

# Saint Louis University Public Law Review

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Volume 22  
Number 2 *The Protection of Children's Rights  
Under International Law (Volume XXII, No. 2)*

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Article 18

2003

## Drug Testing Those Crazy Chess Club Kids: The Supreme Court Turns Away From the One Clear Path in the Maze of “Special Needs” Jurisprudence in Board of Education v. Earls

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### Recommended Citation

Raymond, Marcus (2003) "Drug Testing Those Crazy Chess Club Kids: The Supreme Court Turns Away From the One Clear Path in the Maze of “Special Needs” Jurisprudence in Board of Education v. Earls," *Saint Louis University Public Law Review*. Vol. 22 : No. 2 , Article 18.  
Available at: <https://scholarship.law.slu.edu/plr/vol22/iss2/18>

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**DRUG TESTING THOSE CRAZY CHESS CLUB KIDS: THE  
SUPREME COURT TURNS AWAY FROM THE ONE CLEAR PATH  
IN THE MAZE OF “SPECIAL NEEDS” JURISPRUDENCE IN  
*BOARD OF EDUCATION v. EARLS***

I. INTRODUCTION

Extracurricular activities serve important functions in contemporary high schools, as they serve to establish positive social supports and networks, to teach specific competencies and prosocial values, and to keep children busy so they do not have as many opportunities to engage in risky activities.<sup>1</sup> As a result of these effects, or because lower risk students tend to engage in these activities in the first place, students involved in extracurricular activities are less likely to use drugs, tend to like school, get good grades, and go to college more often than those that do not participate in extracurricular activities.<sup>2</sup> Thus, the Supreme Court’s recent decision of *Board of Education v. Earls*, which states that high school students engaging in extracurricular activities may be subjected to mandatory drug tests by high schools,<sup>3</sup> is perplexing. Lindsay Earls, like many good students, had not been in trouble for drugs previously, in fact, Earls was a member of the marching band, the show choir, the Academic Team, and National Honor Society.<sup>4</sup> However, because of the Supreme Court’s concern regarding U.S. high schools and the use of the “special needs” doctrine, good students like Earls can be made to submit to drug testing without individualized suspicion, even though these types of students are the least likely to be using drugs.<sup>5</sup> The decision to allow such testing is even more problematic because the Supreme Court ignored its already confusing special needs precedent in order to hold in such a way, and

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1. Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, 14 JOURNAL OF ADOLESCENT RESEARCH 10, 11 (1999).

2. See *id.*; Jeanne E. Jenkins, *The Influence of Peer Affiliation and Student Activities on Adolescent Drug Involvement*, 31 (122) ADOLESCENCE 297, 304 (1996); Lee Shilts, *The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, and Personal Attitudes*, 26 (103) ADOLESCENCE 613, 614-15 (1991).

3. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottowatomie County v. Earls, 122 S.Ct. 2559 (2002).

4. *Id.* at 2563.

5. See Eccles & Barber, *supra* note 1, at 15-25.

the logic used in *Earls* inevitably leads to the allowance of mandatory drug tests for all high school students.

This note will focus on the special needs doctrine and how it has been, is, and could be applied to high school student drug testing. Section II will focus on the origins of the special needs doctrine, including some discussion of non-school based applications. Section III will then discuss *Earls*, keeping an eye towards the applicable precedent. Section IV will discuss the state of student drug testing after *Earls* and some surrounding legal areas open to debate, while Section V will be the conclusion.

## II. HISTORY OF SPECIAL NEEDS DOCTRINE

The Fourth Amendment states that “people [are] to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>6</sup> Thus, only reasonable searches are allowed under the Fourth Amendment. The Fourteenth Amendment extends the application of the Fourth Amendment to state and local governments.<sup>7</sup> So, all Fourth Amendment inquiries must first decide whether the government actor is indeed initiating a “search,” and then decide whether this “search” is “reasonable.”<sup>8</sup> The Fourth Amendment only protects against “searches” if the “searched” individual has a legitimate expectation of privacy.<sup>9</sup> Typically, “reasonable searches” are accompanied by probable cause or a warrant and individualized suspicion, and limited to criminal investigations.<sup>10</sup>

### A. T.L.O. and the Inception of the Special Needs Doctrine

A concurrence in *New Jersey v. T.L.O.* started using the term “special needs” to describe a growing body of exceptions to the requirement of a warrant or probable cause.<sup>11</sup> The case involved two 14-year-old girls

6. U.S. CONST. amend IV.

7. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995).

8. *Id.*

9. *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985).

10. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559, 2564 (2002); *Chandler v. Miller*, 520 U.S. 305, 308 (1997); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

11. Matthew A. Pring, *The Death of a Doctrine: The Tenth Circuit Court of Appeals and Random Suspicionless Urine Drug Tests Eroding the “Special Needs Doctrine,”* 79 DENV. U. L. REV. 457, 463 (2002). The term “special needs” grew out of Justice Brennan’s opinion that concurred in part and dissented in part, in which he said, “[S]ome special governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify the categorical exception to the warrant requirement,” and “special governmental needs sufficient to override the warrant requirement flow from ‘exigency.’” *T.L.O.*, 469 U.S. at 356 (emphasis original). This phraseology was simply shortened to the “special needs” exception in *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

suspected by a teacher of smoking, one of whom was T.L.O.<sup>12</sup> The two girls were sent down to a principal's office, and the principal demanded to view the contents of T.L.O.'s purse.<sup>13</sup> Upon a cursory examination, he found cigarettes and cigarette rolling papers which the principal knew were connected to marijuana use.<sup>14</sup> The principal thus searched her whole purse, and found marijuana and related materials.<sup>15</sup> T.L.O. contended that the search of her purse violated the Fourth Amendment, and while the trial court agreed that although the Fourth Amendment applied to her situation, the search was reasonable.<sup>16</sup> The appellate court vacated this judgment, but the New Jersey Supreme Court upheld the idea that certain "reasonable" circumstances allow for warrantless searches.<sup>17</sup> Regardless, the New Jersey Supreme Court believed that the circumstances were not "reasonable" in this case, and so held the search of T.L.O.'s purse violated the Fourth Amendment.<sup>18</sup>

The U.S. Supreme Court noted that while the Fourth Amendment should protect high school students, the school needed some degree of autonomous discretion in searching students in order to maintain discipline.<sup>19</sup> Thus, the Court sought to strike a balance between these two concerns, and dismissed any potential requirement of the school to obtain either a warrant or probable cause.<sup>20</sup> The Court decided that the test for the legality of a search should be a "reasonableness" standard, based on "whether the action was justified at its inception," and "was reasonably related in scope to the circumstances which justified the interference in the first place."<sup>21</sup> In applying this standard, the Court held that the principal's search was valid, as he initially had a reasonable basis to search for cigarettes because of the report from the teacher, and a reasonable basis to further search the purse when he discovered the rolling papers.<sup>22</sup> However, Justice Brennan thought the Court sacrificed too much individual freedom when crafting this test, especially because of the standard's amorphous characteristics.<sup>23</sup>

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

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 329.

17. *T.L.O.*, 469 U.S. at 330-31.

18. *Id.*

19. *Id.* at 337-39.

20. *Id.* at 340-41.

21. *Id.* at 341.

22. *T.L.O.*, 469 U.S. at 343-45.

23. *Id.* at 356 (Brennan, J., concurring in part and dissenting in part). Justice Brennan did not believe that the "reasonableness" standard to be developed enough for use, especially since he believed the test to be unnecessary. *Id.* at 354. Justice Brennan stated, "The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit," so a

The Court in *T.L.O.* told schools that searching students without a warrant or probable cause did not necessarily violate the Fourth Amendment. However, “reasonableness” under the circumstances was required, and individualized suspicion had not yet been deemed unnecessary. The Court did not rule on the individualized suspicion requirement to Fourth Amendment jurisprudence, as it was not necessary in *T.L.O.*<sup>24</sup>

*B. Vernonia and the Elimination of Individualized Suspicion in Schools*

*Vernonia Sch. Dist. 47J v. Acton* further analyzed the special needs doctrine in the context of high schools.<sup>25</sup> However, because the Court decided the case based on a specific fact scenario,<sup>26</sup> the circumstances of this decision must be analyzed. The schools in the Vernonia district had recently been victim to a large increase of drug use and insubordination regarding this new drug use.<sup>27</sup> The District Court found that student athletes were the leaders of this new “drug culture.”<sup>28</sup> Vernonia brought specific evidence and expert testimony regarding the danger that drug use posed to student athletes.<sup>29</sup> The school district had employed other strategies to combat the new drug program.<sup>30</sup> The final plan of action would consist of an adult monitor that would accompany the student during a urine sample, which would be sent to an outside party that would not know the identity of the student.<sup>31</sup> This outside party would reveal only information regarding the relevant drugs.<sup>32</sup> Thus, only a class of students engaging in a dangerous activity and known to be leaders of a current drug use and behavioral problem were subject to a drug test, which would be taken in a discreet and protective manner.<sup>33</sup>

The Court’s analysis noted that the action by Vernonia constituted a “search” under the Fourth Amendment.<sup>34</sup> However, the Court reiterated its

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balancing test is inappropriate. *Id.* at 356. Further, he believed no precedent existed for such a “balancing test” of Fourth Amendment jurisprudence. *Id.* at 358.

24. *T.L.O.*, 469 U.S. at 342, n. 8 (The Court noted that certain situations had allowed for the government to ignore the individualized suspicion requirement, but only when there were “‘other safeguards’ available ‘to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the officer in the field.’” (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979))).

25. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

26. *Id.* at 666 (Ginsburg, J., concurring).

27. *Id.* at 648-49.

28. *Id.*

29. *Id.*

30. *Vernonia Sch. Dist.*, 515 U.S. at 649.

31. *Id.* at 650.

32. *Id.* at 650-51.

33. *See id.*

34. *Id.* at 652.

position from *T.L.O.*, that a warrant or probable cause is not necessary for a search to be legal, if it is based on reasonableness and “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”<sup>35</sup> The Court also noted that individualized suspicion had not been needed in other “special needs” contexts such as railroad personnel, federal customs officers, and border patrol officers.<sup>36</sup> While noting this, the majority did not attempt to explain why the individualized suspicion requirement should be eliminated in the public school context.<sup>37</sup> However, the Court fashioned a three part test to determine the Constitutionality of *Vernonia*’s searches which included: 1) the nature of the privacy interest upon which the search intrudes, 2) the character of the intrusion, and 3) the immediacy of the governmental concern giving cause for the search.<sup>38</sup>

In applying this three-part test, the Court looked to the nature of the privacy interest that the search intrudes upon.<sup>39</sup> The Court, though nominally rejecting the notion that school teachers and administrators have full parental power over students, disregarded the general characterization of the student-

35. *Vernonia Sch. Dist.*, 515 U.S. at 653.

36. See *id.* at 653-54 (For railroad personnel, see *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989), for customs officers, see *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), and for border patrol officers, see *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)). *Skinner* and *Von Raab* were companion cases that served to eliminate the individualized suspicion requirement from “special needs” situations. The Court in *Skinner* found that in the context of drug testing railroad workers, “[I]t would be unrealistic, and inimical to the Government’s goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances.” *Skinner*, 489 U.S. at 631. Thus, the Court places the wagon before the horse by stating because we have already decided that the government’s goal is important and that individualized suspicion requirements would make this goal harder to achieve, the individual suspicion requirement is not needed. No discussion is given regarding the importance of individualized suspicion in Fourth Amendment jurisprudence. *Id.* In *Von Raab*, the Court uses a similar argument, claiming that the government’s interest in fighting the war on drugs is more valued than the Fourth Amendment rights of the customs workers. See *Von Raab*, 489 U.S. at 672-75. *Martinez-Fuerte*, though not technically a “special needs” case, as it was decided in 1976, held that the governmental interest of preventing illegal aliens from crossing into the U.S. warranted some abridgment of Fourth Amendment rights. *Martinez-Fuerte*, 428 U.S. at 554-59. Thus, up to this point in “special needs” jurisprudence, governmental needs win the utilitarian balancing contest with a person seeking to government to obtain individualized suspicion before a search.

37. *Vernonia Sch. Dist.*, 515 U.S. at 653-54. Justice O’Conner makes a powerful argument in support of retaining the individualized suspicion requirement in her dissent. She claims that it is not for judges to decide Fourth Amendment cases according to public policy concerns and that the Court ignores the fact that suspicionless searches have generally been considered *per se* unreasonable. *Id.* at 667-68 (O’Conner, J., dissenting).

38. *Id.* at 654, 658, 660.

39. *Id.* at 654.

school relationship from *T.L.O.* and instead emphasized the “custodial and tutelary” nature of the supervision that schools exercise over students.<sup>40</sup> This emphasis included noting that students are subjected to physicals “for their own good and that of their classmates.”<sup>41</sup> Thus, students have a limited expectation of privacy in schools.<sup>42</sup> Justice Scalia, writing for the Court, noted that student athletes have even a lesser expectation of privacy than non-athletes, as they require public showering, dressing and undressing, placing themselves in the public light by voluntarily “go[ing] out for the team,” and agreeing to a stricter set of rules of conduct requiring grades and dress.<sup>43</sup> The Court thus concluded that student-athletes are akin to a “closely regulated industry” and should expect to have more intrusions upon their privacy, meaning that any expectation of privacy is less reasonable and it becomes easier for them to be “searched” under the Fourth Amendment.<sup>44</sup>

The second factor the Court considered was the character of the intrusion.<sup>45</sup> In urine tests, the degree of intrusion is measured by the manner of collection.<sup>46</sup> Since the conditions of the *Vernonia* drug test were similar to those typical in a public restroom, the intrusion of privacy is minimal.<sup>47</sup> Also, the intrusions is minimal since the test demonstrates only a limited type of information and the records are released to as few people as possible and not turned over to law enforcement agencies.<sup>48</sup>

The school district’s drug testing system contained one controversial element, namely requiring the disclosure of taking any prescription medication in advance.<sup>49</sup> However, the Court looked to other precedent such as *Skinner v. Railway Labor Executives’ Ass’n*, and decided that the mandatory disclosure of

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40. *Id.* at 655-56. (In *T.L.O.*, the Court noted many freedoms of the students and emphasized the school’s lack of parental power over them, while in *Vernonia*, Justice Scalia only mentions *T.L.O.* factors that support this reevaluation of the student-school relationship. The factors supporting the students’ expectation of privacy from *T.L.O.* left out by the Court include the fact that compulsory education laws are not “consonant” with school officials acting as parents over the children, that children should not have the same standing as criminals according to the Fourth Amendment, that students have a legitimate need to maintain certain personal items for use during school and after school, and many students bring personal and protected items such as photographs, letters, and diaries to school. *Id.*; *T.L.O.*, 469 U.S. at 336-40.).

41. *Vernonia Sch. Dist.*, 515 U.S. at 656.

42. *Id.* at 657.

43. *Id.*

44. *Id.* The phrase “closely regulated industry” was applied in *Skinner*, and factored into the balancing test of the special needs doctrine by demonstrating a lesser expectation of privacy. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 627 (1989).

45. *Vernonia Sch. Dist.*, 515 U.S. at 658.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 659.

current prescription medication is not unreasonable, and holds that this element does not make the test too intrusive.<sup>50</sup> Thus, “the invasion of privacy was not significant.”<sup>51</sup>

The third prong of the analysis was the nature of the governmental concern at issue. Interestingly enough, the Court rejected the standard of a “compelling” interest, instead using an “important enough” standard to justify the search.<sup>52</sup> At this point Scalia listed the ill effects of drug use by high school students including the ease of addiction for younger people, greater susceptibility to impairment, and the cascade effects that drug use has on a school environment.<sup>53</sup> Scalia also noted that student athletes have a particular risk of physical injury when drug use is combined with athletic activity.<sup>54</sup> The fact that the drug-testing program targeted only a class labeled “leaders of the drug culture” and “role model[s]” had particular import for the Court, as the drug test then narrowly targeted individuals largely responsible for the problem.<sup>55</sup> Thus, the contextual situation of the student athletes as a primary cause for the drug problem led the Court to find that the nature of the governmental interest is important enough to warrant a search.<sup>56</sup>

Since the Court determined that student athletes have a decreased expectation of privacy, the search employed by the school was relatively unobtrusive, and the need severe, the Court held that Vernonia’s drug testing program as reasonable and Constitutional.<sup>57</sup> However, the Court did so based on a fact specific inquiry, as the Court stated, “[w]e caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”<sup>58</sup> The main reason the Court allowed the drug testing was because of the newly-defined role of the student-school

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50. *Vernonia Sch. Dist.*, 515 U.S. at 659-60. *Skinner* stated that disclosure of medical records was not a “significant invasion of privacy.” *Skinner*, 489 U.S. at 626, n. 7. However, the holding in *Von Raab* had deemed important the notion that such disclosure of medical records would only be required for those testing positive in the test. *Von Raab*, 489 U.S. at 672-73, n. 2. Thus, the Court does not require drug-testing to be accomplished in the least invasive means.

51. *Vernonia Sch. Dist.*, 515 U.S. at 659-60.

52. *Id.* at 661. (emphasis in original). I say “interestingly enough” because the Court had just relied on *Skinner* and *Von Raab* as precedents, and now rejects the standard used by those precedents. *Id.*

53. *Id.* at 661-62.

54. *Id.* (Drugs pose an additional threat to student athletes because the impairment of judgment, slow reaction time, and a lessening perception of pain have greater acuity of affect when engaged in athletic activity.).

55. *Id.* at 662-63.

56. *Vernonia Sch. Dist.*, 515 U.S. at 664-65.

57. *Id.*

58. *Id.* at 665.



relationship, again noting the school's roles as "guardian and tutor."<sup>59</sup> Additionally, the Court noted that the school oftentimes acts *in loco parentis*, or in the place of the parent.<sup>60</sup> In some situations these roles, under *Vernonia*, give a school district the ability to engage in suspicionless searches under the special needs doctrine to student athletes. Once the Court construed the relationship between student and school in this manner, students lost a great deal of their "reasonable expectations of privacy," meaning that lesser governmental interests can now override students' Fourth Amendment protections under the special needs doctrine. However, this interpretation still had to be qualified by the context of the situation.<sup>61</sup>

Justice Ginsburg, in concurring, stated, "I comprehend the Court's opinion as reserving the question whether [a district may] . . . constitutionally . . . impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school," as "[t]he Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics."<sup>62</sup> Thus, Justice Ginsburg's concurrence echoed the opinion written by Justice Scalia by emphasizing the fact-intensive basis upon which the decision was made. After *Vernonia*, despite Justice O'Connor's convincing argument to the contrary,<sup>63</sup> school districts no longer needed individualized suspicion to mandate students

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59. *Id.*

60. *Id.*

61. See Nathan Roberts & Richard Fossey, *Random Drug Testing of Students: Where Will the Line be Drawn?*, 31 J.L. & EDUC. 191, 196 (2002) (listing the nature of sports and documented use of drugs by athletes as factors of the Court's analysis in *Vernonia*); Neal H. Hutchens, Commentary, *Suspicionless Drug Testing: The Tuition for Attending Public School?*, 53 ALA. L. REV. 1265, 1272 (2002) ("While the Court in *Vernonia* considered a number of issues, the decision left unclear the specific weight the Court afforded to each factor. . . . In other circumstances, students involved in extracurricular activities, including athletics, may actually demonstrate less of a disposition to engage in drug use than the rest of the student population.").

62. *Vernonia Sch. Dist.*, 515 U.S. at 666, (Ginsburg, J., concurring) (Justice Ginsburg notices that the fact that the students were athletes affected the three-prong approach because of the reduced expectation of privacy, closer school regulation, and the additional risk of physical injury.).

63. *Id.* at 666-86, (O'Connor, J., dissenting). Justice O'Connor, joined by Justices Stevens and Souter, wrote that individualized suspicion requirements protect against governmental intrusions by giving the individual some means of preventing the circumstances that lead to the search, and that to eliminate this requirement is an affront to liberty. *Id.* at 667. Justice O'Connor also argues that such large policy based decisions are not for the judiciary to make, and that large, suspicionless searches are typically *per se* unreasonable under the Fourth Amendment, unless there are unique circumstances that would render suspicion-based testing ineffectual. *Id.* at 667-68.

to submit to Fourth Amendment searches if the context of the search was strong enough to mandate a special need.<sup>64</sup>

C. *The “Special Needs” Doctrine Applied to other Contexts*

“Special needs” have been demonstrated in non-school circumstances.<sup>65</sup> As the application of the doctrine turns on the context, a brief survey of important special needs cases in other contexts will be informative. In a case in which a public employee’s office was searched, *O’Conner v. Ortega*, the Court upheld the search under the special needs doctrine, and noted that such searches may be undertaken as long as there are some “reasonable grounds” that the search will discover misconduct.<sup>66</sup> Another case, *Griffin v. Wisconsin*, held that special needs are present when the police search the home of a probationer.<sup>67</sup> The Court compared a probationer and a probation officer to a child and a parent, and noted that the probation officer is charged with protecting the public interest.<sup>68</sup>

The Court’s special needs jurisprudence turned an important corner in the context of the companion cases of *Skinner* and *Treasury Employees v. Von Raab*, which dealt with railroad workers and customs officers, respectively.<sup>69</sup> These cases supplied the Court with contexts suitable to eliminate an individualized suspicion requirement within the special needs doctrine. In *Skinner*, the Court dealt with a rule that mandated drug testing to railroad

64. *Id.* at 664-65.

65. See *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In the first Supreme Court case involving special needs after *T.L.O.*, *O’Conner v. Ortega*, a plurality opinion held that the legitimate expectation of privacy by a public employee is outweighed by the public employer’s interest of running the workplace. See *O’Connor v. Ortega*, 480 U.S. 709, 719-24 (1987) (plurality opinion). The employee on this particular case was barred from his office because of sexual harassment allegations filed against him. His office was searched, and the search yielded such items as a Valentine’s Day card, a photograph, and a book of poetry. He had been the only person to use that office for 17 years. *Id.* at 712-13, 718. In holding that a special need existed, the Court stated that the government’s interest was strong, as public employees perform many services on which the public depends, and it would be too burdensome for employers to acquire a warrant before searching the office of the employee. *Id.* at 722-23. The Court stated, “public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe.” *Id.* at 724.

66. *Ortega*, 480 U.S. at 726.

67. *Griffin*, 483 U.S. at 880 (only one dissenting judge).

68. *Id.* at 876-77 (In “such a setting, we think it reasonable to dispense with the warrant requirement,” and allow for the special needs exception to control.). It also seemed important to the Court that probationers are within “criminal sanctions” and should expect less privacy. *Id.* at 873-74.

69. *Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656.

workers involved in certain railroad accidents, or allowed the employer to perform a drug test if the employee is suspected of on-the-job drug use.<sup>70</sup> No warrant or individualized suspicion other than a “reasonable basis” was required under the rule.<sup>71</sup> However, the Court applied a utilitarian balancing test and determined that the governmental needs of deterring and detecting drug use within the railroad industry outweighed the individual expectation of privacy of the employees against a urine test.<sup>72</sup> The fact that a drug problem existed made this outcome easier to arrive at than it would have been.<sup>73</sup>

However, there was no such drug problem within the fact scenario in *Von Raab*. In that case, the United States Customs Service enacted a plan to conduct drug tests for all those who either applied for or occupied certain positions, even though the Commissioner believed that “[c]ustoms is largely drug-free” and there had not been a showing that any U.S. customs officers had been using drugs.<sup>74</sup> However, the Court found a special needs exception to exist here and allowed the test, due to the strong governmental interest of monitoring those people in positions that interdict illegal drugs.<sup>75</sup> As “drug abuse is one of the most serious problems confronting society today,” the Court believed that the government’s interest in detecting drug use was compelling, and more important than the worker’s expectation of privacy.<sup>76</sup> Thus, the utilitarian approach of the “special needs” exception to the warrant requirement and individualized suspicion now extended to allow governmental interests to look for and prevent problems that had not yet occurred, because the potential harm could be great.<sup>77</sup>

Justice Marshall declared that the Court should not use utilitarian balancing acts to justify suspicionless drug testing in his dissent in *Skinner*.<sup>78</sup> He also argued that the Court ignored the fact that the Fourth Amendment was enacted in order to prevent such utilitarian balancing.<sup>79</sup> He stated that times of crises are the times when the Fourth Amendment protections are most needed

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70. *Skinner*, 489 U.S. at 609-11.

71. *Id.* at 613.

72. *Id.* at 634.

73. *Id.* at 608 (as a result of drug use, 34 fatalities, 66 injuries, and \$28 million of property damage occurred).

74. *Von Raab*, 489 U.S. at 660.

75. *Id.* at 679.

76. *Id.* at 674-75. The Court compares the situation of detecting U.S. customs officers to searching for explosives on planes, border checkpoints searches, and housing code inspections, all of which do not require a warrant. *Id.* at 674-75, n. 3.

77. *See id.*; *see also* Kimberly Menashe Glassman, Comment, *Shedding Their Rights: The Fourth Amendment and Suspicionless Drug Testing of Public School Students Participating in Extracurricular Activities*, 51 CATH. U. L. REV. 951, 961-62 (2002).

78. *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).

79. *Id.* at 635-36 (Marshall, J., dissenting).

and too often ignored, and the war on drugs is no exception.<sup>80</sup> Justice Marshall found it relevant that all five special needs cases up to that point have found a strong governmental interest overriding an individual's or class of individuals' privacy interest and "ignoring the literal requirements of the Fourth Amendment."<sup>81</sup> Also of interest, he stated that a "majority of this Court, swept away by society's obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures . . . [to] bend time-honored and textually based principles of the Fourth Amendment . . . designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy."<sup>82</sup>

After *Vernonia*, the special needs doctrine developed in a different way, as the Court began to reject the application of the special needs exception. In *Chandler v. Miller*, the Court for the first time rejected applying the special needs exception and held a search to violate the Fourth Amendment.<sup>83</sup> Writing for an 8-1 majority, Justice Ginsburg found no special need regarding Georgia's plan to administer drug tests to political candidates running for high offices.<sup>84</sup> The Court emphasized that in order to overcome an individual's Fourth Amendment right without individualized suspicion, the government's interest must be "substantial—important enough to override the individual's acknowledged privacy interest."<sup>85</sup> In an attempt to differentiate between the current case and *Von Raab*, which was similar in that there was no drug problem, the Court noted that difference between the two cases was because of the unique context present in *Von Raab*.<sup>86</sup> In *Chandler*, safety was not at issue, and in *Von Raab* typical law enforcement techniques would have been less effective at discovering a drug problem.<sup>87</sup> Chief Justice Rehnquist, the only

80. *Id.* (Marshall, J., dissenting) (Justice Marshall points out that Fourth Amendment rights were abridged during the World War II relocation- camp cases, the Red Scare McCarthyism subversion cases, and others.).

81. *Id.* at 639 (Marshall, J., dissenting).

82. *Id.* at 654-55 (Marshall, J., dissenting) (Justice Marshall quotes Justice Oliver Wendell Holmes in support of his position: "[G]reat cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts judgment . . . [which] before which even well settled principles of law will bend." (quoting from *Northern Securities Co. v. U.S.* 193 U.S. 197 (1904) (J. Holmes, dissenting))).

83. *Chandler v. Miller*, 520 U.S. 305 (1997).

84. *Id.* at 309.

85. *Id.* at 318. Georgia had no problem with drug use among high-ranking politicians, and the Court was persuaded by the fact that normal law enforcement techniques should be adequate to discover drug use among prominent individuals. *Id.* at 318-20.

86. *Id.* at 321 (The Court stated, "Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context.").

87. *See id.* at 321-22.

dissenting Justice, did not persuade the Court to support his version of what constitutes a special need. His test was simply to determine if the government had a legitimate purpose other than law enforcement.<sup>88</sup>

The Court also rejected the use of the special needs exception in the context of traffic stops in *City of Indianapolis v. Edmund*.<sup>89</sup> The City's search involved highway checkpoints at which the motorist would be stopped and sniffed for drugs by a narcotics detection dog.<sup>90</sup> The Court again noted that the government must have a substantial or important need to overcome Fourth Amendment rights in this matter, as the context of the situation did not merit so drastic a measure.<sup>91</sup> The Court stated that Fourth Amendment rights are important, even in the face of an important social problem: "[t]here is no doubt that traffic in illegal narcotics creates social harms of the first magnitude . . . [b]ut the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue their purpose."<sup>92</sup> Thus, even if the governmental need is substantial, the method of the search cannot abridge Fourth Amendment rights in such an expansive manner.

The final case decided by the Supreme Court before *Earls* regarding the special needs exception was *Ferguson v. City of Charleston*, which also found no special need by a 6-3 vote.<sup>93</sup> The context in question dealt with hospitals checking pregnant and delivering women for cocaine use.<sup>94</sup> The Court pointed out that this test was more invasive than previous tests,<sup>95</sup> and found this to violate the pregnant women's reasonable expectations.<sup>96</sup> Also, the Fourth

88. *Id.* at 325 (Rehnquist, C.J., dissenting).

89. *City of Indianapolis v. Edmund*, 531 U.S. at 32, 48 (2000).

90. *Id.* at 34-36.

91. *Id.* at 42-43. Traffic stops were allowed in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), because of the location of the search, as the context of the U.S.-Mexico border warranted a search. Also, this case is different than *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (in which sobriety checks were upheld because of the significant danger that intoxicated drivers pose to the public, whereas simply transporting narcotics does not pose this immediate danger.).

92. *Edmund*, 531 U.S. at 42.

93. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). It should be pointed out that after *Vernonia*, Chief Justice Rehnquist has never voted to deny the application of the special needs exception, and that Justices Scalia and Thomas have only done so in *Chandler*. *Chandler v. Miller*, 520 U.S. 305 (1997); *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

94. *Ferguson*, 532 U.S. at 70-73 (Hospitals were to "identify/assist pregnant patients suspected of drug use." If cocaine was found, the woman could be charged with possession or even distribution, as the fetus would be receiving the cocaine.).

95. *Id.* at 78. (The test was intrusive because the same test yielded information relevant both to cocaine use but also the pregnancy.).

96. *Id.*

Amendment acted to disqualify this search because the results were to be used in law enforcement purposes, which is barred in all circumstances except in the odd case of criminals on probation.<sup>97</sup> The Court analyzed the nature of the special need claimed by the state via “close review,” and decided that because of the law enforcement factor, there was no special need even if the women were to get substance abuse treatment after being discovered.<sup>98</sup>

*D. An Analysis of the Special Needs Precedent Leading to Earls*

After reviewing the Supreme Court’s decisions regarding the special needs doctrine, an important conclusion to reach is that the doctrine is fact specific. The Court does not routinely focus on the same elements of the balancing test between the individual’s reasonable expectation of privacy against the government’s interest in conducting the search. Typically, the Court’s ever-changing method of applying the special needs test determines the result, as when the Court focuses on utilitarian principles a special need tends to be found, while when the Court focuses on individual rights the tendency is to the opposite.<sup>99</sup> *T.L.O.*, *Vernonia*, *Skinner*, and *Von Raab*, all cases that allowed special needs, focused on utilitarian principles. In *T.L.O.*, searches were allowed without probable cause not because the children were considered lesser citizens, but because of the need for the administration to efficiently run the school.<sup>100</sup> Although the *Vernonia* Court did speak of students as lesser citizens than those of majority, the citing of large amounts of psychiatric and medical journals and the Court’s own broad language betrayed the utilitarian basis for the Court’s decision.<sup>101</sup> The fact that the Court eliminated any individualized suspicion requirement for “searches” also demonstrates that the Court focused on utilitarian principles over individual rights. Similarly, the Court in the companion cases of *Skinner* and *Von Raab* also focused on the utilitarian purposes of fighting the war on drugs and making railroads safe, dismissing the individual rights concerns of the workers because their jobs fulfill a utilitarian value.<sup>102</sup> Additionally, the *Chandler* Court did not speak

97. *Id.* at 79-81, n.15.

98. *Id.* at 81-84. The Court states that the special needs category is “closely guarded.” *Id.* at 84.

99. The one exception to this was *Griffin*, which allowed the search of a probationer via a 8-1 decision, which was based on a regulatory special need governing probation, and as such the decision was not based on utilitarian or individual rights principles. *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

100. *See New Jersey v. T.L.O.*, 469 U.S. 325, 338-42 (1985).

101. *See Vernonia Sch. Dist. v. Acton*, 515 U.S. 661-62 (1995).

102. *See Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 628 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 671-72 (1989) (in *Skinner*, the railroad workers had a lesser expectation of privacy because of the danger inherent in railroad operation, while in *Von*

particularly on any individual rights, and looked primarily on utilitarian principles.<sup>103</sup> However, no special need was found because of a great lack of any utilitarian arguments to support the drug testing of potential candidates for office.<sup>104</sup> No individual rights argument needed to be made.<sup>105</sup>

Since *Chandler*, the Court emphasized individual rights, giving little concern to perhaps important utilitarian concerns. For example in *Edmund*, the searching of cars to look for narcotics did not qualify as a special need, as this search could act to get around the typical rights of a criminal defendant, even though the benefits to the public generally could have been substantial.<sup>106</sup> Similarly, the Court struck down searches of certain pregnant women for drug use in *Ferguson* even though law enforcement was not the primary purpose of the law and important interest of protecting young children from drug related abuse.<sup>107</sup>

Thus, perhaps not surprisingly, when the Court placed emphasis on utilitarian arguments, a special need was typically found, while no special need was found when the focus was on individual rights. However, other than the timing of the cases, there was little that could predict what the Court would emphasize with a broad rule. The Court would not focus on individual rights only when law enforcement became involved, even though Chief Justice Rehnquist's suggestion would have saved the Court much reasoning. Additionally, although the Court focused on utilitarian principles in *Chandler*, the individual rights of the candidates for office prevailed in that case, demonstrating that the Court still values all individual rights, and not just those involved with the criminal justice system. Also, the Court did not always apply utilitarian principles when the searches in question were directed against drug use. In *Von Raab*, *Vernonia*, *Edmund*, and *Ferguson*, the cases most directly dealing with the disciplining or preventing drug use, the Court emphasized utilitarian principles twice and individual rights twice. Thus, throughout special needs jurisprudence before *Earls*, a fact sensitive inquiry was used in which it would not be possible for an observer to predict which facts would be valued by the Court via any broadly based distinctions or patterns.

### III. BOARD OF EDUCATION V. EARLS

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*Raab*, the customs officers were said to have a lesser expectation of privacy only because of their duty to interdict illegal drugs).

103. See *Chandler v. Miller*, 520 U.S. 305, 317-20 (1997).

104. *Id.*

105. *Id.*

106. See *City of Indianapolis v. Edmund*, 531 U.S. 31, 42-48 (2000).

107. See *Ferguson v. City of Charleston*, 532 U.S. 67, 81-85 (2001).

### A. *Factual Background*

Since the Supreme Court has stated many times that the context of the search is important in regards to special needs cases,<sup>108</sup> an understanding of the immediate case is necessary. In the small rural city of Tecumseh, Oklahoma, the School District adopted the Student Activities Drug Testing Policy (Policy), which required all high school and junior high students to submit to drug tests in order to participate in extracurricular activities.<sup>109</sup> However, drug tests have only been administered to students engaging in competitive activities, including band, choir, athletics, cheerleading, and academic teams.<sup>110</sup> Drug tests are administered before participating in the activity, and may be administered randomly or upon reasonable suspicion.<sup>111</sup> The students must undergo urinalysis, which is only designed to detect illegal drugs.<sup>112</sup> The School did not demonstrate any pervasive or increasing drug use among the students, however some drug use was evident.<sup>113</sup> The two students who opposed the test are Lindsay Earls, a member of the show choir, marching band, the Academic Team, and National Honor Society, and Daniel James, who sought to participate in the Academic Team.<sup>114</sup>

### B. *District Court*

#### 1. *Holding*

At the trial level, *Earls ex rel Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.*, the U.S. District Court of the Western District of Oklahoma upheld the District's drug testing policy.<sup>115</sup> In doing so, the District Court used many of the arguments that would later be used by the Supreme Court, and as such will be detailed later.<sup>116</sup> However, certain aspects of the District Court's analysis are worth exploring. When reading *Vernonia*, which the District Court took to be as the controlling case,<sup>117</sup> it repeatedly emphasized the factors

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108. *See supra* Section II.

109. *Earls*, 122 S.Ct. at 2562-63.

110. *Id.*

111. *Id.* at 2563.

112. *Id.* (The specific drugs the test can detect include amphetamines, marijuana, cocaine, opiates, and barbituates.).

113. *See id.* (some evidence, but no "drug culture" or statistics demonstrating the breadth of any drug problem).

114. *Id.*

115. *Earls ex rel Earls v. Bd. of Educ. of Tecumseh Sch. Dist.*, 115 F.Supp2d 1281, 1296 (W.D. Okla 2000) *rev'd*, 242 F.3d 1264 (10th Cir. 2001).

116. *See supra* Section III(D).

117. *See Earls ex rel Earls v. Bd. of Educ. of Tecumseh Sch. Dist.*, 115 F.Supp2d 1281 (W.D. Okla 2000) *rev'd*, 242 F.3d 1264 (10th Cir. 2001).



from *Vernonia* that cast schools as the guardians of the students and did not mention factors supporting the argument that students have some legitimate expectations of privacy in the school setting.<sup>118</sup> Furthermore, although the District Court acknowledged that the school district's plan of drug testing students in extracurricular activities did not effectively target students who use drugs,<sup>119</sup> the court dismissed this concern by stating, "[i]t can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs."<sup>120</sup> The court noted that *Vernonia* did not require a match between the tested students and the drug users, and noted that *Skinner* and *Von Raab* did not require such a match either.<sup>121</sup> Additionally, the district's policy was reasonable because the court concluded that *Vernonia* should not be read to require an epidemic drug problem before taking "peremptory measures," as this would be at odds with the notion of schools as guardians of the students.<sup>122</sup>

## 2. Analysis

Once the District Court decided that the school districts should act as the guardians of the students without any qualifiers, the court's holding is pre-determined. Although this conclusion will be addressed in greater detail below,<sup>123</sup> it made it possible for the court to dismiss the "bad fit" between the students who are more likely to use drugs and those that would have been tested under the plan. If the students' rights are not a concern, and the school is viewed as a parent or guardian, it becomes easy to search any student, regardless of any low probability of drug use. Additionally, though the court states that drug testing so many students will help with a drug problem, the court overlooks the fact that the students included within the tests are the least likely to use drugs,<sup>124</sup> meaning there is a good argument to claim that the policy will do little to ameliorate the drug problem in Tecumseh schools. Furthermore, the district court relied on *Skinner* and *Von Raab* in supporting the notion that the test need not target those likely to use drugs is in error, as those cases dealt with professionals in "closely regulated industries," not high school students. From these arguments, the court allowed "peremptory measures" and ignored the fact-specific analysis in *Vernonia* by drug testing students engaged in extracurricular activity. Such "measures" could only be

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118. *Id.* at 1287-90.

119. *See id.* at 1295.

120. *Id.*

121. *Id.* at 1295, n 52.

122. *See Bd. of Educ. of Tecumseh Sch. Dist.*, 115 F.Supp2d at 1285, 1288.

123. *See supra* Section III(D).

124. *See e.g.*, Eccles & Barber, *supra* note 1 at 10, 11, 15-25.

conceived of after determining that the school acts as a guardian over the students, as that sort of abridgment of Fourth Amendment rights, searches without suspicion and instead reason to believe the search for drugs will be fruitless anyway, is blatantly unconstitutional in other contexts. Thus, the district court's immediate characterization of students led to its decision to validate the testing.

### C. Circuit Court

#### 1. Holding

The Tenth Circuit also used *Vernonia* as the primary authority for deciding the case.<sup>125</sup> However, writing for a 2-1 majority, Circuit Judge Anderson and the Tenth Circuit read *Vernonia* and the special needs doctrine differently, and reversed the District Court.<sup>126</sup> The Tenth Circuit relied on the specific factual basis of *Vernonia*, and noted that the situation in *Vernonia* was quite different than in *Earls*.<sup>127</sup> While the drug problem in *Vernonia* was an epidemic, at Earls' high school, only two students out of 486 students involved in extracurricular activities tested positive for drug use in the 1998-99 school year, and both students were athletes.<sup>128</sup> Similarly, in the 1999-2000 school year, only one student out of 311 students tested positive, and that student was an athlete as well.<sup>129</sup> From these facts, the court concluded that the interest of the school in continuing the drug testing program was "negligible."<sup>130</sup> When applying the *Vernonia* test, the court reasoned that although students engaged in extracurricular activities do have a lesser expectation of privacy than other students, this expectation is not as low as that of student athletes.<sup>131</sup> Further, the court noted that students have constitutional rights, even though the school assumes some guardianship roles.<sup>132</sup> After agreeing with the trial court that the character of the invasion is not great,<sup>133</sup> the Tenth Circuit analyzed the nature and immediacy prong of the *Vernonia* test. The court noted that many of the facts that led to the constitutionality of the *Vernonia* search were missing in the *Earls* context, as non-athletes do not have the same safety risks coupled with

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125. *Bd. of Educ. of Indep. Sch. Dist.*, 242 F.3d at 1270.

126. *Id.* at 1279.

127. *Id.* at 1272-73.

128. *Id.*

129. *Id.* (not surprisingly, the total amount of students engaged in extracurricular activities dropped remarkably).

130. *Bd. of Educ. of Indep. Sch. Dist.*, 242 F.3d at 1275.

131. *Id.* at 1276.

132. *Id.* at 1275.

133. *Id.* at 1276.

drug use as do athletes, and there is no evidence of any role-model relationship between the students tested in the current case.<sup>134</sup>

The Tenth Circuit rejected the argument that since students engaging in extracurricular activities frequently have less supervision than students during normal school hours, that the school has a need to use monitor them in this fashion.<sup>135</sup> The argument does not work, as students who are not in extracurricular activities are less monitored than those still at school, meaning that if this argument were allowed to prevail, then all students could be tested regardless of any extra involvement.<sup>136</sup> As the court did not find that the matter was pressing upon the school, and the solution only abridged the rights of students without fixing any problem, it invalidated the drug testing policy.<sup>137</sup> The Tenth Circuit concluded that if there is no requirement forcing the school to impose a program on an identifiable drug problem that will address a sufficient number of students to actually redress its drug problem, school districts would be able to effectively drug test all students, which would be unconstitutional.<sup>138</sup> The court stated an “epidemic” need not be shown, but that there must be a problem and a solution that will act to solve that drug problem.<sup>139</sup>

## 2. Dissent

Circuit Judge Ebel, though in agreement with the standard of law adopted by the majority, disagreed with the way the facts of the case were applied.<sup>140</sup> Throughout his dissent, he stated that the facts of this case were similar to *Vernonia*, as he believed the problem in *Vernonia* to not be as bad as the majority thought it was.<sup>141</sup> Further, Ebel believed that students engaging in extracurricular activity have a lesser expectation of privacy, as their activity is voluntary and therefore they should anticipate more searches.<sup>142</sup> Since he considered drugs to be a relatively large problem, he analyzed the nature and immediacy of the problem prong differently than did the majority.<sup>143</sup> The dissent also criticized the majority’s requirement that there must be some sort of match between the problem and the solution, by noting that *Vernonia* never

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134. *Id.* at 1276-78.

135. *Bd. of Educ. of Indep. Dist.*, 242 F.3d at 1277.

136. *Id.*

137. *Id.* at 1278.

138. *Id.*

139. *Id.*

140. *Bd. of Educ. of Indep. Sch. Dist.*, 242 F.3d at 1279-87 (Ebel, J., dissenting).

141. *Id.* (Ebel, J., dissenting). He also believed drugs to be a more important problem than did the majority. *Id.* at 1280.

142. *Id.* at 1283, 85 (Ebel, J., dissenting).

143. *Id.* at 1286 (Ebel, J., dissenting).

required a strict scrutiny analysis for special needs cases and that the “least intrusive” means were not required in *Vernonia*.<sup>144</sup> Thus, although Ebel insists that drug testing all students just by their nature as students would be unconstitutional,<sup>145</sup> he does not mind drug testing a large sample of students repeatedly found not to be using drugs, because of the importance afforded to controlling drug use among students.

### 3. Analysis

The Tenth Circuit was right to assert that there should be a relationship between the alleged problem and the proposed solution, which in this case means that any drug testing program must target those students most likely to use drugs or refrain from targeting students that were not using drugs. Although the dissent argued that the Tenth Circuit used a strict scrutiny approach rejected by the Supreme Court, the majority decided the case correctly. As *Vernonia* depended heavily on a context and a rationale that showed that the drug testing fit the problem, it became reasonable for the Tenth Circuit to use the same analysis. Although neither court applied strict scrutiny, both *Vernonia* and the Tenth Circuit applied some scrutiny, so it looks more akin to an intermediate scrutiny standard. These courts both admitted the possibility of drug testing, while making certain that constitutional rights were not abridged without applying some real judicial review to the drug-testing plan. The Tenth Circuit additionally was correct in reaffirming that students do have constitutional rights within the school setting, even though the school takes on some guardianship roles. As mentioned below,<sup>146</sup> simply characterizing all students as under the care of the school without addressing the students’ legitimate expectation of privacy as described in *T.L.O.* will eventually lead to allowing the drug testing of all students, which is something both sides say would be unconstitutional.<sup>147</sup>

### D. Supreme Court

#### 1. Holding

Justice Thomas, writing for a 5-4 majority, reversed the Tenth Circuit as the Court held the drug testing policy to be within the special needs exception

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144. *Id.* (Ebel, J., dissenting).

145. *Bd. of Educ. of Indep. Sch. Dist.*, 242 F.3d at 1286 (Ebel, J., dissenting).

146. *See supra* Section III(D).

147. *See e.g.* *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottowatonic County v. Earls*, 122 S.Ct 2559, 2466 (2002); *Id.* at 2573 (Ginsburg, J., dissenting); *Id.* at 1286 (Ebel, J., dissenting); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995).

of the Fourth Amendment.<sup>148</sup> After stating that the Fourth Amendment applies, “reasonableness” is the standard, and that warrants, probable cause, and individualized suspicion are not needed if there are “special needs,” the Court noted that special needs have been found in public schools before.<sup>149</sup> Justice Thomas claimed that the Court did not “simply authorize all school drug testing, but rather conducted a fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.”<sup>150</sup> In doing so, the Court applies the same test used in *Vernonia*,<sup>151</sup> it just does so quite differently.

In undertaking the *Vernonia* test, the Court considered the nature of the privacy interest allegedly compromised by the Policy.<sup>152</sup> The Court considered the public school’s responsibility for maintaining discipline, health and safety standards, and requiring both vaccinations and physical examinations important, emphasizing the notion of students as children while giving no attention to factors that would enhance the expectation of privacy interests of the students.<sup>153</sup> The Court rejected the argument that the *Vernonia* holding should be limited to student athletes, by stating that the distinction was not the essential factor, and that any student in extracurricular activities also has a decreased expectation of privacy as compared to other students.<sup>154</sup> Thus, the

148. *Earls*, 122 S.Ct. at 2564. It should be pointed out how the current makeup of the Court typically view the special needs exception. Since and including *Vernonia*, the Chief Justice has always found a special need exception in the cases before the Court, while Justices Scalia and Thomas have found an exception in every case except *Chandler*. Justices O’Connor, Stevens, and Souter have never found a special needs exception since *Vernonia*. Justice Ginsburg concurred in *Vernonia* that there was a special need exception, but wrote to emphasize the limited nature of the holding due to the facts. Otherwise, he has not found an exception. Justices Breyer and Kennedy have only found special needs for Fourth Amendment searches within a public school context. It would seem then that even though Justice Ginsburg wrote the dissent in *Earls*, that the swing votes for special needs cases are Justices Ginsburg, Breyer, and Kennedy. *Earls*, 122 S.Ct. at 2559; *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmund*, 531 U.S. 31, 32 (2000); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist.*, 515 U.S. at 646.

149. *Earls*, 122 S.Ct. at 2564-65; *see also Ferguson*, 532 U.S. at 74-77; *Edmund*, 531 U.S. at 36; *Vernonia Sch. Dist.*, 515 U.S. at 652-53.

150. *Earls*, 122 S.Ct. at 2565.

151. *Id.* The three part test includes the nature of the privacy interest compromised, the character of the intrusion, and the nature of the government’s interest and how the government is meeting those interests. *Id.* at 2565-67; *see supra* text accompanying note 38.

152. *Earls*, 122 S.Ct. at 2565.

153. *Id.* This was similar to what the Court did in *Vernonia*, as it emphasized only those factors that tend to show a decreased expectation of privacy, while it ignored the other factors from *T.L.O.* favoring enhanced expectations of privacy. *See supra* Section II(B).

154. *Earls*, 122 S.Ct. at 2565-66.

Court considered the first prong satisfied if the student is a child under the care of the school, and engages in an activity that is not required by the school.<sup>155</sup>

The Court also considered the character of the intrusion, and found the character of the urinalysis test dictated by the policy to be relatively unobtrusive.<sup>156</sup> The Court points out, by citing *Skinner*, urinalysis is an accepted measure even though the “excretory function [is] traditionally shielded by great privacy.”<sup>157</sup> Also, the information provided by the test is kept by the school, can be viewed only by those who need to, and is not used for law enforcement purposes.<sup>158</sup> Thus, the Court finds the character of the intrusion to be of minimal harm.

The Court also determined that the nature and immediacy of the government’s concerns and the efficacy of the search fell in favor of the school district.<sup>159</sup> First and foremost, the Court stated the drug problem in the nation’s high schools is growing, stating that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”<sup>160</sup> Thus, though no particular findings aside from what could be isolated incidents were demonstrated, the School District’s concerns over drugs merited the abridgment of the individual’s Fourth Amendment rights.<sup>161</sup> The Court denied the argument that a pervasive drug problem was a requirement before the government’s needs were considered important enough to warrant a drug test by quoting *Von Raab*, which stated “drug abuse is one of the most serious problems confronting our society today.”<sup>162</sup> Justice Thomas also noted that this will deter children from using drugs, and that schools should not have to wait before drugs are present before searching for them.<sup>163</sup> Next, the Court rejected the argument that in *Vernonia* the fact that athletes were allowed to be drug tested because of the additional safety concerns that surround sports, and that *Vernonia* excluded the possibility of drug testing students engaged solely in non-athletic extracurricular activities.<sup>164</sup> After stating that no individualized

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155. *See id.*

156. *Id.* at 2566-67.

157. *Id.* at 2566.

158. *Id.* (This goes along with the precedents in *Von Raab* and *Skinner*.)

159. *Earls*, 122 S.Ct. at 2567.

160. *Id.*

161. *Id.* at 2567-69.

162. *Id.* at 2567-68.

163. *Id.*

164. *Earls*, 122 S.Ct. at 2568-69. This argument is again wrong, as it uses the same line of reasoning described in the first part of the *Vernonia* test. All factors were crucial in that case, and it is not simply a matter of noting a student-school relationship and concluding a special need exists. *See supra* Section II(B).

suspicion is needed,<sup>165</sup> the Court found no difficulty in drug-testing those students not likely to use drugs, and in fact targeting those least likely to use drugs, because of the “public school’s custodial responsibilities.”<sup>166</sup> The Court’s reasoning allows for a school to issue a drug-testing requirement to those least likely to use drugs and still satisfy the nature and immediacy of the government’s concern prong of the *Vernonia* test, based only on the nationwide drug problem.

## 2. An Analysis of the Holding

In beginning the analysis, the majority’s failure to recognize the distinction between student athletes and other students is without merit under the first prong of the *Vernonia* test. In rejecting the claim that the *Vernonia* decision depended on the factual context of the students as student athletes, Justice Thomas pointed out the language in *Vernonia* that said, “legitimate privacy interests are *even less* with regard to student athletes.”<sup>167</sup> His statement was supposed to show that all students have a lesser expectation of privacy at school, and that student athletes have an even weaker expectation of privacy than the other students, meaning that the fact that *Vernonia* students were athletes was only supplemental to that case’s holding.<sup>168</sup> However, that argument does not follow, as the phrase “even less” does not necessarily imply that the fact that the *Vernonia* students were athletes was superfluous to the Court’s holding, as the threshold of a lessened expectation of privacy may not have been reached in regards to other students.

*Vernonia* did not speak to this question, as that matter did not come before the Court in that case. After considering the basic relationship between the students and the school, the *Vernonia* Court concluded that “students within the school environment have a lesser expectation of privacy than members of the population generally.”<sup>169</sup> However, after adding the additional factors of student athletes into the calculus, the Court concluded that student-athletes are akin to adults in a “closely regulated industry” and “have reason to expect intrusions upon normal rights and privileges, including privacy.”<sup>170</sup> The Court did not say that intrusions into privacy were allowed until the Court considered the special status of student athletes.<sup>171</sup> Reading *Vernonia* in such a manner makes sense, because if Justice Thomas’ reading were to be correct, any

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165. *Earls*, 122 S.Ct. at 2568-69. This was first decided in *Skinner* and *Von Raab*, and first applied to schools in *Vernonia*. See *supra* Section II(B)-(C).

166. *Earls*, 122 S.Ct. at 2569.

167. *Id.* at 2565, n. 3. (emphasis original).

168. See *id.*

169. *Vernonia Sch. Dist.*, 515 U.S. at 657.

170. *Id.*

171. *Id.*

student would be subject to drug testing since all students are in the student-school relationship. However, the Court has not stated this to be the case, and in fact has stated that subjecting all students to drug tests “is not entirely consonant with compulsory education laws.”<sup>172</sup> Further, there would be no need to consider the different contexts of athletic involvement, extracurricular activity, or on-campus parking, if the determining factor of “reasonableness” is the relationship between the student and the school. As courts do concern themselves with these contexts,<sup>173</sup> the *Earls* Court mischaracterized the privacy interest prong of *Vernonia* and disregarded the proper reading of precedent.

The Court had ample foundation in the precedent for holding that the character of the intrusion is acceptable. After *Skinner* and *Von Raab*, urinalysis has always been held to be minimally intrusive.<sup>174</sup> Also, since the results of the drug test are not distributed to any law enforcement agency, they do not have the same difficulties as did the searches in *Edmund* and *Ferguson*. It appears that the majority decided character of the intrusion prong correctly according to precedent.<sup>175</sup>

The Court’s argument regarding the third prong of the *Vernonia* suffers from the same shortcomings that the first test does. By ignoring all related context and focusing on a national drug problem when allowing drug testing for students, the Court logically committed to allowing drug testing for all students, which the Court has rejected.<sup>176</sup> The Court ignored the context of *Vernonia*, namely a recent drug problem had emerged in the school in question, the fact that athletes are at a greater safety risk, and the status of athletes as leaders of a “drug culture,” meaning they used more drugs and served to spread their use. Focusing on “constitutionality of the program in the context of the public school’s custodial responsibilities”<sup>177</sup> at the expense of the status of the students must logically lead to the allowance of drug-testing

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172. *Id.* at 655.

173. See Bd. Of Educ. Of Indep. Sch. Dist. No. 92 of Pottowatomie County v. *Earls*, 122 S. Ct 2559 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000) (students who drive to school must submit to a suspicionless drug test).

174. See *Chandler v. Miller*, 520 U.S. 305, 318 (1997); *Vernonia Sch. Dist.*, 515 U.S. at 660.

175. There is some disagreement among the Justices here, but a urinalysis test will frequently pass this prong of the test. The dissent focuses on the fact that the test results were not as protected as they should have been. *Earls*, 122 S.Ct. at 2574-75 (Ginsburg, J., dissenting). Also, Justice Breyer noted some doubts about urinalysis tests being uninvasive. *Id.* at 2570-71 (Breyer, J., concurring).

176. See *Earls*, 122 S.Ct. at 2573 (Ginsburg, J. dissenting) (“Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student’s blood or urine for drugs, the opinion in *Vernonia* could have saved many words.”).

177. *Id.* at 2569.



all students, which the Court claims it must not do.<sup>178</sup> Further, on a practical level, any abridgment of the Fourth Amendment should be done so in a matter that will best accomplish what it sets out to do. Students engaged in extracurricular activity are least likely to use drugs,<sup>179</sup> and so developing a policy to test them just because they are involved in such activities seems ill-conceived and unnecessarily abridges the students' rights. Additionally, the Court misread *Von Raab* when it relies on it to allow drug testing among a population that reported no problems of drug use. As noted above, drug tests were allowed in *Von Raab* only because of the safety issues and public consequences that could result for customs workers affected by drugs.<sup>180</sup> The Court in *Chandler* noted that the *Von Raab* context was to be limited, "*Von Raab* must be read in its unique context . . . Customs workers . . . are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use."<sup>181</sup> Some high school students do use drugs, but are not involved in drugs to the extent of hunting down drug traffickers, and it would seem that the "unique context" is not present in US high schools. Thus, although the problem of high school drug use is pervasive,<sup>182</sup> any drug-testing rule that ignores the immediate context of the situation and is applied to those least likely to use drugs where no pervasive drug problem has been demonstrated, does not follow precedent and goes too far in abridging students' Fourth Amendment rights.

Furthermore, the Court's rule will allow for bad policies to continue. As Justice Ginsburg noted in her dissent, "[e]ven if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use."<sup>183</sup> Since students who participate in extracurricular activities are less than half as likely to use drugs, the school may be pushing students away from a factor that will tend to eliminate some drug use among students.<sup>184</sup> Further, students who are pushed away from

178. See *Vernonia Sch. Dist.*, 515 U.S. at 655; *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (mandatory drug testing and compulsory education are not "consonant" with each other).

179. *Earls*, 122 S.Ct. at 2572 (Ginsburg, J., dissenting); see *Eccles & Barber*, *supra*, note 1 at 15-25.

180. See *Treasury Employees v. Von Raab*, 489 U.S. 656, 674-75 (1989) (where preventing drug use of US customs officials is akin to searching luggage for explosives at airports).

181. *Chandler v. Miller*, 520 U.S. 305, 321 (1997).

182. *Earls*, 122 S.Ct. at 2567, n. 5.

183. *Earls*, 122 S.Ct. at 2577 (Ginsburg, J., dissenting), see also *supra*, Section III(C)(1) (note the decline of the number of students tested at *Earls*' high school. Although they may just have tested fewer students, it is possible the number of eligible students declined as more students became "conscientious objectors.").

184. *Earls*, 122 S.Ct. at 2577 (Ginsburg, J., dissenting); Tamara A. Dugan, Note, *Putting the Glee Club to the Test: Reconsidering Mandatory Suspicionless Drug Testing of Students*

extracurricular activities by such drug testing requirements are then likely to have more time and opportunity to use drugs.<sup>185</sup> Thus, suspicionless drug testing on students involved in extracurricular activities is poorly suited for addressing drug use by adolescents, making the intrusion on their rights even more needless.

### 3. Concurrence

Justice Breyer concurred with the Court's judgment, agreeing with the Court's application of *Vernonia* to Lindsay Earls' contention, but with a different emphasis.<sup>186</sup> He characterized the drug problem as quite important and pervasive, and cited numerous studies that relay statistics on drug use, some economic impact of drug use, that the government's activity regarding the supply side of the drug problem has not been effective.<sup>187</sup> He further stated

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*Participating in Extracurricular Activities*, 28 J. LEGIS. 147, 178-79 (2002); see also Eccles & Barber, *supra* note 1 at 1 (The authors conducted a longitudinal study that showed that students involved in extracurricular activities are less likely to use drugs than other students, excepting that athletes tend to drink more alcohol. Sixty-nine percent of the students polled were involved in some kind of organized activity. Also, interesting, the questionnaire had the children select and archetype drawn from the John Hughes movie, *The Breakfast Club*, namely the princess, the jock, the brain, the basketcase, and the criminal. "Criminals" had the least amount of extracurricular activities, and participated even less in them by their senior year. They were also the most likely to drink alcohol, skip school, use drugs, and the least likely to like school. In contrast, the "Brain" was the most likely to engage in academic clubs and volunteer work, and the least likely to drink alcohol, skip school, use drugs, had the best grades, was most likely to attend college, and liked school as much as the "princess" and the "jock." "Princesses," who oftentimes were involved in the performing arts, were similar, but not as averse to risky behavior, to the "brain." The study also noted that athletes were more likely to go to college than other students, but they engaged more often in drinking alcohol. However, this risky activity was thought not to be "necessarily problematic" as the risky behavior takes place within the context of a group of highly motivated and otherwise healthy students.); Jenkins, *supra* note 2 (students with high levels of academic performance and extracurricular activity are less likely to use "gateway" and "hard" drugs); Shilts, *supra* note 2, at 614-15 (drug abusers reported little involvement with extracurricular activity, while students with high levels of extracurricular involvement used little drugs and spent more time with their families).

185. See Dugan, *supra* note 184 at 178-79; Eccles & Barber, *supra*, note 1 at 11

(The authors [of studies detailing students' involvement with extracurricular activities] argued that constructive, organized activities would be a better use of the adolescents' time for the following three reasons; (a) idle time is the devil's playground—doing good things with one's time takes time away from opportunities to get involved in risky activities; (b) one can learn good things while engaged in constructive activities—for example, specific competencies and prosocial values and attitudes; and (c) involvement in organized activity settings increases the possibility of establishing positive social supports and networks.).

186. See *Earls*, 122 S.Ct. at 2569 (Breyer, J., concurring).

187. *Id.* at 2567-70 (Breyer, J., concurring).

that the schools, as actors with certain parental responsibilities, must find a way to deal with the problem.<sup>188</sup> Justice Breyer also discussed the policy at issue, stating that taking urine samples should not necessarily be considered a “negligible” invasion of privacy, but that individualized suspicion is not needed in this context.<sup>189</sup> Further, he believed that a good aspect of the program in question was that it did not subject the entire school to drug testing, and that there is still an option for the conscientious objector.<sup>190</sup>

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188. *Id.*189. *Id.* at 2570-71 (Breyer, J., concurring).190. *Id.* at 2571 (Breyer J., concurring).

#### 4. An Analysis of the Concurrence

Justice Breyer devoted little of his concurrence to constitutional argument, but instead used his concurrence to list problems the ills of drug use. This emphasis demonstrates that once the schools are characterized as a type of parental figure and drugs are considered to be a large problem, little legal argument is needed to jump to a conclusion that a drug-detecting program is constitutional. Although few would deny that the drug problem is bad, many would contend that such problems do not warrant the dismissal of constitutional protections so easily.<sup>191</sup> The constitution was written to stop the federal government from acting recklessly along the lines of popular opinion when other important rights, such as privacy, are endangered.<sup>192</sup> Justice Breyer's consideration of drug testing all students<sup>193</sup> shows that the Court's current reading of *Vernonia* is dangerously close to allowing all students to be drug testing based solely on school attendance. Also, he mischaracterizes the importance of extracurricular activities for students when he states that a student may opt out of them in order to avoid drug testing. Forgoing extracurricular activities has serious implications for students socially, physically, and academically,<sup>194</sup> which may be too great of a penalty for most "conscientious" students to pay. This is especially true for students with ambitions to go to college, as extracurricular involvement is a key factor in the college admissions process.<sup>195</sup> So, even if the government maintains the drug testing program and only tests those students who submit to it, there is still quite a bit of coercion being used on the students.

191. Linda Oshman, Comment, *Public School Lessons: Setting Limits on Suspicionless Drug Testing After Vernonia*, 38 HOUS. L. REV. 1313, 1341-42 (2001) ("[T]he Court also should end its reliance on the special needs doctrine and return to individualized suspicion when evaluating public school drug testing policies. The Supreme Court should give more than a passing nod to the plain language of the Fourth Amendment.").

192. See Justice Brandeis' words from *Olmstead v. US*, 277 U.S. 438, 479 (1928), as was quoted by Justice Ginsburg in *Chandler v. Miller*, 520 U.S. 305, 322 (1997).

("[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.).

193. *Earls*, 122 S.Ct. at 2571 (Breyer, J., concurring).

194. See Eccles & Barber, *supra* note 1 at 10-13.

195. See Rachel Hartigan Shea & David L. Marcus, *Make Yourself a Winner: Insider Strategies for Getting Into College*, USNEWS.COM, 2002, at 1, at <http://www.usnews.com/usnews/edu/college/articles/brief/02cbstrategy.htm> (last visited May 19, 2003) (a particular dedication to a particular activity is now even recommended); Kaplan, *Road to College* (2003), at [http://www.kaptest.com/repository/templates/Lev5InitDroplet.jhtml?ProductId=&\\_lev5Parent=/www/KapTest/docs/repository/content/College/Admissions/Road\\_to\\_College/Preparing](http://www.kaptest.com/repository/templates/Lev5InitDroplet.jhtml?ProductId=&_lev5Parent=/www/KapTest/docs/repository/content/College/Admissions/Road_to_College/Preparing) (last visited May 14, 2003).

#### 4. Dissent

Justice Ginsburg, joined by Justices Stevens, O'Connor, and Souter,<sup>196</sup> contended that the majority ignored the importance of context in regards to special needs judgments and that the Court is misreading *T.L.O.* and *Vernonia*.<sup>197</sup> Justice Ginsburg stated that by overlooking the context of the particular search and students in question and focusing solely on the school's responsibilities over the children, the majority's logic applied to all students and not just those that are involved in extracurricular activity.<sup>198</sup> She wrote, "[h]ad the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words."<sup>199</sup> The dissent, in order to dispute the expectation of privacy prong from *Vernonia*, argued that extracurricular activities are an integral part of the school's educational program and they cannot be said to be truly "voluntary."<sup>200</sup> She further argued that the context of athletics is different than that of other extracurricular activities, as there is no communal undress or any physical risk, and these factors act to create a lesser expectation of privacy for athletes than other students involved in extracurricular activity.<sup>201</sup> Justice Ginsburg accused the Court of failing to recognize this distinction, and noted that under *T.L.O.* "the legality of a search of a student should depend simply on the reasonableness, *under all the circumstances*, of the search."<sup>202</sup> The dissent also maintained that a urine sampling is more invasive than the Court believes it is, and noted that the information gleaned from the tests was not always aptly protected.<sup>203</sup> Justice Ginsburg attacked the majority's conclusion on the nature and immediacy of the governmental interest prong of the *Vernonia* test.<sup>204</sup> She noted that the context between the school in *Vernonia* and the *Earls* school were different in two regards, as the *Vernonia* school had a much larger drug problem, and that its drug testing program tested the students using drugs.<sup>205</sup> Opposed to *Vernonia*, the *Earls* school's drug testing plan did not target the

196. Justice O'Connor wrote a short and separate dissent in which she was joined by Justice Souter, which reaffirmed her dissenting position from *Vernonia*. *Earls*, 122 S.Ct. at 2571 (O'Connor, J., dissenting).

197. *Earls*, 122 S.Ct. at 2572-73 (Ginsburg, J., dissenting).

198. *See id.*

199. *Id.*

200. *See id.*

201. *Id.* at 2573-74 (Ginsburg, J., dissenting).

202. *Earls*, 122 S.Ct. at 2573 (Ginsburg, J., dissenting) (emphasis added in the *Earls*' dissent) (quoting *T.L.O.*, 469 U.S. at 341).

203. *Id.* at 2574-75 (Ginsburg, J., dissenting).

204. *Id.* at 2575 (Ginsburg, J., dissenting).

205. *Id.* at 2575-76 (Ginsburg, J., dissenting).

students who used drugs, and had to deal with a lesser drug problem.<sup>206</sup> Thus, the *Vernonia* context had a greater need and a plan that more appropriately addressed that need, and so the nature and immediacy prong was satisfied in *Vernonia*, but not in *Earls*.<sup>207</sup> In this manner the dissent attacked the Court's holding on all three levels of the *Vernonia* balancing test.

In the second part of the dissent, Justice Ginsburg compared Lindsay Earls' situation to the context of *Chandler*, and argued that the Court should have decided the matter along those lines.<sup>208</sup> As in *Chandler*, where mandatory drug tests of political candidates were declared unconstitutional, there was no "concrete danger" and no action taken to appropriately advance a "special need."<sup>209</sup> She also related the idea described by Justice Brandeis that the government acts as a teacher, and that such drug testing measures that actually accomplish little are powerful symbols that demonstrate that constitutional freedoms and principles have little meaning.<sup>210</sup> This is a dangerous message to teach to today's youth and tomorrow's leaders.

### 5. An Analysis of the Dissent

Justice Ginsburg read *Vernonia* and the *Earls* context together correctly. Although her attack on the second prong of the *Vernonia* balancing test (the urine test) was a futile one, she is right to come to different conclusions regarding the expectation of privacy and the immediacy of the government's need prongs. *Vernonia*, as recalled from above, dealt with a situation where a rampant drug problem was spreading throughout the school that had its origins with student athletes.<sup>211</sup> In comparison, the school in *Earls* had a lesser drug problem, and offered a solution that did not serve to help the situation and for the most part subjected students to embarrassing tests needlessly.<sup>212</sup> Additionally, the fact scenario in *Earls* had much in common with *Chandler*, because although there was a small problem, it was not to the degree to require broad testing of mostly innocent subjects. However, though the dissenting judges were quick to attack the conclusion of the majority, they did not offer another solution. Given that the judges of the majority consider drugs to be a paramount problem worth sacrificing civil rights for,<sup>213</sup> an alternative plan may

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206. *Id.*

207. *Earls*, 122 S.Ct. at 2577-78 (Ginsburg, J., dissenting).

208. *Id.*

209. *See id.*

210. *Id.* at 2578 (Ginsburg, J., dissenting).

211. *See supra* Section II(B).

212. *See supra* Section III(A) (note again that a minute portion of those students tested proved positive for drug use); *supra* Section III(C)(1).

213. *See supra* Section III(D), *see also Earls*, 122 S.Ct. at 2571 (Breyer, J., concurring) (Justice Breyer seemed concerned about the drug problem in his concurrence, and in his

be needed to convince them to abandon the current direction of their jurisprudence.

#### IV. AN ANALYSIS OF *EARLS* AND THE DRUG TESTING OF STUDENTS

Though the Court has often stated that “schoolchildren do not shed their constitutional rights when they enter the schoolhouse,”<sup>214</sup> the Court’s misreading of the special needs precedent in *Earls* almost makes that statement untrue in regards to the Fourth Amendment. If the Court allows drug testing of students because of their membership on the chess club, schools can craft any drug testing program they want, as long as they find some minimal “volunteer” basis for the program. Thus, students who drive their cars to school or smoke on campus can almost certainly be tested, and even possibly students who choose their own lockers, dress certain ways, or get a certain number of disciplinary referrals. Such an expansion of drug testing could only occur if the *Vernonia* test was applied out of context.

Given that the Court applies the special needs doctrine based on contextual factors,<sup>215</sup> a comparison of the context between *Vernonia* and *Earls* should determine how the doctrine is applied. The two cases should have reached different results under the proper reading of *Vernonia*.<sup>216</sup> In *Vernonia*, the school had a rapidly increasing drug problem, with a group of students who led a “drug culture,” and a test that specifically applied to that same group.<sup>217</sup> Additionally, drug use among student athletes poses more risk than to other students, and athletes expect to abide by additional rules, for their own safety and for fairness of competition concerns.<sup>218</sup> Meanwhile, in *Earls* the situation was quite different, as the drug problem in that case lacked the immediacy of the *Vernonia* school, and the drug testing program did not target those responsible for drug use, as only three tests out of 792 came back positive.<sup>219</sup> Also, the students subjected to the *Earls* drug test did not have the same lessened expectation of privacy as athletes, and drug use did not pose any more of a risk to these students than any other student.<sup>220</sup> Thus, the contexts of the

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conclusion mentioned that although he did not know that the program would work, it was worth trying. This suggests that he believed action to be required, and so authorized the drug test. If there was an alternative to combat the drug problem that would be more “reasonable” under the constitution, then Justice Breyer and the others may hold differently on this issue.).

214. See, e.g. *Earls*, 122 S.Ct. at 2564 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

215. See *supra* Section II(D).

216. See *supra* Section III.

217. See *supra* Section II(B).

218. *Id.*

219. See *supra* Section III.

220. *Id.*

two cases differed significantly except for: 1) the subjects of the drug tests were students who had at least minimally “volunteered,” and 2) there was at least some drug use at each school. Since the majority in *Earls* still held that the drug test was constitutional, it had to have misread or ignored all the other factors considered in *Vernonia*. Such a reading poses a danger to students’ constitutional rights, since the Court’s acceptance of view of that the custodial role of the school over the students is paramount means students who do not “volunteer” for anything may soon be subjected to mandatory drug tests.

One reason for the Court’s behavior regarding this issue may be because of the current perceptions of drugs and high schools. Courts consider the “war on drugs” to be important,<sup>221</sup> and high schools have been increasingly looked upon as places of danger after the wake of the Columbine shootings and similar tragedies. Since the Columbine shootings, courts and school administrators have been acting to take away and limit constitutional rights.<sup>222</sup> Although these tragedies were awful, they are the exception rather than the rule, as schools remain one of the safest places for children.<sup>223</sup> Since schools are safer than most give them credit for, it would be a mistake to abridge the Fourth Amendment rights of all students because of a few extremely bad, but highly publicized, apples. Although it is not possible to prove that the Court decided *Earls* because of the concerns regarding drugs and high schools, if it was true, it would be unfortunate that the Court let misperceptions and fear cloud its judgment and sacrifice students’ Fourth Amendment rights as a result. Or, to put it as Justice Marshall did in *Skinner*, the “majority of this Court, swept away by society’s obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures . . . [to] bend time-honored and textually based principles of the Fourth Amendment . . . designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual’s privacy.”<sup>224</sup>

221. See e.g., *Treasury Employees v. Von Raab*, 489 U.S. 656, 676-75 (1989); see also Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 842 (2002).

222. Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 740 (2000) (Although this article speaks mostly to First Amendment rights, Fourth Amendment rights can be said to have followed a similar course after a comparison between *Vernonia* and *Earls*. Calvert stated, “. . . [C]onstitutional rights currently are trampled on a routine basis in the nation’s public schools, largely out of a combination of fear, ignorance, and self-preservation on the part of the administrators. ).

223. Patrick Richard McKinney II, Note, *On the School Board’s Hit List: Community Involvement in Protecting the First and Fourth Amendment Rights of Public School Students*, 52 HASTINGS L.J. 1323, 1344 (2001).

224. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 654-55 (1989) (Marshall, J., dissenting).



Additionally, the *Earls* Court missed an opportunity to clarify the special needs doctrine. *Earls* is unique within special needs jurisprudence in that it is the first case that can draw on precedent from a similar context. No other pair of special needs cases have contexts as similar as *Earls* and *Vernonia*, since both cases involved the same “searchers” and “searchees,” such a similar type of test, a similar motivation for testing, and closely related arguments between the governmental interest and the individual’s expectation of privacy. The context in *Earls* mirrors *Vernonia* in these respects, yet it is different enough that it should warrant a different conclusion under the same analysis.<sup>225</sup> Such cases could help observers ascertain the meaning of the special needs doctrine. However, instead of affirming the context-based approach used in *Vernonia* that limited drug testing to student athletes, the Court changed the context by redefining the relationship between the student and the school, leading to the allowance of drug testing students as a class. By doing so, the Court has laid the framework for a future in which all students may be forced to submit to drug tests. The precedent set by *Vernonia*’s analysis did not inevitably lead to the conclusion that all students are available for drug testing, and it is unfortunate in regards to Fourth Amendment jurisprudence that the Court decided to ignore its prior reasoning. Additionally, had the Court used the same type of analysis used by *Vernonia*, some of the rationale behind special needs decisions would have been more apparent, whereas now the doctrine is perhaps more muddled than it already was.<sup>226</sup>

Furthermore, the Court’s decision leads to bad policy and is not realistic concerning the current nature of U.S. high schools. The *Earls* decision drug-tests students least likely to use drugs and may act to discourage students from joining extracurricular activities that provide benefits for children.<sup>227</sup> Studies show that involvement in school-based leadership clubs, spirit activities, and academic clubs increase the likelihood of the child being enrolled in college full-time at age 21, and that all extracurricular involvement is correlated with lesser illegal drug use.<sup>228</sup> Students who engage in extracurricular activity

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225. See *supra* Section IV.

226. See Krislen Nalani Chun, Note, *Still Wondering After All These Years: Ferguson v. City of Charleston and the Supreme Court’s Lack of Guidance Over Drug Testing and the Special Needs Doctrine*, 24 U. HAW. L. REV. 797, 819 (2002) (this note concludes that the special needs doctrine is a malleable one, and able to be bent the way a majority of justices decide that it should be bent); Jason E. Yearout, Note, *Individualized School Searches and the Fourth Amendment: What’s a School District to Do?*, 10 WM. & MARY BILL RTS. J. 489, 523 (2002) (*T.L.O.* has been decided for 16 years and the factors to be concluded in assessing “reasonableness under all the circumstances” is still unknown in special needs jurisprudence. Meanwhile, different courts emphasize different factors.).

227. See *supra* note 184.

228. See e.g., Eccles & Barber, *supra* note 1, at 15-25.

associate themselves with more positively influencing peers and create more positive activity-based identity formation.<sup>229</sup> So not only was the *Earls* drug test a bad fit regarding constitutional concerns, but it may serve to isolate students from an influence that supports academic achievement and curbs a desire for drug use. Additionally, school districts who use drug-testing policies similar to that in *Earls* may find that certain students have a harder time getting into college. Although extracurricular activities are in the strict sense “voluntary,” there is extreme pressure on contemporary high school students to engage in these activities.<sup>230</sup> Students wishing to go to college usually need some kind of extracurricular involvement,<sup>231</sup> and so those students deterred from joining clubs because of a desire for drug use or who are “conscientious objectors” will find themselves at a disadvantage compared to other students for admission into college. Thus, the price to pay by a “conscientious objector” is quite high, meaning that because in the realistic sense extracurricular involvement is not “voluntary,” and so the drug-testing schools apply a high degree of coercion that is not acceptable considering the mandatory nature of education. A policy that serves to discourage involvement in extracurricular activity and views such activity as wholly “voluntary” is not in congruence with contemporary U.S. high schools.

Given the problems of a Court that misapplies its precedent, a confusing doctrine, and the creation of a bad policy, a new approach is needed. In certain situations, drug testing may be warranted, but there needs to be a better system to determine when drug testing is appropriate. The analysis of the Tenth Circuit and Justice Ginsburg’s dissent can provide a starting point, as both opinions read the precedent accurately.<sup>232</sup> However, the special needs doctrine requires further clarification. Perhaps courts could import an intermediate scrutiny standard from First Amendment jurisprudence when applying the special needs doctrine. Strict scrutiny would not work with special needs, especially after individualized suspicion was eliminated in *Vernonia*, and a rational basis test would allow for too much abridgment of Fourth Amendment rights. However, an intermediate scrutiny standard that forces some reasonable fit between a drug testing policy and a pressing problem to be addressed would serve to increase the stability of the doctrine and assure that constitutional rights are not being set aside needlessly. For example, under this test, the *Earls* drug testing policy would fail because the drug problem is not pressing and that the test does not reasonably fit to remedy the purported

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229. *Id.*

230. *See supra* Section III(D)(4).

231. *See* US News and World Report and Kaplan, *supra* note 195.

232. *See supra* Section III(C), (D)(4-5).

problem. The Tenth Circuit applied a similar standard, and although that court did not label the standard any kind of scrutiny, it achieved the same result.<sup>233</sup>

School districts may use other approaches besides mandatory drug testing as well. One innovative school in Autauga County, Alabama used a voluntary drug testing program instead of a mandatory one.<sup>234</sup> Their Independent Decision program received the cooperation of 55 local stores and restaurants, and provided discounts to students who voluntarily submitted to drug tests and tested clean for nicotine, cocaine, amphetamines, opiates, PCP, and marijuana.<sup>235</sup> The system rewards students who choose to remain drug free.<sup>236</sup> The program has been largely successful, as over half of the students volunteer for the program, and questionnaires show that there has been a decrease in drug use since the program was implemented.<sup>237</sup> This kind of system has the advantage of using the carrot instead of the stick, as it accomplishes the same goal as that of mandatory drug testing, but the students will not feel punished or lose confidence in the value of constitutional rights. Furthermore, discounts at certain businesses may offer a compelling reason for students to remain clean and some discounts may provide for more use of safe, public facilities, such as a roller skating rink or a movie theater. The program also has an advantage over mandatory drug testing programs such as the one found in *Earls* in that all students can participate in the program and not just those who are in extracurricular activities and least likely to use drugs. School boards should consider this sort of truly voluntary program before embarking on a mandatory drug testing program, even though the Supreme Court allows expansive mandatory programs.

Although *Earls* allowed for a high amount of students to be drug tested, certain factors may be raised that could avoid mandatory drug tests. One such factor is that students over 18 may be able to avoid testing. Students of this age are no longer children, and as such the school may no longer act *in loco parentis*. As this factor played a critical role in the *Earls* decision allowing mandatory drug tests, courts may not be able to justify a search according to the redefined *Vernonia* test without the subject of the test being a "child." Another factor that could lead to the avoidance of the drug test involves certain high school classes that require extracurricular activity. Courses such as band,

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233. See *Bd. of Educ. of Indep. Sch. Dist.*, 242 F.3d at 1278.

234. Office of National Drug Control Policy, *What You Need to Know About Drug Testing in Schools*, (June 27, 2003), available at [http://www.whitehousedrugpolicy.gov/publications/drug\\_testing.pdf](http://www.whitehousedrugpolicy.gov/publications/drug_testing.pdf) (last visited May 20, 2003).

235. *Id.*

236. *Id.*

237. *Id.* (in regards to eighth graders, nicotine use went down from 35.9 percent to 24.4 percent, while alcohol use went down from 39.9 to 30 percent, and marijuana use decreased from 18.5 to 11.8 percent).

orchestra, choir, and others often require attendance to functions outside of normal school hours in order to pass the class. Although these classes can be avoided to a certain extent, meaning that these courses are in a way “voluntary,” credit is given for these classes within a school’s mandatory curriculum. Thus, a court may be persuaded that the school is using mandatory drug tests on students who did not “volunteer” for anything, and thus fail the *Vernonia* test. Undoubtedly, other factors may avoid the holding in *Earls*, but such further analysis is outside the scope of this note.

## V. CONCLUSION

The *Earls* decision ripped away Fourth Amendment protections needlessly from students in the name of the war on drugs by allowing students least likely to be drug users to be forced into mandatory drug testing. In doing so, the Court failed to apply almost any level of scrutiny on student drug testing, and laid the foundation for the drug-testing of all students by virtue only of high school enrollment.<sup>238</sup> Although attacking drug use amongst high school students is an important societal goal, constitutional rights should not be abridged because of inconvenience.

The Court also further confused the special needs doctrine. The only clear standard in special need jurisprudence was that the context of the search was critical in determining the validity of the search.<sup>239</sup> However, after the Court’s misapplication of the *Vernonia* test, the contextual aspects to be focused on are no longer clear. Additionally, if the Court misread *Vernonia* in *Earls* because of a perceived danger regarding U.S. high schools, then it missed a chance to act as the rational voice amongst the prevailing forces acting to take away rights of students.<sup>240</sup>

Although *Earls* was wrongly decided, other avenues for combating the drug problem exist. *Vernonia*, read correctly, still allows for mandatory drug testing of students in certain situations, and courts should apply an intermediate scrutiny standard so that a balance can be struck between protecting students from drugs and maintaining constitutional rights.<sup>241</sup> School districts can also enact truly “voluntary” drug testing programs to discourage drug use while teaching children that constitutional rights are important and not cast aside out of fear or because of the demands of a popular will acting on their shock and confusion rather than their reason.<sup>242</sup>

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238. See *supra* Section III(D).

239. See *supra* Section II(D).

240. See Calvert, *supra* note 222, at 740.

241. See *supra* Section IV.

242. See Calvert, *supra* note 222, at 740; see *supra* Section IV.

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