THE “SPECIAL NEEDS” DOCTRINE AND THE EROSION OF FOURTH AMENDMENT RIGHTS IN THE PUBLIC SCHOOL SYSTEM

by

ERIC MEDWED

(Under the Direction of C. Thomas Holmes)

ABSTRACT

The Fourth Amendment prior to 1985 had never been applied to educational institutions. In *New Jersey v. T.L.O.* (1985), the student search in question was founded on the idea of individualized suspicion. Between the years of 1989-2002, the High Court heard five cases dealing with searches and seizures, specifically about the question of drug testing. Using precedent established in *T.L.O.* (1985), the Supreme Court assumed a position that a “special need” existed in various industries, including the school system. These “special needs” have eroded our Fourth Amendment freedoms against unnecessary searches and seizures. Based upon the current interpretation of the Fourth Amendment in a school setting, any student who participates in any extracurricular activity may be drug-tested (*Board of Education of Independent School District No. 92 of Pottawatomie City v. Earls*, 2002). The Supreme Court has effectively forced students to submit to a drug test, or not participate in extracurricular activities. Currently, the courts weigh the governmental interest against an individual’s privacy concerns to determine if a search is

justified. The 2002 ruling in *Earls* has allowed the courts and the government to further reduce Fourth Amendment protections by claiming that either a "special need" exists or an increased governmental concern is present.

INDEX WORDS: Fourth Amendment, search and seizure, drug-testing, special needs, urinalysis, schools, and extracurricular activities

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CHAPTER 1

INTRODUCTION

Problem Statement

> 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. (United States Constitution, 1791)

The Fourth Amendment contains two main provisions. The first provision provides a general right to be free from "unreasonable searches and seizures." The second provision, known as the warrant clause, provides the methodology for conducting searches that are "reasonable" and therefore deemed constitutional. A general search, based on the language of the Fourth Amendment, occurs when a government agent somehow examines something protected by a person's "reasonable expectation of privacy" (Hughes, 2005).

Before 1985, the courts had never determined how, and if, the Fourth Amendment should apply to schools and students. In *New Jersey v. T.L.O.* (1985), the student search in question was founded on the idea of individualized suspicion. Based upon the current interpretation of the Fourth Amendment in a school setting, any student who participates in any extracurricular activity may be drug-tested (*Board of Education of Independent*

School District No. 92 of Pottawatomie City v. Earls, 2002). The Supreme Court has effectively forced students to submit to a drug test, or not participate in extracurricular activities. Currently, the courts weigh the governmental interest against an individual's privacy concerns to determine if a search is justified. The 2002 ruling in *Earls* has allowed the courts and the government to further reduce Fourth Amendment protections by claiming that either a "special need" exists or an increased governmental concern is present.

The courts have examined four key issues over the years in determining the role of the Amendment within the public school system. The first issue is weighing the reasonableness of a search against the safety of the rest of the school population. The second issue deals with whether a student who is a minor is entitled to the protection of the Fourth Amendment or should they be treated as adults? The third issue is the role of the school officials: are school officials synonymous with government officials? Historically, the Fourth Amendment applies only when a government official acting as a state official conducts the search. Finally, the courts have examined the degree of suspicion needed to conduct a search within a school setting (LaMorte, 2002).

Including *T.L.O.*, the Supreme Court examined the question of individualized suspicion and special needs in six separate cases. Because the Fourth Amendment protects citizens against unreasonable searches, the Court had to wrestle with whether or not suspicionless testing is in fact "reasonable." This dissertation also examined the historical significance of the Fourth Amendment within the public schools, specifically, students' privacy rights. In addition to students' rights, a comparison of the Supreme

Court's decisions within the six cases revealed an undeniable trend: the need for individualized suspicion is no longer necessary to be considered "reasonable."

Research Questions

(1) What is the relevant legal history of Fourth Amendment case law in the public schools?

(2) What is the current status of Fourth Amendment case law in the public schools?

Procedures

This study employed legal research methodology. Research included an extensive search for relevant sources of law, including federal constitutional provisions, case law, scholarly commentary and other relevant documents using the "Lexis-Nexis" and "Findlaw" databases. The resulting documents were reviewed, analyzed, and synthesized to construct an accurate historical perspective on the law concerning the Fourth Amendment and student rights within the public school system, and a current composite perspective on the current legal status of the question of individualized suspicion and students' rights within the public school system.

The literature review in Chapter 2 is arranged in chronological order, to provide the reader with a perspective on the historical development of the law concerning the issue of the Fourth Amendment and student's rights in the public schools. Chapter 2 begins the historical significance of the Fourth Amendment in society; Chapter 2 then focuses on the Amendment and its role within the public school system, beginning with

New Jersey v. T.L.O. Chapter 2 continues by analyzing two cases that did not involve the school system, but do in fact help set precedent for the question of individualized suspicion and "special needs." The cases are *Skinner v. Railway Labor Executives Association* (1989) and *Treasury Employees v. Von Raab* (1989). Based on the ideas held in *T.L.O.*, *Skinner*, and *Von Raab*, the Supreme Court ruled on the question of drug testing student athletes in *Vernonia School District 47J v. Acton* (1995). In *Chandler et al v. Miller, Governor of Georgia, et al* (1997), the High Court examined the impact of the "special needs" doctrine as it relates to politicians seeking high office. For the last case, *Board of Education of Independent School District No. 92 of Pottawatomie City v. Earls* (2002), the Supreme Court held drug testing any student who participates in an extracurricular activity as constitutional based on the logic set forth in *Skinner* and *Von Raab*.

Chapter 3 analyzes the evolution of the "special needs" doctrine. This chapter summarizes pertinent dissenting opinions of both circuit courts and the United States Supreme Court. The focus of Chapter 3 is the dissenting opinions of both *Chandler v. Miller* and *Board of Education of Independent School District No. 92 of Pottawatomie City v. Earls*. Chapter 4 describes the findings and conclusions drawn from this study.

Limitations of the Study

The findings of this study are limited to the constitutionality of the Fourth Amendment question of "reasonable" searches. This study specifically examines the issue of "suspicionless" drug testing of students in the public schools. This study did not attempt to examine the drug testing of faculty or other school officials in the same

context as students, nor did it attempt to examine whether there is an actual *need* for drug testing within the schools, i.e. a drug epidemic in the public school system. Finally, this study does not attempt to prove what is morally or ethically "right" by today's standards, rather the study is meant to illustrate how the Court has ruled in the past and where the Court appears to be heading.

Chapter II

A REVIEW OF THE LITERATURE CONCERNING FOURTH AMENDMENT RIGHTS AND THE PUBLIC SCHOOLS

Origins of the Fourth Amendment

> The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter, the rain may enter--but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenement (Pitt, 1763).

Arguably, one of our society's most important rights is the right to privacy. The derivation of our Fourth Amendment is deeply rooted in English common law as illustrated in the 1604 case of *Semayne v. Gresham.* The proposition, "Every man's house is his castle," reflects the idea that the individual is safe from the King's unwarranted search within his own dwelling (K.B. 1604). *Semayne* does recognize the importance of protecting one's personal effects from a government entity, but at the same time, stresses the fact that with just cause, government officials can and do have proper authority to follow the prescribed procedures invoking a search of a private residence.

The prosecution of John Wilkes and his supporters is one of the most well known examples of a government practicing an unreasonable search. According to Steinberg

(2003), Wilkes wrote an anonymous letter condemning the British government describing them as “the tools of corruption and despotism.” The Secretary of State issued a general warrant in attempts of discovering who the author was, which led to British officers searching at least five houses and arresting at least 49 people. In retaliation, Wilkes and his supporters responded with false imprisonment lawsuits of their own. The English courts ruled that the searches and the general warrant violated British common law and ordered the officers to pay damages to Wilkes and the other search victims. The British judges sided with Wilkes and his supporters expressing that the search was illegal since the officers had physically entered the houses of Wilkes and his supporters without an adequate warrant. Rather than seditious libel, as in the case of Wilkes, the practice of smuggling goods into the American colonies led the Royal government to severely curtail colonists’ privacy rights with the use of writs of assistance in the early 1750s (*History and Scope of the Amendment*, 2005).

Writs of assistance are the equivalent to a British general warrant. The writs allowed customs officials to search for non-specific contraband in not only warehouses and shops, but also private homes. In 1761, James Otis, a prominent Boston attorney, filed a petition with the Superior Court in Boston to challenge the writs of assistance. Otis argued the writs violated common law principles. Interestingly, Otis’ argument did not focus on the officials’ searches of shops and warehouses, only on private residences. Even though the Court upheld the use of the writs, Otis’ argument gained popularity among the colonists (Steinberg, 2003).

With the heroism of John Wilkes in England and James Otis’ arguments in the Massachusetts Superior Court, the American colonists yearned for justice against the use

of general warrants. The first American law to condemn the usage of general warrants is in Article X of the Virginia Declaration of Rights of 1776, which states:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted. (Avalon Project, 1996)

Under Article X, a warrant is inadequate if it contains either of these two deficiencies, (1) the warrant fails to specify the places to be searched or persons to be seized, and (2) the warrant lacks adequate evidence for the search or seizure (Steinberg, 2003).

Fourth Amendment Analysis and the Public Schools

The heart of the Fourth Amendment contains two provisions: (1) citizens are protected against unreasonable searches; (2) a search may only take place upon having a warrant (1791). Zane (1987) purports two theories in Supreme Court opinions: (1) the warrant clause elucidates the reasonableness clause, and (2) each clause has independent significance. The first theory, known as the "conventional" interpretation, holds that a search is unreasonable per se if not conducted pursuant to a warrant, unless it comes under a warrant clause exception (*Carroll v. United States*, 1925). The second, called the "reasonableness" theory, maintains that a warrantless search is constitutional if it is reasonable. Although the High Court originally favored the conventional interpretation, it has recently focused on the independent significance of the reasonableness clause in determining the scope of legally permissible searches under the Fourth Amendment (Zane, 1987).

Proponents of the reasonableness theory believe that the Fourth Amendment's two clauses operate independently. In *United States v. Edwards* (1974), the Court debated the question of whether a search of a detained prisoner's clothes was reasonable against the reasonableness of obtaining a warrant after much time had already elapsed between the arrest and the subsequent search. Justice Rehnquist, in his dissenting opinion in *Robbins v. California* (1981), said, "…nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants." Based on this logic, a search may be reasonable, and therefore constitutional, even if it is conducted without a warrant.

Another version of the reasonableness standard weighs the state interest in conducting a search against the magnitude of intrusion upon an individual's privacy. These competing interests are balanced on a sliding scale: as the intrusiveness of a search increases, the state interest in carrying out the search also must increase if it is to pass constitutional scrutiny (Zane, 1987). The first case in which the Supreme Court used this balancing approach weighed a state's interest in conducting an administrative housing search against the privacy interests of an individual (*Camara v. Municipal Court*, 1967).

Camara was charged with violating the San Francisco housing code for refusing to allow city housing inspectors to examine his ground-floor apartment. The inspector, while conducting an annual inspection, sought to enter Camara's apartment after the building manager told him that Camara was violating the building's occupancy permit. Alleging that the inspection ordinance was unconstitutional for failure to require a warrant for inspections, Camara sued. Camara attempted to use the conventional analysis in arguing that search warrants should be issued only when the inspector possesses probable cause to believe that a violation has occurred. The Court held that the search

was reasonable due to the long history of judicial and public acceptance of such inspections, the need to prevent dangerous conditions, the absence of a practical alternative, and the minimal intrusion of privacy by inspections, which was neither personal in nature nor aimed at discovering evidence of crime (*Camara*, 1967). In his dissenting opinion in *Donovan v. Dewey* (1981), Justice Stevens called the *Camara* holding, "a fundamental misreading of the Fourth Amendment," due to the idea that the facts of *Camara* support the probable cause standard.

In *Terry v. Ohio* (1968), the High Court created an exception to the warrant and probable cause requirements, allowing the warrantless search of a person for criminal evidence based upon "reasonable suspicion," a standard that is lower than probable cause. In an 8-to-1 decision, the Court held that the search undertaken by the officer was reasonable under the Fourth Amendment and that the weapons seized could be introduced into evidence against Terry. Attempting to focus narrowly on the facts of this particular case, the Court found that the officer acted on more than a "hunch" and that "a reasonably prudent man would have been warranted in believing Terry was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." The Court in *Terry* held that a police officer's brief "stop and frisk," based on suspicion that amounted to less than probable cause, was reasonable because the interests of the government and society outweighed the intrusion into individual privacy. The government's interests were those of effective crime prevention and detection and the safety of the police officer. Weighed against these governmental interests, the protective search for weapons was only a brief intrusion upon the sanctity of the person. The Court held that, "our evaluation of the proper balance that has to be struck in this type of case

leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search" (*Terry* at 27).

In *Camara v. Municipal Court*, the Court articulated that the Fourth Amendment was designed, "to safeguard the privacy and security of private individuals against arbitrary invasions by government officials" by protecting reasonable expectations of privacy. In the majority opinion from *Burdeau v. McDowell* (1921), Justice Day wrote that the Fourth Amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies" (at 467).

School Searches Prior to T.L.O.

Until 1967, courts generally did not recognize that students possessed constitutional rights. In *Tinker v. Des Moines Independent Community School District* (1969), the Court held that, "students [do not]…shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Tinker Court determined that a school regulation prohibiting the wearing of black armbands violated students' First Amendment rights because the school failed to show how such activity would disrupt the educational process (Zane, 1987). The Court argued that, "students in school as well as out of school are 'persons' under [the] Constitution" and therefore, deserves its full protection (*Tinker,* 1969). Zane (1987) argues that prior to *T.L.O.*, the state courts did limit the Fourth Amendments applicability to school searches using the following two methods: (1) by classifying the school as a private actor, and (2) by reducing the level of suspicion needed to conduct a school search.

First, prior to *T.L.O.*, courts ruled that school officials act in a private capacity and therefore, the Fourth Amendment would not apply. In so holding, many of these courts relied upon the *in loco parentis* doctrine, which says that a school official stands in place of the student's parent and holds the same parent rights, duties, and responsibilities while the student is at school (Zane, 1987). For example, the California Court of Appeals held that a public school official's search of a locker constituted private action. The court reasoned that the school official's *in loco parentis* status enabled them to use moderate force to enforce school rules. The court stated that the search's primary purpose was to "further an educational objective by securing evidence of student misconduct rather than to obtain evidence of criminal wrongdoing" (*In re Donaldson*, 1969).

The second method courts used to limit Fourth Amendment rights was to reduce the level of suspicion needed to conduct a search. *People v. Jackson* (1971) found that a school "Coordinator of Discipline" was a government agent, but upheld a student search for drugs several blocks away from the school based on "reasonable suspicion." The court also stated that, "the *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept…, that any action, including a search, taken…upon reasonable suspicion should be accepted as necessary and reasonable" (Id., 1971) (citing *Terry v. Ohio).*. In *Tarter v. Raybuck* (1984), the Sixth Circuit held that a student search did not violate the Fourth Amendment because the official had reasonable cause to believe the search was necessary to maintain school discipline and/or to maintain an environment conducive to education. The court noted that not only must the official have a reasonable ground for instituting the search, but also the search itself must be reasonable (Id., 1984). In *State v. Young* (1975), the Georgia Supreme Court held that

even though the school official was a government agent, the same school official might constitutionally search a student in the "good faith" exercise of his duties. The school official in this case observed the student in question "acting suspiciously."

New Jersey v. T.L.O., (1985)

T.L.O. and another student were caught smoking in the school lavatory. Since this was a violation of school policy, the two students were taken to the assistant principal's office where T.L.O.'s friend admitted to smoking. T.L.O. denied that she was smoking and the assistant principal demanded to see her purse on the "hunch" that T.L.O. possessed cigarettes. The assistant principal did find the cigarettes and upon removal from the purse, he found rolling papers. The assistant principal would later argue that possession of rolling papers is a clear indication of marijuana use and continued to search T.L.O.'s purse. This search revealed marijuana, a pipe, a large amount of cash, and a detailed list of people who owed T.L.O. money (*New Jersey v. T.L.O.,* 1985).

T.L.O did confess to selling marijuana at school, but argued that the search and subsequent confession violated her Fourth Amendment rights. The Juvenile Court concluded that the Fourth Amendment did apply to searches carried out by school officials by explaining,

> …a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies. State ex rel. T.L.O., 178 N.J. Super. 329, 428 A. 2d 1327 (1980)

T.L.O.'s argument against the search relies on two premises. The first is the fact that possessing cigarettes was not against school policy at the time; smoking the cigarettes in

the lavatory was against the policies (which T.L.O. denied). Second, the opinion that the assistant principal's search should have ended when he discovered the cigarettes, since that was the objective of the original search. Upon finding the cigarettes, the assistant principal determined that T.L.O. was no longer credible in her denial of guilt. He therefore continued the search and found the rolling papers, marijuana, pipe, and list of names of people who owed money to T.L.O. (Id., 1980)

The Supreme Court was able to decide two main issues with its holding in *T.L.O.* (1985). The first is whether the Fourth Amendment applies to school officials, and second; if so, what degree of suspicion a school official needs before he may conduct a search. The High Court held that the Fourth Amendment does in fact apply to searches by public school officials. The Court based this reasoning on the idea that the Fourth Amendment applies to states through the Fourteenth Amendment and that public school officials are actors under the Fourteenth Amendment (*T.L.O.,* 1985) (Brennan, J., concurring and dissenting). The Supreme Court rejected the New Jersey Supreme Court's idea that the Fourth Amendment only applies to law enforcement officers. The Amendment applies to the activities of both civil and criminal authorities because it would be, "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior" (*T.L.O.,* 1985) (quoting *Camara v. Municipal Court,* 1967).

The ultimate question is the balance between a student's legitimate expectations of privacy versus the school's equally legitimate need to maintain an environment in which learning can take place. Based on this balancing test, the Court determined that in order to be considered reasonable, the search must be justified at its inception and related

in scope to the circumstances that justified the search in the first place. The search is justified at its inception where there are reasonable grounds that the search will turn up evidence of a violation. The search will be related in scope when the search methods are reasonably related to the objectives of the search and not excessively intrusive (*New Jersey v. T.L.O.,* 1985).

Rather than examining whether or not the search violated the exclusionary rule, which was the original intent of granting certiorari (Id., 1985), the Court determined that the role of school officials conducting the search was the more important legal issue. Teachers and school officials play dual roles in educating students. One role provides an education and discipline when needed; the other role is to serve *in loco parentis* (Id., 1985).

Justice Blackmun, in concurring with the majority, stressed the "special need" of breaking away from the Framer's intent of the Fourth Amendment. Schools are a place for learning. A single teacher is required to maintain order over a large amount of students, and those students may be at times, hard to control. Because drug use and possession of weapons is becoming more prevalent among young people (*T.L.O.*., 1985) (Blackmun, J., concurring), an immediate response is required to encourage learning and to protect students and faculty. Teachers do not have the training, nor do they have the experience necessary to determine probable cause. The time needed to determine probable cause is better spent educating the students (Id., 1985). Justice Brennen, with whom Justice Marshall concurs, is in direct contradiction with Justice Blackmun's "special need" doctrine to determine the legality of school searches.

Justice Brennan argues that determining "reasonableness" in school searches is clearly different from the test used to determine "probable cause" found in the text of the Fourth Amendment. Brennan contends that this change in interpretation of the Fourth Amendment ignores the standards from the previous Fourth Amendment cases because this new doctrine has no precedent and the "balancing test" that has been developed is not fair in its application. Rather than using a "balancing test," Justice Brennan proposed three principles for future Fourth Amendment case law. First, warrantless searches are per se unreasonable, subject to only a few exceptions. Second, full-scale searches are reasonable only on a showing of probable cause that a crime has been committed and that the evidence will be found in the place to be searched. Third, searches that are substantially less intrusive than full-scale searches may be justifiable in accordance with a balancing test (*T.L.O.*, 1985) (Brennan, J., concurring and dissenting).

Justice Marshall is not against legitimizing a "test" to determine probable cause or "reasonableness." The problem with the majority's conclusion is the ambiguity of the "test." School officials will be uncertain with their authority and will encourage more litigation. All students and all situations are different; therefore, there cannot be one standard "test." Marshall reasons that police officers may at times conduct a search on something less than probable cause; teachers should have the same flexibility in conducting searches (*T.L.O.*, 1985) (Marshall, J., concurring and dissenting). Justice Stevens' dissention examines the possible implications for students based on the ambiguous rules to invite a search.

Justice Stevens believes that because T.L.O.'s actions were legal and that those actions did not pose a threat to school discipline, the search did violate her Fourth

Amendment rights. As for the legal issues of the case, Stevens contends that the Court is choosing to ignore the actual question: whether the Fourth Amendment's exclusionary rule applies to school officials and teachers in school. However, because the Court chose to address the whole Fourth Amendment, Stevens' dissent focuses on the fear that the ruling would allow school officials to conduct searches dealing with the most trivial matters. The Court's standard for deciding whether a search is justified "at its inception" implies that all violations of school rules are equal in weight. The ambiguity of the test may lead a school official to search dress code violators with the same fervor of a suspected gang member. In order to alleviate this concern, a possible solution is the standard for conducting a search only apply when there is a danger that a student may pose an actual threat or seriously disrupt the school environment (*T.L.O.*, 1985) (Stevens, J., concurring and dissenting).

T.L.O. Analysis

Zane (1987) argues that constitutional analysis of any search begins with the assumption of full Fourth Amendment protection. The strict requirements of the warrant clause and of probable cause should always apply, subject to only specifically established, narrow exceptions. The T.L.O. Court stripped the Fourth Amendment of much of its effectiveness by allowing an increased number of searches constitutionally permissible.

The Supreme Court did not apply the Fourth Amendment to the schools in its strictest form. From *Terry* (1968), the Court established "reasonable suspicion," defined as, "specific and articulable facts which, taken together with rational inferences from

those facts, reasonably warrant [a limited search]." *T.L.O.* determined that a school official needs neither a warrant nor probable cause to search a student- "the legality of a search of a student should depend simply on reasonableness, under all the circumstances, of the search." If a particular student raises a teacher's suspicion, the test for reasonableness of a search is the two-pronged inquiry developed in *Terry*: "[F]irst, one must consider 'whether the…action was justified at its inception,'…second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place"' (*T.L.O.*, 1985) (quoting *Terry v. Ohio,* 1968). Using this two-pronged test, the Court concluded that the search of T.L.O. was constitutional. The initial search was justified because possession of cigarettes related to the accusation of smoking: his "common-sense" conclusion that she might possess cigarettes justified his search of T.L.O.'s purse (*T.L.O.*, 1985) (citing *United States v. Cortez,* 1981). The Court further found that the discovery of rolling papers gave rise to reasonable suspicion that T.L.O. was carrying marijuana, thus justifying the further search of the purse that revealed evidence of drug dealing. Based on probable cause standards, Justice Brennan argued that the assistant principal's search actually violated T.L.O.'s Fourth Amendment rights. The assistant principal's search was complete after finding the cigarettes and the assumption of possession of marijuana was based solely on his illegal discovery of rolling papers (*T.L.O.*, 1985) (Brennan, J., concurring and dissenting).

The "Reasonableness" Approach

Justice Brennan argued that the T.L.O. Court skewed the balance in favor of the state. The Court weighed the state's need for efficient law enforcement rather than the costs of requiring probable cause. It is the state's responsibility to protect the privacy and security of its private citizens. Therefore, the Court should not have balanced the rights of the state against the rights of private citizens, but rather it should have balanced the different constitutional methods of carrying out the state's varied responsibilities against each other (Id., 1985). Justice Stevens, in his dissenting opinion, argued that even though the Court did recognize students' privacy rights, its approach might ultimately destroy those rights. Searches based on reasonable suspicion of the violation of the most trivial school rules may now pass constitutional muster. As long as a court determines the search reasonable under the circumstances, a school official may conduct a full-scale search based on a student's attire.

Zane (1987) argues that the T.L.O. Court established an unnecessary school search exception to Fourth Amendment analysis. Zane proposes a new two-pronged test to determine whether a search can be considered warrantless and reasonable: (1) whether the intrusion was the only practical method of achieving an important law enforcement interest beyond gathering evidence of criminal conduct, and (2) whether the proposed intrusion belongs in a specific class of search definable as limited in scope. This test, according to Zane, would follow precedence held in cases prior to *T.L.O.* adopting a reasonableness approach.

Drug Testing and Non-School Related Case Law

Skinner v. Railway Labor Executives' Association and *National Treasury Employees Union v. Von Raab* established a balancing test for determining whether a drug-testing program is reasonable under the Fourth Amendment (Lundquist, 1992). This balancing test weighs the government's interest in implementing the drug-testing program against the employees' privacy interests. Although the High Court has established this balancing test, Lundquist found many inconsistencies among the lower courts with virtually identical issues (Id., 1992). For example, a Florida district court held mandatory drug testing of fire fighters unconstitutional in *Beattie v. City of Petersburg Beach* (1990), but district courts in Michigan and California upheld the testing programs for the same employment positions in *Plane v. United States* (1992) and *American Federation of Government Employees, Local 1533 v. Cheney* (1991), respectively.

Lundquist (1992) cites four methods courts have used in determining reasonableness. First, courts weigh some factors consistently, which include government interests in safety and national security, the actual procedure of the drug-test, and the history of drug use in the specific employment field. Second, some factors appear to be weighed inconsistently, but the weights of those factors are consistent, which include government interest in deterrence, integrity, office efficiency, employees' background check/mental or physical exam/constructive knowledge, and the on-duty/off-duty distinction. Third, the weights of some factors differ with judges' individual opinions as to the significance of each, which include the amount or nature of the harm the government is seeking to prevent and whether the employee works in a traditional office environment or is under supervision. Finally, the courts sometimes manipulate the

weights of different factors to achieve the desired result. Factors in this category include the privacy interest in urinalysis, the employees' background check/mental or physical exam/constructive knowledge, and which less intrusive means were available at the time of testing.

Pre-*Skinner* and *Von Raab*

Before *Skinner* and *Von Raab,* the courts did not use balancing as a method of analysis, but instead employed an analysis that examined absolute differences in the kind of interests involved. A court would be concerned with the degree of interest only when balancing competing interests to determine constitutional validity (Aleinikoff, 1987). For example, a statute in question was either within the realm of police power of the state or solely in the hands of Congress under the Commerce Clause. The language of the Fourth Amendment expresses specific standards to be met and does not mention any interests that courts may balance to determine the validity of an action. In interpreting the Fourth Amendment's prohibition against unreasonable searches and seizures, the Supreme Court has held that, generally, the Fourth Amendment requires searches and seizures to be supported by probable cause and a warrant issued by a magistrate (*McDonald v. United States,* 1948). There are established steps for determining whether a search has taken place in violation of the Fourth Amendment. First, it must be determined whether a search, within the meaning of the Fourth Amendment, has occurred. The generally recognized test for making such a determination is whether the individual has "exhibited an actual (subjective) expectation of privacy and …that the expectation be one that society is prepared to recognize as "reasonable" (*Katz v. United States,* 1967). Second, it must be determined whether a valid warrant has been issued or whether the search falls

into a well-recognized exception to the warrant requirement (Id., 1967). Third, the search must be evaluated to see whether it should be based on probable cause or may validly be based on a lesser suspicion because it was minimally intrusive (*Terry v. Ohio,* 1968). Finally, the search must have been conducted in a reasonable manner. The goal of these requirements is to preserve adequately an individual's right to be free from intrusive state actions, while permitting law enforcement officials to conduct reasonable searches and seizures (*Winston v. Lee*, 1985) (Lewis, 1989).

In *Carroll v. United States* (1925), the Supreme Court identified exceptions to the warrant and probable cause requirements, stating that the "Fourth Amendment does not denounce all searches and seizures, but only those that are unreasonable." In *Carroll*, the Court held that warrantless searches and seizures were reasonable where securing a warrant before stopping a moving car suspected of bootlegging would be impractical. In *Camara v. Municipal Court* (1967), the Court extended the Fourth Amendment to civil searches. In *Camara*, the Court deemed a housing department's routine annual inspection reasonable without a warrant or individual probable cause after the court balanced the need to search against the privacy it entailed (Lundquist, 1992). First, the inspection programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditioners be prevented. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve limited invasion of the urban citizen's privacy (*Camara*, 1967). Aleinikoff (1987) argues that Fourth Amendment protections are weakened by balancing because the inherent dangers of all constitutional balancing tests are present, namely a lack of objectivity and a devaluation of fundamental rights. Thus, the result of balancing

will lead to the evaluation of the degree of intrusiveness of a particular search based upon the subject determination of the judge and no factual evidence. Governmental interests will always outweigh the individual privacy interests when the intrusion is found to be minimal. Rather than courts ruling on individual subjective cases, probable cause requires the existence of a reasonable belief that a search will reveal evidence before a reasonable expectation of privacy is invaded, which is much more difficult to satisfy (Lewis, 1989).

In *Terry v. Ohio* (1968), the High Court created an exception to the warrant and probable cause requirements, allowing the warrantless search of a person for criminal evidence based upon "reasonable suspicion," a standard that is lower than probable cause. In an 8-to-1 decision, the Court held that the search undertaken by the officer was reasonable under the Fourth Amendment and that the weapons seized could be introduced into evidence against Terry. Attempting to focus narrowly on the facts of this particular case, the Court found that the officer acted on more than a "hunch" and that "a reasonably prudent man would have been warranted in believing Terry was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." The Court in *Terry* held that a police officer's brief "stop and frisk," based on suspicion that amounted to less than probable cause, was reasonable because the interests of the government and society outweighed the intrusion into individual privacy. The government's interests were those of effective crime prevention and detection and the safety of the police officer. Weighed against these governmental interests, the protective search for weapons was only a brief intrusion upon the sanctity of the person. The Court held that, "our evaluation of the proper balance that has to be struck in this type of case

leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search" (*Terry v. Ohio,* 1968).

"Special Needs"

Beginning in 1987, the Supreme Court recognized noncriminal situations that revealed certain "special needs" that would allow warrantless searches without probable cause. In *O'Conner v. Ortega*, the Court adopted Justice Blackmun's proposed standard to invoke a specific balancing test only when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable" (1987). After finding the existence of a special need for the search or seizure- the interest of the employer in completing the government agency's work in a prompt and efficient manner- the Court in *O'Conner* balanced the government's interest against the privacy expectations of the employee and found the invasion reasonable. This standard was the prevailing law prior to *Skinner* and *Von Raab*, and it is against this background that the Court decided the two cases.

In a 1982 radio address, President Reagan denounced illegal drugs expressing that "drugs are bad and we're going after them" (President's Radio Address to the Nation, 1982). President Reagan signed an Executive Order (1986) calling for the testing of a large portion of the Federal government's 2.6 million civilian employees. The Order called for the head of each executive agency to develop and implement a plan for assuring that government employees are not using drugs. The Order also outlined which employees should be tested: employees in sensitive positions; those suspected based on reasonable suspicion, of using drugs; employees involved in an accident or unsafe

practice; employees who are part of a drug counseling or rehabilitation program and any applicant for employment. The Order included the provision that any plan should be developed with "consideration of the rights of the government, the employee, and the general public."

The issue in *Skinner* is the constitutionality of the Federal Railroad and Safety Act of 1970 (84 Stat. 971, 45 U.S.C. § 431 (a)). The Federal Railroad Administration (FRA) has adopted regulations that do not require, but do authorize, railroads to administer breath and urine tests to employees who violate certain safety rules. The policy in question also requires train operators and personnel in certain levels of control to undergo urinalysis and possibly blood testing in the event of any reported mishap (Heder, 1999).

In 1983, the FRA determined that the customary sanction of dismissal was not effective enough for violators of the regulations in place to deter employees from possessing and consuming alcohol and/or drugs while on duty. Using accident investigation reports, the FRA found that from the years 1972 to 1983, there were at least 21 significant train accidents involving alcohol or drug use as a contributing factor. These 21 accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million" (*Skinner v. Railway Labor Executives' Association*, 1989). Based on theses findings and similar findings dealing with train accidents that resulted in a release of hazardous materials, the FRA announced in 1984 its intentions to publicize federal regulations on the subject.

The district court, in an unpublished decision, upheld the constitutionality of the FRA's drug-testing program. On appeal, the Ninth Circuit reversed the district court, finding that the drug-testing program violated the employees' Fourth Amendment rights

because the testing was not based on any individualized suspicion (*Railway Labor Executives' Association v. Burnley,* 1988). The court held that privacy expectations were adequately protected by sections of the drug-testing scheme that required a reasonable suspicion standard. But the court objected to the provisions that lacked any form of particularized suspicion: "Accidents, incidents or rule violations, by the themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew" (Id., 1988).

The government argued that the railroad regulations should be held to the same standard the High Court used in *Camara*, in that the search was likened to the annual inspection of the housing projects. The court reasoned that even though there was a long history of close regulation, the employees still did not have a diminished sense of privacy. Furthermore, the court reasoned that the safety regulations that had been imposed over the industry were directed at management and not the employees themselves (*Burnley,* 1988). The court's logic, therefore, was based upon a two-pronged test from *T.L.O.* rather than applying the administrative search as discussed in *Camara*.

The first "prong" of the two-prong test is whether the "search was justified at its inception" and the second is whether the search as conducted was reasonably related in scope to the circumstances which initially justified the intrusion (*T.L.O.,* 1985). The court concluded that because there was no individualized suspicion, toxicological testing cannot be justified at its inception. Consequently, the tests could not be considered reasonable in scope because there was no observable sign of impairment or other reason to suspect that an employee was impaired. The court noted that because of the testing technology of the time, there could be no accurate reading of current levels of

intoxication, only remnants which remain in the body. The court did conclude that it is imperative that drug-tests be mandatory when there is some individualized suspicion because only "the combination of observable symptoms of impairment with a positive result on a drug-test would provide a sound basis for appropriate disciplinary action (*Burnley*, 1988).

The newly formalized regulations contain two major provisions that are pertinent to the constitutionality argument in *Skinner*: Subpart C and Subpart D. Subpart C is entitled "Post-Accident Toxicological Testing," and is mandatory. Employees who are directly involved with a "major train accident" are required to provide blood and urine samples for toxicological testing. The "major train accident" definition includes fatalities, release of hazardous materials accompanied by evacuation or reportable injury, or damage to railroad property totaling $500,000 or more (*Skinner*, 1989). Subpart D is entitled "Authorization to Test for Cause," is not mandatory, but does authorize railroad officials to require employees to submit breath or urine tests in certain circumstances not addressed in Subpart C. The basis for enforcing Subpart D of the regulations is "reasonable suspicion" by a supervisor. A supervisor may require a breath test based on the employees' appearance, speech, or any other visual/audible sign of impairment. If the railroad suspects impairment due to drugs, the railroad may require a urine test as well, but only if two supervisors make the appropriate determination and one has specialized training in detecting the signs of drug intoxication (Id., 1989).

The Court and the railroad share the common belief that the purpose of the testing is not for punishment, rather for safety precautions. The safety of the traveling public, as well as the employees, clearly show a governmental interest in prohibiting employees

from using alcohol or drugs on duty, or while subject to being called for duty. A further issue to examine is whether this interest justifies the privacy intrusions absent a warrant or individualized suspicion (Id., 1989).

The Court has established, when "special needs" arise a warrant may hinder the search process (*New Jersey v. T.L.O.,* 1985*).* Based on 49 Fed. Reg. 24291 (1984) (to be codified at 49 C.F.R. §§ 212, 217, 218, 219, and 225), the FRA established that drugs and alcohol are eliminated from the bloodstream at a constant rate. Although remnants of some drugs may remain in the urine for longer periods of time enabling the FRA to estimate whether the employee was under the influence at the time of the incident, the delay necessary to obtain a warrant may lead to the destruction of evidence (Id., 1984). Assuming the same logic as *T.L.O.* (1985), the Court held that railroad supervisors are "not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence" (*Skinner v. Railway Labor Executives' Association*, 1989).

Suspicionless Drug Testing

In *Skinner v. Railway Labor Executives' Association*, the Supreme Court held the use of suspicionless drug and alcohol testing of railroad employees permissible under the Fourth Amendment's "special needs" exception. Although the Court recognizes the intrusiveness of the testing procedures, the petitioners argued the nature of the urine test was such that it violated their privacy rights. The Court does not deny the fact that the urine tests could place the employee in an embarrassing situation. The Court defends its

position by explaining that the process takes place at a medical facility and does not require direct observation. Furthermore, the respondents argue that the employees' expectation of privacy are further diminished due to the nature of the job and strict safety guidelines the railroad company must adhere (Id., 1989).

In *T.L.O.*, the Court ruled that continuing the search of the purse was admissible, even after finding proof of misconduct, was admissible compares to the same logic used in deciding *Skinner.* A positive urine test may only reveal a recent use of a controlled substance, but this would be sufficient to warrant further research to determine whether the employee used drugs at the relevant times during the inquiry. A positive test result, coupled with information about the employee's activities, may allow the FRA to reach an informed judgment as to how a particular accident occurred (*Skinner v. Railway Labor Executives' Association*, 1989).

In their dissenting opinion, Justices Marshall and Brennan, argue in favor of individual rights by positing, "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens" (Id., 1989). In *T.L.O.*, the majority opinion supports the idea of individualized suspicion; in *Skinner*, the policy of testing all employees after an accident occurred was upheld, even employees who gave every indication of attentiveness and sobriety. Marshall and Brennan also compare the decision in *T.L.O.* to the majority decision in *Skinner*, stating,

> In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process begun in *T.L.O.* of eliminating altogether the probable-cause requirement for civil searches- those undertaken for the reasons "beyond the normal need for law enforcement." In its place, the majority substitutes a manipulable balancing inquiry under which, upon the measure of a

> "special need," even the deepest dignitary and privacy interests become vulnerable to governmental incursion. (Id., 1989)

To conclude his dissenting opinion, Justice Marshall purports that the majority has succumbed to popular pressure to fight the war on drugs. In upholding the drug and urine testing, the Court has deviated from the Framers' intent of the Fourth Amendment- to ensure that the Government has a strong individualized justification when it seeks to invade an individual's privacy (Id., 1989). Justice Marshall observed that with *Skinner,* the Court had now allowed the "special needs" exception to displace the Constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of houses (*Griffin v. Wisconsin,* 1987*),* papers (*O'Conner v. Ortega*, 1987), effects (*New Jersey v. T.L.O.,* 1985), and now persons (*Skinner v. Railway Labor Executives' Association,* 1989) (Skinner, 1989, Marshall dissenting). Justice Marshall warned that even the most sensitive privacy interests are now vulnerable to government intrusion because under the majority's analysis, the probable cause requirement will not apply in the civil context (Id., 1989). On the same day that *Skinner* was decided, the Court also handed down the verdict in *Treasury Employees v. Von Raab* (1989).

In *Skinner*, the Court, utilizing the reasonableness test, held that the governmental interest in the safety of the railway industry and its passengers and employees was sufficiently compelling to justify an intrusion of privacy via drug tests without individualized suspicion. In *Von Raab*, the United States Customs Service required urine tests for its employees that sought promotion or transfer to positions involving drug prohibition, the carrying of a firearm, or the handling of classified information (Id., 1989). The Custom Service's testing program was initially challenged in the United States District Court for the Eastern District of Louisiana. The court held that the test

constituted “an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy” and ordered the Customs Service not to require tests of any covered employees (*National Treasury Employees Union v. Von Raab,* 1986). The Court of Appeals for the Fifth Circuit agreed with the lower court’s ruling that the testing procedure constituted a search with the meaning of the Fourth Amendment. Though the court reversed the decision based on the idea that drug testing by urinalysis was reasonable considering the strong governmental interest in ensuring that Customs officials remain drug-free (*National Treasury Employees v. Von Raab,* 1987).

As is the case in *Skinner*, the Customs Service argued that employees have a diminished sense of privacy because they should expect the government to investigate their health and fitness due to the nature of the job as a customs official. Interestingly, unlike the FRA in *Skinner*, the Customs Service in *Von Raab* did not have documented proof of significant drug use among its employees (Id., 1989). The Court does justify the ruling in both *Skinner* and *Von Raab* due to the special circumstances of the individual cases, but more specifically, the nature of the job requirements. The ruling does illustrate that the drug-testing program in *Von Raab* is not designed for everyday law enforcement. The results may not be used for criminal prosecution of the employee without the employee’s consent. The purpose of the ruling is to stop drug users from reaching higher, more sensitive levels within the Customs Service.

Although the petitioners accept the governmental interests in suspicionless testing of Service employees, the petitioners still argue two points against the testing program. The petitioners argue that there is no basis for a drug-testing program since there is no

evidence of drug use among covered employees. Based on the petitioner's oral argument before the Court, no more than five employees out of 3,600 have tested positive for drugs (Brief for Petitioners, 1988). The Court contends that even though there may not be a current drug problem among Customs Service employees, there is a national drug problem, and the Customs Service is not immune to the same issues that plague all workplaces throughout the country. This drug-testing program is to deter future drug use among those employees who may seek a promotion to sensitive positions within the Customs Service. Secondly, the petitioners argue that the test method is ineffective because employees have the ability to "beat" the tests. This argument is based on the idea that the employee can abstain from using the drug when they know they will be tested, or if the employee can taint their urine specimen. The Court contends that if the proper precautions are taken, the test will be valid, and thus, achieving the original goal of the program: not allowing drug users to be promoted to sensitive positions within the Customs Service (*Treasury Employees v. Von Raab*, 1989).

Justice Scalia, with whom Justice Stevens joins, argue that the case is not about whether customs officials can be denied a promotion for drug use; rather the issue is the constitutionality of the process of detecting drug use among the Service's employees (*Treasury Employees v. Von Raab*, 1989) (Scalia, A., dissenting). One major point of contention is the fact that there was no evidence of drug use among customs officials, whereas in *Skinner*, there was a definite need for drug testing as exposed in the numbers of train accidents and fatalities. Scalia also criticizes the relevancy of singling out drug use among Customs Service employees in relation to the general population,

> The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that. It is not apparent to me

> that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler-unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without the benefit of a urine test. Nor is it apparent to me that Customs officers who use drugs will be appreciably less "sympathetic" to their drug-interdiction mission, any more than police officers who exceed the speed limit in their private cars are appreciably less sympathetic to their mission of enforcing traffic laws. (Id., 1989)

Justice Scalia believes that the only plausible explanation for the drug-testing program is to set an example for the rest of society. Above all else, in Justice Scalia's opinion, are our individual liberties, "the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." (Id., 1989)

Differing Opinions in *Skinner* and *Von Raab*

Among the justices, differences were found in the issues of deterrence, evidence of the need for a search, and the "true" meaning of the Fourth Amendment. Justice Stevens concurred with the Court's ruling in *Skinner* that the need to determine the cause of serious railroad accidents supported the validity of the test, but he believed that the deterrence of the use of alcohol or drugs did not justify the testing authorized by the regulations (*Skinner,* 1989) (Stevens, J., concurring in part). Justice Scalia disagreed with the majority's opinion that drug tests would deter the drug use of employees carrying firearms, or that drug interdiction employees who use drugs are significantly more likely to be bribed. Furthermore, Justice Scalia argued that the drug use and connection to harm were present in *Skinner,* but not linked to the facts of *Von Raab*. *Von Raab* lacked any evidence of a real problem and that the government's case was

supported only by speculation (*Von Raab,* 1989) (Scalia, J., dissenting). It should be noted that Justice Scalia would support drug testing of employees in a workplace only if the use of drugs could produce "catastrophic social harm that no risk whatever [was] tolerable" (Id., at 684).

Justices Brennan and Marshall dissented in both *Skinner* and *Von Raab* because they felt that the majority ignored the text and history of the Fourth Amendment. The two justices both felt that highly intrusive searches, such as those in the presented cases, be based upon probable cause (*Von Raab,* 1989) (Marshall, J., joined by Brennan, J., dissenting). Justice Marshall noted that until recently, precedent had dictated that a full-scale search, whether pursuant to a warrant or an exception to the warrant requirement, had to be based on probable cause. Only in cases such as *Terry*, where the government's actions were far less intrusive, could the standard be relaxed. The only searches that were permitted "in the absence of individualized suspicion were routinized, fleeting, and nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person" (*Skinner,* 1989) (Marshall, J., joined by Brennan, J., dissenting). Justice Marshall believed that the extension of the special needs exception to searches without any suspicion at all was unjustified. Instead, Justice Marshall would have analyzed the reasonableness of the drug-testing programs by using a four-step process. First, is to establish "whether a search has taken place" (Id., at 642). If so, the second determinant is "whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement" (Id.). Third, the court would determine "whether the search was based on probable cause or validly based on lesser suspicion because the search was minimally intrusive" (Id.). Finally, the court must

determine "whether the search was conducted in a reasonable manner" (Id.). If all four questions were satisfied, then the drug-testing program would be constitutional (Lundquist, 1992). Justice Marshall predicted that the majority's reasoning to expand the "special needs" exception in authorizing these drug-testing programs would result in a "manipulable balancing inquiry" (*Skinner*, 1989) (Marshall, J., joined by Brennan, J., dissenting).

Ramifications of the "Special Needs" Doctrine

The "special needs" doctrine essentially makes balancing government interest versus privacy rights the norm rather than the exception (*Skinner,* 1989) (Marshall, J., dissenting). This logic implies that the only time traditional probable cause should be applied is when the police are searching for criminal evidence in an overtly criminal context. Arguably, whenever the search is "beyond the normal need for law enforcement," making traditional probable cause "impracticable," all that will be necessary to show that the search is reasonable is showing that the government's interests outweigh the individual's privacy interests. Traditional probable cause will cease to be a relevant consideration in civil searches (Lewis, 1990). Lewis (1990) explains that the true danger of balancing will influence the Fourth Amendment in the criminal context as well. For example, the FRA's drug-testing policy includes a provision which makes blood and urine samples available to a party in litigation (49 C.F.R. § 219.211(d), 1987). Consequently, the FRA's regulations would not prevent a criminal prosecutor from obtaining the samples and using them as a basis for a criminal investigation or as

evidence in a criminal trial. Justice Marshall referred to the Code as an "unprecedented invitation" for criminal prosecution based on suspicionless body searches (*Skinner,* 1989) (Marshall, J., dissenting).

The Supreme Court has left opportunity for broad application of the "special needs" doctrine. The only guideline set forth by the Supreme Court in determining a case with "special needs" is when obtaining a warrant and probable cause is "impracticable." In *United States v. Place* (1983), Justice Blackmun argued, "while the Fourth Amendment speaks in terms of freedom from unreasonable [searches], the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers. The Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause (Lewis, 1990). The Constitution may not be modified or revised for the sake of convenience or practicality (*Skinner*, 1989) (Marshall, J., dissenting).

Vernonia School District 47J v. Acton, 1995

School officials in Vernonia, Oregon began to observe an increase in drug use among its student population during the 1980s. Teachers in the school district argued that not only would the drug use among the student athletes cause them bodily harm, but also that the behavior would adversely affect the student population (*Vernonia Sch. Dist. 47J v. Acton*, 1995). The District attempted to alleviate the problem by holding seminars, classes, and using a drug-sniffing dog, but none of these measures proved to be successful. As a final measure, with the support of the parents, the administration, and the superintendent, Vernonia School District implemented the "Student Athlete Drug Policy" in the fall of

1989. The policy requires random drug testing through urinalysis for any student wishing to participate in Vernonia's athletic programs. All students who wished to participate in athletics must comply with the Policy and sign a form authorizing the school district to perform a drug test on their urine specimen. Before each athletic season begins, each student is tested, and the student athlete may be randomly tested throughout the season (Id., 1995). The process is as follows:

> The student to be tested completes a specimen control form, which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial. (*Vernonia School District 47J v. Acton*, at 650, 1995)

After an independent laboratory analyzes the sample, all positive results are reported to the superintendent. If the student tests positive, the procedure is repeated as soon as possible to confirm the results. If the second test is positive, the school notifies the student's parents. The student then has two options. First, to participate in a drug-counseling program for six weeks and submit to weekly drug tests. Alternatively, the student may accept a suspension from the athletic program for the remainder of the current season and the entire following season (Malin, 1996). If the student tests positive for a third drug test, an automatic two year suspension from the athletic team will be imposed upon the student.

Seventh grade student, James Acton and his family challenged the policy because they believed the testing procedure violated his rights under the Fourth Amendment and under the Oregon Constitution. Article I, Section 9 of the Oregon Constitution states,

> No law shall violate the right of the people to be secure in their persons, house, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probably cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. (2003)

Acton argued that the urinalysis test violated his right to be free from unreasonable searches. A federal district court held that the search was reasonable and dismissed Acton's suit (*Acton v. Vernonia Sch. Dist. 47J*, 1992). The district court did not attempt to examine Acton's privacy interests and held, "…that his privacy interests must give way to the district's need to maintain order and protect its students from injury by the use of the least intrusive means available to it" (Id., at 1364, 1992).

The Ninth Circuit then reversed the suit, holding that the policy did in fact violate Acton's privacy rights under the United States and Oregon Constitutions. The Actons argued that the district had no evidence upon which to build a drug testing policy and even if there were verification, it did not constitutionally justify random drug tests. In terms of whether there was evidence of drug usage among the athletes, the Actons argued that the teacher testimony was merely hearsay. The court countered with the factual evidence of declining student discipline in the school and the fact that there was reason to believe that one athlete had suffered an injury because of drug usage. The court then addressed the constitutionality of the random searches. To determine whether the search is reasonable, the court applied the balancing test. The court recognized that students do not give up their basic privacy rights merely because they attend school. Furthermore,

the Ninth Circuit found students' privacy rights to be "robust," concluding that, "there simply is no sufficient basis for stating that the privacy interests of students are much less robust than the interests of people in general" (Acton v. Vernonia School District 47J, at 1525, 1994).

The Appeals Court sought to use precedent set by the Supreme Court to determine the differences that existed between drug testing students and drug testing employees. Citing *Skinner*, the Ninth Circuit examined the need for drug testing where serious safety issues existed and compared those risks to the public school setting. Although the court recognized that drug abuse is in fact a national problem, it was "not the type of potential disaster" to justify suspicionless drug testing. The court determined that even though the School District's interest in deterring drug use among student athletes based on individualized suspicion is worthwhile, the court did not support random testing of student athletes (*Acton v. Vernonia Sch. Dist. 47J*, 9th Cir. 1994).

The Majority Opinion

The United States Supreme Court reversed the Ninth Circuit's decision, holding that the School District's Policy was reasonable and therefore did not violate the Fourth Amendment (*Vernonia School District 47J v. Acton*, 1995). Justice Scalia, in the majority opinion, stated that the Fourth Amendment did not require a warrant or probable cause in a situation where, "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable" (Id., at 2391, 1995). The Court also used *T.L.O.* to reason that teachers and administrators' ability to maintain

order and discipline within the school would be severely limited if they were required to follow the probable cause and warrant process.

In balancing Fourth Amendment interests, students in general have a diminished expectation of privacy. To establish this idea, the Court considered both the fact that the subjects of the Policy were children and that they were committed to the temporary custody of the state while in school. The Court added that student athletes as a group have even lower privacy expectations. The fact that the students voluntarily chose to participate in an already regulated activity proves that there is not an expectation of privacy. The Court argued that the locker room provides no more privacy than the urinalysis drug test and that the student athlete already understands the ramifications of not following rules and regulations of the team. The majority held that the testing procedure was no more intrusive than the procedures used by men, women, and children in public restrooms (Id., 1995). Combine these factors with the School District's interest in stopping the students from using drugs; the Court held that the school's "special needs" outweighed the students' privacy rights. The High Court focused on student athletes because the Vernonia School District argued that those students were the "supposed" leaders of the drug culture at the high school. Although the Court's ruling targeted one class of student drug users, it did not address drug use among students not participating in athletics (Bursch, 1996).

The Dissenting Opinion

Justice O'Connor represented the three-member group that disagreed with the majority opinion, and in doing so, stressed that the Vernonia School District's "Student Athlete

Drug Policy" was unconstitutional under the Fourth Amendment to the United States Constitution (*Vernonia School District 47J v. Acton,* 1995) (O'Connor, J., dissenting). Justice O'Connor stated, "…for most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment" (Id., at 2398-99, 1995). Justice O'Connor believed that the Framer's intent of the Fourth Amendment held individualized suspicion in high regard and is an inherent quality of reasonable searches and seizures. To illustrate the point, Justice O'Connor cited both *Skinner* and *Von Raab,* arguing that in both cases the searches were not personally intrusive and both arose out of a unique context (Malin, 1996). The Court upheld suspicionless searches only when the government interest could be placed in jeopardy or many lives were in jeopardy.

In the dissenting opinion, Justice O'Connor asserts that the majority did not place enough emphasis on the need for individualized suspicion as a requirement of the Fourth Amendment (*Vernonia School District 47J v. Acton,* 1995) (O'Connor, J., dissenting). According to O'Connor, the majority did not take the time to investigate alternatives to the suspicionless random drug tests. Teachers and administrators argued that the student athletes were the main drug users of the overall school population. If this were the case, Justice O'Connor contends that these are the students who should have been drug tested. Justice O'Connor believes that the District was afraid a more adversarial relationship between the administration and the students would develop,

> …the District's concern for the adversarial nature of a suspicion-based regime (which appears to extend even to those who are *rightly* accused) seems to ignore the fact that such a regime would not exist in a vacuum. 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. To such a scheme, suspicion-based drug testing would be only a minor addition. (*Vernonia School District 47J v. Acton,* at 677, 1995) (O'Connor, J., dissenting)

There was enough reasonable suspicion of drug use among these students to warrant a drug test and at the same time, the Fourth Amendment rights of James Acton could be preserved (Id., 1995).

Justice O'Connor also stated that even if the majority was correct in assuming the drug testing policy was reasonable, there were two additional Fourth Amendment violations. First, little, if any, evidence in the record illustrated a drug problem at the grade school level. Second, the record did not establish a sufficiently strong connection between student athletes and a drug-related discipline problem (Malin, 1996).

Other Circuit Court Decisions based on *Vernonia*

The Vernonia Court, "cautioned against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts," but did not go as far as prescribing how far drug testing could extend in the public schools (*Vernonia,* at 646, 1995). In *Todd v. Rush County Schools* (1998), the Seventh Circuit relied on the *Vernonia* holding to uphold Rush County Schools' drug testing program. The program required any student wishing to participate in any extracurricular activity to consent to random suspicionless drug testing for not only drugs, but also, alcohol and cigarettes. The Seventh Circuit believed that the school district had a compelling need to deter drug use and found no difference between athletics and other extracurricular organizations. The court reasoned that like athletes, students who take leadership roles in non-athletic extracurricular activities also serve as an example to others, both in the school and

community. The most significant factor the court used was the idea that participation in extracurricular activities is a privilege, and not a requirement (*Todd,* at 986, 1998).

In *Miller v. Wilkes* (1999), the Eighth Circuit upheld a similar drug-testing program. The program required consent from both student and parent for random drug testing before the student could participate in any activity outside the regular curriculum. The Eighth Circuit applied the three-pronged Vernonia test and found the balance fell in favor of the school district. The court first noted that the students have less privacy protections than ordinary citizens. Second, the court held that the character of the intrusion was no more intrusive than the test in *Vernonia*. Finally, in determining the nature and immediacy of the concern, the court determined drug abuse is a serious problem facing schools and suspicionless drug testing a portion of its students is an effective means to address the concern (*Miller,* 580-1, 1999).

Chandler v. Miller, 1997

In 1990, the Georgia General Assembly enacted Official Code of Georgia Annotated § 21-2-140, which required candidates for certain state public offices to take a urine test each time they sought qualification to run for election. The Code stated, "each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for drugs" (1993). In 1994, the Libertarian Party nominated several candidates for various state offices covered by the legislation (*Chandler v. Miller,* 1997). The candidates' aim was to end the suspicionless searches by challenging the constitutionality of O.C.G.A. § 21-2-140. In a television interview, Walker Chandler said, "if they can carry out suspicionless

tests of a category of people—politicians, people who are going to drive the ship of state—well, then they can test you if you're going to drive a car down the highway" (CNN Morning News, 1997).

In May of 1994, petitioners Chandler, Harris, and Walker filed suit against Zell Miller, then Governor of Georgia, and two officers responsible for the implementation of the statute in the United States District Court for the Northern District of Georgia (*Chandler v. Miller,* 1994). The nominees complained that the drug tests violated their First, Fourth, and Fourteenth Amendment rights under the United States Constitution. The district court denied the plaintiff's motion and found in favor of the defendants (*Chandler,* 1997). The Eleventh Circuit Court affirmed the lower court's decision because the purpose of the statute involved "special needs" rather than criminal prosecution. The court balanced "the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context" (*Chandler,* 1996). The Eleventh Circuit used what it described as the, "Skinner-Von Raab framework," where the state's interest is measured by "the level of documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position" (Id., 1996).

Even though the state of Georgia has no prior drug problems on record for elected officials (Id., 1996), the Eleventh Circuit based its judgment on *Von Raab*, in which the Customs officials were also unable to demonstrate a history of drug use among its employees. The court reasoned that the drug-testing regulation in *Von Raab* was upheld because of evidence that the physical and ethical demands of customs agents were so

great as to make drug abuse completely incompatible with the nature of the job. The court compared the public interest involved in *Von Raab* to Georgia's interest in having drug-free government leaders, and found that "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use" (*Chandler,* 1996).

As to the question of privacy issues, the court did admit that a drug test could be "particularly destructive of privacy and offensive to personal dignity" (Id., 1996) (quoting Justice Scalia's dissent in *Von Raab*, 1989). The prescribed methodology for drug testing in O.C.G.A. § 21-4-140 were relatively non-intrusive when compared to *Von Raab.* In Georgia's testing program, the urine specimen may be produced in the office of the candidate's own private physician. A positive result would be released only to the candidate, and not to law enforcement officials (1993). Furthermore, the Eleventh Circuit argued that by running for high public office, the candidates diminished their own privacy expectations (*Chandler,* 1996).

In an 8-1 decision, the Supreme Court held that Georgia's drug-testing policy for high political office violated both the Fourth and Fourteenth Amendments. The Court reasoned that testing a candidate for public office for drugs did not meet the "special need" exception for a suspicionless search (*Chandler,* 1997). Generally, the Court explained, the prohibition on unreasonable searches and seizures bars the state from undertaking a search or seizure absent individualized suspicion. The Court cited *Von Raab* to explain that there are limited circumstances when searches conducted without grounds of particular suspicion have been upheld. Citing *Skinner*, Justice Ginsburg

reaffirmed that a search without individualized suspicion can be conducted on "special needs" beyond the scope of law enforcement. When such "special needs" are alleged, the courts must balance a person's individual rights versus the interests of the government. The Court identified that in limited circumstances, when an individual's privacy rights are minimal, and where an important state interest would be jeopardized by the necessity of individualized suspicion, a search may be reasonable without such suspicion (Id., 1989). Because Georgia's statute was not based on individualized suspicion, the Court would have to use the balancing test.

The Federal Railroad Administration had adopted a regulation implementing a drug-testing program in reaction to apparent drug and alcohol abuse by some railroad employees even without individualized suspicion. The Skinner Court argued that the public had a genuine safety interest that was addressed by the regulation because drug tests were meant to deter illegal drug use by employees who were in a position to "cause great human loss before any signs of impairment become noticeable to supervisors" (*Skinner,* 1989). The Court argued that the employees already had a diminished expectation of privacy due to the safety regulations already in place. The Court continued by arguing that requiring individualized suspicion for railroad workers would not work as a deterrent for three reasons. First, an employee could avoid detection by simply not using the drug at the prescribed drug test. Second, employees could not predict when events that would invoke testing, accidents or safety violations, would occur. Finally, requiring a drug test in the aftermath of an accident could seriously impede the efforts to discern the cause of the accident (Id., 1989).

Justice Ginsburg cited *Von Raab* to explain the idea of a strong government interest. In *Von Raab,* drug tests were only required for those Customs Officials who were promoted or transferred to positions that either directly involved drug interdiction or that required an employee to carry a firearm. The majority stated that because of the exposure to large amounts of illegal narcotics and the safety concerns for those carrying firearms, the Von Raab Court held that the government had a compelling interest to ensure that individuals placed in these positions would not include drug users. Furthermore, Justice Ginsburg reasoned, suspicionless drug testing was warranted because these officials are not subjected to the day-to-day scrutiny that is traditional in other office environments (*Chandler,* 1997) (citing *Von Raab,* 1989).

Based on the precedents set in *Skinner* and *Von Raab,* the Court originally felt that Georgia's statute was relatively noninvasive because the candidate could provide a urine sample in his private physician's office. The candidate also had sole discretion about the dissemination of the test results. Therefore, if a "special need" had been shown, an excessive intrusion would not exist. The "special need" in this case, "important enough to override the individual's acknowledged privacy interest and sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion" (Id., 1989).

The majority found that the respondents' justification for the certification requirement insufficient. Specifically that the unlawful use of drugs is incompatible with holding state office, the question of a candidate's integrity and judgment, executing public office (including anti-drug law enforcement, and undermines public confidence in elected officials (*Chandler,* 1997) (Respondent's Brief).

Specifically, the Court explained that Georgia had failed to meet its burden of establishing a "special need" for its drug testing statute primarily because it offered no evidence of any real "concrete danger" (Id., 1997). As noted in the case, Georgia had no prior history of state office holders abusing drugs. The Court also stressed that the statute would be highly ineffective as a deterrent to drug users seeking office because the candidates were aware of the test date and could simply avoid taking any drugs in order to pass the test. As for the questions of drug addicts, the High Court doubted that such people would become candidates for an elected position. Finally, the Court reasoned that should a drug addict succeed in obtaining a high state office, public scrutiny is so high at this level that the abuse would be uncovered (Post, 1998).

Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist dissented arguing that Georgia's drug-testing program for political candidates was reasonable under the Fourth Amendment. Justice Rehnquist feared that the reason the majority found the program unconstitutional was that Georgia was the first state to employ such a program (*Chandler*, 1997) (Rehnquist, C.J., dissenting). While Judge Edmonson of the Eleventh Circuit followed precedent on "special needs" reasoning, Justice Ginsburg, writing for the Supreme Court in *Chandler*, threw away the script (Dery, 1998). Justice Ginsburg redefined the term "special" in "special needs." "Special" no longer meant a justification "apart from the regular needs of law enforcement"; it now referred to the measure of the importance of the state's justification (*Chandler*, 1997) (Rehnquist, C.J., dissenting). Justice Rehnquist continues by saying that the logic in Fourth Amendment balancing has changed in the area of

governmental "need." Now, the governmental "need" had to be substantial enough to "override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion" (Id., 1997).

Chief Justice Rehnquist's dissent focused on the inconsistencies between the majority's opinion in *Chandler* and the Court's decision in *Von Raab.* Citing *Von Raab,* Justice Rehnquist insisted that empirical evidence of a prior drug problem was not an essential element for finding a "special need." The majority believed Georgia's drug-testing program to be hypothetical and merely symbolic in nature (*Chandler,* 1997). Justice Rehnquist countered with, "Surely the State need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become Governor before it installs a prophylactic mechanism" (*Chandler,* at 324) (Rehnquist, C.J., dissenting).

Justice Rehnquist then noted the similarities between the participants in *Von Raab* and *Chandler*. The Von Raab Court held that the government had a compelling interest in ensuring that Customs Service officials did not use drugs, even when off-duty, because such use would create a risk of bribery and blackmail against which the government was entitled to guard. Justice Rehnquist noted that high-ranking government officials are at the same risk as Customs officials, on-duty, or off-duty. In *Von Raab,* Customs Service officials who sought a promotion to positions that required handling of sensitive materials were subject to the drug screening. High-ranking public officials would also handle sensitive materials. Finally, Rehnquist argued that both, Customs officials and highly ranked publicly elected officials, could expect background checks and examinations and therefore, a diminished sense of privacy (Id., 1997).

A major point of contention between the majority of the Court and Justice Rehnquist's dissent was the question of the intrusiveness of Georgia's testing program. The majority noted that the drug test would be ineffectual as a deterrent simply because the candidates would know in advance of their test date. Justice Rehnquist claims that this is the aspect of the screening that enables the test to fall under Fourth Amendment reasonableness; conversely, Justice Rehnquist notes that had the statute prescribed a random testing method, the majority would have deemed it too intrusive (Id., 1997).

Dodson (2000) noted that the Chandler Court appears to have taken Justice Scalia's voice in his *Von Raab* dissent. There must be an actual problem, or at least show that a problem is imminent in order to invoke the "special needs" doctrine. The Court distinguished *Von Raab* from *Chandler* because it involved safety-sensitive positions, and that "*Von Raab* must be read in its unique context" (*Chandler*, at 307). The Chandler Court held that the "special needs" doctrine only applies when public safety is in jeopardy. The Court invalidated Georgia's program because the government failed to show that political candidates that use drugs pose any real danger to public safety. Interestingly though, Justice Ginsburg's majority opinion in *Chandler* completely ignores *O'Conner v. Ortega* (1987) in which the Court held that reasonableness applies to a warrantless search based on the "special needs" doctrine (Dodson, 2000), though that case had no bearing on public safety.

Limitations of *Chandler*

Chandler v. Miller (1997) represents the first instance that the Supreme Court struck down a suspicionless drug-testing scheme (Glassman, 2002). The Chandler Court

concluded that where public safety is not sincerely an issue, the "Fourth Amendment precludes the suspicionless search…" (*Chandler v. Miller,* 1997 at 323). This holding reiterated the requirement of a special need that is "sufficiently vital to suppress the Fourth Amendment's normal requirement[s]" (Id., at 318) before a valid suspicionless drug-testing scheme may be instituted. The fact that elected officials take leadership roles was not a sufficient justification to invade their Fourth Amendment rights (Glassman, 2002). The High Court upheld the previous drug testing policies because there was evidence that safety was a real concern. In *Chandler*, the state showed neither a particularized drug problem nor specific safety concerns. Based on these ideas, subsequent cases involving drug-testing students for participation of extracurricular activities should be deemed unconstitutional. Glassman (2002) argues that the Seventh and Eighth Circuit courts failed to acknowledge specific safety concerns involved in athletic competition. The Eighth Circuit stated that the possibility of harm was enough to deem the policy constitutional, even though school officials admitted there was no crisis facing the school system. The Seventh Circuit also failed to mention any specific safety risks, citing only that "successful extracurricular activities require healthy students" (*Todd,* 1998, at 986). By ignoring this significant component of special needs analysis, the Seventh and Eighth Circuits exceeded the range of the Supreme Court's standard in a manner that should be considered unconstitutional.

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 2002

In the fall of 1998, the school district in the town of Tecumseh, Oklahoma, adopted the Student Activities Drug Testing Policy (Policy). The Policy requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, cheerleading, and athletics. The Policy states that students must take a drug test prior to participating in such activities, must submit to random testing while participating in the activity, and must agree to be tested at any time upon reasonable suspicion (*Board of Education v. Earls*, 2002).

Lindsay Earls, who attended Tecumseh High School, was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Earls challenged the Policy by using a 42 U.S.C. § 1983 action against the District, claiming the Policy was depriving her, "…of any rights, privileges, or immunities secured by the Constitution and laws." Earls was only interested in how the Policy affected her unique situation, and not how the Policy applies to athletes or as it provides for drug testing upon reasonable, individualized suspicion. Earls argued that the Policy violates her Fourth Amendment rights as incorporated through the Fourteenth Amendment. Furthermore, Earls argued that the District failed to show a "special need" for students who participate

in extracurricular activities and that the "Drug Testing Policy neither addresses a proven problem nor promises to bring any benefit to students or the school" (*Board of Education v. Earls,* at 822, 2002).

In 2000, the District Court of the Western District of Oklahoma upheld the District's drug testing policy. The District Court used the precedent set in *Vernonia* to establish that the school acts as the students' guardian but ignored the idea that students have some legitimate expectations of privacy in the school setting (*Earls ex rel Earls v. Bd. of Ed,* 2000). In addition, the court admitted the Policy was not an effective method of targeting students who use drugs, but argued that, "it can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs" (Id., at 1295). Furthermore, the court held that in the three previous related cases, *Vernonia*, *Skinner,* and *Von Raab,* the Supreme Court did not require a match between the tested students and the drug users (Raymond, 2003). Finally, the District Court held that the Policy was reasonable because *Vernonia* should not be read to require a drug epidemic before taking protective measures because this would be incongruent with the idea of the school as guardians of the students (Raymond, 2003).

The Tenth Circuit reversed the District Court because it read *Vernonia* and the "special needs" doctrine differently, noting that the situation in *Vernonia* was very different from that in *Earls* (*Earls v. Board of Education of Tecumseh Public School District,* 2001). The main difference revealed by the Tenth Circuit was that that the drug epidemic found in the Vernonia school district is non-existent in the Tecumseh school district. In fact, only two students out of 486 students involved in extracurricular

activities tested positive for drug use in the 1998-99 school year- and both students were athletes. During the 1999-2000 school year, only one student out of 311 students tested positive (Id., at 1272). The Vernonia Court held that one main purpose of the drug test was the safety concerns for the student athletes; the Tenth Circuit argued that non-athletes do not have the same risks coupled with drug use as do athletes and that no role-model relationship exists between the students tested in *Earls* (Id., at 1276-78). The Tenth Circuit did allow for the idea that a drug "epidemic" is not specifically necessary to warrant drug testing, but contended that there should actually be a drug problem and that the solution focuses on solving the specific drug problem (Id., at 1278).

Supreme Court Analysis

In a 5-4 decision, the United States Supreme Court reversed the Tenth Circuit ruling explaining that the drug testing policy falls within the "special needs" exception to the Fourth Amendment (*Board of Education of Independent School District No. 92 of Pottawatomie City v. Earls*, 2002). Because those "special needs" are present in *Earls*, warrants, probable cause, and individualized suspicion are not needed. Justice Thomas, writing for the majority, claimed that the Court did not, "simply authorize all school drug testing, but rather conducted a fact specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests" (Id., at 2565). Justice Thomas contends that the Court applies the same test as in *Vernonia*, but just takes a different approach. The test includes the nature of the privacy interest compromised, the character of the intrusion, and the nature of the government's interest, and how the government is meeting those interests (*Earls*, 122 S.Ct at 2565-67).

The Earls Court explained the nature of student privacy by examining the school's responsibility for maintaining discipline, health, and safety standards, and requiring both vaccinations and physical examinations as important factors. The key factor was still the idea that the students are children and under the guardianship of the school. Raymond (2003) purports that the Court used the same logic as in *Vernonia* in emphasizing only those factors that tend to show a decreased expectation of privacy and ignored factors held in *T.L.O.* that favor student privacy rights. The Earls Court further diverged from *Vernonia* holding that students in *any* extracurricular activity share the same decreased expectation of privacy as compared to other students. Thus, the first prong of the Vernonia test is satisfied because students are under the care of the school and the student participates in an activity that is not required by the school.

The second prong of the test is the character of the intrusion of privacy. The Court based its decision on precedent found in *Skinner* and *Von Raab*. The urinalysis procedure for the drug-testing program is relatively unobtrusive in the eyes of the Court, even though the act of urinating is usually considered a private matter. Furthermore, because the information is kept by the school, is confidential, and not used for law enforcement purposes, the Court held the second prong of the test satisfied.

In deciding the third prong of the test, the Court argued that the drug problem at the high school level is growing, stating that, "the nationwide drug epidemic makes the war against drugs a pressing concern in every school" (*Earls*, 122 S.Ct at 2567). Even though there was no evidence of a drug problem in the Tecumseh schools, the District was justified in taking a proactive approach to solving the nation's drug problem. Justice Thomas wrote that this program will serve as a deterrent to children and drug use and

those schools should not have to wait until there is a drug problem in the schools before being allowed to search for drugs (Id., at 2567-68). The Court rejected the argument in *Vernonia* that athletes were allowed to be drug tested because of the additional safety concerns that surround sports. Because no individualized suspicion is necessary, the Court found no difficulty in testing those students least likely to use drugs because they are still under the care of the school. The Court's reasoning allows for a school to drug test all students and still satisfy the nature and immediacy of the governmental concern found in the third prong of the Vernonia Test, based only on the notion of a nationwide drug problem (Raymond, 2003).

The Dissenting Opinion and Analysis

Justice Ginsburg, writing the dissenting opinion, contended that the majority ignored the importance of context in regards to "special needs" judgments and that the Court is misreading *T.L.O.* and *Vernonia* (*Earls*, 122 S.Ct. at 2572) (Ginsburg, J., dissenting). Justice Ginsburg wrote that by overlooking the context of the particular search and students in question to focus solely on school's responsibilities over the children, the majority's opinion applies to all students, and not just those involved in extracurricular activities (Id., at 2572). In his concurring opinion, Justice Breyer mischaracterizes the importance of extracurricular activities by arguing that the student can simply "opt out" rather than be subjected to a drug test (Id., at 2571). Ginsburg argues extracurricular activities are truly not voluntary, stating,

> While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program; for that reason, the petitioner…is justified in expending public resources to make them available. Participation in such activities is a key component of school life,

> essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. (Id., at 2572)

Another specific distinction made in the dissenting opinion is the fact that there is no communal undress or physical risk for the non-athletic extracurricular activities. These factors lead to a lower expectation of privacy for the athletes that simply do not exist for the other students involved in extracurricular activities (Id., at 2573-74).

Justice Ginsburg condemned the majority's position on the nature and immediacy of the governmental interest prong of the Vernonia test. The student populations at both schools were different in two regards- first, there was a drug problem in the Vernonia school system; no such problem existed in the Tecumseh school system, and second, Vernonia's drug testing program targeted those students using drugs, and not all students participating in extracurricular activities (Id., at 2575-76). Because the drug problem existed in Vernonia, the nature and immediacy prong of the test was satisfied, but not in *Earls* (Ginsburg, J., dissenting).

In *Chandler v. Miller* (1997), the Court held that mandatory drug tests of political candidates were unconstitutional because there was no "concrete danger" and no action taken to appropriately advance a "special need." Ginsburg compared *Chandler* to *Earls* in the same respect- there was no evidence of a particular problem, and the policy targeted a group not involved in "high-risk, safety-sensitive tasks" (*Earls,* 122 S.Ct. at 2577-78).

Chapter III

THE EVOLUTION OF THE "SPECIAL NEEDS" DOCTRINE

The main issue before the Court is the "reasonableness" of a particular search. The Court determines "reasonableness" using a balancing test by weighing an individual's privacy rights against the government's desire to promote public interest. Malin (1996) argues the more compelling the Supreme Court determines the government's needs to be, the less Fourth Amendment protection the individual is afforded. A strong governmental interest coincides with a lesser expectation of privacy, a sliding scale that the Court relies upon to give the government greater leeway when the Court evaluates the permissibility of a suspicionless search. Historically, individualized suspicion has been a major component of Fourth Amendment protections. In *Illinois v. Gates* (1983), the Court held that individualized suspicion is a term that describes the specific justification required for the inception of a Fourth Amendment search, which includes probable cause and reasonable suspicion. If the search is deemed reasonable, the Court may then employ a "special needs" exception to eliminate the need for individualized suspicion. Over the years, the courts have found many ways to circumvent the need for individualized suspicion.

Beginning with *T.L.O.*, the High Court has defended the warrantless search based on the idea of a "special need." "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing

interests for those of the Framers" (Id., at 351) (Blackmun, J., concurring). In 1985, the circumstances were the need to maintain order and discipline in the classroom setting. In *Skinner* and *Von Raab*, the Court cited numerous safety risks in the railroad industry and the government interest in keeping customs officials physically fit to justify suspicionless drug testing. The Supreme Court even allowed an employer to search an employees' desk to ensure that everything was in order in the workplace (*O'Connor v. Ortega*, 1987).

The Birth of Reasonable Suspicion in the Public Schools

Courts have wrestled with the task of weighing the privacy interests protected by the Fourth Amendment with the states' interest in maintaining a safe environment complimentary to education in the public schools. The T.L.O. Court was charged with finding a balance between the "schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place" (*New Jersey v. T.L.O.*, 1985 at 340). The Court held that school officials had no legal requirement to obtain a warrant before searching a student under their direct authority because in special circumstances, the public interest was better served by a standard of reasonableness rather than probable cause (Oshman, 2001). The test to determine "reasonableness" is based on whether the action was justified at its inception and whether the search was related in scope to the circumstances that justified the search in the first place (*New Jersey v. T.L.O.*, 1985). The Supreme Court felt that by legitimizing reasonableness as an appropriate standard, they were actually doing teachers and administrators a favor by not requiring them to learn about the many facets of probable cause. In doing so, the Court reasoned that teachers and administrators could

focus on education rather than the law. Because of this decision, reasonable suspicion replaced probable cause as the level of evidence required to conduct a search in the public school setting (Id., 2001).

Justice Brennan, in his opinion, shows strong reservations in implementing the new standard,

> Today's decision sanctions school officials to conduct fullscale searches on a "reasonableness" standard whose only definite content is that it is *not* the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion. (*New Jersey v. T.L.O.,* 1985 at 354) (Brennan, J., concurring and dissenting)

According to Justice Blackmun, if the new standard is justified by “special needs,” these “special needs” were not to be considered a general ideal. “Special needs” in the school setting are reserved for situations when specific behaviors threaten teachers, other schoolchildren, or the educational process itself. Justice Stevens argues that schools by their very nature are places where our children learn about the values essential for a government based on the people. To take away their rights would be going against everything we as a society try to teach. “If the Nation’s students can be convicted [of a crime] through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly” (Id., at 373-74) (Stevens, J., dissenting).

Urinalysis Testing: Moving Away from Individualized Suspicion

The Skinner Court held that urinalysis testing is constituted as a search under the Fourth Amendment (*Skinner v. Railway Labor Executives Association,* 1989). The railroad workers argued that the suspicionless drug-testing policy violated their constitutional rights. The Court reasoned that requiring individualized suspicion would be impracticable following the scene of a railway disaster. The Court used the following balancing equation to justify its decision: the nature of the privacy interest upon which the search intruded, together with the character of that intrusion, was balanced against the government's compelling interest in preventing drug use (Oshman, 2001). The High Court determined that even though the search is intrusive, the testing procedure is justified because of the government's special need to protect public safety coupled with the ongoing drug and alcohol problem. Suspicionless testing was also upheld in *National Treasury Employees Union v. Von Raab* (1989). The Court explained that employees whose job description requires them to carry firearms and handle drugs should anticipate a diminished expectation of privacy. In *Von Raab,* the Court used the "special needs" rationale to forego the individualized suspicion requirement because of the government's need to monitor the workplace for safety reasons and the customs inspectors' unique working conditions (Oshman, 2001).

In many respects, after *Skinner*, the decision in *Von Raab* was not surprising. What actually is surprising is Justice Scalia's concurrence in *Skinner* while penning a strongly worded dissenting opinion in *Von Raab.* Penrose (2002) highlights three distinct ideas within the dissent to illuminate Justice Scalia's belief that suspicionless drug testing should not be allowed without credible evidence of a drug problem.

Justice Scalia's first argument against the majority is the fact that in *Skinner*, there was in fact evidence of a drug and alcohol problem. The facts are very different in *Von Raab*. Justice Scalia contends that the drug test in *Von Raab* is more symbolic,

> The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that. It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler - unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without benefit of a urine test. (Id., at 682) (Scalia, J., dissenting)

Justice Scalia's second argument is that, even though there have been some cases where customs officials have been found guilty of taking bribes and leaking information, there is no evidence that shows these crimes occurred due to drug use. Justice Scalia's third argument is against the apparent misinterpretation of the new "special needs" doctrine. With no evidence justifying a suspicionless search, the Court has further diminished the value of the Fourth Amendment. Justice Scalia contends that if the Court is to follow the logic that people who carry firearms are subject to drug testing, it will open the door for "all others whose work, if performed under the influence of drugs, may endanger others - automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards" (Id., at 686).

Context-Specific Analysis

The Skinner Court held that two elements must be satisfied in order for a suspicionless special needs search to be deemed constitutional. The first is that privacy interests implicated by the search must be minimal. The second is proof that basing the search on probable cause would somehow hamper the governmental interest (Gorman, 2004). For

example, in *Skinner*, the government had to show that those employees involved in the search were working in an industry that created a specific threat of injury to the public. After the initial threat was established, the government had to show that those specific workers within the railway industry were the same workers that would further the government's interest by conducting the search in the first place.

The High Court held that in certain instances, a school district might have a "special need" to search its students (*Vernonia v. Acton,* 1995). The Court reached this conclusion because school officials and teachers have a "substantial interest…in maintaining discipline in the classroom" in order to create an environment conducive to educating students (*New Jersey v. T.L.O.,* 1985 at 339). Although *T.L.O.* dealt with a student search founded on individualized suspicion of student wrongdoing, the Court in *Vernonia* concluded that, in certain instances, requiring school districts to obtain individualized suspicion before conducting a search "would unduly interfere with the maintenance…and the informal disciplinary procedures needed" in the schools (Id., 340).

The constitutionality of a search depends on the idea of "reasonableness," whether the search is based on individualized suspicion or not. However, the standards for determining reasonableness in the public schools are different. Based on *T.L.O.*, a suspicion-based search is reasonable in the public schools when it is both "justified at its inception" and "reasonably related in scope" to whatever circumstances justified the initial search. In general terms, a student search conducted by a school official will be "justified at its inception" where a school official has "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school" (Id., 342).

School district policies that permit suspicionless searches of students requires a "fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests" (*Board of Education v. Earls,* 2002 at 830). The Vernonia Court established three factors to guide the Court's balancing analysis: (1) the "nature of the privacy interest" allegedly compromised by the search (*Vernonia v. Acton,* 1995 at 654); (2) the "character of the intrusion that is complained of" (Id., at 658); and (3) the "nature and immediacy" of the school district's concerns, as well as the effectiveness of the policy (Id., at 660). Gorman (2004) explains that the first prong focuses on the right to privacy that students enjoy in the public school context. The second prong focuses, as in all drug screenings, the "degree of intrusion" upon one's privacy that accompanies the collection of a urine sample (specifically, the methodology for collecting the sample). The "nature and immediacy" prong is based on five separate factors: (1) the immediacy of the school district's concern; (2) the existence of a demonstrated drug problem within the class targeted by the policy; (3) whether there are safety interests to be furthered by drug testing those targeted by the policy; (4) whether testing based on individualized suspicion would be impractical; and (5) whether the policy "is a reasonably effective means of addressing the [s]chool [d]istrict's legitimate concerns in preventing, deterring, and detecting drug use" among the group targeted by the policy (Id., at 182).

Malin (1996) argues that the Vernonia Court improperly applied the reasonableness-balancing test, premised on the special need for drug-free schools, to uphold random drug testing in public schools. The underlying problem is that the Court eliminated the individualized suspicion requirement in an academic setting. A student's

privacy rights will always be in direct conflict with the government's interest in providing a safe, drug-free environment where learning can take place. The Vernonia Court held in favor of the state using its balancing test by inadequately assessing the interests involved (Id., 1996).

The Nature of Students' Privacy Interests

The Tinker Court held that "students do not lose their constitutional rights at the schoolhouse gate." Instead of beginning with the idea that students have constitutional rights while in school, the Vernonia Court focused on why students have a diminished expectation of privacy. The Court cited the numerous physical examinations, areas of communal undress in locker rooms and various other restrictions imposed on athletes. Rather than examining students' privacy rights as a whole, the Court combined those rights with the governmental interest and used the "special need" doctrine to define the individual's interest. In 1967, the Supreme Court held that the Fourth Amendment protects people, and not places (*Katz v. United States*). In contrast, the Vernonia Court held that the Fourth Amendment protects only "legitimate" privacy expectations, and those expectations varied depending on the context (*Vernonia v. Acton,* 1995 at 2391).

The Vernonia Court used the fact that students, while in school, are under the temporary custody of the state to lessen the importance of individual interests and stress the government's needs. The Court based this argument using the precedent of *Griffin v. Wisconsin* (1987), stating that impingement upon a probationer's privacy is constitutional because of the supervisory relationship between the state and the probationer. Malin admits that schools do have somewhat of a supervisory role over students, but the Court's

approach to justify an intrusion of privacy is flawed. A student who is not suspected of wrongdoing cannot be analogized to a probationer who has been convicted of a crime (1996).

The Supreme Court in *Vernonia* failed to address the privacy rights of the student. The Court focused instead on previous cases, which showed the role of public education and the supervisory nature of schools. In *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court held that a school sponsored publication or activity may be subject to a school authorities' control if the authorities' actions are "reasonably related to legitimate pedagogical concerns." The First Amendment does not cover "vulgar and lewd" speech when the school is trying to maintain discipline (*Bethel School District No. 403 v. Fraser*, 1986).

If the Vernonia Court truly wanted to assess students' privacy rights, it could have focused on cases where those rights were genuinely examined. Instead of focusing on the supervisory role that schools play found in *T.L.O.*, the Court could have stressed the idea that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds" (Id., at 339). In *Goss v. Lopez* (1975), the Supreme Court held that the state must recognize a student's legitimate entitlement to a public education as a property interest which, "is protected by the Due Process Clause and which may not be taken away for the misconduct without adherence to the minimum procedures required by that Clause" (Id., at 574).

The holding in *Vernonia* (1995) reveals that children have almost no constitutional rights compared to adults. Historically, this has not been true. In *Tinker v. Des Moines,* the Court held that students have the right to freedom of expression, the right to privacy in *New Jersey v. T.L.O.* (1985), and the right of due process in *Goss v. Lopez* (1975). Although children may not be given the same maximum scope of a right as that given to adults, the potential infringement of this right must still be subject to some degree of scrutiny (Malin, 1996).

The Court correctly surmises the fact that the First and Fourteenth Amendment cases show a difference of constitutional rights between children and adults in the school context. It would not be the same conclusion while examining those Fourth Amendment cases to dismiss the students' privacy issues. The Tinker Court ruled that the school board could not prevent students from wearing black armbands to protest the Vietnam War (1969). Even though there are special circumstances in the school setting, the Court disallowed a prohibition against expression of opinion under the First and Fourteenth Amendment. The majority quoted a 1947 ruling that explained the importance of not forsaking constitutional rights in the school environment,

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they 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. (*West Virginia v. Barnette,* at 637)

The Character of the Intrusion

The Supreme Court held that the methodology of the drug testing policy in *Vernonia* (1995) is "…nearly identical to those typically encountered in public restrooms" (Id., at 2393). The Court reasoned that this drug test is less intrusive because a faculty member only listened to sounds of tampering and the "normal" restroom behaviors. It is true that merely listening for sounds is far less intrusive than looking for signs of tampering; however, the Court failed to acknowledge the fact that while in a public restroom, an individual is not monitored by a government official.

The Court did not recognize the role of teachers in the drug testing process. Teachers, by their very nature, are an important part of the students' daily activities and their overall education. The Policy now forces teachers to become involved in the students' private lives as well. Although the test only screens for drugs, the student would be forced to disclose personal health information to the teacher.

The Relationship of the Government Interest and the Test

The Vernonia Court used precedent set in both *Skinner* and *Von Raab* to justify that the government's compelling interest was reasonably related to the drug-testing program. This same Court disregarded Justices Marshall and Brennan's dissenting opinion that reasonableness tests inherently favor the government's interest where special needs exist. In fact, the Vernonia Court defined "compelling need" to mean, "an interest which appears important enough to justify the particular search at hand" (*Vernonia v. Acton,* at 2394-95). Malin purports that by balancing the harm the school district was attempting to avoid against the individual intrusion, the Court's finding in favor of the government

was practically predetermined (1996). The Court wrongly compared testing student athletes to testing government employees. In the two previous cases, *Skinner* and *Von Raab*, the government was able to show a compelling interest based on safety concerns. Justice Scalia, in his dissent, specifically did not side with the majority in *Von Raab* because he felt that there was not enough evidence of a drug problem that would reflect a relationship between the governmental interest and the possibility of harm that the Policy was designed to remedy (Id., Scalia, J., dissenting). Furthermore, in order to be deemed a justifiable search, the majority was able to show a strong possibility of large-scale injury or death existed- alternatively, the same conditions simply do not exist when testing student athletes. Even if the government was able to show a compelling interest and the drug-testing policy satisfied the "special need" requirement on the part of the government, the Vernonia School District's Policy was not reasonably related to remedying the problem. It is impossible to determine if drug use led to injuries of student athletes. In fact, respondents emphasized that the Vernonia School District was "unable to confirm so much as one drug-related injury in the entire history of its sports program" (Brief for Respondent, 1995 WL 89313, at *6). Although the athletes may have been a more vocal group and caused classroom disruptions, there is also no evidence to show that the student athletes used drugs more frequently than non-student athletes.

Confusion of Vernonia

"The only thing that is clear is that we cannot simply say, 'See Vernonia' and leave it at that. The constitutionality of drug testing in the schools is a problem that will recur, and the legal interpretation of *Vernonia* we adopt will often be outcome

determinative" (*Todd v. Rush County Schools*, 1998) (Wood, J., dissenting from denial of rehearing en banc). Oshman (2001) argues that when the Todd court held that drug-testing students enrolled in extracurricular activities was constitutional, the *Vernonia* ruling was expanded in two key areas. First, *Todd* encompassed students in all extracurricular activities, and not just student athletes. Second, the extreme circumstances justifying intervention in *Vernonia* were lacking in *Todd.* Justice Ripple, in his dissenting opinion, focused on the following:

> Unlike the situation in *Vernonia*, there is no showing of a particularized need because of a 'state of rebellion' in the school, and certainly no showing that the targeted group…presents a particularized need…. The teaching of *Chandler* that the group be defined in terms that demonstrate the government's special need for such testing is markedly absent unless the Supreme Court intended in *Vernonia* that all school children are subject to testing all of the time. (*Todd v. Rush County Schools,* F.3d 571, 572 (7th Cir. 1998)) (Ripple, J., dissenting)

Two years later, in the same circuit, *Joy v. Penn-Harris-Madison School Corp*. (7th Cir. 2000), held that a drug testing policy that included alcohol and nicotine screening was constitutional. The Policy affected students participating in extracurricular activities as well as all students driving to school. The court admitted that its decision rested on precedent set by *Todd*, and conceded that if it were considering this case on first impression, it would not sustain the "random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities" (Id., at 1062-63).

The court explained how the Penn-Harris-Madison students enrolled in non-athletic extracurricular activities differed from the Vernonia athletes. Although the court acknowledged, "public high school students have a lesser expectation of privacy than the general public," the students who enrolled in non-athletic extracurricular activities, unlike the student athletes in *Vernonia,* did not knowingly subject themselves to a surrender of

physical privacy. Specifically, students in non-athletic activities have a greater expectation of privacy than athletes, and, in the case of students driving to school, "the contrast is even more stark" (Id., at 1063). Additionally, the court noted that the school had not proven any marked difference between drug use in the targeted group and students in the general population (Id., at 1064). In contrast, the Vernonia school district demonstrated that the student athletes were the leaders of the school drug culture and their drug use was significantly higher than the general population (*Vernonia School District 47J v. Acton,* at 662-663).

The final question of the court was whether there were actual safety risks present (*Joy*, at 1065). Only in the case of student drivers did the court concede a risk, concluding that driving while under the influence within a crowded school parking lot could justify intervention (Id.). Therefore, the court determined that only in the case of student drivers had Penn-Harris-Madison demonstrated a governmental need sufficient to overcome students' Fourth Amendment rights. After the court argued there was no correlation between testing students in extracurricular activities and a ruling of perceived problems, the panel expressed concern that reading this decision too broadly could result in a slippery slope:

> THE COURT: So the slippery slope argument ought to be very much in our minds. I mean, you'll be back here in another year with another school district who wants to test everybody. And you will say there is no principled distinction between the holding you get today and the next case. It's just a matter of time till it gets here. Right?
>
> COUNSEL: Absolutely, your honor.
>
> (Id., at 1066)

Earls v. Board of Education, 242 F.3d 1264 (10th Cir. 2001)

The district court of Oklahoma originally upheld urinalysis testing in the absence of individualized suspicion in *Earls v. Board of Education* (115 F. Supp. 2d 1281 (W.D. Okla. 2000)), but was reversed one year later by the 10th Circuit (242 F.3d 1264 (10th Cir. 2001)). The drug testing policy adopted by the Tecumseh Public School District (TPSD) required all students participating in extracurricular activities, including Future Farmers of America, Future Homemakers of America, Academic Team, band, choral, and athletic groups, to submit to suspicionless drug testing (*Id.*, at 1282-83). In its reversal, the Tenth Circuit focused on the fact that there was no evidence of a drug problem at TPSD. The school district used surveys to gather information about drug and alcohol use in the area, and found most of the incidents reported actually took place in the 1970s (Id., at 1274). Of all of the incidents, none relate to the students who are currently affected by the Policy. Some of the examples include distortions of the record in this case,

> For instance, the "fourteen instances of drug usage" known to Dean Rogers include the following: in 1970, her daughter told her that an unidentified boy on the school bus had offered her some pills, in 1978, one of her son's unidentified friends on the football team left a bag with drug paraphernalia in it at her house, in 1979, her son told her of "parties" he went to at which marijuana was smoked, in 1980, "one of the boys that ran with [her] son" was stopped and marijuana was found in his car, her daughter told her in 1972 or 1973 that the boyfriend of the girl with whom she shared a locker sold drugs, sometime in the middle 1980s a meter reader found some marijuana near the meter at what is now a junior high school, in the 1980s her grandson told her that an unidentified student had a marijuana cigarette at school, in the 1990s her grandson told her he attended a party and the girlfriend of a friend found her mother's marijuana and passed it around, the 1998 incident discussed above in which she overheard a boy in FFA invite other boys to a party at which "there would plenty of smokes," in the 1997-98 school year, her granddaughter told her that an unidentified boy "was bombed out and the teacher asked him if he was all right," in the 1997-98 year, a student not involved in any extracurricular activities was found to have marijuana in his car, the 1999 incident discussed above in which an FFA student was found with drug paraphernalia in his car.

> The reference to "injuries" to "students" and "members of the public" is to the incident in 1990 or 1991 when a steer got loose from a student under the influence of some substance, injuring himself and one other person.
>
> The record reference to the statement that "students enrolled in classes associated with Competitive Activities have been caught with or disciplined for drugs in the last four years" is a response to an interrogatory in which the District stated that Principal Blue "can testify that students enrolled in FFA, FHA and Athletics have been caught with drugs or disciplined for drugs." As indicated above, however, Principal Blue actually testified that, of the three high school students who tested positive under the Policy, all three were athletes and two were involved in FFA. (Id.)

Although, there was *some* evidence of drug use in Tecumseh, the situation was vastly different from that in Vernonia.

Oral Argument- *Board of Education v. Earls*, 2002

The majority and dissenting opinions do not always explain the whole story of a given court hearing. Evidence of how the Justices question the attorneys can give the reader a completely new understanding of underlying themes. For example, in the oral argument (No. 01-332) of *Board of Education v. Earls*, the petitioner was asked about the evidence of drug use among non-athletic students participating in extracurricular activities. The petitioner argued there was evidence of a drug problem, to which she was asked, "…the reports that have been filed up to the eve of the adoption of this regulation by the school district with the Feds, year after year, saying, things are fine here? The only thing we have to worry about is some beer." (Oral Argument, p. 5, *7-11) All the petitioner could respond with was, "They said it -- it wasn't a major problem at the time" (Id., *21-22).

The Court attempted to clarify the aim of the Policy in Vernonia to the Policy in Tecumseh:

> I thought the argument in *Vernonia* and I thought the opinion in *Vernonia*, in assessing the particular interest of the district, repeatedly emphasized the particular problems with the athletes. The athletes were the ones that the kids looked up to. They were the role models. There was rampant drug use among the athletes. There was a rampant disciplinary problem among the athletes. Athletes were getting injured. There was a very specific showing of a very specific interest of the district…And now you're coming in and saying, well, that -- that really does not matter. And it seems to me that the implication of what you're saying is that this so called special needs requirement will apply to every child in every school in the United States. (Id., p. 8, *7-21)

To this point, the petitioner claimed that it is true that the athletes were the role models in Vernonia, but in Tecumseh, the athletes in interscholastic competition are looked at as role models to some students (Id., at 9). Justice Ginsburg countered the petitioner's argument by arguing,

> Except for one startling difference…there was a problem with athletes. Here, one thing that is clear in the record is the – the school board's admission that the – that the drug and alcohol problem is more of a problem with those who are not engaged in these extracurricular activities. In other words, testing is directed to a group, those engaged in competitive activities, that is less of a problem, as far as drug use is concerned, than the rest of the students who are idle. And just naturally one would expect what turns out to be the case, that there's more drug use in the group that's not tested than there is in the group that's tested. (Id., *6-18)

One of the main points the respondents set out to make was the fact that the Tecumseh school district was already being proactive protecting their children and students from the dangers of drugs.

> This is a school that has in place cameras in the halls, security guards, drug dogs that sweep through the school and the – and the parking lot and the students. They search lockers. They have teachers who are trained in looking for drug use. They have all of these things in place, and they have a mandatory reporting policy that if they discover and drug use, they have to report it. Now, over the years,

> that's added up to two instances of drugs being found, none of them associated with non-athletes, none of them associated with extracurricular activities. (Id., p. 36, *4-14)

Context of the School Environment

By comparing the reasonableness in *Vernonia*, *Skinner*, and *Von Raab*, the Court is assuming that all three environments are the same. The school environment must be separated from the employment context. Employees are not regularly monitored while working. In contrast, while in school, students are closely supervised where drug testing can be implemented on a case-by-case basis. The Vernonia Court even explained that, "a proper educational environment requires close supervision of school children, as well as enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult" (*Vernonia v. Acton,* at 3292) (quoting *New Jersey v. T.L.O.,* 1985 at 339).

All evidence provided by the Vernonia School District indicated that testing based upon individualized suspicion would have been reasonable. The Brief for the Petitioner allowed that teachers saw students smoking marijuana at a restaurant near the school, teachers confiscated drug paraphernalia on school grounds, students told one school official that they had used marijuana and teachers overheard students boasting about their use of drugs and alcohol (1995 WL 13176, at *6-7). As Justice O'Connor stated,

> The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first or second hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in school drug use--and thus that would have justified a drug related search under our *T. L. O.* decision. (*Vernonia v. Acton,* 1995 at 2403) (O'Connor, J., dissenting)

Justice O'Connor believed that because blanket searches can potentially be conducted of many people, they present a greater threat to liberty than suspicion-based searches,

because they affect only one person at a time. The Justices concluded, "the greatest threats to our constitutional freedoms come in times of crisis," (Id., at 2407) and that here, the Policy implemented by the District was too broad and imprecise to satisfy the Fourth Amendment's reasonableness analysis.

Misinterpretation of *T.L.O*

Padilla (1996) contends that even though *T.L.O* appears on the surface to hold legal precedent in deciding *Vernonia*, the two cases have different legal significance. *T.L.O.* involved a criminal search; *Vernonia*, however, involved an administrative case. Although the search of a purse in *T.L.O*. was highly intrusive, it nonetheless was not random or suspicionless. An individual student was targeted on reasonable suspicion. Furthermore, the search uncovered marijuana, and the student suffered criminal penalties. The *T.L.O.* school officials conducting the search for marijuana were not furthering a special governmental need beyond law enforcement; the purpose and consequence of the search was criminal. This raised the question of whether school discipline was a special need in *T.L.O.* The answer is yes, with respect to the principal's search for cigarettes. However, the character of the second search for marijuana was criminal.

The warrantless search recognized in *T.L.O.* is not due to any administrative aspect of the search, but rather is an extension of *Terry v. Ohio* (1968). The Terry Court held that a limited, protective, pre-arrest search for weapons by the police was reasonable if a reasonably prudent person in the same circumstances would justifiably believe the suspect posed a danger. A “Terry” search is based on reasonable and articulable individualized suspicion of criminal activity. Because *T.L.O.* is a criminal search case, it

is not related in an analysis of the constitutionality of *Vernonia's* administrative search; therefore, the Court's reliance on *T.L.O.* is misplaced (Padilla, 1996).

Chandler v. Miller, 1997- Part II

In the three previous cases, the Supreme Court upheld the constitutionality of mandatory drug testing based on what it determined to be a "special need." Due to the various circumstances in each of those cases, the Court's rationale for determining reasonableness was perceived to be perplexing. No holding was like another, and the majority was able to stress certain factors in some cases while ignoring those same factors in other cases. For example, in *Skinner*, the Court held that suspicionless drug testing was reasonable because of the safety concerns that are present in the railway industry. The Von Raab Court held there was not necessarily a safety concern with customs officials, but due to the sensitive nature of the position, there was a significant government interest, making the search reasonable. In *Vernonia*, the Court held that because of the nature of sports and the familiarity of communal undress in a locker room, student athletes already have a diminished sense of privacy, and thus, the search was minimally intrusive. The Court argued that the *Vernonia* case was about safety, yet, there was no evidence of any injury caused by drug use among any student athlete.

The Court used the balancing test of the "nature and immediacy of the governmental concern…and the efficacy of [the] means for meeting it" (Id., at 660) to aid their case. The Court made a direct comparison of the governmental needs of *Skinner* and *Von Raab* with the District's expressed needs in *Vernonia*, finding the "nature of the concern is important—indeed, perhaps compelling…" (Id., at 661). With this third case

showing further erosion of the Fourth Amendment, critics now have no reason to doubt that future cases would continue down a "slippery slope." Even Justice Scalia, in his majority opinion, wrote, "we caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts" (Id., at 665).

Symbolic Needs vs. Special Needs

In 1990, the Georgia General Assembly passed O.C.G.A. § 21-2-140, which required candidates seeking certain public offices to take a urine test before being allowed to run in an election. In 1994, the Libertarian Party nominated several candidates covered by the new legislation in an attempt to challenge the constitutionality of O.C.G.A. § 21-2-140 (*Georgia Drug Law Debated in Supreme Court*, 1997). In May of 1994, the petitioners filed suit against Zell Miller, Governor of Georgia, to argue that the drug test violated their First, Fourth, and Fourteenth Amendment rights under the United States Constitution. The district court found in favor of the defendants and the Eleventh Circuit affirmed the lower court's ruling (Ames, 1997).

The Eleventh Circuit held that O.C.G.A. § 21-2-140 did not violate the candidate's First, Fourth, and Fourteenth Amendment rights. The court reasoned that because the purpose of the statute involved "special needs" rather than criminal prosecution, the proper Fourth Amendment analysis was to "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context" (*Chandler v. Miller*, 73 F.3d at 1543). Using what it called the "Skinner-Von Raab framework," the court stated that the state's interest is measured by "the level of

documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position" (Id., at 1545).

The circuit court noted that Georgia did not argue there were any issues with high-ranking elected officials and previous drug problems. The court did use the precedent set in *Von Raab* to show that a drug problem need not be present. The testing regulation in *Von Raab* was upheld because of evidence that the physical and ethical demands of customs agents were so great as to make drug abuse completely incompatible with the nature of the job (*Chandler,* 73 F.3d at 1546). The court compared the public interest involved in *Von Raab* to Georgia's interest in having drug-free government leaders, and found that, "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use" (Id.).

In an 8-1 decision, the Supreme Court overturned the Eleventh Circuit's ruling (*Chandler v. Miller,* 1997). The Court reasoned that, "the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion" (Id., at 1303). Georgia, the Supreme Court ruled, failed to demonstrate that "special needs" existed in this case. Justice Ginsburg described the plan as "symbolic," stating that, "however well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake" (*Chandler v. Miller,* 1997 at 322). Simply put, suspicionless drug testing of adults, the ones who voluntarily submit themselves to public scrutiny through the electoral process, runs counter to the Fourth Amendment (Penrose, 2002).

Chief Justice Rehnquist, in his dissenting opinion, argued that "special needs," as applied in prior Fourth Amendment cases, were not ones of especially great importance, rather the term referred to any proper governmental purpose other than law enforcement. Accordingly, Georgia's governmental interest in ensuring that its high-ranking public officials continue to be drug-free is a sufficient "special need," even though Georgia was unable to provide evidence of past problems of drug abuse by such officers (Id., at 1306). Furthermore, Chief Justice Rehnquist saw no reason to distinguish between the policies upheld in *Von Raab* from those deemed insufficient by the majority in *Chandler* (Ames, 1997).

A Change in Special Needs

In 1998, Indianapolis began implementing suspicionless vehicle checkpoints in an effort to combat narcotic use. The city operated these checkpoints during the daylight hours, posting lighted signs that read, "NARCOTICS CHECKPOINT [number] MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP" (Id., at 34-36). Each traffic stop lasted a few minutes and the checkpoints were placed in predetermined locations based on crime in the area and traffic flow. During the stop, officers looked for signs of impairment and visually checked the car while a trained narcotics dog walked around each vehicle. Two individuals filed suit against the policy, arguing that the policy violated their Fourth Amendment rights. The Supreme Court held in *City of Indianapolis v. Edmond* (2000) that a checkpoint designed to interdict narcotics served only the general interest in crime control, which is not sufficient to justify an exception to the reasonable suspicion requirement for a stop.

The primary purpose of the search was to discover and interdict illegal drugs. The Court noted that the program was relatively successful, of the 104 arrests, 55 were for drug-related crimes (Id., at 34-35). In two previous cases (*United States v. Martinez-Fuerte*, 1976, *Michigan Dept. of State Police v. Sitz*, 1990), similar warrantless searches had been upheld by the High Court. Justice O'Connor differentiated *Edmond* (2000) from the two previous cases by reasoning the purpose of the searches was something other than law enforcement. *Sitz* (1990) involved Michigan highway sobriety checkpoints whose primary purpose was to ensure driver safety by removing impaired drivers from the road. *Martinez-Fuerte* (1976) upheld fixed border vehicle checkpoints due to the difficulty of stopping illegal entrance by immigrants into the United States from Mexico. The majority argued that the precedent set in these two cases is considered too broad to fall within the narrow category of searches upheld by the Court under the "special needs" doctrine (*City of Indianapolis v. Edmond*, at 41). The Court stated that Fourth Amendment rights are important, even in the face of an important social problem. "…there is no doubt that traffic in illegal narcotics creates social harms of the first magnitude…but the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue their purpose" (Id., at 42). Thus, even if the governmental need is substantial, the method of the search cannot abridge Fourth Amendment rights in such an expansive manner. According to Justice O'Connor, the defining feature of the "special needs" test is precisely that the need being asserted is something outside the realm of traditional law enforcement. Justice O'Connor did allude to the fact that there are circumstances that may justify a law

enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control (Id., at 42).

Chief Justice Rehnquist, along with Justices Thomas and Scalia, dissented due to the idea of the natural progression of *Martinez-Fuerte* to *Sitz* to *Edmond*. The checkpoints in the city of Indianapolis were designed to detect and disable impaired drivers from posing a threat on the roads. Accordingly, the Chief Justice concluded that, "because of the valid reasons for conducting these roadblocks seizures, it is constitutionally irrelevant that petitioners also hoped to interdict drugs" (*Edmond*, at 51) (Rehnquist, J., dissenting).

In late 1989, Medical University of South Carolina (MUSC) implemented a policy ("Policy M-7") that required hospital personnel to test the urine of pregnant women, who met certain pre-determined indicia, for the presence of cocaine. MUSC then contacted the Solicitor General and, subsequently, a task force was formed. The Solicitor General informed the task force of a South Carolina law which could be interpreted to mean that a woman who used cocaine after her twenty-fourth week of pregnancy was guilty of distributing a controlled substance to a minor. Based on this law, the MUSC policy was developed to authorize testing the urine of all pregnant mothers who met one of nine indicia developed by the task force to indicate cocaine use. If the drug test results indicated the presence of cocaine, the patient was reported to the police department and was then arrested and charged with distribution of cocaine to a minor (*Ferguson v. City of Charleston*, 2001).

The case made it up to the Supreme Court to clarify whether the "special needs" doctrine should apply to warrantless, suspicionless drug testing that contained both a

medical and law enforcement purpose. The High Court distinguished *Ferguson* from previous drug-testing cases where the results were not turned over to any third party, in particular law enforcement.

The court held in a six to three decision that the searches violated the Fourth Amendment. The Court first distinguished *Ferguson* from its previous Fourth Amendment special needs cases. The Court also focused at length on the extent of law enforcement involvement in the development and daily implementation of Policy M-7. In doing so, the Court created an extra step in the already muddled "special needs" exception: determining a policy's immediate versus its ultimate goal. The Court reasoned that although the policy's ultimate goal may have been to prevent maternal drug use and protect infants, the policy's obvious immediate goal was to collect evidence to use against the woman in criminal proceedings (Barton, 2001). The Court rationalized this new step by reasoning that, "law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose" (*Ferguson*, at 1291-92). Based on their interpretation of the policy's immediate purpose, the Court held that the search was not a special need and, therefore, was inconsistent with the Fourth Amendment.

In *Vernonia*, the Court held that drug testing the urine of student athletes for drugs was constitutional, but emphasized the significance that the test results were "not turned over to law enforcement authorities or used for any internal disciplinary function" (Id., at 658). This lack of any law enforcement involvement was also a factor in *National Treasury Employees Union v. Von Raab*, where the Court held it constitutional to test the

urine of U.S. Customs officers. The Court, in *Von Raab* explicitly stated, "It is clear that the . . . drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent" (Id., at 666). Another element the Court examined was whether there was a threat to public safety. In *Chandler v. Miller* (1997), the Court expressly stated that if "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged" (Id., at 323). The Court also looked at the amount of involvement by law enforcement in the development and administration of the program (Barton, 2001).

Justice Kennedy, in his concurring opinion, differed with the majority regarding the idea of the ultimate goal of the policy rather than its immediate purpose. According to Justice Kennedy, the goal should be the health of the newborn babies and not necessarily the interdiction of drugs (*Ferguson,* 2001) (Kennedy, J., concurring). The majority argued, "…In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose…While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal" (*Ferguson,* 2001 at 81-84). Interestingly, the first "special needs" case, *T.L.O. v. New Jersey* (1985) permitted the use of evidence obtained through the search for both school discipline and criminal adjudication.

Raymond (2003) concludes after reviewing the Supreme Court's decisions regarding the special needs doctrine, an important conclusion to reach is that the doctrine

is fact-specific. The Court does not routinely focus on the same elements of the balancing test between the individual's reasonable expectations of privacy against the government's interest in conducting the search. In fact, in all of the previous cases that have allowed “special needs,” the focus has been on a practical implementation of the search. In *T.L.O.*, searches were allowed without probable cause not because the children were considered lesser citizens, but because of the need for the administration to efficiently run the school. Similarly, in the cases of *Skinner* and *Von Raab*, the Court focused on the utilitarian purposes of fighting the war on drugs and making railroads safe, dismissing the individual rights concerns of the workers because their jobs fulfill a functional value. Although the Vernonia Court did speak of students as lesser citizens than those of majority, the citing of large amounts of psychiatric and medical journals and the Court's own broad language betrayed the utilitarian basis for the Court's decision (Raymond, 2003). The fact that the Court eliminated any individualized suspicion requirement for "searches" also demonstrates that the Court focused on utilitarian principles over individual rights. Additionally, the Chandler Court found the Georgia Policy to be more symbolic rather than practical; therefore, no special need was found.

After *Chandler,* the Court seems to focus more on individual rights rather than utilitarian principles. In *Edmond*, the searching of cars to look for narcotics did not qualify as a special need, as this search could act to get around the typical rights of a criminal defendant, even though the benefits to the public generally could have been substantial. In *Ferguson,* the Court struck down searches of certain pregnant women for drug use even though law enforcement was not the primary purpose of the law; rather the interest of protecting young children from drug related abuse.

The Price for Participation

In 2002, the United States Supreme Court upheld a policy imposing suspicionless drug tests on public school students who participated in extracurricular activities (*Bd. of Education v. Earls,* 2002). The Court applied the "special needs" doctrine in the public school setting, where students are said to enjoy a diminished expectation of privacy because they are temporary custodial wards of the state (Id., at 830) (citing *Vernonia School District 47J v. Acton,* 515 U.S. 646, 655-56 (1995)).

Setterberg (2003) argues that the problem with most Fourth Amendment jurisprudence is that the treatment of privacy as a matter of law is too rigid and static to be of any real benefit. When determining reasonableness for a search, the courts have tried to fit all scenarios into a single entity. What might be a reasonable expectation of privacy in one scenario may not be reasonable in another. Therefore, because privacy expectations change so easily and depend upon various circumstances of an alleged search, they should be determined on their individual merit.

Justice Ginsburg began her dissent by distinguishing the facts between *Vernonia* and *Earls*. She first examined the special needs present in both cases (Id., at 843-45) (Ginsburg, J., dissenting). The Vernonia Court stressed health and safety concerns, particularly relevant to athletes, stating that the, "…particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes" (*Vernonia School District 47J v. Acton*, 1995 at 662). In contrast, the majority in *Earls* found the special needs existed simply because "drug use carries a variety of health risks for children, including death from overdose" (*Bd. of Education v. Earls,* 2002 at 844).

Justice Ginsburg also pointed out that such risks are present for all schoolchildren, and not just athletes like those that the Vernonia Court contends (Id., at 845).

The dissent questioned the majority's dependence on the students' voluntary statement of additional regulation to justify the testing policy. Justice Breyer, in the Oral Argument (01-332), stated,

> It seems to me you could say even if we could drug test anybody, we made the choice of giving a student who feels that strongly about not undergoing drug testing the ability to avoid it by simply not engaging in the extracurricular activities. You don't have to forego going to school entirely or go to a private school. You can simply not participate in the extracurricular activity. Isn't that in itself a valid reason for limiting it to extracurricular activities? (p. 12, *15-23)

The petitioners concurred, arguing that extracurricular students "agree" to additional intrusions on their privacy, to which Justice Souter countered,

> No. But you say they agree to it. They agree to it only under the circumstances that if they don't agree to it, they can't engage in any of these activities. They know perfectly well they'll never get into a competitive college if they don't…the agreement is not simply something that is – is arrived at sort of in the abstract…there's tremendous pressure on them to agree to it. (Id., p. 23, *8-15)

Justice Ginsburg noted that while extracurricular activities are technically voluntary, for all practical purposes they are required for college admission (Id., at 845-46) (Ginsburg, J., dissenting).

The comparison is enlightening. While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program; for that reason, the petitioner (hereinafter School District) is justified in expending public resources to make them available. Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. Students "volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them. Cf. *Lee* v. *Weisman*, 505 U.S. 577, 595 (1992) ("Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those

intangible benefits which have motivated the student through youth and all her high school years."). (Id.) (Ginsburg, J., dissenting)

The dissent then examined the special context of athletics, which imparts a more drastic burden on a student's privacy expectation not only because of the feature of communal undress, but also because of the risk of physical injury. This according to the dissent, is what likens the athletic experience to the "closely regulated industry) and is notably absent in such activities as choir, band, and academic team (Id. At 846) (Ginsburg, J., dissenting). Ultimately, the dissent declared that the legality of a search ""should depend simply on the reasonableness, under all the circumstances, of the search'" (Id.) (Ginsburg, J., dissenting) (quoting *New Jersey v. T.L.O.*, at 341 (1985)). The dissent advocated applying the Vernonia fact-specific balancing test to the facts of Earls, using enrollment in public school and voluntary involvement in activities as mere factors to be considered rather than unconditional justifications for a policy of suspicionless drug searches (Setterberg, 2003).

The dissent examined the nature of the privacy interest in applying the Vernonia test. In *Vernonia*, the student athletes were used to the idea of communal undress in the locker room. In *Earls*, the District itself admitted that closed stalls were usually available when students in nonathletic extracurricular activities did have to change together, and that some of the "more modest students" even found other ways to maintain their privacy" (Id., at 847-48) (Ginsburg, J., dissenting). Because students did not routinely disrobe or subject themselves to circumstances that would reduce their expectations of privacy, the dissenters concluded that the students' privacy interests in *Earls* had not been reduced to the extent of those in *Vernonia* (Setterberg, 2003).

The dissent next considered the importance of the government's concern and the ability of the policy to reach the desired goals. It concluded that the nature of the drug problem in *Earls* was markedly different from that in *Vernonia* (*Bd. of Education v. Earls,* 2002) (Id., at 849) (Ginsburg, J., dissenting). Whereas the Vernonia School District initiated its program in response to very dire circumstances (*Vernonia School District 47J v. Acton,* at 649 (1995)), Tecumseh had repeatedly reported that there were no major problems with illicit drugs in its schools (*Earls ex rel. Earls v. Board of Education,* 115 F. Supp. 2d 1281 at 1287 n.23 (W.D. Okla.2000). The dissent also pointed out that the tests in *National Treasury Employees Union v. Von Raab* (1989) and *Skinner v. Railway Labor Executives' Association* (1989), which the majority relied upon to support preemptive testing (*Board of Education v. Earls,* at 535-36 (2002)), were installed in industries where there was a very large risk of physical injury to others and not merely in response to the health risks posed to the user himself.

Finally, the dissent highlighted the discrepancy between the Tecumseh and Vernonia school district programs in their abilities to remedy the problems at hand (Id., at 851-53) (Ginsburg, J., dissenting). Vernonia applied its testing policy directly to athletes, who were the students abusing drugs, and its policy was designed to screen for drugs that posed a particular safety risk to those athletes (Id., at 851) (Ginsburg, J., dissenting). In addition, the athletes discussed in Vernonia ""were the leaders of the drug culture,"' providing another reason to target that distinct group for testing (Id., at 852) (Ginsburg, J., dissenting) (quoting *Vernonia School District 47J v. Acton,* at 649 (1995)). In contrast, the District's policy deliberately tested all students participating in school-sponsored activities, without consideration for specialized safety risks or any indication

that these students were engaged in any mischievous counter-culture (Id., at 853-54) (Ginsburg, J., dissenting).

Setterberg (2003) purports that despite these elaborate explanations, both holdings clearly rested on something much simpler. In both cases, after arguing that the tested students were entitled to a diminished right to privacy as compared with other public school students, the Court then cited their very status as public school students to adequately reduce their privacy interests relative to those of the government (*Board of Education v. Earls,* (2002) at 830-831 & 831 n.3) (*Vernonia School District 47J v. Acton,* (1995) at 665). Based on this idea, it would not be a far leap to testing all high school students, rather than just students who participate in extracurricular activities. The High Court questioned the ability to drug test all students:

> But if we get to that point, then the whole notion of special needs has – has, more or less, evaporated. We don't have the kind of special safety need as – as in the railroad case. We don't have the unusual temptation to crime need as in the immigration case, and the special need is simply the need to deter drug use among all children in all schools of the United States. And…if the theory of this is special need, it seems to me that the concept of special need seems to have gotten lost. (Oral Argument, *Board of Education v. Earls,* 2002 (01-332)) (pgs. 14-15, *20-25, & *1-4)

In his concurring opinion, Justice Breyer sided with Justice Thomas on many issues, but wrote separately to stress several key points. Justice Breyer did believe in the seriousness of a nationwide drug problem in schools, and that, "not everyone would agree" that the privacy-related issue with providing a urine sample is "negligible," as some people would be "seriously embarrassed" by such a procedure (*Board of Education v. Earls*, 122 S.Ct. at 2570-71). The school board's providing an "opportunity for the airing of…differences at public meetings designed to give the entire community the opportunity to be able to

participate in developing the drug policy" was very important (Id., at 2571). He continued, "The school board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, *in this instance*, revealed little, if any, objection to the proposed testing program" (Id.). Thus, Justice Breyer's concurrence questions the validity of a drug-testing program opposed by a substantial part of the community.

Policy Implications

Constitutional arguments aside, the problem with drug testing policies is that they do not lead to the outcome desired by the schools. Obviously, the schools want to deter students from using drugs. The policies are geared toward students who participate in extracurricular activities, such as athletics and academic clubs, and not focusing on those students who would probably benefit from the additional supervision: at-risk students. The at-risk students who really need the help of drug counseling and rehabilitation should be encouraged to remain in the schools and around adults who can monitor them and identify possible drug abuse problems. Students who are using drugs and know that they will be tested before they can participate in after school activities will simply not participate. The policy will cause these students to remain outside the realm of school supervision; their drug use may increase without the possibility of anyone noticing at all. When there were no suspicionless drug-testing programs, at-risk students could have been under adult supervision for longer than the standard school day, assuming that the students using drugs are typically involved in extracurricular activities at all.

Following this logic, schools implementing policies to drug test voluntarily involved students are likely testing the wrong population (Bishop, 2000). In *Brooks v. East Chambers School District* (1989), Judge Gibson stated that, "students who participate in athletics and other extracurricular activities are, in fact, less likely to use drugs and alcohol, if only because Texas law forbids students who fail courses from participating in extra-curricular activities, and presumably, heavy drug or alcohol use will have a negative impact on academic performance" (Id., at 764). If this is true, students who truly are in most need of counseling and rehabilitation help have probably already been forced to forego participation in extracurricular activities.

Current Issues in School Drug Testing

Proctor (2005) argues that the Acton balancing test after *Earls* has two fundamental problems. The first problem is that there is no guidance as to how a court should actually balance the prongs when a drug testing policy does not meet all three prongs. Second, the test can unnecessarily infringe on student privacy interests. If a school can use the "special need" of a nationwide drug epidemic to satisfy the third prong of the Acton test, then the school can test students even if an actual problem does not exist at their school.

Many schools are concerned about the prevalence of steroid use among male athletes, not only because of the dangerous side effects, but also because of the likelihood of student involvement in dangerous behaviors (Burnett & Kleiman, 1994). High schools have a pressing need to stop the use of steroids among male athletes given the fact that male athletes use steroids at a rate comparable to many other drugs (Id.). In response to

that need, many schools have begun testing programs, and others are seriously considering it.

Earls will lead to many instances where students' rights will be violated because the Court held that schools do not need to show an actual drug problem exists. A steroid testing program could easily pass the first two prongs of the Acton balancing test if the students voluntarily subjected themselves to an extracurricular activity and the testing procedure was relatively unobtrusive. If the program failed the third prong, a lower court would have to determine the constitutionality of the test. More than likely, the lower court would focus on the tutelary function of the school and the government interest in keeping our youth drug-free (Proctor, 2005). Fourth Amendment proponents should be weary of situations where there is no drug problem at all. In such a case, the school has no "special need" to test its students. Under *Earls,* a school could use data establishing a national steroid problem to justify steroid testing in its school, even where no problem exists.

Chapter IV

SUMMARY, FINDINGS, AND RECOMMENDATIONS

Summary

The purpose of this study was to trace the evolution of the “special needs” doctrine and its application to Fourth Amendment case law in the public schools. Our schools do have an obligation to provide a safe learning environment for all students. The question is then, what are we as a society willing to exchange for that mission? Justice Thomas' majority opinion in *Earls* correctly focused on the educational and disciplinary responsibilities of a public school toward its students and their parents and attempted to give schools latitude in testing students for drug use. The Court firmly departed from the Court of Appeals' idea that a "negligible" (*Earls v. Board of Education of Tecumseh Public School District*, 242 F.3d, at 1275) level of drug use among students could not justify drug testing. Considering the national problem of student drug use, drug use of any level should not be tolerated in schools. Still, future school boards, concerned parents, and students will have to take into account lower courts’ decisions regarding Justice Breyer's concurrence and whether drug-testing efforts and public discussion have lead to a slow down of the proposed drug testing programs (Kim, 2003).

In addition to stressing a school's tutelary function, another way Justice Thomas attempted to provide leeway to school districts was by not limiting schools to testing the students most likely to use drugs (*Board of Education of Tecumseh Public School District v. Earls*, 122 S. Ct. 2569). Schools do not have to use the "least intrusive means" when

implementing drug-testing programs (Id.). In contrast, Justice Ginsburg would include only student athletes in a drug testing policy. School boards and parents who favor wider drug testing may ask why only the physically active students should be subject to increased health concerns. Student athletes who engage in rigorous physical training may face *heightened* health risks from drug use, but this fact does not translate to less physically active students are unaffected by the inherently high health hazards of drug use. Drug use affects students who participate in athletics to the same degree as those students who do not participate in athletics. Furthermore, Justice Ginsburg's reliance on *Vernonia* as limiting drug testing only to student athletes is misplaced. The Vernonia Court said that "legitimate privacy expectations are *even less* with regard to student athletes" (Id., at 2565). Justifying drug testing of student athletes rather than non-athletes supports the idea that it is acceptable to protect the public health by testing as many students as possible (Kim, 2003).

Justice Breyer's concurrence stressed the national drug problem in finding the Drug Testing Policy constitutional (*Board of Education of Tecumseh Public School District v. Earls*, 122 S.Ct., at 2569-70). In his concurrence, he also recognized the importance of proactive policies such as counseling and rehabilitation in addition to combating the supply of drugs. Yet his concurrence raises two questions that can work against giving school districts wide latitude in using student drug testing (Kim, 2003). First, should every school board that wishes to implement a drug testing policy provide for a public meeting to allow the public to discuss the privacy issues surrounding drug testing? Justice Breyer said:

> When trying to resolve [a question such as whether the privacy invasion in urine sampling is negligible that] involve[s] *constitutional values,* I believe it is

> important that the school board provided an opportunity for the airing of these differences at public meeting designed to give the entire community "the opportunity to be able to participate in developing the drug policy." (*Board of Education of Tecumseh Public School District v. Earls,* 122 S.Ct., at 2571)

It would appear that school districts can help shield their drug testing programs from constitutional challenge by merely providing a public forum for discussion. Public discussion is a positive method of inclusion; however, Justice Breyer's concurrence poses another hurdle to drug testing.

It is unclear what level of community agreement is needed before public school drug testing can be implemented. Justice Breyer said that it was "important" that the Tecumseh school board "used this democratic . . . process to . . . resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any objection to the proposed testing program" (Id.). A drug-testing policy within a public school system invites opposition. Should drug-testing programs that conform to those found in *Vernonia* and *Earls* be "softened," through greater privacy protections, for example, to earn greater support of the community and to be legally implemented?

Justice Breyer's concern for involving parents and the public in an educational policy as important as student drug testing is understandable. However, such concerns should be left to the local political process. Parents should be trusted to raise objections on their children's behalf and to vote out school board officials who vote against the wishes of the community with respect to student drug testing or any other educational issue. Future courts addressing the *Vernonia* and *Earls'* descendants should focus on public schools' foremost responsibility: that of providing a safe and healthy educational environment. To achieve this goal, parents, school administrators, and students will need

courts to adhere to Justice Thomas' emphasis on the special educational and disciplinary needs of public schools.

Findings

In reviewing these six Supreme Court cases, this study made the following findings:

1. *New Jersey v. T.L.O.* (1985)
    a. The search in question was based on individualized suspicion;
    b. Evidence gathered was used to build a case for criminal prosecution as well as discipline consequences within the school;
    c. The Supreme Court established the idea of *in loco parentis*, which gives school administrators the right to search school lockers and other personal space while on school property;
    d. This idea gives rise to the fact that students are not afforded the same rights as adults.
2. *Skinner v. Railway Labor Executives' Assoc*. (1989)
    a. The High Court held that drug-testing through urinalysis is considered a search under Fourth Amendment jurisprudence;
    b. The government's interest in assuring safety on the nation's railroads constituted a "special need" which justified a departure from standard warrant and probable-cause requirements in searches;
    c. Because of the strict regulations of the industry, railroad workers endure a lesser expectation of privacy;

d. Individualized suspicion requirement is not essential because the testing procedures pose only limited threats to employees' justifiable privacy expectations.

3. *National Treasury Employees Union v. Von Raab* (1989)
    a. United States Supreme Court upheld a drug testing program for certain employees who carried firearms, were involved in drug interdiction assignments, or are in high level positions involving secret information;
    b. Evidence of a national crisis or smuggling illicit narcotics shows governmental interest;
    c. The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions. (at 679)
4. *Vernonia School District 47J v. Acton* (1995)
    a. Using *T.L.O.*, the Court determined that students in general have a diminished sense of privacy;
    b. Evidence showed athletes in Vernonia were partaking in illicit drug use, and those same athletes were the supposed role models of the school;
    c. The Court held that because the students had voluntarily chosen to participate in athletics, they already had a diminished expectation of privacy;

   d. In her dissenting opinion, Justice O'Connor argues, if there was evidence of drug use among the athletes, individualized suspicion would still be the most effective testing program, and not necessarily a blanket search of all athletes.

5. *Chandler v. Miller* (1997)
   a. Eleventh Circuit court followed the "Skinner-Von Raab Framework" and held that politicians who hold high office also serve in the same capacity as customs agents in law enforcement;
   b. Drug testing procedure even less intrusive than in *Von Raab;*
   c. High Court held that Georgia did not provide any evidence of a "concrete danger;"
   d. Chandler Court held that "special needs" doctrine only applies when public safety is in jeopardy.
6. *Board of Education v. Earls* (2002)
   a. Drug epidemic in Vernonia school district not found in Tecumseh school district;
   b. Court focused on the idea that the school is the guardian and therefore students participating in any activity have a lower expectation of privacy;
   c. In her dissent, Justice Ginsburg focused on the similarities between *Chandler* and *Earls*- there was no evidence of drug use in either case, there was no "concrete danger," and both policies targeted a group not involved in "high-risk, safety-sensitive tasks."

Recommendations

The Student Drug-Testing Coalition found that the majority of student drug-testing cases were upheld by the courts when the testing programs encompassed students participating in athletics, extra-curricular activities, or students with parking passes. A key reason that most school districts prevailed, was that those programs followed generally accepted standards and practices in drug testing and made some showing of drug use by students (2007). The coalition analyzed over 40 student drug-testing court cases and rulings to build a list of key elements or components that should be considered when creating and implementing a student drug-testing policy. The key components include:

1. A safety rationale for the illicit drug and alcohol-testing program and concern over student welfare with the goal of reducing drug use by students.

2. All programs for students in activities and parking on school property were non-punitive, resulting only in suspension from the activity. There were no academic consequences.

3. A measure of student drug use in the district (most schools conducted surveys prior to program implementation and/or documented anecdotal information from faculty, students).

4. No requirement to report medications taken to anyone other than the testing laboratory or the Medical Review Officer (MRO) in confidence.

5. Parental consent forms.

6. Minimal intrusion during the collection process, affording maximum privacy possible (NO observed collections).

7. Progressive consequences if more than one positive drug test result for a student.

8. Test result actions do not include law enforcement involvement.

9. Use of well-established test collection procedures, including chain of custody documentation for the specimen.

10. A confirmatory testing process.

11. Establishment of specific and strict confidentiality procedures such as keeping drug-testing records separate from other records.

12. Information on drug test results restricted to a "need to know" basis.

13. Use of a medical review officer in the testing process.

14. Options/referrals for treatment; many districts had SAP services.

15. Destruction of the drug testing records upon graduation or departure from the district.

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