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Shedding Rights, Shredding Rights: A Critical Examination of Students' Privacy Rights and the Special Needs Doctrine after Earls

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SHEDDING RIGHTS, SHREDDING RIGHTS: A CRITICAL EXAMINATION OF STUDENTS' PRIVACY RIGHTS AND THE "SPECIAL NEEDS" DOCTRINE AFTER *EARLS*

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I. INTRODUCTION

"Today, education is perhaps the most important function of state and local governments."[1]

On June 27, 2002, the United States Supreme Court held that all students participating in extracurricular activities in public schools may be subjected to random, suspicionless drug testing.[2] The holding, in itself, is not terribly remarkable, as the decision in *Board of Education of I.S.D. 92 of Pottawatomie County, Oklahoma v. Earls*[3] follows a developing pattern among public schools in this country.[4] Further, the *Earls* case simply broadens the right of the state to randomly drug test students, without individualized suspicion, that this same court announced a mere seven years earlier in *Vernonia v. Acton*.[5] What is remarkable about *Earls*, and what may be disconcerting to those clinging to the notion that students' rights entitle them to Fourth Amendment protection at

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[1] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

[2] Bd. of Educ. of I.S.D. No. 92 of Pottawatomie County, Okla. v. Earls, 122 S. Ct. 2559 (2002) (hereinafter "Earls"). Although the random, suspicionless drug testing involved in the *Earls* case only applied to junior high/middle school and high school age students, the broad language of the opinion did not delimit the propriety of testing to these categories. Rather, as this article will suggest, the unmeasured language used by the majority in *Earls* will permit public schools to possibly test all students – regardless of age – that desire to participate in activities that are deemed "voluntary."

[3] *Id.* (decided by a 5-4 majority of the United States Supreme Court on June 27, 2002).

[4] *See* Part III, *infra*, and related discussion, referencing the numerous cases attempting to delimit students' rights via drug testing.

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

school, is that *Earls* undoubtedly will be the necessary link between testing those engaging in "voluntary" activities, as the athletes in *Vernonia* and the Academic Team member in *Earls*, to the true target of such expansive suspicionless testing policies: all public school students.[6]

Earls represents a problematic break with past application of the Fourth Amendment in school cases.[7] *Earls* goes beyond the holding in *Acton* by broadening the application of the special needs doctrine to all students.[8] The justifications underlying *Acton*[9] – safety in athletic competition and a demonstrated drug problem among students athletes – were not present in *Earls*.[10] Rather, *Earls* breaks with precedent by allowing the liberalization of the "special needs" doctrine in school cases and finding that drug use among American teens and elementary students serves as an appropriate "special need" to support suspicionless drug testing.[11] In this manner, *Earls* is not true to *Acton* and ignores crucial policy justifications for dispensing with the Fourth Amendment warrant and probable cause requirements that the *Acton* majority underscored.[12] Likewise, *Earls* breaks with precedent in the special needs area by allowing the global problem of drug use *generally* to provide ample basis for the suspicionless drug testing of an identifiable group: elementary and secondary public school students.[13] Accordingly, *Earls* represents two problematic departures from stare decisis.

In addition, the *Earls* case, written in seemingly limitless breadth, provides the requisite step between testing those involved in athletics and other extracurricular activities and those in the general student population that we fear, due to self-disclosed surveys or medical data, must be using illicit drugs.[14] For this reason, *Earls* single-handedly sounds the death knell of the assurance that students do not shed their Constitutional rights at the school house gate.[15]

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[6] *See* Oral Argument, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002) (Paul D. Clement arguing on behalf of the United States as amicus curiae, pages 25-26).

[7] *See* T.L.O. v. N.J., 469 U.S. 325 (1985).

[8] *Acton*, 515 U.S. 646.

[9] *See generally id.*

[10] *Earls*, 122 S. Ct. 2559.

[11] *See generally id. See also infra* Section III (discussing the limited nature of the special needs doctrine – particularly as it provides justification for random, suspicionless drug testing).

[12] *See generally Acton*, 515 U.S. 646.

[13] *See generally infra* Section III (explaining the application of the special needs doctrine).

[14] Precisely what constitutes an illicit drug is not clear. The test administered in the Oklahoma community at issue tests only for amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates, and benzodiazepines, but ironically not for alcohol and tobacco. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., Indep. Sch. Dist. No. 92 of Pottawatomie County, 242 F.3d 1264, 1267 (10th Cir. 2001). Further, in the annual "Safe and Drug-Free School and Communities" application for funds, the Tecumseh schools reported alcohol as the most problematic substance in the district. *Id.* at 1274.

[15] Tinker v. Des Moines, 393 U.S. 503, 506 (1969). This particular quote, first articulated in *Tinker*, has been repeatedly misused and incorrectly cited by many. The actual quote, delivered in a case involving First Amendment rights of free speech and expression, reads:

> First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights *to freedom of speech or expression* at the school house gate.

Post- *Earls*, students absolutely shed their constitutional right to be free from suspicionless searches regardless of whether the student's school has any demonstrated drug problem and regardless of whether there is any demonstrated safety or special need attendant to the search.[16] Thus, while the special needs doctrine has consistently been limited to prevent full-scale devaluation of the Fourth Amendment's warrant and probable cause requirements, *Earls* suggests that students and youth fall outside this general limitation.[17] Neither *Acton*'s limited holding and requirement that a compelling drug or safety problem be actually present at the school nor the special needs doctrine requirement for some specific demonstration of a special safety need as to a particular group will delimit application of the Fourth Amendment at public schools after *Earls*. With the resurrection and strengthening of the *in loco parentis* concept, the Supreme Court has given license to schools to continue invading the personal privacy of public school children to ensure that these wards are not using or abusing illicit drugs – either on campus or in the privacy of their homes.

This article will trace the devolution of students' rights to privacy, pursuant to the Fourth Amendment, beginning with *T.L.O. v. New Jersey*.[18] Next, the article will consider the elastic application of the court-created "special needs" doctrine, particularly as applied in drug testing cases and in school settings. In this section, the author will note the traditional requirements for application of the "special needs" doctrine and distinguish the Supreme Court's approach to "special needs" cases when the subjects are children. Finally, the article will consider the recent application of the special needs doctrine in the school setting by comparing the *Vernonia* and *Earls* opinions and project their future application.

While at one time the Supreme Court assured society that "[t]he prisoner and schoolchild stand in wholly different circumstances,"[19] that pronouncement is subject to challenge in both letter and spirit. Post-*Vernonia*, post-Col-

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Id. (emphasis added). Courts and commentators alike have consistently omitted the phrase "to freedom of speech or expression" in assuring students that they retain some of their constitutional rights while at school. It would be most accurate, however, to observe that students have lost the *least* amount of their purported rights in the area of First Amendment jurisprudence, while the Fourth Amendment rights of students have been diminished with increasing frequency and consistent fervor. Nonetheless, Justice Thomas, in his majority opinion in *Earls*, again misuses the *Tinker* quotation to suggest that students' broad constitutional rights are protected at school. Were the *Tinker* quote (as it is now regularly misused) previously true in the broader constitutional context, a statement I find highly suspect in relation to recent case authority, *Earls* certainly puts it to rest and should openly, rather than tacitly, overrule it. Post-*Earls*, students absolutely shed their constitutional right to be free from suspicionless searches for drugs as long as drugs remain a problem among our youth and in our public schools. *See infra* notes 226-30 and accompanying text.

[16] *Compare* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), with Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002).

[17] *See generally* Section III (discussing the special needs doctrine and recent cases limiting its application to adults).

[18] 469 U.S. 325 (1985).

[19] Ingraham v. Wright, 430 U.S. 651, 669 (1977). *Ingraham* discussed, and ultimately dismissed, the applicability of the Eighth Amendment in the school setting. The case confronted the issue of whether corporeal punishment via the paddling of students constituted cruel and unusual punishment. In distinguishing prisoners from public schoolchildren, the Court explained that "[t]he openness of the public school and its supervision by the commu-

umbine, and now, post-*Earls*, schools have become a place where safety concerns reign paramount to challenges against "zero tolerance" policies and Fourth Amendment protections. Schools are increasingly becoming places where police and state presence are both seen and felt.[20] And while safety concerns for students and teachers remain valid, we cannot, we must not, lose sight of the pronouncement in *Brown v. Board of Education*, that "[t]oday, education [*remains*] perhaps the most important function of state and local governments."[21] The lessons we teach our children – particularly those relating to the protection of their rights in times of fear and crisis – will eventually have broad consequences on our society.[22] After all, we are today educating the leaders of tomorrow.

II. THE BEGINNING OF THE END: *T.L.O. v. NEW JERSEY*

"In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally."[23]

It has widely been observed that children live what they learn.[24] We should not be so naive as to believe that our children do not realize the hypocrisy of the governing generation[25] when those in power refuse to tolerate

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nity afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." *Id.* at 670.

[20] Jason E. Yearout, *Individualized School Searches and the Fourth Amendment: What's a School District to Do?*, 10 WM. & MARY BILL RTS. J. 489, 512-13 (2002).

[21] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (emphasis added).

[22] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting) (reminding that "[i]t cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis").

[23] T.L.O. v. N.J., 469 U.S. 325, 348 (1985) (Powell, J., concurring). Justice Powell's concurrence is very enlightening and, perhaps, foreshadows the current climate. In his concurring opinion, Justice Powell reminds that "[t]he Court has balanced the interests of the student against the school officials' need to maintain discipline by recognizing qualitative differences between the constitutional remedies to which students and adults are entitled." *Id.* at 349. In summarizing his brief opinion, Justice Powell unequivocally states:

> The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

Id. at 350.

[24] In fact, there is a widely circulated poem entitled, "Children Learn What They Live," by Dorothy Law Nolte. Certain lines from the poem are quite apropos to many of the lessons implicit in the *Earls* case:

> If children live with hostility, they learn to fight.
> If children live with fear, they learn to be apprehensive.
> If children live with tolerance, they learn patience.
> If children live with fairness, they learn justice.

Id.

[25] Judge Bork was denied his opportunity to sit on the U.S. Supreme Court for, among other reasons, confessing to smoking marijuana. Likewise, former President Clinton responded to allegations that he was observed smoking marijuana by assuring us that "he did not inhale."

"youthful indiscretions" among today's children while simultaneously seeking to justify and dismiss their own past failures on that basis.[26] Schools now impose stringent, zero-tolerance regulations on their student bodies. And this past term, the Supreme Court sided with school districts in upholding limits on student rights in more cases than not.[27] This leads many to believe that schools are increasingly able to impose wide ranging regulations and intrusive policies in the name of safety, order, and discipline. But, as we and perhaps even our children know, it was not always so.

The first major departure from traditional Fourth Amendment[28] analysis in schools occurred in the 1985 case, *T.L.O. v. New Jersey*.[29] At this first critical juncture, the Court laid the foundation for *Vernonia* and *Earls*. In factual terms, *T.L.O.* is a very simplistic case. A teacher at Piscataway High School in New Jersey discovered two girls smoking in the ladies restroom.[30] The teacher escorted the students to the principal's office because smoking by students was

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His remark has been oft repeated in sarcastic and disingenuous tones to refute allegations of drug or alcohol use. Finally, former Vice-President Al Gore, Jr., has reportedly used marijuana during his lifetime. These examples are a few of the many instances where our leaders – now reformed – must nonetheless convince us that the younger generation should not be permitted to use or experiment with drugs and alcohol. *See also* Chandler v. Miller, 520 U.S. 305 (1997).

[26] The current U.S. President, George W. Bush, discounted his prior driving while intoxicated arrest as a "youthful indiscretion" during the 2000 presidential campaign, even though the incident occurred when he was nearly thirty. How, then, can this generation of leaders begin to impose harsh, zero-tolerance provisions on children when those now governing used illicit drugs well into their young adulthood? One would certainly concede that the successes of President Bush demonstrate that one can indeed commit "youthful indiscretions" involving drugs and alcohol and later turn his or her life around without the drastic, dire consequences that the governing generation now reference as inevitable.

[27] *See generally* Owasso I.S.D. No. I-011 v. Falvo, 534 U.S. 426 (2002) (unanimous holding that peer grading does not violate the Family Educational Rights and Privacy Act, commonly referred to as FERPA) (decided February 19, 2002); Gonzaga University v. Doe, 536 U.S. 273 (2002) (holding FERPA's provisions do not create a personal right enforceable under 42 U.S.C. § 1983) (decided June 20, 2002); and Taylor v. Simmons-Harris, 534 U.S. 1111 (finding that state-supported vouchers that may be redeemed to fund religious education do not violate the First Amendment's Establishment Clause) (decided June 27, 2002).

[28] The Fourth Amendment to the U.S. Constitution reads in whole as follows:

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

U.S. CONST. amend. IV.

[29] 469 U.S. 325 (1985). *T.L.O.* was originally submitted to the Court on the limited issue of whether the exclusionary rule applied to searches conducted in the school setting. *Id.* at 331. After argument, the Court determined it more appropriate to decide the broader issue of "what limits, if any, the Fourth Amendment places on the activities of school authorities." *Id.* at 332. Because the Court resolved the case on the more broad issue, eventually deciding that the Fourth Amendment did apply in the school setting and establishing a lower threshold standard to support warrantless searches, the Court did not address the issue regarding the application of the exclusionary rule. *Id.* at n.3.

[30] *Id.* at 328. Terry Lynn Osborne, infamously known as "T.L.O.," was at the time a fourteen year-old freshman. *Id.*

prohibited.[31] Once there, T.L.O. denied that she had been smoking or that she smoked at all.[32] The assistant vice principal asked T.L.O. into his office and demanded inspection of her purse.[33] While fumbling through T.L.O.'s purse, the vice principal discovered a pack of cigarettes and a pack of cigarette rolling papers, the latter of which is commonly associated with marijuana.[34] Believing that a closer inspection was warranted, the vice principal continued to examine the purse.[35] Upon further inspection the vice principal uncovered a trace amount of marijuana, a pipe, a number of empty plastic bags, numerous one dollar bills, and an apparent itemization of students owing T.L.O. money.[36] The school notified T.L.O.'s mother of the offense and turned all evidence over to the police.[37] T.L.O. ultimately confessed to selling marijuana and was processed by the state as a delinquent.[38] During the delinquency proceedings, T.L.O. challenged the search of her purse by the Vice Principal as unlawful.[39] In resolving this controversy, the United States Supreme Court laid the cornerstone to *Earls*.

T.L.O. is important, from a legal perspective, for three crucial holdings. First, the Court expressly noted that the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials."[40] This finding is important because it ensures that students will not, in theory, be subjected to any search that is unreasonable at the hands of their teachers and principals.[41]

The second major holding that stems from *T.L.O.* is that the warrant requirement typically mandated by the Fourth Amendment is not always necessary in the school setting.[42] This finding was palatable in *T.L.O.* because schools, like police, may confront exigencies that justify immediate warrantless searches. The *T.L.O.* Court expressly noted that "[t]he warrant requirement . . . is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would *unduly interfere with the maintenance of the swift and*

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 329.
[39] *Id.*
[40] *Id.* at 333. As noted above, the case was argued twice. Initially, the Court granted certiorari to decide whether the exclusionary rule applied in school settings where the challenged search was conducted by a school official rather than a traditional peace officer. *Id.* at 332. Thereafter, the Court ordered reargument on the question of what limits, if any, the Fourth Amendment imposes upon school officials *within* the school setting. *Id.*
[41] *Id.* at 334 (briefly noting the axiomatic principle that school officials are state actors pursuant to the Fourth and Fourteenth Amendment).
[42] *Id.* at 340. The Court justifies its decision regarding the warrant requirement as follows:

> How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.

Id.

informal disciplinary procedures needed in the school."[43] The problem with dispensing the warrant requirement under such a broad principle is that it enables the school district to act as a law enforcement agency as well as an educator. However, the school district as a law enforcement agency is not bound by the strictures of the Fourth Amendment warrant requirement.[44] Although school officials may conduct warrantless searches when it is feared that a school rule or the criminal law has been violated, the exigency of circumstances mandating the search will no longer be evaluated. In short, *T.L.O.* permits school officials to do precisely what peace officers cannot under the strictures of the Fourth Amendment: dispense with securing a warrant in *all cases* due solely to the situs of the alleged offense.

The third critical holding in *T.L.O.* is the delineation of what constitutes a "reasonable" search by a school official. In many respects, the Court simply drew from past experience in creating a two-part balancing test.[45] Noting that many prior cases dispense with the probable cause requirement, the Court accepted a much lower standard of "cause" required to initiate a search in the school setting.[46] Henceforth,

> The legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[47]

The essential holding of *T.L.O.* is that, due to the unique nature of the school setting, teachers and school officials may initiate searches on students without first obtaining a warrant if they have reasonable suspicion that the student has violated a school rule or criminal law.[48] When testing the "reasonableness" of the search pursuant to the Fourth Amendment, such warrantless searches will be upheld as valid where the search was justified at its inception (i.e., the teacher or school official had individualized suspicion that this student had committed a particular violation of school rules or law) and was reasonable

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

[44] Not only did T.L.O. find herself in trouble at school, but the evidence uncovered by the Vice Principal later served as the basis for adjudicating T.L.O. a delinquent in the criminal arena. Thus, although the search was initially seeking only evidence of cigarette smoking, which violated a school rule, the more serious items uncovered in T.L.O.'s purse were later used against her in a court of law.

[45] T.L.O. v. N.J., 469 U.S. 325, 341-42 (1985) (referencing the familiar *Terry v. Ohio* "stop and frisk" standard). *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[46] *Id.* at 341 (observing that "we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although 'reasonable,' do not rise to the level of probable cause") (citations omitted).

[47] *Id.* at 341-42 (internal citations to *Terry v. Ohio* omitted).

[48] *See supra* notes 32-40 and accompanying text.

in its scope (i.e., that the search is consistent with the evidence sought or found and does not unduly infringe on the rights of a student based on age and gender).[49] Thus, *T.L.O.* kept in place one of the most closely guarded protections of the Fourth Amendment: the concept of individualized suspicion.

And while these three crucial points are what most individuals mention when citing *T.L.O.*, the concurring opinion of Justice Blackmun unwittingly, perhaps, carved out an entirely new exception to the Fourth Amendment that ushered in a new genre of cases. In commenting on the lowered standard of suspicion required for school searches, Justice Blackmun penned the outline that would later serve as foundation for the "special needs" doctrine:

> The Court correctly states that we have recognized limited exceptions to the probable-cause requirement "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served" by a lesser standard. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause-Clause, only when we were confronted with "a special law enforcement need for greater flexibility." . . . *Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.*[50]

Justice Blackmun probably never intended this language to serve as the impetus for creating a new breed of Fourth Amendment cases – the "special needs" cases. This can be discerned from the remainder of Justice Blackmun's concurring opinion, which limits the balancing test applied in *T.L.O.* to the facts of the case.[51] Rather, Justice Blackmun noted the importance of dispensing with the traditional warrant and probable cause requirements at school where either the safety of the students or the sanctity of the educational process was challenged.[52]

Similarly, Justice Brennan and Justice Stevens seek, in their respective dissenting opinions, to limit the ability of the state to conduct warrantless searches on students based on something less than probable cause.[53] In cautioning for restraint, Justice Stevens characterizes schools as "places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."[54] To ignore this fact would be tantamount to ignoring that children live what they learn. "If the Nation's students can be convicted [of a crime] through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly."[55]

Unlike the *T.L.O.* opinion, which still mandates reasonable suspicion when searching students for evidence of a school violation or violation of the

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[49] *See supra* notes 32-40 and accompanying text.

[50] T.L.O. v. N.J., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) (emphasis added) (internal citations omitted).

[51] *Id.* at 352-54 (Blackmun, J., concurring in judgment).

[52] *Id.* at 353 (Blackmun, J., concurring in judgment).

[53] *See generally id.* at 353-70 (Brennan, J., dissenting); *id.* at 370-85 (Stevens, J., dissenting).

[54] *Id.* at 373 (Stevens, J., dissenting).

[55] *Id.* at 373-74 (Stevens, J., dissenting).

law,[56] *Vernonia* and *Earls* eliminate the requirement for such individualized suspicion where the alleged need is to deter drug use by the student population.[57] Yet, one can hardly believe that the drafters of the Fourth Amendment envisioned that not only the warrant and probable cause requirements, but any individualized suspicion requirements, would be discarded upon finding a sufficient "need." For it was the fear of such vacillating "special needs" that drove our Founders to revolt and provided the impetus behind their efforts to secure our Bill of Rights.[58] But, of course, the warrant and probable cause requirements were not easily discarded; they, like the requirement of individualized suspicion, fell away gradually as we slid further down the slippery slope from *T.L.O.* to *Earls.*

III. THE SPECIAL NEEDS DOCTRINE: COURT CREATED, ILL-DEFINED

> *"Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for those of the Framers."*[59]

Eventually, the state realized the burdensome nature of the Fourth Amendment constraints and sought to justify various searches without fully complying with the constitutional requirements.[60] This line of cases, beginning with *T.L.O. v. New Jersey*,[61] established the "special needs" exception to the Fourth Amendment. Where the need is great enough, usually because the danger is immediate and the potential consequences grave enough, the warrant and probable cause requirement of the Fourth Amendment, which largely translate to individualized suspicion, may be ignored.

"The 'special needs' doctrine, which has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized

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[56] *See supra* notes 42-45 and accompanying text.

[57] *See infra* Section C, discussing in detail both *Vernonia* and *Earls*.

[58] We should certainly not forget that the Founders placed a Preamble in the U.S. Constitution that attempted to "secure the Blessings of Liberty to ourselves and our posterity."

[59] T.L.O. v. N.J., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). This quote reappears in the majority opinion in most all of the special needs cases. Each of these opinions attribute the creation of the "special needs" doctrine to Justice Blackmun in the *T.L.O.* case.

[60] A strict or literal interpretation of the Fourth Amendment would permit no exceptions to the warrant and probable cause requirements. The Fourth Amendment, unlike others in the Bill of Rights, does not, by its own terms, limit application of the freedom to be free from unreasonable searches and seizures to the criminal arena. *See generally*, Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 640 (1989) (Marshall, J., dissenting) (observing that "[b]y its terms . . . the Fourth Amendment – unlike the Fifth and Sixth – does not confine its protections to either criminal or civil actions. Instead, it protects generally '[t]he right of the people to be secure.'").

[61] *Id.* As Justice Blackmun authored only a concurring opinion, there is no question but that his quote was, at least at this time, mere dicta. Since 1985, however, many majority opinions have incorporated the "special needs" doctrine, first set forth as dicta, into the main opinion of the Court and have collectively established an exception to traditional Fourth Amendment analysis. The Court will permit governmental bodies to ignore the warrant and probable cause requirement when some "special need" beyond ordinary law enforcement presents itself. *See infra* notes 62-72 and accompanying text.

suspicion of wrongdoing."[62] Accordingly, the cases entitling the state to conduct suspicionless searches are very limited and can generally be separated into four distinct situations: (1) administrative searches;[63] (2) fixed motorist checkpoint searches;[64] (3) searches implicating physical harm or safety threats against the general public;[65] and (4) searches conducted in the school setting.[66] Justice Marshall has noted that the court-created "special needs" doctrine has now come to "displace [the] constitutional text in each of the four categories of searches enumerated in the Fourth Amendment"[67] – searches of persons,[68] houses,[69] papers[70] and effects.[71] In the special needs line of cases, the Court's substitution of the special needs balancing test for the requirement of probable cause has been inconsistent, and now, with the decision in *Earls*, provides

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[62] City of Indianapolis v. Edmond, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting). *But see Griffin v. Wis.*, 483 U.S. at 873-76 (permitting the warrantless search of a probationer's home by law enforcement personnel due to the probationer's probationary status where, by the very terms of probation and the constant monitoring that probation requires, he was believed to have a lower expectation of privacy).

[63] *See* Camera v. Mun. Court of City and County of S.F., 387 U.S. 523 (1967) (a pre-*T.L.O.* case permitting the warrantless administrative search of building to ensure compliance with San Francisco housing code regulations); Mich. v. Tyler, 436 U.S. 499 (1978) (pre-*T.L.O.* case allowing warrantless administrative search of fire-damaged premises); N.Y. v. Burger, 482 U.S. 691 (1987) (upholding warrantless administrative search of a business considered by the Court to be highly regulated).

[64] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (pre-*T.L.O.* decision permitting the suspicionless stop of vehicles at fixed points close to the border to protect against illegal immigrants); Del. v. Prouse, 440 U.S. 648 (1979) (pre-*T.L.O.* decision suggesting that fixed motorist search checking licenses and vehicle registration would be constitutional); Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (upholding fixed sobriety checkpoints to protect the public against the dangers of drunk drivers). *But see* City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (striking down as unconstitutional a City ordinance that established fixed motorist checkpoints to search for illegal drugs).

[65] *See* Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 656 (1989). In both cases, there was a threat of harm or injury to persons other than the individual who might be using or abusing alcohol and drugs while on the job. This limited application of the "special needs" doctrine did not go unnoticed by the dissenters in *Vernonia*. Justice O'Connor, writing for the dissent, distinguished *Skinner* and *Von Raab* by noting that "an individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 675-76 (1995) (O'Connor, J., dissenting) (citations omitted). *But see* Ferguson v. City of Indianapolis, 532 U.S. 67 (2001) (holding a state hospital's mandatory drug testing program for pregnant women unconstitutional despite the importance of curtailing drug use among expectant mothers).

[66] *See* T.L.O. v. N.J., 469 U.S. 325 (1985); *Acton*, 515 U.S. 646; Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002). In addition, several state and lower federal courts have utilized the special needs doctrine to justify discarding the pure Fourth Amendment requirements of individualized suspicion in the school setting.

[67] *Skinner*, 489 U.S. at 636-37 (Marshall, J., dissenting).

[68] *Skinner*, 489 U.S. 602.

[69] Griffin v. Wis., 483 U.S. 868 (1987).

[70] O'Connor v. Ortega, 480 U.S. 709 (1987).

[71] *T.L.O.*, 469 U.S. 325.

seemingly disparate treatment between adults and children – even in relation to the national drug crisis.[72]

A. *The Non-School Drug Testing Cases*

> "*In widening the 'special needs' exception to probable cause to authorize searches of the human body unsupported by* ANY evidence of wrongdoing, the majority today completes the process begun in T.L.O. of eliminating altogether the probable-cause requirement for civil searches – those undertaken for reasons 'beyond the normal need for law enforcement.'"[73]

Although *T.L.O.* is credited with the creation of the "special needs" doctrine,[74] this exception to the warrant and probable cause requirement has been more frequently applied in non-school cases. The first application of the "special needs" exception to warrantless, suspicionless drug testing appeared in a 1989 constitutional challenge to the suspicionless drug testing of railroad employees involved in certain railway accidents.[75] The precipitating factor necessitating mandatory suspicionless drug testing was evidence of on-the-job intoxication that contributed to railroad accidents with fatalities and significant property loss.[76] Thus, in response to growing concern that the railroad industry was unable to deter drug use among its employees, the Federal Railroad Administration implemented a program mandating drug testing[77] on all employees involved in incidents defined as either a "major train accident,"[78] an

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[72] The Court has decided four drug testing search cases within the past six terms. In the first three cases, all involving attempted searches against adults, the Court struck down the searches involved as beyond the reach of the "special needs" exception to the Fourth Amendment. *Compare*, Chandler v. Miller, 520 U.S. 305 (1997); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Ferguson v. City of Charleston, 532 U.S. 67 (2001). These three cases certainly conflate the "special needs" doctrine as applied to drug testing generally. Only in the most recent decision, *Earls*, did a majority of the Court find that suspicionless drug testing falls within the "special needs" doctrine. This holding can be explained either by recognizing the distinction in treatment between the rights of adults and the rights of schoolchildren or by delineating those cases where the primary purpose of the search is to deter drug use versus those conducted to further criminal law enforcement. *But see Chandler v. Miller*, 520 U.S. 305 (1997) (where the need to deter drug use among our leaders, those voluntarily running for political office, was not sufficient to permit testing of political candidates who are our legal representatives and societal role models).

[73] Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 640 (1989) (Marshall, J., dissenting) (emphasis in original).

[74] T.L.O. v. N.J., 469 U.S. 325 (1985) (describing the dicta in Justice Blackmun's concurring opinion regarding "special needs" in the *T.L.O.* case). *See also* Ferguson v. City of Charleston, 532 U.S. 67, 76 n.7 (2001) (crediting Justice Blackmun with the balancing test applied in subsequent "special needs" cases).

[75] *Skinner*, 489 U.S. at 606-10 (describing the Federal Railroad Administration's regulations in response to data indicating that numerous railway accidents had involved alcohol or drug impairment).

[76] *Id.* at 606-07 (noting that "[t]he problem of alcohol use on American railroads is as old as the industry itself").

[77] The Federal Railroad Administration's regulations required blood, urine, *and* breathalyzer testing to discern the presence of drugs or alcohol in an employee's system. *Id.* at 609-12.

[78] *Id.* at 609 (defining a "major train accident" as any accident involving a fatality, the release of hazardous materials, or causing at least $500,000 in railroad property damage).

"impact accident,"[79] or any incident resulting in a fatality to an on-duty railroad employee.[80] The Railway Labor Executives Association and members of the organization challenged the propriety of the suspicionless drug testing and alleged that such testing ran contrary to the protections enshrined in the Fourth Amendment.

Justice Kennedy, writing for the majority, noted very quickly that individuals have a reasonable expectation of privacy in their bodily fluids, particularly their blood, breath, and urine.[81] In reaching his conclusion, Justice Kennedy noted that the "chemical analysis of urine, unlike that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant or diabetic."[82] The Court further noted that "the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests."[83] In following the unanimous holding of all federal appellate courts at the time, the Court found that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable,"[84] and, therefore, invokes protection under the Fourth Amendment.[85]

Under the "special needs" doctrine, the Court was then required to balance the privacy interests of the individual against the countervailing interests of the

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[79] *Id.* (defining an "impact accident" as a collision resulting in a reportable injury or more than $50,000 damage to railroad property).

[80] *Id.*

[81] *Id.* at 616-18. *See also*, Schmerber v. Cal., 384 U.S. 757, 769-70 (1966) (in this case involving the warrantless, unconsented withdrawal of blood by hospital employees at the behest of law enforcement, the Court noted that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."); *Rochin v. Cal.*, 342 U.S. 165 (1952) (due process challenge to the warrantless, unconsented pumping of an individual's stomach because the suspect had allegedly swallowed morphine).

[82] Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 617 (1989).

[83] *Id.*

[84] *Id.* The Court quoted a paragraph from the Fifth Circuit Court of Appeals decision in *Nat'l Treasury Employees Union v. Von Raab*, the companion case to *Skinner*. This quote has appeared subsequently in other opinions detailing the very intimate nature of urination and the composition of urine. The passage reads as follows:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social customs.

Id., quoting Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).

[85] *Skinner*, 489 U.S. at 619 (stating that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable"). *See also Schmerber*, 384 U.S. at 768. The Court stated that, in a warrantless blood testing case,

> the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected the relevant Fourth Amendment standard of reasonableness.

Id.

government in conducting the search.[86] The *Skinner* Court determined that a railroad employee will naturally have a lessened expectation of privacy due to his or her participation in a highly-regulated industry.[87] Thus, in evaluating the "reasonableness" of a search pursuant to the Fourth Amendment and the court-created "special needs" doctrine, a court is now able to consider an individual's expectation of privacy under the unique circumstances of the individual – not just in relation to society at large.[88] This malleable approach toward Fourth Amendment jurisprudence certainly could not have been foreseen by the Founders. Yet, this evolving approach provided a sufficient harbinger for the students in both *Vernonia* and *Earls*.

In contrast to the limited expectations of privacy by those employees in a highly regulated industry, the Court considered the government's interest in deterring drug use by those engaged in safety-sensitive tasks to be "compelling."[89] The Court observed:

> The possession of unlawful drugs is a criminal offense, that the Government may punish, but it is a separate and far more dangerous to perform certain sensitive tasks while under the influence of those substances. Performing those tasks while impaired by alcohol is, of course, equally dangerous, though consumption of alcohol is legal in most other contexts. The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substances in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose. The necessity to perform that regulatory function with respect to railroad employees engaged in safety-sensitive tasks, and the reasonableness of the system for doing so, have been established in this case.[90]

Accordingly, the Court upheld the mandatory, suspicionless drug testing of railroad employees who were involved in certain designated accidents. Justice Stevens, in a concurring opinion, noted that he was not "persuaded, however, that the interest in deterring the use of alcohol or drugs is either necessary or sufficient to justify the searches authorized by these regulations."[91]

On the same day that *Skinner* was decided, the Court handed down a companion case, *National Treasury Employees Union v. Von Raab*.[92] Much like the facts of *Skinner*, *Von Raab* involved a challenge to mandatory, suspicionless drug testing of applicants for promotion at the United States Customs Service in positions involving either the use of a firearm or the interdiction of

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[86] This so called "balancing test" has not been consistently applied. At times, the Court first determines whether a "special need" appears and then proceeds to conduct the balancing test. At other times, the Court will assess whether a "special need" arises by conducting a balancing test. *See e.g.*, *supra* note 23 and accompanying text.

[87] Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 627 (1989) (noting that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees").

[88] *See generally Katz v. United States*, 389 U.S. 347 (1967).

[89] *Skinner*, 489 U.S. at 628-30.

[90] *Id.* at 633.

[91] *Id.* at 634. Justice Stevens's reluctance toward relaxing the warrant and probable cause requirements in suspicionless drug testing cases would recur, and be echoed by other members of the court, many years later in *Vernonia* and *Earls*.

[92] 489 U.S. 656 (1989).

illegal drugs.[93] As in *Skinner*, the results of a positive test were not turned over to law enforcement or any other agency.[94] The consequence of a positive test, if the employee could proffer no suitable explanation for the result, was dismissal.[95]

Justice Kennedy, again writing for the majority, reminded that the Court's holding in *Skinner*:

> reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[96]

The Court held that the search in question did not violate the Fourth Amendment because Customs Agents are our first line of defense in safeguarding our borders and interdicting illegal drugs.[97]

In many respects, after *Skinner*, the decision in *Von Raab* was not surprising. The one remarkable component, however, is Justice Scalia's strongly worded dissent. Noting the complete lack of evidence of drug or alcohol problems in the Customs Service, Justice Scalia refused to sign on to the majority's opinion.[98] Three distinct paragraphs written over four pages suggest that Justice Scalia would not permit suspicionless drug testing in the absence of credible evidence that a drug problem exists, supporting the dispensation of the Fourth Amendment's literal warrant and probable cause requirements.[99]

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[93] *Id.* at 659-63.

[94] *Id.* at 663.

[95] *Id.*

[96] *Id.* at 665-66.

[97] *Id.* at 677 (as in *Skinner*, Justice Kennedy termed the government's interest "compelling"). The Court only upheld the drug testing program against those who are responsible for searching for narcotics and illegal drugs and those required to carry firearms. The Court did not uphold suspicionless drug testing against those dealing with "classified" documents and, instead, remanded this portion of the decision back to the lower court for clarification. *Id.* at 679.

[98] *Id.* at 680-81 (Scalia, J., dissenting).

[99] *Id.* at 680-84 (Scalia, J., dissenting). Given Justice Scalia's seeming change in heart later in the *Earls* case, it is important to set forth these paragraphs in full text. Had Justice Scalia remained convinced that evidence of a *prior* drug problem was a prerequisite to suspicionless drug testing, the *Earls* decision would have come down 5-4 in favor of the student – not the school. Ultimately, it is the majority's stance that carried the day and won over even Justice Scalia when addressing alleged drug use in our public schools.

In distinguishing his dissenting opinion in *Von Raab* from his earlier vote to join the majority in *Skinner*, Justice Scalia wrote:

> Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

Treasury Employees v. Von Raab, 489 U.S. 656, 680-81 (1989) (Scalia, J., dissenting).

B. Recent Deviations: The Court Pulls Back

In 1997, the Court pulled back from its "special needs" application to drug testing cases generally. *Chandler v. Miller*[100] provided the Court an opportunity to consider whether the holdings of *Skinner* and *Von Raab* should be extended to candidates for state office.[101] In 1993, the state of Georgia passed a statute requiring candidates for certain public offices[102] to submit to a drug test in order to qualify for a place on the ballot.[103] Justice Ginsburg, writing for the majority, discussed the previous three drug testing cases, *Skinner*, *Von Raab* and *Vernonia*, in determining first whether any "special need" existed to support the test.[104] Justice Ginsburg found that prior "precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, and sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[105] As there was no evidence of drug use among the selected class, the Court was unable to find that a special need existed.[106] Much like Justice Scalia before her, Justice Ginsburg described the Georgia

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Later in the same opinion, Justice Scalia further distinguished his stance in *Von Raab* from his decision in *Skinner* by noting as follows:

> What is absent in the Government's justifications – notably absent, revealingly absent, and as far as I am concerned dispositively absent – is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.

Id. at 683 (Scalia, J., dissenting) (emphasis in original).

Finally, Justice Scalia explains that generalized drug use or speculative needs will not suffice to justify departure from traditional Fourth Amendment requirements in most case. He writes:

> But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. In *Skinner*, *Bell*, *T.L.O.*, and *Martinez-Fuerte*, we took pains to establish the existence of special need for the search or seizure – a need based not upon the existence of a "pervasive social problem" combined with the speculation as to the effect of that problem in the field at issue, but rather upon well-known and well-demonstrated evils *in that field*, with well-known or well-demonstrated consequences.

Id. at 684 (Scalia, J., dissenting) (emphasis in original).

[100] 520 U.S. 305 (1997).

[101] *Id.* at 308-10.

[102] The only offices requiring drug tests were the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commission of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Services Commission. *Id.* at 309-310 (citing GA. CODE. ANN. sec. 21-2-140(a)(4)).

[103] *Id.* at 308-10 (explaining that potential candidates must submit to the drug test and certify that their test was negative).

[104] *Id.* at 314-19.

[105] *Id.* at 318.

[106] *Id.* at 318-19 ("Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule" requiring individualized suspicion.).

plan as largely symbolic.[107] Finding the absence of a "special need" due to the lack of any evidence supporting drug use or safety issues, the Court did not even conduct a balancing test of the interests between individual privacy and governmental need.[108] Simply put, suspicionless drug testing of adults, the ones who voluntarily submit themselves to public scrutiny through the electoral process, runs counter to the Fourth Amendment.

Justice Rehnquist was the only dissenting voice in *Chandler*.[109] Justice Rehnquist was quick to point out the irony in the majority's opinion, noting that "the Court perversely relies on the fact that a candidate for office *gives up* so much privacy . . . as a reason for *sustaining* a Fourth Amendment claim."[110] Because candidates are subject to constant public scrutiny, the majority reasons, "their candidacy will enable people to detect any drug use on their part."[111] Relying on the prevalence of drug use in society, the "negligible privacy concerns implicated by urinalysis drug testing and the vulnerability of public officials to bribery and blackmail," Justice Rehnquist was willing to uphold the Georgia statute against challenge.[112] In the next two drug testing cases, two more voices would join his dissent.

In 1998, Indianapolis began implementing suspicionless vehicle checkpoints in an effort to combat narcotic use.[113] The checkpoints were placed in predetermined locations based on crime in the area and traffic flow.[114] The average traffic stop initiated pursuant to the policy lasted just a few minutes.[115] During the warrantless vehicular stops, officers looked for signs of impairment and visually checked the car while a trained narcotics dog walked around each vehicle.[116] Two individuals challenged the suspicionless checkpoints under the Fourth Amendment.[117] This challenge culminated in the second deviation from

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[107] *Id.* at 322 (stating that "[h]owever well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake").

[108] *Id.* at 323. Justice Ginsburg concluded her opinion as follows:

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" – for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

Id. (internal citations omitted).

[109] *Id.* at 324 (Rehnquist, C.J., dissenting).

[110] *Id.* at 325 (Rehnquist, C.J., dissenting).

[111] *Id.* at 325-26 (Rehnquist, C.J., dissenting).

[112] *Id.* at 326-28 (Rehnquist, C.J., dissenting) (noting that "[n]othing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court"). *Id.* at 328.

[113] City of Indianapolis v. Edmond, 531 U.S. 32, 34-36 (2000) (indicating that the City operated these checkpoints during daylight hours, posting lighted signs that read ANARCOTICS CHECKPOINT [number] MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP").

[114] *Id.* at 35-36.

[115] *Id.* at 36 (The city policy as implemented was to ensure that most drivers would not be detained beyond five minutes.).

[116] *Id.* at 35.

[117] *Id.* at 36 (The complainants were James Edmond and Joell Palmer, both of whom were stopped by officers at a City checkpoint in September 1998.).

the "special needs" drug testing line of cases: *City of Indianapolis v. Edmond*.[118]

The primary purpose of the suspicionless vehicle checkpoints in Indianapolis was to discover and interdict illegal drugs.[119] The program was relatively successful, as approximately nine percent of vehicles stopped resulted in arrests.[120] Similar warrantless checkpoints, all deemed to be searches pursuant to the Fourth Amendment, had been upheld by the Supreme Court in the past.[121] Justice O'Connor, writing for the majority, distinguished these prior cases by emphasizing that the primary purpose of the acceptable searches in *Sitz*[122] and *Martinez-Fuerte*[123] was something other than law enforcement,[124] whereas in *Edmond*, the point of the vehicle checkpoints was to intercept illegal drugs that might otherwise enter the city.[125] Such broad-based law enforcement techniques were held not to fall within the narrow category of searches upheld by the Court under the "special needs" doctrine.[126]

Justice O'Connor was quick to proclaim that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[127] Rather, the defining feature of the "special needs" test is precisely that the need being asserted is something outside the realm of traditional law enforcement.[128] Without disturbing prior precedent, Justice O'Connor assured that:

> there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, as the Court of Appeals noted, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.[129]

Justice Rehnquist wrote a dissenting opinion in which Justices Thomas and Scalia joined.[130] The dissenters focused on the seemingly natural evolu-

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[118] 531 U.S. 32.

[119] *Id.* at 34.

[120] *Id.* at 34-35 (noting that, of the 104 arrests, 55 were for drug-related crimes).

[121] *Id.* at 34 (citing Mich. Dept. of State Police v. Stiz, 496 U.S. 444 (1990) and United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

[122] 496 U.S. 444 (1990) (involving Michigan highway sobriety checkpoints whose primary purpose was to ensure driver safety by removing impaired drivers from the road).

[123] 428 U.S. 543 (1976) (upholding fixed border vehicle checkpoints due to the difficulty of stopping illegal entrance by immigrants into the United States from Mexico).

[124] City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) ("what principally distinguishes these checkpoints from those we have previously approved is their primary purpose").

[125] *Id.* at 41.

[126] *Id.*

[127] *Id.* at 42.

[128] *See supra* notes 62-63 and accompanying text.

[129] *Id.* at 44 (internal citations omitted).

[130] *Id.* at 48 (Rehnquist, C.J., dissenting).

tion of vehicle roadblock cases from *Martinez-Fuerte*[131] to *Sitz*[132] to *Edmond*.[133] In fact, one of the purposes of the City of Indianapolis checkpoints was assuredly to detect and disable impaired drivers from posing a threat on Indianapolis roadways.[134] Accordingly, the Chief Justice concluded that "[b]ecause of the valid reasons for conducting these roadblock seizures, it is constitutionally irrelevant that petitioners also hoped to interdict drugs."[135] Justice Rehnquist was clear to distinguish the "special needs" cases, which he suggested applied only to *searches* of homes and businesses, from the unique area of roadblock seizures.[136] In doing so, the Chief Justice failed to cite the Court's *Vernonia* decision which broadened the category of "special needs" cases to include suspicionless drug testing of students. The following term, the issue of suspicionless drug testing would again face the Court in *Ferguson v. City of Charleston*.[137]

For the past two decades, the issue of drug use by expectant mothers has become an increasing national concern.[138] To address this dilemma, and to combat the increased drug use by expectant mothers in the Charleston area, the Medical University of South Carolina began implementing drug screens on maternity patients that the hospital had reason to suspect might be using illegal drugs, particularly cocaine.[139] Women testing positive were referred by the hospital to drug counseling and treatment.[140] This program failed to diminish the drug problem among expectant mothers and prompted the state hospital to implement more stringent testing.[141] The modified testing procedures[142] included potential legal sanctions for women who tested positive.[143]

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[131] 428 U.S. 543 (1976).

[132] 496 U.S. 444 (1990).

[133] 531 U.S. 32 (2000). *See also* Del. v. Prouse, 440 U.S. 648 (1979) (recognizing the use of vehicular checkpoints to check for driver's licenses and registrations).

[134] 531 U.S. at 51 (Rehnquist, C.J., dissenting).

[135] *Id.* (Rehnquist, C.J., dissenting) (citing Whren v. United States, 517 U.S. 806 (1996)). The Chief Justice later remarks that "[o]nce the constitutional requirements for a particular seizure are satisfied, the subjective expectations of those responsible for it, be it police officers or members of a city council, are irrelevant."

[136] *Id.* at 53 (Rehnquist, C.J., dissenting) ("[W]hatever sense a non-law-enforcement primary purpose test may make in the search setting, it is ill suited to brief roadblock seizures, where we have consistently looked at 'the scope of the stop' in assessing a program's constitutionality.").

[137] 532 U.S. 67 (2001).

[138] *Id.* at 70 n.1 (observing that several witnesses testified at trial that "the problem of 'crack babies' was widely perceived in the late 1980s as a national epidemic, prompting considerable concern both in the medical community and among the general populace").

[139] *Id.* at 70.

[140] *Id.*

[141] *Id.* at 70-71.

[142] *Id.* at 72 n.4 (describing the nine criteria for discerning which maternity patients should be tested. The categories included those (1) with no prenatal care; (2) late prenatal care after twenty-four weeks gestation; (3) incomplete prenatal care; (4) abruptio placenta; (5) intrauterine fetal death; (6) preterm labor of "no obvious cause"; (7) intrauterine growth retardation of "no obvious cause"; (8) previously known drug or alcohol abuse; and, (9) unexplained congenital anomalies).

[143] *Id.* at 72-73. The process, in detail, was as follows:

> The threat of law enforcement involvement was set forth in two protocols, the first dealing with the identification of drug use during pregnancy, and the second with identification of drug use

Ten women, arrested under the policy after testing positive, initiated suit challenging the unlawfulness of the search.[144] *Ferguson* ultimately made its way to the Supreme Court to clarify whether the "special needs" doctrine should apply to warrantless, suspicionless drug testing that contained both a medical and law enforcement purpose.[145] The Court, with Justice Stevens writing for the majority, promptly distinguished this case from the Court's previous drug testing cases where the results were not turned over to any third party.[146] In particular, the Court's previous drug testing cases permitted suspicionless searches where the results of the test were not turned over to law enforcement and criminal sanction was not a possible consequence of testing positive.[147]

In describing application of the "special needs" test, Justice Stevens proclaimed that the Court employs "a balancing test that weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that support[ ] the program."[148] In harmonizing the Court's holding in *Ferguson* with the holding in *Edmond*, the majority emphasized that:

> The critical difference between those four drug-testing cases [where the Court upheld the suspicionless search] and this one, however, lies in the nature of the "special need" asserted as justification for the warrantless searches. In each of those earlier cases, the "special need" that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement. This point was emphasized both in the majority opinions sustaining the programs in the first three cases, as well as in the dissent in the *Chandler* case. In this case, however, the central and indispensable feature of the policy

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after labor. Under the latter protocol, the police were to be notified without delay and the patient promptly arrested. Under the former, after the initial positive drug test, the police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor. In 1990, however, the policy was modified at the behest of the solicitor's office to give the patient who tested positive during labor, like the patient who tested positive during a prenatal care visit, an opportunity to avoid arrest by consenting to substance abuse treatment.

The last six pages of the policy contained forms for the patients to sign, as well as procedures for the police to follow when a patient was arrested. The policy also prescribed in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy. If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18 – in this case, the fetus. If she delivered "while testing positive for illegal drugs," she was also to be charged with unlawful neglect of a child. Under the policy, the police were instructed to interrogate the arrestee in order "to ascertain the identity of the subject who provided illegal drugs to the suspect." Other than the provisions describing the substance abuse treatment to be offered to women who tested positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns.

Id.

[144] *Id.* at 73.

[145] *Id.* at 77.

[146] *Id.* (citing Chandler v. Miller, 520 U.S. 305 (1997); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 656 (1989); and Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995)).

[147] *See generally Skinner*, 489 U.S. 602; *supra* notes 76-88 and accompanying text; *Von Raab*, 489 U.S. 646; *supra* notes 93-98 and accompanying text; *Acton*, 515 U.S. 646; *infra* notes 182-84 and accompanying text.

[148] Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001).

> from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.[149]

The opinion continued:

> Respondents argue in essence that their ultimate purpose – namely, protecting the health of both mother and child – is a beneficent one. In *Chandler*, however, we did not simply accept the State's invocation of a "special need." Instead, we carried out a "close review" of the scheme at issue before concluding that the need in question was not "special" as that term has been defined in our cases . . . . In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose . . . . While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.[150]

Although the Court has permitted, in the past, resort to the "special needs" doctrine to circumvent the traditional and literal requirements of the Fourth Amendment, such elastic application is not permitted when the ultimate goal of the search is to further law enforcement or criminal investigations.[151] Rather, it is precisely when evidence is being gathered for utilization in criminal proceedings that the pure strictures of the Fourth Amendment must be adhered to.[152]

Thus, in relying on the distinction first set forth in *Edmond*, a majority of the Court was unwilling to rely on the "special needs" doctrine to exempt state hospital drug searches of expectant women when the results of the tests were ultimately turned over to the police.[153]

Justice Kennedy wrote separately to concur in the judgment.[154] His principle disagreement with the majority was that a policy should be evaluated by its ultimate goal (i.e., preserving the health of newborn infants) rather than its proximate purpose.[155] This approach acknowledges one of the natural consequences of any search is the collection of some form of evidence.[156] In fact, the first "special needs" case, *T.L.O. v. New Jersey*,[157] permitted dual use of the evidence obtained through the search – for both school discipline and criminal adjudication.[158] The use of evidence in both the school and prosecutorial context did not otherwise delegitimize the search.

In addition, Justice Kennedy found that there was an element of voluntariness to the "special needs" cases.[159] His statements regarding voluntariness

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[149] *Id.* at 79-80.

[150] *Id.* at 81-84 (emphasis in original).

[151] *Id.* at 84-85.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 86 (Kennedy, J., concurring).

[155] *Id.* at 87-88 (Kennedy, J., concurring).

[156] *Id. See also T.L.O. v. N.J.*, 469 U.S. 325 (1985) (wherein the evidence obtained by the Vice Principal served as the basis for adjudicating T.L.O. a delinquent. The primary purpose of that search was to maintain order and discipline in the classroom.).

[157] *T.L.O.*, 469 U.S. 325.

[158] *Id.*

[159] Ferguson v. City of Charleston, 532 U.S. 67, 90-91 (2001) (Kennedy, J., concurring). For example, in *Vernonia*, students had the option of either participating or abstaining from participation in school-sponsored athletic competitions. *See* Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995); *infra* notes 169-72 and accompanying text.

and consent serve as an ominous foreshadowing of what would ultimately become fundamental to the Court's holding in the *Earls* case.[160] As will be discussed later in this article, Justice Kennedy authored the majority opinion in *Von Raab* and much of his reasoning, first set forth in his concurrence in *Ferguson*, would be adopted by five members of the Court.

Justice Scalia, writing for the dissent, was joined by Justices Rehnquist and Thomas.[161] Justice Scalia did not see any need for the Court to resort to the "special needs" doctrine as he found that the women in *Ferguson* had all consented to the urine tests they challenged.[162] Justice Scalia further distinguished the search involved in the act of collecting urine from the (non-search) act, the testing of the urine itself.[163] Focusing on the medical benefits to drug testing expectant mothers, Justice Scalia found the program – which he believed was not initiated at police suggestion nor tainted with police involvement – acceptable.[164] It would ultimately be the voices of Justices Kennedy, Rehnquist and Scalia who would broaden the "special needs" doctrine in the context of suspicionless drug testing in *Vernonia* and *Earls*.

C. *The School Cases:* Vernonia *and* Earls

> *"Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example."*[165]

1. Vernonia – *the Stepping Stone*

> *"[C]hildren at school do not enjoy two of the Fourth Amendment's traditional categorical protections against unreasonable searches and seizures: the warrant requirement and the probable cause requirement. . . . The instant case, however, asks whether the Fourth Amendment is even more lenient than that, i.e., whether it is* so lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people."[166]

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[160] *Ferguson*, 532 U.S. at 90-91 (Kennedy, J., concurring). Justice Kennedy foreshadows the reasoning that would soon become law in a brief concurring opinion:

> An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences (e.g., dismissal from employment or disqualification from playing on a high school sports team) will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word. The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program.

Id. at 91-92 (internal citations omitted).

[161] *Ferguson*, 532 U.S. at 91 (Scalia, J., dissenting).

[162] *Id.* at 98 (Scalia, J., dissenting) (explaining that "[t]he special needs doctrine is thus quite irrelevant, since it operates only to validate searches and seizures that are otherwise unlawful").

[163] *Id.* at 92-93 (Scalia, J., dissenting).

[164] *Id.* at 99-100 (Scalia, J., dissenting).

[165] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[166] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 681 (1995) (O'Connor, J., dissenting) (emphasis in original).

In 1991, a seventh grade boy, James Acton, wanted to play football at his elementary school in Oregon.[167] Prior to taking the field and suiting up, however, James was required by the Student Athlete Drug Policy ("the Policy") to submit to a warrantless, suspicionless drug test to ensure that he, and all others participating in extracurricular athletics, were drug free.[168] In addition, as a condition for participating in athletics, the school district required James and the other Vernonia students in grades seven through twelve to agree to submit to random, suspicionless drug testing during each season.[169] James and his parents refused to sign the requisite consent forms for the drug testing.[170] As a result, James was prohibited from playing football at school.[171]

James and his parents filed suit in federal district court challenging the policy under the Fourth and Fourteenth Amendment.[172] After a full trial on the merits, the district court sustained the policy against constitutional challenge, finding that there was ample evidence of drug use among student athletes in Vernonia.[173] The U.S. Court of Appeals for the Ninth Circuit reversed the district court, finding that the policy violated both the United States Constitution and the Oregon state constitution.[174] The United States Supreme Court granted certiorari in the case to determine whether the policy violated students' rights to be free from unreasonable searches and seizures pursuant to the Fourth Amendment.[175]

Writing for the majority,[176] Justice Scalia found no constitutional deficiency in the Vernonia drug testing policy. Following its consistent pattern, the Court held that the collection and testing of students' urine pursuant to the school's policy constituted a search under the Fourth Amendment.[177] As an initial matter, Justice Scalia emphasized the pervasive and alarming drug use

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[167] *Id.* at 651.

[168] *Id.* at 648-52 (explaining the drug testing policy adopted in Vernonia, a small Oregon town).

[169] *Id.* at 650 (explaining the Policy as follows: "The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a 'pool' from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.").

[170] *Id.* at 651.

[171] *Id.*

[172] *Id.* at 651-52. In addition, the Actons challenged the Policy under Article I, § 9 of the Oregon Constitution. In their suit, the Actons sought both declaratory and injunctive relief.

[173] *Id.* at 652 (indicating that the parties submitted to a bench, rather than jury, trial). The district court's opinion may be found at 796 F. Supp. 1354 (Or. 1992).

[174] *Id.* The original decision of the Ninth Circuit may be found at 23 F.3d 1514 (9th Cir. 1994).

[175] The decision granting certiorari may be found at 513 U.S. 1013 (1994).

[176] Justice Scalia, Chief Justice Rehnquist, and Justices Kennedy, Thomas, Ginsburg, and Breyer formed a 6-3 majority. In addition, Justice Ginsburg wrote a separate, one-paragraph concurring opinion to express her understanding that the opinion in *Vernonia* did not make any comment on the possible constitutionality of a more broad drug testing program – particularly one that might attempt to test all students. *See id.* at 666 (Ginsburg, J., concurring).

[177] *Id.* at 652.

among student athletes in Vernonia.[178] The evidence at trial suggested a strong link between increased discipline incidents and student drug use.[179] In addition, the Court emphasized the safety concerns noted below in the district court that use of illicit drugs by student athletes increases risk of injury by interrupting the natural reactions and judgments of an athlete.[180]

The expressed purpose of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[181] Thus, the urine collected from each student-athlete and the accompanying test results were not shared with police nor were they utilized for criminal enforcement of the state's drug laws.[182] This limited use of data, where the primary purpose of testing is not for law enforcement, is the hallmark of "special needs" searches that have survived constitutional attack. In fact, Justice Blackmun's initial explanation of the court-created doctrine explicitly states that "only in those exceptional circumstances in which special needs *beyond the normal need for law enforcement*" are present will the dispensation of a warrant and probable cause be sustainable against a Fourth Amendment challenge.[183]

A troubling portion of the *Vernonia* decision is that the majority found, for the first time, that "special needs" exist *generally* within the public school context.[184] Rather than retain the narrow limitation of *T.L.O.*'s focus on the need for swift and informal discipline in a school setting, the majority simply extended *T.L.O.*'s meaning to encompass the school environment, in its entirety, based on the resurrected concept of *in loco parentis*.[185] Even the renewal of the *in loco parentis* doctrine seems uncomfortably stretched to fit the needs of state-compelled drug testing. And, under this interpretation of *in loco parentis*, the rights of parents to raise their children and direct their education run subordinate to the schools' custodial and tutelary burden.[186] The fact that parents may want to deter drug use among their children in a manner that is not involuntary and devoid of suspicion becomes irrelevant. To participate in

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[178] *Id.* at 648-49, 662-64. Not only was drug use exacerbated among the student athlete population at Vernonia, there was evidence that the athletes were "the leaders of the drug culture." *Id.* at 649.

[179] *Id.* at 648-49 (observing that disciplinary referrals had doubled and that student behavior was disrupting the educational experience in the classroom).

[180] *Id.* at 649. In particular, Justice Scalia noted that "[t]he high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use." *Id.*

[181] *Id.* at 650.

[182] *Id.* at 651 (indicating that "[o]nly the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year").

[183] *See generally* T.L.O. v. N.J., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (emphasis added).

[184] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995). No citations were provided by the Court, however, to affirm this very broad, general and, I would argue, transmogrified extension of the holding in *T.L.O.*

[185] *Id.* at 654-55.

[186] *See id.* at 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

student athletics in Vernonia, the desire of the actual parent to protect his/her child from warrantless, suspicionless drug testing by the state was deemed secondary to the school's desire to deal with a drug epidemic.

In sustaining the Student Athlete Drug Policy against the Actons' challenge, the Court took into account the following three factors: (1) the students' legitimate expectations of privacy; (2) the character of the intrusion; and (3) the nature and immediacy of the governmental concerns and the efficacy of the means for meeting those concerns.[187] The Court did not appear to hold any one of the three components above any other, nor did it appear that a policy omitting any of three requirements would be tolerated. The opinion suggests, albeit erroneously we subsequently learn in *Earls*,[188] that two of the more important justifications for upholding the *Vernonia* policy were found in the latter elements – the nature and immediacy of the governmental concerns and the efficacy of meeting those concerns via suspicionless search.

The majority easily dispensed with the first element: the students' legitimate expectations of privacy. Justice Scalia clearly noted that students as a whole have more limited expectations of privacy due to their involuntary status as schoolchildren. In addition, the Court spent several paragraphs explaining that athletes, by the very nature of communal undress and their voluntary subjugation to added rules and regulations for participation, have a lessened expectation of privacy in comparison with the student population at large.[189] For these reasons, the Court abruptly found that student athletes have a lowered expectation of privacy.

The second issue, the character of the search or intrusion, was equally minimized. Although past decisions had noted the intimate nature of urinating in public and the traditional protection of bodily fluids, the Court found requiring children to pee in a cup in the sight or sound of their coach or teacher was "negligible."[190] Justice Scalia wrote that the conditions of testing are no more

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[187] *Id.* at 664-65 ("Taking into account *all the factors* we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude Vernonia's Policy is reasonable and hence constitutional.") (emphasis added).

[188] *See infra* notes 224-30 and accompanying text.

[189] Justice Scalia remarks that:

> Legitimate privacy expectations are *even less* with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. . . . There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

Id. (emphasis added). Justice Scalia also emphasizes that students choosing to participate in athletics will be required to undergo physical examination and that students, in general, are subject to state-compelled inoculations to protect against the spread of disease. Justice O'Connor both notes and distinguishes this argument in her dissent by writing:

> It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive. These facts may explain the absence of Fourth Amendment challenge to such searches.

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 683 (1995) (O'Connor, J., dissenting) (emphasis in original).

[190] *Id.* at 658.

onerous than those "typically encountered in public restrooms" which all citizens use daily.[191]

The unfortunate consequence of this finding is that it completely minimizes the horrors of adolescence – the time when male junior high students begin growing pubic hair and become self-conscious of their genitalia and the new and, often, uncomfortable bodily responses that accompany puberty. Likewise, junior high is often the time when female students begin menstruating. Imagine the humiliation and embarrassment of a menstruating junior high student required to provide school officials with a urine sample that will possibly reveal that she is taking birth control pills, is HIV positive, is on medication for depression, or perhaps suffers from a sexually transmitted disease. To assert that providing a urine sample during these formative and agonizing years presents only a "negligible" privacy violation denies a very real fact of adolescence – every little act or action is generally amplified and overwhelming. It is disingenuous to suggest that taking a state-compelled urine sample from an adolescent does not invoke the most intimate of privacy interests.[192]

Furthermore, the Court was able to dismiss the nature of the invasion of privacy by focusing merely on the aspect of collecting the urine sample from the student. The Court ignored the ultimate intrusion of the actual testing process and what it can reveal about a person. The Court's minimization of the privacy interests at stake is the failure to continue recognizing that our urine may provide evidence of latent medical conditions as well as any substances ingested. In fact, a search of one's urine becomes more intrusive than allowing the government into one's home to rifle through the medicine cabinets. And there are intimate privacy interests that attach to the medical conditions one has in our society. We should be reluctant to permit the state to search our children's urine for evidence of *any condition* without suspicion.[193] If we are to tolerate drug testing to ensure the safety of athletes due to the rigors of competition, why not pregnancy or AIDS testing? What is to prevent further exten-

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[191] *Id.*

[192] *See* Amicus Brief, *Earls*, submitted by the American Academy of Pediatrics, et al., available at 2002 WL 206367. The American Academy of Pediatrics brief reminds that "this Court has recognized [that] the act of urination is one that society treats as quintessentially private: urination in public is the subject of almost universal social disapproval and legal prohibition; urine is treated as waste, to be promptly disposed of; and even among mature adults, the subject is referred to, euphemistically, if at all." *Id.* at 15 (citation omitted).

[193] Amicus Brief, *Earls*, submitted by Jean Burkett, et al., available at 2002 WL 206374. Ms. Burkett explains on behalf of herself and others that:

> Amici oppose the Policy because it takes parenting away from the parents; it unfairly targets children who are unlikely to use drugs; it stamps a badge of shame onto children whose parents might wish to approach the issue of drug use without imposing mandatory urinalysis on their children; it unnecessarily forces parents to choose between two parenting strategies they deem essential – encouraging participation in extra-curricular activities and maintaining a parent-child relationship based on trust and respect; it creates an atmosphere of distrust and disrespect at school, and potentially at home; and it usurps parents' authority to make decisions about how their children are raised. These parents disagree with the proposition that the school district is entitled to assault the integrity of the parent-child relationship.

Id. at 6.

sion of the special needs doctrine in relation to our children?[194] Perhaps the state, via the school, will entertain the idea of keeping those whose medical conditions make them more susceptible to injury or exacerbation of a health condition from participating in athletics.[195] Certainly contact sports, such as soccer and basketball, are more dangerous for mother and fetus in the third trimester than, perhaps, in the first. If we are willing to dilute students' rights based simply on their lack of privacy as set forth in *Vernonia*, then the slippery slope argument that a parade of horribles will follow may not be completely unfounded.

The third major factor considered by the Court – the immediacy of the governmental interest and the efficacy of the search in meeting the concerns – is perhaps the least offensive, at least in the manner applied in *Vernonia*. The Court painstakingly reiterated that there was evidence at the district court level of a drug epidemic among student athletes. Further, the presence of drugs *on campus* was causing disruption *at school*. This is the very notion – securing order and discipline in the educational setting – that underlies the need to dispose of a warrant requirement in *T.L.O.* Thus, the majority correctly extended the *T.L.O.* "special needs" doctrine to this narrow category where drug use combines with disciplinary problems to disrupt the learning environment.

The prevalence of drugs and, more particularly in *Vernonia*, the specific evidence of disorder in the classroom were appropriately deemed by the Court to constitute a compelling governmental interest.[196] Few would challenge that drug use among our children is of vital concern and importance to all of society. And, it should be axiomatic at this point that safety, order, and discipline are prerequisites to learning. The importance of applying a balancing test to address this "special needs" scenario – balancing the privacy interests of the students against the strength of the government's concern and the efficacy in a search addressing this concern – is somewhat analogous to the testing of equal protection claims under either the rational basis, mid-tier or strict scrutiny tests. The "balancing test" language is something the Court is very familiar with and usually astute in applying. Thus, it is difficult at this stage of constitutional development to criticize the extension of *T.L.O.* to the facts of *Vernonia*.

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[194] The broad language of the Court in both *Vernonia* and *Earls* causes great discomfort to this author. For example, Justice Scalia, writing for the majority in *Vernonia* contends that "[d]eterring drug use by our Nation's schoolchildren is at least as important" as the interests protected in both *Skinner* and *Von Raab*. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995). But, were adolescent pregnancy or AIDS to become a national crisis, this approach and reasoning would likewise support the testing of individuals to "deter" sexual promiscuity among teens. Current approaches to teach either abstinence or to educate students on the potential perils of sexual conduct, much like the efforts that failed in both *Vernonia* and *Earls*, have not successfully overcome these continuing dangers of young adulthood.

[195] *Acton*, 515 U.S. at 662 (wherein the Court notes that "it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.").

[196] *Id.* at 661.

Justice Scalia convincingly explained the efficacy of the drug testing in *Vernonia* by observing that it seems "self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."[197] Although the Actons argued for a least-intrusive search requirement under the "special needs" doctrine, the Court found that searches under the Fourth Amendment need only be "reasonable."[198] There is no corresponding need that a search under the Fourth Amendment be the least intrusive possible.[199] Accordingly, schools looking to the Court for guidance regarding the implementation of drug testing policies, following *Vernonia*, would consider the combined application of the three elements noted above.[200] Generally, schools would have been lulled into believing that, provided they could demonstrate that a severe enough drug problem existed and that the test for collecting specimens was relatively unobtrusive, the test would pass Constitutional muster.[201] Seven years later, this notion would be dramatically altered.

2. Earls – *Redefining "Special Needs" in the Public Schools*

> *"There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest."*[202]

The first two sentences of *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* ("*Earls*"), omit any language of

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[197] *Id.* at 663.

[198] *Id.* at 663-64.

[199] In this manner, the Court clearly conveys the dissimilarity to Fourth Amendment search cases from the Equal Protection line of decisions that, on occasion, employs strict scrutiny review. *See generally Loving v. Virginia*, 381 U.S. 1, 11 (1967) (noting that "[a]t the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' " *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). Race discrimination cases initiated under the Fourteenth Amendment Equal Protection Clause have routinely been subjected to strict scrutiny review. *See generally also Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Thus, although the Court utilizes the term "compelling" state interest to describe the importance of deterring drug use among schoolchildren, there is no concomitant need of the Court to then apply a "least restrictive" analysis that is routinely applied in strict scrutiny review.

[200] The "least intrusive" search issue was one of the areas where Justice O'Connor parted ways with the majority. Her concern was that regardless of whether the Court should apply a least-intrusive analysis, the mandates of the Fourth Amendment clearly call for this very assessment.

> In any event, whether the Court is right that the District reasonably weighed the lesser intrusion of a suspicion-based scheme against its policy concerns [militating in favor of suspicionless testing] is beside the point. As stated, a suspicion-based search regime is not just any less intrusive alternative; 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. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting).

[201] *Id.* at 646. ("Taking into account all the factors we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude the Vernonia Policy is reasonable and hence constitutional.").

[202] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

balancing tests, Fourth Amendment searches, and any language regarding "special needs."[203] Nonetheless, in these two sentences Justice Thomas gives license to schools to test not only students participating in extracurricular activities but, potentially, any student that "reasonably serves the School District's important interest in detecting and preventing drug use among students."[204]

Justice Thomas was equally curt in explaining that the Supreme Court "has previously held that 'special needs' inhere in the public school context."[205] Conspicuously missing in this statement is an explanation of how or why "special needs" are applicable *generally* in the school setting. This statement, like much of the *Earls* opinion, is disconcertingly broad in its potential for future application. The fact that the "special needs" doctrine first emanated from *T.L.O.*, in a concurring opinion nonetheless, does not suffice to hold that "special needs" applies in *every* school case.[206] Rather, the Court disappoints proponents of *stare decisis* in not limiting its findings more narrowly to the specific facts and settings of the cases cited for authority. For example, the "special needs" doctrine was born in *T.L.O.* out of a need to provide school officials with a rapid response to safety, order, and discipline situations in public schools.[207] There is nothing in the *T.L.O.* opinion that mandates a similar finding in suspicionless drug testing cases.[208]

Likewise, the case of *Vernonia* is cited for the principle that "a finding of individualized suspicion may not be necessary when a school conducts drug testing."[209] While this statement is factually true, its presentation in *Earls* is misleadingly simple. In fact, much of the majority's opinion seems to rely on these two statements – that "special needs" applies to school and that individualized suspicion is not necessary for drug testing public school students – without relying on the prior context and limited presentation of previous decisions.

Tecumseh, Oklahoma is a rural area located just outside Oklahoma City, Oklahoma.[210] In 1998, following *Vernonia*, the Tecumseh School District adopted a suspicionless drug testing policy that included athletes and all stu-

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[203] 122 S. Ct. 2559, 2562. Writing for the majority, Justice Thomas announces:

> The Student Activities Drug Testing Policy implemented by the Board of Education of Independent School District No. 92 of Pottawatomie County (School District) requires all students who participate in competitive extracurricular activities to submit to drug testing. 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.

Id.

[204] *Id.*

[205] *Id.* at 2564.

[206] *But see* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[207] *T.L.O. v. N.J.*, 469 U.S. 325 (1985).

[208] *See supra* notes 42-49 and accompanying text. *T.L.O.* emphasized that permitting school officials to search students under a lower standard of suspicion (reasonable suspicion) was due to the importance of school officials needing to provide swift discipline. The search at issue in *T.L.O.* followed a violation of school rules. In contrast, the suspicionless regime does not rely on any observed or imminent violation of school rules; rather, suspicionless testing relies on nothing more than a mere hunch that something may be amiss in a very broad, generalized manner.

[209] Bd. of Educ. of I.S.D. No. 92 of Pottawatomie County, Okla. v. Earls, 122 S. Ct. 2559, 2565 (2002).

[210] *Id.* at 2562.

dents participating in extracurricular activities.[211] Lindsay Earls was a member of the Academic Team, the band, and competitive choir while attending Tecumseh High School, making her susceptible to the drug testing policy. She and a fellow student[212] initiated suit alleging that the drug testing policy violated their Fourth Amendment rights.[213] In addition, the pair challenged the policy for failing to address any "special need" in the school or school district that might justify implementation of suspicionless testing.[214] The District Court resolved the suit on a Motion for Summary Judgment, finding in favor of the School District.[215] Earls appealed.

The U.S. Court of Appeals for the Tenth Circuit reversed the finding of the District Court with only one judge dissenting.[216] The Tenth Circuit majority opinion deliberately set forth the summary judgment evidence regarding drug use – or lack of drug use – in Tecumseh.[217] Because the standard on summary judgment is significantly distinct from the standard required to uphold a decision following a full trial,[218] the Court of Appeals was able to

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[211] *Id.* at 2563-64. Although the Student Activities Drug Testing Policy required all middle and high school students to submit to suspicionless drug testing as a condition for participation in extracurricular activities, its application has been much more narrow. As the Court noted, "[i]n practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics."

[212] *Id.* at 2563 n.1. Daniel James, the other named plaintiff, most likely lost his standing to challenge the Policy as his grades disqualified his participation in extracurricular activities. Because the issue regarding standing was not dispositive to the merits of the suit, as Lindsay Earls maintained standing, the District Court did not resolve the question of whether Daniel James had standing. Similarly, finding that Earls had standing, the Supreme Court did not address the standing issue as to James. *Id.*

[213] *Id.* at 2563.

[214] *Id.*

[215] *Id.* For the full District Court opinion, *see* 115 F. Supp. 2d 1281 (W.D. Okla. 2000).

[216] *Id.* at 2563-64. For the full Tenth Circuit opinion, *see* 242 F.3d 1264 (10th Cir. 2001). Judge Ebel wrote a lengthy dissent at the circuit court level. His dissent begins at 242 F.3d 1279 (Ebel, J., dissenting).

[217] 242 F.3d at 1272-74 (cataloguing the testimony regarding drug use among students). Unlike the picture painted by the U.S. Supreme Court in *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559, 2568 (2002) (noting that "[t]he School District has provided sufficient evidence to shore up the need for its drug testing program"), the Tenth Circuit panel found:

> In sum, while there was clearly some drug use at Tecumseh schools, such use among students subject to the testing Policy was negligible. It was vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*.

Id. In contrast, no footnote is provided in the Supreme Court's majority opinion with specific details or findings regarding the number of students accused of using drugs. The appellate decision, however, provides detailed data of the number of accusals, the number of participants in extracurricular activities, and the number of students testing positive during the Policy's lifespan. 242 F.3d at 1272-73.

[218] Appellate decisions reviewing summary judgment utilize the *de novo* standard of review to assess whether a genuine issue of material fact exists. The *de novo* standard of review permits appellate courts to consider the evidence anew, as if the court were making the initial decision. This standard of review is much more searching than the standard applied – clearly erroneous – to full trials.

substitute its opinion for that of the District Court in reversing and remanding the case for further proceedings.[219]

The shortcoming of the policy noted by the Tenth Circuit was the fit between the nature and immediacy of the governmental concern – keeping students free from drugs – and the efficacy of the proffered solution.[220] In particular, the circuit court challenged the tightness of the fit between testing some students due to their participation in extracurricular activities while not testing other students, such as those participating in classes involving laboratories, chemicals, or sharp instruments, where impaired judgment might pose a similar threat to safety.[221] The essence of the court's complaint is that the Tecumseh policy is at once both over and under-inclusive.[222]

In reversing the holding of the Tenth Circuit, the Supreme Court did not adhere to the traditional formula for "special needs" cases. Prior to *Earls*, most commentators would have advised that three components set forth in *Vernonia* were the *sin qua non* of suspicionless drug testing of public school students. First, per *Vernonia*, most observers believed that the nature of the privacy interest involved should be evaluated. Rather than truly consider the privacy interests of students in extracurricular activities, the *Earls* majority found that urinating before a teacher or coach involves only a slight intrusion into an adolescent's privacy. Rather than assess the privacy interests of students partaking of extracurricular opportunities, the Court made every effort to explain that this issue (i.e., whether students are subjected to communal undress and shower, etc.) did not really play a decisive factor in the *Vernonia* decision. The Court labored to explain that although Justice Scalia invested two lengthy paragraphs to distinguishing the conduct of student athletes from the general student population, what he really had intended to say was that students who voluntarily subject themselves to greater scrutiny (i.e., adherence to greater academic regulations than others) waive the privacy protections that they might otherwise have. This statement surely cannot be true, as it was Justice Scalia who reminded us in *Lee v. Weisman*[223] that certain events in high school, such as a graduation ceremony, are too important to be sacrificed at the cost of losing

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[219] 242 F.3d at 1278-79 (noting their decision deviated from two other Circuits).

[220] *Id.* at 1276-78.

[221] *Id.* at 1277.

[222] *Id.* at 1276-77. Because the Policy only applies to students participating in extracurricular activities, where drug use in not suspected as very high, the test is over inclusive because it tests too many students in an effort to find just a very few students who may be using drugs. Likewise, the test is under inclusive because it does not test all students whose activities relating to a school may pose a risk of safety to self or others. For example, the Policy does not test students enrolled in driver's education, shop, chemistry, or home economics. Similarly, the Policy does not require testing of students prior to attending prom, graduation, or as a prerequisite to obtaining a parking decal for school use. The Circuit Court summarizes its findings most succinctly in a footnote:

> To the extent one could argue that the safety issue here is the health care risk of addiction or physical harm from the use of drugs, then the logical solution is to test all students. The fact that the District only tests a select group of students – those participating in extracurricular activities – indicates that its testing Policy is not motivated simply by health care concerns.

Id. at 1277 n.12.

[223] 505 U.S. 577 (1992) (noting the vital importance of attending one's high school graduation ceremony).

constitutional protections.[224] Of all the areas where this majority seemingly shift gears, this one presents the most glaring deviation from previous precedent. Realizing that the Supreme Court cannot issue advisory opinions and generally tries to steer clear of excessive dicta, it seems anomalous that Justice Scalia would have been so careless with his language in the *Vernonia* opinion.

Second, most observers were convinced that the court would consider the character of the intrusion, recognizing that, to be valid, the search need not be the least intrusive, but need only be reasonable. As the process of state-compelled urination does not deviate significantly from that approved in *Vernonia*, there is little reason to believe that this collection process would be deemed invalid. But this author, and many others, continues to believe that the Court fails to adequately grasp the significance for children of urinating in public before a teacher or coach. Unlike the prior drug testing cases, *Skinner* and *Von Raab*, where the process of urine collection occurred in a medical facility, the tests conducted in the school setting require children to urinate in front of teachers and school officials with whom they have a daily relationship. Thus, the school tests are distinguishable from the medical tests or analogies drawn to school physicals because there is an additional element of familiarity with the testers that compounds the embarrassing nature of the test itself.

Finally, most commentators believed that a school district would have to provide evidence of a drug problem at the school.[225] This belief is consistent with Justice Scalia's earlier approach in the case of *Von Raab*, where his vociferous dissent chastised the majority for burdening a class of citizenry we had no reason to suspect had engaged in wrongdoing.[226] Further, proof of an urgent need, beyond the need for normal law enforcement, has traditionally been the hallmark of the "special needs" cases.[227] Thus, the third requirement observers were lulled into believing was critical to defend suspicionless drug testing was proof that the nature and immediacy of the governmental concern

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[224] *See also*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559, 2573 (2002) (Ginsburg, J., dissenting). Justice Ginsburg makes reference to the *Weisman* decision by emphasizing that:

> Participation in [extracurricular 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. . . . Students "volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.

Id. (internal citations omitted).

[225] This is particularly true in relation to the Tenth Circuit opinion wherein the majority writes:

> [G]iven the paucity of the evidence of an actual drug abuse problem among those subject to the Policy, the immediacy of the District's concern is greatly diminished. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to the perceived problem is similarly greatly diminished. While the Court in *Vernonia* had no trouble identifying the efficacy of a drug testing policy for athletes when the athletes were at the heart of the drug problem, we see little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem.

Earls v. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County, 242 F.3d 1264, 1277-78 (10th Cir. 2001).

[226] *See supra* notes 98-99 and accompanying text.

[227] *See, e.g.*, *supra* note 50 and accompanying text.

and the efficacy of the policy adopted to address this concern were greater than the need to protect the individual's right to privacy.[228] However, proof of an existing or threatened drug problem was not required by the Court in *Earls* to uphold the Tecumseh policy.[229]

In the end, Justice Thomas discounted the importance of a tight "fit" between drug use and the efficacy of a suspicionless regime to meet the purported use discussed in *Vernonia* in finding:

> [T]hat testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding.[230]

Yet, the fact that there was evidence of a drug problem in *Vernonia* provided precisely the "special need," under traditional "special needs" analysis,

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[228] *Chandler*, 520 U.S. at 318-19. The Court, in striking down random, suspicionless drug testing on adult candidates for political office, explained:

> Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. . . . [The state in *Chandler*] failed to show, in justification [for suspicionless drug testing,] a special need of that kind. . . . Notably lacking in respondent's presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule.

Id.

[229] *Earls*, 122 S. Ct. at 2567-68 (indicating that, to succeed on the Motion for Summary Judgment, "[t]he School District has provided sufficient evidence to shore up the need for its drug testing program"). In steering clear of requiring any specific amount of evidence regarding drug use or impending drug use, the Court stated:

> 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 would in effect be a constitutional quantum of drug use necessary to show a "drug problem."

Id. at 2568. This paragraph underscores two important distinctions between *Chandler* (the case striking down suspicionless drug testing on adult political candidates) and *Earls*. The main distinction is found in the first sentence, wherein the Court uses the specific term "schoolchildren." Future cases involving drug testing of schoolchildren will not require evidence of drug use, while cases involving adults will. The second distinction between *Chandler* and *Earls* is that the Court did not apply the traditional "special needs" test in reaching its decision in *Earls*. The requirement, under the special needs balancing test, that evaluates the privacy interests at stake against the efficacy of the government's selected testing regime was not utilized in *Earls*. All that was necessary to uphold the District Court's grant of summary judgment in *Earls* was evidence of *potential* drug use among children. This evidence provided sufficient impetus to dispose of the literal Fourth Amendment requirements for public school children.

[230] *Id.* at 2569 (internal citation omitted). It is difficult to read *Vernonia* or any of the "special needs" cases and anticipate that a complete lack of proof regarding the efficacy of the program that devalues an individual's Fourth Amendment rights would ever be upheld. This is especially true in the *Earls* case, where there was a scintilla of evidence regarding any present or past drug use. Much of the evidence proffered, in fact, was speculative and, at most, created a genuine issue of material of fact that *should have* been resolved at trial. Or, if the proper summary judgment evidence standard had been applied – that all reasonable inferences be drawn in favor of the party opposing the motion (in this case, Earls) – then there would be only one or two known instances of drug use at Tecumseh. Such lack of evidence historically prevented the application of "special needs" doctrine. *See supra* note 81 and accompanying text.

that shifted the balance in favor of omitting the warrant requirement to test all potential violators.[231] No such situation was present in *Earls*.[232] Only Justices Ginsburg, Stevens, O'Connor, and Souter seemed troubled by this point.[233] A further, and important, deviation from the *Vernonia* decision is that there is no explanation of how such random, suspicionless testing furthers the safety interests of the school.[234] Drug use may just as easily occur off campus as well as

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[231] *See* Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (Scalia, J., dissenting); Chandler v. Miller, 520 U.S. 305, 321-22 (1997). The distinction between cases where a "special need" has been demonstrated to permit random, suspicionless drug testing, such as *Skinner* and *Von Raab*, and the cases where such a "special need" is not evidenced is clearly drawn by the *Chandler* majority in the following manner:

> What is left, after close review of Georgia's (random drug testing) scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents free from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.

Chandler, 520 U.S. at 321-22.

[232] To gain a true appreciation for the paucity of evidence regarding drug use among Tecumseh youth, one must read the Tenth Circuit appellate opinion very carefully. The Circuit Court, both in text and footnotes, explains with exhaustive detail the lack of evidence regarding drug use. Earls v. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County, 242 F.3d 1264, 1272-74 (10th Cir. 2001). The Tenth Circuit majority challenges the accuracy of the District Court record in footnote 9. *Id.* at 1274. In fact, the Court suggests that:

> some of these assertions [regarding drug use] involve distortions of the record in this case. For instance, the "fourteen instances of drug usage" known to Dean Rogers include the following: in 1970, her daughter told her that an unidentified boy on the school bus had offered her some pills, . . . one of her son's unidentified friends on the football team left a bag with drug paraphernalia in it at her house. . . . in 1979, her son told her of "parties" he went to at which marijuana was smoked, . . . in 1980, "[o]ne of the boys that ran with [her] son" was stopped and marijuana was found in his car, . . . her daughter told her in 1972 or 1973 that the boyfriend of the girl with whom she shared a locker sold drugs, . . . sometime in the middle 1980s a meter reader found some marijuana near the meter at what is now a junior high school, . . . in the 1980s her grandson told her that an unidentified student had a marijuana cigarette at school. . . .

Id. n.9 (with additional double hearsay examples from Dean Rogers's relatives). Under the appropriate federal standard for summary judgment, hearsay evidence, as is thoroughly catalogued in footnote nine, would be inadmissible to demonstrate that no genuine issue of material fact exists. *See* FED. R. CIV. P. 56. Only those items that would be admissible as testimony in federal court should be considered when resolving a Motion for Summary Judgment.

[233] *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559, 2567-68 (2002). Justice Thomas errantly relies upon the Court's earlier decision in *Chandler v. Miller*, 520 U.S. 305 (1997), which struck down the attempted suspicionless drug testing regime on adults to support his point that a demonstrated drug problem is unnecessary. In fact, *Chandler* stands for the very point that such ineffective attempts to test individuals without warrant or suspicion just to detect and deter drug use is an invalid circumvention of the Fourth Amendment. Without presenting the minimal evidence proffered by the School District in *Earls*, Justice Thomas simply asserts that "[t]he School District has provided sufficient evidence to shore up the need for its drug testing program." *Id.*

[234] The lack of any uncontroverted evidence regarding a drug problem at Tecumseh was the primary reason that the Tenth Circuit Court of Appeals reversed the District Court's grant of summary judgment in favor of the school district. Earls v. Bd. of Educ. of Indep. Sch. Dist.

on. Drug use, when it occurs at all among Tecumseh students, may occur outside of school hours and far removed from school premises. Thus, it becomes increasingly difficulty to justify the sacrifice of extracurricular opportunities to meet the speculative and symbolic need to deter drug use generally among children.[235] If the suspicionless drug test being administered by the state is merely "symbolic," then past precedent indicates it cannot survive constitutional scrutiny.[236]

For these reasons alone, *Earls* is a disturbing case. *Earls* is not loyal to past precedent – either in the school context or under the "special needs" doctrine.[237] Further, from all outward signs, *Earls* provides the clear stepping stone from *T.L.O.*'s system of lessened individual suspicion requirements for searches at schools to *Vernonia*'s suspicionless testing of athletes to the potential that all students attending public school may now be subject to random, suspicionless drug testing at school without any evidence of an existing drug problem at the school or proof that the testing furthers the legitimate governmental interests of safety, order, and discipline. Simply put, the public school itself has become the "special need."

Lest readers think that this commentary is simply the "slippery slope" argument emanating from a dissatisfied court observer, it is important that lawyers, students, and school officials alike look beyond the mere wording of the *Earls* majority opinion. It is recommended that those tracking "special needs" and education law cases read beyond the text of the opinion and study the dialogue that resonated throughout oral argument in this case. Counsel for the school district was clear in explaining that the Tecumseh policy was not intended for disciplinary purposes or to "catch" students actually using drugs – the main emphasis in *T.L.O.* – but rather "to deter drug use and help those students."[238] General deterrent testing, standing alone, had not, prior to *Earls*, successfully eviscerated any individual's Fourth Amendment rights.[239]

During oral argument, counsel for the school district explained that the deterrent effect sought by the school district would effectively serve to deter

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No. 92 of Pottawatomie County, 242 F.3d 1264, 1277-78 (10th Cir. 2001). The Tenth Circuit majority, relying on past precedent, surmised that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." *Id.* at 1278.

[235] *See e.g.*, *id.* at 2569 (Breyer, J., concurring) ("The drug problem in our Nation's schools is serious in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and the rest of us.").

[236] *See generally* Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (Scalia, J., dissenting); Chandler v. Miller, 520 U.S. 305, 321-22 (1997).

[237] *See generally* United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853, 857 (5th Cir. 1998) (reminding that "special needs must rest on demonstrated realities").

[238] Oral Argument, March 19, 2002, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002), at 13 (argument of Linda M. Meoli, Esq., Oklahoma City, OK, on behalf of Petitioners).

[239] *See e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Chandler v. Miller, 520 U.S. 305 (1997); Ferguson v. City of Charleston, 532 U.S. 67 (2001); *and* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). Each of these cases required some evidence of actual drug use and refused to permit the tests to be employed for symbolic reasons.

drug use among the general student body.[240] The Court seemed very concerned regarding what the evidence suggested: (1) that there was sparse, if any, drug use among students; and (2) that there was even less indication that the students participating in extracurricular activities were at a higher risk for drug use than the general student body.[241] This concern, one would expect, was consistent with the Court's prior application of the "special needs" doctrine in trying to determine whether – on balance – the need for testing outweighed the need for individualized suspicion.[242] And, perhaps the most compelling sign that the days of students' right to be free from suspicionless drug testing are numbered, is the fact that the United States' Deputy Solicitor General explicitly argued for the expansion of drug testing to all students.[243] At least one district court has grappled with the question of whether a school-wide drug testing policy contravenes the Fourth Amendment and, because the case preceded *Earls*, struck down the policy as unconstitutional.

One of the problems in expanding suspicionless drug testing programs within public schools is that such action contributes to the recently resurrected concept of *in loco parentis*. Why should tax payers be burdened with any additional expenditures to test students we do not suspect are using drugs in an effort to dissuade children, generally, from turning to drugs and alcohol? Why should the state substitute its action in an area where parents really are, and should be, the first line of defense? If parents desire to drug test their children, such tests are now readily available at local grocery stores, pharmacies and supermarkets. And, at schools in Tecumseh and other districts, the utilization

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[240] Oral Argument, *supra* note 238. Although the Court tried to encourage counsel for Petitioners to admit that such broad scale testing is the stepping stone to testing all students in the general student body, counsel would only take the following bite at the carrot proffered:

> QUESTION: [by the Court] What I'm interested in and Justice Ginsburg was a moment ago is it seems to me that if – if we take your argument and we take the evidence that is indicated on the record, there is at least an equally good argument for testing everybody in the school, whether they go out for band or whatnot or – or do not. And – and isn't that the case? That's what we're interested in.
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> MS. MEOLI: [counsel for Petitioners] Well, I think there is a reasonably good argument for that. We're not espousing that . . . .

Id. at 14.

[241] *Id.* at 20 (referencing the Amicus Brief submitted by the American Academy of Pediatrics et al., proffering information regarding student drug use. The Court noted that this Amicus Brief "pointed out that students that engage in these extracurricular activities are, indeed, the least likely to be involved in drug use. And it seems so odd to try to penalize those students and leave untested the students that are most apt to be engaged in the problem."). *Id.*

[242] *Id.* at 14-15.

> But if we get to that point [where no evidence of drug use and the fit between testing and use is clear], then the whole notion of special need has – has, more or less, evaporated. We don't have the kind of special safety need as – as in the railroad case. We don't have the unusual temptation to crime need as in the immigration case, and the special need is simply the need to deter drug use among all children in all schools of the United States. And – and if the – if the theory of this is special need, it seems to me that the concept of special need seems to have gotten lost.

Id.

[243] *Id.* at 25-26 (suggesting that if the only consequence of a positive drug test included the confidential notification of parents, the United States does not believe that such a regime would offend the Fourth Amendment).

of drug-sniffing canines, locker searches, and suspicion-based searches have successfully kept drug use to a minimum.[244]

Another issue, not squarely dealt with by the Court, is how much information will be compelled by the school to complete the drug testing. Our urine reveals much about us – whether we are diabetic, pregnant, under lawful medication or using illegal substances. The privacy rights all individuals maintain in shielding medical conditions, such as hypertension or pregnancy, from the state should not be so quickly or carelessly disregarded. It would have been preferable for the majority to assure its audience that special care *must be taken* not to reveal existing medical conditions to a child's teachers or coaches. In some instances, such as those where the child has a condition that requires communication to others or where the parents have had their child designated as "disabled" under the IDEA statute, this concern is inherently less troublesome. But, in those remaining instances where latent medical conditions are involuntarily revealed to the state through a suspicionless drug test, we should be hesitant to give our constitutional stamp of approval. Such revelations, under a state-mandated testing scheme that is not invoked through the traditional Fourth Amendment requirements, should be severely limited. Otherwise, what was initially intended as a method of deterring illicit drug use among teens can be relied upon to detect or deter other teenage societal problems, such as pregnancy.

In addition, the "efficacy" of the Tecumseh policy should be improved – if not under the pure "special needs" formula, at least from a more practical standpoint. The majority opinion in *Earls* conveniently avoided mention of the fact that the main culprit in Tecumseh schools – alcohol – is not a substance that the policy's drug test detects. While illicit drug use poses great risks to children, the abuse of alcohol and cigarettes remains a national problem among children and adults alike. If schools are going to invest the resources, both financial and otherwise, to educate and guide our children on healthy living patters, then such obvious vices as alcohol and cigarette smoking should also be discouraged. In recent years, the medical costs associated with tobacco use have cost many lives and many dollars. To think that we can deter destructive behavior by focusing only on certain illegal substances is terribly misguided.[245] But again, such education may best be served by requiring parents to act appropriately in their role as parents. One cannot help but question whether the modern impetus toward greater and greater state control over students' behavior, both on and off campus, is an admission on the failing nature of our society's parenting skills.

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[244] In many respects, the resort to suspicionless drug testing in Tecumseh was unnecessary. The school had already implemented other techniques, including use of a drug dog to keep the school as drug free as possible. And, as the record reflects, these less intrusive methods were largely successful. *See* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., Indep. Sch. Dist. No. 92 of Pottawatomie County, 242 F.3d 1264, 1267 (10th Cir. 2001).

[245] *See supra* note 14 and accompanying text, detailing the drugs tested for under the Tecumseh Policy.

IV. CONCLUSION

> *"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship . . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available on equal terms."*[246]

The issue in *Earls* was straightforward: must a school provide evidence of a safety danger or existing drug problem to permit wide-scale random, suspicionless drug testing of all students participating in extracurricular activities in order to come within the narrow exception of the "special needs" doctrine. Perhaps the question presented was even more simplistic than that. Perhaps the issue was whether the *T.L.O.* version of watering down the Fourth Amendment due to the unique nature of the school environment could be extended and transmogrified into suspicionless searches of school children when an important social need – other than immediate physical danger – presents itself.[247] The unfortunate answer, regardless of the phrasing of the question, was yes. Or, as the title of this article suggests, the unfortunate reality is that students rights have been shed and shred at the schoolhouse gate.

Post-*Earls*, if a student wants to "go out for the team," she relinquishes her rights to be free from suspicionless drug testing. If a student wants to sing in the choir, he must realize that his school may screen his urine for illicit drugs, with or without evidence that his school has a drug problem or that he, individually, might be suspected of using illegal substances. Public school students cannot expect that the constitutional protections they learn in their civics or government class will apply with equal force to them. Public school students cannot expect that their constitutional rights will be evaluated with the same scrutiny as those afforded to all others in society. Rather, public school students will realize that they are at the mercy of the state to extend to them only as much of the Fourth Amendment as the state desires.

When students volunteer for basketball or the academic team, a school can assume that their dedication to training and competition put them at risk for poor decisions. Only those who voluntarily choose to avoid all supervised

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[246] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

[247] While drug use and drug abuse among children presents an immediate social concern, there was little evidence to suggest that children at the Tecumseh school were using or abusing drugs. And, while it may seem illogical to require schools to set forth evidence of such use and abuse prior to embarking on suspicionless testing, such evidence is more consistent with both the "special needs" doctrine and the Fourth Amendment hallmark of individualized suspicion. The fear or thought that some individual students may be using drugs should not enable a school district to completely discount the traditional requirements for Fourth Amendment searches. Particularly after the Supreme Court's holding in *Chandler v. Miller*, it seems that we are applying two different standards to those suspected of using drugs – one to adults and another, more stringent, to minors.

activity at school will be free – for the time being – from sacrificing their coveted right to invoke the protections of the Fourth Amendment. The cheerleader is now treated in a manner consistent with the local convict while the school dreg maintains her Fourth Amendment guarantees.

Earls is a disconcerting precedent. It is a disconcerting precedent for stare decisis. It is a disconcerting precedent for "symbolic" attempts to deter drug use. It is a disconcerting precedent for "special needs" and education law cases. But, most importantly, it is a disconcerting precedent for our children. The unfortunate reality is that their public school educations will have likely taught them to read. And, those that read the Fourth Amendment and the line of "special needs" cases will undoubtedly feel betrayed. The special needs doctrine that developed out of the school context has now been transformed. Students no longer receive the benefit of a special needs balancing analysis or a demand for a valid governmental interest when reaching into students' most private matters – the school itself has become the special need.