The Public Schools Have a "Special Need" for Their Students' Urine

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Prior to my teaching career, I was an attorney for the Juvenile Rights Division of the Legal Aid Society in New York City—a snarly metropolis that has the best and the worst, of everything. I represented children who lived in bombed out sections of the Bronx who were alleged to be delinquent, in need of supervision, or neglected—that is, children charged with murder, rape, robbery, truancy, running away from home and those beaten beyond recognition by their parents. I have never recovered from that grisly encounter with law in the real world.

For over twenty-five years I have been writing and teaching about children in various legal contexts. My main focus has been on the

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juvenile courts and the public schools, and I have been critical of both institutions—in my opinion, deservedly. In this Article I want to share my concerns about the drive for drug testing in the public schools, and the dangers of the “special needs” doctrine that facilitates reduced Fourth Amendment protection for students (and for certain classes of adults). To that end I analyze the Supreme Court cases dealing with searches of public school children—New Jersey v. T.L.O., Vernonia School District 47J v. Acton, and Board of Education v. Earls. I conclude that the Court’s analyses in these cases seriously erode the Fourth Amendment, an explicit fundamental constitutional right, and treats school drug testing policies, that impinge on bodily privacy, with the same degree of deference given to economic governmental regulations or laws that receive low level rational relationship scrutiny, a scrutiny that is “toothless.”

In New Jersey v. T.L.O., the Court ruled that although public school officials were state actors for purposes of the Fourth Amendment, neither a warrant nor probable cause was required to permit searches—not just frisks—of students. The standard for school searches of public school students was a mushy “reasonableness, under all the circumstances.” The searches authorized by T.L.O. could be conducted for evidence of either criminal wrongdoing or violation of school rules. The principal who searched the student’s purse in T.L.O.


7. See id. at 333. Prior to T.L.O., many jurisdictions had concluded that public school teachers were not state actors for purposes of the Fourth Amendment because they acted in loco parentis. See, e.g., D.R.C. v. State, 646 P.2d 252, 260 (Alaska Ct. App. 1982) (finding that teachers searching students for evidence of crime did so merely as an incident to their employment rather than as a police official whose job it was to discover evidence of criminal activity); In re R.C.M., 660 S.W.2d 552, 553-54 (Tex. App. 1983) (concluding that school officials, including a security guard, were acting in loco parentis when searching a student).
9. Id. at 341.
10. See id. at 371 (Stevens, J., concurring in part and dissenting in part).
had reasonable suspicion for doing so, but in a footnote the Court made clear that it was not deciding whether the Fourth Amendment required such a particularized belief in the school context.\(^{11}\) Indeed, the majority left open many Fourth Amendment issues, including the standard for police searches of students\(^{12}\) and whether the exclusionary rule applies to the fruits of school searches.\(^{13}\)

The reduced standard for searches in public schools was made possible because the Court concluded that public schools presented “special needs” beyond that of law enforcement.\(^{14}\) This view regarding “special needs” is in accord with other decisions of the Court limiting the First,\(^{15}\) Eighth,\(^{16}\) and Fourteenth Amendments in the public schools,\(^{17}\) as well as Court rulings restricting constitutional protection for minors in other contexts.\(^{18}\)

The special needs doctrine was initially recognized as an exceptional basis for deviating from the normal protections of the Fourth Amendment.\(^{19}\) The theory was that government should not be held to such a strict standard when its goal was not to further criminal law

11. See id. at 342 n.8.
12. See id. at 341 n.7. Apparently the standard for police frisks of juveniles outside school premises is the same as for adults—reasonable suspicion. See Florida v. J.L., 529 U.S. 266, 269 (2000) (reversing conviction of youth upon whom a gun was found when frisked by the police, because the information lacked the indicia of reliability).
13. See T.L.O., 469 U.S. at 333 n.3.
14. See id. at 332 n.2.
15. See Tinker v. Des Moines, 393 U.S. 503, 507-09, 515 (1969) (Stewart, J., concurring) (affirming First Amendment right of public school students to wear black armbands as a political protest, but specifically noting that such a constitutional right would not be coextensive with those of adults because of the school environment).
16. See Ingraham v. Wright, 430 U.S. 651, 664 (1977) (finding that severe corporal punishment of public school students did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment because that prohibition only applied in criminal contexts, not to schools).
17. See Goss v. Lopez, 419 U.S. 565, 581 (1975) (requiring minimal due process hearing for students suspended from school for less than ten days); Ingraham, 430 U.S. at 682 (holding that due process does not require a hearing prior to infliction of severe corporal punishment by school officials).
18. See, e.g., Schall v. Martin, 467 U.S. 253, 265 (1984) (upholding vague preventive detention statute for youths alleged to be delinquent, noting that children only possess a truncated liberty interest because they are always in some form of custody); Parham v. J.R., 442 U.S. 584, 604 (1979) (holding constitutional a statute giving parents the right to commit their children to state mental hospitals without a formal due process commitment hearing); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (using a reduced significant state interest test to determine abortion rights of minors rather than the more rigorous compelling state interest test used for adult women); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) (refusing to extend Sixth Amendment right to jury trial to alleged delinquents being tried in juvenile court).
19. See, e.g., Camara v. Mun. Court, 387 U.S. 523, 538-40 (1967) (upholding area warrants for inspection of possible housing, fire and health violations, if there were standards for conducting such area inspections).
enforcement, and where the warrant and probable cause requirements would impede the government’s pursuit of substantial non-criminal objectives.\(^\text{20}\) Of course, if any evidence of criminal wrongdoing were uncovered during the government’s actions regarding its non-criminal goals, the evidence would be admissible in a criminal trial even though it was obtained without a warrant or probable cause.\(^\text{21}\) The government was acting legally and therefore evidence it discovered during such searches was untainted. But as the old adage goes, give them an inch and they’ll take a mile—maybe two or three. Exceptional became commonplace, and over the years the Court has recognized a large number of special needs.\(^\text{22}\) If special needs are found, the Fourth Amendment warrant and probable cause requirements are inapplicable. Instead, the finding triggers a balancing of private and governmental interests, looking to whether the search is reasonable. The special needs balancing invariably results in upholding the governmental intrusion.\(^\text{23}\) In those cases in which the government alleged special needs and lost, it lost not because of the balancing; rather, the Court concluded that there was no special need. The Justices would find either that the need was symbolic rather than special,\(^\text{24}\) or that the immediate objective was merely to search for evidence of criminal wrongdoing.\(^\text{25}\)

\(^{20}\) See id. at 533.

\(^{21}\) See, e.g., South Dakota v. Opperman, 428 U.S. 364, 375 (1976) (upholding inventory search of car without warrant or probable cause; the search yielded contraband drugs which was used against the defendant car owner).

\(^{22}\) See Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (noting that “[a] state’s operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements”) (footnote omitted); see also Gerald S. Reamey, When “Special Needs” Meet Probable Cause: Denying the Devil Benefit of Law, 19 Hastings Const. L.Q. 295, 318-19 (1991) (“[T]he Supreme Court has created subclasses of the population entitled to less constitutional protection than the rest. Probationers, automobile salvage dealers, government workers, railway employees, certain customs agents, and school children no longer enjoy the safeguards of probable cause and warrants.”) (footnotes omitted).


\(^{24}\) See Chandler v. Miller, 520 U.S. 305, 322 (1997) (invalidating law requiring candidates for high political office to submit to drug testing, finding governmental need "symbolic, not ‘special’").

\(^{25}\) See Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001) (invalidating city hospital rule transmitting positive drug test results of pregnant women to police for prosecution, finding that the immediate need was not protection of pregnant women and fetuses, but rather the gathering of information for prosecution).
Indeed, one of the difficulties of the special needs cases is that the result seems to depend on the answer to the front-end question—is there a special need? If the need is viewed as special, which it usually is, the balancing always tilts toward the government. Conceptually, it appears in these cases that the governmental interest is counted twice—once to determine if the need is special, and then again in the balancing of governmental and private interests. The double dipping must result in a governmental win unless the search is extremely intrusive.  

Interestingly, the Court refuses to do any balancing of interests if probable cause exists, except in “extraordinary” cases, such as seizures accomplished by deadly force or an unannounced entry into a home. Thus, if the police have probable cause, and they have not acted barbarously, the Court generally will not balance to provide extra Fourth Amendment protection. Thus, balancing almost always yields less, not more.

There are no fixed or objective criteria to determine when a need is special. If the Court believes that the need is substantial or important and is independent of law enforcement goals, then the need is deemed special. The special need inquiry is the converse of the substantive due process analysis to determine if a non-textual right is fundamental. If the right is fundamental, the Court uses a strict scrutiny compelling state interest–necessary means test, and the result is almost always in favor of the individual right. The real analysis, however, is in deciding if the right is fundamental, and the Court has not clarified why a particular

26. Cf. Winston v. Lee, 470 U.S. 753 (1985) (reversing court ordered surgery on defendant to obtain bullet as evidence; the Court weighed and balanced private and governmental interests and concluded that the state had not shown a compelling need for the bullet and that the operation could result in harm to the defendant).
29. See, e.g., Whren v. United States, 517 U.S. 806, 819 (1996) (authorizing pretextual stops for traffic violations). The petitioners, citing the extraordinary amount of discretion placed in police hands, asked the Court to balance the private and governmental interests. But, said Justice Scalia, the Court only balances when there is probable cause if the search or seizure is conducted in an extraordinary way or where it is harmful to a person’s privacy or physical interest, citing Winston. See id. at 818.
30. See, e.g., Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) (recognizing a fundamental right to die, but allowing state to regulate the decision); Zablocki v. Redhail, 434 U.S. 374 (1978) (although an equal protection case, the Court was using the fundamental rights strand of equal protection which is the same as the substantive due process inquiry; Court found right to marry a fundamental right); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (the choice of family members to live together is a special right requiring intense scrutiny of government ordinance denying them that right); Roe v. Wade, 410 U.S. 113 (1973) (finding woman has a privacy right to an abortion in the early stages of her pregnancy).
right is fundamental. 31 The Court announces results rather than providing reasons. The Burger and Rehnquist Courts have moved away from finding fundamental rights because of the fluidity and subjectivity of the inquiry, which, if positive, usually results in the law being struck down, and because it smells like the disavowed Lochnerizing-ends scrutiny. 32 In special needs cases, on the other hand, the laws are almost always upheld. As a result, the special needs exception is in danger of swallowing the Fourth Amendment, which, it must be remembered, embodies an explicit constitutional right protected by the warrant and probable cause requirements.

The analysis in special needs cases has evolved into a simplistic schema: a once over lightly, special needs inquiry—balancing with a thumb on the government's side. Surprise, government wins. Interestingly, in those few cases where the Court finds no special need, the analysis of that issue tends to be much more refined. 33 The Court will look at many factors and for evidence that a warrant or probable cause would impede the state's ability to carry out an important non-criminal objective that is based in reality. 34

With rising drug use and violence in the schools, it did not take school officials long to test the limits of T.L.O. In Vernonia School District v. Acton, 35 the United States Supreme Court rejected Fourth Amendment claims and upheld a public school district's policy

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31. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state law criminalizing homosexual sodomy). The majority noted the two tests for determining whether a right is fundamental—liberties deeply rooted in the nation's history, and whether the right is implicit in the concept of ordered liberty, summarily concluding that homosexual sodomy did not fit either standard, nor did it resemble prior cases finding fundamental rights in childbearing and rearing, marriage, and contraception. See id. 190-92. The dissent viewed the implicated right as "the right to be let alone." See id. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); see also Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion). Justice Scalia argued that when determining if a right is fundamental one looks to the historic tradition that is at the most specific level of generality. See Michael H., 491 U.S. at 122. Even the Justices joining Justice Scalia's opinion specifically disassociated themselves from the above view. See id. at 132 (O'Connor, J., concurring in part).

32. See, e.g., San Antonio ISD v. Rodriguez, 411 U.S. 1 (1973). An equal protection case in which the Court refused to find that the right to education was a fundamental right requiring strict scrutiny. See id. at 37. Whether a right is fundamental, said the Court, is not the importance of the right but "whether there is a right to education explicitly or implicitly guaranteed by the Constitution." Id. at 33-34; see Bowers, 478 U.S. at 195 (noting that there was a "great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental").


34. See id. at 314-15.

permitting random urinalysis drug testing\textsuperscript{36} of both grade school and high school students who voluntarily participated in interscholastic athletic programs.\textsuperscript{37} Earlier decisions upheld random urinalysis in other special needs contexts. In \textit{Skinner v. Railway Labor Executives' Ass'n},\textsuperscript{38} the Court found that random testing of railroad personnel who were involved in serious train accidents or who violated safety regulations was constitutional because of the high incidence of drug use among railway employees and the danger to railroad passengers.\textsuperscript{39} However, in \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{40} urinalysis of federal customs officials who carry weapons or who are involved in drug interdiction was upheld by the Court because of the risk of harm to the populace, even though there was no evidence of drug use by such officers.\textsuperscript{41} Thus, in these cases, the government had asserted a special need, and presented evidence either that drug use was a problem in the particular context,\textsuperscript{42} or that the danger to the public was acute.\textsuperscript{43} Where neither factor was present, the Court denied special needs status,\textsuperscript{44} thus obviating the balancing test.\textsuperscript{45}

In \textit{Acton}, the school district introduced evidence of heavy drug use and increasing disciplinary problems.\textsuperscript{46} The schools had targeted athletes because of the increased danger of physical injuries to them,\textsuperscript{47} and because they were role models for the student body.\textsuperscript{48} The combined role

\textsuperscript{36} Government mandated taking of urine for drug analysis is a search within the meaning of the Fourth Amendment. See \textit{Skinner v. Ry. Labor Executives' Ass'n}, 489 U.S. 602, 617 (1989).
\textsuperscript{37} See \textit{Acton}, 515 U.S. at 663.
\textsuperscript{38} 489 U.S. 602 (1989).
\textsuperscript{39} See id. at 629-31. One might even argue that the testing in \textit{Skinner} was not really random. The requirements of a serious accident or violation of safety regulations might be viewed as providing reasonable suspicion, or at least, seriously limiting the number of persons subject to the testing.
\textsuperscript{40} 489 U.S. 656 (1989).
\textsuperscript{41} See id. at 664.
\textsuperscript{42} In \textit{Skinner}, the government produced evidence that there was prevalent drug use among railway employees. See \textit{Skinner}, 489 U.S. at 607.
\textsuperscript{43} In \textit{Von Raab}, there was no evidence that customs officials used drugs, but the danger to the public that could arise because of drugged officers carrying weapons was deemed sufficient to constitute a special need. See \textit{Von Raab}, 489 U.S. at 666. Justice Scalia dissented, arguing that the need was merely symbolic of the war on drugs. See id. at 686 (Scalia, J., dissenting).
\textsuperscript{44} See \textit{Chandler v. Miller}, 520 U.S. 305, 323 (1997).
\textsuperscript{45} Nonetheless, in \textit{Chandler}, even though the majority declined to assign special need status to the law requiring candidates for high office to take a drug test, it went on to note "that the testing method the Georgia statute describes is relatively noninvasive; therefore, if the 'special needs' showing had been made, the State could not be faulted for excessive intrusion." \textit{Id.} at 318.
\textsuperscript{47} See id. at 649.
\textsuperscript{48} See id. at 648.
model influence and physical danger gave the governmental interest greater oomph.

Justice Scalia’s majority opinion, however, could be read to grant schools even greater power, one not dependent on the role model status of targeted students or the possibility of physical injury. When Justice Scalia discussed the privacy right at stake he noted that “[c]entral, in our view, to the present case is the fact that the subjects of the [drug testing] Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.”49 Again, at the end of his opinion, Justice Scalia noted that “the most significant element” in upholding the policy was the *parens patriae* interest of the schools, as “guardian and tutor of children entrusted to its care.”50 In addition, the majority appeared to lower the standard for determining the strength of the government interest from compelling to important, and also seemed to lessen the stringency of the means analysis.51 At the beginning of the opinion, Justice Scalia emphasized the general drug and disciplinary problems at the school, thus focusing on the entire student body.52 In the concluding part of the opinion, however, he finally focused on the athletes, their role model affect and susceptibility to injury.53 Thus the ends and means did not require a very tight fit. *Acton* rejected an individualized suspicion test even though it would limit the number of students, most of whom are innocent, subjected to testing. In fact, the Court was enamored of the random testing, because it did not single out students for stigmatization.

Did *Acton* mean that schools could show special needs in the abstract, that is, as a national problem which all schools could address regardless of the incidence of drug use in their schools, or more narrowly, did special needs arise because of the drug and discipline problems in the particular school? Assuming the latter, what standard of proof would be sufficient to show special need? Furthermore, could a school reach beyond its interest in preventing injuries and blunting the role model affect to reach students engaged in extracurricular activities or even all students?

Justice Scalia’s opinion in *Acton* seems to find special needs simply because a school was involved. After describing how special needs could make the warrant and probable cause requirements

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49. *Id.* at 654.
50. *Id.* at 665.
51. See *id.* at 660-61.
52. See *id.* at 648-49.
53. See *id.* at 663.
"impracticable," without further ado he states, "[w]e have found such 'special needs' to exist in the public school context."\footnote{54} This suggests a broad reading of special needs, which merely requires that a school be involved. That conclusory statement, however, followed a long recitation of the drug and disciplinary problems in the particular schools. This suggests that the special needs doctrine could not be invoked unless the school demonstrates special needs by showing significant drug use among its students. Or, was the special need evidence relevant only to the strength of the governmental interest, that is, in the balancing of private and governmental interests? In this connection, Justice O'Connor, dissenting in \textit{Acton}, argued that even if suspicionless drug testing were justified, on the facts of the \textit{Acton} case, the testing was unreasonable because there was "virtually no evidence in the record of a drug problem" at the grade school.\footnote{55}

In \textit{Board of Education v. Earls},\footnote{56} the Court, 5-4,\footnote{57} upheld a policy requiring drug testing of students who wanted to participate in any extracurricular activities (but in practice applied only to competitive extracurricular programs).\footnote{58} These activities included the National Honor Society, the Academic team, Future Farmers of America, band, choir, Future Homemakers of America, cheerleading and athletics. The drug testing policy mandated a urine test before participating in the activity, and student agreement to drug testing at any time thereafter based on reasonable suspicion.

Justice Thomas immediately honed in on \textit{Acton}'s "the schools' custodial and tutelary responsibility for children" language as a basis for dispensing with individualized suspicion when testing school children for drugs—"'special needs' inhere in the public school context."\footnote{59} Interestingly, this view was shared by Justice Ginsburg in dissent. However, even though she thought it was a special needs case, she concluded that the search was unreasonable, noting that the policy

\begin{footnotesize}
\footnotetext{54. Id. at 653.}
\footnotetext{55. Id. at 684 (O'Connor, J., dissenting).}
\footnotetext{56. 122 S. Ct. 2559 (2002).}
\footnotetext{57. Justice Thomas wrote the opinion for the Court, in which Chief Justice Rehnquist and Justices Scalia, Kennedy and Breyer joined. Justice Breyer also wrote a separate concurring opinion. Justice O'Connor wrote a dissenting opinion in which she was joined by Justice Souter. Justice Ginsburg also filed a dissenting opinion, in which she was joined by Justices Stevens, O'Connor and Souter.}
\footnotetext{58. See \textit{Earls}, 122 S. Ct. at 2569.}
\footnotetext{59. Id. at 2561, 2564.}
\end{footnotesize}
“targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects.”

The perfunctory special needs finding led to the balancing of interests rather than application of the warrant and probable cause requirements of the Fourth Amendment. As in Acton, this custodial and tutelary responsibility plays a large part in the balancing. Looking first to the students’ privacy interests, the Court noted that they are “limited in a public school environment” because children are required to undergo physical examinations and vaccinations. The plaintiffs argued that they had a greater expectation of privacy than athletes because they did not have “regular physicals and communal undress,” a fact stressed by the Acton majority. Justice Thomas, however, found that such factors were not “essential” to the Acton Court’s decision, which he claimed, “depended primarily upon the school’s custodial responsibility and authority.” But, Justice Thomas asserted, “students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes,” pointing to “off-campus travel and communal undress.” Furthermore, extracurricular activities are regulated and this further diminishes the expectation of privacy. Justice Ginsburg, in dissent, countered that many students are “modest and shy,” and that extracurricular activities only occasionally required out of town travel during which times the bathroom facilities provided were usually enclosed stalls. More to the point, she stressed that “[p]articipation 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.”

The majority also minimized the nature of the intrusion, as it did in Acton. In fact, in the case at bar, male students could produce urine samples behind a closed-door stall, whereas in Acton only females had

60. Id. at 2572 (Ginsburg, J., dissenting). Justice O'Connor joined Justice Ginsburg's dissenting opinion. In a separate one paragraph dissent joined by Justice Souter, Justice O'Connor noted that she still thought Acton was wrongly decided, but “[b]ecause [Acton] is now this Court’s precedent, and because I agree that petitioners’ program fails even under the balancing approach adopted in that case, I join Justice Ginsburg’s dissent.” Id. at 2571 (O'Connor, J., dissenting).

61. Id. at 2565.

62. Id.

63. Id.

64. Id. at 2565-66.

65. See id. at 2574 (Ginsburg, J., dissenting).

66. Id. at 2573 (Ginsburg, J., dissenting).

67. See id. at 2566.
that privilege. Since Acton’s collection practice was deemed “negligible,” the method used in Earls was “even less problematic.” Justice Breyer, concurring, noted that “not everyone would agree with this Court’s characterization of . . . urine sampling as ‘negligible.’”

In assessing the privacy interest, Justice Thomas stressed that the test results were not shared with police officials. The only consequence of three positive reactions was suspension from the extracurricular activities. This latter factor appealed to Justice Breyer because it gave a “conscientious objector” a way out. He acknowledged that the price paid for this option was “serious, but less severe than expulsion from the school.”

Finally, Justice Thomas looked to the “nature and immediacy” of the government’s concern and the efficacy of the policy in meeting them—a means-ends analysis. Unlike Acton, there was very little evidence of a significant drug problem in the district’s schools. No matter, said the majority—“the nationwide drug epidemic makes the war against drugs a pressing concern in every school.” But in any event there was specific evidence of drug use, which, said Justice Thomas, was “sufficient . . . to shore up the need for its drug testing program.” He added, however, that proof of a drug problem was not necessary to the government’s power to require drug testing. He concluded that “[g]iven the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools,” the school district’s policy was reasonable.

Justice Thomas rejected outright the Tenth Circuit’s more stringent means-end test that such drug testing could be sustained only if the school showed that there was “some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.” This reasoning resonated with the Court’s opinion in Chandler, which

69. Earls, 122 S. Ct. at 2566.
70. Id. at 2570-71 (Breyer, J., concurring).
71. See id. at 2567.
72. See id.
73. See id. at 2571 (Breyer, J., concurring).
74. Id.
75. See id. at 2567.
76. Id.
77. Id. at 2568.
78. See id.
79. Id.
80. Id. at 2567-68 (quoting Earls v. Bd. of Educ., 242 F.3d 1264, 1278 (10th Cir. 2001)).
found no special need because there was no evidence that there was a drug abuse problem among Georgia officials.\(^8\)

In *Acton*, the Court had emphasized the safety concerns relating to athletes. The plaintiffs in *Earls* stressed this point, but to no avail.\(^2\) Safety is a concern for all children, not just athletes. Individualized suspicion was not necessary because it would be too heavy a burden for teachers and because of the possibility that unpopular groups could be targeted, which would increase the fear of lawsuits—an echo of Justice Scalia’s argument in *Acton*.\(^3\) The *Earls* majority conceded that there was a closer fit between means and ends in *Acton*, but “such a finding was not essential to the holding.”\(^4\)

Justice Breyer, although writing his own opinion, concurred in Justice Thomas’s opinion. He cited statistics showing significant drug use among children, the government’s failure to reduce usage and the school’s responsibility to provide a safe learning environment.\(^5\) He argued that if schools were unsafe, parents would send their children to religious or private schools, a possibility facilitated by the Court’s determination that vouchers for religious schools did not violate the First Amendment.\(^6\) Finally, Justice Breyer was persuaded because the school board had open meetings about the policy and there was little objection from the community.\(^7\) This factor also played a role in *Acton*.\(^8\) In effect, this reasoning gives the majority the power to define the Fourth Amendment, a fundamental right purportedly not subject to majoritarian manipulation.

Justice Ginsburg in dissent argued forcefully that athletes presented different problems than students who participate in non-physical extracurricular activities.\(^9\) Although it is possible that tuba players in the band might collide because they took drugs, “the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference


\(^{82}\) See *Earls*, 122 S. Ct. at 2568.


\(^{84}\) See *Earls*, 122 S. Ct. at 2569.

\(^{85}\) See id. at 2570 (Breyer, J., concurring).

\(^{86}\) See *Zelman* v. Simmons-Harris, 122 S. Ct. 2460, 2473 (2002). Presumably, however, that same ruling would permit parents who do not want the public schools to require random urinalysis of their children to take their voucher money to private schools that do not resort to such tactics.

\(^{87}\) See *Earls*, 122 S. Ct. at 2571 (Breyer, J., concurring).

\(^{88}\) See *Acton*, 515 U.S. at 665.

\(^{89}\) See *Earls*, 122 S. Ct. at 2573 (Ginsburg, J., dissenting).
between imperfect tailoring and no tailoring at all. The irony she noted was that "students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers." Justice Ginsburg concluded that if the school’s policy was aimed at deterrence, it was doubly irrational. It targets students who generally do not need deterrence and excludes students who are more likely to have drug problems from the very activities that might help them.

Parsing court opinions is the core concern of law school and the law. We teach students to read both broadly (what is the overarching driving policy concern of the court), and narrowly (what is absolutely essential to the holding), in order to ascertain the extent of the court’s ruling and the direction in which it may be going.

Elsewhere, I have analyzed the breadth of Justice Scalia’s opinion in Acton, and therefore the Earls decision was not surprising to me, or, I suspect, to many others. The scope and weakness of the majority’s opinion in Earls, however, was somewhat more than I expected. First, that special safety concerns relating to the target group is largely irrelevant. The health of all children seems to be what is important, no matter how unstrenuous the activities in which they engage. Quarterbacks and chess club members are equal in that regard and if so, it is no small leap from that to all students, whether involved in extracurricular activities or not. After all, students could be injured during gym class or while running past each other in the halls. Justice Breyer concurring, however, voiced approval of the policy because it “avoids subjecting the entire school to testing.” Justice Ginsburg argued in dissent in Earls that

[Acton] cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them . . . . Had the [Acton] Court agreed that public school attendance, in and of itself, permitted the State to test each student’s blood or urine for drugs, the opinion in [Acton] could have saved many words.

90. Id. at 2577 (Ginsburg, J., dissenting).
91. Id.
92. See id.
94. Earls, 122 S. Ct. at 2571 (Breyer, J., concurring).
95. Id. at 2572-73 (Ginsburg, J., dissenting).
Given the Court’s enthrallment with the custodial and tutelary responsibility of the schools as a basis for constricting constitutional protection, such a broad regulation is not beyond the pale. This is not to say, however, that all drug testing of students or drug testing of all students would necessarily be upheld. As noted above, Justice Breyer emphasized that the policy “avoids subjecting the entire school to testing.”

Furthermore, Justice Thomas stressed that the information yielded by the test was not turned over to the police. Presumably, therefore, sharing such information with the authorities might be problematic. But not all such cooperation is invalid in special needs cases. In Griffin v. Wisconsin, evidence obtained from a probationer’s home without a warrant or probable cause was used in evidence to convict the defendant, and in New York v. Burger, evidence taken from a car dealer’s lot without a warrant or probable cause was used to convict the lot owner of a crime. The Court noted in Burger that government may attack a problem by both criminal and regulatory means. By extension, arguably a school district may attempt to curb drug use among students by denying access to extracurricular activities, suspension from school, or by criminal prosecution.

On the other hand, in Ferguson v. City of Charleston, the Court overturned a conviction of a pregnant woman whose urine test the public hospital turned over to the police for prosecution. The hospital policy authorized such cooperation with the police to force pregnant women whose urine tests showed drug use into drug treatment programs or risk jail. The Court was uneasy about the cozy cooperation between police and hospital. Of course, Ferguson involved adult women. Furthermore, Ferguson is technically not a special needs case. The Court found that the government’s special objective, i.e., protecting the health of the woman and fetus, were not the immediate need but rather the ultimate goal. The immediate objective was to gather evidence for the police

96. Id. at 2571 (Breyer, J., concurring).
97. See id. at 2566.
99. See id. at 872.
101. See id. at 693.
102. See id. at 700.
104. See id. at 69-70, 86.
105. See id. at 82-84.
and therefore was subject to normal Fourth Amendment constraints.\footnote{106} The immediate/ultimate objective was a new distinction in special needs cases, one that Justice Kennedy pooh-pooed.\footnote{107} He argued in his concurrence in \textit{Ferguson} that in every special needs case the search yielded evidence of criminal activity, which was then used to convict.\footnote{108} The use of such evidence in no way took the search out of the special needs category, if indeed it was a special need. He opined that such a distinction was of little use and ephemeral.\footnote{109}

The immediate/ultimate distinction may have been invented to deal with the hand in glove cooperation of hospital and police personnel, which was used as a bludgeon against pregnant women. But clearly, under prior case law, such cooperation should not have been constitutionally determinative.\footnote{110} The Court could perhaps have achieved the same result by arguing that the means were not sufficiently related to the objective of protecting the health of mother and child. Amici, the American Medical Association and the American Public Health Association, argued that such a hospital policy would drive women, who were poor, not to seek prenatal care, thus increasing risk to both.\footnote{111} That analysis might, however, be used to strengthen the means-end analysis in other cases. The Court apparently thought that the special needs distinction could be more easily contained. In any event, \textit{Ferguson} is not a special needs case and deals with adult women. Therefore its ruling might not be applicable to public school students who are minors, whose constitutional rights are diluted, and who learn in a public school which does implicate a special need.

In \textit{T.L.O.}, the marijuana the administrator found was in fact turned over to the police and was used to convict her of delinquency in juvenile court.\footnote{112} Because the Court found that the search was constitutional, the majority did not need to reach the issue of whether illegally obtained evidence from a student was admissible.\footnote{113} Indeed, the Court has never determined whether the exclusionary rule of the Fourth Amendment applies to school searches, thus barring illegally obtained evidence in

\begin{footnotesize}
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\item See \textit{id.} at 84.
\item See \textit{id.} at 86-87 (Kennedy, J., concurring).
\item See \textit{id.} at 87 (Kennedy, J., concurring).
\item See \textit{id.} at 87-88 (Kennedy, J., concurring).
\item See \textit{Ferguson}, 532 U.S. at 84 n.23.
\item In \textit{T.L.O.}, the Court had initially granted certiorari on only the exclusionary rule issue. After briefing and oral argument, a majority ordered the parties to brief and argue the substantive issue of whether the search itself was constitutional. \textit{See id.} at 327-28.
\end{enumerate}
\end{footnotesize}
juvenile or adult criminal court. Furthermore, the Court may never have to reach the exclusionary rule issue because its rulings are substantively constricting the Fourth Amendment. What Earls does is to expand the category of permissible searches in schools.

Since Justice Breyer was the fifth vote in Earls, it is important to focus on the factors that might influence him to invalidate certain drug testing programs in the public schools. While it is true that he joined the majority opinion, he wrote a concurring opinion to “emphasize several underlying considerations,” which, in his view, were “consistent with the Court’s opinion.”

Justice Breyer liked the policy because he thought it would discourage drug use. Peer pressure, he noted, was the “single most important factor leading school children to take drugs.” He saw the extracurricular activities as providing an excuse which would allow students to refuse to take drugs without fear of stigmatization by his or her drug-taking friends. In this way, the school environment would be changed. Also important to Justice Breyer is that the penalty for refusing to give urine samples or for those testing positive was merely nonparticipation in the extracurricular activities, which he thought was not as onerous as expulsion from school.

Justice Breyer opined that individualized suspicion might lead schools to “push the boundaries of ‘individualized suspicion’ to its outer limits” and might result in the use of “subjective criteria” that would more heavily impact on “unpopular groups,” and “leave those whose behavior is slightly abnormal stigmatized in the minds of others.” Because of these dangers, he concluded that the Fourth Amendment reasonableness requirement “will further that Amendment’s liberty-protecting objectives at least to the same extent as application of the mediating ‘individualized suspicion’ test, where, as here, the testing program is neither criminal nor disciplinary in nature.”

Thus, Justice Breyer is not committed to upholding urine testing of all students, nor to programs in which the penalty for refusal is punished


114. See generally Irene Merker Rosenberg, A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings, 24 AM. J. CRIM. L. 29 (1996) (arguing that the Court, if faced with the question, would hold that the exclusionary rule is not applicable to delinquency cases as a matter of federal law, particularly regarding searches by school officials).
116. Id. at 2570.
117. Id. at 2571.
118. Id.
119. Id.
either by criminal sanctions or disciplinary actions by the school. Moreover, as noted above, to Justice Breyer the "democratic, participatory process" that resulted in no opposition to the policy, is an important factor in the reasonableness of the program.120

The danger of Earls is that it is a precedent that permits an invasive drug testing program that overcomes the privacy rights of children, even though it does not substantially relate to the problem at hand. The means-end fit in Earls resembles the way the Court analyzes Equal Protection challenges to social and economic programs. If a fundamental right or suspect classification is not involved, and usually they are not in such types of legislation, the Court uses a low-level rational relationship test that turns out to be no test. If the ends and means are remotely in the same or even adjacent ballparks, the legislation is upheld.121

From time to time, however, the Court, although reluctant to find more suspect classifications or fundamental rights, because the strict scrutiny it triggers is usually "fatal in fact," occasionally subjects some economic and social legislation which impacts on an "important" interest or on a disfavored class to a more stringent form of rational relationship analysis. For example, in City of Cleburne v. Cleburne Living Center, Inc., the Court refused to find retarded persons a suspect or quasi-suspect class or that the right to housing was a fundamental right, either of which would trigger heightened scrutiny. At the same time, supposedly using only low-level rational relationship scrutiny, the Court invalidated a zoning order refusing a permit for a group home for retarded persons. In fact, the Court was subjecting the zoning ordinance to a more rigorous analysis, one which Justice Marshall calls "heightened scrutiny" and which Gerald Gunther terms rational relationship with "bite."128

120. See id.
121. See, e.g., U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (upholding federal benefits law under a rational relationship standard, and noting that if there is any plausible reasons for Congress' action, the Court's inquiry is over); see Gunther, supra note 5, at 8 (noting that the deferential old equal protection required "minimal scrutiny in theory and virtually none in fact").
122. See Gunther, supra note 5, at 8.
124. See id. at 442.
125. "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." Id. at 446.
126. See id. at 447-50.
127. Id. at 456 (Marshall, J., concurring in part and dissenting in part).
128. See Gunther, supra note 5, at 22.
Similarly, in *Plyler v. Doe*, although the right to education is not a fundamental right, and undocumented children are not a suspect class, the Court, citing the need for "special constitutional sensitivity," struck down a Texas law prohibiting such children from receiving a free public school education. The majority looked to the importance of education, seeing it as a way of preventing a permanent underclass. Justice Brennan argued that the law "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status," and that in looking to its rationality the Court "may appropriately take into account its costs to the Nation and to the innocent children who are its victims." This more rigorous kind of analysis, which, while still deferential, assures that the government proposal is actually designed to meet the stated problem without overkill.

The public schools in this country perform vital functions—imparting knowledge, developing analytical skills, instilling the democratic values of our constitutional system, and nurturing special talents by offering special courses and extracurricular activities. The latter in particular provide a broad range of educational opportunities. Conditioning access to these programs by forcing students to consent to searches is not a lesson the schools should be teaching. The schools can accomplish their objectives more directly and effectively by the use of particularized suspicion. Students are under constant observation by teachers, administrators and other students, and that scrutiny will facilitate spotting drug users, certainly far more so than random testing.

The Court and Justice Breyer made oblique references to the possibility of racism or other kinds of discrimination if individualized suspicion were required. That is perverse reasoning. Complaints are sometimes made that adult minorities are singled out more often by the police than white persons. We do not on that account suspend the need for probable cause and allow random searching. Indeed, perhaps such discrimination can best be met by insisting on particularized suspicion, because it forces the police to articulate specific non-racial factors about the suspect. Of course, we must also try to make sure that equal protection is obeyed, both on the streets and in our schools. Interestingly, the federal courts generally will not entertain section 1983

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130. *Id.* at 226.
131. *See id.* at 230.
132. *See id.* at 226.
133. *Id.* at 223.
134. *Id.* at 224.
actions based on students' allegations that they were subjected to arbitrary and excessive corporal punishment in violation of due process. If, however, the student complains that the beatings were inflicted because of race, the courts will examine the claim under the Equal Protection Clause. In fact, in Whren v. United States, it was argued that allowing police officers to make pretextual stops when drivers committed minor traffic infractions would impact adversely on racial minorities. The Court's curt response was to direct the petitioner's attention to the availability of the Equal Protection Clause, even though equal protection is not an adequate substitute for Fourth Amendment protection because it requires proof of intent, which is hard to establish.

Justice Breyer was also concerned that requiring individualized suspicion would result in pushing that test to its limits and beyond. Why any more so than with adults? Either there is or there is not sufficient information to establish the requisite level of suspicion. Furthermore, the Court itself has been the one pushing the tests for both probable cause and reasonable suspicion to low levels. Does that mean we must abandon such tests and allow random testing of everyone? The remedy for these possibilities lies with insisting that the test for particularized suspicion be maintained. Indeed, one might argue that since enforcement officials tend to dilute the Court's rulings, to assure appropriate protection, the Court should make its standards stricter.

The reach of Earls will undoubtedly soon be determined. After T.L.O., Acton, and Earls, I have no doubt that there is some school administrator somewhere who will decide to require all students to undergo urinalysis as a condition to school attendance. It is also likely that parents will applaud the idea because it shifts the burden of conflict between them and their children to the schools.

135. See, e.g., Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). Some courts will do so if malice and inhumane abuse is shown. See e.g., Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).
136. See, e.g., Coleman v. Franklin Parish Sch. Bd., 702 F.2d 74 (5th Cir. 1983) (per curiam).
138. See id. at 813.
Notwithstanding their purported non-criminal objectives, our schools are becoming fortresses of police power without adequate constitutional controls, engaging in drug testing, strip searches, dogs patrolling the halls and classrooms, and corporal punishment. Is there any time for education in them?