Affecting Eternity: The Court's Confused Lesson in Board of Education v. Earls

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IN BOARD OF EDUCATION V. EARLS

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In Board of Education v. Earls, the U.S. Supreme Court found the random drug testing of schoolchildren who participated in extracurricular activities to be reasonable under the Fourth Amendment. In this Article, Professor Dery argues that this latest extension of the special needs doctrine is both patronizing to student privacy interests and inconsistent with the Court’s previous limitation of suspicionless searches in New Jersey v. T.L.O. and Chandler v. Miller. Professor Dery criticizes the Court’s Earls decision as a confused lesson in constitutional law, abandoning the very fundamentals of the Fourth Amendment.

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"A teacher affects eternity; he can never tell where his influence stops."’
Henry Adams

I. INTRODUCTION

How much should we trust our schoolchildren? Life in our nation’s schools is fraught with risk at every turn. If your child shows promising musical ability, be forewarned that perils lie ahead when he or she joins the high school marching band. The school district of Tecumseh, Oklahoma has warned that such band members must “perform extremely precise routines with heavy equipment and instruments in close proximity to other students.”2 If instead, you have a prodigy in the agricultural sciences, think twice before enrolling them in the Future Farmers of America, in which students must control animals “as large as 1500 pounds.”3 Also, future chefs are not insulated from danger. The Future Homemakers of America work with hazards hidden even in seemingly mundane “cutlery” and “sharp instruments.”4

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1 HENRY BROOKS ADAMS, THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY 300 (Houghton Mifflin Co. 1918) (1907).


3 Id.

4 Id.
Add drug use to the mix, and one shudders at the prospect of what might happen with an errant trombone, hog, or spatula.

The Supreme Court, however, is working to protect the nation from the hazards attending the mix of drugs with band equipment, domesticated animals, or flatware. In Board of Education v. Earls, the Court found the random drug testing of schoolchildren participating in extracurricular activities reasonable under the Fourth Amendment. The Court reached this conclusion in part due to its concern that schoolchildren receive adequate protection to enable learning. Notably, the Earls Court recognized the State’s “special responsibility of care and direction” over its children. In regards to directing our youth, however, it is unclear precisely what lesson Earls is teaching the nation’s schoolchildren.

The plaintiffs bringing suit in this case were high school students. Presumably, plaintiffs Lindsay Earls and Daniel James were only a few years away from exercising their right to vote or their privilege to protect our country in the armed forces. They may have even been entrusted with driving on our streets and highways. It could be argued that Ms. Earls and Mr. James, verging on adulthood, must be prepared for these responsibilities by learning the lesson of individual judgment and self-reliance. The Supreme Court, however, has chosen to send a message that our future citizens are not to be trusted even to join a choir or pom pom without a drug test.

This Article begins, in Part II, with a review of the doctrine that forms the underpinnings of the Earls Court’s rationale: special needs. Part III examines Earls — its facts, lower court litigation, and the Court’s decision. In Part IV, this Article assesses the Court’s analysis and thus considers the lessons taught by the opinion rendered by the Earls Court.

II. The Special Needs Doctrine

As they stand in their stalls providing officials with urine samples, students at Tecumseh High School can trace their loss of privacy back to a fourteen-year-old high school freshman, known only as T.L.O., who chose to smoke a cigarette in a

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5 Id. at 830. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

6 Earls, 536 U.S. at 834 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662 (1995)).

7 Id. at 826.

8 See id.
school bathroom.9 In New Jersey v. T.L.O., when a teacher caught T.L.O. violating the school rules by “smoking in the lavatory,” the teacher sent her to the office of the assistant vice principal.10 T.L.O. not only denied smoking in the bathroom, but “claimed that she did not smoke at all.”11 The assistant vice principal then promptly searched T.L.O.’s purse, finding a pack of cigarettes, which he held before her “as he accused her of having lied to him.”12 The recovery of the cigarettes in turn exposed evidence of marijuana possession and dealing.13 The State later presented this evidence against T.L.O. in juvenile court.14

This public school search of a student’s purse presented the Court in T.L.O. with an interaction between government and individual that differed from the criminal investigation norm. In the usual case, the Court recognized a “warrant requirement” in which government officials could not intrude upon individual privacy without first obtaining a search warrant.15 This Fourth Amendment warrant preference has been heralded repeatedly by the Court throughout the decades.16 Justice White, who authored the Court’s opinion in T.L.O., was alert to the case’s unique setting beyond the traditional law enforcement boundaries; he thus recognized that what was “reasonable” under the Fourth Amendment depended on “the context within which a search takes place.”17 To therefore determine reasonableness of searches in the school setting, the T.L.O. Court balanced “‘the need to search against the invasion which the search entails.’”18 Justice White then declared that a school official’s “search of a child’s person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.”19 The Court, however, also took heed of the government’s needs in the matter, stating: “Against the child’s interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”20 Balancing the student’s interest in privacy against the school’s interest in discipline, T.L.O. found the search, based as it was on “reasonable grounds for suspecting that the search will

10 Id.
11 Id.
12 Id.
13 Id.
14 Id. at 329.
15 Id. at 340.
17 T.L.O., 469 U.S. at 337.
18 Id. (quoting Camara v. Mun. Ct., 38 U.S. 523, 536–37 (1967)).
19 Id. at 337–38.
20 Id. at 339.
turn up evidence that the student has violated or is violating either the law or the rules of the school,” to be reasonable.\textsuperscript{21} The actual naming of this new kind of analysis as one of “special needs” fell to Justice Blackmun in his concurring opinion.\textsuperscript{22}

Thus, in its first case to apply special needs balancing to the competing interests at a school, the Court still adhered to a mandate of individualized suspicion — the reasonable suspicion standard. This is graphically illustrated by the Court’s detailed link-by-link analysis of the chain of suspicion supporting the vice principal’s search for marijuana.\textsuperscript{23} Justice White began by considering, for three pages of the Court’s opinion, the first link of chain: whether the school official possessed reasonable suspicion to search T.L.O.’s purse for cigarettes.\textsuperscript{24} Then, upon removing the package of cigarettes, reasonable suspicion for the marijuana search was established by the official’s observation of rolling papers.\textsuperscript{25} The step-by-step reliance upon reasonable suspicion continued as follows:

The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.’s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money.\textsuperscript{26}

This, in turn, enabled a further search of a “separate zippered compartment of the purse,” which revealed sheets “containing a list of ‘people who owe[d] [T.L.O.] money’” and letters.\textsuperscript{27} This careful analysis thus demonstrates that the Court, in its first special needs case involving public schools, disciplined itself to maintain a rigorous individualized suspicion standard.

Any protection provided by T.L.O.’s reasonable suspicion standard was short-lived. The Court’s next two special needs cases, \textit{Skinner v. Railway Labor

\textsuperscript{21} \textit{Id.} at 342.
\textsuperscript{22} Justice Blackmun emphasized: “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.” \textit{Id.} at 351 (Blackmun, J., concurring).
\textsuperscript{23} \textit{Id.} at 343–48.
\textsuperscript{24} \textit{Id.} at 343–46.
\textsuperscript{25} \textit{Id.} at 347.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
Executives' Ass'n and National Treasury Employees Union v. Von Raab, allowed the government to intrude without any showing of individualized suspicion. Further, these two toxicology cases sanctioned invasions beyond searches of articles being carried to the testing of fluids from the body. Again, the Court reached such conclusions by a balancing of the interests of society against those of the individual.

In Skinner, the Federal Railroad Administration (FRA) mandated "blood and urine tests of employees who [were] involved in certain train accidents," and permitted "breath and urine tests" of employees who violated "certain safety rules." Justice Kennedy, writing for the majority, explicitly acknowledged the Court’s warrant requirement by noting:

In most criminal cases, we strike [the balance of interests] in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.

By the same token, the Skinner Court added that: "We have recognized exceptions to this rule, however, ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’ The railroad regulations addressed such special needs, because “[t]he FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather ‘to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.”'

Skinner then used the special needs label to individually pick off each Fourth Amendment protection. The first to go was any need for prior judicial approval, dispatched with the dismissive conclusion that “[w]e do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.” When Justice Kennedy set his sights on the probable cause standard, he declared that “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.” The Court therefore jettisoned the requirement of any level of individualized suspicion.
by reasoning:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.\textsuperscript{38}

Deeming the privacy interests in the contents of one’s own body “minimal” necessitated a review of the magnitude of intrusions involved as well as a reliance on the “employment context in which [testing] takes place.”\textsuperscript{39} As to the size of the invasions caused by the tests, Skinner found the “intrusion occasioned by a blood test” to be “not significant,” for such “tests are a commonplace in these days of periodic physical examinations.”\textsuperscript{40} Breath tests were “even less intrusive” for they did not “require piercing of the skin.”\textsuperscript{41} Likewise, urine tests were “not invasive of the body.”\textsuperscript{42} The Court then moved on to the even more important variable: the context of the searches. Justice Kennedy urged that: “[E]xpectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.”\textsuperscript{43}

In contrast to the small intrusions on employees, the government’s concerns loomed large. The FRA had a “compelling” interest in testing “without a showing of individualized suspicion.”\textsuperscript{44} Justice Kennedy warned of the continual danger of catastrophe hovering over the rails run by frail human beings, fretting that “[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”\textsuperscript{45} Indeed, the slightest mental misstep could trigger an event in proportion to those at “nuclear power facilities.”\textsuperscript{46} Further, mandating the gathering of individualized suspicion during the bedlam of a train wreck might defy practical reality. Skinner recognized:

\begin{itemize}
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id. at 625 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).
  \item \textsuperscript{41} Id. at 625.
  \item \textsuperscript{42} Id. at 626.
  \item \textsuperscript{43} Id. at 627.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id. at 628.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id.
\end{itemize}
Investigators who arrive at the scene shortly after a major accident has occurred may find it difficult to determine which members of a train crew contributed to its occurrence. Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident.\(^{48}\)

The government's "compelling interests" therefore outweighed the employees' "privacy concerns," enabling the railroads to perform suspicionless toxicological testing under the Fourth Amendment.\(^{49}\)

The Court struck the same balance of interests in *Von Raab*, in which employees of the United States Customs Service were required to submit to drug tests before being placed in positions involving "drug interdiction," carrying of "firearms," or handling "classified" material.\(^{50}\) Justice Kennedy, writing for the *Von Raab* Court, once again acknowledged that, "as a general matter," a search needed to be supported by "a warrant issued upon probable cause."\(^{51}\) He noted, however, that the purpose of the testing in *Von Raab* was to "deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent promotion of drug users to those positions" rather than to pursue "criminal prosecution[s]."\(^{52}\) *Von Raab* therefore deemed this goal to be "beyond the normal need for law enforcement" and thus one of "special governmental needs."\(^{53}\)

As in *Skinner*, the Court in *Von Raab* found the balance of interests tilted in the government's favor.\(^{54}\) The privacy concerns of individual agents were diminished by their choice of profession, for it should be "plain that certain forms of public employment may diminish privacy expectations even with respect to . . . personal searches."\(^{55}\) The scrutiny that the customs agents reasonably could expect was analogous to that placed on employees of the United States Mint, the military, or intelligence services, who "may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions."\(^{56}\)

The diminished concerns of the individual officer paled in comparison to the interests of the government in *Von Raab*. The "smuggling of illicit narcotics" had

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\(^{48}\) Id. at 631.

\(^{49}\) Id. at 633.


\(^{51}\) Id. at 665.

\(^{52}\) Id. at 666.

\(^{53}\) Id. at 665.

\(^{54}\) Id. at 677.

\(^{55}\) Id. at 671.

\(^{56}\) Id.
created a ""veritable national crisis in law enforcement."" Further, it was the Customs Service that formed "our Nation's first line of defense" against such drug trafficking. Customs officers consequently were "targets of bribery," subject to "blackmail," and in danger of committing "integrity violations." Justice Kennedy therefore concluded that "[t]he Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms." After considering risks on the scale of nuclear reactors and espionage, it might seem that a return to the school setting would be a let down. Not for the Court, as it found a series of hazards lurking on the playing field in Vernonia School District 47J v. Acton. In Vernonia, an Oregon logging community in "small-town America," was suddenly and dramatically transformed by drugs in its schools during the mid-1980s. School officials witnessed such a "sharp increase in drug use" that students had no qualms openly speaking about the "drug culture" and even boasting that "there was nothing the school could do about it." Disciplinary referrals more than doubled since before the drug problems, "outbursts of profane language became common," and coaches observed failures in following "safety procedures" and an increase in sports-related injuries. The school officials responded by providing "classes, speakers, and presentations," and even brought a drug-detecting dog on campus. None of these attempted remedies worked. The administration found itself "'at its wits end' for "'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion.'"

To deal with this crisis, the School District implemented a "Student Athlete Drug Policy," in which those wishing to participate in school sports were required to sign forms consenting to suspicionless drug testing. Students consequently submitted to two testing procedures, in which: 1) every student was tested at the beginning of the sport's season; and 2) each week, ten percent of the athletes were

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57 Id. at 668 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).
58 Id.
59 Id. at 669.
60 Id. at 674.
61 Id. at 669.
62 Id. at 668.
64 Id. at 648.
65 Id.
66 Id. at 649.
67 Id.
68 Id.
1992)).
70 Id. at 650.
randomly selected to provide samples for testing. The guidelines for sampling were quite explicit:

The student . . . enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

Students with two positive test results faced a choice of attending an “assistance program” requiring weekly testing, or being suspended from school athletics. James Acton, a seventh grader wishing to play football, refused to sign the consent form and thus was denied entry into school athletics. James Acton and his parents sought declaratory and injunctive relief, arguing that the forced urinalysis violated a series of rights, including the Fourth Amendment.

The Vernonia Court wasted little effort in categorizing the case as one of “‘special needs,’” because “in the public school context . . . , the warrant requirement ‘would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,’ and ‘strict adherence to the requirement that searches be based on probable cause’ would undercut ‘the substantial need of teachers and administrators for freedom to maintain order in the schools.’” Thus, Justice Scalia, the author of the majority opinion in Vernonia, had quickly pushed aside most of the Fourth Amendment protections. The only obstacle to the government’s testing program that remained was “individualized suspicion of wrongdoing.” Indeed, T.L.O. — the only other special needs case in the school setting — kept and relied upon this last vestige of Fourth Amendment protection.

To relieve Vernonia from T.L.O.’s reasonable suspicion requirement, Justice Scalia aimed to liken Vernonia’s facts to those of the suspicionless testing cases:

\[71\] Id.
\[72\] Id.
\[73\] Id. at 651.
\[74\] Id.
\[75\] Id. at 652.
\[76\] Id. at 653 (quoting New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985)) (alteration in original).
\[77\] Id. at 653.
\[78\] Id.
Skinner and Von Raab. This feat demanded the formulation of an elaborate test.\(^7\)

For this task, the Vernonia Court further parsed special needs' typical balancing of interests into the following factors: 1) the students' "decreased expectation of privacy," 2) the "relative unobtrusiveness of the search," and 3) the "severity of the need met by the search."\(^8\) Hovering above all these interests was the "most significant element": the "government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."\(^9\) Despite the complexity of Justice Scalia's new test, its outcome predictably followed those of the prior special needs cases; the government's concern in deterring "drug use by our Nation's schoolchildren"\(^\) outweighed the students' needs, particularly since the athletes had diminished their own privacy interests by going "out for the team."\(^\) Therefore, Vernonia held that urinalysis of student athletes was reasonable under the Fourth Amendment, even lacking any individualized suspicion of wrongdoing.\(^\)

After a decade of consistently supporting the government in special needs cases, the Court took an abrupt turn in Chandler v. Miller.\(^\) Chandler arose in Georgia, where the state legislature had passed a law requiring that each "candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs."\(^\) The statute included a long list of offices requiring such certification, from district attorneys to "Justices of the Supreme Court."\(^\) The legislation's requirements provided some flexibility and sensitivity. Candidates were allowed to choose between providing a specimen to a state-approved laboratory or to their personal physician.\(^\) Further, a candidate could preserve the privacy of a positive

\(^{7}\) Id. at 653–54.


\(^{9}\) Id. at 515 U.S. at 664–65.

\(^{10}\) Id. at 665.

\(^{11}\) Id. at 661; see also id. at 664–65.

\(^{12}\) Id. at 657; see also id. at 664–65.

\(^{13}\) Id. at 663–64.

\(^{14}\) 520 U.S. 305 (1997).

\(^{15}\) Id. at 309.

\(^{16}\) Id. at 310.
test, because the “results of the test [were] given first to the candidate who controls further dissemination of the report.”90 Some Libertarian nominees for state office, among them Walker L. Chandler, filed suit to enjoin enforcement of the statute, claiming in part that it violated the Fourth Amendment.91

This time, the argument against the government’s program found a receptive audience. Although Justice Ginsburg, who authored Chandler, still applied the balance-of-interests analysis, she reached a result that contrasted dramatically with prior special needs precedent. When viewing the government’s side of the balance, the Chandler Court noted with dismay that “[n]othing in the record hints that the hazards [the State] broadly describe[s] are real and not simply hypothetical for Georgia’s polity.”92 For instance, Georgia’s test, because of its scheduling rules, could easily be cheated by temporary abstention and therefore failed to offer a “credible means to deter illicit drug users from seeking election to state office.”93 Moreover, there seemed to be no need for the test in the first place, since candidates “are subject to relentless scrutiny — by their peers, the public, and the press.”94 Justice Ginsburg’s rejection of the government’s characterization of its own concerns was therefore total. She declared: “Notably lacking in [the government’s] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment’s main rule.”95 Any government need here was “symbolic, not ‘special,’” and thus failed to survive the Court’s balancing analysis.96

The most recent case offering a discussion of special needs before Earls was Ferguson v. City of Charleston.97 In Ferguson, employees at a public hospital in Charleston perceived “an apparent increase in the use of cocaine by patients who were receiving prenatal treatment.”98 Ultimately, the hospital responded to this health danger by participating in a task force that planned to “prosecute women who tested positive for cocaine while pregnant.”99 The task force formed a policy under which the hospital would test any patient “through a urine drug screen” if the patient met one or more of nine criteria.100 In some circumstances, patients testing positive

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90 Id. at 318.
91 Id. at 310.
92 Id. at 319.
93 Id.
94 Id. at 321.
95 Id. at 318–19.
96 Id. at 322.
98 Id. at 70.
99 Id. at 72.
100 Those criteria were:
1. No prenatal care.
2. Late prenatal care after 24 weeks gestation.
3. Incomplete prenatal care.
4. Abruptio placentae.
could enroll in a substance abuse treatment program. However, the hospital’s policy also:

prescribed in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy. If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18 — in this case, the fetus. If she delivered “while testing positive for illegal drugs,” she was also to be charged with unlawful neglect of a child.

Ten women who were arrested after testing positive for cocaine filed suit, arguing that their Fourth Amendment rights were violated. In their defense, hospital, law enforcement, and city officials urged that the test and arrest policy was “justified by special non-law enforcement purposes.” In an opinion written by Justice Stevens, the Court refused to categorize the case as one of special needs. The Ferguson Court concluded that this case differed from previous cases “in which [the Court] considered whether comparable drug tests ‘fit within the closely guarded category of constitutionally permissible suspicionless searches.’” Justice Stevens found the “critical difference” between this and previous drug testing cases which the Court upheld “lies in the nature of the ‘special need’ asserted” to justify the searches. The earlier cases had special needs “divorced from the State’s general interest in law enforcement.” However, “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.” Simply, there can be no special needs balancing in the absence of a special need recognized by the Court.

5. Intrauterine fetal death.
6. Preterm labor “of no obvious cause.”
7. IUGR [intrauterine growth retardation] “of no obvious cause.”
8. Previously known drug or alcohol abuse.
9. Unexplained congenital anomalies.

Id. at 72 n.4 (citation omitted).
Id. at 72.
Id. at 72–73 (citation omitted).
Id. at 73.
Id.
Id. at 77 (quoting Chandler v. Miller, 520 U.S. 305, 309 (1997)).
Id. at 79.
Id.
Id. at 80.
III. BOARD OF EDUCATION v. EARLS

A. Factual Background

On September 14, 1998, the Tecumseh Public School District in Oklahoma adopted a drug testing policy requiring “all students who participate in extracurricular activities to submit to suspicionless drug testing.” In establishing this program, school officials were not responding to the kind of “state of rebellion” that precipitated a crisis in James Acton’s school in Vernonia. Instead of such an immediate threat, the school district was dealing with “some evidence of student drug abuse dating back to the 1970’s.” Further, officials in Tecumseh used the phrase “drug abuse” in a broad sense to include alcoholic beverages and tobacco. Ms. Meoli, who spoke on behalf of the Board of Education at the Court’s oral argument, noted that the “district has always admitted that alcohol really is the number one problem in the school district.” School officials “were saying at the same time that they didn’t have a problem with — with what we usually refer to as drugs.”

Tecumseh’s officials were able to piece together instances of drug use, even if many were based “upon hearsay, or [were] virtually anecdotal.” Carolyn Daugherty, the “vocal music teacher and choir director,” testified that although “she had never caught a choir member using illegal drugs,” she has had “students tell her they thought some other student was using drugs.” Ms. Daugherty herself suspected some students of substance abuse because “‘appearance wise their eyes looked dilated [and] they looked spaced out.’” In her twenty-nine years of teaching, Ms. Daugherty had “referred one student to the office for suspected drug use,” and “a choir member was caught six or seven years previously bringing alcohol concealed in a cough syrup bottle on a trip.” Despite these instances, Ms. Daugherty believed “most of her choir students do not use drugs.”

Scrounging up evidence of drug use among students actually participating in extracurricular activities was a challenge. Shiela Evans, a teacher, testified that “she did not think that any of her students” who competed in the Future Homemakers of

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111 Earls, 115 F. Supp. 2d at 1285.
113 Id.
115 Id. at 1273.
116 Id. (alteration in original).
117 Id.
118 Id.
Another teacher, Danny Sterling, offered little more evidence. Over the past five years, he had spoken to the principal about one student he suspected of drug use and one time even "'smelt the aroma of pot.'" Further, Mr. Sterling estimated seeing "ten students per year" whom he believed were on drugs. However, none of these users competed in the Future Farmers of America (FFA) program. In fact, he testified that "students in FFA were less likely to use drugs than students who were not so involved."

The testimony providing the most direct link between drugs and extracurricular activities came from Dean Rogers, who spoke of "'[f]ourteen instances of drug usage.'" A careful examination of the actual specifics of these instances belies what the Court of Appeals called "distortions of the record," for they fail to be as damning as Roger's statement would imply. Many "instances" were nothing more than reports from her children or grandchildren that "unidentified" persons were seen with or spoke of "marijuana," "drug paraphernalia," or "smokes." Dean Rogers, however, also spoke of an "unidentified boy" offering her daughter "some pills," and mentioned an incident "in 1972 or 1973" in which a person "sold drugs."

Some of the drug hazards grew with the telling. Evidence heard by the District Court prompted it to find the following evidence of drug usage: "Injuries which have occurred to students and members of the public by District students engaged in Competitive Activities under the influence of drugs." Close inspection revealed that these "injuries" to "students" and "members of the public" were in fact a single incident in which "a steer got loose from a student under the influence of some substance, injuring himself and one other person." Nonetheless, regardless of the actual number involved, this incident provides a link, however rare, between drug use and extracurricular activities.

School records also provide paltry proof of drugs endangering students during extracurricular activities. Of twenty disciplinary referrals at the high school, "occurring over an unspecified period of time," thirteen involved a drug dog "showing an interest in the student, or his or her vehicle or locker." Although one

119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
124 Id. at 1274.
125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id. at 1273.
of these alerts involved marijuana possession, the "remainder involved possession of or suspected consumption of alcohol." None of these disciplinary referrals provides evidence linking the involved students to extracurricular activities.

At times, Tecumseh school officials themselves seemed less than certain of the existence of a drug problem. In its 1995–1996 application for funds under the Safe and Drug-Free Schools and Communities program, the district's "analysis of current use" stated: "[T]he use of the surveys have provided us with information concerning alcohol as our number one problem. Our students express that the main use is alcohol on the weekends. We have not found other types of illegal or controlled substances to be a major problem although they do exist." Officials again failed to sound any alarm the next year, reporting that:

The use of tobacco and alcohol continue to be our number one problems. Our students utilize that alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs including, controlled dangerous substances, are present but have not identified themselves as major problems at this time.

During 1998–1999, the very year that the school was requiring students in extracurricular activities to provide urine samples, the school's Safe and Drug-Free Schools and Communities report contained a statement "virtually identical" to the prior statements.

Rather than referring to its own reports, the Tecumseh School District responded to various accounts of drug use by mandating urinalysis of students wishing to participate in "any extracurricular activity." The Student Activities Drug Testing Policy covered "FFA [Future Farmers of America], FHA [Future Homemakers of America], Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics." For "many years," Tecumseh High School offered such activities as FFA, FHA, choir, marching band, and color guard to "all students who wished to participate." Team sports and some other activities were offered on a "competitive basis."

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131 Id.
132 Id. at 1274.
133 Id.
134 Id.
135 Id.
137 Id. As to the reference to "Pom Pon," the Court of Appeals noted: "The drug testing policy itself and the district court's opinion both describe this activity as Pom Pon. We accordingly refer to it that way in this opinion." Earls, 242 F.3d at 1267 n.2.
138 Earls, 115 F. Supp. 2d at 1282.
139 Id.
Consequently, the “vast majority of students” participated in “one or more school-sponsored activities.” Yet, to avoid being barred from participation under the new policy, students were required to submit to three different testing regimes: 1) testing “before participating” in the activity; 2) testing “randomly during the year while participating” in the activity; and 3) testing “at any time while participating in competitive activities upon reasonable suspicion.” The urinalysis tested for “amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates, and benzodiazepines.” The screen did not detect alcohol or nicotine. Unless waived by an informally created policy, each student was charged a yearly fee of four dollars to cover the costs of testing.

For testing, students were called out of class “in groups of two or three,” directed to the bathroom, and monitored by faculty who waited “outside the closed restroom stall for the student to produce the sample.” The monitor then poured “the contents of the vial into two bottles,” and together student and teacher sealed the bottles. The bottles, along with a form signed by the student, were then placed into a mailing pouch “in the presence of the student.” Also enclosed by the student, if pertinent, would be a form listing any legally prescribed medications. The test results, placed in “files separate from the students’ other educational files,” would be “disclosed only to those school personnel who have a need to know” and would not be turned over to law enforcement authorities.

The mandatory urinalysis created discomfort for both students and faculty. Ms. Daugherty testified that “ten percent of her students have complained about the drug testing procedure.” Four students dropped Ms. Daugherty’s choir class since the implementation of the drug testing policy, one explaining her dropping the class was “because of the drug testing policy.” Another teacher, Grant Gower, “testified that some students gave sideways looks to each other, and giggled and snickered during the testing procedure.” Even a teacher commented that “she felt she was engaging in potty training.”

140 *Id.*
141 *Id.* at 1282–83.
142 *Id.* at 1283.
143 *Earls*, 242 F.3d at 1267.
144 *Earls*, 115 F. Supp. 2d at 1283 n.4.
145 *Id.* at 1283.
146 *Earls*, 242 F.3d at 1267.
147 *Id.*
148 *Id.*
149 *Id.* at 1268.
150 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*
These trips to the restroom resulted in 243 students being tested in the 1998–1999 school year and some 241 students submitting to urinalysis in the 1999–2000 school year. Of these 484 students, four students (three from high school and one from junior high school) tested positive. All three high school students played in school athletic programs and thus presumably would have been discovered in a more traditional Vernonia-type test of students in sports.

**B. Litigation in the Lower Courts**

Lindsay Earls, a member of the “show choir, the marching band and the academic team,” filed suit in federal court challenging the portion of the testing policy that mandated “drug testing of students participating in non-athletic activities.” Judge David Russell of the District Court acknowledged that “[a]dmittedly the evidence in this case does not show an epidemic of illegal drug abuse in the Tecumseh School District.” Yet, the District Court decided that, “[w]hile the evidence in this case does not show a drug problem of epidemic proportions, or a student body in a state of rebellion, it certainly shows legitimate cause for concern.” Judge Russell reasoned that, regardless of particulars at Tecumseh High School, “[t]his Court is well aware of the prevalence of illegal drugs in our society, including our schools.” He thus concluded that a special need for random drug testing existed.

In performing special needs balancing, Judge Russell regarded schoolchildren’s privacy concerns as diminished because “simply being a student in a public school is ‘central’ to a lowered expectation of privacy.” As for the character of the State intrusion, the District Court figured that it was “the same basic procedure described

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155 Earls, 242 F.3d at 1273.
156 Id.
157 Id.
158 Id. at 1268.
159 Earls, 115 F. Supp. 2d at 1283. An additional plaintiff, Daniel James, also sued, seeking to participate “in the academic team in the 1999/2000 school year.” Id. at 1282. A dispute arose over James’s standing, due to potential ineligibility to pursue extracurricular activities because of failing grades and a suspension. Id. at 1282 n.1. The district court declared: “The Court finds it unnecessary to resolve this dispute under the circumstances. Because there is no suggestion of lack of standing on the part of Plaintiff Lindsay Earls, the Court must reach the merits of the Plaintiffs’ constitutional attack on the District’s drug testing policy in any event.” Id.
160 Id. at 1285.
161 Id. at 1287.
162 Id.
163 Id. at 1288.
164 Id. at 1289.
in *Vernonia*" and thus had "negligible" impact on privacy.\textsuperscript{165} Turning to the effectiveness of the drug testing policy, Judge Russell simply made a bald assumption that: "It can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs."\textsuperscript{166} The interests therefore weighed in the government's favor of performing suspicionless drug testing.\textsuperscript{167}

The Court of Appeals likewise decided the case in terms of special needs balancing.\textsuperscript{168} Judge Anderson, writing for the majority, first considered the nature of the student's privacy interest being affected by the drug tests.\textsuperscript{169} Here, Judge Anderson urged: "We do not believe that voluntary participation in an activity, without more, should reduce a student's expectation of privacy in his or her body. Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights."\textsuperscript{170} However, voluntary participation in this case did temper privacy expectations. The Court of Appeals concluded:

[S]tudents participating in non-athletic extracurricular activities . . . do, like athletes, agree to follow the directives and adhere to the rules set out by the coach or other director of the activity. This inevitably requires that their personal freedom to conduct themselves is, in some small way, constrained at least some of the time. We therefore conclude that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students.\textsuperscript{171}

Although indeed thoughtful, the "somewhat lesser privacy expectation" standard lacked clarity and therefore added little to the rest of the balancing process.

When it turned to weighing the "character of the intrusion that is complained of,"\textsuperscript{172} the Court of Appeals agreed with the District Court that Tecumseh's urinalysis scheme was "virtually identical to the testing process in *Vernonia*," and therefore, the resulting privacy intrusion was "not significant."\textsuperscript{173} Judge Anderson,
however, found the drug use "among students subject to the testing" to be "negligible."\textsuperscript{174} Indeed, the drug situation at the Tecumseh schools was "vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in Vernonia."\textsuperscript{175} Therefore the "nature and immediacy of governmental concern" factor tipped "the balancing analysis decidedly in favor of the plaintiffs."\textsuperscript{176} The Court of Appeals concluded that "the policy violates the Fourth Amendment."\textsuperscript{177}

C. The Court's Opinion

After the two lower courts weighed the competing concerns, the Supreme Court in Earls chose to balance the interests yet a third time. At the outset, Justice Thomas, the author of the Court's opinion, found it significant "that 'special needs' inhere in the public school context."\textsuperscript{178} The first interest to be measured was that of the privacy of students "allegedly compromised by the drug testing."\textsuperscript{179} Here, the Court emphasized: "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease."\textsuperscript{180} Furthermore, "students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions" experienced by Vernonia's athletes.\textsuperscript{181} The majority thus concluded that the students' submission to urinalysis implicated "a limited expectation of privacy."\textsuperscript{182}

The "character of the intrusion" went next onto Earls's special needs scales.\textsuperscript{183} The Court handled this variable in short order, finding the drug testing procedure to be "virtually identical" to the program it approved in Vernonia.\textsuperscript{184} Earls therefore deemed the urinalysis of the students participating in extracurricular activities to be similarly "negligible."\textsuperscript{185}

When Justice Thomas considered the third factor in the balance, the "nature and immediacy of the government's concerns and the efficacy of the Policy in meeting
them," he worried that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." As to the drug threats faced by students at Tecumseh High School, the Court declined to "second-guess" the trial court's finding that "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 Policy." The Court declared the school district "entirely reasonable" in enacting the drug testing policy. Moreover, the policy itself was a "reasonably effective means" for "preventing, deterring, and detecting drug use." Earls therefore found the school district's drug testing of students participating in extracurricular activities to be constitutionally reasonable.

IV. THE UNINTENDED LESSONS CREATED BY THE COURT'S LATEST INTERPRETATION OF SPECIAL NEEDS IN EARLS

In spite of its varied formulations over the decades, the special needs balancing of interests has boiled down to the weighing of three factors: 1) the nature of the privacy interest; 2) the character of the intrusion imposed by the government; and 3) the nature and immediacy of the government's concerns. When considering each of these factors in its turn, the Earls Court has taught us, by example, how to view and treat our nation's schoolchildren. As seen below, the Court's analysis of each of the three above factors has developed its own curious lesson.

186 Id. at 834.
188 Earls, 536 U.S. at 836.
189 Id. at 837.
190 Id. at 838.
191 As noted in Part III, the special needs test has varied over time. At its inception in T.L.O., the test included a requirement of individualized suspicion. See New Jersey v. T.L.O., 469 U.S. 325, 341–43 (1985). Moreover, Vernonia complicated the balancing test in a variety of ways. It described the government's role as "guardian and tutor" as being "[t]he most significant element." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995). Also, Vernonia further divided each factor into sub-factors. For instance, the first interest of student privacy was broken down into the "context" in which the interest was asserted and the individual's "legal relationship with the State." Id. at 654. The second factor of character of intrusion was parsed into a review of the manner of the intrusion and the information it divulged. Id. at 658. The third government interest factor was divided into three queries: the nature of the government concern, the immediacy of that concern, and the efficacy of the government program. Id. at 660.
192 Earls, 536 U.S. at 830.
193 Id. at 832.
194 Id. at 834.
Affecting Eternity

A. Earls Taught that an Educator Can Patronize Students

When the Court considered the privacy interests implicated by Tecumseh’s urinalysis testing, it violated an obvious and fundamental tenet of education that a teacher must respect his or her students. Notably, in his first sentence on the subject, Justice Thomas seemed to resent even having to go through the exercise of weighing the facts on the students’ side of the balance, for he characterized the privacy interests here as “allegedly compromised.” Such an attitude represented a considerable erosion of the respect shown to students since the time of T.L.O., when Justice White explained that a search of a student’s “closed purse or other bag” should be considered “no less than a similar search carried out on an adult.” Furthermore, T.L.O. did not hesitate to characterize such an intrusion as “undoubtedly a severe violation of subjective expectations of privacy.” The Court’s steady dismantling of deference toward student privacy becomes all the more apparent when it is noted that T.L.O. expressed these concerns for an intrusion on a mere purse. By the time the Court wrote its decision in Earls, Justice Thomas demonstrated less concern for an invasion of a student’s own body.

Earls discounted students’ privacy interests by focusing on the “context of a public school environment,” as the “backdrop” for its analysis. The Court relied heavily on what it termed the “most significant element in this case” — that in the “public school system,” the government acted as the children’s “guardian and tutor.” The student’s privacy interest was thus “limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.”

The “guardian and tutor” rationale, however, does not provide the soundest of foundations. Its main proponent was Justice Scalia, who authored the Court’s opinion in Vernonia. In that decision, Justice Scalia intoned:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination — including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.

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195 Id. at 830.
196 T.L.O., 469 U.S. at 337–38.
197 Id. at 338.
198 Earls, 536 U.S. at 830.
199 Id. (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).
200 Id.
201 Vernonia, 515 U.S. at 654–55.
202 Id. at 654.
Justice Scalia then extended this restriction over children's liberty to include the schoolyard. He flatly asserted: "When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status." The Court in *T.L.O.*, however, had already explicitly rejected the "in loco parentis" rationale, noting that "the Court has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'"203

Furthermore, *Earls's* and *Vernonia's* placement of students in the "context" of the "guardian and tutor" relationship with the State exposed another mode of reasoning even more offensive to student dignity. In *Vernonia*, Justice Scalia openly likened students to convicted criminals. He opined:

> [T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin*, we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendment," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." Central, in our view to the present case, is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.205

Interestingly, one decade earlier in *T.L.O.*, the same Court had considered the rights of criminals so as to contrast them with those of students. In *T.L.O.*, Justice White, although recognizing the "difficulty of maintaining discipline in the public schools today," still emphasized that "the situation is not so dire that students in the schools may claim no legitimate expectation of privacy."206 In this vein, he declared that "it goes almost without saying that [the] prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."207 The *T.L.O.* Court, therefore, was "not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."208 When *Earls* took on Justice Scalia's "guardian and tutor" logic,
it also inherited *Vernonia*'s underlying distrust of students, eroding the Court's respect for schoolchildren.

**B. Earls Signaled that a Teacher Need Not Know the Subject of the Lesson**

It should go without saying that every teacher must be a master of his or her subject. As they ask questions and seek guidance, students naturally rely on the teacher's expertise in the material at hand. Despite the patent importance of this point, the *Earls* Court apparently did not heed it and thus failed to adequately prepare for its own lesson. In examining "the character of the intrusion imposed" by the drug policy,\(^{209}\) Justice Thomas vainly attempted to hide the Court's apparent gaps of knowledge regarding special needs by offering the briefest analysis possible. *Earls* simply stated that Tecumseh's urinalysis of students was "virtually identical to that reviewed in *Vernonia*" which had been labeled a "negligible" intrusion.\(^{210}\) Further, since the Tecumseh policy allowed male students to provide a sample "behind a closed stall," *Earls* considered it "even less problematic."\(^{211}\) Justice Thomas also noted that, rather than being turned over to law enforcement, test results were given only to those who had a "need to know."\(^{212}\) The Court thus concluded that, "[g]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, ... invasion of students' privacy is not significant."\(^{213}\) *Earls* thus dispatched special needs' "character of intrusion" factor quickly and simply.

This surface treatment of privacy intrusion exposed *Earls*'s willful ignorance both of the relevant circumstances of the *Vernonia* case and of the world of the schoolchild. As to the situation faced by the students in *Vernonia*, Justice Scalia specifically had recognized that "[I]legitimate privacy expectations [were] even less with regard to student athletes."\(^{214}\) He then pursued this point with a detailed description of the atmosphere of athletics: "School sports are not for the bashful. They require ‘suiting up’ before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford."\(^{215}\) *Vernonia* then reviewed the actual physical facilities used by the school's athletes, noting: "No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors."\(^{216}\) Thus, when students

\(^{210}\) *Id.* at 832–33.
\(^{211}\) *Id.* at 833.
\(^{212}\) *Id.* at 833.
\(^{213}\) *Id.* at 834.
\(^{215}\) *Id.*
\(^{216}\) *Id.*
in Vernonia, Oregon, went "out for the team," they "voluntarily subjected themselves" to an entire series of very particular privacy intrusions.\footnote{Id.}

Such was simply not the case in Tecumseh, Oklahoma. Ironically, perhaps the most vivid evidence of the differences between athletics and other extracurricular programs was offered by the \textit{Earls} Court in its vain attempt to liken the two. Justice Thomas asserted that "students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes."\footnote{Earls, 536 U.S. at 831.} The facts that Justice Thomas relied upon to support his equation, however, were sparse indeed. Instead of all participants "suiting up" before every event, the best \textit{Earls} could offer was that "[s]ome of these clubs and activities require \textit{occasional} off-campus travel and communal undress."\footnote{Id. at 832 (emphasis added).} Justice Thomas also emphasized that all of the activities "have their own rules and requirements" and employ a "faculty sponsor" who "monitors the students for compliance with the various rules dictated by the clubs and activities."\footnote{Id.} Such basic limits are a far cry from the omnipresent locker room atmosphere detailed by the \textit{Vernonia} Court. \textit{Earls} simply lacks any mention of locker rooms, showers, or toilet stalls.

Moreover, \textit{Earls}'s measurement of privacy intrusion revealed the Court's curious amnesia about childhood. There is a reason why athletes in school are not intimidated by the "element of communal undress" present in a locker room; by and large, those who participate in physical activities possess a level of comfort with their bodies. Indeed, athletes usually come to rely upon their physical abilities to gain acceptance, recognition, and even admiration. In contrast, students who aim to succeed in the academic team, the band, or choir, are relying on abilities that may be far removed from a person's strength or physique. Such activities may be all the more important, for they enable those students who are not as comfortable with their growing bodies to become an active part of the school community. Thus the \textit{Earls} Court, by lumping together all extracurricular activities into the same group as sports, failed to appreciate the individual differences among students. Justice Thomas took one standard, previously limited to the fittest of students, and applied it to all children regardless of their sense of self. \textit{Earls}'s reasoning in this regard

\footnote{Id.}
was particularly insensitive, in light of the evidence presented by the participants themselves. Some ten percent of the students openly complained to Ms. Daugherty about the drug testing, whereas others simply dropped out of choir altogether.\footnote{Earls v. Bd. of Educ., 242 F.3d 1264, 1291 n.38 (10th Cir. 2001).} Those who chose to endure the urinalysis demonstrated their discomfort with giggles and snickers.\footnote{Id.} Even the teachers were bothered, joking about engaging in "potty training."\footnote{Id. at 310.} Thus, in lecturing on the level of intrusion, Earls showed an ignorance of the very people its rule was most affecting.

A more careful review of precedent would have cautioned the Court against any shallow analysis of the character of intrusion. In Chandler, Justice Ginsburg deemed an even less intrusive drug-testing program than that in Earls to be unreasonable.\footnote{Chandler v. Miller, 520 U.S. 305, 318 (1997).} Georgia's urinalysis of candidates for office was "relatively noninvasive,"\footnote{Id. at 310.} since subjects were given a choice to produce a sample at a state-approved lab or at the office of a private physician.\footnote{Id. at 318.} Moreover, the candidate was the first to receive the results of the urinalysis and therefore controlled "further dissemination of the report."\footnote{Id. at 309.} Despite these precautions, the Court still held Georgia's testing regime to be unconstitutional.\footnote{Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).} This was due in part to Justice Ginsburg's insistence on remembering the bigger picture. Chandler's rejection of drug testing included not only a review of its impact on the individual, but also its purpose — an issue considered in the next section.

\section*{C. Earls Indicated that an Educator Need Not Be Consistent}

Perhaps the people most sensitive to the school's role as "'guardian and tutor',"\footnote{Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).} are the students themselves, for they are the very subjects of government monitoring and discipline. Arguably, those who must follow the rules tend to be quite alert to any inconsistency practiced by the rule-makers. The best teachers, therefore, lead by consistent conduct and strive to instruct by constancy of example. Unfortunately, the fundamental need of consistency in education was yet another principle missed by the Earls Court. Students, ever aware of hypocrisy and double standards, might heed the wrong lessons from Earls's message.

The Court's inconsistency was most stark in its assessment of the "nature and immediacy of the government's concerns and the efficacy of the Policy in meeting
them.”

In weighing the government’s interests, Justice Thomas declared: “This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren.”

He further proclaimed that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”

Earls, however, did not show the same generous view when considering the students’ plight. The Court did not stop to ponder whether the mass use of urinalysis would cause an entire generation of schoolchildren to become callous or cynical about a bodily function “traditionally shielded by great privacy.”

Indeed, Earls even failed to respect the Court’s own prior discussion of urinalysis, where it noted:

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

In contrast, Earls subjected the student’s side of the equation to a different standard, in which the intrusion was weighed one bathroom stall at a time. When the schoolchildren worried about the improper safeguarding of sensitive information, Justice Thomas dismissed the concern as an isolated incident, writing: “This one example of alleged carelessness hardly increases the character of the intrusion.”

Thus, when the government was heard, the stakes were on a national scale, whereas when the students were considered, the interests were on an individual scale.

Earls’s inconsistency in its treatment of the administration and the individual became even more glaring when it turned to the particular “evidence of drug use at Tecumseh schools.”

Justice Thomas wrung his hands that teachers “had seen students who appeared to be under the influence of drugs” and “had heard students speaking openly about using drugs.” It did not seem to bother the Court that much of this information, as the Court of Appeals noted, was based on “hearsay” and was “virtually anecdotal.” Many of the reports were of various people who

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231 Id. at 834.
232 Id.
233 Id.
234 Id. at 832 (quoting Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 626 (1989)).
235 Skinner, 489 U.S. at 617.
236 Earls, 536 U.S. at 833.
237 Id.
238 Id. at 834.
239 Id. at 834–35.
were not even identified by their fellow students. Further, to make any case, school officials were forced to scrape up examples of drug use dating back decades to the 1970s. To make matters worse, Justice Thomas himself became part of the rumor mill by offering that "people in the community were calling the board to discuss the 'drug situation.'" Moreover, Earls relied on evidence of a "drug dog [who] found marijuana cigarettes near the school parking lot." In its Chicken Little state of mind, the Court failed to note the full import of this evidence; despite the fact that the school pursued its drug investigation so diligently that it employed a special canine to detect drugs, no drugs were found on campus.

The Earls Court's hypersensitivity to the government's interests caused it to accept the District Court's finding that "it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy." Again, such a statement demonstrates an uneven treatment of the facts, for the testimony clearly offered the Court evidence of such "reasonable" disputes. Ms. Daugherty, a veteran teacher of twenty-nine years, expressed the belief that "most of her choir students do not use drugs." Another teacher, Ms. Evans, "did not think that any of her students . . . used drugs." School District officials themselves, when discussing drugs outside of the guarded context of litigation, expressed a lack of concern for a major drug problem. Although recognizing problems with tobacco and alcohol, officials repeatedly reported to the Federal Government that their schools did not have a "major problem" with drugs. Here, the Earls Court had such trouble with consistency that it could not recognize its absence in the arguments of the School District.

Earls's solicitous attitude toward the government's concerns bordered on farce when it considered the dangers imposed by the mix of drugs and extracurricular activities. The School District strained to stir up visions of danger in such innocuous activities as music, homemaking, and farming. The effort lacked such credibility that it moved Justice Ginsburg to quip about "nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh."
The Court's varying perceptions of risk become all the more evident when Tecumseh's rumors of drugs affecting extracurricular activities are contrasted with actual problems confronted in prior cases. In Vernonia, teachers, rather than relying on hearsay accounts, actually witnessed several alcohol and drug-related accidents occur during sporting events and practices.\footnote{Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992).} Students were so bold as to form "drug culture" groups such as the "Big Elks" and the "Drug Cartel."\footnote{Id. at 1356.} Further, they were seen openly using drugs "across the street from the high school."\footnote{Id. at 1356–57.} Drug use in Vernonia correlated with "an almost three-fold increase in classroom disruptions and disciplinary reports."\footnote{Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649 (1995).} Teachers witnessed "various omissions of safety procedures and misexecutions by football players."\footnote{Id.} The danger was not hypothetical contact between horns and drums, but a "severe sternum injury."\footnote{Id. at 1356–57.} The school's officials were at their "wits end," because "a large segment of the student body . . . was in a state of rebellion. Disciplinary actions had reached 'epidemic proportions.'"\footnote{Id. (quoting Acton, 796 F. Supp. at 1357).} The cumulative effect of this evidence of actual harm leaves Tecumseh's worries about potential harms pale by comparison.

Likewise, the Tecumseh student brandishing a spatula or trumpet posed nowhere near the danger at issue in the Court's early suspicionless drug-testing cases — Skinner and Von Raab. Unlike Earls, Skinner dealt with the prospect of truly catastrophic events: train wrecks.\footnote{Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 607 (1989).} In Skinner, Justice Kennedy noted that railroad employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."\footnote{Id. at 628.} A "major calamity" on the railroads, such as a crash or spill of toxic chemicals, could cause devastation to an entire community.\footnote{Id. at 629.} It is not surprising, therefore, that Justice Kennedy compared train employees to "persons who have routine access to dangerous nuclear power facilities."\footnote{Id. at 628.}

In Von Raab, the threats were equally chilling. Justice Kennedy explained: "[T]he Government [has] a compelling interest in ensuring that many of [the Customs Service] employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard."\footnote{Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989).} The Court further noted the "safety and national security hazards that would attend
the promotion of drug users to positions that require the carrying of firearms or the
interdiction of controlled substances.\textsuperscript{264}

When juxtaposed with gun-toting drug users entrusted with fighting the drug
war and railroad employees whose lapses could wipe out entire neighborhoods,
dangers from students involved in such extracurricular activities as choir,
cheerleading, and pom pon are placed in their proper perspective. The tales from
children or grandchildren of people seen with or talking about “marijuana” or
“smokes”\textsuperscript{265} pose a risk of harm more on par with those considered in \textit{Chandler},
where Justice Ginsburg noted: “Our precedents establish that the proffered special
need for drug testing must be substantial — important enough to override the
individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth
Amendment’s normal requirement of individualized suspicion.”\textsuperscript{266} In applying this
standard to Georgia’s assertions of need, the Court found any evidence of “concrete
danger” to be “[n]otably lacking.”\textsuperscript{267} The \textit{Chandler} Court found that “[n]othing in
the record hints that the hazards [state officials] broadly describe are real and not
simply hypothetical for Georgia’s polity.”\textsuperscript{268} Much the same could have been said
of the Tecumseh School District’s evidence, which was based essentially on hearsay
accusations directed at unidentified persons.\textsuperscript{269} Arguably, \textit{Earls} could at least make
the dubious assertion that it met \textit{Chandler}’s challenge of establishing “any
indication of a concrete danger,”\textsuperscript{270} for the described episodes point indirectly to
possible drug use or possession on campus. Yet, such supposition hardly meets
\textit{Chandler}’s standard of an interest so “substantial” that it could “suppress the Fourth
Amendment’s normal requirement of individualized suspicion.”\textsuperscript{271}

The genuine reason underlying \textit{Earls}’s urinalysis of students seems the same as
\textit{Chandler}’s urinalysis of candidates: symbolism.\textsuperscript{272} What else could explain a policy
that addresses a problem regarding tobacco and alcohol\textsuperscript{273} by testing for
“amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates,
and benzodiazepines?”\textsuperscript{274} What other reason could exist for drug-testing children
who purposely involve themselves in the anti-drug pursuits of extracurricular

\textsuperscript{264} \textit{Id.}
\textsuperscript{265} \textit{Earls} v. Bd. of Educ., 242 F.3d 1264, 1274 n.9 (10th Cir. 2001).
\textsuperscript{266} \textit{Chandler} v. Miller, 520 U.S. 305, 318 (1997).
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.} at 319.
\textsuperscript{269} \textit{Earls}, 242 F.3d at 1273–74.
\textsuperscript{270} \textit{Chandler}, 520 U.S. at 318.
\textsuperscript{271} \textit{Id.}
\textsuperscript{272} \textit{Id.} at 321–22 (discussing the symbolic benefits of Georgia’s drug testing policy).
WL 485032.
activities? Why look for something one does not expect to find in a place where one does not expect to find it? The answer, as the Court in Chandler phrased it, is that "[t]he need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." Such a government desire to "set a good example" is not sufficient to satisfy special needs. Yet Earls, blind to the need for consistency, hung its conclusion on this slim reed.

Earls's shifting standards were further manifested in its assessment of the next issue involved in the government-interests analysis: the "efficacy of the Policy" in meeting the school's needs. Justice Thomas boldly declared that "testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concern in preventing, deterring, and detecting drug use." The only support for this assertion was that the connection between Tecumseh's testing and drug worries was only a slightly worse "fit" than that upheld in Vernonia. Perhaps sensing the weakness of this conclusion, the Earls Court attempted to hide the defects of its reasoning with the cure-all of the government-as-guardian. Justice Thomas saw Vernonia as not mandating that the school focus on testing "students most likely to use drugs," but rather as a constitutional consideration of "the context of the public school's custodial responsibilities."

The Tecumseh School District needed such a forgiving standard, because a closer examination of the facts would have revealed even more problems with the officials' reliance on drug testing. Once again, the Earls Court itself provided the strongest case against the efficacy of drug testing students. In 1995, the Court upheld suspicionless drug testing of students in Vernonia. Earls noted, however, that "[t]he drug abuse problem among our Nation's youth has hardly abated since [then]". In fact, Justice Thomas dolefully intoned that "evidence suggests that [the drug problem] has only grown worse." The Court then provided the following specific statistics to support its assertion: "[T]he number of 12th graders using any illicit drug increased from 48.4 percent in 1995 to 53.9 percent in 2001.

See Earls, 536 U.S. at 853 (Ginsburg, J., dissenting) (citing evidence that "students who participate in extracurricular activities are significantly less likely to develop substance abuse problems").

Chandler, 520 U.S. at 322.
Id.
Earls, 536 U.S. at 834.
Id. at 837.
Id.
See id.
Id. at 838.
Id. at 834.
Id.
Id.
Id.
The number of 12th graders reporting they had used marijuana jumped from 41.7 percent to 49.0 percent during that same period. Thus, in an irony that apparently escaped Justice Thomas, the Court gave its hardest facts in proving the ineffectiveness of urinalysis testing. Such numbers were certainly more convincing than the Court’s vague discussions regarding the “immediacy of the government concerns” or the “efficacy of the Policy.”

Tecumseh School District officials compounded the problem by targeting for testing those students least likely to abuse drugs. In her dissent, Justice Ginsburg made note of scholarly literature which indicated that “[n]ationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers.” Specifically, “tenth graders ‘who reported spending no time in school-sponsored activities were . . . 49 percent more likely to have used drugs’ than those who spent 1-4 hours per week in such activities.” Further, Justice Ginsburg noted that the prospect of urinalysis might cause students at risk for drugs to avoid extracurricular activities in order to evade any monitoring. The School District’s policy might have the following unpleasant, unintended consequences: “Tecumseh’s policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.”

Compounding Tecumseh’s problems was the fact that the school’s urinalysis program tested for such illegal drugs as opiates, amphetamines, and cocaine, even though it had “always admitted” that alcohol really was its “number one problem.” School officials had repeatedly certified to the federal government that “tobacco and alcohol” gave them the most trouble, whereas other “controlled substances,” although present, were not “major problems at this time.”

Finally, Earls not only upheld searches of the wrong people for the wrong things, it allowed such intrusions to be performed in the most invasive manner possible: random searches without suspicion. Justice Thomas even defended suspicionless intrusions as a preferred method.

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286 Id. at 834 n.5.
287 Id. at 834.
288 Id. at 853 (Ginsburg, J., dissenting).
289 Id. (quoting NICHOLAS ZILL ET AL., ADOLESCENT TIME USE, RISKY BEHAVIOR, AND OUTCOMES: AN ANALYSIS OF NATIONAL DATA 52 (1995)) (omission in original).
290 Id.
291 Id.
293 Earls, 242 F.3d at 1274; see supra text accompanying note 249.
294 Earls, 536 U.S. at 837.
295 See id.
We question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.

What may be most notable here about Earls's defense of blanket testing is its identification of the government as the target of its own intrusive program. Perversely, Justice Thomas worried about the stress that urinalysis would have on the teachers who handed out the cups rather than the students who were forced to fill them. He fretted that individualized suspicion would harm the government's cause by spawning lawsuits. The Fourth Amendment by its very terms, however, guards "the people" from government intrusions rather than concerning itself with the welfare of those officials actually performing the invasions of privacy. Justice Thomas, in protecting the government's interests, turned the Fourth Amendment on its head.

Besides misdirecting its concerns, Earls's defense of suspicionless testing also misconstrued the whole purpose of the Fourth Amendment's individualized suspicion requirement. Without proper reference to context, Justice Thomas plucked the following single phrase out of Skinner: "[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed

296 Id.
297 Id.
298 Id. Strangely, Justice Thomas expressed concern over a potential lawsuit motivated by the lack of an individualized suspicion standard. Id. If opening the floodgates to litigation is a valid factor to consider in whether the Court chooses to recognize a right, it would seem that this argument would cut against Earls's reasoning rather than in its favor. After all, the Court in Earls was reacting to an actual lawsuit based on suspicionless testing, whereas litigation from suspicion-based testing is mere speculation. The Court has refused to consider such speculative arguments in the past. For instance, when the Court considered whether to allow the impeachment exception to the Fourth Amendment's exclusionary rule in Harris v. New York, 401 U.S. 222 (1971), it deemed the possibility that this impeachment exception would lessen deterrence of illegal police activity to be "speculative," and thus dismissed any such danger. Id. at 225. The Harris Court preferred to focus on more certain outcomes, noting: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." Id.
299 The Fourth Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.
unreasonable. The Earls Court used this reasoning as a means to justify treating individualized suspicion as a question of policy rather than constitutional mandate. Such an approach conflicted sharply with the Court’s long line of precedent prohibiting any search or seizure absent a reason to interfere.

Over three-quarters of a century ago, in the seminal case creating the automobile exception, *Carroll v. United States*, the Court clearly established that individualized suspicion was a constitutional mandate. Chief Justice Taft, who authored the Court’s opinion, declared: “The measure of legality of [a warrantless automobile] seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.”

The *Carroll* Court would accept no lesser standard. In fact, Chief Justice Taft proclaimed: “It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.” *Carroll* placed the onus not on individuals to go along with everyone else, but on the government to explain why it should bother someone in the first place. Specifically, the Court found that “those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.” The importance of these statements becomes all the more apparent when their context is considered. The *Carroll* Court refused to allow suspicionless search and seizure when the intrusion involved only a privacy invasion of an automobile, rather than the deeper intrusion occasioned by the testing of an individual’s own bodily fluids. Moreover, when the *Carroll* Court handed down this case, the nation was in the midst of another high-stakes drug war: prohibition. Despite the lack of any intrusion on an individual’s person, and during a battle with organized criminal distributors of contraband, the Court still respected the Fourth Amendment requirement of individualized suspicion.

Over fifty years later, in *Delaware v. Prouse*, the Court again abided by its

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302 *Id.* The Court reached such a rule by construing the “Fourth Amendment . . . in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.” *Id.* at 149.
303 *Id.* at 153–54.
304 *Id.* at 154.
305 See *id.*
individualized suspicion requirement. The majority, in an opinion written by Justice White, held random stops of motorists to be unreasonable, "even [when] the purpose of the stop is limited and the resulting detention quite brief."\(^{307}\) Upon "balancing" the intrusion of a particular law enforcement's practice "against its promotion of legitimate governmental interests," \textit{Prouse} still adhered to the rule that "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test."\(^{308}\)

When the Court did allow blanket government intrusion, it did so only because circumstances in the particular case were such that an individualized suspicion requirement would doom any possibility of the program's success. In \textit{Camara v. Municipal Court of San Francisco},\(^ {309}\) the Court upheld housing inspections so as to escape a chicken-egg problem wherein government officials aimed to stop hazardous housing conditions, which rarely generated articulable grounds for searching a particular residence until after the inspection.\(^ {310}\) \textit{United States v. Martinez-Fuerte} provided another example in which a mandate of individualized suspicion would have prevented the operation of the government program.\(^ {311}\) In \textit{Martinez-Fuerte}, the Court held that a "particularized suspicion" that a car held an undocumented alien "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."\(^ {312}\) Finally, in \textit{Skinner}, the Court found that any "requirement of particularized suspicion of drug or alcohol use would seriously impede" the railroad's ability to gather information regarding employee impairment: "Obtaining evidence that might give rise to the suspicion that a particular employee is impaired . . . is most impracticable in the aftermath of a serious accident."\(^ {313}\) Suspicionless drug tests offered the only genuine deterrence of "illegal drug use by railroad employees, workers positioned to 'cause great human loss before any signs of impairment become noticeable to supervisors.'"\(^ {314}\)

The precedent thus establishes that a constitutional mandate of individualized suspicion is so important that the Court historically would not excuse its absence unless it actually endangered the implementation of the government program.\(^ {315}\) Quite simply, no such case was made in \textit{Earls}. Indeed, the \textit{Earls} Court did not even

\begin{footnotesize}
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\item \(^{307}\) \textit{Id.} at 653.
\item \(^{308}\) \textit{Id.} at 654.
\item \(^{309}\) 387 U.S. 523 (1967).
\item \(^{310}\) \textit{Id.} at 535--36.
\item \(^{311}\) 428 U.S. 543 (1976).
\item \(^{312}\) \textit{Id.} at 557.
\item \(^{315}\) See \textit{Skinner}, 489 U.S. at 624 (arguing in favor of maintaining individualized suspicion unless the government interests involved were placed "in jeopardy").
\end{itemize}
\end{footnotesize}
consider whether this program could be implemented by employing some standard of individualized suspicion. This is all the more puzzling in light of the facts presented by the government itself. With all of Tecumseh High School's ever-alert teachers and administrators, it would seem that drug use could be detected before two trombones collided or a hog got loose.

V. CONCLUSION

Almost everyone can remember a teacher who, frustrated with the misbehavior of one pupil, chose to punish the entire class. Perhaps this can be effective — the naughty child might respond to the peer pressure brought to bear by the group of punished students. It is, however, a crude form of discipline, for it punishes the innocent many for the wrongs of the few. It is therefore a poor teaching method. More importantly, when practiced by the government in the form of suspicionless searches and seizures, it should be deemed unconstitutional.

In Earls, however, the Court chose to teach a different lesson. Justice Thomas instructed that when a school fears alcohol and tobacco, it is reasonable for the institution to test for any illegal drugs. Moreover, the Court lectured that when rumors persist that some students are abusing substances, it does not violate the Fourth Amendment to compel urinalysis of those students least likely to be involved in drugs. In short, the lesson learned is that if officials do not know how to detect and deter the true troublemakers, they can turn the good students into whipping boys.

This teaching is the very antithesis of the Fourth Amendment, a constitutional guarantee of the security and privacy of the individual against the invasions of the State. By abandoning Fourth Amendment fundamentals in its latest extension of the special needs doctrine, the Court has lost its way. We learn that an invasion of an individual's privacy interest in the very contents of his or her person is "limited," even though the mere opening of a purse has constituted a "severe violation" of privacy expectations. The Earls Court further tutors that the character of the intrusion — the compelled urinalysis of students — is less than "negligible." Finally, we are drilled that government drug-testing programs, which have seen a documented rise in drug use since their implementation, are effective means of combating a non-problem among the school's most dedicated students. After presenting such a confused lesson, it is evident that the Court itself should hit the books.

317 Earls, 536 U.S. at 825.
318 Earls, 536 U.S. at 832.
320 Earls, 536 U.S. at 833.
321 See id. at 834 n.5.