

# Washington Law Review

---

Volume 84  
Number 1 *Symposium: The Prosecutorial Ethic:  
An Tribute to King County Prosecutor Norm  
Maleng*

---

2-1-2009

## ***York v. Wahkiakum School District* and the Future of School Searches under the Washington State Constitution**

Kerem Murat Levitas

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Fourth Amendment Commons](#)

---

### **Recommended Citation**

Kerem M. Levitas, Note, *York v. Wahkiakum School District and the Future of School Searches under the Washington State Constitution*, 84 Wash. L. Rev. 93 (2009).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol84/iss1/5>

This Note is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

## **YORK V. WAHKIAKUM SCHOOL DISTRICT AND THE FUTURE OF SCHOOL SEARCHES UNDER THE WASHINGTON STATE CONSTITUTION**

Kerem Murat Levitas

*Abstract.* In March 2008, the Supreme Court of Washington decided *York v. Wahkiakum School District*,<sup>1</sup> a case involving mandatory, suspicionless drug testing of student athletes. The court struck down the testing regime, but, unable to agree on the grounds for invalidating the testing, issued three separate opinions. The lead opinion argued that suspicionless testing could never be countenanced under the Washington Constitution. Two concurrences argued that suspicionless testing could be permissible under certain circumstances pursuant to a variant of the federal special-needs doctrine. This Note reviews search-and-seizure protections under the United States and Washington constitutions, their application to school search law, and gives an overview of *York*. Finally, this Note argues that jurisprudential, democratic, and educational values all counsel in favor of following *York*'s lead opinion and maintaining an individualized-suspicion requirement for school searches.

### INTRODUCTION

In March 2008, a divided Supreme Court of Washington decided *York v. Wahkiakum School District*, a case that involved a suspicionless drug-testing regime in which the school district tested all of its student-athletes. While the court's nine justices unanimously struck down the program as a violation of article 1, section 7 (Section 7) of the Washington State Constitution, they did not produce a majority opinion.

The lead opinion, written by Justice Sanders and signed by three other justices, rejected the federal special-needs exception to the warrant requirement in the school context. Two concurrences, one written by Justice Madsen and signed by three other justices, and the other written by Justice James Johnson, argued that the State Constitution does allow for a special-needs exception in Washington schools, but that the facts before the court did not satisfy the requirements of that exception.

This split decision provides no clear answers to school districts, students, school administrators, practitioners, or lower courts as to whether a special-needs exception exists for Washington's public schools. Clear doctrine on this point is critically important for all stakeholders: students must know the parameters of their privacy rights,

---

1. 163 Wash. 2d 297, 178 P.3d 995 (2008).

schools need to plan for drug control within clearly defined contours of the law, and the uniform administration of justice requires that lower courts have clear directives. This Note weighs the strengths and weaknesses of the various opinions and argues that the Supreme Court of Washington should adhere to a bright-line requirement of individualized suspicion for all school searches.

Part I compares the basic jurisprudence of the U.S. Constitution's Fourth Amendment with Section 7 of the Washington State Constitution and shows that the state provision more vigorously protects the privacy of Washington residents than do the federal guarantees. Part II explains how Fourth Amendment rules apply to searches performed in schools and shows that they allow for suspicionless drug testing of students. Part III introduces Washington cases that have applied Section 7 in the school context, and demonstrates that the opinions have all relied upon individualized suspicion of wrongdoing when upholding invasions of students' privacy. Part IV presents *York v. Wahkiakum School District*, describing the underlying controversy and summarizing the court's three major opinions. Finally, Part V argues that Washington courts should follow the lead opinion's approach in *York* when evaluating school searches, as jurisprudential, democratic, and educational values all counsel in favor of an individualized-suspicion requirement.

## I. THE WASHINGTON CONSTITUTION PROVIDES BROADER SEARCH-AND-SEIZURE PROTECTIONS THAN THE FOURTH AMENDMENT

### A. *The Fourth Amendment's Prohibition on Unreasonable Searches Allows Many Warrantless Searches*

The Fourth Amendment of the U.S. Constitution contains two different clauses. The Search Clause guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]”<sup>2</sup> The Warrant Clause commands that “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.”<sup>3</sup>

A search occurs if a state actor intrudes upon an individual's “actual (subjective) expectation of privacy,” where that expectation is one that

---

2. U.S. CONST. amend. IV.

3. *Id.*

“society is prepared to recognize as ‘reasonable.’”<sup>4</sup> A search occurs only if both conditions are present.<sup>5</sup>

There is disagreement, however, about how to evaluate whether a search satisfies the reasonableness requirement of the Fourth Amendment. The Supreme Court has historically interpreted the guarantees of the Search Clause in the context of the Warrant Clause.<sup>6</sup> Under this view, the U.S. Constitution requires that law-enforcement officers have a warrant authorizing a search in order to satisfy the reasonableness requirement.<sup>7</sup> As the Court emphasized in its landmark *Katz v. United States*<sup>8</sup> decision, a search conducted “without prior approval by judge or magistrate, [is] *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>9</sup>

Another school of thought views the Warrant Clause as delineating the requirements for a warrant, not the bounds of reasonableness.<sup>10</sup> This perspective argues that the ultimate measure of the constitutionality of a government search, therefore, is “reasonableness.”<sup>11</sup> The Court appears to have adopted this approach recently, divorcing its search analysis from the Warrant Clause.<sup>12</sup> In *Samson v. California*,<sup>13</sup> for example, the

4. *Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990). *See also* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Knotts*, 460 U.S. 276, 281 (1983); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This definition applies to state as well as federal authorities, because *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), made Fourth Amendment strictures applicable to the states.

5. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) (holding that dog sniffs for drugs are not searches, because they can detect only contraband, and society does not recognize a subjective privacy interest in contraband as reasonable); *Smith*, 442 U.S. at 742–43 (holding that installation of a pen register is not a search, because people have no subjective expectation of privacy in information (i.e., phone numbers dialed) that they convey to the phone company).

6. *See* Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 20–21 (1994) (arguing that the “warrant clause informs the judiciary of the type of search that is reasonable . . .”).

7. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994).

8. 389 U.S. 347 (1967).

9. *Id.* at 357 (footnote omitted).

10. *See* Amar, *supra* note 7, at 762 (positing that the reasonableness clause requires that all searches be reasonable while the warrant clause “addresses the narrower issue of warrants.”).

11. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995); *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), *overruled on other grounds by* *Chimel v. California*, 395 U.S. 752 (1969).

12. *See* *Atwater v. City of Lago Vista*, 532 U.S. 318, 360 (2001) (“The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular

Court explained its “general Fourth Amendment approach” without once referring to the Warrant Clause.<sup>14</sup> Instead, it applied a reasonableness balancing test,<sup>15</sup> “examin[ing] the totality of the circumstances” and “assessing, on the one hand, the degree to which [the search] intrudes upon the individual’s privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>16</sup> Using this test, the Court upheld the suspicionless search of a parolee in good standing, concluding that the government’s “‘overwhelming interest’ in supervising parolees”<sup>17</sup> outweighed the parolee’s “severely diminished expectations of privacy,” which exist “by virtue of their status alone.”<sup>18</sup>

Extending its balancing-test jurisprudence, the Court established a “special needs” category of searches. Under this exception to the warrant requirement, a law-enforcement official may conduct searches without a warrant or probable cause when (1) a special need for the search beyond ordinary law enforcement exists, and (2) obtaining a warrant or establishing probable cause would be impractical.<sup>19</sup> If both requirements are met, the Court employs the same balancing test articulated in *Samson*. The Court has used special-needs balancing to sanction suspicionless-search programs in several cases. For example, the Court has approved the suspicionless drug testing of customs officials, based on the “special need” of “deter[ring] drug use among those eligible for promotion to sensitive positions . . . .”<sup>20</sup> The Court also sanctioned

---

governmental invasion of a citizen’s personal security.”) (internal quotations and citations omitted); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (describing a “general touchstone of reasonableness which governs Fourth Amendment analysis”); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”).

13. 547 U.S. 843 (2006).

14. *Id.* at 848 (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)).

15. The Court first articulated its balancing test in *Camara v. Municipal Court*, 387 U.S. 523 (1967), which applied Fourth Amendment restrictions to administrative searches. The Court expanded the reach of the balancing test to the criminal search-and-seizure context in *Terry v. Ohio*, 392 U.S. 1 (1968). JOSHUA DRESSLER & ALAN C MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 277 (4th ed. 2006); *see also* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 229 (4th ed. 2004) (describing a “*Camara* balancing test” and arguing that a theoretical basis for it “did not clearly emerge until the Supreme Court’s decision in *Camara*[.]”).

16. *Samson*, 547 U.S. at 848 (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)).

17. *Id.* at 853.

18. *Id.* at 852, 854–56.

19. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

20. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989).

random drunk-driving checkpoints, as they addressed the special danger that drunk driving poses to community safety.<sup>21</sup> In short, the Fourth Amendment’s reasonableness requirement has allowed for searches based on reasonableness balancing and, in certain circumstances, special-needs rather than strict adherence to the warrant and probable cause standard.

*B. Article I, Section 7 Provides Broader Search Protections and Presumes that All Searches Require Warrants*

Washington courts have not always consistently applied Section 7 when deciding search-and-seizure cases. Section 7 entered a period of dormancy after 1961’s *Mapp v. Ohio*,<sup>22</sup> which made Fourth Amendment protections applicable to the states through the Due Process Clause.<sup>23</sup> Effectively, Fourth Amendment law provided such a high bar of rights that Washington courts generally did not analyze their own constitution’s protections during this period.<sup>24</sup> However, when the pendulum swung the other way and Fourth Amendment rights were cut back under the Burger<sup>25</sup> and Rehnquist Courts,<sup>26</sup> Washington courts reasserted an independent reading of Section 7.<sup>27</sup>

---

21. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000) (fitting *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990), into the special-needs framework by describing the city’s drug interdiction checkpoints as designed to address the “immediate hazard posed by . . . drunk drivers” and *not* aimed at “detect[ing] evidence of ordinary criminal wrongdoing”).

22. 367 U.S. 643 (1961).

23. See George R. Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331, 332 (1985) (commenting on the effect on Section 7 of *Mapp*, 367 U.S. at 655 (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”)).

24. Nock, *supra* note 23, at 332; see also *State v. Ringer*, 100 Wash. 2d 686, 698–99, 674 P.2d 1240, 1247 (1983) (describing the Supreme Court of Washington’s neglect of Section 7 in favor of Fourth Amendment protections).

25. See, e.g., *United States v. Ross*, 456 U.S. 798, 820–21, 824 (1982) (holding that probable cause to believe a vehicle contains contraband justifies warrantless search of any area of the vehicle where such contraband is likely to be found); *New York v. Belton*, 453 U.S. 454, 460–61 (1981) (holding that lawful arrest of the former occupants of a vehicle justifies search of entire passenger compartment including closed containers and glove box); *United States v. Salvucci*, 448 U.S. 83, 88–90, 95 (1980) (creating Fourth Amendment standing doctrine); *Michigan v. DeFillippo*, 443 U.S. 31, 39–40 (1979) (allowing evidence from a search pursuant to a statute later found to be unconstitutionally vague).

26. See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (allowing warrantless search anywhere in a vehicle where there is probable cause to believe it contains contraband or evidence); *Whren v. United States*, 517 U.S. 806, 812–13 (1996) (holding that a pretextual traffic stop does not violate the Fourth Amendment); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451–53

Today, Section 7 is broadly acknowledged to provide greater protections than the Fourth Amendment. Indeed, many Section 7 protections were developed as specific reactions to federal cases that restricted Fourth Amendment guarantees.<sup>28</sup> Independent analysis is now so well established that courts forego the typical analysis required to determine if a state-constitutional provision offers greater protection than its federal counterpart.<sup>29</sup>

The text of Section 7 stands in fairly significant contrast to the Fourth Amendment. It provides, in its entirety, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>30</sup> Unlike the Fourth Amendment, which has a Search Clause that requires reasonableness and a Warrant Clause that requires probable cause, Section 7 provides a single guarantee: no disturbances of private affairs without authority of law. This different wording and structure have required different interpretive paradigms that, in turn, provide greater individual protections in certain circumstances.<sup>31</sup>

---

(1990) (finding suspicionless drunk-driving checkpoints did not violate the Fourth Amendment where all drivers were stopped and officer discretion was limited by the program).

27. See Nock, *supra* note 23, at 333, 352.

28. Compare *State v. Simpson*, 95 Wash. 2d 170, 181, 622 P.2d 1199, 1206 (1980) (interpreting Section 7 to confer automatic standing), with *United States v. Salvucci*, 448 U.S. 83, 88–90, 95 (1980) (creating Fourth Amendment standing doctrine); compare also *State v. White*, 97 Wash. 2d 92, 104, 640 P.2d 1061, 1068 (1982) (excluding evidence from a search pursuant to a statute later found “flagrantly unconstitutional in its vagueness”), with *Michigan v. DeFillippo*, 443 U.S. 31, 39–40 (1979) (allowing evidence from a search pursuant to a statute later found unconstitutionally vague); compare also *State v. Ringer*, 100 Wash. 2d 686, 700–03, 674 P.2d 1240, 1248–50 (1983) (disapproving warrantless car searches after drivers have exited the vehicles and have been lawfully arrested outside of the vehicles), with *United States v. Ross*, 456 U.S. 798, 820–21, 824 (1982) (holding probable cause to believe a vehicle contains contraband justifies warrantless search of any area of the vehicle where such contraband is likely to be found), and *New York v. Belton*, 453 U.S. 454, 460–61 (1981) (holding that lawful arrest of the former occupants of a vehicle justifies search of entire passenger compartment, including closed containers and glove box).

29. *State v. Rankin*, 151 Wash. 2d 689, 694, 92 P.3d 202, 204–05 (2004); *State v. McKinney*, 148 Wash. 2d 20, 26, 60 P.3d 46, 48–49 (2002); *State v. Ladson*, 138 Wash. 2d 343, 347–48, 979 P.2d 833, 837 (1999).

30. WASH. CONST. art. I, § 7.

31. See *McKinney*, 148 Wash. 2d at 26, 60 P.3d at 48–49 (stating that it is settled that Section 7 is both qualitatively different and provides greater protections than the Fourth Amendment in certain circumstances); *Ladson*, 138 Wash. 2d at 348–49, 979 P.2d at 837 (stating that it is well established that Section 7 has broader application than the Fourth Amendment); *State v. Myrick*, 102 Wash. 2d 506, 510, 688 P.2d 151, 153 (1984) (remarking that Section 7’s unique language provides greater protections than the Fourth Amendment); *State v. Chrisman*, 100 Wash. 2d 814, 818, 676 P.2d 419, 422 (1984) (stating that the unique language of Section 7 allows Washington courts to provide heightened protections against searches and seizures); see also *State v. Jackson*, 102 Wash. 2d 432, 436–39, 688 P.2d 136, 139–41 (1984) (applying the *Aguilar-Spinelli* test for assessing probable

Washington’s search-and-seizure analytical framework is now well established. Washington courts first inquire whether a state actor has invaded a citizen’s private affairs.<sup>32</sup> If so, they ask: Did the state actor have authority of law for that invasion?<sup>33</sup>

Section 7’s “private affairs” language gives Washington citizens greater protection than the Fourth Amendment. Under the Fourth Amendment, a search occurs only if a state agent invades a subjective privacy expectation that was objectively reasonable.<sup>34</sup> The Washington test, on the other hand, focuses on “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”<sup>35</sup> The difference is significant because Section 7 protections are “not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.”<sup>36</sup>

If a Washington court determines that a private interest or affair is implicated, it turns to the second analytical step: determining whether that disturbance was sanctioned by “authority of law.”<sup>37</sup> The Supreme Court of Washington has interpreted “authority of law” to express a strong preference for a warrant, stating that while “a Fourth Amendment analysis hinges on whether a warrantless seizure is reasonable . . . an article I, section 7 analysis hinges on whether a seizure is permitted by ‘authority of law’—in other words, a warrant.”<sup>38</sup> Unlike the Fourth Amendment, Section 7 contains no textual basis to allow searches based on a reasonableness balancing test, as the Section 7 default requires

---

cause based on an informant’s tips despite the Supreme Court’s abandonment of the test in *Illinois v. Gates*, 462 U.S. 213 (1983); *Ringer*, 100 Wash. 2d at 698–99, 674 P.2d at 1247 (departing from the Fourth Amendment standard for the search-incident-to-arrest exception to the warrant requirement); *Simpson*, 95 Wash. 2d at 178–79, 622 P.2d at 1205 (finding “ample basis for interpreting Const. art. 1, § 7 as more protective than the federal constitution”).

32. *McKinney*, 148 Wash. 2d at 27, 60 P.3d at 49; *City of Seattle v. McCready*, 123 Wash. 2d 260, 270, 868 P.2d 134, 139 (1994); *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 153–54.

33. *McCready*, 123 Wash. 2d at 270, 868 P.2d at 139.

34. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 741–43 (1979) (holding that installation of a pen register is not a search, because people have no subjective expectation of privacy in information (i.e., phone numbers dialed) that they convey to the phone company).

35. *Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154.

36. *Id.*

37. *McCready*, 123 Wash. 2d at 270, 868 P.2d at 139.

38. *State v. Hatchie*, 161 Wash. 2d 390, 397, 166 P.3d 698, 702–03 (2007); *see also York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 306, 178 P.3d 995, 1001 (2008).



authority of law.<sup>39</sup> Indeed, Section 7 “poses an almost absolute bar to warrantless arrests, searches and seizures, with only limited exceptions . . . .”<sup>40</sup> Furthermore, the Supreme Court of Washington has recognized fewer exceptions to the warrant requirement than the U.S. Supreme Court,<sup>41</sup> and it draws those exceptions more narrowly.<sup>42</sup>

## II. THE FOURTH AMENDMENT APPLIES TO SCHOOLS AND ALLOWS SUSPICIONLESS DRUG TESTING

### A. *In New Jersey v. T.L.O., the U.S. Supreme Court Applied the Fourth Amendment to Searches of Students by School Officials, but Departed from the Probable Cause and Warrant Requirements*

The U.S. Supreme Court first faced the issue of whether the Fourth Amendment applies to school officials in *New Jersey v. T.L.O.*<sup>43</sup> A high-school teacher discovered two students smoking in a school bathroom and took them to see Assistant Vice Principal Theodore Choplick.<sup>44</sup> One of the students, T.L.O., not only denied that she had been smoking, but also insisted that she did not smoke at all.<sup>45</sup> Choplick demanded to see the contents of her purse.<sup>46</sup> Inside the purse he discovered a pack of

---

39. WASH. CONST. art. I, § 7; see also *Hatchie*, 161 Wash. 2d at 397, 166 P.3d at 702–03; *York*, 163 Wash. 2d at 331 n.25, 178 P.3d at 1014 n.3 (Johnson, J.M., J., concurring) (“The Washington Constitution is notably not based on a reasonableness standard . . . .”); Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 462 (2008) (noting that Section 7 does not include reasonableness and probable-cause requirements).

40. *State v. Ringer*, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983).

41. Compare *State v. Ladson*, 138 Wash. 2d 343, 349, 979 P.2d 833, 838 (1999) (listing six exceptions to the warrant requirement—consent, exigent circumstances, incident to arrest, inventories, plain view, and investigatory stops) (citing Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. PUGET SOUND L. REV. 411, 528–80 (1988)), with *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in judgment) (“[T]he ‘warrant requirement’ [has] become so riddled with exceptions that it [is] basically unrecognizable . . . .”) (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985), which lists more than twenty exceptions to the warrant requirement).

42. See, e.g., *State v. Thompson*, 151 Wash. 2d 793, 802–03, 92 P.3d 228, 232–33 (2004) (limiting scope of community caretaking function); *State v. White*, 135 Wash. 2d 761, 770–71, 958 P.2d 982, 987 (1998) (limiting inventory searches of automobiles to unlocked compartments); *State v. Chrisman*, 100 Wash. 2d 814, 821–22, 676 P.2d 419, 424 (1984) (limiting scope of search incident to arrest).

43. 469 U.S. 325, 328 (1985).

44. *Id.*

45. *Id.*

46. *Id.*

cigarettes and cigarette rolling papers, which he associated with marijuana use.<sup>47</sup> Suspecting that a more thorough search would yield evidence of drug use, he searched the purse more completely and found marijuana, a pipe, plastic bags, and forty dollars, mostly in one-dollar bills.<sup>48</sup> Choplick then opened a zippered compartment, where he found a list of students who owed T.L.O. money and two letters implicating her in selling marijuana.<sup>49</sup> He called T.L.O.'s mother and gave the evidence to the police.<sup>50</sup>

The Court held that the Fourth Amendment applies to school officials because, as state officials, they could not claim the immunity from Fourth Amendment strictures that parents enjoy when disciplining their children.<sup>51</sup> It did not impose the warrant and probable-cause requirements, however, because these requirements would hamper the quick maintenance of school order<sup>52</sup> and require teachers to “school[] themselves in the niceties of probable cause . . . .”<sup>53</sup>

Instead, the Court started its analysis with what it identified as the “fundamental command of the Fourth Amendment”: “that searches and seizures be reasonable.”<sup>54</sup> While “both . . . probable cause and . . . a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.”<sup>55</sup> The Court applied a balancing test to evaluate reasonableness, weighing “the schoolchild’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place . . . .”<sup>56</sup> The Court held that a school search is reasonable where a school official has reasonable grounds for suspecting a search will yield evidence of wrongdoing, and the search measures are related to the object of the search and are not excessively invasive.<sup>57</sup> The Court refused to decide

---

47. *Id.*

48. *Id.* See also *State In Interest of T.L.O.*, 463 A.2d 934, 936 (N.J. 1983) (“The purse also contained \$40, most of it in one-dollar bills.”).

49. *T.L.O.*, 469 U.S. at 328.

50. *Id.*

51. *Id.* at 336–37.

52. *Id.* at 340.

53. *Id.* at 343.

54. *Id.* at 340.

55. *Id.* (internal citations omitted).

56. *Id.*

57. *Id.* at 341–42.

whether individual suspicion was necessary for a reasonableness finding.<sup>58</sup>

Choplick's search of T.L.O. was found to be reasonable because the teacher's report that T.L.O. had been smoking gave Mr. Choplick a reasonable suspicion that T.L.O. had cigarettes, and "her purse was the obvious place in which to find them."<sup>59</sup> The discovery of rolling papers provided a reasonable basis to search for other evidence of marijuana use, a conclusion T.L.O. did not dispute.<sup>60</sup> Choplick's subsequent discovery of a pipe, plastic bags, marijuana, and money also made it reasonable to open the zippered compartment in T.L.O.'s purse and read her letters.<sup>61</sup>

Justice Blackmun concurred in the judgment but was troubled by the Court's apparent drift towards applying the balancing test as a rule, rather than as an exception.<sup>62</sup> For Justice Blackmun, the only thing that justified using the balancing test, instead of the warrant and probable cause requirement, was that "the elementary and secondary school setting presents a *special need* for flexibility justifying a departure from the balance struck by the Framers."<sup>63</sup>

Justice Brennan, joined by Justice Marshall, dissented. He took exception to the majority's emphasis on reasonableness, which "jettison[ed] the probable-cause standard—the only one that finds support in the text of the Fourth Amendment."<sup>64</sup> Relying on reasonableness alone, he argued, was a departure that "finds support neither in precedent nor policy."<sup>65</sup> Justice Brennan held fast to the view that the reasonableness clause is informed by the warrant and probable cause requirements. He argued that "[f]or all . . . but narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that [searches and] seizures are 'reasonable' only if supported by probable cause."<sup>66</sup>

---

58. *Id.* at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976)).

59. *Id.* at 345–46.

60. *Id.* at 347.

61. *Id.*

62. *Id.* at 352 (Blackmun, J., concurring).

63. *Id.* at 351–52 (Blackmun, J., concurring) (emphasis added).

64. *Id.* at 357–58 (Brennan, J., dissenting).

65. *Id.* at 358 (Brennan, J., dissenting).

66. *Id.* at 359 (Brennan, J., dissenting) (quoting *Dunaway v. New York*, 442 U.S. 200, 214 (1979)).

Brennan also faulted the reasonableness balancing test itself, describing it as “Rohrschach-like”<sup>67</sup> and “amorphous,”<sup>68</sup> with little capacity to constrain judicial decision-making.<sup>69</sup> He warned of a “conceptual free-for-all” should “an unguided balancing test [be] used to assess specific categories of searches.”<sup>70</sup> For Justice Brennan, the balancing test was merely a way of “reaching a predetermined conclusion acceptable to this Court’s impressions of what authority teachers need . . . .”<sup>71</sup>

*B. The U.S. Supreme Court Has Applied Special-Needs Balancing to School Searches to Allow Suspicionless Drug Testing*

The Court next considered the Fourth Amendment’s application to searches of students in *Vernonia School District v. Acton*.<sup>72</sup> Drug use had not historically been a problem in the Vernonia schools.<sup>73</sup> In the mid- to late-1980s, however, teachers and administrators noticed a marked increase in drug use and disciplinary problems.<sup>74</sup> Students were “in a state of rebellion . . . fueled by alcohol and drug abuse . . . .”<sup>75</sup> School District administrators were particularly concerned about student-athlete drug use because the athletes were leaders of the student drug culture and drug use also increased their “risk of sports-related injury.”<sup>76</sup> The District tried education-based deterrence efforts, but drug use continued.<sup>77</sup> Finally, the District called a parental input meeting to consider a proposed drug-testing policy, which the attendees unanimously supported.<sup>78</sup>

The District’s mandatory drug-testing policy applied to all students participating in interscholastic athletics.<sup>79</sup> Athletes were tested once at

---

67. *Id.* at 358 (Brennan, J., dissenting).

68. *Id.* at 359 (Brennan, J., dissenting).

69. *See id.* at 357–58, 360, 367 (Brennan, J., dissenting).

70. *Id.* at 360 (Brennan, J., dissenting).

71. *Id.* at 367 (Brennan, J., dissenting).

72. 515 U.S. 646 (1995).

73. *Id.* at 648.

74. *Id.* at 648–49 (1995).

75. *Id.* at 649.

76. *Id.*

77. *Id.* at 649 (noting that the School District offered classes, speakers, and presentations in an attempt to deter drug use).

78. *Id.* at 649–50.

79. *Id.* at 650.

the beginning of the season.<sup>80</sup> During the season, they could be tested again if their name was drawn in a weekly random drawing.<sup>81</sup> Male athletes produced a sample at a urinal with a monitor standing ten to fifteen feet behind them.<sup>82</sup> Females urinated into a specimen cup while inside a closed bathroom stall, with the monitor outside listening for sounds of urination.<sup>83</sup> After receiving samples from the children, monitors checked them for temperature and signs of tampering before submitting them to an independent laboratory for testing.<sup>84</sup>

In 1991, James Acton, a seventh grader at a Vernonia School District school, signed up to play football.<sup>85</sup> He and his parents refused to consent to drug testing, so he was told he could not join the team.<sup>86</sup> Acton and his parents sued the school district, arguing that the program violated his Fourth Amendment rights.<sup>87</sup>

The Court applied the same balancing test it had used in *T.L.O.* and upheld the testing regime.<sup>88</sup> The Court found that students generally enjoy a “lesser expectation of privacy,”<sup>89</sup> and that athletes, specifically, had a further diminished privacy expectation because they shower and change communally and subject themselves to a higher degree of regulation.<sup>90</sup> The Court described the alleged invasion of this diminished privacy expectation as “not significant”<sup>91</sup> because, when producing a sample, male students remained clothed, while females were in stalls, and because the urinalysis results were disclosed “to a limited class of school personnel.”<sup>92</sup>

The Court balanced this invasion against the “important—indeed perhaps compelling” governmental interest in deterring student drug use.<sup>93</sup> Deterrence was particularly important because of the special need

---

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 651.

87. *Id.*

88. *See id.* at 652–57.

89. *Id.* at 657 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)).

90. *Id.* at 657.

91. *Id.* at 660.

92. *Id.* at 658.

93. *Id.* at 661.

to maintain order in schools, promote the learning process, and prevent the harmful effects of drug use, which are more severe on developing bodies and nervous systems.<sup>94</sup> The Court also agreed that it was rational to focus on student-athletes, not only because of “the ‘role model’ effect of athletes’ drug use,”<sup>95</sup> but also because “the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”<sup>96</sup> Like in *T.L.O.*, the Court found that requiring a warrant or probable cause would interfere with quickly maintaining school order.<sup>97</sup>

Seven years later, in *Board of Education of Independent School District of Pottawatomie County v. Earls*,<sup>98</sup> the Court upheld suspicionless drug testing for all student participants in extracurricular activities. The Court deemed the diminished privacy interests of student-athletes that supported testing in *Acton* to be “not essential” to that decision.<sup>99</sup> As for the drug problem, the local school superintendent “repeatedly described [it] as ‘not . . . major.’”<sup>100</sup> Nevertheless, the *Earls* Court declared that the immediacy and role of athletes in the drug problem noted in *Acton* were “not essential to the holding.”<sup>101</sup>

### III. WASHINGTON COURTS HAVE ALWAYS REQUIRED INDIVIDUALIZED SUSPICION FOR SCHOOL SEARCHES

#### A. *The Supreme Court of Washington Applied the Reasonable Suspicion Standard to School Searches in 1977*

The Supreme Court of Washington confronted school searches in *State v. McKinnon*,<sup>102</sup> decided eight years before *T.L.O.* In 1977, the issue had split state high courts across the country.<sup>103</sup> The *McKinnon* majority, like several federal and state courts, applied a standard that

---

94. *Id.* at 661–62.

95. *Id.* at 663.

96. *Id.* at 662.

97. *Id.* at 653.

98. 536 U.S. 822 (2002).

99. *Id.* at 831.

100. *Id.* at 843 (Ginsburg, J., dissenting).

101. *Id.* at 838.

102. 88 Wash. 2d 75, 558 P.2d 781 (1977).

103. See Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, BYU EDUC. & L.J., Winter 1999, at 71, 94 (describing disparate approaches to the applicability of the Fourth Amendment to school searches across state and federal courts).

resembled that which the *T.L.O.* Court would later develop: applying the Fourth Amendment to school officials as state actors, but requiring only reasonable suspicion for a valid search.<sup>104</sup> Some state high courts, on the other hand, had held that the Fourth Amendment did not apply to school officials because they act in loco parentis with their authority derived from parents and not the state.<sup>105</sup>

In *McKinnon*, an informant told the Snoqualmie, Washington police chief that two students, Raymond Yates and Walter McKinnon, were selling amphetamines and identified the pockets where they kept the drugs.<sup>106</sup> The chief of police telephoned the local high-school principal with the information.<sup>107</sup> The principal escorted Yates into his office, while the vice-principal took McKinnon into his own office.<sup>108</sup> At the principal's direction, Yates emptied his pockets—except the one the informant had identified as containing the drugs.<sup>109</sup> The principal reached inside that pocket and removed two packets of white pills.<sup>110</sup> He then proceeded to the vice principal's office where he reached into McKinnon's pocket, again finding white pills where the informant said they would be.<sup>111</sup> The principal called the police chief, who arrested both students.<sup>112</sup>

Although the *McKinnon* court purported not to decide whether a school official was a state actor for Fourth Amendment purposes,<sup>113</sup> the court nevertheless applied a Fourth Amendment analysis when considering the lawfulness of the principal's search. The court held that a search was reasonable under the Fourth Amendment where a school

---

104. *McKinnon*, 88 Wash. 2d at 81, 558 P.2d at 784; *see also* Heder, *supra* note 103, at 94 (citing *Tarter v. Raybuck*, 742 F.2d 977, 981 (6th Cir. 1984); *Bilbrey v. Brown*, 738 F.2d 1462, 1466 (9th Cir. 1984); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982); *Bellnier v. Lund*, 438 F. Supp. 47, 53 (N.D.N.Y. 1977)).

105. Heder, *supra* note 103, at 94 (citing *D.R.C. v. State*, 646 P.2d 252, 260 (Alaska Ct. App. 1982); *In re Thomas G.*, 90 Cal. Rptr. 361, 363–64 (Cal. Ct. App. 1970); *In re Donaldson*, 75 Cal. Rptr. 220, 222 (Cal. Ct. App. 1969); *R.C.M. v. State*, 660 S.W.2d 552, 553–54 (Tex. App. 1983); *Mercer v. State*, 450 S.W.2d 715, 717 (Tex. App. 1970)).

106. *McKinnon*, 88 Wash. 2d at 77, 558 P.2d at 782.

107. *Id.*

108. *Id.*

109. *Id.* at 77, 558 P.2d at 782–83.

110. *Id.* at 77, 558 P.2d at 783.

111. *Id.*

112. *Id.* at 78, 558 P.2d at 783.

113. *Id.*

official has reasonable grounds to believe the search is necessary to maintain school order.<sup>114</sup>

The court identified six factors to consider when determining whether a school official had reasonable grounds to search a student: “the child’s age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.”<sup>115</sup> Thus, the court still evaluated individual circumstances when determining if a school search was justified, but did not explicitly decide whether the new rule required individualized suspicion.

*B. Kuehn v. Renton School District Emphasized that School Searches Require Individualized Suspicion of Wrongdoing*

In *Kuehn v. Renton School District*,<sup>116</sup> decided only four days before *T.L.O.*, the Supreme Court of Washington squarely confronted the issue of individualized suspicion in the school context. *Kuehn* dealt with a high school’s mandatory pre-departure luggage search policy for school music ensemble trips. Although the trips were not required, they were considered the highlight of the music ensemble year.<sup>117</sup> The school implemented the policy after two students were found with liquor in their hotel rooms during a trip to Astoria, Oregon.<sup>118</sup>

High-school senior Adam Kuehn and his parents objected to a search prior to a music trip to Vancouver, Canada.<sup>119</sup> They tried and failed to negotiate a compromise with the school so he would not miss the group’s trip.<sup>120</sup> Kuehn arrived on the day of the trip with a locked suitcase and a note from his mother saying that she had checked his baggage, that it contained nothing illegal, and that Kuehn wanted only

---

114. *Id.* at 81, 558 P.2d at 784.

115. *Id.* at 81, 558 P.2d at 785.

116. 103 Wash. 2d 594, 694 P.2d 1078 (1985).

117. Brief of Respondent at 2, *Kuehn v. Renton Sch. Dist.*, 103 Wash. 2d 594, 694 P.2d 1078 (1985) (No. 49873-3).

118. *Kuehn*, 103 Wash. 2d at 596, 694 P.2d at 1079.

119. *Id.*

120. *Id.*



customs officials to search it.<sup>121</sup> Kuehn was barred from participating in the trip.<sup>122</sup>

Kuehn and his parents filed a civil-rights claim under 42 U.S.C. § 1983 alleging that the school's policy had violated Kuehn's Fourth Amendment rights. They also asserted violations of Kuehn's rights under Section 7.<sup>123</sup> The family focused on the fact that Kuehn had done nothing to arouse any suspicion of wrongdoing, arguing that "[t]he absence of suspicion individually focused on plaintiff (or any of his classmates) is fatal to defendants' effort to establish that its mass search policy is reasonable."<sup>124</sup> The School District argued that the suspicionless search of Kuehn's luggage met the *McKinnon* standard because "minors consuming alcohol while on a Tour with other band members, parents and teachers is highly disruptive of school discipline and order."<sup>125</sup> Because the purpose of the search was not criminal investigation, the District argued, individualized suspicion was not necessary.<sup>126</sup>

The court took pains to delineate a requirement of individual suspicion for school searches.<sup>127</sup> In the court's view, the factors prescribed in *McKinnon* for determining whether a search was based on a reasonable belief "evidence the requirement of individualized suspicion."<sup>128</sup> The "statistical probability that someone [in a group] will have contraband in his possession" could not satisfy that requirement.<sup>129</sup> Rather, "[t]he Fourth Amendment demands more than a generalized probability; it requires that the suspicion be particularized with respect to each *individual* searched."<sup>130</sup> The court was absolute with respect to its view of searches lacking individual suspicion: "In the absence of individualized suspicion of wrongdoing, the search is a general search. We never authorize general, exploratory searches."<sup>131</sup> Because the

---

121. *Id.* at 596, 694 P.2d at 1079–80.

122. *Id.* at 596, 694 P.2d at 1080.

123. *Id.*

124. Brief of Appellants at 24, *Kuehn v. Renton Sch. Dist.*, 103 Wash. 2d 594, 694 P.2d 1078 (1985) (No. 49873-3).

125. Brief of Respondents, *supra* note 117, at 31 (internal quotation marks omitted).

126. *Id.* at 30.

127. *See Kuehn*, 103 Wash. 2d at 598–99, 694 P.2d at 1080–81.

128. *Id.* at 599, 694 P.2d at 1081.

129. *Id.*

130. *Id.* (emphasis added).

131. *Id.* (internal citation and quotation marks omitted).

school officials had no reason to believe they would find anything in Kuehn's baggage, the search violated his Fourth Amendment rights.<sup>132</sup>

While Kuehn alleged violations of both the Fourth Amendment and Section 7, the court characterized his claim as arising from a deprivation of a federal right.<sup>133</sup> As such, the court focused almost exclusively on violations of the Fourth Amendment. Even so, the case was decided during the beginnings of the section's independent interpretation, and the Kuehns' brief had provided a separate analysis of Section 7.<sup>134</sup> The court accepted the invitation. Its analysis concludes that "[t]he general search is anathema to Fourth Amendment *and Const. art. 1 § 7 protections*, and except for the most compelling situations, should not be countenanced."<sup>135</sup>

*C. Since Kuehn, Washington Appellate Courts Have Upheld School Searches Only When Based on Individualized Suspicion*

The first post-*Kuehn* case to examine school searches, *State v. Brooks*,<sup>136</sup> upheld a locker search because it was based on reasonable suspicion of wrongdoing. School officials received a tip that Steve Brooks was selling marijuana out of a blue metal box in a locker.<sup>137</sup> When school officials opened the locker, they found the blue box, which they could not open.<sup>138</sup> They removed Brooks from class and told him to open the box or they would call the police.<sup>139</sup> He opened it to reveal hallucinogenic mushrooms, which he admitted he had been selling to students.<sup>140</sup> School officials then called the police, who arrested Brooks.<sup>141</sup>

The court upheld the search under both the Fourth Amendment and Section 7. The court understood both *T.L.O.* and *McKinnon* to establish a reasonable-grounds predicate for school searches.<sup>142</sup> Accordingly, the

---

132. *Id.* at 599–600, 694 P.2d at 1081.

133. *See id.* at 598, 694 P.2d at 1080 (“This action arises under 42 U.S.C. § 1983.”).

134. Brief of Appellants, *supra* note 124, at 40–42.

135. *Id.* at 601–02, 694 P.2d at 1082 (emphasis added).

136. 43 Wash. App. 560, 718 P.2d 837 (1986).

137. *Id.* at 561, 718 P.2d at 837.

138. *Id.* at 562, 718 P.2d at 838.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 567–68, 718 P.2d at 840–41.

court concluded that “article 1, section 7 affords students no greater protections from searches by school officials than is guaranteed by the Fourth Amendment.”<sup>143</sup> Under the *T.L.O.* standard, the court found “there were reasonable grounds for the school officials to suspect that the search would turn up evidence that Brooks had violated or was violating either the law or the rules of the school.”<sup>144</sup>

The next school-search case, *State v. Slattery*,<sup>145</sup> also involved a school official who had reason to suspect a student of selling drugs at school. Vice Principal Sterling Thurston received reports that Mike Slattery was selling marijuana and had been involved with drugs.<sup>146</sup> Thurston called Slattery into his office and demanded that he empty his pockets, which revealed \$230 in cash and a pager number—both of which Thurston associated with drug dealing.<sup>147</sup> Thurston called a security officer, who searched Slattery’s locker, found nothing and then moved on to Slattery’s car.<sup>148</sup> Slattery initially refused the car search,<sup>149</sup> but acquiesced after he spoke with his mother on the phone.<sup>150</sup> In the car, the security officer found a pager and a notebook with names and dollar amounts. He proceeded to search the locked trunk and discovered a locked briefcase.<sup>151</sup> Slattery denied owning the briefcase or knowing the combination.<sup>152</sup> The security officer pried it open and discovered 80.2 grams of marijuana.<sup>153</sup> Slattery was charged and convicted for possession with intent to distribute marijuana.<sup>154</sup>

A Washington appellate court concluded that the school officials had reasonable grounds to search Slattery’s person, car, and briefcase.<sup>155</sup> The informant’s tip, Slattery’s reputation for drug problems, his possession of a large amount of cash, and a pager number “reasonably could lead

---

143. *Id.* at 568, 718 P.2d at 841.

144. *Id.* at 565, 718 P.2d at 839.

145. 56 Wash. App. 820, 787 P.2d 932 (1990).

146. *Id.* at 822, 787 P.2d at 933.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 825–26, 787 P.2d at 934–35.

the principal to expect to find drugs in appellant's possession."<sup>156</sup> When school officials did not find drugs on his person, "they logically went outside to search his car . . . ."<sup>157</sup> The *McKinnon* factors also supported a reasonableness finding.<sup>158</sup> The court did not separately analyze the warrantless entry of the briefcase.

Finally, in *State v. B.A.S.*,<sup>159</sup> an appellate court held that school officials must have reason to suspect a student of a particular violation, and that there must be a correlation between the suspected violation and the scope of the search. The local school had a policy that prohibited students from leaving the school, including trips to the parking lot, during school hours.<sup>160</sup> Under the policy, a violation was grounds for a search.<sup>161</sup> A school-attendance officer, David Halford, discovered B.A.S. and three other students twenty feet from the parking lot.<sup>162</sup> Halford believed that B.A.S. had been in a nearby field, as the bottom of his pants were wet, while the parking lot was dry.<sup>163</sup> Halford also checked with the school's records and discovered that B.A.S. was missing class.<sup>164</sup> In order to determine if B.A.S. had any prohibited items, Halford asked him to empty his pockets, which contained a black case with plastic bags of marijuana inside.<sup>165</sup>

The court acknowledged that Halford had reason to suspect B.A.S. of leaving campus during school hours, but not to suspect B.A.S. of the particular behavior for which he was searching—possessing contraband.<sup>166</sup> Indeed, "there was no evidence . . . of a correlation between a student's violation of the closed campus policy and a likelihood he or she is bringing contraband onto campus."<sup>167</sup> While the court noted that a school could punish a student for breaking a rule, it

---

156. *Id.* at 825, 787 P.2d at 934–35.

157. *Id.* at 826, 787 P.2d at 935.

158. *Id.* at 825–26, 787 P.2d at 934–35.

159. 103 Wash. App. 549, 13 P.3d 244 (2000).

160. *Id.* at 551, 13 P.3d 245.

161. *Id.* at 551–52, 13 P.3d at 245.

162. *Id.* at 552, 13 P.3d at 245.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 554, 13 P.3d at 246–47.

167. *Id.* at 554, 13 P.3d at 246.

held that “violating that rule without more does not warrant an automatic search.”<sup>168</sup>

#### IV. YORK STRUCK DOWN A SUSPICIONLESS DRUG-TESTING PROGRAM BUT DID NOT PRODUCE A MAJORITY OPINION

##### A. *Two Families Challenged the Wahkiakum County School District’s Mandatory Suspicionless Drug-Testing Program*

By the mid-1990s, Wahkiakum County School District leaders concluded that their community suffered from a teenage drug problem.<sup>169</sup> A 1994 survey revealed that forty-five percent of tenth graders and sixty-five percent of twelfth graders had used some illegal drug besides alcohol.<sup>170</sup> In 1995 and 1997, thirty-four percent and thirty-one percent, respectively, of the high-school student body reported using marijuana in the last thirty days.<sup>171</sup> The School District implemented numerous policies designed to tackle the drug-use problem. For example, it funded a part-time School Resource Officer from the local sheriff’s office to intervene in any campus incidents, instituted staff substance-abuse and violence-prevention training, and created counseling and preventionist positions.<sup>172</sup>

Despite these efforts, drug problems persisted. In the spring of 1998, for example, forty percent of sophomores and forty-two percent of seniors identified themselves as users of illegal drugs.<sup>173</sup> Nineteen percent of sophomores and twelve and one-half percent of seniors had used drugs in the past thirty days.<sup>174</sup> The 1998 numbers, however, represented lower drug-use levels than the state average in twenty-three of thirty-two subcategories<sup>175</sup> and constituted lower usage numbers than found in the 1994 survey.<sup>176</sup>

---

168. *Id.* at 555, 13 P.3d at 247.

169. Brief of Respondents at 1, *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 178 P.3d 995 (2008) (No. 78946-1), 2006 WL 4286298.

170. *Id.* at 4.

171. *Id.*

172. *Id.* at 3–4.

173. *Id.* at 5; *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 300, 178 P.3d 995, 998 (2008).

174. Brief of Respondents, *supra* note 169, at 5; *York*, 163 Wash. 2d at 300, 178 P.3d at 998.

175. Brief of Appellants at 4–5, *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 178 P.3d 995 (2008) (No. 78946-1), 2006 WL 4286297.

176. Brief of Respondents, *supra* note 169, at 4–5.

With these data before it in 1999, the District’s Board of Directors implemented a mandatory drug-testing program that relied on urinalysis for all student-athletes. The testing regime required, as a condition of participating in school athletics, that students be tested initially, and it subjected them to random tests during the season.<sup>177</sup>

Students were forced to produce urine samples at the Wahkiakum County Health Department.<sup>178</sup> Samples were then sent to an independent laboratory for analysis.<sup>179</sup> Students provided urine samples in a closed bathroom stall, with a health department official in the doorway to the bathroom or just inside it and a school official at the other end of the hallway.<sup>180</sup> Student-athletes who tested positive were suspended from school athletics, but the results were not passed on to law enforcement, and there were no academic consequences.<sup>181</sup>

The York plaintiffs consisted of parents whose children were tested under the Wahkiakum School District policy. Hans York, a deputy sheriff with Wahkiakum County, was the father of Aaron and Abraham York, who were tested in the 1999–2000 school year.<sup>182</sup> Paul Schneider, a community doctor, was the father of Tristan Schneider, who was tested in the 2000–2001 year.<sup>183</sup>

The Yorks<sup>184</sup> filed suit in 1999, alleging the policy violated Section 7 of the Washington Constitution and the Fourth Amendment of the U.S. Constitution and seeking a preliminary injunction.<sup>185</sup> Although the trial judge denied the preliminary injunction,<sup>186</sup> he agreed that the policy violated the students’ “privacy rights” and issued an order requiring that test results be sent to the court and then to students’ doctors for appropriate action.<sup>187</sup> Perhaps loath to saddle such a burden, the District

---

177. *York*, 163 Wash. 2d at 300–01, 178 P.3d at 998.

178. Brief of Respondents, *supra* note 169, at 7.

179. *Id.*

180. *Id.*

181. *York*, 163 Wash. 2d at 301, 178 P.3d at 998.

182. *Id.*; Brief of Appellants, *supra* note 175, at 13.

183. *York*, 163 Wash. 2d at 301, 178 P.3d at 998; Brief of Appellants, *supra* note 175, at 13.

184. The Schneiders did not join the action until after their daughter was tested in the 2000–2001 school year.

185. Brief of Appellants, *supra* note 175, at 14. The Fourth Amendment claim was dropped after the United States Supreme Court’s decision in *Earls*. *York*, 163 Wash. 2d at 301 n.4, 178 P.3d at 998.

186. *York*, 163 Wash. 2d at 301–02, 178 P.3d at 998–99.

187. Brief of Appellants, *supra* note 175, at 14.

voluntarily suspended testing while the trial court's ruling was appealed.<sup>188</sup> In June 2006, the trial court granted summary judgment in favor of the School District on the grounds that the federal "special needs exception" authorized the suspicionless testing regime.<sup>189</sup> The Supreme Court of Washington granted the families' petition for direct review.<sup>190</sup>

The families argued that the District's testing regime violated Section 7 because it implicated a private affair without authority of law. The families noted Washington's long history of protecting bodily functions<sup>191</sup> and asserted that "it is practically beyond dispute that governmental actors disturb individuals' 'private affairs,' by the entire process of mandatory urinalysis."<sup>192</sup> As for "authority of law," the families maintained that while only reasonable suspicion is required for a school search, *Kuehn* "squarely refused to extend this exception to cover *suspicionless* searches for drugs or alcohol."<sup>193</sup> As such, the trial court's special-needs test was at odds with Washington law.<sup>194</sup>

Whereas the families' departure point was the broader protections of Section 7, the School District started with the Fourth Amendment. The District argued that Section 7's protections in schools were commensurate with those of the Fourth Amendment.<sup>195</sup> It drew support for this contention from the appellate court's dictum in *Brooks* that "article 1, section 7 affords students no greater protections from searches

---

188. *Id.*

189. *Id.* at 15–16.

190. *York*, 163 Wash. 2d at 302, 178 P.3d at 999.

191. Brief of Appellants, *supra* note 175, at 20 (citing WASH. REV. CODE § 70.24.330 (year omitted in original) (establishing freedom from HIV testing without consent, with limited exceptions); *Robinson v. City of Seattle*, 102 Wash. App. 795, 810, 10 P.3d 452, 460 (2000) ("Preexisting state law reflects a consistent protection of privacy of the body and bodily functions."); *City of Tukwila v. Nalder*, 53 Wash. App. 746, 749–52, 770 P.2d 670, 673–74 (1989) (bathroom stalls have subjective and objective privacy); *State v. Berber*, 48 Wash. App. 583, 589, 740 P.2d 863, 867 (1987) (bathroom stalls have subjective and objective privacy); *State v. Rochelle*, 11 Wash. App. 887, 892, 527 P.2d 87, 90 (1974) (urinalysis tests are privileged part of doctor-patient relationship).

192. *Id.* at 24 (citing *Robinson*, 102 Wash. App. at 818, 10 P.3d at 456 ("It is difficult to imagine an affair more private than the passing of urine."); *State v. White*, 129 Wash. 2d 105, 111, 915 P.2d 1089, 1102 (1996) ("[A]n individual has a reasonable expectation of privacy in respect to those bodily functions which take place in a bathroom stall.")).

193. *Id.* at 29 (emphasis in original).

194. *See id.* at 17, 29–30.

195. Brief of Respondents, *supra* note 169, at 13.

by school officials than is guaranteed by the Fourth Amendment.”<sup>196</sup> The District argued that the families’ reliance on *Kuehn’s* individual suspicion standard was misplaced as it was based on the Fourth Amendment, and not Section 7, and was thus subsequently overruled by *T.L.O.*, and presumably, its progeny.<sup>197</sup> Because the District viewed Section 7 as “coextensive with the Fourth Amendment”<sup>198</sup> in the school context, it asked that the court uphold the testing regime under the federal special-needs test and its post-*T.L.O.* development.<sup>199</sup>

*B. The York Court Unanimously Invalidated the Program but Failed to Produce a Majority Opinion*

The *York* court’s nine justices unanimously condemned the School Districts’ testing regime.<sup>200</sup> A majority opinion did not emerge, however, because the justices could not agree as to whether suspicionless testing could ever be countenanced. Justice Sanders, joined by Chief Justice Alexander and Justices Owens and Chambers, argued that suspicionless searches were nearly always impermissible under the Washington Constitution.<sup>201</sup> Justice Madsen, joined by Justices Charles Johnson, Fairhurst, and Bridge,<sup>202</sup> believed that such searches could pass constitutional muster where a state actor could show that individualized suspicion could not detect the illicit conduct.<sup>203</sup> Justice Jim Johnson, for his part, argued that testing would be permissible where it was narrowly drawn to advance a compelling state interest.<sup>204</sup>

Every justice agreed that the School District’s testing regime implicated students’ private affairs. The lead opinion cited state and federal authority for the proposition that a “student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily

---

196. *Id.* (quoting *State v. Brooks*, 43 Wash. App. 560, 568, 718 P.2d 837, 841 (1986)).

197. *Id.* at 14.

198. *Id.* at 33.

199. *Id.* at 37, 46.

200. *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 316, 178 P.3d 995, 1006 (2008); *id.* at 329, 178 P.3d at 1012 (Madsen, J., concurring); *id.* at 345–46, 178 P.3d at 1021 (Johnson, J.M., J., concurring).

201. *Id.* at 315–16, 178 P.3d at 1005–06.

202. Retired Justice Bobbe Bridge served in a *pro tem* capacity in place of the recused Justice Stephens.

203. *York*, 163 Wash. 2d at 323–24, 178 P.3d at 1010 (Madsen, J., concurring).

204. *Id.* at 342, 178 P.3d at 1019 (Johnson, J.M., J., concurring).



functions.”<sup>205</sup> The Madsen concurrence also found that the test infringed on students’ privacy, saying it was “difficult to understand how the necessity to share locker rooms and restrooms diminishes a student’s expectation that their excretory functions will not be subject to governmental intrusion absent particularized suspicion of wrongdoing.”<sup>206</sup>

Justice Jim Johnson, by contrast, was reluctant to dismiss the potential for participation in athletics to diminish a student athlete’s privacy interest. For him, athletes had diminished privacy expectations due to mandatory annual physical exams, the lack of urinal or shower dividers in locker rooms, and the risk of performance-enhancing drug use.<sup>207</sup> Nevertheless, Justice Johnson agreed with his eight colleagues that the urinalysis program was an invasion of this diminished privacy expectation.<sup>208</sup>

The three opinions differed, however, on whether proper authority of law for the search existed based on the special-needs exception to the warrant requirement. The lead opinion refused to adopt the federal special-needs exception, stating that Washington had long invalidated searches that are not based on at least reasonable suspicion.<sup>209</sup> The court cited *Kuehn* for the proposition that a suspicionless luggage check “violated both the Fourth Amendment and article I, section 7.”<sup>210</sup> Thus, for the lead opinion, *Kuehn* established that searches without individual suspicion are “anathema to the Fourth Amendment and Const. art. 1, § 7 protections.”<sup>211</sup>

The lead opinion discounted two Washington cases that had sanctioned suspicionless searches for convicts. First, Justice Sanders distinguished *In re Juveniles A, B, C, D, E*<sup>212</sup>—a case that countenanced mandatory HIV testing for convicted juvenile sexual offenders without

---

205. *Id.* at 308, 178 P.3d at 1002.

206. *Id.* at 327, 178 P.3d at 1012.

207. *Id.* at 332–34, 178 P.3d at 1014–15.

208. *Id.* at 334, 178 P.3d at 1015.

209. *Id.* at 314–15, 178 P.3d at 1005 (citing *State v. Jorden*, 160 Wash. 2d 121, 127, 156 P.3d 893, 896 (2007) (“[T]his court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition.”); *City of Seattle v. Mesiani*, 110 Wash. 2d 454, 458–60, 755 P.2d 775, 777–78 (1988) (holding that suspicionless sobriety checkpoints violated Section 7 because they interfered with private affairs and lacked authority of law).

210. *York*, 163 Wash. 2d at 315, 178 P.3d at 1005.

211. *Id.*

212. 121 Wash. 2d 80, 847 P.2d 455 (1993).

individualized suspicion—as based “exclusively” on Fourth Amendment precedent.<sup>213</sup> Justice Sanders also distinguished *State v. Surge*,<sup>214</sup> a 2007 case in which the court upheld mandatory DNA testing of convicted felons not because it found authority of law, but because, unlike the case before the court, it did not implicate a private affair.<sup>215</sup> He also emphasized that these cases had limited applicability to the school context as they involved convicted felons and thus “present[ed] far different factual situations from drug testing student athletes.”<sup>216</sup>

Finally, the lead opinion rejected the special-needs exception for its lack of a limiting principle, stating that “we can conceive of no way to draw a principled line permitting drug testing only student athletes.”<sup>217</sup> Justice Sanders feared that countenancing suspicionless drug testing of student-athletes would allow school districts to “test[] students participating in any extracurricular activities, as federal courts now allow, or test[] the entire student population . . . .”<sup>218</sup>

The Madsen concurrence, by contrast, believed that special needs could justify suspicionless school searches in some circumstances. Justice Madsen proposed a rule somewhat like the federal special-needs exception, but placed greater emphasis on the impracticability of individualized suspicion. Like the federal standard, Justice Madsen’s proposed exception would apply only if there were a special need beyond law enforcement, and the warrant and probable-cause requirements were impracticable.<sup>219</sup> Justice Madsen argued, however, that a Washington special-needs doctrine should only be applied where individual suspicion was unworkable.<sup>220</sup>

To determine unworkability, according to Justice Madsen, courts should “consider both the opportunities for developing the requisite individualized suspicion and the severity of the consequences that may ensue by failing to detect illicit conduct.”<sup>221</sup> Justice Madsen stated that individual suspicion can be unworkable in two situations: first, when the

---

213. *York*, 163 Wash. 2d at 313, 178 P.3d at 1004.

214. 160 Wash. 2d 65, 156 P.3d 208 (2007).

215. *Id.* at 315, 178 P.3d at 1005–06.

216. *Id.* at 315, 178 P.3d at 1006.

217. *Id.*

218. *Id.* at 315–16, 178 P.3d at 1006.

219. *Id.* at 319, 178 P.3d at 1007 (Madsen, J., concurring).

220. *Id.* at 321–22, 178 P.3d at 1009.

221. *Id.* at 324, 178 P.3d 995 at 1010.

object of the search is unrelated to criminal activity, which would render the concepts of probable cause and individualized suspicion inapt,<sup>222</sup> and second, when the object of the search is hidden or latent, presenting inadequate opportunities for detection.<sup>223</sup>

The Madsen concurrence drew support for its contention that suspicionless searches could be permissible primarily from *Juveniles* and *Surge*. It argued that *Juveniles* recognized a Washington common-law special-needs exception that justified searches without individualized suspicion.<sup>224</sup> *Surge* more generally supported suspicionless searches by “address[ing] the special needs exception,” but the court in *Surge* “had no need to address whether the special needs exception would have provided . . . ‘authority of law’ under article I, section 7” because no private affair was implicated by the facts of that case.<sup>225</sup>

Justice Madsen applied her proposed rule to the District’s policy of mandatory urinalysis and struck it down. Because drug use has observable manifestations and students are under constant observation from teachers and administrators, she argued, those officials would likely be able to “supply the particularized suspicion necessary to support a search.”<sup>226</sup>

Justice Jim Johnson took exception to the lead opinion’s broad rule that special needs could never justify suspicionless testing, and differed with Justice Madsen’s focus on the impracticability of individualized suspicion. His proposed standard would require that special-needs searches “advance compelling interests, show narrow tailoring, and employ a less intrusive method of testing.”<sup>227</sup> Justice Johnson effectively proposed a balancing test, asserting that the gravity of the state interest should be weighed against the importance of the privacy interest to be invaded.<sup>228</sup>

Justice Johnson concluded that the District’s program failed his test. He wrote that the testing program was not narrowly tailored because “there was no showing that athletes used drugs at a higher rate than other students or that testing the athletes would address the drug problem

---

222. *Id.* at 323–24, 178 P.3d at 1010.

223. *Id.* at 324, 178 P.3d at 1010.

224. *Id.* at 318, 178 P.3d at 1007.

225. *Id.*

226. *Id.* at 325, 178 P.3d at 1010–11.

227. *Id.* at 342, 178 P.3d at 1019 (Johnson, J.M., J., concurring).

228. *Id.* at 342–43, 178 P.3d at 1019–20.

among the general student body.”<sup>229</sup> He also took issue with the level of intrusion, noting the availability of “saliva samples or sweat patches, which are significantly less intrusive and humiliating.”<sup>230</sup>

#### V. SUSPICIONLESS SEARCHES ERODE JURISPRUDENTIAL, DEMOCRATIC, AND EDUCATIONAL VALUES

In *York*, five justices of the Supreme Court of Washington seemed ready to jettison Section 7’s requirement of individualized suspicion for certain school searches. In its place, they would have used some variant of a balancing test. While the Madsen and Johnson concurrences propose different standards, both are grounded in the federal special-needs exception—an exception that allows for suspicionless searches in several contexts, including schools.<sup>231</sup>

The *Kuehn* court described a foundational principle of Washington law: for a search to be valid, it must be based on individualized suspicion.<sup>232</sup> Because *Kuehn* was a § 1983 case, the court’s Section 7 discussion was unnecessary to its holding. In the context of school searches, the Supreme Court of Washington nonetheless took pains to describe suspicionless searches as “anathema to Fourth Amendment and *Const. art. I § 7* protections.”<sup>233</sup> Only four days later, *T.L.O.* lowered the school-search predicate, but did not reach the individualized suspicion question.

Today, with the insight that decades of federal special-needs doctrinal development provide as to its effects, Washington courts should hold fast to *Kuehn*’s requirement of individualized suspicion. The federal special-needs exception has proven to be highly malleable and prone to expansion.<sup>234</sup> In the school context, it undermines both educational and democratic values. Rather than follow the federal lead, Washington courts should maintain their independent search-and-seizure jurisprudence and strictly adhere to an individualized-suspicion requirement for school searches.

---

229. *Id.* at 344, 178 P.3d at 1020.

230. *Id.* at 345, 178 P.3d at 1021.

231. See *infra* Section IV.B for a detailed discussion of *York*.

232. See *Kuehn v. Renton Sch. Dist.*, 103 Wash. 2d 594, 599, 601–02, 694 P.2d 1078, 1081–82 (1985) (“We never authorize general, exploratory searches.”) (quoting *State v. Helmka*, 86 Wash. 2d 91, 93, 542 P.2d 115, 117 (1975) (internal markings omitted)).

233. *Id.* at 601–02, 694 P.2d at 1082 (emphasis added).

234. See *infra*, notes 235–41, and accompanying text.

A. *Washington Courts Should Adhere to a Strict Individualized-Suspicion Standard Because Suspicionless Searches Are Ill-Defined and Prone to Expansion*

Suspicionless searches under the special-needs doctrine are supposedly rooted in pressing governmental needs, one of which is the need to maintain order in schools. In practice, however, the circumstances that have allowed for their application are extremely malleable. As one commentator observed, “[L]ittle or no effort has been made to explain what these ‘special needs’ are; the term turns out to be no more than a label that indicates when a lax standard will apply.”<sup>235</sup> The result is something akin to rational-basis review: where the standard applies, the search regime will be upheld.<sup>236</sup>

This irregularity exists because judges do not have bright-line rules to constrain their decisions, like the requirements of probable cause or reasonable suspicion. Instead, they can engage in “a factual tug-of-war,” where “[f]acts can be emphasized or ignored in order to reach a preordained result.”<sup>237</sup> Justice Brennan now appears prophetic in his characterization of *T.L.O.*’s balancing test as a method of “reaching a predetermined conclusion.”<sup>238</sup>

The malleability of special-needs is related to another problem: it can apply almost anywhere, as it has no real limiting principles. The school cases illustrate two manifestations of this problem. First, the degree of immediacy required for the special need has been steadily eroded in federal courts. The U.S. Supreme Court relied upon a rampant and pressing drug problem to justify drug testing in *Acton*.<sup>239</sup> Only seven years later, in *Earls*, the Court described those facts as “not essential to the holding” when it upheld mandatory testing of any student participant in extracurricular activities based on the nationwide drug epidemic.<sup>240</sup> Second, the degree of diminished privacy interests of the group to be tested has also been undermined. The *Earls* Court deemed the

---

235. William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992).

236. *Id.*

237. George M. Dery III, *Are Politicians More Deserving of Privacy Than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment “Special Needs” Balancing*, 40 ARIZ. L. REV. 73, 88–89 (1998).

238. *New Jersey v. T.L.O.*, 469 U.S. 325, 367 (1985) (Brennan, J., dissenting).

239. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 662–63 (1995).

240. *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002).

diminished privacy interests of student-athletes that helped justify suspicionless drug testing in *Acton* “not essential to our decision.”<sup>241</sup>

The standards proposed by Justices Madsen and Johnson bear these same central flaws. The Madsen concurrence purports to constrain the special-needs exception by requiring the state to show that the individualized-suspicion requirement is impracticable.<sup>242</sup> The impracticability requirement itself is subject to manipulation, however, as courts would weigh “opportunities for developing the requisite individualized suspicion and the severity of the consequences that may ensue by failing to detect illicit conduct.”<sup>243</sup> Both considerations invite courts to engage in a “factual tug-of-war,”<sup>244</sup> emphasizing certain facts to the exclusion of others to “reach[] a predetermined conclusion.”<sup>245</sup> Justice Johnson’s proposal poses the same risk as the highly manipulable federal special-needs category. His compelling-interest schema relies upon the kind of balancing that promotes uncertainty and expansion.<sup>246</sup>

The Madsen concurrence’s impracticability restriction on suspicionless searches could equally prove ineffectual. Justice Madsen’s malleable standard constitutes an invitation to lower courts to expand suspicionless searches to other contexts. The potential for expansion posed by standards without limiting principles is already apparent in Washington case law. For example, despite a clear directive from the *Juveniles* court that its holding “applies only to convicted sex offenders . . . [t]here are no other ‘groups’ included—either explicitly or implicitly,”<sup>247</sup> it was seized upon by both the Madsen and Johnson concurrences in *York* as support for suspicionless testing.<sup>248</sup>

The lesson is clear: suspicionless searches in one area are likely to lead to suspicionless searches in other areas. Given Section 7’s textual foundation in the bright-line authority-of-law requirement, Washington

---

241. *Id.* at 831.

242. *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 323, 178 P.3d 995, 1009 (2008) (Madsen, J., concurring).

243. *Id.* at 324, 178 P.3d at 1010.

244. Dery, *supra* note 237, at 88.

245. *New Jersey v. T.L.O.*, 469 U.S. 325, 367 (1985) (Brennan, J., dissenting).

246. *See York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 343, 178 P.3d 995, 1019–20 (2008) (Johnson, J.M., J., concurring) (“Thus, the greater the intrusion into constitutional rights, the more compelling the interests must be.”).

247. *In re Juveniles A, B, C, D, E*, 121 Wash. 2d 80, 96, 847 P.2d 455, 462 (1993).

248. *See York*, 163 Wash. 2d at 318, 178 P.3d at 1007 (Madsen, J., concurring); *id.* at 335–36, 178 P.3d at 1016 (Johnson, J.M., J., concurring).

courts should avoid eroding citizens' rights through such a malleable doctrine. Washington courts must hold fast to the *Kuehn* court's powerful principle that "[i]n the absence of individualized suspicion of wrongdoing, the search is a general search. We never authorize general, exploratory searches."<sup>249</sup>

*B. Suspicionless Searches Will Damage Students' Understanding of Democratic Government and Undermine Trust Relationships*

Furthermore, suspicionless searches would have serious negative repercussions if the state were to perform them on Washington students, who take cues about appropriate behavior from teachers, school officials, and other authority figures.<sup>250</sup> Especially where teachers are charged with teaching civic responsibilities and rights, students look to them for guidance on the fundamental freedoms of the federal and Washington systems of government.<sup>251</sup> Subjecting students to blanket suspicionless searches teaches students that constitutional protections do not apply to them.<sup>252</sup> Where drug testing is concerned, students learn that their body is just another object to be regulated.<sup>253</sup> In fact, while on the stand at trial, James Acton's father lamented the lessons the Vernonia School District was teaching his son: "[S]uspicionless testing sends a

---

249. *Kuehn v. Renton Sch. Dist.*, 103 Wash. 2d 594, 599, 694 P.2d 1078, 1081 (1985) (internal markings omitted) (quoting *State v. Helmka*, 86 Wash. 2d 91, 93, 542 P.2d 115, 117 (1975)).

250. *See Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 239 (E.D. Tex. 1980) (noting that students look to teachers and authority figures for models of appropriate behavior).

251. *See Kuehn*, 103 Wash. 2d at 601, 694 P.2d at 1082 (lamenting the damage done to student understanding of constitutional freedoms when student rights are violated by officials "entrusted with teaching civic responsibilities"); *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 855 (2002) (Ginsberg, J., dissenting) (noting that a school's role in educating students for citizenship demands strong protection of constitutional rights) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

252. *See Doe v. Renfrow*, 451 U.S. 1022, 1027 (1981) (Brennan, J., dissenting from denial of certiorari) ("We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' . . ." (quoting U.S. CONST. amend. IV)).

253. *See Martin R. Gardner, Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803, 845 (1980) (noting that questioning one's innocence without cause makes one "a piece of criminal evidence, an object to be probed").

message to children that are trying to be responsible citizens that they have to prove that they're innocent."<sup>254</sup>

The Supreme Court of Washington has recognized this danger, cautioning in two different cases when the rights of teenagers were violated that “[t]he damage to the understanding of constitutional guaranties of freedom from unreasonable searches on the part of these young persons is incalculable.”<sup>255</sup> Indeed, the court cautioned that searches in schools were grounds for stronger protection of constitutional liberties: “That [the schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the *individual*, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>256</sup>

Blanket, suspicionless searches also undermine teachers’ and school officials’ ability to form and rely on relationships of trust with their students.<sup>257</sup> Many teachers rely on trust with their students—just as many parents come to rely on the honesty of their children—to maintain order and appropriately discipline students.<sup>258</sup> Erosion of these trust relationships engenders disobedience, thus handicapping the educational process.<sup>259</sup> Turning schools into “enclaves of totalitarianism”<sup>260</sup> where students constantly fear the invasion of their private affairs threatens to

---

254. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 682 (1995) (internal markings omitted).

255. *Kuehn*, 103 Wash. 2d at 601, 694 P.2d at 1082 (internal markings omitted) (quoting *Jacobsen v. City of Seattle*, 98 Wash. 2d 668, 674, 658 P.2d 653, 657 (1983)).

256. *Id.* (emphasis added) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

257. *See* Brief of Amici Curiae Washington Education Ass’n and Drug Policy Alliance in Support of Appellants at 14–15, *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 178 P.3d 995 (2008) (No. 78946-1), 2007 WL 1685929 (“Mandatory suspicionless drug testing of students disrupts the fragile balance of trust between adolescents and their teachers, coaches, and administrators by creating an adversarial role where students are treated as guilty until proven innocent.”).

258. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 682 (1995) (O’Connor, J., dissenting).

259. *See* Brief of Amici Curiae Washington Education Ass’n and Drug Policy Alliance in Support of Appellants, *supra* note 257, at 15 (“[S]uspicionless drug testing is perceived by adolescents as an expression of adult mistrust and suspicion. Such perceptions, in turn, can trigger oppositional behavior . . . .”); *Irene Merker Rosenberg, New Jersey v. T.L.O.: Of Children and Smokescreens*, 19 FAM. L.Q. 311, 329 (1985) (arguing that allowing state invasions of privacy without adequate cause engenders hostility to authority, disobedience, and even crime).

260. *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 236 (E.D. Tex. 1980) (describing a Texas school district’s suspicionless drug searching regime, which relied on dog sniffs).



taint students' role models, undermine trust relationships, and teach that constitutional guarantees of privacy are "mere platitudes."<sup>261</sup>

## CONCLUSION

Article I, section 7 of the Washington Constitution has a distinct and well-defined tradition of independent interpretation and broad protections, which "pose[] an almost absolute bar to warrantless arrests, searches and seizures."<sup>262</sup> Washington courts have consistently applied the *McKinnon* factors—which the *Kuehn* court interpreted as requiring individualized suspicion—when analyzing school searches. The *Kuehn* court cautioned that suspicionless searches would violate Section 7's authority-of-law requirement and Washington's tradition of privacy protections. The court adopted a bright-line rule barring suspicionless school searches.

Decades of suspicionless-search and special-needs jurisprudence in federal courts have proven the wisdom of the *Kuehn* court's warning. The vagueness of the special-needs standard allows courts to reach their preferred results by emphasizing certain facts to the exclusion of others. The lack of limiting principles makes this results-oriented approach and the special-needs exception prone to steady expansion. Finally, suspicionless searches in schools teach students that constitutional protections do not apply to them, while at the same time undermining the trust relationships that promote education.

The standards proposed by the Madsen and Johnson concurrences bear these same hallmarks. Justice Madsen's impracticability standard would prove a poor barrier to suspicionless searches. Like the federal special-needs exception, the standard would invite courts to highlight facts that foreshadow severe consequences for failure to detect illicit conduct, while minimizing facts that cut the other way. Justice Johnson's standard poses the same risks: courts could rely on facts that promote a compelling-interest finding while downplaying those that do not.

Suspicionless searches under either standard threaten to severely erode "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."<sup>263</sup> Given the demonstrated premium put on privacy rights in

---

261. *Kuehn v. Renton Sch. Dist.*, 103 Wash. 2d 594, 601, 694 P.2d 1078, 1082 (1985) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

262. *State v. Ringer*, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983).

263. *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984).

Washington,<sup>264</sup> Washington courts should maintain a requirement of individualized suspicion in the school context and reject suspicionless searches.

---

264. *See State v. Ladson*, 138 Wash. 2d 343, 349, 979 P.2d 833, 837 (1999) (“[W]hile the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7, holds the line . . .”).