School Searches Under the Fourth Amendment
New Jersey v. T.L.O.

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SCHOOL SEARCHES UNDER THE FOURTH AMENDMENT: NEW JERSEY v. T.L.O.

In recent years the United States Supreme Court has significantly altered the traditional view of the fourth amendment to the Constitution. New Jersey v. T.L.O. represents a further departure from conventional analysis in the context of student searches by a school official. The Supreme Court held that a school official's in-school search of a student's purse, based on reasonable suspicion that she had violated a school rule, was constitutional despite the lack of a search warrant or probable cause. Initially, this Note examines the fourth amendment precedent the Court faced when deciding T.L.O. Second, it discusses the Court's decision. Third, it argues that the Court misapplied precedent and reached an improper result by creating a new and unnecessary approach to fourth amendment jurisprudence. Finally, this Note suggests an analysis that maintains the fourth amendment's inherent flexibility while ensuring traditional fourth amendment rights for students.

I

BACKGROUND

A. General Fourth Amendment Analysis

The framers of the fourth amendment to the United States Constitution designed the amendment "to safeguard the privacy and security of private individuals against arbitrary invasions by government officials" by protecting reasonable expectations of privacy. It is enforceable against the states through the due process

1 See infra notes 41-67 and accompanying text.
3 Id. at 343-48.
4 See infra notes 8-106 and accompanying text.
5 See infra notes 107-42 and accompanying text.
6 See infra notes 143-99 and accompanying text.
7 See infra notes 200-09 and accompanying text.
8 The fourth amendment states:

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 person or things to be seized.

U.S. CONST. amend. IV.

10 See, e.g., Katz v. United States, 389 U.S. 347, 351 (1967) ("Fourth Amendment protects people, not places"). Prior to Katz, a search violated the fourth amendment only by physical intrusion into a "constitutionally protected area." Berger v. New York,
clause of the fourteenth amendment. The framers intended that it apply only to searches conducted by agents of the government and not to acts by private individuals.

The fourth amendment consists of two clauses. The "reasonable clause" mandates that "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures shall not be violated." The "warrant clause" provides that "no Warrants shall issue, but upon probable cause." The relationship between these two clauses has generated much controversy as to the amendment's proper construction. Commentators discern two theories in Supreme Court opinions: (1) the warrant clause elucidates the reasonableness clause, and (2) each clause has independent significance. The first theory, known as the "conventional" interpretation, holds that a search is unreasonable per se if not conducted pursuant to a warrant, unless it comes under a

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388 U.S. 41, 59 (1967). *Katz* reflected the emerging view that the fourth amendment protects personal expectations of privacy rather than specific physical locations. See generally Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 *Sup. Ct. Rev.* 133 (asserting that *Katz* demonstrated the Court's willingness to "release the Fourth Amendment . . . from the moorings of precedent and determine its scope by the logic of its central concepts"). Thus, the Court held in *Katz* that electronic surveillance of a public telephone booth, without a search warrant, violated the fourth amendment because even though the intrusion occurred in a public place, it violated the appellant's expectation of privacy. *Katz*, 389 U.S. at 351-52.


12 See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) ("[amendment's] origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority").


14 U.S. CONS.T. amend. IV.

15 Id.


Professor Landynski argues that from a historical perspective there are actually three possible interpretations: (1) a reasonable search is one that meets the warrant requirements; (2) the reasonableness clause provides an additional restraint in that a search may be unreasonable even when a warrant is secured; and (3) the reasonableness clause provides an additional search power so that some warrantless searches nevertheless may be reasonable. *J. Landynski, supra* note 16, at 42-43. He concludes that the first two theories are plausible within the intended meaning of the amendment and prefers the second interpretation to the first. He considers the third theory untenable because the fourth amendment makes no provision for warrantless searches. He reasons that to detach the reasonableness clause from the warrant clause runs the risk of rendering the latter clause useless. *Id.* at 43-44.
The warrant clause exception.\textsuperscript{18} The second, called the "reasonableness" theory, maintains that a warrantless search is constitutional if it is reasonable.\textsuperscript{19} Although the Supreme Court originally favored the conventional interpretation, it has recently focused on the independent significance of the reasonableness clause in determining the scope of legally permissible searches under the fourth amendment.\textsuperscript{20}

1. The Conventional and Reasonableness Theories

Adherents of the conventional interpretation believe that the warrant clause governs fourth amendment searches, relegating the reasonableness clause to subordinate importance.\textsuperscript{21} Under this theory, the police\textsuperscript{22} must demonstrate to a magistrate that probable cause exists in order to obtain a search warrant.\textsuperscript{23} Probable cause exists when the facts and circumstances within a person's knowledge, plus any other reasonably trustworthy information, would cause a person of reasonable caution to conclude that contraband will be found in a particular place.\textsuperscript{24} If the warrant clause incorporates the reasonableness clause, then "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."\textsuperscript{25}

\textsuperscript{18} See Carroll v. United States, 267 U.S. 132, 156 (1925). For a discussion of the warrant clause exceptions, see infra notes 25 & 41-67 and accompanying text.

\textsuperscript{19} See Wasserstrom, supra note 17, at 321-22; infra notes 41-67 and accompanying text.

\textsuperscript{20} Bacigal, supra note 16, at 764. See generally Wasserstrom, supra note 17, at 309-40.

\textsuperscript{21} See, e.g., J. LANDYNSKI, supra note 16, at 42-44.

\textsuperscript{22} Fourth amendment protections are not limited to situations in which an individual is suspected of criminal behavior. Camara, 387 U.S. at 530; see infra text accompanying note 123.

Camara involved an administrative search of a private premises to examine the building's use and condition. For a general discussion of administrative inspections and searches, see 3 W. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 597-628 (2d ed. 1987).

\textsuperscript{23} See Katz, 389 U.S. at 357; 1 W. LAFAYE, supra note 22, at 554-55.


Therefore, under the conventional interpretation, a search not falling within an exception is reasonable only when probable cause exists to issue a warrant.26

Adherents of the reasonableness theory believe that the fourth amendment's two clauses operate independently.27 Thus, a search may be reasonable, and therefore constitutional, even if it is conducted without a warrant.28 Analysis utilizing a reasonableness standard may proceed in a number of ways. The most extreme alternative, which is least protective of individual rights, applies a commonsense (or "rational") analysis.29 This standard is highly amorphous because it has no guidelines but for the interpretation of the term "reasonable." Furthermore, factors in determining reasonableness change from case to case.30 The Court came closest to adopting this "pure reasonableness" standard in United States v. Rabinowitz,31 stating, "What is a reasonable search is not to be deter-

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26 Camara, 387 U.S. at 534.
27 See, e.g., Wasserstrom, supra note 17, at 281; see also United States v. Edwards, 415 U.S. 800, 807 (1974) (inquiring whether search was reasonable rather than whether it was reasonable to obtain warrant).
28 See Robbins v. California, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) ("nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants").
29 Bacigal, supra note 16, at 765; see, e.g., Coolidge v. New Hampshire, 403 U.S. 433, 527 (1971) (referring to "commonsense standard of reasonableness governing search and seizure cases") (White, J., concurring and dissenting).
30 See Coolidge, 403 U.S. at 510 ("test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts") (Black, J., concurring and dissenting); Vale v. Louisiana, 399 U.S. 30, 36 (1970) ("common sense dictates that reasonableness varies with the circumstances of the search").
31 339 U.S. 56 (1950), rev'd, Chimel v. California, 395 U.S. 752, 768 (1969). In Rabinowitz, federal agents obtained an arrest warrant for the defendant, a dealer in forged stamps. At the time of the arrest at the defendant's business address, the officers searched the desk, safe, and file cabinets and found 573 forged stamps. Rabinowitz, 339 U.S. at 57-59. The Supreme Court authorized the search as a valid search incident to an arrest. Id. at 63-64.

In Chimel, police officers armed with an arrest warrant apprehended the petitioner in his home. At the same time, the officers conducted a search of the entire house on the basis of a lawful arrest. They seized items linking the defendant to several burglaries. Chimel, 395 U.S. at 753-54. The Court held that the warrantless search could not be
mined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test.' Commentators severely criticized Rabinowitz as the nadir of fourth amendment jurisprudence.

A less extreme version of the reasonableness standard weighs in each case the state interest in conducting a search against the magnitude of intrusion upon individual privacy. These competing interests are balanced on a sliding scale: as the intrusiveness of a search increases, the state interest in carrying out the search also must increase if it is to pass constitutional scrutiny. While the Supreme Court has never adopted the sliding scale approach explicitly, it has in some limited cases applied a balancing-of-interests approach.

An even more restrictive form of the reasonableness standard considers the warrant clause a touchstone for evaluating a search's reasonableness. This restrictive view employs a totality of circumstances test considering the existence of a warrant as but one relevant factor. However, if no warrant on probable cause exists, adequate substitute safeguards must exist to compensate for non-compliance with the warrant clause.

constitutionally justified as incident to an arrest. Id. at 768. The Chimel Court criticized the Rabinowitz Court's characterization of fourth amendment requirements and rejected the pure reasonableness view, stating that "[i]n the scheme of the [Fourth] Amendment, . . . the [warrant clause] plays a crucial part." Id. at 761. The Court further noted that any warrant clause exception must be strictly limited to the purpose underlying the exception. Thus, when an arrest is made, it is reasonable for the arresting officer to search only the arrestee and the immediately surrounding area to remove weapons and to prevent concealment or destruction of evidence. Id. at 763. The searches in both Rabinowitz and Chimel went beyond this narrow scope.

32 Rabinowitz, 399 U.S. at 63.
33 See, e.g., Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 394 (1974). Nevertheless, Rabinowitz's "ad hoc test of general reasonableness seems to be precisely the interpretation of the amendment which the conservatives on the Court now seek to restore." Wasserstrom, supra note 17, at 312.
34 See Bacigal, supra note 16, at 764-65; Wasserstrom, supra note 17, at 309-10.
35 Wasserstrom, supra note 17, at 310.
36 Id. It cannot be said that the Court applies a true sliding scale analysis because although the Court has required relatively low state interests to justify less intrusive searches, it has not demanded higher than average interests where highly intrusive searches are challenged. Id. at 310-12.
37 See infra notes 41-67 and accompanying text.
38 Bacigal, supra note 16, at 765.
40 Bacigal, supra note 16, at 765. This view is more protective of individual rights than the balancing-of-interests approach because it maintains a concern for adequate protection of individual rights. Under the balancing-of-interests view, courts focus on the importance of the governmental interest involved.
2. The Supreme Court's Struggle in Construing the Fourth Amendment

In developing the reasonableness approach, the Supreme Court has applied a balancing-of-interests analysis to ease warrant clause requirements in particular situations. The Court first balanced a state's interest in conducting housing inspections against the privacy interests of the individual in a 1967 administrative search case, *Camara v. Municipal Court.*\(^{41}\) The *Camara* appellant utilized the conventional analysis in arguing that search warrants should be issued only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the applicable code's minimum standards.\(^{42}\) Rejecting the appellant's contention that a particularized probable cause determination is necessary,\(^{43}\) the Court held that an area search is reasonable where there is probable cause to believe that violations exist within that geographic area\(^{44}\) and "where the need to search [outweighs] . . . the invasion which the search entails."\(^{45}\) Although the Court held that probable cause and a warrant are needed to conduct an area inspection,\(^{46}\) its probable cause determination was based upon legislative and administrative standards, which vary with the municipal program being enforced.\(^{47}\) Because *Camara* supports a variable probable cause standard, critics have called it "a fundamental misreading of the Fourth Amendment."\(^{48}\) In any event, *Camara* established a new variable probable cause test and a balancing test to evaluate fourth amendment protections.\(^{49}\) To date, the Supreme Court has extended the *Camara*

\(^{41}\) 387 U.S. 523, 534-35 (1967). *Camara* was charged with violating the San Francisco housing code for refusing to allow city housing inspectors to examine his ground-floor apartment. The inspector, while conducting an annual inspection, sought to enter *Camara*'s premises after the building's manager told him that *Camara* was violating the apartment building's occupancy permit. Alleging that the inspection ordinance was unconstitutional for failure to require a warrant for inspections, *Camara* sued for a writ of prohibition. *Id.* at 525-26.

\(^{42}\) *Id.* at 534.

\(^{43}\) *Id.* The Court reasoned that requiring probable cause for each building search would cripple housing code enforcement efforts. *Id.* at 536.

\(^{44}\) *Id.* at 537. Conventional analysis required probable cause to exist for each particular place searched. *Id.* at 534.

\(^{45}\) *Id.* at 537. The Court noted that the persuasive factors in the balance were the long history of judicial and public acceptance of such inspections, the need to prevent dangerous conditions, the absence of a practical alternative, and the minimal intrusion of privacy by inspections, which were neither personal in nature nor aimed at discovering evidence of crime. *Id.*

\(^{46}\) *Id.* at 538.

\(^{47}\) The Court stated that the factors in determining the existence of probable cause would be "the passage of time, the nature of the building, . . . or the condition of the entire area." *Id.*


\(^{49}\) The Court, by explicitly rejecting appellant's contention that its new approach
analysis to allow three types of searches where probable cause does not exist: stop-and-frisk searches,\textsuperscript{50} border searches,\textsuperscript{51} and automobile stops.\textsuperscript{52}

A year after Camara, the Supreme Court held in Terry v. Ohio\textsuperscript{53} that the fourth amendment permits a police officer to engage in a limited search for a criminal suspect's weapons in certain circumstances, even absent probable cause to arrest.\textsuperscript{54} "[T]he Court treated the stop-and-frisk as a sui generis 'rubric of police conduct,'"\textsuperscript{55} and concluded, "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual . . . ."\textsuperscript{56} In reaching this result, the Court balanced the government interest put forward to justify the search against the intrusion upon the private citizen.\textsuperscript{57} Terry thus represented a significant change in the law: for the first time, the Court used a balancing test to eliminate the probable cause requirement.\textsuperscript{58}

The Supreme Court also has applied this reasonableness analy-
sis to allow searches designed to detect illegal immigration along international borders upon less than probable cause. In *United States v. Brignoni-Ponce*, the Court deemed constitutional the use of roving patrols to stop vehicles, usually for no more than a minute, to check for illegal immigrants. The Court noted that these intrusions did not encompass a search of the vehicle or its occupants, and visual inspection was limited to peering through the vehicle's windows. Such searches are constitutional under the *Camara* rationale because they are regulatory in nature, an important state interest outweighs their intrusiveness, and no practical alternative to enforce the state interest exists. The Court stated, "Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest."

The *Camara* analysis also has been extended to permit searches during automobile stops on less than probable cause. In *Delaware v. Prouse*, the Court held that an officer may not stop a vehicle unless he has "at least [an] articulable and reasonable suspicion that a motorist is unlicensed . . . or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." The Court reached this result by balancing the public's interest in road safety against the affected individuals' rights. Although the specific search challenged in *Prouse* was not based upon any suspicion and therefore was held unconstitutional, the case is significant because

60 Although the Court prohibited random stops, it expressly permitted stops where the facts "reasonably warrant suspicion." Id. at 884. This standard is more lenient than probable cause.
61 Id. at 880.
62 Id.; see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (random stops based upon less than reasonable suspicion at border patrol checkpoints permitted where level of intrusiveness is less than in *Brignoni-Ponce*).

The *Brignoni-Ponce* Court distinguished *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), in which the Court held that a roving border patrol's thorough search for aliens without a warrant or probable cause to believe the driver committed any crime violated the fourth amendment. *Brignoni-Ponce*, 422 U.S. at 874. Although the state interest in *Almeida-Sanchez* was identical to the interest in *Brignoni-Ponce*, the *Brignoni-Ponce* Court deemed the degree of intrusiveness too great to pass constitutional muster. *Id.* at 874-76.

64 *Id.* at 663. A police officer on patrol stopped Prouse's automobile. The officer smelled marijuana smoke as he approached the vehicle and seized marijuana in plain view on the car floor. Prouse was indicted for illegal possession of a controlled substance. *Id.* at 650.
65 *Id.* at 656-57.
66 At a hearing on Prouse's motion to suppress evidence, the officer testified that prior to stopping the vehicle he observed no traffic or equipment violations and that he made the stop merely to check the driver's license and registration. *Id.* at 650. The Court found that random, discretionary spot checks of automobiles are more intrusive than the border patrol stops in *Martinez-Fuerte* and at least as intrusive as the stops in
it apparently articulates a balancing test in which probable cause plays no part.\textsuperscript{67}

Whereas the \textit{Camara} balancing test has been used in specific, limited situations, the Supreme Court in \textit{Dunaway v. New York}\textsuperscript{68} rejected the general applicability of a multifactor balancing test that would weigh the search’s intrusiveness against the law enforcement interest served in each case.\textsuperscript{69} The \textit{Dunaway} Court concluded that “the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases.”\textsuperscript{70} The Court emphasized that it has placed narrow limitations on the probable cause exceptions.\textsuperscript{71} Some commentators have agreed that the Court should impose strict limits on the use of a balancing test.\textsuperscript{72}

\textbf{B. Treatment of School Searches Prior to \textit{T.L.O.}}

Until 1967, courts generally did not recognize that students\textsuperscript{73} possessed constitutional rights.\textsuperscript{74} The Supreme Court purported to end this notion in \textit{Tinker v. Des Moines Independent Community School}...
by stating that "[s]tudents [do not] ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court argued that "[s]tudents in school as well as out of school are 'persons' under [the] Constitution" and therefore deserve its full protection. Despite Tinker, courts have proven reluctant to provide full fourth amendment protection to students. Only one state court has held that the fourth amendment fully applies to in-school searches. The most common methods state courts use to limit the fourth amendment's applicability to school searches are (1) classification of the school official as a private actor, and (2) reduction of the level of suspicion needed to conduct a school search.

1. The School Official Classified as a Private Actor

Prior to T.L.O., some courts held that the fourth amendment does not apply to school officials because these officials act in a private capacity; thus, no state action exists to trigger the fourth amendment. In so holding, many of these courts relied upon the
in loco parentis doctrine, which postulates that a school official stands in the student's parents' place and is therefore vested with the parents' rights, duties, and responsibilities while the student is at school. For example, in In re Donaldson, the California Court of Appeals held that a public school official's search of a student's locker constituted private action. The court reasoned that school officials' in loco parentis status enabled them to employ moderate force to obtain obedience in school. The court noted that the search's primary purpose was to further an educational objective by securing evidence of student misconduct rather than to obtain evidence of criminal wrongdoing. Similarly, in Mercer v. State, a Texas appellate court invoked the in loco parentis doctrine and found that a public school official acted in a private capacity when conducting a student search. The Mercer court, however, did not consider the searcher's objective relevant in determining whether the doctrine applied.

2. The Reduced Level of Suspicion Needed Reduced to Conduct School Search

Before T.L.O., courts applied the in loco parentis doctrine to justify searches based upon reasonable suspicion that a student was violating or had violated a school rule or a criminal prohibition.

\[\text{Vol. 72:368}\]
In *People v. Jackson*, a New York court found that a school "Coordinator of Discipline" was a government agent, but upheld a student search for narcotics conducted several blocks away from the school based upon reasonable suspicion. Applying the *in loco parentis* doctrine, the court concluded that school officials have an affirmative obligation to protect students under their care from "harmful and dangerous influences." The court reasoned that an understanding of the distinct relationship between school officials and students was required in determining the reasonableness of a school official's actions. The court went so far as to state that "[t]he *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept . . . , that any action, including a search, taken . . . upon reasonable suspicion should be accepted as necessary and reasonable." Furthermore, by finding that the *in loco parentis* policy does not end abruptly at the school door, the court permitted the school official greater freedom to conduct an off premises search than it would permit a law enforcement official.

Other courts not applying the *in loco parentis* doctrine nevertheless have held that a school official may conduct an in-school search upon less than probable cause. In *Tarter v. Raybuck*, the Sixth Circuit held that a search of a student's person did not violate the fourth amendment because the official had reasonable cause to believe the search was necessary either to maintain school discipline

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*In re L.L.*, 90 Wis. 2d 585, 280 N.W.2d 343 (Ct. App. 1979) (upholding search of student's pocket for dangerous or illegal items).


*Id.* at 911, 319 N.Y.S.2d at 733.

*Id.* at 914, 319 N.Y.S.2d at 736. The Coordinator of Discipline noticed a bulge in the student's left pants pocket on the school premises. He requested that the student accompany him to his office and the student agreed, but en route the student fled the school grounds. The Coordinator gave chase, catching him three blocks from the school. He grabbed the student's clenched left hand and wrested away from the student's fist a syringe, an eyedropper, and other drug paraphernalia. *Id.* at 909-10, 319 N.Y.S.2d at 732-33.

*Id.* at 910, 319 N.Y.S.2d at 732-33.

*Id.* at 912, 319 N.Y.S.2d at 735.


*Jackson*, 65 Misc. 2d at 910, 319 N.Y.S.2d at 733.

*Id.* at 915, 319 N.Y.S.2d at 737 (Markowitz, J., dissenting).


and order or to maintain an environment conducive to education.\textsuperscript{100} The court noted that not only must the official have a reasonable ground for instituting the search,\textsuperscript{101} but also the search itself must be reasonable.\textsuperscript{102} The Georgia Supreme Court in \textit{State v. Young}\textsuperscript{103} adopted a standard more lenient than reasonable suspicion for school searches. Although the court found that the school official was a government agent,\textsuperscript{104} it concluded that a school official may constitutionally search a student in the "good faith" exercise of his duties.\textsuperscript{105} The court allowed the search merely because the student acted "suspiciously."\textsuperscript{106} 

The Supreme Court thus heard \textit{New Jersey v. T.L.O} against a backdrop of case law that placed school searches outside of the fourth amendment's general warrant and probable cause requirements. Most of these decisions held either that the fourth amendment did not apply to school officials or that school officials could search upon reasonable suspicion.

\section*{II} \textit{New Jersey v. T.L.O.}

\subsection*{A. The Facts}

On March 7, 1980, a Piscataway High School teacher discovered T.L.O.\textsuperscript{107} and a second girl smoking in a lavatory.\textsuperscript{108} Because smoking on campus violated a school rule,\textsuperscript{109} the teacher took the two students to see assistant vice principal Theodore Choplick.\textsuperscript{110} When T.L.O. denied that she had been smoking, Choplick de-
manded to see her purse and upon opening it discovered a pack of cigarettes. As he removed the cigarettes from the purse he spotted a package of cigarette rolling papers. He continued searching the purse and discovered a small amount of marijuana, a pipe, and miscellaneous paraphernalia that implicated T.L.O. in marijuana dealing. Choplick delivered this evidence to the police, who instituted delinquency charges against T.L.O.

T.L.O. moved to suppress the evidence at her delinquency hearing, arguing that the search violated the fourth amendment. The juvenile court, concluding that the search was reasonable, denied the motion to suppress, found T.L.O. delinquent, and sentenced her to probation for one year. T.L.O. appealed to the Appellate Division of the New Jersey Superior Court, where a divided court affirmed the finding that the search did not violate the fourth amendment. The New Jersey Supreme Court reversed, and the United States Supreme Court subsequently granted New Jersey’s petition for a writ of certiorari.

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111 Id.
112 Id. Choplick would not have seen the cigarette rolling papers if he had not removed the cigarettes. Id.
113 Id. Choplick also found a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed money to T.L.O., and two letters implicating T.L.O. in marijuana dealing. Id.
114 Id.
115 Id. at 929.
116 State ex rel. T.L.O., 178 N.J. Super. 329, 343, 428 A.2d 1327, 1334 (Juv. & Dom. Rel. Ct. 1980). The court held that the evidence met a reasonable suspicion standard. The court reasoned that when the teacher observed T.L.O. smoking, the school official had a duty to investigate and thus was justified in opening the purse. While an exploratory search was not permissible at that point, the opening of the purse brought the search within the plain view exception to the warrant requirement. See supra note 25. Choplick’s sighting of the marijuana and other paraphernalia justified a complete search of the purse. State ex rel. T.L.O., 178 N.J. Super. at 343, 428 A.2d at 1334.
117 T.L.O., 469 U.S. at 930.
118 State ex rel. T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (Super. Ct. App. Div. 1982) (per curiam). The court vacated, however, the finding of delinquency and remanded for a determination of whether T.L.O. had knowingly waived her fifth amendment rights before confessing.
119 State ex rel. T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). Like the trial court, the New Jersey Supreme Court applied a reasonable suspicion test, stating that “when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence.” Id. at 346, 463 A.2d at 941-42. The court held, however, that the assistant principal did not have the requisite suspicion to search. The court noted that mere possession of cigarettes did not violate a school rule because smoking was allowed in designated areas. The purse’s contents, therefore, had no direct bearing on the infraction. Furthermore, he had no reasonable grounds to believe that the purse contained cigarettes. Id. at 347, 463 A.2d at 942.
120 464 U.S. 991 (1983). The petition for certiorari raised only the issue of “whether the exclusionary rule should operate to bar consideration in juvenile delin-
B. The Supreme Court Opinion

A divided Supreme Court held that the search of T.L.O. did not violate the fourth amendment. The Court decided two important issues affecting student searches: (1) whether the fourth amendment applies to school officials, and (2) if so, what degree of suspicion a school official needs before he may conduct a lawful search.

1. The Fourth Amendment Applies to School Officials

The Court first determined that the fourth amendment applies to searches conducted by public school officials. The Court reasoned that the fourth amendment applies to the states through the fourteenth amendment and that public school officials are state actors under the fourteenth amendment. It rejected New Jersey's contention that the fourth amendment only applies to law enforcement officers, noting that the amendment has long been applied to the activities of both civil and criminal authorities because "it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" The Court also rejected the argument that the "in loco parentis" visitation proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers." T.L.O., 469 U.S. at 331. The Court nevertheless ordered reargument on the search's legality. Justice Stevens, in dissent, criticized the Court for unnecessarily and inappropriately reaching a constitutional question. Id. at 371 (Stevens, J., concurring and dissenting). Justice Stevens believed that the Court instead should have affirmed the state court's judgment suppressing the evidence. Id. at 372 (Stevens, J., concurring and dissenting). Although certiorari was originally granted to determine the exclusionary rule's applicability, the Court refused to reach this issue. See id. at 333 n.3 ("[O]ur determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.").

The Court also rejected the argument that the in loco parentis

121 Justice White wrote the majority opinion, in which Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger joined. Justice Powell wrote a concurring opinion, which Justice O'Connor joined. Justice Blackmun also wrote an opinion concurring in the judgment. Justice Brennan, with whom Justice Marshall joined, concurred in part and dissented in part. Justice Stevens, with whom Justice Marshall joined, and with whom Justice Brennan joined in part, concurred in part and dissented in part. 122 T.L.O., 469 U.S. at 333-37; see also supra notes 11-13 and accompanying text. All nine Justices agreed that school officials are subject to the fourth amendment. T.L.O., 469 U.S. at 353-54 (Brennan, J., concurring and dissenting); id. at 371 (Stevens, J., concurring and dissenting).

123 T.L.O., 469 U.S. at 335 (quoting Camara v. Municipal Court, 387 U.S. 523, 530 (1966)).
doctrine excludes school officials from the dictates of the fourth amendment.\textsuperscript{124} The Court noted that school authorities are considered state actors under the first\textsuperscript{125} and fourteenth\textsuperscript{126} amendments. Moreover, the Court observed that the concept of parental delegation is not consonant with compulsory education laws.\textsuperscript{127}

2. Reasonable Suspicion is Needed for a Lawful School Search

The Court next address the degree of suspicion necessary to validate a school search.\textsuperscript{128} The Court concluded that the fourth amendment mandates a balancing of the state’s need to search against the search’s invasion of personal liberty to determine the “standard of reasonableness governing any specific class of searches.”\textsuperscript{129} On one side of the balance is society’s substantial interest in maintaining discipline in the school environment.\textsuperscript{130} The Court noted that drug use and violent crime within the schools had become major social problems in recent years\textsuperscript{131} and that the pres-

\textsuperscript{124} Id. at 336. The status of state court decisions curbing students’ fourth amendment rights based upon \textit{in loco parentis} is therefore questionable. See supra notes 82-97 and accompanying text.


\textsuperscript{126} Id. at 336; see \textit{Goss v. Lopez}, 419 U.S. 565 (1975) (due process clause applicable to public school officials).

\textsuperscript{127} \textit{T.L.O.}, 469 U.S. at 336. The Court considered school officials agents of the government who further compulsory education laws, not mere parental surrogates. Id.; see, e.g., \textit{N.J. STAT. ANN. § 18A:38-25} (West 1968) (requiring every parent having custody of child between ages of six and 16 to enroll child in public school or equivalent).

\textsuperscript{128} Justice Brennan would have ceased the inquiry upon finding that the fourth amendment applies to school officials and that the search was full-scale. \textit{T.L.O.}, 469 U.S. at 362 (Brennan, J., dissenting).

\textsuperscript{129} Id. at 337. Thus, the Court apparently rejected the conventional analysis and adopted the balancing-of-interests approach to the standard of reasonableness governing school searches.

Justice Blackmun, although concurring in the judgment, noted that the Supreme Court uses a balancing test only when confronted with a special law enforcement need for flexibility. Id. at 351 (Blackmun, J., concurring). He believed, however, that the school setting presents such a special need for flexibility. Id. at 352 (Blackmun, J., concurring).

Justice Brennan vigorously opposed generalized use of a balancing test and advocated three principles for fourth amendment jurisprudence. Id. at 354-55 (Brennan, J., concurring and dissenting). First, warrantless searches are per se unreasonable, subject only to a few exceptions. See supra note 28 and accompanying text. Second, full-scale searches are reasonable only on a showing of probable cause that a crime has been committed and that the evidence will be found in the place to be searched. \textit{T.L.O.}, 469 U.S. at 355 (citing \textit{Beck v. Ohio}, 379 U.S. 89, 91 (1964); \textit{Wong Sun v. United States}, 371 U.S. 471, 479 (1963); \textit{Brinegar v. United States}, 338 U.S. 160, 175-76 (1949)). Third, searches that are substantially less intrusive than full-scale searches may be justifiable in accordance with a balancing test. \textit{T.L.O.}, 469 U.S. at 355 (citing \textit{Dunaway v. New York}, 442 U.S. 200, 210 (1979)); \textit{Terry v. Ohio}, 392 U.S. 1, 20 (1968)).

\textsuperscript{130} \textit{T.L.O.}, 469 U.S. at 339.

\textsuperscript{131} Id. (citing 1 \textit{NATIONAL INST. OF EDUC.}, U.S. DEP’T OF HEALTH, EDUC. AND WEL-
ervation of an orderly educational environment requires close supervision of students. Furthermore, the Court recognized that maintaining school order and security depends upon informal and flexible school disciplinary procedures. On the other side of the balance is the student's privacy interest. Noting that students may bring to school a number of legitimate, noncontraband items, the Court found that students have legitimate expectations of privacy.

Nevertheless, the Court concluded that the ordinary restrictions on government searches must be eased in the school setting. The Court reasoned that the fourth amendment's warrant requirement is unsuited to the school environment because it would interfere with the prompt and informal disciplinary procedures desirable in schools. Furthermore, the T.L.O. Court opined that strict adherence to the probable cause requirement is not necessary, stating, "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . ." The Court con-

132 T.L.O., 469 U.S. at 339-40.
133 Id. at 338-39. The Court acknowledged that the fourth amendment does not protect unreasonable, subjective privacy expectations but refused to equate students with prisoners who retain no legitimate expectations of privacy. Id.

Justice Powell concluded that students do not have the same constitutional protections as adults because students within the school environment have a lesser expectation of privacy than do members of the population in general. Id. at 348 (Powell, J., concurring).

134 Id. at 340. Justice Blackmun viewed education as government's most important function and stressed the state's obligation to safeguard students within its care. Id. at 353 (Blackmun, J., concurring). He noted that school officials have no experience with probable cause and are ill-equipped to make quick probable cause judgments. He concluded that the dynamics of the school setting demand prompt action and that a warrant requirement would defeat timely intervention. Id.

135 Id. at 340. All nine Justices agreed that teachers may search a student's belongings without first obtaining a warrant. Id. at 355-56. Justice Brennan argued, however, that the Court should not use a balancing test to justify this exception: only a special government interest, beyond the general interest in apprehending lawbreakers, can justify a categorical exception to the warrant requirement. Id. at 356 (Brennan, J., concurring and dissenting). This special interest exists in the school setting because a teacher can neither perform his educational functions nor adequately protect students' safety if required to wait for a warrant. Id. at 357 (Brennan, J., concurring and dissenting). Justice Stevens opined that warrantless searches of students by school administrators are reasonable when undertaken to maintain order in the school. Id. at 376 (Stevens, J., concurring and dissenting).

136 Id. at 340. Justice Brennan argued that the majority's elimination of probable cause as a requirement for a full-scale search violated both precedent and policy. He stated that every previous Supreme Court case had held that probable cause is a prerequisite for a full-scale search, id. at 358 (Brennan, J., concurring and dissenting); the line of cases begun by Terry v. Ohio, 392 U.S. 1 (1968), only utilizes a balancing test to evaluate minimally intrusive searches involving crucial law enforcement interests. T.L.O., 469 U.S. at 360 (Brennan, J., concurring and dissenting). Even assuming argu-
cluded that the legality of a student search depends on its reasonableness under all the circumstances; thus, the constitutionality of a school search turns on "whether the . . . action was justified at its inception" [and] whether the search . . . 'was reasonably related in scope to the circumstances which justified the interference'” with the student's privacy.

The Court applied this test to conclude that the search of T.L.O. was constitutional. The Court found that Choplick's initial search for cigarettes in T.L.O.'s purse was justified because possession of cigarettes related to the accusation of smoking: his "common-sense" conclusion that she might possess cigarettes justified his search of T.L.O.'s purse. The Court further found that the discovery of rolling papers gave rise to a reasonable suspicion that T.L.O. was carrying marijuana, thus justifying the further search of the purse that revealed contraband and evidence of drug dealing.

III

Analysis

Constitutional analysis of any search should begin with an assumption of full fourth amendment protection. The strict requirements of the warrant clause and of probable cause should always apply, subject only to specifically established, narrow exceptions. By deciding that the fourth amendment's underlying command is that searches be reasonable, the Court erected a framework under which an ever-increasing number of searches may be deemed consti-

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137 Id. at 341. Justice Stevens criticized the majority's treating school rules as if they were "fungible," thereby allowing searches to uncover evidence of "even the most trivial" violations of school regulations. Id. at 377 (Stevens, J., concurring and dissenting). Justice Stevens suggested that only situations that seriously disrupt school order or the education process constitute reasonable grounds for a search. Id. at 378 (Stevens, J., concurring and dissenting).

138 Id. at 341 (quoting Terry, 392 U.S. at 20).

139 Id. at 343.

140 Id. at 344. Evidence that is otherwise relevant to an inquiry need not be conclusive as to the ultimate fact in issue; thus, possession of cigarettes provides the nexus between the item searched for and the infraction under investigation. Id.

141 Id. at 346 (citing United States v. Cortez, 449 U.S. 411, 418 (1981).

142 Id. at 347. Applying the probable cause standard to the facts, Justice Brennan concluded that the search violated T.L.O.'s fourth amendment rights. Upon opening the purse and discovering the cigarettes, Choplick's search was complete. Id. at 368 (Brennan, J., concurring and dissenting). Choplick did not have probable cause to continue the search; his suspicion of the presence of marijuana was based solely on his illegal discovery of rolling papers. Id.
A. The Impropriety of T.L.O.'s Reasonableness Approach

Under conventional fourth amendment analysis, all state-sponsored searches must be conducted pursuant to a warrant obtained upon a showing of probable cause. Where this standard has proved impracticable, the Court has carved out specific exceptions to the warrant clause requirements. The T.L.O. Court imprudently and unnecessarily abandoned this measured approach by analyzing the challenged search under a broad reasonableness standard.

T.L.O.'s reasonableness standard does not provide a workable general framework for fourth amendment analysis; in most situations application of the reasonableness view is both illogical and unwieldy. Even though the reasonableness view may be textually plausible, "[i]t would be strange . . . for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised 'reasonable' searches without warrant. To detach the first clause from the second is to run the risk of making the second virtually useless." Furthermore, "reasonableness" is a notoriously difficult standard to apply to searches and seizures. As one commentator noted,

[T]he word "reasonable" takes on two distinct meanings in fourth amendment analysis. Students of the fourth amendment quickly learn that for courts and commentators "reasonableness" is both a term of art synonymous with constitutionality and a convenient shorthand denoting a process of rational analysis. Failure to distinguish reasonableness as a process of rational thought from "reasonableness" as a standard of constitutionally permissible behavior, however, is fatal to any attempt to delimit the scope of fourth amendment protection. . . . Unfortunately, an analysis of relevant Supreme Court cases reveals that the Court has failed to establish an objective methodology which would facilitate the identification of constitutionally permissible searches from among those considered reasonable in behavioral terms. Furthermore, the Court's "implication that the balancing test is the rule rather than the exception" is both substantively inaccurate and intellectually dishonest. As Justice Brennan noted in his
dissent, the balancing test is flawed at both its inception and execution.\textsuperscript{149}

1. \textit{The Court’s Reasonableness Approach Contradicts the Fourth Amendment’s Purpose}

By needlessly balancing away the probable cause requirement, the \textit{T.L.O.} Court effectively rewrote the fourth amendment to render the warrant clause inapplicable. “Probable cause” is not a judicially developed doctrine that a court may balance away when it finds that constraints on government action no longer appear desirable. When the framers formulated the fourth amendment, they deliberately chose the probable cause standard as the proper balance between governmental and private interests.\textsuperscript{150}

The warrant clause’s probable cause requirement guards against indiscriminate searches and seizures in three ways. First, it prevents unjustified searches and seizures by securing an individual’s right to privacy until adequate justification is demonstrated for interfering with that privacy.\textsuperscript{151} Second, it protects against arbitrary searches and seizures by preventing capricious exercises of power by government officials.\textsuperscript{152} Finally, it requires a high level of suspicion to justify a search, thereby decreasing the incidence of mistake: because reasonable suspicion requires less certainty than probable cause, it will allow more searches of innocent people.

The fourth amendment was adopted specifically to protect against searches conducted upon a lesser standard of suspicion than probable cause. Cases both before and immediately after the amendment’s adoption rejected “common rumor or report, suspicio

\begin{itemize}
  \item \textsuperscript{149} \textit{T.L.O.}, 469 U.S. at 358 (Brennan, J., concurring and dissenting).
  \item \textsuperscript{150} In United States v. Place, 462 U.S. 696 (1983), Justice Blackmun observed: While the Fourth Amendment speaks in terms of freedom from unreasonable searches, the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers: the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by judicial warrant based on probable cause.
  \item \textsuperscript{151} Amsterdam, \textit{supra} note 33, at 411; \textit{see also} Dunaway v. New York, 442 U.S. 200, 214 (1979) (“For all but... narrowly defined intrusions, the requisite ‘balancing’ has been performed in centuries of precedent and is embodied in the principle that [searches and] seizures are ‘reasonable’ only if supported by probable cause.”).
  \item \textsuperscript{152} Amsterdam, \textit{supra} note 33, at 411.
\end{itemize}
cion, or even 'strong reason to suspect' ” as inadequate to justify a lawful search.

Despite the weight of authority, the T.L.O. Court applied a reasonableness standard where it was unnecessary to do so. The Court justified its choice of a reasonable suspicion standard by arguing that lay persons (such as school officials) would not be able to make accurate probable cause determinations. Such reasoning is unpersuasive for two reasons. First, probable cause is at least as easy a standard to apply as reasonable suspicion. The Court has stated repeatedly that the probable cause concept is based upon common sense and is nontechnical. In contrast, the reasonable suspicion standard leaves great potential for abuse and is likely to promote undue judicial deference in evaluating challenged searches. The Court recently recognized that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of the personal rights that the search entails."160

Second, even assuming arguendo that probable cause is a difficult concept, the state could either educate teachers about probable cause or assign law enforcement officials to conduct school searches. The Court's implication that the efficacy of constitutional rights varies depending on the ease and expense of government compliance is unwarranted. As the Court has stated, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."161

2. The Reasonableness Approach was Inappropriate

The T.L.O. Court made no attempt to review general rules of

155 See infra note 170 and accompanying text.
156 T.L.O., 469 U.S. at 343.
158 Note, School Officials May Conduct Student Searches Upon Satisfaction of Reasonableness Test in Order to Maintain Educational Environment, 14 SETON HALL L. REV. 738, 753 (1984); see also supra note 72 and accompanying text.
159 Amsterdam, supra note 33, at 394 ("If there are no fairly clear rules telling the policemen what he may and may not do, courts are seldom going to say that what he did was unreasonable.").
fourth amendment jurisprudence; it merely cited *Camara v. Municipal Court*\(^\text{162}\) for the proposition that determining the reasonableness of a search requires a balancing of the need to search against the search’s privacy invasion. The Court then applied the balancing test and concluded that relaxation of the probable cause requirement for school searches was appropriate.\(^\text{163}\)

The majority’s reliance on *Camara* is misplaced, however, because *Camara* involved a unique kind of search. The *Camara* Court used a balancing test only in light of its determination that it could not adequately protect the particular governmental interests involved if it required individualized suspicion.\(^\text{164}\) In contrast, Choplick accused T.L.O. of generally violating a rule—New Jersey was not trying to prevent an infraction by a group of students. Furthermore, the *T.L.O.* Court’s approach ignored *Camara*’s explicit statement that “‘probable cause’ is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness.”\(^\text{165}\) Under *Camara*, a court should apply the balancing process to determine what quantum of evidence satisfies the probable cause requirement, not to determine if probable cause is the correct standard to use, as the *T.L.O.* Court did. The *Camara* Court recognized that reasonableness encompasses probable cause when it stated, “In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of . . . reasonable goals of code enforcement.”\(^\text{166}\)

Other decisions prior to *T.L.O.* that employed a reasonableness analysis rather than a conventional analysis are consistent with *Camara*; in each case a law enforcement objective beyond gathering evidence of criminal conduct existed, and it would have been impracticable to require a warrant and probable cause. A stop-and-frisk\(^\text{167}\) scenario permits no time to obtain a warrant; requiring that a police officer show probable cause before disarming a suspect may endanger the officer’s life. Border patrols\(^\text{168}\) deter illegal immigration by threatening random detection, as in *Camara*. This purpose could not be achieved if probable cause and a warrant were required for every car searched. The same analysis applies to automobile

\(^{162}\) 387 U.S. 523, 536-37 (1967); see supra notes 41-49 and accompanying text.

\(^{163}\) *T.L.O.*, 469 U.S. at 340.

\(^{164}\) *Camara*, 387 U.S. at 537-38.

\(^{165}\) *Id.* at 534.

\(^{166}\) *Id.* at 535.

\(^{167}\) See supra notes 53-58 and accompanying text.

\(^{168}\) See supra notes 59-62 and accompanying text.
stops, which similarly attempt to induce compliance with safety laws.

A reasonableness analysis is therefore appropriate where the only effective search must be warrantless and not based on probable cause. In a student search, the school still can achieve its goal of enforcing rules within the confines of the probable cause requirement.

3. Even if Appropriate, the Court Misapplied the Reasonableness Approach

Even if a 'reasonableness' balancing process is proper in the school context, the T.L.O. Court skewed the balance in favor of the state. On the side of the balance designated as the state's interest, the Court weighed the state's need for efficient law enforcement rather than the costs of requiring probable cause. In addition to characterizing the societal/governmental interest solely as the school official's obligation to maintain order, the Court should have considered the negative effects of denying students full fourth amendment protection. For example, the denial of students' privacy expectations could create resentment toward school officials and disrupt student-teacher relations—precisely the relations that the Court sought to foster.

In addition, the vast majority of schools do not have the drug and violence problems cited by the majority. In any case, the presence of such problems alone cannot justify abandoning the

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169 See supra notes 63-67 and accompanying text.
170 It is impracticable to require warrants in a school setting. Students accused of infractions could simply hide items that violate school rules after being accused of possessing them. The idea of obtaining a warrant to search for minor items like squirt guns or gum is ludicrous. Indeed, all nine T.L.O. Justices agreed that warrants are inappropriate for student searches. T.L.O., 469 U.S. at 355-56; see supra note 135.
171 T.L.O., 469 U.S. at 363 (Brennan, J., concurring and dissenting). The Court characterized the state's side of the balance as 'the government's need for effective methods to deal with breaches of public order.' Id. at 337. However, the state must also protect the privacy and security of its private citizens. Therefore, the Court should not have balanced the rights of the state against the rights of private citizens, but rather it should have balanced the different constitutional methods of carrying out the state's varied responsibilities against each other. Id. at 363 n.5 (Brennan, J., concurring and dissenting).
172 Note, supra note 158, at 752.
173 T.L.O., 469 U.S. at 340 ("[W]e have respected the value of preserving the informality of the student-teacher relationship.").
usual fourth amendment safeguards. The Court assumed that school officials would be unable to fulfill their educational mission if they were subject to the same fourth amendment requirements as law enforcement officials. This assumption is unsupported and probably incorrect; school officials could likely maintain school discipline despite the probable cause requirement.

In weighing the competing interests of individual and state, the T.L.O. Court should have focused on the infringement of the individual's privacy right, not on the government's need to search. Although the Court acknowledged that students have perfectly sound reasons for carrying purses containing "highly personal items" and that "[a] search of . . . a closed purse . . . is undoubtedly a severe violation of [legitimate] subjective expectations of privacy," it failed to accord these factors enough weight in its analysis. The fourth amendment was designed to protect persons from excessive and unjustified governmental intrusions. With the obvious exception of a strip search, it is difficult to envision a more intrusive violation of privacy than the search of a purse. Indeed, the Court has stated, "[L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." A purse often contains items of an even more personal nature than luggage.

Prior to T.L.O., the Supreme Court emphasized the limited scope of the search in all cases utilizing a balancing test to allow limited searches upon less than probable cause. The Terry Court, in describing the stop-and-frisk in question, noted that the police officer "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." Similarly, in the border patrol cases

175 4 W. LaFave, supra note 22, at 167 (focus should be on maintenance of proper educational environment).
176 T.L.O., 469 U.S. at 340-41.
177 See supra text accompanying note 170.
178 T.L.O., 469 U.S. at 339.
179 Id. at 337-38.
180 While the Court did not explicitly call the search of T.L.O. "full-scale," as Justice Brennan did, see supra note 104, the Court's conclusion that the search severely violated T.L.O.'s privacy, see supra note 179 and accompanying text, seems the equivalent of a full-scale search.
181 Arkansas v. Sanders, 442 U.S. 753, 762 (1979) (luggage is subject to warrant requirement).
182 See T.L.O., 469 U.S. at 339.
183 See, e.g., United States v. Place, 462 U.S. 696, 703 (1983) ("When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.").
184 Terry v. Ohio, 392 U.S. 1, 30 (1968). While the Terry Court itself noted that a frisk "is a serious intrusion upon the sanctity of the person, which may inflict great in-
the Court focused great concern on the scope of the search. Whereas in *Alameida-Sanchez v. United States*, the Court held that a thorough search for aliens violated the fourth amendment, the *United States v. Brignoni-Ponce* Court allowed a brief stop and questioning "[b]ecause of the limited nature of the intrusion." The *T.L.O.* Court, on the other hand, would apply the reasonable suspicion test to any search in the school context, whether limited or not, requiring merely that the scope be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction."

4. Contradictions Within the Court's Analytical Framework

Although the Court recognized students' privacy rights, its approach may ultimately destroy those rights. Searches based on reasonable suspicion of the violation of the most trivial school rules may now pass constitutional muster. For example, a school official may conduct a full-scale search to enforce school rules regulating such innocuous activities as gum chewing or attire so long as a court later deems the search reasonable under the circumstances. The Court at least should have limited its holding to school rules disciplining conduct highly disruptive of the educational process. While all school rules arguably are created to promote order, many rules only indirectly serve this purpose. Certainly there should be some point, even under a balancing test,


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185 413 U.S. 266 (1973).
186 422 U.S. 873 (1975).
187 *Id.* at 880; *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (random stops at border patrol checkpoints allowed upon less than reasonable suspicion because of minimal intrusiveness); *cf. Delaware v. Prouse*, 440 U.S. 648, 656-59 (1979) (random automobile stops unconstitutional because level of intrusion on individuals outweighs state interest). *But see United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (detention of traveler at border to await bowel movement to check for alimentary canal smuggling of narcotics permitted where based on reasonable suspicion).
188 *See supra* note 137 and accompanying text.
189 *T.L.O.*, 469 U.S. at 342.
190 *See supra* note 133 and accompanying text.
191 *T.L.O.*, 469 U.S. at 377 (Stevens, J., concurring and dissenting).
192 *Id.* at 377 n.16 (Stevens, J., concurring and dissenting).
193 *See supra* note 137 and accompanying text.
194 For example, a school board may create a rule prohibiting gum chewing in class. This rule indirectly enforces school order in the sense that a student may chew gum to defy a teacher's authority. However, reasonable suspicion of mere possession of gum clearly should not authorize a full-scale search for gum.
where the state's need to enforce a rule is so minor that a search cannot be justified.\textsuperscript{195}

The \textit{T.L.O.} analysis is particularly ill-advised because although society wants students to respect the law, the Court has decreed that their very status as students affords them less constitutional protection than other citizens enjoy.\textsuperscript{196} Students generally enjoy full fourth amendment rights away from school premises. Once in school, however, \textit{T.L.O.} subjects students to full-scale searches by school officials under a reasonable suspicion standard. This clearly violates the \textit{Tinker} maxim that students do not shed their rights at the schoolhouse gate.\textsuperscript{197}

The Court deliberately chose not to discuss the applicability of the exclusionary rule,\textsuperscript{198} yet, \textit{T.L.O.} empowers school officials to conduct searches that undermine the values used to justify the exception in the first place. The \textit{T.L.O.} analysis deems student searches upon reasonable suspicion constitutional because of factors unique to the educational setting. Thus, the state should use the fruits of a search only to effectuate valid school goals and to benefit the student's welfare.

Possession of an item that violates a school rule justifies a school-imposed punishment to foster respect for school rules. The school should notify the student's parents of all contraband seized in order to reduce the likelihood of future transgressions. Such evidence also justifies compelling the student to attend counselling or educational programs. For example, the school could have required T.L.O. to attend classes discussing the health risks resulting from smoking. Such use of the school search exception serves valid educational aims. In contrast, when a student search is used for non-school purposes, that search's fruits should be subjected once more to conventional fourth amendment analysis. Just as any illegally obtained evidence must be destroyed rather than used for criminal prosecution,\textsuperscript{199} any evidence seized through a student search should be excluded from subsequent criminal proceedings. Unfortunately, \textit{T.L.O.} invites bootstrapping the use of evidence obtained by a student search into decidedly noneducational settings.

\textsuperscript{195} Justice Stevens asserted in dissent that the majority did not contend that the state has a compelling need to search in order to enforce minor school regulations. \textit{T.L.O.}, 469 U.S. at 377-78 (Stevens, J., concurring and dissenting). However, neither did the majority deny it.

\textsuperscript{196} \textit{Id.} at 385-86 (Stevens, J., concurring and dissenting); \textit{see also} Note, supra note 158, at 753.

\textsuperscript{197} 393 U.S. 503, 506 (1969); \textit{see supra} notes 75-77 and accompanying text.

\textsuperscript{198} \textit{See T.L.O.}, 469 U.S. at 333 n.3 ("[This case] implies no particular resolution of the question of the applicability of the exclusionary rule.").

\textsuperscript{199} Mapp v. Ohio, 367 U.S. 643 (1961).
B. A Suggested Approach for Analyzing Fourth Amendment Searches

The *T.L.O.* Court unnecessarily created a new school search exception to established fourth amendment analysis: preexisting law provides the best solution to the problem. To preserve the integrity of the amendment's language, the Court should retain conventional warrant and probable cause requirements wherever possible.

After determining that the fourth amendment applies to the search in question, a court should consider two further questions: (1) whether the intrusion was the only practical method of achieving an important law enforcement interest beyond gathering evidence of criminal conduct, and (2) whether the proposed intrusion belongs in a specific class of search definable as limited in scope. If the court answers either question in the negative, then it should consider it a warrantless search and per se unreasonable. If both questions can be answered affirmatively, then the court may employ the balancing test to determine whether it should ease the warrant clause requirements in that situation. This proposed test endorses the Court's choices in cases prior to *T.L.O.* adopting a reasonableness approach.

In the context of student searches, this framework more effectively "ensure[s] that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools" than does the application of a reasonableness standard to all school searches. This analysis permits a loosening of conventional fourth amendment protection based on not only the nature of the school environment, but also the impracticability...
of maintaining the warrant and probable cause requirements. Thus, the same fourth amendment analysis will protect students' rights, whether in school or out.

Applying this proposal to the facts of T.L.O., a court would find that the search violated T.L.O.'s fourth amendment rights. The balancing test would be inapplicable: although obtaining a warrant is impracticable in a school setting, subjecting searchers to the probable cause requirement would not impede the maintenance of school order. Furthermore, the search was not definable as limited in scope. There was a detailed, full-scale search of T.L.O.'s purse. Arguably, Choplick's initial search of T.L.O.'s purse was not based on probable cause that she was violating the law or a school rule—there was no law or rule prohibiting mere possession of cigarettes. Even if Choplick had probable cause for the initial search, none existed to authorize a quest for drug paraphernalia.

**CONCLUSION**

Although the Supreme Court's opinion in *New Jersey v. T.L.O.* laid to rest the theories formerly used by lower courts to justify intrusive searches of students in the school setting, the Court nevertheless failed to accord students conventional fourth amendment

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204 See supra note 170.
205 See supra text accompanying note 170.
206 See supra notes 107-12 and accompanying text.
207 Possession of cigarettes is not probative of the accusation of smoking in the lavatory. Thus, Choplick lacked even reasonable suspicion to search. Even if Choplick had reasonable suspicion to search, however, the full-scale scope of the search conducted was unjustified. See infra note 209 and accompanying text. The Supreme Court has stated, "In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his . . . other effects." *Florida v. Royer*, 460 U.S. 491, 499 (1983). Choplick only suspected T.L.O. of violating a school rule, yet he subjected her to a full-scale search.
208 The Court found there was a sufficient nexus between the accusation and possession of cigarettes to justify the search. See supra note 140 and accompanying text.
209 The presence of rolling papers alone is not enough to constitute probable cause to search for drugs. As Justice Brennan stated in dissent:

The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T.L.O. had violated the law by possessing marihuana and that evidence of that violation would be found in her purse. Just as a police officer could not obtain a warrant to search a home based solely on his claim that he had seen a package of cigarette papers in that home, Mr. Choplick was not entitled to search possibly the most private possessions of T.L.O. based on the mere presence of a package of cigarette papers.
*T.L.O.*, 469 U.S. at 368-69 (Brennan, J., concurring and dissenting); see supra note 24 and accompanying text. Furthermore, as the Supreme Court has stated, "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 18.
protection. The Court carved out another exception to conventional fourth amendment jurisprudence based on the supposed special characteristics of the school environment. In so doing, the Court implied that probable cause is not required for any search that can later be deemed reasonable under the circumstances.

This Note proposes that the Court should employ a balancing test only when it finds that it is impracticable to require a warrant or probable cause, to achieve a law enforcement objective beyond gathering evidence of criminal conduct and that the intrusion upon the individual is limited in scope. The facts of *T.L.O.* satisfied neither of these requirements.

Even if a balancing test was appropriate in *T.L.O.*, the Court misapplied it. It is ill-advised to treat students differently from the rest of society under the fourth amendment simply because they are students. As Justice Jackson stated, “[Fourth amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivation of rights, none is so effective in... crushing the spirit of the individual and putting terror in every heart.”

Dale Edward F. T. Zane

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