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Attention All Students: Please Deposit Your Constitutional Rights at the Door

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ATTENTION ALL STUDENTS: PLEASE DEPOSIT YOUR CONSTITUTIONAL RIGHTS AT THE DOOR†

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I. INTRODUCTION

High school students in the Future Independent School District were the first in a sweeping trend around the nation to undergo random, suspicionless drug testing prior to beginning classes. This testing will continue at random intervals throughout the school year. Unlike previous drug testing programs in public schools, this program is not limited to competitive athletes or extracurricular participants: it covers the entire student body. For example, Sarah Student, an ordinary freshman, makes good grades and never gets into trouble. She is quite terrified by the prospect of having to urinate while her teacher listens, and then hand over a cup filled with her urine to her teacher. After all, she does not use drugs and has done nothing to warrant such an embarrassment. Her parents, Paul and Pam, are outraged at the thought of their daughter having to undergo such an intrusive procedure. Drug testing was certainly not part of the educational experience that they had in mind for Sarah. Paul and Pam are prepared to fight for the right that they never even knew they had lost: the right to raise their daughter.

The Supreme Court has yet to consider the hypothetical case of the Future Independent School District, but its history of diluting the Fourth Amendment rights of students foreshadows an acceptance of such an all-encompassing program. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[1] the Court recently allowed expansion of drug testing to include students who had no history of drug use and who were not susceptible to increased physical danger like that faced by athletes.[2] The same standard used by the Court in *Pottawatomie* could easily be used to approve the broad drug testing program of the Future Independent School District.[3]

In 1969, the Court stood firmly behind the constitutional rights of students: "It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate."[4] By 1995,

1. 536 U.S. 822 (2002).
2. *See id.* at 837–38.
3. *See infra* Part IV.B.1.
4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). This language was referenced by the Supreme Court in the recent decision of *Board of*

the Court's stance had greatly changed. In that year, the Court handed down *Vernonia School District 47J v. Acton*,[5] which upheld a school district's random, suspicionless drug testing of students involved in interscholastic athletics.[6] Continuing this trend in *Pottawatomie*, the Court upheld an Oklahoma school district's practice of random, suspicionless drug testing of all students involved in extracurricular activities:[7] a practice that forces students to shed their constitutional freedoms in order to engage in activities that many consider an essential part of the educational experience.[8] As these two cases illustrate, the next logical evolution will be to expand random, suspicionless drug testing to all students. In *Pottawatomie*, the Court abandoned the factually-based test used in *Vernonia*.[9] In *Vernonia*, a severe drug problem existed among the students, and drug use would have greatly increased the risk of injury to student athletes.[10] In *Pottawatomie*, no drug problem existed among the students involved in extracurricular activities, and there was no increased risk of injury to those students.[11]

This Note argues that the Court should return to the fact-specific balancing test utilized in *Vernonia* and close the door to the further expansion of suspicionless drug testing in public schools. Part II of this Note will discuss the steady erosion of Fourth Amendment protections in the school context, as well as the expansion of drug testing outside the school setting. Part III will discuss the factual and procedural background of *Pottawatomie* and will focus on the Supreme Court's analysis and the dissent's application of the *Vernonia* standard to *Pottawatomie*'s facts. Part IV will explore the problems and ramifications of the *Pottawatomie* decision. Part V will offer recommendations for what the Court should do in the future to protect the Fourth Amendment rights of students and prevent the further expansion of drug testing in schools. Part VI will summarize and conclude.

II. The Erosion of Fourth Amendment Protections for Students[12]

A. *Traditional Protections of the Fourth Amendment*

The Fourth Amendment provides:

Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 829 (2002).

5. 515 U.S. 646 (1995).
6. *See id.* at 650, 665.
7. *Pottawatomie*, 536 U.S. at 824–26.
8. *See id.* at 845 (Ginsburg, J., dissenting).
9. *Vernonia*, 515 U.S. 646.
10. *See id.* at 648–49.
11. *See Pottawatomie*, 536 U.S. at 835–36.
12. Although beyond the scope of this Note, it is worth noting that the erosion of the Fourth Amendment extends into various other contexts. For a discussion of the erosion of the Fourth Amendment in other areas, see generally Nancy J. Kloster,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[13]

The Supreme Court's interpretation of the reasonableness requirement[14] of the Fourth Amendment has focused on three areas: warrants, probable cause, and individualized suspicion.[15] Generally, a warrant[16] is required to conduct a search or seizure under the Fourth Amendment;[17] warrantless searches are per se unreasonable, save only for specific exceptions.[18] Although some form of individualized suspicion of wrongdoing is usually required, the Fourth Amendment itself does not impose such a requirement.[19] Full-scale searches are reasonable within the meaning of the Fourth Amendment on a showing of probable cause[20] "to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched."[21] Searches or seizures that are less than full-scale may be reasonable under the Fourth Amendment, even without probable cause or a warrant, if they comply with a balancing test that gives due regard to the privacy interests that will be invaded.[22] In order to determine reasonableness under the Fourth Amendment in such a case, the Court will balance the invasion which the search encompasses against the need to search.[23]

Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99 (1996); Nicole J. Lehmann, Note, *The "Plain Feel" Exception in* Minnesota v. Dickerson*: A Further Erosion of the Fourth Amendment*, 16 CAMPBELL L. REV. 257 (1994); Julie A. Line, Note, *Fourth Amendment—Further Erosion of the Warrant Requirement for Unreasonable Searches and Seizures: The Warrantless Trash Search Exception*, 79 J. CRIM. L. & CRIMINOLOGY 623 (1988).

13. U.S. CONST. amend. IV.

14. The Constitution does not forbid all searches and seizures; it forbids only unreasonable ones. Elkins v. United States, 364 U.S. 206, 222 (1960).

15. *See generally* Mary Kim, *Investigation and Police Practices: Overview of the Fourth Amendment*, 90 GEO. L.J. 1099 (2002) (discussing reasonableness requirement under the Fourth Amendment).

16. Warrants must specify with particularity the persons or things to be seized. Maryland v. Garrison, 480 U.S. 79, 84 (1987).

17. Terry v. Ohio, 392 U.S. 1, 20 (1968).

18. New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., concurring).

19. United States v. Martinez-Fuerte, 428 U.S. 543, 560–61 (1976).

20. *T.L.O.*, 469 U.S. at 354–55. "Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (alteration in original) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

21. *T.L.O.*, 469 U.S. at 354–55 (Brennan, J., concurring).

22. *Id.* at 355 (Brennan, J., concurring).

23. Terry v. Ohio, 392 U.S. 1, 21 (1968) (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)).

The "special needs" exception to the warrant requirement is one such case in which a balancing test is employed to determine the reasonableness of the search:[24] "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."[25] The "special needs" exception was first developed by Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*[26] "Special needs" exist in the public school setting,[27] as well as in other contexts.[28]

B. *The Traditional Protections of the Fourth Amendment Eradicated from the School Setting*

1. *T.L.O.*: Students Kiss Warrants and Probable Cause Good-bye

In *T.L.O.*, a high school freshman, T.L.O., was caught smoking in the bathroom by her teacher.[29] T.L.O. was taken to the vice principal's office, where he searched her purse and found marijuana paraphernalia, as well as other items that implicated her in the sale of marijuana.[30] The State used the information to prosecute T.L.O. for delinquency.[31] The sole issue in this case was the admissibility of the evidence found in her purse.[32]

The Supreme Court held that the warrant and probable cause requirements that normally apply under the Fourth Amendment were unnecessary in a public school setting.[33] Reasonableness, the Court stated, was the fundamental inquiry under the Fourth Amendment.[34] The Court looked to *Terry v. Ohio*[35] for its analysis of the reasonable-

24. *See* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259 (2000). *See generally* Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1992); Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529 (1997).

25. *T.L.O.*, 469 U.S. at 337.

26. *See id.* at 351 (Blackmun, J., concurring). *See infra* Part II.B.1 (providing a detailed discussion of *T.L.O.*).

27. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

28. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989). *See infra* Part II.C.1–2 (providing an in-depth discussion of these cases).

29. *T.L.O.*, 469 U.S. at 328.

30. *Id.*

31. "'[D]elinquency' means the commission of an act by a juvenile which if committed by an adult would constitute: a. A crime; b. A disorderly persons offense or petty disorderly persons offense; or c. A violation of any other penal statute, ordinance or regulation." N.J. STAT. ANN. § 2A:4A-23 (West 1987).

32. *See T.L.O.*, 469 U.S. at 328.

33. *Id.* at 340–41. The Court also held that school officials qualified as state actors and were subject to Fourth Amendment scrutiny. *Id.* at 336.

34. *Id.* at 340.

35. 392 U.S. 1 (1968).

ness of the search. Under *Terry*, the inquiry is twofold: (1) "whether the . . . action was justified at its inception"[36] and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[37]

According to the *T.L.O.* Court, the first prong is satisfied when reasonable grounds exist to believe that the search will reveal evidence that the student either has violated or is violating the rules of the school or the law.[38] The second prong is satisfied if the search is limited in scope to measures that are reasonably related to the goals of the search and not overly intrusive when taking into consideration the nature of the infraction, the student's age, and the student's sex.[39]

The Court retained the requirement of individualized suspicion in *T.L.O.* but made clear that individualized suspicion, like the warrant and probable cause requirements, was not required in all cases.[40] Thus, in one fell swoop, the Court removed the Fourth Amendment protections of a warrant and probable cause from students and hinted that the last remaining protection of individualized suspicion would soon fall.[41]

Justice Blackmun's concurring opinion in *T.L.O.* emphasized that "special needs"[42] in the elementary and secondary school setting were crucial to the Court's judgment.[43] Justice Blackmun wrote that "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[44] Thus, *T.L.O.* gave birth to the "special needs" exception to the general requirements of the Fourth Amendment, and this exception would become the basis for upholding the drug testing policies in *Vernonia*[45] and *Pottawatomie*.[46]

2. *Vernonia*: Students Bid Farewell to Individualized Suspicion

In *Vernonia*, school administrators were confronted with a large increase in disciplinary problems among students involved in interscho-

36. *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20).
37. *Id.* (quoting *Terry*, 392 U.S. at 20).
38. *Id.* at 341–42.
39. *Id.* at 342.
40. *Id.* at 342 n.8.
41. *See id.* at 340–41, 342 n.8.
42. *See generally* Jennifer E. Smiley, Comment, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 Nw. U. L. Rev. 811 (2001) (discussing the evolution of "special needs" jurisprudence).
43. *See T.L.O.*, 469 U.S. at 351–52 (Blackmun, J., concurring).
44. *Id.* at 351 (Blackmun, J., concurring).
45. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653, 665 (1995).
46. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 829 (2002).

lastic athletics.[47] Strong evidence existed of drug and alcohol abuse among student athletes, and they were believed to be the leaders of the drug culture.[48] In response to these problems, the school district implemented a policy of random, suspicionless drug testing for students involved in interscholastic athletics.[49]

The Court upheld *Vernonia*'s suspicionless drug testing policy.[50] Writing for the six-to-three majority, Justice Scalia relied on Justice Blackmun's concurrence in *T.L.O.*[51] that "special needs" exist in the public school setting:[52] "the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'"[53] As the Court had foreshadowed in *T.L.O.*,[54] the *Vernonia* case provided the perfect vehicle to eliminate the protection of individualized suspicion.

After stating that urine collection and drug testing constituted a "search" subject to the Fourth Amendment,[55] the *Vernonia* Court conducted a fact-specific balancing[56] of *the nature of the privacy interest and the character of the intrusion against the nature and immediacy of the governmental concern and the efficacy of the means used to meet it.*[57] Central to the Court's holding was the observation that "children . . . have been committed to the temporary custody of the State as schoolmaster"[58] and schools act *in loco parentis*[59] over children in their care.[60]

With respect to the nature of the privacy interest, the Court found that students who participate in school athletics have subjected them-

47. *See Vernonia*, 515 U.S. at 662–63 (citing Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S. 646 (1995)).

48. *See id.* (citing *Vernonia*, 796 F. Supp. at 1357).

49. *See id.* at 649–50.

50. *See id.* at 665. For a further discussion of this case, see Charles Neil Floyd, Note, *Searches in the Absence of Individualized Suspicion: The Case of* Vernonia School District 47J v. Acton, 50 ARK. L. REV. 335, 335–40, 349–62 (1997).

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

52. *Id.* at 352 (Blackmun, J., concurring).

53. *Vernonia*, 515 U.S. at 653 (alteration in original) (quoting *T.L.O.*, 469 U.S. at 340–41).

54. *See T.L.O.*, 469 U.S. at 342 n.8.

55. *Vernonia*, 515 U.S. at 652.

56. *See id.* at 664–65.

57. *See id.* at 654–61.

58. *Id.* at 654.

59. *In loco parentis* means "[a]cting as a temporary guardian of a child." BLACK'S LAW DICTIONARY 791 (7th ed. 1999). For an in-depth discussion of the doctrine of *in loco parentis*, see generally Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of* In Loco Parentis*: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17 (2002).

60. *Vernonia*, 515 U.S. at 654.

selves to privacy intrusions because they engage in communal undress, submit to vaccinations and medical examinations, and voluntarily choose to participate.[61] In addition, the Court found that the invasion of privacy was insignificant because the urine sample was produced in a setting similar to that of public restrooms; the tests only detect drugs and not health problems; the results are disclosed only to limited personnel; and students need not reveal prescription medications to school officials.[62] On this side of the scale, the Court found that the students were subjected to a minimal invasion of privacy in a realm in which they already had a diminished expectation of privacy.

On the other side of the scale, the Court found the governmental concern—drug use by schoolchildren—a compelling interest.[63] The Court relied on the district court's conclusion that "'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of *rebellion*,' that '[d]isciplinary actions had reached '*epidemic proportions*,'" and that 'the *rebellion* was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture.'"[64] In addition, the Court emphasized the narrow tailoring of the program to athletes, where the risk of physical harm to drug users and their fellow participants was extremely high.[65]

Justice Ginsburg's concurring opinion stressed that the holding was limited to students who participate in interscholastic athletics, in large part based upon the risks of physical harm inherent in athletics.[66]

Justice O'Connor's dissenting opinion focused on the history of the Fourth Amendment and its accompanying protections from its inception to the present.[67] According to Justice O'Connor, the Framers of the Constitution enacted the Fourth Amendment to protect against general, blanket searches.[68] Justice O'Connor found it unacceptable that students had been "deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people."[69] After the *Vernonia*[70] decision was delivered, the

61. *Id.* at 656–57.
62. *See id.* at 658, 660.
63. *Id.* at 661.
64. *Id.* at 662–63 (emphasis added) (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S. 646 (1995)).
65. *Id.* at 662. The Court also found that suspicion-based testing would be worse than suspicionless testing and that the least intrusive search need not be used. *Id.* at 663–64.
66. *Id.* at 666 (Ginsburg, J., concurring).
67. *See id.* at 667–76 (O'Connor, J., dissenting).
68. *Id.* at 669–70 (O'Connor, J., dissenting).
69. *Id.* at 681 (O'Connor, J., dissenting).
70. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

student's basic Fourth Amendment protections—the need for warrants, probable cause, and individualized suspicion—were eradicated.

C. *Drug Testing Outside the School Setting*

After the "special needs" doctrine came into existence, the Court expanded its application to other contexts. The Court found "special needs" to exist among railroad[71] and customs employees.[72] The Court looks to the entirety of its "special needs" jurisprudence when analyzing "special needs" cases.[73] For this reason, it is important to understand the Supreme Court's approach to the "special needs" analysis in these areas.

1. *Skinner*: Documented Drug Use and the Risk of Mass Fatalities

In *Skinner v. Railway Labor Executives' Ass'n*,[74] the Federal Railroad Administration (FRA) promulgated regulations providing for mandatory drug testing of employees after a "major train accident,"[75] an "impact accident,"[76] or any incident involving the death of an on-duty employee.[77] Various labor organizations filed suit to enjoin these regulations.[78] In response, the FRA presented specific evidence of nearly two dozen train accidents, involving alcohol or drug use, from 1972 to 1983,[79] accidents that resulted in nineteen million dollars in damage, sixty-one injuries, and twenty-five fatalities.[80] Also, seventeen on-duty employees suffered injuries resulting in death from accidents in which alcohol or drug use was a contributing factor.[81] According to the Court, this evidence demonstrated that drug use by railroad employees could easily result in "great human loss."[82]

The existence of "special needs" in the railroad industry was key to the reasonableness of the suspicionless drug testing of railroad employees.[83] Due to the finding of "special needs," the Court applied the reasonableness balancing test: the intrusion on the person's Fourth Amendment interests versus the promotion of legitimate governmen-

71. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620 (1989).
72. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989).
73. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 *passim* (2002); *Vernonia*, 515 U.S. *passim*.
74. 489 U.S. 602 (1989).
75. *Id.* at 609. A major train accident means any train accident that involves "(i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of $500,000 or more." *Id.*
76. *Id.* An impact accident means a collision that results in damage to railroad property of $50,000 or more, or results in a reportable injury. *Id.*
77. *Id.*
78. *Id.* at 612.
79. *Id.* at 607.
80. *Id.*
81. *See id.*
82. *See id.* at 628–29.
83. *See id.* at 619–20.

tal interests.[84] The Court found that the employees had a diminished expectation of privacy because the railroad industry was so highly regulated,[85] and the government's interest outweighed the employees' minimal expectations of privacy.[86] Railroad employees performed safety-sensitive tasks[87] similar to employees in nuclear power facilities: they "discharge duties fraught with such risks of injury to others that . . . can have disastrous consequences."[88] The risk of high human casualties in this case justified the removal of the Fourth Amendment requirements of a warrant, probable cause, and individualized suspicion.[89]

2. *Von Raab*: Direct Contact with Drugs and the Risk of National Security Breaches

In *National Treasury Employees Union v. Von Raab*,[90] the United States Customs Service (USCS) implemented a drug testing program[91] for employees in any one of three positions: those involved in drug interdiction, carrying firearms, or handling classified material.[92] A union of federal employees filed suit against the Customs Commissioner, claiming the testing was a violation of their constitutional rights.[93] The Customs Commissioner argued that the program was necessary because Customs employees have direct contact with drugs, carry firearms, and are exposed to threats of large criminal syndicates,[94] and the Commissioner presented specific evidence that nine officers had been killed in the last decade and over sixty employees had been arrested for criminal and integrity violations from 1985 to 1987.[95] According to the Court, the USCS was the "first line of defense" in protecting the public from drug trafficking across the borders.[96]

Applying the same analysis as that used in *Skinner*,[97] the Court found that "special needs" existed in the USCS, and therefore, once again, balanced the individual's privacy expectations against the government's asserted interests.[98] The Court held that Customs employ-

84. *Id.* at 619.
85. *See id.* at 627–28.
86. *Id.* at 633.
87. *Id.* at 630.
88. *Id.* at 628.
89. *See id.* at 623–33.
90. 489 U.S. 656 (1989). This was a companion case to *Skinner*. *See id.* at 665.
91. *Id.* at 660. The USCS established a Drug Screening Task Force that concluded drug screening was a reliable and viable option. *Id.*
92. *Id.* at 660–61.
93. *Id.* at 663.
94. *Id.* at 660–61.
95. *See id.* at 669–70.
96. *See id.* at 668.
97. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 622–33 (1989).
98. *Von Raab*, 489 U.S. at 665–66.

ees have a diminished expectation of privacy due to the nature of their work.[99] In contrast, the government's interest in ensuring the fitness and integrity of Customs employees was found to be compelling[100] due to the "extraordinary safety and national security hazards" attendant with protecting America's borders.[101] The risk of national security breaches in this case justified the removal of the Fourth Amendment requirements of a warrant, probable cause, and individualized suspicion.[102]

3. *Chandler*: The Absence of Established Drug Use and the Absence of Risk

In *Chandler v. Miller*,[103] the State of Georgia enacted a statute requiring candidates for certain state offices to pass a drug test in order to qualify for a place on the ballot.[104] Libertarian Party nominees filed suit against state officials contesting the statute.[105] The legislature did not claim that it had enacted the statute in response to any suspicion or fear of drug use among state officials; no evidence of drug use or endangerment of public safety was presented.[106] Rather, the statute was enacted to deter drug users from seeking office.[107]

The Supreme Court stated that the guiding framework was the Fourth Amendment analysis for suspicionless drug testing used two years prior in *Vernonia*,[108] as well as the analysis used in *Skinner*[109] and *Von Raab*.[110] The Court rejected the idea that preventive drug testing in this context presented a "special need";[111] the need was merely symbolic and did not qualify as a "special need."[112] In holding the drug testing program unconstitutional,[113] the Court relied heavily on the fact that no evidence existed of drug abuse by elected offi-

99. *Id.* at 672.
100. *Id.* at 670.
101. *Id.* at 674.
102. *See id.* at 679. The Court vacated and remanded the part of the judgment which upheld drug testing for employees who handle confidential information. *Id.* at 664–65.
103. 520 U.S. 305 (1997). For a further discussion of this case, see Joy L. Ames, Note, Chandler v. Miller: *Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273 (1997).
104. *Chandler*, 520 U.S. at 309.
105. *Id.* at 310.
106. *See id.* at 319, 321–23.
107. *Id.* at 318.
108. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
109. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).
110. *See Chandler*, 520 U.S. at 318.
111. *See id.* at 322; *id.* at 325 (Rehnquist, C.J., dissenting).
112. *Id.* at 322.
113. *Id.* at 309. Justice Ginsburg, who dissented in *Pottawatomie* and concurred in *Vernonia*, authored the majority opinion in *Chandler*. *See id.* at 308; Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 842 (2002); *Vernonia*, 515 U.S. at 666.

cials.[114] When the Court discussed *Skinner*,[115] the focus was on human casualties and safety hazards;[116] when the Court discussed *Von Raab*,[117] the focus was on the unique role of the Customs Service in defending the nation against drugs;[118] when the Court discussed *Vernonia*,[119] the focus was on the drug crisis led by athletes who were placed at greater risk of injury because of their drug use.[120] The Court's decision in *Chandler* hinged on the fact that state officials did not perform safety-sensitive tasks and, therefore, the public safety was not in jeopardy.[121]

III. THE ROAD TRAVELED IN *POTTAWATOMIE*

A. *Factual Background of* Pottawatomie

On September 14, 1998,[122] the school board in rural Tecumseh, Oklahoma adopted the Student Activities Drug Testing Policy (Policy).[123] The Policy required all middle and high school students who participated in extracurricular activities to submit to suspicionless drug testing.[124] The original draft covered only students participating in athletic competition, but the Policy was later amended to cover students in all extracurricular activities,[125] including Academic Team, Future Homemakers of America (FHA), Future Farmers of America (FFA), band and choir, as well as cheerleading and athletics.[126] Although the Policy provided for testing of students in all extracurricular activities, the school district chose to apply the terms of the Policy only to students engaging in activities of a competitive nature.[127]

The Policy required that each student and the student's parent or guardian sign and return a form agreeing to submit to drug testing.[128] The tests could be administered on three occasions: (1) prior to participating in an extracurricular activity, (2) on a random basis while participating in an extracurricular activity, and (3) at any time, while

114. *See Chandler*, 520 U.S. at 311, 318–19, 321–22.
115. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).
116. *See Chandler*, 520 U.S. at 314–15.
117. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
118. *See Chandler*, 520 U.S. at 316.
119. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
120. *See Chandler*, 520 U.S. at 316–17.
121. *See id.* at 321–23.
122. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1282 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).
123. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 826 (2002).
124. *Id.*
125. *Earls*, 115 F. Supp. 2d at 1283 n.2.
126. *Id.* at 1282.
127. *Id.* at 1282–83. In addition, an annual fee of four dollars was charged to each student that was required to participate in the drug testing program. *Id.* at 1283.
128. *See* Brief of Petitioners, 2001 WL 1819195 at *10, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332).

competing, based upon reasonable suspicion.[129] The tests would detect cocaine, opiates, amphetamines, barbiturates, benzodiazepines, and cannabinoid metabolites (marijuana).[130] On the basis of reasonable suspicion, students could be tested for substances other than these, such as anabolic steroids and alcohol.[131]

When selected, a student provided a urine sample for drug testing.[132] A faculty member called a student out of class and monitored the student's urine production in the restroom.[133] Male and female students produced the urine samples in a closed bathroom stall while a monitor of the same sex waited outside the stall[134] and listened for normal urination sounds.[135] The monitor poured the urine sample into two bottles and, along with the student, sealed the bottles.[136] The bottles were then placed into a mailing pouch, along with a consent form signed by the student.[137] The monitor also provided the student with a form on which the student could list any prescription medications taken in the last thirty days.[138] The form was submitted to the lab in a sealed envelope, and neither the monitor nor any other employee of the school district could examine it.[139]

The Policy required that test results remain confidential and be provided to school personnel only on a "need to know" basis.[140] The first time a student tested positive for drugs, the school would notify the student's parent or guardian.[141] The student could continue participating in extracurricular activities if the student submitted proof of participation in drug counseling within five days of the meeting and agreed to another drug test in two weeks.[142] The second time a student tested positive, the student would be (1) suspended from participation in extracurricular activities for fourteen days, (2) required to submit to monthly drug tests, and (3) required to complete drug counseling.[143] The third time a student tested positive, the student would be suspended from participation in extracurricular activities for the longer of either eighty-eight school days or the remainder of the

129. *Earls*, 115 F. Supp. 2d at 1283.
130. *Id.*
131. *Id.* at 1283 n.3.
132. *See id.* at 1290–91.
133. *Id.*
134. *Id.* at 1290 n.35; Brief of Petitioners, 2001 WL 1819195 at *37, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332).
135. *Earls*, 115 F. Supp. 2d at 1290 n.35.
136. *Id.* at 1291.
137. *Id.*
138. *Id.* at 1294.
139. *Id.*
140. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 833 (2002).
141. *Id.*
142. *Id.*
143. *Id.* at 833–34.

school year.[144] At no point would academic disciplinary action be taken,[145] and the results were not to be turned over to law enforcement officials.[146]

B. *Procedural Background of* Pottawatomie

Lindsey Earls,[147] a student at Tecumseh High School, sued the Board of Education of Tecumseh Public School District and Tecumseh Public Schools for declaratory and injunctive relief after enactment of the Policy.[148] Ms. Earls was a member of the academic team, show choir, and marching band.[149] She and her parents challenged the portions of the Policy that required suspicionless drug testing of students in non-athletic extracurricular activities.[150] They did not challenge the portions of the Policy that applied to athletes.[151]

The District Court for the Western District of Oklahoma found the Policy's search procedure reasonable under the Fourth Amendment and granted summary judgment in favor of the Board of Education.[152] After finding the existence of a "special need,"[153] the court applied the same balancing test used in *Vernonia*.[154] The court interpreted *Vernonia* as holding that the most significant element in the analysis was the fact that the Policy applied to students attending public school, not the fact that it was limited only to students participating in athletics.[155] The court found the voluntary nature of athletics and extracurricular activities equivalent in that they both result in a diminished expectation of privacy.[156] Additionally, the court found that the character of the intrusion was insignificant, as in *Vernonia*,[157] because the Policy's testing procedure respected student confidentiality more than the policy had in *Vernonia*.[158] The court determined that the Pol-

144. *Id.* at 834.
145. *Id.* at 833.
146. *Id.*
147. Daniel James, another student of Tecumseh High School, also joined in the suit as a plaintiff. However, he became otherwise ineligible to participate in extracurricular activities because he no longer satisfied the academic requirements, so the Court focused its discussion on Ms. Earls. *See* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1282 & n.1 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).
148. *See id.* at 1282.
149. *Id.*
150. *Id.* at 1283.
151. *Id.* at 1283 n.6.
152. *Id.* at 1296.
153. *Id.* at 1288.
154. *See id.* (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995)).
155. *Id.* at 1289 n.31.
156. *Id.* at 1289.
157. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
158. *Earls*, 115 F. Supp. 2d at 1294–95. In *Vernonia*, students were required to disclose any prescription medications which they were taking to the teacher who monitored their urine sample. *See Vernonia*, 515 U.S. at 659. The Court was troubled by this breach of confidentiality and suggested that the information be sent in a sealed

icy was sound by interpreting *Vernonia* so as not to require the school district to focus on the students who are using drugs or are most likely to use drugs;[159] it made no difference that testing extracurricular participants would cover the "vast majority" of the student population.[160]

On appeal, the Tenth Circuit interpreted the *Vernonia* decision quite differently.[161] In the Tenth Circuit's view, the most significant element to be considered in the analysis was the Court's emphasis and reliance on the existence of a drug problem among those students tested.[162] The Tenth Circuit agreed with the district court that the Supreme Court emphasized the school's role as guardian and tutor, but found that the Court also emphasized the serious need for the testing that the *Vernonia* situation presented.[163] In comparison, drug use in Tecumseh schools was minimal:[164] the schools in previous years had reported that drugs were not a major problem.[165]

In applying the balancing test, the court found that students in extracurricular activities, like athletes, have a diminished privacy interest.[166] The court based that conclusion not on the voluntary nature of the activity, but on the increased rules accompanying participation.[167] The court also agreed that the character of the intrusion was insignificant.[168] One factor—the lack of a governmental concern and the ineffectiveness of the testing—tipped the balance, however, in favor of the students. The court stated: "[W]e see little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem."[169] In order for a drug testing policy to be reasonable, and thus constitutional, the court stressed that a school district must demonstrate a documented drug problem among a significant number of those students subject to the testing:[170] only then would drug testing actually remedy the drug problem.[171]

These divergent interpretations of *Vernonia*[172] would soon be resolved by the Supreme Court's abandonment of the fact-specific test upon which the Tenth Circuit relied.

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envelope to the testing lab. *Id.* at 660. Tecumseh's Policy incorporated this suggested level of confidentiality. *Earls*, 115 F. Supp. 2d. at 1294.

159. *See id.* at 1295.

160. *See id.* at 1282.

161. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

162. *Id.* at 1271 n.5.

163. *Id.* at 1268, 1272.

164. *Id.* at 1272.

165. *Id.* at 1274.

166. *Id.* at 1276.

167. *See id.*

168. *Id.*

169. *Id.* at 1277 (alteration in original).

170. *Id.* at 1278.

171. *Id.*

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

C. *The Supreme Court's Analysis in* Pottawatomie*:* Vernonia*'s Balancing Test*

1. Majority

The Supreme Court held in *Pottawatomie* that the Policy was reasonable and constitutional under the Fourth Amendment.[173] After discussing the existence of "special needs" in the public school setting,[174] Justice Thomas, writing for the five-to-four majority, stated that the *Vernonia* balancing test was the controlling analytical framework.[175] The Court's analysis on the first part of the balancing test—the nature of the privacy interest and the character of the intrusion—was in line with the facts and reasoning in *Vernonia*.[176] The Court's analysis of the governmental interests diverged from *Vernonia*, however, because none of the concerns present in the Vernonia schools were present in the Tecumseh schools.[177] The *Pottawatomie* Court reiterated that the school's status as guardian and tutor was crucial to upholding the drug testing policy:[178] "[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[179]

a. The Nature of the Privacy Interest and the Character of the Intrusion

Like athletes, students who participated in extracurricular activities voluntarily subjected themselves to additional rules and requirements that further diminished their expectation of privacy.[180] Also, students were regularly subjected to vaccinations and physical examinations.[181] These factors discussed in *Vernonia* were also present in *Pottawatomie*.[182]

According to Justice Thomas, the method used to collect the urine samples determined the character of the intrusion on Earls' privacy.[183] The Court found the Policy's method to be basically identical to the one approved in *Vernonia*,[184] but even less intrusive because both male and female students produced their samples behind a closed stall.[185] The results remained mostly confidential[186] and were not

173. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 837 (2002).
174. *Id.* at 827.
175. *See id.* at 829.
176. *Compare Vernonia*, 515 U.S. at 654–60, *with Pottawatomie*, 536 U.S. at 829.
177. *See infra* Part III.C.1.a–b.
178. *Pottawatomie*, 536 U.S. at 830–31 & n.3.
179. *Id.* at 830 (alteration in original) (quoting *Vernonia*, 515 U.S. at 665).
180. *Id.* at 831.
181. *See id.* at 830–31.
182. *Compare Vernonia*, 515 U.S. at 654–57, *with Pottawatomie*, 536 U.S. at 830–31.
183. *Pottawatomie*, 536 U.S. at 832.
184. *Id.*
185. *See id.* at 832–33.

used for academic discipline or law enforcement purposes.[187] Thus, the Court determined that the character of the intrusion in this case was minimal.[188] Again, the Court's reasoning paralleled its decision in *Vernonia*.[189]

b. *The Nature and Immediacy of the Government's Concerns and the Efficacy of the Means Used in Meeting Them*

The Court found that the health and safety concerns present in *Vernonia* were also present in *Pottawatomie*.[190] Although Tecumseh presented very little evidence of a drug problem, the Court stated: "[T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school."[191] The Court discussed earlier cases[192] to illustrate that a demonstrated drug problem was not required to find a testing program reasonable[193] and that drug testing could be valid when used for a solely preventative reason.[194] The Court found the Tenth Circuit's required showing of a drug problem to be impracticable: designating a threshold level of drug use sufficient to qualify as a drug problem would be impossible.[195]

Justice Thomas noted that safety risks for students in extracurricular activities differed from the risks of students in athletics, but asserted that drug testing furthers the safety interest of *all* students.[196] The Court acknowledged that there was a closer fit between the drug testing in *Vernonia* and drug use by student athletes, but stressed this did not mean that *Vernonia* required schools to test only those students most likely to use drugs.[197] Ultimately, the Court found that Tecumseh's Policy effectively served the school's interest in protecting the health and safety of its students.[198] The Court thus abandoned *Vernonia*'s fact-specific test by (1) allowing national data to replace school-specific threshold information so that students among whom there was no drug problem could be tested and (2) allowing the general risk of overdose to replace the specific risks of physical harm faced by athletes utilizing drugs.[199]

186. *Id.* at 833.
187. *Id.*
188. *Id.* at 834.
189. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658–60 (1995).
190. *Pottawatomie*, 536 U.S. at 834.
191. *See id.* (alteration in original).
192. *Id.* at 835 (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 673 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 607 (1989)).
193. *Id.* (citing Chandler v. Miller, 520 U.S. 305, 319 (1997)).
194. *Id.* (citing *Skinner*, 489 U.S. at 607; *Von Raab*, 489 U.S. at 673).
195. *Id.* at 836.
196. *See id.*
197. *Id.* at 837–38.
198. *Id.* at 838.
199. *See id.* at 834.

2. Justice Breyer's Concurring Opinion

Justice Breyer's concurrence emphasized four points about Tecumseh's need for the drug testing program: (1) the severity of the drug problem in schools generally, (2) the fact that supply-side interdiction had failed to reduce teenage drug use, (3) the need for public schools to find an effective way to deal with the drug problem, and (4) the effect that policies like Tecumseh's could have on peer pressure.[200]

Justice Breyer next addressed the privacy concerns related to drug testing.[201] First, he gave great weight to the fact that the school board gave everyone an opportunity to participate and express their views, and very little, if any, opposition was raised against instituting the drug testing program.[202] Second, the Policy *did not test the entire student population*,[203] and this effectively allowed a student to choose not to participate in extracurricular activities: a less severe penalty than expulsion.[204] Third, the alternative of testing based upon suspicion could lead to targeting and subsequent stigmatization of members of unpopular groups.[205] Although Justice Breyer allowed drug testing in this case, his emphasis on the Policy's limitation to students in extracurricular activities suggests that he would not approve of a policy that subjected all students to drug testing. Thus, Justice Breyer's vote will likely be crucial in future cases.

3. Justice Ginsburg's Dissenting Opinion[206]

Justice Ginsburg's dissenting opinion focused on the absence of drug use and safety risks to students in extracurricular activities: "The particular testing program upheld today is not reasonable, *it is capricious, even perverse*: [Tecumseh's] policy targets for testing a student population *least likely to be at risk* from illicit drugs and their damaging effects."[207]

a. The Common Characteristics of Vernonia *and* Pottawatomie

With respect to the nature of the public school setting, Justice Ginsburg acknowledged that schools certainly have an interest in the health and safety of their students but noted that the risks of drug use

200. *Id.* at 839–41 (Breyer, J., concurring).
201. *Id.* at 841–42 (Breyer, J., concurring).
202. *Id.* at 841 (Breyer, J., concurring).
203. *Id.* (Breyer, J., concurring).
204. *Id.* (Breyer, J., concurring).
205. *Id.* (Breyer, J., concurring).
206. *Id.* at 842 (Ginsburg, J., dissenting). Justice Ginsburg's dissenting opinion was joined by Justices Stevens, O'Connor, and Souter. *Id.* (Ginsburg, J., dissenting). In addition, Justice O'Connor wrote a brief dissenting opinion, with which Justice Souter joined, reiterating her belief that *Vernonia* was wrongly decided. *Id.* (O'Connor, J., dissenting).
207. *Id.* at 843 (Ginsburg, J., dissenting) (alteration in original) (emphasis added).

are present for *all* schoolchildren.[208] "*Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them."[209] In Justice Ginsburg's view, the *Vernonia* decision was limited to student athletes based upon their drug use as a group and the enhanced dangers associated with their participation in sports.[210]

With respect to the voluntary nature of the activities, Justice Ginsburg explored the reality that participation in extracurricular activities is essential for college applications, as well as for enhancing the quality of the educational experience.[211] Students volunteer for extracurricular activities for the same reasons they volunteer for honors classes.[212] The distinction between athletics and extracurricular activities lies in the fact that schools have a duty to mitigate the physical dangers associated with sports.[213] Close regulation of athletics is therefore required, but extracurricular activities do not involve any similar physical risk.[214]

b. *What* Vernonia *Really Means Here*

Applying *Vernonia*'s "fact-specific balancing"[215] to *Pottawatomie*, Justice Ginsburg concluded that the suspicionless drug testing of students in extracurricular activities was unconstitutional.[216] When discussing the nature of the privacy interest—the first part of the balancing test—the *Vernonia* Court emphasized the routine communal undress required of athletes in describing their reduced expectation of privacy: changing in the locker room, showering in the open, and utilizing toilet facilities that have no stall doors.[217] In *Pottawatomie*, participation in extracurricular activities had no equivalent to such communal undress.[218] Justice Ginsburg insisted that sharing sleeping quarters and using restrooms that do have stall doors when traveling hardly compared to changing clothes and showering naked in front of other students.[219]

Justice Ginsburg further noted that the *Vernonia* Court assumed that all information pertaining to the drug test and prescription medi-

208. *Id.* at 844 (Ginsburg, J., dissenting).
209. *Id.* (Ginsburg, J., dissenting).
210. *See id.* at 845 (Ginsburg, J., dissenting).
211. *Id.* (Ginsburg, J., dissenting).
212. *Id.* at 845–46 (Ginsburg, J., dissenting).
213. *Id.* at 846 (Ginsburg, J., dissenting).
214. *Id.* (Ginsburg, J., dissenting).
215. *Id.* at 830.
216. *Id.* at 855 (Ginsburg, J., dissenting).
217. *Id.* at 847 (Ginsburg, J., dissenting) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)).
218. *Id.* at 847–48 (Ginsburg, J., dissenting).
219. *Id.* at 848 (Ginsburg, J., dissenting).

cation would remain confidential.[220] The Court found the character of the intrusion negligible based on the manner in which the urine samples were obtained.[221] In *Pottawatomie*, however, evidence was presented to the district court that the personal information of Ms. Earls, along with other students, was often left lying about unsealed, within reach of anyone.[222] Evidence was also presented that the test results were given out to people who did not possess a "need to know."[223] Thus, in Justice Ginsburg's analysis, the character of the privacy intrusion in *Pottawatomie* was greater because the personal information was carelessly handled and did not remain confidential.[224]

The final step in the analysis, in Justice Ginsburg's view, presented the greatest divergence from *Vernonia*.[225] In *Vernonia*, an alarming drug epidemic existed among athletes;[226] in *Pottawatomie*, no drug problem existed among students in extracurricular activities or even among students in general.[227] In *Vernonia*, the drug testing policy was limited to athletes;[228] in *Pottawatomie*, the drug testing policy indiscriminately applied to all students in extracurricular activities.[229] In *Vernonia*, athletes were subjected to enhanced physical risk by drug use and the test specifically screened for drugs that posed a demonstrated risk;[230] in *Pottawatomie*, students in extracurricular activities were not subject to any level of special risks.[231]

In these respects, Justice Ginsburg found *Pottawatomie* much more analogous to *Chandler*, where the Court found the drug testing policy unconstitutional for these very reasons.[232] The drug testing program in *Chandler*, as in *Pottawatomie*, was not enacted in response to a known drug problem or some extreme danger, and the program tested individuals who were not engaged in activities that posed high safety risks.[233] The *Chandler* Court concluded that the proposed need for testing was "symbolic," rather than "special," in that the purpose be-

220. *See id.* (Ginsburg, J., dissenting) (quoting *Vernonia*, 515 U.S. at 660).
221. *See id.* (Ginsburg, J., dissenting) (quoting *Vernonia*, 515 U.S. at 658).
222. *Id.* (Ginsburg, J., dissenting).
223. *See id.* (Ginsburg, J., dissenting) (quoting Brief of Respondents, 2002 WL 243578 at *6, *24, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332)); Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1293 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).
224. *See Pottawatomie*, 536 U.S. at 848 (Ginsburg, J., dissenting).
225. *See id.* at 849 (Ginsburg, J., dissenting).
226. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648–49 (1995).
227. *See Pottawatomie*, 536 U.S at 849 (Ginsburg, J., dissenting).
228. *See Vernonia*, 515 U.S. at 650.
229. *Pottawatomie*, 536 U.S. at 851 (Ginsburg, J., dissenting).
230. *Vernonia*, 515 U.S. at 662.
231. *Pottawatomie*, 536 U.S. at 851 (Ginsburg, J., dissenting).
232. *See Pottawatomie*, 536 U.S. at 854 (Ginsburg, J., dissenting); Chandler v. Miller, 520 U.S. 305, 319–22 (1997).
233. *Pottawatomie*, 536 U.S. at 854 (Ginsburg, J., dissenting) (quoting *Chandler*, 520 U.S. at 319–22).

hind the testing was to appear committed to the war on drugs.[234] Justice Ginsburg reached the same conclusion about the Policy in *Pottawatomie*: the need was symbolic because the true purpose behind the testing was to broadcast Tecumseh's stand against drug use.[235] Justice Ginsburg's correct application of *Vernonia*'s fact-specific test focused on Tecumseh, not the nation; therefore, the absence of specific facts relating to drug use and safety risks in *Pottawatomie* precluded a finding that the Policy was reasonable.

IV. The Road Beyond *Pottawatomie*: What Happens Next?

A. *No Drugs and No Risks: Problems with the Court's Analysis*

Evidence of drug use and the safety-sensitive nature of the tasks performed, or lack thereof, was crucial to the Court's decisions in *Vernonia*, *Skinner*, *Von Raab*, and *Chandler*. In *Vernonia*, evidence of drug use among athletes was high and the increased risk of physical injury to athletes was also high.[236] In *Skinner*, evidence of drug use among railroad employees was low, but the increased risk of mass casualties from drug use was incredibly high.[237] In *Von Raab*, evidence of drug use among Customs employees was low, but the increased risk of national security breaches from drug use was incredibly high.[238] *Vernonia*, *Skinner*, and *Von Raab* each upheld random, suspicionless testing.[239] In *Chandler*, evidence of drug use was non-existent and safety concerns were also non-existent,[240] thus drug testing was disallowed.[241]

The Court's resolution of these cases seems to illustrate a spectrum of reasonableness. If drug use is low but the danger to safety is high, then drug testing is reasonable.[242] If drug use is low and the danger to safety is also low, then drug testing is unreasonable.[243] In *Pottawatomie*, evidence of drug use and danger to safety were both minimal,[244] so the drug testing program should have been found unreasonable.

234. *Id.* (Ginsburg, J., dissenting) (quoting *Chandler*, 520 U.S. at 321–22).
235. *Id.* (Ginsburg, J., dissenting).
236. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650 (1995).
237. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 607–08 (1989).
238. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 660, 664–65 (1989).
239. *See Vernonia*, 515 U.S. at 665; *Von Raab*, 489 U.S. at 664; *Skinner*, 489 U.S. at 634.
240. *See* Chandler v. Miller, 520 U.S. 305, 311, 318–19 (1997).
241. *Id.* at 309.
242. *See Vernonia*, 515 U.S. at 665; *Von Raab*, 489 U.S. at 664; *Skinner*, 489 U.S. at 634.
243. *See Chandler*, 520 U.S. at 321–23.
244. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 849, 852 (2002) (Ginsburg, J., dissenting).

1. *Vernonia* vs. *Pottawatomie*: Opposite Ends of the Spectrum

a. The Absence of Drug Use

In *Vernonia*, the Court labeled the drug problem in the school district as "an immediate crisis" more severe than that in either *Skinner* or *Von Raab*.[245] The Court argued that, in *Skinner*, suspicionless testing of railroad employees was upheld "without proof that a [drug] problem existed."[246] In *Skinner*, however, the Federal Railroad Administration produced evidence of a significant number of train accidents involving alcohol or drug use that caused numerous fatalities and injuries, as well as millions of dollars in damage.[247] The *Skinner* Court went on to stress that the results of drug use by employees could result in "great human loss" and "disastrous consequences" with even the smallest lapse in attention.[248] The Court also likened railroad employees and the risks they engender to employees in nuclear power plants.[249] In *Von Raab*, the Court upheld suspicionless drug testing of customs officials who carry firearms or are responsible for intercepting drugs.[250] The Court emphasized the "extraordinary safety and national security hazards" present.[251]

The *Vernonia* Court felt that the drug problem in the school warranted this "immediate crisis" designation because of the evidence of the severity of the problem that was presented to the district court.[252] Teachers had observed a sharp increase in drug use that led to an increase in disciplinary problems in the schools:[253] disciplinary referrals had more than doubled in less than ten years[254] and had reached "epidemic proportions."[255] The student athletes were the "leaders of the drug culture,"[256] and the staff directly observed the students using and glamorizing drugs.[257] A large number of students involved in interscholastic athletics were "in a state of rebellion."[258]

In *Pottawatomie*, however, the district court acknowledged that neither an epidemic drug problem nor a "state of rebellion" existed among the students in Tecumseh.[259] The school district, in applica-

245. *Vernonia*, 515 U.S. at 663.
246. *Id.*
247. *Skinner*, 489 U.S. at 607 (1989).
248. *Id.* at 628.
249. *Id.*
250. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989).
251. *Id.* at 674.
252. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662–63 (1995).
253. *Id.* at 648.
254. *Id.* at 649.
255. *Id.* (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S. 646 (1995)).
256. *Id.* (quoting *Vernonia*, 796 F. Supp. at 1357).
257. *Id.*
258. *Id.* (emphasis added) (quoting *Vernonia*, 796 F. Supp. at 1357).
259. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1287 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

tions to the Department of Education in prior years, had stated that drug use was not a major problem.[260] No teachers had observed students taking drugs; the choir teacher stated that most of her choir students did not use drugs, and the FHA teacher also stated that her students involved in competition did not use drugs.[261] The FFA teacher reported "that students in FFA were less likely to use drugs than students who were not so involved."[262] The principal of Tecumseh High School reported that there had been no alcohol or drug-related injuries or deaths while he had been at the school.[263]

Notwithstanding the lack of evidence of a significant drug problem, the Court substituted the "nationwide drug epidemic" to substantiate the governmental interest.[264] In addition, the Court mentioned several other instances in Tecumseh: marijuana found near the parking lot and teachers' testimony that they had seen students who "appeared" to be on drugs.[265] Unlike *Vernonia*, no evidence of the direct observation of drug use among students was mentioned.[266]

Due to the lack of a documented drug problem, the Court used *Skinner* and *Von Raab* to support the use of drug testing on a preventive basis.[267] The Court failed to address adequately, however, the obvious distinction between these cases and drug use by students in extracurricular activities.[268] The tests in *Skinner* and *Von Raab* were "installed to avoid enormous risks to the lives and limbs of others, not dominantly in response to the health risks to users invariably present in any case of drug use."[269] In the context of students in extracurricular activities, no national security concerns or risks of deadly train wrecks were involved.[270] In *Chandler*, a case decided two years after *Vernonia*, the dissenting opinion of one lone Justice would have allowed drug testing on a purely preventive basis on the theory that it

260. *Id.* at 1287 n.23.

261. *See* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1273 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

262. *See id.* at 1273.

263. *Id.* at 1272. The president of the school board provided the greatest amount of evidence relating to a drug problem; many of the instances she described, however, occurred in the 1970's and 1980's and were merely the stories of her children or comments she overheard. *Id.* at 1274 n.9. She mentioned over a dozen instances of drug usage, but the only specific incident of suspected drug use of a student involved in extracurricular activities occurred in 1999, when drug paraphernalia was found in the car of an FFA student. *Id.* During the 1998-99 school year, 486 high school students were drug tested, but only two students tested positive, both of whom were athletes. *Id.* During the 1999-2000 school year, 311 high school students were tested, but only one tested positive, again, an athlete. *Id.* at 1273.

264. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 834–35 (2002).

265. *Id.*

266. *See id.*

267. *See id.* at 835.

268. *See id.* at 835–36.

269. *Id.* at 850 (Ginsburg, J., dissenting).

270. *See id.* (Ginsburg, J., dissenting).

was unnecessary to wait for an actual drug problem to evidence itself.[271] This logic was rejected, however, by the majority of the Court, which continued to stress the need for evidence of an actual drug problem.[272] The Court's preference for evidence of a drug problem seemed to dissolve in *Pottawatomie*.

b. The Absence of Safety Risks

In *Vernonia*, the Court found that "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."[273] The district court found that the school administrators were greatly concerned for the safety of student athletes because they were observed to be the most involved in the drug culture.[274] At the trial, expert testimony verified the harmful effects of drugs on coordination, reaction, memory, motivation, judgment, and performance.[275] The high school wrestling and football coach witnessed injuries to football players and a wrestler that he believed were the result of drug use: safety omissions and misexecutions on the football field and a severe injury to a wrestler during competition.[276] The drugs that the district tested in *Vernonia* were drugs that posed physical risks to athletes.[277]

In holding the drug testing policy unconstitutional in *Chandler*,[278] the Court stressed that in addition to the lack of a drug problem, the "officials typically do not perform high-risk, safety sensitive tasks."[279] The Court noted that there was no indication whatsoever of a concrete danger sufficient to dispense with the requirement of individualized suspicion.[280]

In *Pottawatomie*, the Court simply stated that "the safety interest furthered by drug testing is undoubtedly substantial for *all* children, athletes and nonathletes alike."[281] The only particular risk even mentioned was the risk of overdose.[282] According to the Tenth Circuit, "[i]t is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete

271. *See Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting).
272. *See id.* at 321–22.
273. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662 (1995).
274. *Id.* at 649.
275. *Id.*
276. *Id.*
277. *Id.* at 662. Amphetamines mask the body's normal response to fatigue and are dangerous when used during exercise. *Id.* Marijuana alters blood pressure responses and increases body temperature by inhibiting the body's ability to sweat. *Id.* Cocaine causes a rise in blood pressure and possible heart malfunctions. *See id.*
278. Chandler v. Miller, 520 U.S. 305, 309 (1997).
279. *Id.* at 321.
280. *See id.* at 318–19.
281. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 836 (2002) (emphasis added).
282. *Id.* at 836–37.

in those activities while using drugs, any more than any student is at risk simply from using drugs."[283] The only true exploration of drug-associated dangers to students in extracurricular activities, or the lack thereof, was made in the briefs to the Court.[284]

In its brief, Tecumseh argued that safety risks exist for band members because they perform routines with heavy instruments and for cheerleaders because they perform acrobatics and create pyramids.[285] In addition, FFA members work with large animals that they must control and restrain.[286] Although Tecumseh admitted that activities such as choir, FHA, and academic team do not pose any similar physical danger, Tecumseh argued that those activities pose a safety risk due to the lack of supervision[287] associated with travel to events.[288] The Tenth Circuit found this argument unpersuasive, however, because other groups that travel on field trips and stay overnight face the same supervision concerns but are not subject to drug testing.[289]

Justice Ginsburg positively poked fun at Tecumseh's efforts to equate the dangers associated with extracurricular activities with the dangers presented in the contexts of the Court's earlier cases: "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree."[290] No student participating in band, choir, academic team, or FHA ever suffered an injury as a result.[291] Only one injury of a student involved in an extracurricular activity was even mentioned.[292] The evidence presented by Tecumseh failed to show the existence of any significant safety concerns with respect to students in extracurricular activities.[293]

283. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1277 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002) (alteration in original).

284. *See* Brief of Petitioners at *4–8, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332), 2001 WL 1819195; Brief of Respondents, 2002 WL 243578 at *2, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332).

285. Brief of Petitioners at *43, *Pottawatomie* (No. 01-332).

286. *Id.*

287. *Id.*

288. *Id.* at *43–44.

289. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1277 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

290. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 852 (2002) (Ginsburg, J., dissenting).

291. Brief of Respondents, 2002 WL 243578 at *2, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332).

292. *Earls*, 242 F.3d at 1274 n.9. In 1990 or 1991, an FFA student lost control of a steer, which injured the student and another person. *Id.* at 1272. The president of the school board observed the incident and believed the student was "under the influence of some substance." *See id.* at 1272, 1274 n.9.

293. *See id.* at 1277.

B. *The Ramifications of the Court's Leniency*

1. School-Wide Testing: The Reality of the Future Independent School District

Students in the Future Independent School District will likely challenge the expansive policy of drug testing all students. Yet applying the analysis used in *Pottawatomie*,[294] the program could easily be declared constitutional. "Special needs" exist in the public school setting, so the reasonableness balancing test would be applied: "a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests."[295] Under *Pottawatomie*, all students have a diminished expectation of privacy due to required vaccinations and examinations. In addition, a school acts as guardian and tutor over the children under its care.[296] Under *Pottawatomie*, the character of the intrusion for drug testing would be minimal because the urine would be collected in a manner like that of a public restroom and the results mainly kept confidential.[297]

On the other side of the scale, the importance of the government's concern in preventing drug use by students would be "compelling."[298] Under *Pottawatomie*, a demonstrated drug problem would be unnecessary because the nationwide drug epidemic makes drugs a primary concern in every school.[299] Drug use poses the same risk of overdose to all students: "the safety interest furthered by drug testing is undoubtedly substantial for *all children* . . . ."[300]

As the above discussion indicates, the drug testing policy of the Future Independent School District could easily pass muster under the Court's analysis in *Pottawatomie*. The remaining bastion of hope against such wide expansion is Justice Breyer, whose concurring opinion stressed that the policy in *Pottawatomie* did not apply to all students.[301]

If school districts are not required to show an identifiable drug problem prior to instituting a testing program, then schools will be free to test larger and larger segments of the population.[302] Indeed, Deputy Solicitor General for the United States, Paul Clement, argued before the Supreme Court that a school-wide drug testing program

294. *See Pottawatomie*, 536 U.S. at 830–38.
295. *See id.* at 830.
296. *Id.*
297. *See id.* at 832–33.
298. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995).
299. *See Pottawatomie*, 536 U.S. at 834.
300. *Id.* at 836 (emphasis added).
301. *See id.* at 841 (Breyer, J., concurring). *See supra* Part III.C.2.
302. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1278 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

would be constitutional.[303] Justice Scalia, during oral argument, also seemed to push for the validity of extending drug testing to include all children in public schools.[304]

The legal and judicial leaders of this country seem to be leaning towards further expansion of drug testing in schools.[305] Tecumseh received so many requests regarding the implementation of its Policy that the district posted it on the Internet,[306] and after the decision in *Vernonia*,[307] schools throughout the country began implementing some sort of drug testing policy for their students.[308] In Lockney, Texas, and Sundown, Texas, the school districts enacted a mandatory drug testing policy for all junior and senior high school students.[309] If a student or parent refuses, the student receives the same punishment as that for an initial failure to pass the test: in-school suspension.[310]

Considering the expansion in drug testing that occurred after *Vernonia*, one can only imagine the expansion that will occur, and is already occurring, as a result of *Pottawatomie*.[311] As Justice Ginsburg stressed, the danger in replacing the fact-specific showing of a drug problem with the nationwide drug problem is that all students become fair game for drug testing.[312] Absent the showing of a drug problem among the students to be tested, where, if anywhere, is the line to be drawn?

2. Interference with Parental Rights

The Court first stated in *Vernonia*, and later reiterated in *Pottawatomie* that "when the government acts as guardian and tutor the *relevant question is whether the search is one that a reasonable guardian and tutor might undertake.*"[313] The Court did not, however, define "reasonable guardian and tutor."[314] Although the Court constantly em-

303. United States Supreme Court Official Transcript at 22, *Pottawatomie* (No. 01-332), *available at* 2002 WL 485032.

304. *See id.* at 26, 40–41, 49.

305. *See id. passim.*

306. Tamar Lewin, *With Court Nod, Parents Debate School Drug Tests*, N.Y. TIMES, Sept. 29, 2002, at A1.

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

308. Lewin, *supra* note 306, at A1. Other school districts waited for the decision in *Pottawatomie* and are now beginning to debate how broadly that decision can apply. *Id.*

309. Jim Yardley, *Family in Texas Challenges Mandatory School Drug Test*, N.Y. TIMES, Apr. 17, 2000, at A1.

310. *Id.*

311. Lewin, *supra* note 306, at A1.

312. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 844 (2002) (Ginsburg, J., dissenting).

313. *Id.* at 830 (emphasis added) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)).

314. *See id.* (quoting *Vernonia*, 515 U.S. at 665).

phasized the importance of the school acting *in loco parentis*,[315] the Court never intimated that parents relinquish their parental rights to the school when their children walk in the front door. But the Court approved of a policy that removes parental consent from the equation; parents *must* consent to a drug test in order for their children to be able to participate in extracurricular activities.[316]

Over a dozen parents and grandparents joined together to file an amicus curiae brief to voice their opposition to the suspicionless drug testing policy in *Pottawatomie*.[317] They opposed the Policy because "it takes parenting away from the parents . . . and it usurps parents' authority to make decisions about how their children are raised."[318] The fundamental nature of the right of a parent to raise a child has been recognized by the Supreme Court for decades.[319] Other parents across the country have objected to the drug testing policies of their children's schools, as evidenced by the growing number of legal cases.[320]

Larry Tannahill, parent of a junior high student, filed suit against the Lockney school district's mandatory drug testing policy because he felt that it took away his rights as a parent:[321] "They cannot tell me how I'm supposed to believe . . . I believe in the Constitution. And because I believe in our Constitution and our rights, you're going to punish my son? I don't think so."[322] What about parents who object to mandatory testing?

Drug testing programs that allow for parental consent and participation provide one alternative. In Dade County, Florida, the school district implemented a non-mandatory drug testing policy that requires parental consent and whose only consequence is notification to

315. *See Pottawatomie*, 536 U.S. at 830–31; *Vernonia*, 515 U.S. at 654–55. For a discussion of *in loco parentis*, see DeMitchell, *supra* note 59.

316. *See* Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1282–83 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002).

317. Brief of Jean Burkett et al. as Amici Curiae in Support of Respondents, at 1–2, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-332), *available at* 2002 WL 206374.

318. *Id.* at 2.

319. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding prohibition on private schools was an unconstitutional interference with "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding prohibition on teaching of foreign languages was an unconstitutional interference with the right to "bring up children").

320. *See* Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1057 (7th Cir. 2000); Miller *ex. rel.* Miller v. Wilkes, 172 F.3d 574, 577 (8th Cir. 1999); Todd v. Rush County Schs., 133 F.3d 984, 984–85 (7th Cir. 1998); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095, 1097 (Colo. 1998).

321. Yardley, *supra* note 309, at A1.

322. *Id.*

the parent of the test's outcome.[323] A school program in Arkansas makes "drug testing kits available to parents upon request."[324] This allows for parents to choose if they want to test their children for drugs, just as they are allowed to choose how to raise their children, in general.

V. RECOMMENDATIONS

The Supreme Court should return to the fact-specific test used in *Vernonia*[325] and allow only for drug testing those students among whom there is a demonstrated drug problem and an increased risk of injury. An important defense against needless and unjustified intrusion remains by requiring districts to demonstrate a drug problem. Students would not be penalized simply because they desired to join the choir or band.

Testing only those students who have a demonstrated drug problem affects a balance between the rights of schools to guard against drug use among students and the rights of parents to choose how to address drug use with their children. Under *Pottawatomie*, parents are needlessly removed from the decision-making process. The Court has a history of respecting the rights of parents to raise their children,[326] and the Court should honor this tradition.

In *Pottawatomie*, Justice Thomas stated that it would be impossible to require a threshold amount of drug use before a testing program could be implemented,[327] and the Court allowed the nationwide drug problem to supplant any such requirement.[328] This reasoning is inconsistent, however, with the Court's decisions in other areas. For example, in *City of Richmond v. J. A. Croson Co.*,[329] the Court held that evidence of nationwide discrimination was insufficient to support an affirmative action program in a particular locality.[330] The Court's rigorous standard in *Croson* required proof of actual discrimination against a specific group within a particular locality, among other crite-

323. *See* Mireya Navarro, *Parents Support Florida School District's Offer of Drug Testing*, N.Y. TIMES, Sept. 28, 1997, at A23.

324. *Worried About Drugs? Have Parents Do the Testing*, PRO PRINCIPAL, July 2002, at 3.

325. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995).

326. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding prohibition on private schools was an unconstitutional interference with "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding prohibition on teaching of foreign languages was an unconstitutional interference with the right to "bring up children").

327. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 836 (2002).

328. *See id.* at 834.

329. 488 U.S. 469 (1989).

330. *See id.* at 500, 504–05.

ria.[331] As *Croson* demonstrates, the Court does not always disapprove of such threshold requirements and such a requirement should be imposed upon random, suspicionless drug testing of students.

VI. Conclusion

The Supreme Court's decision in *Pottawatomie* foreshadows approval of the all-encompassing drug testing program of the Future Independent School District. The *Pottawatomie* Court validated testing students among whom there was no evidence of drug use and no increased risk of physical harm from participation in extracurricular activities.[332] All students across America fit into such a broad category. Without adequate safeguards against the expansion of drug testing programs, suspicionless drug testing will likely spread rapidly.

The Supreme Court's rulings continue to erode Fourth Amendment protections for students.[333] If this erosion continues, the words of the Fourth Amendment will lose their substance and a hollow shell of its protections is all that will remain. In addition to this alarming trend of eradicating students' rights, parents seem to have been ignored in the rush to test larger segments of the student population. This exclusion violates the rights of parents to choose how to address drug use with their children.

The Supreme Court once wisely stated: "[The fact] [t]hat [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[334] In order to heed these great words, the Supreme Court should return to the fact-specific test of *Vernonia* and close the door to the further expansion of random, suspicionless drug testing in schools.

Emily Crockett

331. *See id.* at 509–11.

332. *See Pottawatomie*, 536 U.S. at 834–38.

333. For a discussion of the erosion of the Fourth Amendment in other areas, see generally Kloster, *supra* note 12; Lehmann, *supra* note 12; Line, *supra* note 12.

334. *Pottawatomie*, 536 U.S. at 855 (Ginsburg, J., dissenting) (alteration in original) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).