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Constitutionality of Testing High School Male Athletes for Steroids Under *Vernonia School District v. Acton* and *Board of Education v. Earls*

I. INTRODUCTION

Congress is concerned with steroid use not only by professional baseball players,¹ but also by the nation's youth.² The legislature has good reason to be concerned. A 2003 study by the National Institute on Drug Abuse showed that illicit use of drugs increasingly plagues schools across the United States.³ Steroids are among those drugs that high school students are using at an increasing rate.⁴ Equally disturbing is the evidence that fewer and fewer high school students view steroids as harmful.⁵ These trends are especially alarming given that numerous studies have alerted the public to the adverse physical side effects of steroids,⁶ as well as behavioral problems that coincide with steroid use.⁷

1. See Duff Wilson & Tyler Kepner, *Lawmakers Intensify Their Fight Over Steroids*, N.Y. TIMES, Mar. 11, 2005, at D1. Congress subpoenaed seven current and former major league baseball players to testify at Congressional hearings in March. *Id.*

2. See Edward Epstein, *House Leaders at Boiling Point at Hearing on Drugs in Sports*, S.F. CHRON., Mar. 11, 2005, at A10. Reporting on an earlier hearing, this reporter noted that "the hearing repeatedly returned to the example that big-leaguers set for young people who idolize them." *Id.*

3. See LLOYD D. JOHNSTON ET AL., NAT'L INST. ON DRUG ABUSE, MONITORING THE FUTURE, NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS, 2003, 5 (NIH Publication No. 04-5506), available at <http://www.monitoringthefuture.org/pubs/monographs/overview2003.pdf>. The report found that 50% of twelfth graders had used cigarettes at least once in their lifetime, and 24% had used drugs within the last thirty days. *Id.* at 42 tbl.1, 50 tbl.2. While these numbers represented a slight decrease in drug use from 2002, there has been a sharp increase in the overall use of drugs since 1991. See *id.* at 45 tbl.1, 50 tbl.2. In 1991, 44.1% of high school seniors had used drugs at least once in their lifetime; in 2003, the percentage was 51.1%. *Id.* at 42 tbl.1. Likewise, in 1991, only 16% of seniors had used drugs within the last 30 days, while in 2003 the percentage was 24.1%. See *id.* at 47 tbl.2.

4. See *id.* at 44 tbl.1. Steroid use nearly doubled among twelfth graders between 1991 and 2002 (from 2.1% to 4%). *Id.*; see *infra* Part II.A.

5. JOHNSTON ET AL., *supra* note 3, at 44 tbl. 1. In 1990, 69.9% of high school seniors believed that using steroids posed a great risk of harm, while only 55% felt that way in 2003. *Id.* at 54, tbl.5. See *infra* notes 47-52 and accompanying text.

6. See, e.g., Am. Acad. of Pediatrics, Comm. on Sports Medicine and Fitness, *Adolescents and Anabolic Steroids: A Subject Review*, 99 PEDIATRICS 904, 905 (June 1997) [hereinafter PEDIATRICS] ("In men, steroid use . . . leads to decreased endogenous testosterone production, decreased spermatogenesis, and testicular atrophy. The masculinizing effects of anabolic steroids in women include hirsutism, acne, deepening of the voice, clitoral hypertrophy, and male-pattern

While most schools do not currently test for steroids, a minority of schools do test student athletes for steroid use.⁸ Additionally, some state legislatures are discussing laws that would require schools to test student athletes for steroids.⁹ This paper uses a theoretical high school policy that randomly¹⁰ tests male athletes for steroids to critically examine the “special needs” balancing test that the Supreme Court developed in *Vernonia School District v. Acton*¹¹ and *Board of Education v. Earls*.¹²

Courts have long recognized that drug testing implicates the Fourth Amendment’s prohibition on unreasonable searches.¹³ In the public school context, the Supreme Court developed a three-pronged balancing

baldness.”); John M. Tokish et al., *Ergogenic Aids: A Review of Basic Science, Performance, Side Effects, and Status in Sports*, 32 AM. J. SPORTS MED. 1543, 1545 (2004) (stating that the side effects of steroids include “hepatic cellular damage, testicular atrophy, cardiovascular disease, and psychological disturbance”).

7. See Robert H. DuRant et al., *Use of Multiple Drugs Among Adolescents Who Use Anabolic Steroids*, 328 NEW ENG. J. MED. 922, 925 (1993) (finding “significant associations between the use of anabolic steroids and the use of marijuana, cocaine, cigarettes, smokeless tobacco, and alcohol”).

8. See Nat’l Fed’n of State High Sch. Ass’ns, *Sports Medicine: High School Drug-Testing Programs: August 2003*, http://www.nfhs.org/scriptcontent/va_Custom/vimdisplays/contentpagedisplay.cfm?content_id=236 (reporting that 13% of high schools test for drugs, but less than one-third of those schools test for steroids); see also Andrew Dunn, *School Board OKs Steroid Tests*, LEDGER, Dec. 15, 2004 (reporting that the Polk County School Board had expanded its student athlete drug testing to include steroids); Mike Celizic, *Time for Steroid Testing in High School: If Kids Can’t Get Caught, the Problem Will Only Get Worse*, MSNBC.com, Apr. 24, 2004, <http://msnbc.msn.com/id/4556250/> (explaining the typical excuse school officials give for not testing for steroids is the cost).

9. See, e.g., Jeffrey Gilbert, *House Panel Explores Steroid Use in Sports: Committee Boss Says He’s in Favor of Random Testing for High-Schoolers*, HOUSTON CHRON., Mar. 31, 2005, at B1 (reporting discussions of Texas lawmakers regarding steroid testing of high school students); Baird Helgeson, *Committee Passes Statewide Testing For Use of Steroids*, TAMPA TRIB., Mar. 31, 2005, at Metro 1 (discussing potential Florida bill that would create a pilot program for testing student athletes for steroids).

10. This Comment limits the scope of testing to high school aged male athletes because steroid use is higher among this group, see *infra* notes 160–63 and accompanying text, and because steroid testing is too expensive to test a broader base of students, see *infra* notes 62–64 and accompanying text.

11. 515 U.S. 646 (1995).

12. 536 U.S. 822 (2002).

13. See, e.g., *Chandler v. Miller*, 520 U.S. 305 (1997) (holding requirement that candidates for state office participate in random drug testing violated the Fourth Amendment); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding that suspicionless drug testing of government employees who sought positions that involved the interdiction of illegal drugs or required the employee to carry a firearm was reasonable under the Fourth Amendment); *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602 (1989) (holding that the Fourth Amendment applies to drug and alcohol testing mandated by the Federal Railroad Administration regulations).

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test in *Acton* to decide whether the school's drug testing policy was a reasonable search.¹⁴ The *Acton* test's prongs are (1) the nature of the privacy interest involved,¹⁵ (2) the character of the intrusion,¹⁶ and (3) the nature of the governmental concern and the efficacy of the search in meeting that concern.¹⁷ In *Earls*, the Court expanded this test and found that the nationwide drug epidemic created an important governmental concern that satisfied the third prong.¹⁸ In both *Acton* and *Earls*, the Supreme Court found that the schools' random drug testing policies satisfied all three prongs.¹⁹ The Court thus did not actually have to perform any balancing.

The *Acton* balancing test after *Earls* has two fundamental problems that this Comment addresses. First, these cases do not provide any guidance as to how a court should actually balance the prongs when a drug testing policy does not meet all three prongs. Second, the test can unnecessarily infringe on student privacy interests. If a school can use the nationwide drug problem to satisfy the test's third prong, then the school can test students even if an actual problem does not exist at their school.

A hypothetical high school policy that randomly tested male athletes for steroids easily demonstrates these two problems. Schools obviously have an important concern in preventing steroid use among their students. Applying the *Acton* balancing test to a policy that randomly tested male athletes for steroids would create confusion, though, because the policy likely would not meet the second part of the third prong because steroid testing is significantly more expensive than other forms of drug testing and steroid testing simply cannot detect many forms of steroids. Since the Court did not provide any guidance on how to balance these prongs in *Acton* or *Earls*, a steroid-testing policy would create confusion in the lower courts with respect to how to actually balance the *Acton* test's three prongs. Additionally, a steroid-testing policy could unnecessarily infringe on students' privacy rights. If the school can use the national steroid problem to satisfy the first part of the test's third prong, then student privacy interests are marginalized even though the school has not shown an actual steroid problem at its campus.

14. See *infra* Part III.B.2.

15. *Acton*, 515 U.S. at 654.

16. *Id.* at 658.

17. *Id.* at 660.

18. 536 U.S. 822, 836 (2002).

19. See *infra* notes 128 and 157 and accompanying text.

This Comment proposes two slight modifications to the *Acton* balancing test that can rectify these problems. First, to prevent confusion that would ensue when all of the prongs are not met, courts should transform the three-pronged *balancing* test into a simple four-pronged test that requires all four prongs be satisfied before finding that steroid testing is constitutional. The courts would split the two branches of the third prong into two separate prongs to create a total of four prongs. If a particular regime of steroid testing failed to satisfy even one of the prongs, it would not qualify as a reasonable search under the Fourth Amendment. Second, to ensure that students' privacy interests are not unnecessarily denied, courts should apply an intermediate scrutiny analysis to the third and fourth prongs similar to an intermediate scrutiny level of review in First Amendment or Equal Protection Clause jurisprudence. To satisfy the third and fourth prongs, a school would thus have to provide actual proof of a steroid problem at the school and show that the testing procedure is at least substantially related to that problem. Such an analysis would allow the schools to address their tutelary functions, but student privacy interests would only be reduced if the school could show a need to reduce those interests.

Part II describes the current problem of steroid use among high school male athletes, the dangers associated with steroid use, and the likelihood that more schools will begin steroid testing in the near future. Part III explores the legal precedent for random drug testing set forth in *Acton* and *Earls* and details the three-pronged balancing test for reasonableness outlined in these cases. Part IV uses a theoretical steroid-testing policy to highlight the confusion that would ensue if a court were forced to balance the three prongs of the test and how the current balancing test improperly marginalizes student privacy rights. This Part culminates by recommending the aforementioned four-pronged balancing test. Part V offers a brief conclusion.

II. THE STEROID PROBLEM

Steroid use, especially among high school male athletes, is a growing national problem. According to a 2003 study performed by the National Institute on Drug Abuse, steroid use among high school seniors has gradually increased from 1992 to 2003.²⁰ The study also shows that steroid use among all high school students rose from 1.2% in 1992 to

20. *See supra* note 3.

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2.1% in 2003.²¹ However, these numbers do not tell the complete story. Because steroid use by male athletes is significantly higher than use by other students, schools should be especially concerned about the prevalence of steroid use among *male athletes*.

A. Steroid Use Among High School Male Athletes

Numerous studies show that a significant percentage of high school aged male athletes use or have used steroids.²² Among all male high school students, not just athletes, some studies have shown that anywhere from 5 to 11.1% have used steroids.²³ Additional studies have found that athletes are more apt to use steroids than nonathletes, and that males are more likely to use steroids than females. For example, one study concluded, "Steroid users are significantly more likely to be males. . . . Student athletes are also more likely than non-athletes [to be users]. . . . [F]ootball players, wrestlers, weightlifters and especially bodybuilders have significantly higher prevalence rates than students not engaged in these activities."²⁴ Another survey of steroid use found 64% of the students who reported using steroids were male athletes, the majority of whom were football players.²⁵

A 5 to 11% rate of steroid usage among all male students is quite similar to the usage rates of several other drugs, including: inhalants (11%), LSD (6%), ecstasy (8%), methamphetamines (10%), ice (4%),

21. JOHNSTON ET AL., *supra* note 3, at 38.

22. See, e.g., PEDIATRICS, *supra* note 6, at 904; DuRant et al., *supra* note 7, at 922; Adam H. Naylor et al., *Drug Use Patterns Among High School Athletes and Nonathletes*, 36 ADOLESCENCE 627 (2001); Vincent G. Stilger & Charles E. Yesalis, *Anabolic-Androgenic Steroid Use Among High School Football Players*, 24 J. CMTY. HEALTH 131 (1999).

23. See DuRant, *supra* note 7, at 922; see also PEDIATRICS, *supra* note 9, at 905 tbl.1; Michael S. Bahrke et al., *Risk Factors Associated with Anabolic-Androgenic Steroid Use Among Adolescents*, 29 SPORTS MED. 397 (2000) (noting studies have shown steroid use among adolescent males to be between 3% and 12%); William E. Buckley et al., *Estimated Prevalence of Anabolic Steroid use Among Male High School Seniors*, 260 J. AM. MED. ASS'N. 3441 (1988) (finding over 6% of male high school seniors had used steroids).

24. Bahrke et al., *supra* note 23, at 403. *But see* Naylor, *supra* note 22, at 627 (arguing that there is no significant difference in use between athletes and nonathletes).

25. See Gregory L. Gaa et al., *Prevalence of Anabolic Steroid Use Among Illinois High School Students*, 29 J. ATHLETIC TRAINING 216, 217 (1994). This study surveyed 3047 students in Illinois and found that 3% of males had reported steroid use. Other studies have stated similar results. See Buckley et al., *supra* note 23, at 3442 (finding steroid users were more inclined to participate in sports); Rise Terney & Larry G. McLain, *The Use of Anabolic Steroids in High School Students*, 144 AM. J. DISEASES CHILD. 99, 100 (1990) (reporting 79 out of 94 adolescent steroid users participated in sports).

tranquilizers (10%), and amphetamines (14%).²⁶ Most of these rates of use fit within the 5–11% range of steroid use among all male students. Among high school aged male athletes, the rate of usage is even higher.²⁷ The magnitude of the steroid problem among high school male athletes is thus comparable, if not greater, to that of other drugs.

B. Dangers Associated with Steroid Use

Many schools are concerned about the prevalence of steroid use among male athletes because steroids have been shown not only to cause both serious physical and mental side effects but also to increase the likelihood of student involvement in dangerous behaviors. These negative effects are especially troubling considering the fact that there is a growing perception among adolescents that steroids are not very harmful.²⁸

The negative physical side effects that can result from steroid use are well-documented.²⁹ These physical side effects can include “hepatic cellular damage, testicular atrophy, cardiovascular disease, and psychological disturbance.”³⁰ The cardiovascular effects have been linked to atherosclerosis.³¹ The American Academy of Pediatrics explained that in men, “steroid use . . . leads to decreased endogenous testosterone production, decreased spermatogenesis, and testicular atrophy.”³² Further, there is a risk of “premature physseal closure in any child/adolescent, which results in a decrease in child height.”³³

In addition to these negative physical side effects, a particularly harmful physical risk associated with steroid use is the transmission of

26. JOHNSTON ET AL., *supra* note 3, at 42–44.

27. *See supra* notes 24–25 and accompanying text.

28. *See* JOHNSTON ET AL., *supra* note 3, at 5.

29. *See, e.g.*, PEDIATRICS, *supra* note 6, at 905; NAT’L INST. ON DRUG ABUSE, PUBL’N NO. (ADP) 00-2622, ANABOLIC STEROID ABUSE, NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH REPORT SERIES 1, 4 (2000); M. Parssinen et al., *Increased Premature Mortality of Competitive Powerlifters Suspected to Have Used Anabolic Agents*, 21 INT’L J. SPORTS MED. 225 (2000); M.L. Sullivan et al., *Atrial Fibrillation and Anabolic Steroids*, 17 J. EMERGENCY MED. 851 (1999); M.L. Sullivan et al., *The Cardiac Toxicity of Anabolic Steroids*, 41 PROGRESSIVE CARDIOVASCULAR DISEASE 1 (1998); Tokish et al., *supra* note 6, at 1545; P. Varriale et al., *Acute Myocardial Infarction Associated with Anabolic Steroids in a Young HIV-Infected Patient*, 19 PHARMACOTHERAPY 881 (1999).

30. Tokish et al., *supra* note 6, at 1545.

31. *Id.*

32. PEDIATRICS, *supra* note 6, at 905.

33. *Id.* at 905–06.

infection or disease through needle sharing³⁴—an alarming possibility given that 25% of adolescents who used steroids shared needles.³⁵ In fact, the very reason the National Institute on Drug Abuse began monitoring steroid use was the risk of spreading infectious disease among needle-sharing steroid users.³⁶

A number of studies have also concluded steroid use can cause severe emotional and mental harm to users.³⁷ The effects on behavior include “irritability, aggressiveness, euphoria, depression, mood swings, altered libido, and even psychosis.”³⁸ One report found “significantly higher” levels of depression, anger, and mood swings among steroid users.³⁹ Another disturbing study investigated the deaths of thirty-four known steroid users and found that eleven—almost one-third of the deaths—were suicides.⁴⁰ These harmful side effects are particularly dangerous because an individual who *withdraws* from steroid use experiences an increased risk of depression.⁴¹

An additional compelling reason for schools to worry about adolescent steroid abuse is the apparent link between steroid use and other destructive behaviors.⁴² Steroids may be a “gateway” drug according to one expert who also noted that “[i]n general, the more frequently . . . adolescents used anabolic steroids, the more likely they were to use one or more other drugs.”⁴³ Studies have shown that steroid use is most strongly associated with cocaine and marijuana use.⁴⁴ Additionally, researchers reported higher incidents of various problem

34. See JOHNSTON ET AL., *supra* note 3, at 79.

35. J.D. Rich et al., *The Infectious Complications of Anabolic-Androgenic Steroid Injection*, 20 INT’L J. SPORTS MED. 563 (1999).

36. JOHNSTON ET AL., *supra* note 3, at 79.

37. See PEDIATRICS, *supra* note 6, at 905; Kathleen Miller et al., *Anabolic-Androgenic Steroid Use and Other Adolescent Problem Behaviors: Rethinking the Male Athlete Assumption*, 45 SOC. PERSP. 467, 483 (“[A]dolescent steroid users . . . were more likely than nonusers to report . . . aggression, suicidal behavior, risk taking, vehicular risk taking, and pathogenic weight loss behavior.”); Nat’l Inst. on Drug Abuse, *supra* note 29, at 5–6; Tokish et al., *supra* note 6, at 1545.

38. PEDIATRICS, *supra* note 6, at 905.

39. Kent F. Burnett & Mark E. Kleiman, *Psychological Characteristics of Adolescent Steroid Users*, 29 ADOLESCENCE 81 (1994).

40. Ingemar Thiblin et al., *Cause and Manner of Death Among Users of Anabolic Androgenic Steroids*, 45 J. FORENSIC SCI. 16 (2000).

41. PEDIATRICS, *supra* note 6, at 905.

42. See DuRant et al., *supra* note 7, at 922.

43. *Id.* at 924.

44. *Id.* at 924–25.

behaviors among adolescent steroid users than nonusers.⁴⁵ The problem behaviors included illicit drug use, alcohol use, tobacco use, aggression, suicidal tendencies, risk-taking, vehicular risk-taking, and pathogenic weight loss.⁴⁶

The negative physical, mental, and behavioral effects of steroid use pose an even greater threat considering that the perceived harm of steroid use is actually decreasing among high school students.⁴⁷ For instance, in 1998, 68% of high school seniors felt that people risked harming themselves by taking steroids.⁴⁸ In 1999 and 2000, that percentage dropped to 62% and 58%, respectively.⁴⁹ Currently, only 55% of high school seniors feel that taking steroids poses a serious risk to their health.⁵⁰ Attitudes toward the seriousness of drugs are important to examine because “beliefs and attitudes about drugs are determinants of both the rise and fall of drug use.”⁵¹ The results of this study confirm that the decrease in the perceived risk of harm of steroids coincided with increased use.⁵² Given the decrease in perceived risk of harm among adolescents, the increasingly prevalent use of steroids among high school-aged male athletes, and the concomitant negative effects of steroid usage, many parents and school administrators have taken steps to address the steroid problem.

45. Miller, *supra* note 37, at 480 (“Compared to their nonusing counterparts, steroid users . . . reported markedly higher prevalences of nearly all problem behaviors examined.”).

46. *Id.* at 479 tbl.2. For example, 49.3% of nonsteroid-using males had used marijuana compared to 84.2% of users. Likewise, 7.6% of nonusers had tried cocaine at least once compared to 53.4% of users; 44.1% of nonusers had been in a fight in the past year, compared to 77.5% of users; 19.5% of nonusers had driven after drinking within the past month, while 57.6% of users had done so. Further, 1.7% of nonusers reported vomiting or using laxatives in the past month to lose weight, compared to 11.8% of users. *Id.*

47. The *Monitoring the Future* study conducted by the National Institute on Drug Abuse indicated a sharp decrease in the perceived risk of harm from steroids in 1999 and 2000. JOHNSTON ET AL., *supra* note 3, at 38–39.

48. *Id.* The question posed in the survey was “How much do you think people risk harming themselves (physically or in other ways), if they . . . take steroids?” *Id.* The percentages used above are the percentages of those who responded “great risk.” *Id.* Also note that the author of this Comment has rounded the percentages from the survey to facilitate comparison.

49. *Id.*

50. *Id.*

51. *Id.* at 1.

52. *Id.* at 38–39. The sharp decrease in perceived risk of harm among twelfth graders in 1999 coincided with a sharp rise in steroid use that year among eighth and tenth graders. *Id.* at 38.

C. Steroid Testing

Many schools have programs to educate students about the dangers of steroid use and some already test for steroids.⁵³ Because of increases in steroid use, more schools will likely begin testing for steroids. In fact, at least two state legislatures are discussing laws that would make steroid testing mandatory in schools.⁵⁴

Steroid testing has two main drawbacks. First, most available steroid tests cannot detect many forms of steroids.⁵⁵ For example, no accurate test currently exists for hGH,⁵⁶ and scientists have only recently designed a test to detect the steroid THG.⁵⁷ Further, “unscrupulous biochemists” continue to develop new versions of the drugs that are undetectable in the currently available tests.⁵⁸ Some experts believe that they cannot detect many other performance enhancing drugs because they do not yet know that these steroids exist.⁵⁹ Additionally, even if undetectable enhancers such as hGH are unavailable to students, masking agents used to hide the detectable steroids are widely available.⁶⁰ Unfortunately, studies of steroid use do not distinguish between the types of steroids being used.⁶¹ They are simply surveys that ask the participants whether they have used steroids. It is thus impossible to know with certainty whether high school male athletes are using detectable or undetectable steroids. Nevertheless, the fact remains that schools will not be able to detect all types of steroids.

Second, steroid testing is significantly more expensive than testing for other drugs. The typical cost of a drug test that does not test for

53. *See supra* note 8 and accompanying text.

54. *See supra* note 9 and accompanying text.

55. *See generally* Charles E. Yesalis et al., *Incidence of Anabolic Steroid Use: A Discussion of Methodological Issues*, in *ANABOLIC STEROIDS IN SPORT AND EXERCISE* 73, 77 (Charles E. Yesalis ed., 2d ed. 2000) (noting there is no effective test for human growth hormone, insulin like growth factor, or erythropoietin).

56. Human growth hormone. Studies have shown hGH increases muscle size but have not linked it to increased strength or performance. *See Tokish et al., supra* note 6, at 1543–45.

57. THG stands for tetrahydrogestrinone, which is a steroid commonly used by track and field athletes. *See Ken Mannie, Designer Steroids: Ugly, Dangerous THInGs*, COACH & ATHLETIC DIRECTOR, Apr. 2004, at 14.

58. *Id.* at 14–16.

59. *Id.*

60. U.S. DEP’T OF JUSTICE, *STERIOD ABUSE IN TODAY’S SOCIETY: A GUIDE FOR UNDERSTANDING STEROIDS AND RELATED SUBSTANCES* 5–6 (Mar. 2004). Uricosuric agents “decrease entry of steroids into the urine,” diuretics “dilute-steroid concentration in the urine,” and epitestosterone “reduces detection of testosterone usage.” *Id.*

61. *See supra* notes 20–27.

steroids is fourteen to thirty dollars per test.⁶² Including steroids in the testing raises the cost to approximately one hundred dollars per test.⁶³ Obviously, a difference of as much as eighty-six dollars per test is substantial and would give most schools pause. Many schools are underfunded and thus testing for normal drugs is not a financial possibility.⁶⁴ For many schools, testing even a small group of students for steroids would be out of the question.

In conclusion, high schools have an actual and pressing need to stem the use of steroids among male athletes given the fact that male athletes use steroids at a rate comparable to many other drugs. In response to that need, some schools have already begun testing for steroids, and others are seriously considering it. However, any school that wishes to continue, or to begin, to test for steroids must deal with the realities of testing, namely the cost of steroid testing and the fact that testing cannot detect some forms of steroids.

III. WHAT IS A REASONABLE SEARCH IN THE PUBLIC SCHOOL CONTEXT?

Any attempt by a public school to implement a steroid-testing regime on its students implicates the Fourth Amendment. Specifically, the Supreme Court has held that the Fourth Amendment's prohibition of unreasonable searches is implicated by random drug-testing policies in high schools.⁶⁵ Thus, a school policy of steroid testing would be subject to the Fourth Amendment's restriction on unreasonable searches.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."⁶⁶ The Supreme Court has repeatedly held that reasonableness is the fundamental requirement for a search to be constitutional under the Fourth Amendment.⁶⁷ Traditionally, a showing

62. Ryoko Yamaguchi et al., *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 159 (2003).

63. *Id.*

64. See Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the Earls Decision on High School Random Drug Testing Policies*, 34 J.L. & EDUC. 297, 316-17 (2003).

65. See Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002) (finding that random drug testing implicated the Fourth Amendment); see also Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 652 (1995).

66. U.S. CONST. amend. IV.

67. See, e.g., Chandler v. Miller, 520 U.S. 305, 313 (1997) ("Because 'these intrusions [are] searches under the Fourth Amendment,' we focus on the question: Are the searches reasonable?")

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of reasonableness has required a warrant and/or probable cause.⁶⁸ However, the Court has found numerous exceptions to this general rule.⁶⁹ This Section discusses the Supreme Court's development of a "special needs" exception to the general constitutional requirement of a warrant and probable cause in public school settings.

Under the special needs exception, the Court recognized that sometimes "special needs, beyond the normal need for law enforcement" justify an abandoning of the warrant and probable cause requirement for Fourth Amendment searches.⁷⁰ Instead of looking for a warrant or probable cause to determine whether a search is reasonable, when special needs inhere the Court balances individual privacy interests against the governmental concern.⁷¹ The Court first found that special needs inhere in the public school setting in *New Jersey v. T.L.O.*⁷² Later, the Court developed the special needs exception in *Vernonia v. Acton* and created a three-pronged balancing test to determine when suspicionless drug testing in public schools constituted a reasonable search.⁷³ The Court expanded the *Acton* balancing test in *Board of Education v. Earls*.⁷⁴

(quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)); *Skinner*, 489 U.S. at 619 ("[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."); *Nat'l Treasury Employee's Union v. Von Raab*, 489 U.S. 656, 665 (1989) ("[T]he Fourth Amendment protects individuals from unreasonable searches . . ."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) ("[A]ll searches and seizures must be reasonable [under the plain text of the Fourth Amendment].").

68. See *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate [i.e., without a warrant], are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))); George M. Dery III, *Are Politicians More Deserving of Privacy Than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 75 (1998); Michael A. Sprow, *The High Price of Safety: May Public Schools Institute A Policy of Frisking Students as They Enter the Building?*, 54 BAYLOR L. REV. 133, 138–39 (2002). But see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557–90 (1999) (criticizing both the warrant and generalized reasonableness standards as not being true to an original understanding of the Fourth Amendment).

69. See, e.g., *Katz*, 389 U.S. at 357; *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967); *Cooper v. California*, 386 U.S. 58, 59 (1967); *McDonald v. United States*, 335 U.S. 451, 454–56 (1948); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

70. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). See also, Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 310 (1992).

71. Reamey, *supra* note 70, at 309–10.

72. 469 U.S. 325 (1985).

73. 515 U.S. 646 (1995).

74. 536 U.S. 822 (2002).

Currently, a public school need only comply with this balancing test if it seeks to implement a steroid-testing policy.⁷⁵

A. *New Jersey v. T.L.O. and “Special Needs” in the Public Schools*

New Jersey v. T.L.O. was the first case in which the Supreme Court held the Fourth Amendment’s “prohibition on unreasonable searches and seizures appli[ed] to searches conducted by public school officials.”⁷⁶ In *T.L.O.* a school official searched a student’s purse after a teacher caught the girl smoking in the bathroom. The search turned up a package of cigarettes, cigarette rolling papers, “a small amount of marihuana [sic], a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana [sic] dealing.”⁷⁷ The girl sought to suppress the evidence of the items found in her purse by claiming the search violated the Fourth Amendment.⁷⁸

In holding the school’s search constitutional, the Court created an exception to the Fourth Amendment’s warrant/probable cause requirement. Initially, the Court made clear that the Fourth Amendment applied to searches by school officials and required that the search be reasonable.⁷⁹ The Court acknowledged that ordinarily “reasonableness” requires a warrant or probable cause.⁸⁰ The school setting, though, presented a special challenge.⁸¹ Teachers and school administrators had a “substantial interest . . . in maintaining discipline.”⁸² Further, “maintaining security and order in schools requires a certain degree of flexibility in school disciplinary procedures.”⁸³ Because of the special

75. *Acton*, 515 U.S. at 654–64.

76. *T.L.O.*, 469 U.S. at 325.

77. *Id.* at 328.

78. *Id.* at 329.

79. *Id.* at 334–37. Some lower courts had held that the Fourth Amendment did not apply to school officials “by virtue of the special nature of their authority over schoolchildren.” *Id.* at 336. These courts argued that schools acted with the authority of parents, not the State, in their interactions with students. *Id.* The Court stated that “[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.” *Id.* at 336–37.

80. *Id.* at 340.

81. *Id.*

82. *Id.* at 339.

83. *Id.* at 340.

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need to maintain order and discipline in the school setting, the Court held that “school officials need not obtain a warrant before searching a student who is under their authority.”⁸⁴ The Court thus created the “special needs” exception to the warrant/probable cause requirement.⁸⁵

The Court explained that the proper test to determine the reasonableness of a search by school officials required a balancing of the students’ legitimate expectation of privacy with the school’s interest in maintaining order on school grounds.⁸⁶ This balancing was achieved because the school could conduct the search so long as it had “reasonable grounds” to believe that a search would show that the student was breaking the law and the search was not excessively intrusive.⁸⁷ In this case, the search was reasonable because the school official had reason to believe that the girl’s purse contained cigarettes. Additionally, searching the student’s purse was not an excessively intrusive search.

B. Vernonia v. Acton and the Three-Pronged “Special Needs” Test

*Vernonia v. Acton*⁸⁸ presented a situation similar to *T.L.O.* in that it dealt with searches in public schools. *Acton* built on the foundation of *T.L.O.* by defining the “special needs” doctrine and further refined *T.L.O.*’s test by introducing a three-pronged balancing test to determine the reasonableness of a search by public school officials. Similar to *T.L.O.*, *Acton* stressed the uniqueness of the school setting and the tutelary functions of schools in order to justify its departure from the warrant/probable cause requirements of the Fourth Amendment.

1. Background

While *T.L.O.* concerned the constitutionality of the search of an individual’s belongings, in *Acton* the Supreme Court looked at the constitutionality of a high school policy that randomly tested student athletes for drugs. In the mid-to-late 1980s, teachers and school officials in the Vernonia School District noticed a “sharp increase” in drug use among students.⁸⁹ Further compounding the school district’s problems

84. *Id.*

85. Justice Blackmun actually coined the phrase “special needs” in his concurrence. *Id.* at 351 (Blackmun, J., concurring).

86. *Id.* at 337–40.

87. *Id.* at 341–42.

88. 515 U.S. 646 (1995).

89. *Id.* at 648.

was the increase in disciplinary problems that accompanied the increase in drug usage.⁹⁰

In *Acton*, the increased drug use was easily identifiable with a specific class of individuals. According to the district court, athletes were not only drug users, they “were the leaders of the drug culture.”⁹¹ Given the nature of athletics, the school district was also concerned that drug use among athletes could lead to injury.⁹²

After failing to deter drug use with “special classes, speakers, and presentations,” the school board implemented the “Student Athlete Drug Policy.”⁹³ The policy applied to all students participating in interscholastic athletics and required them and their parents to consent to drug testing.⁹⁴ Under the policy, the school tested all athletes at the beginning of the season for their sport, and then each week the school randomly tested ten percent of the student athletes.⁹⁵

The testing process required the students to produce a urine sample. After completing a specimen control form bearing an assigned number, the student was accompanied by an adult of the same sex into an empty restroom.⁹⁶ According to the Court,

Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed.⁹⁷

After the student produced the sample, the school sent it to a laboratory.⁹⁸ The school district did not disclose the identity of the students to the laboratory and revealed the results of the test only to the superintendent, principals, vice-principals, and athletic directors.⁹⁹ The

90. *Id.*

91. *Id.* at 649.

92. *Id.*

93. *Id.* at 649–50.

94. *Id.* at 650.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* The sample was routinely tested for amphetamines, cocaine, and marijuana. Other drugs could be tested at the district’s request. *Id.* at 650–51.

99. *Id.* at 651.

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school district discarded test results after a year.¹⁰⁰ In this case, the lawsuit arose when one student and his parents refused to consent to the testing and challenged the policy as an unreasonable search under the Fourth Amendment.¹⁰¹

2. *Court's analysis: the three-pronged "special needs" test*

Relying on *T.L.O.*, the Court noted that the Fourth Amendment applied to school officials and "state-compelled collection and testing of urine."¹⁰² Further, the Court again held that a warrant and probable cause are not always necessary to establish the reasonableness of a search.¹⁰³ In explaining when a warrant and probable cause are not necessary, the Court stated, "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"¹⁰⁴ The Court further stated, "We have found such 'special needs' to exist in the school context."¹⁰⁵

While it merely mentioned the "special needs" doctrine in passing in *T.L.O.*,¹⁰⁶ the Court clearly set forth the doctrine's prominent role within the school arena in *Acton*.¹⁰⁷ The Court emphasized the school's special needs by explaining that "[t]he most significant element in this case is . . . that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."¹⁰⁸ This fundamental principle was the foundation of the Court's opinion and declaration that special needs exist within the school environment. Further, because special needs indeed exist in the public-school setting, the normal warrant and probable cause

100. *Id.*

101. *Id.* at 651–52.

102. *Id.* at 652.

103. *Id.* at 652–53.

104. *Id.* at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). The Supreme Court has also applied the "special needs" exception to government drug testing of railroad employees, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989), and U.S. customs agents, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In contrast, the Court held that states do not have a special need to test political candidates for drugs. *Chandler v. Miller*, 520 U.S. 305 (1997).

105. *Acton*, 515 U.S. at 653.

106. The *T.L.O.* majority only mentioned the term "special needs" in a footnote. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 n.2 (1985).

107. *Acton*, 515 U.S. at 653.

108. *Id.* at 665.

requirement for valid searches under the Fourth Amendment are not applicable in this setting. The special needs doctrine does not, however, give schools the right to search any student at any time. The search must still be reasonable.¹⁰⁹

To determine when a search at a public school is reasonable, the Court elaborated on the test it provided earlier in *T.L.O.*¹¹⁰ by devising a three-pronged test to balance students' privacy interests and the school's tutelary functions.¹¹¹ Under this analysis the Court examined (1) "the nature of the privacy interest upon which the search . . . at issue intrudes,"¹¹² (2) "the character of the intrusion that is complained of,"¹¹³ and (3) "the nature and immediacy of the governmental concern at issue . . . and the efficacy of [the search] for meeting it."¹¹⁴

3. Application of the three-pronged test

In applying this test, the Court first analyzed the students' expectation of privacy and noted that in the school setting, "students . . . have a lesser expectation of privacy" given the school's custodial responsibilities toward children.¹¹⁵ Further, the Court reasoned that student athletes' expectation of privacy is further reduced because "locker rooms . . . are not not[ed] for the privacy they afford."¹¹⁶ Additionally, student athletes "voluntarily subject themselves" to additional regulation by the school in the form of preseason physicals, insurance requirements, minimum grades, and other rules.¹¹⁷ Thus, "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."¹¹⁸

In examining the character of the intrusion during its analysis of the second prong, the Court emphasized two aspects of the intrusion. First, although collecting urine samples "intrudes upon 'an excretory function

109. *Id.* at 652.

110. *See supra* notes 79–85 and accompanying text.

111. *Acton*, 515 U.S. at 654–63.

112. *Id.* at 654.

113. *Id.* at 658.

114. *Id.* at 660.

115. *Id.* at 657 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985)).

116. *Id.*

117. *Id.*

118. *Id.* The practical result of the Court's broad language is that student athletes in every high school would likely have a reduced expectation of privacy. *See infra* Part IV.A.1.

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traditionally shielded by great privacy,”¹¹⁹ the manner in which the students produced the samples¹²⁰ was “nearly identical to [conditions] typically encountered in public restrooms, which . . . schoolchildren use daily.”¹²¹ Second, regarding the information the tests disclosed, the Court noted that the tests “look only for drugs,” the drugs tested for are “standard,” and the disclosure of the tests is limited to “school personnel who have a need to know.”¹²² The Court concluded that the nature of the intrusion was not great, and thus this prong also weighed in favor of testing.¹²³

Under the third prong, the Court considered “the nature and immediacy of the governmental concern . . . and the efficacy of [testing] for meeting it.”¹²⁴ Regarding the nature of the concern, the Court concluded that the government had a “compelling” interest in “[d]eterring drug use by our Nation’s schoolchildren.”¹²⁵ The Court also emphasized that the Vernonia School District had an immediate concern since a large segment of the student body, and especially athletes, were involved in the school’s drug culture.¹²⁶ With respect to the efficacy of testing student athletes to meet the concern, the Court held that even though athletes were not the only students using drugs, the school district was justified in testing only athletes because using drugs posed an injury risk to athletes and athletes were role models to the other students. In other words, if athletes do not use drugs, ostensibly other students may not either.¹²⁷

Taking into account all three prongs of the test—the “decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search,” the Court found the balancing test weighed in favor of the drug testing policy, thus making it a reasonable, constitutional search.¹²⁸ Since all three prongs supported the testing, the Court did not have to perform any balancing.

119. *Acton*, 515 U.S. at 658 (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 626 (1989)).

120. *See supra* notes 96–97 and accompanying text.

121. *Acton*, 515 U.S. at 658.

122. *Id.*

123. *Id.* at 660. The Court’s language implies that as long as drug testing at a public school is discreet, it will meet the second prong of the reasonable test. *See infra* Part IV.A.2.

124. *Id.*

125. *Id.* at 661.

126. *Id.* at 662–63.

127. *Id.* at 663.

128. *Id.* at 664–65.

The Court's careful analysis of this three-pronged test lends itself to the conclusion that only carefully tailored drug-testing policies where the school provided sufficient proof of a drug problem would pass constitutional muster.¹²⁹ The next case to address the issue, however, significantly expanded the application of this test.¹³⁰

C. Board of Education v. Earls and the Expansion of "Special Needs"

Whereas *Acton* seemed to create a narrow exception to the warrant/probable cause standard for reasonableness, *Earls* significantly expanded this test. In *Acton*, the Court found that the school district had an immediate drug problem and that the policy was narrowly tailored to the student group with the biggest drug problem—student athletes. In *Earls*, the Court relied on a national drug problem to justify the random testing of any student who participated in extracurricular activities.

1. Facts

Similar to *Acton*, *Earls* presented the Supreme Court with a school drug-testing policy requiring students to consent to random urinalysis testing.¹³¹ In *Earls*, this policy required all students participating in *any extracurricular activity*, not just athletics, to consent to testing.¹³² The students produced the urine samples in a manner that was essentially the same as in *Acton*.¹³³ Like *Acton*, the facts in *Earls* confirmed a "drug problem" manifested in a variety of ways: students that had appeared to be under the influence of drugs at school, students that had spoken openly about drug use, a drug dog that found marijuana "near the school parking lot," police officers who found drugs in a student's car, and people in the community who called the school board concerning the

129. See Meg Penrose, *Shedding Rights, Shredding Rights: A Critical Examination of Students' Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 NEV. L.J. 411, 436–37 (2003) (noting the specific evidence of drug use and disorder in the classroom created a compelling government interest).

130. *Id.* at 440–43.

131. Compare Bd. of Educ. v. Earls, 536 U.S. 822, 826 (2002), with *Acton*, 515 U.S. at 650.

132. *Earls*, 536 U.S. at 826. *Acton* had only required athletes to be tested. See *Acton*, 515 U.S. at 650.

133. See *Earls*, 536 U.S. at 832–33 ("This procedure is virtually identical to that reviewed in [*Acton*], except that it additionally protects privacy by allowing male students to produce their samples behind a closed stall."); *Acton*, 515 U.S. at 650. Since the procedure was essentially the same, it is unnecessary to repeat it here. See *supra* notes 96–97 and accompanying text.

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“drug problem.”¹³⁴ Like *Acton*, citizens brought suit challenging the drug-testing policy on Fourth Amendment grounds.¹³⁵

2. Fourth Amendment analysis

As might be expected, considering the similarity in issues and facts, the Court’s analysis of the Fourth Amendment in *Earls* relied heavily on *Acton*.¹³⁶ The *Earls* Court again emphasized that probable cause was not necessary to establish the reasonableness of a search when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,”¹³⁷ and further noted, “this Court has previously held that ‘special needs’ inhere in the public school context.”¹³⁸ Quoting *Acton*, the Court stated, “the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”¹³⁹ According to the Court, it is this “custodial and tutelary” responsibility that creates the special need. After noting this principle, the Court then applied the three-pronged balancing test set forth in *Acton* to determine whether the search was reasonable.¹⁴⁰ In considering the first prong—“the nature of the privacy interest allegedly compromised,”¹⁴¹—the Court essentially set a bright-line rule that students who participate in a school activity with its own “rules and requirements” have a reduced expectation of privacy. The Court relied on *Acton* in explaining that “[a] student’s privacy interest is limited in a public school environment.”¹⁴² Examples of this limitation include “physical examinations and vaccinations against disease.”¹⁴³ The Court also found that students who participate in “competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes” because the activities they participate in

134. *Earls*, 536 U.S. at 834–35.

135. *Id.* at 822.

136. *See id.* at 828–30; *see also* David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263, 269 (2003). Since the analysis in *Acton* was essentially the same as in *Earls*, it will be reviewed only briefly here. *See supra* Part III.B.2 for a more detailed discussion of *Acton*’s analysis.

137. *Earls*, 536 U.S. at 829 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985))).

138. *Id.* (citing *Acton*, 515 U.S. at 653; *T.L.O.*, 469 U.S. at 339–40).

139. *Id.* at 830 (quoting *Acton*, 515 U.S. at 656).

140. *See id.* at 830–38; *see also supra* notes 110–14 and accompanying text.

141. *Earls*, 536 U.S. at 830.

142. *Id.*

143. *Id.* at 830–31.

have “their own rules and requirements.”¹⁴⁴ The Court thus held that the *Earls* students had a “limited expectation of privacy.”¹⁴⁵ In *Earls*, then, the Court expanded the group of students who had limited expectations of privacy from student athletes to all students who participated in extracurricular activities.

Regarding the character of the intrusion, the Court first noted that the process of collecting urine samples mandated by the policy was actually less intrusive than in *Acton* because male students could produce a sample in a closed bathroom stall.¹⁴⁶ Since the Court found the process in *Acton*—males using an open urinal—to be only a minimal intrusion, the *Earls* method was logically “even less problematic.”¹⁴⁷ In addition, the policy required the test results to be kept confidential and allowed their release only “on a ‘need to know’ basis.”¹⁴⁸ Importantly, “the test results [were] not turned over to law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences.”¹⁴⁹ The Court concluded that “[g]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results [were] put . . . the invasion of students’ privacy [was] not significant.”¹⁵⁰ As with the first prong, the Court set forth another bright-line rule that a sufficiently discreet drug testing policy will always meet the second prong of *Acton*’s balancing test.

As for the third prong—“the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them,”¹⁵¹—the Court emphasized that the government has a “pressing concern” in preventing drug use because of the “nationwide drug epidemic.”¹⁵² Additionally, the school district offered some evidence of drug use in the district,¹⁵³ none of which specifically evidenced a drug problem among students involved in extracurricular activities.¹⁵⁴ However, the Court stated, “this Court has not required a particularized

144. *Id.* at 831–32.

145. *Id.* at 832.

146. *Id.* at 832–33. In *Acton*, the school’s policy required male students to produce a urine sample at a urinal. *See supra* note 97 and accompanying text.

147. *Earls*, 536 U.S. at 833.

148. *Id.*

149. *Id.*

150. *Id.* at 834.

151. *Id.*

152. *Id.*

153. *Id.* 834–35.

154. *See supra* note 134 and accompanying text.

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or pervasive drug problem before allowing the government to conduct suspicionless drug testing [T]he need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.”¹⁵⁵

The Court glossed over the second part of the third prong—the efficacy of random testing to meet the school’s drug problem. It simply held that “testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”¹⁵⁶ The majority did not cite any statistics or evidence that the drug testing actually would decrease drug use at the school. The Court simply assumed that testing would detect, deter, and prevent drug use. Since it found that the testing policy at issue in *Earls* met all three prongs of the *Acton* test, the Court held that it was a reasonable search under the Fourth Amendment.¹⁵⁷

In conclusion, the Court in *Acton* and *Earls* held that random drug testing in schools can be constitutional so long as the drug testing satisfies *Acton*’s three-pronged balancing test. As a result, the Court essentially established bright-line rules for the first two prongs and the first part of the third prong. The first prong is satisfied if the students have voluntarily submitted to some extracurricular school activity. Likewise, the testing will meet the second prong if it is performed in a manner as discreet as the testing procedures in *Acton* and *Earls*. Further, the Court’s broad holding in *Earls* established that as long as the nation continues to experience a “drug epidemic,” public schools will have an important interest in preventing drug abuse. These bright-line rules indicate that the majority of drug-testing policies in public schools would be a reasonable search.

IV. THE IMPLICATIONS OF THE SPECIAL NEEDS ANALYSIS IN HIGH SCHOOL STEROID TESTING

As a practical result of the Court’s holdings in *Acton* and *Earls*, school districts are essentially given great discretion in pursuing policies of random, suspicionless drug testing within the Court’s broad parameters. However, the special needs analysis as articulated by the Court potentially has negative consequences for lower courts and

155. *Earls*, 536 U.S. at 835–36.

156. *Id.* at 837.

157. *Id.* at 838.

students. First, the special needs balancing test will create confusion in lower courts in the event one of the prongs is not clearly met and a trial court has to balance the prongs against each other. The Supreme Court did not balance the individual prongs in *Acton* or *Earls* because the schools' testing policies met all three prongs. Nor did the Court discuss in either case how to balance the prongs if one of them failed. Thus, it remains unclear whether a drug-testing policy that only met two of the three prongs would pass the *Acton* test.

Second, the Court's expanded application of the special needs analysis as found in *Earls* will potentially impinge upon students' Fourth Amendment privacy rights in many instances. The main criticism of *Earls* is that it does not require schools to show an actual drug problem in their school for drug testing to be a reasonable search.¹⁵⁸ Instead, the national drug epidemic will apparently justify suspicionless testing in any school as long as the testing meets the other prongs.

By applying the special needs analysis to a hypothetical school policy that mandated that male athletes be tested for steroids, these negative consequences become quite apparent. A steroid-testing policy likely would not pass all three prongs of the special needs balancing test. It could easily meet the first two prongs if, as in *Earls* and *Acton*, the group of students tested had voluntarily subjected themselves to an extracurricular activity and the testing procedure was sufficiently unobtrusive. Steroid testing would also meet the first portion of the third prong because the government has a sufficiently great interest in preventing steroid abuse given its widespread use. The school's policy would probably fail the second portion of the third prong, however, because steroid testing is prohibitively expensive and does not detect many steroids that students use. If the testing did fail this part of the third prong, *Acton* and *Earls* do not provide any guidance as to how a court should actually balance the three prongs.

However, even if a steroid-testing policy failed the second part of the third prong, a court would still likely find that the policy constituted a reasonable search. The court might find that since two of the three prongs as well as the first branch of the third prong were met, the balance of the *Acton* test favors steroid testing. Additionally, because the Supreme Court in *Acton* and *Earls* placed such emphasis on the schools' tutelary functions and its overriding interest in preventing substance

158. See *infra* notes 168–72 and accompanying text.

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abuse among the nation's youth,¹⁵⁹ a trial court would likely find that the comparable interest in deterring adolescent steroid use was strong enough to justify testing.

Despite well-intentioned actions to combat the apparent national steroid problem among youth, the above-described result should rightfully cause us to pause. Based on the Supreme Court's previous decisions, courts would essentially ratify ineffectual testing regimes based solely on a perceived national drug problem, thereby improperly infringing on male athletes' privacy rights in schools where no particularized steroid problem exists. In such a case, the school has no "special need" to test its students. Under *Earls*, though, a school could use data establishing a national steroid problem to justify steroid testing in its school, even though no proof of a particularized steroid problem exists. Therefore, students living in areas where no steroid problem exists will potentially be forced to sacrifice constitutional rights in the name of a national cause that does not affect them or their classmates.

Courts can properly protect student rights and foster effective polices under the special needs analysis, however, if the *Acton* balancing test is slightly modified. The real problem with the test is that the Supreme Court in *Acton* and *Earls* failed to analyze the second part of the third prong. The Court simply assumed that drug testing was an effective means of deterring drug abuse. It never discussed, however, its reasons for making such an assumption. Additionally, the Court overemphasized the school's interests in fighting the war on drugs. While fighting the war on drugs is certainly an important objective, the Court's emphasis on this one aspect of the balancing test, especially in *Earls*, makes it easy to overlook the students' important privacy interests.

This Section proposes that instead of a three-pronged balancing test, the *Acton* test be turned into a simple four-pronged test that involves no balancing. The first two prongs would remain the same, namely (1) the nature of the privacy interest involved and (2) the character of the intrusion. The third prong would be split into two prongs, thus creating four prongs. The third prong would thus be (3) the nature of the governmental concern. The real change to the test, however, would be in the fourth prong. Instead of simply looking at whether drug testing is an effective means of addressing an important concern, the courts should employ an intermediate scrutiny analysis to determine (4) whether the testing is reasonably related to the school's concern. Thus, a school

159. See *supra* notes 124–27, 151–55 and accompanying text.

would not simply be able to rely on the national steroid problem to justify steroid testing; rather, the school would have to show that an actual steroid problem existed at its school.

This slight tweaking of the *Acton* balancing test will alleviate the two main concerns with the special needs analysis. It eliminates confusion because instead of balancing the prongs, the court simply checks that each prong is met. This four-prong test also prevents students from unnecessarily forfeiting their Fourth Amendment rights because the school's interest in preventing steroid abuse would only outweigh the students' privacy concerns if the school can actually prove that a drug problem exists in their school.

Subpart A applies the current three-pronged balancing test to a hypothetical suspicionless testing policy that randomly tested high school male athletes for steroids. It will show the confusion that could ensue if a steroid-testing policy does not meet all three prongs. Further, this Subpart will demonstrate how random steroid testing could unnecessarily infringe on male athletes' privacy rights. Subpart B examines the proposed modification of the *Acton* balancing test and explains how it would alleviate these negative consequences of the current test.

A. Applying the Three-Pronged Test to a Hypothetical Steroid-Testing Policy

The following applies the *Acton* balancing test to a random, suspicionless public school policy that used urinalysis to test male athletes for steroids. The hypothetical policy would use urinalysis to detect steroids because although tests can detect steroids in both blood and urine, testing procedures at almost every level of competitive sports use only urine samples.¹⁶⁰ The testing is limited to male athletes for two reasons. First, the majority of schools that perform testing for any drugs test only student athletes.¹⁶¹ Second, since steroid testing is so expensive¹⁶² and male athletes use steroids more than any other group of

160. See R. Craig Kammerer, *Drug Testing in Sport and Exercise*, in PERFORMANCE-ENHANCING SUBSTANCES IN SPORT AND EXERCISE 323–24 (Michael S. Bahrke & Charles E. Yesalis eds., 2002). Drug testing is limited to urinalysis for several reasons. First, using a urine sample is less traumatic than taking a blood sample. Urinalysis avoids the necessity of using needles that may transmit disease and avoids possible religious or moral issues. Additionally, drug concentrations are usually higher in urine than in blood. *Id.*

161. See Nat'l Fed'n of State High Sch. Ass'ns, *supra* note 8 (stating that 63% of high schools only test student athletes).

162. See *supra* notes 62–64 and accompanying text.

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students,¹⁶³ a high school policy of randomly testing for steroids would probably be limited to male athletes.

1. The first prong—the nature of the privacy interest

In light of *Acton* and *Earls*, the privacy interests of high school-aged male athletes are not of the nature that would preclude school-imposed steroid testing. The *Acton* Court found that student athletes have a reduced expectation of privacy because locker rooms do not afford privacy and because athletes voluntarily subject themselves to their sports' additional rules and requirements.¹⁶⁴ In *Earls*, the Court stretched *Acton*'s holding to find that students who participated in nonathletic, extracurricular activities also had a reduced expectation of privacy.¹⁶⁵ The Court noted that, similar to athletes in *Acton*, students who participate in any extracurricular activities "voluntarily" subject themselves to the rules and requirements of their activity.¹⁶⁶ As one commentator observed, "*Earls* appears to give schools freedom in defining the student groups to be tested as long as those groups are voluntary and governed by rules not applicable to the student body at large."¹⁶⁷

The dissenting opinion¹⁶⁸ in *Earls* and several commentators have severely criticized *Earls* for, as one author put it, "shredding" students' Fourth Amendment privacy rights.¹⁶⁹ The dissent criticized the majority

163. See *supra* notes 22–25 and accompanying text.

164. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995); see also *supra* Part III.B.3.

165. *Bd. of Educ. v. Earls*, 536 U.S. 822, 832 (2002).

166. *Acton*, 515 U.S. at 657.

167. Ralph D. Mawdsley, *Random Drug Testing for Extracurricular Activities: Has the Supreme Court Opened Pandora's Box for Public Schools*, 2003 BYU EDUC. & L.J. 587, 600; see also *Tannahill ex rel. Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001) (striking down policy requiring all students to submit to random drug testing because the court found the District failed to demonstrate sufficient special need).

168. *Earls*, 536 U.S. at 844 (Ginsburg, J., dissenting) ("Vernonia cannot be read to enforce 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.").

169. Penrose, *supra* note 129, at 440 (arguing that the Court's ruling waives the privacy protections that they might otherwise have"). See Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 129–30 (2004) ("The denial of Fourth Amendment protections [in *Earls*] is a clear and powerful example of the deconstitutionalization of education."); M. Casey Kucharson, *Please Report to the Principal's Office, Urine Trouble: The Effect of Board of Education v. Earls on America's Schoolchildren*, Note, 37 AKRON L. REV. 131, 131–32 (2004) ("[S]chool officials, following the lead of the Supreme Court, are dealing with the drug problem by trampling on high school students' Fourth Amendment rights by requiring them to submit to random, suspicionless drug tests."); Irene Merker Rosenberg, *The Public Schools Have a "Special*

because the school did not offer any proof that students who participated in extracurricular activities actually had a drug problem.¹⁷⁰ The dissent also pointed out that school officials had not identified a significant drug problem at their school.¹⁷¹ In short, the dissent rejected the majority's opinion because the majority minimized students' privacy expectations even though the school had failed to show an actual drug problem at their school.¹⁷²

Despite these criticisms, the Court in *Acton* and *Earls* clearly established that high school athletes have limited expectations of privacy. The athletes have voluntarily submitted to the special rules and regulations of their sport. Additionally, the Court upheld the policy in *Acton*, which only tested athletes for drug use.¹⁷³ Testing male athletes for steroids would thus clearly meet the first prong of the balancing test after *Earls* regardless of whether the school showed an actual steroid problem among its male athlete students.

2. The second prong—the character of the intrusion

If carefully designed to minimize the intrusion upon the students' privacy, with the facts of *Acton* and *Earls* providing the guiding influence, a regime of random, suspicionless steroid testing within the public school context would very easily pass the second prong, which examines the character of the search's intrusion. *Acton* and *Earls* make clear that a steroid-testing policy will pass this prong if the students produce the urine samples in circumstances that are no more intrusive than a public restroom, the test results are confidential,¹⁷⁴ and the results are not turned over to law enforcement officials.¹⁷⁵ Thus, a high school

Need" for Their Students Urine, 31 HOFSTRA L. REV. 303, 312 (2002) (noting that Justice Thomas's majority opinion in *Earls* did not find that athletes had a lesser expectation of privacy than students participating in extracurricular activities); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1086 (2004) ("[I]n *Earls*, the state school board . . . failed to demonstrate 'any particularized or pervasive drug problem' . . ." (quoting *Earls*, 536 U.S. at 835)).

170. *Earls*, 536 U.S. at 843 (Ginsburg, J., dissenting).

171. *Id.* at 849 ("[The school district] repeatedly reported to the Federal Government during the period leading up to the adoption of the policy that 'types of drugs [other than alcohol and tobacco] including controlled substances are present [in the schools] but have not identified themselves as major problems at this time.'").

172. *Id.* at 852–53.

173. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650 (1995).

174. This means the results are revealed to school officials only on a need to know basis. See *id.* at 658.

175. See *supra* Parts III.B.3, III.C.3.

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steroid-testing procedure that mirrored those methods employed in *Acton* and *Earls* would undoubtedly satisfy the second prong of the constitutionality test.¹⁷⁶

3. The third prong—the nature of the government’s concern and the efficacy of testing to meet the steroid concern

The third prong contains two parts: first, a school district implementing a policy for steroid testing must show that it has a concern “important enough to justify the particular search at hand[;]”¹⁷⁷ and second, that testing is an effective means of addressing that concern.¹⁷⁸ While a school district’s concern in preventing student athletes from using steroids will almost certainly be important enough to justify the search at hand, steroid testing would likely fail the second branch of the third prong. Each of these requirements will be addressed in turn.

a. Nature of the concern. Given the Court’s broad reasoning in *Earls*, a school district could very likely characterize its concern for steroid use within its boundaries as serious and very important. If the Court’s holding in *Earls* is as broad as it appears,¹⁷⁹ all that a school district must do to satisfy this part of the third prong is cite a national drug problem. The Court in *Earls* relied primarily upon the “nationwide drug epidemic” in finding that the school had an important concern that justified the

176. One potential issue that could arise as an intrusion upon students’ privacy, however, is the possible legal implications of requiring students to report any prescription medications they are using. See Mawdsley, *supra* note 167, at 613–14 (noting that *Acton* and *Earls* do not address “the remedy that a student might have where confidential information regarding the medication list . . . is revealed to persons” without a “need-to-know”). The *Acton* Court noted that such a requirement presents a significant encroachment on students’ privacy interests. *Acton*, 515 U.S. at 659. Concerning reporting prescription medications, the Court explained that it “ha[s] never indicated that requiring advance notification is *per se* unreasonable.” *Id.* This exact issue was raised in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

In *Von Raab*, the government required employees who were seeking “certain positions within the service” to submit to a drug test. 489 U.S. 660–61. The Court found the government’s procedure minimally intruded upon the employees’ privacy interests because they were required to provide a list of medications only if they tested positive. *Id.* at 672 n.2. Even then, the employees had to supply a list of medications to a licensed physician only, rather than to their employer, the government. *Id.* If a school followed a similar procedure, it would also minimize the intrusion into a student’s privacy. If a student failed the test, the school could require him to send a list of any prescription medications to the lab. This would avoid the problem of possibly intruding on a student’s privacy interests by revealing prescription medications to a coach or other school personnel. See *Acton*, 515 U.S. at 659.

177. *Acton*, 515 U.S. at 661.

178. See *id.* at 663.

179. See *supra* notes 151–55 and accompanying text.

search.¹⁸⁰ In fact, the Court explicitly stated, “Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”¹⁸¹

The growing national steroid problem, especially among high school male athletes, is in many ways as widespread and harmful as the “nationwide drug epidemic” the Court described in *Earls*.¹⁸² Male high school athletes have used steroids at a rate similar to rates of drug use of other drugs among all high school students.¹⁸³ In addition, similar to other drugs, steroids adversely affect the physical, mental, and emotional health of those that use them.¹⁸⁴ Given this similarity in drug use rates and concomitant negative effects, a court would thus likely find that the national steroid problem is sufficient to satisfy the first part of the third prong.

This illustrates one of the fundamental problems with the current balancing test. After *Earls*, a school district can rely upon a national drug problem—in this case, increased steroid use among male athletes—to justify an infringement upon student privacy rights even when no local problem exists. As was discussed above, the dissent and others have severely criticized the Court in *Earls* for using a national problem to infringe upon students’ privacy rights.¹⁸⁵ The Court should not abandon its responsibility to uphold constitutional guarantees because of a serious, national problem, especially where alternatives exist that may be less invasive of a student’s privacy rights.

b. Efficacy of testing to meet the concern. Although steroid testing would meet the other parts of the *Acton* balancing test, it likely would fail the second part of the third prong. The third prong requires not only that the school district show a compelling interest in preventing steroid use, but also that the policy is an “effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting [steroid] use.”¹⁸⁶ In neither *Acton* nor *Earls* did the Court

180. *Id.*

181. *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002).

182. *See supra* Part II.A.

183. *See supra* notes 26–27 and accompanying text.

184. *See supra* Part II.B.

185. *See supra* notes 168–72 and accompanying text.

186. *Earls*, 536 U.S. at 837; *see also* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 663–64 (1995). Although this is what the third prong requires in theory, after *Earls* it appears that a school only need show a national drug problem. *See supra* Part IV.A.3.a.

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discuss in detail how a school could show its drug-testing policy effectively addressed its drug problem.

For example, in *Acton*, the Court relied on anecdotal evidence to find that the testing policy effectively addressed the school's concern. The District Court had found that athletes were the leaders of the school's drug culture.¹⁸⁷ Accepting this finding, the Court reasoned that since athletes were the leaders of the drug culture, a random drug-testing policy aimed at athletes effectively combated the school's drug problem.¹⁸⁸ *Earls* expanded *Acton* in finding that the school in *Earls* was addressing the broader problem of "protecting the safety and health of its students."¹⁸⁹ This larger problem justified the broader testing of all students who participated in extracurricular activities.¹⁹⁰ Besides this anecdotal evidence, however, the Court did not cite any proof in either case to show that drug testing actually detected, deterred, and prevented drug abuse.

If a court actually examined whether steroid testing effectively addresses the steroid problem, it would likely find that steroid testing is less effective than the tests in either *Acton* or *Earls*. The fundamental problem with steroid testing is that no test currently exists for certain steroids.¹⁹¹ Unfortunately, studies do not ask high school students which type of steroids they have used—only whether or not they have used steroids.¹⁹² At least in some cases, though, steroid users will know that the test is not going to detect their steroid abuse. The question for the courts then becomes how effective steroid testing needs to be. Again, the Court in *Earls* and *Acton* did not provide any guidance as to how effective random drug testing must be in order to be constitutional.

B. How Should a Court Apply the Acton Test?

Given the Court's failure to adequately analyze the second part of the third prong, and the fact that steroid testing is less effective than other types of drug tests, an examination of a high school's steroid-testing policy would potentially present a situation not addressed in *Acton* or

187. *Acton*, 515 U.S. at 649.

188. *Id.* at 663.

189. *Earls*, 536 U.S. at 838.

190. *Id.*

191. *See supra* notes 55–60 and accompanying text.

192. *See supra* note 61 and accompanying text.

Earls—how should a court actually balance the three prongs when one of the prongs does not clearly favor testing?

An attempt to balance the prongs could potentially create unnecessary confusion as the court would have to decide which prongs were most important. It could hold that since the first two of the three prongs and half of the third prong favored steroid testing, such testing is a reasonable search. This conclusion would be nonsensical, however, if the testing did not actually reduce or deter steroid use. What is the point of having a steroid-testing policy if it does not reduce steroid use? Even more importantly, allowing schools to employ a steroid-testing policy without showing an actual steroid problem at the school would unnecessarily infringe on the students' Fourth Amendment privacy rights.

Instead of trying to balance the three prongs, a court should transform the *Acton* balancing test. The third prong should be divided into two separate prongs, and then a court should simply analyze whether all four prongs are met. If one of the prongs is not met, then a random steroid-testing policy would fail. If all four are met, then the policy would pass constitutional muster. Additionally, courts should use an intermediate level of scrutiny on the third and fourth prongs to ensure that schools do not unnecessarily reduce student privacy expectations.¹⁹³ Modifying the test in this way will prevent confusion and protect students' privacy rights while allowing schools to implement drug testing procedures if they can show an actual need.

Under the modified test, the bright-line rules the Court created will remain unchanged. Analyzing the first prong, the Court in *Acton* found student athletes had a reduced expectation of privacy because they had voluntarily submitted to the rules and requirements of their sport, which were unique from the rules to which the general student body adhered.¹⁹⁴ The *Earls* decision used this rationale and found any student who participated in an extracurricular activity likewise had a reduced expectation of privacy that allowed drug testing.¹⁹⁵ Therefore, to meet the first prong, a steroid-testing policy simply must target a group of

193. See Marcus Raymond, *Drug Testing Those Crazy Chess Club Kids: The Supreme Court Turns Away From the One Clear Path in the Maze of "Special Needs" Jurisprudence in Board of Education v. Earls*, 22 ST. LOUIS U. PUB. L. REV. 559, 590 (2003) (advocating that courts employ an intermediate scrutiny standard from First Amendment jurisprudence to random drug testing in public schools).

194. See *supra* notes 116–18 and accompanying text.

195. See *supra* notes 141–45 and accompanying text.

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students who voluntarily participate in some school program with its own set of rules and requirements that do not apply to the student body as a whole. A steroid-testing policy meets the second prong as long as it is designed in such a manner that it is significantly discreet.¹⁹⁶ As long as these two prongs are met, then the analysis would move onto the third and fourth prongs.

Under the *Acton* and *Earls* balancing test, the third prong will always favor testing given the Court's overriding concern in the government's interest in preventing drug abuse among the nation's youth. In *Acton*, the Court found the school's interest in deterring drug use was "important—indeed, perhaps compelling."¹⁹⁷ The Court also stressed the negative psychological and physical effects of drugs on adolescents.¹⁹⁸ In *Earls*, the Court reemphasized that "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy."¹⁹⁹ The Court obviously felt the schools had a great interest in preventing drug use among the schools' students. This strong emphasis on the school's interest overshadowed the fact that the testing would be infringing on students' privacy rights.

The cursory manner in which the Court analyzed the effectiveness portion of the third prong further demonstrates the importance the Court places on the school's interest in preventing drug use. In both *Acton* and *Earls*, instead of looking for tangible proof that the drug testing was inhibiting drug abuse, the Court relied on anecdotal proof that drug testing would work. For example, in *Acton* the Court found that since the drug testing policy was aimed at the leaders of the school's drug culture—athletes—the drug testing would naturally alleviate the school's drug problem.²⁰⁰ Similarly, the Court in *Earls* found simply that "testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."²⁰¹ In both of these cases, however, the Court was obviously more concerned with the schools' interest in deterring drug use than in determining whether a drug problem existed and whether drug testing was aimed at this problem.

196. See *supra* notes 119–23, 146–50 and accompanying text.

197. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995).

198. *Id.*

199. *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

200. *Acton*, 515 U.S. at 663–64.

201. *Earls*, 536 U.S. at 837.

As long as the perceived interest in deterring drug use among the country's youth blinds the Court to the fact that drug testing may unnecessarily infringe the students' Fourth Amendment rights, any balancing between the two branches of the third prong will always weigh in favor of finding that the testing is reasonable. For that reason, the separate analysis of the fourth prong will best ensure that testing is not only needed, but effective.

In determining whether a steroid-testing regime meets the last two prongs, courts should apply an intermediate level of scrutiny. In other areas of constitutional law, courts apply an intermediate scrutiny standard when state classifications or legislation raise "recurring constitutional difficulties."²⁰² Ordinarily, the state classification or legislation that infringes on a constitutional guarantee must be substantially related to an important government objective to withstand intermediate scrutiny.²⁰³ For example, the state of Virginia only allowed males to attend the Virginia Military Institute.²⁰⁴ When this classification was challenged on equal protection grounds, the Court reiterated that the

State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.²⁰⁵

If such a standard were applied to steroid testing, then the government objective of preventing steroid use among male high school athletes would not change. However the school would have to show that the steroid testing was substantially related to this objective. Further, it could not rely on the "overbroad generalization" that a national steroid problem exists. In other words, to pass the third and fourth prongs the school would have to show a steroid problem at its school and that the steroid testing was substantially related to remedying that problem. If applied as described above, the modified special needs test would eliminate confusion as to how to balance the prongs of the current *Acton*

202. See Am. Jur. 2d *Constitutional Law* § 814 (2004).

203. *Id.*

204. *United States v. Virginia*, 518 U.S. 515, 519–20 (1996).

205. *Id.* at 533 (citations omitted).

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test and also prevent schools from unnecessarily infringing upon student privacy rights.

V. CONCLUSION

A steroid problem clearly exists among high school male athletes. As more and more stories emerge in the media, the public may realize steroids are an even bigger problem than previously thought.²⁰⁶ Schools obviously have an important concern in deterring the growing steroid problem. If the school chose to employ a suspicionless steroid-testing policy, the policy would have to be a reasonable search under the three-pronged special needs balancing test applied in *Acton* and *Earls*. The current test is inadequate, however, because it does not provide guidance as to how lower courts should actually balance the prongs. Additionally, it improperly infringes upon students' privacy rights because schools need not show an actual steroid problem on their campuses to justify subjecting students to suspicionless searches.

Instead of using *Acton's* three-pronged balancing test, a court should split the third prong into two additional prongs and thus create a four-pronged test. A court should then require all four prongs be met before finding that randomly testing male athletes for steroids constitutes a reasonable search. In addition, courts should employ an intermediate scrutiny test on the third and fourth prongs to ensure that student privacy rights are not unnecessarily sacrificed to the national steroid problem. Creating a four-pronged test would thereby remove any confusion that might ensue as to how to properly balance the three prongs and provide the correct measure of protection to students' constitutional rights.

Thomas Proctor

206. Recently, several stories regarding steroid use by high school students have garnered national attention. In Texas, nine students (mostly football players) admitted to using steroids. See Julie Scelfo & Dirk Johnson, *Texas, Football and Juice*, NEWSWEEK, Mar. 7, 2005, at 46. Similarly, five students (including three football players) in Connecticut were arrested and charged with possessing steroids. See Azi Salzman, *Daniel Hand Students Caught With Steroids*, N.Y. TIMES, Mar. 13, 2005, at 14CN. Additionally, at the recent congressional hearing on steroid abuse in baseball, parents of two sons whose suicides have been attributed to steroid use testified about the dangers of steroid use. See Dave Sheinin, *Baseball Has a Day of Reckoning in Congress; McGwire Remains Evasive During Steroid Testimony*, WASH. POST, Mar. 18, 2005, at A1.

