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STUDENTS' FOURTH AMENDMENT RIGHTS IN SCHOOLS: STRIP SEARCHES, DRUG TESTS, AND MORE

*Emily Gold Waldman**

I. INTRODUCTION

At the end of June 2009, the Supreme Court decided *Safford Unified School District No. 1 v. Redding*,¹ a case involving the strip search of a thirteen-year-old girl at an Arizona middle school.² Thus, the Court has now decided four cases regarding public school students' Fourth Amendment rights while at school³ and the time is ripe to take stock of this jurisprudence as a whole. The following discussion provides such an overview.

As an initial matter, it is useful to divide the Court's four Fourth Amendment cases into two categories: (1) cases involving suspicion-based searches of individual students, such as the search in *Redding*; and (2) cases involving random, suspicionless searches of students, such as those conducted pursuant to random drug-testing policies. I will cover each of these two categories, their basic approaches, some of the open issues that remain with respect to each of them, and their underlying similarities.

II. THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Any discussion of the Supreme Court's framework for stu-

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¹ 129 S. Ct. 2633 (2009).

² *Id.* at 2637.

³ *See id.*; Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); New Jersey v. T.L.O., 469 U.S. 325 (1985).

dents' Fourth Amendment rights must start with the text of the Fourth Amendment itself. 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.⁴

Prior to 1985, however, it was unclear whether and how the Fourth Amendment applied to students at school. The Supreme Court first addressed that question in *New Jersey v. T.L.O.*,⁵ to which I now turn.

III. SUSPICION-BASED SEARCHES OF STUDENTS

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

New Jersey v. T.L.O. was a criminal case involving a high school student (“T.L.O.”) who was found smoking cigarettes with a friend in the school bathroom.⁶ At the time, smoking in school was a violation of school policy.⁷ As a result, T.L.O. and her friend were both sent to the principal’s office.⁸ T.L.O.’s friend admitted to smoking, but T.L.O. denied it, prompting the vice principal to demand to see her purse.⁹ When the vice principal reached into T.L.O.’s purse, he found a pack of cigarettes and cigarette rolling papers.¹⁰ The vice principal considered the rolling papers indicative of marijuana use, and then searched the purse more thoroughly, finding that it contained marijuana, a pipe, empty plastic bags, numerous one dollar bills, index cards listing “students who owe me money,” and two letters implicating T.L.O. in marijuana dealing.¹¹ The school turned all of these items over to the police, and T.L.O. was ultimately charged

⁴ U.S. CONST. amend. IV.

⁵ 469 U.S. 325.

⁶ *Id.* at 328.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 328.

¹⁰ *T.L.O.*, 469 U.S. at 328.

¹¹ *Id.*

as a juvenile delinquent.¹²

In her defense, T.L.O. argued that the evidence against her—that is, the contents found in her purse—was the fruit of an illegal search, and should therefore be suppressed. (*T.L.O.* is the only Supreme Court student speech case where the Fourth Amendment issue was raised defensively, as opposed to in a Section 1983 lawsuit brought by a student-plaintiff.) The threshold question, therefore, was whether the Fourth Amendment applied to school officials' searches of public school students while on school grounds.¹³ New Jersey argued that the Fourth Amendment was inapplicable here, asserting that students do not have a reasonable expectation of privacy with respect to their personal belongings while they are at school.¹⁴ Essentially, the state argued that students had no need to bring any personal items to school and that by nonetheless choosing to do so, they were implicitly agreeing that the school could search them.¹⁵

The Supreme Court, however, ruled that the Fourth Amendment indeed applied to such searches, explaining that “schoolchildren may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.”¹⁶

The Court's conclusion that the Fourth Amendment applied to students while at school was not surprising. By 1985, the Supreme Court had already decided *Tinker v. Des Moines Independent Community School District*,¹⁷ the 1969 First Amendment case holding that “students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁸ It had also decided *Goss v. Lopez*,¹⁹ where it held that Fourteenth Amendment procedural due process protections apply to students at school.²⁰ The Court's *T.L.O.* decision thus continued the trend of holding that students possessed constitutional rights while at school.

¹² *Id.* at 328, 329.

¹³ *Id.* at 327-28.

¹⁴ *Id.* at 338.

¹⁵ *T.L.O.*, 469 U.S. at 338.

¹⁶ *Id.*

¹⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 506 (1969).

¹⁸ *See id.* at 506.

¹⁹ 419 U.S. 565 (1975).

²⁰ *See id.* at 574.

That said, as in *Tinker* and *Goss*, the *T.L.O.* Court modified the nature of the constitutional protection in light of the specific needs of the school setting. Specifically, the Court ruled that the usual Fourth Amendment requirements of a warrant and probable cause were not necessarily appropriate in the context of school officials' searches of public school students on school grounds.²¹ Instead, the Court emphasized the touchstone of the Fourth Amendment: its protection against unreasonable searches and seizures.²² The Court concluded that the constitutionality of a public school's search of a student should turn on whether the search was reasonable under the totality of the circumstances.²³

The Court further articulated a two-part inquiry for courts to use when analyzing the reasonableness of the search: first, whether the search was "justified at its inception"; and second, whether the search was "permissible in its scope," in terms of how it was actually carried out.²⁴ With respect to measuring whether the search was justified at its inception, the Court explained that the basic test was whether there were reasonable grounds for suspecting that the search would produce evidence demonstrating "that the student . . . violated . . . either the law or the rules of the school."²⁵ As to *T.L.O.*'s case, the Court concluded that this first prong had been satisfied, stating that "[the vice principal] acted [r]easonably when he examined *T.L.O.*'s purse to see if it contained cigarettes."²⁶ With regard to the second part of the inquiry—whether the search was permissible in its scope—the Court explained that the underlying question was whether "the measures adopted [were] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."²⁷ As to *T.L.O.*, the Court concluded that this second prong was met, reasoning that the initial search—when the vice principal first reached into the purse looking for cigarettes—was directly connected to the infraction of

²¹ See *T.L.O.*, 469 U.S. at 340 (holding that school officials need not obtain a warrant to search a child under their supervision).

²² See *id.* at 340-41.

²³ See *id.* at 341-42.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *T.L.O.*, 469 U.S. at 346.

²⁷ *Id.* at 342.

smoking at school.²⁸ His discovery of rolling papers in her purse then created additional suspicion that justified his fuller search of the entire purse.²⁹ Thus, the search of the purse was not excessively intrusive in light of the vice principal's concerns.³⁰ Because the search of T.L.O. satisfied both prongs of the test, it was reasonable under the circumstances and therefore did not violate the Fourth Amendment.

In holding that the Fourth Amendment prohibited "unreasonable" searches of public school students, and in articulating the above two-prong test for measuring reasonableness, *T.L.O.* obviously had a major impact. Not surprisingly, however, several key issues remained open. One such issue was the constitutionality of random drug testing policies, which necessarily involved searches *not* based on individualized suspicion. I return to that question a little later. But even with regard to individual, suspicion-based searches, some questions still remained, particularly in terms of what constituted an excessively intrusive search under *T.L.O.*'s second prong.³¹ In *Safford v. Redding*, to which I now turn, the Supreme Court shed light on that issue.

B. *Safford Unified School District No. 1 v. Redding*

Safford v. Redding involved a thirteen-year-old, Savana Redding, who attended an Arizona middle school.³² Savana was called to the assistant principal's office after a classmate was found with various prescription-strength painkillers and claimed that Savana had given her the pills.³³ The chronology is complicated, but there had apparently been a previous problem with students bringing various contraband items into school.³⁴ On the morning that culminated in the strip search of Savana, another student who had previously used painkillers tipped off the administration that students were continuing

²⁸ See *id.* at 345.

²⁹ See *id.* at 347.

³⁰ See *id.* at 346-47.

³¹ See, e.g., Ralph D. Mawdsley & Jacqueline Joy Cumming, *Student Informants, School Strip Searches, and Reasonableness: Sorting Out Problems of Inception and Scope*, 230 WEST'S EDUC. L. REP. 1, 6 (2008).

³² *Redding*, 129 S. Ct. at 2638.

³³ *Id.* at 2640.

³⁴ *Id.*

to bring pills to school.³⁵ This student specifically stated Marissa Glines, one of Savana's friends, had given a pill to him.³⁶ Marissa was ultimately found to possess various contraband items, including pills and a razor blade, and claimed that Savana had given her the pills.³⁷

Savana was then pulled out of class and brought in to see the vice principal for questioning.³⁸ Savana acknowledged that she and Marissa were friends and that she had lent her a day planner.³⁹ School officials were also aware that Savana and Marissa were part of a group at a school dance that had allegedly been rowdy.⁴⁰ Savana denied, however, knowing anything about the pills that had been taken from Marissa.⁴¹ The assistant principal asked to search Savana's backpack.⁴² She agreed, but the search revealed nothing.⁴³ The assistant principal then sent Savana to the nurse's office.⁴⁴ The nurse was a female, and asked Savana to take off all of her clothing except for her bra and underwear.⁴⁵ Again, nothing was found.⁴⁶ Savana was finally asked to pull out her bra and underwear, partially "exposing her breast[] and pelvic" region.⁴⁷ No pills were ever found on her body.⁴⁸ Savana, through her mother, subsequently filed a § 1983 lawsuit, accusing the school of violating her Fourth Amendment rights as established under *T.L.O.*⁴⁹

Savana's case took an interesting procedural path even before reaching the Supreme Court. A federal district court initially dismissed her case on summary judgment, and the Ninth Circuit affirmed that result in a 2-1 split.⁵⁰ The Ninth Circuit then went on

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Redding*, 129 S. Ct. at 2640.

³⁸ *Id.* at 2640-41.

³⁹ *Id.* at 2641.

⁴⁰ *Id.*

⁴¹ *Id.* at 2638.

⁴² *Redding*, 129 S. Ct. at 2638.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Redding*, 129 S. Ct. at 2638.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Redding v. Safford Unified Sch. Dist.*, 504 F.3d 828 (2007).

banc, however, and reversed that ruling in a divided opinion, finding that the search violated *T.L.O.*⁵¹ Moreover, the Ninth Circuit found that Savana's Fourth Amendment rights were so clearly established in this context that the school district officials who carried out the search were not even entitled to qualified immunity.⁵² (When a suit is filed against state officials pursuant to § 1983, in order to recover monetary damages from those individuals, a plaintiff must pierce qualified immunity, meaning that the plaintiff not only needs to show that the officials violated a constitutional right, but also that the constitutional right was clearly established.⁵³)

The Supreme Court ultimately ruled the strip search unconstitutional. In an opinion authored by Justice Souter, the Court applied the *T.L.O.* two-step framework, and held that although the initial search of the backpack and outer clothing was justified at its inception, the further strip search was not permissible in its scope.⁵⁴ The Court opined that here, the search was overly intrusive considering the age and sex of the student (a middle school female), particularly because the infraction involved only prescription-strength painkillers, which are available over-the-counter, as opposed to illegal street drugs.⁵⁵ It focused on the language of the second prong of the *T.L.O.* test: whether the measures adopted were reasonably related to the objectives of the search and not excessively intrusive.⁵⁶ It reasoned that there was no "indication of danger to the students from the power of the drugs or their quantity, and [no] reason to suppose that Savana was carrying the pills in her underwear."⁵⁷ Justice Souter further stated that if a school is going to make the "quantum leap from outer clothes and backpacks to exposure of intimate parts," the school official needs either a "reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing."⁵⁸ Still, the *Redding* Court granted qualified immunity to the school officials, explaining that the circuit courts had been divided over the way in which *T.L.O.*

⁵¹ *Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071 (9th Cir. 2008) (en banc).

⁵² *See id.* at 1088.

⁵³ *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

⁵⁴ *See Redding*, 129 S. Ct. at 2641-44.

⁵⁵ *Id.* at 2642-43.

⁵⁶ *See id.* at 2642.

⁵⁷ *Id.* at 2642-43.

⁵⁸ *Id.* at 2643.

applies to strip searches.⁵⁹ Given the general lack of clarity here, the Court reasoned that the school district officials were at least entitled to qualified immunity.⁶⁰

The *Redding* decision included additional opinions that staked out positions on opposite sides of the spectrum.⁶¹ Justices Stevens and Ginsburg concurred in part and dissented in part, agreeing that the search violated the Fourth Amendment, but disagreeing that the school district officials should be entitled to qualified immunity.⁶² By contrast, Justice Thomas dissented from the conclusion that there had been a Fourth Amendment violation at all.⁶³ He argued that if a student is suspected of carrying pills, and it is reasonable to look for them in the student's backpack, it does not become unreasonable to search further if the initial search of the backpack reveals no wrongdoing.⁶⁴ Justice Thomas added that by holding that further suspicion is required in order to strip search students, the Court was, in effect, announcing that the safest place for a student to hide drugs in school is in his or her undergarments.⁶⁵

C. Open Issues with Suspicion-Based Searches

In *Redding*'s aftermath, several questions still remain for lower courts to sort out in future cases. For instance, the *Redding* Court stated that before a strip search occurs, there must be "reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts."⁶⁶ What, precisely, qualifies as a "reasonable suspicion of danger"? Justice Souter suggested that there was not a high suspicion of danger in *Redding* because the case involved a relatively small number of

⁵⁹ *Redding*, 129 S. Ct. at 2643-44.

⁶⁰ *See id.* at 2644.

⁶¹ *See id.* at 2637 (showing that Justices Stevens, Ginsburg, and Thomas concurred in part, however, all three also dissented in part).

⁶² *See id.* at 2644-45 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 2645-46 (Ginsburg, J., concurring in part and dissenting in part).

⁶³ *Redding*, 129 S. Ct. at 2646 (Thomas, J., concurring in part and dissenting in part).

⁶⁴ *See id.* at 2647-49.

⁶⁵ *Id.* at 2650.

⁶⁶ *Id.* at 2643 (majority opinion).

low dosage prescription painkillers.⁶⁷ It is not clear whether a larger quantity of the same strength of drugs, or a similarly small quantity of higher-dosage drugs, would have qualified as sufficiently dangerous.

Similarly, with respect to the *Redding* Court's discussion of the "reasonable suspicion" standard, an unresolved question is the extent to which tips from other students can create reasonable suspicion. In *Redding*, the case largely hinged on the tip of one student, Marissa. Courts are likely to face future cases in which there are multiple tips, and will have to consider whether that changes the outcome. Also lurking in the background is the question of whether, in considering the reliability of a student's tip—or the suspected student's denial—factors like a student's academic record, past disciplinary history, and other characteristics should be considered. It is interesting to note, for instance, that Justice Stevens' separate opinion in *Redding* specifically described Savana as an "honors student."⁶⁸

Another open issue with respect to suspicion-based searches—addressed neither by *T.L.O.* nor *Redding*—is the extent to which the basic analysis changes if the search is carried out by school resource officers (such as police department employees who are posted in the school) rather than school administrators themselves. So far, courts have generally held that the key question here is whether the school resource officer is conducting the search at the direction of school officials, in which case *T.L.O.* should apply, or is instead really acting as a police officer at the behest of the police department, in which case the traditional Fourth Amendment protections should apply.⁶⁹

⁶⁷ *Id.* at 2642 (noting that the pills were common painkillers "equivalent to two Advil, or one Aleve").

⁶⁸ *Redding*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part).

⁶⁹ See, e.g., *Wilson v. Cahokia Sch. Dist. No. 187*, 470 F. Supp. 2d 897, 910 (S.D. Ill. 2007); *Shade v. City of Farmington, Minn.*, 309 F.3d 1054, 1061 (8th Cir. 2002) (similarly concluding that the *T.L.O.* reasonableness standard "govern[ed] the lawfulness of the search conducted by [the officer]" because the search was initiated by a school official). *But cf. Patman v. State*, 537 S.E.2d 118, 119, 120 (Ga. Ct. App. 2000) (holding that where police officer who was working a "special detail" at a high school searched a student after being told by the school secretary that the student smelled of marijuana, the Fourth Amendment applied because "[u]nlike a school official, a police officer must have probable cause to search a suspect").

IV. RANDOM SEARCHES OF STUDENTS

Having considered suspicion-based searches of individual students, I now move to the second category of cases: cases involving random, suspicionless searches of students. Here, too, there are two Supreme Court cases on point.

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

The first case regarding random suspicionless searches of students was *Vernonia School District 47J v. Acton*, decided in 1995.⁷⁰ As noted previously, *T.L.O.* left open the question of whether individualized suspicion would always be necessary to satisfy the Fourth Amendment.⁷¹ *Vernonia* squarely presented the Court with that issue.

Vernonia involved an Oregon school district that, after experiencing a major rise in drug use among its students, decided to adopt a random drug testing policy for student-athletes.⁷² There were several reasons why the district focused on student-athletes. First, there was a prevailing concern that some of the athletes were “leaders of the drug culture.”⁷³ Second, and relatedly, student-athletes were considered role models in the school, and the district hoped that combating athletes’ use of drugs would influence the rest of the school.⁷⁴ Third, school officials were concerned about the particularly high risk of injury that drug use posed to student-athletes.⁷⁵

After many meetings, and with widespread support from both parents and the community at large, the district unveiled a random drug-testing policy.⁷⁶ All student-athletes were tested at the beginning of each season.⁷⁷ Additionally, the names of all student-athletes went into a lottery pool and ten percent of the names were randomly drawn each week for drug testing.⁷⁸ If a student was chosen, he or

⁷⁰ See *Vernonia*, 515 U.S. 646.

⁷¹ See *T.L.O.*, 469 U.S. at 342 n.8.

⁷² *Vernonia*, 515 U.S. at 650.

⁷³ *Id.* at 649.

⁷⁴ See *id.* at 663.

⁷⁵ *Id.* at 649.

⁷⁶ See *id.* at 649-50 (noting that the school “held a parent ‘input night’”).

⁷⁷ *Vernonia*, 515 U.S. at 650.

⁷⁸ *Id.*

she was asked to go with a monitor to provide a urine sample that was immediately sent off to an independent lab.⁷⁹ There were various protections in place in terms of how the monitor oversaw the urine collection.⁸⁰ The monitor was supposed to stand behind the urinal if the student was a boy and outside the stall if the student was a girl.⁸¹ In order to avoid false positives, students were asked to provide a list of any medications they were taking.⁸² If there was a positive test, “a second test [was performed] . . . to confirm the result[s].”⁸³ If the second test was positive as well, the student-athlete had to choose between participating in a drug assistance program for six weeks, or being suspended from sports in the current and following seasons.⁸⁴ Significantly, the school’s policy was that the results would not be shared with law enforcement, but would be kept within the school.⁸⁵

The constitutionality of this policy was challenged by a student who wanted to participate in athletics but did not want to participate in the above-described regime.⁸⁶ The case ultimately reached the Supreme Court, which held—in an opinion authored by Justice Scalia—that the policy did not violate the Fourth Amendment. The Court relied on the “special needs” doctrine, under which certain searches (such as automobile checkpoints looking for drunk drivers) can pass Fourth Amendment muster even though they are not based upon individualized suspicion, on grounds that they are being conducted for purposes of a “special need” other than law enforcement.⁸⁷ The majority concluded that the “special needs” doctrine was applicable here, and articulated a balancing test for courts to use when evaluating the constitutionality of suspicionless searches in public schools. Under this test, courts must weigh the nature of the privacy interest and the character of the intrusion against the nature of the

⁷⁹ *Id.*

⁸⁰ *See id.* (noting that monitors were approximately within fifteen feet of the students watching or “listen[ing] for normal sounds of urination”).

⁸¹ *Id.*

⁸² *Vernonia*, 515 U.S. at 650.

⁸³ *Id.* at 651.

⁸⁴ *Id.*

⁸⁵ *See id.* (noting that the superintendent, principals, vice-principals, and the athletic directors were the only people that had access to the test results).

⁸⁶ *Id.*

⁸⁷ *See Vernonia*, 515 U.S. at 653.

governmental concern at issue and the efficacy of the particular means for meeting that concern.⁸⁸

In applying this test to the random drug-testing policy at issue in *Vernonia*, the Court began by finding that the nature of the privacy interest was minimal, acknowledging that urination is generally “an excretory function traditionally shielded by great privacy” but adding that student-athletes are already subject to various reductions of their privacy. The Court also found the character of the intrusion weak, given the privacy-shielding way in which students were monitored while urinating, in conjunction with the fact that the results were not passed onto law enforcement.⁸⁹ On the flip side, the Court concluded that the government’s interest in deterring drug use among the nation’s school children was compelling and that the random drug-testing policy at issue was likely to be an efficacious way to respond to it. The Court thus upheld the constitutionality of the policy.

The *Vernonia* Court’s emphasis on the diminished privacy expectations of student-athletes naturally raised the question of whether the outcome would have differed had the policy been directed toward a broader group of students. Less than a decade later, the Supreme Court returned to that very question.

B. *Board of Education of Independent School District No. 92 v. Earls*

In 2002, the Supreme Court decided *Board of Education of Independent School District No. 92 v. Earls*,⁹⁰ a case involving an Oklahoma school district that adopted a very similar drug-testing policy to the one at issue in *Vernonia*. Here, however, the policy applied not only to student athletes but rather to all students participating in competitive extracurricular activities.⁹¹ (In fact, according to its written terms, the policy applied to students participating in *all* extracurricular activities. In practice, however, it was only applied to students participating in competitive extracurricular activities, which included sports as well as other activities like the Academic Team

⁸⁸ *Id.* at 652-53.

⁸⁹ *See id.* at 658.

⁹⁰ *Earls*, 536 U.S. 822.

⁹¹ *See id.* at 825.

and the Future Farmers of America.⁹²) Interestingly, unlike in *Vernonia*—where the drug-testing regime at issue was adopted in response to a serious drug problem that already existed in the school district—the *Earls* policy was adopted largely from a preventative standpoint, in order to respond to more limited instances of drug use.⁹³

A student who participated in various competitive extracurricular activities, including the Academic Team, challenged the policy on Fourth Amendment grounds. She argued that the intrusion upon privacy here was greater than that in *Vernonia*, because the policy was not limited to student-athletes.⁹⁴ She further attempted to distinguish *Vernonia* on grounds that here, there was no proven drug problem in the school.⁹⁵

The Supreme Court, however, upheld the constitutionality of the policy.⁹⁶ Its opinion, authored by Justice Thomas, stated that *Vernonia*'s discussion of student-athletes' reduced privacy expectations was "not essential to our decision."⁹⁷ Likewise, the Court deemed it irrelevant that the district was not already combating a serious drug problem, stating that "we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren."⁹⁸

C. Open Issues with Random Searches

Now that the Supreme Court has upheld the constitutionality of random drug-testing regimes for all students participating in extracurricular activities, an obvious open issue is whether a district can adopt a random drug-testing policy that applies to *all* of its students. Neither the *Vernonia* nor *Earls* majority opinions addressed that question. In his *Earls* concurrence, Justice Breyer—who provided the fifth vote for upholding the policy—touched on this issue, observing that "the testing program avoids subjecting the entire school to testing. And it preserves an option for the conscientious objector. He

⁹² *Id.* at 826.

⁹³ *Id.* at 834-35.

⁹⁴ *Id.* at 831.

⁹⁵ See *Earls*, 536 U.S. at 834-35.

⁹⁶ *Id.* at 838.

⁹⁷ *Id.* at 831.

⁹⁸ *Id.* at 836.

can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.”⁹⁹ This suggests that Justice Breyer might have ruled differently had the policy applied to all students. In any event, the Supreme Court’s composition has changed since 2002, and it is unclear how the four new justices appointed since that time (Justices Roberts, Alito, Sotomayor, and Kagan) might rule on the issue.

Another question is whether the outcome would have been different had the test results been turned over to law enforcement, rather than being kept within the respective schools. The Supreme Court did not explicitly address this question in either *Vernonia* or *Earls*, but it did emphasize in both cases—when characterizing the privacy intrusion in these policies as minimal—that the results were not sent to law enforcement authorities.¹⁰⁰ As such, a random drug-testing policy that *did* share the results with law enforcement might have a tougher time overcoming a Fourth Amendment challenge.

A fairly recent Eighth Circuit case, *Doe ex rel. Doe v. Little Rock School District*,¹⁰¹ touched upon both of the above issues. There, the court had to assess the constitutionality of a policy that authorized random searches of all students’ belongings, and any evidence of wrongdoing was turned over to law enforcement for prosecution.¹⁰² The Eighth Circuit struck down this policy, emphasizing that the evidence was turned over to law enforcement, unlike in *Vernonia* and *Earls*.¹⁰³ In addition, the court pointed out that the policy reached all students, rather than being limited to a class of students who voluntarily chose to participate in certain activities, as in *Vernonia* and *Earls*.¹⁰⁴

A final open question is the extent to which the *Vernonia* and *Earls* outcomes hinged on the fact that the drug-testing policies were adopted in response to community concern about actual or potential drug use in the schools. In both decisions, the Supreme Court noted this background history.¹⁰⁵ Future courts may instead be confronted

⁹⁹ *Id.* at 841 (Breyer, J., concurring).

¹⁰⁰ See *Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 833.

¹⁰¹ 380 F.3d 349, 354-55 (8th Cir. 2004).

¹⁰² *Id.* at 354.

¹⁰³ *Id.* at 355-57.

¹⁰⁴ See *id.* at 353-54.

¹⁰⁵ See *Vernonia*, 515 U.S. at 650; *Earls*, 536 U.S. at 835.

with a scenario in which a school district adopts such a policy over the objections of the majority of the community, and will have to consider whether that should affect the result.

V. CONCLUSION

As this discussion has shown, the four Supreme Court cases involving students' Fourth Amendment rights divide into two doctrinal categories: suspicion-based searches and random searches. It is important to note, however, that these two lines of cases share a common underlying approach: recognition that the Fourth Amendment is generally applicable here, coupled with a willingness to modify the nature of that protection in light of school needs. This approach is similar to the way in which the Supreme Court has conceptualized students' First Amendment rights at school, as well as their Fourteenth Amendment procedural due process rights. In all of these areas, the fundamental question to consider is whether the Supreme Court has attained the right balance. In other words, has the Supreme Court protected the core of the constitutional right at issue, while still giving schools the flexibility that they need to maintain a safe, effective learning environment?

