

THE UNCONSTITUTIONALITY OF STUDENT DRESS CODES

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INTRODUCTION

This Article is about the constitutionality of mandatory student dress code and uniform policies.¹ The issue of what students may wear in American public junior high and high schools (schools) has been contentious for years. Although the U.S. Supreme Court has not addressed this issue in more than 50 years, students usually lose such cases in the lower courts.² Given the undeniable communicative aspects of dress,³ it is perplexing that judges have provided so little constitutional protection for this effective mode of communication when students are on campus, where they spend much of their day during the school year. Dress can not only serve as expressive conduct, but as an extremely effective means of communication, especially in a school setting. In some situations, dress can be more effective at communicating than pure speech, whether oral or written. However, under the constitutional status quo, state lawmakers, school board officials, and administrators have considerable authority to enact and enforce dress codes without raising any serious First Amendment problems. This Article approaches this constitutional question from the perspective of the constitutional and moral importance of student speech and relies heavily on the imperative of ensuring that school authorities respect the personal autonomy of every student because of—not in spite of—the fact that many of them are not yet adults.

The American Civil Liberties Union has expressed constitutional concerns about dress codes and mandatory uniform policies.⁴ Such codes can be racist and sexist.⁵ They make it harder for marginalized students,

1. Dress codes could cover length of skirts and shorts, sleeveless tops, spaghetti straps, leggings, pajamas, bare midriffs, necklines, hairstyles, gang attire and accessories, bulky clothing, loose shirts, head coverings, sunglasses, tattoos, piercings, and tight or revealing clothing. Megan Cooper, *School Dress Codes: What They Are & Why Students Are Fighting Back*, LOVE TO KNOW, <https://www.lovetoknow.com/parenting/teens/school-dress-codes> (last updated July 22, 2024). This list is not exhaustive. Under this broad definition, I include mandatory uniform policies and physical appearance as well. However, I do not include clothing with writing, which would be pure speech, like a T-shirt that expresses a political message.

2. TODD A. DEMITCHELL, *THE LEGAL AND POLICY CHALLENGES OF STUDENT DRESS AND GROOMING CODES: BALANCING RIGHTS AND RESPONSIBILITIES* xiii (2024) [hereinafter *THE LEGAL AND POLICY CHALLENGES*].

3. See, e.g., DIANA CRANE, *FASHION AND ITS SOCIAL AGENDA: CLASS, GENDER, AND IDENTITY IN CLOTHING* 100 (2000).

4. Sherwin et al., *4 Things Public Schools Can and Can't Do When It Comes to Dress Codes*, ACLU (Sept. 21, 2022), <https://www.aclu.org/news/womens-rights/4-things-public-schools-can-and-cant-do-dress-codes>.

5. Li Zhou, *The Sexism of School Dress Codes*, ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/education/archive/2015/10/school-dress-codes-are-problematic/410962/>; see Christopher Rodgers, *Don't Touch My Hair: How Hegemony Operates Through Dress Codes to Reproduce Whiteness in Schools*, 19 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 175, 176 (2022).

including those who are gender non-conforming, to fight back against stigmatization.⁶ Dress restrictions may also inhibit or prevent religious students from practicing their respective religions and expressing their deepest convictions.⁷ Last but not least, dress can convey political viewpoints. Doctrinally, political speech is core speech in almost all other contexts, whether a student is wearing a Make America Great Again or Black Lives Matter cap.⁸ Beyond these concerns, dress codes are coercive; they enforce conformity at an age where students are impressionable—precisely when they should be learning how to express their respective identities for themselves. At minimum, in a society that is supposed to be committed to diversity and freedom of expression, this current state of affairs must be scrutinized more carefully. For some students, their choice of clothing may be the primary means of expressing their individuality.⁹ Because school dress codes often interfere with the ability of teenagers to communicate how they see themselves to others, they chill valuable speech; equally important, they impede the development of teenagers' autonomous capacities.¹⁰ This sort of censorship should not occur, particularly when students are at a critical stage of their moral and intellectual development.

This Article builds on John Stuart Mill's profound insights into what makes a human life worthwhile, namely self-development and individuality.¹¹ A Millian approach lends itself to normative constitutional analysis of student dress codes by accounting for the considerable room adolescents need for experimentation as they form and revise their identities as they near adulthood. With these concerns in mind, this Article constructs a perfectionist Millian argument to defend the constitutional conclusion that school authorities may not dictate to their students how they may dress. This Article argues that constitutional protection for expressive conduct through student dress and appearance more generally serves this end. The effect of dress codes is to deprive many students of an easily accessible, rhetorically powerful channel of communication when they need it the most.

This Article first provides an overview of the theoretical and historical background of student speech and dress codes, including the applicable case

6. Wendy Cummings-Potvin, *The Politics of Dress Codes and Uniform Policies: Towards Gender Diversity and Gender Equity in Schools*, 122 INT'L J. EDUC. RSCH., Sept. 25, 2023, at 1, 6.

7. In this article, I do not engage in free exercise of religion analysis.

8. The term "core" speech is found in academic literature on free speech, denoting the importance of political speech in a democracy. See generally RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 13–14 (1992) (explaining the importance of free speech to self-governance).

9. *Bear v. Fleming*, 714 F. Supp. 2d 972, 983 (D.S.D. 2010).

10. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 957–58 (4th ed. 2011) (noting the protection of personal autonomy as a rationale for free speech).

11. ALAN RYAN, J.S. MILL 125–33 (2016).

law. Second, it elaborates on the legal concept of expressive conduct and discusses how dress codes negatively impact racial minorities, women, and other marginalized students. Third, it spells out the place of personal autonomy in American constitutional law and its relationship to free speech, with attention to how such autonomy can be cast in the perfectionist language of Millian self-development and individuality. Specifically, it draws on Mill's idea of experiments in living to elaborate on how dress, as self-expression, can serve these ends. Fourth, it explains how dress can enhance the communicative impact of what a student is saying about themselves and why content-neutral dress codes unfairly take an essential channel of communication away from them. Fifth, this Article addresses countervailing state interests: incitement to violence, threats, safety, substantial disruptions to the learning environment, and reducing socioeconomic competition. It concludes by showing that while some state interests are important, it is not evident that dress codes are substantially related to these interests.

I. THEORETICAL AND HISTORICAL BACKGROUND

A. Student Free Speech Rights

Not until the late 1960s did federal courts finally start to take constitutional challenges to restrictions on student speech more seriously.¹² In the last 50 years, the Court has exhibited ambivalence about the value of junior high and high school students' speech.¹³ In fact, even the recent *Mahanoy* decision may not provide sufficient room for students to criticize administrators for how they are doing their jobs.¹⁴ If the fact pattern had been different—imagine that B.L. was not off-campus on a weekend—the Court may not have protected what she had said, including her vulgar language. After the famous *Tinker* decision, which created the *substantial disruption test*, the Justices gradually curtailed student free speech rights on campus; then in the recent *Mahanoy* decision, they protected some off-campus speech outside of school hours on social media.¹⁵ They did not protect speech that might be substantially disruptive.¹⁶ One legal scholar downplayed the benefits of letting students exercise their free speech rights in a book-length

12. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 72 (2018).

13. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, (1988); *Morse v. Frederick*, 551 U.S. 393 (2007); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

14. Justin Driver, *The Coming Crisis of Student Speech*, 76 *STAN. L. REV.* 1515–23 (2024).

15. *Tinker*, 393 U.S. at 513–14; *Mahanoy*, 141 S. Ct. at 2046–47.

16. *Mahanoy*, 141 S. Ct. at 2048.

treatment of the topic, instead calling attention to its bad consequences.¹⁷ This position is predicated on two assumptions: (1) student speech, including dress and appearance more generally, is not particularly important or comparable to the importance of student speech on a college campus;¹⁸ and (2) the countervailing state interests in censorship are strong enough in the context of secondary education to supersede the importance of students' personal decisions on how to dress.¹⁹

The lack of concern for the value of student speech extends far beyond dress codes. Currently, school officials can ban student speech that is substantially disruptive,²⁰ sexually themed²¹ (or perhaps merely offensive or inappropriate), school-sponsored (when the imprimatur of the school is on the speech, like an article in a student newspaper),²² or that advocates the consumption of illegal drugs²³ (or arguably, other kinds of illegal activity). In other words, student speech is afforded considerably less constitutional protection at public schools compared to other venues, even when the speech is political, provided that it falls into one of the aforementioned unprotected categories developed for the context of secondary education. Not only is too much of the law on the school officials' side, but officials have strong incentives to restrict student speech as well. Understandably, they want to control the educational environment, avoid controversy, and not antagonize parents and other members of the community. Expressive conduct and free speech more generally may disrupt the educational environment. At best, there will be trade-offs.

B. Judicial Decisions

The *Tinker* decision did not extend constitutional protection to the regulation of skirt length, clothing type, or hairstyle.²⁴ Therefore, *Tinker*'s substantial disruption test may not apply when it comes to dress codes.²⁵ 15 years ago, the Ninth Circuit upheld a school uniform policy.²⁶ That

17. ANNE PROFFIT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* (2009) (arguing that constitutional protection of student speech in public schools interferes too much with the primary purpose of education because order is needed in such an environment).

18. *Id.* at 15, 17.

19. *Id.* at 17.

20. *Tinker*, 393 U.S. at 513.

21. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

22. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

23. *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

24. *Tinker*, 393 U.S. at 507–08.

25. DAVID L. BRUNSMA, *THE SCHOOL UNIFORM MOVEMENT AND WHAT IT TELLS US ABOUT AMERICAN EDUCATION: A SYMBOLIC CRUSADE* 55 (2004).

26. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 441 (9th Cir. 2008).

decision reflects a trend that began in the 1990s where dress codes became more prevalent in American public schools, ostensibly as a response to gang violence.²⁷ In 1996, President Bill Clinton called for mandatory dress codes.²⁸ In the name of putting “discipline and learning back in our schools,” President Clinton had the Department of Education send manuals to every school district in the country explaining how to enforce a school uniform policy.²⁹ As two legal scholars explain:

In a relatively short period of time, the overlapping communities of lawyers, politicians, opinion-makers, and ordinary citizens who comprise our constitutional culture reconsidered the constitutionality of public school uniforms and broad student dress codes. The constitutional culture shifted from a set of background assumptions that understood such policies as antithetical to our collective constitutional values and unlikely to survive constitutional scrutiny to a new set of assumptions that treated such dress policies as constitutionally unproblematic.³⁰

At present, across the country, dress codes vary from school to school, yet they are not uncommon.³¹ Indeed, mandatory uniforms are increasingly required in American public schools.³² It is difficult for parents to sue schools that may have violated their children’s free speech rights.³³ In cases where parents, on behalf of their children, challenge the legality of such dress codes, some judges defer to school officials, trusting them to use their judgment appropriately.³⁴ The assumption appears to be that school officials know best because they are experts in education and base their decisions on years of experience. In the eyes of critics, if students have the constitutional right to

27. David L. Hudson Jr., *Clothing, Dress Codes & Uniforms*, FIRST AMEND. CTR. (Apr. 1, 2002), <https://web.archive.org/web/20160322232800/http://www.firstamendmentcenter.org/clothing-dress-codes-uniforms>.

28. Alison Mitchell, *Clinton Will Advise Schools on Uniforms*, N.Y. TIMES (Feb. 25, 1996), <https://www.nytimes.com/1996/02/25/us/clinton-will-advise-schools-on-uniforms.html>; Bill Clinton, *The President’s Radio Address*, 1 PUB. PAPERS 324–25 (Feb. 24, 1996).

29. *Id.*

30. Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 52–53 (2019).

31. *Id.* at 51.

32. *School Uniforms*, INST. OF EDUC. SCI., <https://nces.ed.gov/fastfacts/display.asp?id=50> (last visited Dec. 14, 2025).

33. CATHERINE J. ROSS, *LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS’ FIRST AMENDMENT RIGHTS* 5 (2015).

34. See CHEMERINSKY, *supra* note 10, at 1193; RICHARD FOSSEY & TODD A. DEMITCHELL, *STUDENT DRESS CODES AND THE FIRST AMENDMENT: LEGAL CHALLENGES AND POLICY ISSUES* 102 (2014) (noting that “the outcome of this [dress code] litigation has been mixed”).

dress how they choose, then some students would dress in ways that are vulgar, offensive, or too sexually provocative.³⁵

Many schools implement such codes or uniform policies to improve their educational environments.³⁶ Many policymakers likely have admirable intentions in the sense that they believe what they're doing is best for their students' education and welfare. However, some of them may have partisan reasons for not allowing students to dress in certain ways, which may amount to viewpoint discrimination. Those who support dress codes maintain that they improve discipline, prevent gang-related violence, reduce socioeconomic divisions, foster school spirit, and help staff identify trespassers.³⁷ Other proponents believe that dress codes create "a purposeful learning environment that reflects community values."³⁸ These days, school districts must worry about learning and safety.³⁹ According to two commentators, "dress-code litigation subverts a primary mission of public education, which is to instill a decent respect for community values and civil speech."⁴⁰

The point is not that all school administrators will be hostile to protecting student expressive conduct through dress; rather, it is that some and perhaps too many of them will not care enough. This indifference necessitates a more proactive approach on the part of judges to enlarge the scope of the constitutional right to free speech in public schools to cover expressive conduct like clothing choices. In one case, a principal punished students for wearing "I ♥ Boobies!" bracelets to promote breast cancer awareness.⁴¹ In another case, school officials suspended students for wearing Confederate Flags on the back of their T-shirts.⁴² In the *Canady* case, involving mandatory school uniforms, the Fifth Circuit applied the *O'Brien Test*⁴³ for content-neutral speech restrictions and upheld the lower court's decision to grant summary judgment.⁴⁴ In that decision, the court implied that the First

35. Todd A. DeMitchell, *The Law and Student Clothing*, in *THE SCHOOL UNIFORM MOVEMENT AND WHAT IT TELLS US ABOUT AMERICAN EDUCATION: A SYMBOLIC CRUSADE* 51, 52 (Daniel L. Brunsma ed., 2004).

36. David L. Hudson, Jr. & Mahad Ghani, *School Dress Codes: A First Amendment Breakdown*, FREEDOM F., <https://www.freedomforum.org/clothing-dress-codes-uniforms> (last visited Dec. 14, 2025).

37. *Id.* According to the National Center for Education Statistics, in the 2019–2020 school year, 18.8% of public schools required that students wear uniforms. *School Uniforms*, *supra* note 32.

38. FOSSEY & DEMITCHELL, *supra* note 34, at 3.

39. Eesha Pendharker, *School Dress Code Debates, Explained*, EDUCATIONWEEK (Dec. 27, 2022), <https://www.edweek.org/leadership/school-dress-code-debates-sexist-explained/2022/12>.

40. FOSSEY & DEMITCHELL, *supra* note 34, at 103.

41. *H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 399 (E.D. Pa. 2011).

42. *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 538 (6th Cir. 2001).

43. *See infra* Part IV.B.

44. *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 443, 445 (5th Cir. 2001).

Amendment applied to student dress, and therefore recognized that student dress, as expressive conduct, may contain sufficient communicative content to trigger First Amendment analysis.⁴⁵ After all, dress can be communicative: it “can indicate either conformity or resistance to socially defined expectations for behavior.”⁴⁶ The burden of proof is on the student challenging the constitutionality of the dress code to show the communicative elements of her expressive conduct.⁴⁷

II. EXPRESSIVE CONDUCT

A. *The Law*

The legal concept of expressive conduct itself is complicated because of the existence of both speech and non-speech elements. How judges conceptualize expressive conduct makes an enormous difference as well when they examine dress codes to determine their constitutionality. Many kinds of expression do not take the form of words.⁴⁸ Nor is written or spoken language necessarily the best medium for expressing ideas.⁴⁹ Think of the rhetorical power of the rainbow symbol or a black fist raised in the air. The Court has not provided consistent precedent to help determine when nonverbal communication is subject to First Amendment analysis.⁵⁰ Since 1931, the Court has treated expressive conduct (previously known as symbolic speech) as if it were akin to pure speech.⁵¹ Such conduct requires free speech analysis when someone does something to “say something,” or, with the particular concern of this Article in mind, when a student wears something to convey a message without words.⁵² In *Spence*, the Court established two requirements for conduct to be expressive enough to trigger First Amendment analysis: (1) a particularized message (the speaker’s intent) and (2) the likelihood that a reasonable person in the audience would understand it (while exactly how well they have to understand the message

45. *Id.* at 440.

46. RUTH P. RUBINSTEIN, DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE 3 (2d ed. 2001).

47. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

48. MARK V. TUSHNET ET AL., FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT 18 (2017).

49. Lea Salje & Robert Mark Simpson, *Composing Thoughts: Free Speech and the Importance of Thinking Aloud in Music and Images*, 30 LEGAL THEORY 83, 84 (2024).

50. TUSHNET ET AL., *supra* note 48, at 18.

51. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

52. Katrina Hoch, *Expressive Conduct*, FREE SPEECH CTR. (Dec. 1, 2025), <https://firstamendment.mtsu.edu/article/expressive-conduct/>; see CHEMERINSKY, *supra* note 10, at 1097–98.

remains an open question).⁵³ On top of that, there must not be an important governmental interest that supersedes the right to free speech.⁵⁴ A driver who flips off a law enforcement officer, for instance, is not only intending to express disdain for the police or how the officer is doing her job; others who witness the incident, including the addressee herself, would also get the gist of the message. If the speech is covered by generally expressive media like painting, music, poetry, parading, displaying flags, or wearing armbands, even when the speech act lacks a “particularized message,” it constitutes expression.⁵⁵

Traditionally, student dress fails to meet the second prong of *Spence*’s expressive conduct test. The trouble is that all dress codes infringe upon the clothing choice of students, even when they are meant to be expressive. Mandatory uniforms are even worse in this regard because they may constitute compelled speech.⁵⁶ The *Spence* test developed for expressive conduct is not appropriate for free speech analysis of dress codes in public schools. First, the message clothing choice is trying to convey may be vague, ambiguous, or hard to interpret for other reasons. The student themselves may not be entirely clear on what they are trying to say. A student might wear a Colin Kaepernick jersey because they are a San Francisco 49ers fan or supports Black Lives Matter (or both). Under free speech doctrine, though, nobody should be penalized for being inarticulate. If a student walks around their neighborhood with a sign containing a confusing political message, that sign still constitutes speech; it is just speech that is open to considerable interpretation. The meaning of dress can be “undercod[ed]” in American society, “leaving much to the imagination of the perceiver.”⁵⁷ Above all, the choice of clothing may be intended to be communicative and, therefore, may constitute self-expression.⁵⁸ Some students “choose their school clothing to make some sort of statement.”⁵⁹ The point is not that all fashion choices on the part of students have this purpose; it is that enough of them probably do, in one way or another, to merit a presumption of constitutional protection.

53. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (“An intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it.”); see *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

54. *Spence*, 418 U.S. at 411; *Johnson*, 491 U.S. at 403 (noting that content-based regulations require a stronger state interest than content-neutral regulations).

55. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 569 (1995).

56. See THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 234–36 (describing dress codes and compelled speech).

57. Kimberly A. Miller-Spillman, *Dress as Nonverbal Communication*, in THE MEANINGS OF DRESS 79, 80 (Bloomsbury Publ’g 3d ed. 2012) (1999).

58. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 52 (1982).

59. FOSSEY & DEMITCHELL, *supra* note 34, at ix.

Furthermore, the Court has not applied the *Spence* test since *Texas v. Johnson*.⁶⁰ As such, it is arguably no longer good law.⁶¹ Applying this approach to school dress codes to determine whether expressive conduct triggers free speech analysis carries the unacceptable risk of protecting too little valuable speech. Self-expression can be extremely valuable, like disclosing one's feelings about an unjust war as in the fact pattern of *Tinker*, even if the idea expressed will not contribute much to the marketplace of ideas. The Court has not yet expanded the legal definition of expressive conduct to make it less underinclusive.

That is the bad news. The good news is that recently, in a different context, two conservative justices have been willing to do the latter. In *303 Creative*, both parties stipulated that graphic and website design are expressive in nature.⁶² As it turns out, a customized wedding website design is pure speech.⁶³ Although the Court decided *Masterpiece Cakeshop* on free exercise of religion grounds, Justices Clarence Thomas and Neil Gorsuch maintained that the baker should have won on the free speech theory.⁶⁴ In Justice Thomas's concurrence, in which Justice Gorsuch joined, Justice Thomas contended the baker's conduct was expressive and, therefore, was compelled speech.⁶⁵ As Justice Thomas correctly notes:

[T]he Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.⁶⁶

For Justice Thomas, these cases do not require a "particularized message."⁶⁷ In Michael McConnell's view, a baker who makes custom cakes, like a dressmaker who refuses to design an inaugural gown for Melania Trump, may not be legally compelled to make a wedding cake for a

60. Richard P. Stillman, Note, *A Gricean Theory of Expressive Conduct*, 90 U. CHI. L. REV. 1239, 1243 (2023).

61. *Id.* at 1244 (stating that one interpretation of "the Court's repeated snubbing of the *Spence* test . . . [is that the test,] as originally stated, is no longer good law").

62. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2309 (2023).

63. *Id.* at 2312.

64. *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring).

65. *Id.* at 1742.

66. *Id.* at 1741–42.

67. *Id.* at 1742.

same-sex couple to avoid celebrating ideas which the baker rejects.⁶⁸ Both a wedding cake and an inaugural gown can be expressive.⁶⁹ No doubt, some ideas ought to be rejected. For instance, it stands to reason that very few bakers would want to be forced by the law to make a birthday cake for a white supremacist with a chocolate swastika on top. But with McConnell's approach, "[t]here is no need to draw lines between architects, speech writers, public relations firms, photographers, musicians, bakers, or florists: no one engaged in an expressive activity can be compelled to use their talents in support of a cause they disapprove of."⁷⁰ For McConnell, *Masterpiece Cakeshop* was a compelled speech case because the creator of the cake was being forced to speak and endorse a viewpoint that he rejected. As McConnell puts it, the "fashioning of expressive symbols cannot be compelled."⁷¹ Along similar lines, a mandatory uniform policy may make students express a message they do not want to, such as school spirit.⁷² If this is the case, there may be a compelled speech issue as well.⁷³

Despite a U.S. Court of Appeals' earlier ruling to the contrary, it may be appropriate to extend the aforementioned rationales to clothing choices of students.⁷⁴ In colonial America, dress denoted social standing, and gentleman deliberately dressed differently to distinguish themselves from commoners.⁷⁵ Sumptuary laws in Europe reinforced social hierarchy and patriarchy by preventing certain people "from wearing certain fabrics, colors, and garments."⁷⁶ As they always have, people will continue to use clothing to convey a wide range of messages, as this author does when he wears his San Francisco 49ers jersey. Most of these acts will be trivial, yet enough of them will be consequential or have the potential to be so.

A court cannot concern itself with whether a speech act happens to be trivial, assuming a standard could be agreed to in the first place, due to obvious concerns about selective enforcement. The First Amendment

68. Michael W. McConnell, *Dressmakers, Bakers, and the Equality of Rights*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 378, 380 (William N. Eskridge, Jr. ed., 2019).

69. *Id.* at 384.

70. *Id.*

71. *Id.*

72. *See* *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir., 2017) (finding a school logo on a uniform, "Tomorrow's Leaders," to be unconstitutional).

73. *See* THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 234–36 (describing dress codes and compelled speech).

74. *See, e.g.,* *Zalewska v. Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) ("[A] person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection.").

75. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 33 (1992).

76. Deborah L. Rhode, The Injustice of Appearance 61 STAN. L. REV. 1033, 1074 (2009).

protects all ideas, not only those that are well formulated or articulated.⁷⁷ Surely, a speaker or writer does not have to be bright or knowledgeable to be allowed to say or write whatever they happen to believe.

The few categories of unprotected speech, moreover, are narrow. For example, it is deliberately designed to be hard for the government to prove that speech is incitement⁷⁸ or obscene,⁷⁹ or for a public figure to prove they have been defamed.⁸⁰ Generally, when it comes to pure speech, the mode of expression is equally as important as the content of the speech itself.⁸¹ Judges should be willing to deviate from tradition given that society has been slow to recognize that speech can take new non-verbal forms. The appropriate scope of free speech may change over time. With the advent of artificial intelligence (AI), the world is on the cusp of new technological changes in communication that will force courts to view expressive conduct differently.

Many students will not use their appearance to make political statements or share their identities with others, which is fine. For instance, students who play football—or may only want to let their classmates know that they are football players—can share this information by wearing their jerseys to school on a Friday before the game (or they may want to express solidarity with their teammates). That a student wants to dress in a certain way to be cool or trendy should not take away from the fact that dress can be used to communicate other, less-trivial information effectively. In an environment with no risk of punishment, and only peer pressure and social media to worry about, students may reflect more deeply on how they see themselves and how they want others to see them.

The primary concern about restrictions on clothing choices is that these restrictions prevent students from dressing how they want to dress, thereby depriving them of their voice when it's needed most. Lower courts need more guidance regarding the distinction between mere conduct and expressive conduct.⁸² While the traditional approach is defensible—not all conduct is expressive, after all—the particularized message requirement should be relaxed in the context of secondary schools. By incorporating a strong presumption that the speaker intended to convey some message through

77. There is no Supreme Court decision in modern free speech doctrine that imposes a requirement that the oral or written expression of an idea be eloquent. Indeed, speakers and writers may use vulgar words. *See* *Cohen v. California*, 403 U.S. 15 (1971). In fact, the Court allowed a student to use the “F” word in the recent *Mahanoy* decision. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 3028, 2043 (2021).

78. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

79. *Miller v. California*, 413 U.S. 15, 23–24 (1973).

80. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

81. *See Cohen*, 403 U.S. at 21, 26 (1971).

82. Ross, *supra* note 33, at 299.

dress, even when the student's intention is vague or ambiguous, courts can err on the side of free speech, reducing the risk of false positives (where the student intended to say something through their dress but their intention is in dispute). They can also establish a more flexible standard to decide whether the audience would understand the message.

Doctrinally, the most promising way of defending student expressive conduct more generally is to highlight how such codes compromise political speech and point out how a dress code could constitute viewpoint discrimination. This concern arose in *Tinker* with respect to the black armbands the children wore to school.⁸³ In the last decade, students have made critical statements about immigration policy by wearing T-shirts.⁸⁴ A student who wears a Colin Kaepernick jersey to school could be commenting on policing, racial justice in America, or how the National Football League mistreated the former quarterback when the owners blackballed him. A student who wears a Nick Bosa jersey may be making a statement in support of Make America Great Again. A student who wears a Brock Purdy jersey may just be a passionate San Francisco 49ers fan, which is its own message—just not a political one. Yet, it could be a political message if the fan was also trying to say something about Purdy's religious beliefs and group prayers on the field after games.

It is possible that a student who wears a Colin Kaepernick jersey to school because they are a San Francisco 49ers fan and cannot afford a newer Brock Purdy jersey. Intentions can be vague or ambiguous, even in verbal or written communication, and could be deliberately so. Regarding expressive conduct, it will be nearly impossible to always identify the student who does not intend to say anything by how they dress as opposed to the student who intends to say something but is not allowed to do so under the school dress code. Under such circumstances, students should be given the benefit of the doubt because their speech is instrumental to teenagers' Millian self-development. Judges ought to interpret the particularized message requirement as generously as possible to avoid under-protecting student speech. After all, even nude dancing can qualify as speech, albeit low value speech.⁸⁵

In 1998, a girl violated her school dress code that banned hats by wearing an African headdress, and the court found that others would not comprehend

83. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

84. *See, e.g., Madrid v. Anthony*, 510 F. Supp. 2d 425, 427 (S.D. Tex. 2007) (describing a student walk-out to protest immigration policy).

85. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (stating that nude dancing lies only “within the outer perimeters of the First Amendment” and is “only marginally” expressive).

her cultural message.⁸⁶ This case illustrates why the second part of the *Spence* test for expressive conduct—which requires establishing that a reasonable observer would likely understand the message—must also be relaxed or discarded. Here, it is enough to know that she is identifying herself as being proud of her African heritage. Even the most obtuse student, teacher, or administrator is likely to understand what is being “said” more or less. The audience should not have to know exactly what the student is saying by wearing a headdress for her speech to qualify as expressive conduct. The exercise of free speech should not turn on the cultural or religious literacy of those who are exposed to the message(s).

B. Marginalized Students

Fashion choices also implicate important free speech issues concerning culture, race, sex, sexual orientation, and gender non-conformity.⁸⁷ Considerable empirical evidence indicates that racial minorities and LGBTQ+ are disproportionately affected by the imposition of dress codes.⁸⁸ In a country like the United States, which has denigrated racial and ethnic identities (and other minorities) for most of its history, judges should not overlook the potential for dress to be a means of resistance or dissent. Students of color should not feel like they have no other choice but to adopt Eurocentric dress or hairstyles in a country that has a record of trying to forcefully assimilate different minority groups and appropriating many of their distinct contributions to American culture. The Court has not yet decided the extent to which schools may restrict the hairstyles of their students.⁸⁹ At some schools, marginalized students will find themselves in precarious situations where they experience bullying, microaggressions, or worse.⁹⁰ The opportunity to engage in expressive conduct is crucial for those who want to fight back. As Ruth Rubinstein remarks, “[s]uch dress may serve as a public announcement that the group has declined to accept the ideas or values of mainstream culture; their clothes indicate heresy.”⁹¹

In a liberal society, there should be no such thing as heresy. Dress can function as counterspeech, calling into question widespread taboos, norms, and beliefs that may be unjust or lack evidentiary support. In *Bivens v.*

86. ROSS, *supra* note 33, at 132.

87. *Id.*

88. Alyssa Pavlakis & Rachel Roegman, *How Dress Codes Criminalize Males and Sexualize Females of Color*, 100 PHI DELTA KAPPAN 54, 54 (2018).

89. Hudson & Ghani, *supra* note 36.

90. *See, e.g.*, ELIZABETH KANDEL ENGLANDER, BULLYING AND CYBERBULLYING: WHAT EVERY EDUCATOR NEEDS TO KNOW 19–20 (2013).

91. RUBINSTEIN, *supra* note 46, at 14.

Albuquerque Public Schools, the judge questioned whether sagging pants convey any particular message, stating “[s]agging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States.”⁹² Evidently, the Judge meant that even if sagging pants amounted to a message, the student who had the burden of proof did not show that reasonable observers would recognize any particular message coming from wearing pants in that particular manner. Much depends on how one interprets the totality of the circumstances, of course. No doubt, some administrators and judges will be less racially and culturally sensitive than they should be. The lives of lower-income young Black and Latino men already are heavily policed in different ways.⁹³ Wearing sagging pants could be an act of defiance against the White norms of American society. Surely, that possible intention cannot be ruled out in advance.

In disclosing one’s identity, dress can encourage other students to reflect on how they see themselves and their place in society as well. The choice of clothes can signal who one is, what one cares about, and what that individual thinks our society ought to be like; its communicative value should never be underestimated just because a student happens to be on campus at a public school. Dress is both speech and conduct; a sharp distinction between them is unhelpful.⁹⁴ Another serious concern with dress codes, then, through their foreseeable disparate impact, is that they discriminate against those who find themselves in racial or ethnic minority groups.⁹⁵ As an example, a Black high school student was suspended for more than a month for wearing a natural hairstyle.⁹⁶

The list of possible examples is endless. A Palestinian student may wear a Keffiyeh to campus or a shirt with a Hamas flag to criticize the war in Gaza or to call for Palestinian statehood. A Sikh student might have kesh (uncut hair) wrapped in a turban for religious reasons.⁹⁷ A Native American student

92. *Bivens v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 561 (D.N.M. 1995) (arguing that the expressive conduct message would not have been understood by those who were merely exposed to it).

93. VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 5, 7 (John Hagan ed., 2011).

94. MATTHEW H. KRAMER, *FREEDOM OF EXPRESSION AS SELF-RESTRAINT* 25–26 (2021).

95. *Hair, Discipline, and Race: A Call to Cut Discrimination Out of School Dress Codes*, EQUITY ALL., <https://equityalliance.stanford.edu/content/hair-discipline-and-race-call-cut-discrimination-out-school-dress-codes> (last visited Dec. 14, 2025); Cole Claybourn, *Why School Dress Codes Are Often Unfair*, U.S. NEWS: EDUC. (Dec. 23, 2022), <https://www.usnews.com/education/best-high-schools/articles/why-school-dress-codes-are-often-unfair>.

96. THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 204. However, by 2023, “twenty states had passed CROWN [(Creating a Respectful and Open World for Natural Hair)] Acts.” *Id.* at 206.

97. MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 155 (2d rev. ed., 2014).

may want to wear their hair long as a symbol of cultural pride. A cisgender woman might want to appear in traditionally male attire at her prom to protest sex stereotypes about how women are supposed to dress and act at formal events. A non-binary student may want to cross-dress or dress in a non-gendered way to subvert gender fashion norms. A transgender student most likely desires to dress in a manner that corresponds with their chosen gender to convey to others how they see themselves (and how they want others to see them). A young Black person may want to wear locs, braids, corn rows, or an afro to make a statement about pride in their heritage. A Muslim student may want to wear a hijab.

As Justice Anthony Kennedy writes, “[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”⁹⁸ The disclosure of a student’s identity, through dress and physical appearance, can be intrinsically valuable, regardless of the effects of the dress. Even in an egalitarian society, there are bound to be disadvantages to being a member of any minority group. One of these disadvantages is that members of the majority may not understand or even make the effort to learn how members of the minority see themselves.

C. Young Women

Over time, clothing has functioned as a vehicle of gender socialization.⁹⁹ Even today, dress codes have unfairly targeted young women,¹⁰⁰ which can cause them to conceal their sexuality.¹⁰¹ In *Peltier*, the Fourth Circuit struck down a charter school’s skirts-only rule under equal protection and recognized that Title IX applies to sex-based dress codes.¹⁰² However, the Fourth Circuit’s earlier 2021 panel decision was vacated on rehearing en banc.¹⁰³ Several writers worry about the contribution of dress codes to such

98. *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

99. RUBINSTEIN, *supra* note 46, at 103–04.

100. “Young women” in this section refers to teenagers.

101. Recent federal data supports this conclusion:

According to GAO’s nationally generalizable review of public school dress codes, districts more frequently restrict items typically worn by girls—such as skirts, tank tops, and leggings—than those typically worn by boys—such as muscle shirts. Most dress codes also contain rules about students’ hair, hair styles, and head coverings, which may disproportionately impact Black students and those of certain religions and cultures, according to researchers and district officials.

U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105348, K-12 EDUCATION: DEPARTMENT OF EDUCATION SHOULD PROVIDE INFORMATION ON EQUITY AND SAFETY IN SCHOOL DRESS CODES (2022).

102. *Peltier v. Charter Day Schs., Inc.*, 8 F.4th 251, 274 (4th Cir. 2021) (creating a double standard by not requiring boys to wear the same attire).

103. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130–31 (4th Cir. 2022).

discrimination.¹⁰⁴ One commentator focuses on gender (understood as a chosen identity, not a biological category) discrimination and attempts to establish that coerced conformity causes poor academic and mental health outcomes.¹⁰⁵ Another commentator, who endorses one rationale behind student dress codes,¹⁰⁶ bemoans the lack of clear constitutional standards delineating what students may wear while they are on campus.¹⁰⁷

In American society, the tremendous social pressure to care about appearances falls disproportionately on women, who often internalize this pressure.¹⁰⁸ The phenomenon of lookism—where people are judged on their physical appearance and are treated differently in accordance with it—is ubiquitous.¹⁰⁹ A more permissive dress code for young women may help them to develop a positive body image amid so much social pressure to care so much about their physical appearance. Above all, what they wear must be their choice. Back in the day, as more than a mere fashion statement, a belly shirt, low-cut jeans, or spaghetti string tank top could be a way of bucking convention about how “proper” young women were expected to dress and behave. In other words, what women wear can be transgressive. In the past, young women have been adversely affected by dress codes.¹¹⁰ There have been more dress code restrictions on women because schools demanded that they dress more modestly to cover their bodies (according to traditional views of feminine modesty).¹¹¹ That practice is a kind of sex discrimination and slut-shaming; it reflects a fear that young women are dressing too provocatively, thereby serving as a distraction.¹¹² Teenagers should not be

104. See, e.g., Ariel G. Siner, Note, *Dressing to Impress? A Legal Examination of Dress Codes in Public Schools*, 57 SANTA CLARA L. REV. 259 (2012) (demonstrating how dress codes reinforce widely-held stereotypes about how young women are supposed to behave and how they are supposed to understand their sexuality); Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public Dress Codes*, 50 UNIV. RICHMOND L. REV. 1039 (2016) (discussing school dress code sexualization of girls and its broader cultural implications).

105. See Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Early Point for Trans* School to Prison Pipeline*, 24 J. GENDER, SOC. POL’Y & L. 263 (2015) (arguing that dress codes dictate to students that their gender is supposed to conform to their biological sex).

106. That is, to teach students how to dress appropriately in the workplace.

107. See Jeremiah R. Newhall, *Sex-Based Dress Codes and Equal Protection in Public Schools*, 12 APPALACHIAN J.L. 209 (2013).

108. See generally HEATHER WIDDOWS, *PERFECT ME: BEAUTY AS AN ETHICAL IDEAL* (2018).

109. See generally ANDREW MASON, *WHAT’S WRONG WITH LOOKISM? PERSONAL APPEARANCE, DISCRIMINATION, AND DISADVANTAGE* (2023). By contrast, later in life, men tend to be judged by their income and professional status. NANCY ETCOFF, *SURVIVAL OF THE PRETTIEST: THE SCIENCE OF BEAUTY* 79–80 (1999).

110. See generally Rebecca Raby, “*Tank Tops Are Ok but I Don’t Want to See Her Thong:*” *Girls’ Engagements with Secondary School Dress Codes*, 41 YOUTH & SOC’Y 333 (2010).

111. ROSS, *supra* note 33, at 132.

112. See Hudson & Ghani, *supra* note 36 (discussing the illegality of double standards when it comes to dress codes for young men and women).

taught that there is something shameful about women's bodies (or sexuality) or that women are somehow to blame for their role in stoking young straight men's sexual desires and their inappropriate (or worse) behavior. The situation is not that of Iran, but the rationale for covering women's bodies is disturbingly similar—namely, to blame them for attracting attention.¹¹³ Anyone who has been on a college campus when the weather is nice knows that straight young men are expected to behave appropriately even when young women dress as if they were going to the gym or the beach. Women are not responsible for catcalls and staring. A society that is committed to sex equality should not reinforce a double standard.

III. SELF-DEVELOPMENT AND INDIVIDUALITY

A. *The Place of Autonomy in American Constitutional Law*

One advantage of a Millian approach to self-expression is that it covers considerably more expression than other traditional arguments used to defend free speech. Nobody must attempt to draw a line between what is political (or close enough) and what is not. Nor should anyone attempt to explain how the way a student dresses might contribute to the search for truth¹¹⁴ or make our country more democratic.¹¹⁵ As noted, a non-binary or transgender student may use their clothing to convey to classmates, teachers, staff, and administrators that people should have the right to define their own gender. This act would be perceived as political now, yet would not have been perceived as such until relatively recently when people finally began to discuss the topic more openly.¹¹⁶

In previous Parts, this Article has tried to show that student dress can be expressive conduct and ought to be treated as such. More is at stake than meets the eye. Above all, a student's decision to dress a certain way is their own choice and must be treated as such to respect their autonomy. Furthermore, dress codes inhibit the introspection that comes from experimenting with different identities at a crucial stage of students' personal development. By definition, expressive conduct occurs when someone acts

113. Jiyar Gol, *Iran Pauses Controversial New Dress Code Law*, BBC (Dec. 16, 2024), <https://www.bbc.com/news/articles/c0mv83m4z7vo>.

114. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

115. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

116. Jay Prosser, *Trans Rights and Political Backlash: Five Key Moments in History*, CONVERSATION (Aug. 10, 2022) <https://theconversation.com/trans-rights-and-political-backlash-five-key-moments-in-history-187476>.

to convey a message,¹¹⁷ such as when a person burns a draft card, an American flag, or a cross to make a political point. The merits of the viewpoint being expressed are beside the point; it is not the place of government or school authorities to assess the viewpoint.

This Part examines how self-expression through dress is conducive to self-development and individuality as students learn to exercise their autonomous capacities and improve their ability to do so over time. In a society like the United States, the pressure to conform can be extraordinary. From an early age, people are told to act in certain ways, as if nonconformity is obviously unacceptable. In American society, the refusal to comply with norms and take orders may be admired in theory, but not much in practice. In what follows, this Article relies upon the place of individual autonomy in a good human life—understood as personal choice with respect to the most important life decisions—in perfectionist terms.

There are many conceptions of autonomy. According to the Stanford Encyclopedia of Philosophy, “[i]ndividual autonomy is an idea that is generally understood to refer to the capacity to be one’s own person, to live one’s life according to reasons and motives that are taken as one’s own and not the product of manipulative or distorting external forces, to be in this way independent.”¹¹⁸ An autonomous person reflects on their options and makes their own decisions, even when others disagree with them and have compelling reasons for such disagreement. As John Christman writes, “one must be able to consider reasons that one has for one’s lower-order judgements, the connections these reasons have to one’s identity, and the implications of those values for one’s future and for interaction with others.”¹¹⁹ As an agent with a wide range of choices about how she wants to live, a woman should trust her own judgment in determining how she will act and take responsibility for her decisions. The government, or anyone else for that matter, should not make those deeply personal choices for her or prevent her from making the decision for her own good according to a paternalistic rationale. While the exercise of autonomy does not always produce good consequences—indeed, many people make bad choices repeatedly—it enables cultivation of their rational capacities to transform themselves into the kind of human being they desire or aspire to be. Such learning opportunities increase the likelihood that they will have the kind of life that is best suited. Because of where they are on the learning curve, there should

117. See CHEMERINSKY, *supra* note 10, at 1097–99.

118. John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYC. PHIL. ARCHIVE (Aug. 22, 2025), <https://plato.stanford.edu/archives/fall2025/entries/autonomy-moral>.

119. John Christman, *Autonomy and Liberalism: A Troubled Marriage*, in THE CAMBRIDGE COMPANION TO LIBERALISM 141, 150 (Steven Wall ed., 2015).

be plenty of room for teenagers to experiment and a lot of tolerance for their mistakes as they go through the learning process.

Respect for autonomy on the part of government is not only morally important, but constitutionally important as well. Even post-*Dobbs*,¹²⁰ American constitutional doctrine still supports the view that people must be allowed to make personal decisions about their respective life plans without governmental interference. *Barnette*,¹²¹ *Griswold*,¹²² *Yoder*,¹²³ *Lawrence*,¹²⁴ *Cruzan*,¹²⁵ and *Obergefell*¹²⁶ suggest that American constitutional doctrine incorporates something like a principle of respect for personal autonomy, where the right to make the most personal decisions about how to live is constitutionally protected. In Justice Anthony Kennedy's words, the Constitution protects "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."¹²⁷ The disagreements are about its scope, that is, which deeply personal choices the Constitution covers, such as the right to die. Although *Roe* is no longer good law, it is inconceivable that a court would uphold a law that forced women, who want to have children, to abort their fetuses in the name of population control or because they could not afford to raise them.¹²⁸ Americans must be able to decide for themselves how to live; at the same time these decisions should not harm others, create unnecessary risk, or unreasonably infringe upon others' equally important right to make their own life choices.¹²⁹ That is one reason why those who adhere to liberalism (as a political theory of government) frown upon legally moralistic and

120. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (upholding a state's near-total ban on abortion).

121. See *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusing to uphold a law that required all students to salute the American flag at the beginning of the school day in public schools and creating an exception for Jehovah's Witness children who refused to worship what they saw as a false idol).

122. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a ban on the use of contraceptives by married couples).

123. See *Wisconsin v. Yoder*, 406 U.S. 205 (1971) (striking down a compulsory school attendance law for Amish students after eighth grade).

124. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (creating a constitutional right of same-sex intercourse for consenting adults).

125. See *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990) (upholding a state requirement that there must be clear and convincing evidence of an incompetent patient's wishes before withdrawing life-sustaining treatment).

126. See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (establishing a constitutional right to same-sex marriage).

127. *Id.* at 663.

128. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

129. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 5–6 (1963).

paternalistic rationales for laws that everyone is subject to.¹³⁰ Free speech is not an exception to this rule. Indeed, in *On Liberty*, Mill devotes considerable time explaining its importance and putting forth different arguments on its behalf.¹³¹ It requires considerable arrogance to assume you know better than the person whose life it is to justify not letting them make their own decisions. One important way of respecting the autonomy of a person is to let them speak their mind even when you are convinced they are wrong. That right includes expressive conduct like dress, even when many people do not care for what a person is saying or how they are saying it.

B. Millian Self-Development and Individuality

Philosophically, personal autonomy can be connected to Millian self-development by underscoring the moral objective of respecting the freedom to make one's own choices about who to be and how to live. This freedom can be characterized as an ongoing endeavor to turn oneself into a unique individual who lives an authentic life, irrespective of what others think of its merits. Mill did not view public opinion positively.¹³² Above all, what matters is that your only life is fully your own. In many important respects, human beings are profoundly different in terms of what they care about, how they prefer to spend their time, where their talents and interests lie, what they find fulfilling, and what ends they want to pursue.

As a political theory, liberalism is predicated on a commitment "to a conception of freedom and of respect for the capacities and the agency of individual men and women."¹³³ As such, there must be considerable space and encouragement to be the person one really is (or wants to be) even if that identity turns out to be idiosyncratic. For Mill, human beings must be free for self-development to take place and for happiness to result.¹³⁴ In Mill's eyes, rights are synonymous with the conditions for individual self-development.¹³⁵ Only a handful of legal scholars have defended free speech in terms of self-development.¹³⁶ That is unfortunate because Mill's thought has the kinds of resources conducive to defending the free speech rights of

130. See Shane D. Courtland et al., *Liberalism*, STAN. ENCYC. PHIL. (Feb. 22, 2022), <https://plato.stanford.edu/entries/liberalism/> (citing Section 1.1 The Presumption in Favor of Liberty).

131. See generally JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* 1 (Stefan Collini ed., 1989).

132. RYAN, *supra* note 11, at 135.

133. JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 36 (1993).

134. JOHN SKORUPSKI, *WHY READ MILL TODAY?* 18 (2006).

135. Alan Ryan, *Mill in a Liberal Landscape*, in *THE CAMBRIDGE COMPANION TO MILL* 497, 529 (John Skorupski ed., 1988).

136. SCHAUER, *supra* note 58, at 55; SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 87–88 (2014).

teenagers on developmental grounds. The exercise of such rights can have transformative effects, including moral ones, not only on the student themselves but on other community members, who may learn from or be inspired by the student example. A student who sees one of their classmates making a statement through dress may encourage others to come out of the closet rather than conceal their identities. After all, the closet does not only apply to the gay and lesbian community.¹³⁷

The transformative effects of free speech on self-development are particularly important for marginalized students who are socially isolated or feel unwelcome at school. “[S]ome students,” as two authors write, “choose their school clothing to make some sort of statement.”¹³⁸ As a result, whether school officials realize it, a dress code is not only a manifestation of governmental coercion but may also incorporate viewpoint discrimination, intimating that some identities are problematic. A school that refuses to let a young man dress as a woman or vice versa is sending a very strong message to the student body about “proper” gender roles, intentionally or otherwise.

This Article proposes a Millian approach designed specifically for adolescents who need encouragement to resist the pressures of conformity. As Christopher Macleod states:

The dominance of the majority, Mill held, presented new threats of tyranny over the individual—freedom was no less at risk from a newly empowered many, than from an absolute monarch. The restrictions over freedom that concerned Mill included, to be sure, legislatively enacted restrictions of liberty—but they also took in broader “compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion.” Informal mechanisms of social pressure and expectation could, in mass democratic societies, be all-controlling. Mill worried that the exercise of such powers would lead to stifling conformism in thought, character and action.¹³⁹

137. See generally CHARLES ANTHONY SMITH ET AL., *THE POLITICS OF PERVERTS: THE POLITICAL ATTITUDES AND ACTIONS OF NON-TRADITIONAL SEXUAL MINORITIES* (2024) (outlining the first study of the political attitudes of non-traditional sexual minorities like furies, nudists, and polyamorists).

138. FOSSEY & DEMITCHELL, *supra* note 34, at ix.

139. Christopher Macleod, *John Stuart Mill*, STAN. ENCYC. PHIL. (Aug. 25, 2016), <https://plato.stanford.edu/entries/mill> (citing Section 4.5 *On Liberty* and Freedom of Speech).

Communication, critical thinking, and self-reflection are interconnected. Everyone needs exposure to the perspectives of others to figure out for themselves how to meet the demands of this life before it is over too quickly. Communicative interactions with others are indispensable to the developmental process that makes us the unique person we are (or could be with the right sorts of opportunities for self-expression). For Mill, everyone must continuously try to figure out which kind of life best captures their uniqueness: “[H]is own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.”¹⁴⁰

The advantage of reliance on a perfectionist Millian conception of autonomy, with emphasis on the means of self-development, is that students would become accustomed to deciding for themselves how they want to live, even when their decisions contradict societal expectations. Teenagers must be able to begin this learning process as soon as possible without fear of being punished for a silly dress code violation. There are already plenty of other reasons why teenagers may not feel comfortable deciding for themselves how they want to live, like peer pressure, bullying, and fear of being embarrassed on social media. Indeed, most people self-censor more than they realize or will admit.¹⁴¹ Most people seem to think that it is good to have a filter, yet what they forget is the importance of being sincere. For Mill, objectively good lives are those which people create via experimentation, in the gradual process of distinguishing themselves from others.¹⁴² There is no substitute for personal experience as an individual strives to make their life as authentic as possible. In Mill’s eyes, “it is only the cultivation of individuality which produces, or can produce, well-developed human beings.”¹⁴³

With this objective in mind, the individual must also find themselves in circumstances that are conducive to such self-development. American constitutional doctrine can help schools provide exactly such an environment. A society that does not legally or constitutionally protect self-expression (or for that matter, encourage its practice) is a society that does not appreciate the centrality of such an educational process in a good human life. A society that is too homogeneous and fails to value diversity will not be conducive to the kind of experimentation that fosters, or even permits, non-conformity. Mill speaks of the pressure to conform, the tyranny of public

140. MILL, *supra* note 131, at 67.

141. See Samson Yuen & Francis L.F. Lee, *Echoes of Silence: How Social Influence Fosters Self-Censorship under Democratic Backsliding*, 32 DEMOCRATIZATION 1213, 1213–15 (2025) (studying social influences on self-censorship in authoritarian political cultures, while also noting that self-censorship “need not depend on the presence of an external censoring entity”).

142. Elizabeth S. Anderson, *John Stuart Mill and Experiments in Living*, 102 ETHICS 4 (1991).

143. MILL, *supra* note 131, at 64.

opinion, and the despotism of custom.¹⁴⁴ In his view, public opinion can stifle difference.¹⁴⁵ According to John Gray, “an autonomous agent must also have distanced himself in some measure from the conventions of his social environment and from the influence of the persons surrounding him.”¹⁴⁶ Thus, individuals must be able to resist the temptation to fit into the crowd and should instead not care too much about what others think of them.

The effort to resist, however, may be exhausting. First, most people are afraid of being mocked, ridiculed, or humiliated—fears that are exacerbated in an era of social media where one mistake can irreparably damage one’s reputation. Second, fear of being called out or being “trolled” online may compel individuals to be overly cautious. Third, people may lack the self-confidence to stand on their own or have the courage of their convictions. It takes tremendous courage to be different when many people fear difference, do not understand it, and make no effort to do so.¹⁴⁷

These concerns are magnified with respect to American teenagers. While Victorian England is not the equivalent of the United States or a typical American public school in 2025, Mill’s worry about the challenges of individuals being able to turn themselves into the unique person they could be remains pertinent. Novels like *The Chocolate War* and films like *Cool Hand Luke* showcase the high costs of non-conformity.¹⁴⁸ Indeed, it may be natural to want to take the path of least resistance, complying with social expectations instead of transgressing them. The human behavioral predisposition not to incur social disapproval clashes with Mill’s imperative of the cultivation of individuality. According to Mill, the actual experience of trying to make reflective choices and acting upon them is indispensable in the process.¹⁴⁹ Nobody can do that for someone else. As Mill notes, “it is the privilege and proper condition of a human being, arrived at the great maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character.”¹⁵⁰

144. *Id.* at 57–59.

145. ALEX ZAKARAS, *INDIVIDUALITY AND MASS DEMOCRACY: MILL, EMERSON, AND THE BURDENS OF CITIZENSHIP* 127 (2009).

146. JOHN GRAY, *MILL ON LIBERTY: A DEFENCE* 74 (2d ed. 1996).

147. It is worth noting here that American historical figures or free speech martyrs, like the abolitionist Elijah Lovejoy, faced much more serious threats—including violence—for refusing to stop printing an anti-slavery newspaper. Lovejoy was killed by a mob in 1837 defending the warehouse that housed his printing press. KEN ELLINGTON, *FIRST TO FALL: ELIJAH LOVEJOY AND THE FIGHT FOR A FREE PRESS IN THE AGE OF SLAVERY* 282–83 (2021).

148. ROBERT CORMIER, *THE CHOCOLATE WAR* (1974); *COOL HAND LUKE* (Warner Brothers 1967).

149. MILL, *supra* note 131, at 58.

150. *Id.* at 58.

C. Millian Experiments in Living

The lifelong process of cultivating individuality requires experimentation with different identities, necessitating trial and error. As Gray writes, “[p]art of the rationale for encouraging experiments in living, after all, is that they are aids in attaining self-knowledge.”¹⁵¹ Self-expression constitutes an essential part of Millian experiments in living because human beings can only form and revise their identities by disclosing them to others and vice versa. In that way, dress can be communicative, and the process of self-development through experiments in living is invariably social. In the absence of a venue for such expression, it will be harder to see a wide range of possibilities. For Mill, there are also benefits for others: “In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore more capable of being valuable to others.”¹⁵²

In the contemporary United States, this right of self-expression is particularly important for marginalized people to be themselves and express difference in the face of intolerance. As Jeremy Waldron states, “it is through speech that we make a distinct and undistracted choice to disclose who we are and where we stand on issues of value.”¹⁵³ In the 1970s, gay men developed a “handkerchief code” to communicate their sexual availability and particular preferences.¹⁵⁴ In 2025, wearing rainbow colors or appearing in drag might have a similar effect. A dress code in a workplace, based on traditional norms regarding how men and women are supposed to dress, may not only be sexist or misogynistic but also oppressive, as it makes it much harder for a person to be authentic. Similarly, forcing a gay man to conform to traditionally straight dress may make him feel that he must deny who he really is, which undoubtedly could have tremendous personal costs, including developing mental health problems.¹⁵⁵ People should be allowed to and even encouraged to be creative when they express themselves, particularly when they are younger and more impressionable. Such creativity may enable them to communicate more effectively than they could through pure speech. Doctrinally, privileging some forms of expression over others

151. GRAY, *supra* note 146, at 79.

152. MILL, *supra* note 131, at 63.

153. JEREMY WALDRON, *THE HARM IN STATE SPEECH* 164 (2012).

154. Drew Hofbauer, *The Power of Dress: Expressing Gender Identity Through Fashion*, VOX MAG. (May 27, 2021), https://www.voxmagazine.com/features/fashion-identity-expression-lgbtq-gender-outfits/article_19464a90-b410-11eb-ac21-b71e3a6aba42.html.

155. John E. Panchankis et al., *The Mental Health of Sexual Minority Adults in and Out of the Closet: A Population-Based Study*, 83 J. CONSULT CLINICAL PSYCH. 1, 2 (2015) (noting that while there are mixed results in studies on how being in the closet affects the health of gay men, there is evidence to suggest it can increase mental health or psychological problems).

unfairly favors individuals who happen to be more articulate in a conventional medium.

D. As Applied to Public Schools

The opportunity for self-expression is even more urgent in American public schools, which can be enclaves of conformity.¹⁵⁶ While Mill did not have children or adolescents in mind,¹⁵⁷ this Article contends that his proposal for cultivating individuality—through experiments in living—requires considerable freedom for students to engage in self-expression because they learn to communicate in non-verbal ways. Self-expression through dress can serve individuality. Mill thought that experiments in living would cause people to be more reflective about their choices.¹⁵⁸ In that regard, freedom of thought and action are interconnected.¹⁵⁹ Experimenting with different identities in the presence of others would likely prompt individuals to be more introspective. This introspection would likely include not only the choices they had made previously, but also the choices they could make in the future to improve their life (and prompt others to reflect on their own lives as well).

At a formative stage in their lives, students need the opportunity to engage in self-expression without the risk of punishment. This opportunity will help them continue to develop their individuality by instilling the belief—and then reinforcing it—that there is nothing wrong with being different. American history contains numerous examples of how majorities have marginalized minorities and individuals for their differences (or have used their ostensible differences as a pretext for treating them unequally). Even in the absence of dress codes or uniform policies, social pressure still may produce widespread conformity. Students not only have the opportunity to express themselves through dress, art, or music—they must have the opportunity to experiment with their identity through their physical appearance in social spaces, such as in school. Students spend a considerable amount of time during the academic year interacting with their peers;

156. Ayla Iqbal, *Resisting the Pressure to Conform*, REALCLEAR EDUC. (Oct. 22, 2021), https://www.realcleareducation.com/articles/2021/10/22/resisting_the_pressure_to_conform_110654.html.

157. Mill focuses on adults in *On Liberty* and does not discuss children or adolescents. See MILL, *supra* note 131.

158. Ryan Muldoon, *Expanding the Justificatory Framework of Mill's Experiments in Living*, 27 UTILITAS 179, 180 (2015).

159. Fred Wilson, *John Stuart Mill*, STAN. ENCYC. PHIL. (July 10, 2007), <https://plato.stanford.edu/archives/spr2012/entries/mill/>.

likewise, they interact on social media, where they share pictures and videos of themselves.

All students should be allowed to choose how they want to dress and not be forced to conform to what school authorities or school board members (and probably many parents) happen to believe to be appropriate (which often will be subject to disagreement and misunderstandings). School authorities are no more qualified to dictate how students must dress than anyone else simply because they happen to be professional educators. Additionally, many dress codes can be arbitrary.¹⁶⁰ Equally importantly, if school officials disagree with the viewpoint expressed by what a student wears, then they are welcome to counteract the students' "bad" speech with their own "good" speech through non-censorious alternatives, like public announcements through loudspeakers or social media. While a school is free to suggest or recommend how students ought to dress, school administrators should not be allowed to impose that view on the students—most of whom are required to be there. At most, if a student really is dressed "inappropriately"—which is subjective to begin with—a teacher or administrator could say something to the student or arrange a parent-teacher conference. This alternative is not equivalent to having the power to order a student to change and to discipline them for non-compliance—such as by compelling the student to wear attire that identifies them as a dress code violator and is designed to humiliate.¹⁶¹ There is a world of moral difference between the authority to coerce students and persuasion. If a student has been coerced to dress in a certain way, that is where the line must be drawn.

By definition, any minority is non-conformist. A liberal society is supposed to tolerate those who behave unconventionally.¹⁶² Judges should not minimize the extent to which unconventional expressive conduct in public schools could have considerable value—especially in the long term—due to its cumulative effects. While most Americans probably have more sympathy when students have religious reasons for dressing in a certain way or displaying religious symbols, that reaction likely would not apply to marginalized religions. For instance, a court ruled that a school could prevent a student from wearing a five-pointed star (the central symbol of Wicca).¹⁶³

160. Whitney Bellephant, *Enforcement of Dress Codes is Sexist, Arbitrary*, BEACHCOMBER (Sep. 11, 2014), <https://bcomber.org/editorials/2014/09/11/enforcement-if-dress-codes-is-sexist-arbitrary/>.

161. *Student Forced to Wear 'Shame Suit' for Dress Code Violation*, ABC NEWS (Sept. 4, 2014), <https://abcnews.go.com/US/student-forced-wear-shame-suit-dress-code-violation/story?id=25252041>.

162. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 259–63 (1991) (explaining John Locke's understanding of the practice of toleration and its importance).

163. HAMILTON, *supra* note 97, at 163.

By contrast, when a student wants to wear a cross, yarmulke, head scarf, or turban to school—even in the absence of a Free Exercise Clause or state and federal Religious Freedom Restoration Acts—many Americans might be willing to acknowledge their right to wear such symbols because they appreciate the important role that religion can play in human life. By implication, Americans also recognize why it is critical to let people disclose their religious identities. In any liberal democracy, people should be allowed to make statements about themselves, their religious beliefs, and their way of life without the permission of legislative majorities.

The challenge is to convince Americans that other deep convictions may be just as important to nonreligious people. Suppose that at a high school, a student assigned male at birth wants to cross-dress because the student identifies as a woman. A student assigned male at birth who wants to wear a dress to school, or a woman who wants to wear a tuxedo to the prom,¹⁶⁴ would be communicating something very powerful about themselves and gender norms in America. By refusing to conform to traditional fashion norms, these students highlight broader controversies, including the denial of gender-affirming medical care in some states, transgender bathroom access, and who should play on which high school sports teams. There would not be too many more emotionally powerful ways to make such a statement; it would be hard to ignore and would prompt conversations.

While dressing non-traditionally could offend some or perhaps many faculty, staff, and students, such as those who are wedded to more traditional gender roles, their offense or shock is beside the point, constitutionally. After all, offensive speech is constitutionally protected.¹⁶⁵ Moreover, being offended, or even seriously offended, is often subjective and hardly counts as being harmed in a meaningful way.¹⁶⁶ Just because speech is offensive to some, many, or all people does not mean that the message being conveyed is not valuable in terms of either its truth value or as a means of self-disclosure. Those who are bothered by gender-bending attire are free to ignore what they have seen. They are also equally free to reveal who they are or why they think resisting new gender norms is called for, either by pure counterspeech or their own expressive conduct. Such counterspeech or expressive conduct is the traditional remedy for “bad” speech.

164. *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d. 699, 701 (N.D. Miss. 2010) (finding viewpoint discrimination for a woman wearing a tuxedo to prom).

165. *Cohen v. California*, 403 U.S. 15 (1971) (holding that people may use vulgarities like the “F” word when they criticize the government).

166. See ANDREW SNEDDON, OFFENSE AND OFFENSIVENESS: A PHILOSOPHICAL ACCOUNT 56, 81 (2021) (noting that being offended, even seriously offended, likely does not rise to the level of being harmed).

One could respond that wearing a dress is not analogous to wearing a yarmulke or head scarf for free speech purposes. However, that response misses the point. First, not all Jews or Muslims believe that such dress is a religious requirement. The expression of who you are may be necessary to living the life that you want to live, letting others know who you are, and reminding yourself of what you believe to be most worthwhile in life. In that respect, an Orthodox Jew wearing a yarmulke is the equivalent of a young man cross-dressing, given the importance of disclosing one's identity in a society that is often hostile to differences. At a junior high or high school, no student should be coerced or pressured into dressing like a stereotypical man or woman. By implementing such a policy, the school is implying that it is wrong for a young man to identify as a woman or for a lesbian student to identify as more masculine.

If a student is allowed to challenge conventions by how they dress, they may gain a better appreciation for why others ought to have the same right to be themselves. As tweens and teenagers, they are bound to be impressionable and vulnerable to being overinfluenced by the authority figures in their life. For this reason, they should be free to choose from a long menu of options in Millian experiments in living. As Mill writes:

It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.¹⁶⁷

Thus, a school should not be granted the authority to interfere in this vital process of self-discovery, self-creation, or both by inhibiting teenagers from expressing themselves and shielding their classmates from exposure to such self-expression for their own good.¹⁶⁸ In such an environment, a greater number of students will think more deeply about what they wear and what they are trying to communicate through their physical appearance. A student who cross-dresses may encourage others who are not as courageous to feel safe subverting gender norms if that is what they desire. In this way, the exercise of free speech can normalize differences.

These sorts of concerns are not hypothetical. A school cancelled its prom rather than let a lesbian student bring her girlfriend to the prom and wear a

167. MILL, *supra* note 131, at 57.

168. Or because their peers, parents, faculty, staff, or administrators find the message being conveyed off-putting.

tuxedo.¹⁶⁹ As Justin Driver observes, “When a school prohibits articles of clothing through individualized assessments, opportunities for arbitrary discrimination present themselves.”¹⁷⁰ During most of American history, and still in too many places, a different-sex interracial couple holding hands as they walk down the hall in a public school would be conveying a message about the nature of love, romantic relationships, and race relations. They would be conveying this message even though they are not expressing themselves orally or in writing. The same would be true of a same-sex couple. In such situations, allowing students to engage in symbolic speech constitutes a way of fighting intolerance. At the same time, although many other teenagers may be reluctant to share their identities with others, they should not fear being suspended or expelled for doing so. Ultimately, dress codes have a chilling effect and infringe upon the right students have to decide for themselves what kind of person they want to be. When school authorities deny their students one of the most effective means of self-expression, they inhibit Millian self-development, notwithstanding their intentions. The consequences are foreseeable.

People not only are different in some important respects but should be allowed to be so in public spaces, as long as they are not harming others or unreasonably putting them at risk. That is a lesson that must be imparted to students long before they are set in their ways. There is nothing wrong with being unlike everyone else. In fact, such individuality makes us the distinct person that we are; that, in itself, is important.¹⁷¹ Unfortunately, some people have their identities thrust upon them; for example, racism forces people of color to identify in one way rather than another because, socially, they have no genuine options and assimilation has much lower personal costs.¹⁷²

Students must be left alone so they can experiment with new identities as they find their place in the world. Far too often, they have already been told what to do, which discourages them from taking ownership of their decisions.¹⁷³ For many teenagers, that experimentation may amount to doing something conventional, like dyeing their hair, getting a tattoo, or having some body part pierced, which is fine. After all, they must start somewhere. By striking down dress codes as unconstitutional, judges can empower students to engage in trial and error, thereby teaching them that the process

169. *McMillen*, 702 F. Supp. 2d. at 701.

170. DRIVER, *supra* note 12, at 131.

171. SHIFFRIN, *supra* note 136, at 89.

172. Zuva Seven, *Cultural Assimilation—How it Affects Mental Health*, VERYWELLMIND (May 19, 2023), <https://www.verywellmind.com/what-is-cultural-assimilation-5225960>.

173. Giselle Galoustian, *All Work, No Independent Play Cause of Youth Declining Mental Health*, FLA. ATL. U. NEWS DESK (Mar. 9, 2023), <https://www.fau.edu/newsdesk/articles/child-play-independence-study>.

matters as much as the outcome. Early in life, such experiences may be formative and probably will affect how students see themselves and others in the future. Empirical evidence suggests that members of minority sexual communities are less judgmental of non-conformity and more accepting of others as they are, rather than as society expects them to be.¹⁷⁴

IV. THE ENHANCEMENT OF SPEECH

A. Rhetorical Effects

For some students, speaking through dress may be preferable if they are uncomfortable with public speaking or lack confidence in their writing skills. One way or another, their voices should be heard. Dress can also enhance the rhetorical impact of the message that the student is trying to convey, helping it to reach a wider audience in an age of social media, where young people take a lot of selfies. The idea of the significance of enhancing the rhetorical efficacy of speech is found in Justice John Marshall Harlan II's majority opinion in the famous *Cohen v. California* case, also known as the *F*** the Draft Case*.¹⁷⁵ Dress can amplify any message. Indeed, it may be much more effective than pure speech at times due to its shock value. As the old saying goes, "a picture is worth a thousand words."

In Justice Harlan's view, the Constitution protects the emotive function of speech.¹⁷⁶ The implication is that how something is said is as important as what is being said. Drawing on the fact pattern in *Cohen*, the use of vulgar words may pack a more powerful rhetorical punch because they reveal how strongly the speaker feels about the issue.¹⁷⁷ By contrast, a more polite alternative may not have the same impact. The point is that expressive conduct can be more rhetorically consequential, depending on the circumstances. In taking away from students an essential channel of communication in a digital age, where students can create their own videos, schools fail to respect their students' rights to decide how they say what they want to say. It would be strange to claim that people have a right to freedom of speech yet are only allowed to say what they want to say in a way prescribed by the state. Indeed, it may be hard to separate the medium from the message. Obviously, *Draft* ☹ on the back of a leather jacket is not exactly the same as *F*** the Draft*.

174. SMITH ET AL., *supra* note 137, at 230.

175. 403 U.S. 15, 16 (1971).

176. *Id.* at 26.

177. *Id.*

Compared with pure speech, one advantage of expressive conduct more generally is that it can capture and keep people's attention, and maybe even go viral. The claim is that dress may be more effective in making a deeper impression than verbal or conventional alternatives. Imagine that a high school student wears a T-shirt depicting Officer Derek Chauvin kneeling on George Floyd's neck to convey a political message about police brutality and identify themselves as a Black Lives Matter supporter. Because it engages emotions, such a T-shirt could easily be more communicative than the words "I can't breathe," which would count as pure speech. The former sort of expressive conduct is likely to draw attention and prompt conversations on campus about what is happening with regard to policing in this country. No doubt, people can be clever with spoken and written words as well. But some students will be more articulate than others, orally or in writing. Dress is a clever way to convey a message through expressive conduct because dress can be artistic or creative, which makes it harder for others to ignore the statement being made.

B. Content-Neutral Restrictions

Doctrinally, the strongest constitutional argument in defense of student dress codes is that they are content neutral. To be content neutral, the rationale of the restriction must have nothing to do with the viewpoint being expressed.¹⁷⁸ In this Part, this Article elaborates on why allowing school officials to defend the constitutionality of restrictions of student dress on content-neutral grounds is problematic. A content-neutral speech restriction is also known as a "time, place, and manner" restriction.¹⁷⁹ In *United States v. O'Brien*, the Court developed the *O'Brien* test for determining the constitutional permissibility of content-neutral speech restrictions and later supplemented it with an additional requirement—namely, the restriction must leave open ample alternative channels of communication.¹⁸⁰

In effect, the original test asks two questions. The government bears the burden of satisfying both elements before the speech in question can be suppressed: (1) does the restriction on speech further an important or substantial governmental interest; and (2) is the incidental restriction on speech no greater than is necessary to the furtherance of that important or

178. CHEMERINSKY, *supra* note 10, at 960–62.

179. Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FREE SPEECH CTR.: MIDDLE TENN. STATE UNIV. (July 9, 2024), <https://firstamendment.mtsu.edu/article/time-place-and-manner-restrictions/>.

180. 391 U.S. 367, 376–77 (1968); *Clark v. Cmty. Creative Ctr. for Non-Violence*, 468 U.S. 288, 293 (1984) (leaving open ample alternative channels of communication to the *O'Brien* Test).

substantial state interest?¹⁸¹ Put differently, are there any alternatives that would serve the state interest equally well but do not require the suppression of speech? The third part asks whether ample alternative channels of communication have been left open so that the speaker may convey their point through another medium of communication. The trouble is not with the test per se but with how the Court and lower courts have applied it. This application makes it too easy for such restrictions on speech to pass constitutional muster. The test is supposed to incorporate the intermediate scrutiny standard of review.¹⁸²

For content-neutral restrictions, courts must balance competing considerations, such as the possible value of student self-expression and the school's interest in making the educational environment on campus conducive to student learning.¹⁸³ For that reason, in this context, perhaps content-neutral restrictions should not be subject to strict scrutiny, when strict scrutiny is supposed to mean "strict in theory, but fatal in fact."¹⁸⁴ At the same time, judges should not uphold content-neutral restrictions so casually, as if they were applying something more like rational basis standard of review. As Justice Thurgood Marshall points out in his dissent in *Clark*:

The minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection. By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity.¹⁸⁵

In *Jacobs*, a court upheld a uniform policy because the restriction on student speech was content neutral.¹⁸⁶ The school defended its policy by referencing three state interests: "increasing student achievement, promoting safety, and enhancing a positive school environment."¹⁸⁷ The court found these goals to be important.¹⁸⁸ In Judge Michael Daly Hawkins's words, "it is hard to think of a government interest more important than the interest in

181. *O'Brien*, 391 U.S. at 376–77.

182. CHEMERINSKY, *supra* note 10, at 552–54.

183. FOSSEY & DEMITCHELL, *supra* note 34, at x.

184. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotations omitted); see CHEMERINSKY, *supra* note 10, at 554 (explaining strict scrutiny).

185. *Clark*, 468 U.S. at 313 (Marshall, J., dissenting).

186. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 441 (9th Cir. 2008).

187. *Id.* at 422.

188. *Id.* at 435.

fostering conducive [sic] learning environments for our nation's children."¹⁸⁹ Thus, intermediate scrutiny was satisfied.¹⁹⁰ In this fact pattern, the strongest state interest is a "distraction-free educational environment."¹⁹¹ The rationale of this decision is in sync with that of *Tinker*. In *Tinker*, restrictions on student speech can only be constitutionally permissible in the event that the speech in question would be likely to substantially disrupt the educational environment.¹⁹²

There are three problems with the way in which courts tend to employ content-neutral analysis in the context of free speech in public schools. First, notwithstanding the intent of those who created the dress code, such codes may infringe upon the constitutional right of free speech, including the expression of political viewpoints (and these restrictions on the choice of clothing may not be trivial). Many African American students will not be indifferent to a dress code that prevents them from wearing their hair in a manner that expresses their racial and cultural identity in a country where there still is pressure to "act white." Second, when a judge decides that the restriction is content neutral, the infringement on student speech probably will be ruled constitutional, without the kinds of considerations that would be weighed if strict scrutiny were the applicable standard of review.¹⁹³ Third, dress codes do not leave open ample, equally effective alternative channels of communication.¹⁹⁴ Because it is situational—and cannot be otherwise—dress can be a much more effective mode of communication than the alternatives.

Usually, it will not be too challenging for school authorities to come up with content-neutral reasons in support of their dress codes. For Judge Thomas in *Jacobs*, though, the uniform policy was not viewpoint-neutral because pro-school messages were permitted.¹⁹⁵ By contrast, according to the majority, there was no evidence of pretext.¹⁹⁶ The school logo on the uniform was not intended as a pro-school message.¹⁹⁷ Even if that was not the intent of the school officials, it is reasonable to infer that someone who was wearing the school's logo on their uniform is showing support for the school, possibly against their will, unless the message is somehow meant

189. *Id.* at 435–36.

190. *Id.* at 437.

191. *Id.* at 437.

192. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)

193. See CHEMERINSKY, *supra* note 10, at 554 (summarizing strict scrutiny).

194. *Clark v. Cmty. Creative Ctr. for Non-Violence*, 468 U.S. 288, 308 (1984) (Marshall J., dissenting).

195. *Jacobs*, 526 F.3d at 444 (Thomas, J., dissenting).

196. *Id.* at 436–37.

197. *Id.* at 433.

ironically. Again, there appears to be a compelled speech problem here. From the plaintiffs' standpoint, the real goal of the school was to establish conformity.¹⁹⁸

In *Jacobs*, the school threw a bunch of state interests at the wall, hoping one of them would stick, like “increasing student achievement,” “promoting safety,” or “enhancing a positive school environment.”¹⁹⁹ As Judge Thomas wrote in his dissent:

So what is the “important or substantial” government purpose here? It is not, as some have suggested in similar contexts, to reduce socio-economic divisions. Rather, the state[d] purpose of the school uniform and printed message ban is to promote “school spirit.” Assuming this is an important government purpose—an assumption indeed—the majority neglects to consider whether the record demonstrates that the school uniform policy actually furthers this interest. The school argues that the imposition of mandatory school uniforms and the ban on expressive messages results in an improvement of the educational process in individual schools through increasing student achievement, promoting safety, and enhancing a positive school climate. There is no empirical evidence of this in the record, only conclusory affidavits filed by school officials.²⁰⁰

Apart from concerns about compelled speech, this decision reveals why judges almost always uphold content-neutral restrictions. The school does not actually have to show that its purported interest is important or that there are no less restrictive means of serving that interest. In other contexts, intermediate scrutiny has more bite, like that of sex classifications.²⁰¹ It is unlikely that any of the interests offered to defend the uniform policy were genuinely important—like promoting school spirit—given the normal legal meaning of “important,” whereas they would have been legitimate under the first part of the rational basis standard of review.

On top of that, the Court has not established a definitive or clear standard, allowing schools to defend their dress codes on whatever grounds strike them as being conducive to protecting the educational environment.²⁰²

198. *Id.* at 435.

199. *Id.*

200. *Id.* at 444–45 (Thomas, J., dissenting).

201. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

202. *Hudson & Ghani, supra* note 36.

Obviously, in social science, causal inference can be tricky. This claim is almost self-evident; trying to explain cause and effect in the human world is difficult, and social scientists often disagree on methodology.²⁰³ Also, very few judges have training in the nuances or even basics of social science.²⁰⁴ Moreover, in the eyes of the majority, ample channels of communication were left open.²⁰⁵ However, that probably was untrue, given that we are in an age of camera phones and social media, where there is so much emphasis on the visual. In his dissent in *Clark*, Justice Thurgood Marshall alludes to the rhetorical impact of having large numbers of unhoused people sleeping overnight in a public park to dramatize the gravity of the problem of homelessness in America.²⁰⁶

School officials can always fall back on the non-trivial doctrinal distinction between content-based and content-neutral speech restrictions, where only the former triggers strict scrutiny standard of review.²⁰⁷ Surely, many schools have content-neutral reasons for institutionalizing dress codes.²⁰⁸ Again, the rationale for such a distinction may be plausible in many situations more generally, where there are overriding reasons for allowing government to enforce content-neutral restrictions—for example, when someone wants to drive a sound truck through a residential neighborhood at midnight, blaring “Vote for Robert Kennedy, Jr.” That said, judges should not be so deferential to what school authorities decide to do with respect to student dress when equally or more effective alternative channels of communication are not left open. A transgender student who cannot dress to subvert traditional gender norms due to the dress code has been deprived of a particularly promising means of disclosing who they are. The ease of showing that dress codes are constitutional for content-neutral reasons enables school authorities to conceal sex biases.²⁰⁹ A fundamental assumption of modern free speech doctrine is that government (or here, school authorities), cannot be competent or impartial when it comes to censorship decisions.²¹⁰ There is no reason to believe that school officials are any better in this regard.

203. *See generally*, ALEXANDER ROSENBERG, PHILOSOPHY OF SOCIAL SCIENCE 4 (2d ed. 1995).

204. David L. Faigman, *Judges As “Amateur Scientists”*, 86 B.U. L. REV. 1207, 1211 (2006).

205. *Jacobs*, 526 F.3d at 437.

206. *Clark v. Cmty. Creative Ctr. for Non-Violence*, 468 U.S. 288, 302–06 (1984) (Marshall, J., dissenting).

207. CHEMERINSKY, *supra* note 10, at 961.

208. *See id.* at 1193–94.

209. *See Harbach, supra* note 104, at 1058 (noting that teachers may unwittingly contribute to sexualization and urging schools to consider how “dress coding” perpetuates it and to examine curricula for implicit messages).

210. Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, KNIGHT FIRST AMEND. INST. (Oct. 19, 2022) <https://knightcolumbia.org/content/distrust-negative-first->

V. STATE INTERESTS

In the previous Parts, this Article demonstrates why it is imperative for students to dress however they please in the name of respecting their autonomous capacities and facilitating the development of their individuality. In this last Part, the Article shifts focus, explaining why none of the state interests typically offered on behalf of dress codes are strong enough to justify bans on any kind of clothing on campus. In plain English, a state interest that is strong enough may supersede the right of a student to dress however they want to dress. Typical state interests include preventing violence on campus, minimizing substantial disruptions to the learning environment, and reducing socioeconomic inequality. The trouble is not that these state interests are not important per se or are pretexts. Instead, it is far from evident that dress codes do much, if anything, to serve them. In defending their dress codes in court, most school districts do not allege that such policies foster academic achievement; they focus on disruptions and distractions.²¹¹ It appears that defenders of dress codes do not deny that student dress or appearance can constitute self-expression. Instead, they assume that most student speech, including expressive conduct through dress or physical appearance, is not likely to be valuable enough to supersede countervailing school interests.²¹² According to Fossey and DeMitchell, “school authorities adopt dress codes with the simple goal of creating a purposeful learning environment that reflects community values.”²¹³ However, a weak state interest, coupled with potentially valuable speech, ought to lead to the constitutional conclusion that the student speech in question is presumptively protected.

A. Incitement, Safety Concerns, and Bans on Gang Attire

These days, the safety of students on campus is on everyone’s mind. Consider the example of a prohibition on gang attire, where students are not allowed to wear clothing that displays their affiliation with or support for a certain street gang.²¹⁴ Some proponents of such dress codes insist that these restrictions will reduce the likelihood of violence.²¹⁵ As an example, in the San Joaquin Valley in California, a gang member could wear sports attire

amendment-theory-and-the-regulation-of-lies (explaining that the distrust of government is important in contemporary First Amendment interpretation).

211. THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 5–6.

212. FOSSEY & DEMITCHELL, *supra* note 34, at ix–x, 3–4.

213. FOSSEY & DEMITCHELL, *supra* note 34, at 3.

214. *Id.* at 44.

215. THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 67.

where the team initials represent the gang, like a Padres cap for the Posole gang or a Fresno State cap for the Fresno Bulldogs.²¹⁶ They could also be decked out in matching colors—hats, shirts, shorts and shoes—to communicate their affiliation, coupled with overall appearance, language, and mannerisms. When school districts ban the wearing of such caps, they assume that some of the students who wear them are engaging in expressive conduct, conceding that it is speech. After all, the problem seems to concern the message conveyed, even when a particular student is not intending to convey such a message.

Under the *Brandenburg* Test, to constitute incitement, three conditions must be satisfied: (1) the speaker intends to incite others to commit violence; (2) the lawless conduct must be imminent; and (3) there is a high likelihood of success.²¹⁷ Applying this to clothing as expressive conduct, in a typical fact pattern, it is improbable that a student's wearing a Padres or Fresno State cap would satisfy all three parts. In terms of the first condition, the speaker might not be intending to incite others, like their friends, to attack classmates from rival gangs—and the speaker must be given the benefit of the doubt.²¹⁸ Rather, they may be articulating their membership in a particular group and expressing group solidarity. For the second and third conditions, the mere wearing of such a cap is unlikely to immediately provoke someone to attack someone else. In fact, students could wear caps for a variety of reasons.

Like many others, Marci Hamilton subscribes to the view that school officials should be able to reduce gang activity by singling out gang colors, insignias, and jewelry.²¹⁹ The prevention of violence in an educational environment, so that a school is safe enough for all students to learn, is an important or probably compelling state interest. The trouble lies in whether the approach is narrowly or substantially tailored, which is the second requirement of a heightened standard of review.²²⁰ At most, the causal relationship between bans on gang attire and gang activity or violence in public schools is attenuated; it is not established by the data.²²¹ Nor is it

216. Under California education law, Section 35183, schools may ban students from wearing “gang-related apparel” if the school has adopted that type of a dress code. CAL. EDUC. CODE § 35183(b) (2024).

217. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

218. *See Hess v. Indiana*, 414 U.S. 105, 109 (1973) (holding that the State failed to meet its burden to prove intent and likelihood of imminent disorder because “there was no evidence, or rational inference from the import of the language, that [appellant’s] words were intended to produce, and likely to produce, imminent disorder”).

219. HAMILTON, *supra* note 97, at 160.

220. CHERMERINSKY, *supra* note 10, at 554.

221. Caroline Mimbs Nyce, *Can School Dress Code Help Curb Gang Violence?* ATLANTIC: CULTURE (May 24, 2016), <https://www.theatlantic.com/culture/archive/2016/05/can-dress-codes-rules-help-curb-gang-violence/623934/>.

evident where the burden of proof ought to lie. Given the potential value of student dress and the presumption that it is entitled to constitutional protection that this article has defended, my position is that burden of proof should be on school officials, who would have to make the case for such a connection before censorship is permitted. After all, their reasons could be pretexts. It is hard to believe that gang problems would disappear or be mitigated simply because students could not wear certain clothes. Indeed, there are so many other ways to express gang affiliation, like language, signs, and slang. Lastly, there are non-censorious alternatives available.²²²

When it comes to bans on gang attire, another issue is whether a student should be prohibited from wearing certain clothing—as opposed to making their own decision—because how they dress renders them more vulnerable to criminal assault and battery. This rationale for censorship is very hard to defend as well. If a school were full of anti-Semites, we would not allow school officials to reduce the likelihood that they would be targeted by preventing Orthodox Jewish students from wearing a yarmulke. That approach would be based on an unacceptable victim-blaming rationale. Besides, there is a substantial risk that school authorities would enforce bans on gang colors or clothing in a discriminatory manner, where students of color, unlike their white counterparts, are singled out. Laws that permit such discretion on the part of school authorities can easily be selectively enforced. A nice illustration of this point appears in a Texas case, where a student was disciplined for wearing a rosary.²²³

B. True Threats

Like incitement, true threats—where one person directly threatens another with violence—fall outside the scope of First Amendment protection.²²⁴ True threats incorporate a reasonable person standard.²²⁵ The individual, who conveys the threat, also must know that the communication will be viewed in that way.²²⁶ Obviously, a student should not be able to directly threaten other students with violence, especially in an educational setting. According to the legal definition, the wearing of gang attire does not

222. FOSSEY & DEMITCHELL, *supra* note 34, at 48.

223. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 671 (S.D. Tex. 1997).

224. *Watts v. United States*, 394 U.S. 705, 708 (1969).

225. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 117 (2017).

226. NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 60 (2018).

amount to a true threat.²²⁷ The mere existence of such attire does not qualify as a verbal threat of violence. In other words, wearing a cap or NFL jersey, or even gang tattoos, does not reflect an intention to threaten others with violence. If one student threatens another with violence, attacks them, or both, punishment and other preventative measures would be called for. Because of valid concerns about safety, it is easy to see why school officials overreact. At the same time, our society tends to stigmatize gang members, who are disproportionately low income and people of color, and treat many non-gang members as if they were affiliated.²²⁸ At the end of the day, when a student identifies with a particular gang, that identification is also self-expression and ought to be treated as such, even though many people do not care for such speech. Schools can beef up security when gang activity or violence is a problem, or deal with the situation in a more speech-friendly manner.

C. Substantial Disruptions

Given the nature of an educational environment, perhaps the strongest state interest—other than safety—concerns when a student’s appearance may be too distracting, causing a substantial disruption on campus. Under *Tinker*, if the speech or expressive conduct in question is likely to cause such a disruption, school authorities can ban it.²²⁹ They can demand that the student change, and if they refuse, they can be sent home or suspended. Under the *Tinker* Substantial Disruption Test, the school has the burden to prove that the student’s expressive conduct must “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”²³⁰ The school must demonstrate that “its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²³¹ This rule

227. See Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 284, 290–91 (2001) (explaining that, at the most basic level, “threats are speech which communicate[] the possibility of future use of physical force or violence against the intended victim or those close to the victim, or unlawful damage of valuable property”).

228. See JAMES DIEGO VIGIL, *A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY 6* (2023) (describing concentration of street gangs in low-income ethnic-minority neighborhoods, documenting law-and-order crackdowns in minority areas, and explaining how physical and cultural markers are used to draw social boundaries that subject minorities to prejudice and discrimination).

229. ROSS, *supra* note 33, at 134.

230. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1996)).

231. *Id.*

denies school officials the authority to restrict student speech for other reasons, such as those that are unrelated to the operation of the school.

In many situations, though, what constitutes a substantial disruption will be a judgment call. As Anne Proffitt Dupre observes, “[t]he [*Tinker*] opinion did not explain how clear the fear of disturbance needed to be before school officials could act to control it.”²³² Take an extreme example. Imagine that a young woman comes to school dressed in saran wrap to make a statement about body positivity.²³³ If someone were to allege that a near-nude student was child pornography, one could respond that mere nudity does not meet the legal definition of child pornography.²³⁴ Most of the time, at a school, there are few scenarios in which such dress would be so distracting in the classroom that students could not concentrate and, therefore, could not learn. In a digital world, public schools are full of distractions. Many students have short attention spans, and many of them are glued to their phones.²³⁵ The legal rule should not be predicated on the worst-case scenarios. Here, a precautionary rule is preferable. Normally, a student’s attire will not be so distracting that nobody will be able to concentrate on what the teacher is saying in class, even when there are some rare exceptions. Outside the classroom, moreover, students are usually not a captive audience. At most, how someone dresses might be somewhat distracting for a short period, but it is not clear that the person who may have dressed to attract attention is blameworthy.²³⁶

D. Socioeconomic Equality

Lastly, some people defend dress codes or uniform policies in the name of creating a more socioeconomically egalitarian environment in schools by concealing socioeconomic difference and discouraging competitive

232. DUPRE, *supra* note 17, at 16.

233. I thank Bill and Stephanie Niemi for this not-so-hypothetical example.

234. *United States v. Kemmerling*, 285 F.3d. 644, 645–46 (8th Cir. 2002) (“We have held that more than mere nudity is required before an image can qualify as ‘lascivious’ within the meaning of the statute. A picture is ‘lascivious’ only if it is sexual in nature. Thus, the statute is violated, for instance, when a picture shows a child nude or partially clothed, when the focus of the image is the child’s genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer.”) (citation omitted).

235. See Jen Hatfield, *72% of U.S. High School Teachers Say Cellphone Distraction is a Major Problem in the Classroom*, PEW RSCH. CTR. (June 12, 2024) <https://www.pewresearch.org/short-reads/2024/06/12/72-percent-of-us-high-school-teachers-say-cellphone-distraction-is-a-major-problem-in-the-classroom/>.

236. Americans continue to have odd reactions to nudity. That a (nude) dating show in the United Kingdom, “Naked Attraction,” could be so popular for so long but would be unacceptable in the U.S. strongly suggests that such standards are culturally relative.

dressing.²³⁷ From a progressive standpoint, this objective is well-intentioned due to the importance of social leveling. Forcing all students to dress in the same way has the appeal that it does inasmuch as there may be less conflict and resentment if privileged students are not allowed to flaunt their wealth through their fashion choices. However, there is virtually no peer-reviewed research about the extent to which dress codes reduce socioeconomic inequality (or the perception of it). At most, it is a guess. Usually, an advocate does not have much trouble in finding some study that supports the legal conclusion that they are arguing for. If that were not concerning enough, it does not take much to certify an expert witness at trial, when the judge has so much discretion.²³⁸ The certification is largely left up to the judge, for better or for worse.

Presumably, the theory is that mandatory uniforms will make it much more difficult for students to know who qualifies as low income and for a social hierarchy to exist. There are numerous ways that wealthier students can display their economic privilege. This includes showing off cash, credit cards, the electronic devices that they use, the car that they drive, what they wear outside of school at parties and school events, what they talk about, and who their friends are. Likewise, unhoused and other socioeconomically disadvantaged students will not be able to hide their status simply by dressing like everyone else. Other noticeable signs of poverty exist assuming they are able to regularly attend school in the first place.

CONCLUSION

As this Article has demonstrated, dress codes have a much higher cost than most people realize when the importance of self-expression for teenagers is factored in during a critical time in their journey to adulthood. School officials should not be able to act like the morality police by forcing conformity. Upon closer inspection, the reasons offered on behalf of such codes turn out to be dubious when school officials cannot show the alleged negative effects of their dress codes. Too many of these effects seem to be in the eye of the beholder. At public junior high and high schools, student expressive conduct in the form of dress must be constitutionally protected even when school officials have content-neutral reasons for restricting what

237. *Frudden v. Pilling*, 877 F.3d 821, 825 (9th Cir. 2017) (stating that one reason the superintendent supported a school dress code was because she believed it would “help even the playing field for those students who could not afford expensive clothes”).

238. FED. R. EVID. 702 (permitting opinion testimony by a witness “qualified as an expert by knowledge, skill, experience, training, or education” if the proponent shows it is “*more likely than not*” that Rule 702(a)–(d) are satisfied) (emphasis added).

students wear to school. In making a perfectionist Millian argument, this Article has highlighted the importance of self-development and individuality for teenagers, considering where they are on the learning curve and the environment they find themselves in, amid ubiquitous social pressure to conform. Even when school officials have plausible content-neutral reasons for such codes, they still produce a tremendous chilling effect. The threat of punishment most likely dissuades many students from revealing aspects of who they are or their views about society that could be quite important, either to themselves or others, at that very moment or in the distant future.

Although this Article has mainly used examples that progressives would have sympathy for, conservatives also have good reasons not to empower school authorities to formulate and enforce dress codes. Free speech should be a principle that transcends partisan disagreements. Religious and conservative viewpoints and expressions of identity also are in danger when school authorities may censor them. In *Jacobs*, the student was disciplined for wearing a religious symbol.²³⁹ At minimum, this Article has sought to cast doubt—on free speech grounds—on the widely shared view that school officials should have *carte blanche* to regulate how students dress on campus. It has also highlighted the comparative weakness of the state interests that school authorities use to defend dress codes. If that were not enough, school authorities will never come up with viewpoint-neutral policies that are enforced even-handedly. Like other government officials, elected school board members and administrators cannot be expected to protect unpopular kinds of expressive conduct, including student dress. If they did so consistently, then the First Amendment and judicial review might not be necessary. To give school officials the authority to regulate student dress is to give them the power to censor student speech. That problem should not be ignored just because students are teenagers. Their free speech rights matter as well.

239. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 423 (9th Cir. 2008).