

NOTE

STRIPPING DOWN THE REASONABLENESS STANDARD: THE PROBLEMS WITH USING *IN LOCO PARENTIS* TO DEFINE STUDENTS' FOURTH AMENDMENT RIGHTS

I. INTRODUCTION

The Fourth Amendment protects citizens “against unreasonable searches and seizures”¹ unless the search is founded “upon probable cause.”² However, it has been almost a quarter of a century since the U.S. Supreme Court first established the reasonableness standard for searches conducted in schools in its decision, *New Jersey v. T.L.O.*³ Despite over twenty years of disparate analysis of the reasonableness standard in this nation’s courts since the *T.L.O.* standard was handed down, the Supreme Court has recently affirmed its confidence in the test in *Safford Unified School District No. 1 v. Redding*.⁴ Nevertheless, predictability and uniformity of adjudication on the subject of school searches have been compromised due to confusion on how to properly apply the reasonableness standard.⁵ This confusion is due in large part to the Supreme Court’s inability to firmly define, in exact terms, how much power a school can exercise over students.⁶ There are several reasons why the Supreme Court has not been able to concretely commit to both what constitutional rights students are entitled to enjoy in a school, and the depth of those rights. This Note will explore the two most salient

1. U.S. CONST. amend. IV.

2. *Id.*

3. 469 U.S. 325, 341 (1985).

4. 129 S. Ct. 2633, 2639 (2009).

5. See Sunil H. Mansukhani, *School Searches After New Jersey v. T.L.O.: Are There Any Limits?*, 34 U. LOUISVILLE J. FAM. L. 345, 361 (1996) (finding that the loosely defined standards in the reasonableness test have compromised predictability of courts’ adjudication on student searches).

6. See *T.L.O.*, 469 U.S. at 342 n.9 (“We have ‘repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969))).

reasons why the Court has failed to properly define students' constitutional rights. First, the Court's grant of constitutional rights to students has changed pursuant to the Court's oscillation in its conception of how much power schools' should wield over their students.⁷ And second, the doctrine of *in loco parentis* has historically underscored the Court's legal analysis on how much control a school is entitled to exercise over its students.⁸

Despite denouncing *in loco parentis* as controlling in *T.L.O.*,⁹ vestigial elements of the doctrine still exist.¹⁰ The Court espoused the reasonableness standard in the hopes of striking a balance between respecting both the authority of schools and the constitutional rights of students.¹¹ However, this standard has thus far failed to fulfill its intended objective.¹² Having the opportunity to address the problems stemming from the reasonableness standard in the recent *Redding* decision, the Court instead affirmed the reasonableness test of *T.L.O.* as legally sound.¹³ Contrary to the Court, this Note proposes a reversion back to the *Tinker v. Des Moines Independent Community School District*¹⁴ standard.¹⁵ The *Tinker* Court rendered its decision against a tumultuous political backdrop: the civil rights era and the Vietnam War.¹⁶ The students in *Tinker* were suspended from school after refusing to remove anti-war armbands.¹⁷ This restriction, the Court found, was an impermissible violation of the students' protected First Amendment rights.¹⁸ In order to preserve the schoolhouse as a receptive forum for student discourse, the Court formulated a new standard to be applied to

7. See Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 64 (1996).

8. See *Morse v. Frederick*, 551 U.S. 393, 416 n.6 (2007) (Thomas, J., concurring) ("[T]his Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools."); see also discussion *infra* Part IV (examining the doctrine of *in loco parentis* historically as well as in modern education law).

9. *T.L.O.*, 469 U.S. at 336.

10. See *Morse*, 551 U.S. at 416 n.6 (Thomas, J., concurring) (noting the continued relevance of *in loco parentis*); see also discussion *infra* Part IV (discussing the modern relevance of *in loco parentis*).

11. See *T.L.O.*, 469 U.S. at 349 (Powell, J., concurring).

12. See Dupre, *supra* note 7, at 83 (discussing, briefly the deleterious effects the *T.L.O.* decision has had upon both students and the public school structure); see also discussion *infra* Part III (expounding the inconsistencies that the *T.L.O.* standard has produced).

13. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009) (identifying the *T.L.O.* reasonableness standard as applicable).

14. 393 U.S. 503 (1969).

15. See *id.* at 509.

16. *Id.* at 503.

17. See *id.* at 504.

18. See *id.* at 511.

future limitations of student speech within the school.¹⁹ The Court held that “where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with . . . discipline in the operation of the school,’ the prohibition [of such conduct] cannot be sustained.”²⁰ Although this standard was initially formulated in order to preserve students’ First Amendment rights,²¹ a modified *Tinker* standard could also be properly applied in a Fourth Amendment context as well.²²

Part II of this Note will examine the Court’s analysis in *T.L.O.* and the Court’s subsequent re-examination of the reasonableness standard in *Redding*. Part III will discuss how, pursuant to the reasonableness standard, students’ Fourth Amendment rights have been diluted as a result of judicial uncertainty in the adjudication of the *T.L.O.* standard. Part IV will examine the history of *in loco parentis* and the strength of the doctrine in the modern legal framework. Part V will propose that the Court should revert back to a modified *Tinker* standard, a standard which will properly achieve the students’ rights-school authority balance that the *T.L.O.* reasonableness standard was originally formulated to achieve.²³

II. *T.L.O.* AND THE INCEPTION OF THE REASONABLENESS STANDARD FOR FOURTH AMENDMENT STUDENT SEARCHES

The reasonableness standard is considered to properly balance the constitutional rights of students, in a Fourth Amendment context, with the order, safety, and general functions of a school.²⁴ The standard found its inception in a student-asserted Fourth Amendment claim entertained by the Supreme Court in *T.L.O.*²⁵ When T.L.O., a New Jersey high school freshman, was discovered smoking in a school bathroom by a teacher, she was promptly escorted to the administrative office for violating a school policy.²⁶ Once in the office, Assistant Vice Principal

19. *See id.* at 509.

20. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

21. *Id.*

22. *See* discussion *infra* Part V (proposing that the Court should replace the *T.L.O.* standard with a modified *Tinker* standard).

23. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985) (Powell, J., concurring).

24. *See, e.g.,* *Cason v. Cook*, 810 F.2d 188, 191 (8th Cir. 1987) (citing reasonableness with full support); *Wynn v. Bd. of Educ. of Vestavia Hills*, 508 So. 2d 1170, 1171 (Ala. 1987) (citing the Supreme Court’s reasoning for promulgating the reasonableness standard); *In re P.E.A.*, 754 P.2d 382, 387-88 (Colo. 1988) (finding the *T.L.O.* reasonableness standard as properly effectuating both the interests of the student and the school).

25. *See T.L.O.*, 469 U.S. at 327-28.

26. *Id.* at 328.

Theodore Choplick inquired about the smoking incident and demanded to see the contents of T.L.O.'s purse.²⁷ Upon inspection, Mr. Choplick found a pack of cigarettes, rolling papers, a small amount of marijuana, a smoking pipe, several empty plastic bags, a large amount of money in small bills, and an index card of students' names who owed T.L.O. money.²⁸

Based on this evidence and T.L.O.'s subsequent confession of drug dealing in the school, the state of New Jersey brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County.²⁹ In her defense, T.L.O. argued that her Fourteenth Amendment Due Process and Fourth Amendment rights were violated because of the school's unlawful search and seizure.³⁰ The court found that, acting within the confines of the Fourth Amendment, "a school official may properly conduct a search of a student's person if the official has . . . reasonable cause to believe that the search is necessary to maintain school discipline or enforce school polices."³¹ Applying this standard, the court found Mr. Choplick's search of T.L.O.'s purse to be reasonable because school officials have a duty to "investigate and control the abuse of noncriminal activities as they do with instances involving weapons and drugs."³²

On appeal, the New Jersey Appellate Division affirmed the trial court's decision that the school and Mr. Choplick's conduct was constitutionally permissible under the circumstances.³³ The New Jersey Supreme Court eventually reversed the decisions of the lower courts, finding that Mr. Choplick's search was unconstitutional because he "did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence that would seriously interfere with school discipline or order."³⁴ Although the New Jersey Supreme Court ultimately deemed that Mr. Choplick's search was unreasonable within the bounds of the Fourth Amendment, the court found that the standard of reasonable cause, outlined in the trial court's opinion, was the proper analytical framework for assessing a student's

27. *Id.*

28. *Id.*

29. *Id.* at 329.

30. *State ex rel. T.L.O.*, 428 A.2d 1327, 1330 (N.J. Middlesex County Juv. & Dom. Rel. Ct. 1980), *vacated*, 448 A.2d 493 (N.J. Super. Ct. App. Div. 1982), *rev'd*, 463 A.2d 934 (N.J. 1983), *cert. granted*, 464 U.S. 991 (1983).

31. *Id.* at 1333.

32. *Id.* at 1334.

33. *See State ex rel. T.L.O.*, 448 A.2d 493, 493 (N.J. Super. Ct. App. Div. 1982), *rev'd*, 463 A.2d 934 (N.J. 1983), *cert. granted*, 464 U.S. 991 (1983).

34. *State ex rel. T.L.O.*, 463 A.2d 934, 942 (N.J. 1983), *cert. granted*, 464 U.S. 991 (1983).

Fourth Amendment rights.³⁵ However, the disparate interpretations rendered in the lower courts led the parties to seek clarification of the proper guidelines for searches conducted on school grounds.

The U.S. Supreme Court granted certiorari in order to clarify the tension between students' Fourth Amendment rights and the need for school officials to swiftly eradicate any threat of disorder.³⁶ Justice White, writing for the majority, held that it is "indisputable . . . that the Fourteenth Amendment protects the rights of students against encroachment by public school officials."³⁷ While the Court importantly established a constitutional cause of action for a student against a school that violates that student's Fourth Amendment rights,³⁸ the crux of the decision lies in the Court's promulgation of the reasonableness standard.³⁹ Although the Fourth Amendment explicitly requires that all searches be reasonable,⁴⁰ the Court rejected a uniform meaning of reasonable in favor of a more contextually-based analysis that involves a balancing between "the individual's legitimate expectations of privacy . . . [and] the government's need for effective methods to deal with breaches of public order."⁴¹

Despite the Court taking due judicial notice of a student's interest in privacy, the *T.L.O.* Court found paramount importance in the school's discretionary ability to internally maintain discipline.⁴² This conclusion

35. See *id.* at 940 ("[S]chool officials, within the school setting, have the authority to conduct reasonable searches necessary within the schools.").

36. See *New Jersey v. T.L.O.*, 469 U.S. 325, 327-28 (1985). The Court initially granted certiorari to examine whether the exclusionary rule was the appropriate remedy for searches that violate the Fourth Amendment in the schoolhouse. See *id.* However, the central analysis to the case is the promulgation of the Fourth Amendment search standard to be used in public schools. *Id.*

37. *Id.* at 334.

38. See *id.* at 335-36.

39. See *id.* at 341-42.

40. U.S. CONST. amend. IV ("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.").

41. *T.L.O.*, 469 U.S. at 337. The contextual analysis was not exactly novel. See *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967) (holding that there is "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails"). However, the Court's ultimate adoption of naked reasonableness would be the only search standard that did not require probable cause or a warrant absent some sort of emergency or imminent danger situation. See Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 650-51 (2009) (discussing instances in which reasonableness was paired with either a warrant or probable cause).

42. See *T.L.O.*, 469 U.S. at 339 (detailing the several reasons why maintaining discipline in the school is important); see also *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (holding that, unlike police procedures, immediate discipline must be dispensed quickly in a school following any misconduct in order to avoid "disrupting the academic process").

was largely based upon the fact that school officials have historically employed informal disciplinary schemes in order to properly respond to the various infractions that plague schools on a day-to-day basis.⁴³ The Court, therefore, found it both unnecessary and inimical to school order to require a warrant for searches conducted in the schoolhouse.⁴⁴ A warrant structure, the Court argued, would undoubtedly ignore the reasonableness standard's consideration of flexibility in schools' disciplinary procedures.⁴⁵ That is, a warrant, and acquisition thereof, would be counterproductive to school policies, which generally demand effective and instant discipline to even the most minor of infractions in order to promote a peaceful learning environment.⁴⁶ The Court likewise rejected a probable cause standard for a similar rationale.⁴⁷ In reasoning that arrests constituted a full-intrusion into one's privacy, thus requiring a heightened search standard, the Court found that any searches in a school context would be "substantially less intrusive."⁴⁸ The majority found several instances in which the Court had "recognized the legality of searches and seizures based on suspicions that, although reasonable, do not rise to the level of probable cause."⁴⁹ The vital legal focus, instead, rested upon the proper balancing of the private (the students) and public (the schools) entities.⁵⁰ The reasonableness test, the Court concluded, properly effectuated the two competing interests.⁵¹

The reasonableness test itself involves a two-fold inquiry: "[F]irst, one must consider 'whether the . . . action was justified at its inception,'"⁵² and "second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"⁵³ A search that is reasonable in its inception, satisfying the first prong of the inquiry, would be one in which a teacher or school official believes there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."⁵⁴ The second prong of the standard, the scope of the search,

43. See *T.L.O.*, 469 U.S. at 339-40.

44. See *id.* at 340.

45. See *id.*

46. See *id.*

47. See *id.* at 340-41.

48. See *id.* at 355 (citations omitted).

49. *Id.* at 341 (citations omitted) (internal quotation marks omitted).

50. See *id.*

51. See *id.*

52. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

53. *Id.* (quoting *Terry*, 392 U.S. at 20).

54. *Id.* at 342.

will be found reasonable when the “search . . . measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁵⁵

This standard was explicitly lifted from a previous Supreme Court decision, *Terry v. Ohio*.⁵⁶ The *Terry* Court found it necessary to relax the probable cause requirement and warrant procedures in a Fourth Amendment context in favor of the aforementioned two-prong inquiry when a police officer reasonably suspects “that he is dealing with an armed and dangerous individual.”⁵⁷ However, the *Terry* Court cautioned that this standard is only to be employed in situations to protect the officer or the immediate general public, and not to be used to abridge a citizen’s valued Fourth Amendment rights.⁵⁸ Throwing the *Terry* Court’s caution to the wind, the *T.L.O.* Court believed that the reasonableness standard should *always* be applied in a school context because reasonableness was determined to be a successful confluence of a student’s constitutional rights and a school’s need to swiftly administer discipline to preserve order.⁵⁹ Based on this reasonableness standard, the Court found the school in *T.L.O.* to be within the bounds of permissible searches under the Fourth Amendment.⁶⁰

Although the majority was steadfast in its sweeping declaration that reasonableness was the most legally sound search standard,⁶¹ a vocal minority of the Court was quick to point out the vacuous aspects of the reasonableness standard.⁶² Justice Brennan, along with Justice Marshall, authored a dissenting opinion, criticizing both the adoption of the reasonableness standard for Fourth Amendment searches in schools and the result rendered under the reasonableness standard.⁶³ Justice O’Connor joined Justice Powell in concurring,⁶⁴ while Justice Blackmun

55. *Id.*

56. 392 U.S. 1, 20 (1968).

57. *Id.* at 27.

58. *See id.* at 29.

59. *See T.L.O.*, 469 U.S. at 342-43.

60. *See id.* at 345-48. The Court found that an accusation that T.L.O. was smoking, which T.L.O. denied, justified Mr. Choplick’s search of her purse to uncover the evidence: her cigarettes. *Id.* at 345-46. The initial accusation of smoking and the discovery of the cigarettes, created the requisite nexus under the reasonableness test of particularized suspicion of misconduct and a search for evidence relating to the misconduct. *See id.* The Court found the discovery of the other drug paraphernalia to be similarly reasonable because their discovery was simply incidental to the initial search which was already determined to be reasonable. *Id.* at 347.

61. *See id.* at 341.

62. *See id.* at 353-86 (Brennan, J., concurring in part, dissenting in part).

63. *See id.* at 354.

64. *See id.* at 348-50 (Powell, J., concurring) (agreeing with the propositions advanced by the majority, but emphasizing the diluted constitutional rights students enjoy).

issued a separate concurring opinion.⁶⁵ Although acknowledging the deleterious effects a warrant-based system would have on every aspect of the educational environment,⁶⁶ Justice Brennan found the reasonableness standard unduly vague and an “unnecessary departure from generally applicable Fourth Amendment standards.”⁶⁷ Justice Brennan argued that a per se categorical exception for schools from accepted search standards was, in essence, mitigating the protections guaranteed in the Fourth Amendment.⁶⁸ The need for a school to maintain order was not so extraordinary, Justice Brennan contended, to “cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search.”⁶⁹ Nonetheless, the majority reasonableness standard was embraced with little derision by subsequent lower court decisions.⁷⁰

It was not until 2009, nearly a quarter of a century after *T.L.O.*, that the Supreme Court encountered another student-based Fourth Amendment challenge in *Redding*.⁷¹ Despite a disparity in interpretation of the reasonableness standard under factually similar circumstances,⁷² the Court refused to repeal or modify the reasonableness standard upon review of the following facts in *Redding*.⁷³ Thirteen-year old Savana Redding was called to the office by Principal Wilson when she was suspected of giving students prescription strength ibuprofen and other over-the-counter pain killers.⁷⁴ Redding denied selling the pills and consented to a search of her backpack by Mr. Wilson, which proved fruitless.⁷⁵ Still convinced Redding was concealing the pills on her person, Mr. Wilson instructed Redding to report to the nurse’s office for a more thorough search.⁷⁶ The school nurse, in search of the pills, ordered Redding to remove all of her clothes, shake out her bra,

65. *See id.* at 351-53 (Blackmun, J., concurring). Justice Blackmun acknowledged the flexibility schools require in disciplinary situations and took issue with the fact that a reasonableness standard has never been the rule, but rather it has always been an exception to probable cause. *See id.* Although Justice Blackmun ultimately accepted reasonableness as the appropriate standard, he argued that the Court should have been careful to note that probable cause is generally the default standard in almost all search contexts. *See id.*

66. *See id.* at 355-56 (Brennan, J., concurring in part, dissenting in part).

67. *Id.* at 354.

68. *See id.* at 356.

69. *Id.* at 357.

70. *See, e.g.*, cases cited *supra* note 24.

71. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2637 (2009).

72. *See* discussion *infra* Part III.

73. *See Redding*, 129 S. Ct. at 2639.

74. *See id.* at 2638.

75. *See id.*

76. *See id.*

exposing her breasts, and pull out the elastic band of her underwear.⁷⁷ The nurse did not find any pills on Redding.⁷⁸ The Redding family consequently filed suit alleging a Fourth Amendment violation in the District Court of Arizona.⁷⁹ The district court granted the school district's motion for summary judgment, finding the school's search to be reasonable within the *T.L.O.* guidelines.⁸⁰ The Reddings appealed to a three-judge panel on the Ninth Circuit,⁸¹ which affirmed the district court's decision.⁸² However, the Reddings were granted a rehearing en banc by the Ninth Circuit Court of Appeals, which then reversed the panel decision.⁸³ Although the divided circuit found that the initial search of Redding's backpack was justified, the second search was much more intrusive and therefore required either a higher level of suspicion or a more serious infraction.⁸⁴

Granting certiorari, Justice Souter's majority opinion reiterated, albeit briefly, much of the holding of *T.L.O.*,⁸⁵ despite loud scholarly outcry in the *T.L.O.* aftermath, either criticizing the standard, or advocating for repeal.⁸⁶ The Court found that drug possession, sale, and use were all serious impediments to school order, and that school administrators must necessarily take drastic measures to eradicate such problems.⁸⁷ But, in applying the *T.L.O.* reasonableness standard, the facts at hand presented no "indication of danger to the students from the

77. *See id.*

78. *See id.*

79. *See Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 831 (9th Cir. 2007).

80. *See id.*

81. *Id.* at 829.

82. *See id.* at 832-36 (holding that the school district had reasonable grounds for suspecting a search would turn up evidence of Redding's alleged drug dealing and the search methods employed were reasonable when balanced against the threat imposed by drug dealing).

83. *See Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1089 (9th Cir. 2008) (en banc).

84. *See id.* at 1082. The court held that neither the suspicion, a tip from two students, nor the misconduct, possessing drugs equivalent to two aspirins, justified such an intrusive search.

85. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642-43 (2009).

86. *See also Dupre*, *supra* note 7, at 62-64 (criticizing the *T.L.O.* standard for usurping students' protected constitutional rights); Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 689 (1987) (noting that the *T.L.O.* decision is illustrative of the Court's "unwillingness to conclude that due process has no application at all to schools"); Frank D. LoMonte, *Shrinking Tinker: Students Are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1324-25 & n.8 (2009) (criticizing the Court's willingness to cast aside students' constitutional rights); Mansukhani, *supra* note 5, at 361 (finding that *T.L.O.* has been read too broadly in lower courts and the constitutional rights of students have suffered); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1181-83 (1988) (noting that the Court has failed to promulgate a search standard, in the place of reasonableness, which seeks to utilize least intrusive methods).

87. *See Redding*, 129 S. Ct. at 2643.

power of the drugs or their quantity, and any reason to suppose that Savana was carrying the pills in her underwear . . . these deficiencies [were] fatal to finding the search reasonable.”⁸⁸ Bereft of the particularized suspicion “to match the degree of intrusion[,]”⁸⁹ the Court found that the school district’s conduct failed the two-prong *T.L.O.* reasonableness inquiry. Justice Stevens, with whom Justice Ginsburg joined, concurred with the holding of the decision.⁹⁰

III. UNEVEN ADJUDICATION OF THE REASONABLENESS STANDARD AFTER *T.L.O.*

Many states have come to vastly different conclusions in applying the *T.L.O.* reasonableness standard.⁹¹ In the past, the Supreme Court has often revised or clarified standards handed down to lower courts that resulted in inequity or disparate analysis in factually similar circumstances.⁹² However, none of the Justices of the Court acknowledged any of the several vacuous aspects that the *T.L.O.* reasonableness standard has spurned upon re-examination of students’ Fourth Amendment rights in the *Redding* opinion.⁹³ Much of this confusion has stemmed from the incongruent definition of what a reasonable or intrusive search is in different situations.⁹⁴ An intrusive search, the *T.L.O.* Court held, is a relative term and is defined in light of

88. *Id.*

89. *Id.* at 2642.

90. *See id.* at 2644-45.

91. *See, e.g.,* *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 605 (6th Cir. 2005) (holding that a “less weighty governmental interest” is served when a strip search for money is conducted, thus making such a search unreasonable); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 889 (N.D. Ill. 2001) (holding that stolen money will never require any form of a strip search, regardless of the amount of money, because the threat to school order will not satisfy the constitutional considerations of reasonableness under the *T.L.O.* standard). *But see* *H.Y. ex rel. K.Y. v. Russell Cnty. Bd. of Educ.*, 490 F. Supp. 2d 1174, 1185-87 (M.D. Ala. 2007) (holding that patting down of students’ pants in search of twelve dollars was constitutionally permissible under *T.L.O.*, but subsequent nude searches in the restroom were unreasonable); *Wynn v. Board of Educ. of Vestavia Hills*, 508 So. 2d 1170, 1171-72 (Ala. 1987) (holding that a teacher, who called a fifth-grade student to the front of the classroom and instructing her to remove her shoes and socks for six dollars, was reasonable under the *T.L.O.* standard).

92. *See, e.g.,* *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 576 (2003); *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494-95 (1954). General disapproval with the *Bowers* case and disparity in the lower courts prompted the *Lawrence* Court to overturn *Bowers*. *See Lawrence*, 539 U.S. at 576. Inequality that spawned from the decision in *Plessy* caused the *Brown* Court to overrule the 1896 decision. *See Brown*, 347 U.S. at 494-95.

93. *See Redding*, 129 S. Ct. at 2642-43 (applying the *T.L.O.* reasonableness test to the facts of the case).

94. *See Beard*, 402 F.3d at 605; *Bell*, 160 F. Supp. 2d at 889. *But see H.Y.*, 490 F. Supp. 2d at 1185-87; *Wynn*, 508 So. 2d at 1172.

the “age and sex of the student and the nature of the infraction.”⁹⁵ The Court declined to concretely define either reasonable or intrusive in order to give broad deference to the “comprehensive authority of the States and of school officials.”⁹⁶ However, at least one critic has proposed a school policy which compartmentalizes intrusive searches into three distinct categories in order to bring clarity to lower courts’ adjudication on the *T.L.O.* standard.⁹⁷ A least intrusive search would include a search of school owned property, such as a desk or a locker; a moderately intrusive search would be a search of the student’s personal belongings, but not of the student’s person; and a highly intrusive search would be a physical search of a student, be it a pat-down search or a strip search.⁹⁸ The first section of this Part will explore the *T.L.O.* standard in action and the uneven adjudication of contested school searches throughout the nation’s courts. The second section of this Part will examine why there has been a considerable amount of scholarly outcry to change the *T.L.O.* standard, and yet a dearth of judicial derision, including the Supreme Court itself in the recent *Redding* decision.

A. Searches for Money

As a general rule, most jurisdictions have found that a highly intrusive search for money never passes muster under the *T.L.O.* standard.⁹⁹ However, some courts, in applying the same *T.L.O.* standard, have found intrusive searches for money to be constitutionally reasonable.¹⁰⁰ *Oliver v. McClung*¹⁰¹ is demonstrative of the general rule

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

96. *Id.* at 342 n.9 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

97. See Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921 app. at 977 (1997).

98. See *id.* These terms and their according definitions will be referenced throughout the rest of this Note.

99. See, e.g., *Beard*, 402 F.3d at 605 (holding that a “less weighty governmental interest” is served when a strip search for money is conducted, thus making such a search unreasonable); *Bell*, 160 F. Supp. 2d at 889 (holding that stolen money will not ever require a strip search, regardless of the amount of money, because the threat to school order will not satisfy the constitutional considerations of reasonableness under the *T.L.O.* standard); *Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1207 (D.S.D. 1998) (holding that “case law is pervasive that a strip search, the objective of which is to recover money, is illegal”); *Bellnier v. Lund*, 438 F. Supp. 47, 54 (N.D.N.Y. 1977) (holding that a search for money was unreasonably applying the *Terry* test as this case pre-dated *T.L.O.*); *West Virginia ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 49 (W. Va. 1993) (holding that stolen money is undoubtedly a serious offense, but does not require a strip search as “it does not begin to approach the threat posed by the possession of weapons or drugs”).

100. See *H.Y. ex rel. K.Y. v. Russell Cnty. Bd. of Educ.*, 490 F. Supp. 2d 1174, 1185-86 (M.D. Ala. 2007) (holding that pat down of students’ pants in search of twelve dollars was constitutionally

that a moderately or highly intrusive search for money will never pass muster under the *T.L.O.* test.¹⁰² The Northern District of Indiana entertained a claim by a group of seventh grade girls who were subject to a strip search in an effort to recover a sum of \$4.50 that was reported stolen.¹⁰³ The court applied *T.L.O.*, and found that the reasonableness standard must also take into account whether the search is “*excessively intrusive in light of the age and sex of the student and the nature of the infraction.*”¹⁰⁴ Incorporating these factors in the reasonableness discussion, the court held that legal inquiries regarding strip searches of pre-pubescent children are not always analyzed as per strict legal guidelines.¹⁰⁵ Instead, the court found it best to inject an innate, common sense, or natural law point of view in determining what is reasonable.¹⁰⁶ Pursuant to this natural law based definition of reasonableness, the court found it clear that a strip search of thirteen-year-old girls for a trivial sum of money was intrinsically unreasonable.¹⁰⁷

Other courts, however, have rebutted the majority position outlined in *McClung* when applying the *T.L.O.* reasonableness test to factually similar circumstances.¹⁰⁸ Most of the courts in this minority have condoned highly intrusive searches of students, which fall just short of

permissible under the *T.L.O.* standard as the school “had an important interest in promoting order and discipline in the classroom”); *Wynn v. Bd. of Educ. of Vestavia Hills*, 508 So. 2d 1170, 1172 (Ala. 1987) (holding that calling a fifth-grade student to the front of the classroom and instructing her to remove her shoes and socks for six dollars, was reasonable under the *T.L.O.* standard); *In re A.D.*, 844 A.2d 20, 28 (Pa. Super. Ct. 2004) (holding that a search of a group of boys and girls pockets was reasonable in inception and scope under the *T.L.O.* reasonableness standard).

101. 919 F. Supp. 1206, (N.D. Ind. 1995).

102. *Id.* at 1211, 1218.

103. *See id.* at 1210-11.

104. *Id.* at 1217 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

105. *See id.*

106. *See id.*; *see also Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) (holding that a strip search of a thirteen-year old girl violates “any known principle of human decency”). The *Renfrow* Court further held, “[a]part from any constitutional readings and rulings, simply common sense would indicate that . . . such a nude search was . . . outrageous under ‘settled indisputable principles of law.’” *Renfrow*, 631 F.2d at 93 (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975) (alteration in original)). This language was also used in Justice Stevens’ concurring in part and dissenting in part opinion for *T.L.O.* *See T.L.O.*, 469 U.S. at 382 n.25.

107. *See McClung*, 919 F. Supp. at 1218.

108. *See H.Y. ex rel. K.Y. v. Russell Cnty. Bd. of Educ.*, 490 F. Supp. 2d 1174, 1185-86 (M.D. Ala. 2007) (holding that pat down of students’ pants in search of twelve dollars was constitutionally permissible under the *T.L.O.* standard); *Wynn v. Bd. of Educ. of Vestavia Hills*, 508 So. 2d 1170, 1172 (Ala. 1987) (holding that calling a fifth-grade student to the front of the classroom and instructing her to remove her shoes and socks for six dollars, was reasonable under the *T.L.O.* standard); *In re A.D.*, 844 A.2d 20, 28 (Pa. Super. Ct. 2004) (holding that a search of a group of boys and girls pockets was reasonable in inception and scope under the *T.L.O.* reasonableness standard).

being a strip search, for a sum of money.¹⁰⁹ However, at least one court, the District Court of Kansas, authorized a strip search of a thirteen-year-old student for a sum of \$150 in *Singleton v. Board of Education*.¹¹⁰ The *Singleton* Court held that the search was justified in its inception because possession of the sum of money was a result of theft and the student in question had previously been in trouble with the police.¹¹¹ The court similarly held that the search met the second *T.L.O.* prong, reasonable in scope, as the student was neither required to remove his underwear nor was the student touched inappropriately by the male administrators present.¹¹² Although the *Singleton* Court declared that other jurisdictions “have found similar student searches to be reasonable in scope,”¹¹³ the case law cited by the *Singleton* Court supported a strip search when the alleged contraband was drugs or weapons, not money.¹¹⁴ The *Singleton* Court’s misplaced emphasis on cases that did not support their legal proposition undoubtedly stems from the Supreme Court’s refusal to flesh out what constitutes a reasonable search.¹¹⁵ Although it is the providence of any court to interpret the law and apply it to the facts at hand, the vagueness of the reasonableness standard has led to disparate decisions at the expense of both judicial uniformity and students’ constitutional rights.

B. Searches for Drugs and Weapons

Contrary to the general proposition that a search for money will never substantiate a highly intrusive search, most courts have found that a highly intrusive search for drugs or weapons will almost always pass muster when applying the *T.L.O.* reasonableness standard.¹¹⁶ For

109. “Strip search,” the phrase used throughout this Note, conforms with *Black’s Law Dictionary* definition of the term: “A search of a person conducted after that person’s clothes have been removed, the purpose usu[ally] being to find any contraband the person might be hiding.” BLACK’S LAW DICTIONARY 1378-79 (8th ed. 2004).

110. 894 F. Supp. 386, 390-91 (D. Kan. 1995).

111. *See id.*

112. *See id.* at 391.

113. *Id.*

114. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993) (holding that a strip search of a student who was suspected of carrying drugs on his person was reasonable pursuant to the *T.L.O.* test); *Williams v. Ellington*, 936 F.2d 881, 886-87 (6th Cir. 1991) (finding that a strip search of a suspected drug dealer was reasonable as per the *T.L.O.* reasonableness test); *Widener v. Frye*, 809 F. Supp. 35, 38 (S.D. Ohio 1992) (holding that a strip search of a student who smelled strongly of marijuana was constitutionally permissible under the *T.L.O.* standard).

115. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) (refusing to firmly define reasonableness in order to give deference to the authority of the school administration).

116. *See Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146, 1150 (7th Cir. 1997) (finding a highly intrusive search for drugs reasonable under the *T.L.O.* standard); *Thompson v.*

instance, in *Williams v. Ellington*,¹¹⁷ the court was willing to relax the *T.L.O.* standard in a search for drugs or weapons because the presence of such contraband on school grounds posed a grave threat to school order.¹¹⁸ Tipped off by a parent who expressed concern that a certain student, Williams, might have given drugs to her daughter, Principal Jerald Ellington ordered a strip search of Williams after a search of her locker and books failed to uncover any evidence of drugs.¹¹⁹ Although Mr. Ellington lacked any hard evidence that would necessarily lead him to conduct a strip search on Williams, the court nonetheless found the search reasonable under the *T.L.O.* two-fold inquiry.¹²⁰

In sharp contrast to the general rule that an intrusive search for drugs will always be reasonable under *T.L.O.*, there are other jurisdictions which find that the relaxation of the reasonableness standard is not warranted even when the search is for drugs or weapons.¹²¹ The Second Circuit recently held in *Phaneuf v. Fraikin*¹²² that a strip search of a student for marijuana was unsubstantiated under the two-part *T.L.O.* test because the information was based only on a student tip coupled with the fact that the student was carrying cigarettes

Carthage Sch. Dist., 87 F.3d 979, 982-83 (8th Cir. 1996) (holding that a mass search for weapons was reasonable under *T.L.O.* despite having any individualized reasonableness); *Cornfield*, 991 F.2d at 1322-23 (finding that a search upon the suspicion that the student had drugs on his person was reasonable in both scope and inception according to *T.L.O.*); *Shamberg v. Alaska*, 762 P.2d 488, 492 (Alaska Ct. App. 1988) (finding a search for drugs posed a special and dangerous threat for the school); *Berry v. Indiana*, 561 N.E.2d 832, 837 (Ind. Ct. App. 1990) (citing *T.L.O.* with affirmative support but hardly going through the two requisite reasonable inquiries and ending its analysis in finding a search for marijuana met the *T.L.O.* test).

117. 936 F.2d 881 (6th Cir. 1991).

118. See *Ellington*, 936 F.2d at 886-87.

119. See *id.* at 882-83.

120. See *id.* at 889. Although the court acknowledged that the tips on Williams were unverified, the court nonetheless held the prospect of drugs in the school posed a great risk. See *id.*

121. See *In re Appeal in Pima Cnty. Juvenile Action No. 80484-1*, 733 P.2d 316, 317-18 (Ariz. Ct. App. 1987) (holding that a principal who instructed a student to empty out his pockets acted unreasonably under *T.L.O.* as the principal had no personal knowledge that would give rise to a reasonable suspicion that the student was carrying drugs); *In re William G.*, 709 P.2d 1287, 1289, 1297-98 (Cal. 1985) (finding a principal who forcibly seized a student's calculator case with a suspicious bulge was unreasonable under *T.L.O.* as the principal could not articulate any fact to support his suspicion that the student was carrying drugs); *T.J. v. Florida*, 538 So. 2d 1320, 1322 (Fla. Dist. Ct. App. 1989) (finding that a principal's search of a student's zippered side pocket was unreasonable under *T.L.O.* as the pocket did not bulge and "clearly contained no weapon"); *Illinois v. Pruitt*, 662 N.E.2d 540, 550-51 (Ill. App. Ct. 1996) (finding that a principal's pat-down search of a student was unreasonable, although the search elicited a hand gun, because the intrusive search was only conducted after the student was found using an off-limits staircase); *Coronado v. Texas*, 835 S.W.2d 636, 641 (Tex. Crim. App. 1992) (finding a principal's search of a student for drugs which required the student to pull down his pants to be unreasonable under the *T.L.O.* test).

122. 448 F.3d 591 (2d Cir. 2006).

on her person.¹²³ While the facts and evidentiary support that led to the strip search in *Phaneuf* are strikingly similar to the *Williams* decision,¹²⁴ the two courts reached vastly different conclusions when applying the same legal standard.¹²⁵

Due to the vague guidelines of the reasonableness test and the subsequent aforementioned uneven adjudication thereof, uniformity in the administration of justice has been compromised.¹²⁶ In the years following the Supreme Court's decision in *T.L.O.*, several scholars heavily criticized the vagueness of the standard and how it has been interpreted in lower courts.¹²⁷ One scholar criticizes the Supreme Court in taking the "easy" way out by granting certiorari to *T.L.O.* because the factual circumstances in the case would have satisfied not only the reasonableness test established as result of the *T.L.O.* decision, but also a probable cause standard.¹²⁸ Since the factual circumstances in *T.L.O.* could have met a higher probable cause search standard, lower courts were therefore left without a proper template to analyze the reasonableness standard when the case at bar did not meet a probable cause standard.¹²⁹ *Redding*, undoubtedly more factually difficult than *T.L.O.*, could be viewed as the Supreme Court attempting to rectify lower courts' confusion.¹³⁰ However, *Redding* was instead more of a simple application of the *T.L.O.* reasonableness standard to a singular set

123. *Id.* at 598-99.

124. Like *Phaneuf*, the only evidence that led to the strip search in the *Ellington* decision, was a series of student tips that Williams had drugs on her person at school. *See Ellington*, 936 F.2d at 882.

125. *See Phaneuf*, 448 F.2d at 598-99 (holding that a student tip was not enough to find a strip search reasonable under the *T.L.O.* test). *But see Ellington*, 936 F.2d at 887-89 (holding that a student tip was enough to justify a strip search under *T.L.O.*).

126. *See, e.g., Webb v. McCullough*, 828 F.2d 1151, 1155-56 (6th Cir. 1987) (refusing to extend the *T.L.O.* reasonableness standard to searches conducted off school property); *Fewless v. Bd. of Educ. of Wayland Sch.*, 208 F. Supp. 2d 806, 820 (W.D. Mich. 2002) (finding that a strip search of a student for marijuana was unreasonable under *T.L.O.*); *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (finding that a strip search of a student who tried to hide from a security guard in the school parking lot was unreasonable under *T.L.O.*); *In re P.E.A.*, 754 P.2d 382, 386 (Colo. 1988) (finding support for the application of the *T.L.O.* reasonableness standard even though the property searched in the case was off school property).

127. *See Dupre, supra* note 7, at 62-63; *Hafen, supra* note 86, at 689; *LoMonte, supra* note 86, at 1324-25 & n.8; *Mansukhani, supra* note 5, at 360-61; *Strossen, supra* note 86, at 1181-83.

128. *See Mansukhani, supra* note 5, at 360.

129. *See id.* at 360-61.

130. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2638 (2009). The factual circumstances at issue in *Redding* were controversial. *See id.* They involved drugs, a young girl, very little evidence, and a highly intrusive strip search. *See id.* Unlike *T.L.O.*, where the threat of infraction was cigarettes and the evidence ample, the Court's grant of certiorari to the *Redding* case could be seen as an attempt to rectify lower court confusion. *See New Jersey v. T.L.O.*, 469 U.S. 325, 329-30 (1985).

of facts; the Court did not endeavor to clarify either of the two reasonableness prongs.¹³¹ The Court ignored suggestions from scholars like Professor Nadine Strossen, who posited that the Supreme Court should “compare the marginal costs and benefits of alternative search and seizure techniques, and uphold a particular technique only if it is the least intrusive measure that substantially promotes the state’s goals.”¹³² The reasonableness test as it stands, Professor Strossen asserts, “has the effect of eroding the fundamental privacy and liberty rights protected by the [F]ourth [A]mendment.”¹³³ The Supreme Court had an opportunity to employ a less intrusive standard or, at least, to clarify the current standard, and failed to do so.¹³⁴

IV. WHY ALL THE CONFUSION?: *IN LOCO PARENTIS*

In loco parentis, in Latin, means in the place of the parent.¹³⁵ *Black’s Law Dictionary* defines the term as “[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.”¹³⁶ The historical strength of *in loco parentis*, although not explicitly mentioned in *T.L.O.* or its subsequent progeny, underscored the Supreme Court’s formulation of the reasonableness standard.¹³⁷ Despite the fact that the Supreme Court denounced the *in loco parentis* doctrine as non-functional in the modern legal system,¹³⁸ several courts continue to cite the doctrine as a springboard for holdings that limit the constitutional rights of students.¹³⁹ Section A of this Part will trace the legal history of *in loco parentis*. Section B of this Part will examine the two distinct ways the Court has applied *in loco parentis*.

131. See *Redding*, 129 S. Ct. at 2639-43.

132. Strossen, *supra* note 86, at 1266.

133. *Id.*

134. See *Redding*, 129 S. Ct. at 2642-43 (simply applying the *T.L.O.* standard to the facts of the case).

135. BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

136. *Id.*

137. See Mansukhani, *supra* note 5, at 360 (discussing that although the Supreme Court has rejected *in loco parentis*, they nonetheless allow schools to employ a lesser search standard).

138. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (finding that the doctrine of *in loco parentis* is “in tension with contemporary reality and the teachings of this Court”).

139. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (“[M]inors lack some of the most fundamental rights . . . subject to the control of their parents When parents place minor children in . . . schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them.”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[F]reedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially inappropriate behavior.”).

A. A Brief Legal History of *In Loco Parentis*

The doctrine of *in loco parentis* is deeply embedded in the American legal framework, with its roots stemming from English common law.¹⁴⁰ William Blackstone provides the classic formulation of the *in loco parentis* doctrine: “[a parent] may . . . delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge.”¹⁴¹ Blackstone’s definition of *in loco parentis* was transported to America and quickly appeared in several nineteenth-century cases.¹⁴² These decisions stood for the general proposition that it is the school’s responsibility to reform and make respectable citizens out of its students by employing whatever means it deems necessary.¹⁴³ Further, and more authoritatively, James Kent, Chancellor of New York, embraced the doctrine of *in loco parentis* in his multi-volume study of American jurisprudence, *Commentaries on American Law*.¹⁴⁴ Although several of the early decisions which pledge their full support to *in loco parentis* are, more or less, 150 years old, decisions like *North Carolina v. Pendergrass*¹⁴⁵ are still occasionally cited with support.¹⁴⁶ These citations serve to undercut the Supreme Court’s assertion in *T.L.O.* that reliance on *in loco parentis*, in light of the current legal landscape, “is in tension with contemporary reality and teachings of this Court.”¹⁴⁷

Tinker effected a “sea change”¹⁴⁸ upon the traditional doctrinal notions of students’ constitutional rights.¹⁴⁹ Early- to mid-twentieth century adjudication on the bounds of student rights and school authority generally conformed to the nineteenth century traditional formulation of

140. *Smith v. W. Va. State Bd. of Educ.*, 295 S.E.2d 680, 685 (W. Va. 1982).

141. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (Univ. of Chi. Press 1979) (1765).

142. *See Sheehan v. Sturges*, 2 A. 841, 842 (Conn. 1885) (holding that *in loco parentis* allows the school to administer discipline by whatever means it saw fit, without the interference of the courts); *Stevens v. Fassett*, 27 Me. 266, 281 (1847) (holding that a schoolmaster’s power over a child is analogous to that of a master over a servant or parent over a child).

143. *North Carolina v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365, 366 (1837).

144. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *205-06 (John M. Gould ed., Little, Brown & Co. 1901) (1896) (“[T]he power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education.”).

145. 19 N.C. (2 Dev. & Bat.) 365 (1837).

146. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 413-14 (2007) (Thomas, J., concurring) (quoting *Pendergrass*, 19 N.C. at 365-66); *Gaspersohn v. Harnett Cnty. Bd. of Educ.*, 330 S.E.2d 489, 493, 498 (N.C. Ct. App. 1985) (citing *Pendergrass*, 19 N.C. at 365) (holding that corporal punishment can be administered in reasonable amounts).

147. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

148. *Morse*, 551 U.S. at 416 (Thomas, J., concurring).

149. *See id.*

in loco parentis.¹⁵⁰ However, by 1969, the year *Tinker* was decided, the Court began to move away from *in loco parentis*.¹⁵¹ The students at issue in *Tinker* were two high school students who decided to publicize their criticism of the Vietnam War by wearing black armbands and fasting to demonstrate their commitment to peace.¹⁵² The students' high school principal became aware of this plan and quickly formulated a school policy which would suspend students who refused to remove their armbands after being asked by an administrator.¹⁵³ The students in *Tinker* were subsequently suspended from school after refusing to remove their armbands and were not allowed back to school unless they were without their armbands.¹⁵⁴ Despite the disruptive threat the armbands posed to school order, the Supreme Court held that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁵⁵ The majority also declared, however, that the Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."¹⁵⁶ Recognizing this tension, the Court resolved to formulate a new test to address these competing interests.¹⁵⁷

A bulk of the Court's analysis in *Tinker* is focused on the need to stay away from school policies based on unsubstantiated fears which hinder the fundamental rights of students.¹⁵⁸ The Court therefore promulgated a standard that afforded a broad reading of students' freedom of expression: "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."¹⁵⁹ The school

150. See *O'Rourke v. Walker*, 128 A. 25, 26 (Conn. 1925) (holding that the teacher stands *in loco parentis* of students while "under his control and oversight in the school room"); *Wilson v. Bd. of Educ. of Chi.*, 84 N.E. 697, 700 (Ill. 1908) (deferring all authority to teachers and schools to formulate all rules necessary to ensure obedience to school policies); *Hobbs v. Germany*, 49 So. 515, 517 (Miss. 1909) (holding that parental authority is checked at the schoolhouse gate and transferred to teachers and administrators); *Guerrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. Ct. 1942) (holding that a teacher may inflict reasonable corporal punishment upon disorderly students pursuant to the doctrine of *in loco parentis*).

151. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

152. See *id.* at 504.

153. See *id.*

154. See *id.*

155. *Id.* at 506.

156. *Id.* at 507.

157. See *id.*

158. See *id.* at 508 ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

159. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

officials' wish to be free from any incitement of political controversy, the Court held, was not enough to ban the students' freedom of expression.¹⁶⁰ Students, the majority opined, are "persons under our Constitution[,] [t]hey are possessed of fundamental rights which the State must respect."¹⁶¹ The *Tinker* Court initially declared that the balancing test would meet in the middle of "where students['] . . . rights collide with the rules of school authorities."¹⁶² However, the resulting *Tinker* standard afforded students broad latitude when it came to freedom of expression within the schoolhouse.¹⁶³

Although *Tinker's* expansive reading of students' constitutional rights eroded the very core of *in loco parentis*, the doctrine has not disappeared in the *Tinker* aftermath.¹⁶⁴ The *Tinker* decision remains good law and is still cited as the leading authority in student-based freedom of expression cases.¹⁶⁵ However, the liberal reading given to freedom of expression inside the schoolhouse by *Tinker* has been severely whittled away.¹⁶⁶ The reductionist scope of *Tinker* is, as one scholar suggests, attributed to the difficulty courts have had with reconciling the *Tinker* standard with traditional notions of school authority and *in loco parentis*.¹⁶⁷

In his *Morse v. Frederick*¹⁶⁸ concurrence, Justice Thomas posited that the doctrine of *in loco parentis* is in fact alive and well.¹⁶⁹ Although the *Tinker* Court found that ensuring that students receive proper constitutional protection was a paramount concern,¹⁷⁰ Justice Thomas

160. *See id.* at 510-11.

161. *Id.* at 511 (internal quotation marks omitted).

162. *Id.* at 507.

163. *See* LoMonte, *supra* note 86, at 1341-44 (discussing cases which applied *Tinker* in order to diminish students' constitutional rights).

164. *See id.* (discussing cases which explicitly carve out exceptions to *Tinker* in order to maintain authority over students' freedom of expression).

165. *See id.* at 1326.

166. Many courts were confused as to how *Tinker* should be applied and instead only applied it where a specific viewpoint was being directly discriminated against rather than applying *Tinker* to all freedom of expression cases arising in the schoolhouse. *See, e.g.,* Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 431-32 (9th Cir. 2008) ("*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny . . ."); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 391-93 (6th Cir. 2005) (finding that style of dress is not the type of freedom of expression the *Tinker* Court contemplated when formulating its standard).

167. *See* LoMonte, *supra* note 86, at 1327.

168. 551 U.S. 393 (2007).

169. *See id.* at 417 (Thomas, J., concurring) (noting that *Tinker* conflicted with *in loco parentis* and thus has been scaled back in more recent years).

170. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves respect their obligations to

argued that constitutional protection should only be afforded to students on a very limited basis.¹⁷¹ *Tinker*, Justice Thomas criticized, “conflicted with the traditional understanding of the judiciary’s role in relation to public schooling, a role limited by *in loco parentis*.”¹⁷² Although never explicitly overturned, Justice Thomas contended that the subsequent decisions on student expression have served to erode the liberal analysis upon which *Tinker* was based.¹⁷³ Justice Thomas credited this erosion to the strong hold of *in loco parentis* upon all aspects of education law.¹⁷⁴ However, since the renunciation of *in loco parentis* in *T.L.O.*,¹⁷⁵ the doctrine is rarely explicitly mentioned due to the stigma it carries “of treating children as though it were still the [nineteenth] century.”¹⁷⁶ Still, the whittling away of the *Tinker* standard in consideration of overriding “administrative and pedagogical challenges” in schools, Justice Thomas argued, is effectuating the exact doctrinal aims of *in loco parentis*.¹⁷⁷

Some scholars had prematurely agreed with Justice Thomas’ proposition in rejecting the *T.L.O.* Court’s renunciation of *in loco parentis* as not being consonant with the modern socio-legal framework.¹⁷⁸ Similar to Justice Thomas’ *Morse* concurrence, these scholars argue that any “attempts to transfer civil liberties doctrines from the adult contexts in which they originated to schools . . . have confused our understanding of the very nature of public schools.”¹⁷⁹ *T.L.O.* held that schools are agents of the state in the Fourth Amendment context, *but* they enjoy special disciplinary discretion to monitor and control student conduct.¹⁸⁰ Granting special disciplinary discretion to a school to maintain order is the classic definition of *in loco parentis*.¹⁸¹ There are,

the State.” (internal quotation marks omitted)).

171. See *Morse*, 551 U.S. at 419 (Thomas, J., concurring).

172. *Id.* at 417.

173. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986) (holding that a school acted within the *Tinker* standard when punishing a student for giving a speech with sexual undertones as the Constitution should not “compel[.] . . . teachers, parents, and elected school officials to surrender control of the American public school system to public school students” (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting) (internal quotation marks omitted))); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988) (holding that the *Tinker* standard does not apply to school sponsored activities, like the school newspaper).

174. See *Morse*, 551 U.S. at 417 (Thomas, J., concurring).

175. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (finding that the doctrine of *in loco parentis* is “in tension with contemporary reality and the teachings of this Court”).

176. *Morse*, 551 U.S. at 419 (Thomas, J., concurring).

177. *Id.* at 418-19 (holding that the majority’s opinion in *Morse* is yet another exception to the *Tinker* standard without attempting to overrule it).

178. See, e.g., Hafen, *supra* note 86, at 693-94.

179. *Id.* at 693.

180. See *T.L.O.*, 469 U.S. at 336.

181. *KENT*, *supra* note 144, at *205-06 (“[T]he power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of

therefore, two separate competing propositions that can be elicited from *T.L.O.*¹⁸² First, *T.L.O.* explicitly posited that *in loco parentis* has no place in the modern legal system.¹⁸³ However, the *T.L.O.* Court's second holding maintained that schools still maintain absolute discretionary disciplinary authority over its students.¹⁸⁴ Lower courts, which were delegated the task of finely analyzing the intricacies of *T.L.O.* have grappled with the "uncertainty [of] whether children really do lack the necessary maturity to be treated as adults."¹⁸⁵ This confusion has, in effect, left lower courts uncertain as to whether or not students have any concrete vested rights in the Constitution and, if so, how to properly weigh these rights against the competing interests of a school's need to maintain order.¹⁸⁶

B. Conceptualizing In Loco Parentis

It is clear that the doctrine of *in loco parentis* still has a resonating effect today,¹⁸⁷ despite explicit judicial denouncement.¹⁸⁸ The confusion over whether *in loco parentis* is still applicable is due in large part to the different ways that the Supreme Court has conceptualized the authority a school may exercise over its pupils.¹⁸⁹ One scholar suggests that the Court oscillates between two models of construction of *in loco parentis* in determining whether to afford students broader constitutional rights or to grant schools more disciplinary deference.¹⁹⁰ The two models are central to deciphering how the Supreme Court, and as a result, lower courts define the relationship between the state, the school, and the student.¹⁹¹ The first model, social reconstruction, affords schools only the "power . . . necessary . . . to facilitate the child in his attempt to reconstruct a new social order . . . [T]he reconstruction model

education.").

182. See Hafen, *supra* note 86, at 693 (noting the two competing ideas that have resulted from the Supreme Court's discussion of *in loco parentis*).

183. See *T.L.O.*, 469 U.S. at 336.

184. See *id.*

185. Hafen, *supra* note 86, at 694. This is especially true in light of the fact that the Supreme Court still cites *Tinker* for the proposition that students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

186. See Hafen, *supra* note 86, at 693-94 (discussing the competing readings of *in loco parentis*).

187. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting the continued use of *in loco parentis*); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (explaining that students' rights must be duly balanced against the prevailing interests and agenda of the school).

188. See *T.L.O.*, 469 U.S. at 336.

189. See Dupre, *supra* note 7, at 59, 62.

190. See *id.* at 64.

191. See *id.* at 70.

endeavors to support those students who rebut the values that the school is trying to inculcate.”¹⁹² The second model, social reproduction, makes it the school’s mission to “proclaim the child’s place in society by inculcating society’s traditions and habits.”¹⁹³ The school, under the social reproduction model, plays a paternalistic role in making sure the educational environment will produce responsible community members.¹⁹⁴

In loco parentis, undoubtedly, is central to the two models’ discussion.¹⁹⁵ In the nineteenth and early twentieth century, pre-*Tinker*, *in loco parentis* was rarely challenged as it was viewed as a necessary consequence of public education.¹⁹⁶ However, the tumultuous sociopolitical landscape of the 1960s gave way to a relaxation of several authoritarian structures, including *in loco parentis*, in the aftermath of *Brown v. Board of Education*.¹⁹⁷ The reconstruction model, which supports a liberal reading of students’ constitutional rights, was at its zenith at this time, peaking with the *Tinker* decision.¹⁹⁸ Subsequent decisions on students’ rights, namely *T.L.O.*, have elements of both models, making it very difficult to interpret the exact meaning of the *T.L.O.* holding.¹⁹⁹ The disparate results in the lower courts on the *T.L.O.* reasonableness standard serve to attest to this confusion.²⁰⁰ Although scholars have hypothesized that the Court is moving in a direction of clarity,²⁰¹ the recent *Redding* decision and its simple application of the *T.L.O.* standard to the facts serve to undercut this hypothesis.²⁰²

While the two models provide a very useful insight in trying to decipher the Supreme Court’s jurisprudence on students’ constitutional rights, other scholars have found the increasing instances of drug use and violence in schools as the cause of several courts’ willingness to provide schools with more disciplinary discretion.²⁰³ In the face of the choice

192. *Id.* at 65.

193. *Id.* at 67.

194. *See id.*

195. *See id.* at 70-72.

196. *See id.* at 72; *see also* cases cited *supra* note 150 (discussing basic principles of *in loco parentis*).

197. 347 U.S. 483 (1954); Dupre, *supra* note 7, at 74.

198. *See* Dupre, *supra* note 7, at 74, 77.

199. *See id.* at 80.

200. *See* discussion *supra* Part III.

201. *See* Dupre, *supra* note 7, at 101-02 (noting that the Court took an important step forward in refining the analysis of school power in *Vernonia*).

202. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639-43 (2009).

203. *See* J. Chad Mitchell, Comment, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students’ Rights with School Safety*, 1998 BYU L. REV. 1207, 1222-24 (discussing how safety concerns and the special environment of the schoolhouse has motivated the Court’s refusal to apply the exclusionary rule as a remedy for violations of students’ Fourth

between providing a safe learning environment or providing students with adequate constitutional protection, the Supreme Court has fashioned recent decisions to side with a safe learning environment.²⁰⁴ Courts, in their discussions of students' constitutional rights, often cite alarming statistics in support of the proposition that the modern school environment is one littered with violent crimes and drug use.²⁰⁵ Despite efforts to combat school violence, it is estimated that students bring nearly "135,000 guns to the nation's 85,000 public schools each day."²⁰⁶ Therefore, although *T.L.O.* has been subjected to harsh scholarly derision,²⁰⁷ there is a large constituency of scholars who believe that school safety, above all else, is paramount.²⁰⁸ The schoolhouse is widely viewed as an institution for social cultivation.²⁰⁹ As such, it has been vehemently stressed that the public school assumes a duty to protect its students against the various dangers which may arise in the educational environment.²¹⁰

V. RE-THINKING THE *T.L.O.* REASONABLENESS STANDARD

As a result of the Supreme Court's failure to remedy the vast inconsistencies and vagueness of the *T.L.O.* reasonableness standard in the recent *Redding* decision,²¹¹ the current lay of the law heavily favors the disciplinary authority of the school administration.²¹² Courts' deference to state and school officials is often legitimized by citing both

Amendment rights).

204. See, e.g., *Redding*, 129 S. Ct. at 2643 (noting the importance of school officials to maintain a safe environment for its students).

205. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 407 (2007) ("About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders.").

206. Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169, 170 (1995).

207. See, e.g., Dupre, *supra* note 7, at 62; Mansukhani, *supra* note 5, at 360-61; Strossen, *supra* note 86, at 1182-83 (noting that the previously accepted view, that Fourth Amendment reasonableness balancing should only be employed when faced with exigent circumstances, "has been increasingly been relegated to concurring or dissenting opinions").

208. See, e.g., Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 182-84 (2009) (arguing that schools need to take more of a paternalistic role in order to mitigate the harmful effects of bullying); Scott R. Simpson, Comment, *Report Card: Grading the Country's Response to Columbine*, 53 BUFF. L. REV. 415, 453-54 (2005) (arguing that schools' independence in disciplinary decisions is key to maintaining a violence-free school environment).

209. See Dupre, *supra* note 7, at 67-68.

210. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37, 339 (1985).

211. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639-42 (2009) (applying the *T.L.O.* reasonableness standard to the facts of *Redding*).

212. See *id.* at 2639.

the informality of the school environment and the need for administrators to dispense discipline as quickly as possible.²¹³ The goal of the *T.L.O.* Court, in formulating the reasonableness standard, was to “strike the balance between the schoolchild’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place.”²¹⁴ This Part will explore the proposed alternatives to the *T.L.O.* reasonableness standard and conclude that the standard outlined in *Tinker*²¹⁵ would best advance the *T.L.O.* Court’s initial goal.²¹⁶

A common alternative proposed to displace the *T.L.O.* reasonableness standard is the default Fourth Amendment search standard of probable cause.²¹⁷ The exact definition of probable cause is not committed to a concrete legal standard.²¹⁸ However, a classic formulation of the standard often requires both reasonable ground for a belief of guilt and that “the belief of guilt . . . be particularized with respect to the person to be searched or seized.”²¹⁹ The two prongs of the *T.L.O.* reasonableness standard, conversely, demand a diluted likelihood of guilt and do not require individualized suspicion.²²⁰ Although probable cause has been derided for being incompatible with the common disciplinary framework of a school,²²¹ it has never been empirically proven that probable cause would fail in a school context.²²² Proponents of probable cause therefore argue that the incompatibility of the standard in a school context is without evidentiary basis and is mere

213. See, e.g., *T.L.O.*, 469 U.S. at 340.

214. *Id.*

215. “[W]here there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with . . . discipline in the operation of the school,’ the prohibition [of such conduct] cannot be sustained.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

216. See *T.L.O.*, 469 U.S. at 340.

217. See 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 495 (4th ed. 2004) (proposing that most student searches would satisfy a probable cause standard).

218. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

219. *Id.*

220. See *T.L.O.*, 469 U.S. at 340-41 (holding that the reasonableness of any search involves a two-fold inquiry: “first, one must consider ‘whether the . . . action was justified at its inception,’ . . . second one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place’” (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968))); see also Neal I. Aizenstein, *Fourth Amendment—Searches By Public School Officials Valid on ‘Reasonable Grounds,’* 76 J. CRIM. L. & CRIMINOLOGY 898, 930 (1985) (discussing the various safeguards that the probable cause standard offers which are absent from the standard of reasonableness).

221. See *T.L.O.*, 469 U.S. at 340-41.

222. See LAFAVE, *supra* note 217, at 496 (noting that there would likely be little to no difficulty in finding probable cause in student searches).

speculation.²²³ Contrary to the assertion that probable cause would fail in a school setting,²²⁴ advocates argue that the fixed, precise rules of probable cause would provide much needed clarity to schools currently conducting searches under the vague *T.L.O.* standard.²²⁵ Probable cause, it is urged, would solve other problems caused by the *T.L.O.* reasonableness standard. For instance, police officers still must adhere to the probable cause standard when conducting searches in schools.²²⁶ However, when both police officers and school officials are present at the search, officers “may encourage school officials to conduct searches where probable cause does not exist and where the police could not legally conduct the search themselves.”²²⁷ Requiring both school officials and police officers to subscribe to a probable cause search would effectively eliminate the danger imposed by this current double standard.²²⁸

Although probable cause has been revered by some to be the blanket solution to the unduly vague *T.L.O.* reasonableness standard,²²⁹ probable cause contains several mitigating attributes which make it an ill fit for the school context. For example, a major criticism of importing the probable cause standard to schools is that probable cause is not considered to be as legally potent as it once was.²³⁰ Two years before *T.L.O.*, the Court decided *Illinois v. Gates*.²³¹ The *Gates* Court rejected treating probable cause as a rigid legal standard,²³² and instead found that balancing the totality of the circumstances would be “far more consistent”²³³ with a standard that demands a ““practical, nontechnical conception.””²³⁴ After the *Gates* Court embraced this concept of a fluid

223. *See id.*

224. *See, e.g., T.L.O.*, 469 U.S. at 340.

225. *See* LAFAVE, *supra* note 217, at 495; Mansukhani, *supra* note 5, at 376-77. Although it is true that the standard of probable cause is fluid and almost always based on the totality of the circumstances, it is a more precise safeguard than reasonableness.

226. *See In re P.E.A.*, 754 P.2d 382, 386 (Colo. 1988).

227. Patrick K. Perrin, Comment, *Fourth Amendment Protection in the School Environment: The Colorado Supreme Court's Application of the Reasonable Suspicion Standard in State v. P.E.A.*, 61 U. COLO. L. REV. 153, 173-74 (1990). This type of double standard not only encourages police misconduct, but also completely undermines the student's integrity and Fourth Amendment rights. *See id.*

228. *See id.*

229. *See* LAFAVE, *supra* note 217, at 496; Mansukhani, *supra* note 5, at 376-77.

230. *See* Kinports, *supra* note 41, at 651 (discussing that the Supreme Court's perception of probable cause as a fluid, totality-of-the-circumstances like concept has effectively relaxed the traditional formulation of probable cause).

231. 462 U.S. 213 (1983).

232. *See id.* at 232.

233. *Id.* at 230.

234. *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

probable cause search standard, “phrases like ‘reasonable belief’ and ‘reason to believe’”²³⁵ have made their way into the Supreme Court’s analysis of probable cause.²³⁶ Scholars have suggested that this type of utilitarian balancing is due to the Court’s increasing reliance on balancing tests to resolve a multitude of constitutional issues.²³⁷ The effect of this abandonment of bright line rules in favor of a probable cause balancing test has been to dilute the traditional safeguards of the Fourth Amendment.²³⁸ Since the current analysis of probable cause now includes discussions of reasonableness, displacing the *T.L.O.* standard with that of probable cause would do little to remedy either *T.L.O.*’s vagueness or the scant constitutional protection it affords students.

In addition to the waning strength of probable cause, it is highly unlikely that any court would embrace adopting such a standard due to the explicit aversion the Supreme Court has had to probable cause in a school setting.²³⁹ Moreover, the schoolhouse is considered by the Supreme Court to be a special environment.²⁴⁰ The students in this special environment, therefore, do not enjoy complete constitutional protection.²⁴¹ The uniqueness of the school environment, mentioned in *T.L.O.*, was not thoroughly explained.²⁴² Although the *T.L.O.* Court briefly discussed the need for school officials to immediately administer

235. Kinports, *supra* note 41, at 649.

236. *See id.*; *see also* Georgia v. Randolph, 547 U.S. 103, 118 (2006) (holding that police may enter a home of an alleged domestic violence dispute “so long as they have good reason to believe such a threat exists”); Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring) (using phrases like “reasonable basis” when discussing whether or not probable cause does indeed exist); Maryland v. Pringle, 540 U.S. 366, 371 (2003) (finding that the root of the probable cause analysis is reasonableness); Maryland v. Buie, 494 U.S. 325, 331-32, 334 (1990) (employing relaxed reasonableness standards in the probable cause analysis); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (holding that a police officer who conducts a search of a person believed to be carrying weapons does not need probable cause to conduct the search, only reasonable suspicion).

237. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 964-65 (1987) (arguing that balancing tests have completely changed the landscape of constitutional adjudication by eroding at the era of bright line rules); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 253-56 (1984) (discussing the history of probable cause and the fact that, at the time of ratification, the term probable cause did not have a fixed definition in the mind of the Framers, and this continues to be the case); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1022, 1024 (1978) (noting that balancing first arose as the method for determining burdens on interstate commerce, but balancing tests have now been supplanted to evaluate various issues in constitutional adjudication).

238. *See* Kinports, *supra* note 41, at 654 (noting that the language employed when analyzing probable cause more closely mirrors more lenient search standards, like reasonable suspicion).

239. *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

240. *See id.*

241. *See id.* (noting that the school setting “requires some easing of the restrictions to which searches by public authorities are ordinarily subject”).

242. *See id.* at 338-40.

discipline in order to maintain harmony,²⁴³ there are other special characteristics of a school that compel the legal system to institute protective measures. Most importantly, schools have enjoyed a sturdy history of independence in both disciplinary and pedagogical methods used to fashion productive citizens out of their students.²⁴⁴ Modern courts adjudicating the issue of student's rights in the schoolhouse, often tip their proverbial hat to Justice Black's dissent in *Tinker* in holding that the Constitution does not compel "teachers, parents, and elected officials to surrender control of the American public school system to public school students."²⁴⁵ It is unlikely, therefore, that the Supreme Court would repeal the *T.L.O.* reasonableness standard in favor of probable cause, a standard that is inimical to the entire history of American jurisprudence on education law.

An ancillary, nonetheless important, special characteristic that public schools possess is that they are a direct arm of the state.²⁴⁶ Therefore, the school is interested in employing policies and procedures that advance a specific interest of the state.²⁴⁷ To replace the *T.L.O.* reasonableness standard with probable cause would likely be viewed as a significant impediment on the furthering of state interest in public schools.²⁴⁸ These unique considerations would be a considerable roadblock in attempting to replace the *T.L.O.* reasonableness standard with that of probable cause.

Due to the continued strength of *in loco parentis*,²⁴⁹ and the decidedly unique environment of the schoolhouse,²⁵⁰ the standard proposed to repeal the *T.L.O.* reasonableness test must, at least, marginally appeal to these two competing interests. Therefore, breathing new life into the *Tinker* standard, a test that is both still cited as good law and allows for an expansive reading of student rights, would properly

243. See *id.* at 340.

244. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that "schools must teach by example the shared values of a civilized social order"); see also *O'Rourke v. Walker*, 128 A. 25, 26 (Conn. 1925) (noting the important social values teachers impart onto their students).

245. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting); see, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 n.4 (1988); *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863 (Pa. 2002).

246. See *T.L.O.*, 469 U.S. at 336.

247. *LoMonte*, *supra* note 86, at 1350 (discussing, in a First Amendment context, that "[i]mplicit in the concept of a nonpublic forum is the notion that the forum may be closed to any speech not essential to furthering government business").

248. Although the foregoing discussion in this section speaks of the diminished strength of probable cause, the standard was still explicitly rejected in *T.L.O.* as an undue obstacle to the school administration. See *T.L.O.*, 469 U.S. at 340.

249. See discussion *supra* Part IV.

250. See, e.g., *T.L.O.*, 469 U.S. at 340.

achieve the balance of school authority and student privacy hoped for by *T.L.O.*²⁵¹ The *Tinker* Court held that student speech could not be censored “where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”²⁵² Although the language, verbatim, cannot be lifted and applied to a Fourth Amendment school context, the principles will remain the same. Instead, a prototype standard would read as such: a strip search of a student will only be necessary and permissible if the suspected conduct “‘materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.’”²⁵³ The goal of the *Tinker* Court was to ensure that students, while in school, remain “persons under our Constitution.”²⁵⁴ A *Tinker* standard, re-configured to a search framework, would share the same goal.

Unlike the *T.L.O.* and *Redding* Courts, which never defined what is truly meant to be reasonable,²⁵⁵ the terms “material,” “substantial,” and “interference” would need to be explicitly defined. Conduct deemed to fall into the three aforementioned categories, for instance, would include “the purchase, sale, or use of alcohol or illicit drugs . . . evidence of violence perpetrated [with a weapon] against a student, teacher, or other person . . . and . . . theft of a substantial amount of money or property.”²⁵⁶ Moreover, types of searches would be neatly delineated into classifications according to their respective level of intrusiveness.²⁵⁷ Therefore, uneven adjudication and lack of judicial uniformity over issues about whether or not, for example, a search for money justifies a highly intrusive search would be effectively remedied due to clear cut examples and thoroughly defined terms.²⁵⁸

In addition to the aforementioned attributes of this proposed standard, imposing two additional safeguards would ensure both that students’ bodily integrity would be protected and any alleged infraction would be properly handled. The first safeguard would require school

251. *See id.*

252. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

253. *Id.* (quoting *Burnside*, 363 F.2d at 749).

254. *Id.* at 511 (internal quotation marks omitted).

255. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642 (2009) (simply applying the reasonableness test); *T.L.O.*, 469 U.S. at 337, 341.

256. Gartner, *supra* note 97, app. at 976-77.

257. *See id.* at 977 (discussing that a least intrusive search would include a search of school owned property, such as a desk or a locker; a moderately intrusive search would be a search of the student’s personal belongings, but not of the student’s person; and a highly intrusive search would be a physical search of a student, be it a pat-down search or a strip search).

258. *See discussion supra* Part III.A.

officials to always evaluate a least intrusive alternative analysis. A least intrusive alternative would require school officials to perform a highly intrusive search only when a moderately or least intrusive search has failed to solve the problem in question.²⁵⁹ Therefore, school officials would have to perform both least and moderately intrusive searches before escalating to a highly intrusive search. Attempts to solve the alleged infraction through a least intrusive search would be heavily emphasized by the proposed standard, as a least intrusive search does not involve any physical touching of the student.²⁶⁰

The second additional safeguard would require the school to possess individualized suspicion and evidentiary support before carrying out any type of search. Strip searches of students have been found to be reasonable when the only basis for conducting the search was a singular student tip.²⁶¹ The proposed standard would allow school administrators to investigate any individual student asserted claims; however, the single student claims would never be sufficient to substantiate a highly or moderately intrusive search.²⁶² Individualized suspicion based on other claims would be assessed on a sliding scale according to the credibility of the source with the information. Parents, school administrators, faculty, and other school personnel would be atop this credibility pyramid. Reports from two or more students and then single-student reports would fall in line next. These additional protections would not only preserve the vested Fourth Amendment rights students possess in the schoolhouse, they will also provide the school administration with clear guidelines in handling potentially volatile, sensitive situations.

Replacing the *T.L.O.* reasonableness standard with the above modified *Tinker* standard, would be a considerable step in the right direction in beginning to resolve the various deficiencies the two-pronged *T.L.O.* test has spurned.²⁶³ Although probable cause facially offers more protection under the Fourth Amendment,²⁶⁴ that search standard is likewise plagued with various shortcomings²⁶⁵ making it unlikely that probable cause would ever come to fruition in a school

259. Gartner, *supra* note 97, at 977 (defining the terms highly, moderately, and least intrusive searches).

260. *See id.*

261. *See, e.g.,* Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991).

262. A least intrusive search based on a student tip would be substantiated because, again, it does not involve touching a student's person. *See* Gartner, *supra* note 97, app. at 977.

263. *See* discussion *supra* Part III.

264. *Compare* Maryland v. Pringle, 540 U.S. 366, 371 (2003) (defining probable cause), *with* New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (defining the reasonableness standard).

265. *See supra* text accompanying notes 217-48.

context.²⁶⁶ Adopting any of the aforementioned suggestions, even just one, would bring a great deal of much needed clarity to school strip search adjudication.

VI. CONCLUSION

The current standard for searches conducted in schools still follows the test set forth in *T.L.O.* That is, a search must be both reasonably “justified at its inception”²⁶⁷ and reasonably “related in scope to the circumstances which justified the interference in the first place.”²⁶⁸ The two-fold reasonableness standard was recently reaffirmed as the proper search standard in *Redding*. The Supreme Court considers a reasonableness standard, over probable cause, to properly balance both the constitutional rights of students and the authority of the school administration.²⁶⁹ However, subsequent adjudication in lower courts on the reasonableness standard has resulted in disparate results due to the Supreme Court’s lack of clarification as to what reasonableness means. A quarter of a century has passed since the *T.L.O.* decision was handed down, and no general rules have been elicited from the countless cases decided when using the reasonableness standard. Several deleterious effects have resulted from this confusion. Most saliently, students’ Fourth Amendment rights are extremely tenuous when litigating search claims in the schoolhouse due to the lack of predictability in the judicial system on this issue.²⁷⁰

In the face of lower courts’ confusion over the reasonableness standard, the Court still refused to repeal the standard and instead affirmed its confidence in the *T.L.O.* test in *Redding*.²⁷¹ The Court’s refusal to clarify the unduly vague reasonableness standard is undoubtedly due to the stronghold of *in loco parentis* upon education law. Despite denouncing the doctrine explicitly in *T.L.O.*,²⁷² its principles permeate throughout the American legal system and often appear in decisions adjudicating student rights in the schoolhouse. Although *Tinker* attempted to usurp the stronghold of *in loco parentis* and impose more stringent standards for abridging students’ First Amendment rights,²⁷³ the *Tinker* standard has been severely diluted in

266. See *T.L.O.*, 469 U.S. at 340.

267. *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

268. *Id.* (quoting *Terry*, 392 U.S. at 20).

269. See *id.* at 340–41 (establishing the reasonableness standard).

270. See discussion *supra* Part III (discussing the disparate jurisprudence under *T.L.O.*).

271. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642 (2009).

272. See *T.L.O.*, 469 U.S. at 336.

273. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

favor of school authority.²⁷⁴ The Court has oscillated in the way it has conceptualized *in loco parentis*, resulting in cases like *Tinker*, which gave expansive latitude to student rights, and *T.L.O.*, which undercut student rights. *Redding* is demonstrative of the current Court's unwillingness to go back to the broad grant of student rights that was evident in *Tinker*.

Although the Court is considered to be in an ebb period in regards to their perception of student rights in the schoolhouse, the *T.L.O.* standard unduly burdens lower courts and, as a result, compromises students' protected Fourth Amendment rights. The standard needs to be thoroughly re-worked and clarified in order to prevent courts from condoning highly intrusive searches of students. Proponents for replacing the *T.L.O.* reasonableness standard with probable cause will likely never have their day in court considering the *T.L.O.* majority derided probable cause as completely incongruent with the school environment.²⁷⁵ Adopting a modified *Tinker* standard, and allowing school officials to conduct a search only where the suspected conduct "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,"²⁷⁶ would provide students, schools, and judges with more judicial certainty when litigating student asserted Fourth Amendment claims. Although, under this proposed standard, there would be clearly delineated degrees of searches and defined terms, school officials would nonetheless enjoy a significant amount of deference in their disciplinary capacities. Therefore, a modified *Tinker* standard would not only duly protect students' Fourth Amendment rights, it would still grant school officials the broad authority courts have historically recognized. The *Redding* Court's refusal to recognize the constitutional deficiencies in the *T.L.O.* standard, however, provides a grim outlook on the Supreme Court's future adjudication of students' Fourth Amendment rights in school.

Alysa B. Koloms*

274. See LoMonte, *supra* note 86, at 1327.

275. See *T.L.O.*, 469 U.S. at 340.

276. See *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

* J.D. candidate, 2011; Hofstra University School of Law. Several people generously provided their support throughout the Note writing process. I would like to thank Professor John Gregory for his thoughtful suggestions and guidance. Thank you to Danielle Nunziato, Laurel Harris, Lauren Manning, Jon Frankel, and Tim Fallon for their tireless efforts in editing and refining this Note. I would also like to thank my family for always being patient and supportive even when I cannot offer the same. Finally, I would like to dedicate this Note to Marissa Wiley for her thorough editing, amazing friendship, and constant unwavering support.