

**PLEASE REPORT TO THE PRINCIPAL'S OFFICE, URINE
TROUBLE: THE EFFECT OF *BOARD OF EDUCATION V.
EARLS*[†] ON AMERICA'S SCHOOLCHILDREN**

I. INTRODUCTION

High school students participating in extracurricular activities will lose sleep stressing about a new type of exam.¹ Not a traditional exam that tests their knowledge of math, social studies, or English, but an exam that tests their urine.²

Drug abuse among high school students is a serious problem that school officials confront everyday.³ Instead of traditional drug

[†] See *Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.* [Earls I], 115 F. Supp.2d 1281 (W.D. Okla. 2000) (allowing the school district to drug test students wishing to participate in extracurricular activities), rev'd sub nom, *Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist. No. 92 of Pottawatomie County* [Earls II], 242 F.3d 1264 (10th Cir. 2001) (finding it unconstitutional under the Fourth Amendment to require students wishing to participate in extracurricular activities to submit to suspicionless drug test), rev'd sub nom, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls* [Earls III], 536 U.S. 822 (2002) (holding public high school policy of suspicionless drug testing of students participating in extracurricular activities was reasonable and did not violate the Fourth Amendment).

1. See *Too Much Tossing and Turning?*, THE SUN HERALD, July30, 2002, available at <http://www.sunherald.com/mld/sunherald/living/3761385.htm> (discussing how teenage students do not get enough sleep on the typical school night). Studies show that most teens need about nine hours a sleep a night, but more than 25% of teens sleep fewer than seven hours. *Id.*

2. See *Earls III*, 536 U.S. at 837 (allowing school district to drug test students participating in extracurricular activities at any time during students' involvement).

3. See Dept. of Health and Human Services, *Monitoring the Future: National Results on Adolescent Drug Use, Overview of Key Findings* (2001) (discussing statistics of drug use among American children). The number of seniors in high school using any illicit drug increased from 48.4% in 1995 to 53.9% in 2001. *Id.* The number of high school seniors reporting they used marijuana increased from 41.7% to 49% in that same six year span. *Id.* In 1998, studies revealed 26% of twelfth-graders reported using illicit drugs within the last thirty days, and 22% of tenth-graders and 12% of eighth-graders reported the same. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICAS CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING (1999), available at <http://www.childstats.gov/ac1999/ac99.asp> (the most recent findings of the FIFCFS are available at <http://www.childstats.gov/>). About 34% of school children between the ages of eleven and fifteen say they have been offered drugs. David Brindle, *Society: Tempting Fate*, GUARDIAN, Aug. 2, 2000, at 5. Among youths aged 12 or 13, the rate of past month illicit drug use increased from 3% in 2000 to 3.8% in 2001. See SAMHSA'S NATIONAL SURVEY ON DRUG USE & HEALTH 2001, available at <http://www.samhsa.gov/oas/nhsda.htm#NHSDAinfo> (listing the most recent information on the prevalence, patterns, and consequences of alcohol, tobacco, and illegal

awareness programs, school officials, following the lead of the Supreme Court, are dealing with the drug problem by trampling on high school students' Fourth Amendment rights by requiring them to submit to random, suspicionless⁴ drug tests.⁵

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁶ The Fourth Amendment generally requires a warrant or existence of probable cause for a search and seizure to pass constitutional muster.⁷ However, using an analytical creation known as the "special needs" doctrine,⁸ the

drug use and abuse in the general U.S. civilian non institutionalized population, age 12 and older).

4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1890 (3d ed. 1986) (defining suspicionless as "having or showing no suspicion"). BLACK'S LAW DICTIONARY 1460 (7th ed 1999) (defining suspicion as "[t]he imagination or apprehension of the existence of something wrong based only on slight or no evidence, without definitive proof").

5. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding the school district's suspicionless drug testing program of student athletes was reasonable and, therefore, constitutional under the Fourth Amendment); *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000) (affirming the school district's policy requiring all students who wanted to participate in extracurricular activities or who wished to drive to school to submit to drug testing); *Miller ex rel. Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (upholding a school district's suspicionless drug testing policy of all students in grades seven through twelve wanting to participate in extracurricular activities); *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir. 1998) (holding that the school district's suspicionless drug testing policy requiring all students participating in extracurricular activities to be tested was constitutional under the Fourth Amendment). *But see Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 930 F.2d 915 (5th Cir. 1991) (holding random drug testing of students wishing to participate in extracurricular activities was unconstitutional under the Fourth Amendment).

6. U.S. CONST. amend. IV. The Fourth Amendment states:

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

Id.

7. *Id.* See *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602, 619 (1989) (stating a search and seizure is not reasonable unless it is accomplished using a judicial warrant issued upon probable cause); *Payton v. N.Y.*, 445 U.S. 573, 584-87 (1980) (discussing that two requirements of the Fourth Amendment, probable cause and warrant, were established by the founders of the Constitution to prevent the evils of unreasonable searches and seizures); Nancy D. Wagman, Casenote, *Are We Becoming a Society of Suspects? Vernonia School Dist. 47J v. Acton: Examining Random, Suspicionless Drug Testing of Public School Athletes*, 3 VILL. SPORTS & ENT. L.J. 325, 353 ("The Supreme Court's determination that a drug test conducted in a public school system without suspicion of any wrongdoing is reasonable and thus constitutional ignored the long standing history of the Fourth Amendment and the elements which are traditionally required for a search to be reasonable.").

8. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (defining a special need as a need of the government to discover a latent or hidden condition, or prevent the development of a hidden condition, which can only be accomplished by conducting a search without individualized suspicion); *Skinner*, 489 U.S. at 619 (stating that a special need is a need, "beyond

Supreme Court has been able to sidestep traditional Fourth Amendment requirements such as warrants, probable cause, and individualized suspicion.⁹ Instead of complying with these requirements, the Court balances the compelling interests of the government against the privacy of the individual to determine if the search is constitutional.¹⁰

In a landmark decision, the Supreme Court used the “special needs” doctrine to eliminate additional constitutional protections from schoolchildren, as previously guaranteed by the Fourth Amendment.¹¹ In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,¹² Lindsey Earls, a student in Pottawatomie school district, challenged the constitutionality, under the Fourth Amendment, of the school district’s policy requiring all students wishing to participate in extracurricular activities to submit to random

the normal need of law enforcement,” that causes the warrant and probable cause requirements to become impracticable); BLACK’S LAW DICTIONARY 1404 (7th ed 1999) (defining the special-needs analysis as “[a] balancing test used by the Supreme Court to determine whether certain searches (such as administrative, civil-based, or public-safety searches) impose unreasonably on individual rights”).

9. *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997) (discussing how the Supreme Court has in limited circumstances made exceptions to requirements of the Fourth Amendment); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (stating that the Supreme Court has recognized exceptions to the Fourth Amendment “when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable’”); *Skinner*, 489 U.S. at 619 (discussing *Griffin*); Jennifer L. Malin, *Vernonia School District 47J v. Acton: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469, 490 (1996) (discussing the Fourth Amendment’s erosion due to the Supreme Courts expanding special needs exception).

10. *Earls III*, 536 U.S. at 838 (holding suspicionless drug testing of students involved in extracurricular activities was constitutional based in part on government’s interest to deter drug use among schoolchildren); *Vernonia*, 515 U.S. at 661 (holding suspicionless drug test of student athletes was constitutional based in part on government’s interest to deter drug use among schoolchildren); *Skinner*, 489 U.S. at 628 (holding suspicionless drug test of railroad workers was constitutional based on compelling government interest in having workers operating dangerous equipment free from influence of drugs in order to reduce risk of injuries to others); *Nat’l Treasury*, 489 U.S. at 671-72 (holding suspicionless drug test of custom service agents applying for promotions was constitutional based in part on compelling government interest in safeguarding the nations borders and keeping people who carry firearms off the influence of drugs). *But see Chandler*, 520 U.S. at 319 (holding that drug testing of candidates running for political office was unconstitutional based in part on the government not having a compelling interest in keeping political candidates free from influence of drugs).

11. *See Earls III*, 536 U.S. at 838 (holding public high school policy of suspicionless drug testing of students participating in extracurricular activities was reasonable and did not violate the Fourth Amendment); Ian Messerle, Note, *Trinidad School Dist. No. 1 v. Lopez: The Fourth Amendment, Random Drug Testing, and the High School Marching Band*, 61 U. PITT. L. REV. 819, 839-41 (2000) (discussing how expanding suspicionless drug testing to all students participating in an extracurricular activity would present unfair choice between waiver of the Fourth Amendment right against unreasonable search and seizures and refusing to participate in extracurricular activities).

12. 536 U.S. at 826-27.

drug testing.¹³ The Supreme Court held that the school district's policy was constitutional and did not violate the Fourth Amendment because "special needs" exist in the public school setting that make the warrant and probable cause requirements of the Fourth Amendment impracticable.¹⁴ Therefore, the Court concluded because the government's interest in preventing drug use among schoolchildren outweighed the children's Fourth Amendment rights, the search was reasonable and not in violation of the Fourth Amendment.¹⁵

This Note analyzes the Supreme Court's recent opinion in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* and its implication for the future of the Fourth Amendment and drug testing.¹⁶ Part II of this Note documents the history and the expansion of the "special needs" doctrine, and illustrates how the doctrine has whittled away high school and middle school students' Fourth Amendment guarantees.¹⁷ Part III of this Note introduces the parties and gives a picture of the circumstances surrounding the *Earls* case.¹⁸ Part III then discusses the District Court

13. *Id.* at 827 (arguing that random drug testing of students who are not involved in athletic related extracurricular activities constituted an unreasonable search or seizure under the Fourth Amendment, and can be distinguished from the earlier holding in *Vernonia*). Plaintiffs argue specifically that the search should be based on some individualized suspicion. *Id.* at 829. The plaintiffs do not argue that the school district needs probable cause before drug testing students because the school district's policy is not related in any way to criminal investigations. *Id.*

14. *Id.* at 829-30 (citing *Vernonia*, 515 U.S. at 653 and *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985)). The Supreme Court "allowed the Tecumseh, Oklahoma School District to conduct testing of students as a means of preventing and deterring drug use." Alison Knopf, *Drugs in the Workplace*, XVI NO. 9 DRUGS IN WORKPLACE 7 (2002). The Supreme Court "held that a public school policy requiring all students who participate in competitive extracurricular activities to submit to drug testing did not violate the Fourth Amendment's guarantee against unreasonable searches." Alexander C. Black, Annotation, *Search Conducted By School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision*, 31 A.L.R.5th 229, §16.5 (2002). "The policy reasonably served the school district's important interest in detecting and preventing drug use among its students." *Id.*

15. *Earls III*, 536 U.S. at 838. See Black, *supra* note 14, at § 16.5 (stating the nationwide drug problem among school children makes the war against drugs a pressing concern in every school). The Court has already articulated in detail the importance of the government's concern of keeping students off drugs in *Vernonia*. *Id.* The health and safety risks the Court identified in *Vernonia*, apply to the students in the Tecumseh school district which justify suspicionless drug testing of students. *Id.*

16. *Earls III*, 536 U.S. at 822-855. See *infra* notes 160-67 and accompanying text.

17. See U.S. CONST. amend. IV; *infra* notes 22-50 and accompanying text. See Malin, *supra* note 9, at 490 (discussing how the Fourth Amendment is being eroded due to the Supreme Court's expanding special needs exception); Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 276-77 (2000) (claiming special needs balancing test has become little more than a judicial rubber stamp for approval of suspicionless drug tests).

18. See *infra* notes 51-101 and accompanying text.

for the Western District of Oklahoma, the Court of Appeals for the Tenth Circuit, and Supreme Court decisions in this significant case.¹⁹ Part IV scrutinizes the Supreme Court's application of the "special needs" doctrine in allowing public schools to drug test students wishing to participate in extracurricular activities.²⁰ Lastly, Part V of this Note suggests possible consequences of the Supreme Court's decision and the potential dangerous effect it will have on Fourth Amendment rights.²¹

II. BACKGROUND

In *Earls*, the Supreme Court addressed whether the Pottawatomie School District violated the Fourth Amendment of the United States Constitution by requiring all students participating in extracurricular activities to submit to suspicionless drug tests.²² A discussion of the Fourth Amendment and the evolution of the "special needs" doctrine are necessary to understand the Court's reasoning and eventual ruling.²³

A. *The Fourth Amendment*

The Fourth Amendment protects individuals from unreasonable searches and seizures of their person, houses, papers, and possessions.²⁴ An important objective of the Amendment is to protect the legitimate

19. See *infra* Part III; *Earls I*, 115 F.Supp.2d 1281 (W.D. Okla. 2000); *Earls II*, 242 F.3d 1264 (10th Cir. 2001); *Earls III*, 536 U.S. 822 (2002).

20. See *infra* notes 102-159 and accompanying text.

21. See *infra* notes 160-167 and accompanying text.

22. See U.S. CONST. amend. IV; *Earls III*, 536 U.S. at 822.

23. See Shannon O'Pry, Comment, *A Constitutional Mosh Pit: Fourth Amendment, Suspicionless Searches, and the Toughest Public School Drug Testing Policy in America*, 33 TEX. TECH L. REV. 151, 158-59 (2001) (discussing how the Fourth Amendment was created from colonists' dislike and fear of general searches in England that gave the King authority to enter merchants' property at anytime); Peter A. Veytsman, Comment, *Drug Testing Student Athletes and Fourth Amendment Privacy: The Legal Aftermath of Vernonia v. Acton*, 73 TEMP. L. REV. 295, 297 (2000) (discussing how the Framers of the Constitution drafted the Fourth Amendment in response to abuses by British soldiers using writs of assistance to conduct unnecessary searches).

24. See U.S. CONST. amend. IV. The Fourth Amendment does not apply to a search or seizure by a private party. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). The Amendment only protects against intrusions by a private party acting as an agent of the Government. *Id.* (citing *U.S. v. Jacobsen*, 466 U.S. 109, 113-14 (1984)). Whether a private party should be labeled an agent or instrument of the government under the Fourth Amendment turns on the amount of government involvement in the private party's actions. *Id.* Although the Fourth Amendment was believed for a long time only to apply to searches conducted by law enforcement officers, the Supreme Court expanded the Amendment to include searches by civil government authorities, as well. Joanna Raby, Note, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 CARDOZO L. REV. 999, 1004 (1999). Searches by civil government authorities have been termed "administrative" searches. *Id.*

expectations of privacy, dignity, and security of persons, in places where one has the right to be alone.²⁵ Traditionally, a Fourth Amendment search is deemed reasonable only if it is conducted pursuant to a warrant and based on probable cause.²⁶ However, the Supreme Court has carved out a limited number of exceptions to the general rule, which allow searches in the absence of either a warrant or probable cause.²⁷ One of the exceptions that has been applied to searches conducted in public schools is the “special needs” doctrine.²⁸

25. See *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978) and quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). The Fourth Amendment imposes standards against government officials “in order to safeguard the privacy and security of individuals against arbitrary invasions.” *Id.* “An important objective of the amendment is to protect expectations of privacy—the individual’s legitimate expectations that in certain places and at certain times he has the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.” *Wagman*, *supra* note 7, at *3 (citing *Winston v. Lee*, 470 U.S. 753, 758 (1985)). The Fourth Amendment is a safeguard for the privacy and security of individuals and gives a concrete expression to the rights of the people which are “basic to a free society.” *Raby*, *supra* note 24, at 1002-03.

26. *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasizing that “the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment”); *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (declaring that official nonconsensual search not authorized by valid warrant is unconstitutional). See *Loree L. French*, Note, *Skinner v. Railway Labor Executives' Association and the Fourth Amendment Warrant-Probable Cause Requirement: Special Needs Exception Creating a Shakedown Inspection?*, 40 CATH. U. L. REV. 117, 123 (1990) (stating that Fourth Amendment searches would traditionally only be reasonable upon issuance of warrant based on probable cause); *David Badanes*, Comment, *Earls v. Board of Education: A Timid Attempt To Limit Special Needs From Becoming Nothing Special*, 75 ST. JOHN'S L. REV. 693, 695 (2001) (discussing how in the past the Supreme Court followed a general rule that nonconsensual searches are unconstitutional if not authorized by a valid warrant or individualized suspicion).

27. See, e.g., *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding police roadblocks to check the sobriety of drivers); *Skinner*, 489 U.S. at 634 (holding drug testing of railroad workers did not violate the Fourth Amendment); *Nat'l Treasury*, 489 U.S. at 679 (holding suspicionless drug test of custom service agents applying for promotions was constitutional); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (holding temporary detainment at permanent border patrol checkpoints for questioning of motorists about citizenship and immigration status was constitutional). See *Wagman*, *supra* note 7, at 332-33 (summarizing exceptions to the warrant requirement of the Fourth Amendment).

28. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (holding that special needs exist in public schools allowing school officials to suspend traditional Fourth Amendment requirements); *Malin*, *supra* note 9, at 473 (“The Supreme Court uses the ‘special needs’ exception to uphold searches that are not based on individualized suspicion.”); *Roseann Kitson*, Note, *High School Students, You're in Trouble: How the Seventh Circuit Has Expanded the Scope of Permissible Suspicionless Searches in Public Schools*, 1999 WIS. L. REV. 851, 856 (discussing how the Supreme Court has upheld searches not meeting the two requirements of the Fourth Amendment when special needs exist).

B. The Fourth Amendment and its Application to Searches in Public Schools

New Jersey v. T.L.O. marked the first time the Supreme Court attempted to reconcile the privacy rights of students against the government's interest in maintaining an environment conducive to learning.²⁹ In *T.L.O.*, the Supreme Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applied to searches conducted by public school officials.³⁰ However, the Court went on to state that even though the Fourth Amendment does apply in the school context, the legality of searches by school officials should be assessed against a standard lower than that of probable cause because schools have a "special need" to maintain control in the classroom.³¹ The Court concluded that the level of reasonableness is one that stops short of probable cause and that school officials do not need to obtain a warrant.³² To determine the level of reasonableness of school searches,

29. *T.L.O.*, 469 U.S. at 325. See Linda Oshman, Comment, *Public School Lessons: Setting Limits on Suspicionless Drug Testing After Vernonia*, 38 HOUS. L. REV. 1313, 1318 (2001) (stating how the Supreme Court attempted to strike a balance between students' expectations of privacy at school and schools' interest in a strong learning environment).

30. *T.L.O.*, 469 U.S. at 333. It has been held that school officials are state actors when it comes to not being able to deprive students of their constitutional guarantee of freedom of expression under the First Amendment, so therefore it does not make sense that school officials would not be considered state actors when conducting searches of students. *Id.* at 336. "In carrying out searches and other disciplinary functions, school officials act as representatives of the State, not merely as surrogates of parents," being able to claim immunity from the Fourth Amendment requirements. *Id.*

31. *Id.* at 340 (recognizing that the school setting requires easing of the Fourth Amendment restrictions that government agents are required to follow); Michael Book, *Group Suspicion: The Key to Evaluating Student Drug Testing*, 48 U. KAN. L. REV. 637, 643 (2000) (stating how the Supreme Court discussed the special needs of public school officials in maintaining order and discipline is important to justify relaxing the Fourth Amendment requirements). *But see* J. Bates McIntyre, Note, *Empowering Schools to Search: The Effect of Growing Drug and Violence Concerns on American Schools*, 2000 U. ILL. L. REV. 1025, 1049 (2000) (discussing how suspicionless drug testing may not create an environment conducive to learning, but teaches students that order and discipline is more important than individual constitutionally protected rights).

32. *T.L.O.*, 469 U.S. at 340 (stating in particular that the warrant requirement is deficient in the school setting because school officials need to take fast disciplinary action). Forcing teachers or other school officials to obtain a warrant before searching a student suspected of violating school rules would frustrate the purpose behind the search. *Id.* The need of teachers to maintain order in school does not require strict adherence to requirement of probable cause. *Id.* at 341. The legality of a search of students should depend on reasonableness and not traditional standards of probable cause. *Id.* "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* at 341. "By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the

the students' legitimate expectations of privacy must be balanced against the government's need for having an effective method to maintain an environment conducive to learning.³³ Consequently, reasonable suspicion replaced probable cause as the level of evidence necessary to pass constitutional muster, and opened the door to suspicionless searches in schools.³⁴

C. Expansion of the Special Needs Doctrine: Suspicionless Drug Testing of Student Athletes

In *T.L.O.*, the Supreme Court left unanswered the question of whether individualized suspicion was an indispensable element of the reasonableness standard required for searches conducted by school officials.³⁵ However, the Supreme Court wrestled with this question in *Vernonia School District 47J v. Acton*, and held that random drug testing of student athletes did not violate the Fourth Amendment.³⁶ The

necessity of schooling themselves in the niceties of probable cause. . . ." *Id.* at 343. The court created the special needs doctrine because the traditional Fourth Amendment requirements are not well suited for searches in a school setting when trying to discipline students. Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241, 246-47 (1998).

33. *T.L.O.*, 469 U.S. at 340 (stating in particular that the warrant requirement is deficient in the school setting because school officials need to take fast disciplinary action). Forcing teachers or other school officials to obtain a warrant before searching a student suspected of violating school rules would frustrate the purpose behind the search. *Id.* The need of teachers to maintain order in school does not require strict adherence to requirement of probable cause. *Id.* at 341. The legality of a search of students should depend on reasonableness and not traditional standards of probable cause. *Id.* "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* at 341. "By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause. . . ." *Id.* at 343. The court created the special needs doctrine because the traditional Fourth Amendment requirements are not well suited for searches in a school setting when trying to discipline students. Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241, 246-47 (1998).

34. *Id.* at 354 (Brennan, J., dissenting) (explaining how a reasonableness standard is not the same test as the probable cause standard found in Fourth Amendment). Oshman, *supra* note 29, at 1318 (stating the level of evidence necessary to conduct a search in the public school setting changed from probable cause to reasonable suspicion). The decision in *T.L.O.* opened the door for suspicionless school searches. *Id.*

35. *T.L.O.*, 469 U.S. at 342, n.8 ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."); Neal H. Hutchens, Commentary, *Suspicionless Drug Testing: The Tuition for Attending Public School*, 53 ALA. L. REV. 1265, 1269 (2002) (stating the Supreme Court did not answer whether school searches conducted without individualized suspicion would not violate the Fourth Amendment).

36. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995). See Anne Proffit Dupre,

Supreme Court relied on its reasoning in *T.L.O.*, where it held “special needs” exist in the public school context, which call for a narrowing of the Fourth Amendment requirements.³⁷ The Court noted that the *T.L.O.* decision was based on individualized suspicion, but reconciled this difference by pointing to cases where suspicionless searches involving drug tests were held constitutional.³⁸

Subsequently, the Supreme Court used a balancing test as a guide in determining whether searches conducted by school officials, notwithstanding a lack of individualized suspicion, were reasonable.³⁹ The Court stated that reasonableness should be assessed by balancing the strength of the student’s privacy interest guaranteed by the Fourth Amendment against legitimate governmental interest in conducting the search.⁴⁰ The factors the Supreme Court used to measure the strength of the student’s privacy interest were: (1) the nature of the privacy interest upon which the search intrudes, and (2) the character of the complained

Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 GEO. WASH. L. REV. 49, 57 (1996) (discussing how the Supreme Court failed to decide a question that it would later deal with in *Acton*: whether individualized suspicion was necessary for a school search).

37. *Vernonia*, 515 U.S. at 653 (emphasizing that the Supreme Court in *New Jersey v. T.L.O.* found special needs exist in the public school context that make the warrant and probable cause requirements impracticable meeting the warrant requirement of the Fourth Amendment). Mandating school officials to meet the warrant requirement would “unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed” in the school context. *Id.* Strict adherence to Fourth Amendment requirement that all searches be based on probable cause would make ineffective the need of school officials to have the power to maintain order at school. *Id.* See Jon Eskelsen, Note, *How Random and Suspicionless May School Searches Be?: Doubting Joy v. Penn-Harris-Madison School Corporation*, 2001 B.Y.U. EDUC. & L. J. 343, 348 (2001) (explaining how *Vernonia* continued where *T.L.O.* left off by applying “special needs” that exist in school context to random drug testing of student athletes); Jennifer E. Smiley, Note, *Rethinking the “Special Needs” Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 821-22 (2001) (stating the Supreme Court referred to its decision in *T.L.O.* and “made a blanket determination” that a special need existed in public schools and focused its analysis on whether the *Vernonia* policy met the reasonableness standard and the Fourth Amendment).

38. *Vernonia*, 515 U.S. at 653 (explaining how even though the search approved in *T.L.O.* was based on individualized suspicion, the Court made a point in *T.L.O.* to acknowledge the Fourth Amendment “imposes no irreducible requirement of individualized suspicion”). The Court went on to note it has upheld suspicionless searches and seizure to conduct drug tests of railroad workers, in *Skinner*, 489 U.S. at 602, and random drug testing of federal customs agents who carry guns or are involved in preventing drug trafficking, in *Nat’l Treasury*, 489 U.S. at 656. *Id.*

39. *Vernonia*, 515 U.S. at 652-53 (discussing that in a case where no standard exists either approving or disapproving the type of search involved reasonableness is measured by using a balancing test).

40. *Id.* Justice Scalia stated that “whether a particular search meets the reasonableness standard is ‘judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’” *Id.* (citing *Skinner*, 489 U.S. at 619; quoting *Prouse*, 440 U.S. at 654).

of intrusion.⁴¹ The Court stated that since the nature of school officials' power over students is "custodial and tutelary," students have a lesser expectation of privacy while at school.⁴² These legitimate privacy expectations are even smaller for athletes because there is "an element of communal undress inherent in athletic participation."⁴³ The Court then reasoned that since the drug testing procedures presented conditions "nearly identical to those typically encountered in public restrooms," the nature of the intrusion was negligible.⁴⁴

41. *Id.* at 654-660. See Denise E. Joubert, Note, *Message in a Bottle: The United States Supreme Court Decision in Vernonia School District 47J v. Acton*, 56 LA. L. REV. 959, 973 (1996) (discussing how the Court elucidated two factors to look at to determine the impact of the search on the students' privacy expectations). The first factor is the scope of the student's expectation of privacy or the nature of the interest on which the search intrudes, and the second factor is the character of the intrusion. *Id.* at 974. See Sherri L. Toussaint, Note, *Something is Terribly Wrong Here: Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995), 75 NEB. L. REV. 151, 156 (1996) (stating, "[t]he factors the Supreme Court evaluated in weighing the students' Fourth Amendment interests included the students' expectations of privacy and the character of the intrusion itself").

42. See *Vernonia*, 515 U.S. at 655-57 (discussing why students in general have lesser expectations of privacy). School officials stand *in loco parentis* over children while at school and hold a portion of the power of the child's parent. *Id.* at 655. Even though the State's power over students is not equal to that of a parent, the nature of the power is higher than that which could be exercised over adults. *Id.* (citing *T.L.O.*, 469 U.S. at 339). See also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (discussing that, for limited purposes, school officials act *in loco parentis*); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that even though students do not "shed their constitutional rights. . . at the school house gate," the extent of their rights is only what is appropriate for children at school); Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77, 85 (1999) (discussing three interpretations of children's constitutional rights given the fact that children are always under the control of either their parents or the State). The Supreme Court has been struggling with the dilemma of whether children are considered persons with fundamental rights that the State must respect, or if they to be regarded as human beings who are always in some form of custody. *Id.* at 80. A useful approach to help solve this dilemma is to distinguish between having a right and enjoying that right, because a person may have a constitutional right but the enjoyment of that right might be postponed comparable to a future interest in property law. *Id.* at 85.

43. See *Vernonia*, 515 U.S. at 657 (internal citations and quotations omitted). Student athletes in particular have a lesser expectation of privacy compared to the student population in general. *Id.* The majority opinion stated, "[s]chool sports are not for the bashful," and require "suiting up before each practice or event, and showering and changing afterwards." *Id.* Public school locker rooms where the suiting up and showering occur do not afford much privacy. *Id.* By going out for the team, athletes reduce their expectation of privacy because they are subjected to more regulations than the average student. *Id.* This reasoning is comparable to the reasoning in *Skinner* where adults who choose to work in a closely regulated profession should expect intrusions into normal rights. *Id.*

44. *Vernonia*, 515 U.S. at 658. Collecting a urine sample intrudes into an excretory function that is generally regarded as highly private. *Id.* (citing *Skinner*, 489 U.S. at 626). However, the degree of the intrusion depends on the way in which the urine sample is monitored while being produced. *Id.* See Jason J. Bach, *Students Without Rights: The Elimination of Constitutional and*

The factors the Supreme Court used to measure the strength of the governments interest in conducting the search were: (1) the nature of the governmental concern at issue, and (2) the immediacy of the government's concern.⁴⁵ The Court stated that the nature of the concern had to be "important enough" to justify a suspicionless search, and found that deterring drug use by our nation's schoolchildren is undoubtedly important enough.⁴⁶ Finally, in analyzing the immediacy of the concern, the Court noted that drug abuse was escalating in the school district and the drug problem was largely "fueled by" the role model status of student athletes who used drugs.⁴⁷

Civil Rights, as they Apply to Minors, 1 NEV. LAW. 19, 22 (stating that he personally has never forgotten the strip search he was subjected to while he was in high school, so he can relate to how humiliating a drug test is for students); Badanes, *supra* note 26, at 715 (discussing how forcing students to urinate on demand for a drug test causes student to suffer from stress). Ordinarily students urinate because their body tells them to, not because a school districts policy insists the student do so on demand. *Id.* at 716. See Katharine J.M. Chester, Note, *Is Random Suspicionless Drug Testing in the Schools Reasonable? An Analysis of Vernonia School District 47J v. Acton*, 22 N.C. CENT. L.J. 230, 241-247 (1996) (discussing how urination is intensely private to individuals and how schools can perform their important tasks within the boundaries of the Fourth Amendment); Amanda L. Harrison, Comment, *Urinating on the Pennsylvania Constitution? Drug Testing of High School Athletes and Article I, Section 8 of the Pennsylvania Constitution*, 104 DICK. L. REV. 379, 403 (2000) (discussing how compulsive urinalysis has been recognized as a very invasive procedure).

45. See *Vernonia*, 515 U.S. at 660-64 (stating that the final factor to be evaluated is the nature and immediacy of the governmental concern at issue in the case); Eskelsen, *supra* note 37, at 348 (discussing how the Court articulated the factors to be used when evaluating the governments interest is the nature and immediacy of the governmental concern).

46. *Vernonia*, 515 U.S. at 661 (discussing how deterring drug use among students is at least, if not more, important than the government's concern in other cases where suspicionless drug testing was upheld). Schools where drug use is prevalent not only have a negative impact on the users, but on the entire student body and faculty because the educational process is disrupted. *Id.* at 662. Drugs present a substantial physical risk to athletes in particular; . . . marijuana, for example, causes "reduction in the oxygen-carrying capacity of the blood," and "inhibition of the normal sweating responses resulting in increased body temperature." *Id.* (citing Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance*, in H. Appenzeller, *Managing Sports and Risk Management Strategies* 90, 94 (1993)). See also Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 PHI DELTA KAPPA 310, 314 (1990) (discussing dangerous effects drugs can have on children). School years are the time when the physical, psychological, and addictive effects of drugs are most severe. *Id.* See also Todd W. Estroff, et al., *Adolescent Cocaine Abuse: Addictive Potential Behavioral, and Psychiatric Effects*, 28 CLINICAL PEDIATRICS 550 (1989) (discussing effects that drugs can have on adolescents); Denise B. Kandel, et al., *The Consequences in Young Adulthood of Adolescent Drug Involvement*, 43 ARCH. GEN. PSYCHIATRY 746 (1986) (discussing effects that drugs can have on adolescents).

47. *Vernonia*, 515 U.S. at 663 (discussing how drug use among the students was increasing because the student body looked up to student athletes who were drug abusers themselves). The immediacy of the concern is of greater magnitude than existed in *Skinner*, where the government's drug testing program of railroad workers was upheld. *Id.*; *Skinner*, 489 U.S. at 602. But see Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care If Athletes Inhale?*, 8 MARQ. SPORTS L.J. 75, 87-89 (discussing whether a person's status as an athlete should subject him/her to greater

The Court, taking into account all the factors above, concluded that Vernonia's suspicionless drug testing policy was reasonable and hence constitutional.⁴⁸ However, the Court warned against the assumption that suspicionless drug testing will be held constitutional in other cases, and emphasized the most significant element weighing in the decision of the case was the government's responsibilities as a guardian and tutor of the children.⁴⁹ This warning set the stage for school districts across America to stretch the ruling in *Vernonia* to its limits, and became the topic of litigation in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.⁵⁰

scrutiny for drug use).

48. *Vernonia*, 515 U.S. at 664-65 (stating, "[t]aking into account all the factors we have considered—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's policy is reasonable and hence constitutional[]").

49. *Vernonia*, 515 U.S. at 665 (cautioning against the assumption that all suspicionless drug testing will pass "constitutional muster"). When the government acts as a guardian and tutor in the school context, the relevant question is whether the intrusion complained of is one "that a reasonable guardian and tutor might undertake." *Id.* The question in the employment arena is whether the invasion into privacy is one in which a reasonable employer might engage. *Id.*

50. *Earls III*, 536 U.S. 822 (2002). See Cobby A. Caputo, *Public Schools and Drug Testing: What's Next?*, 18 TEX. LAW. 24 (August 19, 2002) (discussing how after *Vernonia*, many school districts implemented suspicionless drug testing of all students, and the expansion led to the most recent constitutional challenges). Some school districts have implemented policies that encompass students in non-athletic extracurricular activities, while other schools have strictly followed the ruling in *Vernonia*. Oshman, *supra* note 29, at 1341 (discussing how the ruling in *Vernonia* has allowed lower courts and school districts to "adopt a broadstroke reading" of the Supreme Court's holding). The state of affairs after the Supreme Court's decision demands clarification because lower courts have engaged in a case-by-case determination of which students can be randomly tested under the *Vernonia* standard. *Id.* After the decision in *Vernonia*, schools have undertaken programs that spread beyond athletes to include all students wishing to participate in extracurricular activities. Amanda E. Bishop, Note, *Students, Urinalysis & Extracurricular Activities: How Vernonia's Aftermath is Trampling Fourth Amendment Rights*, 10 HEALTH MATRIX 217, 218 (2000) (discussing drug testing programs implemented after *Vernonia*). After *Vernonia*, the question became what else schools can do under the Supreme Courts holding. *Id.* See Nathan Roberts & Richard Fossey, *Random Drug Testing of Students: Where Will the Line be Drawn?*, 31 J.L. & EDUC. 191 (analyzing post *Vernonia* decisions that are in conflict regarding if student drug testing policies that go beyond testing student athletes are constitutional under the *Vernonia* standards); 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, 963-66 (2002) (analyzing court decisions that have interpreted *Vernonia* to allow suspicionless drug testing beyond athletes).

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

On September 14, 1998, the Tecumseh Public School District adopted a Student Activities Drug Testing Policy ("Policy").⁵¹ The Policy required all high school and middle school students who participated in extracurricular activities to submit to suspicionless drug testing.⁵² Each student wishing to participate in any extracurricular activity was required to sign a written consent agreeing to submit to random drug testing prior to participating in the extracurricular activity, to submit to random drug testing while participating in that activity, and to agree to be tested at any time while participating upon reasonable suspicion.⁵³ The urinalysis tests were designed to detect only illegal drugs.⁵⁴

The actual testing process is as follows: (1) students to be tested are called out in groups of two or three students, (2) the students go to the restroom and a faculty monitor waits outside the closed stall door while the student produces his/her urine sample, and (3) the student signs a form which is placed in a mailing pouch together with the filled urine vials.⁵⁵

51. *Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.* [*Earls I*], 115 F. Supp.2d 1281, 1282 (W.D. Okla. 2000). The Board of Education of Tecumseh School District and Tecumseh Public Schools, operate the school and are in charge of establishing and implementing policies. *Id.*

52. *Id.* The Policy as originally proposed extended to only students participating in athletic competition, but was then expanded to cover all extracurricular activities. *Id.* at 1283, n.2. In practice the Policy has only been applied to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls* [*Earls III*], 536 U.S. 823, 826 (2002). These competitive extracurricular activities include the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics. *Id.*

53. *Earls I*, 115 F. Supp.2d at 1283. The students and their families are charged an annual fee of four dollars for participation in the drug testing program. *Id.* The defendants allege that the four-dollar fee would be waived for students who could not afford it. *Earls I*, 115 F. Supp.2d at 1283, n.4. The vast majority of students in the school district participate in one or more school sponsored activity. *Id.* at 1282.

54. *Earls III*, 536 U.S. at 826. The illegal drugs tested for include amphetamines, marijuana, cocaine, opiates, and barbiturates. *Id.* The urinalysis tests were not supposed to test for medical conditions or the presence of authorized medical prescriptions. *Id.* Upon reasonable suspicion, students may be tested for other substances the policy identifies, such as alcohol and anabolic steroids. *Earls I*, 115 F. Supp.2d at 1283, n.3.

55. *Earls I*, 115 F. Supp.2d at 1291, n.35. The Policy stated the urine specimen should be collected in a restroom or other private bathroom facility behind a closed stall. *Id.* The principal or athletic director designates a school official of the same sex as the student to accompany the student to the stall, and observe the student while the specimen is being produced. *Id.* The monitor stands

The plaintiffs, Lindsey Earls and Daniel James, were students at Tecumseh High School, and were actively involved in extracurricular activities.⁵⁶ The two students brought suit against the Tecumseh School District alleging that the Policy violated their Fourth Amendment⁵⁷ rights as incorporated by the Fourteenth Amendment⁵⁸ and requested injunctive and declaratory relief.⁵⁹ The student plaintiffs and their parents challenged the provisions of the Policy which require random suspicionless drug testing of students participating in non-athletic activities.⁶⁰ The plaintiffs further alleged that the school district failed to identify a special need for testing students who participated in non-athletic extracurricular activities, and that the drug testing Policy neither addressed a proven drug problem in the Tecumseh school district nor assured the Policy would benefit the students or the school.⁶¹

outside the stall and listens for the normal sounds of urination to make sure the specimen is not tampered with. *Id.* The monitor then takes the specimen and checks it in the student's presence to verify the warmth and appearance of the specimen. *Id.* at 1291 n.39. The results of the urinalysis are not given to police and there is no academic sanction imposed. *Earls v. Bd. of Educ. of Tecumseh Sch. Dist. No. 92 of Pottawatomie County [Earls II]*, 242 F.3d 1264, 1268 (10th Cir. 2001). Random drug testing using these procedures occurred on eight occasions during the previous school year. *Id.* at 1267-68.

56. *Earls I*, 115 F. Supp.2d at 1282. Lindsey Earls was a member of the Tecumseh High School show choir, the marching band, the academic team, and the National Honors Society. *Earls III*, 536 U.S. at 826. Daniel James was seeking to participate in the academic team for the 1999-2000 school year. *Id.* The Board of Education and the Tecumseh Public Schools presented the district court with allegations concerning Daniel James' standing to sue because he had failing grades that made him ineligible to participate in any competitive extracurricular activity. *Earls I*, 115 F. Supp.2d at 1282, n.1. The Plaintiffs argue that Daniel James' failing grades were the result of an unreasonable suspension from school. *Id.* The district court stated there was no evidence that Lindsey Earls lacked standing to litigate and therefore the court must reach the merits of the Plaintiff's constitutional claim. *Id.*

57. *See* U.S. CONST. amend IV. *California v. Minjares*, 443 U.S. 916, 921 (1979) (stating "the Fourth Amendment [is] applicable to the States by incorporation through the Fourteenth Amendment"); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (stating the Fourth Amendment's right of privacy is enforceable against the states through the due process clause).

58. *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

59. *Earls III*, 536 U.S. at 827.

60. *Earls I*, 115 F. Supp.2d at 1283. The Plaintiffs did not challenge the Policy as it applies to the random suspicionless drug testing of students participating on athletic teams or insofar as it requires drug testing of all students upon reasonable, individualized suspicion. *Earls I*, 115 F. Supp.2d at 1283, n.6.

61. *Earls III*, 536 U.S. at 827. Plaintiffs argue the existence of a special need is a threshold

B. The District Court for the Western District of Oklahoma

The district court rejected the students' claim that the drug testing policy was unconstitutional and granted summary judgment in favor of the defendant school district.⁶² First, the court rejected the plaintiffs' argument that the defendants needed to show a severe and immediate drug problem in the school district, similar to the problem that existed in *Vernonia*, to demonstrate a "special need" justifying a drug testing policy.⁶³ Next, the court employed the factors enumerated in *Vernonia* to determine whether the drug testing policy constituted a reasonable search under the Fourth Amendment.⁶⁴ Looking to the first factor, the court found that the privacy interests to be protected were "diminished by virtue of the Plaintiffs' position as children in a public school setting" and the voluntaries of participating in extracurricular activities.⁶⁵

test under the Tenth Circuit's decision in *19 Solid Waste Dept. Mechs. v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998), and that the school district failed to demonstrate that a drug problem existed among the students to be tested, so no special need existed. *Earls II*, 242 F.3d at 1269-70.

62. *Earls I*, 115 F. Supp.2d at 1296. Summary judgment is required when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of informing the court of the basis of its motion and identifying the matter it believes demonstrates the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies this initial burden, the nonmoving party must identify specific facts showing there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e).

63. *Earls I*, 115 F. Supp.2d at 1284-85. Plaintiffs point out that, in approving the drug testing policy in *Vernonia*, the Supreme Court stressed the severity and immediacy of the drug problem the school district faced. *Id.* at 1284. The district court stated it did not think the opinion in *Vernonia* was limited to "circumstances where the drug problem had reached such magnitude." *Id.* at 1285.

In determining whether Defendants have demonstrated a 'special need' sufficient to justify suspicionless drug testing, the Court does not focus solely upon evidence of actual use or possession of illegal drugs by students . . . but such other factors as the cultural or social atmosphere in which students spoke openly of illegal drug use . . . phone calls to school board members from parents; and the plea of a concerned mother . . .

Id. at 1286. While the evidence in this case does not show a drug problem as severe as *Vernonia*, it definitely shows a legitimate cause for concern. *Id.* at 1287.

64. See *Earls I*, 115 F. Supp.2d at 1288-1296 (discussing every factor in the *Vernonia* analysis as it applies to the circumstances in the present case).

65. *Earls I*, 115 F. Supp.2d at 1296. The court relied on the reasoning set forth in *Vernonia* stating that simply being a student in a public school automatically creates a lowered expectation of privacy. *Id.* at 1289-90. Similar to students in athletic programs, students participating in non-athletic extracurricular activities will be subjected to additional rules and regulations that do not apply to the student body as a whole, and thus these students' privacy expectations are diminished further. *Id.* The district court clarified that the nature of communal dress and undress engaged by students involved in extracurricular activities was of minor importance, even though discussed in *Vernonia*. *Id.* The decision in *Vernonia* does not imply that only athletes' legitimate expectation of privacy is diminished among public school students. *Id.* The most important element of *Vernonia* was that the policy was furthering the government's responsibilities as guardian and tutor of

Analyzing the second factor, the court stated that the character of the intrusion was minimal.⁶⁶ Finally, the court found that the Policy was effective in addressing the special governmental concern of preventing drug use by school children entrusted to its care.⁶⁷ Accordingly, the district court concluded that Tecumseh's drug testing policy constituted a reasonable search, and therefore was permissible under the Fourth Amendment.⁶⁸

C. *The Court of Appeals for the Tenth Circuit*

On appeal, the Tenth Circuit reversed the district courts decision.⁶⁹ The Tenth Circuit agreed that the district had demonstrated a "special need" permitting a relaxing of Fourth Amendment requirements,⁷⁰ but concluded that the Tecumseh policy was unconstitutional based upon the factors set forth in *Vernonia*.⁷¹ Looking at the first factor, the Tenth

children, and not the exclusive application to student athletes, which the *Vernonia* court found central to its analysis. *Id.* at 1289 n.31.

66. *Earls I*, 115 F. Supp.2d at 1295. The court noted that the testing procedure was almost identical to the one in *Vernonia*, where the Supreme Court held the character of the intrusion negligible. *Id.* at 1291. The setting and condition is identical to those typically encountered in public restrooms. *Id.* The school district Policy contains an express provision to ensure confidentiality of prescription drug information and the results of the tests, and absent evidence indicating actual breach of privacy concerning these matters, the court will not assume the worst. *Id.* at 1294-95.

67. *Earls I*, 115 F. Supp.2d at 1295. The Supreme Court's decision in *Vernonia* does not require the school district to target students most likely to use drugs. *Id.* The drug problem among the entire student body is "effectively addressed by making sure that the large number of students participating in competitive extracurricular activities do not use drugs." *Id.*

68. *Earls I*, 115 F. Supp.2d at 1296.

69. *Earls II*, 242 F.3d at 1279. The students argued that the Supreme Court's ruling in *Chandler v. Miller*, 520 U.S. 305 (1997), required courts to first decide whether the school has established the existence of a special need before the court balances the students privacy interest against the government's interest. *Id.* at 1269. In deciding if the government has established a special need, courts need to inquire, (1) whether the government's concerns are "real" by asking if the drug testing program was adopted due to a documented drug abuse problem or whether drug abuse by the group to be tested would pose a danger to the public, and (2) whether the drug testing met the goals of detection and deterrence. *19 Solid Waste Dept. Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1073 (10th Cir. 1998).

70. *Earls II*, 242 F.3d at 1270 (discussing how the Supreme Court explicitly stated in *Vernonia* that "special needs" exist in the public school context making adherence to the Fourth Amendment requirements impractical). "Whether or not the Supreme Court has raised the bar in other contexts, we must assume, until the Court directs us otherwise, that the analysis in *Vernonia* governs . . .". *Id.* Even if the Tenth Circuit agreed with plaintiff that the *Chandler* decision raised the bar to find a special need in the school context, the Tecumseh School District has still demonstrated a special need. *Id.* at 1270, n.4.

71. *Id.* at 1272 (discussing how applying the *Vernonia* factors to the Tecumseh Policy results in a different conclusion). Before engaging in analysis of the three factors set forth in *Vernonia*, the Tenth Circuit noted that evidence of drug use among students subjected to the Tecumseh Policy was

Circuit agreed with the district court that participants in non-athletic extracurricular activities have a somewhat lesser expectation of privacy.⁷² The Tenth Circuit also agreed with the district court that the character of the intrusion was not significant.⁷³ However, the Tenth Circuit stated the nature and immediacy of the government's concern was lacking, which tipped the balancing decidedly toward the plaintiffs.⁷⁴ Accordingly, the Tenth Circuit concluded that Tecumseh's

far from epidemic, which differentiated the case from *Vernonia*. *Id.* at 1272.

72. *Earls II*, 242 F.3d at 1276. The Tecumseh School District argued that students participating in extracurricular activities have reduced privacy expectations because: (1) they voluntarily participate, (2) travel out of town where they share sleeping quarters and use communal bathrooms, and (3) they agree to follow additional rules set by the District and the OSSAA. *Id.* at 1275. The Tenth Circuit stated the most significant factor in its decision was that students in extracurricular activities subject themselves to additional rules and regulations. *Id.* An additional rule "inevitably requires that their personal freedom to conduct themselves is, in some small way, constrained at least for some time." *Id.* at 1276. The Tenth Circuit stated that voluntary participation without more should not reduce a student's privacy expectation in his/her bodily fluids by stating most members of society voluntarily engage in activities and do not suffer reduced privacy expectations. *Id.* at 1276. The Tenth Circuit declined to give much weight to the School District's argument concerning communal undress because they doubted the Supreme Court intended students privacy expectations to rest upon the degree the student showers or dresses with other students. *Id.* at 1275.

73. *Id.* In *Vernonia*, the student entered an empty locker room with a same sex adult monitor, produced a urine sample at a urinal or a stall, and the monitor listened for normal sounds of urination. See *Vernonia*, 515 U.S. at 650 (discussing the testing procedure in *Vernonia*). The only difference between the testing procedures was under Tecumseh's Policy male students produce sample behind closed stall doors. See *Earl I*, 115 F. Supp.2d at 1291, n.35 (explaining the testing procedures in *Earls*).

74. *Earls II*, 242 F.3d at 1276. The Tenth Circuit noted that the government's interest in deterring drug use among students is very important, but pointed out in *Vernonia* the Supreme Court emphasized the particular physical danger to athletes using drugs. *Id.* The Tenth Circuit acknowledged the immediacy of the government's concern was wanting given the lack of evidence of a drug abuse problem among the students to be tested and cautioned that unless school districts are required to demonstrate an identifiable drug abuse problem among a sufficient number of students in the group to be tested, schools could perceivably test any and all students regardless of suspicion. *Id.* at 1277-78. There is no line at which one could say a drug abuse problem is severe enough to warrant suspicionless drug testing. *Id.* To ensure drug testing will redress the perceived drug problem, a school district seeking to impose a suspicionless drug testing policy must demonstrate an identifiable drug abuse problem among a sufficient number of students in the group to be tested. *Id.* See Book, *supra* note 31, at 650-53 (discussing how courts should use group suspicion but also have to demonstrate that an actual or imminent problem exists within the group for the drug test to be constitutional); Charles W. Chotvacs, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 DENV. U. L. REV. 331, 347 (2002) (mentioning if school districts do not have to demonstrate a perceivable problem before implementing suspicionless drug testing policies, their ability to invade upon the rights of students would be limitless); Zachary A. Bultuis, Note, *Suspicionless Drug Testing By Public Actors: How Chandler v. Miller Should Change the Standard*, 74 S. CAL. L. REV. 1549, 1576-77 (2001) (discussing how efforts by the Supreme Court to curb drug abuse by suspicionless drug testing is means to achieve social control, and how suspicionless drug tests should only be used where there is real danger, not symbolic). The Tenth Circuit stated

drug testing Policy was unconstitutional under the Fourth Amendment.⁷⁵

D. *The United States Supreme Court*

1. Majority Opinion

The Supreme Court, with a five-justice majority, reversed the Tenth Circuit Court of Appeals decision.⁷⁶ Applying the principles in *Vernonia* to the somewhat different facts presented in *Earls*, the Court concluded that the Tecumseh policy did not violate the Fourth Amendment.⁷⁷

Considering first the nature of the privacy interest alleged, the Supreme Court concluded that students participating in extracurricular activities have a diminished expectation of privacy.⁷⁸ The Supreme Court rejected the plaintiffs' argument that students participating in non-athletic extracurricular activities have stronger privacy expectations

that without evidence of drug abuse among the target group of students, the usefulness of the Policy to the perceived problem is diminished. *Earls II*, 242 F.3d at 1276. The Tenth Circuit rejected the School District's argument that students engaged in non-athletic extracurricular activities who use drugs are exposed to the same type of physical harm as athletes who use drugs. *Id.* at 1277. The School District also argued the degree of supervision is a sufficient reason for testing because all extracurricular students are subjected to less supervision than ordinary students in the classroom. *Id.* The Tenth Circuit rejected this argument stating the argument created an imperfect match between the need to test and the students tested because many students not participating in extracurricular activities are less supervised while at lunch than in the classroom. *Id.* at 1278.

75. *Earls II*, 242 F.3d at 1278 (applying all the factors enumerated in *Vernonia*, the testing Policy was unconstitutional). The court of appeals agreed with the district court that the drug testing policy should be evaluated by taking into consideration the uniqueness of the school setting. *Id.* at 1270. In its holding, the Tenth Circuit stressed that its decision should not be interpreted as requiring a school to wait until it identifies a drug abuse problem of "epidemic proportions." *Id.* at 1278.

76. Board of Education of Independent School District No. 92 of Pottawatomie County v. *Earls* [*Earls III*], 56 U.S. 822 (2002). Justice Thomas delivered the opinion of the Court, in which Justices Rehnquist, Scalia, Kennedy, and Breyer joined. *Id.* at 824. Justice Breyer filed a separate concurring opinion stressing certain factors the Court relied on when making its decision. *Id.*

77. *Id.* at 830 (discussing the major differences as the non extracurricular activities to be regulated in *Earls* did not require regular physicals or communal undress). Furthermore, the Tecumseh schools had not identified a drug problem as severe and pronounced as the one that existed in the *Vernonia* school district. *Id.* at 836. There was also evidence that demonstrated the Tecumseh school district had been careless in keeping the students' test results and information gathered during the testing confidential. *Id.*

78. *Id.* at 830-32 (discussing reasons students in extracurricular activities have diminished expectations of privacy). Every student's privacy interests are limited in the public school environment because the State acts as guardian and tutor of children entrusted to its care. *Id.* at 830 (citing *Vernonia*, 515 U.S. at 665). The Court by way of example discussed that because the State is responsible for maintaining discipline, health, and safety, it requires students to routinely submit to physical examinations to test for disease. *Id.* at 830-31 (citing *Vernonia*, 515 U.S. at 656).

because they are not subject to regular physical and communal undress as were the *Vernonia* athletes.⁷⁹ The Court stated that, “this distinction, however, was not essential in *Vernonia*.”⁸⁰ Next, the Court analyzed the nature of the intrusion imposed by the Tecumseh policy and concluded that the method of collection was a negligible intrusion.⁸¹ The plaintiffs argued that the intrusion was significant because the Policy failed to effectively protect against the confidential information being disclosed to unauthorized school officials.⁸² The Court rejected this argument acknowledging the school Policy provided adequate precautions and stated, “one example of alleged carelessness hardly increases the character of the intrusion.”⁸³ Finally, in considering the nature and immediacy of the government’s concern and the efficacy of Tecumseh’s policy in redressing them, the Court concluded the government’s

79. *Id.* at 831 (discussing how the plaintiffs attempted to distinguish its case from the facts of *Vernonia* premised on degree of communal undress associated with the different extracurricular activities). In plaintiffs’ brief they discuss how students in the choir are able to change in and out of their choir uniforms on the school bus without being nude unlike athletes who completely disrobe in locker rooms. See Brief for Resp’t at 20, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, No. 01-332 (2002).

80. *Id.* at 831. “In upholding the drug testing program in *Vernonia*, we considered the school context ‘central’ and ‘the most significant element.’” *Id.* at 831 n.3. The hefty weight given to the school being a guardian and tutor of children entrusted in its care applies with similar force in this case. *Id.* Even if the court accepted the students’ distinction regarding communal undress and privacy expectations, the students’ expectations of privacy are alone limited by participating in extracurricular activities. *Id.* at 832. By participating in extracurricular activities students voluntarily agree to adhere to additional rules and requirements that do not apply to the student body as a whole. *Id.*

81. *Id.* at 832. The court noted that urination is an excretory function that has generally been equated with great privacy. *Id.* (citing *Skinner*, 489 U.S. at 626). The degree of intrusion in collecting urine samples depends on the way the urinalysis is conducted. *Id.* The procedure of collecting urine in *Earls* is nearly identical to the procedure used in *Vernonia*, which was previously stated as a negligible intrusion. *Id.* The method of collecting urine in *Earls* additionally protected the students privacy by allowing male students to produce their urine sample behind a closed stall door instead of an urinal. *Id.* at 833.

82. *Id.* at 833. The students specifically state that the school had been careless in protecting personal information obtained as a result of the testing. *Id.* As an example, the students claim the Choir teacher looked at students’ prescription drug list and left the list exposed allowing other students to look. *Id.*

83. *Id.* (explaining the precautions the Policy takes in making sure the students’ test results are kept confidential). The Policy requires that the test results are kept confidential in separate files from the students’ academic records. *Id.* These confidential files are only released to school personnel on a “need to know basis.” *Id.* The court stated that the choir teacher was a school official who “needed to know” because during overnight trips the teacher needs to know which of her students take what medications. *Id.* The nature of the intrusion is lessened by the fact that the test results are not turned over to any law enforcement authority or have any academic consequences besides limiting the student’s privilege to participate in competitive extracurricular activities. *Id.*

concern was important⁸⁴ and that Policy “effectively serve[d] the Tecumseh School District’s interest in protecting the safety and health of its students.”⁸⁵ In holding so, the Court dismissed the students’ arguments that, (1) a real and immediate interest needs to exist to justify a policy testing non-athletes,⁸⁶ (2) testing of non-athletes does not implicate safety concerns, which is a crucial factor in the special needs theater,⁸⁷ and (3) drug testing should be based upon individualized suspicion to reduce the intrusiveness of the search.⁸⁸

Using the *Vernonia* balancing test, the majority concluded that the Tecumseh School District’s legitimate concern of preventing drug use among its students outweighed the privacy expectations of students wishing to participate in extracurricular activities.⁸⁹ Therefore, the Tecumseh Policy did not violate the Fourth Amendment rights of the

84. *Id.* at 834. The court stated it already discussed the nature of the government’s concern in keeping students off drugs in *Vernonia*, and how that concern remains. *Id.* Evidence suggests that the drug problem among school children has increased since *Vernonia*, making the concern even greater. *Id.* Identical to *Vernonia*, the need for the state to act is greater when the evil trying to be abated concerns children entrusted to its care. *Id.* The nationwide drug epidemic makes the war against drugs a pressing concern in every school. *Id.*

85. *Id.* at 838. Drug testing students participating in extracurricular activities is a reasonably effective way of redressing the Tecumseh School District’s legitimate concern of stopping drug use. *Id.* at 837. *Vernonia* requires schools to consider the constitutionality of their actions “within the context of their custodial duties,” and does not require schools to test the group of students most likely to be abusing drugs. *Id.* at 838. Findings of fact that the drug problem is “fueled” by a certain group of students is not essential to determining if a school’s policy effectively addresses a school’s concerns of preventing and stopping drug abuse. *Id.*

86. *Id.* at 835. A demonstrated problem of drug abuse is not in every case essential to determining the validity of a testing policy. *Id.* Some showing of drug use among the student body does “shore up an assertion of special need” for the suspicionless drug-testing program. *Id.* In the past, the Supreme Court has not required an identified drug problem as a prerequisite before the government conducts suspicionless drug testing. *Id.* See *Nat’l Treasury*, 489 U.S. at 656 (holding suspicionless drug test of custom service agents on a preventive basis). The proven nationwide epidemic of drug use among school children establishes it is reasonable for Tecumseh to enact a drug testing policy. *Earls III*, 536 U.S. at 836.

87. *Id.* at 836. Plaintiffs’ argument goes as far as to state that there needs to exist “extraordinary safety and national security hazards” before the Fourth Amendment requirements can be relaxed. *Id.* (citing Resp’t Br. at 25-26). Safety concerns are no doubt part of the special needs analysis, but the safety interest of keeping schoolchildren off drugs is substantial for all children, whether athletes or not. *Id.* Drug use by children creates considerable health risks, which is enough of a safety hazard to determine that a special need exists. *Id.*

88. *Id.* at 837. A Policy based on individualized suspicion might unfairly target students who are members of unpopular groups. *Id.* “The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.” *Id.* Reasonableness under the Fourth Amendment does not require the government to use the least intrusive search because this would create “insuperable barriers to the exercise of virtually all search-and-seizure powers.” *Id.*

89. *Earls III*, 536 U.S. at 837.

students.⁹⁰

2. Concurring Opinion

Justice Breyer, in his concurring opinion, reached the same conclusion given by the majority opinion, but stressed several underlying considerations that were consistent with the majority's opinion.⁹¹ First, Justice Breyer emphasized the seriousness of the drug problem in America's schools and how the government's attempts at "supply side interdiction" to stop the problem have failed.⁹² Second, since public schools act *in loco parentis*,⁹³ it is mandatory that schools "shoulder the burden" in stopping the drug problem.⁹⁴ Thirdly, regarding the privacy intrusions drug testing imposes on students, he emphasized that people have different opinions about whether producing a urine sample is embarrassing.⁹⁵ Justice Breyer concluded that he was unsure if Tecumseh's drug testing program would work, but based on the considerations he emphasized, he felt the drug-testing program was constitutional.⁹⁶

90. *Id.* at 838.

91. *Id.* (Breyer, J., concurring). *Vernonia* governs this case and requires reversal of the Tenth Circuit's decision. *Id.* The Tecumseh Policy addresses a serious national drug problem and does not violate the Fourth Amendment. *Id.*

92. *Id.* at 839 (Breyer, J., concurring). "[T]he drug problem in our Nation's schools is serious in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and the rest of us." *Id.* The government's emphasis upon supply side interdiction apparently has not reduced teenage use in recent years. *Id.* Supply side programs account for sixty-six percent of the federal drug control budget, but drug use has increased. *Id.* (citing R. Perl, CRS Issue Brief for Congress, Drug Control: International Policy and Options, CRS-1 (Dec. 12, 2001)).

93. *Vernonia*, 515 U.S. at 655 (stating a school becomes *in loco parentis* when a parent delegates part of his parental authority to the tutor or schoolmaster of his child). Part of the authority granted is the power to restrain and correct the child. *Id.*

94. *Earls III*, 536 U.S. at 840 (Breyer, J., concurring) (stating that schools must find an effective way to deal with the national drug problem among schoolchildren because the schools *acting in loco parentis* need to protect children and instill habits and manners of civility in their students). If the schools do not carry out these responsibilities, then parents may start to send their children to private schools. *Id.*

95. *Id.* at 841 (Breyer, J., concurring) (stating that some people find urine sampling procedures no more intrusive than going to the doctor for a routine examination, but others are seriously embarrassed). Justice Breyer stressed it is a close and debatable question of whether producing a urine sample is only a negligible intrusion, and the best way to resolve this question is to air out the differences at public meetings. *Id.* By getting the whole community involved, the school board, in this case, was able to reveal that there was little objection to the Tecumseh policy. *Id.* Allowing the whole community to be involved by discussing the differences of opinions of what is the best procedure to follow when conducting the test, would make the testing seem less intrusive. *Id.* See Harrison *supra* note 44, at 403 (discussing compulsive urinalysis has been recognized as very invasive procedure for many people).

96. *Earls III*, 536 U.S. at 842 (Breyer, J., concurring) (stating that despite the possibility of

3. Dissenting Opinion

The dissenting justices believed that the Court should have reached a different result when it applied the factors enumerated in *Vernonia* to a school policy that tested all students wishing to participate in non-athletic extracurricular activities.⁹⁷ Writing for the dissent, Justice Ginsburg stated that the nature of the privacy interest upon which the search intruded was stronger than the majority expressed,⁹⁸ the character of the intrusion complained of was more than negligible due to evidence of the school district's carelessness,⁹⁹ and that the nature and immediacy of the government's concern in *Vernonia* "dwarfed" the concerns facing the Tecumseh School District.¹⁰⁰ Therefore the dissenters concluded that the judgment of the Tenth Circuit declaring the Tecumseh policy unconstitutional should be affirmed.¹⁰¹

the school's drug testing policy failing, the facts emphasized in the concurring opinion lead him to conclude the drug testing program was not unreasonable, constitutionally speaking).

97. *Id.* at 843 (Ginsburg, J., dissenting). Justices Stevens, O'Connor, and Souter joined in the opinion authored by Justice Ginsburg. *Id.* at 842. The *Vernonia* Court focused on the increased risk of sports-related injuries associated with drug use and that the *Vernonia* athletes were the leaders of an identified drug culture; neither factor was a concern in *Earls*. *Id.* at 843. *Vernonia* can't be held to permit suspicionless drug testing of all student solely because drugs have health risks associated with them, because student engage in many other activities that jeopardize their health on their own time. *Id.* at 844. The *Vernonia* drug testing program was directed at drug use by school athletes where the risk of harm to the student athlete impaired by drugs is high. *Id.* at 851. One could maybe stretch the risk of harm to band members who may trip and have their tubas collide, but the majority of students who will be tested under Tecumseh's policy are not engaged in activities where the risk of injury is high if the student participates while under the influence of drugs. *Id.* at 852.

98. *Id.* at 848 (Ginsburg, J., dissenting). Unlike in athletic participation where communal undress is inherent to participation, students participating in non-athletic extracurricular activities are rarely faced with situations where there is communal undress. *Id.* at 848 n.1. Students in choir have found ways of changing without anyone seeing them nude, and the out-of-town trips students take are generally limited to changing in enclosed restroom stalls, a condition that did not exist in *Vernonia*. *Id.* Competitive extracurricular activities serve students that have a variety of personality characteristics, from modest and shy to bold and uninhibited. *Id.* at 847.

99. *Earls III*, 536 U.S. at 848 (Ginsburg, J., dissenting). The assumption that the provisions in the Tecumseh policy providing for confidentiality will be honored is not warranted. *Id.* at 849. The character of the intrusion is heightened in *Earls* because there is evidence that the School District carelessly handled personal information collected from drug testing. *Id.* There was evidence that the choir teacher left information concerning students' prescription drug use unlocked and unsealed where other students could see them. *Id.* at 848.

100. *Id.* at 849 (Ginsburg, J., dissenting). *Vernonia* initiated its drug testing policy to combat a situation where the school was in a state of rebellion that was largely due to the increased drug use among the student body. *Id.* The Tecumseh School district has repeatedly reported to the federal government prior to the implementation of the Policy that a drug abuse was not a problem in the school district. *Id.* Without demonstrating that a drug problem exists, the effectiveness of the Policy in correcting the problem is greatly diminished. *Id.* at 850.

101. *Id.* at 855 (Ginsburg, J., dissenting).

IV. ANALYSIS

A. "Special Needs" Doctrine is Subjective Absurdity

Earls gave the Supreme Court an opportunity to halt its continuing consumption of individual's rights by engaging in a judicial whimsy labeled as "special needs" balancing.¹⁰² The Supreme Court's decision in *Earls* rested in large part upon the importance of the governmental concern in preventing drug use by school children entrusted to the school's care.¹⁰³ Preventing drug use has consistently been used to uphold suspicionless drug tests in other arenas outside the school walls.¹⁰⁴ However, in *Chandler v. Miller*, the most recent preceding case involving suspicionless drug testing, the Supreme Court demonstrated that the special needs analysis can be twisted to fit any result the Court desires.¹⁰⁵ The incongruity between the *Earls* and *Chandler* decisions

102. *Earls III*, 536 U.S. 822; George M. Dery III, Are Politicians More Deserving of Privacy Than Schoolchildren? How *Chandler v. Miller* Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing, 40 ARIZ. L. REV. 73, 75 (1998) (discussing how the special needs balancing the Supreme Court uses is standardless and can create inconsistencies in the Court's decisions). The special needs balancing analysis developed by the Court cannot be considered an analysis at all. *Id.* at 89. The balancing used by the Court is nothing more than a subjective view regarding the acceptability of the government intrusion in question. *Id.*; Parr, *supra* note 32 at 274 ("Because the special needs test has no clear standards, 'danger looms that the Court [will] serv[e] an ideological agenda and using the convenience of a balancing test. . ."); Krislen Nalani Chun, Casenote, 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, 812-819 (2002) (discussing how the special needs doctrine can be bent in any direction that the Justices of the Supreme Court, public policy, or issues at national attention dictate at the expense of personal privacy).

103. *Earls III*, 536 U.S. at 834 (discussing the importance of the government's concern in keeping students off drugs that was previously established in *Vernonia*, and how that concern remains in *Earls*). The nationwide drug epidemic makes the war against drugs a pressing concern in every school. *Id.*

104. *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 628 (1989) (holding suspicionless drug test of railroad workers was constitutional based on compelling government interest in having workers operating dangerous equipment free from influence of drugs in order to reduce risk of injuries to others); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671-72 (1989) (holding suspicionless drug test of custom service agents applying for promotions was constitutional based in part on compelling government interest in safeguarding Nation's borders and keeping people who carry firearms off influence of drugs).

105. *Chandler v. Miller*, 520 U.S. 305 (1997). See Dery, *supra* note 102, at 74 (stating "in the surreal world of special needs, any fact can be twisted to fit the desired result without regard for Fourth Amendment mainstay"). In *Chandler*, the Supreme Court made obvious the malleability of special needs balancing and further distorted special needs reasoning and logic. *Id.* "Facts can be emphasized or ignored in order to reach a preordained result." *Id.* The special needs test used by the Supreme Court is "spineless" and was bent in the *Chandler* case in the direction of the outcome of the Supreme Court's "latest choosing." *Id.* at 88-89. Since there is no mention of "special

drains the credibility of the special needs doctrine and calls into question the real reasons behind the *Earls* ruling.¹⁰⁶

In *Chandler*, the Georgia legislature enacted a statute that required all candidates for specified state offices to verify they had taken and passed a drug test.¹⁰⁷ The Supreme Court held the state requirement did not fit within the special needs requirement of Fourth Amendment, mainly because (1) Georgia had failed to demonstrate a drug use problem among state officeholders, and (2) the requirement was not well designed to identify candidates who used drugs.¹⁰⁸ The Court went on to state that making a symbolic gesture to illustrate the government's commitment to fighting drug abuse does not constitute a sufficient reason to infringe on personal privacy.¹⁰⁹ A "special" need must be

needs" in the Fourth Amendment, the Court shaped the special needs doctrine out of thin air, and having such a dubious origin means the doctrine is subject to the Court's shifting values. *Id.* at 102.

106. Dery, *supra* note 102, at 103 (discussing the incongruity between how the Supreme Court decided the *Chandler* case and past precedent involving suspicionless drug testing); Michael E. Brewer, Comment, *Chandler v. Miller: No Turning Back From a Fourth Amendment Reasonableness Analysis*, 75 DENV. U. L. REV. 275, 291 (1997) (discussing how the *Chandler* decision tends to indicate the Court is halting suspicionless drug testing temporarily because the decision was decided contrary to past precedent); Michael Polloway, Comment, *Does the Fourth Amendment Prohibit Suspicionless Searches – or do Individual Rights Succumb to the Government's "So-Called" Special Needs?*, 10 SETON HALL CONST. L. J. 143, 171 (stating the majority opinion in *Chandler* demonstrated a divergence from the Court's previous holdings in suspicionless drug testing cases).

107. *Chandler*, 520 U.S. at 309 (discussing how the statute passed by the Georgia legislature required candidates for certain state offices to certify they had taken a urinalysis drug test within thirty days prior to being nominated for office and the test results were negative). The candidates could provide a specimen at a state approved laboratory or at their personal physician's office. *Id.* at 310; Dery, *supra* note 102, at 87 (discussing if a candidate did test positive for drugs, the result was not disclosed to law enforcement if the candidate chose not to file the certificate). If the candidate elected to take the urinalysis at his personal physician's office, no state agent needed to know the test was being administered. *Id.*

108. *Chandler*, 520 U.S. at 318 (discussing why Georgia's statute was unconstitutional). Precedent establishes that the special need for suspicionless drug testing must be important enough to override the individual's privacy interest. *Id.* Nothing in the record indicates that drug use among state officeholders is a real problem. *Id.* at 319. Furthermore, Georgia's requirement is not well designed to identify candidates who are drug users or deter drug users from seeking election in state offices. *Id.* at 319. See Brewer, *supra* note 106, at 288 (discussing how Georgia provided no immediate or concrete evidence which the drug testing regime would address and attempt to cure); Joseph S. Dowdy, *Well Isn't That Special? The Supreme Court's Immediate Purpose of Restricting The Doctrine Of Special Needs in Ferguson v. City of Charleston*, 80 N.C. L. REV. 1050, 1065 (2002) (discussing how, after *Chandler*, a search had to actually achieve its intended goal for it to be a constitutional search).

109. Brewer, *supra* note 106, at 288-89; Roger W. Wilkinson, Student Work, *Constitutional Law – Special Needs Exception For Suspicionless Searches Does Not Extend To Candidate Drug Testing – Chandler v. Miller*, 117 S. Ct. 1295 (1997), 31 SUFFOLK U.L. REV. 237, 237 (1997) (discussing how a social need to prevent drug use constitutes a symbolic need which will not permit the suspicionless testing regime to past constitutional scrutiny).

exhibited to relax Fourth Amendment protection, which is distinguishable from a “symbolic” need.¹¹⁰

Just five years after *Chandler*, the Supreme Court granted certiorari to *Earls*, which contained the same important facts that the Court drew on to justify why testing of political candidates was unconstitutional in *Chandler*.¹¹¹ Specifically, *Earls* involved a drug-testing regime with no immediate or concrete evidence of drug abuse among students participating in non-athletic extracurricular activities,¹¹² and the school

110. *Chandler*, 520 U.S. at 314 (stressing that a special need is one that goes beyond the normal needs of law enforcement and exists in situations where an important government interest would be thwarted by traditional Fourth Amendment requirements). Symbolism, or a symbolic need, is not a sufficient reason to exempt a search from the traditional Fourth Amendment protections. Brewer, *supra* note 106, at 288 (discussing how the Supreme Court distinguished the importance between a “special” need and a “symbolic” need in terms of what is necessary to relax Fourth Amendment protection).

111. Compare *Chandler*, 520 U.S. at 309-13, with *Earls III*, 536 U.S. at 825-28; *Earls III*, 536 U.S. at 855 (Ginsburg, J., dissenting) (discussing how the facts of *Earls* is similar to *Chandler* and different from *Vernonia*.); Tamara A. Dugan, Note, *Putting the Glee Club to the Test: Reconsidering Mandatory Suspicionless Drug Testing of Students Participating in Extracurricular Activities*, 28 J. LEGIS. 147, 167-173 (2002) (analyzing the facts surrounding the suspicionless drug testing of students in *Earls* and also analyzing the facts surrounding the suspicionless drug testing of political candidates in *Chandler*). “The factual premise [of *Chandler*] in some ways bears greater resemblance to the testing of students participating in non-athletic extracurricular activities than does the factual premise of *Vernonia*.” *Id.* at 177. Based on the Supreme Court’s decision in *Chandler*, it seems highly unlikely that school districts and the Court could justify suspicionless drug testing of all students participating in extracurricular activities. *Id.*

112. *Earls III*, 536 U.S. at 834-35 (discussing the evidence of drug use of students at Tecumseh schools generally, and not specifically demonstrating drug use by students participating in extracurricular activities). “Viewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a ‘drug problem’ when it adopted the [drug testing] policy.” *Id.* at 835. Unlike *Vernonia*, where the athletes tested were the leaders of the drug culture, there is no reason or justification given in *Earls* for testing all students engaging in extracurricular activities. *Id.* at 852-53 (Ginsburg, J., dissenting). The only evidence presented to support Tecumseh students’ general use of drugs was the testimony of teachers that students talked openly about drugs, and that a drug dog found a marijuana cigarette close to the school grounds. *Id.* at 834-35. There is even less evidence that students participating in extracurricular activities used drugs – police officers found drug paraphernalia in a car driven by a Future Farmers of America member. *Id.* Tecumseh has repeatedly reported to the federal government before implementing the drug testing policy that drug use, besides alcohol and tobacco, was not a major problem within the school district. *Id.* at 849 (Ginsburg, J., dissenting). See Dugan, *supra* note 111, at 167 (discussing how *Earls* exemplifies a case that includes no findings that students who engage in non-athletic extracurricular activities are more likely than other students to engage in drug use). The Court even concluded that the Tecumseh school district had failed to establish a drug problem that the drug testing would combat. 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, 481-82 (2002) (stating how the Tecumseh School District “spent little time establishing the drug problems in the school district, and did not demonstrate that the [drug testing] policy was geared toward the core of the drug culture”). Reviewing the history of the random drug test results that had previously been given to students in extracurricular activities, illustrated that a serious drug

district failed to demonstrate that the drug testing policy was well designed to identify student drug users.¹¹³ Surprisingly, the drug testing Policy in *Earls* was held constitutional despite facts that the children were subjected to more intrusive testing procedures¹¹⁴ and had little control to which school personnel the test results were disseminated.¹¹⁵ It is difficult to find a concrete justification of why the Court, only a few years earlier relying on similar facts, determined that obligating politicians to submit urine samples crossed the constitutional line, but a more invasive search concerning students does not.¹¹⁶ The Court's

problem did not exist in *Tecumseh*. *Id.* at 482.

113. *Earls III*, 536 U.S. at 838 (stating how the Court only holds that the *Tecumseh* policy is a reasonable means of furthering the school district's interest in keeping students off drugs, not that it is an effective means of deterring drug use among the specific students being tested). *Tecumseh's* drug testing policy falls short of deterring students who are in the most danger of using drugs. *Id.* at 853 (Ginsburg, J., dissenting). See Dugan, *supra* note 111, at 180 (maintaining that the drug testing policy implemented in *Earls* does not put the focus where it needs to be—upon students who the school has “reasonable grounds to believe” are using drugs); Pring, *supra* note 112, at 482 (stating how the *Tecumseh* drug testing policy was not an effective deterrent because it tested students who did not have a history of a drug problem and who were not exposed to safety concerns associated with student drug use); Chotvac, *supra* note 74, at 347 (mentioning if school districts do not have to demonstrate a perceivable problem before acting, their ability to invade upon the rights of students would be limitless); Book, *supra* note 31, at 650-54 (discussing how courts should use group suspicion but have to demonstrate an actual or imminent problem existing within a group for the drug test to be constitutional). *But see* Shannon D. Landreth, Note, *An Extension of the Special Needs Doctrine to Permit Drug Testing of Curfew Violators*, 2001 U. ILL. L. REV. 1247, 1267 (2001) (requiring teacher or school official to formulate suspicion before implementing a drug test is problematic because they lack proper training).

114. See *Earls I*, 115 F. Supp.2d at 1291, n.35. (discussing how the Policy stated the urine specimen should be collected in a restroom or other private bathroom facility behind a closed stall.) The principal or athletic director designates a school official of the same sex as the student to accompany the student to the stall, and observe the student while the specimen is being produced. *Id.* The monitor stands outside the stall and listens for the normal sounds of urination to make sure the specimen is not tampered with. *Id.* Compare this to the process in *Chandler*, 520 U.S. at 310 (discussing how candidates could provide a specimen at a State approved laboratory or at their personal physician's office). See Dery, *supra* note 102, at 85 (discussing if the candidate elected to take the urinalysis at his personal physician's office, no state agent needed to know the test was being administered). The procedures in *Vernonia*, to which *Earls* has been compared, expose students to more intrusive and potentially more humiliating testing procedures. *Id.* at 74.

115. Compare *Earls*, 536 U.S. at 833 (discussing how the *Tecumseh* policy requires students' test results to be given to school personnel only who are on a “need to know” basis of the results), with *Chandler*, 520 U.S. at 309 (a candidate could prevent disclosure of the test results by choosing not to file the certificate reporting he or she took a urinalysis). In *Vernonia*, to which *Earls III* is similar, students had less control to whom their test results were released. Dery, *supra* note 102, at 74. No state agent even needs to be notified that a particular political candidate has taken or will take a urinalysis. *Id.* at 85.

116. Dery, *supra* note 102, at 89 (discussing how the inconsistency concerning the *Chandler* decision and past precedent make the Courts reasoning less credible). “After years of sustaining more intrusive searches of railroad employees, Custom Service officers, and schoolchildren, the Court, for some reason, decided that compelling politicians to urinate into a cup crossed the line.”

disparate treatment of politicians and schoolchildren is conclusive evidence that the special needs analysis used by the Court is a “factual tug-of-war” rooted in nothing more than a subjective view of the tolerability of “certain government intrusions.”¹¹⁷ The outcome of suspicionless drug testing cases is determined by which side of the scale the Court believes it should place its “judicial thumb.”¹¹⁸

B. What is More Dangerous, “Stoned” Politicians or “Stoned” Band Members?

The Supreme Court unconvincingly tried to justify the inconsistencies between *Earls* and *Chandler* by citing previous cases

Id. See *Chun*, *supra* note 102, at 811 (discussing the outcome in *Chandler* cannot be reconciled with holdings concerning the suspicionless drug testing of students). It will no longer be “increasingly routine for citizens to suffer the indignity, embarrassment, and inconvenience of unjustified warrantless police searches all in the name of the government’s drug war.” Keleigh Biggins, Casenote, *Candidates for Public Office Exempt From Drug Testing – Supreme Court Rules There is No Special Need Justifying a Departure from Fourth Amendment Requirements* *Chandler v. Miller*, 520 U.S. 305 (1997), 23 S. ILL. U. L.J. 781, 797 (discussing how *Chandler* narrowed the circumstances in which a “special need” will be found).

117. Dery, *supra* note 102, at 88 (stating after *Chandler* it was apparent that without the traditional Fourth Amendment protections of warrants and probable cause, the special needs analysis “devolves into a factual tug-of-war founded on little more than a subjective view regarding the acceptability of certain government intrusions.”); Dodson, *supra* note 17, at 275 (discussing how the special needs balancing test amounts to nothing more than how the Supreme Court Justices feel about a particular law). The vagueness of the special needs test allows courts to freely pick and choose which problems in society they feel are bad enough to permit abandonment of constitutional guarantees under the Fourth Amendment. *Id.* at 276-77. “The balancing test used when the Court invokes the special need doctrine is highly subjective.” *Id.* at 288. See *Chun*, *supra* note 102, at 811 (discussing how an examination of the inconsistencies regarding suspicionless drug testing cases demonstrate that the Supreme Court engages in a picking and choosing game concerning whose Fourth Amendment rights will be subjected to the special needs exception). The Court did nothing more than apply subjectivity in order to decide *Chandler* in favor of personal liberties guaranteed by the Fourth Amendment. *Id.* See *Oshman*, *supra* note 29, at 1335 (discussing how the Court has failed to consistently define what constitutes a special need, which has allowed a high degree of judicial subjectivity producing an outcome determinative test that will support the search being challenged).

118. Dery, *supra* note 102, at 89 (discussing how the outcome of suspicionless drug testing cases are decided on what the Court personally feels is an offensive invasion of constitutionally protected privacy). When the Court feels that a particular intrusion should be permitted, it emphasizes the State’s interest and minimizes the privacy interests of the individuals. *Id.* Conversely, as *Chandler* illustrates, if the Court believes the government testing is offensive, the Court simply places its judicial thumb on the other side of the scale. *Id.* Facts in each case can be emphasized by the Court, or ignored, in order to reach a predetermined result. *Id.* at 88-89. See *Oshman*, *supra* note 29, at 1335-36 (discussing how the special needs balancing used by the Court tilts the judicial scale decisively in favor of the government interest being promoted and against individual privacy); Katrina Quicker, Note, *Discrimination Perfected to a Science: The Evolution of the Supreme Court’s War on Drugs*, 30 U. TOL. L. REV. 677, 678 (1999) (stating “courts are afforded wide-open and free-wheeling discretion in employing the [special needs] balancing test”).

where it held that a particular or immediate drug problem is not required before allowing the government to conduct suspicionless drug testing.¹¹⁹ Specifically, the Court referenced *Nat'l Treasury Employees Union v. Von Raab*, where it stated that when the government seeks to prevent "highly dangerous conduct," a lack of proof does not make the testing unwarranted.¹²⁰

It would seem that the integrity and judgment of an elected politician is at least as important as preventing a member of the high school band from being under the influence of drugs while performing the school's alma mater.¹²¹ For example, Ohio Governors are entrusted and empowered to direct and coordinate all state law agency activity, call out the state militia, and appoint important commissioners and state

119. *Earls III*, 536 U.S. at 835 (stating how the Court has not required that a state demonstrate a particularized or pervasive drug problem before allowing the government to engage in suspicionless drug testing); *Nat'l Treasury*, 489 U.S. at 671-72 (holding suspicionless drug test of custom service agents applying for promotions was constitutional based in part on the compelling government interest in safeguarding the nation's borders and keeping people who carry firearms off the influence of drugs); *Skinner*, 489 U.S. at 628 (holding suspicionless drug testing of railroad workers was constitutional based on compelling government interest in having workers operating dangerous equipment free from influence of drugs in order to reduce risk of injuries to others).

120. *Nat'l Treasury*, 489 U.S. at 674-75 (stating "if the possible harm against which the government seeks to guard against is substantial, the need to prevent its occurrence furnishes ample justification for reasonable searches calculated to advance the government's goal"). See Michael A. Sprow, *The High Price of Safety: May Public Schools Institute a Policy of Frisking Students as they Enter the Building?*, 54 BAYLOR L. REV. 133, 167-68 (2002) (discussing how according to the Supreme Court if the conduct trying to be deterred is highly dangerous, then a lack of proof of drug use among individuals to be tested does not make the testing policy unconstitutional); Parr, *supra* note 32, at 272 (discussing how the Court had sustained suspicionless drug testing policies in *Nat'l Treasury* and *Skinner* because of significant public safety concerns brought forth when customs officials or railroad workers are under the influence of drugs while performing their jobs); D. Garrison Hill, *The Needle and the Damage Done: The Fourth Amendment, Substance Abuse and Drug Testing in the Public Sector*, 8-JUN S.C. LAW. 19, 20 (1997) (discussing how *Nat'l Treasury* and *Skinner* have created a framework in which many state and federal courts have permitted suspicionless drug testing of numerous public employees regardless of their position of power).

121. Dery, *supra* note 102, at 93 (discussing how qualifications of political candidates, such as physical health, integrity, judgment, and perception are very important). In comparison to *Nat'l Treasury*, it would seem these qualifications are at least as important, if not more important, than those of a custom service agent. *Id.* The Court was worried that custom service agents may be tempted by bribes or threatened by blackmail if they used drugs, but these same worries exist, arguably to a higher degree, for government officials. *Id.* See Walker Chandler and Miranda Doming-Krush, *The Constitutional Validity of Suspicionless Drug Testing after Chandler v. Miller*, 28 STETSON L. REV. 737, 745 (1999) (discussing that the things that should disqualify people from public office are their ethics, morality, and integrity); Eric B. Post, Comment, *Chandler v. Miller: Drug Testing Candidates for State Office Under the "Special Needs" Exception*, 64 BROOK. L. REV. 1153, 1175 (1998) (discussing how there can be devastating results if powerful elected officials are drug abusers, so states should be able to take preventative measures before a drug abuser is elected).

board members.¹²² Consequently, a governor could make a flawed decision, injurious to a vast number of people, brought about by a lack of honesty or clear-sightedness resulting from drug use.¹²³ Conversely, a tuba player in the band under the influence of drugs, in the worst-case scenario, might ruin a halftime show by tripping or blowing the wrong note.¹²⁴ Apparently, in the Court's subjective view, preventing band members from using drugs is more important than ensuring that the political leaders of our nation are drug-free.¹²⁵

122. *The Ohio Governor*, Syllabus for PLS 323: Ohio Government, available at <http://www.cola.wright.edu/courses/pls323/ohiogov.htm> (last visited October 5, 2003) (discussing the State of Ohio's Governor's duties and responsibilities while in office). See also Dery, *supra* note 102, at 96 (discussing generally how governors are empowered to call out the state militia, appoint administrators, respond to state emergencies, and direct law enforcement agencies, and as the highest of all state offices, governors should be held to the highest standards of honesty, integrity, and clear-thinking).

123. Dery, *supra* note 102, at 93-95 (discussing possible dangers that could arise if certain elected state officials are under the influence of drugs while carrying out their respective duties). The highest state judges rule on criminal cases, many times drug related cases, which will affect the determinations and future outcome of similar drug cases in lower courts. *Id.* at 94. It seems there is a serious danger in having judges make decisions without a clear state of mind, or impartial based on their own drug use. *Id.* Attorney generals have a duty to prosecute drug violators and are regularly exposed to large amounts of drugs. *Id.* at 94. If attorney generals are drug users they may have impartial judgment and could be persuaded by blackmail or bribery, and subsequently lose track of their duties to stop drug use. *Id.* Attorney generals or prosecutors are empowered with the decision of whether or not to prosecute and what charges to file, and this discretion should be exercised with the highest level of honesty and clear thinking. *Id.* at 95. But see Robert S. Logan, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 497 (2000) (discussing how there is no immediate or direct public harm that could result if political candidates used drugs).

124. See *Earls III*, 536 U.S. at 852 (Ginsburg, J., dissenting) (discussing how the majority of Tecumseh students required to take a urinalysis are not engaged in the kinds of extracurricular activities that raise safety issues). The only safety issues that can be dreamt up are "nightmarish images of colliding tubas, out-of control flatware, or livestock running amok." *Id.* "Although one could imagine the havoc a drug-influenced tuba player might wreak on a halftime formation, realistically, no credible risk of injury exists." Messerle, *supra* note 11, at 837 (discussing how the decision in *Vernonia* should not be extended to include members of the band because there is a lack of potential harms which could ensue on band members performing while using drugs). See Hutchens, *supra* note 35, at 1278 (discussing how it is difficult to imagine how participants in non-athletic extracurricular activities such as choir or the academic team are in any physical danger if they compete in those activities while under the influence of drugs); Ralph D. Mawdsley & Charles J. Russo, Commentary, *Random Drug Testing and Extracurricular Activities*, 159 EDUC. L. REP. 1, 11 (2002) (discussing the only consequences of members of the chess club being under the influence of drugs while playing chess is they may be humiliated by a bad chess move, but there is little chance of the student suffering any physical injury).

125. See *Chandler*, 520 U.S. at 321-22 (discussing how Georgia has failed to produce any evidence of a drug problem among its state elected officials, and therefore no special need exists). The court further discusses how political candidates do not perform high risk, safety sensitive tasks that would warrant a drug testing regime. *Id.* But see *Earls III*, 536 U.S. at 835 (stating that "viewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was

C. *Diminished Expectations of Privacy Apply Equally*

In *Earls* the Court discounted the students' reasonable expectation of privacy by stating that students participating in extracurricular activities have reason to expect intrusions upon their privacy because they are exposed to additional rules and regulations, similar to adults who chose to work in closely regulated industries.¹²⁶ It seems absurd the Court failed to apply this same "diminished expectations of privacy" reasoning to political candidates in *Chandler*.¹²⁷ Politicians' everyday conduct is continuously under the public's eye, and notably his or her personal life becomes fair game for television and the tabloids.¹²⁸ Just as extracurricular activities have additional rules and regulations that diminish the students' expectations of privacy, a candidate running for office exposes himself to the additional rules and regulations of

faced with a 'drug problem' when it adopted the [drug testing] policy"). The Court also stated that although testing of students in non-extracurricular activities doesn't raise the same safety concerns as athletes on the football field, drug use in general carries a variety of health risks for students. *Id.* at 836. See also Parr *supra* note 32, at 260-61 (stating that apparently the Court believes that the nation is more interested in keeping children off drugs than political leaders who make important decisions); Post, *supra* note 121, at 260-61 (discussing how the drug problem is not limited to adolescents it has effected high public office as well, so the Supreme Court should allow testing).

126. *Earls III*, 536 U.S. at 832 (discussing the privacy interests of students choosing to participate in competitive extracurricular activities). All of the extracurricular activities available to students have additional rules and regulations which further diminish the students' expectations of privacy. *Id.* This diminished privacy is comparable to adults who choose to be employed in heavily regulated industries. *Id.*

127. *Chandler*, 520 U.S. at 319, 321-22 (discussing how Georgia had failed to show a special need for drug testing that was important enough to override the individual's right to privacy under the Fourth Amendment). Since there is no special need there was no reason to engage in a balancing of the parties individual privacy expectations and the government's interest in conducting drug tests. *Id.* See Parr, *supra* note 32, at 260 (discussing how in past cases like *Skinner* and *Vernonia*, the Court held diminished expectations of privacy supported allowing suspicionless drug testing, but in *Chandler* the Court used this fact as a way to show no special need existed); Pring, *supra* note 112, at 435 (discussing how the Court used the heavy scrutiny politicians are faced with while in office not as a way to argue that politicians have a diminished expectation of privacy, but to say that no special need exists); Dery, *supra* note 102, at 100 (discussing how bizarre it is that the Supreme Court would not apply the same diminished expectations of privacy reasoning to politics). It would not have been a surprise at all if the *Chandler* Court used the special needs doctrine to state that since politicians voluntarily cast themselves into the public eye they have decreased their privacy expectations in regards to drug use. Dery at 100.

128. Dery, *supra* note 102, at 100 (discussing how little expectations of privacy a politician can expect while they are in public office). When a political candidate takes office his personal life becomes fair game for public scrutiny. *Id.* It can be said that there are virtually no boundaries to the intrusions of privacy that a politician can expect while in office. *Id.* See Parr, *supra* note 32, at 260 (discussing how politicians have diminished expectations of privacy by virtue of their chosen occupation). Candidates for political office are subject to "relentless scrutiny by their peers, the public, and the press." *Id.* The day-to-day conduct of politicians running for a political office attracts attention beyond the "normal work environment." *Id.*

America's tabloids and media frenzy.¹²⁹ Just recently, President Bush's routine physical examination, which included a colonoscopy, was legitimate news,¹³⁰ and Senate Majority Leader Trent Lott's comments praising former Senator Strom Thurmond at his 100th birthday celebration were meticulously picked apart and criticized as supporting segregation.¹³¹ Thus, the *Earls* analysis concerning reasonable expectations of privacy, if consistently applied, would have most likely sustained the suspicionless drug testing of political candidates in *Chandler*.¹³²

129. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (discussing how the Court has held different rules exist when a public figure, such as a politician, wants to sue an individual for defamation). A public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971) (stating that a candidate who vaunts his spotless record and sterling integrity cannot complain when an opponent or the media attempts to demonstrate the candidate is lying); *But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (stating if a newspaper or television station publishes defamatory statements about an individual who is neither a public official nor a public figure they may not claim constitutional privilege against liability for the injury inflicted). When a student decides to go out for a high school sports team, she exposes herself to the atmosphere of a communal locker room. *Dery, supra* note 102, at 100 (comparing situations which support why student athletes have diminished expectations of privacy to similar situations politicians face). Similarly, a political candidate decides to join a state team by putting his name on the ballot, and exposes himself to the imaginary locker room of tabloids and television. *Id.* Furthermore, just as railroad employees in *Skinner* submit to privacy invasions because they work in a highly regulated industry, politicians seeking public office submit to privacy intrusions by reporters and opponents because it is in the nature of their profession. *Id.*

130. Tamara Lipper, *Power: "President" Cheney?*, NEWSWEEK, July 8, 2002, at 55 (discussing how President Bush recently had a colonoscopy done as a precautionary measure to ensure he does not have colon cancer); CNN.com/ inside politics, *Bush to have colonoscopy under anesthesia*, June 28, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/06/28/bush.tests/> (last visited October 5, 2003) (discussing how President Bush was going to Camp David to have a routine physical examination which included a colonoscopy). "All in all, a colonoscopy is no big deal . . . except, it now seems, when the large intestine to be explored belongs to the current occupant of the White House. Then, what is for everyone else little more than a pain in the ass is elevated to an event of constitutional moment." World Socialist Web Site, *Why the big fuss over Bush's colonoscopy?*, July 2, 2002, available at <http://www.wsws.org/articles/2002/jul2002/bush-j02.shtml> (last visited October 5, 2003) (discussing how it should not be a big deal that President Bush is undergoing a colonoscopy).

131. Stephen F. Hayes, *A Very Sorry Majority Leader*, The Weekly Standard On-Line, December 23, 2002, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/026qckpn.asp> (last visited October 5, 2003) (discussing the comments made by Senator Trent Lott at Senator Strom Thurmond's 100th birthday celebration). During Lott's praise of Thurmond for his long career in the Senate, Lott stated when Strom Thurmond ran for president his state voted for him and was proud of it. *Id.* Critics jumped all over the statement saying that when Thurmond ran for president he ran on a ballot that supported segregation. *Id.* Lott later apologized explaining his comments were not an endorsement of his positions of over 50 years ago, but of Thurmond and his remarkable life. *Id.*

132. *Dery, supra* note 102, at 100 (discussing how it would not have been a surprise at all if the

D. Earls Involves a Symbolic Need, Not a Special Need

As stated earlier, the Supreme Court made clear that a drug testing policy established to set a good example or make a symbolic gesture to demonstrate a state's commitment to the "war against drugs" is insufficient to relax Fourth Amendment guarantees.¹³³ Since the Tecumseh school district was unable to present immediate or concrete evidence of drug abuse among the students to be tested,¹³⁴ a strong argument can be made that the school district's drug testing regime amounts to nothing more than a symbolic gesture to demonstrate a state's commitment to the "war against drugs."¹³⁵ However, the Court

Chandler Court used the special needs doctrine to state that since politicians voluntarily cast themselves into the public eye they have decreased their privacy expectations in regards to drug use); Parr, *supra* note 32, at 260 (discussing how the Court confused itself and past precedent by failing to use the reasoning in *Vernonia* [and *Earls*] when deciding *Chandler*, which could have been produced a different outcome in that case).

133. *Chandler*, 520 U.S. at 321-22 (discussing how "symbolic" gestures, such as setting a good example or displaying a commitment to the fight against drug use, is not a special need and thus not enough to relax Fourth Amendment protections). Actions such as setting a good example or making symbolic gestures do not reach the level of an important government need required to relax the constitutional guaranteed right to privacy. Brewer, *supra* note 106, at 288-89 (quoting Justice Brandies by mentioning how "well meant symbolism is not sufficient reason to exempt a search from Fourth Amendment protection"). See also Rebecca Claire Fischer, *Current Development in the Law: Willis v. Anderson Comm. Sch. Corp.*, 8 B.U. PUB. INT. L.J. 395, 398 (1999) (discussing how the Seventh Circuit rejected a school's policy for drug testing students who got into a fight at school because the suspicionless search was based on a symbolic purpose).

134. *Earls III*, 536 U.S. at 838 (stating how the Court only holds that the Tecumseh policy is a reasonable means of furthering the school district's interest in keeping students off drugs, not that it is an effective means of deterring drug use among the specific students being tested). Tecumseh's drug testing policy falls short of deterring students who are in the most danger of using drugs. *Id.* at 853 (Ginsburg, J., dissenting). See Dugan, *supra* note 111, at 180 (maintaining that the drug testing policy implemented in *Earls* does not put the focus where it needs to be—upon students who the school has "reasonable grounds to believe" are using drugs); Pring, *supra* note 112, at 482 (stating how the Tecumseh drug testing policy was not an effective deterrent because it tested students who did not have a history of a drug problem and who were not exposed to safety concerns associated with student drug use); Chotvacs, *supra* note 74, at 347 (mentioning if school districts do not have to demonstrate a perceivable problem before acting, their ability to invade upon the rights of students would be limitless); Book, *supra* note 31, at 650-54 (discussing how courts should use group suspicion but have to demonstrate an actual or imminent problem exists within group for the drug test to be constitutional). *But see* Landreth, *supra* note 113, at 1267 (requiring a teacher or school official to formulate suspicion before implementing drug testing is problematic because they lack proper training).

135. *Earls III*, 536 U.S. at 854 (Ginsburg, J., dissenting) (discussing how reviewing the Tecumseh drug testing policy and the facts presented should make the Supreme Court reach the conclusion that a symbolic need exists). "What is left is the School District's undoubted purpose to heighten awareness of its abhorrence of, and strong stand against, drug abuse." *Id.* See Dugan, *supra* note 112, at 171 (discussing that because the facts of *Earls* do not present a situation where students participating in extracurricular activities have drug problems, the need of the school amounts to a symbolic need similar to *Chandler*). The language the Supreme Court used in

refused to apply its “symbolic” reasoning in *Earls*, stating essentially that a marijuana cigarette found close to the school ground by a drug dog was enough to “shore up” the special need for its drug testing program.¹³⁶ If finding a marijuana cigarette near a school was enough to shore up a special need, maybe the Supreme Court is ready to say that finding the same near the Capitol or the Supreme Court building would be enough to shore up a drug testing program for our highest ranking officials; but do not count on it.¹³⁷

E. Testing the Wrong Population

The Supreme Court, although arguably upholding the Tecumseh policy for a symbolic purpose, targeted the wrong population when it approved suspicionless drug testing of students who participate in extracurricular activities.¹³⁸ Evidence has shown a strong correlation

Chandler seems equally as applicable to school districts who implement a suspicionless drug testing policy for extracurricular participants. *Id.* at 180. See also Craig M. Bradley, *Court Gives School Drug-Testing an A*, 38-DEC TRIAL 56, 57 (discussing how based on the facts of *Earls*, the drug testing policy presented could have been termed symbolic and not special); Veytsman, *supra* note 23, at 327 (stating how drug testing policies focused on students involved in school activities are being adopted by school districts for the primary purpose of creating a “good image banner”). But see Paul Goodwin, *Student Drug Testing Since Vernonia: “Guidance Down the Slippery Slope”*, 38 WILLAMETTE L. REV. 579, 613 (2002) (discussing how the Court should not require evidence of a specific drug problem among the students to be tested by a suspicionless drug testing policy because the school environment is very unique).

136. *Earls III*, 536 U.S. at 835 (discussing how the only evidence presented supporting that Tecumseh students use drugs was a drug dog finding a marijuana cigarette close to the school ground). A demonstrated problem of drug abuse is not necessary to sustain a drug testing program, but there has to be some evidence to “shore up an assertion of special need for a suspicionless general search program.” *Id.* The Tecumseh school district has provided sufficient evidence to shore up the need for its drug testing program. *Id.*

137. Dery, *supra* note 102, at 103 (stating briefly that the reason for the Supreme Court’s inconsistencies in applying the special needs doctrine to drug testing policies aimed at government officials may be the result of the Justices themselves fearing they will be tested at some point). Subjecting political candidates to suspicionless drug testing, although similar to other cases, did not “sit well with the Justices—indeed it was a drug-testing case the Supreme Court did not like.” Bulthuis, *supra* note 74, at 1579 (implying the Justices may have had personal bias in deciding *Chandler* because it applied to drug testing officials in similar positions to themselves). See Kitson, *supra* note 28, at 885 (discussing how Justice Scalia said that there is no better way to show that the government is serious about the “war on drugs” than to subject its own to the war by making them submit to tests).

138. Veytsman, *supra* note 23, at 324 (discussing how imposing drug testing of students involved in school extracurricular activities would be testing the students least likely to be using drugs); Raby, *supra* note 24, at 1033 (explaining how students involved in extracurricular activities are less likely than non-active students to engage in adolescent drug use); Glassman, *supra* note 50, at 981-82 (stating that a drug testing policy that only tests students who participate in extracurricular activities ignores drug use by the other groups of students who may be in the most need of school intervention). A survey done in Indiana, which reported about drug use among students, concluded

between student participation in athletics and other extracurricular activities and reduction in drug use.¹³⁹ As participation in school sponsored extracurricular activity increases, the likelihood of those participating students becoming drug users decreases.¹⁴⁰ Following this logic, schools wishing to eradicate student drug use should focus on getting students involved in extracurriculars instead of providing them a reason not to participate.¹⁴¹ It is non-participating students who are truly the “at risk” students the government should be targeting, not the students already participating in extracurricular activities.¹⁴²

that many suspicionless drug testing policies are unlikely to deter drug use because they target the low risk students. Bishop, *supra* note 50, at 241 (discussing how schools districts that implement suspicionless drug testing policies for students who voluntarily participate in extracurriculars will likely be testing the wrong population).

139. Bishop, *supra* note 50, at 242 (discussing a study done by the U.S. Department of Human and Health services regarding the correlation between extracurricular participation and drug use). The study clearly showed that students who get involved in school extracurricular activities were significantly less likely to exhibit risky behavior such as drug use and smoking. *Id.* See Raby, *supra* note 24, at 1033 (stating that scientific studies have demonstrated that students who isolate themselves from social activities are at a greater risk for drug abuse than students who are involved); Reginald G. Smart & Dianne Fejer, *Recent Trends in Elicit Drug Use Among Adolescents*, 68 CANADA'S MENTAL HEALTH SUPPLEMENT 12 (1971) (discussing how a study of close to 9,000 junior high and high school students revealed that students who didn't participate in school activities were more likely to use drugs).

140. *Earls III*, 536 U.S. at 853 (Ginsburg, J., dissenting) (discussing how “nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers”) Tenth graders who stated they spent no time participating in school extracurricular activities were forty-nine percent more likely to have used drugs compared to students who spent one to four hours per week engaging in extracurricular activities. *Id.* See Bishop, *supra* note 50, at 241 (quoting a district judge who discussed how students participating in school extracurricular activities are less likely to use drugs and alcohol); Raby, *supra* note 24, at 1033 (discussing how participating in social activities has been proven to decrease the risk of student drug use); Veytsman, *supra* note 23, at 324-25 (stating that as a students get more involved in school activities, including participation in extracurricular activities, the likelihood of the student becoming a marijuana user decreases greatly); Harrison, *supra* note 44, at 405 (discussing how students involved in competitive extracurricular activities use drugs less often because the fear drugs will have a negative effect on their performance).

141. Raby, *supra* note 24, at 1033 (discussing how the strong correlation between participation in extracurricular activity and decreased drug use suggests that school districts wanting to eliminate drug use among its students should encourage every student to get involved in school activities). Failure to do this by implementing suspicionless drug testing policies may “frustrate this goal.” *Id.* By looking at studies done that show student participation in extracurricular activities decrease drug use, schools should be advised to encourage students to participate in extracurricular activities. Veytsman, *supra* note 23, at 324 (stating to discourage student drug use, schools need to be concerned with getting more of their students involved in school sponsored activities).

142. See *supra* notes 140-141 (discussing how students already involved in extracurricular activities are less likely to be using drugs than students not participating in extracurricular activities).

F. Negative Consequences of Drug Testing Policies

By handing students a cup to fill as a condition to participate in extracurriculars, students may simply chose not to participate as an alternative to undergoing a humiliating drug test.¹⁴³ Proponents of suspicionless drug testing policies hope that the fear of random drug testing will coerce students to quit using drugs in order remain eligible to participate in their extracurricular activity.¹⁴⁴ However, these same people fail to give consideration to the possibility students may chose the option.¹⁴⁵ If students decide to forgo participation in extracurricular activities in preference to undergoing a urinalysis, it may generate numerous negative consequences.¹⁴⁶ Students who are drug

143. Bishop, *supra* note 50, at 241 (discussing how students who are drug users and know they will have to undergo a urinalysis before they can participate in school extracurricular activities may simply chose not to participate); Dugan, *supra* note 111, at 178 (discussing how students may be inclined to drop out of their extracurricular activity in order to avoid submitting to a drug test); Glassman, *supra* note 50, at 982-83 (discussing how drug testing policies may actually cause students to quit their activities); Dan Hardy, *Athletes' Drug Testing Has Been Quietly Dropped in Chester Upland, Phila.*, *Inquirer*, Oct. 11, 1998, at MD3 (discussing how a Pennsylvania school district implemented a drug testing program and students and parents blamed the lack of turnout for the football team to the drug testing policy). Drug testing of students places extra burdens on participation and these extra burdens may lead marginal athletes and those interested in drugs to quit participation. Raby, *supra* note 24, at 1033 (discussing there is a good chance that the threat of being drug tested may actually discourage some students from participating rather than deter the drug use); Veytsman, *supra* note 23, at 325-26 (discussing how educators are concerned that drug testing as a condition to participation in extracurricular activities may "dissuade" students from volunteering for school sponsored activities).

144. Dugan, *supra* note 111, at 178 (discussing how school districts assume that the drug testing policies they adopt will work because students value extracurricular activities over drug use). "The authors of suspicionless drug testing policies hope that the prospect of random testing will convince students to give up their drug habits in order to ensure their eligibility for extracurricular activities." *Id.* See McIntyre, *supra* note 31, at 1051 (discussing how the suspicionless drug testing policies adopted are scare tactics to intimidate students into compliance to reach the policies goals).

145. Dugan, *supra* note 111 at 178 (discussing how school districts are narrow sighted when they draft drug testing policies). "School districts ought to take into account the likelihood that some students—perhaps because they are addicted, or perhaps because they value drugs above extracurriculars – either cannot or will not stop using drugs." *Id.* See Wagman, *supra* note 7, at 358 (discussing how it is unclear whether a suspicionless drug testing policy will "weed out abusers or make them think twice about participating in an extracurricular"); David Schimmel, *Supreme Court Expands Random Drug Testing: Does the Fourth Amendment Still Protect Students?*, 170 ED. LAW REP. 15, 22 (discussing an argument against suspicionless drug testing of students is that the testing will drive students away from extracurriculars that might help keep them off drugs and students will not participate because they feel their privacy is being invaded).

146. Bishop, *supra* note 50, at 241 (discussing that a major problem with drug testing policies aimed at students participating in extracurricular activities is that the policies do not logically lead to the outcome schools want to achieve); Dugan, *supra* note 111, at 177-79 (discussing the other arguments for striking down suspicionless drug testing of students besides Constitutional ones); Messerle, *supra* note 11, at 840-41 (discussing the possible dangerous results that may occur as side effects of suspicionless drug testing of students wishing to participate in extracurricular activities).

users or “at risk” students will be further removed from the positive support, guidance, and supervision available within the school environment.¹⁴⁷ As a result, it becomes harder for school personnel to provide drug counseling or treatment, or even identify possible drug abuse problems.¹⁴⁸ This being true, suspicionless drug testing policies could actually intensify an adolescent’s drug problems and make the habit more difficult for the student to overcome, which does not accomplish the purposes set out by the school.¹⁴⁹

Another potential side effect to suspicionless drug testing policies emerges from the policies blindness as to the time frame in which student drug use is most prevalent.¹⁵⁰ If students opt to quit participating

“Policies may actually discourage the student who is vulnerable to drug abuse from pursuing the structure and positive influence” of an extracurricular program. Harrison, *supra* note 44, at 405 (discussing drug testing policies will make some students hide their drug problems by avoiding participating in school extracurricular activities).

147. Bishop, *supra* note 50, at 240 (discussing how suspicionless drug testing policies may discourage students from participating which takes at risk students away from the protective school environment). Suspicionless drug testing policies may have the effect of making students discontinue participating in extracurricular activities, which would remove students from the “positive support and guidance that his school has to offer.” Dugan, *supra* note 111, at 178 (discussing a possible negative consequence of suspicionless drug testing policies would be to take students out of a controlled school environment).

148. Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools – A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 19 (2002) (discussing how a good teacher or administrator could form some basis to believe a student has a drug problem based on interaction with the student under the teacher’s supervision). Students who really need the help of drug counseling and rehabilitation would not be around school personnel who could monitor them and identify drug use problems so these students can get the appropriate help. Bishop, *supra* note 50, at 240–41 (discussing how it would become much more difficult for school faculty to help students if they are not participating in extracurriculars at the school). Students who are “at risk” would not be under supervision longer than the standard school day, which may not be long enough for school personnel to notice the students’ drug problem. *Id.* at 240. It makes more sense to keep students with drug problems under school district control where there is school initiated counseling programs available. Dugan, *supra* note 111, at 178 (discussing how when students do not participate in extracurricular activities it makes it much harder for school personnel to secure treatment options for students on drugs).

149. Dugan, *supra* note 111, at 179 (discussing how if students chose not to participate in extracurriculars the suspicionless drug testing policies may have the effect of increasing student drug problems). If students are not participating and under supervision of the school, a student’s drug problem may be more difficult to overcome. *Id.* “As a result, there is an increased risk that students will choose drug use over participation in extracurricular activities, which arguably decrease drug use. Glassman, *supra* note 50, at 983 (discussing how drug testing only certain groups of the student body may increase drug use because the students would quit the activity that subjects them to the drug test).

150. Bishop, *supra* note 50, at 242 (discussing the peak times in which students would engage in juvenile crimes are between three o’clock and eight o’clock). This time frame represents the time separating when students get out of school and their parents arrive home. *Id.* See Dugan, *supra* note 111, at 179 (stating a major problem with many drug testing regimes are their narrow focus and not looking at the potential side effects such as what students will do with their extra free time if

in extracurricular activities as an alternative to being tested, the drug testing policies adopted by schools would in essence be creating more free time for students to use drugs.¹⁵¹ The time frame in which students would normally be engaging in productive extracurricular activity, such as football, band, or cheerleading, transforms into unsupervised time in an empty house where the effects of peer pressure can dominate a child's decisions.¹⁵² Keeping students involved in constructive extracurricular activities that may reveal an undiscovered talent or passion seems like much better public policy than leaving students in unsupervised homes with hours of free time to be tempted by curiosity.¹⁵³

Finally, the authors of suspicionless drug testing policies and the

they chose not to participate in extracurriculars).

151. Bishop, *supra* note 50, at 242 (discussing the free time students would acquire by choosing not to participate in extracurriculars would be time they are most likely to get into trouble or use drugs). "If students are given enjoyable activities in which they can truly excel and become constructively involved, then there is less time for them to get into trouble with illegal substances, get involved with others spending their time dealing in illegal substances, or even become involved in crimes." *Id.* The peak times in which students would engage in juvenile crimes are between three o'clock and eight o'clock. *Id.* This time frame represents the time separating when students get out of school and their parents arrive home. *Id.* See Dugan, *supra* note 111, at 179 (discussing an important effect of suspicionless drug testing may be to free up time for students to engage in drugs after school during the hours which they might otherwise be involved in extracurricular activities).

152. Bishop, *supra* note 50, at 242 (discussing how if students are not participating in extracurricular activities after school they will be faced with the temptation to do illegal activities). Extracurricular activities are major ways to keep students from going home to empty houses where they are unsupervised and can get into trouble. *Id.* See Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*: 91 CAL. L. REV. 163, 193 (2003) (discussing how adolescents are more likely to engage in all criminal activity when they are in groups and the acts adolescents participate in often related to peer pressure and trying to impress one's friends); Andrew D. Leipold, *The War on Drugs and the Puzzle of Deterrence*, 6 J. GENDER RACE & JUST. 111, 117 (2002) (discussing how the greatest reason most teenagers report they use or have experimented with drugs is peer pressure from their friends). But, students could rely on the threat of being selected for the suspicionless drug testing as an excuse when telling their peers they do not want to participate in drug use. Raby, *supra* note 24, at 1032 (discussing how drug testing policies adopted by school districts could serve as a weapon for students to use to fight off peer pressure). See Sandy Louey, *Schools Considering Drug-Testing Program, Trustees may get Recommendation this Spring*, The Dallas Morning News, Jan. 21, 1999, at 1G (stating that drug testing can give students a good reason to refuse drugs and escape peer pressure from other students).

153. Bishop, *supra* note 50, at 242-43 (discussing a better public policy would be keep students occupied in constructive extracurricular activities rather than putting them in a position to be tempted by illegal activity). "After all, barring a student from participating in an activity that could reveal an undiscovered talent or passion, or which may provide a glimpse of opportunities available to the student besides drug use, hardly seems like good public policy." Dugan, *supra* note 111, at 179 (discussing that public policy would be better served if schools made every effort to get students involved in extracurricular activities instead of excluding students from the activities and creating more time for students to use drugs after school).

Supreme Court underestimate the value of school related extracurricular activities by maintaining the position that extracurricular activities are simply a privilege and not an integral part of a student's educational experience.¹⁵⁴ By maintaining this position, primary and secondary educational institutions lose focus of their main obligation to students – to make sure students are prepared for the real world.¹⁵⁵ Arguably a student's future success and livelihood can be equally attributed to what is learned and achieved through extracurricular activities as well as what is learned in the classroom.¹⁵⁶ Participation in school extracurricular

154. See *Earls III*, 536 U.S. at 825 (suggesting that any extracurricular students engage in high school is purely a privilege because the students voluntarily participate in them); Badanes, *supra* note 26, at 718 (discussing how there is a strong argument that extracurricular activities are not really a voluntary privilege). Justice Ginsburg recognized in her dissent in *Earls* that a student's participation in extracurricular activities is "part of a complete educational experience." *Earls III*, 536 U.S. at 845-46 (Ginsburg, J., dissenting). But see Mawdsley, *supra* note 124, at 9 (stating that courts continue to treat extracurricular activities as a privilege despite the recognized educational benefits associated with extracurricular activities).

155. See *Todd v. Rush County Sch.*, 139 F.3d 571, 573 (7th Cir. 1998) (Ripple, J., dissenting) (discussing how "exclusion of a high school student from all extracurricular activities deprives that student of a great deal of what the modern American high school has to offer in terms of academic and personal development."). The success of teachers being able to educate depends on whether the student trusts the teacher, which may not happen if that teacher is the one monitoring the student's suspicionless drug test. Dupre, *supra* note 36, at 100 (stating that "teachers are in school to educate" students). "Perhaps the real problem is merely that schools have lost focus on their primary goal: to educate young people in a discrete set of skills in preparation for adulthood." Eskelsen, *supra* note 37, at 363 (discussing the argument that schools need to shift their focus). Teachers must examine whether their purpose is to clean up societies problems or prepare students. Kitson, *supra* note 28, at 882 (discussing how high schools would be more effective if they used their sparse educational resources to further educational goals and not on drug testing). "School administrators' time and efforts would be better spent maintaining their successful educational efforts to discourage drug use, rather than shadowboxing against problems that may not exist." McIntyre, *supra* note 31, at 1051 (discussing how school administrators are not spending their time and efforts correctly to ensure students are law abiding citizens when they leave); Jamie Parslow, *4th Amendment & Searches in Schools*, 28-JUN VT. B.J. 68, 68 (2002) (stating how an adolescents high school years are the years that teach students to grow and prepare to be the future leaders and employers of the world). See University Interscholastic League, *Benefits of Extracurricular Activities*, available at <http://uil.utexas.edu/admin/benefits.html> (last visited October 5, 2003) (discussing how extracurricular activities teach students valuable qualities that the public expect high schools to produce in the students so the students become responsible adults).

156. Mawdsley, *supra* note 124, at 9 (discussing how extracurricular activities can play an important role in deciding how a student's future turns out economically). "In a changing society where a student's future livelihood may just as well reflect what is learned in extracurricular activities as in the classroom." *Id.* Participation in extracurricular activities is important to a student's development educationally and economically in the future. *Id.* See University Interscholastic League, *supra* note 155 (discussing how participation in extracurricular activities is a great predictor of whether the student will have later success in life). Studies done show that the only factor that could be used to predict a student's later success in life was whether the student achieved in school extracurricular activities. *Id.* Extracurricular activities are valuable because they reinforce skills the student learns in the classroom and gives the student an opportunity to apply

activities can play an integral role in developing the character traits that may dominate a student's personality the rest of his or her life.¹⁵⁷ If students elect not to participate as an alternative to undergoing an invasive drug test, they may never learn the value of teamwork, importance of responsibility, or rewards of hard work and dedication.¹⁵⁸ This being so, primary and secondary educational institutions will fail in accomplishing their primary task by not preparing drug free students, a consequence far worse than allowing a few members of the band, an extracurricular group that has no demonstrated proclivity towards drug use, play their school's fight song under the influence.¹⁵⁹

V. CONCLUSION

The Supreme Court once said that students do not "shed their constitutional rights . . . at the school-house gate,"¹⁶⁰ but after the *Earls* decision one would not be too far off the mark to say that the rights of students are now shredded when they walk through the schoolhouse gates.¹⁶¹ The disparate treatment of schoolchildren and politicians illustrates that the special needs doctrine can be manipulated to meet

things learned in the classroom to a real-life situation. *Id.*

157. Lani Guinier, *Reframing the Affirmative Action Debate*, 86 KY. L.J. 505, 518 n.29 (1998) (stating how intense extracurricular involvement in high school reflects qualities of student leadership as well as initiative); Peter Sansom and Frank Kemerer, *It's All About Rules*, 166 ED. LAW REP. 395, 396 n.4 (stating that students who participate in athletics and extracurricular activities are likely to overcome biases based on race, cultural, and socioeconomic status); McIntyre, *supra* note 31, at 1048 (discussing how the values students learn in grade school and high school are ones the students will take with them the rest of their lives).

158. Nemours Foundation, *Extracurricular Excitement*, available at http://kidshealth.org/teen/school_jobs/school/involved_school.html (last visited October 5, 2003) (discussing how participating in school extracurricular activities helps students become well-rounded and responsible). See University Interscholastic League, *supra* note 155 (discussing how extracurricular activities provide valuable lessons to students such as teamwork, sportsmanship, and hard work). Extracurricular activities also help students develop self discipline. *Id.* Studies have shown that ninety-five percent (95%) of students and principals feel that participation in extracurricular activities teach students valuable lessons that cannot be learned in the classroom. *Id.*

159. Wagman, *supra* note 7, at 358 (discussing how in reality the suspicionless drug testing policies adopted by schools infringe upon the constitutional rights of all students being tested to detect just a few students who do use drugs); University Interscholastic League, *supra* note 155 (discussing how extracurricular activities teach students valuable qualities that the public expect high schools to produce in the students so the students become responsible adults).

160. *Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that even though students do not "shed their constitutional rights. . . at the school house gate," the extent of their rights is only what is appropriate for children at school).

161. Schimmel, *supra* note 145, at 21 (discussing how in Professor Herman Schwartz's opinion, the decision in *Earls* means the "rights of young people are shredded when they walk through the school-house gates").

whatever end the Court subjectively feels is the best outcome.¹⁶² Recognizing that the special need doctrine has no anchor in the Fourth Amendment and serves as a string-puppet for the Court's shifting values should raise serious concerns about the implications of the *Earls* decision. It is not inconceivable that *Earls* will lead to an avalanche of suspicionless testing policies not based on evidence of drug use or other concrete evidence, but based on amorphous principles of ensuring student health and well being.¹⁶³

The national crisis America is facing regarding adolescent drug use is by no means a problem that can be ignored.¹⁶⁴ It is indisputable that the government has an extremely important interest in keeping our students drug free.¹⁶⁵ However, analyzing the possible negative ramifications that flow from suspicionless drug testing policies, like the one adopted in *Earls*, demonstrate that this interest should not be absolute.¹⁶⁶ The Courts must never forget: "the greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding."¹⁶⁷

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162. See *supra* notes 117-18 (discussing how the special needs doctrine amounts to nothing more than a balancing test susceptible to the Supreme Court's shifting values).

163. Hutchens, *supra* note 35, at 1286 (discussing what other kinds of searches may survive constitutional scrutiny under the rationale of insuring student health and safety). Since sexually transmitted diseases, like drugs, represent a serious threat to the safety of students, a school may be able to initiate suspicionless testing of students for sexually transmitted diseases. *Id.* See Schimmel, *supra* note 145, at 24 (discussing how based on the rationale of *Earls* it may be constitutional for schools to require students who drive to school to be subject to random suspicionless drug testing); Raby, *supra* note 24, at 1023-24, 1027-28 (discussing how testing only certain groups of students is just a screen for testing virtually the entire student body, and if the government's objective is to deter drug use among students, courts could logically extend testing to entire student population).

164. Glassman, *supra* note 50, at 981; McIntyre, *supra* note 31, at 1028-29.

165. McIntyre, *supra* note 31, at 1028-29, 1038.

166. See *supra* notes 143-55 (discussing negative consequences of suspicionless drug testing).

167. *Olmstead v. United States*, 277 U.S. 438, 573 (1928) (Brandeis, J., dissenting).