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Body

At the end of the term last week, the Supreme Court handed down a raft of 5-4 decisions that will make the entire country more like high school and make high school more like prison. The court held "among other things "that elected judges may behave more like student council candidates (I promise more theme dances and strict construction for everyone!) and parochial schools may be treated like public ones. But the court also voted to allow public schools to treat their students "future citizens "as though they're likely to commit a drug crime.

The holding in Board of Education of Pottawatomie County v. Earlsshouldn't just enrage students and parents unwilling to see their kids shamed just for joining the band. It should terrify any of us who fear that in promoting a War on Something, the court might be prepared to suspend all rules of constitutional interpretation based on the preposterous legal theory that Heck, we oughtta try something. The majority opinion in Earls reflects some of the worst results-based decision-making we've seen since Bush v. Gore. And like Bush v. Gore, it is rooted in panic, expediency, and a twisting of prior precedent to fit the facts.

The question in Earls was whether school districts may constitutionally conduct warrantless, suspicionless searches of all public-school students engaged in extracurriculars. The court decided that school districts may conduct such tests, using what was once a very limited special needs exception to the requirement that government actors must have probable cause, even for administrative (as opposed to law enforcement) searches. Initially, these special needs cases involved suspicionless drug tests for individuals in jobs that would be highly dangerous if

performed while high. With Earls, it's enough that the government thinks that, dang, something should be done about drugs.

The special needs doctrine is an odd duck: In 1989 the court decidedSkinner v. Railway Labor Executives' Association, allowing railroad workers to be tested for drug use to ensure public safety in a highly regulated industry. That same year it decided in Treasury Employees Union v. Von Raabthat a drug-testing program for customs officials was constitutional, again because of the compelling state interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. The next slide down this slippery slope was an easy one, and so in 1995 the court upheld, by a 6-3 vote, the constitutionality of a school district's policy of drug-testing student athletes without suspicion. Turning to its trusty special needs balancing test, the court in Vernonia School District v. Acton balanced the privacy expectations of student athletes against the urgency of the government's war on drugs. Not surprisingly, the students (whom the court felt were used to walking around naked in public anyhow) lost.

In a surprise decision in 1997, the high court actually found one suspicionless drug-testing program not sufficiently compelling to meet the infinitely malleable special needs exception. The Georgia Legislature required that candidates for certain state public offices be drug-tested, and in an 8-1 decision, the court in Chandler v. Miller invalidated the program. Perhaps realizing the court had unleashed a dragon with Vernonia, Justice Ginsburg, writing for the majority, used Chandler to refine the special needs exception: [T]he proffered special need for drug testing must be substantial, she wrote, and the majority of the court felt that Georgia had not demonstrated a sufficiently compelling or urgent need to keep its high-ranking public officials drug-free.

Chandler did two things that set the court up to decide Earls as it did: One, it left unchallenged the bizarre assertion "first articulated in Vernonia "that suspicionless urine tests constitute a negligible intrusion on personal privacy. More profoundly, the opinion gutted the idea of a balancing test, in which state interests are balanced against the intrusiveness of the drug-testing program, and simply asserted that "in the case of the Georgia program "the state interests in suspicionless drug tests were not sufficiently compelling to warrant the intrusion. In short, Ginsburg rejiggered the balancing test: The privacy issue is now a constant (intrusiveness equals negligible), and the importance of the government interest is the only relevant variable.

Perhaps it's not surprising that such a skewed test would lead to the result in Earls: First, Thomas saws away at any remaining notion that students expect privacy at school. Sure the kids in the choir don't change in public like the athletes in Vernonia. But they are routinely required to submit to physical examinations and vaccinations against disease, and [s]ome of these clubs and activities require occasional off-campus travel and communal undress (like the school's lap-dancing team?). Repeating the claim in Vernonia that having to pee in a cup while a faculty monitor listens at the door of your stall constitutes a negligible intrusion, Thomas makes it clear to him, urine tests at school are no different than spelling tests.

The big constitutional fake-out comes with the assertion that the substantial state interest in winning the drug war is more compelling than it was in Chandler. Despite testimony from the school board that drugs are not a real problem at present, the school board announces, and Justice Thomas agrees, that there is indeed a drug problem in a sleepy high school in Oklahoma where 797 students have been tested under the policy and three (all athletes) tested positive. Why? Because: Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. Speaking openly! At school? Perish forbid. Also: A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the 'drug situation.' Now people in the community probably also call the board to discuss the Britney Spears situation, but we can't urine-test students for being bimbos. So, there must be a drug problem.

Thomas cuts the last possible tether to Vernonia (where there was actual evidence of a drug problem) with this winning constitutional shrug: Even if there's no problem, there may be a future problem. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Thomas finally eviscerates the public safety requirement that once characterized all the special needs exceptions. Railroad workers and customs officers endangered the public with drug use. Students, Thomas says, endanger themselves. And that is enough for the court to approve the program. It's enough to force every single American to also submit to suspicionless drug-testing, but Thomas neglects to mention this.

Numerous strange defenses of the Oklahoma policy have been put forward in the wake of the Earls decision: The Washington Post claims no one was really being hurt because there are no criminal consequences to students who test positive. Justice Breyer, in a concurrence my friend Tim describes as a cover letter for his application to be chief, argues both that drugs are real bad and that this will give a student a nonthreatening reason to decline his friend's drug-use invitations. And Professor Sherry Colb argues that testing all kids is somehow less stigmatizing than testing simply the freaky-looking ones.

But all these bizarre defenses ignore two vital facts: that making a kid, particularly a good kid, pee in a cup just to enter a science fair is obscene; and it's especially obscene because, to quote Justice Breyer (himself quoting the New Basic History of the United States, 1968), schools prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves. If schools foster civility by treating schools as prisons, to quote Justice Scalia ▾ at oral argument in Earls, don't be surprised if students someday become as civilized as prisoners.

But more alarming is the specter of the infinitely growing maw of the special needs exception to what was once a constitutionally sacred warrant requirement for state searches. No longer is special need to circumvent the warrant defined merely by the danger you pose to the public while on the job. A bare government assertion that there's a war on will suffice. It's worth recalling that with a war on terror just ramping up, the most special need the government should have right now is a warrant.

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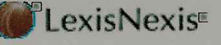

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