

**Out of Bounds: The United States Supreme Court
Allows Suspicionless Drug Testing of Students
Engaging in Extracurricular Activities
[*Board of Education of Independent School
District No. 92 v. Earls*, 122 S. Ct. 2559 (2002)]**

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*The primary role of schools is and always has been to educate, to inspire, to bring forth a “marketplace of ideas,” and to teach our youth about democratic ideals. If we forget this role by . . . punishing the many for the wrong-doings of a few, then perhaps we have met the enemy. Perhaps we are the enemy.*¹

I. INTRODUCTION

An ideal educational setting imparts knowledge, fosters creativity, enhances self-esteem, and teaches the fundamentals of being a member of society.² Teachers in public schools try to inculcate all these values in students, while faced with challenges involving control and discipline.³ It is imperative that teachers have the ability to control the educational setting and to keep students safe. Because of this need, students’ constitutional rights must be appropriately tailored in the educational setting to allow teachers this flexibility. However, students still need to maintain a semblance of their constitutional rights.

Unfortunately, students’ constitutional rights are being severely limited. In the Tecumseh, Oklahoma, school district, all students wanting to participate in extracurricular activities are required to submit to drug testing.⁴ The Tecumseh school district justified the policy based on some evidence of drug use by students, not necessarily those participating in extracurricular activities.⁵ Lindsay Earls, a student at this school, was required to take the drug test and found the process embarrassing.⁶ This prompted her to challenge the drug testing policy as a violation of her constitutional right to privacy.⁷ However, the

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1. Jacqueline A. Stefkovich, *Students’ Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass?*, 69 ST. JOHN’S L. REV. 481, 513 (1995).

2. *See id.* at 510; *see also* NANCY E. WALKER ET AL., *CHILDREN’S RIGHTS IN THE UNITED STATES* 168-172 (1999).

3. *See* ROBERT JAMES PARELIUS & ANN PARKER PARELIUS, *THE SOCIOLOGY OF EDUCATION* 156 (2d ed. 1987).

4. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 2559, 2563 (2002) (*United States Reports* pagination not available at time of publication).

5. *See* Brief of Petitioner at 8, *Earls* (No. 01-332).

6. Brief of Respondents at 5, *Earls* (No. 01-332).

7. *Id.* at 7.

United States Supreme Court upheld this test in *Board of Education of Independent School District Number 92 v. Earls*.⁸

The above scenario illustrates the problem with the Court's holding. Armed with the powerful policy objective of drug deterrence, the Court allowed testing of all students participating in extracurricular activities.⁹ These students were the least at risk for drug use,¹⁰ but their constitutional rights were ignored because of fear of drug use in the general student population.

The United States Supreme Court incorrectly held that suspicionless drug testing of students who participate in extracurricular activities was constitutional because the Court extended precedent too far to justify the intrusion. This was not supported by any specific safety issue and was not necessary, considering teachers were already allowed to search students based on reasonable and individualized suspicion.¹¹

II. CASE DESCRIPTION

In 1998, the Pottawatomie County School District Number 92 (school district) in Oklahoma met to discuss the merits of a drug testing policy after teachers and parents expressed concern that other programs to combat drugs were ineffective.¹² At this meeting, the school district adopted the Student Activities Drug Testing Policy (Policy).¹³ The Policy required all students in middle and high school to consent to a urinalysis test for drugs before participating in any extracurricular activities.¹⁴ The school district applied the Policy to all students interested in participating in competitive extracurricular activities including "Athletics, Academic Team, Band, Vocal, Future Homemakers of America (FHA), Future Farmers of America (FFA), Cheerleading[,] and Pom Po[n]."¹⁵

Lindsay Earls was a student at Tecumseh High School.¹⁶ She was a member of the "show choir, the marching band, the Academic Team, and the National Honor Society."¹⁷ Because of her desire to participate in these activities, Earls consented to a urine test.¹⁸ The

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

9. *Id.*

10. *See infra* note 180 and accompanying text.

11. *See infra* notes 70-72 and accompanying text.

12. Brief of Petitioners at 8, *Earls* (No. 01-332). Tecumseh High School held anti-drug rallies, sponsored educational programs, had certain students counsel other students about using drugs, used canine drug searches on a yearly basis, had a police officer patrol, and installed surveillance cameras. *Id.* at 7.

13. *Earls*, 122 S. Ct. at 2563.

14. *Id.*

15. Brief of Petitioners at 3, *Earls* (No. 01-332).

16. *Earls*, 122 S. Ct. at 2563.

17. *Id.*

18. Brief of Respondents at 5, *Earls* (No. 01-332).

test required that Earls give a sample of urine while a school monitor waited outside to listen for the sound of urination.¹⁹ Earls was required to report to the gymnasium for her drug test.²⁰ Then, three teachers waited outside the stall to listen for tampering, while Earls urinated.²¹ After the sample was collected, it was tested for warmth and held up to the light to view its color and clarity.²² Then, the sample was mailed to a lab for testing.²³ The results were to be kept separately from the student's educational files and only released on a "need to know basis."²⁴

If the sample tested positive for drugs, the student could still participate in the activity, but he or she had to submit proof of drug counseling and take another test in two weeks.²⁵ If the second test was positive, the student must take monthly drug tests, be suspended from all activities for fourteen days, and undergo four hours of substance abuse counseling.²⁶ If a third test was positive, the student was suspended from all extracurricular activities for the rest of the year or eighty-eight days, whichever was longer.²⁷

In 1999, Lindsay Earls' parents filed suit in the United States District Court of the Western District of Oklahoma under 42 U.S.C. § 1983, alleging that the Policy violated the Fourth Amendment.²⁸ Relying on *Vernonia School District 47J v. Acton*,²⁹ the district court granted summary judgment to the school district after balancing the students' privacy interest against the need of the public school to address a history of drug abuse that provided a "legitimate cause for concern."³⁰ The United States Court of Appeals for the Tenth Circuit reversed, finding insufficient proof of an identifiable drug problem among a sufficient number of students that were going to be tested, so that the drug testing would actually address the problem.³¹ The United States Supreme Court granted certiorari.³²

19. *Earls*, 122 S. Ct. at 2566.

20. Brief of Respondents at 5, *Earls* (No. 01-332).

21. *Id.*

22. *Id.*

23. *See Earls*, 122 S. Ct. at 2566.

24. *Id.*

25. *Id.* at 2567.

26. *Id.*

27. *Id.* These are the only consequences of a positive test; there are no academic or criminal actions. *Id.* at 2566-67.

28. *Id.* at 2563. In the original suit, the parents of another student, Daniel James, also joined in the filing. Respondent's Brief at 5, *Earls* (No. 01-332). After filing suit, however, Daniel James transferred from the school district. *Id.*

29. 515 U.S. 646 (1995).

30. Brief of Petitioners at 11, *Earls* (No. 01-332).

31. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1278 (10th Cir. 2001).

32. *Earls*, 122 S. Ct. at 2564.

III. BACKGROUND

The Fourth Amendment protects people against unreasonable searches and seizures.³³ The basic purpose of the Fourth Amendment as defined by the United States Supreme Court is to “safeguard the privacy and security of individuals against arbitrary invasions by government officials.”³⁴ The drafters inserted the requirements of a warrant and probable cause to prevent the government from carrying out general suspicionless searches.³⁵ This fear of general searches came from the “colonists’ experience with the writs of assistance and their memories of the general warrants formerly in use in England.”³⁶ These writs were a government tool used to accomplish sweeping, suspicionless searches.³⁷

Historically, the Court had determined that the Fourth Amendment required a warrant for all searches with a few “well-delineated exceptions.”³⁸ However, in recent times, the Court has adopted the less stringent “generalized-reasonableness” standard, which determines the reasonableness of a search based on the totality of the circumstances.³⁹ The concept of reasonableness is the starting point for disputes involving Fourth Amendment searches.⁴⁰ The reasonableness of a particular law enforcement practice is determined by “balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”⁴¹ In the criminal context, a reasonable search must normally be accompanied

33. 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.

Id.

34. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967). A government official is anyone who is conducting a search against another that is sanctioned by the government. See JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* § 1:16 (2d ed. 1991) (noting that the Fourth Amendment does not just apply to police, but has reached conduct of inspectors, tax law enforcers, fireman, public school officials, and employers).

35. See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 489 (1994).

36. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). The Court stated that “the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.” *Id.* at 9.

37. See Clancy, *supra* note 35, at 502-03.

38. *Katz v. United States*, 389 U.S. 347, 357 (1967).

39. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 559 (1999). The amount of protection a person is afforded by the Fourth Amendment will change depending on “the purpose of the search, the person doing the searching, the place being searched, the background or type of person being searched, the severity of the penalties resulting from the search, and the extent to which the persons’ privacy was invaded by the searcher.” LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, *SEARCH AND SEIZURE IN PUBLIC SCHOOLS* 3 (2d ed. 1995).

40. HALL, *supra* note 34, § 1:19.

41. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

by a warrant based on probable cause.⁴² However, the United States Supreme Court has found numerous exceptions to the warrant and probable cause requirements.⁴³ One of these exceptions is the “special needs” test, which is a label for the balancing the Court does when a search is not done for a law enforcement purpose and there is an important government need for the search.⁴⁴

However, before the “special needs” test was defined, the Court decided numerous cases that employed the same balancing to determine if a search was constitutional absent a warrant or probable cause.⁴⁵ One of the first cases that lessened the probable cause standard was *Camara v. Municipal Court*.⁴⁶ In 1967, the Court found that searches by municipal health and safety inspectors required a warrant, if consent to search was not given.⁴⁷ However, the probable cause to support the warrant did not need to be based on any individualized belief regarding the condition of a particular building.⁴⁸ The Court held that probable cause for inspections could be established “based upon the passage of time, the nature of the building, . . . or the condition of the entire area” such that a *valid public interest* provided the requisite probable cause for the search.⁴⁹ In making this determination, the Court balanced the need to search against the invasion that the search entailed.⁵⁰ The Court considered the long history of judicial and public acceptance of the programs, the noncriminal nature of the search, the program being the best technique available to meet the goals, and that the search involved a limited invasion of privacy.⁵¹

In *United States v. Biswell*,⁵² the United States Supreme Court added another factor to the balancing scale. The Court upheld a warrantless search of a licensed weapons dealer in an industry heavily

42. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

43. See Jonathan Reid Friedman, *Twenty-Fifth Annual Review of Criminal Procedure*, 84 GEO. L.J. 717, 727 (1996). The many exceptions to the Fourth Amendment requirement that an arrest and search must be based on probable cause and supported by a warrant include: investigatory detentions, warrantless arrests, search incident to arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and special need searches. *Id.*

44. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

45. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (alcohol checkpoints); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (searching government employee's desk); *United States v. Biswell*, 406 U.S. 311 (1972) (search of gun dealer under Federal Act); *See v. City of Seattle*, 387 U.S. 541 (1967) (inspections of buildings not used as residences); *Camara v. Mun. Court*, 387 U.S. 523 (1967) (building inspection for housing code violation).

46. 387 U.S. 523.

47. *Id.* at 539-40.

48. *Id.* at 538. In the criminal context, the probable cause standard requires substantial evidence that the items sought are connected to criminal activity and that the items will be found in the place to be searched. WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 10.1(b)(2d ed. 1996).

49. *Camara*, 387 U.S. at 538.

50. LAFAVE, *supra* note 48, § 10.1(b).

51. *Id.*

52. 406 U.S. 311 (1972).

regulated by Congress.⁵³ The Court reasoned that a search of a business authorized under a valid statute and limited in scope was justified where the business was subject to pervasive government regulation.⁵⁴

In *United States v. Martinez-Fuerte*,⁵⁵ the Court again justified the reasonableness of a suspicionless search.⁵⁶ It held that the Border Patrol could make routine stops of vehicles without individualized suspicion because the heavy traffic flow made this type of suspicion impracticable.⁵⁷ The Court stated that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.”⁵⁸ The Court found that the stops did not violate the Fourth Amendment because each involved only brief questioning and visual inspection.⁵⁹

The Court balanced various factors to determine the reasonableness of a search when a legitimate government interest was involved, and there was no less intrusive way to conduct the search practicably. With this background, the Court next decided the issue of searches of public school students.

The United States Supreme Court first considered the issue of student searches by public school officials in *New Jersey v. T.L.O.*⁶⁰ The Court had already recognized that students do not “shed their constitutional rights . . . at the schoolhouse gate” in the context of the First Amendment right to freedom of speech.⁶¹ But in *T.L.O.*, the Court analyzed a student’s right to be free from unreasonable searches.⁶² In that case, a student (T.L.O.) was accused of breaking the school policy of smoking, and during the course of questioning, the assistant vice principal looked in the student’s purse.⁶³ The assistant vice principal saw a pack of cigarettes, removed them, and searched the rest of the purse.⁶⁴ In doing so, he uncovered evidence that T.L.O. was dealing marijuana, which led to a criminal prosecution.⁶⁵ The student argued that the search was a violation of the Fourth Amendment and sought to have the fruits of the search suppressed.⁶⁶

53. *Id.* at 316.

54. *Id.* at 315.

55. 428 U.S. 543 (1976).

56. *Id.* at 562.

57. *Id.* at 557.

58. *Id.* at 561.

59. *Id.* at 562.

60. 469 U.S. 325 (1985).

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

62. *T.L.O.*, 469 U.S. at 332.

63. *Id.* at 328.

64. *Id.*

65. *Id.* at 328-29.

66. *Id.* at 329. The United States Supreme Court granted certiorari to decide the appropriateness of the exclusionary rule when the violating search was conducted by public school officials. *Id.* at 332. However, the Court determined that the search did not violate the Fourth Amendment. *Id.* at 333. First, the Court stated that the Fourth Amendment applied to states

In *T.L.O.*, the Court employed the same reasoning used in *Camara* to determine that searches by public school officials were subject to Fourth Amendment protection, but the requisite standard for the search was lower.⁶⁷ As in *Camara*, the Court held that the standard to search would be reasonable suspicion instead of the usual probable cause.⁶⁸ It determined the reasonableness of the search by balancing the individual's legitimate expectations of privacy and security with the government's need to effectively deal with "breaches of public order."⁶⁹ The Court reasoned that it would be impracticable for school officials to obtain a warrant.⁷⁰

The Court developed a two-prong test for searches of students.⁷¹ The search must be "justified at its inception."⁷² Further, the scope of the search must be "reasonably related to the objectives of the search[.]" while taking into consideration "the age and sex of the student and the nature of the infraction."⁷³ The search of the student's purse in this case was constitutional because another teacher had reported the violation, which prompted the search of the purse for evidence.⁷⁴

The "special needs" doctrine was first introduced in *T.L.O.*⁷⁵ The United States Supreme Court stated that in some circumstances "*special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."⁷⁶ When a special need is identified, the Court balances the government and privacy interests to determine what standard to search should be applied.⁷⁷

In the following cases, the Court extended the special needs test to allow searches without any individualized suspicion. In *Skinner v. Railway Labor Executives' Ass'n*,⁷⁸ the United States Supreme Court

through the Fourteenth Amendment and that the actions of public school officials were subject to limits placed on the state by the Fourteenth Amendment; the Fourth Amendment was not limited to law enforcement. *Id.* at 334-35. Also, school officials were not exempt from accountability by the doctrine of in loco parentis because they have already been recognized as state actors for purposes of the First and Fourteenth Amendment. *Id.* at 336.

67. *Id.* at 341.

68. *Id.* at 341-42.

69. *Id.* at 337.

70. *Id.* at 340.

71. *Id.* at 341.

72. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Justified at its inception means that there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated school rules. *Id.*

73. *Id.* at 341-42.

74. *Id.* at 345.

75. *Id.* at 351 (Blackmun, J., concurring). The United States Supreme Court followed the reasoning of the majority of lower courts, which had determined that the "special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause." *Id.* at 332 n.2.

76. *Id.* at 351 (Blackmun, J., concurring) (emphasis added).

77. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

78. *Id.*

considered whether regulations by the Federal Railroad Administration (FRA) violated the Fourth Amendment.⁷⁹ Those regulations required blood and urine tests of employees involved in accidents.⁸⁰ Additionally, the regulations authorized railroads to administer drug tests to employees who disobeyed safety rules.⁸¹ The Court noted that the collection and testing of urine were protected by the Fourth Amendment as searches because medical facts could be revealed and monitoring urination implicates privacy interest.⁸²

Although these regulations called for searches, the Court concluded that a warrant was not required for two reasons.⁸³ First, there was an immediate need to obtain samples when an accident occurred.⁸⁴ Second, it was unreasonable to expect railroad supervisors to understand the procedures of Fourth Amendment law.⁸⁵

Individualized suspicion was also not necessary in this context because of the minimal intrusion and the risk placed on the important governmental interest.⁸⁶ The Court found that employees experienced a lessened expectation of privacy by their involvement in a highly regulated industry with high safety standards.⁸⁷ Plus, the employee could cause "great human loss before any signs of impairment [would] become noticeable to supervisors or others."⁸⁸ Furthermore, the Court stated that the regulations would act as a good deterrent because the employees would know that an accident triggered a drug test.⁸⁹ Also, the tests provided the industry with information about the cause of accidents by either identifying substance abuse as a contributor or being able to eliminate it as a possible cause.⁹⁰

In the companion case of *National Treasury Employees Union v. Von Raab*,⁹¹ the Court upheld the United States Customs Service's drug testing policy.⁹² The policy required urinalysis of employees seeking promotion or transfer to positions entailing direct involvement in drug interdiction or enforcement, carrying firearms, or han-

79. *Id.* at 606.

80. *Id.*

81. *Id.* The Fourth Amendment is only an issue with drug testing of public or private employees who are tested by the government or governmental mandate. LAFAYE, *supra* note 48, § 10.2(g). In *Skinner*, the test was whether the government did "more than adopt a passive position toward the underlying private conduct." *Skinner*, 489 U.S. at 615.

82. *Skinner*, 489 U.S. at 617.

83. *Id.* at 623.

84. *Id.*

85. *Id.* at 624.

86. *Id.*

87. *Id.* at 627.

88. *Id.* at 628.

89. *Id.* at 630.

90. *See id.* The Court recognized that the testing of blood was more accurate to determine when the drug had been taken and that the urinalysis test was used to identify drugs that could be quickly eliminated from the blood stream. *Id.* at 632.

91. 489 U.S. 656 (1989).

92. *Id.* at 679.

dling classified material.⁹³ The Court held that the program was constitutional for several reasons.⁹⁴ First, the Court stated that these employees are often exposed to drug smugglers and drugs.⁹⁵ The Court noted that national interests would be jeopardized, if the employees involved in detection were unsympathetic because of their own drug use.⁹⁶ Second, custom agents who carry weapons posed a dangerous risk, if they used drugs.⁹⁷ Third, the Court reasoned that this employment setting did not make it feasible to closely monitor employees in their daily work activities.⁹⁸ Fourth, the Court found it compelling that off-duty drug use could make employees more susceptible to blackmail and bribes.⁹⁹ Finally, the Court noted that the purpose of the regulation was just as much to prevent drug users from occupying sensitive positions as it was to detect drug use by employees.¹⁰⁰

Next, the Court evaluated whether similar reasoning for drug testing of employees could apply to drug testing of student athletes. In *Vernonia School District 47J v. Acton*,¹⁰¹ the Court was faced with the issue of whether a school district could require its student athletes to submit to drug testing.¹⁰² The school district had adopted the policy because “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,” which was attributed to alcohol and drug abuse.¹⁰³ The Court looked at several factors to determine reasonableness.¹⁰⁴

The first factor that the Court examined was the nature of the privacy interest protected, noting that the only legitimate expectations of privacy protected were the ones society recognized.¹⁰⁵ The Court stated that the two facts central to the issue were that the search involved children and the state had temporary custody of them.¹⁰⁶ The nature of the state’s power permits a level of control that cannot be exercised over adults.¹⁰⁷ The Court noted that under a school’s duty to students, the school officials can require children to submit to vari-

93. *Id.* at 659-60. The Court did not decide whether it was reasonable to require drug tests of those employees handling classified materials because the record was inadequate. *Id.* at 679.

94. *See id.* at 669-74.

95. *Id.* at 669.

96. *Id.* at 669-70.

97. *Id.* at 670.

98. *Id.* at 674.

99. *Id.*

100. *Id.*

101. 515 U.S. 646 (1995).

102. *Id.* at 648.

103. *Id.* at 649.

104. *See id.* at 654.

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

106. *Id.*

107. *Id.* at 655.

ous physical exams and be vaccinated.¹⁰⁸ In addition, students who choose to participate in sports have a lesser expectation of privacy due to such factors as public locker rooms (communal undress), higher degree of regulation (GPA requirements), physical rules of conduct, dress code, and practice hours.¹⁰⁹ These factors contributed to student athletes having a lesser expectation of privacy than the regular school population.¹¹⁰

The Court further examined the nature of the privacy interest by analyzing the character of the intrusion.¹¹¹ The Court had already recognized urinalysis as a search, and that urinalysis intruded upon “an excretory function traditionally shielded by great privacy.”¹¹² However, the Court determined that the degree of intrusion in this case was negligible because the male students were only viewed from behind and the female students were in a stall with a monitor listening.¹¹³ This makes the situation more like a public restroom setting.¹¹⁴ Additionally, the Court found that the results of the drug test did not enhance the degree of intrusion because the athletes were uniformly screened for the same drugs and were only tested for drugs.¹¹⁵ Also, the information was only disclosed to those that needed to know, was not released to law enforcement, and was not used by the school for discipline.¹¹⁶ The Court found the privacy intrusion insignificant.¹¹⁷

The second factor the Court analyzed was “the nature and immediacy of the governmental concern.”¹¹⁸ The Court determined that the policy had several valuable outcomes.¹¹⁹ It would deter drug use by school children when the effects of drugs can be most severe.¹²⁰ Also, the policy would avoid disruption of the educational process by drug use.¹²¹ Further, it was narrowly directed at student athletes who risk immediate physical harm from drug use in sports.¹²² Additionally, the Court found an “immediate crisis of greater proportions than existed in *Skinner*” based on the school district’s findings of the state

108. *Id.* at 656.

109. *Id.* at 657.

110. *Id.*

111. *Id.* at 658.

112. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 626 (1989).

113. *Vernonia*, 515 U.S. at 658.

114. *Id.*

115. *Id.*

116. *Id.* The Court was concerned that students had to identify any prescription drugs they were using, but indicated that this intrusion could be easily mitigated by ensuring a confidential process. *Id.* at 659.

117. *Id.* at 660.

118. *Id.*

119. *See id.* at 661-63.

120. *Id.* at 661. The Court quoted several sources that stated that “children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.” *Id.*

121. *Id.* at 662.

122. *Id.*

of rebellion fueled by the role model effect of athletes.¹²³ The Court also stated that there was no requirement that the “least intrusive” search practicable was the only reasonable one.¹²⁴ In fact, the Court noted that in many cases testing based on suspicion of drug use would be worse because teachers would have the added responsibility of detecting drug use.¹²⁵ According to the Court, testing based upon suspicion could lead to three possible outcomes: a “badge of shame” for the targeted student, teachers focusing on troublesome students, and expenses related to defending lawsuits.¹²⁶ For all these reasons, the United States Supreme Court found the policy of testing student athletes for drugs constitutional under the Fourth Amendment.¹²⁷

After several cases that expanded the reach of the special needs doctrine, the Court finally decided a case that limited its use. In *Chandler v. Miller*,¹²⁸ the Court determined that requiring candidates for state office to take a drug test violated the Fourth Amendment.¹²⁹ The Court held that the special need (incompatibility of drug use and holding high office) was not “sufficiently vital” and therefore did not outweigh the individual’s privacy interest.¹³⁰ The Court stated that the reasons offered by the state¹³¹ did not pose a “concrete danger” sufficient enough to justify a suspicionless test.¹³² The Court further noted that the testing was poorly designed to identify those who use drugs or to deter drug users from seeking election.¹³³

The preceding cases briefly illustrated the various requirements for a constitutional search when an important governmental interest could be shown. The Court initially had a balancing test to allow searches absent warrants based on probable cause, but this test could only be invoked when there was no other logical alternative. The Court then created a category of special need cases that extended this earlier reasoning even further to allow searches of groups of people absent a warrant or probable cause. Eventually, the Court was able to identify a strong enough need for drug detection that a search could

123. *Id.* at 663.

124. *Id.*

125. *Id.* at 664.

126. *Id.* at 663. The Court stated that the most significant element in the case was that the “[p]olicy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.” *Id.* at 665.

127. *Id.* at 664-65.

128. 520 U.S. 305 (1997).

129. *See id.* at 323.

130. *Id.* at 318.

131. *Id.* The State argued that the statute was justified because the “use of illegal drugs draws into question an official’s judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials.” *Id.*

132. *Id.*

133. *Id.* at 319.

be performed without a warrant, probable cause, or individualized suspicion.

IV. ANALYSIS

The issue in *Board of Education of Independent School District Number 92 v. Earls* was whether the school district's Policy of suspicionless drug testing of students who participate in any extracurricular activities violated the students' Fourth Amendment right to be free from unreasonable searches and seizures.¹³⁴

A. Parties' Arguments

The school district argued that schools have a compelling interest in deterring, not just detecting, drug use.¹³⁵ The school district also argued that students already had a diminished expectation of privacy because they submitted themselves to temporary custody and control of their teachers and were required to abide by school rules.¹³⁶ Furthermore, students who participated in extracurricular activities had an even more diminished expectation of privacy because they were subject to more rules and regulations than the general student body.¹³⁷ In addition, the school district contended that the character of the intrusion was less significant than the one in *Vernonia* because both girls and boys were allowed to urinate behind closed stalls.¹³⁸ Finally, the school district proposed that schools should have the flexibility to adopt common sense procedures to deter drugs.¹³⁹ The school district asserted that schools should not be forced to wait until a record factually documenting the drug use problem was developed before initiating a drug testing program.¹⁴⁰

Earls countered that the Court had already determined in *T.L.O.* that a school needs reasonable suspicion to search, unless a particular urgent need, like a drug crisis, was present.¹⁴¹ The drug abuse at Tecumseh was not sufficient enough to justify a search without any individualized suspicion.¹⁴²

Earls also argued that a student athlete's expectation of privacy was lower than a student participating in extracurricular activities for several reasons.¹⁴³ First, students who participated in non-athletic ex-

134. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 2559, 2565 (2002).

135. Brief of Petitioners at 37, *Earls* (No. 01-332).

136. See *id.* at 36.

137. *Id.*

138. *Id.* at 37.

139. See *id.* at 48-49.

140. See *id.* at 47-48.

141. Brief of Respondents at 13, *Earls* (No. 01-332).

142. *Id.* at 16.

143. *Id.* at 18-22.

tracurricular activities had a greater expectation of privacy than athletes because they were not subject to the same requirements as athletes, such as communal undress and physicals.¹⁴⁴ Second, the nature of the intrusion was significant because when students provided urine samples, the teacher listened and closely examined the urine.¹⁴⁵ Once test results were received, Earls asserted that no effective protection against possible release of confidential information existed.¹⁴⁶ Third, Earls argued that there were no safety concerns that amounted to an immediate threat, so no “special need” existed.¹⁴⁷ Finally, Earls argued that the Policy was ineffective regardless because it targeted the students who were the least likely to use drugs, while ignoring those students who were “disengaged and disinterested.”¹⁴⁸

B. *Majority Opinion*

Writing for the majority, Justice Clarence Thomas held that the drug testing was not a violation of students’ Fourth Amendment rights, relying primarily on the *Vernonia* analysis.¹⁴⁹ The Court noted that the Fourth Amendment did not necessarily require individualized suspicion.¹⁵⁰ Further, the Court stated that in the administrative and safety regulation context, a search could be justified when special needs exist.¹⁵¹ The Court reasoned that the school’s custodial and tutelary responsibility for school children changed the reasonableness inquiry so that individualized suspicion was not a prerequisite for a search.¹⁵²

To analyze the reasonableness of the search, the Court first looked at the nature of the privacy interest impaired.¹⁵³ The Court determined that students’ privacy interests were already impaired in the school setting because of their required submission to vaccinations and physical exams.¹⁵⁴ Also, the Court stated that the lower expectation of privacy that the students in *Vernonia* had was not based solely on them being athletes.¹⁵⁵ Instead, the lower expectation of privacy focused more on the school’s “custodial responsibility and authority.”¹⁵⁶ The Court reasoned that extracurricular activities involved a

144. *Id.* at 20.

145. *Id.* at 23. Earls also argued that the nature of the intrusion was significant because other students knew that testing was occurring. *Id.*

146. *Id.* at 24.

147. *Id.* at 27.

148. *Id.* at 44.

149. *See Earls*, 122 S. Ct. at 2565.

150. *Id.* at 2564 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

151. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)).

152. *Id.* at 2565 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

153. *Id.*

154. *Id.* (citing *Vernonia*, 515 U.S. at 656).

155. *Id.*

156. *Id.*

lesser degree of privacy because students could be subject to off-campus travel, communal undress, and additional rules that did not apply to the student body as a whole.¹⁵⁷ The Court determined that students participating in extracurricular activities had a limited expectation of privacy.¹⁵⁸

The Court looked next at the character of the intrusion and determined that it was a minimal invasion of students' privacy.¹⁵⁹ The Court reasoned that the samples were produced in a regular restroom setting, that test results were confidential and only released on a "need to know" basis, and that the student was not disciplined because of the test results.¹⁶⁰

The Court noted that the government had a very high interest in preventing drug use among students, and the school had provided evidence of drug use among students.¹⁶¹ The Court stated that the drug use problem among the nation's youth had only grown worse since the *Vernonia* decision.¹⁶² The Court explained that evidence of drug use was not always required to make a testing program valid, but "some showing does 'shore up an assertion of special need for a suspicionless general search program.'" ¹⁶³ Furthermore, the Court noted that *Von Raab* allowed testing of custom officials even though there was no record of drug use.¹⁶⁴ It reasoned that waiting for a significant drug problem before using a preventative drug-testing program did not make sense.¹⁶⁵ The Court determined that the Policy enacted was an effective way of dealing with the drug use problem.¹⁶⁶

Further, the Court contended that safety did factor into the special needs analysis, and the "safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike."¹⁶⁷ The Court rejected the argument that individualized suspicion was required, stating that a search did not have to be the least intrusive one possible to be reasonable under the Fourth Amendment.¹⁶⁸ Furthermore, it theorized that testing based on individualized suspicion could lead to additional work for teachers, targeting of certain unpopular students, and lawsuits.¹⁶⁹ The Court opined that

157. *Id.* at 2566.

158. *Id.*

159. *Id.* at 2567.

160. *Id.* at 2566.

161. *Id.* at 2567.

162. *Id.* The Court stated that the "war against drugs" was a pressing concern in every school. *Id.*

163. *Id.* at 2567-68 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

164. *Id.* at 2568.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 2568.

169. *Id.*

the trial court in *Vernonia* might have allowed the testing because the athletes were identified as leaders of the drug problem, but this finding was not essential to that holding.¹⁷⁰

C. *Dissenting Opinion*

Justices John Paul Stevens, Sandra Day O'Connor, and David Souter joined Justice Ruth Bader Ginsburg in her dissent.¹⁷¹ Justice Ginsburg argued that the Policy targeted a group of students the least likely to be at risk for drug use.¹⁷² She further noted that the case was distinguishable from *Vernonia* in many significant ways.¹⁷³ Ginsburg asserted that the safety of athletes was used as justification in *Vernonia* due to the perils of mixing drugs and athletics.¹⁷⁴ In this case, the safety issue was a justification based on the general dangers of drug use for the entire student population.¹⁷⁵

Justice Ginsburg made several additional arguments. She pointed out that non-athletic extracurricular activities do not entail the lowered expectation of privacy that athletics do.¹⁷⁶ Further, Ginsburg noted that the school in this case did not demonstrate the same severe drug abuse problems that the school in *Vernonia* was experiencing.¹⁷⁷ She also contended that extracurricular activities were not really voluntary in the school setting.¹⁷⁸ She supported this by stating that colleges usually required applicants to participate in extracurricular activities, and these activities significantly contributed to a valuable education.¹⁷⁹ Finally, she argued that the Policy would not meet its goal of preventing drug use; instead, 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.”¹⁸⁰

D. *Commentary*

The United States Supreme Court incorrectly held that suspicionless drug testing of students did not violate the Fourth Amendment based on the precedent set by past special need cases. In *T.L.O.*, the Court set out a two-part test to search a student.¹⁸¹ First,

170. *Id.* at 2569.

171. *Id.* at 2571 (Ginsburg, J., dissenting).

172. *Id.* at 2572 (Ginsburg, J., dissenting).

173. *Id.* (Ginsburg, J., dissenting).

174. *See id.* at 2577 (Ginsburg, J., dissenting).

175. *Id.* at 2572 (Ginsburg, J., dissenting).

176. *Id.* at 2574 (Ginsburg, J., dissenting).

177. *Id.* at 2576 (Ginsburg, J., dissenting).

178. *Id.* at 2573 (Ginsburg, J., dissenting).

179. *Id.* (Ginsburg, J., dissenting).

180. *Id.* at 2577 (Ginsburg, J., dissenting).

181. *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985).

there must be reasonable suspicion that the student is violating school rules or the law.¹⁸² Second, the search needs to be limited to the object of the search.¹⁸³ The Court has not overruled *T.L.O.*¹⁸⁴ Instead, in *Earls* the Court applied the *Vernonia* exception that allowed suspicionless searches of students, in addition to testing, based on individualized suspicion.¹⁸⁵ In *Earls*, the Court had no reason to apply the *Vernonia* precedent. Instead, the Court should have recognized that the school already had all the power to search that it needed under *T.L.O.*

The Court should not have allowed suspicionless testing in this context for numerous reasons. First, the *T.L.O.* test has the implicit requirement of individualized suspicion, which helps avoid the dangerous territory of generalized searches.¹⁸⁶ Second, the important governmental interest is satisfied by *T.L.O.* without the diminution of students' rights. There was no additional justification in terms of safety, necessity, or practicability that allowed a suspicionless test. Finally, the *T.L.O.* test more closely resembles the constitutional rights that students are afforded under the First Amendment.

The United States Supreme Court should have followed the precedent used in *T.L.O.* to avoid violating the primary concern of the drafters of the Fourth Amendment: blanket searches of people.¹⁸⁷ Suspicionless searches are generally considered unreasonable within the meaning of the Fourth Amendment.¹⁸⁸ Exceptions to this rule developed in cases where it would be inefficient to require suspicion or the circumstances involved injurious consequences to a large number of people.¹⁸⁹ The standards set forth in *T.L.O.* required that there be reasonable grounds for thinking a student is violating a law or rule before a search occurs.¹⁹⁰ Consequently, there should be some level of individualized suspicion to search. Allowing student searches based on reasonable suspicion is a lower standard than the usual probable cause, but it is definitely better than a suspicionless search because it implicitly requires the one element the framers were most concerned with: individualized suspicion.¹⁹¹

182. *Id.*

183. *Id.*

184. *See Earls*, 122 S. Ct. at 2577 n.4 (Ginsburg, J., dissenting).

185. *See id.* (Ginsburg, J., dissenting).

186. While the Court specifically stated that it was not addressing the subject of suspicionless searches in *T.L.O.*, the test set forth by the Court demanded reasonable suspicion that a student violated school rules before a search could occur. *T.L.O.*, 469 U.S. at 342 n.8.

187. Clancy, *supra* note 35, at 489.

188. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). There is a strong presumption against suspicionless searches, which is supported by the purpose of the Fourth Amendment. Clancy, *supra* note 35, at 489.

189. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 674 (1995) (O'Connor, J., dissenting).

190. *See supra* notes 71-73 and accompanying text.

191. *See Clancy, supra* note 35, at 490.

Furthermore, the governmental need to test students participating in non-athletic extracurricular activities is not important enough to justify suspicionless searches. As Professor Thomas Clancy said, “[t]he initial cases dispensing with individualized suspicion rested upon a powerful conception of necessity.”¹⁹² Due to an inspector’s inability to see inside a building, the Court in *Camara* allowed generalized warrants without any individualized suspicion because it was the only way to ensure compliance with the housing codes.¹⁹³ The important governmental interest of ensuring public safety outweighed the need for individualized suspicion because there was no other reasonable alternative.¹⁹⁴ Also, in *Martinez-Fuerte* a requirement of individualized suspicion was deemed impracticable because the Border Patrol was dealing with a large number of vehicles, so it would be impossible to form individualized suspicion.¹⁹⁵ The Court determined that the stops needed to be done in this manner, and that the stops were necessary considering the government’s interest in protecting its borders.¹⁹⁶ However, this necessity is not present in the school setting.

Students are subject to constant supervision by educators.¹⁹⁷ Therefore, teachers have the opportunity to develop the individualized reasonable suspicion necessary to search.¹⁹⁸ Consequently, a student who is using drugs while at school or school activities will be readily apparent to the teacher and give them the reasonable suspicion necessary to search. This test is effective because it allows teachers to test *any* student reasonably suspected of drug use, not just those in extracurricular activities. Furthermore, drug testing based on reasonable suspicion limits schools to monitoring students when appropriate: at school or school-related functions.

In *Earls*, the Court said that there is no requirement that the least intrusive method be used.¹⁹⁹ However, the *T.L.O.* standard is more than just a less intrusive method. The ramifications of testing under the *T.L.O.* standard will also have a less detrimental impact. The Court has permitted a testing system that provides a barrier to extracurricular activities. While these activities are not part of the curriculum, each still serves a fundamental role in the school system.²⁰⁰ Academic achievement is closely linked to participation in certain ex-

192. *Id.* at 602.

193. *Id.* at 603.

194. *See id.*

195. *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

196. *Id.* at 562.

197. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995).

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

199. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 122 S. Ct. 2559, 2569 (2002).

200. *PARELIUS & PARELIUS*, *supra* note 3, at 134.

tracurricular activities.²⁰¹ Additionally, there is an indication that participation in extracurricular activities helps prevent early school drop out.²⁰² It does not make sense to provide a hurdle to participation in extracurricular activities absent a showing of necessity.

The Court argued that a suspicionless regime would prevent teachers from targeting unpopular students.²⁰³ However, as the dissent notes, the teachers are still allowed to test students based on reasonable suspicion in addition to suspicionless drug testing, so this justification is not applicable.²⁰⁴ There is no need to add to this power to search, especially in light of the importance of extracurricular activities.

Furthermore, there are no critical safety concerns involved to justify a suspicionless test. In *Skinner* and *Vernonia*, there was no suspicion to search, but the Court identified critical safety issues. In *Skinner*, a driving force for the tests was prevention of railroad accidents.²⁰⁵ In *Vernonia*, the Court argued that athletes involved in sports are at high risk for injury if they are abusing drugs.²⁰⁶ This risk coupled with the school's custodial responsibility provided the requisite governmental interest to support the suspicionless regime.²⁰⁷ In *Vernonia*, it is questionable whether the suspicionless drug testing was entirely necessary under the special needs test. However, the Court was at least able to identify justifications, stating that there was "an immediate crisis of greater proportions than existed in *Skinner*."²⁰⁸ In *Earls*, the argument for suspicionless testing was even weaker.

The problem in this case is that the Court dispenses with the safety issues summarily, stating that the deterrence of drugs is a safety issue for *all* students.²⁰⁹ This is a puzzling dismissal since the Court had given safety much more weight in the previous special need cases. The safety of employees and athletes was a primary concern in *Skinner* and *Vernonia*.²¹⁰ Furthermore, in *Chandler*, testing of political candidates was struck down because the Court could not identify a "concrete danger" to justify the search.²¹¹ But, in *Earls*, the Court just proclaims that drug use poses health risks for all children.²¹² The Court seems to be arguing that the general risks of drug use by chil-

201. Joseph L. Mahoney and Robert B. Cairns, *Do Extracurricular Activities Protect Against Early School Dropout?*, 33 DEVELOPMENTAL PSYCHOL. 241, 246 (1997).

202. *Id.* at 248.

203. *Earls*, 122 S. Ct. at 2568-69.

204. *Id.* at 2577 n.4 (Ginsburg, J., dissenting).

205. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 630 (1989).

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

207. *Id.* at 655.

208. *Id.* at 663.

209. *Earls*, 122 S. Ct. at 2568.

210. See *supra* notes 88, 122 and accompanying text.

211. *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

212. *Earls*, 122 S. Ct. at 2568.

dren is a large factor because of the school's custodial responsibility, but this does not justify the use of the suspicionless test. The *T.L.O.* test would still allow the school to test students for drugs while under the school's supervision. The Court has failed to identify why the need is so "special."

In addition, relying on the general proposition that drug use implicates safety issues for all students sets a dangerous precedent.²¹³ The Court has removed a stumbling block for schools that want to test the entire student population. The Court only identified generic issues for testing students in non-athletic extracurricular activities. Few of the safety or privacy interests analyzed are unique to these students, most could be applied to the entire student population. For example, the entire school is subject to a lesser expectation of privacy through vaccinations, physicals, and school regulations. Also, the Court only identified safety risks that affect the entire student population, not just those in non-athletic extracurricular activities. Additionally, the Court has never articulated what privacy interests would outweigh a governmental interest.²¹⁴ Theoretically, schools now have the necessary tool to justify suspicionless testing of the entire student population just by stating the "compelling interest" of keeping schools drug free.²¹⁵

Even more troubling, the Policy will not meet the goals it is designed to – detecting and deterring drug use. As Justice Ginsburg noted in her dissent, this type of policy will have the deleterious effect of preventing students who are the most at risk for drug abuse and addiction from finding an alternative outlet for their time and abilities.²¹⁶ This is significant because a student who gets involved in an extracurricular activity has a better chance of stopping drug use or not using drugs at all.²¹⁷

Since students who participate in extracurricular activities are already at a low risk of using drugs, the Policy will not likely curtail drug use.²¹⁸ Also, the Policy could prompt students who do use drugs to seek those that do not stay in the body long or are not tested for by school officials.²¹⁹ Additionally, the Policy could deter students who

213. *See id.*

214. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 275 (2000).

215. *See generally id.* at 275-79 (explaining that the United States Supreme Court has never identified a privacy interest that would outweigh a governmental interest).

216. Brief of Amici Curiae American Academy of Pediatrics et al. at 20, *Earls* (No. 01-332).

217. Indiana Prevention Resource Center, *Suspicionless Drug Testing in Schools*, <http://www.drugs.Indiana.edu/issues/suspicionless.html> (last visited Jan. 3, 2003). "Participation in school athletics and extracurricular activities is a protective factor that reduces the likelihood that a youth will use alcohol, tobacco, and other drugs." *Id.*

218. Robert Taylor, *Compensating Behavior and the Drug Testing of High School Athletes*, 15 CATO J. 351, 362 (1997).

219. Brief of Amici Curiae American Academy of Pediatrics et al. at 24, *Earls* (No. 01-332).

do abuse drugs from participating in the activities, but not from the drug abuse. One study has suggested that the testing of athletes for drug use will actually lead to an increase in overall drug use because the athletes who “quit the team” will actually start using drugs more frequently.²²⁰ This reasoning would also extend to students in other extracurricular activities. A student who opts out of participation because of the invasive drug test will have more free time, especially after school. This is the time that students are most at risk for drug use.²²¹

Finally, the *T.L.O.* standard makes more sense intuitively because it fits within the public schools function of educating children about the Constitution.²²² “Constitutional values are conveyed by . . . the rights accorded to students within the walls of the buildings.”²²³ In the context of the First Amendment, the Court has given more deference to a student’s constitutional rights by only limiting them when necessary for the school to operate.²²⁴ The Court recognized that students are “people” under the Constitution, but balanced the rights this status gives them with the important functions of schools.²²⁵ In the context of students’ First Amendment rights, the Court stated that a student has a right to personal expression until it materially interferes with the school setting.²²⁶ This standard allows students a substantial amount of freedom that can only be restricted when it disrupts the school’s ability to do its statutorily required duty of educating.²²⁷ The Court does not trample on students’ rights in the First Amendment arena.²²⁸ Instead, it balances those rights with the school setting to give students the most constitutional protection possible.

The Court used the same consideration in *T.L.O.* when it balanced a student’s privacy interest with the need for an administrator

220. Taylor, *supra* note 218, at 362.

221. Brief of Amici Curiae American Academy of Pediatrics et al. at 24, *Earls* (No. 01-332).

222. See Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 AKRON L. REV. 1, 18 (2000).

223. *Id.*

224. In 1968, the United States Supreme Court decided that students had constitutional rights in schools. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1968). The Court held that a student had a right to express an opinion that was protected under the First Amendment unless the expression would substantially interfere with the educational setting or the rights of other students. *Id.* at 508. In the 1980s, this general mandate was slightly limited when a student gave a sexually explicit speech at a school-sponsored assembly. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-78 (1986). The Court held that vulgar or offensive speech could be prohibited because of the school’s duty to teach students socially appropriate behavior. *Id.* at 687. The next year, the Court decided that educators could exercise greater control over a school-sponsored publication because the views of the publication could be attributed to the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1987).

225. See cases cited *supra* note 224.

226. *Tinker*, 393 U.S. at 513.

227. Jay Worona, *Student Speech Rights: The True Meaning of Hazelwood School District v. Kuhlmeier*, in CHILD, PARENT, AND STATE 400 (S. Randall Humm et al. eds., 1994).

228. See *id.*

to search.²²⁹ The student's constitutional rights were limited, but only to the extent necessary to allow the school to carry out its custodial function.²³⁰ As Nancy Walker wrote, "*T.L.O.* proves an exemplar case of the 'scaled-down version' of the Bill of Rights for children."²³¹ Unfortunately, the *T.L.O.* standard has been supplemented with a drug test that does not balance students' privacy interests in the same manner as is done with their right to expression.

V. CONCLUSION

It has been said that "the principles we develop and apply to evaluate the constitutionality of actions within the educational context will continue to have striking effects on what the Constitution means in all aspects of our lives. It will behoove us to do things well."²³² The United States Supreme Court failed to apply the correct principles in this case. It allowed a vague governmental interest to outweigh individual students' right to privacy. A suspicionless drug testing policy sends the message to children that they are not trusted,²³³ instead of instilling the values of responsibility and independent decision making that are fundamental to their transition into adulthood.²³⁴ It is not necessary to stifle the educational setting in this way when there is an alternative search allowed. Furthermore, it is disturbing because it makes citizens, not just students, question if the Court will ever find a governmental need in the "war on drugs" that is outweighed by an individual's privacy.

229. See *supra* notes 69-73 and accompanying text.

230. See *supra* notes 69-73 and accompanying text.

231. WALKER, *supra* note 2, at 200-01.

232. Reilly, *supra* note 222, at 19.

233. Editorial, *Tecumseh Tuba Tragedy*, ST. LOUIS POST-DISPATCH, July 1, 2002, at B6.

234. See generally WALKER, *supra* note 2, at 50-66 (discussing giving children more freedom to make important decisions regarding health, safety, and education).

