Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls: Will Louisiana Halt the United States Supreme Court's Continuous Corrosion of Student Fourth Amendment Rights?

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Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls: Will Louisiana Halt the United States Supreme Court’s Continuous Corrosion of Student Fourth Amendment Rights?

There is a circle around every individual human being which no government ought to be permitted to overstep, that there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritarian intrusion. No one who professes the smallest regard for human freedom or dignity can ever call this into question.¹

—Thomas Jefferson

INTRODUCTION

More than three decades have passed since the United States Supreme Court in Tinker v. Des Moines Independent Community School District² recognized student constitutional rights by declaring that constitutional protections are not shed at the schoolhouse gate.³ Today, in the twenty-first century, that statement has been the source of many a footnote, but rarely a source of application because student rights have not only been shed, but have more or less evaporated. While the Supreme Court has not yet abandoned Fourth Amendment protections altogether for people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,⁴ it has, in essence, excluded schoolchildren from the definition of “people.”

While some believe that statement to be harsh, this is, unfortunately, the undeniable conclusion that can be reached by anyone who has read Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,⁵ which upheld a policy requiring

² Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969). Tinker involved a student-led protest of U.S. involvement in the Vietnam War. To illustrate their disapproval of U.S. involvement, the students wore black armbands while on school grounds. The School District issued a policy prohibiting the students from wearing these black armbands and the students sued. The United States Supreme Court ruled that, absent any demonstration that these acts would cause substantial disruption to the school’s learning environment, the School District’s prohibition of these acts was a violation of the students’ First Amendment rights to freedom of speech.
³ Id. at 506, 89 S. Ct. at 736.
⁴ U.S. Const. amend. IV.
⁵ Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls,
all students who participated in extracurricular activities to submit to suspicionless drug testing despite minimal evidence of a drug problem within the school. In upholding the policy, the Supreme Court basically trumped the government’s “special need” to prevent and deter student drug use over the rights proclaimed by that two-hundred-year-old contract we call the United States Constitution. Reading the Court’s opinion makes it difficult to ignore the possible future ramifications. Although the world is currently experiencing a widespread drug problem, truncating student Fourth Amendment rights is not the answer. In the end, it may do more harm than good by causing students to shy away from the one thing acknowledged to be a deterrent from drug abuse—participation in student extracurricular activities. Louisiana, however, may choose to provide its citizens a remedy to prevent this continuing corrosion of individual rights. At least one state has used its own constitution to strike down a student drug-testing policy similar to the policy approved of in Earls. In order for Louisiana to preserve the fundamental liberties it holds dear, the Louisiana Supreme Court should protect its citizens from unreasonable governmental intrusion by applying Louisiana’s constitution and making a declaration that, while the United States Supreme Court has appeared to have abandoned the maxim set out in Tinker, Louisiana will continue to support the view that students do not shed their rights at the schoolhouse gate.

Part I of this article discusses two important Supreme Court cases preceding Earls that involve constitutional challenges to student searches. Part II, which discusses in detail the Earls opinion, is followed by an analysis of the case using a balancing test set forth by the Supreme Court. This analysis not only attempts to distinguish the Earls policy from a previous policy upheld by the United States Supreme Court, but illustrates the consequences Earls will have in the future. Part III then focuses on Louisiana’s constitution, current legislation, and jurisprudence to determine whether Louisiana will prevent the continuous corrosion of student rights.

I. FOURTH AMENDMENT SCHOOL SEARCHES PRECEDING EARLS

A. New Jersey v. T.L.O

T.L.O. was the first Supreme Court case addressing Fourth Amendment searches in the school context. There, school officials

6. Id. at 838, 122 S. Ct. at 2569.
searched a purse of a student suspected of smoking and came upon marijuana cigarettes. The United States Supreme Court granted certiorari to decide whether the evidence produced by the search should be suppressed. The Court first began its analysis by declaring that school officials are not exempt from Fourth Amendment requirements merely because of their tutelary nature. In citing Tinker, the Court stated that, "[i]f school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students." The Court, however, held the evidence to be admissible on the theory that there must be some balancing test to accommodate both student privacy interests and the substantial need for school administrators and teachers to maintain order and discipline within the schools. Therefore, in order to maintain an adequate learning environment, school officials are not bound by probable cause requirements and may search students if the search is based on reasonable suspicion. In order to determine whether the search passes constitutional muster, a test of reasonableness must be performed when conducting both criminal and administrative searches.

B. Veronia School District 47J v. Acton—Expanding the Scope of Student Searches

In 1995, the Supreme Court ruled on the Veronia School District’s drug implementation policy that randomly tested student athletes. The court held the policy constitutional when it refused to apply a standard of reasonable suspicion. Instead, the court formulated a three-part test to determine when Fourth Amendment searches by school officials are reasonable. According to the Court, one must look at (1) the nature of the privacy interest, (2) the character of the intrusion imposed by the policy, and (3) the nature and immediacy of the government’s concerns.

Before fully introducing Veronia’s test, it is important to note that the Veronia School District faced extraordinary circumstances when it decided to implement its drug-testing policy. A sharp increase in

9. Id. at 336, 105 S. Ct. at 739–40.
10. Id., 105 S. Ct. at 740.
11. Id. at 340, 105 S. Ct. at 742.
12. Id. at 337, 105 S. Ct. at 740.
14. Id. at 654, 115 S. Ct. at 2391.
15. Id. at 658, 115 S. Ct. at 2393.
16. Id. at 660, 115 S. Ct. at 2394.
student drug use was noted in the late 1980's. By the mid-1990's, student drug use was so rampant that it was difficult for teachers to control the students in the classroom, and many disciplinary proceedings were held due to this widespread drug problem. Students began to boast of their attraction to the drug culture and some informed school officials that nothing could be done to solve the problem. Evidence also indicated that, not only were athletes abusing drugs, but they were, in fact, the leaders of the drug culture. Further, injuries sustained by student athletes had grown, causing concern about student safety. This situation caused the School District to implement the drug-testing policy requiring student athletes to submit to random drug-testing.

1. The Nature of Veronia Athletes' Privacy Interests

In determining the nature of the athletes privacy interests, the Court stressed that students have a lesser expectation of privacy than adults because of the tutelary nature that school officials exercise over them, but that they retain legitimate privacy expectations nonetheless. This privacy expectation is even less with student athletes, who must abide by athletic rules and regulations and submit to routine physical examinations. Also, since athletic dressing facilities do not have separate shower and dressing facilities, there is an element of communal undress associated with athletic participation. Student athletes in a school setting also have a lower expectation of privacy because their adult counterparts are routinely subjected to suspicionless drug testing. After weighing all of the facts in the case, the Court determined that the nature of the privacy interests purported by Veronia's athletes was minimal.

2. Character of the Intrusion Imposed by Veronia's Policy

Urinary drug-testing has been determined to be a great intrusion of privacy upon a person, but the Court has often looked to the manner in which the test is conducted to determine the degree of that intrusion. The Court analyzed the Veronia School District's testing

17. Id. at 648–49, 115 S. Ct. 2388–89.
18. Id. at 648, 115 S. Ct. at 2388.
20. Id. at 656, 115 S. Ct. at 2392.
21. Id. at 657, 115 S. Ct. at 2392–93.
22. Id., 115 S. Ct. at 2393.
procedure to determine whether the District’s policy created an unnecessary invasion of privacy. The plaintiffs in *Veronia* argued that the Policy imposed a requirement on students selected for random drug testing to produce their prescription medication information beforehand, a requirement disapproved of in a prior case involving random suspicionless drug-testing. However, the Court refused to state that such requirements are *per se* unreasonable. It instead accorded great deference to the School District, stating that, “[i]t may well be that, if and when [students are] selected for random testing at a time that [they are] taking medication, the School District would have permitted [them] to provide the requested information in a confidential manner....” The Court then examined the remainder of the School District’s drug-testing policy and concluded that the tests were performed in a confidential manner.

### 3. Nature and Immediacy of the Government’s Concerns

When analyzing the nature and immediacy of the government’s concerns, the Court found that the government’s need to impose this drug-testing policy among Veronia’s athletes was compelling. Veronia’s educational process had been disrupted and other efforts to curb student drug use had failed. The Court noted that the drug-policy had been narrowly tailored to test only student athletes, where there was an imminent risk of physical harm to both the drug user and to his opponents. Various psychological effects of drug use could have an alarming effect on a student athlete, including “impairment of judgment, slow reaction time, and a lessening of the perception of
great privacy.”).


25. *Skinner*, 489 U.S. at 626–27, 109 S. Ct. at 1418. The Court stressed in *Skinner* that one of the factors in determining that the urinary testing was not a significant invasion of privacy was the fact that railroad employees were not required to submit beforehand information regarding current use of prescription medication. Only after an employee tested positive was he required to supply the medication information. This information was to be given to a licensed physician, and not a governmental official.


27. *Id.* at 658, 115 S. Ct. at 2393. Under the District’s Policy, the students produce the urine samples in bathroom facilities. Male students produce the samples at the urinal along a wall and remain fully clothed while observed from behind. Female students produce samples in an enclosed stall while a female monitor stands outside of the stall listening to sounds of tampering. The tests look only for drugs and do not look for whether a student is epileptic, pregnant, or diabetic. The drugs for which the tests screen are also standard in that they do not vary according to the identity of the student. The results of the tests are disclosed only to a limited number of personnel who need to know and are not turned over to law enforcement authorities or used for any internal disciplinary function.
pain,” and “[the] particular drugs screened by the District’s Policy have been demonstrated to pose substantial physical risks to athletes.”

After determining that the School District had a profound need to implement its drug testing policy, the Court found that the drug problem could be substantially diminished by the District’s drug implementation policy. It seemed self-evident to the court that controlling drug-use among athletes was of particular importance, considering that the drug problem in the Veronia School District was fueled mainly by the “role model” effect athletes had on their peers. Thus, the Court concluded that the School District’s Drug Policy was a legitimate means to obtain its ultimate governmental end, specifically, obtaining an effective learning environment by decreasing drug use among its students.

II. BOARD OF EDUCATION OF INDEPENDENT DISTRICT No. 92 OF POTTAWATOMIE COUNTY v. EARLS

After the Court’s decision in Veronia, several school districts, including the Tecumseh School District in Oklahoma, attempted to enact drug-testing policies within their schools. Tecumseh’s Drug Policy was implemented in the fall of 1998 and required all students who participated in any extracurricular activity to submit to a suspicionless random drug test during the year, while a participant in a school organization, and at any time upon a finding of reasonable suspicion. These extracurricular activities include, among others, the Academic Team, Future Farmers of America (FFA), band, choir, pom-pom, and cheerleading, as well as athletics.

Following the implementation of the school district’s drug policy, two students at Tecumseh High School, with the support of their parents, filed suit. Among the two was Lindsay Earls, a member of the school choir, the marching band, and the Academic Team. The suit challenged the constitutionality of the suspicionless drug testing policy on the grounds that it was an unreasonable search and thus a violation of students’ Fourth Amendment rights against unreasonable searches and seizures.

28. Id. at 662, 115 S. Ct. at 2395.
29. Id. at 663, 115 S. Ct. at 2395–96.
32. Id.
33. Id. at 826–27, 122 S. Ct. at 2563.
Since *Veronia* was controlling, the plaintiffs had to differentiate the facts in *Veronia* from the present case. The plaintiffs argued that, unlike the situation in *Veronia*, there was no ample evidence of a drug problem among the students in the Tecumseh School District and, consequently, no "special need" to engage in urinary drug testing. They also argued that students who engage in extracurricular activities tend to be less likely to use drugs than the general student population, and no evidence existed illustrating that students' privacy expectations diminish when they participate in extracurricular activities.\(^4\)

After applying the Veronia balancing test, the Supreme Court, in a 5-4 decision, upheld the School District’s Drug Policy by noting that extracurricular activities were voluntary and, most importantly, that the government had a profound need to make sure that students do not use and abuse illicit drugs.\(^5\) The Court’s decision thus created a significant expansion of student drug testing. Even without questioning the Court’s decision in *Veronia*, it is difficult to understand the wisdom behind its decision in *Earls*. Assuming that *Veronia* was correct, the Supreme Court erred in applying its balancing test, because of the stark differences in the circumstances and the bad public policy that reasoning creates. The Court seems to have "stretched and pulled" *Veronia*, restricting students’ Fourth Amendment rights, in a manner that the Founders of our nation never intended.\(^6\)

### A. Greater Nature of Student Privacy Interests

While a student’s expectation of privacy is diminished somewhat in schools, students are not totally void of reasonable privacy expectations. Granted, school officials have a great interest in maintaining discipline and order in the classroom to create a productive learning environment for their students, but allowing the government to tout its duty as schoolmaster as a reason to circumvent the protections of the Fourth Amendment goes greatly beyond *T.L.O.*’s mandate that student Fourth Amendment rights may not be diluted any more than necessary to preserve order in the schools.\(^7\) The government’s job as schoolmaster, in addition to protecting the safety of children and maintaining order in the classroom, includes

\(^{34}\) Id.
\(^{35}\) Id. at 829–30, 122 S. Ct. at 2564–65.
respecting that students, too, are considered persons for reasons of the Fourth Amendment and that they continue to retain legitimate expectations of privacy when they enter the schoolhouse gate.

Just as all students have a legitimate expectation of privacy, so too do students who participate in extracurricular activities. While participation is not mandated by school officials, it is stressed. Justice Ginsberg's dissent noted that extracurricular participation is part of an educational program designed to factor into a child's educational experience so that students may "take full advantage of the education offered them." Because extracurricular activities are part of the school's educational program, to deny students who refuse to be drug-tested access to these programs would tend to lessen their educational experience. Foregoing extracurricular participation would also substantially lower students' opportunities to pursue degrees of higher learning because participation is of vital importance to those who wish to gain acceptance to competitive institutions of higher learning. Even students who maintain excellent grade point averages may be turned away from a highly selective university if they are lacking in extracurricular participation. Thus, because participation in extracurricular activities is part of the school's educational program and is a critical factor for universities who are determining which students to accept, the term "voluntary" should not be applicable. It is difficult to agree with Justice Ginsberg, however, on how participation in non-athletic extracurricular activities is different from participation in athletic extracurricular activities. All students are encouraged to participate in any type of extracurricular activity, whether it be athletic or otherwise, and all participants depend on this participation to gain acceptance to universities. Therefore, it may be argued that any type of extracurricular participation is "involuntary."

However, even though athletes may be considered "involuntary" participants, athletic and non-athletic participation are different. While students who participate in extracurricular activities may also be subjected to certain rules and regulations, they are not as stringent as the rules and regulations imposed upon athletes. For example, students on the Academic Team must maintain a certain grade point average in order to qualify. This is a gross deviation from the situation in Veronia in which student athletes were subjected to routine physical examinations. Also, unlike athletes, there is no element of communal undress present for students who participate in

38. Earls, 536 U.S. at 846, 122 S. Ct. at 2573 (Ginsberg, J. dissenting); see also Brief of Amici Curiae American Academy of Pediatrics at 7, Earls.
40. Brief of Amici Curiae American Academy of Pediatrics at 6, Earls.
extracurricular activities. While athletes in a school setting may have a lesser expectation of privacy because their adult counterparts are routinely subjected to suspicionless drug tests, it would be absurd to impute this reality to students who participate in non-athletic extracurricular activities.41

B. Evidence of Greater Degree of Intrusion

While Tecumseh's Drug Policy set forward the same standards as Veronia District's Drug Policy, Lindsay Earls contended that the school did not adhere to its guidelines. She alleged that the personal information was carelessly handled and its confidentiality compromised. According to Lindsay, prescription drug sheets were routinely viewed by her choir teacher, who also kept the files in places that were easily accessible. The test results were also given to all activity sponsors who claimed they had a great need to know the results.42 This was contrary to the District's policy that required that the "medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees."43 Despite these allegations, the Court granted summary judgment for the Tecumseh School District. Justice Ginsberg, in her dissent, argued that the District Court gave substantial deference to the School District,44 even though it had been widely held that, in the stage of summary judgment, "doubtful matters should not have been resolved in favor of the judgment seeker."45 Since the plaintiffs opposed the motion for summary judgment, the evidence should have been viewed in the light most favorable to them. The consequence of permitting summary judgment without resolving any material issues of fact entices school districts that have enacted drug-testing policies to subsequently violate the terms of the policies.

Since we will never know whether any truth to these allegations existed, it is difficult to determine whether the degree of intrusion in this circumstance exceeded the degree of intrusion in Veronia. Assuming that the allegations are correct, however, would mean that

42. Id. at 847-50, 122 S. Ct. at 2574–75, (Ginsberg, J. dissenting).
43. Id. (citing Respondents' Brief at 6, Earls).
44. Id. at 849, 122 S. Ct. at 2575, (quoting Bd. of Educ. of Indep. Sch. District No. 92 of Pottawatomie County v. Earls, 115 F. Supp. 2d. 1281, 1293 (W.D. Okla. 2000)). The District Court stated that, since the Drug Policy, "expressly provides for confidentiality of test results, . . . the Court must assume that the confidentiality provisions will be honored.”).
45. Id. at 849, 122 S. Ct. at 2575 (Ginsberg, J. dissenting) (citing United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993 (1962)).
the drug testing was not performed in the least intrusive manner and unnecessarily compromised an individual's legitimate need for privacy.

C. No Profound Nature and Immediacy of Tecumseh School District’s Concerns

Without question, the nature and immediacy of the Tecumseh School District’s concerns pale in comparison to the concerns that the Veronia School District faced. The only evidence of a drug problem that the District could produce happened to be a small number of occurrences from the 1970's.\(^{46}\) Equally ironic is the fact that the Tecumseh School District repeatedly boasted to the federal government that it did not have a drug problem within its schools and any drug use that may have been occurring was decreasing each year.\(^{47}\) While there was no demonstration by the District of drug abuse among Tecumseh’s students, there was even less of a demonstration of drug abuse among those students who participated in extracurricular activities. On the contrary, an amicus brief filed by the American Academy of Pediatrics contained research that illustrated a correlation between participation in extracurricular activities and abstinence from drugs. Evidence indicated that students who did not engage in extracurricular activities were forty-nine percent more likely to engage in illicit drug use than students who chose to participate in extracurricular activities.\(^{48}\) Thus, the School District could not, and did not, assert that they were implementing the drug policy in response to an epidemic among a certain group of students, making it an unlikely conclusion that an immediate governmental concern was present in Tecumseh’s schools. The majority made the argument that it would not allow drug use to become an epidemic in schools before the government could step in to combat the problem. While this statement may be good public policy, it does not necessarily mean that it is constitutional. In a prior case involving suspicionless drug testing, Justice Scalia noted that the

\(^{46}\) Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 242 F.3d 1264 (10th Cir. 2001).

\(^{47}\) Respondents' Brief at 1, Earls.

\(^{48}\) Brief of Amici Curiae American Academy of Pediatrics at 10, Earls (citing N. Zill et al., Adolescent Time Use, Risky Behaviors and Outcomes (U.S. Pub. Health Serv. 1995) (stating that “students who reported spending no time in school-sponsored activities were [forty-nine] percent more likely to have used drugs”; L. Shilts, The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, and Personal Attitudes, 26 Adolescence 613, 615 (Fall 1991) (finding that among adolescents studied, “the non[drug] using group reported significantly higher involvement in extracurricular activities as compared to the using and abusing groups”)).
person implementing the policy must rely on demonstrated realities, or else a "kind of immolation of privacy and human dignity in symbolic opposition to drug use" occurs.\(^4\) Ironically, Scalia joined the majority in *Earls*, giving testament to the majority's belief that the doctrine of *in loco parentis* is supreme to the Fourth Amendment of the United States Constitution.\(^5\) To the contrary, the doctrine of *in loco parentis* does not authorize school officials to conduct suspicionless drug tests on all students who engage in extracurricular activities. Instead, it is designed to narrowly delegate a subset of parental authority to school officials—the authority to take necessary steps to protect students and maintain order in the classroom. The doctrine does not, and should not, usurp parents' rights to raise their children as they see fit, absent justified reasons of school safety or discipline.\(^5\) This doctrine was invoked in *Veronia*, where there existed an open rebellion in the classroom, and the necessity to protect the safety of student athletes similarly existed. It could not have been reasonably applied in this case, however, where the Tecumseh School Board failed to demonstrate that the policy was enacted to preserve student safety and order in the classroom. Tecumseh argued the existence of an immediate need to maintain discipline and order in its schools, yet the Tecumseh "drug culture," if one existed at all, is dwarfed by the extraordinary troubles that faced the Veronia School District. While school administrators in *Veronia* described the rapid increase in schoolroom disruptions, disciplinary reports, and student boasting indicating that there was little officials could do to combat the drug problem,\(^5\) an increase in classroom disruption failed to occur in Tecumseh's schools. Tecumseh's Drug Policy, therefore, goes beyond the government's duties to maintain order and discipline in order to achieve a safe and productive learning environment.

In addition, the Court erred in applying the "special needs" exception to *Earls*. *Veronia* indicated that a "special need" existed


\(^{50}\) Oral Arguments at 40–41, *Earls*. Justice Scalia's statement to plaintiff's counsel, Graham A. Boyd:

> And—and what I miss in your argument is any recognition of the fact that we are dealing with minors. I mean, you're talking here about a search rather than a seizure, but in the case of minors, you can keep them, in effect, imprisoned after school, can you not, if they haven't done their homework or something else? The school is standing in loco parentis. It is trying to train and raise these young people to be responsible adults.

> And I think that—it's a—a world of difference from—from what—from what the State can do with regard to adults.

\(^{51}\) Brief of Amici Curiae Jean Burkett at 1, *Earls*.

\(^{52}\) *Veronia*, 515 U.S. at 648, 115 S. Ct. at 2388.
because the Veronia School District’s policy was narrowly directed toward student athlete drug use, where there is an imminent risk of physical harm to both the athlete and to his opponent. On the other hand, Tecumseh’s Drug Policy failed to demonstrate how students who participate in extracurricular activities such as the Academic Team, choir and band are deemed to be in grave physical danger if they compete while using drugs.

The Court has made various exceptions to the warrant requirement, administrative searches being listed as one of those exceptions. Those searches are justified when a “special need” exists. The concept of “special needs” ironically was first addressed in T.L.O. when Justice Blackmun stated, “[o]nly in those exceptional circumstances in which special needs [exist], beyond the normal need for law enforcement, . . . is a court entitled to substitute its balancing of interests for that of the Framers.” This “special needs” concept was first applied by the Court in the context of suspicionless drug-testing in the cases of Skinner v. Railway Labor Executives’ Association and National Treasury Employees v. Von Raab. Both involved circumstances in which danger of life or limb was at issue. No such circumstances were proven to have existed in Tecumseh.

1. Skinner and Von Raab—Immediate Danger to Life or Limb

Skinner involved a constitutional challenge to The Federal Railroad Safety Act of 1970, which authorized the Secretary of Transportation to “prescribe as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.” Pursuant to this act, the Federal Railroad Administration (FRA) issued a regulation requiring railroad employees involved in railway accidents to submit to blood and urine testing. In upholding the regulation, the Court first pointed out significant problems of on-the-job intoxication in the railroad industry and focused on data illustrating that various railway accidents had occurred at the hands of intoxicated employees. After concluding that governmental collection of blood and urine samples implicated the Fourth

53. Id. at 662, 115 S. Ct. at 2395.
58. Id.
59. Id. at 607, 109 S. Ct. at 1407. The FRA found that, from 1972 to 1983, on-the-job intoxication led to at least 21 train accidents, resulting in 25 fatalities, 61 non-fatal injuries, and $19 million in property damage.
Amendment, the Court stated that the "Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." In turning to the reasonableness analysis, the Court invoked the "special needs" test, balancing both the employee's privacy interest with the government's exceptional need to preserve the safety of passengers and neighboring communities, as well as the employees themselves. Because the government's interest in preventing railroad accidents was so compelling, there existed a "special need," going beyond the need of law enforcement, to ensure the safety of the thousands of people who travel by train each day.

Von Raab also involved a constitutional challenge to suspicionless drug testing. The Commissioner of the United States Customs Service implemented a drug-testing program that required all Customs employees who met one or more of three criteria to submit to suspicionless drug testing. The employees required to submit to this testing were those employees who (1) were involved in either drug interdiction or enforcement, (2) carried firearms, or (3) handled classified material that might fall into the hands of smugglers. The Court noted that a "special need" existed because the "Customs Service's drug-testing program [was] not designed to serve the ordinary needs of law enforcement." Because many customs employees are frequently exposed to both bribery from traffickers and temptation to use and abuse illegal drugs that are readily accessible, a special need existed. An agent who abuses drugs can be susceptible to these temptations, which may have the potential to eventually cause a breach in national security or substantial injuries to human beings.

After Skinner and Von Raab were decided, some scholars criticized the Court for broadening the Fourth Amendment "special need" requirement in administrative searches, while others stated that the specific circumstances in the cases and the narrow range of employees affected by the drug test would not unnecessarily diminish Fourth Amendment protections.

60. Id. at 619, 109 S. Ct. at 1414.
61. Id.
62. Id.
65. Id.
66. Id. at 666, 109 S. Ct. at 1391.
67. Id. at 669, 109 S. Ct. at 1392.
68. Id. at 670, 109 S. Ct. at 1393.
It is evident, both from the careful fact-specific balancing process that the Court employed in both cases, and in particular from the partial remand of the regulations at issue in Von Raab in order to narrow the range of employees on whom they would be imposed, that the Fourth Amendment does not permit suspicionless drug testing regimes to be imposed indiscriminately on [those] who do not actually perform jobs that justify such an imposition. 70

2. Chandler v. Miller 71—Good Public Policy, but No “Special Need”

These optimistic scholars appeared to be correct in their assumption that the “special needs” would only be invoked when substantial danger to life or limb existed when the Court refused to extend the “special needs” exception to a policy that subjected all candidates who ran for public office to a suspicionless drug test in order to qualify. Only in exceptional circumstances, the Court noted, would it depart from the requirement of a warrant or individualized suspicion. 72 The state’s claim that drug use was incompatible with holding high state office was not important enough to override the candidates’ privacy interests. 73 Because there was no evidence of a drug problem among state officials, a denial of the government’s attempt to depart from constitutional mandates protecting an individual’s reasonable expectation of privacy was appropriate. Public officials did not present the justifiable safety concern present in Skinner and Von Raab; specifically, they did not engage in the high-risk safety-sensitive tasks that would have given the government sufficient justification to impose a drug-testing policy.

While the Supreme Court has attempted to use Skinner and Von Raab as justification that suspicionless drug testing policies like the Tecumseh School District’s are reasonable, Earls seems more analogous to Chandler in that: (1) students who participate in extracurricular activities do not engage in high-risk safety-sensitive tasks; and (2) no evidence of a drug problem exists within the Tecumseh schools. Participation in extracurricular activities can hardly be described as highly safety-sensitive. Images of “out-of-control cutlery, animals run amok, and colliding tubas” 74 belong more

72. Id. at 308, 117 S. Ct. at 1297.
73. Id. at 318, 117 S. Ct. at 1303.
to the creative writers at Pixar than legal scholars. Thus, when "public safety is not genuinely in jeopardy the Fourth [and Fourteenth Amendments] preclude suspicionless search[es], no matter how conveniently arranged."75

3. Possible Ramifications of the Earls decision

In declaring Earls to be similar to Von Raab and Skinner, the Court's reasoning may invoke severe consequences to students. Students who refuse to have their privacy rights violated must abstain from extracurricular competition, which, as discussed previously, will lessen their educational experience and diminish their opportunities to gain acceptance to institutions of higher learning. Earls opens the door to a greater expansion of suspicionless drug testing throughout the nation. It is not denied that drug abuse is and will continue to be a nationwide crisis, but governmental efforts to combat the use of drugs in our society should be done within the confines of the United States Constitution. The need for vigilance against unconstitutional excess is so great precisely because the need for action against the drug crisis is manifest.76 The zealots, sacrificing fundamental freedoms in the name of exigency, ultimately find their enthusiasm turns into regret.77

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.78

The Court has certainly bent well settled principles of law by declaring that the importance of combating the nationwide drug problem subverts student privacy interests. To make such a declaration is to reduce the United States Constitution to a trivial state and calls to mind Justice Brandeis's dissenting opinion in Olmstead v. United States:79 "[f]or good or for ill, [our Government] teaches the

77. Id.
whole people by its example." Likewise, schools should teach their students by example. However, the Court has permitted the use of symbolic measures, substantially diminishing student constitutional protections by teaching students "to discount important principles of our government as mere platitudes." What a tragedy to have school administrators stress to their students to respect a two-hundred year-old constitution, while simultaneously allowing administrators to deny their students basic protections provided in that very constitution.

Because of the apparent failure to meet any of Veronia's criteria and the majority's statement that the most important justification for allowing such a drug policy was that the Drug Policy was undertaken in furtherance of the government's tutelary responsibilities, one wonders whether the Court will continue to bend well-settled principles of law until these principles are so curved that they snap beyond repair. Earls is clearly an omen that the broadening of "special needs" in the school context will continue until all students may be subjected to urinary drug testing.

III. WHAT CAN LOUISIANA DO?

A. Interpreting Article 1, Section 5 of the Louisiana Constitution

While the Supreme Court has blatantly ignored the Fourth Amendment and Tinker, the predicament described above is nevertheless the state of the law today. A possible solution to this problem is to have states apply their own constitutions to rule student suspicionless drug testing unconstitutional. While some courts have agreed to use their state constitutions to determine whether such random drug testing policies are constitutional, Louisiana is one of the many state courts that has yet to address the problem.

Article 1, Section 5 to the Louisiana Constitution expressly states:

Every person shall be secure in his person, property, communication, houses, papers, and effects against unreasonable searches, seizures, or invasion of privacy. No warrant shall issue without probable cause supported by oath

80. Id. at 485, 48 S. Ct. at 575.
83. Earls, 536 U.S. at 830, 122 S. Ct. at 2565.
84. Justice Jackson once stated, "The Court is not final because it is infallible. It is infallible because it is final." Brown v. Allen, 344 U.S. 443, 540, 73 S. Ct. 397, 427 (1953).
or affirmation, and particularly describing the place to be searched, the person or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.  

While both the United States Constitution and the Louisiana Constitution prohibit unreasonable searches and seizures, Louisiana courts have tended to grant broader constitutional rights in spite of numerous United States Supreme Court decisions narrowing the scope of the Fourth Amendment. Justice Dennis, a delegate to the Louisiana Constitutional Convention of 1973, stated in State v. Hernandez, Our state constitution’s declaration of the right to privacy contains an affirmative establishment of a right of privacy, explicit protections against unreasonable searches, seizures, or invasions of property and communications, as well as houses, papers and effects, and gives standing to any person adversely affected by a violation of these safeguards to raise the illegality in the courts. This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individualized liberty than that afforded by the jurisprudence interpreting the federal constitution.

The Louisiana Supreme Court, in Hernandez, departed from federal jurisprudence to determine whether a search was reasonable. That case involved the search of an automobile pursuant to an arrest. The defendant there was arrested for driving while intoxicated. After being taken to the station, his car, which was parked in his driveway, was towed, but not before a search was performed. The Louisiana Supreme Court, in excluding the contraband found in the vehicle, narrowed the United States Supreme Court’s holding in New York v. Belton and concluded that an officer is prohibited from searching

85. La. Const. art. 1, § 5.
88. Id. at 1385 (citation omitted).
89. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860 (1981). In Belton, the United States Supreme Court allowed, as an incident of arrest, an officer to search both the passenger compartment of a vehicle and the contents of any containers
passenger compartments when the arrestee has been handcuffed and removed from the scene. Noting that some differences existed between Belton and this case, the court stated that Belton was an incorrect rule of police conduct under Louisiana's constitution. Instead, the court declared that, when a custodial arrest is made, in order to protect the arresting officer, the officer may only conduct a prompt warrantless search of the arrestee and the area from which the arrestee could gain possession of a weapon or destructible evidence. The court would not allow federal jurisprudence to replace its own independent judgment in construing Louisiana's constitution.

Also at issue are the decisions of State v. Parms and State v. Church, which involved the invalidation of sobriety checkpoints. In Parms, the court explicitly stated that Louisiana's constitution affords its citizens greater protections than the federal constitution. Therefore, the sobriety checkpoint challenged in this case constituted a violation of the defendant's rights against unreasonable searches and seizures. Church invalidated sobriety checkpoints altogether. Here, the Louisiana Supreme Court was even more explicit in its determination that the Louisiana Constitution provides an expansion of individual rights not afforded by the Fourth Amendment. The court stated that the departure from the wording of the Fourth Amendment signaled a conscious decision by the citizens of Louisiana to provide a higher standard of individualized liberty than the United States Constitution. Accordingly, sobriety checkpoints could not pass constitutional muster under Article 1, Section 5.

Despite these pronouncements, and after a United States Supreme Court decision sanctioning the use of sobriety checkpoints, the
Louisiana Supreme Court reversed itself. *State v. Jackson*\(^98\) not only held that sobriety checks were constitutional, but indicated that the Louisiana Constitution does not, in fact, provide an extension of protections with regard to unreasonable searches and seizures. The court noted that since the clause in Article 1, Section 5 was identical to the Fourth Amendment's clause against unreasonable searches and seizures, there was no discernable difference between the two provisions, thus demonstrating an intent by the drafters to parallel the federal constitution.\(^99\)

It is difficult to determine whether *Jackson* will be narrowly construed to apply only to instances involving searches of motor vehicles, or broadly interpreted to apply to all cases involving allegations of unreasonable searches and seizures. Extending *Jackson* beyond automobile searches will undeniably be taking a step backward from long-held jurisprudence and the widespread belief among the citizens of Louisiana that their constitution affords them greater protection than its federal counterpart.

**B. The Louisiana Legislature and Suspicionless Drug-Testing**

Since there are no Louisiana Supreme Court decisions discussing the constitutionality of random drug-testing under Article 1, Section 5, it is important to determine whether the Louisiana Legislature will provide any help to solve the problem that *Earls* has caused. It is difficult to know whether the legislature will provide any relief because, in a series of recent statutory enactments, and in response to what the legislature noted as a "state of emergency"\(^100\) with respect to widespread drug use throughout the state, the legislature has mandated suspicionless drug-testing to either (1) any person receiving anything of economic value from the state,\(^101\) or (2) any adult receiving welfare assistance from the state.\(^102\) Considering that many people receiving governmental benefits need the assistance to

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99. Id. at 71.
100. La. R.S. 49:1021(A)(1) (2003) states in part: "The legislature does hereby declare that a state of emergency exists in Louisiana as a result of the spiraling increases of abuse of illegal substances by its citizens. The legislature further declares that such illegal drug abuse presents a clear and present danger to the health, welfare, and security of the state, its citizens, and government."
101. La. R.S. 49:1021(B) (2003). This provision of the statute states that: The commissioner of administration shall establish and administer a program for random drug testing for all persons who receive anything of economic value or receive funding from the state or an entity thereof, including but not limited to, all persons awarded state contracts to provide goods or services or loans from a state or an entity thereof.
survive, it can hardly be argued that the receipt of assistance is voluntary. The statute lacks a "special need" other than the special need to deter drug use. Under Chandler, because no other special need can be ascertained from the statutory provisions, the two enactments should undoubtedly fail constitutional muster, even under the Fourth Amendment, although it would be interesting to see how the Louisiana Supreme Court interprets Article 1, Section 5, should a constitutional challenge ever arise.

While the two recent legislative enactments seem to encompass virtually every citizen in Louisiana, Louisiana Revised Statute 49:1015 imposes stringent conditions on state employees who wish to implement employee drug-testing programs. The statute requires that some showing of reasonable suspicion is necessary to justify a drug-test, unless the employee occupies "safety-sensitive or

103. La. R.S. 49:1015 (2003) provides in pertinent part:
A. A public employer may require, as a condition of continued employment, samples from his employees to test for the presence of drugs following an accident during the course and scope of his employment, under other circumstances which result in reasonable suspicion that drugs are being used, or as a part of a monitoring program established by the employer to assure compliance with terms of a rehabilitation agreement.
B. A public employer may require samples from prospective employees, as a condition of hiring, to test for the presence of drugs.
C. A public employer may implement a program of random drug testing of those employees who occupy safety-sensitive or security-sensitive positions.
D. Any public employee drug testing shall occur pursuant to a written policy, duly promulgated, and shall comply with the provisions of this Chapter.
E. In the event the Louisiana State Racing Commission shall require or conduct drug testing on its employees, agents, and representatives, the Commission shall comply with the provisions of this Part and the Louisiana Administrative Procedure Act as well as seek prior approval of the procedures of the drug testing by the appropriate legislative oversight committee. The failure of the State Racing Commission to receive the required legislative approval shall negate all test results conducted under the non-approved procedures. Any drug testing program or procedure required or conducted by the State Racing Commission shall be applicable and include the members of the State Racing Commission.
F. (1) A public employer shall require samples to test for the presence of drugs, as a condition of hiring, from prospective employees whose principle responsibilities of employment include operating a public vehicle, performing maintenance on a public vehicle, or supervising any public employee who operates or maintains a public vehicle.

security-sensitive” positions. This requirement is in line with Skinner and Von Raab.

Louisiana Revised Statute 49:1021 has also partly invalidated a prior holding by the Fourth Circuit that upheld random suspicionless drug-testing on licensees of the Louisiana Racing Commission. Holthus v. Louisiana State Racing Commission held that the state had a legitimate interest in preserving the integrity of the horse racing industry, but the statute now requires the Louisiana State Racing Commission to abide by the legislative statute. Therefore, only when a licensee is involved in a safety-sensitive position may that licensee be subjected to random drug-testing.

C. What Will Louisiana Do?

It is difficult to foresee the future, to predict what the Louisiana legislature and Louisiana courts will do. Since the Louisiana Supreme Court’s decision in Jackson seems to signal a reluctance to stray from federal jurisprudence, opponents of unreasonable random drug-testing policies may have little hope. Also, considering the vastness that La. R.S. 49:1021 encompasses, and the fact that La. R.S. 49:1015 is consistent with federal jurisprudence only, the legislature may provide little consolation. Thus, even though the drafters of the Louisiana Constitution may have intended to offer the citizens of Louisiana greater protection from government intrusion than the protection offered by the federal constitution, this broader protection will undoubtedly cease to exist at the mercy of the Louisiana courts and legislature.

IV. CONCLUSION

Because of the United States Supreme Court’s significant expansion of student drug testing, it is questionable whether Tinker is still good case law. Not only has the majority bent to public pressures, but student rights have been similarly twisted as a result. Student rights have taken a back door to public opinion. The Tecumseh School District lacked the significant drug problem that existed in Veronia and, since students who participate in extra-curricular activities are the ones least likely to engage in illicit drug use, it is hard to believe that the drug-testing regime instituted by the School District will have any impact on the School District’s claim to protect students from engaging in drug abuse. Before

105. La. R.S. 49:1015(C).
implementing drug-testing programs such as the one implemented in *Earls*, school districts must evaluate the consequences that such drug-testing programs may have. In the end, more harm than good will occur, for students will shy away from extra-curricular activities at the thought of being subjected to such a great bodily intrusion.

It was once believed that the Louisiana Constitution afforded its citizens greater protections against unreasonable searches and seizures than its federal counterpart. However, after *Jackson*, one wonders whether the Louisiana Supreme Court will continue to take misguided steps down the road of totalitarianism and fascism, or revert back to its former principals. If it chooses the former, in the end, not only will the students be harmed, but society as a whole will be as well. Little by little, constitutional protections that our Founding Fathers instituted and our citizens have so enjoyed will cease to exist. The Court has definitely bent a well-settled principal of law, and this time, it might not snap back so easily.107

Ashley S. Green*

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A majority of this court, swept away by society's obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures described by Justice Holmes. In upholding the FRA's plan for blood and urine testing, the majority bends time-honored and textually based principles of the Fourth Amendment - principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy. I believe the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality. The immediate victims of the majority's constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily.

* I would like to extend my sincere gratitude to Professor John Devlin for his insight and guidance in developing this note. I thank my parents, Frederic and Beth, and husband Chad for their love and support through such a rough year. I love you and I hope I have made you proud. I dedicate this note to two people. To my late grandfather, Ted Cormier—here in spirit and always in my heart, thank you for teaching me the value of an education and the importance of family. To my son, Aidan—may you grow to love and respect your country and stand up for your rights that so many have died for.