

PUBLIC SCHOOL STUDENTS' FOURTH AMENDMENT RIGHTS AFTER VERNONIA AND EARLS: WHY LIMITS MUST BE SET ON SUSPICIONLESS DRUG SCREENING IN THE PUBLIC SCHOOLS

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INTRODUCTION

In 1995, the United States Supreme Court held in *Vernonia School District 47J v. Acton (Vernonia)* that a school district policy subjecting all student-athletes to random urinalysis drug testing was constitutional under the Fourth Amendment.¹ Subsequently, some school districts tested the limits of *Vernonia* by expanding their random urinalysis drug-screening policies to include nonathletes voluntarily enrolled in extracurricular activities. These policies received mixed reviews by lower federal and state courts,² and resulted in a split among the federal circuits as to the permissible scope of Fourth Amendment searches.³

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1. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664–65 (1995); *see also* U.S. CONST. amend. IV. (“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.”).

2. *See Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1296 (W.D. Okla. 2000) (ruling that drug testing of students participating in extracurricular activities is constitutional); *Linke v. N.W. Sch. Corp.*, 763 N.E.2d 972, 985 (Ind. 2002) (holding school policy permitting suspicionless testing of students involved in extracurricular activities to be constitutional). *But see Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 931 (N.D. Tex. 2001) (striking down districtwide suspicionless drug screening policy as violating the Fourth Amendment); *Trinidad Sch. Dist. Number 1 v. Lopez*, 963 P.2d 1095, 1097 (Colo. 1998) (holding suspicionless drug testing of high school marching band members unconstitutional); *Theodore v. Del. Valley Sch. Dist.*, 761 A.2d 652, 653, 662 (Pa. Commw. Ct. 2000) (finding that suspicionless drug screening as a condition of extracurricular participation and of obtaining driving privileges is unconstitutional).

3. *See Todd v. Rush County Sch.*, 133 F.3d 984, 985–86 (7th Cir. 1998) (holding that suspicionless drug testing of students in extracurricular activities is constitutional); *see also Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1066 (7th Cir. 2000) (holding suspicionless drug testing as a condition of participation in nonathletic extracurricular activities constitutional because the court was bound by *Todd*'s recent precedent); *Miller v. Wilkes*, 172 F.3d 574, 582 (8th Cir. 1999) (upholding a school district policy permitting random drug testing of students, which was subsequently vacated as moot). *But see Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1266, 1278 (10th Cir. 2001) (holding that a school policy authorizing suspicionless drug testing of students participating in competitive extracurricular activities violates students' Fourth Amendment rights). *But see also Willis v. Anderson Cnty. Sch. Corp.*, 158 F.3d 415, 417, 424 (7th Cir. 1998) (holding that drug and alcohol testing of students suspended for fighting is unconstitutional).

In light of these varying interpretations, the Court sought to clarify the holding of *Vernonia* through its June 2002 decision in *Board of Education of Independent School District Number 92 of Pottawatomie County v. Earls (Earls)*.⁴ In a 5-4 decision, the Court upheld a school district policy requiring all students participating in competitive extracurricular activities to submit to random urinalysis drug testing.⁵ Relying on its own expansive interpretation of *Vernonia*, the *Earls* majority concluded that the policy constituted a “reasonable” search within the meaning of the Fourth Amendment.⁶ The *Earls* decision is thus one of several Supreme Court decisions which call into question the Court’s own assertion that public school students do not “shed their constitutional rights . . . at the schoolhouse gate.”⁷

This article contends that the *Earls* majority opinion misapplied the analytical framework of *Vernonia*, which set constitutionally permissible and reasonable limits on suspicionless searches of public school students. This article further asserts that public school students’ Fourth Amendment right to be free from unreasonable searches and seizures must not become a casualty of our nation’s “war on drugs.”⁸ Because the *Earls* majority failed to make principled distinctions between student-athletes and nonathletes participating in extracurricular activities, it is a very real possibility that all public school students, regardless of their involvement in school activities, could constitutionally be subjected to similar random urinalysis drug screening.⁹ The *Earls* Court thus sanctioned a search which should otherwise have been deemed unconstitutional, thereby rendering the Fourth Amendment rights of our nation’s school children more myth than reality.

As a result of the expansive language and reasoning employed by the *Earls* majority, courts will be compelled to uphold the constitutionality of virtually any challenged school district drug-screening policy.¹⁰ As a

4. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).

5. *Id.* at 838.

6. *Id.*

7. *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

8. See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting) (case involving drug testing of railroad employees).

9. See *Joye v. Hunterdon Cent. Reg’l High Sch. Bd. of Educ.*, 826 A.2d 624, 642, 649 (N.J. 2003) (relying in part on the *Earls* court’s finding of diminished privacy expectations for students participating in nonathletic extracurricular activities, the New Jersey Supreme Court overturned *Odenheim v. Carlstadt-East Rutherford Reg’l Sch. Dist.*, 510 A.2d 709, 713 (N.J. Super. Ct. Ch. Div. 1985), which struck down a school district policy requiring that *all* high school students submit to drug screening as part of a school medical examination).

10. Of course, states remain free to determine whether student drug-screening policies similar to those approved in *Vernonia* and *Earls* are constitutional in light of their own state constitutions. See, e.g., *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 78 (Pa. 2003) (relying on the state constitution to invalidate a school district policy authorizing suspicionless drug and alcohol testing of students seeking parking permits or participating in voluntary extracurricular activities).

result, the onus to reject suspicionless drug testing of nonathletes will fall primarily upon individual school districts and school boards around the nation.¹¹ In making the decision whether to implement a program similar to, or even more expansive than, the policy upheld in *Earls*, school districts must take into account the numerous negative consequences that drug screening of nonathletes may have on the health and welfare of its students.¹² This article will set forth a number of reasons why school districts should explore alternatives to suspicionless drug screening of nonathletes.

Part I introduces the analytical framework applied by both the *Vernonia* and *Earls* Courts and focuses on how the two majority opinions applied the facts of their respective cases to that framework. Part II distinguishes the *Earls* and *Vernonia* decisions by highlighting the failure of the *Earls* majority to properly apply the *Vernonia* standard, as well as their failure to recognize the fundamental differences between student-athletes and nonathletes participating in extracurricular activities. Part III asserts that the negative effects visited upon the health and welfare of students subjected to suspicionless drug screening provide compelling reasons for school districts nationwide to reject suspicionless drug screening of nonathletes. This Part also sets forth a number of alternatives to suspicionless drug testing, including the implementation of suspicion-based drug-screening policies.

I. VERNONIA AND EARLS: THE PUBLIC SCHOOL CONTEXT

A. General Background: The "Special Needs" Doctrine

The general rule regarding Fourth Amendment searches is that a search not founded upon probable cause is "unreasonable" and, therefore, unconstitutional.¹³ Because the searches at issue in both *Earls* and *Vernonia* do not require probable cause or individualized suspicion, the reasonableness of such searches must be determined in accord with one of the Court's numerous exceptions to this general rule. The Court has

11. See Ralph D. Mawdsley, *Random Drug Testing for Extracurricular Activities: Has the Supreme Court Opened Pandora's Box for Public Schools?*, 2003 BYU EDUC. & L.J. 587, 588 (2003) (stating that if "states do not mandate or prohibit random drug testing, the decision to randomly drug test is one that will be left to individual school districts").

12. See Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the Earls Decision on High School Random Drug Testing Policies*, 34 J.L. & EDUC. 297, 307-09 (2003) (identifying a number of factors school districts consider before implementing a suspicionless drug screening policy: parental support, the cost of administering drug tests, the need to protect students' rights, the deterrent effect of a drug screening policy, and the need to maintain trust among students).

13. *Skinner*, 489 U.S. at 624.

specifically recognized a “special needs” exception,¹⁴ under which, in limited circumstances, probable cause need not be present in order for a search to be deemed reasonable.¹⁵ Therefore, the Court will uphold certain regimes of suspicionless searches as reasonable in instances where the authorized search is designed to serve “‘special needs,’ beyond the normal need for law enforcement.”¹⁶

For a suspicionless special-needs search to satisfy the reasonableness requirement of the Fourth Amendment, the Court has made clear that two elements must be satisfied. First, the Court requires that the privacy interests implicated by the search be “minimal.”¹⁷ Second, the Court requires a showing that the governmental interest furthered by the search would be frustrated if the search were based upon probable cause.¹⁸

Initially, the Court required that both elements be satisfied before applying the special needs exception. Thus, the government had to demonstrate, first, that those subject to the special needs search were involved in an industry which created a compelling threat of injury to the general public, and, second, that searching those within the targeted group would further the government’s interest in securing the safety of the general public.¹⁹ For instance, in *Skinner*, the Court upheld a random urinalysis drug-testing program directed at railroad personnel involved in railroad accidents.²⁰ The *Skinner* Court concluded that the government’s interest in regulating the conduct of railroad employees engaged in “safety-sensitive tasks” outweighed the privacy interests of the effected railroad personnel, and thus the Court found that the searches at issue were plainly justified to ensure the safety of the traveling public.²¹

14. The special needs exception to the Fourth Amendment was first articulated in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). For some other examples of the Court’s application of the special needs doctrine, see *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *Chandler v. Miller*, 520 U.S. 305, 317–22 (1997); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989); *Skinner*, 489 U.S. at 619–21.

15. *United States v. Martinez-Fuerte*, 428 U.S. 543–44 (1976).

16. *Skinner*, 489 U.S. at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

17. *Skinner*, 489 U.S. at 624.

18. *Id.*

19. See *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (stating that a special needs search is appropriate if there is an important governmental interest).

20. *Skinner*, 489 U.S. at 634.

21. *Id.* at 629, 633; see also *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding random suspicionless drug testing of federal customs officers who carry firearms or are involved in front-line drug interdiction); *Chandler*, 520 U.S. at 321–22 (striking down a state statute requiring suspicionless drug screening of all candidates for high state office because the danger associated with such positions was merely “symbolic, not special”).

B. Context-Specific Background: The Special Needs Analysis and the Public Schools

The public school context is one of those narrow circumstances where the Court has determined that, in certain instances, a school district may have a “special need” to search its students.²² The Court has reached this conclusion due to the fact that teachers and administrators have a “substantial interest . . . in maintaining discipline in the classroom” in order to create an environment conducive to educating students.²³ While *New Jersey v. T.L.O.* dealt with a student search founded on individualized suspicion of student wrongdoing, the Court in *Vernonia* subsequently concluded that, in certain instances, requiring school districts to obtain individualized suspicion before conducting a search “would unduly interfere with the maintenance . . . and informal disciplinary procedures needed” in the schools.²⁴

Regardless of whether a search is based on individualized suspicion or not, the Court analyzes the legality of student searches based on a determination of “reasonableness.”²⁵ However, the Court has specified two different standards for determining the reasonableness of a search in the public school context. In *T.L.O.*, the Court made clear that a suspicion-based search is reasonable in the public school context when it is both “justified at its inception” and “reasonably related in scope” to whatever circumstance justified the initial intrusion.²⁶ In general, a student search conducted by a school official will be “justified at its inception” where a school official has “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”²⁷

When evaluating school district policies permitting suspicionless searches of students, the Court has made clear that the reasonableness analysis requires a “fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.”²⁸ The *Vernonia* Court established three factors to guide the Court’s balancing analysis: (1) the “nature of the privacy interest” allegedly compromised by the search;²⁹ (2) the “character of the intrusion that is

22. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

23. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

24. *Vernonia*, 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340).

25. *Vernonia*, 515 U.S. at 652.

26. *T.L.O.*, 469 U.S. at 341.

27. *Id.* at 342.

28. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822, 830 (2002).

29. *Vernonia*, 515 U.S. at 654. This prong of the analysis essentially focuses on the right to privacy that student’s have in the public school environment and, as applied in *Earls*, the right to privacy

complained of,”³⁰ and (3) “the nature and immediacy” of the school district’s concerns, as well as the “efficacy” of the policy at issue in meeting those concerns.³¹

C. The Vernonia Decision

It is within this three-pronged framework that this article will review both the *Earls* and *Vernonia* decisions, as well as critique and analyze the missteps the *Earls* majority made in its application of this standard. While both the *Earls* and *Vernonia* majorities retained the identical analytical framework, it will be important to recognize how each Court applied the vastly different facts of their respective cases to that framework and somehow arrived at the same result.

1. The Facts of *Vernonia*

In the fall of 1989, the Vernonia School District (Vernonia District) adopted the Student Athlete Drug Policy (Vernonia Policy), which authorized random urinalysis drug screening of students who participated in the school district’s athletics programs.³² Under the Vernonia Policy, student–athletes are tested at the beginning of their sports season.³³ In addition, once each week of the season a student, supervised by two adults, blindly draws the names of ten percent of active student–athletes for further drug testing.³⁴ The expressed purposes of the Vernonia Policy are to prevent student–athletes from using drugs and to protect their health and safety.³⁵

The Vernonia District passed their policy in the face of a pervasive drug problem. Beginning in the 1980s, officials within Vernonia schools

that students who participate in nonathletic extracurricular activities are entitled to. *See Earls*, 536 U.S. at 831–32 (reasoning that there is a “diminishe[d] . . . expectation of privacy” because extracurricular activities “have their own rules and requirements for participating students”).

30. *Vernonia*, 515 U.S. at 658. In all drug screening cases, this prong focuses on the “degree of intrusion” upon one’s privacy that accompanies collection of a urine sample. *Id.* Specifically, this prong focuses on the method of collection of the urine sample, including the procedures that school officials are required to follow in conducting the drug screening. *Id.*

31. *Id.* at 660; *see also Earls*, 536 U.S. at 834–37 (considering the following factors when reviewing this prong in the public school context: (1) the “immediacy” of the school district’s concern; (2) the existence of a demonstrated drug problem within the class targeted by the policy; (3) whether there are safety interests to be furthered by drug testing those targeted by the policy; (4) whether or not testing based upon individualized suspicion would be impractical; and (5) whether the policy “is a reasonably effective means of addressing the [s]chool [d]istrict’s legitimate concerns in preventing, deterring, and detecting drug use” among the group targeted by the policy).

32. *Vernonia*, 515 U.S. at 648, 650.

33. *Id.* at 650.

34. *Id.*

35. *Id.*

observed a sharp increase in student drug use.³⁶ Increased disciplinary problems for both teachers and administrators accompanied this increase in drug use.³⁷ The Vernonia District found that not only were student-athletes among the drug users, but that they were the “leaders of the drug culture” within its schools.³⁸ The school district implemented the Vernonia Policy because of concerns with both the discipline problems within its schools and the increased risk of sports-related injury resulting from student drug use.³⁹

Under the Vernonia Policy, students who are to be tested must first complete a “specimen control form,” which requires them to identify any prescription medications that they are taking.⁴⁰ The student then enters an empty locker room, accompanied by an adult monitor of the same sex, in order to produce a urine sample.⁴¹ The Vernonia District sends the specimens to a laboratory that is authorized to mail written test reports only to the superintendent, and only the superintendent, principals, vice-principals, and athletic directors have access to the test results.⁴² If a sample tests positive, the athlete’s parents are notified and the student is given the option of either participating in an assistance program that includes weekly urinalysis, or suffering suspension from athletics for the remainder of the current and subsequent athletic seasons.⁴³

James Acton, then a seventh grade student, signed up to play football at one of the Vernonia District’s schools, but was denied participation because he and his parents refused to sign the testing consent forms.⁴⁴ The Actons filed suit in the United States District Court for the District of Oregon, claiming the Vernonia Policy violated the Fourth and Fourteenth Amendments to the U.S. Constitution.⁴⁵ Following a bench trial, the district court entered an order dismissing the plaintiffs’ claims and dismissing the action.⁴⁶ On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court’s order, and the U.S. Supreme Court subsequently granted certiorari.⁴⁷

36. *Id.* at 648.

37. *Id.*; see also *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992) (indicating that disciplinary actions within the Vernonia District had reached “epidemic proportions”).

38. *Vernonia*, 515 U.S. at 649.

39. *Id.* at 649–50.

40. *Id.* at 650.

41. *Id.*

42. *Id.* at 650–51.

43. *Id.* at 651.

44. *Id.*

45. *Id.*

46. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1368 (D. Or. 1992).

47. *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1527 (9th Cir. 1994); *Vernonia Sch. Dist. 47J v. Acton*, 23 F.3d 1514 (9th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3411 (U.S. Nov. 28, 1994) (No. 94-590).

2. The Supreme Court's Majority Decision and Reasoning

In an opinion penned by Justice Antonin Scalia, the Court upheld the Vernonia Policy by a vote of 6-3.⁴⁸ The Court, analyzing the Vernonia Policy in accord with the following three-pronged analysis, concluded that the Vernonia Policy constituted a reasonable search within the meaning of the Fourth Amendment.⁴⁹

a. The Nature of the Privacy Interest

In upholding the Vernonia Policy, the Court focused largely on the diminished privacy expectations of students within the school environment in general, and the even more diminished privacy expectations of those students involved in competitive athletics.⁵⁰ The Court concluded that the lesser expectation of privacy for student-athletes was a direct result of the nature of participation in athletics, which requires both “suiting up” before, and disrobing and showering after, each athletic event or practice with one’s teammates.⁵¹ The *Vernonia* Court focused on the fact that school sports were not for “the bashful,” and that student-athletes, by choosing “to go out for the team,” voluntarily subjected themselves to a much more extensive degree of regulation than that imposed upon students in the general student population.⁵²

b. The Character of the Intrusion

In analyzing the second prong, the *Vernonia* majority essentially focused on two elements. First, they asserted that the conditions under which a urine sample was collected under the Vernonia Policy constituted only a “negligible” intrusion on a student’s privacy.⁵³ Second, the Court concluded that the Vernonia Policy could not be deemed unreasonable based solely on whom the drug test reports were disclosed to, because access to the reports was limited to a narrow class of school personnel with a “need to know.”⁵⁴

48. *Vernonia*, 515 U.S. at 648, 666.

49. *Id.* at 664–65.

50. *Id.* at 656–57.

51. *Id.* at 657.

52. *Id.* The Court also pointed out that student-athletes were required to undergo a preseason physical exam and obtain medical insurance to participate in their respective sports. *Id.*

53. *Id.* at 658.

54. *Id.* at 658–59.

c. The Nature and Immediacy of the Governmental Interest and the Efficacy of the *Vernonia* Policy in Furthering the Interest

In reviewing the school district's interest, the *Vernonia* majority favorably noted that this particular search was justified because the *Vernonia* Policy was narrowly tailored to deter drug use among student-athletes, where the risk of immediate physical harm to the drug user is "particularly high."⁵⁵ In accord with special needs precedent, the majority went to great lengths to establish that the drugs screened under the *Vernonia* Policy "have been demonstrated to pose substantial physical risks to athletes."⁵⁶ Furthermore, in characterizing the *Vernonia* District's alcohol and drug abuse problem as an "immediate crisis," the Court emphasized the serious disciplinary problems occurring within the school district and the role of student-athletes in helping to foster those problems.⁵⁷

The Court also concluded that the *Vernonia* Policy effectively addressed the school district's concerns. The Court placed great emphasis on the fact that the *Vernonia* Policy was only applied to the group that seemed to have contributed the most to the problems within the *Vernonia* schools.⁵⁸ The Court also asserted that requiring individualized suspicion would not be appropriate because it would transform drug screening into a "badge of shame" by effectively accusing students of drug use.⁵⁹ The Court, however, sought to narrow its holding by making clear that it would be unwise to assume "that suspicionless drug testing will readily pass constitutional muster in other contexts."⁶⁰

3. The *Vernonia* Dissent

In dissent, Justice Sandra Day O'Connor concluded that the majority failed to show why individualized suspicion was impracticable in this context.⁶¹ Justice O'Connor also criticized the majority for failing to require that the *Vernonia* District tailor its policy specifically toward those

55. *Id.* at 662.

56. *Id.*

57. *Id.* at 662–63.

58. See *id.* at 663. ("It seems to us self-evident that a drug problem [within the District] largely fueled by . . . athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.").

59. *Id.*

60. *Id.* at 665; see also *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1310, 1319 (7th Cir. 1988) (upholding school district policy mandating drug screening of student-athletes, but asserting that "[r]andom testing of athletes does not necessarily imply random testing of band members or the chess team").

61. *Vernonia*, 515 U.S. at 676 (O'Connor, J., dissenting).

students who presented disciplinary problems within the District's schools.⁶²

D. The Earls Decision

When reviewing the facts and reasoning of the *Earls* decision, it is important to note how often the majority opinion adopts the reasoning of the *Vernonia* Court without considering whether substantive differences exist between the two policies and the contexts in which they were adopted. The result is legal reasoning which ignores important differences between athletes and nonathletes, and the approval of a search in *Earls* which was very different in scope and application than the one upheld by the *Vernonia* Court.

1. The Facts of *Earls*

On September 14, 1998, the Tecumseh School District (Tecumseh District) adopted the Student Activities Drug Testing Policy (Tecumseh Policy), which requires all middle and high school students participating in extracurricular activities to submit to suspicionless drug testing.⁶³ Under the Tecumseh Policy, students are required to consent to a drug test before participating in any extracurricular activity, and must agree to be tested at any other time based upon reasonable suspicion.⁶⁴ The drug test used by the Tecumseh District screens for amphetamines, marijuana, cocaine, opiates, barbiturates, and benzodiazepines.⁶⁵ The Tecumseh District's stated purpose for implementing its policy was to detect and prevent drug use among its students.⁶⁶

Under the Tecumseh Policy, students to be drug tested are called out of class in groups of two or three, and are directed to a restroom. A faculty member serves as a monitor, waiting outside a closed restroom stall, while the student produces a sample.⁶⁷ At this time, the student is given a form to

62. *Id.* at 685 (O'Connor, J., dissenting). "On this record, then, it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus, . . . disruption that had a strong nexus to drug use, as the District established at trial." *Id.*

63. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1282 (W.D. Okla. 2000).

64. *Id.* at 1282–83. The activities covered by the Tecumseh Policy include, *inter alia*, Future Farmers of America, Future Homemakers of America, Academic Team, Band, Vocal, Cheerleading, and Athletics. *Id.* at 1282.

65. *Id.* at 1283.

66. *Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 825 (2002).

67. *Earls*, 115 F. Supp. 2d at 1290–91. Under the policy, the principal or athletic director designates a coach or school employee of the same sex as a monitor to accompany the student to the

sign, on which he or she may list any legally prescribed medications taken in the preceding thirty days.⁶⁸ The monitor then pours the contents of the vial into two bottles and seals the bottles with the student present.⁶⁹ The Tecumseh Policy provides that test results are to be released to school personnel on a "need to know" basis, although those with a need to know are not specified.⁷⁰ The Tecumseh Policy states that repeat offenders who test positive for drugs are to be excluded from participation in extracurricular activities.⁷¹

The record indicates that within the Tecumseh District there was virtually no evidence of drug use among students participating in extracurricular activities, and that students participating in extracurricular activities were not the types of students likely to use drugs.⁷² While there existed some evidence of drug use among the general student population, the Tecumseh District itself had not concluded in the years leading up to the implementation of its policy that a drug problem existed within the school district as a whole.⁷³

The plaintiffs, Lindsay Earls and Daniel James, bringing suit through their respective parents, were students at Tecumseh High School at the time they filed suit against the Tecumseh District in the United States District Court for the Western District of Oklahoma. The plaintiffs challenged the constitutionality of the Tecumseh Policy under the Fourth Amendment.⁷⁴ The parties filed cross-motions for summary judgment on the plaintiffs'

restroom to produce the sample. *Id.* at 1290 n.35. The monitor is not to observe the student while the specimen is being produced, but is to be present outside the stall "to listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." *Id.* The monitor is also expected to verify the "warmth and appearance" of the specimen. *Id.*

68. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1268 (10th Cir. 2001).

69. *Earls*, 115 F. Supp. 2d at 1291.

70. *Id.* at 1291, 1293.

71. *Id.* at 1292 n.41.

72. Brief for Respondents at 33, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332). "The [Tecumseh] School Board President . . . observed that the majority of students who use drugs or alcohol do not join extracurricular activities." *Id.*

73. *Earls*, 242 F.3d at 1274. "In its yearly application for funds under the Safe and Drug-Free Schools and Communities program, the District submitted a statement called an 'analysis of current use.'" *Id.* In its applications for the 1995-96, 1996-97, and 1998-99 school years, the school district consistently asserted that "drugs including, controlled dangerous substances, are present [within the District] but have not identified themselves as major problems at [that] time." *Id.* Furthermore, in each of the two years preceding enactment of the policy, the Tecumseh schools reported to the federal government that within the school district "[m]inimal problems have been experienced due to violence, safety and discipline problems, and that discipline policies in place at each [school] site have been effective in dealing with the problems." Brief for Respondents at 36-37, *Earls*, 536 U.S. 822 (No. 01-332) (citation omitted) (first alteration in original).

74. *Earls*, 242 F.3d at 1266. "Plaintiff Lindsay Earls [was] a member of the show choir, the marching band and the academic team. Plaintiff Daniel James apparently [sought] to participate in the academic team and was enrolled during the [school year following implementation of the policy] in the academic team class." *Id.* at 1268; accord *Earls*, 115 F. Supp. 2d at 1282.

claims for declaratory and injunctive relief.⁷⁵

The district court concluded that the Tecumseh Policy constituted a reasonable search under the Fourth Amendment, and therefore granted the school district's motion for summary judgment.⁷⁶ A divided panel of the United States Court of Appeals for the Tenth Circuit reversed, with the majority of judges on the panel concluding that the Tecumseh Policy violated the Fourth Amendment.⁷⁷

2. The Supreme Court's Majority Decision and Reasoning

The Supreme Court granted certiorari⁷⁸ and reversed the decision of the United States Court of Appeals for the Tenth Circuit.⁷⁹ The Court, in an opinion by Justice Clarence Thomas, applied the three-pronged *Vernonia* analysis and concluded that the Tecumseh Policy constituted a reasonable search within the meaning of the Fourth Amendment.⁸⁰

a. The Nature of the Privacy Interest

The *Earls* majority founded its decision upon the assumption that *Vernonia* stands for the proposition that the public school context itself creates a limited expectation of privacy, which can be further diminished through activities in which the student chooses to participate.⁸¹ The majority found that participation in an extracurricular activity involving "occasional off-campus travel and communal undress" resulted in a diminished expectation of privacy, similar to the student-athletes covered

75. *Earls*, 115 F. Supp. 2d at 1282. It is important to take note of the procedural differences between the *Vernonia* and *Earls* decisions, as it will become important in understanding how far the Court has come with respect to the individual rights of students and the amount of deference it is willing to show the policy decisions of school districts. The Court reviewed the facts presented by *Vernonia* only after a bench trial in the district court, thereby requiring the application of a much more deferential standard to the district court's findings. On the other hand, the Court in *Earls* reviewed the Tecumseh Policy on a motion for summary judgment, thereby requiring the Court to apply much greater scrutiny to the facts presented. The failure of the *Earls* Court to scrutinize the facts presented, in light of the procedural disposition upon which it reviewed the case, indicates that at least a majority of the Court believes the issues presented by these types of student drug-screening cases were entirely settled by the *Vernonia* decision.

76. *Id.* at 1296.

77. *Earls*, 242 F.3d at 1267. Circuit Judges Anderson and Brorby concluded that the Tecumseh Policy was unreasonable and reversed the decision of the district court, with Circuit Judge Ebel dissenting. *Id.* at 1266–67, 1279.

78. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3331 (U.S. Nov. 8, 2001) (No. 01-332).

79. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 838 (2002).

80. *Id.* at 830. The majority consisted of Chief Justice Rehnquist, Justice Scalia, Justice Thomas, Justice Kennedy, and Justice Breyer, who also filed a concurring opinion. *Id.* at 824.

81. *Id.* at 830–32.

by the *Vernonia* Policy.⁸² Consequently, the majority found that students participating in organizations with rules and requirements that were not applicable to the rest of the student body also had a diminished expectation of privacy.⁸³

b. The Character of the Intrusion

Relying on *Vernonia*, the majority concluded that the Tecumseh Policy's drug testing procedure constituted a "negligible" intrusion on the students' right to privacy.⁸⁴ Justice Thomas also rejected the respondents' claim that school officials acted irresponsibly by releasing confidential student information to a wide variety of school personnel.⁸⁵ The majority summarily asserted, however, that since the sample collection was "minimally intrusive," the character of the intrusion entailed by the Tecumseh Policy was insignificant.⁸⁶

c. The Nature and Immediacy of the Governmental Interest and the Efficacy of the Policy in Furthering the Interest

The *Earls* majority asserted that the health and safety risks accompanying drug use identified by the *Vernonia* Court "apply with equal force to Tecumseh's children."⁸⁷ Relying heavily upon the negative health effects associated with drug use in general, the majority summarily concluded that the importance of the governmental concern asserted in *Vernonia* was similarly shown by the Tecumseh District in this instance.⁸⁸

82. *Id.* at 832.

83. *Id.*

84. *Id.* at 833 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995)).

85. *Earls*, 536 U.S. at 833. Under the Tecumseh Policy, test results are revealed to not only administrative personnel, but also to all coaches and sponsors of the activities covered by the policy, a much more expansive group than the few administrators entitled to students' test results under the *Vernonia* Policy. Brief for Respondents at 24, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822 (No. 01-332). Furthermore, there existed substantial evidence indicating that school personnel, after obtaining students' prescription drug lists, carelessly left the information where other students could see it. *Id.* Taking this information into account, and considering these facts in the light most favorable to the respondents, as the Court was required to do, the Court should have concluded that there existed an "issue of material fact" as to whether the Tecumseh Policy and the way it had been applied actually provided an adequate safeguard against an unconstitutional intrusion upon the students' privacy rights. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (stating that a party must establish the existence "of a genuine issue of material fact" to avoid summary judgment).

86. *Earls*, 536 U.S. at 834.

87. *Id.*

88. *See id.* (reasoning that since "the war against drugs [is] a pressing concern in every school," "[t]he health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children"). Because the *Earls* Court justified drug screening Tecumseh's students based largely upon the negative health effects associated with drug use, which are common to everyone, it is easy to see how this type of

The majority accepted, without any independent analysis, the district court's conclusion that a drug problem existed within the Tecumseh schools and concluded that the Tecumseh District had made a sufficient showing to establish its need for a drug testing program.⁸⁹ The majority also concluded that the need to prevent and deter drug use among children created the necessary immediacy for a school drug-testing policy.⁹⁰

In addition, the majority asserted that the Tecumseh Policy was an effective means of meeting the school district's stated goals for implementing a drug screening program.⁹¹ Claiming to rely on *Vernonia*, the majority held that a search may be valid in the public school context, even when it is not based upon an individualized suspicion of wrongdoing.⁹² Finally, the majority, although expressing "no opinion" as to the "wisdom" of the Tecumseh Policy, concluded that the Tecumseh Policy was an effective means of deterring and detecting student drug use.⁹³

reasoning can be extended to include drug screening of all students.

89. *Earls*, 536 U.S. at 835; see also *Earls*, 115 F. Supp. 2d at 1287 (finding that a drug problem existed in the Tecumseh District). In spite of a plausible disparity of material fact between the parties concerning whether or not a drug problem actually existed within the school district, as well as whether such a problem existed within the group targeted by the Tecumseh Policy, the district court deemed it appropriate to reach the facts presented on the summary judgment motion and rule in favor of the Tecumseh District. *See id.* at 1285–87 (discussing evidence of drug use by Tecumseh District students and concluding that the existence of a drug problem could not be reasonably disputed when the evidence is viewed as a whole). Rather than deny the summary judgment motions, the district court instead resolved the factual dispute in favor of the school district by accepting the deposition testimony of two school officials who testified that there was a drug problem within the school district, while totally ignoring the school district's official reports asserting that there was no drug problem within the district or within the targeted group. *Id.* at 1285 n.12, 1285–86; *Earls*, 242 F.3d at 1274. Taking such a favorable view of the school district's evidence clearly flies in the face of the approach articulated by the Court for reviewing evidence on a motion for summary judgment, which generally entails making all inferences concerning the underlying facts "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

90. *Earls*, 536 U.S. at 836. This, clearly, is a very expansive interpretation of the much more restrained approach taken by the *Vernonia* majority, which went to great lengths to describe the justification for the policy at issue based upon the drug and disciplinary problems that plagued the *Vernonia* schools themselves. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662–63 (using phrases such as "drug-infested school" and "immediate crisis of great[] proportions" and discussing the "role model" dangers that drug-using athletes pose). Moreover, this assertion—that deterrence of drug use is generally sufficient to create a special need—flies in the face of the notion that a special needs determination is a case-by-case, context-specific analysis that views each case individually on the merits to determine if a special need exists. *See Chandler v. Miller*, 520 U.S. 305, 313 (1997) (asserting that "under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing").

91. *Earls*, 536 U.S. at 837.

92. *Id.* at 837.

93. *Id.* at 838. Although a majority of the court appears to have concluded that random suspicionless drug screening is an effective device for preventing student drug use, there is an ongoing debate within the education community as to whether drug screening policies actually serve as an effective deterrent to student drug use. *See Ryoko Yamaguchi et al., Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 164 (2003) (concluding, after extensively surveying students nationwide, that drug testing in schools "may not provide [the] panacea for reducing student drug use that some . . . had hoped"). But see Joseph R. McKinney, *The*

3. The *Earls* Dissent

Writing for the dissent, Justice Ruth Bader Ginsburg expressly disagreed with the majority's broad reading of *Vernonia*.⁹⁴ The dissent also disagreed with the majority's focus on the damaging effects of drug abuse for all children as the basis for upholding the Tecumseh Policy, warning that such reasoning could be read to endorse suspicionless drug screening of all public school students.⁹⁵ The dissent further asserted that the fundamental differences existing between student participation in athletic and nonathletic extracurricular activities result in a greater expectation of privacy for students participating in nonathletic extracurricular activities.⁹⁶ Finally, the dissent took issue with the perceived inability of the Tecumseh schools to make a showing of a special need to test students participating in nonathletic extracurricular activities.⁹⁷ Citing the Tecumseh District's own failure to admit the existence of a drug problem within its schools, the dissenting Justices would have required a showing of an enormous safety risk connected to student involvement in nonathletic extracurricular activities in order to establish a special need to test nonathletes.⁹⁸ The dissent made clear that, based upon prior special needs precedent, the Tecumseh District fell far short of making such a showing.⁹⁹

II. THE NEED FOR A RE-ANALYSIS OF EARLS

Following *Vernonia*, it appeared that the Court sought a workable balance between the students' constitutional rights and the school districts' need to maintain order and safety within the schools. *Vernonia* relied upon many of the central tenets that encompassed special needs analysis outside

Effectiveness and Legality of Random Drug Testing Policies, at <http://www.studentdrugtesting.org/IN%20survey.PDF> (last visited Dec. 17, 2004) (following a survey of high school administrators, the author concluded that “[r]andom drug testing policies appear to provide a strong tool for schools to use in the battle to reduce alcohol and drug usage among teens”).

94. See *Earls*, 536 U.S. at 854 (referring to the Tecumseh Policy, Ginsburg asserts that “[a] program so sweeping is not sheltered by *Vernonia*”). Justice Ginsburg, who was a member of the *Vernonia* majority, was joined in her dissent by Justice Stevens, Justice O’Connor, and Justice Souter. *Id.* at 842.

95. *Id.* at 844.

96. See *id.* at 847–48 (noting that nonathletic extracurricular activities, which do not involve “routine communal undress,” “serve students of all manner: the modest and shy along with the bold and uninhibited”).

97. *Id.* at 854.

98. See *id.* at 852–53 (finding that the Vernonia District had two good reasons for testing athletes, including safety risks and the fact that the athletes “were the leaders of the drug culture,” whereas Tecumseh did not).

99. See *id.* at 852 (“Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas . . . the great majority of students the School District seeks to test . . . are engaged in activities that are not safety sensitive to an unusual degree.”).

of the public school context. Consequently, *Vernonia* did not signal an enormous shift in the Court's special needs doctrine. In general, *Vernonia*, which justified drug screening student-athletes based on the enhanced safety risks connected to athletic competition, followed *Skinner* and its progeny by continuing to require that a safety interest be furthered by the drug screening before finding the existence of a special need. Therefore, the Court's reasoning in *Vernonia* struck the proper balance between the Fourth Amendment rights of public school students and the special needs of certain school districts to combat drug problems that disrupt learning and create significant safety concerns within their schools.

In light of the Court's broad analysis and reasoning in reaching its decision in *Earls*, it has become evident that a majority of the Court is no longer interested in striking such a balance. *Earls* indicates that the Fourth Amendment gives school districts authority to conduct random, suspicionless drug screenings of a large segment of any school's student population.¹⁰⁰ By applying the three-pronged *Vernonia* analysis to the facts of *Earls* in a manner quite different from that undertaken by the *Earls* majority, it will become clear that the majority mistakenly relied upon *Vernonia* as indistinguishable precedent in upholding the Tecumseh Policy.

A. *The Nature of the Privacy Interest*

The *Earls* majority mistakenly concluded that the privacy interests of students participating in nonathletic extracurricular activities were indistinguishable from the privacy interests of student-athletes covered by the policy at issue in *Vernonia*.¹⁰¹ The *Earls* Court not only displayed a fundamental misunderstanding of the different degrees of privacy intrusions athletes and nonathletes consent to in order to participate in their respective activities, but also grossly undervalued the indispensable connection between nonathletic extracurricular activities and the overall educational experience.

1. Distinguishing Degrees of Intrusion for Athletes and Nonathletes

Central to the Court's conclusion that nonathletes did not have a stronger expectation of privacy than athletes was the fact that both athletes and nonathletes voluntarily subjected themselves to more regulation than

100. But cf. Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the Earls Decision on High School Random Drug Testing Policies*, 34 J.L. & EDUC. 297, 298, 311 (2003) (citing a number of studies indicating that, despite the fact that schools have the legal authority to do so, the vast majority of school districts have not conducted random drug testing and are not planning to do so, and that *Earls* itself "did not have a significant impact" on most schools' drug screening policies).

101. *Earls*, 536 U.S. at 831.

the rest of the student body.¹⁰² However, athletes, unlike nonathletes, repeatedly subject themselves to regulations and invasions upon their privacy which can be characterized as "physical." For instance, student-athletes must generally submit to physical exams prior to participating in any sport.¹⁰³ Moreover, throughout their seasons, athletes are required to disrobe and shower in communal locker rooms.¹⁰⁴

On the other hand, the supposedly "extra" regulations which the nonathletes choosing to participate in Tecumseh's extracurricular activities subject themselves to, namely the need to maintain passing grades in order to participate in competitions, are related to the academic goals of the school and in no way intrude on these students' physical privacy.¹⁰⁵ Moreover, nonathletes in the Tecumseh District were not required to take physicals or acquire insurance coverage, as were the athletes, and were not subject to control by their activity supervisors "over their conduct, dress, or schedule."¹⁰⁶

Nevertheless, the *Earls* majority failed to recognize these distinctions between athletes and nonathletes.¹⁰⁷ Because athletes voluntarily consent to physical intrusions into their privacy, they may reasonably expect to be subjected to the type of physical intrusions that are incidental to drug screenings. Nonathletes competing in extracurricular activities, however, are not usually required to meet any type of physical requirements or undergo any physical examination as a condition of their participation in those activities. As a result, voluntary participation in nonathletic extracurricular activities that are essentially academic and instructive in nature should in no way lead to a diminished expectation of physical privacy.¹⁰⁸

102. *Id.* at 832.

103. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995). These physical exams often include giving a urine sample, and, "for male athletes, a hernia examination in which their genitals are directly manipulated." Brief for Respondents at 20, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822 (No. 01-332).

104. *Vernonia*, 515 U.S. at 657.

105. Brief for Respondents at 19, *Earls*, 536 U.S. 822 (No. 01-332).

106. *Id.*

107. See *Earls*, 536 U.S. at 831–32 (stating that these distinctions were "not essential to our decision in *Vernonia*," but nevertheless highlighting the similarities between athletic and nonathletic activities). Lower federal and state courts interpreting *Vernonia* prior to *Earls* differed as to whether students participating in extracurricular activities had greater privacy expectations than student-athletes. See, e.g., Trinidad Sch. Dist. Number 1 v. Lopez, 963 P.2d 1095, 1107 (Colo. 1998) (finding that marching band members had greater expectation of privacy than student-athletes). But see, e.g., Todd v. Rush County Sch., 133 F.3d 984, 986 (7th Cir. 1998) (finding that added privileges accruing to students who participate in nonathletic extracurricular activities diminish these students' expectation of privacy).

108. See Theodore v. Del. Valley Sch. Dist., 761 A.2d 652, 660 (Pa. Commw. Ct. 2000) (stating that "we disagree with [the view] . . . that just by exercising a privilege in any activity that is part of the educational process, a student's privacy interests are lessened").

2. Extracurricular Activities: An Integral Part of the School Experience

The Court has, in several instances, recognized the importance of extracurricular activities to the overall educational experience.¹⁰⁹ The *Earls* majority opinion, however, is devoid of even a cursory recognition of the central role participation in extracurricular activities plays in the high school experience of many students. The *Earls* Court failed to recognize the essential role extracurricular involvement has come to play in the education and development of students.¹¹⁰ High school students gain innumerable benefits through participating in extracurricular activities. These extracurricular activities have become more akin to a requirement than a voluntary activity for many high school students, especially those students who wish to attend college.¹¹¹ As a result, the privacy interests implicated by the Tecumseh Policy weigh more heavily in favor of the students than the *Earls* majority recognized.

It has long been recognized that extracurricular involvement has become indispensable to the overall educational experience of many students.¹¹² Extracurricular activities provide “marginal” students with an incentive to remain in school.¹¹³ Involvement in extracurricular activities has also become essential for all college-bound students.¹¹⁴ As the *Trinidad*

109. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000) (concluding that it would be imprudent to diminish “the importance . . . of attending and participating in extracurricular activities as part of a complete educational experience”); see also *Lee v. Weisman*, 505 U.S. 577, 595 (1992) (recognizing the importance of the high school graduation ceremony as an integral part of the high school experience).

110. See Brief of Amici Curiae American Academy of Pediatrics et al. at 8–9, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822 (2002) (No. 01-332) (citing a study by the American College Testing Service indicating that the best indicator of success in later life is participation in high school activities).

111. *Id.* at 8. While athletics play a similar role in both the development and educational experience of many of our nation’s youth, the expansive and routine intrusions into the physical privacy of student-athletes diminishes the privacy expectations of these athletes to such a degree that they cannot reasonably expect to be free from the incidental physical intrusions that accompany drug screenings.

112. See, e.g., Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, 14 J. ADOLESCENT RES. 10, 29 (1999) (emphasizing how student involvement in extracurricular activities helps students develop an individual identity and strengthens the connections they have with their schools).

113. See Brief of Amici Curiae American Academy of Pediatrics et al. at 4, 8, *Earls*, 536 U.S. 822 (No. 01-332) (stating that research “confirms that students who participate in extracurricular activities are more likely to stay in school”).

114. At all top universities today, good high school grades and strong scores on aptitude tests alone are not sufficient to gain admission. Students who wish to distinguish themselves from the thousands of other applicants with equally good grades and test scores are basically *required* to participate in extracurricular activities if they are to gain admission to such schools. See, e.g., *Harvard College Admissions, Frequently Asked Questions: International Applicants* (mentioning that the “Admissions Committee also considers many other criteria, such as community involvement, leadership and distinction in extracurricular activities, and work experience”), at <http://www.admissions.college.harvard.edu/faqs/international/admissions/> (last visited Dec. 17, 2004).

Court has recognized, the reality for students “who wish to pursue post-secondary educational training and/or professional vocations” is that the invaluable experiences gained by participating in extracurricular activities means that those students “*must* engage in such activities.”¹¹⁵ Nonathletic extracurricular activities serve students of all backgrounds, including those students who are too “bashful” for interscholastic athletics or those students who are not athletically inclined. For many students, extracurricular involvement is a necessary complement to the classroom learning experience. Employers and universities value their candidates’ participation in these activities because they instill real-world social ideals, like commitment to teamwork and leadership skills.

The Court itself has recognized that certain nonathletic extracurricular activities are an essential and integral part of the overall educational experience. In *Lee v. Weisman*, the Court was faced with the question of whether a school policy allowing clergy to offer prayers as part of an official public-school graduation ceremony was forbidden by the Religion Clauses of the First Amendment.¹¹⁶ The Court asserted that the student challenging the policy had no “real choice” in the decision to attend her high school graduation.¹¹⁷ According to the Court, the ceremony was not “in any real sense of the term ‘voluntary’” because of the importance of high school graduation in the course of a person’s life.¹¹⁸ As a result, the Court struck down the policy, concluding that the school district could not require the student to forfeit her First Amendment right to be free from religious coercion “as the price of attending her own high school graduation.”¹¹⁹

Drawing an analogy to *Weisman*, it should be clear that a school district cannot require a student to give up his or her Fourth Amendment right to be free from unreasonable searches as an incident of participating in nonathletic extracurricular activities. In the same way that high school graduation is not a “voluntary” exercise, participation in nonathletic extracurricular activities cannot be considered “voluntary.”¹²⁰ The *Earls*

115. Trinidad Sch. Dist. Number 1 v. Lopez, 963 P.2d 1095, 1109 (Colo. 1998) (emphasis added).

116. *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

117. *Id.* at 595.

118. *Id.* (“Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise . . . for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”) (emphasis added).

119. *Id.* at 596.

120. See *Ferguson v. City of Charleston*, 532 U.S. 67, 91 (2001) (Kennedy, J., concurring) (concluding that the reasonableness of a search regime depends on how “voluntary” the consent given for a drug screening actually is). Applying this reasoning, the consent of a student who must participate in extracurricular activities to gain admittance to college cannot be considered “voluntary” in any real sense of the term, as it has been defined by the Court.

majority, by upholding the Tecumseh Policy, essentially presents students with the following options: either consent to drug screening to participate in nonathletic extracurricular activities, or choose not to consent to drug screening and be absolutely prohibited from participating in an essential part of the educational experience.¹²¹ In light of the importance of extracurricular activities to the education process itself, the Tecumseh Policy clearly places students in an untenable position, which in no way results in a truly “voluntary” waiver of a student’s Fourth Amendment right to be free from unreasonable searches and seizures.¹²²

B. The Character of the Intrusion

In characterizing the intrusion implicated by the Tecumseh District’s drug screening policy as “negligible” and “minimally intrusive,” the *Earls* majority disregarded the actual invasiveness of a urine collection procedure.¹²³ The Court failed to acknowledge the real-world distinctions between giving drug screening tests to student–athletes and giving drug screening tests to nonathletes seeking to participate in extracurricular activities.¹²⁴ In addition, the *Earls* majority failed to distinguish between the greater degree of intrusion these types of searches entail when applied to nonathletes in the context of public schools, as opposed to drug screening procedures in more heavily regulated contexts where an individual’s privacy expectations are greatly diminished.¹²⁵

121. See *Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d 76, 95 (Pa. 2003) (asserting that students should not have to choose between their right to privacy and extracurricular activities).

122. See *Merriken v. Cressman*, 364 F. Supp. 913, 919 (E.D. Pa. 1973) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent and done with sufficient awareness of the relevant circumstances and likely consequences.”) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (indicating that “courts [should] indulge every reasonable presumption against waiver” of an individual’s constitutional rights) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

123. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 833–34 (2000).

124. See Brief of Amici Curiae American Academy of Pediatrics et. al. at 15, *Earls*, 536 U.S. 822 (No. 01-332) (“For young people who are not inured, as many student–athletes are, to routine ‘communal undress’ . . . procedures of the sort Tecumseh uses can be intensely uncomfortable.”) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995)).

125. See *Brooks v. E. Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 765 (S.D. Tex. 1989) (concluding that it “is difficult to imagine any search of school children being more intrusive” after reviewing the school district drug-screening policy directed at students participating in extracurricular activities).

1. Urine Collection Procedures in Any Context Represent an Invasive Search

When initially presented with drug screening policies similar to the one imposed by the Tecumseh District, some members of the Court characterized such searches as “particularly destructive of privacy,” “offensive to personal dignity,” and “demeaning.”¹²⁶ But over time, the Court has essentially ignored the type of privacy our society generally values in connection with the passage of urine and shut its eyes to the actual intrusion that is incidental to such a drug screening procedure.¹²⁷

Despite this shift within the Court, perhaps no Court has been more ambivalent to the invasiveness of drug screening procedures than the *Earls* majority. Unlike the policy approved by the *Vernonia* Court, the Tecumseh Policy was marred by evidence indicating that it violated significant privacy rights of the students being tested, including unauthorized disclosure of significant medical information by school personnel.¹²⁸ In spite of this evidence, by blindly following *Vernonia*, the *Earls* Court incorrectly concluded that the Tecumseh Policy did not invade significant privacy rights that students possess, not only in their physical person, but also in their personal information.

2. Drug Testing Programs are More Invasive as Applied to Nonathletes in the Public School Context than in Other Contexts

The *Earls* Court fails to distinguish between the varying degrees of intrusion visited upon an individual’s privacy when a drug screening policy is applied to nonathletes in the public school context as compared to those individuals involved in more heavily regulated activities. The drug screening policy at issue in *Earls* is much more invasive than the one at issue in *Vernonia*. The student–athletes drug tested in *Vernonia* participated in activities that were “closely regulated,” similar to the train operators in *Skinner* and the customs agents in *Von Raab*.¹²⁹ However, no

126. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 680, 684 (1988) (Scalia, J., dissenting); see also *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1988) (“There are few activities in our society more personal or private than the passing of urine.”) (quoting Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

127. See Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968) (“[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem.”).

128. See Brief for Respondents at 24, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822 (No. 01-332) (indicating that a choir teacher within the Tecumseh District had carelessly left students’ prescription drug lists in a place where other students could see them).

129. *Vernonia Sch. Dis. 47J v. Acton*, 515 U.S. 646, 657 (1995).

similar argument can be made for the students affected by the Tecumseh Policy.¹³⁰ Therefore, *Vernonia* cannot be read to stand for the proposition that the public school context itself permits a relaxation of the ordinary special needs requirements. The Court's failure to establish a degree of regulation over nonathletes analogous to that established over the athletes, regulated by the Vernonia Policy, should have resulted in an invalidation of the Tecumseh Policy.

Nevertheless, there are a number of additional reasons for distinguishing the Tecumseh Policy from other policies previously upheld by the Court. For instance, taking into consideration the awkwardness and insecurity so many high-school-aged students feel about their not-yet-mature bodies, as well as the manner in which the urine sample is collected, the Court should have distinguished the Tecumseh Policy as a greater intrusion on privacy than policies the Court has previously approved in other contexts.¹³¹ Perhaps the greatest indications of the invasiveness of these searches are the reactions of the students themselves to these procedures, many of whom were embarrassed and humiliated at having to undergo the drug testing procedure.¹³² In this context, the Court seems to have turned a blind eye to the reality that announcing to a large, public group which students will be screened for drugs is likely to exacerbate feelings of insecurity and embarrassment that are common among adolescents, especially regarding a matter as personal as urination.¹³³

In addition, the urine collection procedures employed by the Tecumseh District do not reduce the embarrassment felt by many students. The Tecumseh District utilizes teachers and coaches to administer the drug screenings, whereas in other contexts, medical personnel, anonymous to the

130. See Brief for Respondents at 19, *Earls*, 536 U.S. 822 (No. 01-332) (listing the "extra" regulations from which Tecumseh's nonathletes are exempt); see also *supra* notes 103–06 and accompanying text.

131. Cf. *Lee v. Weisman*, 505 U.S. 577, 592, 596–97 (1992) (indicating that in the context of the First Amendment, the Court is willing to recognize the "inherent differences" between the public-school context and other contexts that may make the invasiveness of a school-sanctioned prayer greater upon a student in the public-school context than upon adults in other contexts).

132. See Brief for Respondents at 22, *Earls*, 536 U.S. 822 (No. 01-332) (indicating that approximately ten percent of the choir students subject to the Tecumseh Policy expressed concerns about the drug test to the choir teacher, and that four students had dropped the choir class entirely since the Policy was implemented, one of whom told the choir teacher she was dropping the class because of the embarrassment she felt over the drug test); see also *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1291 n.38 (W.D. Okla. 2000) (recounting the plaintiffs' statements that "[i]t's just kind of embarrassing for someone to be standing outside your stall listening to you while you use the restroom," and that the whole procedure was "disrespectful and humiliating").

133. It is worthy to note that technological advances have provided school districts with much-less-invasive means by which to screen for drugs than through urinalysis testing. See UNITED STATES OFFICE OF NAT'L DRUG CONTROL POLICY, WHAT YOU NEED TO KNOW ABOUT DRUG TESTING IN SCHOOLS 10 (discussing oral fluid testing as a means by which to detect traces of drugs and drug metabolites, and how oral fluid testing is a less-invasive alternative to urinalysis testing), available at http://www.whitehousedrugpolicy.gov/pdf/drug_testing.pdf (last visited Dec. 18, 2004).

test subject and trained to preserve patients' privacy expectations, often conduct drug screenings.¹³⁴ Evidence presented to the district court indicated that Tecumseh school personnel had fallen far short of meeting the professional norms that trained medical personnel would certainly uphold in conducting a drug screening.¹³⁵ Moreover, the teachers and coaches conducting the drug screening in the Tecumseh District may often have a personal relationship with the students being tested. This relationship is likely to cause great discomfort to students and intensify the invasiveness of the procedures by forcing students to examine a urine sample with a teacher or other school personnel in an authoritative position.¹³⁶

C. The Nature and Immediacy of the Governmental Interest and the Efficacy of the Tecumseh Policy in Furthering the Interest

In this third and final prong of the analysis, the *Earls* Court arguably made its sharpest break from *Vernonia*. The *Vernonia* and *Earls* Courts focused upon three major issues when analyzing this prong: (1) safety concerns within the context at issue; (2) the level of drug use within the group targeted by the respective school district's policy; and (3) the efficacy of the policy, including whether an individualized-suspicion requirement would be impracticable for meeting the school district's purpose.¹³⁷ In analyzing this prong, it will become clear that the Tecumseh District fell far short of demonstrating a special need, as outlined in *Vernonia* and other special needs precedents, to randomly drug test nonathletes participating in extracurricular activities.

134. See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626–27 (1989) (observing that collection of urine for drug screening was conducted at an independent facility by medical personnel "unrelated" to the test subject's employer).

135. See *Earls*, 115 F. Supp. 2d at 1291 n.38 (citing Lindsay Earls's statement that a faculty member "joked to her" that the testing procedures made her feel like "she was engaging in potty training").

136. See Brief of Amici Curiae American Academy of Pediatrics et al. at 16–17, *Earls*, 536 U.S. 822 (No. 01-332) (collecting the sample is likely to be "a familiar adult who may well play a powerful authority role in the student's daily school experience").

137. See *Vernonia*, 515 U.S. at 660–64 (performing the analysis of this prong).

1. The Tecumseh District Failed to Establish the Existence of Safety Concerns as is Required to Demonstrate the Existence of a Special Need

a. Safety Concerns and Special Needs: Distinguishing *Vernonia* from *Earls*

Prior to *Earls*, the Court always placed great emphasis upon the existence (or nonexistence) of safety concerns in connection with the activities performed when determining whether a special need to search was present within a given context. For instance, relying upon *Skinner* and its progeny, the *Vernonia* Court concluded that a special need existed to drug test student-athletes because of the obvious risk of “immediate physical harm” that accompanied participation in athletics, especially when combined with drug use.¹³⁸ However, the *Earls* Court, despite failing to identify any safety concerns connected to student participation in nonathletic extracurricular activities or describing how drug use by students participating in the covered activities could create such concerns, summarily concluded that the “health and safety risks identified” by the *Vernonia* Court applied equally to Tecumseh’s students participating in nonathletic extracurricular activities.¹³⁹

Since the extracurricular activities engaged in by student-athletes and nonathletes are not so similar as to warrant such an easily drawn analogy, the Court was clearly referring to the “health and safety risks” that accompany drug use in general.¹⁴⁰ Prior to *Earls*, not once had the Court relied upon this justification to conclude that a special need to conduct a particular search had been demonstrated. In order to conduct a suspicionless search of those within the targeted group, *Vernonia* established that, even in the public school context, the showing of a special need must be based upon the existence of identifiable safety issues within the specific context, *independent* of the general health concerns related to drug use.¹⁴¹ Nevertheless, the *Earls* majority opinion will be searched in vain for even an attempt to develop a nexus between nonathletic extracurricular activities, drug use, and how drug use enhances the

138. *Id.* at 662 (1995). For instance, it is obvious that numerous safety concerns exist for both parties where a baseball pitcher is facing a hitter, such as the injury faced by the batter if struck in the head with a pitched ball, or vice-versa. These safety concerns will clearly be increased if the pitcher or the batter suffers from slowed reflexes, a common side effect of marijuana use.

139. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 834 (2002).

140. See *id.* (asserting that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school”).

141. See *Vernonia*, 515 U.S. at 662 (explaining that one of the reasons why the school’s concerns are important is that “the risk of immediate physical harm to [student-athletes] is particularly high”).

nonexistent “risks” associated with participation in such activities.¹⁴²

b. Defining a “Symbolic” Need, as Opposed to a “Special” Need: *Chandler v. Miller*

Because of the Court’s failure to show a connection between safety concerns and nonathletic extracurricular activities, the *Earls* Court should have concluded that the Tecumseh District’s need to drug test the targeted students presented a “symbolic need,” as defined by the Court in *Chandler v. Miller*.¹⁴³ In *Chandler*, the Court concluded that a Georgia statute requiring suspicionless drug testing of all candidates attempting to qualify for high state office was unconstitutional.¹⁴⁴ Because there was neither a “concrete danger” presented by running for high state office nor a fear or suspicion of drug use by state officials, the Court concluded that a special need did not exist to drug test the candidates.¹⁴⁵ The Court asserted that in the absence of a threat to public safety the Fourth Amendment prohibits suspicionless searches.¹⁴⁶

As a result of Georgia’s failure to establish a safety concern in connection with running for high state office, the Court characterized the “need” expressed by the State in that particular instance as “symbolic, not special.”¹⁴⁷ The Court viewed the need as symbolic because it appeared that the only purpose behind the statute was to display the State’s “commitment to the struggle against drug abuse” by ensuring that all those in public office were drug-free.¹⁴⁸ The Court asserted that where the State attempted to intrude upon an individual’s personal privacy “for a symbol’s sake,” the Fourth Amendment would not bend to make such an accommodation.¹⁴⁹

c. *Earls*: A Symbolic Need

Despite the difference in context, the facts of *Earls* are more analogous to *Chandler* than they are to *Vernonia*. As was the case in *Chandler*, there exists no “concrete danger” to the individual or general public that creates

142. See *id.* (stating that “the particular drugs screened . . . pose substantial physical risks to athletes”).

143. See *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (emphasizing that “[t]he need revealed . . . is symbolic”).

144. *Id.* at 309.

145. *Id.* at 319, 322.

146. *Id.* at 323. “[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.” *Id.*

147. *Id.* at 322.

148. *Id.* at 321–22.

149. *Id.* at 322.

any kind of safety concern through participation in the extracurricular activities covered by the Tecumseh Policy.¹⁵⁰ In light of the Court's precedent and the Tecumseh District's failure to establish a nexus between safety concerns and the activities covered by the Tecumseh Policy, the question as to the existence of a special need to search Tecumseh's students should have been resolved against the school district. Despite the factual consistencies between *Earls* and *Chandler*, the majority opinion in *Earls* did little to explain the disparity in the results of the two cases.

Furthermore, the Tecumseh District's own justifications for the policy were similar to those set forth by Georgia and subsequently rejected by the *Chandler* Court as insufficient to create a special need. For instance, the testimony of school district personnel indicated that the Tecumseh District imposed drug tests on nonathletes to "send[] a message to the community about the school's tough on drugs stance" and to "project a drug free image."¹⁵¹ Based on the aims of the Tecumseh Policy and *Chandler*, the Court should have found a "symbolic" need to drug test the targeted students and concluded that the facts set forth by the Tecumseh District did not warrant a deviation from the normal requirements of the Fourth Amendment.¹⁵²

2. The Tecumseh District Failed to Demonstrate the Existence of a Drug Problem Creating an Immediate Concern

In *Vernonia*, the Court went to great lengths to show that the Vernonia District faced serious substance abuse and discipline problems that were in need of immediate redress.¹⁵³ The existence of a pervasive drug problem among the student-athletes targeted by the Vernonia Policy made a drug screening program narrowly directed towards those students quite reasonable. Therefore, *Vernonia*, and other cases interpreting it, established that the level of drug use within the group targeted by a suspicionless drug screening policy was relevant to determining the "immediacy" of the school district's concern.¹⁵⁴ Due to the disputed evidence regarding the existence

150. *Id.* at 319; see also Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 854 (2002) (Ginsburg, J., dissenting) (stating that the Georgia statute "targeted a group not involved in 'high-risk safety-sensitive tasks'" and "[c]lose review of Tecumseh's policy compels a similar conclusion" to that of *Chandler*) (quoting *Chandler*, 520 U.S. at 321–22).

151. Brief for Respondents at 46, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822 (No. 01-332).

152. See *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 95 (Pa. 2003) (concluding that a "symbolic" need existed where the school district's main purpose for its drug testing policy was to deter drug use in the student population in general by targeting for drug screening students involved in extracurricular activities and who drive to school).

153. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662–63 (1995).

154. *Id.*; see also *Chandler*, 520 U.S. at 321 (concluding that there was no evidence indicating drug use among Georgia's elected officials); *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242

of a drug problem within the Tecumseh schools and the virtual nonexistence of evidence indicating drug use by students participating in nonathletic extracurricular activities,¹⁵⁵ the Court should have concluded that the Tecumseh District was not faced with an immediate problem requiring redress through a suspicionless drug testing regime. Nevertheless, in concluding that the Tecumseh District had shown the existence of a drug problem and by failing to require the school district to show a drug problem existed within the targeted group of students,¹⁵⁶ the Court clearly ignored the narrow tailoring of the *Vernonia* Policy that was so central to its being upheld.

The Tecumseh District failed to develop even a remote connection between the stated purposes of its policy, namely deterrence of drug use, and why students participating in nonathletic extracurricular activities were in special need of such deterrence.¹⁵⁷ The fact that the school district singled out those students for drug screening who, both nationwide and in the Tecumseh schools themselves, appear to be the least likely students to engage in drug use is even more troubling.¹⁵⁸ Therefore, in the absence of evidence of drug use by students participating in extracurricular activities, and in light of all the indications that such students were the least likely to engage in illicit drug use, the *Earls* Court should have declined to find the existence of an immediate problem within the Tecumseh schools.

Clearly, the Tecumseh Policy and similar policies are formulated to bring as large a percentage of the student population as possible within the

F.3d 1264, 1278 (10th Cir. 2001) (requiring school district to show evidence of drug use among those students targeted by the policy); *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1065 (7th Cir. 2000) (asserting that suspicionless drug testing, absent evidence of a drug problem among the targeted group, should not be used if suspicion-based testing is possible); *Tannahill v. Lockney Ind. Sch. Dist.*, 133 F. Supp. 2d 919, 921, 930 (N.D. Tex. 2001) (relying on the fact that drug use within the school district was lower than in other Texas schools in striking down the school district's drug screening policy).

155. Brief for Respondents at 33, *Earls*, 536 U.S. 822 (No. 01-332).

156. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 835 (2002).

157. Cf. *Theodore*, 836 A.2d at 95–96 (concluding that the school district's need to test the targeted students was "symbolic" because no evidence was presented showing that the targeted students were "at all likely to be part of whatever drug problem may . . . exist" within the district).

158. See Nicholas Zill et al., U.S. Dept. of Health & Human Servs., Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data (1995) (concluding that students who participate in extracurricular activities are far less likely to use drugs than their less-involved classmates), available at <http://www.aspe.hhs.gov/hsp/cyp/xstimuse.htm>; see also Lee Shilts, *The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, and Personal Attitudes*, 26 ADOLESCENCE 613, 615 (1991) (finding that among the adolescents studied, those not using drugs reported "significantly higher involvement in extracurricular activities" than those students using drugs); Michael Resnick et al., *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, 278 JAMA 823, 829–30 (1997) (concluding that those students with greater connections to their school used alcohol and marijuana less frequently than those without such a connection).

drug screening policy's ambit.¹⁵⁹ Therefore, in light of the Tecumseh Policy's stated purpose of deterring drug use, the school district sought to cast as wide a net as possible to ensure a large percentage of the Tecumseh student population would be subject to drug screening. Prior to *Earls*, the Tecumseh Policy's goal of focusing upon the deterrence of drug use among students in general, although noble, had never been recognized by the Court as creating the necessary immediacy to cast aside the Fourth Amendment's usual requirement of individualized suspicion.¹⁶⁰

3. The Tecumseh District Failed to Establish that a Suspicionless Search Regime Was Required

Although required as an aspect of the special needs analysis, the *Earls* majority failed to examine whether the requirement of individualized suspicion would hinder the Tecumseh District's ability to attain its goals. Undertaking an expansive reading of *Vernonia*, the *Earls* majority asserted that the public-school context did not require individualized suspicion to conduct a search.¹⁶¹ Therefore, the Court refused to require that the Tecumseh District base its policy upon individualized suspicion.¹⁶² However, the broad reasoning employed by the majority failed to recognize the fundamental differences in the types of safety-sensitive activities engaged in by the student-athletes targeted by the *Vernonia* Policy and the nonathlete-students targeted by the Tecumseh Policy.

In general, prior to *Earls*, the Court had only upheld suspicionless searches where the asserted governmental interest "would be placed in jeopardy by a requirement of individualized suspicion" or where the scheme at issue would be "ineffectual" if based upon individualized suspicion.¹⁶⁴

159. See, e.g., *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 656 n.1 (LaVecchia, J., dissenting) (finding that nearly eighty percent of students within the state could be subject to suspicionless drug screening because the New Jersey Supreme Court upheld a policy similar to that at issue in *Earls*).

160. Cf. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (asserting that a search must be based upon individualized suspicion where the primary purpose of the search is "indistinguishable from the general interest in crime control").

161. *Earls*, 536 U.S. at 837. The *Vernonia* Court, consistent with its limited holding, never made such a broad assertion concerning the use of individualized suspicion in the public-school context. Rather, consistent with the special needs doctrine, the *Vernonia* majority simply reasoned that individualized suspicion was not required for the *Vernonia* Policy to be upheld based upon the specific facts presented to it by the *Vernonia* District. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995).

162. *Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002).

163. See *Earls*, 536 U.S. at 852 (Ginsburg, J., dissenting) (stating that the students targeted by the Tecumseh Policy are not engaged in activities that are "safety sensitive to an unusual degree" as in *Vernonia*).

164. *Vernonia*, 515 U.S. at 667–68 (O'Connor, J., dissenting); see *Skinner v. Ry. Labor*

The Court's failure to address the issue of individualized suspicion resulted in its approval of Tecumseh's suspicionless search regime. The Tecumseh Policy, however, did not meet the constitutional minimum required to establish the authority to undertake a suspicionless search. Moreover, the Tecumseh Policy may not have effectively addressed the concerns of the Tecumseh District which led it to implement the policy.

In *Vernonia*, the asserted interest of the school district—protecting student–athletes from the increased health risks that accompany drug use—would have been “placed in jeopardy by a requirement of individualized suspicion.”¹⁶⁵ Because there is a general safety interest implicated by participation in school athletics, a student–athlete who uses drugs presents an immediate threat to not only himself, but all those he is competing against. In this sense, requiring individualized suspicion for the testing of student–athletes would defeat the school district’s purpose in trying to prevent them from suffering harm, because a student who uses drugs may not necessarily demonstrate outward signs of drug abuse.¹⁶⁶ Therefore, the Vernonia District could not apply an individualized-suspicion requirement in its context without frustrating its purpose of ensuring the health and safety of its student–athletes.

On the other hand, if Tecumseh were required to base its policy on individualized suspicion, no such frustration would have resulted. Because the central goal of the Tecumseh Policy was strictly to deter student drug use, and no immediate safety interest was implicated by participation in nonathletic extracurricular activities, the Court should have concluded that absent individualized suspicion the policy was invalid.¹⁶⁷ Absent suspicion of drug use, the Tecumseh District did not need to screen its nonathletes because there was no need to prevent the occurrence of a serious injury to those students involved in nonathletic extracurricular activities. As a result, the Tecumseh Policy lacks the immediate interest in protecting students from serious injury that was the central purpose behind the *Vernonia* Policy. Therefore, Tecumseh did not have the only type of interest—a

Executives’ Ass’n, 489 U.S. 602, 624, 628 (1989) (stating “individualized suspicion is compelling” but great harm may be caused before incidents of drug use are noticed).

165. *Skinner*, 536 U.S. at 624.

166. Cf. *id.* at 628 (concluding that the drug screening policy at issue, whose purpose was to prevent serious rail accidents, need not be based on individualized suspicion because “employees who are subject to testing under the . . . [policy] can cause great human loss before any signs of impairment become noticeable”). Applying this reasoning to the context of athletics, since an effect of marijuana use is a “reduction in the oxygen-carrying capacity of the blood,” a track runner or football player using marijuana who is engaged in vigorous physical activity presents an immediate risk of serious physical injury to himself that could not be entirely safeguarded against in a search regime requiring individualized suspicion because the athlete may not necessarily demonstrate immediate outward signs of drug use. *Vernonia*, 515 U.S. at 662.

167. *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (concluding that where public safety is not in jeopardy, searches must be based upon individualized suspicion).

context-specific safety interest “which would be placed in jeopardy by a requirement of individualized suspicion”—that would thereby permit abandoning the individualized-suspicion requirement.¹⁶⁸

Additionally, it is untenable to assert that an individualized-suspicion requirement would make the Tecumseh Policy “ineffectual.”¹⁶⁹ The *Earls* Court concluded that drug screening based upon individualized suspicion could not practically be applied because such a requirement would place the “additional burden” on school teachers of identifying student drug use.¹⁷⁰ The Court’s position as to the role schools are to have within our society, when considered along with the *Earls* Court’s repeated references to the dangers of drug use, make it quite unreasonable to assert that requiring teachers to be cognizant of drug use by their students is burdensome.¹⁷¹ Such a position does not comport with the Court’s repeated assertions that educators play an essential role in fostering an environment that will prepare students to lead a productive life.¹⁷²

Moreover, suspicion-based drug screening of nonathletes involved in extracurricular activities is entirely practicable in light of the fact that students participating in nonathletic extracurricular activities often develop closer personal relationships with members of the faculty than other students. As a result, a member of the faculty who is in personal contact with a student would likely notice behavior or attitude changes associated with drug use and recommend drug-screening the student if the “symptoms” of drug use persisted.¹⁷³ Clearly, suspicion-based drug testing of the group of students within the Tecumseh District that have the closest relationship with members of the faculty and administration is the most

168. *Skinner*, 489 U.S. at 624.

169. *Vernonia*, 515 U.S. at 667–68 (O’Connor, J., dissenting). Individualized suspicion is generally deemed “ineffectual” to a search regime where the context at issue has presented an environment so unique that individualized suspicion could not practically be applied. See, e.g., Nat’l Treasury Employees’ Union v. Von Raab, 489 U.S. 656, 674 (1989) (holding that individualized suspicion is not required because “it is not feasible to subject [Customs] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments”).

170. Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 837 (2002).

171. *Id.* at 836–37; see *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (indicating that “the most important function of state and local governments” is to provide an educational environment where all children within the school can grow and develop the skills necessary to succeed in life).

172. See *Brown*, 347 U.S. at 493 (mentioning “it is doubtful that any child may reasonably be expected to succeed in life if he is denied . . . an education”).

173. See *Willis v. Anderson Cnty. Sch. Corp.*, 158 F.3d 415, 424 (7th Cir. 1998) (finding that individualized suspicion was practicable, given individual contact between a student and a school official). While a similar argument could have been made in the context of *Vernonia* concerning the type of close relationships that often develop between a student–athlete and his or her coaches, it is the safety concerns connected to participation in athletic activities that makes the individualized-suspicion requirement impracticable in that context.

effective way of dealing with any perceived drug problems within that student group.

III. REJECTING SUSPICIONLESS DRUG TESTING: A DECISION FOR SCHOOL DISTRICTS

Given that the rate of drug abuse among adolescents nationwide continues to rise, it is highly unlikely that the issue of suspicionless drug screening in public schools is going to disappear anytime soon.¹⁷⁴ The *Earls* decision may provide the impetus for school districts nationwide to not only implement drug screening policies similar in scope to Tecumseh's but also to go beyond the Tecumseh Policy and employ schoolwide drug-testing policies. While the constitutionality of drug testing all students enrolled in public schools is by no means certain,¹⁷⁵ it may be quite difficult in the future to limit *Earls* to its facts.¹⁷⁶ This assertion is true especially when one considers the broad language used by the *Earls* majority and how easily the *Earls* Court discarded the narrow holding and reasoning of *Vernonia*.

Consequently, lower federal and state courts may find it increasingly difficult to limit the scope of drug screening in the public schools.¹⁷⁷ If suspicionless drug testing is to be limited in any way, it will likely be up to the individual school districts and school boards themselves to reject suspicionless drug screening of students beyond what the *Vernonia* Court permitted.¹⁷⁸ Some school districts may reject suspicionless drug screening of nonathletes because they will recognize the invasiveness of such drug testing procedures. Other school districts, however, may see it as wise or

174. The Department of Justice 2003 statistics indicate that 34.9% of high school seniors reported having used marijuana within the previous twelve months. U.S. Dep't of Justice, Bureau of Justice Statistics: Drugs and Crime Facts, *available at* <http://www.ojp.usdoj.gov/bjs/dcf/du.htm> (last visited Dec. 20, 2004). The study further indicated that in the twelve months prior to the survey: 9.9% reported using stimulants; 5.9% reported using hallucinogens; 4.8% reported cocaine use; 6.7% reported using tranquilizers, and 0.8% reported using heroin. *Id.*

175. See *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 921, 931 (N.D. Tex. 2001) (holding that a Texas school district's mandatory drug testing policy that applied to the entire student population of the junior and senior high schools violated the Fourth Amendment).

176. See *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 649, 651-52 (N.J. 2003) (stating that *Earls* was used as precedent to overturn a previous decision of a New Jersey court striking down a drug testing policy that applied to all students within the school).

177. See, e.g., *Joye*, 826 A.2d at 655 (upholding a school board's "random drug and alcohol testing program"). But see *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 78 (Pa. 2003) (relying on Pennsylvania state constitution to invalidate a school district policy requiring students to consent to drug and alcohol testing as a condition of participation in extracurricular activities and obtaining parking permits).

178. See *Conlon*, *supra* note 12, at 311 (concluding, based upon a survey of high school administrators in the early aftermath of *Earls*, the decision "did not have a significant impact on school policy").

desirable to implement such a policy and may need more motivation to reject suspicionless drug screening beyond the student–athlete population. Therefore, this Part highlights several significant reasons why school districts nationwide should refuse to implement policies similar to Tecumseh’s and should only implement suspicion-based drug-testing policies covering nonathletes.¹⁷⁹

A. Drug Screening Nonathletes May Not Actually Result in Healthier Students

The *Earls* majority repeatedly alluded to the idea that drug screening policies like Tecumseh’s may have positive health consequences for students.¹⁸⁰ The long-term effects of drug use are undoubtedly devastating, especially for adolescents.¹⁸¹ Nevertheless, many child-health experts, various pediatricians, and substance-abuse specialists seriously call into question whether drug screening nonathletes will have any positive health consequences for the children being tested.¹⁸²

It is important to understand that virtually any drug screening policy has the potential to cause extremely destructive behavior among adolescents. Because many drug screening policies are unable to effectively screen students for alcohol or tobacco use,¹⁸³ policies like Tecumseh’s may signal to students that alcohol and tobacco do not present as great a danger to their health and safety.¹⁸⁴ This is especially problematic in light of the fact that adolescents nationwide abuse alcohol at

179. This Part does not call into question the ability of school districts to implement policies authorizing suspicionless drug screening of student–athletes, especially in light of the various health and physical consequences that exist when student–athletes are engaged in drug use. This Part does, however, call into question the effectiveness and wisdom of implementing drug screening policies applied to nonathletes.

180. See Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. *Earls*, 536 U.S. 822, 838 (2002) (alluding to “protecting the safety and health of its students” through implementation of a drug screening policy).

181. See Comm. on Substance Abuse, Am. Acad. of Pediatrics, *Testing for Drugs of Abuse in Children and Adolescents*, 98 PEDIATRICS 305, 305 (1996) (“The significant health and social consequences of drug abuse are intensified in the pediatric population because of the added possibilities of long-term effects in a developing person.”).

182. See, e.g., Amanda Vogt, *Drug Test Kits Offer Answer to Worried Parents but Critics Still Question its Use*, CHI. TRIB., Sept. 12, 2001, § 2, at 3 (discussing how parents testing their kids could create deception and distrust between them and actually hurt their relationship).

183. Because alcohol and tobacco are in and out of the human system so rapidly, it is difficult to screen for their use. See Always Test Clean, How Long Can Drugs be Detected (indicating that alcohol remains in the urine for no more than a ten-hour period), at http://www.always-test-clean.com/how_long.htm (last visited Dec. 20, 2004); see also Brief of Amici Curiae American Academy of Pediatrics et al. at 21, *Earls*, 536 U.S. 822 (No. 01-332) (concluding that Tecumseh’s Policy could not practically screen students for alcohol or tobacco).

184. Brief of Amici Curiae American Academy of Pediatrics et al. at 22, *Earls*, 536 U.S. 822 (No. 01-332).

almost twice the rate as illegal drugs.¹⁸⁵ Students who want to "beat" a school district's drug test, therefore, may simply turn to alcohol or tobacco as a substitute for the drugs screened by the school district.¹⁸⁶ This clearly cannot be a desirable result for school districts in light of the disastrous health consequences associated with alcohol and tobacco use, especially for adolescents.¹⁸⁷ School district drug-testing policies may inevitably attach negative consequences to students' use of marijuana but not to alcohol.¹⁸⁸ Students inclined towards destructive behavior may continue to abuse alcohol and tobacco, doing immeasurable damage to their bodies in the process, while still participating in the school's extracurricular activities programs.¹⁸⁹

Furthermore, another deficiency in any school drug testing policy is that drug screening procedures may only screen students for those substances that are in their urine at the time the sample is provided. This may lead some students to seek alternatives to drugs, such as alcohol and tobacco, thereby undermining the school district's purpose of ensuring the health of its students, while students continue to obtain a "clean" result when drug tested. Another way for a student to achieve this result is by turning to the "harder" drugs that often leave the body much faster than drugs which are considered "softer," like marijuana.¹⁹⁰ Many of the most physically damaging drugs tested for in a drug screening procedure, including LSD and Ecstasy, move quickly through the human system and do not remain in the body long enough to be realistically detected through random urinalysis procedures.¹⁹¹ While continuing to participate in school activities, some students, especially those intent on engaging in harmful conduct, will turn to these drugs in an attempt to avoid detection under the drug screening policy.

185. See U.S. Dep't of Justice, *supra* note 174 (indicating that 70.1% of all high school seniors in 2003 reported that they had drank alcohol in the twelve months prior to the survey, whereas approximately 34.9% indicated that they had smoked marijuana during that same period).

186. Brief of Amici Curiae American Academy of Pediatrics et al. at 22–23, *Earls*, 536 U.S. 822 (No. 01-332).

187. See U.S. Dep't of Health & Human Servs., Consequences of Underage Alcohol Use, (highlighting the many negative health consequences of alcohol use among adolescents), available at <http://www.health.org/govpubs/rpo992> (last visited Dec. 20, 2004).

188. Brief of Amici Curiae American Academy of Pediatrics et al. at 22, 24, *Earls*, 536 U.S. 822 (No. 01-332).

189. *Id.* at 23.

190. *Id.*

191. See Always Test Clean, How Long Can Drugs be Detected (indicating that LSD remains in the urine for up to eight hours and Ecstasy remains in the urine for one-to-two days), at http://www.always testcase.com/how_long.htm (last visited Dec. 20, 2004). A student could take either of these two drugs on a Friday night and, even if he or she happens to be randomly selected for a urine screening the following Monday, could still obtain a "clean" result because the drugs will have already passed through the urine.

Finally, it is only logical that students who find drug screening policies like Tecumseh's invasive or insulting will refrain from participating in the types of extracurricular activities regulated by such policies.¹⁹² Clearly, a significant number of students will undergo the drug screenings so as to obtain the numerous benefits that accompany participation in extracurricular activities. However, many students whose interest in extracurricular activities could only be characterized as slight will undoubtedly refrain from such participation. This cannot be a desirable result for schools since students less involved in school activities are more susceptible to drug use.¹⁹³ School districts that implement policies similar to Tecumseh's may inevitably create an entire category of students that are more prone to use drugs simply because they find drug testing to be offensive and will not consent to such testing as a condition of involvement in extracurricular activities.¹⁹⁴

B. Drug Screening Procedures Intrude Upon the Parent–Child Relationship

School authorities, while having substantial authority to maintain order in schools,¹⁹⁵ also have a responsibility not to intrude upon the constitutionally protected parent–child relationship.¹⁹⁶ Suspicionless drug screening of nonathletes in instances where schools lack the need either to

192. See Brief for Respondents at 22, Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822 (No. 01-332) (indicating that at least one student within the Tecumseh District withdrew from extracurricular involvement because of the implementation of the policy).

193. See NAT'L INST. ON OUT-OF-SCHOOL TIME, WELLESLEY COLL., MAKING THE CASE: A FACT SHEET ON CHILDREN AND YOUTH IN OUT-OF-SCHOOL TIME (2003) (indicating that students who do not participate in some form of extracurricular involvement for at least one to four hours per week are 49% more likely to use drugs than students not so involved), available at http://www.niost.org/publications/Factsheet_2003.pdf.

194. See *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 95 (Pa. 2003) (stating that, if the purpose of a school district's drug policy is to deter student drug use, "it hardly seems likely that the [d]istrict will be able to prove the effectiveness of this policy in achieving the stated purpose, since 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'"') (quoting Bd. of Educ. of Indep. Sch. Dist. Number 92 of Pottawatomie County v. Earls, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting)).

195. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654, 665 (1995) (indicating that "schools stand in *loco parentis* over the children entrusted to them," and, as a result, assume "responsibilities . . . as guardian and tutor of children entrusted to its care").

196. See *Merriken v. Cressman*, 364 F. Supp. at 913, 914, 922 (invalidating a school district's drug abuse program that was designed to aid the school district in identifying potential drug users due to the fact certain aspects of the program permitted the school district to "unlawfully . . . exercise the exclusive privileges of parents, extending into areas beyond matters of conduct and discipline, in excess of . . . [the school district's] power and contrary to law"). See generally *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (declaring Fourteenth Amendment right of individual to "establish a home and bring up children").

ensure the safety of the students being tested or a safe and effective learning environment, as was the case in *Earls*, goes beyond the permissible authority of school officials and intrudes upon an area that is ordinarily of parental concern. *New Jersey v. T.L.O.* makes clear that in the context of the Fourth Amendment, “the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.”¹⁹⁷ In providing school authorities with virtually unbridled discretion to subject public-school students to drug screenings, even in the absence of a threat to school discipline or the safety of the child in relation to a school activity, the *Earls* Court has permitted school districts to exercise authority far beyond that authorized by *T.L.O.* Based upon the extensive authority given school districts by *Earls*, school district authority and decision-making now extend into the private sphere of family decision-making and interferes with the long-established constitutional rights of parents.¹⁹⁸

In general, subject to certain limitations, parents have a right to develop a relationship with their child that is in accord with their own values.¹⁹⁹ In line with this principle, many parents choose to develop relationships with their children that are centered upon “dignity and respect” as well as open communication and trust.²⁰⁰ Many parents would rather communicate freely with their children about drugs and trust what their children are telling them concerning these matters.²⁰¹ By fostering such a relationship with their children, many parents believe they are sending a message to their children that encourages them to take personal responsibility for their own conduct.²⁰² Many parents, especially with respect to older adolescents, believe they must trust their children and provide them with the freedom to develop their own identity while at the same time building a foundation that allows their children to feel comfortable approaching them concerning the most serious or uncomfortable matters.²⁰³

197. *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985).

198. See Chad Joshua Winger, Case Note, *Board of Education of Pottawatomie County v. Earls: Broadening the Standard for Fourth Amendment Special Needs Drug Testing in Public Schools*, 5 J.L. & FAM. STUD. 403, 411 (2003) (stating that the expanded power *Earls* gives schools “lifts a school’s power over its student’s privacy nearly to the level of a parent’s power over his or her child”).

199. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (concluding that the state’s interest in compulsory education was insufficient to override parents’ interest in raising their children according to their own religious beliefs).

200. Brief of Amici Curiae Jean Burkett et al. at 13, *Earls*, 536 U.S. 822 (No. 01-332).

201. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 682 (1995) (O’Connor, J., dissenting) (mentioning that parents “prefer to trust their children”).

202. Brief of Amici Curiae American Academy of Pediatrics et al. at 14, *Earls*, 536 U.S. 822 (No. 01-332).

203. See Jennifer L. Rosato, *Let’s Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769, 791 (2002) (stating that “[t]he role of parents . . . should be to encourage independent decision-making during adolescence to help ensure that the minor will grow into a capable adult”).

Undoubtedly, suspicionless drug screening of nonathletes can interfere with the trust and open communication many parents emphasize in their relationships with their children.²⁰⁴ Random urinalysis procedures conducted by any authority figure, including school officials, clearly create an opportunity for feelings of “deception and distrust” on the part of students. Such tests indirectly accuse students of wrongful conduct when most of them have done absolutely nothing to justify such a perception.²⁰⁵ Policies like Tecumseh’s will inevitably isolate many teenagers whom will see drug screening as a breach of trust, including those students with nothing to hide.²⁰⁶ When a school district establishes this level of mistrust with its students, the relationship of trust many parents seek to establish at home will obviously be affected, especially in light of the need for parental consent to have their children drug tested. In certain instances, such consent will undoubtedly undermine parents’ ability to develop an open relationship with their children by ultimately planting a seed of doubt in adolescents’ heads that their parents may not actually trust them. Consequently, a drug testing procedure employed by school districts that is hardly “voluntary”²⁰⁷ and is not required to maintain discipline or protect the safety of students, clearly intrudes upon the right of parents to raise their children in the manner they see fit.²⁰⁸

C. Suspicion-Based Testing of Nonathletes: A More Effective Alternative

In the public school context, the main struggle has always been to find a balance between the students’ Fourth Amendment privacy interest and the schools’ need to maintain discipline and create a secure learning environment.²⁰⁹ Where a threat exists to the physical safety of students, or where drug use within the school impedes the ability of students to learn, a school’s need to protect its students justifies implementing a suspicionless drug testing regime.²¹⁰ However, absent such threats, school districts

204. Claire Martin, *Drug Deterrent? Use of Home Testing Kits May Ruin Trust, Experts Say*, DENVER POST, Nov. 7, 1999, at F11.

205. See *Vernonia*, 515 U.S. at 683 (O’Connor, J., dissenting) (asserting that “any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student’s perspective”).

206. See Conlon, *supra* note 12, at 312 (noting that a school administrator surveyed regarding drug screening in public schools indicated that she was opposed to random suspicionless drug screening because “[r]andom drug testing speaks first to distrust” and that implementing such measures was inconsistent with the overall goals of the education process).

207. See *supra* note 108 and accompanying text.

208. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating that the “role of the parents in the upbringing of their children is . . . an enduring American tradition”).

209. *New Jersey v. T.L.O.*, 469 U.S. 325, 342–43 (1985).

210. This Section does not take issue with the fact that school districts have a substantial need to conduct suspicionless searches of student-athletes because of the safety concerns associated with

should implement search regimes based upon the individualized-suspicion requirement the Court articulated in *T.L.O.* Search policies based upon individualized suspicion are not only more practical, but allow school districts to avoid the identified harms associated with suspicionless search regimes.

As has already been demonstrated, testing students involved in nonathletic extracurricular activities based upon individualized suspicion is a very effective method of determining if a student is involved with drugs.²¹¹ Due to the fact that the permissible scope of a school district's authority extends only to a school's ability to maintain order and safety in the classroom, a suspicion-based search regime better suits a school's objectives because it provides an incentive for students to refrain from behaving in such a manner that will disrupt the classroom environment.²¹² Students who refrain from "wrongdoing" or questionable behavior in the classroom setting will not be tested under a suspicion-based search regime; therefore, the end results will be better-behaved students and an environment more conducive to learning.²¹³ Moreover, it is important to recognize that a more limited, suspicion-based search regime comports with the limited scope of authority the *T.L.O.* Court says schools have in regulating student behavior.²¹⁴ A suspicionless search regime cannot claim any of these advantages. It will not provide incentives for good behavior within the classroom because, regardless of how a student behaves while in school, he or she will eventually be randomly tested.

Furthermore, testing based upon individualized suspicion is much more respectful of the constitutional rights of both parents and students. Testing students based upon individualized suspicion strikes the proper balance between giving parents the opportunity to develop a relationship with their children on their own terms, while also providing school districts the substantial authority to drug test students whose behavior presents problems within the school. Individualized-suspicion regimes have the constitutional

athletic participation. *Vernonia*, 515 U.S. at 662.

211. See *Willis v. Anderson Cnty. Sch. Corp.*, 158 F.3d 415, 424 (7th Cir. 1998) (finding that school officials can use individualized suspicion to test students); *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting) (stating that the best way to avoid a search based upon individualized suspicion is "by not acting in an objectively suspicious way"); see *supra* text accompanying notes 168–174 (identifying the need for individualized suspicion-based searches for Tecumseh).

212. See *Vernonia*, 515 U.S. at 667, 685–86 (O'Connor, J., dissenting) (indicating that a suspicion-based regime serves as a significant deterrent for any student to engage in illicit drug use).

213. *Id.* (O'Connor, J., dissenting). The notion of deterring general drug use is a noble task for schools to undertake, but such a goal is not directly connected to the interests schools have in preserving order in the classrooms and ensuring the safety of their students. As a result, in authorizing a search not related to those interests, school districts invade the Fourth Amendment rights of students. *T.L.O.*, 469 U.S. at 343.

214. *T.L.O.*, 469 U.S. at 343.

virtue of subjecting fewer students to searches.²¹⁵ An individualized-suspicion requirement has a number of practical advantages, including minimizing the cost to school districts when implementing a drug screening policy.²¹⁶ Additionally, suspicion-based regimes give students the ability to conform their conduct and behave in such a way as to avoid being subjected to a search by state officials.²¹⁷

CONCLUSION

Undoubtedly, drug use in this country has taken a huge toll on our adolescent population and presents one of the greatest crises this nation has ever faced. Nobody questions the seriousness of our nation's drug problem and the need to find effective ways to address it. However, many within society also recognize that it is in times of crisis that our cherished constitutional rights are most threatened. Yet, the Constitution and the rights that it grants to all citizens, including school children, have endured throughout the many crises our nation has faced during its history. Nevertheless, the Court seems to have simply tossed aside the Fourth Amendment rights of school children as the inevitable consequence of protecting them from the scourge of drug use. Consequently, it is now up to school districts nationwide to realize that there are numerous ways to effectively fight the "war on drugs," while at the same time protecting the rights of students and remaining within the constitutional framework provided by our founding fathers.

The *Earls* Court has given what amounts to unrestricted authority to school districts to search students and has severely diminished judicial authority in reviewing school board decisions dealing with student drug-testing policies. As a result, parents and proponents of students' rights can no longer rely upon the Court to ensure that their children are protected from unreasonable Fourth Amendment searches. Therefore, it is now up to members of school boards nationwide to take the authority given to them by the Court and reject suspicionless drug screening of nonathletes. Such policies not only eviscerate the Fourth Amendment rights of students, but also ill serve the health and welfare of our nation's children.

215. *Vernonia*, 515 U.S. at 667, 671 (O'Connor, J., dissenting) (highlighting the fact that suspicion-based regimes are more protective of constitutional rights because they only "affect one person at a time") (quoting *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting)).

216. It is worthy to note that suspicionless search regimes have the potential to exact greater financial costs on school districts because they may require districts to send significantly more samples to laboratories for screening. See Mawdsley, *supra* note 11, at 605 n.104 ("Drug testing typically costs \$70,000 per year for weekly random tests of 75 students."). Under a suspicion-based regime, schools are more likely to test fewer students, thereby diminishing the costs of drug screening.

217. *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting).