Scondhand Codes: An Analysis of the Constitutionality of Dress Code in the Public Schools

Wendy Mahling

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/2492
Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools

Wendy Mahling

Throughout the United States, dress codes have gained increasing popularity in public schools.¹ The types of dress codes imposed vary greatly.² Justifications for dress codes vary as well, and include promoting student self-respect,³ maintaining discipline in the classroom,⁴ discouraging peer pressure to buy expensive clothing,⁵ and making the classrooms and students safer.⁶

While maintaining an environment conducive to education is within the power of school authorities,⁷ using dress codes to

---

1. See generally Maia Davis, Fashion Furor: Tougher School Dress Codes Raise Questions of Safety and Rights, L.A. TIMES, Jan. 16, 1994, at B1 (noting the spread of dress codes from gang-ridden urban sites to low-crime suburban areas); Michel Marriott, Uncool for School, N.Y. TIMES, Nov. 14, 1993, at 9-1 (discussing the debate surrounding dress codes in various U.S. cities); Sandra Sardella, Uniformity: Schools Adopt Dress Codes to Eliminate Distractions, BOSTON HERALD, Jan. 15, 1995, at 6 (describing the success of a Boston-area school's voluntary dress code); Cassandra Spratling, Mumford Ban on Expensive Clothes Styles Linked to Drugs Is Criticized, DETROIT FREE PRESS, Mar. 3, 1988, at 6A (tracing the various incidents that led a Detroit public school to adopt a dress code).

2. See infra notes 22-28 and accompanying text (discussing the various dress codes imposed in public schools).

3. See Sardella, supra note 1 (discussing how uniforms may improve self-esteem because kids tend not to tease each other about their clothes).


5. See Sardella, supra note 1 (describing how uniforms may lessen peer pressure on students to buy expensive clothing).

6. See Davis, supra note 1 (describing school officials' arguments that dress codes prohibiting gang-related clothing make schools safer).

7. See infra notes 76-80 and accompanying text (explaining that current constitutional jurisprudence considers maintaining an environment conducive to education to be within public school administrators' authority).
achieve this result creates significant controversy. Some dress codes appear to infringe on important freedom of speech and expression rights guaranteed under the Constitution. As such, civil liberties groups, students, and parents have expressed concern over some dress codes, questioning whether dress codes violate the First Amendment by regulating student expression. Despite these concerns, some states have specifically authorized the adoption of dress codes in public schools and numerous school districts have imposed dress codes in the public schools,


9. In Oakland, for example, the school board banned clothing and jewelry noting identification with a gang; expensive jogging suits; all hats, headgear and clothing designating membership in non-school organizations; and T-shirts with profanity, approval of drug use or violence, or denigration of people based on their race, ethnicity, religion, sex, or sexual preference. Katherine Bishop, Schools Order Students to Dress for Safety's Sake, N.Y. TIMES, Jan. 22, 1992, at A18.

10. See Doyle, supra note 4 (explaining the ACLU's objections to certain dress code provisions); Richard Leiby, Clothed in Controversy, WASH. POST, Sept. 7, 1994, at C1 (recounting the story of a 16-year-old gay transvestite who hired a civil rights attorney to help him assert his right to graduate in drag).


12. See, e.g., Davis, supra note 1 (reporting some parents' concerns that dress codes take away their children's freedom and responsibility). But see George G. Figneroa, Youths Could Make a Fatal Mistake if They're Dressed to Kill, L.A. TIMES, Feb. 27, 1994, at B19 (Valley ed.) (arguing that dress codes are necessary for student safety); Mark Mathabane, Appearances Are Destructive, N.Y. TIMES, Aug. 26, 1993, at A21 (arguing that dress codes pervade everyone's life and are necessary in the school environment to keep the focus on academics, not clothes).

13. See Bishop, supra note 9 (reporting that the ACLU has contested some bans on T-shirts with writing on them).

14. For example, the California legislature passed a statute declaring that dress codes are appropriate and permissible in California public schools when they are aimed at decreasing violence in schools or improving the educational environment. The statute provides:

   The governing board of any school district may adopt or rescind a reasonable dress code policy that requires pupils to wear a school-wide uniform or prohibits pupils from wearing "gang-related apparel" if the governing board of the school district approves a plan that may be initiated by an individual school's principal, staff, and parents and determines that the policy is necessary for the health and safety of the school environment. Individual schools may include the reasonable dress code policy as part of its school safety plan, pursuant to Section 35294.1.

including school districts in Detroit, New York, Oakland, and Washington, D.C.

This Note addresses the constitutionality of public school dress codes. Part I examines various dress codes and school districts' arguments that dress codes ensure a safe and productive educational environment. Part II examines freedom of expression jurisprudence and the extent to which students may exercise this constitutional right. This Part also discusses the disagreement among the federal circuit courts, which considered the constitutionality of dress codes as they applied to students' hair length. Part III argues that the constitutionality of public school dress codes should be examined under the First Amendment and proposes a method for balancing school officials' authority to maintain an educational environment against students' First Amendment rights. This Note concludes that while school dress codes are not outside the scope of judicial review, under the inculcative theory of public school education public school administrators have broad authority to prescribe student expression such as dress if administrators determine the expression disrupts the classroom or threatens school safety.

I. PUBLIC SCHOOL DRESS CODES AND SCHOOL OFFICIALS' JUSTIFICATIONS

Americans express increasing alarm over a perceived decline in the quality of public school education and a concurrent increase in the level of violence and crime in schools. To counter the physical risk to children and to increase the quality of education, several public schools have adopted dress codes. In public schools where violence is the perceived problem, dress

15. Spratling, supra note 1.
17. Id.
19. See infra notes 76-80 and accompanying text (discussing the various models describing the nature of public school education).
21. See supra notes 2-9 and infra notes 22-25 and accompanying text (noting the range of dress codes adopted in cities throughout the United States).
codes tend to prohibit gang-related clothing such as jewelry, insignias, baseball caps, gloves, and certain colors of clothes, as well as expensive clothing. Other public schools prohibit spandex and other clothing with a sexual tone which school officials believe disrupts the classroom. Some public schools have mandatory uniforms or dress codes, others use a voluntary system, while others proscribe certain types of clothing.

Although dress codes are increasing in popularity throughout the United States, educators do not uniformly agree upon the benefits produced by these regulations. There is no certainty that dress codes reduce school violence or improve academic achievement. Furthermore, strict dress codes, which school officials justify because they are aimed at preventing gang violence, have been adopted in several areas that do not have gang problems, undermining some school officials' justifications. Moreover, dress codes may contain an inherent

22. The dress code in central Los Angeles prohibits such gang-related clothing as voluminous, brightly-colored pants and colored shoe strings. Bishop, supra note 9.
23. Murphy, supra note 20, at 1323-24.
25. See, e.g., Alicia Di Rado, SDS Resurfaces, This Time for a New Generation, L.A. TIMES, May 9, 1994, at B1 (describing students' responses to Huntington Beach Union High School District's dress code, which prohibits clothes with a sexual tone as well as tattoos); Margaret Trimer, Weather Is Warm and School Clothes Hot: Sizzling Spandex Barred by Dress Code, DETROIT FREE PRESS, Apr. 25, 1990, at 1A (reporting on the public school dress code in Lake Orion banning spandex among other things).
26. See Wilgoren, supra note 8 (enumerating the wide range of regulations on student dress imposed by school districts in Orange County).
27. Id.
28. See Bishop, supra note 9 (describing prohibitions in the New York and Oakland school districts on expensive clothing and jewelry).
29. See supra notes 3-6 and accompanying text (describing school officials' and educators' views on the benefits of dress codes).
30. Davis, supra note 1. Pedro Noguera, Professor of Education at the University of California at Berkeley, states that he has "never seen any study that showed a connection between style of dress and academic achievement." Id.
31. For example, Oak Park School District in California bans gang-related attire even though the affluent community has no gang problem. Davis, supra note 1. In addition, Santa Catalina Island schools have instituted dress codes aimed at reducing gang violence and improving academic performance despite the fact that there have been no gang problems among the Island's approximate 640 students. James Benning, Importing Mainland Dress Code, L.A. TIMES, Oct. 27, 1994, at J3.
racial bias because they tend to focus on clothing associated with African-American gangs while ignoring other groups such as white supremist gangs.\textsuperscript{32}

In fact, some important educational goals may be undermined by dress codes.\textsuperscript{33} By restricting student speech, dress codes may undermine a fundamental value of American society that public schools should be seeking to teach students, namely freedom of expression.\textsuperscript{34} Furthermore, some educators contend that suppressing free speech in the public schools actually interferes with students' cognitive development.\textsuperscript{35}

In contrast, school officials who favor dress codes often contend that they reduce classroom violence and improve the educational environment.\textsuperscript{36} Dress code proponents frequently

\begin{itemize}
\item \textsuperscript{32} Murphy, supra note 20, at 1356.
\item \textsuperscript{33} See Robert B. Keiter, \textit{Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate}, 50 Mo. L. Rev. 25, 34 (1985) (explaining that one of the major values attributed to the First Amendment, ensuring individual participation in the governmental decision-making process, is particularly important in the context of student speech since students' participation is limited until they reach voting age).
\item \textsuperscript{34} Id.
\item \textsuperscript{35} See Richard L. Roe, \textit{Valuing Student Speech: The Work of the Schools as Conceptual Development}, 79 CAL. L. REV. 1269, 1308-18 (1991) (arguing that the inculcative model of education which allows student speech to be regulated interferes with students' cognitive development).
\item The California legislature agreed that dress could affect the quality of the education received in the classroom when it adopted Cal. Educ. Code § 35183 (West 1993 & Supp. 1994). The statute makes dress codes and uniforms permissible in California public school and declares:
\begin{enumerate}
\item The children of this state have the right to an effective public school education. Both students and staff of the primary, elementary, junior and senior high school campuses have the constitutional right to be safe and secure in their persons at school. However, children in many of our public schools are forced to focus on the threat of violence and the messages of violence contained in many aspects of our society, particularly reflected in gang regalia that disrupts the learning environment.
\item "Gang-related apparel" is hazardous to the health and safety of the school environment.
\item Instructing teachers and administrators on the subtleties of identifying constantly changing gang regalia and gang affiliation takes an increasing amount of time away from educating our children.
\item Weapons, including firearms and knives, have become common place upon even our elementary school campuses. Students often conceal weapons by wearing clothing, such as jumpsuits and overcoats, and by carrying large bags.
\item The adoption of a school-wide uniform policy is a reasonable way to provide some protection for students. A required uniform may protect students from being associated with any particular gang.
\end{enumerate}
\end{itemize}
assert that dress codes prevent students who are not involved with gangs from mistakenly being targeted as a gang member because of their dress. In addition, some educators report that dress codes reduce the number of fights in schools. Many educators who promote the establishment of dress codes also assert that dress codes improve the educational environment of the classroom by encouraging discipline, enhancing self-esteem, and promoting unity in the educational process.

Parents and students are divided over the advantages of dress codes as well. In particular, many parents and students, as well as some educators, question whether dress codes

Moreover, by requiring school-wide uniforms teachers and administrators may not need to occupy as much of their time learning the subtleties of gang regalia.

(6) To control the environment in public schools to facilitate and maintain an effective learning environment and to keep the focus of the classroom on learning and not personal safety, schools need the authorization to implement uniform clothing requirements for our public school children.

(7) Many educators believe that school dress significantly influences pupil behavior. This influence is evident on school dress-up days and color days. Schools that have adopted school uniforms experience a "coming together feeling," greater school pride, and better behavior in and out of the classroom.


37. See Davis, supra note 1 (reporting a youth services officer's claim that police respond daily to incidents of young people who are assaulted based on the clothes they were wearing); Renee Tawa, A New Fashion Statement, L.A. TIMES, Oct. 3, 1993, at J1 (describing San Gabriel Valley public school dress codes aimed at preventing students from becoming victims of mistaken identity in gang violence).

38. See Murphy, supra note 20, at 1332 n.56 (reporting an interview in which a principal claimed dress codes lowered the number of incidents of fighting in school).

39. See id. at 1332 n.57 (reporting an interview in which an educator stated that dress codes gave him authority over the classroom); see also Davis, supra note 1 (explaining that the superintendent of the Ventura Unified School District agrees that student dress affects student behavior).

40. Doris Benson Jones, Professor of School Psychology at Cal State Northridge, asserts that "students' esteem, image and behavior all relate to their appearance... A dress code can be very positive in terms of unity... It could enhance self-esteem and minimize gangs and... can create a more global sense of commitment to the educational process." Doyle, supra note 4.

41. See id. (quoting Professor Jones, who stated her belief in "a sense of unity when everyone wears the same clothes").

42. See Moon, supra note 11 (arguing that school administrators are using the current concern with violence in schools as a justification for unnecessary dress codes); Sardella, supra note 1 (reporting students' negative as well as positive reactions to the new dress code).
are actually aimed at instituting school officials' personal preferences in dress.\textsuperscript{43} In light of the controversy concerning whether dress codes produce the beneficial results that justify their implementation, the result of a challenge of these restrictions under the First Amendment remains questionable.

II. THE FIRST AMENDMENT: LIMITS ON GOVERNMENT REGULATION OF EXPRESSION

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."\textsuperscript{44} Despite the strict language of the First Amendment, the Supreme Court has not endorsed an absolute view of free speech that would prohibit any government restriction of speech.\textsuperscript{45} Rather, the Court has set forth varying tests to determine whether an individual's right to freely express his or her beliefs must be subordinated to other interests of society.

To aid in the determination of whether a governmental regulation infringes on constitutionally protected speech, the Court has developed numerous categories of speech,\textsuperscript{46} regulations,\textsuperscript{47} forums,\textsuperscript{48} and speakers.\textsuperscript{49} Based on these catego-

\textsuperscript{43} Marriott, supra note 1 (noting that when school administrators mandate "dress for success" codes, all students are forced to fit a stereotypical mold).

\textsuperscript{44} U.S. CONST. amend. I.

\textsuperscript{45} JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 866 (5th ed. 1995).

\textsuperscript{46} Id. at 858; Daniel A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 VA. L. REV. 1219, 1229 (1984). A nonexhaustive list of these categories includes fighting words, speech before a hostile audience, symbolic speech, subversive speech, obscene speech, and libelous speech. NOWAK, supra note 45, at 857-58.

\textsuperscript{47} Current First Amendment jurisprudence distinguishes between content-neutral and content-based regulations to determine the appropriate level of scrutiny for restrictions on speech. See generally Daniel A. Farber, Content Regulation and the First Amendment: A Revisionist View, 68 GEO. L.J. 727, 727-30 (1980) (arguing that the Supreme Court, in upholding a number of restrictions related to speech content, has created two distinct tests to determine the constitutionality of content-based regulation); Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 STAN. L. REV. 121, 121-27 (1981) (observing that the Supreme Court has generally adhered to a rule that speech restrictions that turn on the content of expression are subjected to a strict form of judicial review, while restrictions concerned with matters other than content receive more limited examination); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 189-97 (1983) (arguing that the Supreme Court's reliance on the content-neutral, content-based distinction underprotects valuable speech).

Content-neutral regulations limit speech without regard to the underlying
ries, the Court has created different tests to determine the scope of permissible restrictions on different types of speech.\textsuperscript{50}

message. \textit{Id.} at 189-90. Content-neutral regulations include noise restrictions near hospitals, billboard bans in residential neighborhoods, or license fees for parades. \textit{Id.} In contrast, content-based restrictions aim at regulating the underlying message of pure speech and expressive conduct. \textit{Id.} Content-based regulations include the prohibition of the display of swastikas, seditious libel, and the publication of confidential information. \textit{Id.} Content-based regulations contain the subgroup of viewpoint-based regulations, which go a step further to proscribe the expression of particular ideas, views, or items of information. \textit{Id.} at 197.

48. Depending on where the regulated speech takes place, courts will apply differing levels of scrutiny. \textit{See} United States v. Grace, 461 U.S. 171, 177-78 (1983) (describing the various levels of scrutiny that regulations affecting speech receive depending on the location of the speech); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) (observing the long-standing rule that "traditional public forums" for free speech are subject to reasonable time, place, and manner restrictions); Farber & Nowak, supra note 46, at 1220 ("Public forum analysis might well be called the 'geographical approach' to first amendment law, because results often hinge almost entirely on the speaker's location.").


50. Content-based regulations, including viewpoint-based regulations, presumptively violate the First Amendment. \textit{E.g.}, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of discussion of entire topic."); \textit{see also} Geoffrey R. Stone, \textit{Content-Neutral Regulations}, 54 U. CHI. L. REV. 46, 47-48 (1987) (observing that the Supreme Court has invalidated almost every content-based restriction it has considered in the last thirty years except those restrictions concerning low-value speech); \textit{Note}, \textit{The Content Distinction in Free Speech Analysis After Renton}, 102 HARV. L. REV. 1904, 1905-06 n.12 (1989) (providing a survey of cases in which low-value speech or speech by corporations received lesser protection by the Supreme Court). As such, courts subject content-based regulations to strict scrutiny. \textit{See} Texas v. Johnson, 491 U.S. 397, 412 (1989) (stating that speech which is restricted because of the content of the message conveyed is subject to "the most exacting scrutiny"); Boos v. Barry, 485 U.S. 312, 321 (1988) (holding that when a state seeks to regulate speech based on its content, it must show the "regulation is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end").

For content-neutral regulations and time, place, and manner regulations the speech must be justified by significant government interests and must leave open ample alternative channels of communication. \textit{Heffron v. International Soc'y for Krishna Consciousness}, 452 U.S. 640, 647-48 (1981). In addition, the
Hence, an analysis of dress codes in the public schools must first consider whether the regulated speech receives protection and then examine the scope of that protection for public school students.

A. CONSTITUTIONAL TESTS FOR THE REGULATION OF SPEECH: DETERMINING WHETHER CONDUCT CONSTITUTES SPEECH WORTHY OF FIRST AMENDMENT PROTECTION

A threshold question to determine the validity of government regulations concerning speech is whether the speech is "pure speech" or "symbolic speech"—that is, conduct intended to convey a message. The First Amendment protects all "pure speech." Some categories of pure speech, however, receive less protection, such as obscenity or defamatory words. In contrast, "symbolic speech" receives First Amendment protection only after surviving court examination.

The Supreme Court has rejected the view that all conduct in which a person engages intending to convey a message constitutes symbolic speech protected by the First Amendment. Instead, courts apply a two-part test which examines whether "an intent to convey a particularized message was present, and whether the likelihood was great that the message..."
would be understood by those who viewed it.\textsuperscript{59} 

The context in which symbolic speech occurs determines to a significant extent whether First Amendment protection applies. For example, in \textit{Texas v. Johnson},\textsuperscript{60} the Supreme Court used this two-part test\textsuperscript{61} to determine whether the defendant's arrest under Texas's Desecration of a Venerated Object statute\textsuperscript{62} for burning a United States flag outside the Republican National Convention violated the First Amendment.\textsuperscript{63} In assessing whether the defendant engaged in communicative conduct, the Court examined the context in which the conduct took place, such as the political climate as well as current national events.\textsuperscript{64} The Court found that the conduct was intended to, and did, convey a message, although various groups interpreted the message communicated by the defendant's conduct differently.\textsuperscript{65} The differences in interpretation, however, did not place the conduct outside the scope of

\begin{itemize}
\item \textsuperscript{59} Texas v. Johnson, 491 U.S. at 404 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).
\item \textsuperscript{60} 491 U.S. 397 (1989).
\item \textsuperscript{61} Id. at 403.
\item \textsuperscript{62} Id. at 400 n.1 (quoting TEX. PENAL CODE ANN. § 42.09 (1989)). The Desecration of a Venerated Object statute provided:
\begin{enumerate}
\item A person commits an offense if he intentionally or knowingly desecrates:
\begin{enumerate}
\item a public monument;
\item a place of worship or burial; or
\item a state or national flag.
\end{enumerate}
\item For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
\end{enumerate}
\item Id.
\item \textsuperscript{63} Texas v. Johnson, 491 U.S. at 399. Johnson's conduct did not physically injure nor threaten to injure anyone, although several onlookers were offended by his conduct. Id. Furthermore, Johnson was not convicted for disturbing the peace, but rather for desecration of a venerated object which, under the statute, included burning a national flag. Id.
\item \textsuperscript{64} Id. at 405-06.
\item \textsuperscript{65} Texas v. Johnson, 491 U.S. 397, 399, 406 (1989). The Court noted that the defendant was participating in a demonstration dubbed the "Republican War Chest Tour." Id. at 399. The demonstration protested certain policies of the Reagan administration and dramatized the effects of nuclear war. Id. During the demonstration, another protestor gave the defendant a flag, which the defendant then burned. Id. The Court recognized that although the purpose of burning the flag and the message conveyed to the protestors was the protest of Reagan administration policies, the act of burning the flag offended several onlookers. Id. at 408. Hence, a single act can have several meanings depending on the viewers of the conduct.
\end{itemize}
protected symbolic speech.\textsuperscript{66} Hence, First Amendment protection applied to the conduct.\textsuperscript{67}

Likewise, some lower courts have recognized that dress may constitute symbolic speech. For example, the Ninth Circuit held that buttons worn on the lapel by students falls within the Constitution’s protection of symbolic speech.\textsuperscript{68} A district court similarly held that a dress code prohibiting clothing with non-vulgar, non-disruptive speech that “harassed” other students impermissibly censored speech under the First Amendment.\textsuperscript{69} In contrast, other courts have found that dress is not sufficiently communicative to constitute speech\textsuperscript{70} but may be protected by a liberty interest in controlling one’s own body.\textsuperscript{71}

B. STUDENTS’ FIRST AMENDMENT RIGHTS IN PUBLIC SCHOOLS

The First Amendment limits the government’s ability to regulate speech less stringently when public school students’ First Amendment rights are involved. Although students are “persons” under the Constitution\textsuperscript{72} and retain some constitutional rights to freedom of speech and expression while in public schools,\textsuperscript{73} the Supreme Court has held that these rights are limited.\textsuperscript{74} Because students’ First Amendment rights are not coextensive with those of adults, courts do not apply traditional First Amendment jurisprudence when examining regulations

\textsuperscript{66} Id. at 406. Significantly, if the Court had found that the conduct was not symbolic speech, First Amendment protection would not have applied.

\textsuperscript{67} Id. at 406. Significantly, if the Court had found that the conduct was not symbolic speech, First Amendment protection would not have applied.

\textsuperscript{68} Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992).


\textsuperscript{70} See infra notes 101-128 and accompanying text (discussing the differing results reached by the federal circuit courts concerning the proper analysis for examining the constitutionality of hair length regulations).

\textsuperscript{71} See East Hartford Educ. Ass’n v. Board of Educ., 562 F.2d 838, 841-42 (2d Cir. 1977) (finding that there is a liberty interest in the right to control one’s body, including one’s hair and dress).

\textsuperscript{72} Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969). The Court explained: “[Students] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.” Id.

\textsuperscript{73} Id. at 506.

\textsuperscript{74} See id. (recognizing that First Amendment rights are “applied in light of the special characteristics of the school environment”).
affecting speech in the public schools.\textsuperscript{75} Instead, courts examine the necessity of the regulation for maintaining the classroom environment.

The Supreme Court has endorsed an inculcative theory of public school education\textsuperscript{76}—that is, one in which public schools impart school-supported knowledge and values.\textsuperscript{77} Under this theory, school authorities may proscribe student speech that appears inconsistent with its "basic educational mission."\textsuperscript{78} As a result, schools can censor speech that could not be censored outside the school.\textsuperscript{79} Significantly, the Court has held that school boards are the proper decision-makers of what manner of

\textsuperscript{75} See infra notes 76-96 and accompanying text (discussing the guidelines for examining regulations of student speech in the public schools).

\textsuperscript{76} See Betsy Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 YALE L.J. 1647, 1648-54 (1986) (contending that courts and society believe that the role of the public schools is to transmit society's common values and beliefs to the next generation); Martin H. Redish & Daryl I. Kessler, Government Subsidies and Free Expression, 80 MINN. L. REV. 543, 581 (1996) ("Public schools give rise to a unique First Amendment conundrum. On the one hand, public schools play an important, indeed vital, role in socializing and inculcating values in students." (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)); Roe, supra note 35, at 1276-92 (arguing that courts have adopted the view that the work of the public schools is the inculcation of values).

\textsuperscript{77} See, e.g., Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) ("The undoubted freedom 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 appropriate behavior."); see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-73 (1988) (holding that school authorities do not offend the First Amendment by exercising editorial control over the style and content of student speech in "school-sponsored expressive activities" as long as "their actions are reasonably related to legitimate pedagogical concerns").

\textsuperscript{78} Bethel, 478 U.S. at 685. Although the Court has adopted an inculcative theory of education under which to examine regulations of student speech, several commentators have argued that the inculcative theory does not properly reflect the role of the public schools in a democratic society. See Roe, supra note 35, at 1275-76 & n.18 (arguing that neither the inculcative nor marketplace models properly describe the work of schools and advocating a "conceptual-development" model that requires a higher level of tolerance for student speech); Tyll van Geel, The Search for Constitutional Limits on Governmental Authority to Inculcate Youth, 62 TEX. L. REV. 197, 239-62 (1983) (arguing that the inculcation of values is not an effective way to prepare children for citizenship). But see Levin, supra note 76, at 1653-54 (arguing that the inculcative model of education is satisfactory, but one value that must be taught in a democratic society is freedom of expression).

\textsuperscript{79} Hazelwood, 484 U.S. at 266.
speech is consistent with their curricula, potentially limiting the scope of judicial review for many public school regulations.

The Court has not given school districts free reign in determining which speech is permissible in schools, however. Public school administrators may not proscribe speech merely because they disagree with the message of the speech or wish to avoid the unpleasantness accompanying a particular point of view. For example, in Tinker v. Des Moines Independent School District, the Court found that the suspension of several students for wearing black armbands to protest the Vietnam War violated the First Amendment. In examining the suspension, the Court first determined that personal intercommunication is an integral part of the educational process. Hence, First Amendment rights apply in all situations in which students seek to freely express themselves on the school campus, including in the cafeteria, in hallways, or during extra-curricular activities.

The Court held that in the absence of actual or likely classroom disruption or violence on the school campus, the mere fear of a disturbance caused by the wearing of armbands did not justify the restrictions on students’ speech. The Court stated

80. Id. at 267 (citing Bethel, 478 U.S. at 683); see also Board of Educ. v. Pico, 457 U.S. 852, 889-91 (1982) (Burger, C.J., dissenting) (arguing that if, as the Court has held, schools may legitimately be used as vehicles for inculcating fundamental social and political values, "school authorities must have broad discretion to fulfill that obligation").
82. 393 U.S. at 503.
83. The Court stated that wearing armbands to protest the Vietnam War was akin to "pure speech" entitled to comprehensive protection under the First Amendment. Id. at 505-06.
84. Id. at 514.
85. Id. at 512.

The Court stated:
[Intercommunication] is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or the campus during the authorized hours, he may express his opinions.

87. Id. at 508. The Court explained:
[Un]differentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the
that public school administrators may only impose regulations proscribing expression when there is evidence that the regulations are "necessary to avoid material and substantial interference with schoolwork or discipline." Because school officials provided no evidence that the passive wearing of armbands caused any disruption in the classroom, the Court held that the suspensions violated the First Amendment. Public schools, as state actors, may not therefore suppress a particular expression or opinion merely because of a desire to avoid the controversy accompanying an unpopular view.

Despite the Supreme Court's broad description of students' First Amendment rights in *Tinker,* other cases appear to offer far narrower protection for student rights to freedom of expression. The Court has found in several instances that First Amendment protection does not apply to restrictions that do not implicate political speech or a student's access to information. For example, the Court has upheld a public school principal's authority to remove an article discussing a teenager's pregnancy from a school newspaper because he thought it was inappropriate for younger students. In addition, the Court has upheld school officials' right to discipline students for using lewd or vulgar speech. Additionally, several lower courts have determined that dress codes aimed at maintaining a good educational environment do not violate the First Amendment.

majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.

*Id.*

88. *Id.* at 511.
89. *Id.* at 514.
90. *Id.* at 509.
91. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 261 (1988). The Court differentiated between the standards that apply when schools punish student expression that happens to occur on school premises and when schools control "the style and content of student speech in school-sponsored expressive activities." *Id.* School officials may regulate school-related speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.*
92. See Bethel Sch. Dist. v. Fraser, 478 U.S. 677-80 (1986) (holding that a school district may prevent a student from delivering a speech with sexual overtones).
93. E.g., Fowler v. Williamson, 448 F. Supp. 497, 502 (W.D.N.C. 1978) (holding that the Constitution does not bar a principal from preventing a student who was wearing jeans from participating in commencement exercises). But see Bannister v. Paradise, 316 F. Supp 185, 189 (D.N.H. 1970) (overturning a school prohibition on wearing jeans to school because no disturbance, safety,
In *Tinker*, the Supreme Court held that a school cannot regulate speech merely because it disagrees with the content,\(^9\) implying that the public school officials' motivations for regulating speech are relevant to the determination of the constitutionality of the regulations.\(^9\) Nonetheless, the Court has also found that many school administrators' decisions concerning which speech is consistent with the educational mission of the school are beyond the scope of judicial review.\(^9\) As such, the scope of students' First Amendment rights when they enter public school grounds and the extent to which courts will enforce those rights is uncertain.

**C. EARLIER ATTEMPTS TO EXAMINE THE CONSTITUTIONALITY OF HAIR LENGTH REGULATIONS**

Several circuit courts have considered the constitutionality of public school dress codes that regulate the length of students' hair. The circuit courts used different reasoning when examining these regulations and, accordingly, reached different conclusions regarding their constitutionality.\(^9\) Some circuits determined that the examination of public school dress codes is not within the scope of federal judicial review.\(^9\) In contrast, other circuits found that federal courts may properly review public school dress codes regulating hair length,\(^9\) although these circuits did not agree upon which constitutional grounds

---


\(^9\) See van Geel, *supra* note 78, at 232 (arguing that the Supreme Court adopted a motivational test to determine whether school restrictions on speech violated the First Amendment).

\(^9\) See *supra* notes 78-80 and accompanying text (describing the authority of school administrators to limit students' speech in order to maintain the educational environment).

\(^9\) See *infra* notes 101-128 and accompanying text (discussing the circuit courts' reasoning and results in hair length cases).

\(^9\) See, e.g., Zeller v. Donegal Sch. Dist. Bd. of Educ., 517 F.2d 600, 606-07 (3d Cir. 1975) (holding that the federal court system is not the proper forum for determining the appropriateness of public school grooming regulations); see also *infra* notes 101-114 and accompanying text (discussing federal circuit court decisions holding that federal courts should not review public school hair length regulations).

\(^9\) See, e.g., Crews v. Cloncs, 432 F.2d 1259, 1263 (7th Cir. 1970) ("[C]ourts must judge the constitutionality of disciplinary action which denies a student the opportunity to attend classes.").
courts should examine dress codes in the public schools.\textsuperscript{100}

1. The Hands-Off Approach

The Third,\textsuperscript{101} Fifth,\textsuperscript{102} Sixth,\textsuperscript{103} Ninth,\textsuperscript{104} and Tenth\textsuperscript{105} Circuit Courts of Appeals have held that the examination of hair length regulations is not properly within the scope of federal judicial review. Although all of these circuit courts have held that hair length regulations do not implicate sufficient constitutional rights for federal judicial intervention, the courts have adopted differing approaches in reaching this result.

For example, in \textit{Zeller v. Dunegal School District Board of Education}, the Third Circuit overturned an earlier decision and held that it would no longer review hair length regulations\textsuperscript{106} because it believed that public school officials are better able than the federal judiciary to determine proper school discipline and decorum.\textsuperscript{107} The court justified its holding on the basis

\begin{itemize}
\item \textsuperscript{100} See infra notes 115-128 and accompanying text (discussing the tests under which the First, Fourth, Seventh, and Eighth Circuits have examined public school dress codes).
\item \textsuperscript{101} \textit{Zeller}, 517 F.2d at 606-07 (determining that federal courts are ill-equipped to examine a community's determination regarding appropriate grooming for public school students).
\item \textsuperscript{102} \textit{Karr v. Schmidt}, 460 F.2d 609, 613 (5th Cir. 1972) (holding that there is no constitutionally protected right to wear one's hair at the length one chooses).
\item \textsuperscript{103} \textit{Jackson v. Dorrier}, 424 F.2d 213, 217-19 (6th Cir. 1970) (reasoning that regulation of hair length did not violate the First Amendment, Fourteenth Amendment, or the right to privacy and as such, the school district's regulation could not be reviewed by the federal courts).
\item \textsuperscript{104} \textit{King v. Saddleback Junior College Dist.}, 445 F.2d 932, 940 (9th Cir. 1971) (holding that regulations on hair length in public schools do not infringe on substantial constitutional rights and are therefore not reviewable by federal courts).
\item \textsuperscript{105} \textit{Freeman v. Flake}, 448 F.2d 258, 262 (10th Cir. 1971) (holding that public school regulations on length of hair do not sharply implicate constitutional values and therefore "are not cognizable in federal courts").
\item \textsuperscript{106} \textit{Zeller v. Donegal Sch. Dist. Bd. Of Educ.}, 517 F.2d 600, 607 (3d Cir. 1975). The court stated: [T]here are areas of state school regulation in which the federal courts should not intrude. Without attempting to survey a bright line between permissible and impermissible intervention, we conclude that student hair cases fall on the side where the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's.
\item \textsuperscript{107} \textit{Id.} The court based this determination on a concern "that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights." \textit{Id.}
that privacy rights and the right to liberty implicated in hair length regulation cases are not sufficient to merit judicial review. In addition, the court expressed concern that recognizing a freedom to personal liberty within public schools would significantly interfere with the mission of the schools. Because the Third Circuit refused to recognize constitutional rights implicated by hair length regulations, school officials did not need to demonstrate that the regulations prevented disruptions in the classroom. Although the Third Circuit did not address whether freedom of speech limits the scope of permissible hair length regulations in public schools, the court's expansive statement that it will not review hair length regulations implies that the court believes such rights are not implicated.

The Fifth, Sixth, Ninth, and Tenth Circuits agree with the Third Circuit that a personal liberty right is not violated by public school hair length regulations, and have gone a step further to find that such regulations do not violate freedom of

---

(footnote omitted). The court worried that unless this trend was reversed, the Constitution might be trivialized. Id.

108. Id. at 607-08.

109. See id. at 606 (arguing that the nature of the school system inherently limits students' personal freedoms in that the schools maintain the authority to prescribe curriculum, assign faculty, promulgate rules of conduct, and set grading standards).

110. Id. at 607.


112. See supra note 106 (quoting the Zeller court as stating that "student hair cases" fall within the jurisdiction of school authorities rather than the federal judiciary).

113. See Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir. 1972) (holding that the right to wear one's hair as one chooses in public schools is not protected by the First Amendment); Freeman v. Flake, 448 F.2d 258, 260 (10th Cir. 1971) (holding that Tinker does not apply to regulations concerning hair length because hair length is not "akin to pure speech" which contributes to the "storehouse of ideas" but is at most "an expression of individuality"); King v. Saddleback Junior College Dist., 445 F.2d 932, 937 (9th Cir. 1971) (holding that Tinker only applies to rights akin to "pure speech" and not to public school regulations concerning "personal appearance, style of clothing, or deportment"); Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir. 1970) (holding that the record did not establish that the students disciplined for wearing their hair long chose this style to convey a message).
expression under the First Amendment.\textsuperscript{114} These circuits found that hair style, at least in the cases under review, did not possess a sufficient communicative message to warrant protection by the First Amendment.

2. The Right to Govern One's Appearance

In contrast to the view that federal courts are not the proper forum for review of school hair length regulations, the First,\textsuperscript{115} Fourth,\textsuperscript{116} Seventh,\textsuperscript{117} and Eighth\textsuperscript{118} Circuits concluded that hair length regulations may be reviewed by federal courts. These circuits found that a fundamental constitutional right exists to govern one's appearance.

Although all four circuit courts determined that students have a constitutionally protected right to govern their own appearance, the courts did not clearly explain the nature of this right nor the standard courts should use to examine regulations affecting it. The First Circuit, for example, stated that this right is not as fundamental as other rights protected by the Due Process Clause.\textsuperscript{119} The Fourth and Eighth Circuits\textsuperscript{120} stated

\textsuperscript{114} See, e.g., King, 445 F.2d at 937 (finding that the regulation did not conflict with freedom of speech because the "students [who violated the regulation] were not purporting to say anything"); Jackson, 424 F.2d at 217 (stating that the record indicated that neither of the students disciplined for violating the hair regulation had the intention to express an idea or point of view); see also supra notes 53-71 (examining the First Amendment tests that determine whether conduct has enough communicative value to warrant First Amendment protection).

\textsuperscript{115} See Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970) (finding that there exists a personal liberty under the Bill of Rights to control one's appearance).

\textsuperscript{116} See Massie v. Henry, 455 F.2d 779, 781-83 (4th Cir. 1972) (examining the varying approaches to determine whether hair length regulations are constitutional and deciding that a personal right to govern one's appearance exists).

\textsuperscript{117} See Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir. 1974) (reasserting that the right to wear one's hair at the length one chooses is a component of personal freedom).

\textsuperscript{118} See Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971) (holding that students have a constitutionally protected right to govern their own appearance).

\textsuperscript{119} See Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970) ("We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the 'liberty' assurance of the Due Process Clause.").

\textsuperscript{120} See Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972) (holding that sufficient "proof of state interest" and "violation of the rights of others" could demonstrate necessity for regulation); Bishop v. Colaw, 450 F.2d at 1075 ("[T]he
that school administrators must demonstrate the necessity of regulations that infringe upon this right. Under this standard, the Eighth Circuit held that the suggestion that shorter hair improves classroom performance or evidence of a few isolated disruptions does not satisfy the school's burden.\textsuperscript{121} Lastly, the Seventh Circuit described this right as fundamental\textsuperscript{122} and stated that schools have a "substantial burden of justification" when they seek to limit the right.\textsuperscript{123}

Significantly, these courts did not find that First Amendment rights were implicated in the cases which they decided.\textsuperscript{124} The First,\textsuperscript{125} Fourth,\textsuperscript{126} and Eighth\textsuperscript{127} Circuits stated that the records under review contained no information that the students who violated the hair regulations intended to convey a message by their hair length. The Seventh Circuit did not even address the issue.\textsuperscript{128}

The conflicting decisions by the federal circuit courts regarding hair length regulations in the public schools further demonstrate the uncertainty of the standard under which courts should review dress codes. The circuit courts disagree about whether federal courts should review dress codes which prescribe the length of students' hair. Furthermore, even the circuits finding judicial review appropriate were uncertain about the level of scrutiny the regulations should receive.
III. THE CONSTITUTIONALITY OF DRESS CODES IN THE PUBLIC SCHOOLS

Public school officials may take broad measures to create an environment that is conducive to learning.\textsuperscript{129} Hence, public schools may proscribe students' vulgar or disruptive expressive conduct.\textsuperscript{130} Nonetheless, when schools attempt to proscribe political speech or a student's access to information, the Supreme Court has imposed restrictions on the public schools' ability to limit expression.\textsuperscript{131} This Part examines how these limits apply to public school dress codes.

This Part contends that the First Amendment protects student dress. Section A argues that the various frameworks for the examination of school regulations affecting students' appearance enunciated by the circuit courts provide an unsatisfactory method for analyzing dress codes in the public schools. First, a \textit{per se} rule that school dress codes are beyond the scope of judicial review is inappropriate because those codes may go beyond the goal of maintaining the educational environment and seek to limit unpopular views or political speech. Second, the fundamental right framework does not provide enough flexibility or guidance for school officials as to what may constitute a legitimate school dress code. Section B proposes a method to analyze school dress codes using established First Amendment jurisprudence. The proposed method considers the expressive element of the dress along with the context within which the student sets forth the expression to determine the constitutionality of a given regulation.

A. RESOLUTION OF THE CONSTITUTIONALITY OF PUBLIC SCHOOL DRESS CODES: THE IMPOSSIBILITY OF THE ALL OR NOTHING STANDARDS CURRENTLY IN EFFECT

The federal circuit courts' current tests for the examination of public school dress codes regulating hair length do not provide a satisfactory model to resolve the constitutionality of clothing

\textsuperscript{129} See supra 72-96 and accompanying text (explaining the level of scrutiny courts apply to restrictions on student speech).

\textsuperscript{130} See supra note 92 and accompanying text (explaining that school officials may proscribe vulgar or lewd speech).

\textsuperscript{131} See supra notes 72-96 and accompanying text (describing the constitutional basis for, and Supreme Court decisions holding that, students have First Amendment rights).
regulations in the public schools. The current positions defer too much to public school administrators' authority to regulate student appearance, impose too great a burden of substantiation on school administrators to demonstrate the necessity of the regulation, or provide too little guidance in differentiating between constitutional and unconstitutional regulations.

1. The Hands-Off Approach: Abdicating the Judiciary's Ability to Ensure the Protection of Students' Constitutional Rights

The hands-off approach for reviewing public school dress codes could arguably find support in the inculcative theory of education, which the Supreme Court has endorsed. Because the inculcative theory of education seeks to teach students community values, this theory could support the judiciary's deference to public school officials' decisions regarding community standards and appropriate regulations for the classroom.

Nonetheless, the hands-off approach ignores other Supreme Court precedent, such as Tinker, which stand for the proposition that the abdication of judicial review is not proper when regulations implicate public school students' constitutional rights. Furthermore, a failure to protect students' right to freedom of expression runs counter to the inculcative theory of education in the sense that community values include support for freedom of speech and expression as basic rights protected under the Bill of Rights. A total abdication of protection for students' right to freedom of speech and expression would ignore this basic community value.

---

132. See supra notes 101-114 (discussing the position of several circuit courts that the judiciary is not the proper forum to challenge school dress codes).

133. The Supreme Court has indicated that one mission of the public schools is to instill community norms and values in students, and it is the mission of school administrators to accomplish this task. See supra notes 76-96 and accompanying text (overviewing Supreme Court decisions concerning student expression in public classrooms which indicate that the Supreme Court believes public schools should instill community values and standards in students).

134. See supra notes 81-96 and accompanying text (discussing Supreme Court decisions in which the Supreme Court has examined whether students' constitutional rights were infringed).

135. See supra notes 76-80 (discussing the goals of the inculcative theory of education and how that applies to First Amendment jurisprudence affecting the public classroom).

136. See supra notes 33-35 (discussing some educators' concerns regarding dress codes because they believe the codes hinder students' cognitive develop-
Courts often find public school dress codes to fall within constitutional limits because of school officials' broad powers to control the educational environment. This result does not, however, support a per se rule that all public school dress codes are constitutional. Like the Tinker armband prohibition, dress codes can limit students' political speech or censor one particular political view. As such, complete judicial deference to school officials' decisions regarding student dress is inappropriate.

2. The Fundamental Right Approach

The fundamental right to govern one's appearance, which several circuit courts found when examining rules related to student hair length, provides a substantial basis on which students might contest dress codes. Dress codes differ from hair regulations, however, because regulations governing dress do not compel students to alter their physical beings. Clothes can be changed after school; hair length cannot. Furthermore, the fundamental right approach, which focused on personal autonomy, disregards public support for giving school officials authority to maintain an educational environment. School officials have, and need, the authority to regulate student autonomy to foster an educational environment.

The standards for substantiation enunciated under the fundamental right approach also impose too great a burden for school administrators and give insufficient guidance about which dress codes may be constitutional. For example, three circuit courts that found a fundamental right to govern one's appearance required a "substantial burden of justification" by the school district. Such a high standard, however, would

---

137. See supra notes 81-96 and accompanying text (discussing the extent to which First Amendment jurisprudence applies in the public schools).
138. See supra notes 81-90, 94-96 and accompanying text (describing the Supreme Court's determination that schools may not regulate student political speech).
139. See supra notes 115-118 and accompanying text (explaining the grounds on which circuit courts finding a fundamental right to govern one's appearance based their decisions).
140. See supra notes 76-80 and accompanying text (discussing school officials' authority to regulate student conduct to maintain an appropriate educational environment).
141. Holsapple v. Woods, 500 F.2d 49, 49 (7th Cir. 1974); see also Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972) (requiring sufficient "proof of state interest" to uphold a hair length regulation); Bishop v. Colaw, 450 F.2d 1069,
contradict Supreme Court precedent which acknowledges that school officials have an interest in maintaining an educational environment conducive to learning and in teaching students community norms. In addition, because little case law exists on the right to govern one's appearance, school officials would lack guidance for determining constitutionally permissible dress codes.

B. RECOGNIZING THE EXPRESSIVE CONTENT OF DRESS: ANALYZING DRESS CODES UNDER THE FIRST AMENDMENT

The fundamental right jurisprudence developed to analyze hair regulations provides an inappropriate framework for determining the constitutionality of public school dress codes. In contrast, freedom of speech jurisprudence provides an appropriate basis for determining the limits on public school officials' authority to proscribe student dress. The basis of analyzing school dress codes under freedom of expression jurisprudence, however, hinges on first establishing that dress may be the type of conduct which constitutes symbolic speech.

1. Dress Is Expressive Conduct Warranting First Amendment Protection

Although courts that examined hair length regulations dismissed the First Amendment challenges to the regulations because the students had not established that hair style was intended to convey a message, several circuit courts acknowledged that hairstyles could be symbolic speech if the student established that the hairstyle was intended to convey a message beyond style. Significantly, in the context of dress,

1075) (8th Cir. 1971) (placing the burden on the administration to establish that the regulation is necessary).

142. See supra notes 76-80 and accompanying text (discussing the inculcative theory of education and Supreme Court decisions which have adopted this theory).

143. See supra notes 101-128 and accompanying text (discussing the various circuit courts' analyses of the constitutionality of hair regulations).

144. E.g., Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972) ("Perhaps the length of one's hair may be symbolic speech which under some circumstances is entitled to the protection of the First Amendment."); Bishop v. Colaw, 450 F.2d 1069, 1074 (8th Cir. 1971) (rejecting the First Amendment claim since "the record contains no evidence suggesting that [the student's] hairstyle represented a symbolic expression of any kind"); Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970) ("We recognize that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression
several courts have recognized that dress can qualify as conduct that meets the standard of symbolic speech when the dress conveys a message beyond fashion.\(^{145}\)

The context in which regulations limiting conduct are made is one indicator of whether the offending conduct is expressive.\(^{146}\) This indicator suggests that many public schools are regulating certain types of dress precisely because those types of clothing convey a message, albeit a message the school may wish to discourage.\(^{147}\) Of course, whether school officials may be justified in discouraging those messages is yet another issue.

School dress codes, especially those that proscribe certain types of clothing, often regulate types of dress based solely on the message. These regulations include dress codes that prohibit the wearing of gang colors or other gang-associated clothing, sexually provocative clothing, clothing with insignias, logos, or words, as well as expensive clothing.\(^{148}\) For example, school administrators often justify dress codes because the codes prevent misunderstandings of gang membership, thereby protecting unsuspecting students and preventing the intimidation of other students.\(^{149}\) This justification demonstrates that various messages may be conveyed by the prohibited clothing, although the message may be different depending upon the viewer. One viewer sees the clothes as representing style, another feels threatened, while yet another recognizes membership. The ability of dress to convey different messages to different groups of students, however, justifies a conclusion that the dress contains communicative content.\(^{150}\)

\(^{145}\) See Texas v. Johnson, 491 U.S. 397, 404 (1989) (noting that the Court previously found the wearing of military uniforms to protest the Vietnam War symbolic speech in Schact v. United States, 398 U.S. 58 (1970)); see also supra notes 68-69 and accompanying text (discussing some courts' findings that dress is symbolic speech).

\(^{146}\) See supra notes 55-67 and accompanying text (discussing the Supreme Court's analysis of how to determine whether conduct measures up to symbolic speech worthy of First Amendment protection).

\(^{147}\) See supra notes 20-43 and accompanying text (discussing justifications and concerns behind public school dress codes).

\(^{148}\) See supra notes 22-28 and accompanying text (discussing school dress codes which prohibit expensive, vulgar, or lewd clothing as well as clothing which is "gang-related").

\(^{149}\) See supra notes 36-41 and accompanying text (discussing school officials' justifications for dress codes).

\(^{150}\) See supra notes 57-71 (describing the Supreme Court's analysis to determine whether symbolic speech receives First Amendment protection).
The expressed goals of public school administrators indicate that gang-related clothing must be regulated to prevent expression of the underlying messages. The clothing, therefore, is symbolic speech understood by the student audience. Similarly, dress codes that prohibit sexually provocative clothing or clothing with insignias or logos also may seek to regulate the message of the clothing, indicating that those types of dress may constitute symbolic speech.

2. Determining the Limits on Permissible Public School Dress Codes

Because dress often satisfies the requirements for symbolic speech, the First Amendment limits public school officials' ability to impose dress codes. Despite these limitations, public school administrators retain broad powers to restrict speech in the classroom that interferes with its educational mission. This section proposes an analysis for dress codes in the public schools that balances the interest in maintaining the educational environment of the classroom against public school students' First Amendment rights.

To determine the constitutionality of dress codes, courts should first examine whether the dress is symbolic speech. If the dress is not symbolic speech, it does not receive First Amendment protection. If the dress is symbolic speech, however, courts should make a further inquiry into whether there are cause and effect justifications for prohibiting the speech. If there are no such justifications, the speech receives protection. On the other hand, if there are such justifications, courts will need to balance those justifications against the infringement on students' speech.

a. Applying the First Amendment Analysis to Dress Codes

School dress codes frequently prohibit students from

151. See supra notes 59-67 (setting forth the factors which determine the types of speech constituting symbolic speech).

152. See supra notes 53-71 and accompanying text (examining current First Amendment tests to determine whether government regulations of speech are constitutional). Public school students have limited constitutional rights, including First Amendment rights, while in the classroom. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 512-13 (1969).

153. See supra notes 72-96 and accompanying text (discussing the application of the First Amendment in public classrooms).
wearing buttons, certain colors, or clothing with writing.\(^{154}\) Many of these dress codes are aimed at limiting the wearing of “gang” clothing in school. In addition to showing membership in a gang, however, gang styles may also have an underlying political message, such as affiliation with a particular spokesperson or group. As such, gang clothing may qualify as symbolic speech.

In a school with documented prior gang associated violence, prohibitions on such clothing to maintain the educational environment are likely constitutional even if the gang styles qualify as symbolic speech.\(^{155}\) Under \textit{Tinker}, however, school officials must show a “reason to anticipate” actual disruption of the classroom, not merely an “undifferentiated fear” that disruption may occur.\(^{156}\) Assuming that the clothing causes actual disruption, school officials have a significant interest in preventing future violence and providing a non-intimidating atmosphere for students.\(^{157}\) As such, the interest in maintaining a learning-conducive educational environment outweighs the students’ free speech rights.

In contrast, prohibitions on gang styles that qualify as symbolic speech would be unconstitutional in schools with no documented gang-associated classroom disruption. Because there are no present problems necessitating the restrictions, the need for the regulation is merely hypothetical. Such regulations appear to aim at precisely what the Supreme Court has prohibited—regulating speech because of its associated unpleasantness, or the possibility that classroom disruption or violence might ensue.\(^{158}\) In the absence of detrimental effects on the classroom environment, students’ free speech rights prevail.\(^{159}\)

\(^{154}\) See supra notes 22-28 and accompanying text (describing school dress codes that prohibit certain colors or clothing with writing and others that mandate particular types of clothing).

\(^{155}\) See \textit{Tinker}, 393 U.S. at 508.

\(^{156}\) \textit{Id.} at 509 n.3, 510, 513 (stating that material disruption as a result of the symbolic speech must occur before the regulation is constitutional and that a mere fear of disruption does not meet this standard).

\(^{157}\) Another case in which a school’s interest in maintaining an educational environment may outweigh a student’s free speech rights occurs when a student wears a T-shirt, for example, which says, “Legalize Pot.” Although this statement is probably symbolic speech which is political in nature and would normally receive First Amendment protection, because of the school’s goal of preventing student drug use, the school could prohibit the T-shirt.


\(^{159}\) \textit{Id.} at 509.
b. The Benefits and Disadvantages of Using a First Amendment Analysis

The First Amendment analysis of school dress codes honestly weighs the competing interests that restrictions on student dress implicate. Although First Amendment analysis might give differing results for the same dress code depending upon the location of the speech, this characteristic alone does not evidence that student speech expressed through dress should not receive First Amendment protection. Instead, this characteristic results because the context in which speech occurs determines whether it is symbolic and whether actual disruption is necessary to justify restrictions on student speech under Tinker. By examining these factors, this analysis ensures that limits on school officials' powers are not too stringent and permissible restrictions on student speech are not overly broad.

This analysis also provides beneficial guidance for school officials creating dress codes because it forces them to confront their justifications for implementing dress codes. Under this analysis, dress codes which are justified on hypothetical problems are not constitutional. Those codes which are justified on documented problems are constitutional if the interest in maintaining an educational environment outweighs students' free speech rights. Although whether a public school dress code is constitutional under the First Amendment frequently will depend on the significance of public school officials' justifications for the restrictions, First Amendment jurisprudence is sufficiently developed to offer adequate guidance to school officials. Furthermore, even though this analysis does not create a "bright line," this attribute is a necessary result of the conflicting interests at issue. As stated earlier, the fact that the analysis considers conflicting interests does not dictate that the analysis is flawed.

Even though judges lack expertise in the field of education,

160. Differing results for the protection of speech also occur under the public forum doctrine of First Amendment jurisprudence. See supra note 50 and accompanying text (discussing First Amendment tests for time, place and manner and public forum restrictions).

161. Several Supreme Court cases have considered the limits of the restriction of student speech in the classroom. See generally Tinker, 393 U.S. 503; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Board of Educ. V. Pico, 457 U.S. 853 (1982).
judicial scrutiny of dress codes is essential to maintain students’ rights to freedom of expression. Because free speech is highly valued, protecting student speech is consistent with the inculcative theory of education.\textsuperscript{162} Protecting student free speech models for students an important community value—the right to speak freely without fear of overly burdensome governmental regulation.\textsuperscript{163} Moreover, limiting judicial scrutiny to cases in which symbolic speech is involved and where school officials do not have an actual justification narrows the type of dress codes which will receive judicial scrutiny.

CONCLUSION

Public school dress codes, although a seemingly benevolent cure for the ills of the public school system, may often unconstitutionally restrict students’ right to free speech. Significantly, the circuit courts have not yet agreed upon a standard to examine the constitutionality of these regulations. The standards that have been set forth, however, either give too much deference to school officials or fail to consider adequately the needs of maintaining a productive educational environment.

Courts should examine the constitutionality of dress codes using a First Amendment jurisprudence that addresses symbolic speech and student free speech rights. Considering whether a type of dress meets the standards for the protection of symbolic speech ensures that courts will not have to continually review school officials’ judgments. Furthermore, by examining whether a dress code has legitimate purposes, or is instead an attempt to suppress unpopular views, courts will be protecting students’ First Amendment rights.

\textsuperscript{162} See supra notes 33-35 and accompanying text (discussing the clash between the inculcative theory of education and restrictions on student speech).