COMMENT

JUSTICE GINSBURG'S *BOARD OF EDUCATION V. EARLS* DISSENT: CONSTITUTIONAL TEACHING PRINCIPLES FOR KIDS

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INTRODUCTION

In *Board of Education v. Earls*,[1] the Supreme Court further extended its decision in *Vernonia School District 47J v. Acton*[2] by

[1] 536 U.S. 822 (2002).

holding that the suspicionless drug testing of students participating in extracurricular activities is per se constitutional. The Court's reasoning centered on the existence of "special needs" within the public school context, a broad and somewhat nebulous concept grounded in a "reasonability based on the circumstances" analysis.[3] By distinguishing between the dire need for administrative control present in *Vernonia*[4] and the less than pressing considerations set forth in *Earls*,[5] Justice Ginsburg's dissenting opinion delineates an appropriate balance between the "special needs" of adequate drug control and the constitutional protections guaranteed to students based on considerations of efficacy and privacy. When viewed in light of subsequent cases and current research regarding the adequacy of random suspicionless drug testing, Ginsburg's dissent represents a voice of reason in response to a shout of panic among contemporary school administrators. In refusing to relinquish the framers' original intentions for the Fourth Amendment with her unique "middle way" jurisprudence,[6] Ginsburg's dissent follows closely the oft-

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[2] 515 U.S. 646 (1995) (holding that the suspicionless drug testing of athletes was constitutional).

[3] *Earls*, 536 U.S. at 828; *see also* Jacob L. Brooks, Note, *Suspicionless Drug Testing of Students Participating in Non-athletic Competitive School Activities: Are All Students Next?* Board of Education v. Earls*, 536 U.S. 822 (2002)*, 4 WYO. L. REV. 365, 395 (2004) ("In short, with respect to public schools, every significant provision in the Fourth Amendment has been abrogated by the nebulous 'special needs' doctrine that now exists just because schools are responsible for their students, not because a real problem may exist or special risks may be present.").

[4] *See infra* notes 35-38 and accompanying text.

[5] *See infra* note 107 and accompanying text.

[6] Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 636 (2003) (analyzing Ginsburg's jurisprudential preference for "judicial moderation and gradualism"). Ray further noted:

> Although Ginsburg's regard for precedent is flexible enough to accommodate change as well as variation, she tends to prefer incremental rather than dramatic transformations of the law and to require substantial support for significant doctrinal developments. Thus, it is not surprising that she has dissented when she thinks that the majority is striking out unwisely in a new direction.

Id. at 658; *see generally* Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 867 (2009) ("Justice Ruth Bader Ginsburg's preference for narrow rulings that adhere closely to precedent and that avoid grand pronouncements is well-known.").

cited principle that "students [do not] shed their constitutional rights . . . at the schoolhouse gate."[7]

I. BRIDGING THE GAP: INDIVIDUALIZED SUSPICION TO THE SPECIAL NEEDS DOCTRINE

When interpreting the Fourth Amendment and expounding its proper application, heavy emphasis is often placed on the framers' original intentions for the amendment.[8] Our founding fathers had a strong interest in drafting an amendment that would protect against arbitrary and capricious searches based upon unwarranted suspicion.[9] In pre-revolutionary America, the practice of granting general search authority to customs officers has been stated by several scholars as the primary motivation for the framers' drafting of the Fourth Amendment.[10] Such authority was often granted through "writs of assistance,"[11] which were

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[7] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[8] *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299 (1999) (holding that the first step in determining whether a governmental action violates the Fourth Amendment is to inquire whether the action would have be an unlawful search and seizure under the common law at the time the Amendment was framed); Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (stating that while the "underlying command of the Fourth Amendment is always that searches and seizures be reasonable," the effort to give meaning to the term can often "be guided by the meaning ascribed to it by the Framers of the Amendment" (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)). *But see* Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 972-73 (2002) (suggesting that the Court should "stop discussing the historical origins of the Fourth Amendment" due to the Court's inconsistent use of the Amendment's historical framework and its selective distortion of such framework to compliment the Court's modern view of reasonableness).

[9] *See* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 518 (2008) ("An aversion to suspicionless searches and seizures was the prime motivation of the Framers of the Fourth Amendment.").

[10] *See, e.g.*, *Id.* at 40; JACOB B. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 19, 30 (1966); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868, at 25 (2006).

[11] Writs of assistance were a form of a general search warrant issued on the English crown's own authority to search and seize prior to the 1660s and later pursuant to English legislation enabling customs searches and seizures adopted in 1662. CLANCY, *supra* note 9, at 27-30. Such writs "were akin to 'permanent search warrants placed in the hands of custom officials: they might be used with unlimited discretion and were valid for . . . the life of the sovereign.'" *Id.* at 30 (quoting LANDYNSKI, *supra* note 10, at 31).

authorized by English statute and enabled customs searches and seizures virtually "anywhere the searcher desired to look."[12] The repeated abuse of virtually limitless searches and seizures lacking individualized suspicion "produced widespread resistance"[13] in the American colonies and was an impetus for the events that led to the revolution.[14] It is within this historical framework and amongst the original framers' concerns of prohibitions against general search and seizure warrants that the Fourth Amendment was promulgated.[15]

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[16]

The Supreme Court's original interpretation of the Fourth Amendment was "predicated on property law concepts."[17] As such, Fourth Amendment protection would not attach unless the object sought to be protected fell into one of the pronounced categories of "persons, houses, papers, and effects."[18] However, the Supreme

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[12] *Id.* at 30 (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 26 (1969)).

[13] *Id.* at 31.

[14] *Id.* at 34 & n.65.

[15] *See* Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting):

> The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion.

Id. (quoting Henry v. United States, 361 U.S. 98, 100 (1959)).

[16] U.S. CONST. amend. IV.

[17] Madeline A. Herdrich, Note, California v. Greenwood*: The Trashing of Privacy*, 38 AM. U. L. REV. 993, 999 (1989) (citing *Boyd v. United States*, 116 U.S. 616, 638 (1886), which held that a search and seizure was unreasonable when it involved a trespass to an individual's property rights that were superior to that of the government's).

[18] *See* Olmstead v. United States, 277 U.S. 438, 457, 466 (1928) (limiting Fourth Amendment protections to physical intrusions upon the tangible objects of houses, persons, papers, and effects).

Court later abandoned this property-based approach in *Katz v. United States*.[19] *Katz* shifted the focus of Fourth Amendment jurisprudence from a literal interpretation of the Fourth Amendment based upon property rights to one premised upon a "reasonable expectation of privacy."[20] The doctrinal shift in *Katz* has subsequently become the primary measure by which the Court determines whether an individual's privacy interest is protected under the Fourth Amendment.

The constitutionality of a Fourth Amendment search hinges upon its "reasonableness"[21] and ordinarily requires "some quantum of individualized suspicion."[22] The Court uses a variety of legal tools and "models" of interpretation to decide whether a search and seizure will be deemed reasonable.[23] Thus, whether a search will be deemed reasonable under the Court's Fourth Amendment jurisprudence is often difficult to predict.[24] Although reasonableness generally requires probable cause and a warrant in instances where police officers undertake a search to discover evidence, "a warrant is not required to establish the reasonableness of *all* government searches."[25] In certain instances, a search unsupported by probable cause may be constitutional if "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement

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[19] Katz v. United States, 389 U.S. 347, 352-53 (1967).

[20] *Id.* at 360 (Harlan, J., concurring); *see also* Warden v. Hayden, 387 U.S. 294, 300-02 (1967) (rejecting the Court's previously established Fourth Amendment analysis of property rights established in *Boyd* and *Olmstead*). The origin of premising Fourth Amendment jurisprudence on an expectation of privacy rights that are deemed "reasonable" can be found in the seminal *Harvard Law Review* article, Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[21] U.S. CONST. amend. IV.; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

[22] United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976).

[23] *See, e.g.*, CLANCY, *supra* note 9, at 469-515 (organizing the Court's different approaches to reasonableness into a non-exhaustive list of five principal models: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model balancing test giving dispositive weight to the common law).

[24] *Id.* at 469 (acknowledging the Supreme Court's "ever changing treatment of reasonableness").

[25] *Vernonia*, 515 U.S. at 653.

impracticable."[26] Within the context of the "special needs" doctrine, the Court dispenses with both the warrant and probable cause requirement and uses a balancing test to determine the reasonableness of a given search or seizure.[27]

In the landmark case of *New Jersey v. T.L.O.*,[28] the Court held that obtaining a warrant and probable cause was unnecessary in the public school context because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[29] In *T.L.O.*, the Court upheld a school administrator's warrantless search of a student's purse as constitutional because it was based upon reasonable suspicion.[30] The Court reasoned that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we [will] not hesitat[e] to adopt such a standard."[31] In departing from its previous adherence to the Fourth Amendment's probable cause and a warrant requirement, the Court held that "special needs" were inherent in the public school environment and that the legality of the search of a student "depend[s] simply on the reasonableness, under all the circumstances, of the search."[32] The

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[26] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (Blackmun, J., concurring) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (holding that the warrantless search of a probationer's home was valid because the "special needs" inherent in Wisconsin's probation system made the warrant and probable-cause requirement impracticable).

[27] *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 828-29 (2002); *Vernonia*, 515 U.S. at 653; Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989) (holding that the suspicionless testing of federal customs agents was reasonable given the special need of the government in preventing the promotion of drug users to governmental positions involving the interdiction of illegal drugs); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 628, 634 (1989) (upholding the random suspicionless drug testing of railroad employees due to the government's special need in avoiding the "disastrous consequences" that can result from even a momentary lapse of attention from a railway employee using drugs).

[28] 469 U.S. 325 (1985).

[29] *Id.* at 340.

[30] *Id.* at 347-48.

[31] *Id.* at 341 (alteration to original). However, while the Court in *T.L.O.* dismissed the probable cause requirement, it was hesitant to address whether a standard of individualized suspicion should always be necessary in schools to meet the standard of reasonableness set forth in the Fourth Amendment. *Id.* at 342 n.8.

[32] *Id.* at 341.

term "special needs" was coined in Justice Blackmun's concurring opinion in *T.L.O.*, in which Blackmun cautioned that "[o]nly in those *exceptional circumstances* [of] special needs . . . is a court entitled to substitute its balancing of interests for that of the framers."[33]

In summary, the "special needs" doctrine in the public school context provides a standard with which the Supreme Court is able to bypass the framers' heavy deference to individualized suspicion when a legitimate "special need" presents itself in the form of a strong governmental interest that the Court determines cannot be effectuated without a diminishment of student rights. It is against this background that the "special needs" balancing test of *Earls* should be construed.

II. SETTING THE STAGE: *VERNONIA SCHOOL DISTRICT 47J V. ACTON*

In the fall of 1989, the Vernonia School District implemented a drug-testing program known as the "Student Athlete Drug Policy" with the purpose of preventing student athletes from using drugs in order to protect their health and safety.[34] While drugs had not historically been a major problem for the Vernonia School District, teachers and school administrators had "observed a sharp increase in drug use" in the years prior to implementation of the policy.[35] By the 1988-1989 school year, "the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's," and it was noted that the students had became increasingly rude and disruptive.[36] Among the student population, the school's athletes were leaders of the prevailing drug culture that precipitated many of the school's disciplinary problems.[37] This led to a concern among the district's administrators of an increase in sports-related injuries among

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[33] *Id.* at 351 (Blackmun, J., concurring) (emphasis added).

[34] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650 (1995).

[35] *Id.* at 648.

[36] *Id.* at 649. In particular, students began to talk openly of their attraction to the drug culture and the school's inability to address it. *Id.* at 648.

[37] *Id.* at 649.

athlete drug users, prompting the passage of the student testing policy.[38]

Under the policy set forth by Vernonia, students desiring to participate in athletics would need to consent to the drug testing and obtain written consent from their parents.[39] Participants would be tested at the beginning of each season in addition to a "random pool" weekly throughout the season.[40] The drug testing itself would be done by an adult monitor of the same sex, who would stand approximately twelve to fifteen feet from the student while he/she produced the sample and listened for sounds of normal urination.[41] The samples were checked for tampering and sent to an independent laboratory to test for amphetamines, cocaine, and marijuana.[42] The laboratory was not given the identity of the students being tested, and the results were mailed to the superintendent or released to district personnel by telephone after the requesting official recited a confirmation code.[43]

James Acton, a seventh grader, brought suit challenging Vernonia's policy on the grounds that it violated the Fourth and Fourteenth Amendments.[44] Stating its finding in *T.L.O.* that

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[38] *Id.* The high school football and wrestling coach witnessed a severe sternum injury due to wrestling, and several omissions of safety procedures and missed executions by football players, all of which he attributed to be the effects of drug use. *Id.*

[39] *Id.* at 650. Students were also required to disclose any prescription medications they were taking. *Id.*

[40] *Id.*

[41] *Id.* While males were required to produce a sample at a urinal with the monitor waiting twelve to fifteen feet from them, females were required to produce the sample in an enclosed bathroom stall with the monitor outside listening for the normal sounds of urination. *Id.*

[42] *Id.*

[43] *Id.* at 651. If a student tested positive, they would be subsequently tested as soon as possible to confirm the result. Upon a further positive testing, the athlete's parents were notified, and the school principal met with the student's parents to address the situation. The student was then given the option of either participating for six weeks in an assistance program that included weekly urinalysis, or suffering a suspension from athletics for the remainder of their current athletic season and the next. The student would then be retested prior to the start of the following athletic season for which he or she would be eligible. A second offense while on the assistance program resulted in the suspension of the athlete for the remainder of the year and the next athletic season, and a third offense in either scenario resulted in suspension for the remainder of the student's current athletic season and the following two athletic seasons. *Id.*

[44] *Id.*

special needs inhere in the public school context,[45] the Supreme Court upheld the constitutionality of the drug testing policy by employing a reasonableness-based balancing test consisting of three factors.[46] Within the first prong of the balancing test, the Court considered the nature of the privacy interest the search intruded upon.[47] The Court reasoned that the Fourth Amendment only protects "those [privacy interests] that society recognizes as 'legitimate,'"[48] and that whether an expectation of privacy can be deemed legitimate will depend both on the context of the privacy interest and the individual's legal relationship with the state.[49] Hinging its argument on school administrators standing *in loco parentis* over the children entrusted to them, the Court found that "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[50]

Under the second prong of the balancing test, the Court examined the character of the intrusion caused by the search.[51] The Court recognized collecting urine samples infringed upon "an excretory function traditionally shielded by great privacy,"[52] but likened the conditions to those encountered in public restrooms finding little intrusiveness in the actual collection of the urine sample.[53] The Court also considered the intrusiveness of the information that would be disclosed concerning the state of the

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[45] *Id.* at 653; *see also supra* text accompanying notes 32-33.

[46] *Id.* at 654-65.

[47] *Id.* at 654.

[48] *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

[49] *Id.*

[50] *Id.* at 655-57. The Court concluded that in addition to students having a lesser expectation of privacy than members of the general population:

> Legitimate privacy expectations are *even less* with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms . . . are not notable for the privacy they afford. . . . [T]here is an element of communal undress inherent in athletic participation. . . . By choosing to "go out for the team," [athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

Id. at 657 (emphasis added) (internal citation omitted) (internal quotation marks omitted).

[51] *Id.* at 658.

[52] *Id.* (quoting Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 626 (1989)).

[53] *Id.*

student's body and found it significant the tests looked only for illegal drug use, and the results would be released to a very limited group of school personnel.[54] Further, the test results would not be handed over to law enforcement authorities nor used for any additional disciplinary measures.[55] The Court thus found the invasion of privacy in the particular instance was not significant.[56]

The Court then turned to the third prong of the balancing test and considered the "nature and immediacy of the governmental concern" and the "efficacy of [the] means for meeting it."[57] The Court noted that in previous drug-testing cases, such as *Skinner* and *Von Raab*,[58] it held the government interest motivating the search was compelling,[59] and that in the instance of deterring drug abuse by America's schoolchildren there was an equally compelling interest.[60] The Court reiterated that the Vernonia program was narrowly directed to drug use by school athletes,[61] and the efficacy of the means was clearly addressed by

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[54] *Id.*

[55] *Id.*

[56] *Id.* at 660.

[57] *Id.*

[58] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989) (holding that the suspicionless testing of federal customs agents was reasonable given the special need of the government in preventing the promotion of drug users to governmental positions involving the interdiction of illegal drugs); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 628, 634 (1989) (upholding the random suspicionless drug testing of railroad employees due to the government's special need in avoiding the "disastrous consequences" that can result from even a momentary lapse of attention from a railway employee using drugs).

[59] *Vernonia*, 515 U.S. at 660. Scalia's majority opinion was careful to distinguish that a "compelling state interest" was not a "fixed, minimum quantum of governmental concern," but that in the Fourth Amendment context the phrase instead considers whether the interest "appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.* at 661.

[60] *Id.* at 661 ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . .").

[61] *Id.* at 662 ("Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm . . . is particularly high . . . . the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.).

"making sure that athletes do not use drugs," as this would curb the "'role model' effect of [the] athletes' drug use."[62]

The Court was also careful to address the respondents' argument that a drug testing policy based on individualized suspicion would be equally efficient in reaching the means while less intrusive.[63] The Court responded by repeating its assertion in *Skinner* that the least intrusive search is not a necessity for the search to be deemed reasonable, and that a drug test regime based on individualized suspicion would entail substantial difficulties "if it . . . indeed [was] practicable at all."[64] The Court concluded that, taking into account all the factors considered, Vernonia's drug testing policy was reasonable "and hence constitutional."[65] Justice Ginsburg joined in the holding but, in a brief concurrence, noted that she "comprehend[ed] the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."[66]

III. MAJORITY OPINION OF *BOARD OF EDUCATION V. EARLS*

In 2002 the Supreme Court again visited the constitutionality of suspicionless based drug testing in public schools.[67] On September 14, 1998, the Board of Education of Independent School District No. 92 of Pottawatomie County adopted a "Student Drug Testing Policy," which required all students who participated in competitive extracurricular activities

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[62] *Id.* at 663.

[63] *Id.*

[64] *Id.* Of the substantial difficulties associated with individualized drug testing, the Court mentions: concerns that parents would be more unwilling to accept accusatory drug testing for all students which would transform the process into a "badge of shame"; risks that teachers will impose testing arbitrarily upon troublesome but not drug-likely students; concerns that such a policy will generate expensive lawsuits that charge the testing as arbitrary or simply demand greater process before testing is imposed; and the burden it will add to the "ever-expanding diversionary duties of schoolteachers." *Id.* at 663-64.

[65] *Id.* at 664-65.

[66] *Id.* at 666 (Ginsburg, J., concurring).

[67] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

to submit to suspicionless drug testing.[68] To qualify for participation, students would have to consent to drug testing prior and throughout the time they engaged in extracurricular activities and could also be tested based upon individualized suspicion. The policy mandated that students who refused to submit to drug testing would be barred from participation.[69] Plaintiff Lindsey Earls[70] brought suit challenging the provisions of the policy which required the suspicionless drug testing of students participating in *non-athletic* competitive activities.[71] Earls alleged the policy violated the Fourth Amendment and that the school district had failed to identify a special need for testing students who participate in extracurricular activities.[72]

Relying on the holding of *Vernonia School District 47J v. Acton*,[73] the United States District Court for the Western District of Oklahoma rejected respondents' claim that the policy was unconstitutional and held that the Pottawatomie School District had demonstrated a special need to justify the warrantless and suspicionless drug testing of all students involved in competitive extracurricular activities.[74] The Tenth Circuit reversed the district court's ruling, holding that the Pottawatomie School District had failed to demonstrate that an identifiable drug problem existed among Tecumseh High School students.[75] The Tenth Circuit reasoned that before imposing a suspicionless drug

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[68] Earls v. Bd. of Educ., 115 F. Supp. 2d 1281, 1282-83 (W.D. Okla. 2000). The "Policy" provided that "any student . . . represent[ing] Tecumseh Schools in any extracurricular activity . . . [would] be barred from participating in such activities unless the student submit[ed] a written consent to drug testing. *Id.* (internal quotation marks omitted).

[69] *Id.* at 1283. The drug test itself would only recognize "amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines," though based on reasonable suspicion the student could also be tested for anabolic steroids and alcohol. *Id.* at 1283 & n.3.

[70] *Earls*, 536 U.S. at 826. At the time of the suit, Lindsay Earls, a Tecumseh High School student, was a member of the show choir, the marching band, the academic team, and the National Honor Society. *Id.*

[71] *Id.* at 826-27. The plaintiffs did not challenge the suspicionless drug testing of athletes, nor did they challenge drug testing upon reasonable, individualized suspicion. *Id.* at 827 n.2.

[72] *Id.* at 827.

[73] *See supra* notes 46, 64 and accompanying text.

[74] Earls v. Bd. of Educ., 115 F. Supp. 2d 1281, 1296 (W.D. Okla. 2000).

[75] Earls v. Bd. of Educ., 242 F.3d 1264, 1278 (10th Cir. 2001).

testing program a school "must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[76]

Justice Thomas delivered the majority opinion in *Earls*, where once again the "special needs" balancing test was used to determine Fourth Amendment constitutionality.[77] Under the privacy interest allegedly compromised, the Court once more relied heavily on the government's responsibilities both as a "guardian and tutor" of the schoolchildren, defining the question of the reasonableness of the intrusion as "whether [it would be] one that a reasonable guardian and tutor might undertake."[78] In countering the respondents' argument that students not involved with athletics have a greater expectation of privacy than the athletes of *Vernonia*,[79] the majority reasoned that the distinction was not essential to their previous holding, which was ultimately rooted in the school's "custodial responsibility and authority."[80] All students affected by the policy thus had a limited expectation of privacy.[81]

Under its analysis of the intrusiveness of the policy, the majority in *Earls* analogized the Pottawatomie policy to that of *Vernonia*[82] in that it was administered in an almost identical fashion save that the male students were allowed to produce their samples behind a closed stall.[83] The results of the tests were kept equally confidential and disclosed only on a "need to know" basis and were not used for law enforcement or disciplinary purposes.[84]

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[76] *Id.* The Tenth Circuit noted that it was "unclear from a simple reading of *Vernonia* . . . whether the Court's finding of a special need was based upon the school setting alone . . . or whether it was based upon that need in conjunction with the documented serious drug problem at the Vernonia schools." *Id.* at 1271 n.6.

[77] *See Earls*, 536 U.S. at 825.

[78] *Id.* at 830 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

[79] *See supra* note 50.

[80] *Earls*, 536 U.S. at 831. The Court further reasoned that those students involved in extracurricular activities subjected themselves to many of the same intrusions on privacy as athletes, listing occasional off-campus travel and communal undress, individual rules and requirements that do not apply to the student body as a whole, and the general regulation of extracurricular activities as a whole. *Id.* at 831-32.

[81] *Id.* at 832.

[82] *See supra* notes 41-42 and accompanying text.

[83] *Earls*, 536 U.S. at 832-33.

[84] *Id.* at 833.

Further, the procedures and penalties for a failed drug test were similar to those in *Vernonia*.[85] The Court concluded that the invasion of student privacy was not significant given the minimal intrusion resulting from sample collection and limited uses to which the results were put.[86]

In determining the nature and immediacy of the government's concerns and the efficacy of the policy, the Court focused on the importance of preventing drug use by America's schoolchildren. Listing episodes of potential drug use, two instances in which drug paraphernalia were found on campus, and the school board president's testimony that people were calling to discuss the "drug situation,"[87] the majority found a sufficient

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[85] *Id.* at 833-34 ("After the first positive test, the school contacts the student's parent or guardian for a meeting. The student may continue to participate in the activity if within five days of the meeting the student shows proof of receiving drug counseling and submits to a second drug test in two weeks. For the second positive test, the student is suspended from participation in all extracurricular activities for 14 days, must complete four hours of substance abuse counseling, and must submit to monthly drug tests. Only after a third positive test will the student be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer."); *see also supra* note 43 (recounting *Vernonia*'s penalties for positive drug tests).

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

[87] *Id.* at 834-35. The Tenth Circuit found the factual evidence in *Earls* to be unconvincing, noting that much of district's alleged drug use were instances that occurred in the 1970s, were based upon hearsay, or were virtually anecdotal. *See* Earls v. Bd. of Educ., 242 F.3d 1264, 1272-74 (10th Cir. 2001). The Tenth Circuit discussed several of the assertions made by the school district's board president, particularly her claim of fourteen instances of drug usage. The board president provided the following information to the court: (1) in 1970, the president's daughter told her an unidentified boy on a school bus offered her some pills; (2) in 1972 or 1973, her daughter told her that the boyfriend of the girl with whom she shared a locker sold drugs; (3) in 1978, one of her son's unidentified friends on the football team left a bag with drug paraphernalia at her house; (4) in 1979, her son told her of parties where marijuana was smoked; (5) in the mid-1980s, a meter reader found marijuana near the school's meter; (6) in the 1980s, her grandson told her an unidentified student possessed marijuana at school; (7) in the 1990s, her grandson told her he attended a party where his friend's girlfriend found her mother's marijuana and passed it around; (8) in the 1997-1998 school year, her granddaughter told her a boy was "bombed out"; and (9) an instance in the same school year in which a student not involved in extracurricular activities was found to have had marijuana in his car. *Id.* at 1274 & n.9. The Tenth Circuit further noted that the claimed "injuries to students and members of the public" involved an incident in 1990 or 1991 in which a steer got loose from a student "under the influence of some substance," then injuring the student and one other person. *Id.* at 1274 (internal quotations marks omitted).

showing of a "special need" was present.[88] Explicitly overruling the test articulated by the Tenth Circuit,[89] the majority held that it had never required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing.[90]

While it admitted safety concerns of non-athletes' drug use, as opposed to the potential immediate physical injuries of athletes' drug use, did factor into the "special needs" analysis, the Court held that the safety interest furthered by drug testing is undoubtedly substantial for all schoolchildren involved in extracurricular activities.[91] The majority lastly dismissed the notion that a drug testing system based upon individualized suspicion would be less intrusive,[92] citing reasons similar to those listed in *Vernonia*,[93] and concluded that the testing of students involved in extracurricular activities was an effective means of addressing the school district's interest in deterring drugs and the policy was hence constitutional.[94]

IV. GINSBURG'S DISSENT

"The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population *least likely* to be at risk from illicit drugs and their damaging effects. I therefore dissent."[95]

Justice Ginsburg's primary attack on the *Earls* majority was factual in nature and distinguished between the "disruptive and explosive drug abuse problem" in *Vernonia* and the scant evidence presented in *Earls*.[96] In retort to the majority's argument that the

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[88] *Earls*, 536 U.S. at 835 ("[A] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime,' but . . . some showing does 'shore up an assertion of special need for a suspicionless general search program." (alterations to original) (citing Chandler v. Miller, 520 U.S. 305, 319 (1997))).

[89] *See supra* text accompanying note 76.

[90] *Earls*, 536 U.S. at 836.

[91] *Id.* at 836-37 ("We know all too well that drug use carries a variety of health risks for children, including death from overdose.").

[92] *Id.* at 837; *see also id.* at 841-42 (Breyer, J., concurring).

[93] *See supra* note 64.

[94] *Earls*, 536 U.S. at 837-38.

[95] *Id.* at 843 (Ginsburg, J., dissenting) (emphasis added).

[96] *Id.* at 844-45.

holding in *Vernonia* was primarily based upon school administrators acting *in loco parentis*,[97] Ginsburg began her dissent by noting the majority's strong emphasis in *Vernonia* "that drug use increase[d] the risk of sports-related injur[ies] and that Vernonia's athletes were the leaders" of a school "drug culture that had reached epidemic proportions."[98] Citing the majority for its emphasis,[99] Ginsburg reiterated that the risk described in the *Vernonia* opinion was "immediate," as opposed to the "nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas" that she facetiously used to contrast the lack of immediate physical harm from non-athletic extracurricular activities.[100] Thus, in keeping with her preference for narrow rulings that closely adhere to precedent,[101] Ginsburg concluded at the offset of her dissent that while "special needs inhere in the public school context, [they] are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install."[102]

Ginsburg's next attack centered on the majority's analysis of the diminished expectation of privacy among students involved in non-sporting extracurricular activities. Though the majority pointed to the voluntary nature of extracurricular activities as being sufficient to warrant a diminished expectation of privacy through additional regulations and rules not subject to the general student populace,[103] Ginsburg described such a comparison as "enlightening."[104] Noting that participation in extracurricular activities is not only a key component of school life but essential in the college admissions process, she questioned whether such participation can really be deemed "voluntary."[105] The dissent

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[97] *See supra* note 78 and accompanying text.

[98] *Earls*, 536 U.S. at 843 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649 (1995)) (internal quotation marks omitted).

[99] *Id.* at 845; *see supra* notes 61, 62 and accompanying text.

[100] *Id.* at 851-52.

[101] *See supra* note 6.

[102] *Earls*, 536 U.S. at 843 (citation omitted) (internal quotation marks omitted).

[103] *Id.* at 845.

[104] *Id.*

[105] *Id.* at 845-46. This argument is particularly responsive to Justice Breyer's concurrence, in which he elaborated that the testing program "preserves an option for the conscientious objector," who in turn "can refuse testing while paying a price

further opined that participation in athletics itself has a "distinctly different dimension" to that of other extracurricular activities by nature of its common communal undress and the exposure to "physical risks [which] schools have a duty to mitigate."[106] Ginsburg concluded that to elect to participate in school activities alone was, while relevant to a discussion of reasonableness, insufficient to justify a suspicionless search.[107]

Her dissent then addressed the majority's analysis of the character of the intrusion. Ginsburg noted the majority's failure to address that Earls provided instances of personal information, including students' prescription drug use, being routinely viewed by Earls' choir teacher without a "need to know."[108] Earls also alleged the teacher left the files in an unsealed and unlocked location, accessible to other students.[109] Further, other evidence indicated the results were hardly given out on a "need to know" basis but instead were given out to all activity sponsors.[110] Ginsburg stated it should not be assumed the confidentiality provisions of the policy would be upheld when there is factual evidence to the contrary, and thus the invasion of student privacy may not be negligible in all circumstances.[111]

In analyzing the last factor of the "special needs" balancing test—the nature and immediacy of the governmental concern—Ginsburg returned once again to the factual disparity between *Earls* and *Vernonia*.[112] She compared the state of rebellion by a large segment of the student body in Vernonia, led by students participating in athletics, to Tecumseh's annual reports to the government, which stated that drugs were present but "ha[d] not

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(nonparticipation) that is serious, but less severe than expulsion from school." *Id.* at 841 (Breyer, J., concurring).

[106] *Id.* at 846 (Ginsburg, J., dissenting). Ginsburg further mentioned that interscholastic athletics are more closely monitored in safety and health regulations than activities such as band or choir, and that such a reasoning gave credence to the argument in *Vernonia* that analogized programs of competitive athletics as similar to "adults who choose to participate in a closely regulated industry," in which privacy is inherently "intimately affected." *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)).

[107] *Id.*

[108] *Id.* at 848.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 849.

[112] *Id.*

identified themselves as major problems at this time."[113] Ginsburg argued that in such a circumstance the efficacy of any such suspicionless program would be greatly diminished.[114] She further distinguished the majority's reliance on *Von Raab* and *Skinner*, elucidating that in those cases tests were installed "to avoid enormous risks to the lives and limbs of others, not dominantly in response to the health risks to users invariably present in any case of drug use."[115]

Ginsburg also illustrated why the immediacy of the concern was so lacking in *Earls* as compared to *Vernonia*. Citing subsequent case law that confirmed *Vernonia* was premised upon the immediate physical harms that could result from student athletes engaged in athletic activities while on drugs,[116] Ginsburg contrasted the lack of immediate physical risk in other competitive extracurricular activities and noted that any ill effects from drug use in such activities would likely be equally present for any student.[117] As to the efficacy of the drug testing policy in *Earls*, Ginsburg noted that "[t]here is a difference between imperfect tailoring and no tailoring at all."[118] She countered the majority's well-reasoned proposition that students might be deterred from drug use in order to preserve their extracurricular eligibility by arguing it would be equally likely that students more apt to be involved with drugs may forgo extracurricular activity to avoid detection of their drug use.[119] Ginsburg closed her arguments as to the factors of the "special needs" balancing test by reasoning that "Tecumseh's policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need

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[113] *Id.*

[114] *Id.* at 850 (quoting Earls v. Bd. of Educ., 242 F.3d 1264, 1277 (10th Cir. 2001)).

[115] *Id.* (citing Nat'l Treasury Emp. Union v. Von Raab, 489 U.S. 656, 674 (1989)).

[116] *Id.* (citing *Chandler v. Miller*, 520 U.S. 305, 317 (1997), for the proposition that in *Vernonia* the Court "emphasized the importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field."); *see also* Ferguson v. Charleston, 532 U.S. 67, 87 (2001) (Kennedy, J., concurring) (listing *Vernonia*'s policy goal of "'[d]eterring drug use by our Nation's schoolchildren,' and particularly by student-athletes, because 'the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.'" (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-62 (1995))).

[117] *Earls*, 536 U.S. at 851-52.

[118] *Id.* at 852.

[119] *Id.* at 853.

deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems."[120]

Ginsburg lastly applied the holding of *Chandler v. Miller*[121] to the facts presented in *Earls* and found *Earls* similar in that it presented no evidence of a particular "concrete danger" at the school and the policy targeted a group not involved in "high-risk, safety-sensitive tasks."[122] She noted the desire of a school to communicate they are tough on drugs does not "trump the right[s]" of students "within the schoolhouse gate."[123] In closing, Ginsburg emphasized the importance of the government's role as a teacher of Constitutional values in public schools, quoting, "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[124]

VI. DISCUSSION: GINSBURG'S DISSENT PROVIDES THE PROPER BAROMETER IN APPLYING THE SPECIAL NEEDS DOCTRINE IN THE PUBLIC SCHOOL CONTEXT

There is little doubt that on its face Justice Ginsburg's dissent represents a lucid, comprehensive—and at times quite witty—analysis that undermines much of the majority's reasoning in *Earls*.[125] However, it is one thing to render the majority's

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[120] *Id.*

[121] 520 U.S. 305 (1997) (holding a Georgia statute requiring candidates for certain public offices to certify proof of negative urinalysis tests before qualifying for nomination to be unconstitutional).

[122] *Earls*, 536 U.S. at 854.

[123] *Id.* at 855.

[124] *Id.* (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[125] *See* Tony LaCroix, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 267-68 (2008) (describing Ginsburg's dissent as "a dissenting opinion that is simultaneously lucid, pragmatic, and founded upon bedrock constitutional law"); Aaron Marcus, *Beyond the Classroom: A Reality Based Approach to Student Drug Testing*, 11 WHITTIER J. CHILD & FAM. ADVOC. 365, 383 (2004) ("Justice Ginsburg issued an impassioned dissent."); Roger Pilon, *Tenants, Students, and Drugs: A Comment on the War on the Rule of Law*, 2002 CATO SUP. CT. REV. 227, 247 (2002) (stating that Ginsburg's dissent "smartly dispatch[es]" with the majority opinion in *Earls*).

opinion baseless in light of the factual distinctions between *Vernonia* and *Earls* and quite another to articulate a proper standard for the "balancing test" of "special needs" within our public school system. The question then becomes: does Ginsburg's dissent offer any guidance in administering the "special needs" doctrine within the public school context that is capable of maintaining fidelity to students' Fourth Amendment rights while effectuating the proper governmental interest? At a closer glance, I believe the answer is yes.

A. Why Ginsburg's Dissent Is Correct

Ginsburg grounds her dissent in two strains of reasoning. First, athletes generally face special health risks from the use of drugs. Second, the athletes in *Vernonia* were "leaders of the school drug culture," which had reached "epidemic proportions."[126] The underlying theme of both strains is they focus upon the third factor of the "special needs" balancing test: the nature and immediacy of the government's concerns and the efficacy of the policy. By way of this reasoning, Ginsburg seems to implicitly set forth a factual threshold that mirrors the Tenth Circuit's holding.[127] In order for a school district to impose a random suspicionless drug testing policy it must demonstrate an "identifiable drug abuse problem among a sufficient number of those subject to the testing, such that [the suspicionless drug] testing [of] that group of students will actually redress its drug problem."[128] Thus, a testing policy under the framework of the Ginsburg dissent must be more than a mere symbolic gesture of a school's tough stance on drugs. It must address whether a given policy will be effective in deterring drug use and whether there is an established special need at the specific school district.

In determining whether a governmental interest is deemed a special need with respect to drugs in public schools, there seems to

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[126] *Earls*, 536 U.S. at 852 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649 (1995)).

[127] *See Earls*, 536 U.S. at 850 ("As the Tenth Circuit observed, 'without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is . . . greatly diminished.'" (quoting Earls v. Bd. of Educ., 242 F.3d 1264, 1277 (10th Cir. 2001))).

[128] *Earls*, 242 F.3d at 1278 (alteration to original).

be two separate standards articulated in *Vernonia* and *Earls*. The first standard, set forth in *Vernonia*, centered on the immediacy of confronting a "drug epidemic"[129] at Vernonia schools specifically, as well as athletes particular susceptibility to physical injury while engaged in both sports and drugs. The standard for a special need set forth in *Earls*, however, is much broader in scope, and seems to pertain to the "nationwide epidemic of drug use"[130] and its general effects on the well-being of students from a universal standpoint. While both standards address the grave concerns associated with drug use, only the standard set forth in *Vernonia* complies with the development of the "special needs" doctrine.

As evidenced in *Skinner* and *Von Raab*, the "special needs" doctrine centered upon the immediate and enormous risk of "lives and limbs" that could be lost through a corrupt customs official or railway operator under the influence of drugs, not "in response to the health risks to users invariably present in any case of drug use."[131] Further, in one of the few special needs cases in which governmental interests did not take precedent over individual Fourth Amendment protections, *Chandler v. Miller*, the Court found Georgia's policy of random suspicionless drug testing of potential candidates for state office unconstitutional as there was no evidence of a particular drug problem and the targeted group was not involved in "high-risk, safety-sensitive tasks."[132] By allowing a school district with little evidence of drug abuse to implement a suspicionless drug testing policy, the *Earls* policy comports with the disallowed policy in *Chandler* while differing vastly from *Von Raab* and *Skinner* in that there is not an "immediate" threat to students involved with most non-athletic extracurricular activities that is not equally present for all young people. The only extracurricular activities that could pass muster under the *Von Raab* and *Skinner* threshold would be particular athletics involving a high degree of exertion and, in some instances, physical contact.

Thus, from Ginsburg's dissent we can glean three requirements that should be inherent for a suspicionless drug

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[129] *Earls*, 536 U.S. at 843.

[130] *Id.* at 824.

[131] *Id.* at 850 (Ginsburg, J., dissenting).

[132] Chandler v. Miller, 520 U.S. 305, 321-22 (1997).

testing regime to be constitutional. First, for the government's interest to qualify as a "special need," it must go beyond the mere factual findings of intermittent drug use present in virtually all high schools. The school district must show that its ability to "maintain[] security and order in the school[]"[133] has been significantly affected by student drug use. Second, the drug testing policy must be effective in that it tests students likely to do drugs and/or students that could influence other students to do drugs. Third, those being tested are involved in such activities that drug use could result in "immediate" harm differing from that associated with the general health risks for all students doing drugs.[134] Although these requirements appear to limit the applicability of suspicionless student drug testing to scenarios substantially similar to that in *Vernonia*, this is proper considering that in most instances a regime of individualized suspicion in administering drug tests is less invasive of student rights while likely equally effective.

B. Individualized Suspicion: Is There Room for the "Special Needs" Doctrine?

Undoubtedly, the special needs doctrine diminishes the framers' original intentions for suspicion-based searches. As noted in O'Connor's dissent in *Vernonia*, previous decisions allowing for suspicionless based searches were ruled constitutional "only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime[] and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented."[135] Though the majority

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[133] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). With respect to the inherent difficulties of maintaining order in public schools, the *T.L.O.* majority opined, "Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* at 338.

[134] One could also read Ginsburg's dissent to imply that only similarly situated athletes alone could be subject to random suspicionless based drug testing, as they have a greater diminished expectation of privacy when compared to non-athletes. *See Earls*, 536 U.S. at 846, 853-54 (Ginsburg, J., dissenting) (referring to athletes as a "population of students distinguished by their reduced expectation of privacy").

[135] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 674 (1995) (O'Connor, J., dissenting); *see also* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 624 (1989) ("In limited circumstances, where the privacy interests implicated by the search are

opinions of both *Earls* and *Vernonia* center their analyses around the *T.L.O.* axiom that students "have a lesser expectation of privacy than member of the population generally,"[136] the search in *T.L.O.* nevertheless was still based on a form of individualized suspicion; specifically, reasonable suspicion.[137] To allow the holding in *Earls* to dictate a finding of special needs in such sharp contrast to previous decisions is to allow the statement that "special needs inhere in the public school context," to nearly envelop the oft-quoted statement of *Tinker* that "students [do not] shed their constitutional rights . . . at the schoolhouse gate."[138]

Thus, in order to maintain the integrity of the Fourth Amendment, the "special needs" doctrine should be severely limited in the public school context and, as Justice O'Connor pointed out, be implemented only in those situations where it seems an individualized suspicion-based regime would be ineffectual.[139] As some commentators note, this could signal *Vernonia* was incorrectly decided if a suspicion-based regime could have been effective in maintaining the discipline and order integral to the learning environment.[140] But in instances such as *Vernonia*, where a drug culture has clearly run amok and "a large segment of the student body, particularly those involved in interscholastic athletics [are] in a state of rebellion,"[141] an individualized scheme could prove overly vexatious. Moreover, there is an immediate need to maintain a disciplined and

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minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion*, a search may be reasonable despite the absence of such suspicion." (emphasis added)).

136 *T.L.O.*, 496 U.S. at 348 (Powell, J., concurring).

137 *See T.L.O.*, 469 U.S. at 345-46; *see also* Brad Setterburg, Note, *Privacy Changes, Precedent Doesn't: Why* Board of Education v. Earls *Was Judged by the Wrong Standard*, 40 HOUS. L. REV. 1183, 1215-16 (2003) (noting that the "Court ha[d] lost sight of the meaning behind [those] words" in *Vernonia* and *Earls*; as in *T.L.O.* the search was still based upon a form of individualized suspicion).

138 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

139 *Vernonia*, 515 U.S. at 674 (O'Connor, J., dissenting).

140 *See* Pilon, *supra* note 125, at 247-51 (concluding that *Vernonia* itself was incorrectly decided and that, as a result, the Fourth Amendment has been damaged in the process).

141 *Vernonia*, 515 U.S. at 649 (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

productive educational setting that cannot be easily dismissed.[142] While the special needs doctrine may have its uses in the public school context, its use in random suspicionless drug testing should perhaps be limited only to those circumstances that truly are "special."[143]

C. Is a Suspicion-Based Regime Effective?

Little research has been done on the effectiveness of a suspicion-based regime of drug testing in public schools, but it is significant to note that the respondents in both *Earls* and *Vernonia* insisted on the implementation of a suspicion-based drug testing regime alone.[144] In *Earls* and *Vernonia*, the majority opinions proffered several reasons why a suspicion-based drug testing regime would be ineffectual.[145] One reason is the view that parents would be unwilling to accept accusatory drug testing of individual students as it would transform the process into a "badge of shame."[146] In *Vernonia*, Justice Scalia quotes Justice Powell's dissent in *Goss v. Lopez* for the assertion that the student-teacher relationship is one in which "the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversar[ial] in nature."[147] While it

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[142] Marcus, *supra* note 125, at 384-85 (writing that "'Special Needs' Can Stay," but factors of the special needs test need redefining in the wake of *Earls*).

[143] *See* Brooks, *supra* note 3, at 395 (stating that under *Earls* the Court "effectively dispensed with a meaningful 'special need,' as heightened physical risks and an immediate drug problem among those being tested are no longer necessary."). Although the majority in *Earls* was concerned with creating an arduous "constitutional quantum of drug use" for schools to implement a suspicionless drug testing program, *Earls*, 536 U.S. at 836, interpreting the holding of *Vernonia* to require a similar factual showing could still provide adequate discretion to state courts while encouraging programs of individualized suspicion. This discretion could create more distinct boundaries than the decision of *Earls*, which is consistently construed as what each individual school district defines "extracurricular activities" to mean. *See* Marcus, *supra* note 125, at 385 n.148 ("[A]pplying set principles to all schools may be somewhat problematic, but by no means does this argument invalidate the application of the 'special needs' test to public schools.").

[144] Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) ("Respondents instead argue that drug testing must be based at least on some level of individualized suspicion."); *Vernonia*, 515 U.S. at 663 ("Respondents argue that a 'less intrusive means to the same end' was available, namely, 'drug testing on suspicion of drug use.'").

[145] *See supra* notes 64, 93 and accompanying text.

[146] *Vernonia*, 515 U.S. at 663.

[147] *Id.* at 664 (quoting Goss v. Lopez, 419 U.S. 565, 594 (Powell, J., dissenting)).

is true teachers often maintain a non-adversarial role, if they are truly to stand *in loco parentis* as the Court suggests it would seem their duty to address potential drug use in the same way a concerned parent would, which inevitably requires some form of confrontation.

Individualized suspicion is likely sufficient in and of itself for school officials to effectively combat the drug problem; it would not be unduly burdensome or uncomfortable for school officials who have probable cause.[148] As state actors trained in the education of children, they should be given the deference to determine whether a student may or may not have a drug problem based on the students' actions and statements in class. It is within this capacity that courts should give deference to the school systems in handling their drug problems and in determining what sanctions should be imposed based on the needs of the individual student.

Lastly, Justice O'Connor's well-reasoned dissent in *Vernonia* does all but dismiss many of the majority's concerns for suspicion-based testing,[149] and in choosing between the two standards it is clear that a regime of suspicion-based testing could likely be equally effectuated without diminishing the rights of the entire student population.[150] Even if a standard of individualized suspicion-based drug testing was proven less effectual, "'there is nothing new in the realization' that Fourth Amendment protections come with a price."[151]

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[148] *Vernonia*, 515 U.S. at 677 (O'Connor, J., dissenting) ("Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment.").

[149] *Id.* at 676-80.

[150] In keeping with the standard of *T.L.O.*, any drug testing regime of individualized suspicion should be based upon reasonable suspicion. *See supra* note 133; *see also Vernonia*, 515 U.S. at 676-77.

[151] *Id.* at 680 (quoting Arizona v. Hicks, 480 U.S. 321, 329 (1987)). Justice O'Connor further elaborated on this point in *Vernonia*, stating:

> I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be *as* effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. "But there is nothing new in the realization" that Fourth Amendment protections come with a price. Indeed, the price we pay is higher in the criminal context, given that police do not

D. The Subsequent Effect of the Earls *Decision*

Since *Earls*, it is clear the majority's holding that students involved in extracurricular activities can be subjected to random suspicionless drug tests has been not only applied but extended in several school districts. In *Joye v. Hunterdon Central Regional High School Board of Education*, a decision handed down only one year after *Earls*, the New Jersey Supreme Court held that suspicionless drug testing could be extended to those students who used the school parking lot for their cars.[152] In several other school districts, the definition of "extracurricular activities" has been extended to include not only traditional electives in high school but field trips, dances, school plays, and even mere attendance at school-sponsored athletic events.[153] Although individual state courts may at times interpret their own constitutions as providing greater protections among public school students than current Fourth Amendment jurisprudence,[154] the fact remains that *Earls* offers such a wide latitude of constitutionally permissible drug testing that as long as a school district is not testing "all students," and has an available sanction

> closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause.

Id. (citation omitted).

[152] Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624, 628-29 (N.J. 2003); *see also* Linke v. Nw. Sch. Corp., 763 N.E.2d 972 (Ind. 2002) (upholding a school drug testing policy of those engaged in school athletics, extracurricular activities, and students who park their cars on the school). *But cf.* Theodore v. Del. Valley Sch. Dist., 836 A.2d 76 (Pa. 2003) (interpreting the Pennsylvania State Constitution as recognizing a greater degree of privacy than the Fourth Amendment and declaring the school district's policy unconstitutional under Pennsylvania law without a more particularized showing of a drug problem at the school and the efficacy of the means chosen to address it); York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995 (Wash. 2008) (declining to accept the Supreme Court's "special needs" exception with respect to student athletes and holding the collection of urine samples to be a significant invasion of privacy).

[153] *See* Associated Press, *Kansas Schools Take Drug Testing to Extreme*, MSNBC.COM (Sept. 13, 2006, 6:03 PM), http://www.msnbc.msn.com/id/14819494; *see also* Mary Plummer, *Middle Schoolers Face Random Drug Testing*, ABC NEWS (Jan. 13, 2011), http://abcnews.go.com/US/TheLaw/nj-middle-schoolers-random-tested-drugs/story?id=12608164#.TxO20SN7WFc.

[154] *See supra* note 152.

aside from school expulsion, their drug testing policy will likely pass constitutional muster.

The reaching impact of the *Earls* rationale does not end with random suspicionless drug testing, however. In *Doe v. Little Rock School District*,[155] the Little Rock School District's practice of conducting suspicionless searches of students and their belongings was challenged.[156] The district would routinely pick out classrooms at random and order the students therein to leave the room after removing everything from their pockets and placing all their belongings on the desks in front of them.[157] While the district attempted to rely on the "special needs" doctrine by showing a concern for discovering drugs and weapons in school, the Eighth Circuit held this did not extinguish all of a student's privacy interests, nor had the district proffered a showing that not engaging in the searches would have jeopardized some important governmental interest.[158] Though in this instance the extension of *Earls*' rationale was overruled, one can only speculate as to how many other school districts nationwide have developed similar protocols that are not legally challenged. *Earls* impact thus extends beyond its own factual premise in providing a vehicle to further deteriorate students' Fourth Amendment rights, and also extends past the *T.L.O.* standard of "reasonableness, under all the circumstances."[159]

There is little doubt that nationwide adolescent drug use represents a grave concern for our country's public schools. While random suspicionless drug testing may seem like a viable solution, it may often produce results counterintuitive to what those who seek to implement it believe.[160] One such result is framed specifically in Ginsburg's dissent: "Even if students might be deterred from drug use in order to preserve their extracurricular

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[155] Doe v. Little Rock Sch. Dist., 380 F.3d 349 (8th Cir. 2004).

[156] *Id.* at 351.

[157] *Id.*

[158] *Id.* at 356. It is also significant to note that, in contrast to the disclosure policies in *Vernonia* and *Earls*, the district handed over results of the search to local law enforcement agencies, resulting in criminal sanctions. *Id.* at 355.

[159] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

[160] *See generally* Floralynn Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL'Y 231 (2007) (analyzing the benefits and inadvertent harm caused by student drug screening programs).

eligibility, it is *at least* as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use."[161] Further, recent studies of random suspicionless drug testing show that it may not act as the substantial deterrent that courts are prone to project. In recent studies showing the effectiveness of drug testing,[162] random suspicionless drug testing has been shown to have little correlation with the prevalence or frequency of marijuana or illicit drug use in schoolchildren and no effect on their intentions to use drugs in the future.[163] Drug testing itself can also be expensive for many schools, particularly those with larger student populations.

Lastly, the *Earls* decision has helped contribute to an expansion of the special needs doctrine far beyond what it was originally intended for, so much so that requiring an actual showing of "special needs" may no longer be a means for applying the exception, but a *check* on further suspicionless searches.[164] One scholar has suggested that the onset of the "special needs" doctrine has fell way to a "general Fourth Amendment approach,"[165] which broadens considerably the categories of

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[161] Bd. of Educ. v. Earls, 536 U.S. 822, 829, 853 (2002) (Ginsburg, J., dissenting) (emphasis added).

[162] Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159 (2003), *available at* http://studentdrugtesting.org/Michigan%20study.pdf. *But cf.* U.S. DEPT. OF EDUC., THE EFFECTIVENESS OF MANDATORY-RANDOM STUDENT DRUG TESTING (2010), *available at* http://ies.ed.gov/ncee/pubs/20104025/pdf/20104025.pdf (finding that sixteen percent of students subject to suspicionless drug testing reported using substances covered by their school district's policy, as opposed to twenty-two percent of students reporting drug use without such a school program). The report further found there were no "spillover effects" to students not subject to the testing in schools with a suspicionless-based program, and that students' reported intentions to use illegal substances in the future was relatively the same, with thirty-four percent of the student population subject to suspicionless-based drug testing policies reporting that they intended to take drugs in the next twelve months in comparison to thirty-three percent of students with the same intention in schools without such a testing program. *Id.*

[163] *See Yamaguchi*, *supra* note 162, at 164.

[164] *See* Edwin J. Butterfoss, *School Children and Parolees: Not So Special Anymore*, 80 MISS. L.J. 805, 840-41, 843-44 (2011) ("[D]espite early criticism that the special needs exception opened the door to searches being found constitutional, it now appears the special needs exception, in contrast to the Court's 'general Fourth Amendment approach,' has a limiting effect on the range of government conduct justified under the Fourth Amendment.").

[165] *Id.* at 829, 833-34.

individuals who may be subject to suspicionless searches[166] by creating a "much less constrained balancing test" approach in which an unrestricted governmental interest almost always trumps an individual's right to some form of individualized suspicion.[167] Although the "special needs" doctrine at one time required an *actual* showing of a special governmental need "beyond the normal need for law enforcement,"[168] "[t]he door [now] appears to be open to finding the school setting no longer demands the application of the special needs exception, but permits suspicionless searches by school officials to be upheld under the Court's new 'general Fourth Amendment approach.'"[169]

In essence, the decision in *Earls* has deteriorated the Constitutional rights of schoolchildren and expanded the Fourth Amendment definition of reasonableness far beyond the framers' intentions while having scant evidence of any positive results that could not be achieved through a means of individualized suspicion.

E. How Ginsburg's Dissent Frames the Proper Application of the Special Needs Balancing Test with Respect to Random Suspicionless Drug Testing

Ginsburg's dissent suggests a new fact-based inquiry that relies on the *T.L.O.* principle that the legality of the search should depend on the reasonableness—in all circumstances—of the search, by requiring an objective showing that the individual school district meets the rigors of demonstrating an actual special need. As one commentator has noted:

> Surprisingly, a workable compromise emerges in the dissents [of *Earls*]: a fact-based inquiry of reasonableness balanced around individualized suspicion, which acts as an exhaustion requirement for educators. . . . [A] suspicionless search is permitted, but only after a special need is objectively established. [This] approach suggests two virtues. The dissenters avoided presumptions . . . by using a more clearly objective standard than the equation favored by the majority [and,] [m]ore importantly, the Justices would have

[166] *Id.* at 825.
[167] *Id.* at 829-30 (internal quotation marks omitted).
[168] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989).
[169] Butterfoss, *supra* note 164, at 844 (alteration to original).

> *maintained close proximity to traditional Fourth Amendment analysis and expectations*, with courts keeping a watchful eye . . . that in the rare case, educators might have a special need justifying a departure from the individualized-suspicion standard.[170]

Thus, as demonstrated by and advocated for by O'Connor's dissent in *Vernonia*, a requirement of individualized suspicion should be set as the default standard, for all public school drug testing, and it is only once this requirement has been exhausted and shown to be futile to the administration's efforts that in fact a random suspicionless drug testing policy should be implemented. In determining whether the school administration's efforts have become futile, a showing must also be made on the implicit requirements of Ginsburg's dissent: (1) has the school made a sufficient showing that its ability to maintain security and order has been significantly affected and disrupted by the drug problem; (2) will the drug testing policy be effective in deterring drugs in that it tests a group of students likely to do or shown to do drugs or influence their peers to use drugs; and (3) are those being tested involved in such activities that drug use could result in a type of "immediate" harm differing from that associated with the general health risks for all students using drugs.[171] The determination of whether these factors are met will, of course, be grounded in the oft-cited *T.L.O.* standard that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[172]

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[170] Bernard James, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After* Board of Education v. Earls, 56 S.C. L. REV. 1, 30 (2004) (alteration to original) (emphasis added) (footnote omitted).

[171] The third parameter of the test will help alleviate Justice Ginsburg's concerns and the majority's argument of imperfect tailoring. Bd. of Educ. v. Earls, 536 U.S. 822, 851 (2002) (Ginsburg, J., dissenting) (addressing the majority's argument that not all athletes are subject to an immediate, specialized danger from the use of drugs while some extracurricular activity members may be subject to risk of immediate physical harm similar to those found in athletes). Such language would provide guidance to the state courts by allowing them to defer to *Vernonia* or, based upon the state's individual preference, allow for a wider variety of student extracurricular activities to be tested depending on how the state court defines "immediate harm." As Ginsburg noted, "[t]here is a difference between imperfect tailoring and no tailoring at all." *Id.* at 852.

[172] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

CONCLUSION

In light of the public school system's subsequent use of the *Earls* decision and in scope of the framers' original intentions for the Fourth Amendment, it seems that Justice Ginsburg not only adequately addresses the *Earls* majority's arguments but implicitly strikes a proper balance between the need for discipline and order in schools while keeping with both "special needs" and Fourth Amendment precedent. Though such a holding could be argued to place a burden on state courts in determining whether an individual school district made a proper showing of a special need, it is this middle-of-the-road approach in Ginsburg's dissent that would allow for discretion by state courts and school systems while keeping Fourth Amendment principles intact.

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