause)).

126. Id. at 876. The Court analogized the situation to requiring a parent to seek judicial permission to search a child's room. Id. The Court viewed the probation officer as an adequate guardian of the probationer's interests because the job is designed to benefit the probationer through rehabilitation and thus is not entirely adversarial. Id. at 876-77.

127. Id. at 876.

128. Id. at 878-79. The Court emphasized the ongoing supervisory relationship and its non-adversarial aspect in concluding that a probable-cause standard is too inflexible to accommodate the value of the subjective knowledge of individual "clients" as well as the professional experience of probation officers in assessing the need for a search. Id.
beyond that permitted in the states' relationships with the general populace.\textsuperscript{129}

In 1989, in \textit{Skinner v. Railway Labor Executives' Ass'n},\textsuperscript{130} the Court applied a balancing of interests approach in its Fourth Amendment analysis of whether railroads, as mandated by Federal Railroad Administration ("FRA") regulations,\textsuperscript{131} can require drug and alcohol testing of all workers employed in safety-sensitive positions\textsuperscript{132} that are involved in certain train accidents, without suspicion of individual intoxication or fault in the accident.\textsuperscript{133}

The FRA promulgated regulations requiring railroads to enforce an industry-wide prohibition on drug and alcohol use on the job.\textsuperscript{134} This mandate was developed in response to FRA findings that inebriation on the job was a prevalent and long-standing problem among railroad employees,\textsuperscript{135} a substantial number of fatal and costly train accidents were directly or partly attributable to drug or alcohol impairment\textsuperscript{136} and industry reliance on observation by supervisors and co-workers to enforce the prohibition on such intoxication was a failure.\textsuperscript{137}

In prelude to examination of the issue, the Court affirmed that urine testing implicates Fourth Amendment privacy interests.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 875.
\item \textsuperscript{130} 489 U.S. 602 (1989).
\item \textsuperscript{131} \textit{See} 49 C.F.R. \textsection Sects. 219.1-.905 (1994) (mandating that railroads collect blood and urine samples for toxicological testing from all employees involved in accidents of a specified level of severity).
\item \textsuperscript{132} Safety sensitive positions are defined by the Hours of Service Act of 1907, ch. 2939, 34 Stat. 1415 (codified as amended at 45 U.S.C. \textsection Sects. 61-66 (1988)).
\item \textsuperscript{133} \textit{Skinner}, 489 U.S. at 606, 619.
\item \textsuperscript{134} \textit{Id.} at 606. \textit{See} 49 C.F.R. \textsection Sect. 219.101 (proscribing drug and alcohol possession and intoxication at work). Under the regulations, railroads are required to provide blood and urine samples of all covered employees involved in certain train accidents or incidents. \textit{Skinner}, 489 U.S. at 609.
\item \textsuperscript{135} \textit{Skinner}, 489 U.S. at 606, 607 & n.1.
\item \textsuperscript{136} \textit{Id.} at 607. According to the FRA, drug and alcohol use was a likely contributing factor in seventeen employee fatalities and twenty-one train accidents resulting in twenty-one deaths, sixty-one non-fatal injuries and an estimated twenty-seven million dollars in property damage. \textit{Id.} (citing 48 Fed. Reg. 30726 (1983)).
\item \textsuperscript{137} \textit{Id.} at 607-08. The issue as to the constitutionality of this scheme, which does not require suspicion that an individual is inebriated, was raised by the Railway Labor Executives' Association and its affiliated labor organizations. \textit{Id.} at 612. The issue came before the Supreme Court after a decision, by a divided vote of the Ninth Circuit, that although the urgency of promptly obtaining evidence of impairment justifies dispensing with the issuance of a warrant, proper respect due the privacy interests of railroad employees dictates insistence on probable cause to suspect that an individual is impaired for drug-testing of body fluids to be reasonable as required by the Fourth Amendment. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 583, 587 (9th Cir. 1988), rev'd \textit{sub nom.} \textit{Skinner v. Railway Labor Executives' Ass'n}, 489 U.S. 602 (1989).
\item \textsuperscript{138} \textit{Skinner}, 489 U.S. at 616-17. The Court found that urine testing reveals
\end{itemize}
For the Court, the consideration of the reasonableness of these warrantless searches was justified by the Court's determination that the regulations at issue, designed for the purpose of ensuring railroad safety, put the searches in a class serving "special needs," which render the requirements of a warrant and probable cause unnecessary when unworkable.139

The Court proceeded in its evaluation from the premise that there are circumstances in which an individual's Fourth Amendment rights must bow to an overriding governmental concern.140 The Court concluded that because the government has a compelling interest in preventing accidents which would be jeopardized if individualized suspicion was required,141 and because railroad employees have this reduced expectation of privacy, the tests are a reasonable means of detecting and deterring on-the-job intoxication.142

Conceding that a governmental interest in preventing rail accidents is compelling and that insistence on individualized suspicion would threaten the very goals of the tests, the Court's determination of the constitutionality of the FRA's scheme turned on whether the tests amounted to only a minimal intrusion on the employees' rights.143 The Court expressed legitimate concern

private medical information about an employee and intrudes on a very personal and private body function. Id. at 617.

139. Id. at 619 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (holding that searches conducted by school authorities are an exception to the warrant and probable cause elements of the Fourth Amendment)). In Skinner, the Court found the warrant requirement unwieldy and impractical because the delay occasioned by procuring a warrant could result in the loss of invaluable evidence. Id. at 623. A requirement of probable cause, the Court decided, would endanger the purpose of the tests partly because the confusion ensuing in the wake of a train accident is hardly conducive to the observation and reflection necessary to develop a suspicion that a particular employee is impaired or that an employee's possible impairment may have contributed to the mishap. Id. at 631.

140. Id. at 624. The Court referred to "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id.

141. Id. at 633. The Court stated: "[T]he gravamen of the evil is performing certain functions while concealing the substance in the body." Id. The Court stated that railroad experience showed that the dismissal sanction for intoxication was not an adequate deterrent unless employees believed it was likely their substance abuse would be uncovered. Id. at 629-30. The Court found that the unpredictability of the event setting the process in motion (a train wreck) significantly enhances this deterrent effect. Id. at 630.

142. Id. at 633.

143. Skinner, 489 U.S. at 624-31. The Court noted that employees subject to testing "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Id. at 628.
with the interference with the privacy expected when urinating, but reasoned that the Government sought to temper the encroachment.\footnote{144} Furthermore, the Court found no indication that medical facts disclosed in the testing would not be treated as confidential by the Government.\footnote{145}

More crucial to the Court’s evaluation of the extent of personal intrusion was the employees’ participation in an industry comprehensively regulated to ensure the safety of rail transportation.\footnote{146} More specifically, the Court recognized that an employee’s mental and physical fitness are of central concern in preventing potential calamity.\footnote{147} The Court reasoned that employees’ awareness of the correlation between fitness and safety and the policy prohibiting drug and alcohol use combine to reduce the legitimate expectation of privacy in information relating to an employee’s fitness for duty.\footnote{148}

In \textit{National Treasury Employees Union v. von Raab},\footnote{149} decided the same day as \textit{Skinner}, the Court addressed the issue of whether mandatory urine testing by the United States Customs Service (the “Service”) of employees seeking reassignment or promotion to certain positions violates the Fourth Amendment.\footnote{150} The Court found that the Government has a “compelling interest” in the physical fitness, judgment and character of those charged with the duty of intercepting illegal drug importation.\footnote{151} The Court’s decision was unique in that no factual basis existed, nor was a serious claim made that a drug problem existed in the Service.\footnote{152} The drug tests served as a

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\item \footnote{144} \textit{Id.} at 626-27. Samples were not required to be provided under direct observation, despite increased risk of tampering, and were collected in a medical environment absent railroad personnel. \textit{Id.}
\item \footnote{145} \textit{Id.} at 626 n.7.
\item \footnote{146} \textit{Id.} at 627. \textit{Cf.} \textit{New York v. Burger}, 482 U.S. 691 (1987) (holding that participants in closely regulated industries have a reduced expectation of privacy in commercial property); \textit{United States v. Biswell}, 406 U.S. 311 (1972) (holding that dealers who engage in businesses subject to warrantless statutory searches have no justifiable expectation of privacy in records or inventory that are the objects of statutory regulation).
\item \footnote{147} \textit{Skinner}, 489 U.S. at 627. The Court found support for this conclusion in the enactment of the Hours of Service Act of 1907. \textit{Id.}
\item \footnote{148} \textit{Id.} at 628.
\item \footnote{149} 489 U.S. 656 (1989).
\item \footnote{150} \textit{von Raab}, 489 U.S. at 659. \textit{Von Raab}, Commissioner of the Customs Service, implemented the plan to test applicants to positions directly involved in drug interdiction, requiring handling of firearms, and involving access to “classified” material. \textit{Id.} at 660.
\item \footnote{151} \textit{Id.} at 670. The Court considered that the nature of these positions necessitates all reasonable efforts to prevent bribery, misuse of seized contraband, negligent discharge of firearms, and covert complicity with smugglers. \textit{Id.} at 669-71.
\item \footnote{152} \textit{Id.} at 673.
\end{itemize}
form of loyalty test aimed at weeding out an element potentially subversive to the Service’s mission.\textsuperscript{153}

The \textit{Vernonia} decision cannot be adequately understood through Fourth Amendment analysis alone. Indeed, the Court stressed that its opinion of the constitutionality of the search in \textit{Vernonia} was significantly affected by the fact that it was imposed on school children.\textsuperscript{154} Minor children have occupied a particular place in constitutional jurisprudence. Much like adults, the content of the rights possessed by children in our society has varied depending on the relationship considered.

In \textit{In re Gault},\textsuperscript{155} the Court considered the habeas corpus petition\textsuperscript{156} of a fifteen-year-old boy ("Gault") who sought release from a juvenile detention facility on the basis of the constitutional infirmity of the proceedings by which he was committed as a delinquent.\textsuperscript{157} Gault was adjudicated delinquent based on an allegation that he had made an obscene telephone call.\textsuperscript{158} In the course of the proceedings, no formal notice was made to Gault's parents of the nature of the charge against him.\textsuperscript{159} The hearing itself was conducted informally with no record made.\textsuperscript{160} The complainant in the case did not appear at the hearing and the finding that Gault made the objectionable phone call was based on admissions that Gault had allegedly made.\textsuperscript{161} Neither Gault nor his parents were adequately apprised of their right to counsel or

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  \item \textsuperscript{153} \textit{Id.} The Customs Service is the federal agency that oversees all persons, freight, vehicles, and mail entering the United States and it collects tariffs and enforces customs laws. \textit{Id.} at 659-60.
  \item \textsuperscript{154} \textit{Vernonia}, 115 S. Ct. at 2396-97.
  \item \textsuperscript{155} 387 U.S. 1 (1967).
  \item \textsuperscript{156} Habeas corpus is a writ utilized to seek release from unlawful confinement.
  \item \textsuperscript{157} \textit{In re Gault}, 387 U.S. at 3-4. Gault was committed in accordance with the procedure embodied in the Arizona Juvenile Code for the duration of his minority (until age 21) as a consequence of a determination that he had made a lewd telephone call. \textit{Id.} at 7-8. The juvenile court judge based the decision in part on the Arizona Criminal Code and partly on an interpretation of a delinquent child as one who is "habitually involved in immoral matters." \textit{Id.} at 8-9. If convicted of the same offense as an adult Gault would have been guilty of a misdemeanor punishable by a fine of $5 to $50 or a prison term of up to two months. \textit{Id.}
  \item \textsuperscript{158} \textit{Id.} at 7-8.
  \item \textsuperscript{159} \textit{Id.} at 5-6.
  \item \textsuperscript{160} Information as to what occurred in the proceedings was gathered from the testimony of the presiding judge, Gault's parents, and a probation officer. \textit{Id.}
  \item \textsuperscript{161} \textit{Id.} at 7. According to the Court, the evidence indicated that the juvenile court judge based his finding of guilt on unrecorded statements made by Gault at two separate hearings on the matter. \textit{Id.} at 6-7. This finding appeared to be in conflict with Gault's parents' recollection and the testimony of one probation officer present at the hearing. \textit{Id.}
\end{itemize}
the privilege against self-incrimination. No appeal was provided for juvenile cases under Arizona law.

The Supreme Court of Arizona acknowledged that due process, as required of the states by virtue of the Fourteenth Amendment, has to be observed in proceedings to determine whether a juvenile should be committed to an institution. The Arizona court concluded that due process does not mandate that all the constitutional procedural components of an adult criminal trial be brought into juvenile proceedings, but rather requires that for juveniles due process is embodied by the established practice of the juvenile system. The Court indicated that this decision upheld the prevailing situation in practically all jurisdictions that rights granted to adults were largely denied to juveniles. The Court noted that this situation was historically justified by the concept that juvenile proceedings were conducted not to affect the liberty of the juvenile, but to establish custody, to which children have a right.

The Court heard In re Gault to determine what application, if any, the Bill of Rights has in juvenile proceedings in which an individual may be committed to a state institution. In In re Gault, the Court explained that the concept of due process is rooted in a respect for procedure and regularity. The peculiar juvenile system, the Court explained, was founded on good intentions, in which, theoretically, a benevolent judge determines

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163. *Id.* at 8. Thus, the Gault's sought review of the decision by a petition for a writ of habeas corpus. *Id.*
166. *In re Gault*, 387 U.S. at 14. This practice developed out of the philosophy that spawned the creation of a separate juvenile court system in the United States around the turn of the century. *Id.* at 14-15. According to the Court, the reformers were motivated by a desire to rehabilitate juveniles because they were "convinced that society's duty to the child could not be confined by the concept of justice alone." *Id.* at 15. The reformers were dismayed by the common law system in which children convicted of crimes could be confined for long sentences in prisons housing hardened criminals. *Id.* The reform philosophy regarded children as essentially good and in need of the state's "care and solicitude." *Id.*
167. *Id.* at 16-17 & n.21. The Court explained that the Bill of Rights has no role in the process because the state was doing something of assistance for the children from which they needed no protection. *Id.* A child's "guilt" is unimportant because the system does not mete out punishment but, rather, treatment. *Id.* at 15-16.
168. *Id.* at 13-14. The basic rights sought to be obtained by the petition were notice of the charges, the right to counsel, the right to confrontation and cross-examination, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review. *Id.* at 10.
169. *Id.* at 27-28. The Court lamented that under the Constitution the condition of childhood does not justify a deprivation of liberty by a "kangaroo court." *Id.*
what is in a juvenile's best interests.\textsuperscript{170} For the Court, this demonstrated that "unbridled discretion" is a "poor substitute for principle and procedure."\textsuperscript{171}

The Court held that due process cannot be observed without following certain fundamental elements of procedure embodied in the Bill of Rights.\textsuperscript{172} The Court held that juvenile proceedings in which a minor's liberty is at stake cannot be held without adequate advance notice of the facts at issue.\textsuperscript{173} In addition, the Court stated that proceedings carrying the possibility of lengthy confinement in a state institution are comparable in seriousness to a felony prosecution at which the assistance of counsel is essential.\textsuperscript{174} Therefore, the Court held that juveniles and parents must be informed of their right to be represented by an attorney.\textsuperscript{175} Finally, the Court found that a judge's discretion is an insufficient substitute for the right to confront and cross-examine witnesses or the privilege against self-incrimination,\textsuperscript{176} in fairly and accurately determining the facts at issue in a juvenile proceeding.\textsuperscript{177} The Court held that without a knowing,

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\item \textsuperscript{170} Id. at 17-18.
\item \textsuperscript{171} In re Gault, 387 U.S. at 17-18. The Court found that the realities of the system often lead to a denial of fundamental due process. Id. at 19-20. The Court quoted the Chairman of the Pennsylvania Council of Juvenile Court Judges as saying: "Unfortunately, loose procedures, high-handed methods, and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process." Id. at 19 (citation omitted).
\item \textsuperscript{172} Id. at 31-59. The Court stressed the importance of procedural due process to the freedom of the individual, calling it the "basic and essential term in the social compact" defining individual rights and limiting the powers of government. Id. at 20. The Court quoted Justice Frankfurter as saying: "The history of American freedom is, in no small measure, the history of procedure." Id. at 21 (quoting Malinsky v. New York, 324 U.S. 401, 414 (1945) (holding that a conviction resting, in any part, on an involuntary confession cannot be upheld)).
\item \textsuperscript{173} Id. at 33. This notice, the Court explained, must be timely enough to allow adequate preparation for a hearing of the facts and must set forth with sufficient particularity the misconduct charged. Id.
\item \textsuperscript{174} Id. at 36-37. According to the Court, assistance of counsel is needed to "cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." Id. at 36.
\item \textsuperscript{175} Id. at 41.
\item \textsuperscript{176} This privilege is embodied in the Fifth Amendment, which states in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.
\item \textsuperscript{177} In re Gault, 387 U.S. at 43-57. The Court rejected the Arizona Supreme Court's view that the privilege against self-incrimination is inappropriate for a juvenile proceeding, remarking: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." Id. at 47, 51. The Arizona Supreme Court's view considered confession to be a therapeutic beginning of the rehabilitative process, and encouraged juveniles to adopt an attitude of trust
voluntary confession, a finding of delinquency could not be upheld without the sworn testimony of witnesses who were subject to cross-examination. The Court's recognition in *In re Gault* that as against police action juveniles possess constitutional rights akin to those of adults, has been significantly truncated when the scope of those rights has been considered as against the authority of public school officials.

In *Goss v. Lopez*, the Supreme Court considered an appeal from a judgment of a three-judge panel of the United States District Court for the Southern District of Ohio that an Ohio statute permitting disciplinary suspension of public school students without some form of hearing was an unconstitutional denial of due process. In considering the appeal, the Court found that Ohio students possess a constitutionally protected property right in an education by virtue of Ohio law. The Court had little difficulty concluding that a deprivation of this right, by temporary suspension, without an opportunity to challenge its justification, is a denial of constitutional due process. Having thus decided, the Court was left with the more complicated question of what constitutes due process in a school setting.

The Court declined to agree with school administrators that the challenged deprivation was too trivial to warrant application of and confidence toward juvenile officials. *Id.* at 51. The Court found that the basic premise behind the privilege, that involuntary confessions are inherently suspect, is at least equally important when dealing with juveniles as with adults. *Id.* at 52-55.

178. *Id.* at 57. The Court ruled that these requirements are constitutionally mandated by the Sixth Amendment, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor; and the have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.


181. *Goss*, 419 U.S. at 573-74. The Ohio Revised Code directs local officials to provide a free education to all residents between the ages of five and twenty-one. *OHIO REV. CODE ANN.* § 3313.48 (Anderson 1994).

182. *Goss*, 419 U.S. at 574-75. The Court found that these suspensions deprived the students of a property interest in an education to which they are lawfully entitled as well as a liberty interest in personal reputation which could have been harmed by the presence of the suspensions in their school records. *Id.*
the principles of due process. On the other hand, the Court recognized that imposing procedural safeguards akin to those found in courtrooms might tax the disciplinary process and eliminate the usefulness of suspensions in the educational process.

The Court held that the Due Process Clause of the Fourteenth Amendment requires school officials to notify a student of charges and to afford the student an opportunity to present the facts as viewed by the student. In so holding, the Court indicated that this requires no more formal a procedure than is appropriate in an educational setting.

In New Jersey v. T.L.O., the Court was confronted with a dispute over the admission, in a juvenile proceeding, of evidence seized by a school official in a search of a student’s purse which the New Jersey Supreme Court had previously found to be unlawful. The case came to the Court for determination of the applicability of the exclusionary rule in the context of a

183. Id. at 576.
184. Id. at 583. The Court considered the need for discipline and order in classrooms and the frequency of situations calling for corrective action by administrators. Id. at 580. The Court, however, ruled that the evils of a system where school officials could act unilaterally and unchallenged require the minimal assurance that a person in danger of serious sanction has notice of the accusation and an opportunity to be heard regarding it. Id.
185. Id. at 581. Cf. Ingraham v. Wright, 430 U.S. 651 (1977) (holding that school officials need provide no prior procedural safeguards in employing corporal punishment and that common law tort remedies provided an adequate safeguard against abuse).
186. Goss, 419 U.S. at 583. The Court stated that the hearing can follow immediately after notice is given and that all that is required is that the student be given a sufficient chance to address the accusations of misconduct. Id. at 582. The Court stated that this serves to guard against the danger of unjustified deprivations by alerting the official to the existence of a dispute so that the official may take steps to satisfactorily ascertain the truth. Id. at 583-84. Furthermore, the Court did not deny school officials the ability to summarily remove disruptive students, but allowed that in some cases the opportunity to be heard could be provided soon after action was taken. Id. at 582-83.
188. T.L.O., 469 U.S. at 328-31. T.L.O., a fourteen-year-old high school freshman, was observed smoking in a school lavatory in contravention of school rules. Id. at 328. When brought before an Assistant Vice Principal, T.L.O. denied the infraction whereupon the official demanded to search T.L.O.'s purse for cigarettes. Id. In the course of the search, the Assistant Vice Principal discovered, in addition to cigarettes, a small quantity of marijuana, smoking paraphernalia, and correspondence and notations implicating T.L.O. as a marijuana peddler. Id. This discovery, along with T.L.O.'s subsequent confession that she had in fact dealt marijuana, prompted the state to institute delinquency proceedings. Id. at 328-29.
189. The exclusionary rule is an evidentiary rule which operates to exclude evidence from criminal proceedings that is seized in violation of the Fourth Amendment. See Mapp v. Ohio, 367 U.S. 643 (1961) (holding that a state officer is bound to respect a citizen's Fourth Amendment freedom and that evidence seized in violation thereof must be excluded from a criminal proceeding).
juvenile proceeding, but the Court ordered reargument of the constitutionality of the search in order to reach the broader issue of the limits the Fourth Amendment places on school authorities regarding searches of students' personal papers and effects.\footnote{190} Preliminary to that inquiry, the Court affirmed that the Fourth Amendment is in fact applicable to the actions of school officials.\footnote{191}

The Warrant Clause of the Fourth Amendment, and particularly its probable cause prerequisite, were eschewed by the Court as unsuited to the school setting.\footnote{192} School officials, the Court stated, require a certain amount of latitude if discipline and order are to be maintained in the classroom.\footnote{193} The fundamental order of the Fourth Amendment, according to the Court, is that all searches be reasonable.\footnote{194} The Court stated that what is reasonable varies with the context of the search and is to be determined by balancing the legitimate individual privacy expectations\footnote{195} infringed by the search against the governmental need served thereby.\footnote{196}

Having declared that reasonableness is established when the public interest in a search outweighs the interest of the individual in freedom from personal intrusion, the Court proposed an inquiry to guide the determination of the constitutionality of the search of T.L.O.'s purse.\footnote{197} The first step in the test, the Court stated, is

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\item \footnote{190} T.L.O., 469 U.S. at 331-32.
\item \footnote{191} Id. at 333. In so doing, the Court rejected the argument that school officials are not bound by the strictures of the Fourth Amendment because their authority to act is, in essence, the delegated authority of the children's parents. Id. at 336. Because compulsory education is mandated by state laws, the Court stated that actions by school officials are in furtherance of the public policy embodied in those laws and are undertaken on behalf of the state. Id. School officials' roles are representative of the state and therefore, the Court reasoned, school officials cannot claim parental authority as a shield to the Fourth Amendment. Id. at 336-37.
\item \footnote{192} Id. at 340-41. The Court, in elaborating on the standard to displace probable cause, declined to decide whether any "individualized suspicion" is necessary to justify a search by school officials. Id. at 341-42. The Court intimated that there are situations in which a search would be justifiable without regard to any discernible element of suspicion. Id. at 342 n.8.
\item \footnote{193} Id. at 339-40.
\item \footnote{194} Id. at 340. Accord Carroll v. United States, 267 U.S. 132 (1925) (holding that a warrant is not required prior to conducting a search in situations where such a requirement would be unworkable).
\item \footnote{195} T.L.O., 469 U.S. at 337. The Court expressly affirmed that students do not waive all privacy rights in their persons and personal effects by their mere presence in school. Id. at 338-39. Cf. Bell v. Wolfish, 441 U.S. 520 (1979) (holding that inmates of a federal detention center have no expectation of privacy in their cells and belongings that society recognizes as legitimate).
\item \footnote{196} T.L.O., 469 U.S. at 337.
\item \footnote{197} Id. at 341-42. The Court borrowed this test from its seminal decision in Terry v. Ohio, 392 U.S. 1, 17-20 (1968) (holding that a "hands-on" search of an
to determine if, when the search was instituted, the official performing it possessed reason to think the search would produce evidence of an infraction of the law or school policy. Second, the Court explained, the conduct of the search must comport in scope to its objective and not impinge further on the privacy of the student than the circumstances warrant.

It is not surprising that Vernonia is one in a growing list of cases in which the Court has eliminated suspicion of an individual in favor of a more flexible “reasonableness” standard. Supreme Court decisions considering the scope of constitutional rights of school students have consistently been tailored to accord much deference to the need of public school administrators to maintain order and discipline in classrooms. The approval of this broad, suspicionless search in the school context was not dictated by the Court's decision in T.L.O. In T.L.O. the school official possessed grounds for a particular suspicion that gave rise to the search. There is dicta in T.L.O. intimating that the quantum of suspicion possessed by the school administrator was not necessarily a constitutional minimum. However, the fact that grounds to suspect T.L.O. were present undermines an argument that the case stands as authority for the generalized blanket search conducted by the Vernonia School District.

The decision in Vernonia fell within a broader pattern of Supreme Court decisions in which well-established interpretations of the Fourth Amendment have been eschewed as unsuitable. The Court's decisions recognizing exceptions to the probable cause standard have generally occurred outside of criminal law.

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investigatory suspect is constitutionally reasonable if the “action was justified at its inception,” and “was reasonably related in scope to the circumstances which justified the interference in the first place.”). The justification varies, however, in that the Terry decision rested on a police officer's concern for personal safety. Terry, 392 U.S. at 21. In T.L.O., the search was calculated to produce evidence to discredit a student suspected of violating school rules. T.L.O., 469 U.S. at 328.

198. T.L.O., 469 U.S. at 341-42. The Court concluded that the observations of the teacher formed a sufficient basis of suspicion to justify a search of T.L.O.'s purse for cigarettes. Id. at 345-46. Because merely opening and removing a pack of cigarettes is constitutionally acceptable, the Court deemed the incidental discovery of rolling papers inside a reasonable basis to cause the Assistant Vice Principal to suspect the student of marijuana possession. Id. at 346-47. The Court found that the thorough rummaging through the contents of the purse and perusal of T.L.O.'s personal papers was justified to confirm the Assistant Vice Principal's suspicion. Id. at 347.

199. Id. at 341, 347. In a dissenting opinion, Justice Brennan derided this test as having no fixed content save that it was not probable cause, and that it was “Rorschach-like,” implying that a court employing it could find any search reasonable based on a judge's personal predilections. Id. at 355, 357-58 (Brennan, J., dissenting).

200. Id. at 328, 345-47.

201. Id. at 342 n.8.
enforcement, the traditional concern of the Amendment. The Court has often viewed searches in the narrow context of the affected private citizen's relationship to the state and pronounced a more specific rule for what was "reasonable" in the situation.

Throughout most of our constitutional history, broad suspicionless searches were unquestionably determined to be violative of the Fourth Amendment. Blanket searches which subject a whole class of individuals to government scrutiny have been increasingly evaluated with regard to their potential effectiveness instead of their consistency with the concept of probable cause. In the process, the Court appears to be abandoning a requirement that an important enforcement goal be frustrated by the probable cause standard. The Court found the concept of cause inapplicable to the District's Policy in that the procedure was one not contemplated by the Framers of the Fourth Amendment. This characterization is disingenuous in that it implies that the Framers did not perceive that government searches could be employed in a broad and efficient manner.

The Court's treatment of suspicionless testing as a "level alternative" to a suspicion-based regime presupposed no constitutional value inherent in a requirement of cause. In reasoning so, the Court undercut the principle of Acton's objection to the Policy. Without cause, one simply expects not to be searched bodily by the authority of the state. It was an affront to require Acton to prove his incorruption, his freedom from the blight present in Vernonia's schools, as a condition to sharing in the rewards of athletic competition.

The Court has approved this practice before and it was perhaps more understandable upon consideration of the value of blanket searches as a deterrent without criminal sanction. In the criminal

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204. Justice Brandeis, in Olmstead v. United States, 277 U.S. 430 (1928) (Brandeis, J., dissenting), expressed a similar viewpoint when he wrote: [The Framers of the Constitution] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. Olmstead, 277 U.S. at 478 (holding that the interception of conversations through wiretapping is not a search or seizure for purposes of the Fourth Amendment) (emphasis added).

205. According to Justice Brandeis: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead, 277 U.S. at 479 (Brandeis, J., dissenting).
realm resistance to judicially created substitutes for the warrant and probable cause requirements is stiffer because the consequences are the ultimate deprivation of freedom itself.

The *Vernonia* decision is an illustration of the inadequacy of the Court’s balancing test to preserve the Fourth Amendment rights of individuals. The Court merely has to remove some of the weight that belongs to individuals according to the perceived social value of the governmental license taken. For example, the Court considered drug testing to be consistent with the District’s practice of subjecting students to physical examinations and vaccinations. In so doing, the Court ignored the obvious implication that drug testing creates as to the trustworthiness of the individuals. The Court justified its correlation by emphasizing the “prophylactic” purpose of the search, “protecting student athletes from injury and deterring drug use in the student population,” and ignored the social and physical benefits that students were deprived for violation of the Policy. The Court further presumed that the indignity of forced urination upon compulsion, under the watchful eye of school authorities, is negligibly different than using public restrooms. Underlying the history of Fourth Amendment jurisprudence has been a sense that its freedoms carry a price for society. The test employed to determine the reasonableness of the searches conducted by the District allows that price to be avoided by depriving a large number of innocent individuals of substantial constitutional rights.

As a result of the broad applicability of the Court’s decision, millions of school children in the United States are currently free from mandatory production of bodily fluids for governmental inspection only by virtue of administrative discretion. It is regrettable that this compromise of constitutional principle is visited upon an impressionable and idealistic segment of the citizenry. In so doing, the Court risked a concomitant erosion of the belief in the primacy of individual liberty in our society.

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207. As Justice Jackson stated: “That [school officials] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth not to discount important principles of our government as mere platitudes.” *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that a resolution of the West Virginia Board of Education that required all students to salute the flag of the United States was a violation of the First Amendment).

208. *See von Raab*, 489 U.S. at 887 (Scalia, J., dissenting). In *von Raab*, Justice Scalia stated: “Those who lose ... are not just the Customs Service employees, whose dignity is thus offended, but all ... who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small
Viewing *Vernonia* within the context of the Court’s decisions pertaining to public school administration, the case detracts considerably from former Justice Fortas’ observation that “students [do not] shed their constitutional rights ... at the schoolhouse gates.” Viewed, however, from the perspective of its balancing of comparative interests for purposes of the Fourth Amendment, it serves to illustrate the inadequate and shifting nature of the standard it advances. The test stands mutable. What the Court considers to be reasonable appears to beget the values assigned in the balancing equation. The primary usefulness of a balancing approach to Fourth Amendment rights is in overcoming absolute individual liberties to serve the moral judgment of those in office or of popular consensus. The test is a tool used to empower the government to exceed a constitutional absolute in the interest of greater control over perceived crises. The broad applicability of the governmental policies advanced, however, gives this judicial exception the potential to swallow a large portion of the Fourth Amendment’s sphere of protection.

*Cornelius J. O’Brien*