6-1-1995

Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students' First Amendment Rights

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol28/iss4/8
UNDRESSING THE FIRST AMENDMENT IN PUBLIC SCHOOLS: DO UNIFORM DRESS CODES VIOLATE STUDENTS' FIRST AMENDMENT RIGHTS?

We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age.

I. INTRODUCTION

The National School Boards Association estimates that approximately "135,000 guns are brought to the nation's 85,000 public schools every day." These weapons are a cause for concern among both parents and school authorities. As a result, state governments, school districts, and individual schools across the nation have employed a variety of means to curb violence on campuses and in classrooms. Such measures include the use of metal detectors, surprise locker searches, dogs trained to sniff out guns, and prohibitions against students carrying book bags into classrooms. These measures aim to prevent students from hiding weapons in lockers or in their clothing. In California, the San Diego Unified School District even eliminated school lockers in an effort to curb violence. The district claims that its efforts have reduced crime and violence on its campuses by at least thirty-five percent.

Some states and school districts, however, have gone beyond metal detectors and eliminating lockers in their attempts to end vio-

4. Schools in Texas utilize dogs to sniff for the presence of guns. Celis, supra note 2, at A1. The problem of school violence is not limited to large cities. "[P]upils used book bags to bring two pistols" into school in Kings Mountain, North Carolina, a town of only 8500 people. Id. at B8. The school responded by banning the bags and employing metal detectors to search students from kindergarten to twelfth grade. Id.
6. Celis, supra note 2, at B8. School officials also removed lockers at Sheldon High School in Eugene, Oregon. Id.
7. Id.
lence in public schools. For instance, in 1992 California amended its Education Code (Code) to permit school districts to adopt reasonable dress code regulations prohibiting students from wearing "gang-related apparel." 8 Such apparel may include baggy clothing, 9 baseball caps, 10 bandannas, 11 and overalls with one strap up and one strap hanging down. 12 In Illinois a school district banned the wearing or displaying of gang symbols, acts and speech showing gang affiliation, and conduct furthering gang activity. 13

While these regulations prohibit certain clothing and accessories, the Long Beach Unified School District in California took an even more aggressive approach to regulating apparel by adopting a uniform dress code policy in all elementary and middle schools. 14 In an effort to counter gang influence, 15 minimize disruption in schools, 16 and improve the learning environment, 17 the school district implemented a mandatory uniform policy beginning with the 1994-1995 school year. 18 Following Long Beach's lead, and at the urging of a student in Kern County, California, who was concerned about the problems of gang violence in his neighborhood, 19 California amended its law to permit school districts to adopt school-wide uniforms. 20

11. Vogel, supra note 9, at A13.
15. Id. at 1.
16. Id.
17. Id.
18. Id.
19. See Vogel, supra note 9, at A13. The student, Jesse Atondo, wanted to introduce uniforms at his former middle school in Lamont, California. Id.
20. California Education Code § 35183(b) provides: The governing board of any school district may adopt or rescind a reasonable dress code policy that requires pupils to wear a schoolwide uniform or prohibits pupils from wearing "gang-related apparel" if the governing board of the school district approves a plan that may be initiated by an individual school's principal,
This Comment addresses whether states, school districts, and individual schools can implement mandatory uniform dress codes in public schools without violating students' First Amendment rights. While some dress codes that prohibit students from wearing gang-related apparel have survived constitutional challenges, the California law that allows school districts to mandate a particular manner of dress differs vastly from prior laws and may demand stricter constitutional scrutiny. However, the California law has yet to be challenged.

Part II of this Comment discusses the problem of violence on public school campuses and the development of measures to curb violence. It also presents the rationale for implementing various policies targeting gangs and their accompanying violence. Because California is the first state to implement a uniform dress code law, the California law is used as a model in discussing the constitutionality of such laws. Part III presents a background of the relevant First Amendment standards applicable to uniform dress codes, the difference between First Amendment rights of adults and schoolchildren, and a discussion of gang clothing as merely a source of discomfort in the school environment that does not materially affect the educational process. Part IV analyzes uniform dress policies using appropriate standards of scrutiny and argues that these policies are both overbroad and ineffec-
tive in combatting the presence of gangs and violence in public schools. Accordingly, this paper concludes that laws permitting uniform dress codes are unconstitutional.

II. DEVELOPMENT OF LAWS PERMITTING DRESS CODES IN PUBLIC SCHOOLS

A. School Violence and Dress Codes Prohibiting Gang-Related Apparel

The primary purpose of schools is to educate students.\textsuperscript{25} However, concerns about violence frustrate this goal by interrupting the teaching and learning processes.\textsuperscript{26} Authorities attribute much of the problem of violence in schools to the increasing presence of gangs,\textsuperscript{27} which often distinguish themselves by particular styles and colors of clothing.\textsuperscript{28} When hostility arises between rival gangs, the gang members may identify the targets of their violence by the color of the clothing associated with a particular rival gang.\textsuperscript{29} When a nongang member wears gang-related apparel in the color of a particular gang, that student may also unwittingly become a target of violence.\textsuperscript{30}

The Supreme Court has recognized that, in addition to educating the country’s young people,\textsuperscript{31} schools also have an obligation to protect students from violence on campus.\textsuperscript{32} Further, before teachers can begin educating students, they must establish discipline and maintain order in the classroom.\textsuperscript{33} To this end, states and school districts have employed a variety of measures.\textsuperscript{34} One popular approach taken across the country has been the adoption of dress codes that prohibit

\textsuperscript{26} See, e.g., CAL. EDUC. CODE § 35183 (West Supp. 1995).
\textsuperscript{28} See supra notes 8-13 and accompanying text; see also Public School Dress Codes, supra note 23 (providing example of potential gang violence resulting from students wearing colors associated with particular gangs).
\textsuperscript{30} Id.
\textsuperscript{31} See T.L.O., 469 U.S. at 350 (Powell, J., concurring).
\textsuperscript{33} T.L.O., 469 U.S. at 350 (Powell, J., concurring); see also Goss v. Lopez, 419 U.S. 565, 580 (1975) (“Some modicum of discipline and order is essential if the educational function is to be performed.”).
\textsuperscript{34} See supra notes 4-6, 8-13 and accompanying text.
students from wearing gang-related apparel at school. These dress codes have been included in state education codes and adopted by school districts and individual schools. Although school officials note a decline in violence because of the restrictions, students have raised First Amendment challenges to dress code requirements.

Two cases involving constitutional challenges to dress codes prohibiting students from wearing gang-related clothing are *Olesen v. Board of Education of School District No. 228* and *Jeglin v. San Jacinto Unified School District*. In *Olesen*, a high school student challenged the constitutionality of a school antigang rule prohibiting male students from wearing earrings. The student argued that his earring expressed his individuality, and the school regulation violated his right of free speech and expression under the First Amendment. Holding that the school's gang policy did not unconstitutionally infringe on his "freedom to choose his own appearance," the district court focused on the school's concern for its students' safety and the related curtailment of gang activity. The school board justified its regulation as an attempt to curtail the violence between competing gangs that caused students to be reluctant to attend school.

The *Olesen* court further stated that, in order for the student to succeed in his argument that the code was unconstitutional, he must show that "his conduct intended 'to convey a particularized message . . . and . . . the likelihood [was] great that the message would be understood by those who viewed it.'" The court determined that the student's message in expressing his individuality did not satisfy

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36. See, e.g., *Olesen*, 676 F. Supp. at 821 n.*.


42. Id. The student also challenged the regulation on equal protection grounds, but an equal protection analysis is beyond the scope of this Comment.

43. Id. at 823.

44. Id.

45. See id. at 821.

this requirement, taking into consideration the school's concern in protecting its students.\textsuperscript{47} Finally, the court noted that the student was only prohibited from wearing the earring during school hours and on the school grounds; therefore, he was not completely prevented from expressing his message.\textsuperscript{48} The student thus had alternative means of expression.

Students have also challenged a dress code established under the California Education Code provision permitting schools to ban gang-related apparel.\textsuperscript{49} In Jeglin v. San Jacinto Unified School District\textsuperscript{50} elementary and middle school students challenged the constitutionality of a dress code that prohibited clothing identifying any professional sports team or college.\textsuperscript{51} The school district adopted the code because it was concerned that sports-oriented clothing expressed association with gangs.\textsuperscript{52} The district court applied the standard originally established in Tinker v. Des Moines Independent Community School District:\textsuperscript{53} The school district must demonstrate that the wearing of the particular clothing would reasonably have caused substantial disruption of, or material interference with, school activities.\textsuperscript{54} As for the elementary schools, the court concluded that the school district failed to provide evidence of any gang presence and, consequently, there was no threatened disruption or interference of school activities.\textsuperscript{55} Therefore, the school district could not impose a dress code in the elementary schools without violating the students' First Amendment rights.\textsuperscript{56} Regarding the middle schools, the district was able to prove the presence of gangs, but the court found that their presence was "negligible."\textsuperscript{57} Because the district failed to provide evidence that the presence threatened to disrupt school activities, the court held that the district could not impose dress code restrictions in these schools.\textsuperscript{58}

\textsuperscript{47} Olesen, 676 F. Supp. at 822.
\textsuperscript{48} Id. at 823.
\textsuperscript{50} 827 F. Supp. 1459 (C.D. Cal. 1993).
\textsuperscript{51} Id.
\textsuperscript{52} See id. at 1462.
\textsuperscript{53} 393 U.S. 503 (1969).
\textsuperscript{54} Jeglin, 827 F. Supp. at 1461.
\textsuperscript{55} Id. at 1461-62.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 1462.
\textsuperscript{58} Id.
Under Olesen and Jeglin, it appears that courts will strike down school dress codes that prohibit students from wearing gang-related apparel when no actual presence of gang activity exists that interferes with the orderly operation of the school. Both of these cases, however, involved challenges to school dress codes that prohibited particular clothing. Alternatively, instead of banning specific articles, styles, and colors of clothing, some schools have adopted uniform dress policies.

B. Implementation of Uniform Dress Codes

In response to the increasing problem of gang activity in public schools and the difficulty in monitoring changing gang fashions, some school districts implemented voluntary school uniform policies. Uniforms eliminate the need to determine whether schools can ban a particular article of clothing because it is gang related. Although uniform policies began as voluntary measures, some California schools and districts have made uniforms mandatory. The Long Beach Unified School District was the first district to choose this approach.

In 1989 the Long Beach Unified School District began a pilot school uniform program in several schools to determine whether uniforms could effectively resolve problems of violence. After adopting the program, the district experienced a decrease in ethnic and racial tensions, an improvement in scholastic achievement, and a decrease in absenteeism. In addition, parents felt more secure that the students would not be mistaken for gang members while at or on the way to school because of their clothing. Satisfied with these re-
suits, the Long Beach school district instituted a district-wide uniform requirement beginning with the 1994-1995 school year. This occurred before California amended its law to permit uniform dress codes.

C. California Law

The California legislature amended the California Education Code in 1994 to permit public schools to implement uniform dress codes. The amended law replaced section 35183 of the Code, which allowed school districts to prohibit students from wearing gang-related apparel. Like the previous section, the amendment authorizes a school to implement a uniform dress policy as part of the school's safety plan, pursuant to the Code. A safety plan is "a plan to develop strategies aimed at the prevention of, and education about, potential incidents involving crime and violence on the school campus." Enacted in August 1994, the new law took effect throughout the state on January 1, 1995.

There appear to be two principal reasons for the Code's amendment. First, it is difficult to instruct teachers and school administrators about the subtleties of identifying constantly changing gang apparel. The time required to instruct the administration detracts from the time necessary to educate students. By instituting a uniform dress code, the legislature believed that teachers would no longer need to spend classroom time determining whether particular clothing is gang related. Instead, they would be able to focus all of their energy on teaching.

67. See Guidelines, supra note 14, at 1. The mandatory policy applies to all elementary and middle schools in the Long Beach Unified School District. Id.
68. CAL. EDUC. CODE § 35183 (West Supp. 1995).
69. The pre-amended section provided:
The Legislature declares that "gang-related apparel" is hazardous to the health and safety of the school environment. The governing board of any school district may adopt reasonable dress code regulations that prohibit pupils from wearing "gang-related apparel" if the governing board has determined that the regulations are necessary for the health and safety of the school environment. Upon approval of the dress code regulations by the governing board of the school district, individual schools in the school district may adopt reasonable dress code regulations as part of its school safety plan . . . .
70. Id.
71. CAL. EDUC. CODE § 35183(b).
72. CAL. EDUC. CODE § 35294 (West 1993) (emphasis added).
74. Id.
Second, uniforms will prevent students from being associated with a particular gang because of their clothing.\textsuperscript{75} Gang violence on school campuses often results from warring factions of competing gangs that are identified by particular styles and colors of clothing.\textsuperscript{76} While students argue that some styles are worn because they are fashionable—not because of the student's affiliation with a gang—administrators want to eliminate "mistaken-identity violence."\textsuperscript{77} This occurs, for example, when members of gang $X$ mistake a nongang member who is wearing a color or style of clothing associated with gang $Y$—a rival of gang $X$—for being a member of gang $Y$ and harass or assault the student as a result of the misidentification. Administrators assert that school uniforms would protect innocent students from being targets of gang-related violence both on campus\textsuperscript{79} and travelling to and from school.\textsuperscript{80}

While the California legislature's motivation for amending the Code is grounded in the concern for students' safety, the amended law still must survive constitutional scrutiny in order to be implemented. Courts have recognized that the First Amendment right to freedom of speech extends beyond the protection of the spoken and written word.\textsuperscript{81} It also applies to various types of conduct and forms of expression.\textsuperscript{82} Clothing has been viewed as a form of expression in many aspects of life.\textsuperscript{83} The saying "dress for success," for instance, illustrates the notion that the clothing a person wears effects how others perceive that person, at least in forming a first impression.\textsuperscript{84} Further, \[\text{...}\]
people often wear clothing in order to express a particular message. Requiring students to wear a designated uniform deprives students of the ability to express themselves through their choice of dress. Accordingly, clothing raises fundamental issues about expression and, therefore, uniform dress codes must satisfy First Amendment scrutiny to be constitutionally applied.

III. BACKGROUND ON CONSTITUTIONALITY OF UNIFORM DRESS CODES

A. Constitutional Standards

The First Amendment to the United States Constitution provides that Congress shall make no law “abridging the freedom of speech.” This restriction on law-making power applies not only to the federal government, but also to the states. Several interpretations of the meaning of the First Amendment exist. One such theory, supported by former Supreme Court Justices Black and Douglas, is that the First Amendment right is absolute since the amendment speaks in absolute terms: “Congress shall make no law . . . .” As such, every form of speech should be constitutionally protected. Contrast this wording with the Fourth Amendment prohibition of unreasonable—but not all—searches and seizures. Arguably, if the framers had wanted to limit the scope of constitutionally protected speech, they could have done so in the wording of the First Amendment.

If the Supreme Court accepted this argument, opponents of uniform dress codes could assert that any limitation on students’ manner of dress—as a form of expression analogous to speech—would be un-

85. East Hartford Educ. Ass’n, 562 F.2d at 858.
86. See infra part IV for a First Amendment analysis of uniform dress codes.
87. U.S. CONST. amend. I provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
90. U.S. CONST. amend. I (emphasis added); see also Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) (“[W]e reject the view that . . . the scope of . . . [freedom of speech] protection must be gathered solely from a literal reading of the First Amendment.” (citation omitted)).
91. Under an absolutist theory, public school students’ right to wear gang-related clothing would be constitutionally protected.
92. U.S. CONST. amend. IV; NOWAK & ROTUNDA, supra note 89, § 16.7, at 942.
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constitutions. However, a majority of the Supreme Court has never adopted the absolutist position.

While there have been other arguments in favor of unrestricted free speech, the Supreme Court has not accepted such an expansive view. Instead, the Court has designated certain categories of speech as outside First Amendment protection. These categories, however, are not completely unprotected. The distinction of whether particular speech is protected or not depends on the nature of the regulation.

Regulations that restrict speech may be either content based or content neutral. A content-based regulation prohibits speech because of the ideas or information contained in the speech. For such a regulation to be upheld, there must be a compelling government interest for its implementation, and no less restrictive alternatives must be available to achieve the government's interest. Opponents of uniform dress codes would argue that the codes are content based, that there are less restrictive alternatives to achieve the government's interest and, therefore, the codes are unconstitutional.

Even if the speech involved is within one of the constitutionally unprotected categories, a content-based regulation may still violate

93. See generally NOWAK & ROTUNDA, supra note 89, § 16.7, at 942-43 (discussing theory that First Amendment right is absolute).
94. Id. at 943; see also Konigsberg, 366 U.S. at 49 (rejecting view of absolute freedom of speech).
95. NOWAK & ROTUNDA, supra note 89, § 16.6, at 940-41 (stating that other arguments include individual self-fulfillment, monitoring government's use of power, public enlightenment, and free speech as safety valve for society).
96. Konigsberg, 366 U.S. at 49.
97. Id.; see also Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." (footnote omitted)).
100. Id. at 794. An example of a content-based regulation is one that prohibits all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. This prohibition is based on the content of the picketing. See, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).
103. See infra part IV.A.2.a for a discussion of uniform dress codes as content based.
the First Amendment. In *R.A.V. v. City of St. Paul*, the Supreme Court held that a law was impermissibly content based where it prohibited placement on public or private property of "a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Concluding that the law was unconstitutional, the Court stated that it prohibited otherwise permissible speech solely on the basis of the subjects that the speech addressed. When the government regulates a category of unprotected speech—such as the fighting words category in *R.A.V.*—it generally may not do so in a content-based manner. However, the *R.A.V.* Court noted an exception: A government can impose a valid content-based restriction when the basis for the content discrimination is identical to the reason for not protecting the entire class of speech involved.

The second type of regulation is categorized as content neutral. This type of regulation prohibits speech to avoid an evil unconnected with the content of the speech. As a consequence, a content-neutral regulation may interfere with some forms of communication by restricting the time, place, and manner of the speech. To be constitutional such a regulation must serve a substantial government interest, be narrowly tailored to serve that interest, and leave open

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105. Id. at 2541 (quoting *St. Paul*, Minn. Legis. Code § 292.02 (1990)).
106. Id. at 2542. Another example of an impermissible content-based restriction is one prohibiting the government from proscribing libel that is critical of the government. Id. at 2543.
107. Id. at 2542; see also Chaplinsky, 315 U.S. at 572 ("[F]ighting words [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . [and] such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (footnotes omitted)).
109. Id. at 2545-46; see infra notes 220-25 and accompanying text. For instance, the *R.A.V.* Court stated that the government can criminalize threats of violence directed at the President since the entire category of threats is unprotected due to the possibility of resulting violence. Id. at 2546.
110. See *Tribe*, supra note 99, § 12-23, at 977-78.
111. See id. at 978. An example of a constitutional time, place, and manner restriction is one that prohibits the use or operation of any instrument which emits loud and raucous noises on public streets. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).
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alternative channels of communication. Proponents of uniform dress codes would assert that the codes are content neutral and, therefore, they are constitutional.

In addition to distinguishing between content-based and content-neutral regulations, courts also consider the class of persons the regulations target in determining their constitutionality.

B. Comparison of First Amendment Rights of Adults to Students

First Amendment rights apply to all United States citizens. The government's ability to curtail some of the rights, however, such as the right to freedom of speech, may depend on the class of citizens involved. For instance, the government's power to limit the First Amendment rights of schoolchildren is broader than its power to limit similar rights of adults. Yet students are persons under the Constitution and have fundamental rights that the states must respect.

In 1969 the Court stated in Tinker v. Des Moines School District that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In 1985 the Court reaffirmed in Ginsberg v. New York, however, the Supreme Court recognized that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," even where protected freedoms are invaded.


113. See infra part IV.A.2.b for a discussion of uniform dress codes as content neutral.


117. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969) (holding that school officials violated students' First Amendment rights when school adopted rule forbidding wearing of black armbands to protest hostilities in Vietnam since this speech did not cause disruption).

118. Id.

119. Id. at 506.

120. 390 U.S. 629 (1968).

121. Id. at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)). Several cases quoted this language from Ginsberg in a public school student context. See, e.g., Myers v. Arcata Union High Sch. Dist., 269 Cal. App. 2d 549, 558, 75 Cal. Rptr. 68, 73 (1969); Akin v. Board of Educ., 262 Cal. App. 2d 161, 166, 68 Cal. Rptr. 557, 560-61 (1968);
New Jersey v. T.L.O.\textsuperscript{122} that the constitutional rights of students in public schools are not identical to those of adults.\textsuperscript{123} The Court held that, while the Fourth Amendment prohibition of unreasonable searches and seizures applies to searches conducted by public school officials, the school in this situation did not violate a student's right by searching her purse because the search was reasonable.\textsuperscript{124} The Court stated that schools need not adhere to the requirement that searches be based on \textit{probable cause} to believe that the person has violated the law.\textsuperscript{125} Instead, the Court concluded that a school's interest in maintaining order justified the school's search right where there were \textit{reasonable grounds} for suspecting that the search would result in evidence that the student violated either the law or the school's rules.\textsuperscript{126}

Courts have justified the need to impose more stringent regulations on students by recognizing the existence of disciplinary problems and safety considerations in a school environment.\textsuperscript{127} School officials, however, must keep in mind that students retain some constitutional rights and strike a balance between the students' rights and the administration's interest in maintaining discipline and a safe learning environment.\textsuperscript{128} The \textit{Tinker} Court stated that the interest in suppressing a particular conduct must be more than merely the desire to avoid the "discomfort and unpleasantness" that accompanies the conduct.\textsuperscript{129} To justify the prohibition of a particular expression, school officials must show that either the conduct "materially and

\textit{see also} Goss v. Lopez, 419 U.S. 565, 574 (1975) (recognizing that states have broad power to prescribe and enforce standards of conduct in schools).  
\textsuperscript{122} 469 U.S. 325 (1985).  
\textsuperscript{123} \textit{See id.} (discussing public school student's Fourth Amendment rights). "[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally." \textit{Id.} at 348 (Powell, J., concurring); \textit{see also} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that public school could prohibit student from using lewd and indecent speech during school assembly). Although lewd and indecent speech may be permissible for adults, First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings." \textit{Id.} at 682.  
\textsuperscript{125} \textit{Id.} at 341.  
\textsuperscript{126} \textit{Id.} at 342.  
\textsuperscript{129} \textit{Tinker}, 393 U.S. at 509.
substantially interfere[s]' with appropriate school discipline in the
school's operation or impinges on the rights of other students.\textsuperscript{31}

\textbf{C. Is Gang Apparel Simply a Source of Discomfort or Unpleasantness?}

According to the Court in \textit{Tinker}, schools may not prohibit a particular expression simply to avoid the discomfort and unpleasantness that accompanies the expressed viewpoint.\textsuperscript{32} Further, students' First Amendment rights may not be limited because of an "undifferentiated fear or apprehension of disturbance" of the educational process.\textsuperscript{33} Instead, the speech must materially and substantially interfere with the school's operation or infringe on the rights of other students.\textsuperscript{34} The \textit{Tinker} Court concluded that there was no disruption at the schools because of armbands that students wore to protest U.S. involvement in Vietnam because there were no threats of violence or actual violence on the campuses.\textsuperscript{35}

In the case of gang-related apparel, officials must determine if such clothing materially and substantially interferes with the school's operation or infringes on other students' rights before imposing uniforms to restrict such clothing. Long Beach school officials believed that implementing a uniform requirement could minimize disruption caused by students' clothing.\textsuperscript{36} Moreover, California legislators believed that teachers and administrators take time away from teaching to identify and become familiar with constantly changing gang attire.\textsuperscript{37} Instead of focusing on providing an adequate education, they are concerned with the potential for classroom violence. Coupled with students' fear of potential violence, this could interfere with the ability to learn. If the problem escalates so that schools are no longer effectively providing an education, the interference could be both material and substantial. But what stage below significant interference is sufficient for school officials to take action?

\textsuperscript{130} \textit{Id.} (quoting \textit{Burnside v. Byars}, 363 F.2d 744, 749 (5th Cir. 1966)).  
\textsuperscript{131} \textit{Id.}  
\textsuperscript{132} \textit{Id.}  
\textsuperscript{133} \textit{Id.} at 508.  
\textsuperscript{134} \textit{Id.} at 509 (citing \textit{Burnside v. Byars}, 363 F.2d 744, 749 (5th Cir. 1966)).  
\textsuperscript{135} \textit{Id.} at 508. See \textit{infra} notes 266-69 and accompanying text for a discussion of the need to determine whether gang violence exists at a school before uniforms may be adopted.  
\textsuperscript{136} Guidelines, \textit{supra} note 14, at 1.  
\textsuperscript{137} \textit{See CAL. EDUC. CODE § 35183(a)(3), (5) (West Supp. 1995).}
The Court in *Tinker* required a high level of interference or infringement upon the rights of other students. The Court found that wearing armbands did not interfere with other students' rights. Gang clothing may present a different situation. When the clothing results in violence in the public schools, it infringes upon other students' constitutional right to attend a safe campus. This permits school officials to take action to protect the rights of the students—but to what extent?

One factor that distinguishes the requirement of uniforms from the armbands in *Tinker* is the level of action taken by the school authorities. In *Tinker* the Court found it relevant that the authorities did not prohibit the wearing of all controversial symbols. Students continued to wear political campaign buttons and Nazi symbols. The only item the school officials prohibited was the black armband worn in opposition to U.S. involvement in Vietnam. California school officials' approach to gang violence differs. By adopting uniform dress codes, schools do not single out gang-related apparel; instead, schools prohibit all clothing that deviates from the designated uniform, regardless of whether the clothing is controversial. This conveniently eliminates the need to determine whether a particular article or color of clothing is likely to cause violence.

The Supreme Court has stated that schools are not required to "tolerate student speech that is inconsistent with its 'basic educational mission.'" Further, actual disruption of the educational process is not necessary in order for school officials to act. According to *Tinker*, the facts must be sufficient for school officials to "forecast substantial disruption of or material interference with school activities." This standard should be applied in determining whether gang-related clothing is sufficiently disruptive to permit the implementation of uniform dress codes.

139. *Id*.
140. *Id*. at 510-11.
141. *Id*. at 510.
142. *Id*.
143. *Id*. at 510-11.
144. See generally *Cal. Educ. Code* § 35183(b) (allowing school districts to adopt dress code policies that require students to wear school-wide uniforms).
146. See *Tinker*, 393 U.S. at 514; Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973).
147. *Tinker*, 393 U.S. at 514.
IV. CONSTITUTIONALITY OF UNIFORM DRESS CODES

For private schools, a uniform dress policy is not unusual. Uniforms in public schools, however, are an unfamiliar concept to today's students. California is the first state to pass a law permitting schools to implement uniform dress codes. The greatest difference between the previous California law and the recent amendment to the Code is the difference between limiting the type of clothing students may wear and mandating the type of clothing students must wear.

To analyze the constitutionality of a uniform dress code, it is necessary to determine whether gang-related clothing is speech or expressive conduct in order to determine the applicable level of scrutiny. If it is considered expressive conduct, a four-part analysis, established in United States v. O'Brien, would be applied to analyze the constitutionality of uniform dress codes. Alternatively, if gang-related clothing is pure speech, there are two levels of scrutiny that may apply in determining whether uniform dress codes are constitutional: (1) strict scrutiny and (2) intermediate scrutiny. Strict scrutiny applies to regulations of speech that are content based. If a regulation is subject to a strict scrutiny analysis, it must serve a compelling government interest and there must be no less restrictive means available to achieve that interest. An intermediate scrutiny analysis applies to content-neutral time, place, and manner regulations. To satisfy this level of scrutiny, the regulation must serve a substantial government interest.

149. Public School Dress Codes, supra note 23.
155. See infra part IV.A.1 for a discussion of gang-related clothing as expressive conduct.
156. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); see supra notes 100-09 and accompanying text.
interest, be narrowly tailored to serve the interest, and leave open alternative channels for communication of the ideas.\textsuperscript{159}

A. Is Gang-Related Apparel Expressive Conduct or Pure Speech?

Determining whether uniform dress codes are constitutional depends on whether the codes regulate expressive conduct\textsuperscript{160} or pure speech.\textsuperscript{161} This distinction determines the applicable level of scrutiny.\textsuperscript{162}

1. Expressive conduct

Although the First Amendment literally prohibits abridging speech, the Supreme Court has recognized that its protection may extend beyond the spoken word.\textsuperscript{163} However, First Amendment protection does not extend to all conduct intended to express ideas.\textsuperscript{164} Instead, the Court has recognized that some conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]."\textsuperscript{165}

To determine whether particular conduct has "sufficient communicative elements"\textsuperscript{166} to warrant First Amendment protection, the Court considers whether the speaker intended to "convey a particularized message . . . and . . . [whether] the likelihood was great that the message would be understood by those who viewed it."\textsuperscript{167} Examples of conduct the Court has found to have sufficient communicative elements include burning an American flag during a protest rally,\textsuperscript{168}

\textsuperscript{159} City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); \textit{Clark}, 468 U.S. at 293.


\textsuperscript{162} See, e.g., Texas v. Johnson, 491 U.S. 397, 403-04 (1989) (stating that less stringent standard applies to regulations that are unrelated to expression than those related to expression).

\textsuperscript{163} \textit{Id.} at 404.

\textsuperscript{164} \textit{Id.} (citing \textit{O'Brien}, 391 U.S. at 376).

\textsuperscript{165} \textit{Id.} (quoting \textit{Spence} v. Washington, 418 U.S. 405, 409 (1974)).

\textsuperscript{166} \textit{Id.}


wearing black armbands to school to protest United States involvement in Vietnam, and nude dancing performed in a lounge.

a. standard for analyzing expressive conduct

The Supreme Court in *O'Brien* established the standard for analyzing expressive conduct. In *O'Brien* the defendant was convicted for publicly burning his selective service registration certificate, thereby violating a law that prohibited knowing destruction or mutilation of a draft card. Arguing that the law was unconstitutional, O'Brien claimed his conduct was symbolic speech within the First Amendment. He stated that he burned the certificate as a demonstration of his opposition to the draft and the war in Vietnam. The Court held that the law was constitutional and set out the following standard for analyzing statutes regulating symbolic speech: A regulation is justified if (1) it is within the government's constitutional power, (2) it furthers an important or substantial government interest, (3) the government interest is unrelated to the suppression of free expression, and (4) the incidental restriction on First Amendment rights is no greater than necessary to further that interest.

The *O'Brien* Court applied this standard to the Universal Military Training and Service Act, which prohibited the destruction of draft cards. First, the Court stated that the law was enacted in accordance with Congress's power to raise and support armies and to make laws necessary to achieve that end. In addition, carrying a draft card provided proof of registration, facilitated communication between registrants and the draft board, and reminded registrants of the need to notify the board of changes in personal information. Destroying the certificates would defeat purposes such as the government's interest in raising armies. The Court also argued that the regulation aimed solely to protect these purposes, and did not relate

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172. Id. at 370.
173. Id. at 376.
174. Id. at 376-77.
175. Id. at 377.
178. Id. at 377-78.
179. Id. at 378-79.
180. Id. at 378.
to suppressing the communicative aspect of O'Brien's conduct—demonstrating opposition to the war and the draft. Finally, the Court asserted that no less restrictive means existed to ensure the availability of the certificates. Accordingly, the Court found that O'Brien's conduct was expressive conduct that violated the Act.

A court would apply a similar analysis to determine if wearing gang clothing is expressive conduct. In order for gang-related apparel to be considered expressive conduct, it first must be determined whether students who wear such clothing intend to convey a particularized message. The clothing could express the message of the students' affiliation with a particular gang. It is also arguable that the clothing, and its indication of gang affiliation, is intended to instill fear in others. Accordingly, gang-related apparel could satisfy the requirement of a particularized message.

In addition, the standard requires a great likelihood that those who view the message will understand it. The California legislature believes that students understand the message conveyed by gang clothing. The amendment to the California Education Code states that students in the public schools are "forced to focus on the threat of violence and the messages of violence contained in many aspects of our society, particularly reflected in gang regalia that disrupts the learning environment."

The Code's language demonstrates that those who view gang clothing understand its message, and gang clothing would likely have sufficient communicative elements to be considered expressive conduct. Accordingly, the standard established by the Court in O'Brien would apply to determine whether a regulation against such clothing or, more broadly, a law requiring uniforms, is constitutional.
b. application of the O'Brien standard

Under O'Brien, the regulation must be within the government's constitutional power. In California the government and school officials would presumably assert that their authority to regulate school clothing derives from the state constitution and the state education code. The California Constitution provides that all public school students have a right to attend a safe campus. School officials therefore have an obligation to ensure the safety of the public schools. Further, the school officials' authority derives from power granted by the state legislature. The legislature has authorized schools to implement safety plans to prevent crime and violence on school campuses. Prior to the Code's amendment, the safety plans could include a school dress code prohibiting students from wearing gang-related apparel. Following the amendment, schools could require students to wear uniforms as part of the school's safety plan. Accordingly, school officials would have the power to adopt uniform policies under the California Constitution and the California Education Code.

According to the O'Brien Court, the regulation must also further an important government interest that is unrelated to the suppression of free speech. Authorities would assert a government interest in the requirement to provide safe schools. In fact, the amended law specifically refers to students' right to be safe at school and the effect of gang-related apparel on that right. Accordingly, by implementing uniform dress policies, schools aim to protect students from the violence associated with gangs, despite the incidental effect of

195. This is similar to the authority Congress gave to local draft boards in O'Brien to enforce the Universal Military Training and Service Act, ch. 144, tit. I, § 1(a), 65 Stat. 75 (1951), amended by Act of Aug. 30, 1965, Pub. L. No. 89-152, 79 Stat. 586 (current version at 50 U.S.C. § 462(b)(3) (1988)). The distinction, however, is that in O'Brien the draft boards were required to enforce the Act, while the amendment to the California Education Code permits schools to implement uniform dress codes but does not require them to do so.
199. Id. § 35183(b).
uniforms in preventing some nongang members from wearing clothing they may consider fashionable.

Finally, the *O'Brien* standard requires that the regulation restrict students' First Amendment rights no more than necessary to further the government's interest in providing a safe learning environment. While advocates of the amended law may argue that uniforms are necessary to provide safe public schools, despite the incidental effect of restricting students' First Amendment rights, opponents equally may argued that the restriction is far from incidental. If adopted by a school, the law would not only prohibit nongang members from wearing gang-related apparel but would prevent all students from expressing their ideas and individuality through their manner of dress. In addition to gang clothing, uniform dress codes prohibit all clothing that varies from the designated uniform. This is more restrictive than a mere prohibition against gang-related apparel.

Although providing safe schools is an important government interest, a regulation permitting the implementation of uniform dress codes is excessive. Therefore, such regulations would be unconstitutional under a First Amendment analysis of expressive conduct.

2. Pure speech

A court instead may decide that gang clothing is pure speech; therefore, a uniform dress code regulates pure speech, not expressive conduct. If wearing gang apparel constitutes pure speech, a court must determine whether uniform dress codes are content based or content neutral to decide the appropriate level of scrutiny.

   a. uniform dress codes as content based

   The 1994 amendment to the Code implies that the law's intended purpose is to protect students from the increasing violence on public school campuses. The law provides that individual schools

203. CAL. EDUC. CODE § 35183.
204. See infra text accompanying notes 294-97.
205. See CAL. EDUC. CODE § 35183.
206. See id. § 35183(a)(1) ("[C]hildren in many of our public schools are forced to focus on the threat of violence and the messages of violence contained in many aspects of our society, particularly reflected in gang regalia that disrupts the learning environment."). "The adoption of a schoolwide uniform policy is a reasonable way to provide some protection for students." Id. § 35183(a)(5). Further, the law provides that "to control the environment in public schools to facilitate and maintain an effective learning environment and to keep the focus of the classroom on learning and not personal safety, schools need the
may adopt a uniform dress code pursuant to school safety plans, stating that "gang-related apparel is hazardous to the health and safety of the school environment." Despite permitting schools to prohibit clothing other than gang-related apparel, the law emphasizes the message that gang-related apparel sends to other students—the threat of violence. Arguably, it is a content-based law because its focus is on the elimination of particular clothing that may detrimentally effect the learning environment.

If it is content based, the law must satisfy a strict scrutiny analysis to survive: There must be a compelling state interest and no less restrictive alternatives to further that interest. Because this is a high standard, laws rarely survive this level of scrutiny.

Courts have found that states have a compelling interest in maintaining an educational system. Further, states have an interest in providing an effective learning environment. Accordingly, courts consider regulations that promote order within the educational system reasonable, even when they infringe on students' freedom of speech. When violence plagues a campus to the extent that it affects learning, the state cannot achieve its purpose of educating students. Thus, the state has a compelling interest in providing not only an effective learning environment but a safe one as well.

Uniforms may be part of an overall attempt to prevent violence on campus, one aspect of maintaining an effective educational system. When violence is no longer the central concern of school administrators, teachers can focus on the state's goal of educating students. It thus appears that a law requiring students to wear uniforms, in order to prevent the negative effects of gang clothing and its accompanying violence, would satisfy the first part of the strict scrutiny analysis.

authorization to implement uniform clothing requirements for our public school children."

Id. § 35183(a)(6).

207. See id. § 35183(b); see also CAL. EDUC. CODE § 35294 (West 1993) (providing that "a 'safety plan' means a plan to develop strategies aimed at the prevention of, and education about, potential incidents involving crime and violence on the school campus").


211. New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring); Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973) (citing Bayless v. Martine, 430 F.2d 873, 877 (5th Cir. 1970); Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966)).

212. See CAL. EDUC. CODE § 35183(a)(1).

213. Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966) (describing rules such as assignment of students to particular classes, forbidding unnecessary discussions in classroom, and prohibiting conversations between students as reasonable regulations).

However, a state must not only have a compelling interest but also must demonstrate that no less restrictive alternatives are available to achieve the state's goal. This presents the issue of whether dress codes that prohibit gang-related clothing are less restrictive than uniform dress codes. The difference is simply that the former prohibits only the particular clothing that allegedly leads to violence on campus, while the latter mandates exactly what clothing a student must wear.

Some have argued that uniform requirements are actually less restrictive than bans on particular clothing and colors—uniform requirements supposedly treat everyone equally. However, there is a manifest difference between prohibiting particular clothing and mandating what clothing a student must wear. In comparison, a uniform dress code restricts students from wearing a wider variety of clothing than a mere prohibition against gang-related clothing. The former prohibits students not only from wearing gang-related clothing, but also clothing of any kind that varies from the designated uniform. It is apparent that a prohibition against gang-related clothing is a less restrictive alternative and, consequently, a uniform dress code should fail a strict scrutiny analysis.

Even so, a content-based restriction may be permissible if it falls within the exception stated in R.A.V. v. City of St. Paul. Where an entire class of speech is not protected by the First Amendment, a content-based restriction on a subcategory of such speech may be valid if it is restricted for the same reason the entire class is not protected. Proponents of clothing restrictions might argue that gang-related clothing is an unprotected category because it falls under the fighting words doctrine or incites unlawful conduct. If school districts prohibit gang clothing because it tends to incite an immediate breach of the peace, it is likely that courts would uphold regulations prohibiting

215. See Boos, 485 U.S. at 329.
217. Id.
218. See infra part IV.C for a discussion of an overbreadth analysis.
219. See Murphy, supra note 21, for an analysis of dress codes prohibiting gang-related apparel.
221. Id. at 2545.
222. See Murphy, supra note 21, at 1350-53, for a thorough analysis of the fighting words doctrine and incitement to commit unlawful conduct as they apply to gang-related clothing. Murphy concludes that dress codes prohibiting gang-related apparel would likely survive both analyses. Id. at 1353.
such clothing, even though they are content based. However, if no exception applies, it is likely that uniform dress codes would fail a strict scrutiny analysis since less restrictive means are available for achieving safe campuses.

b. uniform dress codes as content neutral

Proponents of school uniforms, however, would argue that a uniform dress code is content neutral since its goal is to provide a safe and effective learning environment through a means unrelated to the speech's content. According to the amendment's legislative findings, educators believe that school dress significantly influences student behavior. In Long Beach, California, where a pilot uniform policy was in effect at several schools during the 1993-1994 school year, administrators concluded that uniforms reduced ethnic and racial tensions, bridged socioeconomic differences between students, improved students' self-respect, decreased absenteeism, and improved academic performance. While a uniform dress code may interfere with some types of communication, such as students expressing their gang affiliation, the law's purpose is to enhance the overall learning environment.

The Court in City of Renton v. Playtime Theatres discussed a similar analysis. The Renton Court held that an ordinance prohibiting adult movie theaters from locating within 1000 feet of various sites did not target the content of the films shown at the theaters, but targeted the secondary effects of the theaters on the surrounding commun-

223. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (discussing states' ability to "forbid or proscribe advocacy of the use of force . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) ("'[D]amned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.").

224. CAL. EDUC. CODE § 35183(a)(7) ("Schools that have adopted school uniforms experience a 'coming together feeling,' greater school pride, and better behavior in and out of the classroom.").

225. Guidelines, supra note 14, at 1. The policy became mandatory at the beginning of the 1994 school year. Id.

226. Id.

227. Id.

228. Id.

229. Van Der Laan Interview, supra note 64.

230. Id. (improvements in scholastic achievement were noticed at some schools in district).

The city enacted the ordinance to prevent crime, maintain property values, and protect the quality of the city's neighborhoods, "not to suppress the expression of unpopular views." Similarly, advocates of the uniform law would focus on secondary effects, arguing that its purpose is to promote the safety of public school campuses, not to suppress students' expression of gang affiliation or other clothing-related expression.

If courts consider the amendment to the Code content neutral, then they would apply a time, place, and manner analysis rather than a more stringent strict scrutiny analysis. Courts would uphold the regulation if it was designed to serve a substantial government interest, was narrowly tailored to serve that interest, and alternative means of communication were available.

The analysis of whether the law serves a substantial government interest would be similar to that discussed above, namely, the purpose of the law is to provide safe public schools—a right guaranteed to students under the California Constitution. Eliminating gang violence on campus is a means of promoting this right. The Court in Renton held that the city's desire to preserve the quality of urban life was a satisfactory interest. Similarly, a school's desire to provide a safe learning environment should be a sufficiently substantial interest.

In addition, the law must be narrowly tailored to serve the government's interest. It does not have to be the least restrictive means of achieving the government's interest; it just must be reasonable and not "burden substantially more speech than necessary." Uniform dress codes, however, burden much more speech than necessary to prevent gang violence. The uniform law permits schools to prohibit not only gang-related clothing, but all clothing that deviates from the school-imposed uniform.

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232. Id. at 47.
233. Id. at 48.
234. Id. at 47.
236. See supra part IV.A.1.b.
237. CAL. CONST. art. I, § 28(c).
238. Renton, 475 U.S. at 50.
239. Clark, 468 U.S. at 293.
Moreover, to be permissible, the law must leave open alternative means of communication. The Court in *Renton* found that the law, which restricted the location of adult theaters, left open adequate alternative means of communication because more than five percent of the land in the entire city remained available for use by the theaters.

A uniform dress code similarly does not completely prohibit students from wearing their desired clothing. The restrictions would apply only on the school campus, leaving students free to wear other clothing off campus. But the real issue is whether uniform dress codes would leave open alternative avenues of communication on school premises. In addition to precluding students from wearing fashionable clothing, the law would also prohibit students from wearing clothing that bears a message or expresses a student's ideas on any issue. Further, school officials may not tolerate even minor modifications of students' uniforms, such as wearing distinct shoelaces or jewelry. It is possible that the only alternative means of communication available would be oral, and even this may be limited in a school context.

Even if generally characterized as content neutral, the law still risks being declared unconstitutional because of its inclusion of a content-based provision. The Code amendment provides that a school district may adopt or rescind a reasonable dress code policy that pro-

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242. *Id.* at 53.

243. *Id.* The Court concluded this was adequate despite respondents' argument that some of the stated land was already occupied by existing businesses and the rest was either not available or not "commercially viable." *Id.* at 53-54.

244. *See infra* text accompanying notes 292-97.

245. *See infra* text accompanying notes 294-97.

246. *See, e.g., Van Der Laan Interview, supra* note 64. California law, however, provides that a school's uniform policy shall not preclude students who participate in nationally recognized youth organizations from wearing organization uniforms when that organization has a scheduled meeting. *Cal. Educ. Code* § 35183(g). The Long Beach policy complies with this provision. *See Guidelines, supra* note 14, at 4.

247. A discussion of a school's ability to limit its students' freedom of oral expression is beyond the scope of this Comment.

hibits students from wearing gang-related apparel. As previously stated, this prohibition is content based since it regulates speech according to the message it sends—only prohibiting students from wearing clothing that is gang related.

Even if a uniform rule is in effect, gang members may attempt to express their gang affiliation through other means. For instance, gang members may try to wear baggy uniforms or make themselves known by wearing particular shoelaces. However, according to Richard Van Der Laan, the Director of Public Information of the Long Beach Unified School District, if police inform school officials that particular clothing is gang attire, the school will not permit the clothing to be worn. This restriction would be based on the authorities' perception that the clothing is gang related, and again the restriction would be content based.

Finally, according to former California State Senator Phil Wyman, schools and parents are given the choice of whether to implement a uniform dress code "based on local conditions of crime, classroom discipline or whatever." This approach to the law closely resembles the argument that the legislature generally enacted it to provide a safe and effective learning environment. However, it provides few limitations to the purposes for which a school may adopt a uniform dress code. While the law mentions benefits other than reducing violence on campus, it specifically states that the governing board of a school district may adopt a school-wide uniform if the board determines that the "policy is necessary for the health and safety

249. CAL. EDUC. CODE § 35183(b). This provision is the equivalent of the earlier law permitting schools to implement dress codes prohibiting gang-related apparel. See Murphy, supra note 21, for a First Amendment analysis of these dress codes.

250. See Murphy, supra note 21, for a discussion of the constitutionality of dress codes prohibiting gang-related clothing. In addition to being content based, a provision permitting schools to prohibit gang-related clothing would also risk being declared vague. For a vagueness analysis of such provisions, see id. at 1355-56.

251. Michel Marriott, Uncool For School, N.Y. TIMES, Nov. 14, 1993, § 9, at 1, 9. Lawrence Steinberg, professor of psychology at Temple University, believes that "students [will] always find a way, perhaps subtle, to assert their individuality and group identities through what they wear . . . ." Id.

252. See Van Der Laan Interview, supra note 64.

253. Id.


255. Id. (emphasis added).

256. See CAL. EDUC. CODE § 35183.

257. See id.
of the school environment." This introduces the issue of whether the law will reduce the violence currently plaguing our nation's public schools—the stated purpose of the law.

B. Effectiveness of Uniform Dress Codes

Opponents of the law may raise two arguments regarding the effectiveness of the California uniform dress law, regardless of whether the law is content based or content neutral. The first argument is that the law is underinclusive—it focuses solely on violence caused by the presence of gangs on campus and neglects to address the other problems that lead to violence. The second argument is that no relationship exists between uniforms and violence. This argument is more powerful because, if accepted, it determines that the law is ineffective and therefore unconstitutional.

1. Underinclusiveness

Opponents of the amendment to the Code may argue that it is underinclusive since it ignores all causes of violence other than gangs. The Court discussed the issue of underinclusiveness in City of Renton v. Playtime Theatres. In Renton respondents argued that the law failed to regulate other types of adult businesses that were likely to produce secondary effects similar to those caused by adult theaters. In response the Court stated that the city's choice of addressing the problems created by a particular type of business did not mean that the city had "singled out" adult theaters for discrimination. The ordinance was a valid governmental response to the serious problems created by the theaters.

Similarly, opponents of uniform dress codes may argue that numerous activities and problems lead to campus violence. The violence is not limited to warfare between competing gangs. The law, however, focuses solely on the problems created by the presence of gangs and their distinct apparel, failing to address other causes of violence. Fol-

258. Id. § 35183(b) (emphasis added); see infra notes 266-69 and accompanying text.
259. See generally California Senate Floor Analysis of SB 1269, 1993-1994 Regular Sess. (July 7, 1994) (Arguments in Opposition) (unpublished analysis, on file with Loyola of Los Angeles Law Review) [hereinafter California Senate Floor Analysis] (expressing view that "there is no sound evidence that uniforms prevent gang violence [or the] carrying of weapons").
261. Id. at 52.
262. Id. at 52-53.
263. Id. at 54.
lowing the analysis of the Court in Renton, advocates of uniform dress codes could respond that the government and schools are attacking the problem of violence one step at a time. By eliminating clothing that distinguishes students as gang members or permits students to hide weapons in their clothing, the schools are taking steps to rid campuses of the violence that interferes with the schools' educational purpose. In the future the government may find additional means it believes will succeed in making the campuses safer. For now, advocates would argue that requiring students to wear designated uniforms "represents a valid governmental response to . . . [a] 'serious problem[ ].'"

Moreover, according to the language of the California law, schools may adopt a uniform policy only if they determine that such a policy is necessary for the safety of the school environment. Therefore, the regulation may not permit all schools to implement a uniform dress code. Instead, school districts first need to prove that a problem of violence exists at the particular school before adopting a uniform policy. If no such problem exists, it would be difficult for the school to justify the need for such a drastic measure. In addition, if a school adopts a uniform policy that successfully eliminates campus violence, at what point would the school be required to terminate the policy because it is no longer justified?

2. No relationship exists between uniforms and violence

Regardless of whether uniform laws are categorized as content based and subject to a strict scrutiny analysis, or content neutral and

264. Educating students about gangs and violence may be another measure schools take in an attempt to eliminate violence on campus. As part of the School Safety Plan, the California Education Code provides for the development of "strategies aimed at the prevention of, and education about, potential incidents involving crime and violence on the school campus." CAL. EDUC. CODE § 35294 (West 1993) (emphasis added).


266. The amended law provides: "The governing board of any school district may adopt or rescind a reasonable dress code policy that requires pupils to wear a schoolwide uniform . . . if the governing board of the school district . . . determines that the policy is necessary for the health and safety of the school environment." CAL. EDUC. CODE § 35183(b) (West Supp. 1995) (emphasis added); see also California Senate Floor Analysis, supra note 259 ("Implementation [of a uniform policy at a school] is contingent upon the governing board's determining that the policy is necessary for the health and safety of the school environment.").

subject to an intermediate scrutiny analysis, the laws must relate to the
ends they seek to achieve.\textsuperscript{268} Before they adopt such policies, schools should consider whether uniforms will succeed in reducing the amount of violence on campuses. Opponents of the Code's amendment, such as the American Civil Liberties Union (ACLU), argue that no empirical evidence shows that the improvements noticed by the Long Beach Unified School District were a result of the voluntary uniform program.\textsuperscript{269} Further, the benefits do not show a direct link between school uniforms and a decrease in gang violence.\textsuperscript{270} If no relationship exists, then the law would fail both a strict scrutiny analysis and an intermediate scrutiny analysis because it would be impossible to effectively argue that the law as enacted achieved its stated goal.

Although the language of the California law states that its purpose is to help reduce violence in schools,\textsuperscript{271} various interpretations may lead to confusion regarding the permissibility of uniforms. As previously mentioned, Phil Wyman, former state senator and author of the uniform bill, stated that schools and parents could choose to adopt a uniform policy "based on local conditions of crime, classroom discipline or whatever."\textsuperscript{272} When Long Beach adopted its mandatory uniform policy, the school district based the decision upon the results of a pilot program within the district.\textsuperscript{273} The pilot program not only enhanced safety\textsuperscript{274} but also promoted nonsafety factors such as bridging socioeconomic differences among students,\textsuperscript{275} promoting good behavior,\textsuperscript{276} and improving students' self-respect.\textsuperscript{277} While these nonviolence-related benefits may enhance the learning environment, it is doubtful that they are the factors the California legislature intended to be considered in deciding whether to institute a uniform

\textsuperscript{268} See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").


\textsuperscript{270} Id.

\textsuperscript{271} CAL. EDUC. CODE § 35183(a).

\textsuperscript{272} Governor Signs Wyman's Uniform Bill, supra note 254. The constitutional analysis in this Comment focuses on the implementation of uniform dress codes for the purpose of decreasing violence in public schools.

\textsuperscript{273} Guidelines, supra note 14, at 1.

\textsuperscript{274} Id.

\textsuperscript{275} Id.

\textsuperscript{276} Id.

\textsuperscript{277} Id.
policy. Further, less intrusive means than uniforms may achieve these benefits.

Since the law focuses on school violence, schools should implement a uniform policy solely to avert violence, not to achieve nonviolence-related benefits. But are uniforms even the solution to violence? If a student, gang member or not, wants to bring a weapon to school, a uniform is not going to prevent the student from doing so. Although it has been asserted that students often conceal weapons by wearing baggy clothing, such as jumpsuits and overcoats, a uniform will not prevent a student from concealing a weapon in a backpack or cut-out book. Children are encouraged and taught to be creative from an early age, and they may be creative in finding ways to bring weapons to school.

Uniforms also will not prevent students from joining gangs the groups commonly associated with campus violence. In order for schools to eliminate gang violence on campus, they should focus on the core of the problem—students’ association with gangs—not the resulting violence or the mere meaning of certain clothing. To prevent gang association, teachers, administrators, and parents should focus on children's environments outside the school, not the clothing they wear to school. For instance, if the family unit is strengthened, children may not feel the need to seek companionship through gangs. Consequently, schools would be relieved of some of the violence that is associated with gangs, resulting in safer campuses, not just the image of a safe school environment.

In addition to not solving the problem of violence, uniforms may actually create more problems. The California law contains an opt-out provision whereby parents may choose to exempt their children from a school’s uniform policy. Assuming a student’s parents do not want their child to wear a uniform, consider the effect on the student when the student’s friends are all wearing uniforms and the stu-

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278. See supra notes 64-65, 275-79 and accompanying text, for examples of nonviolence-related benefits.
279. See CAL. EDUC. CODE § 35183(a)(4).
280. See Celis, supra note 2, at B8 (“There are a million other ways [to bring a weapon to school].”’) (quoting 13-year-old Owen Brice, student at Alexander Graham Middle School).
281. Vogel, supra note 80, at A13.
282. See generally Zoltan L. Simsay, Individual Freedoms Lose if School Uniforms Win, SAN DIEGO UNION-TRIB., Oct. 20, 1994, at B-11 (“The issue of gangs and gang violence extends far deeper than what one wears in school. The problem is a socioeconomic one and must be addressed at home and on the streets.”).
283. CAL. EDUC. CODE § 35183(e).
dent stands out in school. If classmates ridicule the child, the student may give in to peer pressure and join the uniform program to avoid humiliation. This teaches students conformity, not individuality, and may weaken their ability to make individual choices. Further, it fosters "a sterile, uncreative environment" during a period in a child's life when creativity should be encouraged.

If, instead of reducing violence in public schools, uniforms create more problems, schools should not adopt uniform dress codes. Moreover, if uniform requirements bear no relation to a reduction in violence, then the California law permitting schools to implement uniforms would be unconstitutional.

C. Overbreadth

In addition to being unconstitutional for failing to satisfy the appropriate level of scrutiny, uniform dress codes may also be unconstitutional due to overbreadth. A statute is overbroad if, in addition to proscribing activities that constitutionally can be regulated, it also proscribes speech or conduct that is protected by the First Amendment guarantee of free speech. An overbreadth challenge can be applied on a case-by-case basis or used to facially attack a statute. If a court, considering a facial attack, concludes that a statute would deter people from engaging in protected speech, it will strike down the entire statute. Mere overbreadth, however, will not be sufficient to strike down a law. In Broadrick v. Oklahoma, the Supreme Court stated that, for facial invalidation of a statute primarily directed at conduct rather than pure speech, the overbreadth must be both real and substantial in relation to its legitimate sweep. However, if a court concludes that a statute would not deter speech that is constitutionally protected, the court will uphold the law and allow it to be applied on a case-by-case basis. Thus, the concern regarding an

286. See NOWAK & ROTUNDA, supra note 89, § 16.8, at 947.
287. Id.
289. Id. at 615.
290. See id. at 615-16.
overbroad law is that it will have a "'chilling effect'" on free speech.²⁹¹

The issue presented here is whether a uniform dress code would survive an overbreadth attack. Paul Murphy analyzed an overbreadth challenge to restrictions against wearing gang attire.²⁹² Murphy argued that

[v]ery little protected speech will be chilled by the dress codes because students can still express messages by their choice of dress. . . . Thus, the chilling effect will only occur when students choose not to wear a particular article of clothing because they fear it may also express a gang message. . . . This overbreadth is not substantial.²⁹³

The circumstances change, however, when the statute goes beyond the mere restriction of gang clothing. When schools tell students precisely what clothing they must wear to school, they deprive students of any opportunity to express a message through their choice of dress. According to the ACLU, uniform dress codes infringe upon students' free speech rights and "cut off a significant avenue of political expression for students."²⁹⁴ The ACLU expressed the concern that students could not wear T-shirts with messages such as "Just Say No to Drugs" or "Real Women Love Jesus."²⁹⁵ In effect, students would lose their choice of dress entirely. This level of overbreadth is substantial, much more so than a typical dress code that prohibits only specific items.

Further, under the statutes that merely restrict gang clothing, students might have the opportunity to rebut the presumption that their clothing was gang related in order to wear their desired clothing.²⁹⁶ With the implementation of a uniform dress code, however, students can no longer rebut this presumption. The only circumstance in which students might continue to express themselves through clothing would be if their parents chose to opt out of the uniform program,²⁹⁷ assum-

²⁹² Murphy, supra note 21, at 1353-55.
²⁹³ Id. at 1355.
²⁹⁵ Id.
²⁹⁶ See Murphy, supra note 21, at 1356.
²⁹⁷ See California Education Code § 35183(e) (West Supp. 1995), for an example of an opt-out provision. If a parent chose to opt out, and the state also had a law restricting students from wearing gang-related clothing, an analysis of the potential overbreadth of the restriction would be necessary. The California law permits schools to restrict gang-
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ing such an alternative was available. Whether a particular article of clothing is gang related would be irrelevant if a school requires a particular uniform.

Finally, Murphy argued that

[n]ongang members may be forced to change their wardrobe or their color scheme, or may be prohibited from wearing certain gang-related clothing. This does not seem inherently substantial in light of what a dress code is trying to do—establish a safe and effective learning environment. Even if some are prohibited from wearing particular articles of clothing, this seems to fall “within the scope of otherwise valid . . . laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct” that gang regalia may represent.298

The questionable aspect of this argument is the effectiveness of the state's approach in achieving its interest. While limiting the clothing a student wears to school may reduce the overt presence of gangs, it does not eliminate the actual existence of gangs and violence in schools.

Applying this argument to uniform dress codes, even if a court determined that the uniform laws were not substantially overbroad, the issue remains whether the state's approach to the problem effectively achieves its goal. While a state may have a legitimate interest in providing a safe and effective learning environment, the means adopted—implementing uniform dress codes—may be too remote from the ends the state wishes to achieve. Many educators agree that uniforms are not going to solve the problems in public schools.299 A principal of a school in Los Angeles raised the question, "The apple is rotten so you're going to shine the top and that's going to make a difference?"300 Instead of addressing the problem of gangs and their accompanying violence, schools are further suppressing the issue in an attempt to present an image that schools are safe.301 In so doing, the

related clothing or require students to wear uniforms. See Murphy, supra note 21, at 1353-55, for application of the overbreadth doctrine to prohibitions of gang-related clothing.

298. Murphy, supra note 21, at 1354-55 (footnotes omitted) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

299. See Vogel, supra note 80, at A13 (“[S]ome educators call uniforms a Band-Aid that cannot make public school students read better or resist joining [sic] gangs.”).

300. Id. (quoting Dyhan Lal, Carson High School principal).

301. See supra part IV.B.2 for a discussion of the relationship between uniforms and violence.
legislature and school boards appear to drastically infringe upon students’ rights.

V. Conclusion

The 1994 amendment to the California Education Code authorizes public schools to implement uniform dress code policies in an attempt to stop the problem of gang violence that currently plagues the State’s schools.\textsuperscript{302} The law permits individual schools to go beyond the popular method of prohibiting students from wearing gang-related clothing and require a uniform.\textsuperscript{303} While restrictions against gang-related apparel have successfully met challenges,\textsuperscript{304} the constitutionality of uniform dress codes, such as those permitted by the California amendment, has yet to be questioned.

A student or parent who challenges the law will have to show that it unnecessarily infringes on students’ First Amendment rights in a way that is more restrictive than a regulation prohibiting gang-related clothing. While states and school officials do have broad discretion in formulating regulations necessary to provide a safe learning environment,\textsuperscript{305} the United States Constitution limits their power. Under an analysis of uniform dress codes either as expressive conduct or pure speech, dress codes exceed this limit and violate students’ First Amendment rights. Further, by permitting schools to implement uniform dress codes that prohibit all clothing that deviates from the designated uniform, the California law is also overbroad.

Fundamentally, both uniforms and regulations prohibiting gang-related clothing make the same assumption—that campus violence results from the type of clothing that students wear. Although clothing may be a factor, such as when a student wears a color or style associated with a particular gang, it is not the cause of the violence. Gangs, not clothing, cause violence.

Instead of focusing on clothing, the State should direct its efforts at discouraging students from joining gangs. This includes not only teaching them the importance of an education, but also trying to improve the conditions of students’ lives outside the school environment.

\textsuperscript{302} \textsc{Cal. Educ. Code} § 35183 (West Supp. 1995).
\textsuperscript{303} \textit{Id.}
\textsuperscript{305} Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966). States have a compelling interest in maintaining an educational system. \textit{See supra} notes 211-16 and accompanying text.
If the family unit is weak, children may tend to seek companionship from their peers and, ultimately, they may look to gangs to serve as substitute families. However, if children choose not to join gangs, gang presence at the schools could decrease and, as a result, the problem of gang violence in public schools would diminish.

Uniforms, on the other hand, merely seem to mask the underlying problem; they are not the ultimate solution. They will neither deter students from joining gangs nor will they prevent gang violence. They also will not prevent gang members from expressing their gang affiliation through other means, such as hand signals or hairstyles. As one student commented, "'We'll still get jumped. This is the inner city, it's not going to change. You have to change the neighborhoods first; put the kids behind bars who belong there.'"306

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* This Comment is dedicated to my parents, Esther and Howard Barbarosh, my sister, Andrea, and my brother, Craig, for all of their love and support. I would like to thank Professor David W. Burcham and Professor Marcy Strauss for their insightful comments, the editors and staff of the Loyola of Los Angeles Law Review for their hard work, and Alan Kholos for his continued patience and encouragement.