

Tenants, Students, and Drugs: A Comment on the War on the Rule of Law

Roger Pilon

Introduction: The Expansive War on Drugs

For two decades now the nation has been waging a war on drugs—far longer than we waged war on alcohol, yet with no greater success.¹ Over that period numerous legal disputes arising from the war have reached the Supreme Court. Too often, however, the Court has decided those disputes not as a dispassionate adjudicator securing the rule of law but as a handmaiden to the political branches—one more agency in the war.² Rather than apply the law to check the zeal of government agents seemingly steeped in moral certitude, the Court itself, in case after case, has carved out a “drug exception”

¹The current phase of the war is ordinarily taken to have begun with President Reagan in 1982. President’s Radio Address to the Nation (October 2, 1982), in *18 Weekly Compilation of Presidential Documents*, at 1249. In 1989 President Bush aggressively escalated the war. (“We need, fully and completely, to marshal the nation’s energy and intelligence in a true all-out war against drugs.”) Quoted in *Excerpts from News Session by Bush, Watkins and Bennet*, N.Y. TIMES, Jan. 13, 1989, at D16 (Statement by President Bush). But this is the most recent phase in a long line of wars on drugs. U.S. Treasury agents fought the original war in the decade following passage of the Harrison Narcotics Act of 1914, 38 Stat. 785, which brought cocaine and opiates under federal control for the first time. See EDWARD EPSTEIN, *AGENCY OF FEAR* 103 (1977). The Marihuana Tax Act of 1937 led to a second war. Federal Bureau of Narcotics Commissioner Harry Anslinger told Congress it was necessary to stop the “marihuana menace” exemplified by teenage gangs who became violent and murderous after smoking marijuana. *Id.* at 33. President Nixon declared a third drug war. In a message to Congress he labeled drug abuse a “national emergency,” branding it “public enemy number one,” and called for a “total offensive.” *Id.* at 178. See generally AFTER PROHIBITION (Timothy Lynch ed., 2000); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR* (1993).

²See Steven Duke, *The Drug War and the Constitution*, in AFTER PROHIBITION, *supra* note 1, at 41–59. Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO POLY ANALYSIS No. 180, Oct. 2, 1992.

to the Constitution,³ as if we were engaged in a moral crusade with the law serving not as a check but as a weapon. Looking back in 1981, but as if he were looking ahead to the massive legislation that would soon unfold, then-Justice Rehnquist remarked that “[t]he history of the narcotics legislation in this country reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter.”⁴

Two decisions handed down during the 2001 term give ample evidence of that approach to drug cases. In *Department of Housing and Urban Development v. Rucker*,⁵ Chief Justice Rehnquist, writing for a unanimous Court, begins his opinion in what must seem to him a matter-of-fact tone: “With drug dealers ‘increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,’ Congress passed the Anti-Drug Abuse Act of 1988.”⁶ Never mind that tenants themselves had brought the suit against the act, the Court reversed an en banc panel of the Court of Appeals for the Ninth Circuit,⁷ reading the act to allow HUD officials discretion to evict four elderly Oakland, California, tenants from public housing. HUD’s grounds? The grandsons of two tenants were caught in the building’s parking lot smoking marijuana; the mentally disabled daughter of another was found three blocks from the building with cocaine and a crack cocaine pipe; and the caregiver to a disabled 75-year-old tenant was found in possession of cocaine in the tenant’s apartment. So much for the reign of terror.

In the second case, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,⁸ Justice Thomas, writing for Chief Justice Rehnquist and Justices Scalia, Kennedy, and Breyer, upheld a Tecumseh, Oklahoma, school district’s policy of requiring all students who participate in competitive extracurricular activities—from athletics to band, choir, Future Homemakers of America,

³“There is no drug exception to the Constitution.” *Skinner v. Ry. Labor Executive Ass’n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting). See generally, Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002).

⁴*Albernaz v. United States*, 450 U.S. 333, 343 (1981).

⁵122 S. Ct. 1230 (2002).

⁶*Id.* at 1232.

⁷*Rucker v. Davis*, 237 F.3d 1113 (2001).

⁸122 S. Ct. 2559; 70 U.S.L.W. 4737 (2002). Here, too, the court below was reversed. *Earls v. Bd. of Educ.*, 242 F.3d 1264 (2001).

and the academic team—to submit to drug testing by urinalysis. The Court's attitude in this case is best revealed, perhaps, by the exchanges at oral argument. Reporting for the *New York Times*, Linda Greenhouse described them as “spirited, intense and sometimes downright nasty”:

The justices appeared unusually snappish. When Justice Souter was invoking the small number of positive drug tests to question the district's need for drug testing, Chief Justice William H. Rehnquist offered a helping hand to [the district's lawyer]. “The existence of the policy might be expected to deter drug use, wouldn't it?” he asked the lawyer.

“Then we'll never know, will we,” Justice Souter said with some asperity.

“Let her answer the question,” the chief justice said sharply.

But most surprising was Justice Kennedy's implied slur on the plaintiffs in the case. He had posed to [Lindsay Earls's lawyer] the hypothetical question of whether a district could have two schools, one a “druggie school” and one with drug testing. As for the first, Justice Kennedy said, “no parent would send a child to that school, except maybe your client.”⁹

Lindsay Earls, a model student who had passed her drug test and was by then in her first year at Dartmouth College, was in the audience that day.

Given the almost religious fervor that has surrounded the war on drugs, even on the Court, it is hardly surprising that reasoned argument and the rule of law itself are among the war's casualties—collateral damage, so to speak. Congress has made the manufacture, distribution, sale, possession, and use of some drugs—marijuana, for example, but not alcohol—a federal crime. Its constitutional authority for doing so has never been squarely addressed by the Court.¹⁰ Yet neither has a Court otherwise rightly concerned about

⁹Linda Greenhouse, *Supreme Court Seems Ready To Extend School Drug Tests*, N.Y. Times, Mar. 20, 2002, at A1.

¹⁰In *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916), the Court expressed serious doubts about the constitutionality of the Harrison Act but avoided the enumerated powers question by construing the act as authorized under the federal government's taxing and revenue power. *United States v. Doremus*, 249 U.S. 86 (1919), presented a direct challenge to the act on enumerated powers grounds. Over a one-paragraph dissent by four justices, the act was upheld. See Eric Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483 (1997). It is noteworthy that when we sought to prohibit alcohol, we found the federal power to do so only through a constitutional amendment.

federalism, the limits of congressional power, and the integrity of state government addressed those issues seriously as they arise in the context of growing state efforts—by the voters of the states, no less—to free themselves from the war’s federal chains, especially regarding the medical use of marijuana.¹¹ Rather than address the first principles of the matter, the Court instead has narrowed its focus, finding comfort in precedent, prior mistakes notwithstanding. Thus we have today a federal government with vast resources dedicated to this single crusade—hardly a government with powers “few and defined,” as Madison promised in *Federalist* No. 45.

Assume, however, that the Constitution does authorize the federal government to wage a “war on drugs”—either because there is some general federal police power to do so, despite the Court’s repeated admonitions that there is no such power,¹² or because the power of Congress to ensure the free flow of commerce among the states entails, as a necessary and proper means to that end, a power to prohibit commerce in drugs. On such dubious assumptions—plus the equally dubious assumption that the general police power of states entails not only the power to secure rights, as John Locke argued,¹³ but the power to police “morals” as well, whatever that may mean—it remains to be asked how government may wage that war. One imagines that federal and state governments would do so directly—by arresting and prosecuting those who manufacture, distribute, sell, possess, and use the prohibited drugs—since private enforcement through civil actions is unavailable, there being no individual rights violated by those acts. And that, precisely, is how our governments do wage the war, in the main, by prosecuting,

¹¹I have discussed those issues more fully in Roger Pilon, *The Illegitimate War on Drugs*, in *AFTER PROHIBITION*, *supra* note 1, at 23–39.

¹²*See* *United States v. Morrison*, 529 U.S. 598, 618–19 (2000): “The Constitution . . . withhold[s] from Congress a plenary police power,” citing *United States v. Lopez*, 514 U.S. 549, 566 (1995); *Lopez*, 514 U.S. at 584. (“[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.”) (Thomas, J., concurring) (original emphasis); *id.* at 596–97, n.6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause) (Thomas, J., concurring).

¹³JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT* § 13 (Peter Laslett ed., 1960).

convicting, and incarcerating hundreds of thousands of otherwise law-abiding citizens.¹⁴

But that is not the only way this war is waged. Conventional prosecution is not enough for zealous drug warriors. In their quest for a “drug-free America” they insinuate themselves and their cause into every area of life. Public housing and education have thus been conscripted in the war on drugs. Public housing tenants are effectively deputized; if they fail in their duties, they lose their housing. Public schools too become arms of law enforcement, prophylactically testing students who, if they fail, lose their eligibility for extracurricular activities. We’re all in this together—checking, monitoring, policing, changing behavior. Private housing and education have not yet been enlisted so directly,¹⁵ but given the ubiquity of government lending and spending programs, one imagines it only a matter of time before they too will be required to do their parts. That is what we’ve come to in this truly insidious war. What ever happened to that “most comprehensive of rights and the right most valued by civilized men”¹⁶—the right to be let alone?

One would hope to see such issues raised in the Court’s drug opinions—the larger constitutional issues, at least. Instead, those opinions too often read like policy statements on social problems. Just to be clear on that, drug abuse is a problem, to be sure, although it would be less a public and more a private problem were it not for the war on drugs—much like alcoholism has been since the end of Prohibition. But the private problems of drug abuse pale compared with the very public problems of crime, corruption, and cost that are brought on by the war on drugs.¹⁷ Yet the typical drug opinion from the Court rarely notices that. Constrained by its post-New Deal deference to the political branches, which undermines the very reason for separating powers, the Court treats the policies of

¹⁴See Julie Stewart, *Effects of the Drug War*, in *AFTER PROHIBITION*, *supra* note 1, at 141–45.

¹⁵Private institutions are involved indirectly, however. See Diane Jean Schemo, *Students Find Drug Law Has Big Price: Student Aid*, N.Y. TIMES, May 3, 2001, at A12 (college student found guilty of smoking marijuana in a car sentenced to \$250 fine, suspension of driver’s license, 20 hours of community service, a year’s probation, and then is denied student financial aid under the federal Higher Education Act).

¹⁶*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁷See especially, *AMERICA’S LONGEST WAR*, *supra* note 1.

those branches uncritically, taking them as given and presumptively legitimate. Such is the Court's deference that when the policies are balanced against objections on the other side, rarely do they lose. We see that in the cases before us here.

Statutory Construction

The statute at issue in *Rucker* required public housing agencies to use leases for their properties providing that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."¹⁸ Pursuant to that provision, the four elderly plaintiffs noted earlier signed leases obligating them to "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related activity on or near the premise[s]."¹⁹ To administer the statute, HUD wrote regulations that gave local authorities discretion to evict even in situations in which the tenant "did not know, could not foresee, or could not control behavior by other occupants of the unit."²⁰

After the Oakland Housing Authority initiated eviction proceedings based on the facts noted earlier, the tenants challenged HUD's interpretation of the statute under the Administrative Procedures Act,²¹ arguing that it does not require lease terms authorizing the eviction of "innocent" tenants and, in the alternative, if it does, the statute violates, among other things, the Due Process Clause of the Fourteenth Amendment.

The Court disagreed, finding that the statute "unambiguously" allows authorities to evict tenants for drug-related activity, "whether or not the tenant knew, or should have known, about the activity." That conclusion "seems evident from the plain language of the statute," Rehnquist continued for the Court. In fact, "Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes

¹⁸ *Rucker*, 122 S. Ct. at 1232.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 5 U.S.C. § 706(2)(A).

any knowledge requirement.”²² Let us examine those final two points in reverse order.

The word “any” has an expansive meaning, Rehnquist says. He continues: “Thus, *any* drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about.”²³ In truth, however, the word “any” adds nothing to the phrase that follows. It serves simply to make it emphatic that “drug-related activity engaged in by the specified persons [as later qualified] is grounds for termination.” With or without the addition of “any,” that is, the phrase means the same thing. To be sure, the rejected reading that follows *that* phrase—“not just drug-related activity that the tenant knew, or should have known, about”—*narrows* the class denoted by the previous phrase. But those words are no part of the statute. They are invoked, and rejected, by Rehnquist to help indicate *his* understanding of the force of “any.” Yet “any” has no such force. It emphasizes; it does not expand the phrase that immediately follows. We are left, then, with the assertion that “drug-related activity engaged in by the specified persons [as later qualified] is grounds for termination.” We will return to the actual text in a moment.

The second ground Rehnquist gives for precluding any knowledge requirement is “Congress’ decision not to impose any qualification in the statute.” He then moves to reinforce that point by citing civil forfeiture provisions from the same act that *do* contain an “innocent owner defense.” Thus, presumably, Congress could have provided such a defense in the section of the act dealing with evictions, but it did not. As Rehnquist says:

It is entirely reasonable to think that the Government, when seeking to transfer private property to itself in a forfeiture proceeding, should be subject to an “innocent owner defense,” while it should not be when acting as a landlord in a public housing project. The forfeiture provision shows that Congress knew exactly how to provide an “innocent owner” defense. It did not provide one in [the eviction section of the bill].²⁴

²²*Rucker*, 122 S. Ct. at 1233.

²³*Id.* (original emphasis).

²⁴*Id.* at 1234.

That would be a powerful argument if Congress were as thoughtful and orderly as Rehnquist seems to presume, especially when he speaks of Congress's "decision" not to impose any qualification in the statute. One imagines Congress gathered to thoughtfully deliberate and then affirmatively decide the matter, when in truth the lawmaking process is anything but thoughtful and deliberative. Thus, it may be "reasonable" to include innocent owner defenses in forfeiture measures—and over the past decade Congress has done so to a considerable extent. But of the more than 100 federal statutes today with forfeiture provisions, many still do not include innocent owner defenses, however reasonable they may be.²⁵

More generally, however, the idea that Congress "decided" not to impose any qualification in the eviction language simply strains credulity. As is well known beyond the realm of civics textbooks, few if any members of Congress ever even read the bills on which they vote. Most of Congress's work is done by staff. Bills invariably are written in cryptic language, referring to and amending language in existing statutes (e.g., "In sec. 123, delete 'and' and add 'but.'"). Only those few who are deeply conversant with the issue at hand know what is going on. Yet despite that common knowledge about how Congress actually works, the Court, especially in its post-New Deal deferential mode, continues to elevate "congressional intent" to a stature not remotely warranted by the evidence.

The business of interpretation is rarely easy, to be sure.²⁶ And one element in it is congressional intent, however illusory. But it is only one element, and should never be given more credit than it warrants. At bottom, interpretation, whether of statutory or of constitutional language, involves a "rational reconstruction" of the material at hand, starting with the text, then moving, if necessary, to other elements, including background principles. There is no set formula for the process, of course, and there is often room for reasonable disagreement, except in fairly rare cases that truly are unambiguous. When the text is ambiguous, one wants the "best" reading, all things considered, even if the criteria for that may themselves be open to debate.

²⁵ See DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (2002).

²⁶ See generally KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999).

We return, then, to the text that Rehnquist believes is “unambiguous.” (If the text were truly unambiguous, it is hard to understand how the en banc panel below could have read it so differently.) His parsing of that text is worth quoting in its entirety:

The en banc Court of Appeals also thought it possible that “under the tenant’s control” modifies not just “other person,” but also “member of the tenant’s household” and “guest.” The court ultimately adopted this reading, concluding that the statute prohibits eviction where the tenant “for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest.” But this interpretation runs counter to basic rules of grammar. The disjunctive “or” means that the qualification applies only to “other person.” Indeed, the view that “under the tenant’s control” modifies everything coming before it in the sentence would result in the nonsensical reading that the statute applies to “a public housing tenant . . . under the tenant’s control.” HUD offers a convincing explanation for the grammatical imperative that “under the tenant’s control” modifies only “other person”: “by ‘control,’ the statute means control in the sense that the tenant has permitted access to the premises.” Implicit in the terms “household member” or “guest” is that access to the premises has been granted by the tenant. Thus, the plain language of [the statute] requires leases that grant public housing authorities the discretion to terminate tenancy without regard to the tenant’s knowledge of the drug-related criminal activity.²⁷

As both the en banc panel and Rehnquist recognize, the heart of the matter is the meaning and scope of the qualification, “under the tenant’s control.” The en banc panel thought it modified not just “other person” but also “member of the tenant’s household” and “guest.” Rehnquist thinks it modifies “other person” only. Why? Because “the disjunctive ‘or’ means that the qualification applies only to ‘other person.’” Yet that is hardly self-evident. Moreover, taking the provision as a whole, it leads not only to an unnatural reading but to a mistaken reading of the text.

The term “or” is systematically ambiguous. Logicians speak of its exclusive and nonexclusive senses.²⁸ “A or B” can mean either

²⁷ *Rucker*, 122 S. Ct. at 1233–34.

²⁸ See, e.g., WILLARD VAN ORMAN QUINE, *METHODS OF LOGIC* 3–12 (1967).

“A or B but not both,” the exclusive sense; or “A or B and possibly both,” the nonexclusive sense. Which sense is intended can be determined only in context. Considered with reference to truth conditions, however, “A or B” is true when “or” is used in the exclusive sense only if A or B but not both are true. By contrast, “A or B” is true when “or” is used in the nonexclusive sense if A or B or both are true. Thus, unless the context suggests otherwise, one presumes that the nonexclusive use is intended.

At the least, then, “under the tenant’s control” must be presumed to modify not simply “other person” but “guest” as well; for the linguistic context, following the last comma, is “or any guest or other person under the tenant’s control.” In that construction, why would “under the tenant’s control” apply any less to “guest” than to “other person”? In the context of a home, the term “guest” has a somewhat different signification than “other person”—a friend versus, say, a plumber called for a repair—although nothing turns on that distinction. But if “under the tenant’s control” modifies “guest” as well as “other person,” it could also be read to modify “any member of the tenant’s household” and even “tenant.” For the commas in the statutory language are deceptive: the four categories of people reached by the statute—tenants, household members, guests, and other persons—are actually separated by “or.” In fact, the statute can be read that way with perfect fidelity: In brief, “any criminal activity engaged in by a tenant or household member or guest or other person under the tenant’s control shall be cause for termination of the tenancy.”

When that is done, however, it turns out that the crucial word, for interpretive purposes, is “other.” Absent that word, only “person” would be modified by “under the tenant’s control.” With that word, however, “under the tenant’s control” modifies “other person” and “guest” for sure, and probably “household member” and “tenant” as well. For in a very realistic sense, they are *all* presumed to be “under the tenant’s control”—even the tenant. (Thus, Rehnquist is mistaken to say that including the tenant as “under the tenant’s control” is “nonsensical.” It is redundant. They are different.) The force of “other” in the provision is thus explicated as follows: “or any other person *who, like the foregoing*, is presumed to be under the tenant’s control.” How to treat that presumption is another matter, of course, to be discussed below. What is plain, however, is that

Congress, despite its ambiguous construction, meant at bottom to distinguish those under from those not under the tenant's control.

Thus, once the provision is better, more naturally explicated, it makes far more sense. Under the reading Rehnquist gave it, a tenant could be evicted if a plumber or a cable installer with marijuana in his pocket, unbeknown to the tenant, was "permitted access to the premises." Difficult as it may be to determine what Congress intended, that surely cannot be it. Congress wanted tenants to be responsible, to take responsibility for their premises. How else to explain Congress's use of "under the tenant's control"? Rehnquist's reading, by contrast, makes tenants strictly—indeed, almost absolutely—liable. So too does the HUD explanation—"the statute means control in the sense that the tenant has permitted access to the premises." What is a tenant to do? Check the pockets of itinerant repairmen to ensure that they are not lying if asked whether they are carrying any drugs? Police the parking lot? The neighborhood within three blocks? Three miles? Congress could have written "permitted access to the premises" if it had wanted to. It did not, for that means something different than "under the tenant's control."

Indeed, if Congress had wanted to make tenants strictly liable, why did it add the words "under the tenant's control"? Presumably, Congress did not want to have tenants evicted for actions by persons *not* under the tenant's control, which truly would have amounted to absolute liability. But that still leaves us asking how to treat the presumption that persons in the four categories are under the tenant's control. HUD's administrative regulations give local authorities discretion to evict even in situations in which the tenant "did not know, could not foresee, or *could not control* behavior by other occupants of the unit." To be sure, there is a distinction between *persons* not under the tenant's control and *behavior* not under the tenant's control, but as a practical matter it is a distinction without a difference. Does it really make sense to say that B is under A's control if B's *behavior* is not under A's control? Practically, B is under A's control only to the extent that B's *behavior* is under A's control. Thus, HUD's regulations holding tenants liable for behavior they "could not control" runs contrary to Congress's intent to hold tenants liable only for persons "under their control." Because they are inconsistent with congressional intent, therefore, the regulations must be rejected under the first step of the *Chevron* doctrine.²⁹

²⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

The larger problem remains, however. It is that the statute itself is foolish. On one hand, assuming that government should be in the housing business to begin with, much less has constitutional authority to be, we surely do not want to evict people like these plaintiffs. Herman Walker, after all, was 75 years old and partly paralyzed from a stroke. He was hardly in a position to police the drug-related behavior of the caretakers he was fortunate enough to have. But even if he were in a better position to “control” such behavior, it hardly follows that he could. The president of the United States, after all, and his brother, the governor of Florida, both of whom live in public housing, have had their own troubles lately controlling the behavior of their grown children as it relates to controlled substances.³⁰ The folly of this statute lies in its effort to hold some people liable for the behavior of others—just one more extension of the war on drugs. Yet not once in the Court’s opinion do we find that issue addressed. Only below, when District Judge Charles R. Breyer issued a preliminary injunction against the evictions, did we glimpse a bit of candor: “This policy on its face appears irrational.”³¹

Suspicionless Searches

As with public housing, public education is now an arm of law enforcement if the issue is drugs. In *Rucker*, the federal government conscripted public housing tenants to help fight the war on drugs. In *Earls*, it was a local school district that stepped in to do its part, drug-testing students who participated in extracurricular activities, excluding them from such activities if they failed the tests. Given the state of public education today and the problems of simply educating students, one wonders why schools have taken on such responsibilities, distracting as they are from a school’s main business. Yet so officious have public schools become that we learn just now of a rural South Dakota school in which the principal ordered two recent “lockdowns” of every classroom from kindergarten through high school. Local police officials and a federal law enforcement

³⁰ Dana Canedy, *Jeb Bush’s Daughter Is Arrested On Charge of Faking Prescription*, N.Y. TIMES, Jan. 30, 2002, at A12.

³¹ *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *32 (N.D. Cal. June 19, 1998).

officer then arrived with a drug-sniffing German shepherd dog that went up and down the aisles as the students, some as young as six, were ordered to keep their hands on their desks in order not to startle the dog. Students were terrorized, reports said, especially after the dog broke from its handler in one classroom, chasing students around the room.³² Plainly, this is war. Children as young as six are among its targets.

In *Rucker* the issue was primarily one of statutory interpretation. In *Earls* the issue was constitutional—whether suspicionless searches like the ones before the Court are permitted under the Fourth Amendment. In both cases, however, the decisions below were overturned—and in *Earls* the Court split 5 to 4—suggesting that the outcomes were not foreordained. It is in such cases that one wants to examine the reasoning especially closely. The reasoning in *Earls*, unfortunately, is conclusory at every turn. It is one long circular argument, the conclusion seemingly foreordained from the start. Justice Thomas, writing for the majority, gives it away in his second sentence: “Because this Policy reasonably serves the School District’s important interest in detecting and preventing drug use among its students, we hold that it is constitutional.”³³ Note the school’s “important interest”—detecting and preventing drug use, as if it were a law enforcement agency. Because the school’s policy “reasonably serves” that interest, it is constitutional. That is the kind of uncritical, means/end analysis that speaks volumes about deference to the political branches.

The Fourth Amendment guards against “unreasonable” searches and seizures, of course. In that regard, a government search is unreasonable if conducted without good reason; and “good reason” means not simply that the search serves the government’s interest—a matter for the government to determine in any event—but that officials have “probable cause” to believe that the person searched has done something to warrant the search, if only harbor information about a crime. Thus, “good reason” looks backward, to the person or property to be searched, not forward to the government’s aim: “[No]

³²Tamar Lewin, *Drug Dogs Sniff Even 6-Year-Olds; Parents Sue*, N.Y. TIMES, July 26, 2002, at A17; Helen Rumbelow, *Use of Dog to Search Children For Drugs Prompts ACLU Suit*, WASH. POST, July 28, 2002, at A10.

³³*Earls*, 70 U.S.L.W. at 4737.

Warrant 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.” In a nutshell, the Fourth Amendment erects a clear presumption in favor of privacy and against government searches; if government does act, it must have a good reason; and that reason must relate to the person (or property) searched, to something that person is suspected of having done.

It is that presumption in favor of privacy and against government intrusions on privacy that is conspicuously absent from the *Earls* opinion, which goes out of its way to give the government the benefit of the doubt. To be sure, a “reasonableness” standard involves judgment, which means that reasonable people may reasonably differ about the standard and its application. For that very reason, however, it is essential that the Court have a sound theory of the matter—quite apart from the case law—a clear understanding of the presumptions and burdens of proof, grounded in first principles. When the opinion reads like a policy argument that could have been written by the government, we know we are far from that—and probably in the realm of drug policy.

Setting aside the case law for the moment, the problem here begins with the idea of an “administrative search”—as distinct from searches conducted in a criminal context. Administrative searches came to the fore with the modern administrative state, of course.³⁴ As governments began increasingly to regulate in the name of health and safety, as those grounds grew increasingly pretextual, and as unrelated grounds came to justify regulation, the administrative search became more common—to ensure that the law was being obeyed. In an uncertain world, some health and safety regulations are necessary, to be sure, as are the administrative searches that accompany them to ensure not simply that harm is rectified, after the fact, but prevented before it occurs. Among our unenumerated rights, after all, is the right to be free from the excessive risk others might create.

The road to health and safety is paved with peril, however, not least the peril of overregulation and loss of privacy.³⁵ Indeed, in

³⁴ See, e.g., Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, 15 TEMP. L. & TECH. J., 161, 171–77 (1996).

³⁵ In fact, it turns out that most regulation in this area cannot be justified from a cost-benefit perspective. See generally, W. KIP VISCUSI, *FATAL TRADEOFFS* (1992).

arguing that students who participate in extracurricular activities voluntarily subject themselves to intrusions on their privacy, Thomas likens them to “adults who choose to participate in a closely regulated industry.” As a comment on the Court’s reasoning, the analogy is instructive. Because government closely regulates an industry, those who enter it are said, as here, to have no complaint because they consented to the regulation. Absent an independent justification for the regulation, however, the argument is patently circular. It is like the mugger who demands your money or your life. Your “choice” is bogus because he has no right to either your money or your life and hence no right to put you to such a “voluntary” choice. Without an independent justification, therefore, the closely-regulated-industry rationale becomes a circular argument for both initial and subsequent regulation.

What one wants to know, then, is whether there is an independent justification for an administrative search—much as there has to be an independent justification for a more conventional search, one related to something the person searched may have done to give rise to a probable-cause rationale for the search. But administrative searches are called “suspicionless” precisely because there is no *individualized* cause for suspicion. How, then, can they be called “reasonable”?

The answer involves both probability and practicality: probability concerning risk arising from actions of certain kinds by many actors; practicality regarding the inefficacy of suspicion-based searches. Unfortunately, as in the individualized context, there are few bright lines here either—doubtless, there are fewer. In general, however, if actions of certain kinds by many actors entail risk to others, and the risk is of sufficient magnitude, then prophylactic regulation, with enforcement through administrative searches, may be justified. The justification is still backward looking, however: just as in the individualized context, it looks to what those searched are doing—putting others at risk—to justify an otherwise impermissible intrusion on their privacy, not to any policies of the government that go beyond its main business of protecting rights. And in such cases suspicion-based searches are often inefficacious as well. Thus, everything from vision exams for drivers to the screening of airline passengers can be justified along those lines, without any individualized suspicion. Plainly, however, not any rationale will do. In fact, it is because such

searches are *not* based on individualized suspicion that courts must be especially careful about approving them and especially skeptical of the government's rationale. Indeed, it was precisely the use of blanket searches and general warrants against the colonists that led to the Fourth Amendment in the first place.³⁶

Earls and Extracurricular Activities

Under that amendment, then, suspicionless searches are "reasonable" only in situations in which suspicion-based searches would be impractical and would not protect others from excessive risk. Thus, it is mainly to the rights of others that we must look to justify such searches. And in *Earls*, that is where Thomas begins: the probable cause standard, he says, "may be unsuited to determining the reasonableness of administrative searches where the 'Government seeks to *prevent* the development of hazardous conditions.'"³⁷ In elaborating on that rationale, however, he slowly broadens the focus:

"[I]n certain limited circumstances, the Government's need to . . . [prevent harm] is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"

Significantly, this Court has previously held that "special needs" inhere in the public school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights . . . are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the school's custodial and tutelary responsibility for children." In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.³⁸

³⁶ NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES*, ch. 1–3 (1937).

³⁷ *Earls*, 70 U.S.L.W. at 4738, (citing *Treasury Employees v. Von Raab*, 489 U.S. 656, 667–68 (1989)) (original emphasis).

³⁸ *Earls*, 70 U.S.L.W. at 4738–39 (internal citations omitted).

Notice the move from “hazardous conditions” and “safety” to “special needs” and finally to a school’s “custodial and tutelary responsibilities for children.” Citing *Vernonia School District 47J v. Acton*,³⁹ in which the Court upheld drug testing for school athletes, Thomas concludes that what is required to determine if a suspicionless search is justified is “a fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.”⁴⁰ The outcome of the balance is buried in that final phrase, of course. To get there, however, and to do the balancing, Thomas considers (1) the nature of the privacy interest allegedly compromised by the drug testing, (2) the character of the intrusion imposed by the policy, and (3) the nature and immediacy of the government’s concerns and the efficacy of the policy in meeting them.

Regarding the nature of students’ privacy interests, Thomas says that in the public school context, the most significant element is that the policy is undertaken in furtherance of the government’s responsibilities “as guardian and tutor of children entrusted to its care.” Thus, “[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.”⁴¹ If that in fact is the relevant question, let us ask it: Would parents, surely a child’s most important guardians and tutors, conduct suspicionless drug tests on their children? Not likely. Indeed, why would anyone, parent or nonparent guardian alike, conduct a drug test on a child in his charge without some reason to do so—some reason related to something the child had done?

Thomas neither asks nor answers that question. He simply assumes that testing is what a reasonable guardian would do, then goes on to argue that a student’s privacy interests are limited in a public school environment because “the State is responsible for maintaining discipline, health, and safety.”⁴² And he adds that the lowered expectations of privacy that athletes enjoy, which the *Vernonia* Court cited to justify drug-testing that group, apply also to

³⁹ 515 U.S. 646 (1995).

⁴⁰ *Earls*, 70 U.S.L.W. at 4739.

⁴¹ *Id.*

⁴² *Id.*

students who participate in nonathletic activities. The arguments here are so thin that one is almost relieved to find them irrelevant in the end; for Thomas says that the distinction between the privacy expectations of athletes and those of nonathletes “was not essential to our decision in *Vernonia*, which depended primarily upon the school’s custodial responsibility and authority.”⁴³ Better circular than thin arguments, apparently. The school’s testing authority rested on its custodial authority, we are told, not on the students’ status as athletes. Why then stop at athletes, or at students who participate in nonathletic extracurricular activities? Why not test all students? It is at this point that Thomas points to the voluntary nature of such participation, as mentioned above—trying thereby, apparently, to stop the slide made inevitable by the premise. The effort is futile. The custodial arguments in *Earls* will justify testing all students.

Turning to the second element in the balance, the character of the intrusion, the school’s policy requires a faculty monitor to wait outside a closed restroom stall for the student to produce a urine sample and to “listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody.” Thomas calls this process “minimally intrusive.”⁴⁴ He adds, however, that test results are not turned over to any law enforcement authority. Instead, if a student fails a test, the school calls his parents or guardians for a meeting with school officials; and the student must show proof of receiving drug counseling and submit to a second test in two weeks. If he fails that test he is suspended from all extracurricular activities for 14 days; and he must complete four hours of substance abuse counseling and submit to monthly drug tests. A third failed test results in a one-year suspension from all extracurricular activities. Obviously, the school does not have to turn results over to law enforcement authorities. It is itself a law enforcement agency.

As should be clear from what has already been argued, the final element to be balanced—“the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them”—will tip the scale beyond retrieval. In fact, Thomas begins his discussion of this factor in a noteworthy way:

⁴³ *Id.*

⁴⁴ *Id.* at 4739–40.

The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. As in *Vernonia*, "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.⁴⁵

No indifference there. No studied neutrality between the competing litigants. Here is a Court firmly committed to the war on drugs, anxious to do its part.

Given that beginning, the rest of the argument follows naturally. To the objection that the school had virtually no drug problem, Thomas responds that teachers had seen students who appeared to be under the influence of drugs and had heard students speaking openly about using drugs. Again, a drug dog had found marijuana cigarettes near the school parking lot, and police officers "once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member." If that were not enough, "the school board president reported that people in the community were calling the board to discuss the 'drug situation.'"⁴⁶ In point of fact, over the testing years, to the date of summary judgment in the case, only 3 or 4 students of more than 500 tested showed evidence of drug use.⁴⁷ Never mind: just as the distinction between athletes and nonathletes did not matter in the end, neither does the evidence matter here, for "[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime."⁴⁸ And again, "this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. . . . In response to the lack of evidence relating to drug use,

⁴⁵*Id.* at 4740 (citing *Vernonia*, 515 U.S. at 662).

⁴⁶*Id.*

⁴⁷Greenhouse, *supra* note 9, at A22.

⁴⁸*Earls*, 70 U.S.L.W. at 4740 (citing *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

the Court noted generally that ‘drug abuse is one of the most serious problems confronting our society today.’⁴⁹

The reasoning implicit in that final sentence is striking. It moves from the general to the particular in a way the Fourth Amendment was written, precisely, to block. Indeed, for “drug use” and “drug abuse” substitute “crime,” “drunken driving,” “Internet porn,” what have you. The implication seems to be that if there is some “social problem” in the nation, the individualized suspicion required by the Fourth Amendment can be ignored. Thus, Thomas writes: “As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what in effect would be a constitutional quantum of drug use necessary to show a ‘drug problem.’”⁵⁰ In other words, no particularized evidence is necessary. A general “drug abuse problem” in society will do. The Fourth Amendment’s presumption has effectively shifted. It was *against* government intrusion on privacy, unless there is individualized suspicion. Now, a general “social problem” suffices to establish a presumption *in favor* of government intrusion. And the presumption is effectively un rebuttable.⁵¹

Only at the end of his opinion does Thomas return, cursorily, to the safety issue, one of the two main rationales for suspicionless searches. Responding to a claim that “the testing of nonathletes does not implicate any safety concerns, and that safety is a ‘crucial factor’ in applying the special needs framework,” Thomas agrees “that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children,

⁴⁹ *Id.* (citing *Treasury Employees v. Von Raab*, 489 U.S. 656, 673).

⁵⁰ *Id.* at 4741.

⁵¹ One wonders what happened to the Thomas who dissented in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000): “Taken together, our decisions in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that Sitz and Martinez-Fuerte were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered “reasonable” a program of indiscriminate stops of individuals not suspected of wrongdoing.” *Id.* at 56 (Because respondent Edmond did not advocate overruling Sitz or Martinez-Fuerte, and thus did not brief or argue doing so, Thomas was reluctant to consider that step. Given those precedents, therefore, he dissented and voted to uphold the searches before the Court.).

athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose."⁵²

Here again, Thomas tries to justify suspicionless searches by invoking a general proposition about the dangers of drug use rather than a specific situation in which some are exposing others to excessive risk. In dissent, Justice Ginsburg nails the issue solidly. The risks Thomas cites, she says,

are present for *all* schoolchildren. *Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, engage in dangerous activities on their own time; that the children are enrolled in schools scarcely allows government to monitor all such activities. . . . Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words.⁵³

In *Vernonia*, from which *Earls* purports to flow, Ginsburg wrote a one-paragraph *conurrence* stating her understanding that the Court there reserved the question whether, on those facts, *all* students could be drug tested. In *Earls*, in which she found the facts to be quite different, she *dissented*, saying that the balance should have come out other than it did. She was joined by Justices Stevens, O'Connor, and Souter. Separately, O'Connor also dissented, joined by Souter, saying simply that she continues to believe that *Vernonia* was wrongly decided. She had written the dissent in *Vernonia*, joined by Stevens and Souter. Unfortunately, because Ginsburg's dissent in *Earls* proceeds on the assumption that *Vernonia* was rightly decided—whereas *Earls* goes "too far," as it were—it fails to get to the heart of the matter, even if it does smartly dispatch the majority's opinion. To get to the bottom of things, therefore, we have to look back to O'Connor's dissent in *Vernonia*.

⁵²*Earls*, 70 U.S.L.W. at 4741

⁵³*Id.* at 4743.

Vernonia and Athletes

The question in that case, again, was whether student *athletes* could be subjected to random, suspicionless drug tests. Writing for the majority, Justice Scalia noted that the Court had found suspicionless searches reasonable “‘when special needs, beyond the normal need for law enforcement, made the warrant and probable-cause requirement impracticable.’”⁵⁴ The Court had also found that “‘special needs’” existed in the public school context in which the power of the state was “‘custodial and tutelary.’”⁵⁵ Scalia then invoked a simple balancing test, pitting the intrusion on the students’ privacy against the school’s interests. On the students’ side he found a reduced expectation of privacy within the school environment and a still lesser expectation among athletes. Moreover, the privacy interests compromised by the tests were “‘negligible,” he concluded. On the other side, by contrast, was the school’s interest in deterring drug use, especially among athletes who were said to be leaders in the school’s drug culture, had caused disciplinary problems in the school, and were at greater risk of sports injuries because of drug use. Because Scalia believed the balance favored the school, he upheld the suspicionless tests as reasonable under the Fourth Amendment.

In her dissent, O’Connor began by noting that the majority had dispensed with the requirement of individualized suspicion on “‘considered policy grounds’”; yet whether a blanket search was “‘better’” than one based on suspicion was not for judges to decide, she averred.⁵⁶ In fact, for most of the Court’s history, she continued, “‘mass, suspicionless searches have been generally considered *per se* unreasonable.’”⁵⁷ Only in recent years have exceptions been allowed, she noted, and only “‘where it has been clear that a suspicion-based regime would be ineffectual.’”⁵⁸ After reviewing the history of the matter, O’Connor concluded that suspicionless searches have been upheld only in “‘unusual circumstances,” and after first recognizing the Fourth Amendment’s “‘longstanding preference for a suspicion-based search regime’”:⁵⁹

⁵⁴ *Vernonia*, 515 U.S. at 653 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

⁵⁵ *Id.* at 655.

⁵⁶ *Id.* at 667.

⁵⁷ *Id.*

⁵⁸ *Id.* at 668.

⁵⁹ *Id.* at 674.

“In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion*, a search may be reasonable despite the absence of such suspicion.” The obvious negative implication of this reasoning is that, if such an individualized suspicion requirement would *not* place the government’s objectives in jeopardy, the requirement should not be forsaken.⁶⁰

Now there is a statement about the Fourth Amendment’s presumption in favor of privacy and against government intrusion, the kind of statement one would hope to have seen from Scalia or Thomas. It makes it clear how limited the exceptions are, which O’Connor went on to illustrate with examples involving risk for others and the impracticability, under the circumstances, of a suspicion-based regime. She then concluded that “the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns.”⁶¹

But the irony, O’Connor continued, is that the public school context that so colors the Court’s view, far from requiring suspicionless searches, is precisely the kind of setting that lends itself to suspicion-based searches. “In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in the classrooms, the hallways, or locker rooms.”⁶² In fact, most of the evidence the school had presented consisted of stories of “particular, identifiable students acting in ways that plainly give rise to reasonable suspicion” of drug use, suspicion that would have justified a search. Given that, O’Connor drew the inference that utterly escaped the majority: “[A] vigorous regime of suspicion-based testing would have gone a long way toward solving Vernonia’s school drug problem while preserving the Fourth Amendment rights” of the innocent. In such circumstances, she concluded, “a mass, suspicionless search regime is categorically unreasonable.”⁶³

⁶⁰*Id.* (citing *Skinner v. Ry. Labor Executive Ass’n* 489 U.S. 602, at 624 (emphasis added by O’Connor, J.)).

⁶¹*Id.* at 678.

⁶²*Id.*

⁶³*Id.* at 679–80.

Having nailed down her conclusion, O'Connor addressed what she called "the principal counterargument," plainly central to both *Vernonia* and *Earls*, that the Fourth Amendment is more lenient regarding school searches. That is true, she noted; but while public school children do not enjoy either the warrant or the probable cause guarantees—which they do enjoy in nonschool settings—they should still enjoy "the individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people."⁶⁴ That students today, after *Earls*, do not enjoy even that protection is nothing short of scandalous. Indeed, the Court's opinions in this area, together with compulsory attendance laws, have effectively stripped public school students of their Fourth Amendment rights.

In his concurrence in *Earls*, Justice Breyer writes, "[a] public school system that fails adequately to [protect students from drugs] may well see parents send their children to private or parochial school instead—with help from the State. See *Zelman v. Simmons-Harris*."⁶⁵ That may be true. But a school that addresses the problem of drug use with lockdowns and mass, suspicionless searches of mostly innocent students may well see the same thing. Indeed, a cynic would be forgiven for thinking that the Court's jurisprudence in this area is designed precisely to drive parents to send their children to private schools, where a variety of voluntary arrangements is possible to address the problem of drug use. That, of course, would be the ultimate solution to the problem of drugs in schools—and the only one consistent with a free society.

Conclusion

In sum, whether it concerns tenants in public housing, students in public schools, or any other group or context, the war on drugs continues. Our cities have been devastated, our prisons have been filled, our institutions have been corrupted, and our rights have been trampled and lost, along with our lives, all in a futile effort to stop some of us from consuming substances that others of us think should not be consumed, substances that have been consumed by

⁶⁴ *Id.* at 681.

⁶⁵ *Earls*, 70 U.S.L.W. at 4742.

people from time immemorial. The evidence of failure is so palpable that even the Court can no longer ignore it.

Yet the Court continues to play its part in this lost cause, doing untold damage to the rule of law in the process. It neither questions the authority of the federal government to be exercising what is plainly a general police power—the kind of power the Court itself has repeatedly said does not exist—nor protects the rights of individuals to be free from the tyranny that ensues. That is no proper judicial restraint. It is judicial abdication. And the rule of law is its main victim.

