

SCHOOL SEARCHES WRIT LARGE: BROADENING THE PERSPECTIVE IN WHICH WE VIEW SCHOOL SEARCH CASES

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INTRODUCTION

The tendency is to view Supreme Court decisions involving juveniles as “juvenile” cases rather than looking at them in a larger context, such as police interrogation cases or search and seizure cases that happen to involve juveniles. To be sure, some decisions, for example, those that concern the death penalty for juveniles¹ and, more recently, life without parole for juveniles,² entail considerations that are perhaps unique to juveniles.³ Even in school search cases, one could argue the school environment itself is unique, calling for a narrow focus and special rules attending searches at school.⁴ The real point, however, is

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¹ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

² See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010).

³ Indeed, in *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy spent a great deal of time discussing the differences between juveniles and adults in terms of maturity and accountability and why those differences justify drawing the line at age eighteen for imposition of the death penalty consistent with the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* at 568-75.

⁴ Justice Scalia, for example, noted in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the “special needs” that exist in the school setting and the “custodial and tutelary” authority that school officials exercise over students in their care, which taken together, render neither the warrant nor the probable cause requirements indispensable. *Id.* at 653-55.

that while juveniles because of their youth might be unique in terms of their maturity level and the need to exercise control over them in the school setting, cases involving juveniles nevertheless ought to be viewed in the broader context of their fit in the overall jurisprudence of the Court. Viewing them as “school search” cases or even as “search and seizure” cases limits one’s perspective, whereas viewing them in a larger context opens up a new vista and leads to a greater understanding of the cases in their historical and jurisprudential context.

I. SUPREME COURT DECISIONS IN THE AREA OF SCHOOL SEARCHES

A brief survey of the four major Supreme Court decisions involving search and seizure in the school environment will aid in understanding the scope of the problem. The initial case was the Court’s 1985 decision in *New Jersey v. T.L.O.*⁵ In that case, a student was observed smoking in the girls’ restroom in violation of school policy.⁶ When called to the principal’s office, she denied smoking at all.⁷ The principal searched her purse, where he found cigarettes.⁸ He then noticed a pack of rolling papers and, suspecting marijuana use, examined her purse further and found a small amount of marijuana, a pipe, several empty plastic bags, a large amount of cash in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated her in marijuana dealing. The evidence was turned over to the police.⁹

The Court held that the test for validity of a search of a student’s person at school is reasonableness.¹⁰ Reasonableness, the Court said, involves a two-step process. First, the search must be “justified at its inception,” which means there must be reasonable grounds to suspect a search will yield evidence that

⁵ 469 U.S. 325 (1985).

⁶ *Id.* at 328.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 341.

the student has violated or is violating the law or the rules of the school.¹¹ Second, the search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”¹² A search is reasonable in scope “when the 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.”¹³ Interestingly, the New Jersey Supreme Court, in holding that the search was unreasonable, also had employed a reasonableness test.¹⁴ The U.S. Supreme Court, however, found that the reasonableness test used by the New Jersey court reflected “a somewhat crabbed notion of reasonableness.”¹⁵

The next case did not come until ten years later in *Vernonia School District 47J v. Acton*.¹⁶ Following reports of widespread drug use in the schools and that student athletes were at the center of the drug problem, the school district enacted a drug-testing program for students wishing to participate in student athletics.¹⁷ The program required all athletes and their parents to sign a form consenting to drug testing, which would take place at the beginning of the season for the particular sport and would occur randomly throughout the season.¹⁸ James Acton, a seventh-grader, signed up for football but was not allowed to participate because he and his parents refused to sign the consent form.¹⁹ The Actons filed suit alleging that the drug-testing program violated the Fourth Amendment.²⁰

The Court held that the school district’s drug-testing program, designed to curb district-wide drug use, was not an unreasonable search and seizure under the Fourth Amendment.²¹

¹¹ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

¹² *Id.* (quoting *Terry*, 392 U.S. at 20).

¹³ *Id.* at 341-42.

¹⁴ *State v. Engerud*, 463 A.2d 934, 941-42 (N.J. 1983), *rev'd sub. nom.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

¹⁵ *T.L.O.*, 469 U.S. at 343.

¹⁶ 515 U.S. 646 (1995).

¹⁷ *Id.* at 648-50.

¹⁸ *Id.* at 650.

¹⁹ *Id.* at 651.

²⁰ *Id.* at 648-51.

²¹ *Id.* at 664-66.

In so holding, the Court emphasized the “special needs” of law enforcement in public schools and the lower expectation of privacy of students, particularly student athletes, who routinely are subject to physical examinations and shared locker rooms.²² The Court also reasoned that student athletes subject themselves to a greater degree of regulation than that imposed on students generally, and, as such, should be accustomed to intrusions on their privacy.²³ The Court *appeared* to justify the policy because the school district was dealing with a serious drug problem and student athletes were perceived as leaders of the drug culture.²⁴ That notion vanished in the next case decided by the Court.

In *Board of Education v. Earls*,²⁵ the Court once again addressed the issue of suspicionless drug searches by school officials. In this case, however, the school district adopted a policy calling for all middle-and-high-school students desiring to participate in *any* extracurricular activity, not just athletics, to consent to urinalysis drug testing as a condition of participation.²⁶ Lindsey Earls, a high-school student, participated in the marching band, show choir, academic team, and the National Honor Society, but when the policy went into effect, she refused to sign the consent form.²⁷ Her parents filed suit claiming the policy violated the Fourth Amendment.²⁸

Applying the “special needs” analysis of *Acton*, the Supreme Court upheld the district’s policy as an exercise of its legitimate interest in protection of students in its care against the dangers of drug use.²⁹ Justice Thomas, writing for the Court, dismissed the notion that the Court’s decision in *Acton* was based on pervasive drug use among students and the claim

²² *Id.* at 653-57.

²³ *Id.* Justice O’Connor, joined by Justices Stevens and Souter, dissented, arguing that drug testing of student athletes can only be reasonable when justified by some level of individualized suspicion. *Id.* at 676-84 (O’Connor, J., dissenting).

²⁴ *Id.* at 661-64 (majority opinion).

²⁵ 536 U.S. 822 (2002).

²⁶ *Id.* at 826.

²⁷ *Id.*

²⁸ *Id.* at 826-27.

²⁹ *Id.* at 828-30.

that student athletes were at the core of the drug problem.³⁰ Rather, he said, *Acton* was based on the “custodial and tutelary” responsibility that schools have for students while at school and the “special needs” that justify increased security in the school and less than full Fourth Amendment protection in the school environment.³¹ The method of testing was deemed “minimally intrusive” because the results were kept confidential.³² If a student tested positive for drugs, he or she would be ineligible to participate in the activity but would not be reported to law enforcement or disciplined in any other way.³³ Nevertheless, the significance of *Earls* was that it extended *Acton* to allow drug testing of all students who choose to participate in *any* extracurricular activity.³⁴ Following *Earls*, the scholarly commentary on both *Acton* and *Earls* has been very critical.³⁵

³⁰ *Id.* at 835-36.

³¹ *Id.* at 831 & n.3, 837-38. This difference in factual circumstances between *Acton* and *Earls*, however, led Justice Ginsburg to dissent in the *Earls* case even though she had voted with the majority in *Acton*. *Id.* at 843-45 (Ginsburg, J., dissenting).

³² *Id.* at 832-34 (majority opinion).

³³ *Id.*

³⁴ Would drug-testing of students who apply for an on-campus parking permit be permissible under the rationale of *Earls*? See Jared M. Hartman, Note, *Pee-to-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?*, 18 J.L. & HEALTH 229 (2004). Would not the logic of *Earls* extend to permitting random drug testing of all students generally? If one agrees with Justice Thomas’s assertion that the central compelling feature of the *Acton* analysis is the custodial and tutelary duty that the state owes to schoolchildren—and apparently a majority of the Court does—what is to prevent such a broad interpretation? See Jacob L. Brooks, Case Note, *Constitutional Law—Suspicionless Drug Testing of Students Participating in Non-Athletic Competitive School Activities: Are All Students Next?* Board of Education v. *Earls*, 536 U.S. 822 (2002), 4 WYO. L. REV. 365 (2004).

³⁵ See Irene Merker Rosenberg, *The Public Schools Have a “Special Need” for Their Students’ Urine*, 31 HOFSTRA L. REV. 303 (2002); Floralynn Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL’Y 231 (2007); John F. Donaldson, Note, *Life, Liberty, and the Pursuit of Urinalysis: The Constitutionality of Random Suspicionless Drug Testing in Public Schools*, 41 VAL. U. L. REV. 815 (2006); Kari L. Higbee, Comment, *Student Privacy Rights: Drug Testing and Fourth Amendment Protections*, 41 IDAHO L. REV. 361 (2005); M. Casey Kucharson, Note, *Please Report to the Principal’s Office, Urine Trouble: The Effect of Board of Education v. Earls on America’s Schoolchildren*, 37 AKRON L. REV. 131 (2004); Thomas Proctor, Comment, *Constitutionality of Testing High School Male Athletes for Steroids Under Vernonia School District v. Acton and Board of Education v. Earls*, 2005 B.Y.U. L. REV. 1335.

The most recent school search case decided by the Supreme Court, *Safford Unified School District #1 v. Redding*,³⁶ involved the constitutionality of the strip search of a student at school. Thirteen-year-old Savana Redding was taken from class and brought to the principal's office where she was told that a fellow student had reported Savana was distributing drugs at school.³⁷ She denied the accusation and offered to let the assistant principal, Kerry Wilson, search her belongings.³⁸ Wilson and an administrative aide, Romero, searched Savana's backpack and found nothing.³⁹ Wilson then directed Romero to take Savana to the school nurse's office to search her clothing.⁴⁰ There Romero and the school nurse directed Savana to remove her outer clothing and her shoes and socks.⁴¹ As she stood there in her underwear, they directed her to pull out her bra and shake it and to pull out the elastic on her underpants and to shake them.⁴² The strip search revealed nothing.⁴³ Savana's mother filed suit alleging a violation of her Fourth Amendment rights.⁴⁴

With only Justice Thomas dissenting on this issue,⁴⁵ the Court held the strip search was unreasonable and violated Savana's Fourth Amendment rights.⁴⁶ While there was some uncertainty as to what constitutes a "strip search," Justice Souter, writing for the Court, made it clear that he was referring to the search of Savana's bra and underpants. He stated: "The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it."⁴⁷ It was this "final step" that seems to have shocked the conscience of the Court. Savana herself described the last part of the search as

³⁶ 129 S. Ct. 2633 (2009).

³⁷ *Id.* at 2638.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2646 (Thomas, J., concurring in part & dissenting in part).

⁴⁶ *Id.* at 2642-44 (majority opinion).

⁴⁷ *Id.* at 2641.

“embarrassing, frightening, and humiliating.”⁴⁸ Justice Souter observed that “both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.”⁴⁹

The Court adhered to the reasonable suspicion test it had first adopted in *New Jersey v. T.L.O.*, i.e., that a search is reasonable “when the 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.”⁵⁰ The Court found that the information Wilson possessed was sufficient to warrant his suspicion that Savana might be involved in pill distribution on campus and that his suspicion was enough to justify a search not only of her backpack but of her outer clothing as well.⁵¹ Had Romero and the school nurse conducted what some might call a strip search, up to the point of searching Savana’s underwear, the Court apparently would have found no Fourth Amendment violation.

It was the final step, however, that seems to have shocked the Court and to have persuaded all but one of the Justices that a violation of personal privacy of significant proportions occurred. Again referring to *T.L.O.*, Justice Souter emphasized that a search must be “reasonably related in scope to the circumstances which justified the intrusion in the first place” and that the scope is permissible when it is “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁵²

Justice Souter concluded, based on the reasonableness standard, that “[h]ere the content of the suspicion failed to match the degree of intrusion.”⁵³ The “distinct elements of justification,” to which he had referred earlier, were missing in

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2639 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

⁵¹ *Id.* at 2639-41.

⁵² *Id.* at 2642 (quoting *T.L.O.*, 469 U.S. at 341-42).

⁵³ *Id.*

this case. What was missing, he said, was “any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.”⁵⁴ Justice Souter made no reference to *Acton* or *Earls* in his opinion.

Justice Thomas, the lone dissenter on the question of whether a Fourth Amendment violation had occurred, did cite *Acton* and *Earls* in his separate opinion. He argued that school officials are allowed considerable authority to maintain order and discipline in the schools and that drugs pose a serious danger for students in the school environment.⁵⁵ For these reasons, he concluded the strip search in this case was reasonable.⁵⁶

II. A BROADER CONTEXT: THE JURY TRIAL CASES

The purpose of the review of Supreme Court “school search” cases was to make that very point, i.e., that we tend to view them in isolation, as “school search” cases. If they are viewed in a broader sense at all, they still are viewed as “search and seizure” cases. Instead, they should be viewed in an even larger context as part of the Court’s overall constitutional jurisprudence in addressing issues in the area of criminal procedure. One helpful comparison is to consider cases in the area of right to jury trial.

In *McKeiver v. Pennsylvania* in 1971, the Supreme Court held that juveniles are not constitutionally entitled to the right to jury trial in juvenile proceedings.⁵⁷ The decision came as somewhat of a surprise because it was a departure from the Court’s two previous decisions of *In re Gault*⁵⁸ and *In re Winship*⁵⁹ in which the Court had extended certain rights to juveniles as a matter of due process of law. *Gault* was the watershed case that constitutionalized the juvenile process by declaring that in delinquency proceedings juveniles are entitled to

⁵⁴ *Id.* at 2642-43.

⁵⁵ *Id.* at 2657-58 (Thomas, J., concurring in part & dissenting in part).

⁵⁶ *Id.* at 2646-47, 2657-58.

⁵⁷ 403 U.S. 528, 545 (1971).

⁵⁸ 387 U.S. 1 (1967).

⁵⁹ 397 U.S. 358 (1970).

notice of the hearing; the right to counsel, including court-appointed counsel; the right to confrontation and cross-examination; and the privilege against self-incrimination.⁶⁰ In *Winship*, the Court held that the standard of proof in delinquency proceedings is proof beyond a reasonable doubt.⁶¹ *McKeiver* was to have been the next logical step in the progression, with the Court extending the rationale first enunciated in *Gault* to declare that the right to jury trial was guaranteed to juveniles by due process of law. But it was not to be.

The tendency is to view *McKeiver* as a “juvenile” case. Viewing it as such makes it somewhat difficult to understand—difficult, that is, to understand the Court’s departure from the due process analysis begun in *Gault*. *McKeiver* is more readily understood, however, if it is viewed not as a “juvenile” case but rather as a “jury trial” case, one in a series of jury trial cases that the Court decided during the 1970s.

Of course, the Court was in transition during this period in its history. During the period of the 1960s the Court was known as the “Warren Court” because of former Chief Justice Earl Warren. That period was known for the extension of many rights to criminal defendants in state court proceedings as a matter of due process of law under the Fourteenth Amendment. Some examples include *Mapp v. Ohio*⁶² in 1961, *Miranda v. Arizona*⁶³ in 1966, and *Duncan v. Louisiana*⁶⁴ in 1968. By the 1970s, however, Chief Justice Warren had been replaced on the Court by Chief Justice Warren E. Burger, and a new era, a more conservative era, commenced on the Court, known then as the “Burger Court.”

One of the holdovers from the Warren era was Justice John Marshall Harlan. In *McKeiver*, decided at the beginning of the Burger era, Justice Harlan argued in his concurring opinion that the right to jury trial was not required by due process of law in state court juvenile proceedings because, in his view,

⁶⁰ *Gault*, 387 U.S. at 33-34, 41, 55, 57.

⁶¹ *Winship*, 397 U.S. at 367-68.

⁶² 367 U.S. 643 (1961).

⁶³ 384 U.S. 436 (1966).

⁶⁴ 391 U.S. 145 (1968).

it was not required by due process in state court criminal proceedings either.⁶⁵ He pointed out that he had dissented⁶⁶ in *Duncan v. Louisiana* in the waning years of the Warren Court, in which the Court had held the Sixth Amendment right to jury trial applicable to state court criminal proceedings under the Due Process Clause of the Fourteenth Amendment. His argument raises an interesting question. Would the Court that decided *McKeiver v. Pennsylvania* in 1971 have decided *Duncan v. Louisiana* differently in 1968?

Not only was Justice Harlan's vote in *McKeiver* predictable, other votes on the Court were predictable as well. Justice Potter Stewart had dissented⁶⁷ in *Gault* itself, so he was not likely to vote to extend the logic of *Gault* to the right to jury trial. Chief Justice Warren Burger had dissented⁶⁸ in *In re Winship* in 1970, so he too was no friend of extending the due process analysis of *Gault*. And Justice Harry Blackmun, new to the Court and an old friend of Chief Justice Burger from Minnesota, voted so often with the Chief Justice that the two were known as the "Minnesota Twins."⁶⁹ Indeed, Justice Blackmun ended up writing the opinion of the Court in *McKeiver*. Again, one must ask the question whether the Burger Court that decided *McKeiver* in 1971 would have decided *Duncan v. Louisiana* differently in 1968.

Duncan v. Louisiana was the first in a series of Supreme Court decisions addressing the right to jury trial. The Court in that case held the Sixth Amendment right to jury trial applicable to the states via the Due Process Clause of the Fourteenth Amendment.⁷⁰ From that point on, however, the Court began to diminish the right to jury trial. In 1970, the Court held in *Williams v. Florida* that the traditional structure calling for juries

⁶⁵ *McKeiver v. Pennsylvania*, 403 U.S. 528, 557 (1971) (Harlan, J., concurring).

⁶⁶ *Duncan*, 391 U.S. at 171 (Harlan, J., dissenting).

⁶⁷ *In re Gault*, 387 U.S. 1, 78 (1967) (Stewart, J., dissenting).

⁶⁸ *In re Winship*, 397 U.S. 358, 375 (1970) (Burger, C.J., dissenting).

⁶⁹ Louis M. Kohlmeier, *The Burger Bench*, WALL ST. J., June 23, 1971, at 1. Indeed, during his first five terms Justice Blackmun voted with Chief Justice Burger 87.5% of the time in closely divided cases. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 186 (2005).

⁷⁰ *Duncan*, 391 U.S. at 149.

of twelve persons was a “historical accident” and was not binding; juries of six, therefore, were permissible.⁷¹ Two years later the Court held in a pair of companion cases, *Johnson v. Louisiana*⁷² and *Apodaca v. Oregon*,⁷³ that less than unanimous verdicts, such as nine to three in Louisiana and ten to two in Oregon, were constitutional.⁷⁴ The Court then drew a line beyond which it was not willing to go, however, holding in *Ballew v. Georgia* that juries of five were unconstitutional⁷⁵ and in *Burch v. Louisiana* that less than unanimous verdicts on juries of six were unconstitutional.⁷⁶

If *McKeiver v. Pennsylvania* is less easily understood as a “juvenile” case, it is more readily understood as a “jury trial” case. *McKeiver* was decided in the midst of the above series of cases in which the Burger Court scaled back the scope of the right to jury trial. As it did more recently in *Redding* in the area of “school searches,” however, the Court reached a point, in *Ballew* and *Burch*, at which it balked against any further retreat from the Sixth Amendment right to jury trial.

III. ANOTHER COMPARATIVE CONTEXT: THE FIRST AMENDMENT CASES

To appreciate fully how restrictive the Supreme Court has been in applying the Fourth Amendment in the school environment, one need look no further than the Court’s decisions in the area of First Amendment right of free expression in schools. One of the earliest and most significant of those decisions is *Tinker v. Des Moines Independent Community School District*, in which the Court held that under the facts of that case, the school board’s policy banning the wearing of black armbands to protest the war in Vietnam violated students’ right of free expression.⁷⁷ The Court in *Tinker* made the often quoted state-

⁷¹ 399 U.S. 78, 89, 103 (1970).

⁷² 406 U.S. 356 (1972).

⁷³ 406 U.S. 404 (1972).

⁷⁴ *Johnson*, 406 U.S. at 362; *Apodaca*, 406 U.S. at 411.

⁷⁵ 435 U.S. 223, 244-45 (1978).

⁷⁶ 441 U.S. 130, 138-39 (1979).

⁷⁷ 393 U.S. 503, 513 (1969).

ment, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁷⁸ This statement is especially profound when one considers that the rights set forth in the First Amendment enjoy a preferred status.⁷⁹ In later decisions, however, and in one recent decision, the Court retreated from the protective stance taken in *Tinker*.

In *Tinker*, the Court noted that the wearing of armbands did not interfere with the work of the schools or the rights of other students.⁸⁰ Quoting with approval a Fifth Circuit decision,⁸¹ the Court said that in the absence of a finding that the conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition against wearing of armbands could not be sustained.⁸² In *Bethel School District No. 403 v. Fraser*, the school district obviously had relied on this language in enacting a policy prohibiting conduct "which materially and substantially interferes with the educational process."⁸³ Nevertheless, in *Fraser*, the Court held that the school district's action in disciplining a student who had made sexually suggestive remarks in a nomination speech in a student assembly did not infringe on his First Amendment rights.⁸⁴

Although it involved First Amendment freedom of press rather than free expression, the Court's decision two years later in *Hazelwood School District v. Kuhlmeier*⁸⁵ is instructive. In that case, the Court upheld a principal's action in deleting two articles from a school newspaper.⁸⁶ Critical to the Court's decision was its conclusion that the school newspaper was not a

⁷⁸ *Id.* at 506.

⁷⁹ See *Kovacs v. Cooper*, 336 U.S. 77, 88 & n.14 (1949); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); see also *Emp't Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

⁸⁰ *Tinker*, 393 U.S. at 508.

⁸¹ See *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

⁸² *Tinker*, 393 U.S. at 513 (quoting *Burnside*, 363 F.2d at 749).

⁸³ 478 U.S. 675, 678 (1986).

⁸⁴ *Id.* at 685-86.

⁸⁵ 484 U.S. 260 (1988).

⁸⁶ *Id.* at 274-75.

traditional public forum and was produced for educational purposes to teach students to write, edit, and publish a newspaper.⁸⁷

Most recently, in *Morse v. Frederick*, the Court was confronted with a claim that a school principal's confiscation of a banner reading "BONG HiTS 4 JESUS" violated a student's First Amendment right of free expression.⁸⁸ The student, along with other students, had displayed the banner across the street from the school as the Olympic Torch Relay passed by the school.⁸⁹ The principal, viewing the banner as promoting illegal drug use, ordered the students to take it down.⁹⁰ All of them complied except Frederick.⁹¹ The principal then confiscated the sign and later suspended Frederick.⁹² The Court upheld the principal's action as a legitimate exercise of the broad authority given to school officials in supervising and regulating the conduct of students in their care.⁹³ The Court clearly viewed this as a "school speech" case, where free expression is more limited than in the non-school context.⁹⁴

In all of the First Amendment cases, the Court paid homage to its statement in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹⁵ Nevertheless, in each instance, the Court pointed out that freedom of expression in the school setting is not co-extensive with that of adults in the broader, non-school context but rather is limited because of the special need to maintain order and discipline in an environment in which learning can take place.⁹⁶ This view in the area of First

⁸⁷ *Id.* at 268-70.

⁸⁸ 551 U.S. 393, 409-10 (2007).

⁸⁹ *Id.* at 397.

⁹⁰ *Id.* at 398.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 409-10.

⁹⁴ *Id.* at 400-01.

⁹⁵ *Id.* at 396; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 593 U.S. 503, 506 (1969).

⁹⁶ *Frederick*, 551 U.S. at 396-97; *Kuhlmeier*, 484 U.S. at 266-67; *Fraser*, 478 U.S. at 682-83.

Amendment rights is not unlike the “special needs” rationale in the Fourth Amendment context first mentioned by Justice Scalia in *Acton*.⁹⁷

IV. “SCHOOL SEARCH” CASES IN THE CONTEXT OF SEARCH CASES GENERALLY

The “school search” cases also are better understood when viewed in the context of the Court’s decisions in Fourth Amendment cases generally. Since the Court’s initial decision in *Mapp v. Ohio*, the Court has pulled back from any expansion of Fourth Amendment protections. In *South Dakota v. Opperman*, the Court held that the routine inventory search of petitioner’s locked car, which had been lawfully impounded for several parking violations, was reasonable.⁹⁸ In *Illinois v. Gates*, the Court approved a new totality-of-circumstances test for determining the sufficiency of an informant’s tip to establish probable cause for a search warrant, and in applying that test the Court upheld the search of petitioner’s home and car based on an anonymous letter indicating he was involved in drug violations.⁹⁹ In *United States v. Leon*, the Court held that the exclusionary rule should not be applied to exclude the prosecution’s evidence seized pursuant to a search warrant ultimately shown to be invalid, where the officer reasonably relied on the issuing magistrate’s determination of probable cause.¹⁰⁰ Following the Court’s decision in *Leon*, the Court decided the *T.L.O.-Acton-Earls* triad.

In *Illinois v. Caballes*, the Court held that a search of the trunk of petitioner’s car and a subsequent seizure of drugs were reasonable where following a routine traffic stop a drug-sniffing dog alerted to his trunk and he had not been detained longer than normal for issuance of a warning traffic citation.¹⁰¹ In *Hudson v. Michigan*, the Court further limited the application of the Fourth Amendment’s exclusionary rule holding it

⁹⁷ *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653-57 (1995).

⁹⁸ 428 U.S. 364, 375-76 (1976).

⁹⁹ 462 U.S. 213, 238, 245-46 (1983).

¹⁰⁰ 468 U.S. 897, 926 (1984).

¹⁰¹ 543 U.S. 405, 410 (2005).

inapplicable to a violation of the “knock-and-announce” rule that requires law enforcement officers to give advance warning before entering a private residence.¹⁰² Following these cases, however, as pointed out earlier,¹⁰³ the Court in *Redding* was more supportive of Fourth Amendment protection holding that the strip search of a thirteen-year-old student at school violated her constitutional rights.

CONCLUSION

The purpose of this article was to demonstrate that “school search” cases can—and should—be viewed in a larger context. To use an analogy, one might view a painting by Claude Monet, e.g. his “soleil levant” (Impression, sunrise), in isolation. One could appreciate the beauty of his work, but one could appreciate his artistry much better by viewing other works by Monet and could understand the style of Impressionism—the brush strokes, the use of light, the human perception and experience, the use of simple subjects—much better by viewing works of other Impressionists, such as Cézanne, Degas, Renoir, Morisot, Manet, and others. And, of course, one could further appreciate and understand the Impressionist period by comparing it to earlier and later styles, for example, Post-impressionism and Cubism.¹⁰⁴

In similar fashion, one can gain a fuller understanding of the school search cases by looking at them in different and broader contexts, e.g., by viewing them in context with search and seizure cases generally or in context with school cases involving First Amendment issues and by comparing them with cases in other areas, such as the Sixth Amendment right to jury trial. By broadening the perspective one has of school search cases, one can develop a sense of the historical and philosophical texture of the cases and how they fit into the overall constitutional jurisprudence of the Supreme Court.

¹⁰² 547 U.S. 586, 589-90 (2006).

¹⁰³ See *supra* notes 36-56 and accompanying text.

¹⁰⁴ See generally JOHN REWALD, *THE HISTORY OF IMPRESSIONISM* (4th rev. ed. 1973).