NOTES

NOTICING CRISIS

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This Note contends that the Supreme Court has systematically used the doctrine of judicial notice to portray the nation's schools as rife with crisis. Ignoring the record before it, the Court has relied on the "crisis" it has manufactured to curtail students' Fourth Amendment rights. Critiquing this practice and likening it to the Court's invocation of "emergency" in the context of war and natural disaster, this Note concludes that the Court ought to be held more accountable for the "facts" that it judicially notices.

> There is enormous inertia—a tyranny of the status quo—in private and especially governmental arrangements. Only a crisis—actual or *perceived*—produces real change.
>
> —Milton Friedman[1]

INTRODUCTION

Judges have long acknowledged that law must change.[2] The difficulty comes in determining "[h]ow," to quote Justice Benjamin Cardozo, "to develop and extend . . . the law when changing combinations of events make development or extension needful."[3] Focusing on student privacy cases, this Note argues that the Supreme Court has manufactured the appearance of crisis to shift constitutional doctrine.

Since noting in *Tinker v. Des Moines Independent Community School District* that students do not "shed their constitutional rights . . . at the schoolhouse gate," the Court has repeatedly chipped

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[1] MILTON FRIEDMAN, CAPITALISM AND FREEDOM, at viii–ix (1982) (emphasis added).

[2] *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 354–55 (1921) (Brandeis, J., dissenting) ("For conditions change; and, furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures.").

[3] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 56 (1924).

away at these rights.[4] It has done so by judicially noticing crisis. The Court takes judicial notice of legislative facts suggesting that the nation's schools are in crisis—facts that the Court then marshals to create the impression of crisis in the *particular* case at bar. Where on-the-record or adjudicative facts fail to comport with this picture of crisis, the Court finesses or disregards them. The Court, in other words, deploys judicial notice to manufacture generalized "threats to the public welfare as an excuse for needlessly abrogating rights."[5]

Judges take judicial notice of facts they deem relevant to a particular case. They may take judicial notice of "adjudicative facts"—the specific, on-the-record facts of the case[6]—only when such "facts are outside the area of reasonable controversy."[7] But no such sine qua non governs "legislative facts," which are facts extrinsic to the particular case that "inform the tribunal's legislative judgment."[8] The scope of legislative facts is practically unlimited: Judges may invoke any legislative fact they choose, unconstrained by rules of evidence or procedure.[9] It is this flexibility that has enabled the Court to invoke crisis.[10]

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4 393 U.S. 503, 506 (1969).

5 Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (Murphy, J., concurring) (holding unconstitutional Governor of Hawaii's declaration of martial law in immediate wake of Pearl Harbor). This Note's focus on student privacy cases should not be taken to suggest that judicially noticed crisis is limited to the Fourth Amendment context. For instance, the recent *Morse v. Frederick* case held that the First Amendment does not bar schools from suppressing student speech that advocates illegal drug use. 551 U.S. 393, 397 (2007). Chief Justice John Roberts's majority opinion relied extensively on crisis to uphold, unusually if not singularly, a "viewpoint-based restriction in a public forum." Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 18 (2008). Chief Justice Roberts justified this exceptional holding by invoking generalized data about the dangers of drug use without citing specific evidence of drug use by the student-plaintiff or within the school itself. *Morse*, 551 U.S. at 407. Nor has the Court limited its use of judicially noticed crisis to schools. The Court in *Dennis v. United States*, discussed *infra* notes 55–58 and accompanying text, judicially noticed the American Communist Party's "substantial danger to national security," despite—or rather because of—the near-total absence of on-the-record facts in support of this danger. 341 U.S. 494, 547 (1951). And, as Part II of this Note shows, the Court used judicial notice in the World War II Japanese American cases to compensate for a judicial record lacking in evidence that the evacuation and internment of Japanese Americans was a matter of military necessity.

6 Adjudicative facts, in other words, are "facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent." KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 15.03, at 296 (1972).

7 FED. R. EVID. 201 advisory committee's note.

8 Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) ("[W]henever a tribunal is engaged in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record.").

9 While the Eighth Circuit Court of Appeals has noted that "[l]egislative facts are established truths . . . [that] apply universally," United States v. Gould, 536 F.2d 216, 220 (8th Cir. 1976), there is no hard and fast rule that binds judges to take notice of only uncontroversial data. Courts may and often do take judicial notice of social scientific data, news, and other facts that cannot be said to have risen to the level of "established truths."

Crisis, conceptually, is the use of general possibility to trump particular fact. At heart, it is a jurisprudence of uncertainty, justifying the abridgment of individual rights and the coincident expansion of executive power in the name of prudence: exemplifying "what may be" rather than "what is."[11] Noticed crisis is comparable to the better-known "state of emergency" or "state of exception,"[12] and poses the same fundamental threat to liberty: the normalization of the exceptional. But crisis is worse in two ways. First, the Court participates in creating the crisis. Rather than passively deferring to one party's contention that there is an emergency, the Court both *authors* the threat by judicially noticing—and thereby effectively manufacturing—the crisis, and *delimits* the derogation of rights ensuing therefrom by ruling based on a factual scenario that it has distorted through judicially noticed facts.[13] Second, because crisis is centered not around

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Id. This practice is generally sanctioned by legal experts. *See, e.g.*, FED. R. EVID. 201 advisory committee's note ("[T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. . . . He may make an independent search for persuasive data or rest content with what he has or what the parties present." (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270–71 (1944))).

[10] Legislative facts do serve an important purpose, one highlighted by Kenneth Culp Davis: "Every case decided by any court or other tribunal involves the use of hundreds or thousands of extra-record facts. To find facts exclusively on the basis of a record of evidence is intrinsically impossible." Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 69, 73 (Roscoe Pound et al. eds., 1964). Davis continues: "[J]udge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly . . . within the domain of the indisputable.'" *Id.* at 82 (quoting Morgan, *supra* note 9, at 293). He is correct as a general matter, but, with this overly expansive approach to judicial notice of legislative facts, judges may strike down "legislation largely because [they] considered incontrovertible truth what many informed people believed demonstrably false." Morgan, *supra* note 9, at 293. In addition, because the line between adjudicative and legislative facts is blurry at best, *Gould*, 536 F.2d at 219, the Court can dodge the evidentiary strictures that govern its use of adjudicative facts. While judges ought to be arbiters of law, it is questionable whether they should be arbiters of fact, unless the fact in question is all but undeniable.

[11] The most infamous example of potential harm justifying expanded executive power—and contracted individual rights—is the "ticking time bomb" scenario. *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 142–63 (2002) (defending use of torture in cases where threat to public safety is great enough, such as nuclear bomb in Times Square).

[12] George Schwab explained Schmitt's definitions of "state of exception" as occuring within predetermined legal guidelines and "state of emergency" as occuring outside of existing legal frameworks. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 1 n.1 (George Schwab trans., 1985).

[13] One might protest that the Court does not "author" the crisis but rather takes notice of exaggerated facts or claims of crisis that the parties present in the merits briefs. This is true—the Justices rarely create the crisis out of whole cloth, and lawyers who are aware of the Court's receptiveness play to crisis in their petitions to the Court. But however much

discrete, time-limited incidents—such as wars or natural disasters—but instead around amorphous social threats—such as crime waves or drugs in schools—it is more likely that the perceived threat and the social and legal reaction thereto will become, or be made, permanent.[14]

This Note aims to be descriptive and diagnostic—to lay bare the mechanics of and the theory underlying judicially noticed crisis.[15] The normative claims follow from the diagnosis: The Court should be held more accountable for the "facts" of which it takes notice. That the Constitution may be "adapted to the various *crises* of human affairs"[16] cannot mean that the Court may fabricate crises to mold the Constitution to its liking. To flesh out this normative stance, the Note examines the sobering example of the World War II Japanese American cases.[17] In those cases, the Court took extensive judicial notice of legislative facts bespeaking an emergency, which it failed to corroborate by scrutinizing the record. The result was disastrous.[18] Lest the Court continue to use judicial notice to reach its preferred policy outcomes, its members ought to "do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone."[19]

This Note proceeds in three parts. Part I traces the genesis of noticed crisis in the school context to Justice Hugo Black's dissent in *Tinker*. Part II explores the normative implications of noticed crisis through discussion of the Japanese American internment cases and examines the theoretical implications of noticed crisis by comparing it to emergency measures. Part III looks at how the Court has applied the crisis doctrine in landmark Fourth Amendment cases in the school context—*New Jersey v. T.L.O.*,[20] *Vernonia School District 47J v. Acton*,[21] and *Board of Education of Independent School District No.*

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the Court borrows from briefs, it is ultimately responsible for authoring the crisis *into law*. By virtue of its power to define legally significant facts, the Court ensures that unsupported claims to crisis live on as legal truth.

14 *See infra* text accompanying notes 113–19 (discussing risk that judicially authored crises may make expansive emergency powers permanent, especially when crises concern unconventional war waged against things or conditions).

15 Throughout the Note, I use "judicially noticed crisis" and "noticed crisis" interchangeably.

16 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

17 *See infra* note 67 (defining "Japanese American cases").

18 *See* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 492 (1945) ("The opinions of the Supreme Court in the Japanese American cases . . . may encourage devastating and unforeseen social and political conflicts.").

19 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting).

20 469 U.S. 325 (1985).

21 515 U.S. 646 (1995).

92 v. Earls[22]—and concludes by discussing crisis in the context of the Court's most recent student privacy case, *Safford Unified School District No. 1 v. Redding*.[23]

I
Birth of Judicially Noticed Crisis in *Tinker*

This Part traces the genesis of judicially noticed crisis in schools to Justice Hugo Black's dissent in *Tinker v. Des Moines Independent Community School District*.[24] Despite the *Tinker* majority's attempt to constrain courts' use of facts extrinsic to the record, Justice Black's dissent invoked a rash of legislative facts—general sociological and journalistic evidence extrinsic to the case—in an attempt to overcome the record. Though he did not prevail in *Tinker*, Justice Black's invocation of crisis succeeded in shaping the Supreme Court's jurisprudence in subsequent students' rights cases.

A. The Tinker *Standard*

In *Tinker*, the Supreme Court considered the constitutionality of a school regulation that prohibited students from protesting the Vietnam War and mourning the dead by wearing black armbands on school grounds.[25] Three students who violated the regulation were suspended and told not to return to school until they removed the armbands.[26] The students filed a complaint against Des Moines Independent Community School District, claiming a violation of their First Amendment rights. They lost in district court and on appeal to the Eighth Circuit Court of Appeals.[27] But in 1969, five years after the incident, the Supreme Court ruled in their favor.[28]

The Supreme Court's opinion, written by Justice Abe Fortas, contains the famed dictum that students do not "shed their constitutional rights . . . at the schoolhouse gate."[29] But this is not *Tinker*'s holding—nor its most important declaration, given that *In re Gault* had articulated a similar proposition two years prior.[30] More importantly, Justice

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[22] 536 U.S. 822 (2002).

[23] 129 S. Ct. 2633 (2009).

[24] 393 U.S. 503, 515–26 (1969) (Black, J., dissenting).

[25] *Id.* at 504; Appendix at 7–10, 14, *Tinker*, 393 U.S. 503 (No. 21), 1968 WL 94382, at *7–10, *14.

[26] *Tinker*, 393 U.S. at 504.

[27] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967).

[28] *Tinker*, 393 U.S. 503.

[29] *Id.* at 506.

[30] 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

Fortas's opinion held that school authorities may encroach on students' constitutional rights only upon a "showing that the students' activities would materially and substantially disrupt the work and discipline of the school."[31] To borrow Frank Michelman's words, *Tinker* disallowed "bare declarations of professional judgment" as adequate to outweigh students' constitutional freedoms.[32] *Tinker*'s intention, in other words, was to constrain the Court's deference to school officials' unsupported claims of need.[33]

The material and substantial disruption test, as articulated in *Tinker*,[34] was indisputably evidentiary. While not barring school authorities from predicting future harm, it demanded that predictions be grounded in specific factual evidence, not merely in experience, instinct, or belief. "[T]he record [must] demonstrate . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[35] To pass constitutional muster, school officials' predictions had to be those of the clinician, not the clairvoyant.

The School District justified its regulation by invoking the specter of disorder and disruption in the classroom. Director of Secondary Education E. Raymond Peterson testified at trial that the prohibition was "based on a general school policy against anything that was a disturbing situation within the school."[36] However, the Supreme Court noted that there were no facts on the record intimating, ex ante, that the black armbands were likely to cause disorder or disruption.[37] Regardless, the matter should have been settled once the students flouted the regulation and wore the armbands to school because it was then clear that the armbands were nondisruptive.[38] Yet the district

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[31] *Tinker*, 393 U.S. at 513.

[32] Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 8 (1986).

[33] *See* James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 929 (1979) ("When the Bill of Rights is properly invoked, [courts] cannot leave all educational matters to the educators, all correctional matters to the correction people, all mental health matters to the psychiatrists.").

[34] *Tinker*, 393 U.S. at 513.

[35] *Id.* at 514.

[36] Appendix, *supra* note 25 at 45–46, 1968 WL 94382, at *46.

[37] *Tinker*, 393 U.S. at 514. At the very least, the armbands were no more likely to cause disruption than the political buttons, Nazi memorabilia, or religious icons that were regularly sported by students and tacitly permitted by the school. Appendix, *supra* note 25, at 44, 50–51, 1968 WL 94382, at *44, *50–51.

[38] *Tinker*, 393 U.S. at 514. Most comments were no more than friendly warnings that the students were violating school policy. John Tinker suffered nothing more than some "uncomplimentary remarks." Appendix, *supra* note 25, at 22, 26, 1968 WL 94382, at *22, *26. The only threats leveled at Christopher Eckhardt were by school officials, one of whom asked him if he was "looking for a busted nose" and another who warned him that

court found for the School District, holding that the regulation was "reasonable in order to prevent disturbance of school discipline."[39]

To support its ruling, the district court took judicial notice that the Vietnam War was acutely controversial and that, "against [this] background," the School District's prior restraint on student speech was not unreasonable:

> The Viet Nam war . . . has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. . . . Both individuals supporting the war and those opposing it were quite vocal in expressing their views.[40]

The School District's brief urged the Supreme Court to follow the district court's lead and to notice the "background" that informed the School District's regulation.[41] "There have," the School District noted, "been enough other similar demonstrations in schools . . . that the Court can take judicial notice of the fact that the consequences could have been serious if the demonstration had not been stopped almost before it got started."[42] The School District, in other words, argued that broader social unrest outside the school necessarily implied the danger of social unrest within.

Justice Fortas rejected the district court's assertion that background social facts—widespread debate about the Vietnam War, antiwar protest marches on the capital, draft card burnings—justified the school authorities' prohibition on nondisruptive speech.[43] Absent on-the-record evidence of actual or likely disruption, the invocation of background social circumstances revealed nothing more than the school authorities' "urgent wish to avoid . . . controversy."[44] The Supreme Court declared that cases could not be decided on the basis of legislative facts alone, no matter how compelling.

"colleges didn't accept demonstrators or protesters." *Id.* at 32, 1968 WL 94382, at *32. Critically, no teacher testified that the armbands disrupted class. Rather, testimony revealed that school officials were less concerned about disorder than about "bad publicity." *Id.* at 31–32, 34, 1968 WL 94382, at *32, *34.

39 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966).

40 *Id.* at 972–73.

41 Brief for Respondents at 33, *Tinker*, 393 U.S. 503 (No. 21).

42 *Id.*

43 *Tinker*, 393 U.S. at 510.

44 *Id.*

The *Tinker* standard was directed at school authorities *and* at judges. It sought to restrain the discretion of both by shifting the basis of decision making from hypothetical possibility to provable fact—from subjective to objective interpretation.[45] Henceforth, any encroachment on students' constitutional rights would require a showing, drawn from the judicial record, of material and substantial disruption. Nothing else would suffice, for nothing else would adequately curb what had been near-total discretion within the classroom.

B. Black's Dissent

While the Court has never followed the majority's holding in *Tinker*—that one can abridge a student's First Amendment rights only with evidence of material and substantial disruption—Justice Hugo Black's strategic invocation of crisis in his dissent has had a very long life. Since *Tinker*, the Court has repeatedly and systematically taken notice of crisis to undercut students' privacy rights. That Justice Black's dissent was more influential than Justice Fortas's oft-quoted opinion is not, in itself, a novel claim. Erwin Chemerinsky, for example, has documented how Justice Black's "judicial deference model very much . . . replaced [Justice Fortas's] speech protective model" in the First Amendment context.[46] Justice Black's dissent, however, did much more than create a model of judicial deference; it created a vehicle for the imposition of judicial will.

Ignoring the majority's admonition to the lower courts, Justice Black took judicial notice of national upheaval over the Vietnam War. Conceding that the "armband students did not actually 'disrupt' the classwork,"[47] he nevertheless held that "disputes over the wisdom of the Vietnam [W]ar have disrupted and divided this country as few other issues ever have[,] [and] [o]f course students . . . cannot concentrate on lesser issues when black armbands are being ostentatiously

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[45] The move from subjective to objective criteria has been seen by some as vital to the protection of individual liberty. *See* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1–2 (2004) (applauding Lord Atkin's dissent in Liversidge v. Anderson, [1942] A.C. 206 (H.L.) 227–28 (appeal taken from Eng.) (U.K.), which insisted that any abridgment of civil liberties in time of crisis must be based on objective evidence rather than subjective belief).

[46] Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 535 (1999).

[47] *Tinker*, 393 U.S. at 518 (Black, J., dissenting). Indeed, that the armbands did not disrupt class was critical to the Court's decision. A few days after oral arguments, the Justices met in conference to discuss *Tinker*. JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *Tinker v. Des Moines* and the 1960s, at 165 (1997) (alteration in original). Justice Thurgood Marshall's notes from the conference described Justice Byron White's position that the School District had "not done a good job [of demonstrating that the armbands were disruptive] and therefore" should lose. *Id.* at 167.

displayed."[48] Justice Black marshaled broad sociological and journalistic evidence extrinsic to the record[49] to overcome the record itself. Justice Black, in other words, used legislative facts to create the appearance of adjudicative facts.

For instance, Justice Black invoked "all too familiar" television and newspaper reports of student unrest to shore up his prediction that the majority's holding would "compel[ ] the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[50] He wrote:

> [S]ome of the country's greatest problems are crimes committed by the youth, too many of school age. . . . [G]roups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. [Students are] engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. . . . This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.[51]

But Justice Black's depiction of student violence had little, if anything, to do with *Tinker*'s facts or holding. Not a single item on Justice Black's list of horribles could have survived the majority's material and substantial disruption test. "[B]reak-ins, sit-ins, lie-ins, . . . smash-ins[,] . . . rioting, property seizures, . . . destruction, [and] picket[ing]" bear no resemblance to silently sporting black armbands in protest and mourning.[52]

Here we see noticed crisis at work. Justice Black sought to exploit popular fears of student protests in order to trump the factual record. No one disputes that some students in the 1960s engaged in violent acts of protest.[53] Indeed, these violent acts enabled Justice Black's maneuver, given that strategic hyperbole can function only if the possibilities invoked are plausible and resonate with popular fears and frustrations.[54] The trouble was the absence of any indication of real or potential disorder on the record in *Tinker*.

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[48] *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

[49] *Id.* at 524–25.

[50] *Id.* at 525–26.

[51] *Id.* at 524–25.

[52] *Id*. at 525.

[53] The events of 1960, to quote the historian Eric Hobsbawm, ushered in "the decade of student unrest *par excellence*." ERIC HOBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991, at 301 (Vintage Books 1996) (1994).

[54] And this they did. In the wake of *Tinker*, letters in support of Justice Black's dissent flooded in from across the country. JOHNSON, *supra* note 47, at 486–87. Some writers decried American children's "lack of respect for authority," *id.* at 488 (quoting Letter from

Justice Black's move may seem inconsistent given that he was, on the whole, opposed to the Court's use of unsupported legislative facts in other contexts. In *Dennis v. United States*, the Court upheld the conviction of American Communist Party leader Eugene Dennis for speech advocating the overthrow of the United States government.[55] Undeterred by the marked lack of evidence that Dennis's speech would produce (or was intended to produce) a clear and present danger of harm, the Court took notice that the Party posed a threat to national security.[56] Justice Black penned a stirring dissent remarkably similar to Justice Fortas's majority opinion in *Tinker*. "Undoubtedly," he wrote, "a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation however, the benefits derived from free expression were worth the risk."[57] Denouncing the Court's submission to popular sentiment, Justice Black continued:

> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[58]

Indeed, in 1960, nine years before *Tinker*, Justice Black revealed the normative underpinnings of his pre-*Tinker* jurisprudence. Delivering the inaugural James Madison Lecture at New York University School of Law, Justice Black critiqued the view that the Bill of Rights enumerates "mere admonitions" and not "absolute" prohibitions.[59] The "mere admonitions" approach, he noted, is necessarily characterized by judicial balancing—the state as against the individual.[60] The "great danger" of such balancing is that "in times of emergency and

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Jesse E. Walters et al. to Hugo L. Black, J. (Feb. 27, 1969)), others the "sweeping plague of permissiveness" that had sired this youthful defiance, *id.* (quoting Letter from Jack R. Baldwin to Hugo L. Black, J. (Feb. 24, 1969)).

55 341 U.S. 494 (1951).

56 *Id.* at 510–11, 547. Justice William Douglas, dissenting, took the Court to task for this: "This case was argued as if [the Communist Party were teaching the methods of terror]. The argument imported much seditious conduct into the record. That is easy and . . . has popular appeal . . . . But the fact is that no such evidence was introduced at . . . trial." *Id.* at 581 (Douglas, J., dissenting). Justice Douglas went on to say that even with respect to the charge of conspiracy to advocate the overthrow of government by force and violence, the evidence was inadequate: "So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach . . . Marxist-Leninist doctrine . . . ." *Id.* at 582.

57 *Id.* at 580 (Black, J., dissenting).

58 *Id.* at 581.

59 Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 871, 876–79 (1960).

60 *Id.* at 866, 875–88.

stress" the state will necessarily prevail.[61] The judge who adopts this approach is compelled to hold that individual constitutional rights must defer to the greater good. Justice Black was very clear that he could not "accept this approach to the Bill of Rights."[62]

Judicially noticed crisis is a technique; it is not an ideology. In certain situations, Justice Black could and did accept the abrogation of constitutional freedoms in the face of crisis. Justice Black penned the majority opinion in *Korematsu v. United States*, the infamous case upholding an executive order authorizing the World War II evacuation and internment of Japanese Americans.[63] Constitutionalizing the military order, Black conceded the power of crisis to shift bedrock principles of constitutional law: "[T]he need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."[64] The holdings in *Korematsu* and its companion cases, *Yasui v. United States*[65] and *Hirabayashi v. United States*,[66] were possible only because the Court took judicial notice of hypothetical dangers, which it used to justify the curtailment of individual rights.

II
Crisis, Emergency, and Worst-Case Scenarios

This Part first addresses the dangers implicit in the Court's unfettered use of judicial notice through an examination of the Japanese American cases.[67] It then lays out a crisis's theoretical structure by comparing it to an emergency, which is likewise characterized by

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[61] *Id.* at 878.

[62] *Id.* at 866–67. Justice Black steadfastly held to this principle again one decade later in *New York Times v. United States*, a case in which the government sought the suppression of the Pentagon Papers. 403 U.S. 713 (1971). Appeals to security or any other "broad, vague generality," he wrote, "should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Id.* at 719.

[63] 323 U.S. 214 (1944).

[64] *Id.* at 223–24.

[65] 320 U.S. 115 (1943).

[66] 320 U.S. 81 (1943).

[67] By Japanese American cases, I am referring to *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Yasui v. United States*, 320 U.S. 115 (1943), which upheld curfews for Japanese Americans, as well as *Korematsu v. United States*, 323 U.S. 214 (1944), which held constitutional the internment of Japanese Americans. I do not discuss *Ex parte Endo*, in which the Court prohibited the government from detaining "concededly loyal" citizens, even those of Japanese ancestry. 323 U.S. 283, 297 (1944). I am also aware that the cases I cite are merely the most famous prosecutions of Japanese Americans during World War II. *See* Eric L. Muller, *The Japanese American Cases—A Bigger Disaster Than We Realized*, 49 Howard L.J. 417, 419 (2006) (explaining other categories of World War II Japanese American cases).

claims of necessity to justify heightened state power and, consequently, reduced individual rights.

A. The Japanese American Cases

The Japanese American cases best illustrate the practical dangers of noticed crisis. The Court justified its holdings in *Hirabayashi*,[68] *Korematsu*,[69] and *Yasui*[70] by deferring to the government's specious claims of "military necessity,"[71] all the while ignoring evidence that racism motivated the exclusion and internment of Japanese Americans.[72] Though widely criticized as judicial failures—as cases in which the Court "trade[d] rights for results"[73]—legal scholars have paid far less attention to *how* the spurious facts entered the record. It was through judicial notice. The Japanese American cases reveal the Court's willingness to admit unverified, suspect evidence and to treat it as dispositive.

In the 1980s, decades after the Supreme Court upheld the convictions of Fred Korematsu and Gordon Hirabayashi[74] for violating Executive Order 9066—which authorized the removal of Japanese Americans from the West Coast[75]—district courts vacated their convictions per a writ of coram nobis.[76] Courts limit coram nobis writs to instances in which facts, had they been known, clearly would have

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[68] 320 U.S. 81 (1943).

[69] 323 U.S. 214 (1944).

[70] 320 U.S. 115 (1943).

[71] *Hirabayashi*, 320 U.S. at 86 (quoting Public Proclamation No. 1, 7 Fed. Reg. 2320, 2321 (Mar. 26, 1942)).

[72] "The evacuation was impelled by military necessity," begins Lieutenant General John L. DeWitt's statement in the government's final report on the evacuation and internment of Japanese Americans. U.S. DEP'T OF WAR, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii (1943). Later in the same document, the government revealed its true motive: "The Japanese race," declared General DeWitt, "is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized', the racial strains are undiluted." *Id.* at 34; *see also* ALICE YANG MURRAY, HISTORICAL MEMORIES OF THE JAPANESE AMERICAN INTERNMENT AND STRUGGLE FOR REDRESS 15–51 (2008) (presenting history of government's military necessity argument).

[73] Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 839.

[74] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

[75] Exec. Order No. 9066, 3 C.F.R. 1092, 1093 (1942).

[76] Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). Before a district court could decide his case, Minoru Yasui died, rendering the case moot. His family petitioned the Supreme Court for review, but the Court unsympathetically declined. Yasui v. United States, 484 U.S. 103 (1987); *see also* PETER IRONS, JUSTICE DELAYED 29–30 (1989).

compelled a different result.[77] In this instance, the petitioners based the writs on recently unearthed documents that revealed that the "government [had] knowingly withheld information from the courts when they were considering the critical question of military necessity."[78] Notably, the unsupported military necessity argument had entered into the record (and into law) through the government's strategic use of judicial notice and the Court's general "reluctan[ce] to question the factual basis underlying asserted security threats."[79]

The government launched a deliberate and systematic "judicial notice campaign"[80] in litigating *Hirabayashi*, *Korematsu*, and *Yasui*. Beginning with *United States v. Yasui*,[81] government lawyers—unable to proffer testimonial or documentary evidence that Japanese Americans had engaged in or were likely to engage in sabotage or espionage—urged the district court to take judicial notice that they posed a threat to national security.[82] The government's litigation strategy remained the same in all three cases at the Ninth Circuit Court of Appeals[83] and again on appeal to the Supreme Court.[84] Justice Department lawyer Nanette Dembitz was instructed by her superiors to "draft a memorandum, in preparation for the *Yasui* and *Korematsu* [Supreme Court] trials, supporting the introduction of evidence under the concept of 'judicial notice' rather than through the testimony of government witnesses subject to cross-examination."[85] This was necessary because the government's argument, trumpeting the danger posed by the 112,000 Japanese Americans on the West Coast, was—*by its own admission*—not based on "any comprehensive

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[77] *See* 39 AM. JUR. 2D *Habeas Corpus* § 194 (2010) (describing purposes of, and conditions for granting, writ of coram nobis).

[78] *Korematsu*, 584 F. Supp. at 1417; *see also Hirabayashi*, 828 F.2d 591, 597 (1987) (stating Hirabayashi's request for "unusual" writ of coram nobis to vacate convictions alleging that new material had come to light).

[79] William J. Brennan, Jr., *The Quest To Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, *in* 18 ISRAEL YEARBOOK ON HUMAN RIGHTS 11, 12 (Yoram Dinstein & Mala Tabory eds., 1988).

[80] PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 178 (1983) (internal quotations omitted).

[81] 48 F. Supp. 40 (D. Or. 1942).

[82] IRONS, *supra* note 80, at 137–40.

[83] *Id.* at 175–79.

[84] *Id.* at 195–202, 216–17, 225–26.

[85] *Id.* at 196 (italics added). In 1945, Dembitz published a lengthy article in the *Columbia Law Review* charging that the Court's easy acceptance of military judgment in *Korematsu*, "does not represent a fulfillment of judicial responsibility." Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175, 239 (1945).

account of the facts which gave rise to the exclusion and curfew measures" because the "record [did] not contain" these facts.[86]

Undeterred, the government urged the Court to consider the "general military, political, economic, and social conditions under which the challenged orders were issued," which it understood to be "historical facts . . . of the type that are traditionally susceptible of judicial notice."[87] The government, in other words, asked the Court to accept as uncontested and incontestable the government's own unsubstantiated assertions. In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians (CWRIC) to review the facts surrounding Executive Order 9066, the military's decision to evacuate and intern Japanese Americans, and to recommend appropriate remedies.[88] The 1982 CWRIC Report was scathing: "[E]veryone knew that the Japanese were likely to be disloyal, so all the government needed to show was that opinion's respectability and near-universality. No particular facts were needed. And no particular facts of probative force were supplied."[89]

The Supreme Court's quick acceptance of the government's "facts" in these cases was central to the ultimate success of the coram nobis petitions. As the Ninth Circuit observed in vacating Gordon Hirabayashi's conviction, the government "made extensive use of judicial notice in order to convey its position that those responsible for the orders reasonably regarded an emergency situation to exist"[90] and "the Supreme Court obviously accepted the government's view of the facts as the government presented them."[91] Again, the CWRIC Report did not mince words: "[T]he Court chose not to review the factual basis for military decision in wartime, accepting without close scrutiny the Government's representation that exclusion and evacuation were military necessity."[92]

The facts of the Japanese American cases were, technically speaking, closer to emergency than to crisis[93] because President

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[86] Brief for the United States at 10, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870).

[87] *Id.* at 11.

[88] COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1 (1982) [hereinafter CWRIC REPORT].

[89] *Id.* at 91.

[90] Hirabayashi v. United States, 828 F.2d 591, 596 (9th Cir. 1987).

[91] *Id.* at 601.

[92] CWRIC REPORT, *supra* note 88, at 50.

[93] Emergencies are discrete, time-limited, and generally extraordinary events such as wars and natural disasters. Crises, on the other hand, are amorphous social conditions that elude precise temporal delimitation, such as crime waves. *See infra* text accompanying notes 99–121 (explaining differences between emergencies and crises and Court's role in each).

Roosevelt's Executive Order 9066[94] in combination with Public Law 503[95]—the congressionally ratified enforcement bill—was practically a declaration of emergency.[96] But the emergency nature of the internment should still give us pause. If unfettered judicial notice is dangerous during officially declared emergencies, when the Court merely capitulates to the political branches, it is all the more dangerous during crisis, when the Court alone decides that there is a "state of exception"[97]—decides, in other words, that the "challenge [is] so severe that [the state] must violate its own principles to save itself."[98]

B. Crisis and Emergency

Emergencies are best understood as "exceptional circumstances: wars, invasion, rebellions, and so forth" that call for the temporary suspension of, or exception to, the constitutional order to make room for executive "decisional efficiency."[99] Often the legislature grants extraordinary power to the President;[100] sometimes—as when President Lincoln suspended habeas corpus in 1861—the President simply assumes such power.[101] As early as 1827, the Court recognized that the "authority to decide whether [an] exigency has arisen[ ] belongs exclusively to the President, and that his decision is conclusive upon all other persons."[102] Since then, Congress has placed statutory

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94 Exec. Order No. 9066, 3 C.F.R. 1092 (1942).

95 Pub. L. No. 77-503, 56 Stat. 173 (1942) (codified at 18 U.S.C. § 97a (1946)) (repealed 1976).

96 IRONS, *supra* note 80, at 64–68.

97 *See supra* note 12 (explaining "state of emergency" concept).

98 Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1004–23 (2004).

99 John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 220 (2004). While the very term "emergency" evokes a sense of totality, Kim Lane Scheppele points out that emergencies—and emergency powers—need not be, and often are not, existential. Most, indeed, are "small emergencies"—snow emergencies, export control regulations, sanctions, and the like. Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 836, 841–44 (2006) [hereinafter Scheppele, *Small Emergencies*]; *see also* Kim Lane Scheppele, *Legal and Extralegal Emergencies*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 173–78 (Keith E. Wittington et al. eds., 2008) (discussing emergencies, their implications, and strategies used to construct them).

100 *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (authorizing President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001").

101 *See* Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUP. CT. HIST. 215, 219–22 (2003) (describing President Lincoln's unilateral decision to suspend habeas corpus during Civil War).

102 Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827).

limits on the President, most importantly through the 1976 National Emergencies Act.[103] While this Act "provid[es] for the possibility of a congressional override," it still grants the President the power to define and declare the emergency.[104]

During emergencies, the Supreme Court reviews the constitutionality of exercises of executive power only after a party has suffered a derogation of rights pursuant to an officially declared emergency.[105] Most who have studied how the Court rules on emergency-related cases have criticized the Court for its timid deference to the political branches.[106] The Court is apt to accept uncritically that an emergency exists[107] or to defer to the political branches because its members are "no more immune from panic than the rest of us."[108]

In contrast, crises are judicially authored. The Court may take its cue from the political branches—as in the "war on crime" or "war on drugs"—but there is no official declaration of emergency or concomitant suspension of law. Crisis, to turn Alexander Bickel's passive virtues[109] on their head, is very much an "active vice" of the Court: The Court does not defer to an official emergency but rather judicially declares that a crisis exists.

Noticed crisis should not be confused with judicial deference. When the Court defers, it yields to the executive or the legislature, often citing the expertise and accountability of these branches.[110] Def-

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103 Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended in scattered sections of 50 U.S.C. (2006)).

104 Scheppele, *Small Emergencies*, *supra* note 99, at 845–46.

105 Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 18 (2005).

106 *See, e.g.*, Brennan, *supra* note 79, at 17 ("The trouble [is] . . . [judicial] reluctance and inability to question, during the period of panic, asserted wartime dangers with which the nation and the judiciary are unfamiliar."); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1034–37 (2003) ("Notwithstanding statements about the courts' role in safeguarding human rights and civil liberties precisely when those rights and liberties are most at risk, when faced with national crises, the judiciary tends to 'go[ ] to war.'" (quoting Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 59 (1980) (alteration in original))); Anthony Lewis, Marbury v. Madison *v. Ashcroft*, N.Y. TIMES, Feb. 24, 2003, at A17 ("In time of war, actual or threatened, [courts] have repeatedly abdicated their function, bowing to claims of national security."). *But see* Stone, *supra* note 101, at 243 (arguing that it "does not give the Court its due" to say that it yields to every executive claim of military need).

107 Brennan, *supra* note 79, at 11.

108 Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1072 (2004).

109 Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41–42 (1961) (arguing that Court ought to take advantage of jurisdictional doctrines—standing, case and controversy, ripeness, political question—to avoid adjudicating where possible).

110 *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–16 (discussing, and rejecting, courts' frequent reference to agency

erence is, broadly conceived, a form of judicial restraint—restraint that is wholly lacking when the Court judicially notices crisis. Rather than passively defer to the record—or even to the executive—the Court actively manipulates facts to reach predetermined ends. From a debatable array of assertions, the Court declares that a condition exists and then forges law based on that condition—an act that is less interpretation than it is creation. For once the Court has judicially noticed that, for example, America's schools are in crisis, social anxieties have been normalized as legal fact.

"[N]othing," writes Mark Tushnet, "rules out the possibility that the courts themselves could declare that an emergency exists, . . . [rendering courts] the sovereign in [Carl] Schmitt's sense."[111] Through crisis, the Court assumes the mantle of sovereignty, which makes Tushnet's possibility a reality and severely threatens individual liberties. As Alexander Hamilton noted, "the general liberty of the people can never be endangered [by the judiciary] . . . so long as [it] remains truly distinct from both the legislative and executive."[112] When the Court deploys crisis, distinctions among the branches dissolve.

Judicially authored crisis presents yet another danger. Critics of the expansion of executive power during the "war on terror" have invoked the specter of permanent emergency.[113] The war against international terrorism is "more akin to the metaphorical (and indefinite) 'war on drugs' or 'war on crime' than to a conventional war."[114] Conventional wars generally have discrete ends, but wars waged against objects (drugs) or conditions (crime, terrorism) do not—there will always be another crime, another act of terror, another person selling drugs. Of course, we do not yet live in a terrorism-induced permanent state of siege. But the example under consideration in this

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expertise and policy-making competence as justifications for judicial deference to political branches).

111 Mark Tushnet, *The Political Constitution of Emergency Powers: Some Conceptual Issues*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 145, 150 n.20 (Victor V. Ramraj ed., 2008). Carl Schmitt was an influential German jurist—and avowed fascist—who theorized that the power to suspend the rule of law pursuant to a declaration of emergency is the ultimate act of sovereignty. *See* SCHMITT, *supra* note 12, at 5–7.

112 THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003); *accord* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 157 (Thomas Nugent trans., 1752, Batoche Books 2001) (1748) ("Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.").

113 *See generally* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 17–65 (2006) (discussing literature that draws critical attention to possibility that if exception becomes normalized, emergency will be made permanent).

114 David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002); *accord* Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 39, 44–45 (Mark Tushnet ed., 2005).

Note suggests that such a state is all too possible: The schools are, at least de jure, in a state of perpetual crisis.

Since deciding *New Jersey v. T.L.O.* in 1985,[115] the Court has portrayed schools as unceasingly drug ridden. This point is debatable. The statistics that the Court has most often relied upon—surveys on adolescent drug use conducted under grants from the National Institute on Drug Abuse[116]—reveal that drug use among precollege students peaked in the late 1970s, dropped significantly by the early 1990s, peaked again in the late 1990s, and has generally trended downward since.[117] Nevertheless, the so-called drug-induced crisis in the schools has been constitutionalized as "fact" through the Court's relentless reaffirmation. "Every repetition," warned Justice Jackson in the *Korematsu* dissent, "imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . [I]f we review and approve, [each] passing incident becomes the doctrine of the Constitution."[118] And so it has—the drug crisis has been woven into the constitutional fabric. This is extremely worrying. Even scholars sympathetic to emergency powers are careful to include the caveat that "the holder of emergency powers is not permitted to make law [and] . . . the [C]onstitution itself is not to be changed."[119] Yet judicially noticed crisis *has* changed the Constitution—not by amendment but via constitutional lawmaking.

The Court's use of judicial notice exemplifies Justice Jackson's fears of a law that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[120] That need, as Part III explores, arose when the Court, gener-

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115 See *infra* text accompanying notes 129–54 for a discussion of this case.

116 *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 407 (2007) (citing 1 LLOYD D. JOHNSTON ET AL., UNIV. OF MICH. INST. FOR SOC. RESEARCH, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2005, SECONDARY SCHOOL STUDENTS (2006)); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 834 n.5 (2002) (citing LLOYD D. JOHNSTON ET AL., UNIV. OF MICH. INST. FOR SOC. RESEARCH, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE, OVERVIEW OF KEY FINDINGS, 2000, at 40 tbl.1 (2001)).

117 1 LLOYD D. JOHNSTON ET AL., UNIV. OF MICH. INST. FOR SOC. RESEARCH, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2009, SECONDARY SCHOOL STUDENTS 37, 41 tbl.2-1 (2010).

118 Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Alexander Bickel sounded much the same warning: "The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures . . . . The Court, regardless of what it intends, can generate consent and may impart permanence." Bickel, *supra* note 109, at 48.

119 Ferejohn & Pasquino, *supra* note 99, at 212.

120 *Korematsu*, 323 U.S. at 246 (1944) (Jackson, J., dissenting).

ally sympathetic to the government's "war on drugs," confronted allegations of drugs in schools.[121]

III
Development of Judicially Noticed Crisis in School Search Cases

Beginning with *New Jersey v. T.L.O.*,[122] decided at the height of popular "panic" surrounding youth crime and drugs,[123] the Court has systematically noticed crisis to undercut students' privacy rights. Throughout, the Court's maneuver has been virtually identical to that of Justice Black's dissent in *Tinker*: The Court uses legislative facts bespeaking crisis in the nation's schools to justify the derogation of students' Fourth Amendment rights, despite the acute absence of localized evidence of crisis.[124] At times—amply illustrated by *Vernonia School District 47J v. Acton*[125]—the Court cherry-picks from the judicial record to create the impression of crisis. This Part traces the development and realization of crisis through an examination of the landmark student privacy cases: *New Jersey v. T.L.O.*, *Vernonia School District 47J v. Acton*, and *Board of Education of Independent School District No. 92 v. Earls*.[126] It concludes by discussing the Court's most recent application of crisis in *Safford Unified School*

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121 Dissenting Justices have criticized the Court for playing the part of a "loyal foot soldier" in the war on drugs, California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting); for creating a "drug exception to the Constitution," Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting); and for "impair[ing] individual liberties" in deferring to the government's war on drugs, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 686–87 (1989) (Scalia, J., dissenting).

122 469 U.S. 325 (1985).

123 James A. Morone, Hellfire Nation: The Politics of Sin in American History 467 (2004) (discussing some details of "all out panic" over drug use).

124 Although *Tinker* is a First Amendment case, I use it to inform my analysis of a series of Fourth Amendment school search cases. In doing so, I do not intend to imply that First and Fourth Amendment analyses are interchangeable, as should be clear from the constitutional text itself and the Court's doctrinal glosses thereon. Despite the differences between such analyses, however, there is much to be said for an "intratextualist" approach, which looks at the document holistically rather than engaging in strictly clause-bound analyses. *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748, 788 (1999) (describing intratextualist interpretative technique). I am using a similar approach, the legitimacy of which is reinforced by the fact that the Court itself often cites First Amendment opinions in Fourth Amendment cases, and vice versa. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 406 (2007) (citing, in order, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); New Jersey v. T.L.O., 469 U.S. 325 (1985); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002)); *T.L.O.*, 469 U.S. at 336 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

125 515 U.S. 646; *see also infra* Part III.B.

126 536 U.S. 822.

District No. 1 v. Redding,[127] which raises interesting questions about the future application of the doctrine. In *Safford*, the Court declined to judicially notice the "crisis" in the nation's schools and, for the first time, found for the student-plaintiff in a student privacy case.[128]

A. New Jersey v. T.L.O.

New Jersey v. T.L.O. addressed the Fourth Amendment standard for permissible searches by public school officials.[129] School officials accused the fourteen-year-old plaintiff, referred to in the case by her initials T.L.O., of smoking in the lavatory.[130] T.L.O. denied the charge.[131] The school principal searched her bag for cigarettes and discovered evidence that she was selling drugs.[132] Charged with smoking and possession of marijuana, she was suspended from school for ten days.[133] Granting certiorari on the narrow question of "the appropriate remedy in juvenile court proceedings for unlawful school searches" by school officials, the Supreme Court ultimately articulated a broad standard governing all school searches.[134]

Writing for the majority, Justice Byron White explained that courts must evaluate the reasonableness of a school search by balancing the student's interest in "privacy and personal security" against "the government's need for effective methods to deal with breaches of public order."[135] Had Justice White applied this test to the facts, T.L.O. would have prevailed, as she had in the New Jersey Supreme Court[136] under a technically different, but substantially indistinguishable, test.[137] New Jersey's highest court held that a search was constitutional if school officials reasonably suspected that the "student possesse[d] evidence of illegal activity or activity that would interfere with school discipline and order."[138] Under New Jersey's test, the facts

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127 129 S. Ct. 2633 (2009).

128 *Id.*

129 469 U.S. at 337–43.

130 *Id.* at 328.

131 *Id.*

132 *Id.*

133 *Id.* at 329.

134 *Id.* at 332.

135 *Id.* at 337.

136 State v. Engerud, 463 A.2d 934 (N.J. 1983), *rev'd sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

137 *See T.L.O.*, 469 U.S. at 343 ("We recognize that the 'reasonable grounds' standard applied by the New Jersey Supreme Court . . . is not substantially different from the standard that we have adopted today.").

138 *Engerud*, 463 A.2d at 941.

on the record compelled the holding that the search was unconstitutional; possession of cigarettes was neither illegal nor disorderly.[139]

Justice White, however, chastised the New Jersey Supreme Court for its "crabbed notion of reasonableness" and reversed.[140] He did not, and could not, assert a "definite and firm conviction that a mistake ha[d] been committed"—the test for reversal under the "clearly erroneous" standard.[141] Rather, he rebuked the court below for getting "reasonableness" wrong.[142] But this "fact-bound question," as the ACLU argued in its amicus brief, "is hardly a substantial federal question worthy of [Supreme Court] review."[143] Perhaps conscious of this, Justice White changed the New Jersey Supreme Court's standard and, in doing so, eviscerated the Fourth Amendment right in schools at its inception.

Whereas the New Jersey Supreme Court had held that only evidence of illegal or disruptive activity justifies a search,[144] Justice White changed the latter half of the disjunction to read, "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[145] As Justice John Paul Stevens noted in his dissent, under the majority's doctrine, virtually any school regulation, no matter how "trivial . . . or precatory," would trump a student's Fourth Amendment rights.[146] For example, the breach of a school regulation that required students to behave in a manner that, in the eyes of the school administration, is consonant with good order would be sufficient grounds for a search.

To justify the doctrinal shift, Justice White invoked crisis: "[T]his Court may take notice of the difficulty of maintaining discipline in the public schools today . . . . [I]n recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."[147] Yet nothing in the factual record suggested such "ugly" disorder: The school merely accused T.L.O. of smoking in a smoke-free area.[148] The school proffered no evidence suggesting that Piscataway High School was rife

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139 *Id.* at 942.

140 *T.L.O.*, 469 U.S. at 343.

141 United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

142 *T.L.O.*, 469 U.S. at 343.

143 Supplemental Brief for the ACLU et al. as Amici Curiae Supporting Respondent at 15, *T.L.O.*, 469 U.S. 325 (No. 83-712).

144 *Engerud*, 463 A.2d at 941.

145 *T.L.O.*, 469 U.S. at 342.

146 *Id.* at 377 (Stevens, J., dissenting).

147 *Id.* at 338–39 (majority opinion).

148 *Id.* at 328.

with disorder or that high schools in Middlesex County or New Jersey as a whole were so afflicted. Against the student's interest in privacy, Justice White posited a state interest ratcheted up by judicially noticed legislative facts that bore a dubious relationship to the case at bar.

Justice White derived the noticed facts exclusively from the National Institute of Education's 1978 study, *Violent Schools—Safe Schools*,[149] as cited in the Solicitor General's amicus brief.[150] Yet this study, quoted to support the proposition that the nation's schools were in disorder, instead revealed that crime in schools had leveled off and may have been declining since the early 1970s.[151] Indeed, as T.L.O.'s attorneys noted by citing a much wider array of sources, only four to eight percent of the nation's schools could arguably have been in, or even close to, a crisis-like state.[152] The Court, however, ignored this countervailing evidence. Justice White, channeling Justice Black in *Tinker*, implicitly held that equivocal extrinsic evidence of crisis in the nation's schools would suffice to override a student's Fourth Amendment rights. No specific evidence need be proffered. "Even . . . schools that have been spared the most severe disciplinary problems," noted Justice White, must yield to the goal of suppressing "disorder" in the nation's schools.[153]

The ACLU, acting as amicus curiae, came closest to identifying what was at stake in *T.L.O.* and future cases. "The fundamental issue" was whether the Supreme Court would "give way to appeals to hysteria and sweep away the Founders' privacy protection from our public schools."[154] Four years later, in *Vernonia School District 47J v. Acton*,[155] the Court did this and more—not only did it give way to appeals to hysteria, it actively participated in appeals to crisis. Complicit in manufacturing a factually unsupported crisis in the classroom, the Court further undercut students' privacy rights by constitutionalizing a far-reaching student drug-testing regime.

B. Vernonia School District 47J v. Acton

Beginning in 1989, Vernonia School District 47J compelled all students participating or wishing to participate in interscholastic ath-

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[149] 1 NAT'L INST. OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, VIOLENT SCHOOLS—SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS (1978).

[150] Brief for the United States as Amicus Curiae Supporting Reversal at 22–23, *T.L.O.*, 469 U.S. 325 (No. 83-712).

[151] NAT'L INST. OF EDUC., *supra* note 149, at 2.

[152] Supplemental Brief for the Respondent at 17–18, *T.L.O.*, 469 U.S. 325 (No. 83-712).

[153] *T.L.O.*, 469 U.S. at 339.

[154] Supplemental Brief for the ACLU et al. as Amici Curiae Supporting Respondent, *supra* note 143, at 4–5.

[155] 515 U.S. 646 (1995).

letics to submit to suspicionless drug testing.[156] In 1991, Wayne and Judy Acton, the parents of twelve-year-old James Acton, brought an action alleging that the School District's drug-testing regime violated James's Fourth Amendment rights.[157] James, who wished to play football, refused to take the test because he "fe[lt] that [the School District had] no reason to think I was taking drugs."[158]

Amici curiae for the School District vigorously appealed to crisis. The American Alliance for Rights and Responsibilities urged the Court to take "judicial notice . . . that Vernonia School District is not the only school district in America facing a drug problem—the problem is nationwide."[159] In another amicus brief, the Institute for a Drug-Free Workplace unambiguously encouraged the Court to decide the case on the basis of legislative facts, even if unsupported or contradicted by adjudicative facts.[160] In the Institute's opinion, "[t]he Court should not require a specific showing of a [drug] problem . . . . A compelling need to deter drug abuse should be presumed present rather than presumed absent."[161]

The district court, the Ninth Circuit, and the Supreme Court all declined the amici curiae's invitation to base their decisions solely on legislative facts rather than also considering adjudicative facts. The district court noted that "a school may not justify a random urinalysis program upon amorphous statistics or generalized notions about the national drug problem."[162] The Ninth Circuit followed suit: "[Drug usage] is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless testing. It has been lurking as a background condition for our determinations, but that is all."[163] Justice Antonin Scalia, writing for the majority in *Vernonia*, came to a similar conclusion. The "relevant question," he wrote, "is whether the search is one that a reasonable guardian and tutor might undertake. Given the *findings of need* made by the district court, we conclude that *in the present case* it is."[164]

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

157 *Id.* at 1356.

158 Joint Appendix at 17, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (No. 94-590).

159 Brief for the American Alliance for Rights & Responsibilities as Amicus Curiae Supporting Petitioner at 6–7, *Vernonia*, 515 U.S. 646 (No. 94-590).

160 Brief of the Institute for a Drug-Free Workplace as Amicus Curiae in Support of Petitioner at 2, *Vernonia*, 515 U.S. 646 (No. 94-590).

161 *Id.*

162 *Vernonia*, 796 F. Supp. at 1363.

163 Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1526 (9th Cir. 1994).

164 *Vernonia*, 515 U.S. at 665 (emphases added).

In *Vernonia*, the Court not only conjured crisis by marshaling legislative facts; the Court also selectively quoted from, and to a certain extent distorted, the factual record. The School District characterized its drug and disciplinary problem as an "epidemic," an "inva[sion]" that "endanger[ed] 'the very center of activity of the school and the community,'"[165] and a "crisis in the classroom and in the sports program."[166] But actual evidence of drug use did not support the rhetoric. Most of the evidence was "hearsay or hearsay within hearsay"[167]—a fact acknowledged by the trial judge, who recognized the Actons' "continuing objection" to hearsay testimony and granted that such evidence should only provide support of the teachers' perceptions of drug use rather than specific instances of drug use.[168]

Beyond the hearsay, the evidence was hardly sufficient to sustain the School District's claim that it was "facing some epidemic proportions of drug usage."[169] The record revealed that in the period during which disciplinary referrals increased, some "kids act[ed] out," while others were "hostile, . . . dominat[ing][,] . . . erratic[,] . . . gross and inappropriate" and "odd[ly] behav[ed]."[170] There was, however, no evidence of drug use among nonathletes. Among athletes, the evidence was scant: a single suspected but unconfirmed drug-related injury[171] and a wrestling coach's testimony that he had detected the "smell of marijuana."[172] During the three years that the School District's drug-testing program was in place, only two or three students tested positive—a remarkably low figure for a drug "epidemic."[173] Even granting some evidence of drug use among high school athletes, "there [was] virtually no evidence" that grade school students like James were using drugs.[174]

Yet Justice Scalia painted a picture of a school overrun by narcotics. He wrote that "teachers and administrators observed a sharp increase in drug use."[175] But teachers and officials observed no such thing. What they saw was a sharp increase in disciplinary problems, which they *assumed* were drug related. Justice Scalia's statement that

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165 Petition for Writ of Certiorari at 3, 7, *Vernonia*, 515 U.S. 646 (No. 94-590) (quoting *Vernonia*, 796 F. Supp. at 1357).

166 Brief for the Petitioner at 28, *Vernonia*, 515 U.S. 646 (No. 94-590).

167 Brief for the Respondent at 3, *Vernonia*, 515 U.S. 646 (No. 94-590).

168 Joint Appendix, *supra* note 158, at 23.

169 *Id.* at 22.

170 *Id.* at 21, 46–47.

171 *Id.* at 79.

172 *Id.* at 55–56.

173 *Id.* at 38, 83–84.

174 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 684 (1995) (O'Connor, J., dissenting).

175 *Id.* at 648.

"the rebellion was being fueled by alcohol and drug abuse" was simply unsupported by the record.[176] Undaunted, Justice Scalia further upped the rhetoric: The situation in Vernonia's "drug-infested" schools posed an "immediate crisis" for school officials, such that both "the nature and immediacy of the governmental concern at issue" justified the drug-testing regime.[177]

The effects of *T.L.O.* and *Vernonia* were cumulative. When the next student privacy case reached the Court, the Justices were able to draw not only on extrinsic evidence of crisis, but also on the precedent set by these two cases. The result was the constitutionalization of one of the most comprehensive drug-testing regimes ever seen in the nation's schools.[178]

C. Board of Education of Independent School District No. 92 v. Earls

Less than a decade after the *Vernonia* Court approved of suspicionless drug testing for student athletes, Independent School District No. 92 implemented an even more comprehensive regime.[179] The School District tested not just athletes but any student who wished to participate in any extracurricular activity.[180] The plantiff, Lindsay Earls—who participated in Academic Team, Choir, and National Honor Society—sought declaratory and injunctive relief on the theory that the regime violated her Fourth Amendment rights.[181] The district court found for the School District, the Tenth Circuit Court of Appeals reversed, and the Supreme Court reversed again, upholding the constitutionality of the drug-testing regime.[182]

If the evidence of drug use in *Vernonia* was inadequate, in *Earls* it was absent. In *Earls*, the School District repeatedly admitted that

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176 *Id.* at 663 (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)). The Ninth Circuit stated as much: "[W]hat the evidence shows, and all it shows, is that there was some drug usage in the schools, that student discipline had declined, that athletes were involved, and that there was reason to believe that one athlete had suffered an injury because of drug usage and others may have." Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1519 (9th Cir. 1994).

177 *Vernonia*, 515 U.S. at 661–63.

178 *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17 (2007) (noting that while school drug testing policies are commonly limited to student athletes, the School District policy upheld in *Earls* applied to students wishing to participate in all extracurricular activities).

179 Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 826 (2002).

180 *Id.*

181 Joint Appendix at 7, 15, *Earls*, 536 U.S. 822 (No. 01-332).

182 *Earls*, 536 U.S. at 827–28.

there was no on-the-record evidence of drug use.[183] The annual application for funds under the Drug-Free Schools and Communities Act of 1986[184] required the School District to identify, using "objective . . . rather than . . . subjective measures," the nature and extent of drug use in the School District.[185] The School District gathered the necessary data through "annual drug use and violence surveys."[186] From 1989 to 1992, the School District saw "very few" cases of drug use.[187] Between 1994 and 1996, "[l]ess than five percent [of middle and high school students] acknowledged having tried any [illegal drugs]."[188] From 1996 through 1998, drugs were "present but [were] not identified . . . as major problems."[189]

In finding for the School District, the district court trivialized the lack of particularized evidence and instead relied on judicial notice:

> This Court is well aware of the prevalence of illegal drugs in our society, including our schools. The undersigned has observed, far too frequently, the devastating effects of illegal drug use, not only upon the users, but upon the countless others whose lives are touched. . . . [D]rug abuse among public school students causes discipline problems, inattentiveness, and an atmosphere of disruption in the classroom.[190]

The district court's move was, by now, quite familiar. The record contained no evidence of "a drug problem of epidemic proportions" or "a student body in a state of rebellion."[191] This was the court noticing crisis.

The Supreme Court's distorted representation of fact in *Vernonia* had established a perverse precedent. The Tenth Circuit's Judge David Ebel, who voted to uphold the drug-testing regime, wrote that "on facts not much more compelling than those presented in this case, the Supreme Court found that the School District in *Vernonia* had justified its drug testing policy."[192] Solicitor General Theodore Olson made precisely the same point. Faulting the Tenth Circuit for "exaggerat[ing] the record of drug use in *Vernonia*," Olson declared that

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183 *See infra* notes 197–98 and accompanying text (discussing School District's admission of declining drug use).

184 Pub. L. No. 99-570, § 4101, 100 Stat. 3207-125 (repealed 1988).

185 Joint Appendix, *supra* note 181, at 176.

186 *Id.* at 186.

187 *Id.* at 164–65, 167–68, 170–71.

188 *Id.* at 176.

189 *Id.* at 180, 184–86, 188, 191.

190 Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1287 (W.D. Okla. 2000).

191 *Id*.

192 Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist. No. 92, 242 F.3d 1264, 1282 (10th Cir. 2001) (Ebel, J., dissenting).

"the evidence of drug use in this case is not materially different from that in *Vernonia*."[193] The irony of these statements is breathtaking. The Court decided *Vernonia* as it did because Justice Scalia had concluded that the "drug-infested" school was in "crisis."[194] Olson was mistaken; the Tenth Circuit did not exaggerate the facts in *Vernonia*—the Supreme Court did.

In *Earls*, without any evidentiary showing, Justice Clarence Thomas took judicial notice of the "drug abuse problem among our Nation's youth . . . [which] makes the war against drugs a pressing concern in every school."[195] But this was simply not true; drugs were not a "pressing concern" in the School District. Justice Thomas continued: "Given the nationwide epidemic . . . and the evidence of increased drug use in [the School District's] schools," the policy was reasonable.[196] The record flatly contradicted this assertion, revealing, to the contrary, that drug use in the School District's schools had long been *decreasing*. The School District itself admitted that whatever drug problems the school had faced in the 1970s[197] were no longer "major."[198]

Using crisis to shift doctrine, Justice Thomas dismissed the Tenth Circuit's sensible test—a threshold showing of "some identifiable drug use problem among a sufficient number of those [tested]"—as "novel."[199] In fact, the Tenth Circuit's test was not novel but faithfully observant of Supreme Court precedent. From the *Tinker* Court's demand for evidence of material and substantial disruption[200]—to the *T.L.O.* Court's requirement of "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school"[201]—to the *Vernonia* Court's insistence upon case-specific "findings of need,"[202] all prior decisions by the Court had demanded (if not always followed through upon) specific evidence of harm.

By the time *Earls* reached the Court, the systematic application of crisis had debilitated the Fourth Amendment in the school context.

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193 Brief for the United States as Amicus Curiae Supporting Petitioner at 23, *Earls*, 536 U.S. 822 (No. 01-332).

194 *See supra* text accompanying notes 175–77 (arguing that Justice Scalia exaggerated the problem presented by drug use in schools).

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

196 *Id.* at 836.

197 Petition for Writ of Certiorari at app. D, at 57a, *Earls*, 536 U.S. 822 (No. 01-332).

198 Joint Appendix, *supra* note 181, at 171, 186, 191.

199 *Earls*, 536 U.S. at 836.

200 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

201 New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

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

The *Earls* Court was unselfconsciously able to declare that on-the-record evidence was all but immaterial, relying instead on ambiguous legislative facts to justify bold judicial lawmaking. With *Earls*, judicially noticed crisis had effectively become legal doctrine, "set[ting] the terms for future resolution of cases" dealing with the Fourth Amendment in schools.[203]

Then came *Safford*.

D. Safford Unified School District No. 1 v. Redding

In October 2003, school officials suspected thirteen-year-old Savana Redding—based on an "uncorroborated tip"[204]—of harboring, for distribution, prescription-strength pain relievers.[205] After a search of her bag and outer clothing revealed no contraband, the Assistant Principal forced her to undress to her underwear and asked her to "pull [her] bra out and to the side and shake it, exposing [her] breasts" and "pull [her] underwear out at the crotch and shake it, exposing [her] pelvic area."[206] School officials found no drugs.[207] Redding's mother filed suit against the Safford Unified School District, arguing that the strip search violated Redding's Fourth Amendment rights.

Having systematically invoked crisis in all previous student privacy cases, the Supreme Court unexpectedly declined the School District's invitation to do so again in *Safford Unified School District No. 1 v. Redding*.[208] Instead, the Court hewed to the record, did not judicially notice crisis, and, for the first time, held for the student-plaintiff in a school privacy case.

Commentators were justifiably surprised by the decision; nothing in the *Safford* facts foretold the holding.[209] While it is true that a strip

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[203] Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 Nw. U. L. REV. 517, 517 (2006) (defining term "legal doctrine").

[204] Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1074 (9th Cir. 2008) (en banc).

[205] *Id.* at 1074–75; *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2642 (2009) (stating that school officials suspected Redding of harboring "prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers").

[206] Joint Appendix at 23a–24a, *Safford*, 129 S. Ct. 2633 (No. 08-479).

[207] *Safford*, 531 F.3d at 1075.

[208] 129 S. Ct. 2633.

[209] *E.g.*, Dennis D. Parker, *Discipline in Schools After* Safford Unified School District #1 v. Redding, 54 N.Y.L. SCH. L. REV. 1023, 1024 (2010) (writing that "many children's rights advocates apprehensively awaited the United States Supreme Court's decision" in *Safford*, because "a series of Supreme Court decisions had progressively restricted the rights of students"); Dahlia Lithwick, *Search Me: The Supreme Court Is Neither Hot nor Bothered by Strip Searches*, SLATE (Apr. 21, 2009, 7:49 PM), http://www.slate.com/id/2216608/ (predicting, soon after oral argument, that "it's plain the [C]ourt will overturn a [Ninth] Circuit Court of Appeals opinion finding a school's decision to strip-search a 13-

search appears on its face more intrusive—and certainly more humiliating—than urinalysis, this was neither the first school strip search case to appear before a federal court[210] nor the most egregious.[211] Federal courts generally upheld strip searches in schools,[212] "or, more often, concluded that the searches were illegal but granted qualified immunity."[213] More to the point, the Supreme Court had never treated a strip search as legally distinctive,[214] though it had remarked on the intrusiveness of urinalysis.[215] And unlike *Earls*, where the search was both warrantless and suspicionless, the search in *Safford* was merely warrantless—Savana's classmate had, after all, tipped off school officials that Savana was distributing prescription drugs.[216] Finally, whereas there had been no verified (or verifiable) drug problem in *Vernonia* and *Earls*, there was on-the-record testimony of at least two documented incidents of prescription-drug abuse at Safford Middle School, one of which had led to a near fatality.[217] This was also, it is worth noting, the same Court that had decided *Morse v. Frederick*—a case that had accorded school administrators broad

year-old girl unconstitutional"); Jonathan Turley, *Supreme Court Rules Strip Search of Middle School Student Illegal*, JONATHAN TURLEY (June 25, 2009), http://jonathanturley.org/2009/06/25/supreme-court-rules-strip-search-of-middle-school-student-illegal ("There was great concern about the case going to [the Supreme] Court which has repeatedly ruled to strip students of protections and rights.").

210 *See* Lewis R. Katz & Carl J. Mazzone, Safford Unified School District No. 1 v. Redding *and the Future of School Strip Searches*, 60 CASE W. RES. L. REV. 363, 364–66 (2010) (describing previous federal strip search cases, with focus on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

211 For instance, in *Jenkins ex rel. Hall v. Talladega City Board of Education*, teachers in an elementary school in Talladega, Alabama ordered two eight-year-old girls suspected of stealing seven dollars to "enter the bathroom stalls and come back out with their underpants down to their ankles." 115 F.3d 821, 822 (11th Cir. 1997).

212 *See* Katz & Mazzone, *supra* note 210, at 373–81 (discussing school search jurisprudence in series of cases between *T.L.O.* and *Safford*).

213 *Id.* at 378.

214 In *Bell v. Wolfish*, a case dealing with the strip search of a prisoner, the Court held that a strip search ought to be treated under the Fourth Amendment like any other intrusion by weighing the "need for the particular search against the invasion of personal rights that the search entails." 441 U.S. 520, 559 (1979). The only searches that the Court has ruled are a priori "unreasonable" are forced surgical intrusions. *E.g.*, Winston v. Lee, 470 U.S. 753, 759 (1985).

215 Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 626 (1989) ("We recognize . . . that the procedures for collecting the necessary [urine] samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests."). *But see* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995) ("[T]he privacy interests compromised by the process of obtaining the urine sample are in our view negligible.").

216 Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1076 (9th Cir. 2008) (en banc).

217 Joint Appendix, *supra* note 206, at 7a–8a.

leeway to limit student speech that administrators viewed as encouraging drug use.[218]

While Justice Ruth Bader Ginsburg was noticeably disturbed by Savana's treatment and attempted to convey this to her colleagues,[219] the tone and tenor of oral argument favored the School District. Justice David Souter, who ultimately authored the opinion, mused during oral argument that he "would rather have the kid embarrassed by a strip search . . . than to have some other kids dead because the stuff is distributed at lunchtime and things go awry."[220] Justice Stephen Breyer, in turn, appeared unmoved by Savana's claims that the strip search was unwarranted and humiliating: "I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym."[221] This prompted Justice Ginsburg to interject: "I don't think there's any dispute what was done in the case of both of these girls. It wasn't just that they were stripped to their underwear. They were asked to shake their bra out, to—to shake, stretch the top of their pants and shake that out."[222] Justice Souter's apparent skepticism did not bode well for Savana because, unlike Justice Breyer, he had voted for the student-plaintiff in *Vernonia*,[223] *Earls*,[224] and *Morse*.[225]

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218 Morse v. Frederick, 551 U.S. 393 (2007).

219 *See, e.g.*, Transcript of Oral Argument at 5, 9–10, 19–20, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479) (noting that there were no prior occasions where student in Safford Middle School had been strip searched and drugs had been found, finding that school authorities had failed to verify reliability of tip that it was Savana who was distributing drugs, and criticizing school administrators' decision to detain Savana for hours despite having found no drugs); Robert Barnes, *Justices' Takes on Strip Search Vary*, WASH. POST, Apr. 22, 2009, at A3 (noting that "Justice Ruth Bader Ginsburg seemed at times on the edge of exasperation with her all-male colleagues" and that while Justice Ginsburg was addressing arguing attorneys, she was actually "speaking more to her colleagues").

220 Transcript of Oral Argument, *supra* note 219, at 48.

221 *Id.* at 45. And again Justice Breyer noted, "[i]n my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay?" *Id.* at 58.

222 *Id.* at 45.

223 Justice Breyer joined Justice O'Connor's dissent, which argued that the School District's suspicionless policy was unreasonable under the Fourth Amendment. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting).

224 Justice Breyer joined both Justice O'Connor's dissent and Justice Ginsburg's dissent. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 842 (2002) (O'Connor, J., dissenting) (stating both that *Vernonia* was wrongly decided and that, regardless, current case does not pass *Vernonia*'s balancing approach); *id.* at 843 (Ginsburg, J., dissenting) (criticizing majority for extending *Vernonia* to "student population least likely to be at risk from illicit drugs and their damaging effects").

225 Justice Breyer joined Justice Stevens's dissent, which argued that the "Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's deci-

Not only did the facts appear to line up in the School District's favor, but the School District, mindful of the Court's receptiveness to crisis, summoned the specter of the "decades-long war against drug abuse among students," arguing that Safford Middle School was "on the front lines" of this "war."[226] To corroborate this appeal to crisis, it referred to the Court's declaration in *Earls* that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."[227] It also called the Court's attention to the Court's "judicial notice [in *T.L.O.*, *Vernonia*, and *Earls*] of the problem of drug abuse . . . plagu[ing] schools."[228]

When questioned whether there was any evidence that students at Safford Middle School had hidden drugs in their undergarments—which may have bolstered the argument that the strip search was necessary—Matthew Wright, the School District's counsel, maintained during oral argument that it is "common experience [that] schoolchildren . . . hide things . . . in and under their clothing."[229] Interjecting, Justice Ginsburg asked if "there [was] prior experience in this particular school."[230] Wright's response is telling: "Your Honor, I don't know, and that's not in the record, but I can tell . . . you that that would not be the threshold requirement under this Court's prior rulings . . . . [I]n the nationwide school experience . . . we find that they hide them in and under clothing."[231] In its briefs, the School District made the same argument, urging the Court—on the basis of very different factual circumstances in very different schools—to take judicial notice that students were apt to hide drugs in their underwear.[232]

These appeals to crisis, remarkably, did not sway the Court. Pushing back against the suspicionless searches that the Court had upheld in *Vernonia* and *Earls*, Justice Souter—writing for a near-unanimous majority—deemed it necessary that there be at least "a moderate chance of finding evidence of wrongdoing."[233] Citing the record, Justice Souter noted that "what was missing from the suspected facts . . . was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that

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sion to punish Frederick for expressing a view with which it disagreed." Morse v. Frederick, 551 U.S. 393, 435 (2007) (Stevens, J., dissenting).

226 Petition for Writ of Certiorari at 5, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479).

227 *Id*. at 22.

228 Brief for the Petitioner at 38–39, *Safford*, 129 S. Ct. 2633 (No. 08-479).

229 Transcript of Oral Argument, *supra* note 219, at 4.

230 *Id.* at 5.

231 *Id.* at 4–5.

232 Reply Brief for Petitioners at 8–9, *Safford*, 129 S. Ct. 2633 (No. 08-479).

233 *Safford*, 129 S. Ct. at 2639.

Savana was carrying pills in her underwear."[234] Put differently, by the time the strip search took place, school officials were aware of the "limited threat" posed by the anti-inflammatory drugs in question.[235] Teachers, Justice Souter noted, were not reacting to the possible dangers of an unknown chemical substance—a situation that might have compelled a different holding.[236]

Justice Souter further wrote, in what seems to be a direct rejection of the Court's prior practice, that "when the categorically extreme intrusiveness of a search . . . requires some justification in suspected facts, general background possibilities fall short."[237] Since nothing on the record indicated that Safford Middle School students had ever stowed, or were likely to stow, contraband in their underwear, the School District could not justify its search on the mere possibility of illicit drug possession.[238] Concluding the Fourth Amendment analysis, Justice Souter noted the natural tendency of both parents and teachers to "overreact" when children were faced with possible danger.[239] "The difference," Justice Souter wrote, "is that the Fourth Amendment places limits on the [school] official."[240]

The Supreme Court did not repudiate crisis as plainly as the Ninth Circuit, which explicitly "reject[ed] Safford [School District]'s . . . knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs."[241] The Supreme Court's message was nonetheless clear. Returning in many ways to the majority opinion in *Tinker*,[242] the Court held that the state must proffer evidence before it would be permitted to take action that encroaches upon students' constitutional rights.

Only Justice Thomas, the lone dissenter, invoked crisis. Quoting a particularly hyperbolic section of Justice Black's dissent in *Tinker*, Justice Thomas warned that the majority had "surrender[ed] control of the American public school system to public school students."[243] This statement was as inapt when applied to this case as when applied

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234 *Id.* at 2642–43.

235 *Id.* at 2636.

236 *Id.* at 2642.

237 *Id.*

238 *Id.*

239 *Id.* at 2643.

240 *Id.*

241 Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1086 (9th Cir. 2008) (en banc).

242 *See supra* Part I.A. (discussing *Tinker* Court's effort to restrain use of facts extrinsic to record).

243 *Safford*, 129 S. Ct. at 2655 (Thomas, J., dissenting) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Black, J., dissenting) (alteration in original)).

to *Tinker*; as a means to stir up crisis, however, its utility was catholic. Justice Thomas cited the school disorder found in *T.L.O.*,[244] called attention to the potential dangers of an Advil overdose,[245] and quoted his own declaration in *Earls* that "[t]he nationwide drug epidemic makes the war against drugs a pressing concern in every school"[246]—all to no avail. Crisis failed to carry the day.

Did *Safford* represent a scaling back of the crisis doctrine—an emerging skepticism about the Court's posture in *T.L.O.*, *Vernonia*, and *Earls*? On its face it clearly did: The Court, after all, affirmed that only facts specific to the case and not "general background possibilities" may justify a search.[247]

At the same time, however, an uncommon event—a predecision public statement about a pending case by a sitting Supreme Court Justice—suggests that *Safford* could be sui generis and that courts might well distinguish it in future cases. Between the oral argument and the decision, Justice Ginsburg, "[i]n an unusual interview about a pending case," openly criticized her colleagues for their lack of empathy.[248] Justice Ginsburg said that during oral argument, "her colleagues, all men, had failed to appreciate what Ms. Redding had endured."[249] *Safford*, moreover, came on the heels of two decisions unfavorable to women's rights, *Ledbetter v. Goodyear Tire & Rubber Co.*[250] and *AT&T Corp. v. Hulteen*,[251] both of which greatly disappointed Justice Ginsburg.[252] It also coincided with Justice Souter's retirement, which he announced between *Safford*'s oral argument and

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244 *Id.* at 2646 (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985)).

245 *Id.* at 2654.

246 *Id.* at 2657 (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 834 (2002)).

247 *Id.* at 2642 (holding that "general background possibilities" fall short and noting record furnished no evidence to demonstrate Safford Middle School students commonly held dangerous contraband in their underwear).

248 Adam Liptak, *Supreme Court Says Child's Rights Violated by Strip Search*, N.Y. TIMES, June 25, 2009, at A16.

249 *Id.*

250 550 U.S. 618, 621 (2007) (holding that Title VII complaint not filed within 180 days of discrete act of discrimination is time barred).

251 129 S. Ct. 1962, 1964 (2009) (holding that AT&T is not required to include pregnancy leaves taken before enactment, in 1979, of Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000(e)), when calculating pension benefits for its female employees).

252 *See* Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at 1A (noting Justice Ginsburg's open frustration during oral argument in *AT&T*, 129 S. Ct. 1962, and Ginsburg's vigorous dissent in *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting)).

decision.[253] Justice Souter's retirement not only served to highlight the Court's gender imbalance, which was at issue since Justice O'Connor stepped down in 2005,[254] but it also sparked immediate speculation that President Obama would nominate a woman to replace him.[255]

Speaking to *USA Today*'s Joan Biskupic, Justice Ginsburg said that her colleagues "have never been a 13-year-old girl. It's a very sensitive age for a girl. I didn't think [they] . . . quite understood."[256] This lack of understanding, and perhaps sympathy, underscored the Court's gender imbalance—an imbalance that Justice Ginsburg conceded had affected and would continue to affect the outcome in cases like *Safford*.[257]

Widely publicized by the media, including the *New York Times*,[258] *Washington Post*,[259] and *Slate*,[260] Justice Ginsburg's statements suggested that the Court was getting it wrong and needed more women[261]—a sentiment shared by most Americans since Justice O'Connor's retirement, if not before.[262] While it is hardly the role of the Court to pander to public sentiment, the Court does not sit in a vacuum. As recent scholarship has demonstrated, the Court is influenced by, and ultimately tends to fall into line with, popular opinion.[263] The media's intense predecision scrutiny, prompted by Justice Ginsburg's highly unusual public statements about an open

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253 *See* Peter Baker & Jeff Zeleny, *Souter Said To Have Plans To Leave Court in June*, N.Y. TIMES, May 1, 2009, at A1 (reporting that Justice Souter planned to retire in June 2009).

254 *See* Dahlia Lithwick, *The Fairer Sex: What Do We Mean When We Say We Need More Female Justices*, SLATE (Apr. 11, 2009, 7:18 AM), http://www.slate.com/id/2215833 (noting strong demand for gender-balanced court).

255 *See* Adam Nagourney & Jeff Zeleny, *Washington Prepares for Fight Over Any Nominee*, N.Y. TIMES, May 2, 2009, at A10 (noting, on day that Justice Souter's pending retirement appeared in press, candidates under consideration were Sonia Sotomayor, Kim Wardlaw, Kathleen Sullivan, and Diane Wood, among others).

256 Biskupic, *supra* note 252, at 1A.

257 *Id.* at 2A ("The differences between male and female [J]ustices, [Ginsburg] said, are 'seldom in the outcome.' But then, she added, 'it is sometimes in the outcome.'").

258 Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, N.Y. TIMES, June 4, 2009, at A16; Adam Liptak, *A Careful Pen With No Broad Strokes*, N.Y. TIMES, May 27, 2009, at A1.

259 Ruth Marcus, *Wanted: Justices from Venus*, WASH. POST, May 13, 2009, at A19.

260 Emily Bazelon, *Ginsburg on Why the Supreme Court Needs Another Woman*, SLATE (May 7, 2009, 1:51 PM), http://www.slate.com/blogs/blogs/xxfactor/archive/2009/05/07/ginsburg-on-why-the-supreme-court-needs-another-woman.aspx.

261 *See, e.g.*, *id.* (publicizing Ginsburg's criticism of gender bias of her male colleagues).

262 *See* Dahlia Lithwick, *Diversity Jurisdiction: Do We Really Need a Woman or Minority To Fill O'Connor's Shoes?*, SLATE (Sept. 8, 2005, 4:50 PM), http://www.slate.com/id/2125898.

263 *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND CHANGED THE MEANING OF THE CONSTITUTION (2009).

case, and compounded by the impending confirmation of a female Justice, likely pressured the Court to rule for Savana despite every indication during oral argument that it would find for the School District.[264]

Though *Safford*'s holding is in many ways a turn away from noticed crisis, the confluence of out-of-court events bearing on the case suggests that future courts are just as likely to distinguish *Safford* on the facts as they are to view it as a precedent-setting retreat from crisis. We have, alas, probably not seen the last of judicially noticed crisis.

CONCLUSION

"[P]eriods of passions or panic," wrote Learned Hand, "are ordinarily not very long, and . . . are usually succeeded by a serener and more tolerant temper; but . . . serious damage may have been done that cannot be undone, and no restitution is ordinarily possible for the individuals who have suffered."[265] Judge Hand was concerned about legislatures, which, he wrote, "are more likely than courts to repress what ought to be free" when overreacting to real or perceived crises.[266] The implication is that judges are best placed, if not ethically obligated, to defend individual liberties against wayward and fickle legislatures.

If so, then crisis is deeply disquieting, particularly coming from Justices who claim, following Montesquieu, to be but the "mouthpiece of the law."[267] In his oft-quoted Supreme Court confirmation hearing,

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[264] *See, e.g.*, Frank D. LoMonte, Safford v. Redding *Analysis: High Court Surprises with Some Support for Students' Constitutional Rights*, AM. CONST. SOC'Y BLOG (June 25, 2009, 5:32 PM), http://www.americanconstitutionsociety.org/node/13649 ("[T]he justices were startled awake by the thud of press clippings after that tone-deaf oral argument, and recognized this was a moment at which [the] Court was in peril of diverging from the broad public consensus of where reasonableness lies."). After the Court announced its decision in *Safford*, Emily Bazelon interviewed Justice Ginsburg for the *New York Times Magazine*. *See* Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG., July 12, 2009. Asking about *Safford*, Bazelon noted that the "opinion . . . [was] very different from what I expected after oral argument, when some of the men on the [C]ourt didn't seem to see the seriousness here. Is that an example of a case when having a woman as part of the conversation was important?" *Id.* at 46. Justice Ginsburg replied: "I think it makes people stop and think. Maybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed. I think many of [the male Justices] first thought of their own reaction." *Id.*

[265] LEARNED HAND, THE BILL OF RIGHTS 69 (1958).

[266] *Id.*

[267] *See* MONTESQUIEU, *supra* note 112, at 180 ("[N]ational judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."). Justice Scalia, for instance, stated that "it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if

Chief Justice Roberts noted that "a certain humility should characterize the judicial role. . . . Judges are like umpires. Umpires don't make the rules, they apply them."[268] Emphasizing that he had "no agenda" and "no platform," Roberts concluded by reassuring the Senate Committee that he would "decide every case based on the record."[269] As we have seen, however, when the Court notices crisis, it exhibits a conspicuous lack of humility, all but ignoring the record in favor of results-oriented jurisprudence.

While extrinsic checks on judicial behavior may ultimately be the only effective solution, surely it is also incumbent upon the Justices to check themselves. To this end, the Court should heed Justice Sandra Day O'Connor's admonition in her *Vernonia* dissent:

> It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But . . . some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone.[270]

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you think it should be amended. If that's what it says, that's what it says." Justices Antonin Scalia & Stephen Breyer, U.S. Supreme Court, U.S. Association of Constitutional Law Discussion at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0) (statement of Antonin Scalia, J.).

268 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, nominee for C.J.).

269 *Id*.

270 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting).