Case Note

CONSTITUTIONAL LAW—Students Shed Wyoming Constitutional Rights at the Schoolhouse Gate: The Wyoming Supreme Court Upholds a Policy of Random, Suspicionless Drug Testing of Students; *Hageman v. Goshen County School District No. 1*, 256 P.3d 487 (Wyo. 2011)

*Julianne Gern**

Introduction

"It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate."[1] Both the United States and Wyoming Constitutions protect a person from unreasonable searches and seizures.[2] In April of 2009, the Goshen County School District (School District) tested the extent of Wyoming's search and seizure protection when it adopted a policy mandating random, suspicionless drug testing of students participating in extracurricular activities.[3] In *Hageman v. Goshen County School District No. 1*, a group of students and their parents (the Coalition) sued the School District, alleging the testing violated the students' right against unreasonable searches and seizures.[4] The Goshen County District Court granted summary judgment in favor of the School District and the Wyoming Supreme Court affirmed.[5]

The Coalition conceded the school's policy was constitutional under the federal constitution. They argued, however, the policy was unconstitutional under the Wyoming Constitution.[6] The Wyoming Supreme Court has previously held the Wyoming Constitution's prohibition against unreasonable searches and seizures affords greater protection than the Fourth Amendment to the United States. Constitution.[7] Ideally, Wyoming searches and seizures must be supported

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* Candidate for J.D., University of Wyoming College of Law, 2014. Thank you to Josh Eames, Anne Kugler, and Christopher Sherwood for their help throughout the writing process. I especially want to thank Jennifer Horvath for her help, encouragement, and careful editing. Finally, thank you to Michael Fitzgerald for his support and encouragement.

[1] Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506 (1969); *accord* Bd. of Trs., Laramie Cnty. Sch. Dist. No. 1 v. Spiegel, 549 P.2d 1161, 1175 (Wyo. 1976) (quoting *Tinker*, 393 U.S. at 506).

[2] U.S. Const. amend. IV; Wyo. Const. art. 1, § 4.

[3] Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 490–91 (Wyo. 2011).

[4] *Id.* at 505.

[5] *Id.* at 490.

[6] *Id.* at 491.

[7] *E.g.,* Holman v. State, 183 P.3d 368, 371 (Wyo. 2008); O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005); Vasquez v. State, 990 P.2d 476, 483–86 (Wyo. 1999).

by a warrant.[8] If not supported by a warrant, searches and seizures must be "reasonable under all of the circumstances . . . in light of the historical intent of our search and seizure provision."[9] This historical intent was to provide greater protection to Wyoming's citizens than the federal constitution provides.[10] When former delegates to the Wyoming Constitutional Convention composed the Wyoming Supreme Court, the court interpreted the search and seizure provision of the Wyoming Constitution as more protective than the Fourth Amendment.[11]

In *Hageman*, the Wyoming Supreme Court failed to recognize the Wyoming Constitution provides greater protection than the Fourth Amendment when it comes to unreasonable searches and seizures.[12] The School District's policy of random, suspicionless drug testing of students in extracurricular activities is not reasonable under all circumstances.[13] This case note first argues the Wyoming Supreme Court failed to apply the test in *Saldana v. State* for determining whether the Wyoming Constitution should be interpreted differently than the United States Constitution.[14] Thus, the Wyoming Supreme Court failed to rigorously apply its "reasonable under all the circumstances" test.[15] Second, the court did not accord the proper weight to each of the factors used to decide reasonableness in determining whether the particular need for the search was in the public interest and outweighed the invasion of personal rights.[16] Third, there were factors the court did not address, particularly whether there were less intrusive means to

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[8] WYO. CONST. art. 1, § 4; Jessee v. State, 640 P.2d 56, 61 (Wyo. 1982), *overruled on other grounds by* Jones v. State, 902 P.2d 686 (Wyo. 1995).

[9] *Vasquez*, 990 P.2d at 489.

[10] ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION 43 (Oxford Univ. Press 2011) ("When the Wyoming Supreme Court was composed of former delegates to the constitutional convention, the court understood this section to protect liberty more stringently than the level of protection provided by the Fourth Amendment of the U.S. Constitution.").

[11] *Id.*; *see generally* Mervin Mecklenburg, *Fixing* O'Boyle v. State—*Traffic Detentions Under Wyoming's Emerging Search-and-Seizure Standard*, 7 WYO. L. REV. 69, 96–97 (2007) ("The only conclusion that can be reached is that the two provisions may be similar, but they are not identical.").

[12] *See infra* notes 155–260 and accompanying text.

[13] It should be noted that the policy targeted alcohol and illegal drugs, not steroids. *See* Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 490–91 (Wyo. 2011). Steroid testing in high schools existed, until recently, in several states. *High School Steroid Testing Solution*, ANTI-DOPING SCIENCES INSTITUTE, http://www.antidopingsciences.org/HS.php (last visited May 7, 2013). Today, only two states test for steroid usage among high school athletes. *Id.* Athletics fall into a special needs exception to the Fourth Amendment. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 651–53 (1995). Students in athletics are more likely to harm themselves or others if they use performance enhancing drugs, illegal drugs or alcohol. *Id.*; *High School Steroid Testing Solution*, *supra* note 13.

[14] *See infra* notes 170–95 and accompanying text.

[15] *See infra* notes 170–95 and accompanying text.

[16] *See infra* notes 196–254 and accompanying text.

accomplish the School District's goal.[17] Finally, there are strong policy reasons against the School District's drug testing policy that the court should have considered.[18] Accordingly, the court should have found the policy unconstitutional under the Wyoming Constitution.[19]

BACKGROUND

The United States Supreme Court has twice considered and determined that random, suspicionless drug testing of students in extracurricular activities does not violate the Fourth Amendment.[20] Several states followed suit and determined that random, suspicionless drug testing of students in extracurricular activities does not violate their state constitutions.[21] Two states, Washington and Pennsylvania, determined their constitutions to be more protective against unreasonable searches and seizures than the federal constitution and departed from United States Supreme Court precedent by extending this protection to students faced with random, suspicionless drug tests in schools.[22] Similar to Washington and Pennsylvania, the Wyoming Supreme Court has held Wyoming's search and seizure provision to afford greater protection than the Fourth Amendment.[23]

The Wyoming Constitution

When discussing the Wyoming Constitution, the Wyoming Supreme Court has stated, "[i]t is a unique document, the supreme law of our state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated."[24] Additionally, the court has recognized that the Wyoming Constitution as a whole contains rights and language not present in the federal constitution.[25] The people of Wyoming have always placed a very high value on their individual liberties—during a debate

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[17] *See infra* notes 255–68 and accompanying text.

[18] *See infra* notes 269–84 and accompanying text.

[19] WYO. CONST. art. 1, § 4.

[20] Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 665 (1995).

[21] *See, e.g.*, Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 974 (Ind. 2002); State v. Jones, 666 N.W.2d 142, 143–44 (Iowa 2003); Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624, 627 (N.J. 2003); Marble Falls Indep. Sch. Dist. v. Shell, No. 03-02-652-CV, 2003 WL 1738417, at *1 (Tex. App. Apr. 3, 2003); Weber v. Oakridge Sch. Dist. 76, 56 P.3d 504, 506 (Or. Ct. App. 2002).

[22] *See infra* notes 94–109 and accompanying text.

[23] *E.g.*, Vasquez v. State, 990 P.2d 476, 483–486 (Wyo. 1999); O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005).

[24] *Vasquez*, 990 P.2d at 485.

[25] *Id.*

at the Wyoming Constitutional Convention over the cost of establishing a state supreme court, a delegate said, "what is the matter of a few thousand dollars compared with the rights of life and liberty."[26]

Though the language used in the United States and Wyoming Constitutions is similar, the way they have been interpreted is quite different.[27] The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation and particularly describing the place to be searched, and the persons or things to be seized.[28]

The Wyoming Constitution states, "[t]he right of people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized."[29] While the words are significantly similar, the different level of protection lies in the Wyoming Supreme Court's understanding of the intent of the framers of the Wyoming Constitution.[30]

Development of Wyoming Search and Seizure Law

The Wyoming Supreme Court, when it was composed of former delegates to the Wyoming Constitutional Convention, interpreted the Wyoming search and seizure clause as more protective than the federal constitution.[31] The actions of those former delegates who became Wyoming Supreme Court justices show that the Wyoming Constitution search and seizure provision was meant to be more protective than the federal constitution.[32] The Wyoming search and seizure provision contains a specific affidavit requirement that is absent in the United States Constitution.[33] The implementation of an affidavit requirement to the

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[26] T. A. LARSEN, HISTORY OF WYOMING 248 (1965).

[27] *See infra* notes 28–30 (discussing the interpretation of the Wyoming Constitution as opposed to the Fourth Amendment of the United States Constitution).

[28] U.S. CONST. amend. IV.

[29] WYO. CONST. art. 1, § 4.

[30] *E.g.*, *Vasquez*, 990 P.2d at 483–86.

[31] *See* KEITER & NEWCOMB, *supra* note 10; *see also* Maki v. State, 112 P. 334, 336 (Wyo. 1911).

[32] KEITER & NEWCOMB, *supra* note 10; *see also Maki*, 112 P. at 336.

[33] *See* U.S. CONST. amend. IV; WYO. CONST. art. 1, § 4.

search and seizure provision of the Wyoming Constitution indicates the intention of the framers to create a constitutional provision that affords its citizens greater personal privacy protections than does the federal constitution.[34]

Additionally, the Wyoming Supreme Court adopted versions of the exclusionary rule and *Miranda* warnings well before the United States Supreme Court, evidencing the greater protections of the Wyoming Constitution.[35] After *Mapp v. Ohio*, the Wyoming Supreme Court generally followed the United States Supreme Court jurisprudence when dealing with searches and seizures.[36] However, after the decision in *New York v. Belton*, the Wyoming Supreme Court once again broke away from the United States Supreme Court and held that the Wyoming Constitution provides greater protections.[37]

Under the Fourth Amendment to the United States Constitution, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" and the Supreme Court "has said that reasonableness generally requires the obtaining of a judicial warrant."[38] There are exceptions to the general rule; for example, automobile searches incident to arrest.[39] As in federal constitutional analysis, the Wyoming Supreme Court has stated that whether a search is reasonable is a judicial question.[40] The general rule in Wyoming is that "searches not made under a search warrant are unreasonable."[41] Under the Wyoming Constitution a search or seizure must be "reasonable under all of the circumstances," not merely reasonable, to be

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[34] State v. Peterson, 194 P. 342, 346 (Wyo. 1920); *see* KEITER & NEWCOMB, *supra* note 10 ("When the Wyoming Supreme Court was composed of former delegates to the constitutional convention, the court understood this section to protect liberty more stringently than the level of protection provided by the Fourth Amendment of the U.S. Constitution.").

[35] *Peterson*, 194 P. at 350 (holding that evidence seized without a valid warrant will be suppressed if the motion to suppress is timely); *Maki*, 112 P. at 336 (holding that persons placed in detention must be advised that they have the right to remain silent).

[36] Mecklenburg, *supra* note 10, at 75. *Mapp v. Ohio* held that the exclusionary rule, whereby evidence seized in violation of the Fourth Amendment is excluded, applies to the states through the Fourteenth Amendment. 367 U.S. 643, 655 (1961).

[37] Maryt L. Fredrickson, Case Note, *Recent Developments in Wyoming's Reasonableness Requirement Applied to the Search Incident to Arrest Exception*; Holman v. State, 183 P.3d 368 (Wyo. 2008), 9 WYO. L. REV. 195, 200 (2009). *New York v. Belton* held that when a police officer makes a lawful custodial arrest of a motor vehicle occupant, he or she may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. 453 U.S. 454, 460 (1981), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009).

[38] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 652–53 (1995) (citations omitted).

[39] *Gant*, 556 U.S. at 351.

[40] Jessee v. State, 640 P.2d 56, 61 (Wyo. 1982), *overruled on other grounds by* Jones v. State, 902 P.2d 686 (Wyo. 1995).

[41] *Id.*

constitutional.[42] "Reasonable under all of the circumstances" means the search must be "reasonable under all of the circumstances as determined by the judiciary, in light of the historical intent of our search and seizure provision."[43]

In *Vasquez*, decided in the context of a warrantless search of a vehicle incident to arrest, the Wyoming Supreme Court created a modern rule using Wyoming's "reasonable under all of the circumstances" test.[44] The court held that warrantless searches incident to arrest are reasonable only if executed to prevent an arrestee from reaching weapons or to prevent the concealment or destruction of evidence.[45] Since the *Vasquez* decision, the court has revisited the "reasonable under all of the circumstances" test numerous times.[46] In 2005, the court applied the "reasonable under all of the circumstances" test to custodial interrogations.[47] The court has articulated four circumstances when the "reasonable under all of the circumstances" test does not apply: (1) to search for weapons or contraband that pose a risk to officer or public safety; (2) when the presence of a passenger in the car poses a threat to officer or public safety; (3) the need to secure an arrestee's automobile; and (4) to search for evidence related to the crime that justified the arrest.[48] There have been several cases since the decision in *Vasquez*, as well as one law review note, that suggest the "reasonable under all of the circumstances" test, as applied today, simply means reasonable grounds, and that the appropriate standard to apply is reasonable suspicion.[49] The Wyoming Supreme Court, however, still cites to *Vasquez* as the law.[50]

The Wyoming Supreme Court introduced the *Jessee* test to determine reasonableness.[51] A reasonableness analysis is a necessary step in determining whether a search or seizure is "reasonable under all of the circumstances."[52] The

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[42] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999).

[43] *Id.*

[44] *Id.* (involving the search of the passenger cab of a pickup truck and a locked box within the cab as well as the seizure of cocaine found within the box after the owner had been arrested).

[45] *Id.*

[46] *E.g.*, Clark v. State, 138 P.3d 677, 682–83 (Wyo. 2006); Andrews v. State, 40 P.3d 708, 715 (Wyo. 2002).

[47] *See* O'Boyle v. State, 117 P.3d 401, 420 (Wyo. 2005) (holding that extensive questioning about topics unrelated to the traffic stop and detention of the suspect in the squad car during questioning are not reasonable under all of the circumstances).

[48] Sam v. State, 177 P.3d 1173, 1177 (Wyo. 2008).

[49] Fredrickson, *supra* note 37, at 215.

[50] *E.g.*, Holman v. State, 183 P.3d 368, 371 (Wyo. 2008).

[51] Jessee v. State, 640 P.2d 56, 61(Wyo. 1982), *overruled on other grounds by* Jones v. State, 902 P.2d 686 (Wyo. 1995); *see* Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 495 (Wyo. 2011) (listing the *Jessee* factors).

[52] *Jessee*, 640 P.2d at 61.

Wyoming Supreme Court stated that reasonableness is impossible to define.[53] In cases where the reasonableness of the search and seizure is in question, the court will apply a factor-based test.[54] The court stated that the factor-based test involves: (1) probing the scope of the particular intrusion; (2) the manner in which the intrusion is carried out; (3) the justification for the intrusion; and (4) the place in which it is conducted.[55]

Wyoming Constitutional Analysis

Even though the Wyoming Constitution is more protective in some situations, the court has developed a test to determine whether to consider the state constitution separately in a novel factual situation.[56] Justice Golden's concurrence in *Saldana v. State* articulated a list of non-exclusive factors used to decide whether to interpret the state constitution differently: "(1) the textual language [of the constitutional provisions]; (2) the differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[57] The Wyoming Supreme Court considered those factors in *Vasquez*.[58] The court found there was little difference between the text of the two provisions and noted the constitutional history was vague, but that the Wyoming Constitution, in general, listed more rights and protections than the federal constitution.[59] The court also determined there was little Wyoming constitutional history to help with decisions concerning searches and seizures, the court believed the most that could be determined was individual rights were to be protected by the states.[60] The court also considered the *Saldana* factors in *O'Boyle v. State*, determining that the factors indicated the use of the *Vasquez* "reasonable under all the circumstances" test.[61]

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[53] *Id.*

[54] *See Hageman*, 256 P.3d at 495.

[55] *Id.*

[56] Vasquez v. State, 990 P.2d 476, 484–86 (Wyo. 1999) ("The issue of whether this Court should consider an independent interpretation of the Wyoming Constitution's search and seizure provision was answered affirmatively with instructions that a litigant must provide a precise, analytically sound approach when advancing an argument to independently interpret the state constitution." (citing Dworkin v. L.F.P., Inc., 839 P.2d 903, 909 (Wyo. 1992)); Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (quoting State v. Gunwell, 720 P.2d 808, 816 (Wash. 1986)).

[57] *Saldana*, 846 P.2d at 622.

[58] *Vasquez*, 990 P.2d at 484–86.

[59] *Id.*

[60] *Id.*

[61] O'Boyle v. State, 117 P.3d 401, 409–19 (Wyo. 2005).

United States Supreme Court Decisions Concerning Drug Testing in Public Schools

The United States Supreme Court has decided two cases pertaining to random, suspicionless drug testing of students.[62] In *Vernonia School District 47J v. Acton*, the Vernonia School District experienced a major upswing in student drug use.[63] Specifically, the district found that high school student athletes were the leaders of a drug culture in the school.[64] In response, the school district instituted a policy where students were required to consent to random, suspicionless drug tests prior to participating in sports.[65] Students were tested not only at the beginning of their athletic season but also randomly selected for drug tests throughout the season.[66] The purported purpose of the testing was to ensure the health and safety of the students and to help those identified as having drug problems enter rehabilitation programs.[67] The Actons, parents of one student athlete, sued the district because the district denied their son, a seventh grader, participation in the football team because he would not consent to the testing.[68]

The Court held that a drug testing policy must be reasonable under the Fourth Amendment to be constitutional.[69] The Court recognized there are certain settings in which "special needs" make the requirements of a warrant and probable cause impracticable.[70] Finding that public schools fall into a special needs category, the Court held that a warrant and probable cause were unnecessary.[71] Noting that students enjoy a lower expectation of privacy than the general public, the Court reasoned that student athletes enjoy an even lower expectation.[72] The Court noted the means used to address the problem favored a finding of reasonableness.[73] Ultimately, the Court found the school had a legitimate interest in deterring drug use by the student population and, therefore, held that the drug testing policy

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[62] Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[63] 515 U.S. at 648–49. The Vernonia School District 47J, at the time of the decision, was a small district with three grade schools and only one high school. *Id.* at 648.

[64] *Id.* at 649–50.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 650.

[68] *Id.* at 651.

[69] *Id.* at 652.

[70] *Id.* at 653.

[71] *Id.*

[72] *Id.* at 657.

[73] *Id.* at 663.

was constitutional because it was aimed at a particular group of students who had been deemed a problem population for drug use.[74]

Seven years later, in *Board of Education v. Earls*, the Court, in a five-to-four decision, extended the reasoning of *Vernonia* to include testing of students in all extracurricular activities, not just sports.[75] The students and their parents argued the policy violated the Fourth Amendment.[76] The Court held the policy reasonably served the school district's interest of detecting and preventing drug use among students.[77] The facts of *Earls* differed from *Vernonia* in that the district was not targeting a specific group of at-risk students.[78] But the Court emphasized that reasonableness under the Fourth Amendment does not require a school district to use the least intrusive means when attempting to reduce drug use among students.[79] The Court reasoned that students in all extracurricular activities submit themselves to rules and regulations that do not apply to the student body at large.[80] The Court determined the decision in *Vernonia* was not based on the fact that student athletes have a lesser expectation of privacy than non-athletes, but rather on the custodial responsibility and authority exercised by the school district.[81] In addition, the character of the intrusion did not greatly invade the students' privacy interests.[82] Finally, the Court determined that the interest in preventing schoolchildren from using drugs is an important governmental concern and the health risks identified in *Vernonia* also applied to the children in *Earls*.[83] The Court cited the following evidence as being sufficient to justify the policy: teachers witnessing students who appeared to be under the influence of drugs; teachers hearing students openly discuss drugs; the identification of marijuana by a drug dog near the school parking lot; and drugs or drug paraphernalia being found in the car of a Future Farmers of America member.[84]

In dissent, Justice Ginsburg argued the special needs requirement was not so flexible as to allow any drug-testing program the school district chooses to implement.[85] She noted that the risks articulated in *Vernonia* concerning drug use

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[74] *Id.* at 661–65.

[75] *See* Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002).

[76] *Id.* at 826–27.

[77] *Id.* at 827.

[78] *See id.* at 838.

[79] *Id.* at 837.

[80] *Id.* at 832.

[81] *Id.* at 831.

[82] *Id.* at 832.

[83] *Id.* at 834.

[84] *Id.* at 835.

[85] *Id.* at 843 (Ginsburg, J., dissenting).

are present for all schoolchildren, not simply those in extracurricular activities.[86] Justice Ginsburg reasoned that while extracurricular activities are "voluntary," the school expends public resources to support the programs, and "[p]articipation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience."[87] She identified a major difference between athletics, the activity targeted in *Vernonia*, which pose a physical risk to students that schools have a duty to mitigate, and all extracurricular activities as identified in *Earls*.[88] Justice Ginsburg discussed the relatively minor problem faced by the school district in *Earls* compared to that of *Vernonia*.[89] She noted there is a difference between imperfect tailoring of a policy to a problem and no tailoring at all, which she believed to be the case in *Earls*.[90] Finally, Justice Ginsburg pointed out that "students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers."[91]

State and Federal Decisions Concerning Student Drug Testing Policies

Most state and federal courts have followed *Vernonia* and *Earls*.[92] In the majority of cases, courts have held that random, suspicionless drug tests of students in athletics and extracurricular activities, and of those wishing to drive to school, were constitutional.[93] These decisions track the reasoning articulated in *Vernonia* and *Earls*.[94]

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[86] *Id.*

[87] *Id.* at 845.

[88] *Id.* at 846.

[89] *Id.* at 850.

[90] *Id.* at 852.

[91] *Id.* at 853.

[92] *See* Linke v. Nw. Sch. Corp., 763 N.E.2d 972 (Ind. 2002) (holding that random, suspicionless drug tests of students in athletics, extracurricular activities, co-curricular activities, or those wishing to drive themselves to school is constitutional under Indiana Constitution); State v. Jones, 666 N.W.2d 142 (Iowa 2003) (holding that the searching of student lockers for drugs did not violate the Iowa Constitution); Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624 (N.J. 2003) (holding that random, suspicionless drug tests of students in extracurricular activities and of those seeking parking privileges is constitutional under the New Jersey Constitution); Weber v. Oakridge Sch. Dist. 76, 56 P.3d 504 (Or. Ct. App. 2002) (holding that random, suspicionless drug testing of student athletes is constitutional under Oregon Constitution); Marble Falls Indep. Sch. Dist. v. Shell, No. 03-02-652-CV, 2003 WL 1738417, at *1 (Tex. App. Apr. 3, 2003) (holding that mandatory drug testing of students in extracurricular activities did not violate the Texas Constitution).

[93] *See supra* note 91.

[94] *See Linke*, 763 N.E.2d at 985; *Jones*, 666 N.W.2d at 150; *Joye*, 826 A.2d at 655; *Weber*, 56 P.3d at 441; *Shell*, 2003 WL 1738417, at *6.

Contrary to the momentum of state court decisions, the Washington Supreme Court held random, suspicionless drug testing of students violated the Washington Constitution in *York v. Wahkiakum School District No. 200*.[95] Even prior to *York*, the Washington Supreme Court had established that Washington's search and seizure provision provided greater degree of privacy than the United States Constitution.[96] The Washington court held the Washington Constitution's use of the words "authority of law" to mean that, in the absence of a recognized exception, in order for a search and seizure to be constitutional, a warrant must be issued.[97] Due to the nature of random, suspicionless drug tests, they are not accompanied by a warrant.[98] The court concluded the drug testing policy was unconstitutional under the Washington Constitution, and thus violated the students' rights.[99]

A similar result was reached in Pennsylvania when, in a procedurally complicated case, the Pennsylvania Supreme Court determined that a random, suspicionless drug testing policy would violate its constitution if the policy itself was before the court.[100] As in Wyoming and Washington, the Pennsylvania Supreme Court has previously held its Constitution provides greater protections than the United States Constitution.[101] The Pennsylvania Supreme Court was also critical of the decisions made by the United States Supreme Court in the suspicionless school drug testing cases.[102] In Pennsylvania, a lower court dismissed

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[95] York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995, 1001 (Wash. 2008).

[96] *Id.* ("[I]t is well established that in some areas, article 1, section 7 provides greater protection than its federal counterpart—the Fourth Amendment.") (citing State v. McKinney, 60 P.3d 46, 48 (Wash. 2002)).

[97] *Id.* The Washington Constitution's prohibition against reasonable searches and seizures reads, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1, § 7.

[98] *York*, 178 P.3d at 1006.

[99] *Id.*

[100] Theodore v. Del. Valley Sch. Dist., 836 A.2d 76, 91 (Pa. 2003). In *Theodore*, the school district randomly tested five percent of the targeted population monthly. *Id.* at 79. The tests were urine samples, blood samples, or breathalyzers. *See id.* A positive test result led to a variety of consequences depending on the number of previous positive tests. *Id.* at 79–80.

[101] *Id.* at 91. The Pennsylvania Constitution's prohibition against searches and seizures is similar to the Wyoming and federal constitutions. It reads:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. 1, § 8. Like Wyoming, the Pennsylvania Supreme Court has held that the Pennsylvania Constitution's prohibition against unreasonable searches and seizures is more protective than the Fourth Amendment. *E.g.*, Commonwealth v. Waltson, 724 A.2d 289, 292 (Pa. 1998).

[102] *Theodore*, 836 A.2d at 88.

a case brought by a group of parents and students challenging the constitutionality of a school district policy requiring students participating in extracurricular activities and student drivers to submit to random, suspicionless drug testing.[103] On appeal, both the intermediate court and the Pennsylvania Supreme Court held that the school district's policy was *not* constitutional as a matter of law and reinstated the case.[104] In dictum, the Pennsylvania Supreme Court seriously questioned whether such a policy would be constitutional considering the heightened protections against unreasonable searches and seizures found in the Pennsylvania Constitution.[105]

The Pennsylvania policy was aimed at testing students in extracurricular activities, as well as student drivers.[106] The Pennsylvania Supreme Court found "the means chosen . . . to effectuate that general policy are unreasonable given the heightened protection of privacy under the Pennsylvania Constitution."[107] The Pennsylvania court found the school district had not presented any evidence there was a real problem with drugs, did not address whether the students involved in the few, minor incidents with drugs were participants in extracurricular activities or drivers, and did not claim the students selected to be tested were likely to use drugs.[108] In fact, the Pennsylvania court determined the policy entirely ignored a portion of the student body more likely to use drugs than the portion singled out—the "slackers" who chose not to be involved in extracurricular activities at all.[109] The Pennsylvania court concluded by stating the policy

> cannot be deemed constitutional on its face because it authorizes a direct invasion of student privacy, with no suspicion at all that the students targeted are involved with alcohol or drugs, or even that they are more likely to be involved than the students who are exempted from the policy.[110]

Additionally, the United States Court of Appeals for the Seventh Circuit held mandatory drug testing of students returning to school after a suspension for fighting to be unconstitutional.[111] In *Willis v. Anderson Community School Corp.*, the school suspended a student for fighting.[112] The school requested a urine

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[103] *Id.* at 81–82.

[104] *Id.* at 78.

[105] *Id.* at 91.

[106] *Id.* at 90–91.

[107] *Id.* at 91.

[108] *Id.* at 91–92

[109] *Id.* at 92.

[110] *Id.* at 93.

[111] Willis v. Anderson Comm. Sch. Corp., 158 F.3d 415, 424–25 (7th Cir.1998).

[112] *Id.* at 417.

sample to test for drug use upon the student's return to school.[113] The student refused and the school, again, suspended the student.[114] The court determined that while the governmental interest was analogous to the interest expressed in *Vernonia*, the efficacy and the privacy interest of the policy enacted to further that interest was very different.[115] The Seventh Circuit found that the school had not demonstrated that suspicion-based testing would be unsuitable to furthering the interest.[116] In fact, the court reasoned that a suspicion-based system would be highly suitable to furthering the particular interest.[117] Overall, the court focused on setting boundaries to avoid sanctioning routine drug testing of students.[118]

Wyoming's Treatment of Minors

Prior to *Hageman*, the Wyoming Supreme Court had not addressed whether suspicionless drug testing violated students' constitutional right against unreasonable searches and seizures.[119] As a general matter, the Wyoming Supreme Court has recognized that the safety and welfare of students in school is paramount.[120] According to the Wyoming Supreme Court, schools must be given the flexibility to establish rules that might be inappropriate for adults but are acceptable in order to protect the safety and welfare of students.[121] While students and minors retain their constitutional rights, those rights may apply differently to them than to adults.[122] For example, the Wyoming Supreme Court held in *Matter of ALJ* that parole officers do not need to have reasonable suspicion that a minor used alcohol in order to administer a drug test.[123] This is in contrast to the policy that a parole officer, before making a search of an adult parolee, must have reasonable suspicion that the parolee committed a parole violation.[124] Thus, Wyoming has addressed the constitutional rights of minors in other situations.

PRINCIPAL CASE

On April 14, 2009, the Goshen County School District No. 1 Board of Trustees adopted a policy requiring students in grades seven through twelve, who participate in extracurricular activities, to submit to random, suspicionless

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 424–25.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See infra* notes 124–65 and accompanying text.

[120] *In re* RM v. Washakie Cnty. Sch. Dist. No. 1, 102 P.3d 868, 873 (Wyo. 2004).

[121] Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 496 (Wyo. 2011).

[122] *Id.*

[123] Matter of ALJ v. State, 836 P.2d 307, 311 (Wyo. 1992).

[124] Pena v. State, 792 P.2d 1353, 1357–58 (Wyo. 1990).

drug tests.[125] The Board adopted this policy based upon several student surveys revealing that 33% of eighth graders, 41% of tenth graders, and 52% of twelfth graders in Goshen County were at risk of harm from illicit drug use.[126] Following the institution of the policy, a group of students and parents (the Coalition) sued the School District.[127] The district court concluded that the drug testing policy did not violate the Wyoming or United States Constitutions and subsequently granted summary judgment for the School District.[128] On appeal, the primary issue was whether the district court erred in failing to hold that the School District's policy of random, suspicionless drug tests violates the prohibition against unreasonable searches and seizures under the Wyoming Constitution.[129] The Coalition contended that while the drug testing policy did not violate the United States Constitution, it violated the Wyoming Constitution, because the Wyoming Constitution affords citizens greater protections against unreasonable searches and seizures.[130]

Court's Opinion

The Wyoming Supreme Court began by examining the cases in which it had introduced additional protections to the search and seizure clause of the Wyoming Constitution.[131] The court referenced its opinion in *Vasquez*, in which it adopted the requirement that a search be "reasonable under all of the circumstances."[132] The court recognized that the "reasonable under all the circumstances" test had been applied only in criminal law contexts, and that deciding whether to extend it to an administrative search by a school district was a matter of first impression.[133] As a matter of first impression, the Wyoming Supreme Court looked to other jurisdictions for guidance.[134] Surveying other states, all but two jurisdictions follow the United States Supreme Court's doctrine.[135]

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[125] *Hageman*, 256 P.3d at 491. This policy applies to the following schools: Torrington High School, Torrington Middle School, Southeast High School, Southeast Junior High School, Lingle-Ft. Laramie High School, and Lingle-Ft. Laramie Middle School. *See District Policies*, GOSHEN CNTY. SCH. DIST., at § 5140 (2012), *available at* http://goshen.schoolfusion.us/modules/cms/pages.phtml?pageid=14198#student; *see also* GOSHEN COUNTY SCHOOL DISTRICT, http://goshen.schoolfusion.us/ (last visited May 7, 2013) (listing schools in Goshen County).

[126] *Hageman*, 256 P.3d at 490–91.

[127] *Id.* at 490.

[128] *Id.* at 491.

[129] *Id.* at 490.

[130] *Id.* at 492.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *See* York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995 (Wash. 2008); Theodore v. Del. Valley Sch. Dist., 836 A.2d 76 (Pa. 2003).

Since both the Wyoming Supreme Court and the Washington Supreme Court have held that their respective state constitutions afford higher protections against unreasonable searches and seizures than the federal constitution, the Coalition urged the Wyoming Supreme Court to break from the majority of the states and follow the example set by the Washington Supreme Court in *York*.[136] The Washington Supreme Court held the random, suspicionless drug testing at issue violated the extra protections written into the Washington Constitution.[137] The Wyoming Supreme Court, however, unanimously declined to follow *York* and found that the wording of the Wyoming Constitution is more comparable to that of the United States Constitution than to that of the Washington Constitution.[138] The Wyoming Supreme Court largely dismissed the Pennsylvania Supreme Court's decision in *Theodore* because that case was before the court on a procedural matter.[139] The court noted that the *Theodore* case determined a drug testing policy's constitutionality would be based on reasonableness.[140] The Wyoming Supreme Court held that random, suspicionless drug tests of students engaged in extracurricular activities do not violate the Wyoming Constitution's prohibition against unreasonable searches and seizures.[141]

The court, in reaching its holding, determined the reasonableness of the suspicionless searches by weighing three factors.[142] The court applied slightly different factors than those described in *Jessee*, but the basic test remained the same.[143] The factors applied by the court were: "(1) the nature of the personal privacy rights that the Coalition claims are infringed by the Policy; (2) the scope and manner of the alleged intrusion on the students' rights; and (3) the nature of the public interest and the efficacy of the means chosen to further that interest."[144]

In regards to the first factor, the nature of the personal privacy rights infringed by the policy, the Wyoming Supreme Court reasoned the safety of students was of the utmost importance.[145] Schools are afforded the flexibility to impose rules on students that might be inappropriate for adults in order to ensure the safety of students in their care.[146] Students have a diminished expectation of privacy

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[136] *Hageman*, 256 P.3d at 492.

[137] *York*, 178 P.3d at 1006.

[138] *Hageman*, 256 P.3d at 494.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 503.

[142] *Id.* at 495.

[143] *Id.*; *supra* notes 51–60 and accompanying text.

[144] *Hageman,* 256 P.3d at 495.

[145] *Id.* at 496.

[146] *Id.*

at school because of the government's duty to maintain a safe, orderly, and disciplined environment within public schools.[147] The Wyoming Supreme Court found it reasonable to subject students in extracurricular activities to the policy because they are subject to more rules than the general student population.[148] For example, students participating in extracurricular activities must receive a medical release, maintain a certain academic standard, and comply with rules pertaining to drugs, alcohol, and behavior.[149] Because students in extracurricular activities are already more regulated than the general population, they have a more limited expectation of privacy.[150]

When looking at the second factor, the scope and manner of the intrusion, the court looked to the manner in which the samples were collected.[151] First, random students participating in extracurricular activities were selected to give a urine sample.[152] Second, the student selected went alone into a restroom, with the water turned off and dyes placed in the toilets to prevent tampering with the sample, and urinated in a cup.[153] Third, the student exited the restroom and handed the sample to a testing company employee who divided the sample into two cups while the student observed.[154] Finally, after the splitting of the sample was completed, the student returned to class.[155]

The court found the policy less intrusive than the policies upheld in *Vernonia* and *Earls*.[156] For example, in *Vernonia,* male students were observed while creating the sample, and female students had monitors standing outside the stall listening for sounds of tampering.[157] Looking to other states, the court found the School District's policy similar to the drug testing policies upheld in New Jersey and Indiana.[158] Thus, the court concluded the School District's policy protected the students' privacy to the greatest extent possible under the circumstances.[159] Therefore, the court reasoned the scope and manner of the intrusion was constitutional.[160]

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[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 497.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995).

[158] *Hageman*, 256 P.3d at 497.

[159] *Id.* at 498.

[160] *Id.*

Looking at the third factor, the efficacy of the means chosen by the School District to address the alleged drug problem within Goshen County schools, the Wyoming Supreme Court emphasized that the proper test was whether the School District believed the program would have some measurable effect in reaching the School District's goals.[161] The court determined that the School District provided a factual basis to support its concerns regarding drug and alcohol use by the student population.[162] The factual basis provided was that because a majority of students participated in extracurricular activities, a majority of the students would thus be tested for drug and alcohol use.[163] Since a majority of students participated in extracurricular activities, there was bound to be some overlap between the students who admitted to using drugs or alcohol in the survey and the students who participated in extracurricular activities.[164]

The Coalition argued there was a disconnect between the alleged problem and the solution because there was no evidence that students in extracurricular activities were the leaders of the drug culture or evidence that students in extracurricular activities, apart from sports, faced a special health risk.[165] The court determined the alleged disconnect was overcome narrowly by the School District's demonstration of the connection between the means chosen to address the problem identified.[166]

ANALYSIS

The court's decision concerning the School District's policy of random, suspicionless drug testing of students in extracurricular activities was incorrect for four reasons. First, the court failed to apply the *Saldana* test and, thus, did not properly consider Wyoming-specific issues.[167] Applying the *Saldana* test would have helped the court realize the important state interests at issue and would have led to a more rigorous application of *Vasquez*. Second, the court did not accord the proper weight to the factors used to determine reasonableness in line with the court's test of determining whether the particular need for the search in the public interest outweighed the invasion of personal rights.[168] Third, the court ignored important factors, particularly whether there is a less intrusive means available

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[161] *Id.*

[162] *Id.*

[163] *Id.* at 501–02.

[164] *Id.* at 499.

[165] *Id.* at 501.

[166] *Id.*

[167] *See infra* notes 170–95 and accompanying text.

[168] *See infra* notes 196–254 and accompanying text.

to reach the same ends.[169] Finally, there are strong policy reasons for the court finding the school district's drug testing policy unconstitutional.[170]

The Saldana *Analysis*

The Wyoming Supreme Court failed to apply the *Saldana* test.[171] The *Saldana* test is used when analyzing a claim under the state constitution.[172] The Coalition challenged the drug testing policy under the Wyoming Constitution and, therefore, the *Saldana* test should have been applied. Though the court supposedly applied a state constitutional analysis by applying *Vasquez*, the court's application of *Vasquez* was little more than applying a Fourth Amendment analysis under the guise of Wyoming law.[173] Applying *Saldana* would have shown the court the important state interests at issue in this case and would have led to a more rigorous application of *Vasquez*. The court applied *Saldana* in *Vasquez* and determined that the differences between the text of the Wyoming Constitution and the United States Constitution were negligible.[174] Thus, the first factor, textual language, the second factor, differences in the texts, and the fifth factor, structural differences, did not apply in *Vasquez* and do not apply in this case.[175] However, the third, fourth, and sixth factors do pertain to this case and their application would have led the court to apply the *Vasquez* test more rigorously.[176]

Concerning the third factor, constitutional history, the record is admittedly sparse. The evidence presented, however, suggests that privacy was more important to the delegates at the Wyoming Constitutional Convention.[177] During debates at the constitutional convention about whether establishing a state supreme court was worth the cost, one delegate said the cost was irrelevant compared to the rights of life and liberty the court would protect.[178] The statement from this delegate, and the fact the convention did establish a supreme court, indicates that personal rights were very important to the founders of the state. Additionally, when the Wyoming Supreme Court consisted of former delegates to the Wyoming

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[169] *See infra* notes 255–68 and accompanying text.

[170] *See infra* notes 269–84 and accompanying text.

[171] *See generally Hageman*, 256 P.3d 487 (Wyo. 2011).

[172] *E.g.*, O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005); Vasquez v. State, 990 P.2d 476, 484 (Wyo. 1999).

[173] *See Hageman*, 256 P.3d at 492–503.

[174] *Vasquez*, 990 P.2d at 484–86.

[175] Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (quoting State v. Gunwell, 720 P.2d 808, 816 (Wash. 1986)).

[176] *See id.* (stating the third factor being constitutional history, the fourth factor being preexisting state law and, the sixth factor being matters of particular state or local concern).

[177] *See* KEITER & NEWCOMB, *supra* note 10; LARSON, *supra* note 26.

[178] *See generally* KEITER & NEWCOMB, *supra* note 10.

Constitutional Convention they interpreted article 1, section 4 of the Wyoming Constitution as being more protective of personal privacy.[179] Finally, the addition of the affidavit requirement to the Wyoming Constitution evinces the delegates wanted to set a higher bar than the Fourth Amendment.[180]

The fourth factor of the *Saldana* test is preexisting state law.[181] In Wyoming, there is a unique test concerning searches and seizures.[182] The "reasonable under all of the circumstances" test was created because the Wyoming Supreme Court believed the Fourth Amendment, as interpreted by the United States Supreme Court, in the context of automobile searches, did not ensure the citizens sufficient protection.[183] Though the "reasonable under all of the circumstances" test had previously been used only in the criminal context of search incident to arrest, it involves the same section of the Wyoming Constitution and can actually be extended to the situation in *Hageman*, rather than applying the *Vasquez* test in name only.[184]

Finally, and perhaps most importantly, the sixth factor of the *Saldana* test looks at matters of particular state or local concern. Privacy and limited governmental powers are two values important to Wyoming.[185] In 1911, the Wyoming Supreme Court held that people placed in detention must be advised of their right to remain silent.[186] Wyoming effectively adopted a version of the *Miranda* rights fifty-five years before the United States Supreme Court required it.[187] In a different case, the Wyoming Supreme Court further demonstrated its protective policies when it introduced Wyoming's version of the exclusionary rule twenty-one years before the United States Supreme Court decided *Mapp*.[188] Finally, the Wyoming

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[179] *See generally id.*

[180] State v. Peterson, 194 P. 342, 346 (Wyo. 1920); *see* WYO. CONST. art. 1, § 4.

[181] Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (quoting State v. Gunwell, 720 P.2d 808, 816 (Wash. 1986)).

[182] Fredrickson, *supra* note 37, at 196.

[183] Mecklenburg, *supra* note 11, at 70.

[184] Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 495 (Wyo. 2011).

[185] *See* State v. Peterson, 194 P. 342, 350 (Wyo. 1920) (holding that evidence seized shall, without a valid warrant, be suppressed if the motion to suppress is timely); Maki v. State, 112 P. 334, 336 (Wyo. 1911) (holding that persons placed in detention must be advised that they have the right to remain silent); Rebekah Dryden, *Tonight: Small-Government Republicans Win a Culture War*, THE MADDOW BLOG, MSNBC (Mar. 1, 2011, 5:00 PM), http://maddowblog.msnbc.com/_news/2011/03/01/6163022-tonight-small-government-republicans-win-a-culture-war?lite.

[186] *Maki*, 112 P. at 336.

[187] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[188] Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (holding that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court); *Peterson*, 194 P. at 350 (holding that evidence seized shall, without a valid warrant, be suppressed if the motion to suppress is timely).

Supreme Court limited the ability of police to search incident to arrest in *Vasquez* when it believed the federal Fourth Amendment analysis was too intrusive.[189] The Wyoming Supreme Court's introduction of two important legal rules well before they were required federally, as well as the limitation on searches incident to arrest after they were expanded federally, demonstrates the importance Wyoming placed on individual rights and, in particular, on valid searches and seizures.

Wyoming's historical decisions are not the only evidence of the importance of personal privacy and individual rights in Wyoming culture. The majority of people in Wyoming, like most citizens, do not want government unnecessarily intruding into their personal affairs.[190] Random, suspicionless drug testing of high school students is a perfect example of the government intruding into the personal lives of citizens. Without individualized suspicion, the government is able to force young students in extracurricular activities to either urinate in a cup or refrain from participation.[191] The government intrudes into the private lives of students, not only by forcing them to endure the embarrassing situation, but also by gleaning personal information about the student's life that would not otherwise be accessible.[192] For example, the government could obtain information about how much the student drinks or about prescription drugs taken by the student.[193] Because three of the *Saldana* factors clearly indicate that a state constitutional analysis is required, the court should have placed its focus more on a Wyoming analysis and less on the United States Supreme Court and other jurisdictions' reasoning. Applying *Saldana* would have demonstrated the important Wyoming interests at issue in this case and led the court to rigorously apply the "reasonable under all the circumstances" test.

In fact, the court in *Hageman* flipped the "reasonable under all of the circumstances" test.[194] Instead of requiring that the policy be "reasonable under all the circumstances," the court stated, "the Coalition has not demonstrated that the School District's Policy subjects students to searches that are *unreasonable* under all of the circumstances."[195] In applying the *Vasquez* test in this inverted way, the

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[189] *See* Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999).

[190] State Representative Sue Wallis discussed this sentiment with Rachel Maddow after a vote in the house concerning abortion, "There is a real individualistic and independent streak here in Wyoming, and thank goodness, a bunch of old white guys saw the good sense of keeping government out of our private decisions." Rebekah Dryden, *Tonight: Small-Government Republicans Win a Culture War*, THE MADDOW BLOG, MSNBC (Mar. 1, 2011, 5:00 PM), http://maddowblog.msnbc.com/_news/2011/03/01/6163022-tonight-small-government-republicans-win-a-culture-war?lite.

[191] Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 491 (Wyo. 2011).

[192] *See infra* notes 215–19 and accompanying text.

[193] *See Hageman*, 256 P.3d at 497–98; *see infra* notes 215–19 and accompanying text.

[194] *Hageman*, 256 P.3d at 503.

[195] *Id.* (emphasis added).

court required only that the policy be reasonable under *any* of the circumstances, rather than under *all* of the circumstances.[196] This requirement further emphasizes that the court did not rigorously apply *Vasquez*.

Weighing the Factors: Nature of Privacy Rights and Scope and Manner of the Intrusion

The Wyoming Supreme Court considered three factors, derived from *Jessee*, in determining whether the particular need for the search outweighed the invasion of privacy suffered by the students.[197] The factors were: (1) the nature of the personal privacy rights infringed upon by the policy; (2) the scope and manner of the alleged intrusion on the students' rights; and (3) the nature of the public interest and the efficacy of the means chosen to further that interest.[198]

Concerning the first *Jessee* factor, the court found that students in extracurricular activities are more heavily regulated than the rest of the student population and, therefore, have a lesser expectation of privacy than students in general.[199] The court determined that the nature of the privacy interest infringed upon is dependent on the manner in which the search is conducted or, in other words, the constitutionality of the first *Jessee* factor is dependent on the second.[200] In considering the second *Jessee* factor, the scope and manner of the alleged intrusion on the students' rights, the court concluded that the School District's policy protects the students' dignity and limits the intrusion on their personal privacy to the extent possible under the circumstances.[201]

The Wyoming Supreme Court reached this conclusion by using the rationale and reasoning from *Vernonia* and *Earls*.[202] However, this rationale is insufficient under the *Vasquez* "reasonable under all the circumstances" test.[203] The Wyoming Supreme Court failed to analyze whether the search was reasonable in light of the students' enhanced right against unreasonable searches and seizures in Wyoming. The court did not consider all of the facts when deciding whether the policy was reasonable under the second *Jessee* factor.

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[196] *See id.*

[197] *Id.* at 495.

[198] *Id.*

[199] *See supra* notes 144–49 and accompanying text.

[200] *Hageman*, 256 P.3d at 496.

[201] *Id.* at 498.

[202] *See id.* at 495–98; Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[203] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999); *see* Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (quoting State v. Gunwell, 720 P.2d 808, 816 (Wash. 1986)).

Combining four pieces of information would have helped to determine the policy was unreasonable. First, there was no evidence the students singled out for the policy (those in extracurricular activities) used drugs or alcohol at a greater rate than the rest of the student population. [204] Second, the drug testing could uncover private medical information.[205] Third, students in extracurricular activities generally use drugs and alcohol at a lesser rate than their uninvolved peers.[206] Finally, the court should have considered the first two facts in light of the students' enhanced right against unreasonable searches and seizures in Wyoming.[207] The court's analysis ended with whether the search was reasonable, and the court failed to apply the precedent of an enhanced right against unreasonable searches and seizures granted in the Wyoming Constitution. The court should have found testing students engaged in extracurricular activities, despite the lack of evidence concerning whether these students used drugs at a greater rate than the rest of the student population, was not "reasonable under all the circumstances."

There were no special circumstances present in Goshen County that necessitated testing all students in extracurricular activities. The surveys do not represent a special circumstance or a reasonable suspicion.[208] The surveys were issued to *all* students in Goshen County.[209] However, the policy is *only* directed at students in extracurricular activities.[210] The surveys did not indicate that students in extracurricular activities were using or at a greater risk of using drugs or alcohol than other students.[211] In *Vernonia*, the student athletes were the leaders of the drug culture.[212] Importantly, because the students in *Vernonia* were athletes, the Court found a greater risk of immediate physical injury to the student athlete using drugs or to other participants.[213] The drugs screened for in *Vernonia* impaired judgment, lessened the perception of pain, slowed reaction times, and in general posed a substantial threat of physical injury to athletes.[214] However, there was

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[204] *See Hageman*, 256 P.3d at 490–91.

[205] *Id.* at 497–98.

[206] *Earls*, 536 U.S. at 853 (Ginsburg, J., dissenting).

[207] *Vasquez*, 990 P.2d at 489.

[208] Though the argument exists that the surveys represent reasonable suspicion because they indicated drug use occurring in Goshen County schools, they are not sufficient. The surveys identified drug use occurring in the schools but not who was using. The policy enacted by the School District targeted a particular group of students without any reasonable suspicion that the targeted students were the ones using drugs or alcohol.

[209] *Hageman*, 256 P.3d at 490–491.

[210] *Id.*

[211] *Id.*

[212] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649–50 (1995).

[213] *Id.* at 662.

[214] *Id.*

no evidence in Goshen County that students participating in *all* extracurricular activities posed a greater risk of harm to themselves or to others as compared to the general student population.[215]

Additionally, the court mischaracterized the extent of the testing. The court emphasized the limited scope of the testing and emphasized information about prescriptions taken by students was outside the scope of the test.[216] For example, one of the specified substances is benzodiazepine that the court correctly characterizes as a metabolite of Valium.[217] However, benzodiazepines are commonly prescribed to treat a host of medical issues including anxiety disorders, insomnia, seizure disorders, muscle spasms, and delirium.[218] If a student were prescribed a benzodiazepine drug for one of these serious medical reasons, the test would uncover its presence in the student's system.[219] Learning that a student was taking the drug would reveal information about the student's personal medical history and could embarrass the student.[220] Additionally, a positive test result triggers certain procedures within the school district.[221] The student and the student's parents must meet with the drug program coordinator, there is an automatic suspension from practicing the extracurricular activity for five days and competing in the activity for two weeks, the student must complete an assessment by the drug counselor, and must submit to follow up testing at least once a month for a year.[222] Further positive test results trigger repercussions that are even more serious.[223]

Many people, especially teenagers, find their medical conditions embarrassing and seek to hide their medical issues from the public.[224] Testing denies students who are taking benzodiazepines for a legitimate medical condition the opportunity to deal with their conditions in private.[225] A student suffering from a disorder that is treated with a benzodiazepine might choose to abstain from

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[215] *See Hageman*, 256 P.3d at 490–91.

[216] *Id.* at 497–98.

[217] *Id.*

[218] NURSING 2010: DRUG HANDBOOK 38 (Lisa Morris Bonsall et al. eds., 2010).

[219] *See Hageman*, 256 P.3d at 497–98.

[220] *See id.*

[221] *District Policies*, GOSHEN CNTY. SCH. DIST., at § 5140 (2012), *available at* http://goshen.schoolfusion.us/modules/cms/pages.phtml?pageid=14198#student.

[222] *Id.*

[223] *Id.*

[224] Thomas A. Fergus et al., *Shame–and Guilt–Proneness: Relationships with Anxiety Disorder Symptoms in a Clinical Sample*, 24 J. OF ANXIETY DISORDERS 811, 813–14 (2010) (explaining correlation between anxiety disorders and shame).

[225] *See Hageman*, 256 P.3d at 497–98.

participating in extracurricular activities rather than risk exposure of his or her condition. Therefore, the Wyoming Supreme Court failed to consider all of the circumstances when making its decision about the scope of the intrusion. If the court had considered all of the circumstances, it should have found the scope of the intrusion not "reasonable under all the circumstances," and thus was unreasonable under the Wyoming Constitution.[226]

Likewise, the manner of the intrusion was significant based on the greater expectation of privacy.[227] As with the scope of the intrusion, the Wyoming Supreme Court did not appear to consider the manner of the intrusion based on the students' greater expectation of privacy under the Wyoming Constitution. In Goshen County, the students were pulled out of class and required to urinate in a public restroom with the water shut off and a dye put in the toilet water to prevent tampering with the samples.[228] It is likely their peers knew what was occurring and knew the students were unable, until later, to wash their hands after providing their urine sample, which could be highly embarrassing to the student providing the sample.[229] The students were then forced to watch while the adult doing the testing split the urine into two separate containers.[230] Only after this occurred could the students return to class.[231]

This procedure would most likely be embarrassing for most confident adults. It is far more embarrassing for students in junior high and high school. During junior high and high school, students feel pressure to fit in and be normal.[232] Their bodies go through changes, and these changes are often uncomfortable for them to deal with privately, let alone in front of their peers and the people from the testing authority.[233] The Wyoming Supreme Court did not give this evidence *any weight* when considering whether the policy was unreasonably intrusive.[234] The Wyoming Supreme Court should have given this information a great deal of weight because the students' age and maturity level are part of the circumstances to be considered. The test was not "reasonable under all of the circumstances."

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[226] *See id.* at 495–98.

[227] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999).

[228] *Hageman*, 256 P.3d at 497.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] Carl Pickhardt, *Surviving (Your Child's) Adolescence: Adolescence and the Problems of Puberty*, PSYCHOLOGY TODAY (Apr. 13, 2010), http://www.psychologytoday.com/blog/surviving-your-childs-adolescence/201004/adolescence-and-the-problems-puberty.

[233] *See id.*

[234] *See Hageman*, 256 P.3d at 495–500 (emphasis added). Appellants raised this issue on appeal. *See* Reply Brief of Appellants at 10–11, Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487 (Wyo. 2011) (No. S-10-0009), 2010 WL 1986277, at *10–11.

Weighing the Factors: Nature of Public Interest and Efficacy of the Chosen Means

As with its consideration of the first two *Jessee* factors, the Wyoming Supreme Court's analysis of the third *Jessee* factor, the nature lacked evaluation under the enhanced right against unreasonable searches and seizures in the Wyoming Constitution.[235] Had the court considered whether the policy was reasonable in light of the intent of the drafters of the Wyoming Constitution to afford personal privacy greater protection, it should have found that the School District did not meet its burden. The Wyoming Supreme Court should have followed the example set by the *Earls* dissent, in which Justice Ginsburg and three other justices believed the special needs exception used to justify extending the *Vernonia* rule was not so flexible as to allow random, suspicionless drug testing of all students in extracurricular activities.[236] As Justice Ginsburg noted, there is a difference between imperfect tailoring of a policy and no tailoring at all.[237] In this case, the School District did not tailor the policy at all.[238] The School District put down a blanket policy on all students in extracurricular activities hoping to catch some students using drugs or alcohol.[239] There was no proof in Goshen County, as there was in *Vernonia*, that the students in extracurricular activities used drugs more than the rest of the student population.[240] Likewise, for the students in extracurricular activities other than athletics, there was no increased physical danger associated with using drugs or alcohol to justify the invasion of their privacy.[241]

Justice Ginsburg pointed out that the policy in *Earls* fell short of its aims on two grounds.[242] First, it invaded the privacy of students who needed to be deterred from drug use the least, students in extracurricular activities, and second, it risked steering students at greater risk for drug and alcohol use and abuse away from extracurricular activities that potentially might have diminished their drug use.[243] The same reasoning Justice Ginsburg used in her dissent is applicable here. Students nationwide who participate in extracurricular activities are less likely to use drugs or alcohol than students who do not participate.[244] Additionally, a

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[235] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999).

[236] Bd. of Educ. v. Earls, 536 U.S. 822, 843 (2002) (Ginsburg, J., dissenting).

[237] *Id.* at 852.

[238] *See Hageman*, 256 P.3d at 490–91.

[239] *See id.*

[240] *See id.*

[241] *Id.* at 500.

[242] Bd. of Educ. v. Earls, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting).

[243] *Id.*; OR. SCH. ACTIVITIES ASS'N, THE CASE FOR HIGH SCHOOL ACTIVITIES 6 (2008), *available at* http://www.osaa.org/osaainfo/08caseforhsactivities.pdf (citing UNITED STATES DEP'T OF EDUCATION, NO CHILD LEFT BEHIND: THE FACTS ABOUT 21ST CENTURY LEARNING (2002)).

[244] *Earls*, 536 U.S. at 853.

student using drugs and participating in an extracurricular activity is as likely to quit the activity as to cease his or her drug use.[245] However, if the student using drugs were to remain in the extracurricular activity, it might actually diminish drug use.[246]

In addition, there is little to no evidence that the policy was actually effective in combatting the alleged drug problem in Goshen County schools. According to the Wyoming Department of Education, drug and alcohol use by students has generally been on a steady, statewide decline since the mid-1990s.[247] This decline came about, for the most part, not due to random, suspicionless drug testing policies.[248] Neither Natrona County School District in Casper nor Albany County School District Number One in Laramie conduct random drug tests on students.[249] Likewise, Laramie County School District Number One in Cheyenne does not conduct random drug testing.[250] In Laramie County, student drug testing occurs only after a report has been made that a student used drugs or alcohol and an investigation has taken place.[251] Campbell County School District in Gillette conducts random drug testing, but the testing only applies to students in certain extracurricular activities, excluding the band, orchestra, and choir.[252] The evidence suggests drug and alcohol use is decreasing among students, making it unnecessary to implement random, suspicionless drug tests of students in all extracurricular activities in order to achieve a decrease in the number of students using drugs or alcohol. Under the Wyoming Constitution these circumstances should have led to the conclusion the policy was unreasonable.

Looking at the *Jessee* factors as a whole, it is clear that the court should have found the drug testing policy unconstitutional under the Wyoming Constitution. The nature of the privacy rights is important and the scope of the intrusion is severe.[253] The policy at issue was intrusive, embarrassing, and broader than both

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[245] *Id.*

[246] *Id.*

[247] *See generally* WYO. DEP'T OF EDUC., 2011 YOUTH RISK BEHAVIOR SURVEY (2011), *available at* http://edu.wyoming.gov/sf-docs/yrbs/2011_Summary_Report.pdf?sfvrsn=0.

[248] *Id.*

[249] E-mail from Terry Hooker, District Athletics/Activities Manager, Natrona Cnty. Sch. Dist. No. 1, to author (Jan. 14, 2013, 08:23 MST) (on file with author); E-mail from Kimberly Dale, Counselor, Laramie High Sch., to author (Jan. 8, 2013, 17:04 MST) (on file with author).

[250] *Board Policies Chapter 8*, LARAMIE CNTY. SCH. DIST. NO. 1, at § 21 (2011), *available at* http://www.laramie1.org/modules/cms/pages.phtml?sessionid=03442da8bfa9e2aca97aaf07a7ebebe6&pageid=18955&sessionid=03442da8bfa9e2aca97aaf07a7ebebe6.

[251] *Id.*

[252] *District Policies*, CAMPBELL CNTY. SCH. DIST., at § 5130–5130R (2008), *available at* http://www.campbellcountyschools.net/admin.cfm?subpage=58570.

[253] *See supra* notes 196–233 and accompanying text.

the School District and the court acknowledged.[254] Finally, there is no evidence that the students targeted used drugs at a greater rate than their peers.[255] The *Jessee* factors, taken either one at a time or together, indicate that the drug testing policy was not "reasonable under all of the circumstances."

Less Intrusive Means

The court did not examine whether the School District could have used less intrusive means to achieve its purpose. The Wyoming Supreme Court appears to agree with the United States Supreme Court in that "reasonableness under the Fourth Amendment does not require employing the least intrusive means."[256] However, while the least intrusive means may not be required, the court should consider whether there are less intrusive means because the availability of less intrusive means is a circumstance that weighs into the "reasonable under all the circumstances" test.

In *Willis v. Community School Corporation*, the Seventh Circuit thought the availability of less intrusive means was relevant.[257] The court in *Willis* held that requiring individualized reasonable suspicion to drug test students adequately served the school's interest as opposed to the challenged across-the-board rule.[258] Importantly, the students targeted in *Willis* were arguably more likely to use drugs since the original policy applied to students suspended from school for fighting.[259]

The Pennsylvania Supreme Court determined that the policy at issue in *Theodore v. Delaware Valley School District* was unconstitutional because it targeted all extracurricular activities, not only those with inherent dangers, and because there was no evidence that the students targeted were the leaders of a drug culture.[260] Additionally, in both *Theodore* and Justice Ginsburg's dissent in *Board of Education v. Earls*, the policies ignored a segment of the student population more likely to use drugs.[261] Thus, both opinions determined less intrusive means were necessary for the policies to be constitutional.[262]

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[254] *See supra* notes 196–233 and accompanying text.

[255] *See supra* notes 234–51 and accompanying text.

[256] *See* Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002).

[257] Willis v. Anderson Com. Sch. Corp., 158 F.3d 415, 420–22 (7th Cir. 1998).

[258] *Id.*

[259] *Id.*

[260] Theodore v. Del. Valley Sch. Dist., 836 A.2d 76, 92 (Pa. 2003).

[261] *Earls*, 536 U.S. at 853 (Ginsburg, J., dissenting); *Theodore*, 836 A.2d at 92.

[262] *See Earls*, 536 U.S. at 853; *Theodore*, 836 A.2d at 92.

The availability of less intrusive means is an important circumstance that should have gone into the court's application of the *Vasquez* test.[263] Though the Wyoming Supreme Court has repeatedly stated that the Wyoming Constitution affords greater protection for privacy than the federal constitution, it did not apply this protection to Wyoming's student population.[264] Had the court considered this enhanced right against unreasonable searches and seizures, it should have required the School District to utilize less intrusive means to achieve its goals because the presence of less intrusive means is a circumstance weighing into "reasonable under all the circumstances." Requiring a reasonable individual suspicion would not defeat the purpose of the policy. As discussed by the Pennsylvania Supreme Court and Justice Ginsburg, students in extracurricular activities are significantly less likely to use drugs than their uninvolved peers.[265] In addition, the Seventh Circuit held that a reasonable suspicion requirement would not detract from a school drug testing policy.[266] If a reasonable suspicion requirement does not detract from the effectiveness of a drug testing policy aimed at students more likely to use drugs, a reasonable suspicion requirement would not detract from the effectiveness of the misguided policy in Goshen County, which is aimed only at the portion of the student population least likely to use drugs or alcohol.[267]

Less intrusive means would simply require a teacher, coach, or principal to have a reasonable suspicion that a particular student was using or under the influence of drugs or alcohol.[268] The overall policy would not be undermined, because the school could still test students suspected of using drugs or alcohol. One of the reasons given by the School District to justify the policy was that the threat of random drug tests would give students a legitimate reason to turn down drugs or alcohol offered by peers and thus negate peer pressure.[269] Including a reasonable suspicion requirement would not eliminate this justification. Students could still use the threat of a drug test to stave off peer pressure because if a coach, teacher, or principal suspected the student of using drugs or alcohol, the student could be tested. This would have the same result of deterring the drug and alcohol use among students as the policy of random, suspicionless drug tests. In fact, a reasonable suspicion requirement could potentially make the policy more effective, as it would target students more likely to use drugs or alcohol rather than those just in extracurricular activities. Consequently, the court should have considered whether a less intrusive means could have been used to reach the same result.

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[263] *See, e.g.*, Vasquez v. State, 990 P.2d 476, 483–86 (Wyo. 1999).

[264] *See* Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 490 (Wyo. 2011).

[265] *Earls*, 536 U.S. at 853; *Theodore*, 836 A.2d at 91.

[266] Willis v. Anderson Com. Sch. Corp., 158 F.3d 415, 420–22 (7th Cir. 1998).

[267] *See Hageman*, 256 P.3d at 491.

[268] Damato v. State, 64 P.3d 700, 706–07 (Wyo. 2003).

[269] *District Policies*, GOSHEN CNTY. SCH. DIST., at § 5140 (2012), *available at* http://goshen.schoolfusion.us/modules/cms/pages.phtml?pageid=14198#student.

Student Welfare

There are strong policy arguments in favor of finding the School District's drug testing policy unconstitutional under the Wyoming Constitution. In Wyoming, students in extracurricular activities are granted a lower expectation of privacy than parolees. The Wyoming Supreme Court has held that parolees who sign an agreement providing for warrantless searches do not relinquish their right to be free from unreasonable searches.[270] In other words, officers must have a reasonable suspicion that the parolee committed a parole violation before conducting the search or seizure.[271] Parolees have already been convicted of crimes, whereas students have not.[272] It is unreasonable that students who have done nothing more than sign up to participate in extracurricular activities should be afforded fewer rights than convicted criminals.[273]

The Wyoming Supreme Court likened the students in *Hageman* to the minor in *Matter of ALJ*—a case concerning probation requirements.[274] In *ALJ*, the Wyoming Supreme Court held that probation officers do not need reasonable suspicion to test juvenile probationers, because probation officers must be afforded flexibility to act in the best interest of the public's safety and for the welfare of the child.[275] *ALJ* is distinguishable from *Hageman*. In *ALJ*, the probationer *was adjudicated delinquent and on probation* and, therefore, had a lessened expectation of privacy.[276] In *Hageman*, the students subject to random, suspicionless drug testing had not been adjudicated as delinquents.[277] Instead, they were the particular group of students who are least likely to use drugs or alcohol.[278] Students in extracurricular activities have a higher expectation of privacy than parolees, but they actually get less protection under the Wyoming Constitution.[279]

By preventing students who do not wish to consent to the random, suspicionless drug testing from participating in extracurricular activities, the School District places students from Goshen County schools, who value their privacy as did the drafters of Wyoming's Constitution, at a great disadvantage.

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[270] Jones v. State, 41 P.3d 1247, 1257 (Wyo. 2002).

[271] *Id.*

[272] *Compare* BLACK'S LAW DICTIONARY 1903 (9th ed. 2009) (defining parolee), *with* NEW OXFORD AMERICAN DICTIONARY 1729 (3d ed. 2010) (defining student).

[273] *See* Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 490–91 (Wyo. 2011).

[274] 836 P.2d 307 (Wyo. 1992).

[275] *Id.* at 311.

[276] *See id.* (emphasis added).

[277] *See Hageman*, 256 P.3d at 490–91.

[278] Bd. of Educ. v. Earls, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting).

[279] *Compare Hageman*, 256 P.3d at 490–91, *with* Pena v. State, 792 P.2d 1352, 1357 (Wyo. 1990).

The *Hageman* court suggested that a reasonable alternative for students who did not wish to submit to random, suspicionless drug tests was to not participate in extracurricular activities.[280] This is not a reasonable alternative, because colleges and universities weigh a student's participation in extracurricular activities as a criterion for admittance and also for possible receipt of scholarships.[281] Further, school districts should encourage students to participate in extracurricular activities as there has proven to be a positive relationship between participation in extracurricular activities and future success.[282] Studies have shown extracurricular involvement enhances school involvement and achievement, occupational success, and promotes healthy-choices.[283] Additionally, studies have shown a link between extracurricular activities and lower levels of depression in adolescents.[284] The Goshen County School District, and the Wyoming Supreme Court, failed the students from Goshen County high schools by reasoning that to avoid submission to testing they must avoid extracurricular activities. The court's failure to rigorously apply *Vasquez* means that students must either submit to an intrusive drug test or refrain from participating in extracurricular activities and thus make them less likely to be admitted to colleges or granted scholarships.[285]

CONCLUSION

The Wyoming Supreme Court has held the Wyoming Constitution affords greater protections against unreasonable searches and seizures than the United States Constitution.[286] Unfortunately, with its decision in *Hageman*, the court ruled that Wyoming's active youth are not within the scope of this extra protection.[287] Failure on the part of Wyoming Supreme Court to consider the issue under all of the circumstances, as required by the *Vasquez* test, led the court to reach a similar holding as the United States Supreme Court.[288] The court should have found that the School District's policy of random, suspicionless drug testing of

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[280] *Hageman*, 256 P.3d at 502.

[281] *See, e.g.*, *Earls*, 536 U.S. at 845–46; Carolyn Butler, *Focus on 7 Strategies to Get Into College*, U.S. NEWS AND WORLD REPORT (Sept. 25, 2012), *available at* http://www.usnews.com/education/best-colleges/articles/2012/09/25/focus-on-7-strategies-to-get-into-college.

[282] Lisa A. Kort-Butler, Kellie J. Hagewen, *School-Based Extracurricular Activity Involvement and Adolescent Self Esteem: A Growth-Curve Analysis*, 40 J. OF YOUTH AND ADOLESCENCE 568, 568 (2011).

[283] *Id.*

[284] *Id.* at 577.

[285] *See, e.g.*, *Earls*, 536 U.S. at 845–46; Butler, *supra* note 281.

[286] *See supra* notes 25–46 and accompanying text.

[287] *See supra* notes 124–65 and accompanying text.

[288] *See supra* notes 170–254 and accompanying text.

students in extracurricular activities violated the prohibition against unreasonable searches and seizures embodied in the Wyoming Constitution because it was not "reasonable under all the circumstances."[289] Furthermore, the decision subjects a group of students less likely to use drugs or alcohol to an embarrassing and intrusive test.[290] Finally, it fails students by requiring them to decline to participate in extracurricular activities in order to retain their constitutional rights, making them less appealing to colleges and universities for admittance and scholarships.[291] The Wyoming Supreme Court should have followed its precedent affording more protection of personal privacy than provided for under the federal constitution. Ultimately, the court should have held that the School District's policy violated that protection.

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[289] *See supra* notes 170–254 and accompanying text.

[290] *See supra* notes 255–68 and accompanying text.

[291] *See supra* notes 269–84 and accompanying text.