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The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights

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THE DOCTRINE OF DEFERENCE: SHIFTING CONSTITUTIONAL PRESUMPTIONS AND THE SUPREME COURT'S RESTATEMENT OF STUDENT RIGHTS AFTER *BOARD OF EDUCATION V. EARLS*

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Preface

> I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns. . . . Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.[1]

-Justice John Marshall Harlan

1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

> Although "'special needs' inhere in the public school context," those needs are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install. The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects. I therefore dissent.[2]
>
> -Justice Ruth Bader Ginsberg

I. INTRODUCTION

It is, by now, well established that something has happened in the field of education law, most dramatically in the area of student rights. The dissenting opinions above denote the relevant period—almost thirty years—of an extraordinary effort by the courts to accommodate legitimate but competing interests in a unique constitutional context. Whatever one might think of individual rights in the abstract, the process of acknowledging and then accommodating the interests found on the public-school campus has proven both challenging and frustrating.[3]

The rules on student rights have been reconfigured largely as a result of this process. The doctrinal picture that emerges would be, in any other legal area, a welcome settling of expectations. But in the field of education law, it represents a bull's eye for the groups whose interests are affected. This Article offers an exploratory look into the public policy implications of the emerging constitutional equation on student rights and the correlative duty of educators to provide a safe and effective learning environment.

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2. Bd. of Educ. v. Earls, 536 U.S. 822, 843 (2002) (Ginsburg, J., dissenting) (citations omitted).

3. Chief Justice Burger spoke to this challenge in the famous dissent in *Board of Education v. Pico*, 457 U.S. 853 (1982). In *Pico*, the Court struggled to determine how to review a decision made by school officials to remove certain books from school libraries. The Court remanded the case with instructions to the lower court on how to determine whether the school board was acting in good faith. *See id.* at 872-75. The Justices wrote a plurality of opinions, each illustrating the degree of difficulty presented by such cases. In Chief Justice Burger's view, the challenge was a result of trying to harness local democratic processes:

> [T]he people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end.

Id. at 891-92 (Burger, C.J., dissenting) (footnote and citation omitted).

A. The Disjunction Between Student Rights Law and Policy

Rights and duties frequently collide in the context of public education. In descriptive terms, constitutional law has found the campus climate to be a fertile ground for the discovery and refinement of a surprising variety of doctrines.[4] Normatively, one has to consider the possibility that something unique to the educational enterprise attracts disparate interests, creating a propensity for mischief and conflict.[5] Under any characterization, the relationship between education policy and constitutional law has long been interdependent and, in the area of student rights, indeterminate as well.

Policy making in education has, of late, been extraordinarily difficult. Education has always been primarily a local enterprise with decision making necessarily focusing on the needs of students at a particular time in a specific place. The accountability created by this link between the education mission and parental demands, while providing a critical self-check against abuse in decision making, often comes into conflict with constitutional limitations. The difficulty is plain: popular school district policies may sometimes fail to pass legal muster while, at other times, what the law allows may fall short of fully accommodating the perceived needs of the community. What makes good law may not make good policy.

Until recently, the contribution of the United States Supreme Court to any clarity on the subject has been intermittent and uneven. The Justices have focused on narrow constitutional questions in cases that produce defining moments for educators as litigants but provide no unifying clarity for them. Against the broad canvas of the euphemism that "students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate,"[6] stands a decidedly abstract portrait of student rights.[7]

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4. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (using the Equal Protection Clause to invalidate gender segregation in higher education); Plyler v. Doe, 457 U.S. 202 (1982) (using the Equal Protection Clause to invalidate state public school residency requirement that excluded students based on alienage); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (using the Equal Protection Clause to invalidate racial segregation in public education).

5. *See* Stanley Ingber, *Socialization, Indoctrination, or the "Pall Of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 17-18 (1987).

> A fundamental tension exists between the ideology of liberalism, which focuses on individual autonomy, and that of community, which emphasizes institutions that shape character. Nowhere is this tension between liberalism and community more blatant than in our attitude about educating children. Children in fact constitute the "Achilles heel" of liberal ideology. Although liberalism "posits individuals capable of choosing among values without constraint from others or the state," its core assumptions of autonomy and neutrality break down as we examine how children actually acquire values. Children are not born with a particular cultural orientation. Society must teach values if children are to have conceptions of the good as adults. Yet if society cannot distinguish teaching values from imposing values, it severely breaches value neutrality.

Id.

6. *Tinker*, 393 U.S. at 506.

7. The most consistent rulings have come out of the Fourteenth Amendment's Equal Protection Clause. It has unquestionably become the foundation for evaluating the fundamental fairness of campus policies by defining the education mission so as to discourage use of invidious classifications. Other

Competing advocates in the student rights debate (for example civil rights groups and safe schools groups) have grown accustomed to a level of uncertainty in the contest over how the education policy landscape should evolve in the face of an almost unwieldy body of judicial decisions. For educators considering a range of policy options, the challenge has been to find the good law.[8] Unfortunately, in such a climate, education policymakers find themselves in trouble over student rights in two distinct ways.

First, obtaining useful legal advice becomes surprisingly problematic.[9] In the search for an understanding of the link between law and policy, educators encounter a form of art when seeking science. Almost any advisor can, and does, become an expert in education law by holding fast to a favorite set of cases on student rights, arguing the correctness of a preferred position by analogy, by force of reason, or by force of effort.

Second, and as a direct result of this volatility, the search for solutions to campus conflicts is filled with disincentives. A palpable frustration about the role of student rights undermines many good faith efforts to implement effective policies. The inability to eliminate any of the nagging elements in the spectrum of advice (from fear of the filing of a lawsuit itself, to the costs associated with defending any policy, to the judicial uncertainty faced along the way) and the

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substantive constitutional guarantees have found a less comfortable home in the public-campus setting, effectively making student rights discussions almost transparent except for the discrimination cases. The rigor of the Religion Clauses has, for the most part, settled expectations in student rights cases. The guiding presumption in these cases appears to be that a school policy that supports inclusion of a religious ceremony is per se illegitimate and outside the education mission, and curricular policies that are otherwise valid become suspect when motivated by a desire to attack students' religious beliefs. *See* Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see generally* Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333 (1986) (discussing "secular humanism" and "scientific creationism" policies). The Due Process Clauses provide little fire to which the feet of educators can be held, and therefore, few student rights emerge under due process analysis. Education is not a fundamental right. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). State compulsory education laws do not create the type of custodial relationship giving rise to traditional duties of care and efficiency. *Cf.* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (finding no duty to protect a child from his father despite a state agency's knowledge of suspected abuse). Procedural due process applies when students face deprivation of education as a "property interest." Although properly interpreted, this creates, at best, incentive to develop a paper trail in the hope of finding illegitimate educational concerns as a motivating factor in a suspension or dismissal, with an added expectation that any deprivation the student experiences will be of a limited duration. *See generally* Goss v. Lopez, 419 U.S. 565 (1975) (requiring minimum due process protection prior to denying a property interest due to misconduct).

8. In fairness to the student rights decisions by the Court, the task of applying constitutional norms to conflicts on public school campuses has always had a surface simplicity belying entrenched complexities. Litigation over school policies defies attempts at nomenclature, in part because of the diversity and breadth of the educational enterprise itself, and in part because the Court focuses its rulings only on the doctrinal significance of the narrow questions presented therein.

9. *See* Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & EDUC. 73 (1998) (discussing research data on hiring and use of lawyers, including a one-third turnover in lawyers over a three-year period); *see also* Wandalyn Rice, *Don't Waste Your Attorney's Time: Heed This Wise Counsel on When Legal Advice Is Vital and When It's Wasteful*, 169 AM. SCH. BOARD J. 24 (1982) (discussing when school boards should consult attorneys).

relative certainty of second-guessing by the courts have led to timidity and inaction in education problem solving.[10]

Acknowledgment of this hesitancy to act, often in the face of actual or imminent conflicts, has welcomed a level of legislative micromanagement of local school officials that would be divisive in other contexts. State and federal statutes prompt uniformity by requiring or forbidding action in certain "no brainer" areas.[11] Educators do not necessarily benefit from this close scrutiny. Another round of conflict emerges particularly when the law usurps the preferences of local school

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10. See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), for a description of how confusing legal requirements foster poor policymaking. In *Gonzaga*, the Court held that the nondisclosure requirements of FERPA did not give rise to a private right of action. In discussing the misunderstood regulation's impact on educators, Justice Breyer noted in concurrence that:

> Much of the statute's key language is broad and nonspecific. The statute, for example, defines its key term, "education records," as (with certain enumerated exceptions) "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational . . . institution." This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information. It has led, or could lead, to legal claims that would limit, or forbid, such practices as peer grading, teacher evaluations, school "honor society" recommendations, or even roll call responses and "bad conduct" marks written down in class. And it is open to interpretations that invariably favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances, say, where individuals are being considered for work with young children or other positions of trust.

Id. at 292 (citations omitted).

11. For example, The Federal Gun-Free School Act of 1994, 20 U.S.C. § 8921(b)(1) (2000), requires states to pass legislation requiring local educators to expel students possessing weapons in school from school for at least a year. *See also* NEB. REV. STAT. § 79-267 (2003):

> [(]The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act, when such activity occurs on school grounds . . . (5) Knowingly possessing, handling, or transmitting any object or material that is ordinarily or generally considered a weapon; . . . (9) Engaging in any other activity forbidden by the laws of the State of Nebraska which activity constitutes a danger to other students or interferes with school purposes . . . .[).]

MICH. COMP. LAWS ANN. § 380.1311(2) (West 1997):

> [(]If a pupil possesses in a weapon free school zone a weapon that constitutes a dangerous weapon, commits arson in a school building or on school grounds, or commits criminal sexual conduct in a school building or on school grounds, the school board, or the designee of the school board as described in subsection (1) on behalf of the school board, shall expel the pupil from the school district permanently. . ."). Some legislation also clarifies student rights by imposing limits on educators.[).]

See WIS. STAT. ANN. § 948.50 (West 1996) ("Any official, employe [sic] or agent of any school or school district who conducts a strip search of any pupil is guilty of a Class B misdemeanor."). Numerous states have created statutes instituting clothing regulations for students, many tending toward uniform apparel. *See* LA. REV. ANN. STAT. § 17:416.7 (West 2003); TEX. EDUC. CODE ANN. § 11.162 (Vernon 2003).

officials or parental demands. Often, the result is legal challenges that call into question the validity of the legislative choice.[12]

B. *The Supreme Court's Restatement of Education-Law Doctrine*

Dramatically, within the period between the dissenting opinions of Justices Harlan and Ginsburg quoted in the preface, the Court shifted both its focus and tone in an attempt to address the disjunction between law and policy on student rights. The emerging constitutional restatement dramatically settles expectations about the pupil-tutor relationship. Its roots are found in the most controversial of student rights areas: school search policies that trigger the privacy protection of the Fourth Amendment.

In *New Jersey v. T.L.O.*,[13] the Justices agreed to relax Fourth Amendment standards to allow educators to conduct searches based not upon probable cause, but rather on the suspicion "that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[14] In *Vernonia School District v. Acton*,[15] educators were allowed to conduct random, mandatory, suspicionless searches (by testing urine samples for drugs) of students who participated in school-sponsored athletic programs. Fourth Amendment standards were sufficiently flexible to allow such testing because the "relevant question," opined the Justices, "is whether the search is one that a reasonable guardian and tutor might undertake."[16]

Most recently, in *Board of Education v. Earls*,[17] the Court clarified and extended the Fourth Amendment rules on suspicionless searches by upholding a policy that required all students participating in any interscholastic competitive activities to submit to drug testing. Justice Thomas wrote the majority opinion for a Court that declared the power to maintain safe campuses includes the authority "to discover . . . latent or hidden conditions, or to prevent their development."[18] "'[The interest in keeping children safe] is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.'"[19] In place of an objective requirement of some nexus or precision between those tested and any actual drug problem, the Court substituted a presumption that educators will act in good faith in the communities to which they

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12. *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (holding Congress lacked authority to enact the Gun Free School Zones Act, 18 U.S.C. § 922(q), which provided a criminal penalty for possession of a firearm within 1,000 feet of a public school, because the statute exceeded the authority of Congress under the Commerce Clause); *see also* Dohmen *ex rel.* Dohmen v. Twin Rivers Pub. Sch., 207 F. Supp. 2d 972 (D. Neb. 2002) (holding that educators could be sued for damages under the Americans with Disabilites Act when parents sued to challenge the application of a zero-tolerance statute to a special education student).

13. 469 U.S. 325 (1985).

14. *Id.* at 342.

15. 515 U.S. 646 (1995).

16. *Id.* at 665.

17. 536 U.S. 822 (2002).

18. *Id.* at 829 (quoting Treasury Employees v. Von Raab, 489 U.S. 656, 668 (1989)).

19. *Id.* at 828-29 (quoting *Von Raab*, 489 U.S. at 668).

are accountable.[20] As a result, drug testing policies are valid if they "reasonably [serve] the School District's important interest in detecting and preventing drug use among its students."[21]

These decisions reach beyond their Fourth Amendment contours, providing the elements for an extraordinary model of deference to the authority of educators as to policies far less intrusive, if not less controversial. In this model, educator policies are presumed to represent a good faith attempt to maintain safety and discipline and are thus valid when certain factors are at work. Four factors provide the basic framework for this restatement of student rights analysis:

(1) *The Education Mission Factor*
This factor acts as a limit on the presumption of validity, covering campus policies that are "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[22]

(2) *The Custodial Factor*
This factor is based on the historical view that educators have a natural zone of authority, if not a legal duty as to "(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[23]

(3) *The Due Process Factor*
This factor serves to validate the reasonableness of a policy. It is based on an emerging view that there should be a link between the educator's interest in implementing a policy and the character of the intrusion created by the disciplinary process when the law is enforced.[24]

(4) *The Accountability Factor*
This is a requirement that the challenged policy actually represent the views of the affected community, giving rise to an expectation that educators will reach out for parental input by providing a "democratic, participatory process to uncover and to resolve differences,"[25] particularly over controversial policies.

These components, working together, are designed to produce settled expectations regarding student rights on public-school campuses. Interestingly, the equation itself is neither novel nor particularly unexpected in its components. Each factor, standing alone, is reasonably well established in education law, albeit in narrower contexts. What is significant is the synergistic effect that the Court produces by combining the elements in a manner that creates landmark effects in favor of educators and against previous assumptions about student rights.

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20. *See id.* at 835-38.
21. *Id.* at 825.
22. *Id.* at 830 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).
23. Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (quoting *Vernonia*, 515 U.S. at 654).
24. *Id.* at 832-34.
25. *Id.* at 841.

C. *The Journey Through the New Education-Law Landscape*

The practical result of the student-rights restatement is a shift in presumptions about education policymaking that is no less dramatic than the shift in constitutional presumptions about social and economic regulations that effectively ended the substantive due process era in the 1930s.[26] The components of the restatement provide both a nomenclature for policy formulation and a barometer for resolving disputes over the reasonableness of educators' actions. When its components are present in the background of a challenged school policy, the level of judicial deference that should result is similar, if not identical, to the constitutional framework applied in a post-*Lochner* analysis. When educators and their legal advisors focus on the elements of the restatement in fashioning a solution to a campus conflict, uncertainty is likely to give way to a short list of policy options, each with its own relative tradeoffs and shortcomings. When parents and communities participate in the process, even if only at the margins, the form of accountability acts as a self-check on the reasonableness of educators' actions. In the absence of evidence of bad faith, school officials are, in the words of Justice Harlan's *Tinker* proposal, "accorded the widest authority in maintaining discipline and good order in their institutions."[27]

Any clarity in such a model, while settling expectations, highlights a fundamental conflict set in perspective by Justice Ginsburg's *Earls* dissent quoted in the preface of this Article. As a matter of law, a zero-sum game results with significant implications about the larger role of the Bill of Rights as a limitation on government officials when these officials are educators. The restatement reconfigures the concept of reasonableness in a manner that produces results anomalous to the usual constitutional case, because "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[28]

This Article provides a template for understanding the new student-rights landscape and its effect on education policymaking. Part II traces the evolution of the student-search cases as a predicate for understanding the Court's need to offer an ameliorative model on the authority of educators. Part III offers a closer look at *Earls* as the catalyst for a restatement from which all of the elements of a doctrine

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26. Substantive due process has become a code of sorts in constitutional law for the willingness of the federal courts to review state and federal statutes for validity using the Due Process Clause. The history of the exercise of the judicial review power is best understood in terms of the shifting resolve of the courts to defer to legislation rather than striking down laws that violate subjective notions of due process. The "*Lochner* Era" depicts a period (1900-1936) of judicial activism when federal courts routinely invalidated social and economic laws determined to violate the liberty to contract. *See* Lochner v. New York, 198 U.S. 45 (1905). The post-*Lochner* era represented a shift away from a liberty to contract and toward greater deference to social and economic legislation unless the legislation violated specific provisions of the Constitution. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938). For a well-annotated article on modern substantive due process, see Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003).

27. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

28. *Earls*, 536 U.S. at 830 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).

of deference emerge. Part IV assesses the student-rights restatement, laying out its components and tracing their doctrinal roots to explore the new landscape of education-law jurisprudence. It is organized around the theme that the shift of presumptions in the restatement is remarkably similar to the view of Justice Harlan in his *Tinker* dissent that any new rule "cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns."[29] Finally, part V applies the restatement to the broader range of student rights conflicts to provide a preliminary exploration of the adjustments, if any, that may evolve when lower courts apply the *Earls* model as intended.

The message herein is simple enough: With *Earls* serving as the barometer, a new era of policymaking emerges, particularly as to the wider range of school codes of conduct that are far less intrusive than the student drug testing upheld in the *Earls* decision. As to education policy, the implications are just as far-reaching. If *Earls* reflects the manner in which the elements of the restatement are to apply, limitations on policymakers will become harder to articulate. Educators would, on the surface, be empowered to act in ways previously thought unreasonable because their needs are "so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install."[30]

This level of empowerment is not filled with the good news for an educator that appears at first glance. As a result of this authority, a correlative duty to provide a safe campus is within reach as a constitutional matter, bringing into play an array of tools to make educators accountable for their deliberate indifference to conditions that are known or foreseeable with due diligence. Such a duty would be anchored in a competing constitutional presumption that educators should act reasonably to protect "children who . . . have been committed to the temporary custody of the State as schoolmaster."[31] This would bring the education reform movement full-circle, effectively creating a good faith exception for educators in a system now balanced with substantive liability acting as a disincentive to timidity and inaction in campus problem solving.

II. FALLING STUDENT RIGHTS AND ASCENDING EDUCATOR INTERESTS

A. Lowering the Reasonableness Standard in Schools: New Jersey v. T.L.O.

With the Supreme Court's 1985 term, education law began to undergo a not-so-subtle restatement of the rights of students attending public schools. Prior to the decision in *New Jersey v. T.L.O.*,[32] it was generally thought that rights-based challenges to school policies would trigger ordinary constitutional rules in the relevant area. Indeed, in *Tinker v. Des Moines Independent School District*,[33] the Supreme Court acknowledged educators' special position as tutors and guardians but nonetheless barred educators from infringing upon student rights absent a

29. *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting).
30. *Earls*, 536 U.S. at 842 (Ginsburg, J., dissenting).
31. *Id.* at 825 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).
32. 469 U.S. 325 (1985).
33. 393 U.S. 503 (1969).

material and substantial interference with school discipline.[34] However, the Supreme Court's and lower courts' decisions after *Tinker* did not remain true to the decision's admonishment that educators may only infringe on students' constitutional rights under limited circumstances directly tied to preservation of the educational mission.

In *T.L.O.*, the Supreme Court cut deeply into the Fourth Amendment's probable cause requirement in the name of preserving educators' interests. This was the first of the Court's landmark decisions conferring wide deference to school officials acting to maintain campus safety, order, and discipline that continued so dramatically with the *Earls* decision.

To reach its decision regarding what level of individualized suspicion school officials must have that a student may have broken a school rule or the law before they may properly search the student, the Court acknowledged that students retain a legitimate expectation of privacy in their person and effects when they come to school.[35] With this acknowledgment, the Court declined the state's invitations to treat schoolchildren as the Court treats prisoners, wholly lacking an expectation of privacy within the institution.[36]

However, the Court found the students' expectation of privacy did not extend as far inside the schoolhouse gate as outside of it. Recognizing that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, [and that] what is reasonable depends on the context within which a search takes place,"[37] the Court assessed whether the Fourth Amendment's standard requirements of probable cause and a warrant fit into the school environment.[38] The Court determined that they did not.[39] In so doing, the Court began its modern trend of wide deference to the educators' interest in controlling the school environment.

According to the Court, schools possess a substantial interest in maintaining safety, order, and discipline inside and outside the classroom.[40] While "[m]aintaining order in the classroom has never been easy, in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."[41] Because of these challenges, the Court determined that discipline in public schools "requires a certain degree of flexibility" that the warrant and probable cause requirements do not permit.[42] Balancing student privacy rights with the schools' need for flexibility and authority to maintain order, the Court granted school officials permission to search students based upon mere reasonable suspicion of a rule or law violation, as long as the scope of the search is reasonable.[43]

Within a short period, educators and the courts began developing a vernacular for forming "individualized suspicion" in a variety of campus contexts. While

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34. *Id.* at 507-09.
35. *T.L.O.*, 469 U.S. at 338.
36. *Id.* at 338-39.
37. *Id.* at 337.
38. *Id.* at 338-40.
39. *Id.* at 339-40.
40. New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985).
41. *Id.* at 339.
42. *Id.* at 340.
43. *Id.* at 341-42.

courts continued to use the basic formula of the Fourth Amendment, including the totality of circumstances element and a reliance on reasonableness as "the ultimate measure of the constitutionality of a governmental search,"[44] the elements of the equation began to expand to account for a growing awareness of the special needs of the educational environment. Lower courts' opinions recited the mantra of this low standard of suspicion and provided educators (and, after *T.L.O.*, arguably any law enforcement officials working with them),[45] with expansive authority to search students upon almost any good faith suspicion of wrongdoing that a search could confirm.[46] To be sure, the relative seriousness of carrying, selling, or abusing illegal drugs or carrying weapons on campus has promoted lower courts to apply *T.L.O.* most liberally to allow educators to take an extremely proactive role in ferreting out drugs and weapons on campus.[47]

But the Court in *T.L.O.* declined to address the proper Fourth Amendment standard for searches of students without individualized suspicion, reserving that question for another day. That question—what to do when educators suspect a category of students of wrongdoing but do not know precisely who is breaking the rules—resulted in a variety of approaches and holdings regarding testing students for illegal drug use.

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44. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995).

45. These cases present an extraordinary variation on the theme of delegation. Educators are permitted to bring law enforcement into the student-school official relationship by initiating a request for assistance, combined with a measure of supervision and control. *See, e.g.*, Cason v. Cook, 810 F.2d 188, 191-92 (8th Cir. 1987) (finding the reasonable suspicion standard applicable where a police officer conducted a pat-down and some questioning after school officials found evidence of theft); J.A.R. v. State, 689 So.2d 1242, 1243 (Fla. Dist. Ct. App. 1997) (finding reasonable suspicion standard applicable where a police officer "merely assisted the school official during school at the school official's request" for safety reasons); *In re* Josue T., 989 P.2d 431, 436-37 (N.M. Ct. App. 1999) (asking a police officer to conduct a weapons pat-down does not increase the level of suspicion required); *In re* Interest of Angelia D.B., 564 N.W.2d 682, 688 (Wis. 1997) (finding that where school officials "initiate an investigation" and they conduct it "in conjunction with police, the school has brought the police into the school-student relationship").

46. *See, e.g.*, Todd v. Rush County Sch., 133 F.3d 984, 986 (7th Cir. 1998) (upholding drug testing program in conditioning participation in extracurricular activities on consent to test for drugs, alcohol, or tobacco because the program was designed to protect students' health, and participation in extracurricular activities is a privilege carrying an obligation); *In re* Interest of F.B., 726 A.2d 361, 363 (Pa. 1999) (finding constitutional a uniform "point of entry search" for weapons as a condition for entering the school where searches were minimally intrusive and notice was posted); Commonwealth v. Cass, 709 A.2d 350, 365 (Pa. 1998) (finding that general searches of lockers, if carried out in a neutral and clearly articulated manner, do not violate the Pennsylvania Constitution or the Fourth Amendment); *In re* Interest of S.S., 680 A.2d 1172, 1176 (Pa. Super. Ct. 1996) (upholding as constitutional the search of a student and his belongings, even though not based on individualized suspicion, due to safety concerns because of the "high rate of violence" in schools); People v. Dilworth, 661 N.E.2d 310, 321 (Ill. 1996) (concluding that the seizure and search of a flashlight was reasonable under the "totality of the circumstances" where it was unusual for students to carry flashlights and the students behaved suspiciously). *See also* A.J. Moule v. Paradise Valley Unified Sch. Dist., 66 F.3d 335 (9th Cir. 1995).

47. *See, e.g.*, Cornfield v. Consol. High Sch. Dist. No. 230, No. 91-C1887 1992 U.S. Dist. LEXIS 2913 (N.D. Ill. Mar. 13, 1992), *aff'd*, 991 F.2d 1316 (7th Cir. 1993) (validating a search for drugs that included erotch of student's sweatpants under *T.L.O.*).

B. *What to Do with the Problem of Unsafe Schools*

After *T.L.O.*, lower courts reviewed several school districts' attempts to deal with students' illegal drug use. The drug-testing policies' fate generally rested on whether the school district had a real drug problem and how well the policy was aimed at solving it. For example, while one district's targeted testing of a group of students at the center of an acute drug crisis was upheld, other schools' policies of testing large groups of students in hopes of deterring unsubstantiated drug use fell short.[48]

Each court anchored its analysis in *T.L.O.*'s determination that schoolchildren were not like adults, and so could be searched for more reasons and on a lower level of suspicion in order to preserve school safety, order, and discipline.[49] But the reasonable suspicion standard was ill-suited for evaluating categorical searches of students, such as through mandatory drug testing as a condition of participation in extracurricular athletics. So the courts developed new and varied approaches to evaluating the propriety of school drug testing programs.

In 1985, two courts easily disposed of schools' attempts to drug test students without enough particularized suspicion to form reasonable suspicion of any individual tested.[50] In *Anable v. Ford*, the United States District Court for the Western District of Arkansas invalidated a policy under which students found with any trace of illegal drugs in their body were subject to parental notification, law enforcement referral, and severe school discipline.[51] Students who refused to take the test when asked by school officials, even when no reasonable suspicion supported the request, were severely disciplined.[52] The *Anable* court read *T.L.O.*, in the context of suspicionless categorical searches, to require a reasonable relation between the policy and the educators' interest in keeping order in school.[53] Because the policy punished drug ingestion that could have nothing to do with any behavior at school, the court rejected the policy.[54]

The policy at issue in *Odenheim v. Carlstadt-East Rutherford Regional School District*,[55] a case later overruled by the New Jersey Supreme Court, tested students' urine samples for drugs and alcohol in conjunction with the school's annual physical examination of all students.[56] Annoyed by the school's attempt to disguise drug testing for discipline purposes as a medical procedure to keep students healthy, the New Jersey Superior Court rejected the policy under *T.L.O.*'s reasonableness

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48. *Compare* Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1324 (7th Cir. 1988) (upholding school's random drug testing policy), *with* Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1527 (9th Cir. 1994) (striking down school's random drug testing policy), *rev'd*, 515 U.S. 646 (1995).

49. *See Tippecanoe*, 864 F.2d at 1314; *Vernonia*, 23 F.3d at 1522.

50. Anable v. Ford, 653 F. Supp. 22, 41 (W.D. Ark. 1985); Odenheim v. Carlstadt-E. Rutherford Reg'l Sch. Dist., 510 A.2d 709, 713 (N.J. Ch. 1985), *overruled by* Joye v. Hunterdon Cent. Reg'l High Sch., 826 A.2d 624 (N.J. 2003) (holding state constitution's privacy guarantees did not invalidate the drug testing policy).

51. *Anable*, 653 F. Supp. at 25-30.

52. *Id.*

53. *See id.* at 38-40.

54. *Id.* at 40-42.

55. 510 A.2d 709 (N.J. Ch. 1985).

56. *Id.* at 709-10.

standard.[57] In this context, the court found the reasonableness standard's balancing of privacy against school interests favored the students because the school simply did not have a drug or alcohol problem.[58]

While the results may have been reasonable in these cases, their analytical framework left something to be desired. Surely mandatory drug testing of large categories of students ought to be based on something more than a general inquiry into whether the drug test is reasonably related to an actual drug problem. A mere rational basis inquiry did not square with *T.L.O.*'s careful findings that schoolchildren retain legitimate, fundamental privacy interests protected by the Fourth Amendment. Appropriately, then, later cases gave more rigorous assessment of the reasonableness of schools' drug testing policies.

In 1988, the Seventh Circuit validated a school district's program of suspicionless drug testing of student athletes and cheerleaders. *Schaill v. Tippecanoe County School Corporation*[59] involved schools with a documented local drug problem,[60] which would become a required earmark of permissible drug testing programs until the *Earls* decision. The Seventh Circuit's analysis foreshadowed the Supreme Court's analytical approach to student drug testing cases.

The *Tippecanoe* policy arose out of a drug test of the high school baseball team in which five of sixteen students tested positive for marijuana.[61] On top of these results, there were reports of drug use among athletes and concern over the nationwide drug problem in schools.[62] In response, the school board instituted random urine testing for athletes and cheerleaders.[63] If the student tested positive and agreed to counseling, he or she faced no punishment.[64] And any punishment after a refusal of counseling or subsequent positive tests was limited to disqualification from athletic or cheerleading participation.[65] No other school discipline or law enforcement action was taken against offending students.[66]

Taking *T.L.O.*'s acknowledgment of students' low privacy expectations with the Supreme Court's approach to special-needs cases,[67] the Seventh Circuit distilled three relevant factors for assessing the validity of drug testing programs: (1) the degree of the student's privacy expectation; (2) the governmental interests furthered by the search, the effectiveness of alternative searches, and amount of discretion vested in the official conducting the search; and (3) whether the search is intended to detect criminal activity.[68]

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57. *See id.* at 712-13.
58. *Id.* at 713.
59. 864 F.2d 1309 (7th Cir. 1988).
60. *Id.* at 1310.
61. *Id.*
62. *Id.*
63. *Id.* at 1311.
64. *Id.*
65. Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1311 (7th Cir. 1988).
66. *Id.*
67. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding random drug and alcohol testing of railway employees); Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (upholding policy of random drug testing of customs agents without suspicion of wrongdoing). These cases lay the foundation for special needs as a predicate to a valid suspicionless search policy. The Court in *Earls* rejected its application to school officials. *See infra* Part III.
68. *See Tippecanoe*, 864 F.2d at 1315-18.

The *Tippecanoe* policy survived Fourth Amendment scrutiny because: (1) students' privacy expectations are low where the method of sample collection was not as invasive as it could be, and athletes have a diminished expectation of privacy because of the "communal undress" and routine physical examinations involved in athletics; (2) the school interest is high because the statistics regarding the local drug problem mirror the national drug problem, drug use poses a particular safety risk to athletes, and athletes are role models in school; and (3) no criminal penalties attach to positive tests.[69]

Furthermore *Tippecanoe*, as *Vernonia* would some years later, accompanied its endorsement of the school's drug testing program for athletes with warnings that the analysis would not play out the same way regarding, and that the decision should not be read to approve of, students involved in other extracurricular activities or the student population in general.[70]

Four years later, the United States District Court for the District of Oregon looked to *Tippecanoe*, as well as the Supreme Court's unfolding special-needs and administrative-search doctrines, to uphold a similar drug testing program in *Acton v. Vernonia School District 47J*.[71] The district court found that, while drugs had not been a major problem in the district, the district's high school experienced a three-fold increase in classroom disruptions and disciplinary reports in the mid-to-late 1980s. Additionally, the staff directly observed students using and glamorizing drugs and alcohol.[72] Leading this drug culture were the student athletes, and testimony described the unique dangers faced by athletes on drugs and specific occasions where drug use affected athletes' performances.[73] The Vernonia School District first tried to deal with the drug problem with special classes, speakers, and presentations regarding drug use, and even brought in a drug dog to try to detect and remove contraband from the school. The problem persisted.[74]

The district's next effort to combat the drug crisis was to institute consent to initial and random drug testing as a condition of participation in extracurricular athletics.[75] The results were only used for counseling and, ultimately, disqualification from sports if positive tests persisted.[76] No criminal or school discipline followed positive test results.[77]

To review the policy's propriety, the district court reviewed the Supreme Court's developing administrative testing cases, finding that they require the government, in the absence of individualized suspicion, to demonstrate a compelling need for the intrusion that outweighs the privacy invasion.[78] The court found that safety and security concerns in schools are different in type and magnitude than those involved with the jobs at issue in the Supreme Court's

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69. *Id.* at 1319.

70. *See id.* at 1318-24.

71. 796 F. Supp. 1354 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *rev'd*, 515 U.S. 646 (1995).

72. *Id.* at 1357.

73. *Id.*

74. *Id.* at 1357-58.

75. *Id.* at 1358.

76. *Id.* at 1358-59.

77. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1358-59 (D. Or. 1992).

78. *Id.* at 1359-61.

administrative search cases.[79] However, the court found *T.L.O.* recognized that the Fourth Amendment is "relaxed" in schools and so the safety concerns need not be as acute as with a railroad operator or armed border agent.[80] Thus, the court applied the "compelling need" analysis to the drug testing policy.[81]

The district court approved the *Tippecanoe* policy, relying primarily on the specific instances of poor athlete performance caused by drugs, the district's targeting of the students who, due to their leadership of the drug culture and status as role models, were most likely to affect overall drug use in the school, the use of test results only for limited purposes not involving law enforcement, and the athletes' diminished expectations of privacy.[82]

The Ninth Circuit reversed, disagreeing with the district court's assessment of the students' privacy interests.[83] The appellate court acknowledged the tragedy of drugs in schools, as well as this policy's contribution to the school's goal of reduced drug use evidenced by the teachers' observations of a decline in discipline problems since the policy's institution.[84]

However, the Ninth Circuit found this contribution was the policy's most redeeming aspect. The policy failed because students enjoy basic privacy rights and there is "no sufficient basis for saying that the privacy interests of students are much less robust than the interests of people in general,"[85] even after *T.L.O.* Furthermore, the court found that athletes' privacy interests are not substantially lower than those of students in general because locker room conditions and heavy school regulation of student athletic programs do not affect students' expectations of privacy in the drug testing context.[86] According to the court, the strength of the school's interests and the goals of preventing injury, reducing attraction to drugs, and improving discipline "suffer by comparison to the kinds of dangers that have existed when random testing has been approved" in other Supreme Court special-needs cases.[87] The court reasoned that because having students who use drugs in schools is just as tragic as having them use drugs in society, there is no special need to test in schools when the government is not permitted to test elsewhere.[88]

With the Seventh and Ninth Circuits weighing in on different sides of the drug testing debate, the Supreme Court granted certiorari in *Vernonia* and set the stage for an assessment of whether students' diminished privacy expectations could stand up to schools' interests in preserving safety, order, and discipline.

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79. *Id.* at 1361.

80. *See id.* at 1361-62.

81. *Id.* at 1362-63.

82. *Id.* at 1363-65.

83. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994); *see also* Brooks v. E. Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 764-66 (S.D. Tex. 1989) (rejecting district policy requiring all participants in extracurricular activities to undergo drug testing because school failed to show special needs on par with those in the Supreme Court's special needs cases).

84. *Vernonia*, 23 F.3d at 1522, 1526.

85. *Id.* at 1525.

86. *Id.*

87. *Id.* at 1526.

88. *Id.*

C. *A Policy that a Reasonable Guardian or Tutor Might Undertake*

Writing for the six-justice majority in *Vernonia School District 47J v. Acton*, Justice Scalia briefly pointed to *T.L.O.*'s finding that "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable" in the school setting, but acknowledged that *T.L.O.* did not provide the complete analytical framework necessary for *Vernonia* because of its confinement to suspicion-based searches.[89] After a one sentence acknowledgment that the Court had approved suspicionless drug testing in *Skinner* and *Von Raab*, the Court enunciated the new three-prong test for whether a school's drug testing program survives Fourth Amendment scrutiny, without any explanation of why this was the right test.[90]

The test turned out to be a traditional balancing of privacy interests against government interests, fleshed out for the particular factual and policy questions raised by subjecting students to faculty-monitored urine collection and institutional review of the contents of one's bodily fluids as a condition of participation in public school programs.

"The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes."[91] The state's temporary custody and care of the minors dramatically affected the Court's privacy interest inquiry. Since parental control most significantly diminishes minors' rights and the school acts as both parent and custodial and tutelary guardian, the Court found the students' privacy expectations decreased upon entry into school.[92] The Court found that adding to this already low expectation of privacy was the athletes' participation in an activity involving communal undress and heightened school regulation, which the Court found akin to adult employment in highly regulated industries.[93]

The second prong of the analysis assesses the character of the intrusion—how the school conducted the testing.[94] This prong was, and has become for schools that use it as such, a formality to simply insure against methods of urine-sample collection that do not substantially deviate from the process by which students normally use the bathroom in public schools.[95] The Court had no problem finding that Vernonia's sample-collection policy did not materially differ from a student's normal use of locker-room bathrooms.[96]

Finally, the third prong considers the nature and immediacy of the governmental concern at issue and the efficacy of the policy in meeting it.[97] The

89. 515 U.S. 646, 653-54 (1995).
90. *See id.*
91. *Id.* at 654.
92. *Id.* at 654-57.
93. *Id.* at 657.
94. *Id.* at 658.
95. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658-60 (1995); *see also* Bd. of Educ. v. Earls, 536 U.S. 822, 833-34 (2002) (considering test administered in similar manner as *Vernonia*); Hedges v. Musco, 204 F.3d 109, 119-20 (3rd Cir. 2000) (considering test administered at private health clinic); Todd v. Rush County Schs., 133 F.3d 984 (7th Cir. 1998) (considering test administered at private health clinic).
96. *Vernonia*, 515 U.S. at 658-60.
97. *Id.* at 660.

Court declined to require a finding that the governmental interest supporting the policy be compelling.[98] Instead, the Court opted in favor of requiring "an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[99] The Court easily found the governmental interest in this case was "important–indeed, perhaps compelling."[100]

Referring to its administrative search cases, the Court found that deterring drug use by our nation's schoolchildren is at least as important as enhancing efficient enforcement of the nation's laws against the importation of drugs and deterring drug use by engineers and trainmen.[101] It also found that drug use causes actual disruptions in the educational process.[102]

For the Court, adding to its finding of importance was the policy's targeted population, which was particularly at risk of injury from drug use: "[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."[103] Thus, the Court could not find clear error in the school's argument that "a large segment of the student body . . . was in a state of rebellion . . . fueled by drug and alcohol use."[104]

As to the policy's efficacy for addressing the problem, the Court found it "self-evident" that a drug problem fueled by athlete role models is best addressed to athletes alone.[105] Further, the Court explained that requiring individualized suspicion as a precondition to drug testing would actually be more intrusive and problematic because it would come with several risks: parents may not accept targeted testing because it results in a "badge of shame" on their student; teachers may test troublesome, but not drug using students; schools may be forced to bear the expense of lawsuits based on arbitrary testing; students may demand greater process before testing; and all of this may add to the ever-expanding diversionary duties of teachers who have to spot and bring to account drug use.[106]

Not surprisingly, the majority opinion included the perfunctory warning that its decision did not mean that all kinds of drug testing under different circumstances would pass muster.[107] Justice Ginsburg wrote a brief concurrence to specify her understanding that this holding applied to the unique facts of this case.[108] However, the way Justice Scalia concluded his opinion made this promise hollow at its making.

In the end, the Court emphasized that the "most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor

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98. *Id.* at 661.
99. *Id.* (emphasis added).
100. *Id.*
101. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-62 (1995).
102. *Id.* at 662.
103. *Id.*
104. *Id.* at 662-63.
105. *Id.* at 663.
106. *Id.* at 663-64.
107. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666 (1995).
108. *Id.* (Ginsburg, J., concurring).

of children entrusted to its care."[109] The Court concluded its entire analysis by summarizing that its inquiry was simply one into the question of "whether the search is one that a reasonable guardian and tutor might undertake."[110]

Vernonia left the doors wide open for school districts to do three things: approve drug testing of student-athletes; apply the *Vernonia* test to allow other kinds of categorical searches in public schools; and approve drug-testing of other groups or all students. Lower courts widely accepted the first invitation, and drug testing student-athletes is now functionally beyond reproach, even without the rigorous factual showing made by the Vernonia School District. As to the second invitation, schools have met with much success in their efforts to detect criminal activity and code-of-conduct violations through categorical searches. Of course, it would take another Supreme Court decision to resolve the inter-circuit controversy over drug testing non-athletes.

The potential within Justice Scalia's distillation of the three-prong inquiry into a simple determination of whether a reasonable guardian and tutor might conduct such a test was to allow courts to engage in careful, detailed analysis of issues faced at each school initiating suspicionless searches of broad categories of some, if not all, students as mere formalism. Because of the Court's traditional opinion that local educators, not judges, are far better equipped to understand and respond to school discipline issues, the "reasonable guardian and tutor" standard becomes, at its essence, the same standard applied by the early courts confronted with drug testing policies: a standard that simply looks to see if the educator's solution reasonably relates to solving the problem and gives educators a wide deference to control school safety, order, and discipline.

D. Drugs in Backpacks and Guns in Lockers: The Lower Courts Project the Vernonia *Standard All Over Campus*

Besides prompting lower courts to approve school drug-testing programs for athletes, the *Vernonia* decision gave courts a new framework for deciding Fourth Amendment cases involving schoolchildren. These courts found the *Vernonia* three-prong test a useful tool to decide whether school officials could properly search categories of students suspected of committing a particular offense, whether they could search students generally in an effort to keep contraband off campus, and whether schools could expand the scope of mandatory drug-testing policies beyond athletes.

In the first group of cases, the situation is a familiar one in schools across the country: a teacher reports that something is missing—a ring or some money perhaps—and that a particular group of students—who were in the classroom when it disappeared, for example—is most likely to include the thief. The teacher or other school official searches the suspected students as a group to find the contraband, not having individualized suspicion of any particular student.[111]

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109. *Id.* at 665.

110. *Id.*

111. *See, e.g.*, Smith v. McGlothlin, 119 F.3d 786, 787 (9th Cir. 1997) (applying *Vernonia* to validate search of a group of students over whose heads administrator observed a cloud of smoke); Thompson v. Carthage Sch. Dist., 87 F.3d 979, 982-83 (8th Cir. 1996) (applying *Vernonia* to validate

Reviewing these kinds of searches, lower courts have found *Vernonia's* three-prong test well-suited to their analysis.[112] Because these cases do not involve individualized suspicion, *T.L.O.* is not exactly on point. However, the *Vernonia* framework for consideration of categorical searches of students based on the educator's need to maintain safety, order, and discipline provides lower courts with a workable method through which to assess a search's reasonableness.

For example, in *Brousseau v. Westerly*,[113] school officials conducted a suspicionless search of a student and her classmates when an educator discovered a knife was missing from the cafeteria.[114] The students were separated by sex and patted down by an employee of the same sex.[115] Applying the three-prong test, the *Brousseau* court noted the students' reduced privacy expectation at school and found that the pat-down search was the least intrusive search consistent with the goal of finding the knife.[116] The crucial governmental interest analysis showed that the school had a strong interest in locating a potentially dangerous weapon, which the school could reasonably assume someone took so that he could use it to injure someone.[117]

In the second group of cases, the *Vernonia* analysis also worked well for lower courts in reviewing school policies of conducting suspicionless protective searches of all students and their belongings, typically in the interest of keeping drugs and weapons off campus.[118]

In *Commonwealth v. Cass*,[119] for example, the Pennsylvania Supreme Court affirmed a school's decision to use drug-sniffing dogs to detect drugs in students' lockers.[120] The *Cass* court found, under *Vernonia*, that the school's interest in a drug-free campus outweighed the students' small privacy interest in their lockers, which students knew were school property subject to search.[121] The use of a dog, already determined in other contexts not to be a search, was an appropriate,

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search of several grades of students after a bus-driver reported that there might be a knife on campus); Brousseau v. Westerly, 11 F. Supp. 2d 177, 180 (D.R.I. 1998) (applying *Vernonia* to validate the search of a class after school officials discovered cafeteria knife was missing).

112. *See supra* note 111.

113. 11 F. Supp. 2d 177 (D.R.I. 1998).

114. *Id.* at 180.

115. *Id.*

116. *Id.* at 181-82.

117. *Id.* at 182.

118. *See, e.g.*, B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1263-69 (9th Cir. 1999) (applying *Vernonia* to invalidate a school's use of drug-sniffing dogs); Florida v. J.A., 679 So.2d 316, 319-20 (Fla. Dist. Ct. App. 1996) (applying *Vernonia* to validate use of hand-held metal detectors to search a student's belongings); Louisiana v. Barrett, 683 So.2d 331, 337-38 (La. Ct. App. 1996) (applying *Vernonia* to validate school's use of drug-sniffing dogs); *In re* S.S., 680 A.2d 1172, 1176 (Pa. Super. Ct. 1996) (applying *Vernonia* to validate a school's use of metal detectors as students entered school); *see also infra* notes 119-127 and accompanying text (discussing suspicionless protective searches).

119. 709 A.2d 350 (Pa. 1998).

120. *Id.* at 352.

121. *Id.* at 356-57.

minimally intrusive search.[122] Hence, the court affirmed the practice as "a practical means to effectuate the principal's compelling concerns over possible drug use."[123]

In *People v. Pruitt*,[124] the Appellate Court of Illinois affirmed a school's use of metal detectors to secure the campus from weapons.[125] Applying the three-prong test, the court found the school's interest in protecting students in an age of school violence outweighed student's privacy interests.[126] Furthermore, the search was minimally intrusive because it did not involve any touching unless the metal detector went off, at which point school officials had individualized suspicion of a particular student.[127]

These two lines of decisions, allowing suspicionless searches of groups or of the entire student population, show how easily a court may adapt *Vernonia*'s three-prong test to permit a wide range of searches when the search itself involves only a minimal privacy violation. Lower courts readily approve educators' actions as long as the search is not too intrusive and is founded on some articulable, good faith concern for student safety, order, and discipline. Indeed, a documented local problem with drugs or weapons is not necessary; courts have approved categorical searches based on educators' general concerns about drugs and weapons in schools nationally.

This expansion of *Vernonia* to permit such a broad spectrum of searches foreshadowed its expansion to permit a broader range of suspicionless mandatory drug testing. The Seventh Circuit, first to permit athlete drug testing, led the way in permitting drug testing as a condition of participation in all extracurricular activities in *Todd v. Rush County Schools*.[128] Finding that successful extracurricular activities need to be drug and alcohol free just like successful athletic programs, the court approved the school's policy without reviewing the school's method of testing or why students in extracurricular activities might have a lower expectation of privacy than the general student population.[129]

The Eighth Circuit joined in the Seventh Circuit's approval of suspicionless drug testing as a condition of participation in extracurricular activities in *Miller v. Wilkes*.[130] The *Miller* court found students who participate in extracurricular activities, because the activities involve more school regulation of participating students, have a lower expectation of privacy.[131] The school also had a compelling interest in preventing a drug problem.[132] The Eighth Circuit determined, foreshadowing the Supreme Court's majority opinion in *Earls*, that the school did

122. *Id.* at 357.
123. *Id.* at 358.
124. 662 N.E.2d 540 (Ill. App. Ct. 1996).
125. *Id.* at 547.
126. *Id.* at 545-48.
127. *Id.* at 547.
128. 133 F.3d 984 (7th Cir. 1998).
129. *Id.*
130. 172 F.3d 574 (8th Cir. 1999).
131. *Id.* at 579.
132. *Id.* at 581.

not have to wait until it had a drug problem to do something about protecting itself from a national problem.[133]

Other courts to consider suspicionless drug testing as a condition of participation in extracurricular activities found that the policies violated the Fourth Amendment.[134] Schools with failing policies did not satisfy the courts with enough local evidence that students involved in extracurricular activities were involved in drugs.[135] Also, courts found that students' privacy expectations were not as high as those of athletes when students were involved in non-athletic extracurricular activities.[136] The Tenth Circuit's decision in *Earls v. Board of Education*[137] summed up these approaches by finding that special needs must rest on demonstrated realities.[138]

Finally, between *Vernonia* and *Earls*, only one reported decision reviewed a school district's policy of suspicionless drug testing as a condition of school enrollment. In *Tannahill v. Lockney Independent School District*,[139] the District Court for the Northern District of Texas struck down random testing of all sixth through twelfth grade students.[140] Using the *Vernonia* framework, and emphasizing the requirement that the government show a special need for the test, the court first decided that the general student population held a higher expectation of privacy than athletes.[141] While the testing method was the same as in *Vernonia*, the *Tannahill* court did not find any evidence of a school-wide drug problem.[142] Indeed, the district's drug-use rates were lower than those in the surrounding area, and district schools rarely observed positive drug tests. Furthermore, the schools never attempted to deal with the alleged crisis with suspicion-based testing.[143]

Vernonia's aftermath was this: most lower courts, given the chance, carried the three-prong analysis out of the extracurricular athletics arena on their shoulders, using it to easily validate sweeping searches of students' persons. But some courts held back and resisted carrying *Vernonia* so far as to validate suspicionless drug testing outside the extracurricular athletics arena.

III. THE DOCTRINE OF DEFERENCE: *BOARD OF EDUCATION V. EARLS*

Board of Education v. Earls, the second student drug-testing case, ends the chain of decisions.[144] On its face, *Earls* appeared perfunctory; the opinion

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133. *See id.* ("We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools.").

134. *See* Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998).

135. *See Tannahill*, 133 F. Supp. 2d at 929; *Trinidad*, 963 P.2d at 1109.

136. *See Tannahill*, 133 F. Supp. 2d at 929; *Trinidad*, 963 P.2d at 1110.

137. 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

138. *Id.* at 1277-78.

139. 133 F. Supp. 2d 919, 921 (N.D. Tex. 2001).

140. *Id.* at 921.

141. *Id.* at 929.

142. *Id.*

143. *Id.*

144. 536 U.S. 822 (2002).

presented the Court with another challenge to a public school drug-testing policy wholly within the ambit of the *Vernonia* ruling. By the time the 5-4 decision in favor of educators was handed down, it had the makings of a landmark case due solely to the breadth of the language the majority brought to the authority of educators.

The ruling in *Earls* and the restatement it packages complement prior decisions on the breadth of the authority of educators, while offering for the first time an equation for lower courts and policymakers to apply in evaluating a wide range of campus policies. From *Tinker* to *Earls*, the trail is unmistakable. The opinions reveal a gradual shift of the Court to the position originally set forth by Justice Harlan in the *Tinker* dissent: courts should defer to good faith decisions of local educators that further the educational mission. As discussed in part V below, the decision's breadth may, in the long run, work against the philosophy the Justices appear to desire—providing flexibility for education decisionmakers. Nevertheless, the *Earls* rationale represents a leap beyond the prior cases in painting the big picture of what the Constitution requires and permits of educators.

As such, *Earls* represents a defining moment for the Court in education law. Some measure of adjustment of Fourth Amendment standards was to be expected, given the national preoccupation with campus tragedies and student safety that began in the 1990s.[145] The general acceptance of the *T.L.O.* reasonable suspicion standard is thus best understood as a modest adjustment of doctrine in response to changed circumstances to which the courts took judicial notice. The extraordinariness of the *Earls* decision is found in the public policy implications when its brand of judicial deference is applied to the broader range of campus disputes. The implications were immediately apparent when the Justices applied the rules to uphold a drug testing policy in a factual setting that would have failed to pass constitutional muster under any of the previous legal standards.

A. A School District Concerned

In *Earls*, a Tecumseh, Oklahoma school district's student drug testing policy required students to submit urine samples for drug testing as a condition for participating in competitive extracurricular activities.[146] The school district is a part of Pottawatomie County, Oklahoma, located about forty miles southeast of the state capital of Oklahoma City.[147] The city of Tecumseh and Tecumseh High School are

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145. *See* David Zeman et al., *A Child Kills a Child: The Nation Asks Why*, DETROIT FREE PRESS, Mar. 1, 2000, at 1A; *see also* Bryan Vossekuil et al., IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES, *The Final Report and Findings of the Safe School Initiative* (U.S. Dept. of Educ. & U.S. Secret Serv. Washington, D.C.) May 2002, at 3 ("[E]xtensive examination of 31 incidents of targeted school violence that occured in the [U.S.] from December 1974 through May 2000."), *available at* http://www.secretservice.gov/ntac/ssi_final_report.pdf; Matt Bai, et al., *Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 25 (recounting the Columbine tragedy); Derek Larson, *Answering 'Why' is Not Easy*, ST. CLOUD TIMES, Oct. 1, 2003, at 7B (noting that "[s]ince 1995 there have been more than two dozen shootings in American schools. Forty-three victims have died, not including the shooters. At least 115 people have been wounded."); Associated Press, *List of Recent School Shootings*, Apr. 21, 1999.

146. *Earls*, 536 U.S. at 825.

147. *Id.* at 826.

a part of the school district.[148] The policy was implemented in response to perceptions shared by parents, teachers, administrators, members of the community, counselors, and the School Board that student drug use remained a persistent problem in the schools.[149]

While some educators' accounts traced the problem as far back as the 1970s, most focused on more recent anecdotal evidence.[150] These accounts described drug use by students both independent of, and while participating in, school-sponsored events.[151] In these discussions, policymakers acknowledged that policies such as anti-drug rallies, canine searches of school property, routine police patrols, and counseling, were already in place to deter illegal and disruptive conduct by students on campus, including the possession and use of drugs.[152] The district implemented the drug testing policy during the 1998 school year as an additional tool to combat student drug use, and it limited testing to students participating in extracurricular activities like the plan approved in the Supreme Court's *Vernonia* decision.[153]

The policy required all students participating in extracurricular activities to agree to and submit to drug testing.[154] The testing screened urine samples for amphetamines, cannabinoid metabolites, cocaine, opiates, barbiturates, and benzodiazepines.[155] The test did not screen for alcohol or cigarette use.[156] The district barred students who refused testing from participation in any competitive activity.[157] Participating students who tested positive were subject to a graduating scale of requirements. After the first positive test, a student could continue in an activity if he or she agreed to drug counseling and follow-up testing.[158] Students who tested positive a second time were suspended from the competitive activity for fourteen days and could return to the activity only after agreeing to four hours of substance abuse education and follow-up testing.[159] Students who tested positive three times within a school year were suspended from the competitive activity for the rest of the school year.[160]

Enforcement of the policy did not include suspension or expulsion from any curricular class in which the student may have been enrolled.[161] Records of student drug tests were kept separate from the usual education records and results were

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148. *Id.*

149. *Id.* at 834-35.

150. Earls v. Bd. of Educ., 115 F. Supp. 2d 1281, 1285-86 (W.D. Okla. 2000) [hereinafter *Earls I*], *rev'd*, 242 F.3d 1264, 1272-73 (10th Cir. 2001) [hereinafter *Earls II*], *rev'd*, 536 U.S. 822 (2002).

151. *Earls II*, 242 F.3d at 1272-73; *Earls I*, 115 F. Supp. 2d at 1285-86.

152. *Earls I*, 115 F. Supp. 2d at 1286 n.20. The official position of the school on the magnitude of student substance abuse was quite optimistic. The educators believed that "the use of tobacco and alcohol continue to be our number one problems." *Earls II*, 242 F.3d at 1274. School officials reported that they had "not found other types of illegal or controlled substances to be a major problem although they do exist." *Id.*

153. *Earls I*, 115 F. Supp. 2d at 1282.

154. Bd. of Educ. v. Earls, 536 U.S. 822, 826 (2002).

155. *Earls I*, 115 F. Supp. 2d at 1283.

156. *Earls II*, 242 F.3d 1264, 1267.

157. *Id.* at 1268.

158. *Earls*, 536 U.S. at 883.

159. *Id.* at 833-34.

160. *Id.* at 834

161. *Earls I*, 115 F. Supp. 2d at 1281-92 n.49.

shared only with the student, parent, principal, athletic director, and coach of the relevant activity.[162] Law enforcement officials were not notified of a positive drug test by a student.[163]

Lindsay Earls (Earls) and Daniel James (James), then enrolled as students of Tecumseh High School, filed suit challenging the policy.[164] Earls wished to continue participating on the school's academic team, in show choir, and in marching band.[165] James wanted to serve on the academic team.[166] Lacey Earls, the younger sister of Lindsay, was added as a plaintiff in the litigation.[167]

The lower courts disagreed on the constitutional question of whether the policy was the permissible next step after *Vernonia*. The United States District Court for the Western District of Oklahoma ruled in favor of the school board,[168] but the Court of Appeals for the Tenth Circuit invalidated the policy.[169] Both courts looked to *Vernonia* in reaching their decisions. The district court found the similarities to *Vernonia* dispositive: "students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students."[170] The Tenth Circuit ruled that the school district policy failed what it perceived to be a "special needs" requirement under *Vernonia*.[171] The court ruled that while there was some drug use in the schools, most of the evidence was hearsay and anecdotal.[172]

In reversing, the Tenth Circuit ruled that a school must show "that there is [an] identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing . . . will actually redress its drug problem."[173]

B. Deference to Schools' Custodial Responsibility to Keep Students Safe

On appeal to the United State Supreme Court, Justice Thomas wrote for the majority and reversed the lower court, upholding the drug-testing plan.[174] The power of school officials to maintain safe campuses, Justice Thomas wrote, includes the power "to discover [ ] latent or hidden conditions, or to prevent their development. [The interest in keeping children safe] is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."[175] In place of the usual objective nexus (of some fit or precision) between those tested and any actual drug problem, the Court substituted a presumption that educators will act in good faith in the communities

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162. *Earls I*, 115 F. Supp. 2d 1281, 1291 (W.D. Okla. 2000).
163. *Id.*
164. *Earls*, 523 U.S. at 826.
165. Bd. of Educ. v. Earls, 536 U.S. 822, 826 (2002).
166. *Id.*
167. *Earls II*, 242 F.3d 1264, 1264 (10th Cir. 2001).
168. *Earls I*, 115 F. Supp. 2d 1281, 1296 (W.D. Okla. 2002).
169. *Earls II*, 242 F.3d at 1264.
170. *Earls I*, 115 F. Supp. 2d at 1290.
171. *Earls II*, 242 F.3d at 1272.
172. *Id.* at 1272-75.
173. *Id.* at 1278.
174. *Earls*, 536 U.S. at 830.
175. *Id.* at 829 (quoting Treasury Employees v. Von Raab, 489 U.S. 656, 668 (1989)).

to which they are accountable. As a result, drug testing policies are valid if they "reasonably serve [ ] the School District's important interest in detecting and preventing drug use among its students . . . ."[176]

The tone of the majority opinion is decidedly provocative and impatient, hoping by force of attribution to the *T.L.O.–Vernonia* line of cases to convert remaining disbelievers regarding the public educator's exemption from the ordinary operation of the Fourth Amendment. Justice Thomas tries to close the door on further speculation on this matter while explaining why this is so. At the heart of the matter is the belief that "'Fourth Amendment rights . . . are different in public schools than elsewhere; [thus,] the reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children.'"[177]

The *Earls* majority used the Oklahoma litigation to reach beyond the actual controversy in order to simplify the judicial resolution of future conflicts over campus search policies. The Court offered several justifications for rethinking educators' modern authority. Educators, accountable to their communities, have a duty to provide a safe and effective learning environment:

> A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." [178]

Such duty statements compel the result in *Earls* and are extraordinary in several respects. First, they provide a foundation for broad assertions of state power in the education context that are torn from the fact-sensitive moorings of the usual "totality of circumstances" approach that is so dominant in Fourth Amendment analysis. Justice Ginsburg said as much at the beginning of her dissent: "'[T]he legality of a search of a student . . . should depend simply on the reasonableness, under all the circumstances, of the search.'"[179]

Second, the duty statements operate, in the opinions of Justices Thomas and Breyer, as rebuttals to limitations on educators that were largely assumed to exist and that were implied in *Vernonia* and *T.L.O.* For example, after *Vernonia*, critics

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176. *Id.* at 825.

177. *Id.* at 829-30 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)) (internal quotations omitted).

178. Bd. of Educ. v. Earls, 536 U.S. 822, 830-31 (2002) (quoting New Jersey v. T.L.O., 469 U.S. 325, 350 (1985)) (citations omitted).

179. *Id.* at 843 (Ginsburg, J., dissenting) (quoting *T.L.O.*, 469 U.S. at 341).

found some comfort in the impression, created by that decision, of a presumption of a legitimate expectation of privacy by students in the ordinary course of campus life.[180] Such a presumption seemed to distinguish the athletes tested in *Vernonia* based on, among other things, communal undress. The *Earls* majority diminishes the role of casual undress as a factor in the expectation of privacy by students. "[Communal undress] was not essential in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority."[181]

Similarly, commentators had reached a near consensus on the notion that any constitutional benchmark for student searches would have to place suspicion-based searches in front of any policy to conduct generic, suspicionless searches.[182] However, the majority refused to make findings of individualized suspicion a legal prerequisite to suspicionless searches, effectively placing the power to choose which type of search to conduct in the hands of educators:

> We also reject respondents' argument that drug testing must presumptively be based upon an individualized reasonable suspicion of wrongdoing because such a testing regime would be less intrusive. In this context, the Fourth Amendment does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such

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180. "The holding in *Vernonia* can be understood, in its most narrow sense, as limiting the Court's approval of suspicionless drug testing policies to those virtually identical to that of School District 47J–policies affecting only student athletes." Darrel Jackson, Note, *The Constitution Expelled: What Remains of Students' Fourth Amendment Rights?*, 28 ARIZ. ST. L.J. 673 (1996) (arguing that *Vernonia* "departs from precedent"); Joanna Raby, Note, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 CARDOZO L. REV. 999, 1023 (1999); Samantha Osheroff, Note, *Drug Testing of Student Athletes in* Vernonia School District v. Acton: *Orwell's 1984 Becomes Vernonia's Reality in 1995*, 16 LOY. L.A. ENT. L.J. 513 (1995) (arguing the *Vernonia* decision was based on moral, not legal, grounds). *But see* Joaquin G. Padilla, Comment, Vernonia School District 47J v. Acton: *Flushing the Fourth Amendment–Student Athletes' Privacy Interests Go Down the Drain*, 73 DENV. U. L. REV. 571 (1996) (arguing that the Court's *Vernonia* decision erased students' expectations of privacy under the Fourth Amendment).

181. Bd. of Educ. v. Earls, 536 U.S. 822, 823 (2002).

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> *Vernonia* must not be interpreted as condoning anything but suspicionless searches of student–athletes who are known to be the leaders of a well-documented and extreme drug problem among the student body. When the unique circumstances of *Vernonia* are not present, an individualized suspicion standard, based upon the Supreme Court's holding in *New Jersey v. T.L.O.*, should be followed.

J. Nathan Jensen, Note, *Don't Rush to Abandon a Suspicion-Based Standard for Searches of Public School Students*, 2000 BYU L. REV. 695, 708.

> targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use .... [R]easonableness under the Fourth Amendment does not require employing the least intrusive means. . . .[183]

Third, the Court severed any remaining link between the student search cases and ordinary Fourth Amendment analysis. This attenuation, which began with the decision of the Court in *T.L.O.* to allow searches by educators based only upon reasonable suspicion, now removed its proportionalism as a prerequisite. The *T.L.O.* proportionalism–that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances"—influenced the appellate court in *Earls* to embrace the requirement of special need as an element in justifying student drug testing.[184] In its place, the *Earls* majority applied a "loose fit" inquiry. Justice Thomas stated that "[w]hile in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was 'fueled by the role model effect of athletes' drug use,' such a finding was not essential to the holding."[185] Justice Scalia implied as much writing for the majority in *Vernonia*.[186] Educators, after *Earls*, do not have to establish an hermetic link between the problem and policy as applied to students. The status of educators as custodial and tutelary guardians is, in fact, the catalyst for establishing the type of special relationship with their students that satisfies the special-need requirement. Nothing more is needed before they exercise their power to protect their students.

> A demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime .... We reject the Court of Appeals' novel test that any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.[187]

The Justices in the *Earls* majority ended their effort by pointing to the theme emerging from the Court's student rights decisions: a climate of deference based on a constitutional presumption that educators will act in good faith when implementing education policies. This shift, post-*Lochner* in tone, is expressly intended as a by-product of the restatement of the authority of educators. Justices

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183. *Earls*, 536 U.S. at 837 (citations omitted).

184. New Jersey v. T.L.O., 469 U.S. 325, 346 (1985).

185. *Earls*, 536 U.S. at 837-38 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995)) (internal quotations omitted).

186. *Vernonia*, 515 U.S. at 665 ("The most significant element in this case is the first we discussed: 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.").

187. *Earls*, 536 U.S. at 835-36 (internal quotations omitted).

Thomas and Breyer, as though providing a lexicon for lower courts, adapt language suitable for this more deferential level of judicial review.[188]

C. *The* Earls *Dissents: Recognizing the Length of the Majority's Step Away from Protection of Student Rights*

As is often the case in dramatic doctrinal shifts, dissenting opinions play a useful role in marking the distance between the old and new ground. The model set forth in *Earls*, with its implications, commands the Justices' full attention, but not their full agreement. Justices Ginsburg and O'Connor, the latter writing only thirty-one words in dissent, highlight in descriptive and normative terms the landscape between the two groups in a manner that is useful in framing the tools for analyzing the deferential model in part IV below.

There is nothing subtle about the clash of views. The dissenters take aim at the deferential model and the zero-sum game that emerges. Student rights diminish as the presumptions of validity of school policies expand. The judicial role decreases as well, and objective balancing gives way to the expectation that educators will collaborate with parents to find solutions to actual problems that compromise the education mission. The concept of reasonableness is reconfigured in a manner that produces results anomalous to the usual constitutional case because "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[189] Absent evidence of bad faith by educators or parents, the model redirects both local decisionmaking practices and constitutional litigation away from the historical rigor commonly associated with civil rights.

The Justices parry over these aspects of the new model, particularly the underlying doctrinal question about the precise role of the Bill of Rights as a limitation on public officials when that official is an educator. The position of the four dissenters is organized around the theme of a return to normalcy. As a practical matter, this means going back to the essentials of *T.L.O.*

> [T]he legality of a search of a student . . . should depend simply on the reasonableness, under all the circumstances, of the search . . . . The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy

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188. Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002) ("In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."); *id.* at 842 (Breyer, J., concurring) ("I cannot know whether the school's drug testing program will work. But in my view, the Constitution does not prohibit the effort."). It is worth noting that the Court in *Vernonia* offered a similar statement although its implications were not completely evident at the time. Justice Scalia ended the majority decision by noting, "We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonable in the interest of these children under the circumstances." *Vernonia*, 515 U.S. at 665.

189. *Earls*, 536 U.S. at 830 (quoting *Vernonia*, 515 U.S. at 665).

> targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects.[190]

Surprisingly, a workable compromise emerges in the dissents: a fact-based inquiry of reasonableness balanced around individualized suspicion, which acts as an exhaustion requirement for educators. This proposal is itself extraordinary, representing a shift for the four Justices, all of whom, except Justice Ginsburg, dissented in *Vernonia*. Under this scheme, a suspicionless search is permitted, but only after a special need is objectively established.[191] The approach suggests two virtues. The dissenters avoided presumptions, for or against the validity of a policy, by using a more clearly objective standard than the equation favored by the majority. More importantly, the Justices would have maintained close proximity to traditional Fourth Amendment analysis and expectations, with courts keeping a watchful eye aware of the possibility that in the rare case, educators might have a special need justifying a departure from the individualized-suspicion standard.

The dissenters' strategy in packaging this proposal is to clearly mark the ground around *T.L.O.* and its individualized suspicion rules. Justices O'Connor and Ginsburg reprise their attacks on suspicionless searches first raised in separate opinions in *Vernonia* when both correctly sensed a shifting away from Fourth Amendment norms in public education.[192]

In her *Vernonia* dissent, Justice O'Connor challenged the very notion that educators could ever possess an interest that would justify suspicionless searches of students, expressing dismay that the majority could so lightly ease traditional Fourth Amendment protections for students without proof of the futility of a suspicion-based search.

> [*Vernonia*] asks whether the Fourth Amendment is even more lenient than [*T.L.O.*], *i.e.*, whether it is *so* lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly

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190. *Id.* at 843 (Ginsburg, J., dissenting).

191. *See id.* at 843-44 (Ginsburg, J., dissenting). The acceptance of *Vernonia* was both forgone and inevitable. The Court acknowledged the notion of suspicionless searches in previous decisions. *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding random drug and alcohol testing of railway employees); Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (upholding policy of random drug testing of customs agents without suspicion of wrongdoing). It might well be said that by the time the Court considered the application of such a policy in the education context in *Vernonia*, the barn door to a relaxation of the individualized suspicion standards was already wide open. The prior decisions carved a niche in Fourth Amendment jurisprudence that, while small, was well established. Justice O'Connor acknowledged as much in her *Vernonia* dissent: "Outside the criminal context, however, in response to the exigencies of modern life, our cases have upheld several evenhanded blanket searches, including some that are more than minimally intrusive, after balancing the invasion of privacy against the government's strong need." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 673 (1995) (O'Connor, J., dissenting).

192. *Earls*, 536 U.S. at 842 (O'Connor, J., dissenting) ("I dissented in *Vernonia*... and continue to believe that case was wrongly decided."); *id.* at 842-55 (Ginsburg, J., dissenting).

> innocent people . . . . Thus, if we are to mean what we often proclaim—that students do not "shed their constitutional rights . . . at the schoolhouse gate"—the answer must plainly be no.[193]

Justice O'Connor also lamented:

> For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.[194]

Justice Ginsburg, who concurred in the result in *Vernonia*,[195] shifted to the opposing side in *Earls*. She provides the chief opinion for the *Earls* dissenters, with slight, but significant modification of Justice O'Connor's opinion. Justice Ginsburg uses *T.L.O.* to isolate both the *Vernonia* and *Earls* rulings from Fourth Amendment principles, but without repudiating *Vernonia*. This complicates the solidarity of the effort and explains why Justice O'Connor wrote separately. Justice Ginsburg's theme is related but clearly narrower; the two suspicionless search cases are cast as incompatible to each other and together serve as poor vehicles for a sweeping doctrine shift. Justice Ginsburg finds, "[t]his case presents circumstances dispositively different from those of *Vernonia*."[196] Further, Justice Ginsburg found that:

> *Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them . . . . Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each

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193. *Vernonia*, 515 U.S. at 681 (O'Connor, J., dissenting) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

194. *Id.* at 667-68 (O'Connor, J., dissenting).

195. Justice Ginsburg, concurring, stated:

> The Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics . . . . Correspondingly, the most severe sanction allowed under the District's policy is suspension from extracurricular athletic programs. I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.

Id. at 666 (Ginsburg, J., concurring) (citations omitted).

196. Bd. of Educ. v. Earls, 536 U.S. 822, 844 (2002) (Ginsburg, J., dissenting).

> student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words.[197]

This position centers on the belief that students who participate in competitive extracurricular activities other than athletics have a higher expectation of privacy. Justice Ginsburg correctly observed that the majority in *Earls* deferred to educators under an even more lenient standard because the testing program implemented in *Earls* would "fail [ ] even under the balancing approach adopted in [*Vernonia*]."[198] Justice Ginsburg found that:

> [T]oday, the Court relies upon *Vernonia* to permit a school district with a drug problem its superintendent repeatedly described as "not . . . major," to test the urine of an academic team member solely by reason of her participation in a nonathletic, competitive extracurricular activity—participation associated with neither special dangers from, nor particular predilections for, drug use.[199]

The dissenters then applied the *Vernonia* standards to the Oklahoma drug testing policy, as they might have been applied in 1995, and found no basis for its constitutionality. Students who participate in competitive extracurricular activities other than athletics have a greater expectation of privacy than do athletes.[200] No documented incidents existed relating drug use of any kind to this group of students.[201] The activities in which these students engaged did not give rise to the type of safety concerns that exist for athletes.[202]

In sum, the Justices after *Earls* are much closer doctrinally than a cursory glance would reveal. The dissenters, now willing to accept *Vernonia*, find its application in *Earls* disproportionate. They cite imbalance and extremism both in fact[203] and in law.[204] If a desire to return to *T.L.O.* and its expectations of privacy

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197. *Id.* at 844-45 (Ginsburg, J., dissenting). This rationale effectively moves Justice Ginsburg away from the *Vernonia* majority (of which she was a part) and into the camp advocating a return to Fourth Amendment normalcy. Interestingly, she does so without acknowledging that she is, in fact, changing views; rather, Justice Ginsburg creates the impression that it is the *Earls* majority that has moved further downstream by finding that "*Vernonia* applied, . . . not repudiate[d], the principle that 'the legality of a search of a student should depend simply on the reasonableness, *under all the circumstances*, of the search.'" *Id.* at 846 (Ginsburg, J., dissenting) (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

198. *Id.* at 842 (O'Connor, J., dissenting).

199. *Id.* at 843 (Ginsburg, J., dissenting) (citations omitted).

200. *Id.* at 847-48 (Ginsburg, J., dissenting).

201. Bd. of Educ. v. Earls, 536 U.S. 822, 849-50 (2002) (Ginsburg, J., dissenting).

202. *Id.* at 852-53 (2002) (Ginsburg, J., dissenting).

203. "No similar reason, and no other tenable justification, explains [the Oklahoma educator's] decision to target for testing all participants in every competitive extracurricular activity." *Id.* at 852-53 (Ginsburg, J., dissenting).

204. "Although 'special needs' inhere in the public school context, those needs are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install." *Id.* at 843 (Ginsburg, J., dissenting) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)) (internal quotations omitted).

is at the heart of the dissent, at its margins is the fear that, under the new model, limitations on the actions of educators will be hard to articulate and establish.

IV. POST-*EARLS*: A MODEL FOR APPROVING EDUCATORS' GOOD FAITH POLICY CHOICES

The Court in *Earls* set forth what is nearly a complete equation for a deferential model on the authority of educators, largely culling the key components from the *Tinker–Vernonia* line of cases. The model is a testament to the changes in both the outcome of student-rights disputes in public schools as well as a primer on the philosophical shift of the Court over this same time period. Most importantly, its elements provide a glimpse into the future of both law and educational policymaking suggesting that the judicial role will hereafter be narrowly confined to a predictable set of inquiries.

In application to future conflicts over student rights, the model promises to provide a nomenclature for policy formulation and a barometer for resolving disputes over the reasonableness of the educators' actions. Four factors provide the basic framework:

(1) *The Education Mission Factor*:
This acts as a limit on the presumption of validity, covering campus policies that are "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[205]

(2) *The Custodial Factor*:
This factor is based on the historical view that educators have a natural zone of authority over, if not a legal duty to, "(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[206]

(3) *The Due Process Factor*:
This factor serves to validate the reasonableness of a policy. It is based on an emerging view that there should be a link between the educator's interest in implementing a policy and the effects created by the disciplinary process when the law is enforced.[207]

(4) *The Accountability Factor*:
This requires that the challenged policy actually represent the views of the affected community, giving rise to an expectation that educators will reach out for parental input by providing a democratic, participatory process to

205. *Earls*, 536 U.S. at 830 (quoting *Vernonia*, 515 U.S. at 665).

206. *Id.* at 654 (quoting *Vernonia*, 515 U.S. at 665).

207. Bd. of Educ. v. Earls, 536 U.S. 822, 826 (2002) ("In practice, the Policy has been applied only to competitive extracurricular activities"); *see id.* at 833 ("[T]est results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences.").

> uncover and to resolve differences,"[208] particularly over controversial policies.

As a constitutional restatement, the model comes remarkably close to codifying Justice Harlan's dissent in *Tinker* in a manner that, at least at first glance, produces for educators an almost total exemption from ordinary Fourth Amendment analysis. In place of the traditional objective, fact-based balancing of interests comes a set of context-dependent presumptions accompanied by a framework designed to standardize the judicial search for arbitrary, abusive, and bad faith policymaking by educators. As will be seen below, debates over education policies, like suspicionless drug testing, metal detectors, or drug-sniffing dogs, remain just as controversial for educators, but less so for the courts due to the shift in presumptions about the authority of educators in the absence of a finding of bad faith.

Interestingly, the elements that emerge from the restatement are neither novel nor particularly surprising. Each factor, standing alone, is well-established in narrower education-law contexts. What is significant is the synergistic effect the Court derives by combining the elements in a manner that shifts presumptions in favor of educators and burdens toward opponents of school-safety reforms.

For example, the custodial and the education-mission factors are traditional notions in education law such that their exclusion from any restatement would be peculiar. Judicial references to both factors appear frequently, often as dispositive factors in court decisions involving the authority of educators. As a result, the Court in both the *Vernonia* and *Earls* decisions, does little more than formalize judicial notice already taken of the fact that educators operate from a position of strength when they act in good faith to further legitimate educational interests.

In *Vernonia*, the majority, without benefit of any citation, appeared to herald this formalization: "The most significant element in this case is the first we discussed: 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."[209]

Later in *Earls*, the Justices, citing back to *Vernonia*, completed the formalization of these elements:

> Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia*. This distinction, however, was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority.[210]

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208. *Id.* at 841.

209. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995).

210. *Earls*, 536 U.S. at 831 (citations omitted).

A. The Education Mission Factor

Examined separately, the education mission is frequently viewed as a compelling interest by judges, effectively allowing schools to overcome assertions of student rights with a showing of the deleterious effects, overt or subtle, caused by the exercise of those rights. When applying the education mission precedent, courts typically recite the mantra of "[t]he broad authority to control the conduct of students granted to school officials permits a good deal of latitude in determining which policies will best serve educational and disciplinary goals."[211]

This thinking that school officials require latitude in policy determinations runs back to early education-mission decisions in which the Supreme Court first introduced a more deferential judicial approach to good faith actions in support of the education mission. In the *Tinker* decision, while the Court upheld "the students' right to engage in a nondisruptive, passive expression of a political viewpoint,"[212] it confirmed the educators' interest to respond to "speech or action that intrudes upon the work of the schools or the rights of other students."[213] Later, in *Bethel School District v. Fraser*,[214] where the Court upheld punishment of a student who gave a lewd speech in a school assembly, the Justices highlighted the contours of the education-mission factor:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[215]

The deference announced in *Fraser* was later dispositive in the case of *Hazelwood School District v. Kuhlmeier*,[216] a case in which the Court upheld administrative censorship of articles in a high-school student newspaper. The Court, citing *Fraser*, noted, "[w]e thus recognized that [t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts."[217] The *Hazelwood*

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211. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 259 (3d Cir. 2002). This mantra can be traced back to *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), when the Court, while resolving a conflict over the teaching of evolution, noted: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities."

212. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986).

213. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

214. 478 U.S. 675 (1986).

215. *Id.* at 685.

216. 484 U.S. 260 (1988).

217. *Id.* at 267 (citations omitted) (quoting *Fraser*, 478 U.S. at 683).

majority later concluded, "[t]his standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[218]

Historically, state and federal courts have applied this deference to public schools at all levels, including higher education. Perhaps the most extraordinary education-mission decisions involve judicial deference to race-based policymaking in the so-called "affirmative action" cases. Prior to the landmark decisions of the United States Supreme Court in *Grutter v. Bollinger*,[219] and *Gratz v. Bollinger*,[220] which upheld affirmative action in education, only a few courts had ruled that deference to school officials was appropriate when reviewing non-remedial use of racial classifications. For example, in *Hunter ex rel. Brandt v. Regents of the University of California*,[221] the federal court deferred to the decision of educators to use race as a basis for student selection into a special elementary school program that served as a laboratory for the university.[222] The school used gender, race or ethnicity, and family income in its admissions process to obtain the desired student population. The court applied strict scrutiny to the facial classification, but nonetheless, upheld the policy. The court found a compelling interest that justified the use of race as a proxy for student admission: "California's interest in the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools is a compelling state interest."[223] As to the least restrictive means element of the strict scrutiny test, the courts agreed to defer:

> Finally, in evaluating whether [the educators'] use of race/ethnicity in its admissions process is narrowly tailored, we recognize, as did the district court, that courts should defer to researchers' decisions about what they need for their research. The Supreme Court has stated: "Courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'"[224]

The *Gratz* and *Grutter* decisions reinforce this astonishing deference to the education mission. The Court, rather than repudiating affirmative action under the usual "fatal in fact" application of strict scrutiny, deferred to school officials' belief regarding the role of diversity in the education mission:

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218. *Id.* at 273.
219. 539 U.S. 306 (2003).
220. 539 U.S. 244 (2003).
221. 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000).
222. *See id.* at 1066.
223. *Id.* at 1063.
224. *Id.* at 1066-67 (footnotes and citations omitted); *see also* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200-01 (9th Cir. 2000).

> Today, we hold that the [educator] has a compelling interest in attaining a diverse student body . . . . The [educator's] educational judgment that such diversity is essential to its educational mission is one to which we defer. The [educator's] assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the [educator] is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[225]

Therefore, prior to the *Earls* restatement, the courts laid a foundation for a practice of sifting the facts of a conflict for evidence of arbitrariness or bad faith in educational decision-making. In the absence of such evidence an established deference to the education mission was given—even when fundamental rights were involved.[226]

B. The Custodial Factor

Similarly, the notion of the custodial interest of educators, when examined apart from the education mission, supports a more deferential restatement of the law.

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225. *Grutter*, 539 U.S. at 328 (citations omitted). Although one of the two race-based admissions policies was invalidated because it was not narrowly tailored, both were deemed compelling. *See Gratz*, 539 U.S. at 270.

226. "School authorities must be given broad discretionary powers to ensure a better education for the children of this Commonwealth and any restrictions on the exercise of these powers must be strictly construed." Smith v. Darby Sch. Dist.,130 A.2d 661, 668-69 (Pa. 1957); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("'[T]he public schools as a most vital civic institution for the preservation of a democratic system of government'") (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)). For another example of deference, see *Alabama Student Party v. Student Government Association*, 867 F.2d 1344 (11th Cir. 1989), stating the following:

> The United States Supreme Court has consistently reaffirmed the right of state universities to "make academic judgments as to how best to allocate scarce resources," and to determine independently on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study . . . ." The central justification for a student government organization is that it supports the educational mission of the University. This deference to the educational mission of institutes of higher learning has resulted in the recognition of a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

Id. at 1345 (citations omitted). *See also* Smith v. Regents of the Univ. of Cal., 8 Cal. App. 4th 1330 (Ct. App. 1992) ("Our states, through their colleges and universities, must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts. The wisdom or political desirability of the specific route chosen is not a question to be determined by the courts."); Downing v. Sch. Dist. of City of Erie, 61 A.2d 133, 135 (Pa. 1948) ("The burden of showing to the contrary, when the action of a school board is challenged with respect to matters committed to its discretion, is a heavy one.").

Judicial discussions about the custodial interest are occasionally tied to the education mission, but are more routinely found in a separate body of case law organized around the notion of *in loco parentis*.[227] Its prominence in *Earls* serves to essentially codify a type of utilitarianism about the interest of educators to provide a safe, effective learning environment for students, which outweighs the rights of the few or of the individual student.

Unfortunately, discussions concerning *in loco parentis* can be daunting in many respects; modern use of the term is often symbolic rather than precise, making it difficult to navigate its three main branches in education law.[228] In addition, provisions of state education codes regulate certain aspects of the teacher-student relationship creating a variety of hybrid situations.[229] However, all branches lead to the same stem: the mandate to educators to "exercise a 'custodial and tutelary' authority that permit a degree of supervision and control that could not be exercised

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227. The phrase "*in loco parentis*" means "in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 542 (6th ed.). A person that is *in loco parentis*, in effect, assumes the duties of a guardian or custodian without benefit of a court order.

228. Three distinct notions remain in play as to the degree to which educators stand *in loco parentis*. The first is historical and rooted in the common law. At common law, educators were deemed to stand *in loco parentis* in an absolute sense. This carried with it two important corollaries. First, students had no rights on campus unless parents and educators agreed. Second, school officials were subject to few, if any legal limits, asserting immunities because they were acting on behalf of parents. This branch of *in loco parentis* was repudiated in the *T.L.O.* decision. New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985). In *T.L.O.*, Justice Blackman summarized the common law notion and declared it inconsistent with the Bill of Rights: "In 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.*

A second branch of the *in loco parentis* concept that survives the *T.L.O.* denunciation involves special functions performed or assumed by public educators that raise extraordinary care and safety concerns. School trips and off-campus events (extra-curricular and non-curricular) are said to invoke *in loco parentis* in a common-law form that conveys greater authority to educators. The parental permission that is required, the fact that the trip does not involve the curriculum, combined with the additional challenges to safety, supervision, and liability create "a need for a greater range of intervention by an administrator than is the case when a student is only active within the relatively orderly confines of a school." Webb v. McCullough, 828 F.2d 1151, 1157 (6th Cir 1987); *accord* Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075 (5th Cir. 1995); Rhodes v. Guarricino, 54 F. Supp. 2d 186 (S.D.N.Y. 1999). The best argument for this branch appears to be based on liability. "To expose administrators and school districts to increased tort liability while denying them the authority necessary to lessen the likelihood of student injury would be inequitable." *Webb*, 828 F.2d at 1157.

The third branch is the quasi-*in loco parentis* that is articulated in the *Vernonia–Earls* decisions. Careful to link the notion with the *T.L.O.* rejection of common law concepts, the Court still asserts that: "[a]lthough public school officials do not stand entirely [*in loco parentis*] with respect to the students, they do exercise a 'custodial and tutelary' authority that permits 'a degree of supervision and control that could not be exercised over free adults' and that cannot be ignored in conducting a 'reasonableness' inquiry." *In re* Patrick Y., 746 A.2d 405, 410 (Md. 2000) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995)). This language is best understood as a refusal by the Court to return to the common law notion, effectively immunizing educators from liability, particularly for constitutional torts that might arise out of litigation under federal civil rights law, 42 U.S.C. § 1983.

229. *See, e.g.*, D.R. v. Middle Bucks Area Vocational Sch., No. 90-3018, 90-3060, 1991 U.S. Dist. LEXIS 1292 (E.D. Pa. Feb. 1, 1991), *aff'd*, 972 F.2d 1364 (3d Cir. 1992) (*in loco parentis* created by state statute).

over free adults and that cannot be ignored in conducting a 'reasonableness inquiry.'"[230]

The body of law, accurately applied to the facts in *Vernonia* and *Earls*, suggests that both decisions could have been more easily defended as a logical extension of the notion of *in loco parentis*. Prior to the *T.L.O.–Earls* line of decisions, educators had largely assumed the existence of authority based upon *in loco parentis* to make decisions in the best interests of the students during the school day. Assertions of the custodial interest typically increased for extracurricular events that were generally thought to create a need for a greater range of intervention by educators because of the additional challenges in safety, supervision, and liability. Courts held that it was unfair to "expose administrators and school districts to increased tort liability while denying them the authority necessary to lessen the likelihood of student injury."[231] The Supreme Court never adequately explained, in *Vernonia* or *Earls*, why a broader custodial rationale that is loosely tied to notions of temporary custody is preferable to an alternate rationale based on the curricular–extracurricular distinction. This branch of *in loco parentis* would seem tailor-made for the conflicts.

The answer appears to be that, after *Earls*, the Court actually intends to use the factor to complete a new nomenclature for resolving student-rights conflicts generally. This objective required announcing a broader rationale to support future application to a wider range of campus conflicts. For their effort, Justice Scalia in *Vernonia* notes, "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."[232] In *Earls*, Justice Thomas simply states as a general principle that "[c]entral . . . is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[233] However, neither a general custodial interest nor a narrower notion of "temporary custody" is free from controversy. It raises serious questions about the duty of educators to keep students safe on public school campuses and suggests answers that are in conflict with current case law on affirmative duties.[234]

C. The Due Process Factor

The remaining two elements of the equation act as substantive limits on the implementation of student-discipline policies. The due process and the accountability factors provide balance in a formula that, without their inclusion, imposes only slight scrutiny on educational decision making. After *Earls*, the due

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230. *In re Patrick Y.*, 746 A.2d at 410 (citing *Vernonia*, 515 U.S. at 655-56).

231. *Webb*, 828 F.2d at 1157.

232. *Vernonia*, 515 U.S at 655 (quotation marks omitted) (alteration in original).

233. Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (quoting *Vernonia*, 515 U.S. at 654).

234. Courts currently hold that the custodial authority of school officials over students does not give rise to a corresponding duty to protect. *See* Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc); Doe v. Claiborne County, 103 F.3d 495, 510 (6th Cir. 1996); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc); Maldonado v. Josey, 975 F.2d 727, 731 (10th Cir. 1992); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

process inquiry attempts to measure the practical impact of discipline on students' property interests to receive a public education. The accountability factor focuses on broad notions of republicanism: the degree to which student discipline policies reflect the perceptions and desires of parents. As limits, each element provides a way of ferreting out arbitrary, abusive, and bad faith policymaking. These two factors focus on the tangible impact of education policies from the viewpoint of the two most-affected groups: the students and their parents.

The due process element is so well-known that its presence in the restatement would seem essential. Public school discipline policies have always been susceptible to judicial concerns of fundamental fairness as to both form and substance. Minimal requirements of due process in a public school setting emerge from the seminal school discipline case, *Goss v. Lopez*.[235] In *Lopez*, the Court ruled that the Due Process Clause affords public school students both a property interest and a liberty interest in the education that state government provides.[236] These interests are protected from arbitrary deprivation by requiring notice and a hearing on charges.[237] The legal community has viewed *Lopez* as mainly a procedural case, but in fact, its influence in school discipline has been quite substantive, creating an incentive for educators to ruminate the decisions regarding punishment for code violations. The *Lopez* Court, while holding that Ohio educators could not suspend a student for ten days without notice and a hearing, noted that the charges of misconduct had practical consequences to the student. These charges seriously damaged relationships with fellow pupils and their teachers and interfered with later opportunities for higher education and employment:

> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.[238]

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235. 419 U.S. 565 (1975).

236. *Id.* at 574.

237. *Id.* at 579.

238. *Id.* at 583-84. The dissenters in *Lopez* called this the "right of a student not to be suspended for as much as a single day without notice and a due process hearing." *Id.* at 585 (Powell, J., dissenting). After *Lopez*, due process protections have undergone some alterations to match the changing contexts of school discipline cases. Courts have allowed post-punishment hearings in some circumstances. *See, e.g.*, Butler v. Oak Creek Franklin Sch. Dist., 116 F. Supp. 2d 1038 (E.D. Wis. 2000). And in some contexts courts have not required a hearing at all. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (considering no hearing before imposition of corporal punishment); Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975) (considering dismissal from vocational school for academic reasons); Lesser *ex rel.* Lesser v. Bd. of Educ., 239 N.Y.S.2d 776 (N.Y. App. Div. 1963) (considering challenge to academic standing).

This link, of both process and substance, between the type of punishment and its severity has led to a judicial expectation of proportionality in school discipline that works its way into the *Earls* formula. These decisions typically examine school-discipline cases for some reasonable fit between the code-of-conduct violation, procedural fairness, and the actual deprivation the student experiences. The connection is most clearly recognized in the so-called "personal security cases" that apply the spirit of the landmark corporal punishment case, *Ingraham v. Wright*.[239] In *Ingraham*, the Court held that students possess a substantive interest to be free from unreasonable and unjustified intrusions.[240] Tests fashioned around this principle by the lower courts agree that a deprivation of student interests occurs when school discipline is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[241] The emerging rule in the excessive-force school-discipline cases weighs "(1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted."[242]

In *Earls*, all of these considerations play an important, albeit understated role as part of the "character of the intrusion" inquiry. Without citation to any case, the

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239. 430 U.S. 651 (1977).

240. *Id.* at 661. As early as 1977, the Supreme Court held that public-school students have a right guaranteed by the Due Process Clause "to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Id.* at 673; *see also* Wood v. Ostrander, 879 F.2d 583, 589 (9th Cir. 1989) (describing *Ingraham* as holding that students have a "liberty interest in personal security and freedom from restraint and infliction of pain"). Although the *Ingraham* Court did not grant certiorari regarding the specific question of whether unreasonable corporal punishment violates substantive due process, the Court, in its analysis, declared that students have a liberty interest in freedom from unreasonable restraint. The Court has recently described *Ingraham* as follows:

> The same distinction applies to *Ingraham*, which addressed the rights of schoolchildren to remain free from arbitrary corporal punishment. The Court noted that the Due Process Clause historically encompassed the notion that the state could not "physically punish an individual except in accordance with due process of law" and so found schoolchildren sheltered. Although children sent to public school are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State.

Sandin v. Conner, 515 U.S. 472, 485 (1995) (citation omitted).

241. Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990) (quoting Woodard v. Los Fesnos Indep. Sch. Dist., 732 F.2d 1246 (5th Cir. 1984). The groundwork for this development was generally set by the United States Supreme Court in its early substantive due process decisions. The landmark corporal-punishment case of *Ingraham* combines with *Lopez* to clarify the requirement that the Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). The Court has also said that "the substantive component of the due process clause is violated by [state conduct] when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) (quoting *Collins*, 503 U.S. at 128).

242. Gottlieb *ex rel.* Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 173 (3d Cir. 2001) (quoting Wise v. Pea Ridge Sch. Dist, 855 F.2d 560, 563 (6th Cir. 1988)); *see also* Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988) (applying another variation of the test). For other such cases, see London v. Directors of the Dewitt Pub. Schs, 194 F.3d 873 (8th Cir. 1999); Saylor v. Bd. of Educ., 118 F.3d 507 (6th Cir. 1997); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 1988 (8th Cir. 1988); Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

Court merely noted that throughout the dispute over student drug testing, the impact of the policy on student interests was limited:

> [T]est results [must] be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis . . . the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant.[243]

This reasoning succinctly established two realities about school-discipline cases and due process. First, courts will tend to view deprivation of student interests differently when it is limited to loss of extracurricular opportunities. Review of school-discipline cases properly triggers greater judicial attention when sanctions—directly or indirectly—harshly impact matriculation and core curricular activities. The well-established right-privilege distinction is the obvious starting point for justifying such an approach.[244] Second, the notion of "harshness" is a matter of degree, even when due process applies. Judicial concerns are only slightly

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243. Bd. of Educ. v. Earls, 536 U.S. 822, 833-34 (2002) (citations omitted).

244. With few exceptions, courts and legislators view extracurricular programs as a separate enterprise in public education that does not give rise to a right triggering due process. *See, e.g.*, Hebert v. Ventetuolo, 638 F.2d 5, 6 (1st Cir. 1981) ("[T]here is no property right to play interscholastic sports, [so students] had no constitutional entitlement to any process whatsoever.") (internal quotation mark omitted); Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980) ("A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement."); Mitchell v. La. High Sch. Athletic Ass'n, 430 F.2d 1155, 1158 (5th Cir. 1970) ("The privilege of participating in interscholastic athletics must be deemed to fall . . . outside the protection of due process."); Pegram v. Nelson, 469 F. Supp. 1134 (M.D. N.C. 1979) (requiring no formal proceedings in a four-month suspension from extracurricular activities); Dallam v. Cumberland Valley Sch. Dist., 391 F. Supp. 358 (M.D. Pa. 1975) (holding that participation in interscholastic high school competitions is neither a right nor a privilege protected by the Due Process Clause).

For decisions finding a property interest in extracurricular activities, see Boyd v. Board of Directors of McGehee Sch. Dist., 612 F. Supp. 86, 93 (E.D. Ark. 1985) (requiring notice and a hearing before a student could be suspended from the football team since "participating in interscholastic athletics must be deemed a property interest protected by the due process clause of the Fourteenth Amendment."); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972) (stating the interest of college athletes in participation in sports is of such importance that it cannot be impaired without minimum standards of due process); Duffley v. New Hampshire Interscholastic Athletic Ass'n, 446 A.2d 462 (1982) (finding a due process right under the state constitution for deprivation of extracurricular activity participation).

On the legislative front, Congress does require protection of certain extra-curricular activities. The Equal Access Act, 20 U.S.C. §§ 4071-74, guarantees public secondary school students the right to participate voluntarily in extracurricular groups dedicated to religious, political, or philosophical expressive activity protected by the First Amendment when other student groups are given this right.

higher on the curricular side of the student-discipline impact analysis. This is influenced as much by *Lopez* (and its dichotomy of suspensions ten days or less from other, more severe punishments) as it is by the post-*Earls* sentiment of deference in the absence of proof of arbitrary, irrational, and malicious conduct in policymaking and enforcement. After *Earls*, the mantra of educators who enforce safe-school policies in good faith will be the following: "Given our responsibility for maintaining discipline, health, and safety we believe this policy reasonably serves the School District's important interest in detecting and preventing [the proscribed activity] among our students."

D. The Accountability Factor

The notion of accountability is the most provocative element of the doctrine of deference. It is the most unique and undefined factor in the restatement. Unlike the other three elements, no cases are compiled (or could be referenced by readers) in either *Earls* or *Vernonia* that sharpen the role of parental agreement or acquiescence to disputes over school policies. If the other factors represent the sense of the Court that a sufficient body of law exists from which to cull a workable rule for future cases, the accountability factor, at best, reflects a hope by the Justices of possible alternative methods for resolving such disputes.

However, the references in *Earls* to some form of accountability should not be left to speculation or attributed to a form of judicial altruism. It is woven throughout both the *Earls* and *Vernonia* rationale, making discussion of its future impact on education-law development a serious matter, especially in light of the Court's decision to defer to local decisionmakers. Whatever else the Court intended, an unmistakable preference emerges to restrain judicial intervention in student-discipline disputes when the policy in question is forged through community dialogue and participation.

Justice Thomas's majority opinion in *Earls* chronicled the participatory efforts of the Oklahoma educators. After summarizing the process, which included the observations and beliefs of teachers, administrators, law enforcement officials, the school board, and members of the community, the *Earls* majority concluded that deference was appropriate: "We decline to second-guess the finding of the District Court that '[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy.'"[245]

Justice Breyer, in his concurrence in *Earls*, gives weight to such a factor:

> When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community "the opportunity to be able to participate" in developing the drug policy . . . . The board used this democratic, participatory process to uncover and to resolve differences, giving

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245. *Earls*, 536 U.S. at 835 (quoting *Earls I*, 115 F. Supp. 2d 1281, 1287 (W.D. Okla. 2000)).

> weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program.[246]

These assessments mirror those of the majority in *Vernonia*, who based their decision to defer, in large part, on the accountability factor:

> We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this districtwide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.[247]

Ordinarily, such references would be disregarded when reading an opinion involving individual rights. In the garden-variety civil-rights case, it is generally assumed that the plaintiff is challenging the legitimacy of majoritarian preferences. Therefore, a perverse tautology results when a primary basis for denying the rights challenge is the degree of consensus by those favoring the policy. However, after *Earls*, the accountability factor finds its needed anchor in the uniqueness of public-education law that is organized around themes of federalism and the role of schools in local civic life in American communities.

Early views on public education characterized it as a "participatory process with maximum interaction and independent thought."[248] Early court decisions defined the constitutional contours around limits on zealous state and local educators in the hope of preventing unilateralism from "strangl[ing] the free mind at its source."[249] These well-known Supreme Court rulings settled disputes over the role of parents,[250] communities,[251] and private enterprise[252] with emphasis on a local democratic, participatory process. Later, the Court added punctuation to the local-

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246. *Id.* at 841 (Breyer, J., concurring) (citation omitted).

247. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

248. Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 258 (1992):

> [T]he Court has articulated a general view of education that has shifted over time. Court decisions from the 1940s through the mid-1970s reflect a 'progressive' ideology of schooling as exemplified in the writings of John Dewey. According to this view, education is a participatory process with maximum interaction and independent thought. In fact, education's primary function is to develop the child's thought processes. The 1970s seem to mark a turning point in Court thinking. More recent cases reflect a model of "cultural transmission" emphasizing education as the means through which societal values are inculcated.

249. West Virginia v. Barnette, 319 U.S. 624 (1943).

250. *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing a teachers' right to teach and a parents' right to engage them to instruct their children).

251. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972) (reasoning that those who bring up a child also prepare him to be a good citizen).

252. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (finding that public officials cannot require children to attend public school).

control movement in the case of *San Antonio Independent School District v. Rodriguez*,[253] holding that the federal interest, if any, in public education was not of a constitutional dimension because a state-provided education was not a fundamental right under federal law.[254] As a result, the absence of judicial intervention in school policymaking had a logical, if not a firm, foundation.[255]

This early course, charted for federal judicial intervention, animates much of the public-education case law. State public education became a part of the police power as a matter largely reserved to state and local policymakers, including municipalities, counties, and local school districts, with frequent reminders about the limited role of the federal courts.[256] Perhaps the most frequently cited language in this regard comes from an early free-speech decision originally written in dissent:

> [L]ocal control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office.[257]

State law developed its own emphasis on local control, serving to compliment the now general expectation that a linkage would exist between local policymakers and parents in the decision-making process. Most states do not regard public education as a central government function beyond creating the system and providing for its support. Local officials are expected to administer public education within a broad and permissive bureaucratic framework.[258]

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253. 411 U.S. 1 (1973).

254. *Id.* at 18.

255. It is, therefore, no surprise that many of the limitations on educator's authority in education law under the federal constitution are organized around the prohibitions against suspect classifications under the Equal Protection Clause and arbitrary decisionmaking under the Due Process Clause.

256. *See* Goss v. Lopez, 419 U.S. 565, 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. By and large, public education in our Nation is committed to the control of state and local authorities.") (quoting Epperson v. Arkansas, 393 U.S. 97 (1968)); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 489-93 n.4 (1954) (exploring the evolution of free public education in the United States into "perhaps the most important function of state and local governments.").

257. Bd. of Educ. v. Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting).

258. For examples, see GA. CODE ANN. §§ 2-4302, 32-901, 32-912; NEV. REV. STAT. § 385.005 ("[P]ublic education in the State of Nevada is essentially a matter for local control by local school districts."). Courts have also long acknowledged this situation. *See, e.g.*, Eason v. Clark County Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002) ("[L]ocal school districts possess such rights and powers as are necessary to maintain control of education of the children within their respective districts.") (quoting NEV. REV. STAT. § 385.000 (1973)); Wells v. Banks, 266 S.E.2d 270, 272-73 (Ga.1980)

The Court's restatement in *Earls* thus reflects a basic acceptance that when parents and educators agree on school policy, courts should give weight to the result. However well understood its origins, the role of the accountability factor in gauging judicial review of controversial policies is unclear. One is led to believe that the outcomes in *Earls* and *Vernonia* are, in fact, easily reached because of the absence of controversy and conflict in promulgating and implementing the student drug-testing policy. However, the notion of "controversy" is a term of analysis, not one of legal conclusion, such that one would expect the role of the courts to be more vigorous as the degree of consensus declines regarding a particular policy. As discussed in part V below, a minimum inquiry by the courts should include proof that the local democracy is an effective one, that education policymaking is, in fact, a participatory process with workable safeguards to insure accountability of local educators.

The Court in *Earls* sets forth a restatement that is essentially a repackaging of traditional notions of the authority and duty of educators. Factors, which are familiar in history if not in law, are set in place to support a dispute-resolution framework that removes judicial second-guessing from all but the most arbitrary and capricious school policies. Admittedly limited to the education context, the model nevertheless produces results anomalous to the usual constitutional case because "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[259] There are, to be sure, examples in modern constitutional law of specialized exceptions that highlight a disjunction with constitutional-rights protections generally.[260] However, as a close relation to the "good faith exception" family, its application in the case of educators is extraordinary.[261] The next section critically examines the law and policy implications of this presumption.

V. THE DOCTRINE OF DEFERENCE APPLIED TO EDUCATORS' AND STUDENTS' EXPERIENCES IN AMERICA'S PUBLIC SCHOOLS

If *Earls* is taken seriously, it ends the debate over whether educators have an exemption from the ordinary requirements of the Fourth Amendment. In its place,

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("[The Georgia] Constitution and Code provide the local school boards with sweeping authority in the governing of local school systems."). For criticism of this tradition, see generally, Eric P. Christofferson, Note, Rodriguez *Reexamined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553 (2002).

259. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

260. The most disjunctive doctrine currently arises out of the Free Exercise Clause. The landmark decision of *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), superseded by statute in several states, is organized around the enormous presumption that neutral, generally applicable laws should be presumed valid despite their impact on religious practice in the absence of proof of animus and bad faith. A prototype for bad faith appears in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), in which an ordinance is invalidated for targeting religious practice.

261. The role of "good faith" exceptions in law is surprisingly broad. Application of good faith exceptions affects outcomes in labor law, criminal procedure, constitutional torts, and contracts. For examples, see Aditi Bagchi, Note, *Unions and the Duty of Good Faith in Employment Contracts*, 112 YALE L.J. 1881 (2003) (labor law) and Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1 (2001) (criminal procedure).

a different discussion should convene over the logical implications of this legal restatement as a matter of education policy generally. Undoubtedly, the new model reconfigures rules on student rights. The courts' role is both clarified and simplified. Any uncertainties that survive its application in future student-rights disputes are also brought out of the darkness, and while only highlighted in the discussion below, are worthy of closer study.

The public policy implications of any restatement are, in the short run, speculative, but the landscape of education law after *Earls* is brightly lit. A public school is highlighted in which educators possess extraordinary authority to manage the education enterprise with a correlative duty to provide a safe and effective learning environment. This level of empowerment is not necessarily filled with the good news for an educator that appears at first glance. One can easily see how any legal expectation to provide a safe campus might influence shifts in other rules of law, especially with respect to affirmative duties and liability. However, these shifts, if they should occur at all, lie at the end of a chain of predictable effects, the first set of which are already taking place, effectively changing the education-law landscape.

The discussion below of the policy effects produced by the *Earls* restatement is largely exploratory in nature. Exhaustive and careful study of future decisions and legislation will surely follow, helping state and local educators settle expectations as to what does and does not work. As such, one should expect that discussions will be organized around the existing legal categories out of which student rights disputes arise: Fourth Amendment privacy, First Amendment freedom of expression, and Fourteenth Amendment notions of due process and equal protection. Within each category the four elements of the new model should produce outcomes substantially similar to *Earls*. At the same time, these elements should subject educators to varying levels of rigor in search of unlawful policies that are arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.

A. The Fourth Amendment Standard in Public Schools

1. Following the Lower Courts' Cues

In the area of law once thought inscrutable by educators, the Fourth Amendment emerges as a well-settled area after *Earls*.[262] As a Fourth Amendment case, *Earls* added only a small part to what, after *Vernonia*, was already set in motion. Prior to *Earls*, lower courts, both state and federal, sensing a clarifying shift in the philosophy of the Supreme Court, started to move toward a customized, less restrictive view of Fourth Amendment doctrine for the benefit of educators. Only in the larger, doctrinal sense, did *Earls* confirm the elements and the operation of the new model on the authority of educators in search-and-seizure disputes.

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262. Whether what emerges after this settling is desirable from a students-rights perspective, however, is open to debate. *See generally* 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 (2002) (discussing the application of the special needs doctrine in the school setting).

As explained in part II, two different types of suspicionless search cases began to work through the courts prior to *Earls*. The first category presented *Vernonia*-like fact patterns: attempts by school officials to implement drug testing under circumstances similar in purpose, if not in scope, to those of the Oregon educators. The courts invalidated many of the suspicionless search policies, uncertain over the precise fit of the elements presented in the *Vernonia* rationale and unsure of the weight to be given to the fact pattern on athletes.[263] These decisions reflect the middle road taken by the courts on student drug testing, a policy seen as an extreme measure when applied to juveniles in school. To these state and federal judges, outcomes in favor of educators would be based not on a presumption of greater authority when acting in good faith, but rather would be linked to *T.L.O.* and its proportionalism. With few exceptions, the courts required an actual showing of a special need to justify the searches. The Court in *Earls* repudiated this requirement, and with it, the results in these cases.

In the second category of pre-*Earls* cases, also explained in part II, the lower courts fully supported educators' application of the *Vernonia* principles to suspicionless searches that, while less intrusive than drug tests, were more expansive: the search for contraband. These policies relied on the presumption of greater authority, upholding contraband searches of the entire student body even when the special needs showing fell below the standard imposed by the lower courts for validating student drug testing policies.[264]

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263. In *Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095 (1998), a member of the school band refused to consent to suspicionless drug testing implemented by the school for participants in extracurricular activities. *Id.* at 1097. The state court held that the testing policy was unconstitutional because the policy was expanded to include students involved in all extracurricular activities without proof that band members were actually involved in drugs. *Id.* at 1110. In *Tannahill v. Lockney Independent School District*, 133 F. Supp. 2d 919 (N.D. Tex. 2001), the federal district court invalidated a mandatory drug-testing program for all students. *Id.* at 930-31. A parent's refusal to consent to drug testing was construed as the equivalent of a "positive" test. *Id.* at 922. The suspicionless program was too wide and intrusive. Once again, the school district was unable to show a special need for such broad testing. *Id.* at 931. The court found that there was insufficient evidence to support the claim by educators that drug use by students and staff was increasing. *Id.* at 929-32.

In addition, there is the lower court ruling in *Earls II*, 242 F.3d 1264 (10th Cir. 2001), where the court held that testing all participants in extracurricular activities was unconstitutional. *Id.* at 1278. The appellate court held that neither a concern for safety nor a concern about the degree of supervision provided a sufficient reason for testing the particular students whom defendants chose to test under the policy. *Id.* at 1276-77. Also, the immediacy of the defendants' concern was "greatly diminished" because the evidence did not show an epidemic of illegal drug use in the school district. *Id.* at 1277. Defendants failed to demonstrate that there was some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students would actually redress its drug problem. *Id.*

Similarly, in *Linke v. Northwestern School Corporation*, 734 N.E.2d 252 (Ind. Ct. App. 2000), rev'd, 763 N.E.2d 972 (Ind. 2002), the appellate court invalidated a drug testing policy that included athletes and extracurricular activities. However, the Indiana court relied upon the Search and Seizure Clause, art. I, § 11, of the Indiana Constitution in its ruling that individualized suspicion was required prior to such testing. *See id.* at 259. This result was overturned by the Indiana Supreme Court, which relied upon *Vernonia*. *See* Linke v. Northwestern Sch. Corp., 763 N.E.2d 972, 986 (Ind. 2002).

264. *See supra* notes 46, 111-27 and accompanying text. *See also* State v. Barrett, 683 So. 2d 331 (La. Ct. App. 1996) (applying *Vernonia*, the court upheld a dog search of students' belongings on top of desks reasoning that the use of drug dogs was minimally intrusive to the student while the interest of the government in keeping drugs out of schools was great); State v. J.A., 679 So. 2d 316 (Fla. Dist.

This body of pre-*Earls* lower-court decisions essentially applied *Vernonia* to what now appears to be an impressive exercise of judicial dexterity. It is not so much that the judges got it right in terms of the shift. More significantly, they were able to clarify the application of Fourth Amendment principles in the student-rights context. Clarity as to what the Fourth Amendment required and what it allowed began to emerge at about the same time that educators were searching for effective policies to combat campus crime and disruptions. More importantly, this body of decisions served to isolate the areas of the emerging deference doctrine that needed clarification, in effect, packaging the issues addressed by the Court in *Earls*.

2. T.L.O.*'s Future Role in Student-Search Cases*

These lower court decisions, now taken together with *Earls*, illustrate how the Fourth Amendment both expands and contracts to accommodate the new model in future Fourth Amendment student-rights disputes. The roles of probable cause and reasonable suspicion are modified. The former is eliminated entirely while the latter is made optional. The *T.L.O.* decision and its proportionalism are not overruled; rather, it is repositioned after *Vernonia* and *Earls*. *T.L.O.* is rejected as a minimum requirement in student-search cases. A showing of a special need is not required before implementing a suspicionless search. Moreover, the *Earls* majority did not see the usefulness in micromanaging campus problem-solving and ruled that; "reasonableness under the Fourth Amendment does not require employing the least intrusive means."[265] Justice Thomas was concerned that *T.L.O.* as a minimum requirement would do more harm than good on some campuses:

> [W]e question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.[266]

Justice Breyer agreed in concurrence:

> [A] contrary reading of the Constitution, as requiring "individualized suspicion" in this public school context, could well lead schools to push the boundaries of "individualized

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Ct. App. 1996) (holding a suspicionless search by hand-held metal detector was minimally intrusive and therefore legal); DesRoches *ex rel.* DesRoches v. Caprio, 974 F. Supp. 542 (E.D. Va. 997) (determinating suspicionless search illegal where the school's need to determine whereabouts of missing shoes did not outweigh minor's individual rights), *rev'd*, DesRoches v. Caprio, 156 F. 3d 571 (4th Cir. 1998); *In re* Latasha W., 60 Cal. App. 4th 1524 (Ct. App. 1998) (upholding school district policy of random, suspicionless searches of students for weapons using hand-held metal detectors where educators were able to show a special need—an unsafe campus climate).

265. Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002) (citation omitted).

266. *Id.*

> suspicion" to its outer limits, using subjective criteria that may "unfairly target members of unpopular groups," or leave those whose behavior is slightly abnormal stigmatized in the minds of others. If so, direct application of the Fourth Amendment's prohibition against "unreasonable searches and seizures" will further that Amendment's liberty-protecting objectives at least to the same extent as application of the mediating "individualized suspicion" test, where, as here, the testing program is neither criminal nor disciplinary in nature.[267]

Suspicionless searches for contraband will become increasingly legitimate options for educators seeking to maintain a safe campus environment, especially after *Earls*. Explicably, individualized suspicion will survive in the new model as simply another tool in the kit of safe-school policies. The tinkering of the Court notwithstanding, its use in managing campus life should not diminish. Educators, parents, and students have acquired a comfort zone with its use and it works well in response to most campus-discipline scenarios.

3. *Settling Expectations for Suspicionless Searches*

As a practical matter, the Court's warning suggests to educators when a shift to suspicionless policies should take place. The line appears to be drawn between suspicions logically directed at identifiable persons connected to an event or occurrence versus a general belief by school officials of the necessity to respond to conditions or events that cannot be connected, without creative effort and/or delay, to any specific person or group.

Three components—the search based on individualized suspicion, the suspicionless search for contraband, and the proprietary interest search—provide the benchmark for an effective use of the array of powers now available to the educator. The comprehensive safe-school plan would combine both suspicion-based and suspicionless policies, especially the suspicionless searches for contraband, as a way of discouraging both drugs and weapons on campus.[268] If the more intrusive, invasive drug testing can be implemented after *Earls*, then the contraband searches will be even easier to validate and implement. Complementing this combination is the proprietary-interest search of the physical plant. This search, which relies on the absence of a student expectation of privacy as to public property, allows educators to monitor student use of lockers and other school resources.[269]

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267. *Id.* at 841-42 (Breyer, J., concurring) (citation omitted).

268. The policy in Tecumseh, Oklahoma, was in fact, structured around such a combination. Justice Ginsburg's dissent notes that "the School District here has not exchanged individualized suspicion for random testing. It has installed random testing in addition to, rather than in lieu of, testing 'at any time when there is reasonable suspicion.'" *Earls*, 536 U.S. at 853 n.4 (Ginsburg, J., dissenting) (citation omitted).

269. *See* S.A. v. State, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995); *In re* Patrick Y., 746 A.2d 405, 414 (Md. 2000); People v. Overton, 229 N.E.2d 596, 598 (N.Y. 1967); Shoemaker v. State, 971 S.W.2d 178, 182 (Tex. App. 1998); *In re* Interest of Isiah B., 500 N.W.2d 637, 641 (Wis. 1993).

Legally, all previous Fourth Amendment decisions will be redrawn in light of the *Earls* restatement, their reconsideration properly seen as part of the adjustment period, by lower courts and educators, in assessing whether or not student drug testing makes good law and effective policy. Judicial review of education policy in Fourth Amendment cases is simplified in response to this new reality. Educators who correctly match needs (as perceived) to solutions (properly enforced) are allowed to operate in a more fluid manner. This appears to have been in the minds of the Justices as far back as *T.L.O.*: "'Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.' Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility . . . ."[270]

Court decisions dismissing challenges to the legality of suspicion-based searches will become perfunctory. Moreover, searches in areas previously deemed murky, involving metal detectors, dogs, and other devices, should be subject to fewer Fourth Amendment challenges. For example, as to dogs, most courts were already following the lead of the Supreme Court, when it ruled that a canine sniff is not a search within the meaning of the Fourth Amendment.[271] This influenced public-school litigation as a general rule began to emerge that a dog's sniff of a student's property was not a search. Any subsequent alert by the dog provided the cause to conduct a search.[272]

After *Earls*, this rule expands to simplify the analysis when a dog sniffs a student's person, a scenario fostering much lower-court disagreement.[273] Under the new model, even if one assumes that such a sniff is a search, the constitutional issue simply narrows to examine the justification for the search. The search is clearly valid when individualized suspicion acts as a predicate to a dog's sniff of a student or group of students upon whom the suspicion rests. Moreover, dog sniffs as part of a random, suspicionless search policy enjoy a presumption of validity after *Earls*. In the absence of evidence of bad faith or a violation of some other right, suspicionless dog sniffs of students should be invalid only if the policy fails the reasonableness assessment—boiling down to a fact-based ruling of the obtrusiveness of the search in light of the age of the student. Courts examining such policies will simply conduct a comparative analysis, measuring the climate of

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270. New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985) (citations omitted).

271. United States v. Place, 462 U.S. 696, 707 (1983). In *Place*, law enforcement officials detained a suspected drug dealer's suitcase in order to expose the luggage to a canine sniff. The sniff was positive, and a warrant was subsequently obtained to open the suitcase. *Id.* at 698-99. The Court rejected the argument that the sniff itself was a search, thus requiring an initial finding of probable cause. *Id.* at 707. The Court classified the sniff as an investigative procedure that was unobtrusive in the manner in which it is conducted and also limited in the content of the information revealed. *Id.*

272. This rule is most consistently applied to dog sniffs of personal property. *See* Hearn v. Bd. of Pub. Educ., 191 F.3d 1329, 1332 (11th Cir. 1999); Marner *ex rel.* Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318, 1325 (M.D. Ala. 2002); *In re* Dengg, 724 N.E.2d 1255, 1259 (Ohio 1999); Commonwealth v. Cass, 709 A.2d 350, 358 (Pa. 1998).

273. *See* Doe v. Renfrow, 631 F.2d 91, 92 (7th Cir. 1980) (per curiam) (dog sniff of student not a search). For rulings in which dog sniffs of students were deemed a search, see *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1266 (9th Cir. 1999) and *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 479 (5th Cir. 1982).

intrusiveness against that experienced by the students in the high-intrusive drug testing cases, of *Vernonia* and *Earls*.

The Fourth Amendment will not be toothless. Significantly, the analytical clarity the restatement provides should encourage a rigor in judicial findings of arbitrary, irrational, or malicious conduct in campus policymaking and enforcement. Courts will impose liability on educators whose search and seizure policies are wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. Moreover, an otherwise valid policy should trigger Fourth Amendment safeguards when implemented in a capricious manner that shocks the judicial conscience.

For example, strip searches will enjoy no presumptive validity after *Earls*. Even though the Court in *Earls* rejects a "least restrictive means" analysis for searches generally, nothing in the new restatement abrogates the judicial axiom that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."[274] In other words, "[w]hat may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search."[275]

The pre-*Earls* practice of disallowing strip searches in response to a minor infraction of school policy should continue,[276] while searches that involve removal of some clothing should be supported when infractions are moderate to serious and when procedures observe minimum standards of decency.[277] These expectations

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274. Lewis *ex rel.* Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993). It is important to remember what the Court in *Earls* keeps in play in Fourth Amendment law. The Justices characterize the judicial task as "a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests." *Earls*, 536 U.S. at 823. Later the Court organizes its opinion around three factors, now traditional in Fourth Amendment analysis: (1) the nature of the privacy interest; (2) the character of the intrusion imposed by the policy; and (3) the nature and immediacy of the government's concerns and the efficacy of the policy in meeting them.

275. *Cornfield*, 991 F.2d at 1321; *see* Fewless *ex rel.* Fewless v. Bd. of Educ., 208 F. Supp. 2d 806 (W.D. Mich. 2002) (invalidating, while totally ignoring the *Vernonia* test, a strip search where school officials did not fully investigate the veracity of reports of marijuana possession upon which reasonable suspicion might be based).

276. *See, e.g.*, Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290, 1307 (N.D. Ga. 1999) (invalidating a strip search to find an envelope containing $26).

277. A test of sorts evolved in pre-*Earls* strip-search decisions. A partial listing of the evolving factors is found in *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992). After determining that the school officials had reasonable suspicion to initiate a search, courts looked for the following factors: "(1) having members of the same sex perform the search, (2) using a room where only the participants were present to conduct the search, and (3) limiting the search to exclude body cavities," (4) not requiring the student to remove underwear, and (5) no inappropriate touching. *Id.* Educators have been sensitive to these expectations. As a result, most strip searches resulting in litigation before *Earls* were found valid. *See also* Singleton v. Bd. of Educ., 894 F. Supp. 386, 391 (D. Kan. 1995) (validating search for stolen money where the search was conducted in the principal's office with only two male administrators present, the student was not required to remove underwear, and the student was not touched inappropriately); Widener v. Frye, 809 F. Supp. 35, 38 (S.D. Ohio 1992), *aff'd*, 12 F.3d 215 (6th Cir. 1993) (validating drug search where student was removed from the presence of his classmates, and the search was conducted by two security guards; where the student was made to remove socks, shoes, and pants, but not underwear; to lift shirt, and where crotch area was visibly inspected, but student was not touched); Bridgman v. New Trier High Sch. Dist., 128 F.3d 1146, 1150 (7th Cir. 1997) (validating limited strip search of outer jersey, hat, shoes, and socks); Williams *ex rel.*

appear to provide educators with a sufficiently clear standard to meet the "fair warning" requirement for purposes of defeating assertions of qualified immunity in federal liability cases brought under 42 U.S.C. § 1983.[278] Without these parameters, educators would be able to invoke qualified immunity, thereby avoiding accountability altogether, through mere reference to *Vernonia* and *Earls* as cases that confuse constitutional limits on the validity of searches.[279]

4. *The Sliding Scale of Empowerment*

A sliding scale of empowerment emerges to which the Fourth Amendment is sensitive. The new model provides an analytical vernacular for the reasonableness formalism usually associated with Fourth Amendment cases. Coherence between the restatement and prior case law is implied and underlying reasonableness analysis remains the same. The cases will continue to organize around the decreased expectation of privacy mantra, the relative unobtrusiveness of the search, and the severity of the need met by the search. But this framework will now be animated with the elements of deference: the education mission, custodial responsibilities, and proportional sanctions imposed as the result of a participatory process, with parents poised to support or to resolve differences about the policy in question. The burden of proof for a challenging plaintiff will be one of producing clear and convincing evidence of abuse, and doubts about the validity of a policy should be resolved in educators' favor.

Controversies, if any remain, should continue to be pressed in the area of student drug testing. Due to the fragile majority in *Earls*, a suspicious judicial attitude is likely to persist as school districts test the decision's contours with student drug testing polices that will, no doubt, go beyond the facts presented in *Earls*. The entire student body and staff will eventually be subject to a constitutional inquiry about the scope of the doctrine of deference. Unless those

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Williams v. Ellington, 936 F.2d 881, 883-89 (6th Cir. 1991) (validating search for small vial of drugs where student was taken into private administrative office and, with one witness, asked to empty her pockets, lower her blue jeans to her knees, and remove her shoes and socks); Rudolph *ex rel.* Williams v. Lowndes County Bd. of Educ., 242 F. Supp. 2d 1107, 1119-20 (M.D. Ala. 2003) (validating strip search for drugs when it lasted only two to three minutes, was done in a private room, and involved no touching).

278. The United States Supreme Court's recent clarification of qualified immunity in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), underscores its prior rulings that educators can only be held liable for conduct that violates a standard that is "'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" United States v. Lanier, 520 U.S. 259, 270 (1997) (citation omitted). The initial post-*Earls* case development on this question is essential because "where the applicable legal standard is a highly general one, such as 'reasonableness,' preexisting case law, that has applied the general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law." Marsh v. Butler County, Ala., 268 F.3d 1014, 1031 n.9 (11th Cir. 2001).

279. *See* Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 951, 956 (11th Cir. 2003) (finding that Fourth Amendment rights had been violated by strip searches of students, but concluding that the defendants were entitled to qualified immunity); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997) (allowing qualified immunity for educators who conducted a strip search for stolen money); Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290, 1311-12 (N.D. Ga. 1999) (invalidating strip search for missing $26, but finding educators were entitled to qualified immunity).

cases present evidence of bad faith or a violation of some other student right, such as due process, it is easy to see how the Court would be inclined to favor such a policy. However, opponents of drug testing policies are not without recourse. *Vernonia* and *Earls* underscore a uniqueness about the drug testing polices that may prevent any further expansion by educators. Justice Breyer conditions his concurrence in *Earls* on these characteristics:

> The school's drug testing program addresses a serious national problem by focusing upon demand, avoiding the use of criminal or disciplinary sanctions, and relying upon professional counseling and treatment . . . . [T]he testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.[280]

Justice Breyer, then, is the controlling vote to hold the feet of educators to what little fire the Fourth Amendment produces in the area of student rights as long as the Court holds its current composition. The Court had already lost the vote of Justice Ginsburg, who, while expressing alarm at the implications of the *Vernonia* ruling, conditioned her vote on the belief that the ruling's application would not go beyond athletes.[281] Now with a bare majority, any shift in the vote of Justice Breyer would fortify the dissenters who collectively expressed alarm that, after *Earls*, the educators' exemption from ordinary Fourth Amendment requirements is "so

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280. *Earls*, 536 U.S. at 842, 838, 841 (Breyer, J., concurring). Both Justices Thomas and Breyer spoke to this point. Justice Thomas was concerned that *T.L.O.*, as a minimum requirement, would do more harm than good on some campuses:

> [W]e question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.

Id. at 837. Justice Breyer agreed in his concurrence:

> [A] contrary reading of the Constitution, as requiring "individualized suspicion" in this public school context, could well lead schools to push the boundaries of "individualized suspicion" to its outer limits, using subjective criteria that may "unfairly target members of unpopular groups," or leave those whose behavior is slightly abnormal stigmatized in the minds of others. If so, direct application of the Fourth Amendment's prohibition against "unreasonable searches and seizures" will further that Amendment's liberty-protecting objectives at least to the same extent as application of the mediating "individualized suspicion" test, where, as here, the testing program is neither criminal nor disciplinary in nature.

Id. at 841-42 (Breyer, J., concurring) (citations omitted).

281. Justice Ginsburg noted: "I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring).

expansive or malleable as to render reasonable any program of student drug testing a school district elects to install."[282]

The battleground for these concerns will be the degree of documentation needed to support student drug-testing programs and its relation to the group of students being tested. The Court noted in *Earls* that educators' custodial interest justifies something less than a "closer fit" between the students who are tested and those causing any perceived drug problem.[283] In finding that the close fit in *Vernonia* as to athletes was "not essential to the holding," the majority delegated to the lower courts the task of crafting a workable approach evaluating the legitimacy of drug testing programs.[284]

The process should impose a *Tinker*-like duty on educators to provide documentation that connects perceptions regarding drug use to "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone."[285] Policies with an absence of any link will be rejected, as were the assertions of the educators in *Tinker*. Moreover, attempts by educators to establish a linkage anecdotally should fail as well, despite the language in *Earls* that the "nationwide drug epidemic makes the war against drugs a pressing concern in every school."[286] This will be especially true when there is a disagreement within the community over the need for student drug testing, although something close to total parental concurrence or acquiescence will permit a more attenuated fit between law and policy.

As for educators, policy concerns surrounding drug testing will survive formidably as well. The relative firmness of the legal basis for student drug testing says nothing about its desirability as a policy. Drug testing will always be a more intrusive policy and subject to debate as to its effectiveness. In general, there does not appear to be a receptive market for widespread use of drug testing as a school policy. Beyond this, empirical studies on cause and effect will, no doubt, help educators make better decisions about the role, if any, that drug testing will play for school districts with a definite need.

School districts with a parental consensus will continue to lead the push to test the effectiveness of such policies, but it is not clear at all that such a policy will survive in communities divided and uncertain about drug testing students. The educators' levels of comfort about student expectations of privacy may not shift as easily as the doctrine of the Court, leaving a gap of credibility for such policies, at least in the short run. Even the Justices in *Earls* declined to endorse drug testing as good education policy.[287] As a method for managing the campus, student drug

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282. Bd. of Educ. v. Earls, 536 U.S. 822, 843 (2002) (Ginsburg, J., dissenting).

283. *Id.* at 837-38.

284. *Id.* at 838.

285. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

286. *Earls*, 536 U.S. at 834.

287. Justice Thomas noted: "In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren." *Id.* at 838. Justice Breyer echoed the sentiment in his concurrence: "I cannot know whether the school's drug testing program will work. But, in my view, the Constitution does not prohibit the effort." *Id.* at 842 (Breyer, J., concurring).

testing may simply be a policy that, after a brief period of use, will run its course as an approach to school safety.

B. The First Amendment Standard in Public Schools

1. The Erosion of Tinker's *Disruption Rationale and Requirement*

The outcomes in student discipline cases arising out of the First Amendment are reinforced by the *Earls* restatement on the authority of educators. Prior to *Earls*, and its predecessor *Vernonia*, student free speech cases had already shifted in favor of the good faith decisions of educators, creating a disjunction with the analysis applied in other areas. The *Earls* restatement unifies the law in this regard; the approaches in the expression cases are now compatible with the student rights cases generally. This uniformity provides educators and lower courts with an unexpected benefit; it provides a larger body of case law to guide lower courts and educators seeking comfort with the new model.

The shift in the free-speech cases can be traced back as far as the *Tinker* decision, where ironically the students win the case battle, but lose the doctrinal war. The Court, while upholding the right of students to wear black armbands to symbolically express their dissatisfaction with the policies surrounding the Vietnam War, articulates a surprisingly broad mandate for educators:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[288]

Properly understood, the *Tinker* decision requires some rational nexus between the student expression and actual or potential disruptions to the educational climate. The educators in *Tinker* simply fail to document a link of any kind, prompting the Court to suspect whether viewpoint discrimination was the better explanation for the dispute.[289] Thus, while the Court upheld "the students' right to engage in a

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288. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969) (alteration in original) (citations omitted).

289. The *Tinker* Court eventually noted: "As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it." *Id.* at 505. Later the majority opined:

> There is here no evidence whatever of petitioners' interference, actual or nascent,

nondisruptive, passive expression of a political viewpoint,"[290] it confirmed the educators' interest in responding to "speech or action that intrudes upon the work of the schools or the rights of other students."[291] In post-*Tinker* disputes the rationale of decisions began to focus on this link. Educators discovered that their good faith concerns could, with proper documentation, meet the standard with little difficulty.[292] Thus, it came as no surprise when the Court, in *Bethel School District v. Fraser*, decided the case consistent with the *Tinker* standard by upholding the punishment of a student who gave a lewd speech in a school assembly.

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[293]

Thereafter, the emerging judicial deference in the free-speech cases came together quickly along two distinct rationales. First, the doctrine was anchored to the notion of the education mission, underscoring judicial notice of the general authority of public educators to regulate expression incompatible with legitimate pedagogical goals. In *Hazelwood School District v. Kuhlmeier*,[294] where the Court upheld administrative censorship of stories published in a high school student newspaper, the Court cited to *Fraser* noting, "We thus recognized that '[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' rather than with the federal

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> with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Id. at 508.

290. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986).

291. *Tinker*, 393 U.S. at 508.

292. For example, in *Jeglin v. San Jacinto Unified School District*, 827 F. Supp. 1459 (C.D. Cal. 1993), which involved a challenge to a school district dress code, the court held "the First Amendment does not require school officials to wait until disruption actually occurs before they may act to curtail exercise of the right of free speech but that they have a duty to prevent the occurrence of disturbances." *Id.* at 1461. The court held that the defendant failed to carry its burden of proof justifying the curtailment of the free speech of elementary and middle school students. *Id.* at 1461-62. With regard to the elementary schools, the defendant offered no proof of gang presence or of any actual or threatened disruption or material interference with school activities related to students' dress. *Id.* There was some evidence of a negligible gang presence at the middle school, but no actual or threatened disruption of school activities. *Id.* at 1462. Evidence regarding the high school was conflicting, but it carried defendant's burden justifying enforcement of the dress code. *Id.*

293. *Fraser*, 478 U.S. at 685-86.

294. 484 U.S. 260 (1988).

courts."[295] The *Hazelwood* rationale later concluded, "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[296]

The second basis for judicial deference to educators emerged from the public forum doctrine and the implied authority given government officials to place reasonable restrictions on speech. The doctrine, while not designed solely for the benefit of public educators,[297] provides an independent basis for such broad authority. The public school campus is a nonpublic forum, giving school officials more control over speech than if it was a public forum. Schools are deemed to be a nonpublic forum until educators intentionally take steps (by policy or by practice) to open the campus for general public discourse. Unless this occurs, school facilities are reserved for expression that is compatible with its intended purposes.[298] In *Hazelwood*, the school paper was a nonpublic forum. The conduct of the principal, censoring stories found to be inappropriate, easily passed the low threshold rational basis test for validity.[299] These so-called time, place, and manner cases provide an additional basis for regulation of student speech on campus that is not linked to a disruption theory, but rather is grounded on the assumption that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community"[300] when the restrictions are "reasonably related to legitimate pedagogical concerns."[301] The *Hazelwood* Court recognized both elements in its decision to uphold the power of school officials to censor stories in the student newspaper, and in so doing, made complete the First Amendment shift toward deference. This approach to resolving campus disputes is similar in temperament to the elements of the *Earls* equation. Use of the public forum doctrine in free speech cases underscores the custodial interest of school officials to take reasonable steps to maintain a safe and effective learning environment.

Therefore, prior to the *Earls* restatement, the courts built a foundation to support a preference to sift the facts of a campus conflict for evidence of arbitrariness or bad faith in educational decision-making. In the absence of such evidence, there was an established deference to the education mission even when fundamental rights were involved.[302] After *Earls*, the tendency away from rigorous

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295. *Id.* at 267 (alteration in original) (citation omitted) (quoting *Fraser*, 478 U.S. at 683).

296. *Id.* at 273; *see also* Bruce C. Hafen, Comment, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 692-99 (1988) (discussing the Court's deferential approach in *Hazelwood*).

297. The non-traditional forum cases were forged out of public protests and demonstrations of the 1960s and 1970s that took place on public property, begging the question: what type of limitations can government officials impose on speech other than that on streets, parks, and public sidewalks? *See, e.g.*, Greer v. Spock, 424 U.S. 828, 839, 40 (1976) (upholding restrictions on public demonstrations at a military base); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (upholding reasonable restrictions on speech at a county jail).

298. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983).

299. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274-76 (1980).

300. *Id.* at 267 (quoting *Perry*, 460 U.S. at 46 n.7).

301. *Id.*

302. *See supra* discussion and notes in Part II, sections C and D.

judicial review is reinforced, in effect, providing alternating grounds for justifying campus policies that restrict student expression. Disruption becomes only a subset of the concerns that may be addressed through campus codes of conduct. The custodial interest element of the *Earls* restatement takes on a more prominent role; educators under their custodial authority may restrict speech to protect children as a part of the educational process.[303] A list of sorts emerges. Student speech may be regulated when it disrupts campus activities or as a necessary part of managing a closed public forum in which children are "committed to the temporary custody of the state as schoolmaster."[304] School officials may also regulate student expression when it conflicts with the education mission.

2. *Expanding Educators' Control Over the Campus Forum*

In the classroom and in other school-sponsored forums, students are accustomed to yielding. After *Tinker*, the *Bethel* and *Hazelwood* decisions carved out much of the school grounds and many school activities from *Tinker's* disruption standard.[305] But now, students must yield their rights not only when giving speeches on campus and writing for the school newspaper, but also when deciding what to wear to school,[306] what substances to avoid consuming, and what to say on the playground to their friends.[307] While courts have been relaxing *Tinker* to curtail these decisions for years, *Earls* simplifies it further, allowing *Tinker*'s removal from the entire process. The restatement again puts the burden on the complaining student to show clear and convincing evidence of school officials' bad faith or content-based actions.

Two cases arising out of schools' attempts to keep the confederate flag off campus illustrate how the *Earls* restatement is consistent with prior restrictions on students' First Amendment expression, as well as how it can broaden those restrictions in the future. *West v. Derby Unified School District Number 260*[308]

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303. In a free speech case, decided after *Vernonia*, that upheld a school policy that placed limits on the distribution of outside publications, the court correctly deferred, noting that "[a] school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth." Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996).

304. *Earls*, 536 U.S. 822, 830 (2002) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

305. *See supra* notes 290-301 and accompanying text.

306. *See generally* Phoenix Elementary Sch. Dist. No. 1 v. Green, 943 P.2d 836, 840 (Ariz. Ct. App. 1997) (determining the school's uniform policy was "viewpoint-neutral on its face" and applying the *O'Brien* test to uphold the policy); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001) (finding a school district's content-neutral dress code "[regulated] a method, not a message, and [was] reasonable in view of the pedagogical mission of the Academy"); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 287 (5th Cir. 2001) ("Federal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate . . . dress in public schools."); Vines v. Bd. of Educ. of Zion Sch. Dist., No. 01-C7455, 2002 U.S. Dist. LEXIS 382 at *10 (N.D. Ill. Jan. 10, 2002) (finding "dress code's restrictions of [student's expression [were] reasonably related to [legitimate] pedagogical concerns").

307. *See* S.G. *ex rel.* S.G. v. Sayreville Bd. of Educ., 333 F.3d 417 (3d Cir. 2003) (upholding suspension of student who threatened to shoot a playmate during recess).

308. 206 F.3d 1358 (10th Cir. 2000).

exemplifies school officials' authority to respond to campus disruptions in ways that infringe students' free-speech rights under both a pre- and post-*Earls* analysis.

West arose in the Derby School District that, in 1995, experienced significant racial tension at its middle and high schools. This tension led to verbal confrontations between students, racist graffiti on campus walls, racial incidents at football games, and at least one fight.[309] Several white students involved in these incidents wore confederate flag shirts and a fight broke out as a result of a student wearing a confederate flag headband.[310] Responding to the incident, the Derby School District convened a 350-member community task force to suggest a course of action.[311] Upon the task force's recommendation, the district adopted its "Racial Harassment and Intimidation" policy.[312] After the policy's adoption, the school experienced a "marked decline of incidents of racial harassment and discord."[313]

Plaintiff Terry West (T.W.), a seventh-grader, was all too familiar with the policy after having signed off on it as part of the school handbook, having it explained to him by his teachers, and having been suspended for three days under the policy after referring to another student by using a racial slur.[314] In the spring of 1998, T.W. drew a confederate flag on a piece of paper during math class. Another student showed the drawing to T.W.'s teacher, who then handed it over to the assistant principal. Under school policy, the school suspended T.W. for three days. T.W. brought a § 1983 action against the district, alleging, *inter alia*, that his suspension violated his First Amendment rights.[315]

The Tenth Circuit affirmed T.W.'s suspension upon application of *Tinker*. The court had little trouble finding that Derby officials acted, not out of "'undifferentiated fear or apprehension' of disturbance," but based on the reasonable belief that display of the Confederate flag "might cause disruption and interfere with the rights of other students to be secure and let alone."[316] Repeating a refrain widely used in lower-court post-*Tinker* decisions, the court reasoned that

> The fact that a full-fledged brawl had not yet broken out over [this display of] the Confederate flag does not mean that the district was required to sit and wait for one . . . . In this case, the district had a reasonable basis for forecasting disruption from display of such items at school, and its prohibition was therefore permissible . . . .[317]

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309. *Id.* at 1362.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* (quoting West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1228 (D. Kan. 1998)).

314. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1362-63 (10th Cir. 2000).

315. *Id.*

316. *Id.* at 1366 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

317. *Id.* (quoting West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1232-33 (D. Kan. 1998)).

Under the *Earls* restatement, T.W.'s suspension is again validated, but for somewhat different reasons. The custodial factor weighs in the district's favor here based on its duty to keep students safe. Preventing racial harassment and violence falls into the category of valid custodial interests. Given national race problems and the district's local history of racial problems, school officials would have no trouble convincing a court of their good faith in acting to prevent future racial harassment and violence.

Along similar lines, the education mission factor weighs in the district's favor because of educators' interest in raising citizens that reject race-based prejudice, harassment, and violence. Certainly if schools legitimately punish students for describing student body election candidates as "firm,"[318] they legitimately punish students for describing other students with racial slurs and decorating classroom work with racially offensive symbols.

The due process factor weighs in as T.W.'s strongest protection here, ensuring the link between the educators' stated interest and his punishment. In this case, however, T.W. still would receive little protection because of Derby's model process of adoption and implementation of its racial-harassment policy. Indeed, Derby did everything right: The district identified a real campus problem; looked to a wide cross-section of the community for solutions; adopted a comprehensive, content-neutral policy response; gave comprehensive notice of the policy; and reasonably and consistently enforced it.[319] The policy worked. The decrease in racial problems in the school district after the policy's implementation testifies to the strong connection between the educator's interest and the effects of the disciplinary process.[320]

Finally, the accountability factor supports the district's policy because of Derby's model behavior in looking to the community for a considered, focused approach to a discipline problem. Because the school district worked with the community to solve its discipline problem, a court, especially after *Earls*, would be tremendously reluctant to disturb the judgment of the local democratic process in favor of judicial veto of a proven solution.

The *Derby* decision, then, is validated in both a pre- and post-*Earls* world, and it shows how the *Earls* restatement assesses educators' efforts to maintain campus safety, order, and discipline. The Madison County School Board, as discussed below, is in greater need of the *Earls* restatement to validate its policies.

In *Castorina v. Madison County School Board*,[321] the Sixth Circuit reversed the Eastern District of Kentucky's grant of summary judgment in favor of the school board's application of its dress code to suspend two high-school students.[322] The dress code, for which the circuit court provides no explanation of the method or reason it was adopted, prohibited clothing that, *inter alia*, "depicts alcohol, drugs, tobacco or any illegal, immoral, or racist implication."[323]

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318. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986) (Brennan, J., concurring).
319. *See supra* notes 308-17 and accompanying text.
320. *See West*, 206 F.3d at 1363.
321. 246 F.3d 536 (6th Cir. 2001).
322. *Id.* at 544.
323. *Id.* at 538.

Plaintiffs wore matching Hank Williams Jr. concert t-shirts to commemorate the birthday of Hank Williams Sr. and "express their southern heritage."[324] The t-shirts displayed two Confederate flags and the phrase "Southern Thunder."[325] When the principal saw the students wearing the t-shirts, he gave them the option of wearing them inside out, changing clothes, or being suspended for three days.[326] If the students turned the shirts inside out or changed clothes, they would face no further disciplinary action.[327] When the students refused to accept any of the options, the principal called their parents.[328] With their parents' support, the students chose the three-day suspension.[329] When the students returned after their suspensions wearing the same shirts, they were suspended for another three days. The students did not return to school after the second suspension and were homeschooled by their parents.[330]

As did the court in *West*, the *Castorina* court looked to *Tinker* for guidance in resolving the students' challenge to their suspensions. Under its view of the record, the Sixth Circuit found that the school district likely was acting on a "fear or apprehension of disturbance" alone because there was no evidence of racial problems supporting the district's ban on Confederate flag clothing.[331] The concurrence points out, however, that the day before plaintiffs were suspended, a fight broke out between students wearing Confederate flag t-shirts.[332] Also, the court's reading of the record showed that other students were allowed to wear "clothing bearing the 'X' symbol associated with Malcolm X and the Black Muslim movement."[333] Again, the concurrence points out that the principal testified to, on several occasions, asking students to remove Malcolm X t-shirts in the past, although he had not seen any lately.[334] This, for the court, showed that the school's action was an impermissible content-based restriction on speech. In so finding, the court found controlling its analogy between the district's fatal ban of black arm bands in the face of allowing students to wear the Nazi cross in *Tinker* and the district's punishment of students for wearing confederate flags but not for wearing the "X" symbol in this case.[335] This analysis led the Sixth Circuit to remand the case so that the district court could determine whether, in fact, the school selectively enforced its policy.[336]

In the future, the *Earls* restatement would aid educators in the Madison County School Board's position by giving their educational and custodial decisions regarding student safety, order, and discipline more deference than given under

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324. *Id.*
325. *Id.*
326. *Id.* at 538-39.
327. Castorina v. Madison County Sch. Bd., 246 F.3d 536, 539 (6th Cir. 2001).
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 541 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
332. *Id.* at 545 (Kennedy, J., concurring).
333. Castorina v. Madison County Sch. Bd., 246 F.3d 536, 541 (6th Cir. 2001).
334. *Id.* at 546 (Kennedy, J., concurring).
335. *Id.* at 540.
336. *Id.* at 544.

Castorina's application of *Tinker*. First and foremost, the custodial factor would allow a district to assert its duty to keep students safe from racial harassment and violence as justification for its policy without having to first show that racial violence had actually erupted on its campuses.

The erosion of *Tinker*'s disruption requirement in *Earls* would allow a district to act based on concerns over national racial conflict rather than waiting for that conflict to come home before taking action. In *Earls*, the Court permitted the district to take dramatic action to prevent the nationwide drug epidemic from sweeping onto its campuses. Similarly, racial prejudice and harassment can be classified as a nationwide epidemic. Racial tension is certainly more historically problematic in our public schools than recreational drug use, and racial harassment and violence threaten students' safety and school discipline. Thus if the district in *Earls* can point to the nationwide drug epidemic as a threat to its custodial protection of safety, order, and discipline, districts can also point to nationwide racial tension, harassment, and violence as threats to their custodial protection of safety, order, and discipline.[337]

There is an even closer connection between the district's educational mission and its prohibition of racist symbols in cases such as *Castorina* than there is between the district's educational mission and its drug testing policy in *Earls*. As pointed out by the circuit court in *Earls*, the drug testing policy there was both over- and under-inclusive because it did not target many students who would be endangered by drug use, but it did target many who did not engage in activities made especially dangerous by drug use. The dress-code policy, on the other hand, applied to all students during the school day, thus ensuring that racial harassment and violence is prevented at all times. This tightens the connection between educators' interest in preventing racial harassment and violence and the district's policy, showing that the district is acting in good faith in order to combat a problem.

Another aspect of the education mission factor is where the district in *Castorina* likely would again fail based on the evidence on which the majority opinion relied. If the principal only disciplined students wearing confederate symbols but not other allegedly racist symbols, then the facially neutral policy would be converted into a content-based restriction on speech. This would destroy the district's position of good faith and show that the district was acting not in response to valid educational and custodial concerns, but instead in furtherance of personal prejudices. In this respect, *Castorina* serves as a fresh reminder of the danger educators face when their actions appear content-based. Nothing in *Earls* or lower courts' pre-*Earls* expansions of *Tinker* implies that the wide deference educators enjoy to educate and protect students would stand when, without a custodial or educational justification, certain viewpoints are singled out for punishment.

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337. Some may argue that drugs are a nationwide problem where race is a regional problem. So, race would require a more localized showing of disruption to justify infringement of student rights. Just as some school districts have bigger drug problems than others, which may be somewhat regional in nature, however, some school districts have bigger race-relations problems than others. If the Court ignores fluctuations in regional issues in favor of allowing school districts to respond to national problems before these problems arrive in their areas in the drug context, then there is no principled reason for the Court not to allow other national problems, which may also have regional fluctuations in intensity to support restrictive policies.

3. *The Remaining Options for Student-Rights Advocates*

Tinker and *Castorina*, two pre-*Earls* decisions, would thus likely come out the same today.[338] Perhaps *Tinker* functioned only as an obligatory greeting: a comfortable quote with which to begin an opinion, long before *Earls*. After *Earls*, though, court watchers, parents, and educators must face the reality that we are at the bottom of the slippery slope.

While cathartic, cries that *Earls*, even if defensible on its facts, is problematic because of the even more obscene violations of student rights it may lead to in the future are passé and miss the point. The standard is as low as possible in constitutional jurisprudence[339] thus the judiciary will only reject the most patently offensive, content-based, or irrational of educator choices restricting student expression. Instead of lamenting the passing of students' federal constitutional rights, once protected by a watchful judiciary, student advocates are better served to affect policy decisions on the local level. Those decisions, rather than the decisions of the courts, will now provide the strongest shield against bad education policy.

Absent student-rights advocates' ability to prevent constitutionally offensive policies to come into being, the due process factor and the Equal Protection Clause, instead of the disruption inquiry, emerge as the checks on educators' wholesale restructuring of the relationship between students and the Bill of Rights.[340]

According to the due process factor, after *Earls*, students still must know what is expected of them and have the opportunity to explain why they have met those expectations.[341] In the First Amendment context, this factor protects the viability of courts' historical insistence that educators' codes of conduct pass muster under the vagueness and overbreadth doctrines.[342] While educators now possess more options as to what kind of conduct to require and prohibit, the codes of conduct that make these prescriptions must still give sufficient notice of what those prescriptions are. Further, educators must, under the due process factor, ensure some fit between the violation a student commits, the process the student is given, and the punishment meted out. This remaining requirement ensures that educators exercise discipline proportionally with the interests the violation infringes.

4. *The Religion Clauses and Student Rights on Campus*

Longstanding uncertainty over the role of religion in public education has spawned a score of disparate decisions on student rights.[343] The first sixteen words

338. If the district in *Castorina* had the sense to avoid a content-based application of its facially neutral policy, the outcome would be different.

339. When all that is required is a rational basis, no close fit between the ends and the means is required. All that is needed in the context of students' Fourth Amendment rights is good faith, not proof that the policy actually works. *See Earls II*, 242 F.3d 1264 (10th Cir. 2001).

340. *See infra* text and notes in Part V.C.1 and V.C.2.

341. *See infra* text and notes in Part V.C.1.

342. *See infra* text and notes in Part V.B.4.

343. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Westside

of the Bill of Rights, however, carry a built-in complexity to which the campus climate alone contributes only a part.[344] At present, no single philosophy unifies the interpretation of the Establishment and the Free Exercise clauses.[345] Most conspicuously, the Establishment Clause comes laden with an array of approaches, each competing for dominance with each new decision.[346] However, when taken

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Cmty. Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Edwards v. Aguillard, 482 U.S. 578 (1987); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Mueller v. Allen, 463 U.S. 388 (1983); Stone v. Graham, 449 U.S. 39 (1980); Lemon v. Kurtzman, 403 U.S. 602 (1971); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Epperson v. Arkansas, 393 U.S. 97 (1968); Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Everson v. Bd. of Educ., 330 U.S. 1 (1947); *see also* Joanne Kuhns, Note, Board of Education of Kiryas Joel Village School District v. Grumet: *The Supreme Court Shall Make No Law Defining an Establishment of Religion*, 22 PEPP. L. REV. 1599 (1995) ("[E]mphasizing the tremendous discontinuity in the Court's Establishment Clause doctrine."). For cases decided under the Free Exercise Clause, see Lambs' Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Wisconsin v. Yoder, 406 U.S. 205 (1972); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

344. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Court, to its credit, has acknowledged the difficulty of deciding case arising out of the Religion Clauses, but has not shirked from the challenge of weaving a doctrine from the text. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668-69 (1970) ("[Both clauses] are cast in absolute terms, and either of [them], if expanded to a logical extreme, would tend to clash with the other."). Commentary and scholarship share in the struggle to identify common ground between the Clauses. Recent commentary appears to reflect a sense of acquiescence to the possibility that the Clauses may be irreconcilable. *See also* Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 119, 121 (2000).

> Maybe we—academics, lawyers, and judges—who deal with these issues are not very bright people. More probably, this incoherence and doctrinal instability suggests that these constitutional clauses raise very difficult problems that cannot be easily resolved. Acknowledging the difficulty of the problems and the futility of searching for simple doctrinal formulas to solve them may be the necessary first step in determining the constitutional relationship between church and state.

Id.

345. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.1 (6th ed. 2000) ("[T]he Court has reviewed the claims under the different clauses on independent bases and has developed separate tests for determining whether a law violates either clause."); *see also* Michael W. McConnell, *Religious Participation In Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117 (1993) ("Any serious interpretation of the Religion Clauses must explain the relation between the two constituent parts, the Free Exercise Clause and the Establishment Clause, which are joined together in the single command."); H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU J. PUB. L. 203, 248 (1999) ("There is unprecedented confusion in the courts today regarding the interpretation and application of the religion clauses of the First Amendment to the Constitution. The First Amendment seems straightforward but has engendered considerable debate.").

346. *See* Douglas W. Kmiec, *Foreword: Oh God! Can I Say That in Public?*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 307, 309 (2003) ("[There are] some unique American confusions over the meaning of the religion clauses .... There is a profound difference between the separation of church and state and the constitutional freedom of religion. The difference was of immense importance to the founders ... the difference ... has become difficult to discern." (citation omitted)); Paul Earl Pongrace, III, *Justice Kennedy and the Establishment Clause: The Supreme Court Tries the Coercion Test*, 6 J. L. & PUB. POL'Y 217, 217-18 (1994) ("[T]he prevailing test to determine whether challenged laws or practices violate the Establishment Clause has been the three pronged inquiry established in Lemon

from the larger group of Religion Clause decisions, the education cases reflect a unique balancing of legitimate competing interests, all of which are explained with reference to the *Earls* restatement. The descriptions below suggest that, even if the doctrinal discontinuities persist within the religion clauses, the resolution of disputes on public school campuses will be more discernible due to the *Earls* formula.

a. The Free Exercise Clause

Of the two clauses, the Free Exercise Clause is most easily linked to the *Earls* restatement. In *Oregon Department of Human Resources v. Smith*,[347] which several states have superseded by statute, the Court reconfigures free exercise analysis in a manner that, while not crafted solely for the benefit of educators, is organized around the theme of judicial deference. The *Smith,* decision requires courts to accord a presumption of validity to government regulations that interfere with the free exercise of religion when the policy is "an otherwise valid law prohibiting conduct that the State is free to regulate."[348] In other words, after *Smith* one's religiously motivated conduct is not exempt from a religiously neutral, generally applicable regulation. Stated in an educational context, the Free Exercise Clause "does not relieve [a student] of the obligation to comply with a 'valid and neutral [school policy] of general applicability.'"[349]

Even the so-called "hybrid" student rights cases, which present stronger constitutional claims (and therein a more stringent standard of judicial review) by combining religiously motivated conduct with other constitutional protections under *Smith* rationale,[350] revert to the *Earls* restatement. For example, "hybrid" claims involving other communicative activity (freedom of speech or freedom of association) would trigger the education mission and custodial elements of the restatement, invoking the authority of educators to regulate expression incompatible with legitimate pedagogical goals. The same result would be reached by applying the public forum doctrine with the power of school officials to "impose reasonable

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v. Kurtzman [sic] . . . Justice O'Connor's test is the 'endorsement' approach . . . . Another approach offered to replace the Lemon test is the 'coercion test' which Justice Kennedy has proposed.").

347. 494 U.S. 872 (1990).

348. *Id.* at 878-79.

349. *Id.* at 879 (citations omitted). After *Smith*, the courts have consistently applied the rule to the advantage of school officials. *See* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998) (full-time attendance requirement); Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177 (6th Cir. 1993) (course requirements); Vines v. Bd. of Educ. of Zion Sch. Dist., No. 01-C7455, 2002 U.S. Dist. LEXIS 382 (N.D. Ill. Jan. 10, 2002) (dress code); Jesuit Coll. Preparatory Sch. v. Judy, 231 F. Supp. 2d 520 (N.D. Tex. 2002) (sports regulation).

350. *Smith* describes the 'hybrid" case as one which raises a free exercise claim "in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . . compelled expression . . . [or] freedom of association." *Smith*, 494 U.S. at 881-82 (citations omitted).

restrictions on the speech of students . . . [when the restrictions are] 'reasonably related to legitimate pedagogical concerns,'"[351] particularly in a closed forum.[352]

Littlefield v. Forney Independent School District[353] illustrates how post-*Smith* decisions complement the elements of the *Earls* restatement. In *Littlefield*, school officials implemented a dress code that "require[d] students to wear solid color polo-type shirts with collars, oxford-type shirts, or blouses with collars in one of four colors."[354] The uniform policy included an "opt-out" provision that allowed parents and students with "bona fide" religious or philosophical objections to apply for an exemption to the policy.[355] Violation of the dress policy triggered a graduating series of penalties leading up to expulsion in the worst instance.[356] The lower court findings established the belief of school officials that implementation of the program would yield positive results for the district.[357] Educators had also

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351. *Vines*, 2002 U.S. Dist. LEXIS 382, at *9 (citations omitted) (quoting Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1537-38 (7th Cir. 1996)).

352. As a comparative matter, school officials lose control over the school climate when the campus is deemed a limited public forum. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that school policy of excluding student club because of its religious activities violated the free speech rights of the students, and that the Establishment Clause was not a defense for such a policy because the campus was a designated public forum).

353. 268 F.3d 275 (5th Cir. 2001).

354. *Id.* at 280.

355. The opt-out provision was required by a state education-code provision that authorized school districts to implement dress codes. *See* TEX EDUC. CODE ANN. § 11.162 (Vernon 1995). The school officials in *Littlefield* required parents seeking an exemption to fill out a questionnaire designed to help determine the sincerity of the beliefs. *Littlefield*, 268 F.3d at 281.

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> [I]f a non-exempt student attends school in violation of this uniform policy, the following disciplinary steps will be taken in order: [1] the student will be placed immediately in isolation on the campus, either until the parent can bring appropriate clothing or for the entire day, whichever comes first; [2] the student will be sent to BAM [Behavioral Adjustment Modification] for a minimum of 3 days for the second infraction; [3] if the student still refuses to comply, the student will remain in BAM for a maximum of two weeks; [4] if the student still refuses to comply following the two week BAM assignment, the principal will pursue due process for AEP [Alternative Education Program] or expulsion.

Id. at 280-81.

357. "'[School officials] came to the conclusion that the implementation of a school uniform program would . . . have the following beneficial effects on the students and the system as a whole: improve student performance, instill self-confidence, foster self-esteem, increase attendance, decrease disciplinary referrals, and lower drop-out rates.'" *Id.* at 279-80 (quoting Littlefield v. Forney Indep. Sch. Dist., 108 F.Supp. 2d 681, 686 (N.D. Tex. 2000)). Other educators testified that the policy was implemented to:

> [P]romote school spirit and school values, and to promote decorum (and thereby the notion that school is a place of order and work), to promote respect for authority, to decrease socioeconomic tensions, to increase attendance, and to reduce drop out rates, . . . to increase student safety by reducing gang and drug related activity as well as the likelihood of students bringing weapons to school undetected and by allowing teachers to more readily distinguish Forney students from outsiders.

Id.

received positive feedback from parents about the policy prior to its implementation.[358]

On this record, both the lower and appellate courts in *Littlefield* upheld the constitutionality of the program against legal attacks that included free exercise of religion claims. Although all of the elements of the *Earls* formula were present in the facts of the case, most of the claims were resolved with reference to the custodial and the education mission factors. The courts deferred to school officials with respect to the broad free speech claims brought by the students. The policy was found to be viewpoint neutral and "rationally related to the state's interest in fostering the education of its children and furthering the legitimate goals of improving student safety, decreasing socioeconomic tensions, increasing attendance, and reducing drop-out rates."[359] Without any evidence of bad faith on the part of school officials, the courts fell back on the long tradition that "federal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools."[360] The courts continued their deference to educators in the face of a more substantial parental rights claim by observing that "[w]hile Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents' objection to a public school uniform policy. It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation."[361] In addition, the courts rejected the argument that the facts of the case presented a "hybrid" case under *Smith*.[362]

The more difficult claim in *Littlefield* was the free exercise argument that squarely raised the applicability of the *Smith* decision. The *Littlefield* courts declined to depart from the rational basis standard of review:

> [T]here is no evidence to suggest that the Forney school uniform policy is not facially neutral or generally applicable. The evidence clearly reveals that the policy was not enacted for the purpose of inhibiting any religious belief or practice. The only reference in the policy to religion is the opt-out provision, which obviously is an attempt to accommodate, not hinder, the religious beliefs of the

358. Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 280 (5th Cir. 2001).

359. *Id.* at 291.

360. *Id.* at 287.

361. *Id.* at 291.

362. On the "hybrid" analysis there is a split in the federal lower courts. The First, Fifth, Ninth, and Tenth Circuits apply greater rigor to a plaintiffs' hybrid claim before raising the standard of review to strict scrutiny. Plaintiffs are required to make "a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child." Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998). The Sixth Circuit refuses to apply the hybrid language of the *Smith* decision until the Supreme Court provides further guidance. *See* Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177 (6th Cir. 1993). However, at least one other federal court has allowed plaintiffs to merely allege the violation of several constitutional rights, link them to a free exercise claim, and invoke the strict scrutiny standard. *See* Hicks *ex rel.* Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999).

> students and their parents. Clearly then, the policy was not adopted "because of" Plaintiffs' beliefs, but "in spite of" them.[363]

Therefore, under *Smith*, only school regulations that have the purpose or the effect of targeting religious expression by students will run afoul of the Free Exercise and the Equal Protection Clauses, as laws that are neither "neutral" nor of "general applicability."[364] But these policies should fail under the *Earls* formula as well, falling outside the scope of the education mission or violating notions of due process. Courts would not defer to a policy that (in purpose or effect) isolated students, based on their religious beliefs, for special benefits or burdens.[365] Discrimination under the Equal Protection Clause, which today is understood to include not only immutable characteristics, but also the exercise of fundamental rights, is *per se* beyond the legitimacy of the education mission.[366] Exclusion of student groups based on religious targeting would be particularly pernicious.[367] The character of any intrusion on the expressive activities of the students so targeted would be deemed arbitrary, capricious, and wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. Therefore, student claims under the Free Exercise Clause would be upheld upon a showing of discrimination of the sort that clearly falls outside of the presumption of validity for school codes of conduct.[368]

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363. Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 704 (N.D. Tex. 2000).

364. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).

365. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307 n.21 (2000) ("Even if the plain language of the [school] policy were facially neutral, 'the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.'") (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in judgment)). This is also true of the Free Exercise Clause. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 534-35.

366. The presence of discrimination in an otherwise valid state education policy alters constitutional presumptions. *Compare* Norwood v. Harrison, 413 U.S. 455 (1973) (invalidating an otherwise valid state textbook assistance program when it was implemented in a manner that provided aid to a school discriminating on the basis of race) *with* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding state program of providing textbooks to students attending religious schools).

367. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 122 (2001) (Scalia, J., concurring) (finding school policy of excluding religious community groups from access to an otherwise open forum unconstitutional: "Lacking *any* legitimate reason for excluding the Club's speech from its forum—'because it's religious' will not do . . . [the educators] would seem to fail First Amendment scrutiny regardless of how [their] action is characterized. Even subject-matter limits must at least be 'reasonable in light of the purpose served by the forum.'") (citation omitted).

368. There are parallels between the *Earls* restatement and the *Smith* analysis. It is not clear in either area why such deference should be preferred to an approach that would require a more careful balancing of the interests. For its part, the Court, in decisions after *Smith*, continues to underscore the belief that "[t]he government's ability to enforce generally applicable [laws] of socially harmful conduct . . . 'cannot depend on measuring the effects of [the law] on a religious objector's spiritual development.'" Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)). This rationale has been slow to abate broad criticism of *Smith*. *See* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000) ("Justice Scalia's approach to the Religion Clauses is unduly restrictive and would leave little constitutional protection for either free exercise or the Establishment Clause."); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 570-75 (1991) ("[As a result of

b. The Establishment Clause

Much of Establishment Clause law is built around the resolution of cases challenging public school policies.[369] It is fair to say that the outcomes in these decisions underscore a suspicious judicial attitude about religion in public schools that is animated by a variety of approaches, ordinarily resolving doubts against the validity of questionable policies. As such, it is important after *Earls* to understand what the Establishment Clause requires of school officials and what it permits when policies collide with student rights. This is not as impenetrable a task as might appear at first glance.

Most attempts to analyze Establishment Clause doctrine are diverted by expressions of annoyance over the failure of the Court to organize its decisionmaking around a unifying theme. Surprisingly, it is often lamented that Establishment Clause analysis revolves around a loose inquiry on purpose and effect.[370] However, this criticism is tautological at best. All of constitutional law

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Smith,] [c]ourts are essentially removed from the business of protecting religion from the incidental burdens inflicted by general laws.").

369. The Establishment Clause has been used to address a wide range of public-school policies. Some disputes centered on state programs that provide aid or special benefits to religious schools or their students. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 643-44 (2002) (upholding state school voucher program); Bd. of Educ. v. Grumet, 512 U.S. 687, 703-04, 710 (1994) (invalidating a state policy that formed a separate school district composed entirely of members of one religious sect); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14 (1993) (upholding a government program that provided a public school sign language interpreter for a student attending a religious school); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489-90 (1986) (finding "no Constitutional barrier" to vocational scholarship program that provided tuition assistance to students attending religious school); Aguilar v. Felton, 473 U.S. 402, 412-14 (1985) (disallowing public school programs that provided remedial assistance to students attending religious schools), *overruled by* Agostini v. Felton, 521 U.S. 203, 209 (1997) (upholding remedial programs in public schools that provided services to students attending religious schools); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (invalidating a school district program which provided classes to only nonpublic school students at public expense); Mueller v. Allen, 463 U.S. 388, 402-04 (1983) (upholding a state tax policy of permitting deductions for private educational expenses); Bd. of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (upholding state program of providing textbooks to students attending religious schools); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (upholding state program that provided transportation services for students attending public and private schools).

Other challenges have focused on local school policies that serve to encourage or require acts of religious observance. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316-17 (2000) (invalidating school prayer over public address system before football games); Lee v. Weisman, 505 U.S. 577, 598-99 (1992) (invalidating school prayer at graduation ceremony); Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985) (invalidating moment of silence statute); Abbington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (invalidating Bible reading in school); Engel v. Vitale, 370 U.S. 421, 436 (1962) (invalidating school prayer).

A third category of decisions address the degree to which school officials may introduce religious materials and doctrine into the classroom. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 582 (1987) (invalidating state statute requiring the teaching of "creation science"); Stone v. Graham, 449 U.S. 39, 39-40 (1980) (invalidating practice of posting the Ten Commandments on the wall of each classroom); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (invalidating state statute forbidding the teaching of human evolution).

370. "A significant source of this confusion is the *Lemon* test's lack of a conceptual foundation . . . . If that issue was forthrightly addressed, the nature of the purpose and effects test to be applied could be intelligibly determined." Alan E. Brownstein, *Harmonizing the Heavenly and*

is shaped by this general assessment of purpose and effect in determining when a public policy has gone too far. The Court's reluctance to simplify Establishment Clause analysis, at least in the area of public education, underscores a reality about judicial review of educational policies that is formalized in the *Earls* restatement. The *Lemon* test, the endorsement test, the history exception, the neutrality principle, and the free-speech analysis all acknowledge, in varying degrees, the importance of uncovering bad faith in policymaking. In this regard, the public education cases provide a clearer set of guidelines on improper purposes and permissible effects than some would care to acknowledge.

At the core of the Establishment Clause analysis of public school policies is the mandate preventing school officials from using their authority and influence to give direct support to religion. Loosely phrased against the rationale of the *McCollum* decision, where the Court invalidated a policy of bringing sectarian teachers into public schools to provide religious instruction, this framework tries to determine whether classrooms are used for religious instruction and whether "the force of the public school [is] used to promote [religious] instruction" or worship.[371] Surrounding this core are the various subsidiary inquiries used to highlight specific concerns that emerge out of the vast array of educational policies.

A list of sorts emerges that effectively annotates judicial suspicions about religion in public schools in contexts where arbitrary, abusive, and bad faith policymaking is likely to be found. The *Earls* equation is forced to adjust to these concerns by placing the presumption of validity beyond the reach of educators who would otherwise wrap themselves and their policies in the doctrine of deference. Instead, a presumption of invalidity attaches. This presumption forces a stricter standard of judicial review that cancels deference to the education mission, imposes affirmative duties on school officials as temporary custodians of students, and makes more rigorous the due process and accountability factors.

At the top of the list are policies so directly in conflict with the Establishment Clause mandate that they are presumed to fall outside of legitimate educational interests. These per se "bad faith" cases involve policies that directly support religion by creating a preference for students because of their religion,[372] policies that introduce a preferred religious doctrine onto campus,[373] and policies that seek

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Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution, 51 OHIO ST. L.J. 89, 127 (1990).

371. *See* Zorach v. Clauson, 343 U.S. 306 (1952) ("Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also . . . helps to provide pupils for [sectarian groups'] religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.") (citing Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 207 n.1, 212 (1948)).

372. *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (considering policy creating a separate school district for members of one religion).

373. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (policy requiring the teaching of creationism as science); Stone v. Graham, 449 U.S. 39 (1980) (policy requiring the posting of the Ten Commandments in each classroom); Epperson v. Arkansas, 393 U.S. 97 (1968) (policy making it unlawful to teach evolution); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (policy bringing religious teacher onto campus to teach students).

to introduce all or part of a religious ceremony as official educational practice.[374] Courts should routinely apply strict judicial scrutiny to such policies based on the same rationale that is applied to policies that discriminate among students based on suspect classifications under the Equal Protection Clause. Such an approach effectively rebuts the good faith exception for educators under the *Earls* equation. Policies that advance religion on campus are beyond the legitimacy of the education mission, take impermissible advantage of the temporary custody of children, and deny due process by discriminating on the basis of viewpoint in a manner that undermines academic interests.[375]

Beneath the per se "bad faith" cases, the remaining decisions are clearly under the influence of the doctrine of deference. This category is the most revealing about the Establishment Clause and the shift in presumptions about the authority of educators in the absence of a finding of bad faith. Reinforced by notions of neutrality, these decisions defer to school officials when the policies, "'following neutral criteria and evenhanded policies, extend[] benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'"[376] These cases should more properly be called the "indirect-aid" decisions, in which evidence of improper motive or effect is essential to altering the presumption of validity. In its absence, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement

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374. Engel v. Vitale, 370 U.S. 421 (1962) (policy requiring prayer in school); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (policy allowing voluntary Bible reading); Wallace v. Jaffree, 472 U.S. 38 (1985) (policy promoting prayer through a moment of silence); Lee v. Weisman, 505 U.S. 577 (1922) (policy allowing clergy invocations and benedictions at graduation ceremonies); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (policy promoting student prayer at football games and other sponsored events); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state policy directly subsidizing sectarian schools' education costs).

375. Numerous opinions characterize the campus climate that results as one that is not suitable for children in the formative years of development. "[M]andatory attendance requirements [means] that state advancement of religion in a school would be particularly harshly felt by impressionable students." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 116 (2001). "[S]chool [officials] supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion." Lee v. Weisman, 505 U.S. 577, 593 (1992); "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

376. *Good News Club*, 533 U.S. at 114 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 643-44 (2002) (upholding state school voucher program); Agostini v. Felton, 521 U.S. 203, 209 (1997) (upholding remedial programs as applied to public schools that provided services to students attending religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14 (1993) (upholding a government program that provided a sign language interpreter for a student attending a religious school); Witters v. Wash. Dep't of Servs., 474 U.S. 481, 489-90 (1986) (finding "no Constitutional barrier" to vocational scholarship program that provided tuition assistance to students attending religious school); Mueller v. Allen, 463 U.S. 388, 402-04 (1983) (upholding a state tax policy of permitting deductions for private educational expenses); Bd. of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (upholding state program of providing textbooks to students attending religious schools); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (upholding state program that provided costs of transportation services for students attending public and private schools).

of benefits."[377] Acknowledgment of this shift is central to the rationale of the Court in *Agostini v. Felton,*[378] where a state aid program extending benefits to sectarian schools was upheld.[379] Justice O'Connor, writing for the majority, succinctly notes, "What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."[380]

Educators steer clear of violating the prohibition against establishment of religion when their policies, in purpose and effect, are neutral towards religion. Debates over the wisdom of education policies that give indirect aid to religion, like suspicionless drug testing, metal detectors, or the use of dogs to discover contraband, will remain just as controversial for school officials, but less so for the courts due to the shift in presumptions about the authority of educators absent a finding of bad faith. The neutrality principle casts a wider shadow over public school law than any of the competing doctrinal tests. When neutral criteria and evenhanded policies are in place, students tend to be on equal footing in their relationships with school officials, in access to facilities, and in access to other resources under a presumption of compatibility with the education mission. Therefore, the *Earls* restatement formalizes a brighter line that separates permissible policies from those enacted "with the purpose and perception of school endorsement [of religion]."[381]

C. *The Fourteenth Amendment Standard in Public Schools*

1. *Due Process of Law*

The Due Process Clause of the Fourteenth Amendment imposes substantive and procedural limits on educators. Coupled with the Equal Protection Clause, these rights provide what little rigor remains in judicial review of campus disciplinary policies in the wake of the *Earls* restatement. The law supporting each of these rights strikes a different chord toward a common objective: uncovering policies that are arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. The Due Process Clause combines both a procedural framework and a substantive guide. The procedural framework is based largely on the seminal case, *Goss v. Lopez.*[382]

377. *Zelman*, 536 U.S. at 652.
378. 521 U.S. 236 (1997).
379. *Id.* at 209.
380. *See Agostini*, 521 U.S. at 223.
381. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000).
382. 419 U.S. 565, 578-84 (1975).

a. Procedural Due Process

i. Short-Term Suspensions and Other Mild Disciplinary Actions

The current doctrinal approach in procedural due process cases is deferential with, at best, an uncertain promise of rigor. The *Lopez* rationale creates, in effect, a dynamic linkage between the process due a student facing disciplinary action and the nature of the deprivation at stake.[383] The so-called "minimal process" is due a student facing a suspension of ten days or less from any part of the curricular learning process.[384] Notice may be oral or written, at which time the student, if he denies the charges, has an "opportunity to present his side of the story."[385] At this stage the notice and hearing requirements are minimal, the informal discussion of the events serving to satisfy constitutional concerns.[386] It is also beyond debate that the Due Process Clause requires even less process when the nature of the deprivation affects non-curricular opportunities of the student facing disciplinary action.[387] It is, in fact, this thread—the presumed acceptance of school discipline that is less invasive of the property interest of the student—that is woven throughout the *Earls* outcome.[388]

The *Earls* restatement incorporates this expectation that school discipline cases will manifest some reasonable fit between the code-of-conduct violation, procedural fairness, and the actual deprivation the student experiences. The new model should

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383. *See id.* at 576.

384. *Id.* at 581.

385. *Id.*

386. "There need be no delay between the time notice is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." *Id.* at 582.

387. *See supra* discussion at Part III.

388. The Court stated:

> Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Indeed, a student may test positive for drugs twice and still be allowed to participate in extracurricular activities. After the first positive test, the school contacts the student's parent or guardian for a meeting. The student may continue to participate in the activity if within five days of the meeting the student shows proof of receiving drug counseling and submits to a second drug test in two weeks. For the second positive test, the student is suspended from participation in all extracurricular activities for 14 days, must complete four hours of substance abuse counseling, and must submit to monthly drug tests. Only after a third positive test will the student be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer.
>
> Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant.

Bd. of Educ. v. Earls, 536 U.S. 822, 833 (2002).

produce outcomes substantially similar to *Earls* as the degree of the intrusion on the student lessens. Short-term suspensions from the classroom (less than ten days), as well as longer suspensions from extracurricular activities, will trigger both presumptions of reasonableness and judicial deference in reviewing challenges to the imposition of discipline. Conversely, judicial review of school discipline cases will properly involve greater rigor when sanctions—directly or indirectly—harshly impact matriculation and core curricular activities.

Educators, for their part, have shown a willingness to conform disciplinary procedures to the *Lopez* guidelines as to short-term suspensions. If any incentives exist to use the occasion of the *Earls* restatement to gain more of an advantage in this area, they are hard to state realistically. In the larger arena, educators risk far more by appearing to give short shrift to due process. Risk of loss of goodwill by both courts and communities, along with the threat of advocacy and intervention, far outweigh any benefits. In other words, arbitrary and capricious disciplinary processes are the most direct path toward the erosion of the presumption of validity that now exists.

ii. Long-Term Suspensions and Expulsions

Long-term suspensions and expulsions raise a more challenging set of problems not easily resolved with reference to the *Earls* model. Further examination and refinement of what the law permits in this area is essential. After *Lopez*, the Court has given, at best, only general guidance on what process is due when a student is punished with a longer suspension or expulsion.[389] Lower courts have developed a "character of the intrusion" inquiry based upon the three-part analysis set forth in *Mathews v. Eldridge*.[390]

In *Mathews*, the Supreme Court explained that, in determining what process is due, a generally applicable test should be used, taking into account three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[391]

From this test a rule has evolved that due process requires something more than *Lopez*'s informal notice and conversation; rather, some sort of meaningful opportunity to be heard is required.[392]

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389. The Court in *Lopez* stated merely that "longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." 419 U.S. at 584.

390. 424 U.S. 319, 335 (1976).

391. *Id.*

392. *See* Remer v. Burlington Area Sch. Dist., 286 F.3d 1007, 1010-11 (7th Cir. 2002); Black Coalition v. Portland Sch. Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973); Betts v. Bd. of Educ., 466 F.2d 629, 633 (7th Cir. 1972); Linwood v. Bd. of Educ., 463 F.2d 763, 769-70 (7th Cir. 1972); Farrell

However, expectations are unsettled as to what standards educators should meet for expulsions and long-term suspensions. Courts loathe to impose strict adversarial rules on the administrative hearings, fearing that a "meaningful opportunity" will evolve into a judicial or a quasi-judicial proceeding. As a result, many current decisions reflect an extreme pro-educator view, favoring few requirements on educators beyond giving the student notice of the charges against him, and the time of the hearing as well as a full opportunity to be heard.[393] Ostensibly, this preserves a measure of autonomy and flexibility for educators to respond to the vast array of student misconduct.

A judicial presumption against the imposition of higher procedural standards for expulsion hearings is, however, nonsensical. It directly collides with the goal of preventing arbitrary, irrational, and malicious deprivations of property interests, once thought to be at the core of procedural due process philosophy. First, it is not clear in any of the cases disfavoring this approach that the imposition of a standard process for expulsions would compromise educational options in any way. As a practical matter, educators find that as the gravity of the offense increases, such cases are actually easier to process toward the desired end with little, if any, burden to educational interests.

Second, school officials bring flexibility to the imposition of discipline that further reduces the impact of an expulsion event on the education mission. For example, short-term suspensions often are imposed prior to any expulsion, giving educators an opportunity to further investigate and prepare for the disciplinary hearing without compromising campus life.

If, after *Earls*, the deferential procedural due process cases continue to reflect a belief that courts should respect the desire of educators for administrative convenience in disciplinary hearings, then, at a minimum, the burden of persuasion should be placed upon school officials. Under such an approach, school officials would need to establish in each case the nature of the burden on educational interests that might result from the imposition of higher procedural standards in expulsion hearings. Otherwise, *Earls* and its "character of intrusion" requirement are incompatible with *Mathews*, making the due process element of the *Earls* model harder to translate into a workable rule.

The concern with balancing fundamental fairness and administrative flexibility in cases involving expulsions and long-term suspensions is not lost on a growing body of lower courts that require schools to provide additional administratively convenient safeguards.[394] Moreover, the effect of lingering uncertainty casts doubt

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v. Joel, 437 F.2d 160, 163 (2d Cir. 1971); Brown v. Strickler, 422 F.2d 1000, 1002 (6th Cir. 1970); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961); *Wagner ex rel.* Wagner-Garay v. Fort Wayne Cmty. Schs, 255 F. Supp. 2d 915, 925 (N.D. Ind. 2003); S.W. v. Holbrook Pub. Sch., 221 F. Supp. 2d 222, 229 (D. Mass. 2002); Whiteside v. Kay, 446 F. Supp. 716, 719 (W.D. La. 1978).

393. *See, e.g.*, *Betts*, 466 F.2d at 633 (requiring only receipt of notice, an opportunity to prepare, and an "orderly hearing"); *see also Remer*, 286 F.3d at 1010-11 (requiring only notice of the charges, notice of the time of the hearing, and a full opportunity to be heard).

394. *See, e.g.*, Colquitt v. Rich Township High Sch. Dist. No. 227, 699 N.E.2d 1109, 1116-17 (Ill. App. Ct. 1998):

> [I]n expulsion proceedings, the private interest is commanding; the risk of error from the lack of adversarial testing of witnesses through cross-examination is substantial; and the countervailing governmental interest favoring the admission

in several practical areas: the admissibility of hearsay testimony, the right to counsel for the student (especially when the school board attorney appears for the educator), the ability of the student to discover and confront witnesses, and the question of what constitutes proper notice of the alleged misconduct.[395] Resolution of this aspect of fundamental fairness will be all the more essential with the continuing popularity of so-called zero-tolerance policies that often assume expedited imposition of punishment.[396]

2. *Substantive Due Process*

The four elements of the *Earls* restatement essentially formalize an almost piecemeal evolution already occurring in the courts toward deference to educational decisions about most student rights. As to case outcomes, this congruity is profoundly, perhaps unwittingly, present in the area of substantive due process. Student rights claims brought under substantive due process are extraordinarily difficult to maintain, for reasons having very little to do with the underlying philosophy behind the elements of the deference model. Institutional justifications abound: framers' intent, judicial restraint, federalism, and respect for state-based remedies. Each notion, in varying degree, influences how claims brought under substantive due process will be resolved.

At first glance, the empowerment given educators under the *Earls* model appears incompatible with the rationale in the substantive due process student rights cases. Currently, substantive due process comes with built-in impediments for students. Most claims raise issues concerning the accountability of educators for misconduct that results in harm to students. The cause-in-fact of such harm may be from a school official or from the actions of a third party, usually another student. In both cases, the student assertions have a common objective: the imposition of a duty on the educator to provide a safe environment for learning. Accompanying this is often a demand for compensation for injuries, in the form of money damages, for breach of the duty.[397] It is, in fact, because substantive due process cases "sound

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> of hearsay statements is comparatively outweighed . . . . [T]he expansive use of accusatory hearsay, as was done in the instant case, is inconsistent with and violative of due process.

Id. (citation omitted). Courts tend to require at least some access to witnesses. *See* Wayne v. Shadowen, 15 Fed. Appx. 271 (6th Cir. 2001); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Nichols *ex rel.* Nichols v. DeStefano, 70 P.3d 505 (Colo. Ct. App. 2002), *cert. granted*, DeStefano v. Nichols *ex rel.* Nichols, No. 02-SC667, 2003 Colo. LEXIS 465 (May 27, 2003); *In re* Expulsion of E.J.W., 632 N.W.2d 775 (Minn. Ct. App. 2001); Stone v. Prosser Consol. Sch. Dist. No. 116, 971 P.2d 125 (Wash. Ct. App. 1999).

395. *See* Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159, 174-75 (2002).

396. *See* Alicia C. Insley, Comment, *Suspending And Expelling Children From Educational Opportunity: Time To Reevaluate Zero Tolerance Policies*, 50 AM. U.L. REV. 1039 (2001).

397. Most student-rights claims filed in federal court are framed as constitutional torts under the federal civil rights statute, 42 U.S.C. § 1983 (2000), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

in tort" that courts have interpreted the due process clause narrowly, attempting to prevent a collision between the Fourteenth Amendment and state tort laws.[398]

Injury claims against public school officials brought under substantive due process must either be based on a deprivation of a specifically identified liberty or property interest protected under the notion of due process,[399] or be based upon gross misconduct by school officials that "shocks the conscience."[400] Most student rights claims fall under the latter category because of the short list of rights deemed fundamental under substantive due process. The list does not recognize a fundamental right to an education or a right to a safe learning environment as an interest that implicates life, liberty, or property.[401]

> to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

This hundred-year-old civil-rights provision allows a person to sue government officials and entities for violation of federal rights. "To state a valid claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." Resident Council of Allen Parkway Vill. v. United States Dep't of Hous. & Urban Dev., 980 F.2d 1043, 1050 (5th Cir. 1993) (citing West v. Atkins, 487 U.S. 42, 48 (1988)). A claim may also be brought against a local governmental agency or unit when the injury is alleged to have occurred as a result of an "official policy or custom." Monell v. N.Y. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978); *see also* Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (per curiam) (adopting a definition of "official policy"), *modified on other grounds on reh'g*, 739 F.2d 993 (5th Cir. 1984) (per curiam). Local governmental units may not be held liable under § 1983 under a theory of *respondeat superior*. *Monell*, 436 U.S. at 691; Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 452 (5th Cir. 1994), *cert. denied*, Lankford v. Doe, 513 U.S. 815 (1994).

398. In *Paul v. Davis*, the United States Supreme Court held that the Due Process Clause should not become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. 693, 701 (1976). Later, in *Collins v. City of Harker Heights*, the Court noted:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended . . . . It is important, therefore, to focus on the allegations in the complaint to determine how [a plaintiff] describes the constitutional right at stake and what the [government] allegedly did to deprive [plaintiff] of that right.

503 U.S. 115, 125 (1992).

399. *See* Pittsley v. Warish, 927 F.2d 3, 6 (1st Cir. 1991) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

400. Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin*, the Court held that the government could not use evidence obtained by pumping a defendant's stomach against his will because the government's conduct was so egregious that it "shocked the conscience" and offended even "hardened sensibilities." *Id.* at 172.

401. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198 (5th Cir. 1994). Of course, current substantive due process doctrine does protect citizens against intrusions by government into specific fundamental liberty interests. *See* Saenz v. Roe, 526 U.S. 489 (1999) (right to travel); Washington v. Glucksberg, 521 U.S. 702 (1997) (right to refuse medical treatment); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Roe v. Wade, 410 U.S. 113 (1973) (right to obtain abortion). These interests rarely, if ever, conflict with those of public educators, and case development is understandably scant. For decisions involving liberty interests and education policies, see Martinez *ex rel.* Martinez v. Bynum, 461 U.S. 321 (1983) (bona fide residency requirement colliding with the right to travel); Plyler v. Doe, 457 U.S. 202 (1982)

a. Student Rights Claims Based on Intentionally or Maliciously Inflicted Injuries

A provocative body of case law exists regarding what constitutes conscience-shocking behavior under substantive due process that will merit further scholarly and judicial rumination in the wake of *Earls*. The most advantageous branch of "shocks the conscience" decisions under substantive due process supports injury claims brought against school officials for intentionally and maliciously inflicted injuries. These substantive due process claims allege injuries inflicted by school officials as a result of conduct that is arbitrary, disproportionate, or unrelated to legitimate education interests.[402] These cases complement the *Earls* model quite well, under the theory that, as to such conduct, government is "abusing [its] power, or employing it as an instrument of oppression."[403]

The factors of the *Earls* restatement assume punishment of bad faith conduct and policies by school officials even while shifting the burden of production onto students to overcome presumptions of validity. However, judicial deference is designed to give way to proof of intentional or wrongheaded conduct that a "reasonable guardian and tutor [would not] undertake."[404] Bad faith conduct both

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(citizenship requirement runs afoul of the Equal Protection Clause). Procedural due process offers some level of protection against deprivation of the right of access to a public education as a property interest. The expulsion and suspension cases are built around the notion of notice and some kind of hearing as a way to protect students from arbitrary deprivations. *See generally supra* notes 392-94 and accompanying text.

402. *See, e.g.*, Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246 (2d Cir. 2001) (pattern of assaults by angry gym teacher); P.B. v. Koch, 96 F.3d 1298 (9th Cir. 1996) (hitting, grabbing, and pushing of several students by principal); Metzger *ex rel.* Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988) (nose broken by teacher); Dockery v. Barnett, 167 F. Supp. 2d 597 (S.D.N.Y. 2001) (pattern of physical violence against special-education students).

403. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (alteration in original) (quotation marks and citations omitted); *see also* Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 655 (10th Cir. 1987) (determining that corporal punishment of students may "shock the conscience" if it "caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power") (quoting Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980)). Usually, the courts devise a test to provide guidelines for evaluating the merit of substantive due process claims brought by students. For example, in corporal punishment cases, a substantive due process claim is analyzed under the following test: "1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4) whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm." *See, e.g.*, Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988).

404. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995). An excellent example is found in the judicial response to the enforcement of certain provisions of so-called "zero tolerance" policies. Courts have refused to treat such policies as unique and have refused to exempt them from the ordinary legal requirements in the relevant legal area. In *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), for example, the court invalidated the enforcement of a campus weapons policy as applied to a student who was expelled after a friend's knife was found in the glove compartment of the expelled student's car without his knowledge. After acknowledging "[t]he fact that we must defer to the Board's rational decisions in school discipline cases does not mean that we must, or should, rationalize away its irrational decisions," the court noted its reasons for refusing to do so. *Id.* at 579. The court invalidated the provision as applied to the expelled student:

undermines the presumption of reasonableness after *Earls* and falls sufficiently outside of the education mission as to be indefensible.[405]

b. Student Rights Claims Based on a Duty to Protect

The second branch of "shocks the conscience" substantive due process decisions is somewhat incongruent with *Earls*. The cases present the issue of a "duty to protect," with students seeking damages for injuries suffered as a result of the conduct of third parties rather than a school official. The typical claim is based on the notion that educators have, through deliberate indifference, breached an affirmative duty to maintain a safe campus. The elements of the *Earls* model are of little help in understanding this body of law; currently, courts uniformly dismiss such suits, applying a no-duty principle rooted in the traditional jurisprudence of governmental immunity from liability for the commission of torts. The longstanding rule has been that government owes no affirmative duty to act on behalf of any citizen.[406]

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of

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> That said, suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest. No student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence . . . . We would have thought this principle so obvious that it would go without saying . . . .
>
> . . . .
>
> We believe, however, that the Board's Zero Tolerance Policy would surely be irrational if it subjects to punishment students who did not knowingly or consciously possess a weapon. The hypothetical case involving the planted knife is but one illustration of why.

Id. at 575-76, 578.

405. Courts occasionally simplify the burden of production for students in liability suits for bad-faith conduct by educators by taking the student claim out of substantive due process and placing it in a more clearly defined category of law. For example, an assault by an educator on a student may be treated as a violation of the Fourth Amendment or the Fifth Amendment. Some courts have held that unreasonable liberty restrictions or corporal punishment could violate a public school student's Fourth Amendment rights. *See* Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988) ("A decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth Amendment."). This creates an advantage for the plaintiff by decreasing the possibility of an educator's successful qualified-immunity defense, a reality that often plagues substantive due process cases. Bad faith acts by educators may also be actionable under other constitutional provisions. The Equal Protection Clause also provides a remedy under § 1983 for injuries caused by bias on the basis of race, gender, or national origin.

406. *See* Riss v. City of New York, 240 N.E.2d 860, 861 (N.Y. 1968). *See generally* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 985 (1996) (discussing a "strong presumption against governmental liability in failure-to-profit cases").

> protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits.[407]

i. DeShaney *and Its Impact on Educators' Duty to Protect Before* Earls

Application of the no-duty rule has led to complete immunity from common-law tort claims brought against government for failure to provide police protection and other protective services to members of the public.[408] State tort-immunity statutes underscore and formalize this protection from suit. Significantly, substantive due process claims acknowledge this immunity as well, adding a constitutional dimension to the no-duty rule. This was the basis for the decision in the seminal case of *DeShaney v. Winnebago County Department of Social Services*.[409] In *DeShaney*, the Court announced that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[410]

Two exceptions to the no-duty rule exist. First, the Due Process Clause provides a substantive remedy when a special relationship exists between the government and a citizen. In such a case, the law imposes an affirmative duty to protect persons from harm. Second, an affirmative duty to protect is imposed when the government plays a role in creating the danger that poses a risk of harm. *DeShaney* controls application of both the special-relationship and the danger-creation exceptions.

In *DeShaney*, a father beat his four-year-old son so severely that he suffered permanent brain damage.[411] The beating took place after the Winnebago County Department of Social Services had been informed of ongoing child abuse.[412] The government agency had obtained a court order placing the son in the temporary custody of a hospital after previous beatings. Thereafter, the County Department of Social Services released the boy into his father's custody, choosing instead to make periodic home visits during which the agency ignored evidence of further beatings.[413] The Supreme Court rejected an injury claim brought against the agency on the boy's behalf under substantive due process. The Justices ruled that no special relationship existed because the boy did not sustain his injury while in state

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407. *Riss*, 240 N.E.2d at 860-61.

408. *See, e.g.*, Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995) (en banc) (applying immunity to police failure to make good on promise to arrest ex-boyfriend after threat made against plaintiff and children, the latter of whom where killed by the ex-boyfriend); Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993) (finding no duty to protect witness); Ketchum v. County of Alameda, 811 F.2d 1243 (9th Cir. 1987) (finding no duty to protect public after escape of an inmate from a prison). *See* WILLIAM L. PROSSER, LAW OF TORTS, § 131 (4th ed. 1971).

409. 489 U.S. 189, 197-98 (1989).

410. *Id.* at 196.

411. *Id.* at 193.

412. *Id.* at 192-93.

413. *Id.*

custody.[414] The Court did, however, define the scope of the special relationship for future cases:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause . . . . [It] is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[415]

DeShaney also spoke to the narrow application of the danger-creation exception, applying an act–omission dichotomy in its reasoning. The government was not liable for the boy's injuries because it did not play an active role in placing the boy in danger. "While the State may have been aware of the dangers that [the boy] faced in the free world," the Court opined, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[416]

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414. *Id.* at 200-01.

415. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (citations omitted).

416. *Id.* at 201. The danger-creation exception precedes *DeShaney*. Courts recognize it as a simple affirmance of the principle set forth in numerous rulings, holding that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); *see also* Wells v. Walker, 852 F.2d 368, 370-71 (8th Cir. 1988) (applying danger-creation exception where state transported released inmate to store, the owner of which he killed); Escamilla v. City of Santa Ana, 796 F.2d 266, 269-70 (9th Cir. 1986) (finding undercover officers did not deprive an individual killed in barroom shooting of due process where officers did not create risk of harm); Estate of Gilmore v. Buckley, 787 F.2d 714, 722 (1st Cir. 1986) (finding no due process violation when woman was killed by furloughed prisoner where state had no special relationship and did not affirmatively place the victim "in a position of danger"); Jones v. Phyfer, 761 F.2d 642, 646 (11th Cir. 1985) (finding no due process violation in a case where woman was raped by prisoner furloughed without warning when the state did not have a special relationship or affirmatively place in dangerous position). The two exceptions are exclusive in their operation, even though occasionally they blend at the margins. The state is liable when it affirmatively places a citizen in danger, even though the person injured may not have been in custody. *See, e.g.*, Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989) (considering a case where a victim was left in high-crime area after their automobile was impounded); White v. Rochford, 592 F.2d 381, 382 (7th Cir. 1979) (considering a case where children were left by the side of the road after the driver of a car was arrested); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) (considering a case where an auto collision was the proximate result of police leaving a drunk driver in control of car after arresting initial driver who was sober). *See generally* Joseph M. Pellicciotti, *"State-Created Danger," or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.A. § 1983*, 159 A.L.R. Fed. 37 (2000) (summarizing case law in the area of danger-creation exception in due process theory).

Lower courts after *DeShaney* consistently place both exceptions beyond the reach of student-injury claims. These decisions uniformly hold that no special relationship exists because the student is not in physical custody, nor is the compulsory education system like incarceration, institutionalization, or other restraints that trigger an affirmative duty under the Due Process Clause.[417] Courts refuse to apply the danger-creation exception under similar reasoning; liability does not arise when government stands by and does nothing in the face of danger. In the absence of school officials creating danger or increasing students' vulnerability to danger in some way, the failure to provide protection does not make the state liable for harms caused by third parties.[418]

ii. The Diminished Rationality of the No-Duty Rule Under the Earls *Restatement*

These duty-to-protect cases may not survive serious scrutiny after *Earls*.[419] It is not clear why school officials avoid a constitutional duty to protect children who attend public schools under compulsory attendance laws when the law imposes a similar duty on other government officials. The circumstances under which the duty to protect is said to arise provide a clue about its precarious status. In *DeShaney*, the Court identified the core scenario as one that is "sufficiently analogous to incarceration or institutionalization."[420] This logically includes the range of custodial activities by law enforcement officials as well as involuntary commitment and supervision by other government agencies.[421] Lower courts have had little

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417. *See* Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997); Doe v. Claiborne County, 103 F.3d 495, 510 (6th Cir. 1996); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); L.R. *ex rel.* D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc); Maldonado v. Josey, 975 F.2d 727, 731 (10th Cir. 1992); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

418. *See* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc).

419. Scholarly criticism since *DeShaney* has laid a solid foundation for its inapplicability to the school setting:

> [U]nless a school fails to follow disciplinary policies and procedures, has knowledge of specific dangerous propensities of a particular student has received reports of threats against a student or knows that a student has a weapon at school and does not investigate, then the school probably is not liable for student-upon-student violence.

Georgia A. Staton & Rachel Love, *Campus Violence: School District Liability and Students' Fourth Amendment Rights*, 37 ARIZ. ATTORNEY 14, 16-17 (2000); *see also* Stephen Faberman, Note, *The Lessons* of DeShaney: *Special Relationships, Schools & the Fifth Circuit*, 35 B.C.L. Rev. 97, 139 (1993) ("Were a court to find that an affirmative obligation to protect did exist, the school would be under a duty to protect the child from harm at the hands of both public and private actors."); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426 (1990) ("It is both astonishing and disheartening to witness the *DeShaney* court manipulate the original understanding of the fourteenth amendment due process clause by construing it in light of the history of the fifth amendment due process clause.").

420. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 n.9 (1989).

421. For custody cases, see City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Youngberg v. Romeo, 457 U.S. 307, 317 (1982); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976). For danger-creation cases, see Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993).

difficulty applying the two exceptions to protect children under circumstances similar to compulsory education, imposing a duty to protect children placed temporarily in foster homes.[422]

The educator–student relationship after *Vernonia* and *Earls* is configured for imposition of a duty on educators to act in conscious regard of known campus risks. The custodial factor underscores the applicability of the special-relationship exception. Temporary custody emerges as the foundation of the new model. Judicial deference is, in fact, based on the belief that school officials will act reasonably as to "children, who . . . have been committed to the temporary custody of the State as schoolmaster."[423] The application of the danger-creation exception serves as a corollary to this presumption: that educators will be mindful to avoid creating danger on campus or doing anything to render students any more vulnerable to dangers posed by other students and third-parties. The potential for the imposition of a duty to protect was not lost on the Court in *Vernonia*.

> [T]he nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," we have acknowledged that for many purposes "school authorities act *in loco parentis*," with the power and indeed the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school.[424]

Reconciliation of substantive due process doctrine to the *Earls* model is thus ripe for critical examination. An adjustment in judicial thinking about the authority of educators that includes affirmative duties would bring the education reform movement full circle, effectively creating a good faith exception for educators along with substantive liability that would act as a disincentive to timidity and inaction in campus problem solving.

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422. "[P]ublic officials may be held liable for damages when they place a child in a foster home knowing or having reason to know that the child is likely to suffer harm there." Camp v. Gregory, 67 F.3d 1286, 1293 (7th Cir. 1995); *see* K.H. v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990); Doe v. N.Y. City Dep't of Soc. Servs., 649 F.2d 134, 145 (2d Cir. 1981), *cert. denied*, Doe v. Dep't of Soc. Servs., 709 F.2d 782, 791 (2d Cir. 1983); Catholic Home Bureau v. Doe, 464 U.S. 864 (1983); Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (en banc); Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883, 892 (10th Cir. 1992); Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289, 292-93 (8th Cir. 1993).

423. Earls v. Bd. of Educ., 536 U.S. 822, 830 (2002).

424. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (alteration in original) (citations omitted).

Educators would not necessarily be at a disadvantage in such cases. Courts would uphold student claims upon a showing of deliberate indifference under a framework that is similar to that which applies to injury claims brought against school officials for intentional and maliciously inflicted injuries.[425] Congress has from time to time enacted laws that provide for student damages claims using a similar approach.[426] Educators found liable for breaching such a duty would be rare, and the facts that give rise to the liability would be compelling, consistent with the "shocks the conscience" jurisprudence under which "only the most egregious official conduct can be said to be arbitrary in the constitutional sense."[427] The *Earls* model, while presuming good faith by school officials, would subject decisionmaking to varying levels of rigor in search of unlawful policies that are arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.

3. Equal Protection of the Laws

Finally, the body of equal protection case law in the public school arena will survive the *Earls* restatement and satisfy its required linkage of the education mission, school policy, and the imposition of discipline.

a. Non-Suspect Classifications

Standard equal protection doctrine outside the realm of suspect classifications requires state actors to articulate legitimate reasons for treating identifiable groups of citizens differently from other citizens, and requires that the action against that group have some rational relation to the legitimate state interest.[428] This rational-

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425. For example, to make out a proper danger-creation claim, a student must demonstrate that (1) the school and the charged individual educators created the danger or increased the student's vulnerability to the danger in some way; (2) the student was a member of a limited and specifically definable group; (3) the school officials' conduct put the student at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking. *See* Christiansen v. City of Tulsa, 332 F.3d 1270, 1278-79 (10th Cir. 2003); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066-67 (6th Cir. 1998); Frances-Colon v. Ramirez, 107 F.3d 62, 64 (1st Cir. 1997); Wyke v. Polk County Sch. Bd., 129 F.3d 560, 567 (11th Cir. 1997); Pinder v. Johnson, 54 F.3d 1169, 1175-77 (4th Cir. 1995) (en banc); Uhlrig v. Harder, 64 F.3d 567, 572 n.7 (10th Cir. 1995); Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200-01 (5th Cir. 1994); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993); Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc); Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989).

426. *See, e.g.*, Education Amendments Act (Title IX) of 1972, 20 U.S.C. §§ 1681-1688 (1972). Title IX creates a cause of action for damages when school officials engage in the discriminatory conduct. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 72 (1992) ("Congress did not intend to limit the remedies available in a suit brought under Title IX."); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) ("We have held that money damages are available in such suits.") (citing *Franklin*, 503 U.S. at 72).

427. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)).

428. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447-48 (1985) (rejecting, as having no legitimate connection to its proffered safety and density justifications, the city's requirement that group homes for the mentally disabled, but not for fraternities, nursing homes, and

basis review can actually have teeth, as shown by the Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*[429] When the state's regulation of any identifiable group of citizens relies "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," the regulation fails to withstand rational-basis scrutiny.[430]

In the education context, this low threshold becomes important under the *Earls* restatement, with its remaining insistence that educators' policies, and their application of those policies, remain reasonably related to their educational and custodial interests. For example, in *Flores v. Morgan Hill Unified School District*,[431] decided after *Earls*, the Ninth Circuit refused qualified-immunity protection to educators who stood idle in the face of severe anti-gay harassment of several students in the district. The district's anti-harassment policy prohibited the harassment that the plaintiffs suffered; however, school administrators did not adequately or uniformly respond to the harassment, which included physical violence against allegedly gay students.[432]

To decide *Flores*, the court reaffirmed the Equal Protection Clause's prohibition of educators' intentional discrimination and deliberate indifference towards an identifiable group.[433] The court held that plaintiffs presented enough evidence that the administrators acted with deliberate indifference for a jury to find equal protection violations. For example, one administrator, informed by students that they were assaulted because they were allegedly gay, merely told the students to report the incident to the campus police officer.[434] The administrator did not conduct an independent investigation or even follow up on the report.[435] Another administrator disciplined only one of six students involved in an assault on another student at a bus stop.[436] Still another administrator repeatedly promised a student, whose locker was defaced and filled with pornography by harassing students, that she would change the student's locker.[437] Instead, she did not change the harassed student's locker and told her to stop bringing the pornographic material to her.[438]

After *Earls*, then, educators are still required to refrain from intentional discrimination towards, or deliberate indifference to, violations committed against identifiable groups of students. The *Flores* case demonstrates that educators must reasonably wield their extensive power to regulate and control students in their custody. In other words, if educators are going to use their authority to prohibit

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other group housing, obtain a special zoning permit).

429. *Id.*

430. *Id.* at 446.

431. 324 F.3d 1130 (9th Cir. 2003).

432. *See id.* at 1135.

433. The court held that the Equal Protection Clause is violated when it can be shown that educators "intentionally discriminated or acted with deliberate indifference." *Id.* (citing Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996) (citing Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999))). "'Deliberate indifference' is found if the school administrator 'respond[s] to known peer harassment in a manner that is . . . clearly unreasonable.'" *Id.* (quoting Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649 (1999)).

434. *Flores*, 324 F.3d at 1135.

435. *Id.*

436. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1136 (9th Cir. 2003).

437. *Id.*

438. *Id.*

behavior, such as student-to-student harassment on campus, they must ensure that the prohibition is equitably enforced without favor towards some students over others.[439]

The Equal Protection Clause also ensures that educators' actions against individual students are not wholly arbitrary and can withstand rational-basis review.[440] In *Village of Willowbrook v. Olech*,[441] the Court clarified the nature of government officials' duty to fairly administer the law: "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[442] Thus, the Equal Protection Clause prohibits "irrational and wholly arbitrary"[443] treatment of individuals, including safeguards for students in a post-*Earls* world, from educators' arbitrary enforcement of otherwise proper rules.

West v. Derby Unified School District No. 260,[444] described above in the First Amendment discussion, shows how a student can require that educators not only adopt proper policies but evenhandedly enforce them once adopted.[445] In *West*, the student's First Amendment challenge to the district's ban on possession of depictions of the Confederate flag passed constitutional muster as a policy matter, but still had to withstand an as-applied equal protection challenge.[446] Plaintiff alleged that, because other students were allowed to possess the Confederate flag in "history books and other approved materials," his discipline for drawing a confederate flag in math class constituted selective enforcement in violation of the Equal Protection Clause.[447]

The Tenth Circuit affirmed that educators' decisions on how to enforce school policy must be "rationally related to a legitimate government interest."[448] However, the court easily rejected plaintiff's claim because the district's "legitimate interest . . . to prevent potentially disruptive student conduct from interfering with

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439. The mixed blessings of educators' broad authority emerge here, as they do in the substantive due process context. Given the extent to which a school's code of conduct can now regulate student behavior, educators must recognize the commitment they must make on a daily basis to ensure that the policies are equitably and consistently applied to all students. To retain enough time and energy for educating students, educators and school boards are increasingly well-advised to prudently exercise their regulatory authority. This self-regulation may indeed ultimately replace the Bill of Rights as the most substantive restraint on educators' control over students as decisionmakers stop asking "Can we do this?" and begin focusing more on the question of "Should we do this?"

440. "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

441. *Id.*

442. *Id.* at 564-65 (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

443. *Id.* at 563.

444. 206 F.3d 1358 (10th Cir. 2000).

445. *See supra* notes 309-20 and accompanying text.

446. *See West*, 206 F.3d at 1365-66.

447. *Id.* at 1365.

448. *Id.*

the educational process" supported the district's anti-harassment policy and plaintiff's discipline thereunder.[449]

Similarly, the Seventh Circuit has affirmed the principle that the Equal Protection Clause is violated when a student is "intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment."[450] In *Smith v. Severn*,[451] a student alleged that his three day suspension for performing an unauthorized lip-sync in a school talent show was harsher punishment than that received by his fellow participants and thus, violated the Equal Protection Clause.[452] The court disagreed, finding a reasonable relationship between the school's discipline and plaintiff's actions because plaintiff, unlike his fellow pranksters, was disciplined for another improper lip-sync the year before, had ignored a teacher's express warning not to perform, was the only student to bring an unauthorized chain saw and boa constrictor to school that day, and was the only student to wield the chain saw in a "sexually explicit manner" and simulate the "mutilation of a woman with her child" during his performance.[453]

The extreme nature of the facts in *Smith* shows that even when there is no question that educators can properly prohibit the type of conduct engaged in by a particular student, their treatment of that student under the relevant school policy must bear a reasonable relationship to the violation and not be wholly arbitrary in light of the discipline handed down for other students' violation of the same policy.

Thus, *Earls* and traditional equal protection doctrine fit together. Under both, educators' policies must be founded in legitimate custodial or educational interests and enforced consistent with those interests. Neither model permits a disconnect between the reason a policy is in place and the manner in which it is enforced. Any such disconnect simultaneously removes both the protection the custodial and educational interests supply and the rational basis for the educator's action.

b. Suspect Classifications

Turning to equal protection cases involving suspect classifications, no good reason emerges after *Earls* as to why the Court's traditional levels of scrutiny of policies that discriminate against suspect classifications should not hold true in the future. The strict scrutiny of race-based classifications and the mid-tier scrutiny of gender-based classifications enjoy firmer footing in the Court's jurisprudence than students' First and Fourth Amendment rights ever have.

Through its two *Brown v. Board of Education* decisions, the Court ensured strong protection of public school students against invidious race-based

449. *Id.* Recall that the district instituted its policy in response to documented racial conflict on its campuses. *Id.* at 1362.

450. Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 712 (7th Cir. 2002) (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)); *see* Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997).

451. 129 F.3d 419 (7th Cir. 1997).

452. *Id.* at 421-24.

453. *Id.* at 429.

segregation.[454] *Brown* stands in contrast to public school students' first attempts to protect their First and Fourth Amendment rights before the Court, which resulted in the lowering of their fundamental rights under those amendments on school grounds.[455] The Court's willingness to dilute students' First and Fourth Amendment rights because their full protection might disrupt the educational process[456] was nowhere to be found in *Brown*, through which the Court deliberately mandated perhaps the most severe and extended period of disruption of the educational process that this country has ever experienced. The *Brown* tradition continued in *United States v. Virginia*,[457] where the Court again refused to elevate educators' claims that gender integration of the all-male Virginia Military Institute would disrupt the educational process and alter the school's education mission over women's equal protection rights. The Court, then, has not found that students' equal protection rights are naturally diluted at school, as their First and Fourth Amendment rights are.

The difference in the way the Court treats discrimination against suspect classifications under the Equal Protection Clause and infringement of students' First and Fourth Amendment rights points to a tolerance for disruption in the educational process for the sake of allowing all students to participate in it in the first place. Classifications based on race and gender can bar a student's participation in educational opportunities available to other students through no choice of the classified student. Restrictions of expressive and privacy rights, on the other hand, control how students experience the education system and control the choices they make within it.

Thus, continued protection of students' rights against invidious race and gender discrimination ensures that all students enjoy the same educational opportunities. Once all students are allowed into the educational process, educators' broad custodial and educational interests kick in to ensure that the discretionary behavior students engage in once inside the school community does not conflict with the educators' dual goals of educating students and keeping them safe.

VI. CONCLUSION

In its simplest form, the structure of American constitutional law assumes that public policy will yield to individual rights. The notion of a contextual exemption for public educators is both extraordinary and ironic. It is not clear, at first glance, nor under sustained observation, why this judicial reluctance to interfere with

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454. *See* 347 U.S. 483 (1954); 349 U.S. 294 (1955). This result was squarely reaffirmed in the Court's most recent look at race-based classifications in the affirmative action context. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

455. *See* New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1984) (rejecting the higher probable cause standard for educator searches of students in favor of the lower reasonable suspicion standard); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 514 (1969) (requiring an actual or legitimate fear of disruption of the educational process to trump students' First Amendment rights).

456. *T.L.O.*, 469 U.S. at 340 (reasoning that the educational setting requires greater flexibility in educators' ability to search students than is required by police in other law-enforcement settings); *Tinker*, 393 U.S. at 506-08 (reasoning that educators' need to control school environment justifies lower First Amendment standard).

457. *See* 518 U.S. 515 (1996).

legitimate educational needs should generate such a broad departure from constitutional norms. It is, in fact, the breadth of the model that is its most significant feature, begging the question whether judicial accommodation of local educational preferences requires such a level of deference that ordinarily corresponds to a compelling governmental interest.

Future discussions of student rights must take on a different tone both as to substance and procedure. The *Earls* model of deference effectively limits the judicial function to watching for evidence of anomaly and abuse of authority, yielding to even the imprecise implementation of a good faith attempt to match a policy to a campus problem. Justice Harlan's belief, in his *Tinker* dissent, that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions,"[458] is now the theme for a new constitutional model that "cast[s] upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concern . . . ."[459] The disjunction between student rights and limits on authority in the context of public primary and secondary schools has taken the good faith presumption about as far as it can go.

Any attempt to reconcile the extraordinariness of the model must start with the tenets of federalism. There has always been much implied in the observation made by the United States Supreme Court in *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments."[460] Along with the commitment to equality of access comes an invitation to a type of comity through judicial restraint: states should be left alone to pursue approaches to "problem[s] for which there [are] no perfect solution[s]."[461] This inference was formalized in the decision of *San Antonio School District v. Rodriguez*, where the Court ruled that the federal interest, if any, in public education was not of a constitutional dimension because a state-provided education was not a fundamental right under federal law.[462] The absence of judicial intervention in public school policymaking, then, has a logical, if not a doctrinal foundation.

Beyond systemic justifications for such deference is the historic reality that judges have not experienced much of a sense of accomplishment in past attempts at micromanaging public-school policies. In the face of resistance,[463] or outright

458. *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting).

459. *Id.*

460. Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).

461. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

462. It is no surprise that many of the limitations on educators' authority in education law under the Constitution are organized around the prohibitions against suspect classifications under the Equal Protection Clause or arbitrary decisionmaking under the Due Process Clause. *See supra* text and notes in Parts V.C.1.-V.C.3.

463. *See, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (ordering the federal courts to issue orders to state officials to reopen public schools); Harrison v. Day, 106 S.E.2d 636 (Va. 1959) (allowing state and local appropriations for tuition grants to students who did not want to attend racially diverse schools). *See generally* Lino Graglia, *The Busing Disaster*, 2 KAN. J.L. & PUB. POL'Y 13 (1992) (discussing the aftermath of *Brown*).

avoidance,[464] or hostility from those for whose benefit an order was issued,[465] there now appears to be a shared sense among judges to avoid assuming "a level of wisdom superior to that of legislators, scholars, and educational authorities in [the] States."[466] It is, however, a decidedly optimistic aversion, linked to the expectation that the "democracy in a microcosm,"[467] within which public education operates, will produce workable safeguards at the margins, leaving the courts to invalidate educational policies wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning.

The sway that results from the judicial aversion to a more active role in balancing competing interests in public schools should attract a body of research and commentary commensurate to its effects on students and communities. At the outset, one should discover a set of ironies. First, educators have not demanded this level of deference; rather, most state and local policymakers have simply sought clarity in the rules of what the Constitution permits and requires of campus codes of conduct. The clarity inherent in the restatement carries a message of empowerment anchored in the presumption that educators will act reasonably to protect "children . . . who . . . have been committed to the temporary custody of the State as schoolmaster."[468] At the same time, practical ambiguities will surface as to the nature of any limitations on such broad authority. On the surface, educators are empowered to act in ways previously thought unreasonable provided the policies are implemented in good faith in furtherance of the education mission. Reinforcing the legitimacy of the policy is a sense of fairness as to any sanctions actually imposed and validated through a modicum of community support. Discrimination through selective enforcement of an otherwise valid policy appears to be the most tangible constitutional limit on the new model.

The second irony is related to the first. This level of empowerment is not necessarily good news for educators. A new era of policymaking should emerge, particularly as to the wider range of provisions in codes of conduct that are far less

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464. Remember, after the decision in *Brown* some state policymakers simply closed the public schools in response to the order to desegregate. *See generally* Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L.J. 327, 330 (1997) ("Whites closed the public schools for four years, established a private white academy, diverted property tax revenues from public schools, and resisted even the most innocuous court efforts to educate whites and blacks together.").

465. *See* LeRoy Pernell, *Suffering the Children: 35 Years of Suspension, Expulsion, and Beatings—The Price of Desegregation*, 7 HARV. BLACKLETTER L.J. 119, 125 (1990) (describing the "forgotten consequence[s] of desegregation"); Joshua Kimerling, *Black Male Academies: Re-examining the Strategy of Integration*, 42 BUFF. L. REV. 829, 831-32 (1994) ("No longer is it universally agreed upon that integration and equal education are synonymous. Increasing scrutiny has been directed at the *Brown* strategy, which has 'treat[ed] desegregation litigation as a matter solely of racial balance and assum[ed] quality education [would] come with that balance.' Due to this reexamination, non-integration approaches . . . are gaining increasing acceptance.") (alteration in original); *see also* Raneta J. Lawson, *The Child Seated Next To Me: The Continuing Quest For Equal Educational Opportunity*, 16 T. MARSHALL L. REV. 35, 37 (1990) (arguing that racial balancing may be "distracting to the effective education of children").

466. *Rodriguez*, 411 U.S. at 55.

467. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting).

468. Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995)).

intrusive than the student drug testing upheld in the *Earls* decision. With it should follow a change in both expectations and demands as to the quality and effectiveness of the decisionmaking by public educators. Increased awareness of what the law permits should influence an end to policymaking through timidity and inaction. In its place, a duty impetus ought to prompt school officials to make frequent, accurate assessments of current campus conditions leading to timely responses. It will be important to measure the relationship between these forces for change and any shifts that become apparent in public education policymaking. Educators often exhibit a hate–love relationship with the substantive limits that the law imposes on their policies. The ambiguity about student rights previously made available a misleading justification for policy failures that may have been attributable more to unwillingness than to inability to implement a new policy. Under the *Earls* model a different type of accountability will pierce the veil of poor leadership; ineffective or timid campus management will more easily be exposed and confronted. This may be the most important practical contribution of the accountability factor, giving rise to a more fluid, participatory process over both the substance and the procedure of campus policymaking by those who are affected the most.

Additional demands for safer campuses are likely to come from the legislature and judiciary. One can easily see room within the doctrine of deference for a correlative, affirmative duty to provide a safe campus as a way to make educators accountable for their deliberate indifference to conditions that are known or foreseeable with due diligence. The duty may arise in the form of state education codes guaranteeing students a safe campus,[469] or through court decisions that acknowledge the custodial relationship between students and educators in a manner that triggers an affirmative duty to protect as a matter of state and federal law. State courts and legislatures may adjust state tort immunity statutes to the same effect.

If the restatement heralds an era organized around the expectation of safer, more effective campuses, then the true moral of the emerging model of authority may be that educators should guard against the feeling that they are now above the law. The new model contains the raw materials for education reform of a different sort; a surer, more justifiable sanction against acts that are arbitrary, policies implemented under the guise of good faith, disinterest in the condition of the learning environment, and policies implemented by school officials with the knowledge that more, rather than less, harm may be done to the students who are committed to their care.

469. For example, art. I, § 28, subdivision (c) of the California Constitution contains a "Right to Safe Schools" provision: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." This provision provides the basis for future legislative imposition of an affirmative duty. *But cf.* Clausing v. San Francisco Unified Sch. Dist., 221 Cal. App. 3d 1224, 1236 (1990) (ruling that the provision "standing alone is not self-executing and does not create a private cause of action for damages).