

# Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture

Deborah M. Ahrens\* & Andrew M. Siegel†

*Over the last twenty years, a substantial and increasing percentage of public school students have been required to wear school uniforms or adhere to strict dress codes. They have done so in a cultural and legal landscape that assumes such restrictions pose few—if any—constitutional problems. As this Article argues, however, this landscape is relatively new; as recently as forty years ago, the legal and cultural assumptions about student dress codes were completely reversed, with the majority of educators and commentators assuming that our constitutional commitments to equality, autonomy, and free expression preclude strict student dress restrictions. This Article explores the history of this evolution as a case study in the messy process through which constitutional law interacts with politics and culture, at times developing without significant judicial reflection or, indeed, participation. Major cultural developments in parenting, schooling, policing, gender, and race relations interacted with shifting political dynamics and economic factors to change our frames and alter public and judicial perception of the scope of underlying constitutional rights. In this Article, we explain these previously obscured changes in constitutional law and culture, explore their implications for constitutional theory, and argue for their reversal. While the underlying constitutional case law is sufficiently indeterminate to support either era's approach, the approach we reconstruct in this Article better serves our children and our constitutional values.*

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\* William C. Oltman Professor of Teaching Excellence, Seattle University School of Law. BA, Brown University; JD, New York University School of Law; MPP, John F. Kennedy School of Government, Harvard University.

† Associate Professor of Law, Seattle University School of Law. BA, Yale University; JD, New York University School of Law; MA in History, Princeton University. Earlier versions of this Article were presented at the Annual Meeting of the Law & Society Association and at a faculty summer workshop at Seattle University. We would like to thank Jan Ainsworth, Brooke Coleman, Sid DeLong, Charlotte Garden, Lily Kahng, Ron Krotoszynski, and the other participants at those events for their helpful comments; Kell Brauer for his research assistance; and Juliet Ahrens-Siegel for the inspiration and insight she provided on this complicated topic.

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## INTRODUCTION

In the early 1970s, public school students in the United States enjoyed broad freedom to dress, groom, and style themselves as they wished. This emerging norm was, on the one hand, grounded in history; unlike in other western nations, public school uniforms had never been common in the United States, and where student dress codes existed, they tended to be pointillist (restricting particular items) rather than totalizing.<sup>1</sup> On the other hand,

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<sup>1</sup> On the history of public school uniforms and dress codes in the United States, see generally DAVID L. BRUNSMAN, *THE SCHOOL UNIFORM MOVEMENT AND WHAT IT TELLS US ABOUT AMERICAN EDUCATION: A SYMBOLIC CRUSADE* 1–26 (2004). As discussed below, see *infra*

these developing expectations of student autonomy were also the product of changing times, as many school districts across the country had—either voluntarily or under threat of litigation—relaxed or abandoned previously existing grooming and dress restrictions.<sup>2</sup> Moreover, the acceptance of student control over appearance looked to be more than a transitory cultural norm. While it would be a stretch to say that the constitutional issues were firmly settled, the few legal decisions that most directly addressed student attire and grooming pointed in the direction of student freedom,<sup>3</sup> and broader developments in both First Amendment and due process jurisprudence<sup>4</sup> suggested that school districts would have had difficulty justifying restrictions that appeared increasingly arbitrary.<sup>5</sup>

Fast-forward forty years and the landscape has shifted completely. A substantial and rapidly growing percentage of American public school students are now required to wear school uniforms, and a significantly larger

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Part I.A, the literature on student dress restrictions in American public schools before 1960 is sparse, but the evidence we have suggests that particular schools tended to restrict particular items or impose specific requirements, often on an ad hoc basis, rather than issuing detailed, thorough, or formal codes.

<sup>2</sup> For further discussion of these developments, see *infra* Part I.B.

<sup>3</sup> See, e.g., *Wallace v. Ford*, 346 F. Supp. 156, 163 (E.D. Ark 1972) (holding that school district must establish “necessity” before imposing broad dress restrictions, and invalidating numerous dress code provisions for failing to meet that standard); *Bannister v. Paradis*, 316 F. Supp. 185, 189 (D.N.H. 1970) (invalidating school rule prohibiting wearing blue jeans); *Crossen v. Fatsi*, 309 F. Supp. 114, 118 (D. Conn. 1970) (striking down dress code on vagueness and invasion of privacy grounds); *Johnson v. Joint Sch. Dist. No. 60*, 95 508 P.2d 547, 549 (Idaho 1973) (invalidating rule prohibiting women from wearing pants); *Scott v. Bd. of Educ.*, 61 305 N.Y.S.2d 601, 605–06 (N.Y. Sup. Ct. 1969) (same).

The vast majority of court challenges to public school grooming restrictions during this era involved challenges to hair-length restrictions for male students. These challenges created a massive split of authority in state and federal courts, dividing the federal courts of appeal almost exactly down the middle. Compare *Arnold v. Carpenter*, 459 F.2d 939, 944 (7th Cir. 1972) (holding restrictions invalid); *Richardson v. Thurston*, 424 F.2d 1281, 1286 (1st Cir. 1970) (same); *Bishop v. Colaw*, 450 F.2d 1069, 1077 (8th Cir. 1971) (same); *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972) (same), with *Karr v. Schmidt*, 460 F.2d 609, 618 (5th Cir. 1972) (en banc) (upholding restrictions); *Gfell v. Rickelman*, 441 F.2d 444, 447 (6th Cir. 1971) (same); *King v. Saddleback Jr. Coll. Dist.*, 445 F.2d 932, 940 (9th Cir. 1971) (same); *Freeman v. Flake*, 448 F.2d 258, 262 (10th Cir. 1971) (same). For an excellent albeit early summary of the cases, see Recent Case, *Prohibition of Long Hair Absent Showing of Actual Disruption Violates Students’ Constitutional Rights*, *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). *Requirement that High School Students Shave is Valid if Founded on a Rational Basis*: *Stevenson v. Bd. of Educ.*, 426 F.2d 1154 (5th Cir. 1970), cert. denied, 400 U.S. 957 (1970), 84 HARV. L. REV. 1702, 1702–04 (1971).

<sup>4</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (recognizing broad free speech rights for public school students); *United States v. O’Brien*, 391 U.S. 367 (1968) (according fairly broad constitutional protection to expressive conduct); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (grounding emerging substantive due process doctrine in liberty and autonomy rights of individuals); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (Harlan, J., concurring) (laying out substantive due process rationale for invalidating state actions impinging on important liberty interests).

<sup>5</sup> Many commentators during that era confidently predicted the United States Supreme Court would side with student challengers if dress or hair-length restrictions ever made it onto the docket. See, e.g., Clifford Lee Reeves, *The Personal Appearance of Students—The Abuse of a Protected Freedom*, 20 ALA. L. REV. 104, 113 (1967); Note, *High School Hair Regulations*, 4 VAL. U. L. REV. 400, 416 (1970).

percentage are required to adhere to rigid dress codes that drastically limit their sartorial choices.<sup>6</sup> These dress codes are wildly popular, embraced by strong majorities of parents and educators in geographically and culturally diverse regions of the country.<sup>7</sup> While defenders of dress codes were largely isolated on the right wing of the political spectrum in the 1960s and 1970s, their numbers are now buttressed by allies from the left, whose arguments more commonly reflect concerns about equality than order.<sup>8</sup> While dress codes restricting particular messages, limiting religious expression, or aggressively enforcing gender norms encounter occasional problems in the courts,<sup>9</sup> generalized autonomy- or expression-based challenges to uniforms or restrictive dress codes are rarely taken seriously by school districts, judges, or commentators.<sup>10</sup>

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 anti-theoretical to our collective constitutional values and unlikely to survive constitutional scrutiny to a new set of assumptions that treated such dress policies

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<sup>6</sup> See NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2015, 105 (2016) (showing that the percentage of public schools requiring school uniforms increased from 12% in 1999–2000 to 20% in 2014–15). Furthermore, the percentage of public schools enforcing a strict dress code increased from 47% in 1999–2000 to 58% in 2013–2014. See *id.*

<sup>7</sup> See, e.g., David E. Gullatt, *Rationales and Strategies for Amending the School Dress Code to Accommodate Student Uniforms*, 27 AM. SECONDARY EDUC. 39, 45 (1999) (finding that roughly two-thirds of district superintendents felt uniforms would improve discipline); Todd A. DeMitchell et al., *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & EDUC. 31, 41 (2000) (finding that principals at all levels strongly favored dress codes); West et al., *Attitudes of Parents About School Uniforms*, 2 J. FAM. & CONSUMER SCI. 91, 92 (1999) (finding that 56% of parents of fourth graders in Lafayette County, Mississippi strongly favored or favored the use of school uniforms in public schools).

<sup>8</sup> For a discussion of how the politics of school dress codes flipped, with an emphasis on the role of the administration of President William Clinton, see *infra* Part II.E.

<sup>9</sup> See, e.g., *Castorina v. Madison Cty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (concluding that a blanket ban on clothing that displayed the Confederate flag without banning other political statements was inappropriate); *Hayden ex re. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014) (concluding that a hair-length policy for boys but not for girls constitutes sex discrimination); *Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1336–37 (E.D. Tex. 1993) (enjoining a school district from enforcing a dress code that prohibited Native Americans from wearing their hair long under the Free Exercise Clause).

<sup>10</sup> An Illinois District Court succinctly states this point: when a student's "only message is one of . . . individuality . . . [this] message is not within the protected scope of the First Amendment." *Olesen v. Bd. of Educ.*, 676 F. Supp. 820, 821 (N.D. Ill. 1987) (internal quotations omitted). See also *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008) (concluding that a content-neutral school uniform policy did not violate plaintiff's right to free speech); *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (concluding that a school uniform does not prevent students from expressing their views in other ways); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 627 (2002) (stating that a school may impose content-neutral limits on free expression such as school uniforms).

as constitutionally unproblematic. This fundamental shift in our collective constitutional understanding did not result from any major intervening change in Supreme Court case law—the Court issued no opinions dealing directly with these topics and only a handful of tangentially related ones.<sup>11</sup> Nor did it arise from a careful reconsideration of constitutional text or precedent outside the Court—very few lower court cases from this period deal with these core issues<sup>12</sup> and the number of contemporaneous treatises and law review articles that even address these questions is vanishingly small.<sup>13</sup>

This historical development raises several fascinating questions. First, why did it happen? What forces in our culture and politics, what changing ideas, motivated and sustained our collective reconsideration of the constitutionality of student dress codes? Second, what does this episode tell us about how our constitutional culture operates and how our constitutional law is made? Finally, does the current consensus that school uniforms and student dress codes do not implicate serious concerns about constitutionally protected autonomy or expression comport with our broader doctrinal structures, overarching constitutional commitments, and normative instincts?

This Article takes these questions in turn. After Part I fleshes out the history and case law referenced above, Part II explores developments in po-

<sup>11</sup> See, e.g., *Spence v. Washington*, 418 U.S. 405, 414–15 (1974) (arguably narrowing category of communicative conduct eligible for constitutional protection); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988); *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007).

<sup>12</sup> For a discussion of the few circuit court opinions dealing with core autonomy or expression based challenges to school uniforms or strict dress codes, see *infra* Part I.C.

<sup>13</sup> For a thorough overview of constitutional issues related to dress, including a chapter on student dress, see generally RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY* (2013). For the most thorough analysis of the complicated constitutional questions interspersed with provocative post-structural analysis, see generally Gowri Ramachandran, *Freedom of Dress, State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006). The most prolific scholar on these issues is a non-lawyer, Todd DeMitchell. See generally DeMitchell et al., *supra* note 7; Todd A. DeMitchell & Mark A. Paige, *School Uniforms in the Public Schools: Symbol or Substance? A Law & Policy Analysis*, 250 EDUC. L. REP. 847 (2010); Todd A. DeMitchell, *School Uniforms and the Constitution: Common Dress in an Uncommon Time*, 156 EDUC. L. REP. 1 (2000). Student scholarship has also addressed the topic. See generally Alison M. Barbarosh, Note, *Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students' First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415 (1995); Wendy Mahling, Note, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715 (1996); Dena M. Sarke, Note, *Coed Naked Constitutional Law: The Benefits and Harms of Uniform Dress Requirements in American Public Schools*, 78 B.U. L. REV. 153 (1998); Alyson Ray, Note, *A Nation of Robots? The Unconstitutionality of Public School Uniform Codes*, 28 J. MARSHALL L. REV. 645 (1993). Some of the best recent scholarship focuses on the constitutionality of school dress codes and uniforms in regards to gender norms, often in light of the experiences of transgender individuals. See generally Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039 (2016); Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans School to Prison Pipeline*, 24 AM. U.J. GENDER SOC. POL'Y & L. 263 (2016); Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. VU. L. & POL'Y 281 (2009); see also Patrick Eoghan Murray, *Constitutional Challenges to Gender-Restrictive School Dress Codes in the Ninth Circuit*, 8 MOD. AM. 18 (2013).

licing, schooling, parenting, politics, and our attitudes towards gender and sexuality that have facilitated our acceptance—indeed, our embrace—of restrictive school dress policies. Part III then explores the mechanisms by which those trends and attitudes have worked their way into our constitutional analysis, considering along the way broader questions about the process through which we make constitutional law and about the relationships between cultural norms and constitutional doctrine. Finally, Part IV interrogates the constitutional analysis implicit (and occasionally explicit) in our culture’s embrace of broad student dress restrictions and finds that analysis wanting. As that Part argues, while existing constitutional doctrine does not require the recognition of broad student dress freedoms, the doctrine comfortably permits courts to grant such recognition, and the values underlying our individual rights provisions strongly counsel in that direction.

Over two or three decades in the late twentieth century, American constitutional culture, with little fanfare, reconsidered the constitutionality of student dress codes. This reconsideration is rarely mentioned in the legal or historical literature, and the legal regime it produced has been subjected to, at best, sporadic critical attention.<sup>14</sup> This Article elucidates a prior generation’s reconsideration of the constitutionality of student dress restrictions, explores the process through which they changed their minds and the world they thus created, and ends with the conclusion that we must reconsider that reconsideration. As it turns out, our modern constitutional complacency about student dress restrictions rests on a foundation of dubious factual, sociological, and psychological assumptions that allow the courts (and the broader society) to avoid the inherent tension that exists between these policies and the normative core of our constitutional order—tensions well recognized in the early 1970s but since forgotten.

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<sup>14</sup> For notable exceptions, see ROBSON, *supra* note 13; Hahrbach, *supra* note 13; and Ramachandran, *supra* note 13; see also Ruthann Robson, Editorial, *School Dress Codes: Miniskirt Madness*, L.A. TIMES, Sept. 5, 2013, <http://articles.latimes.com/2013/sep/05/opinion/la-oe-robson-dress-codes-school-20130905>, archived at <https://perma.cc/LBU8-FAMW> (drawing on scholarly work to make strong constitutional case against student dress codes). Right before this Article went to press, Professor Justin Driver published an important book analyzing the general decline in protection for student rights during this era, echoing some of the themes of this Article without significantly addressing student dress restrictions. See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018).

I. PUBLIC SCHOOL DRESS CODES AND SCHOOL UNIFORMS IN  
THE UNITED STATES: AN EVOLVING HISTORY

A. *The Long View: Limited and Informal Regulation of Dress  
as the Initial Norm*

Unlike the United Kingdom,<sup>15</sup> the United States has a largely unwritten history of public school dress norms and restrictions.<sup>16</sup> As best as scholars have been able to determine, dress norms and expectations were ubiquitous in American education up until the late 1960s, but formal dress codes were surprisingly rare and public school uniforms were almost—perhaps entirely—unheard of.<sup>17</sup> Styles and expectations for dress were typically set by students' peers and the larger community, turned on material availability, reinforced gender and class norms, and reflected broader cultural values.<sup>18</sup> Anecdotal evidence suggests that school officials resorted to disciplinary action to rein in a recalcitrant or non-conforming student, but tended to do so in a limited and ad hoc way, very rarely establishing a formal dress code. Despite the persistent use of dress and appearance norms to stifle the cultural expression of minority groups and to foster assimilation throughout American society,<sup>19</sup> little record exists of the kinds of racial, ethnic, and religious conflict over clothing in public schools that flare up in other nations dealing with similar questions of assimilation and ethnic identity.<sup>20</sup>

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<sup>15</sup> See generally ALEXANDER DAVIDSON, *BLAZERS, BADGES, AND BOATERS: A PICTORIAL HISTORY OF SCHOOL UNIFORM* (1990) (documenting nineteenth- and twentieth-century history of school uniforms in Great Britain); see also Jenny Scott, *School Uniforms: A History of "Rebellion and Conformity,"* BBC NEWS ONLINE, Sept. 5, 2014, <http://www.bbc.com/news/uk-england-29047752>, archived at <https://perma.cc/XMF3-V2KG> (explaining that the history of uniforms in British public schools traces back to early 1500s and that uniforms were widely adopted by British private schools during the nineteenth century).

<sup>16</sup> For some sources that briefly discuss this history (without going into much detail or citing primary sources), see BRUNSMAN, *supra* note 1, at 1–24; DAVID NASAW, *SCHOOLED TO ORDER: A SOCIAL HISTORY OF PUBLIC SCHOOLING IN THE UNITED STATES* (1979); ROBSON, *supra* note 13, at 103–10. American private and parochial schools have a longer history with uniforms and strict dress codes, a history that has been more thoroughly chronicled. See generally SALLY DWYER-McNULTY, *COMMON THREADS: A CULTURAL HISTORY OF CLOTHING IN AMERICAN CATHOLICISM* (2014); Kerry Weber, *Catholic School Uniforms*, CATHOLIC DIGEST, Oct. 2009.

<sup>17</sup> See BRUNSMAN, *supra* note 1, at 7–11. *But cf.* Noonan v. Green, 80 Cal. Rptr. 513, 514–18 (Cal. Ct. App. 1969) (discussing school uniform for girls at California high school that was voluntarily adopted by vote of student body in 1926 and periodically reenacted through student referendum, expressing skepticism about its constitutionality, but denying relief for failure to exhaust administrative remedies).

<sup>18</sup> See BRUNSMAN, *supra* note 1, at 7–11.

<sup>19</sup> See, e.g., BRUNSMAN, *supra* note 1, at 10–11; ROBSON, *supra* note 13, 104–07; RUTH P. RUBINSTEIN, *DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE* (1995); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 390–93 (1991) (discussing hair style regulation as a form of forced assimilation).

<sup>20</sup> One perverse explanation for the absence of such tension may have been the prevalence of de jure racial segregation and de facto ethnic, religious, and economic segregation in United States public schools for vast swaths of our history.

B. *A First Wave of Restrictions and Challenges:  
Taking Student Liberties Seriously*

During the 1960s and early 1970s, questions about the authority of public schools to set and enforce norms for student dress and appearance briefly became the subject of significant cultural and legal contestation. As students adopted new clothing styles and grooming habits—chosen in part to intentionally differentiate themselves from older generations and established cultural norms—representatives of those generations and norms pushed back, adopting increasingly formal and specific guidelines for student dress, hair length, and facial hair.<sup>21</sup> Many students resisted, including some who turned to litigation.<sup>22</sup> While it is tempting to understand this resistance as the students' attempt to throw off longstanding public school (and hence governmental) control over their appearance, such a narrative is largely inconsistent with both the prior history and the pattern of conflict. As discussed above, habits of dress in American public schools were traditionally policed through community and cultural norms rather than through formal governmental policies or enforcement.<sup>23</sup> The conflict in the late 1960s emerged from a fracturing of those norms and reflected contestation for control between generations and affinity groups rather than resistance to longstanding state authority. When educators issued edicts telling male students how long their hair could be<sup>24</sup> or forbidding women to wear pants to school,<sup>25</sup> they were mobilizing one of their weapons (authority over formal school discipline) in the service of a larger cultural conflict that was playing out in many venues and contexts across the nation.<sup>26</sup>

Within a decade, these battles receded as rapidly as they had emerged, largely as a result of school acquiescence to student control over their own

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<sup>21</sup> Many of the court cases involving hair length or dress restrictions specifically note that the challenged rules had only been adopted in recent years. *See, e.g.*, *Karr v. Schmidt*, 460 F.2d 609, 610 n.1 (5th Cir. 1972) (en banc) (explaining that school district adopted general appearance guidelines in 1960, adopted specific restrictions in 1967, and amended rules three more times between 1967 and 1970).

<sup>22</sup> *See, e.g., supra* note 3 (listing cases). One scholar reports that between the early to mid-1960s and 1974, 150 court cases were filed challenging student grooming or dress restrictions, versus less than a half dozen filed before then. *See* Larry D. Bartlett, *Hair and Dress Codes Revisited*, 33 *EDUC. L. REP.* 7, 7–8 (1986).

<sup>23</sup> *See supra* notes 15–19 and accompanying text (detailing history of cultural norms regarding dress).

<sup>24</sup> *See generally* Recent Case, *supra* note 3 (detailing first wave of litigation over hair length bans).

<sup>25</sup> *See, e.g.*, *Johnson v. Joint Sch. Dist. No. 60*, 506 P.2d 547, 549 (Idaho 1973) (invalidating rule prohibiting women from wearing pants); *Scott v. Bd. of Educ.*, 305 N.Y.S.2d 601, 603 (N.Y. Sup. Ct. 1969) (same).

<sup>26</sup> Standard works on the social and political conflict of the 1960s include TERRY H. ANDERSON, *THE MOVEMENT AND THE SIXTIES: PROTEST IN AMERICA FROM GREENSBORO TO WOUNDED KNEE* (1995); WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY* (1986); TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987); GODFREY HODSON, *AMERICA IN OUR TIME* (1976); and MAURICE ISSERMAN, *IF I HAD A HAMMER—: THE DEATH OF THE OLD LEFT AND THE BIRTH OF THE NEW LEFT* (1987).

appearance and dress.<sup>27</sup> In large measure, this was cultural and consensual, as schools across the country voluntarily rescinded regulations over hair length, blue jeans, and the like, motivated either by an evolving zeitgeist that increasingly valued student self-determination,<sup>28</sup> a wariness over the heavy costs of enforcement, or a combination of the two.<sup>29</sup> These changes were, however, also the result of the prior decade's litigation, in which students challenging public school dress and appearance restrictions won a substantial string of victories under the Federal Constitution or analogous state law provisions. Student victories included state court decisions in New York and Idaho striking down prohibitions against women wearing pants,<sup>30</sup> a New Hampshire federal court decision striking down a school's ban on the wearing of blue jeans,<sup>31</sup> Connecticut and Arkansas federal court decisions applying heightened scrutiny to and striking down many aspects of broader dress codes,<sup>32</sup> and nearly half of the many cases challenging restrictions on male hair length and hair styles.<sup>33</sup> In the one reported case involving a public school uniform (in this case only for girls), a California court expressed great skepticism as to whether uniform policies were legal and great confusion as to why a district would feel the need or authority to adopt one, before ultimately denying relief on the grounds that the plaintiffs had not exhausted administrative remedies.<sup>34</sup>

In addition to these concrete victories, the tea leaves from the Supreme Court appeared to point in favor of recognizing student autonomy over their dress and appearance. The Court expanded the First Amendment rights of students in *Tinker v. Des Moines Independent Community School District*,<sup>35</sup> provided substantial constitutional protection to expressive conduct,<sup>36</sup> gradu-

<sup>27</sup> In the two decades after the end of the Vietnam War there was almost no litigation over the school dress codes or appearance restrictions. One scholar counts less than half a dozen cases of any kind challenging student dress or grooming restriction between 1975 and 1986. See Bartlett, *supra* note 22, at 7. Nor was there any substantial news coverage of controversies related to such policies.

<sup>28</sup> Cf. MARLO THOMAS, *FREE TO BE . . . YOU AND ME* (Bell Records 1972) (reflecting, in much quoted lyrics and vignettes, emerging cultural consensus placing individuality, tolerance, and comfort with one's own sense of self at top of hierarchy of child-rearing values).

<sup>29</sup> One additional factor may have been the existence of federal regulations adopted after the decisions chronicled in this subpart that denied federal funds to public schools that discriminated on the basis of "appearance." See Lawrence Feinberg, *End of US Regulations on School Attire Urged*, WASH. POST., Apr. 17, 1981, at A26. However, federal enthusiasm for enforcing these regulations was never high and was non-existent by 1981. See BRUNSMAN, *supra* note 1, at 14.

<sup>30</sup> *Johnson*, 506 P.2d 547; *Scott*, 305 N.Y.S.2d 601.

<sup>31</sup> *Bannister v. Paradis*, 316 F. Supp. 185, 189 (D.N.H. 1970).

<sup>32</sup> See *Wallace v. Ford*, 346 F. Supp. 156 (E.D. Ark. 1972); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970).

<sup>33</sup> See, e.g., *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972) (holding restrictions invalid); *Richardson v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) (same); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971) (same); *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972) (same).

<sup>34</sup> See *Noonan v. Green*, 80 Cal. Rptr. 513 (Cal. Ct. App. 1969).

<sup>35</sup> 393 U.S. 503, 514 (1969) (holding First Amendment protected the right of public school students to wear arm bands protesting the Vietnam War).

<sup>36</sup> See e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

ally recognized a substantive due process right to make autonomous decisions about important matters free from state control,<sup>37</sup> and even expressed passing interest in the constitutional issues raised by the hair length cases.<sup>38</sup> These Supreme Court actions—in conjunction with the lower court decisions discussed above and the general tone of the dialogue in legal and news sources—led many courts of appeals to conclude, in the words of one, that “our constitutional form of government” protects “the freedom to govern one’s personal appearance.”<sup>39</sup> This right, which “ranks high on the spectrum of our societal values,” applies in the public schools absent a demonstration that a limitation was necessary to allow a school “to carry out its educational mission.”<sup>40</sup>

At that moment, it appeared that a new constitutional norm was about to crystalize. Given the absence of school uniforms or formal student dress codes for most of our history, the string of student victories during the brief period in which schools tried to assert such formal authority, the wholesale abandonment of the experiment in dress restriction, a zeitgeist favoring individual autonomy and self-expression, and a series of Supreme Court cases showing sympathy for the constitutionalization of these values, all signs pointed to the recognition of a broad autonomy- or expression-based right. While no one doubted that schools retained substantial authority to enforce discipline and ensure order in the classroom, most courts and commentators assumed that the standards articulated in *Tinker*<sup>41</sup> struck the appropriate balance: put succinctly, students would be allowed to dress and groom themselves without interference from the state unless the school could

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<sup>37</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding women have constitutional right to determine whether to continue or terminate pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding individuals have right to access birth control in order to facilitate autonomous decision about whether to procreate).

<sup>38</sup> Most notably in Justice Douglas’s fiery dissent from denial of certiorari in *Ferrell v. Dallas Indep. Sch. Dist.*, 393 U.S. 856, 856 (1968):

It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of “life, liberty, and the pursuit of happiness,” expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncrasies to flourish, especially when they concern the image of one’s personality and his philosophy toward government and his fellow men.

Municipalities furnish many services to their inhabitants; and I had supposed that it would be an invidious discrimination to withhold fire protection, police protection, garbage collection, health protection and the like merely because a person was an off-beat, non-conformist when it came to hair-do and dress as well as to diet, race, religion, or his views on Vietnam.

<sup>39</sup> *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971).

<sup>40</sup> *Id.*

<sup>41</sup> See 393 U.S. 503 (1969).

demonstrate, through evidence rather than conjecture, that a student's attire or appearance "substantially disrupted" the educational environment.<sup>42</sup>

In hindsight, however, it is clear that these ambient assumptions about the Constitution's content were never consolidated into concrete constitutional law. The Supreme Court failed to decide a case involving more general student dress or appearance restrictions before those cases dried up due to the disappearance of such restrictions.<sup>43</sup> The pronounced circuit split on the constitutionality of hair length restrictions was never resolved and the divided reasoning of those cases (and other contemporaneous challenges to school dress restrictions) became a complicated mass of conflicting, under-theorized precedent.<sup>44</sup> Each of the many cases granting relief to student plaintiffs relied on a different theory depending on their particular facts and their particular timing in relation to the Supreme Court's rapidly evolving free speech and due process jurisprudence.<sup>45</sup> Though some commentators addressed these cases and attempted to construct a coherent doctrine,<sup>46</sup> no

<sup>42</sup> Importantly, analysis of this sort was common not only to the vast majority of courts who granted relief to student petitioners, *see, e.g., Bishop*, 450 F.2d at 1075 (determining that under circumstance it was not "necessary to infringe on the students' right to carry out the educational mission of the school"); *Wallace v. Ford*, 346 F. Supp. 156, 162 (E.D. Ark 1972) (determining that students possessed broad freedoms "subject [only] to the right of the school authorities to establish [necessary] regulations"), but also of a substantial portion of those cases in which relief was ultimately denied, *see, e.g., Stevenson v. Bd. of Educ. of Wheeler Cty.*, 426 F.2d 1154, 1157–58 (5th Cir. 1970) (denying relief in challenge to hair length restriction only because, under circumstances, which included evidence of conflict and disruption, schools met burden of demonstrating that regulation was "reasonable" for "management of the school"). Commentators not only assumed that such a standard would apply, but also that it would be difficult, if not impossible, to meet in the run of the mill case. *See, e.g., Eldon G. Scriven & A. Harrison, Jr., Student Dress Codes, J. SECONDARY EDUC.* 291, 291–92 (Nov. 1971) (arguing that student dress restrictions are harmful to youth and difficult and disruptive to enforce); *High School Hair Length Regulations*, *supra* note 5 (same); *cf. Reeves*, *supra* note 5 (arguing pre-*Tinker* that schools lacked sufficient reasons to justify intrusion on student freedoms implicit in grooming restrictions).

<sup>43</sup> The Court's only two comments on the issue were contradictory. *Compare Ferrell v. Dallas Indep. Sch. Dist.*, 393 U.S. 856, 856 (1968) (Douglas, J., dissenting from denial of cert) (arguing in caustic language that such restrictions are obviously unconstitutional), *with Karr v. Schmidt*, 401 U.S. 1201, 1202–03 (1971) (Black, J., rejecting motion to vacate stay of injunction pending appeal) (observing in nearly equally caustic language that ruling for student would "rob[ ] the States of their traditionally recognized power to run their school systems in accordance with their own best judgment" and noting that "the only thing about [this case] that borders on the serious" is the supervisory burden the students want to impose on the overworked federal courts).

<sup>44</sup> For attempts to make sense of the full landscape of these cases, with particular attention to their similarities, differences, and contradictions, *see Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972) (en banc); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); Recent Case, *supra* note 3.

<sup>45</sup> *Compare, e.g., Massie v. Henry*, 455 F.2d 779 (4th Cir. 1970) (relying on the Due Process Clause), *with Ferrell v. Dallas Indep. Sch. Dist.*, 393 U.S. 856, 856 (1968) (Douglas, J., dissenting from denial of cert) (relying on the Equal Protection Clause), *and Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (relying on the Ninth Amendment and "penumbras" of the First Amendment).

<sup>46</sup> *See, e.g.,* Recent Case, *supra* note 3.

definitive treatise or law review article provided order to the chaos by articulating a comprehensive theory.

*C. The Modern School Uniform and Dress Code Movement:  
More Restrictions, Fewer Rights*

As described elsewhere in this Article, a variety of politicians, educators, and social commentators redirected public attention to issues of student dress and appearance during the late 1980s and early 1990s.<sup>47</sup> Initially, these actors proceeded in a constitutional vacuum, either unaware of or unconcerned about the substantial constitutional constraints implied by the existing case law. In contrast, the Clinton administration officials who championed and popularized uniform policies and strict dress codes beginning in 1996,<sup>48</sup> at least paid significant lip service to the Constitution, issuing “guidelines” warning schools to leave space for religious and overtly political expression, to offer sound policy rationales for dress restrictions, and to avoid using vague and overbroad language.<sup>49</sup> In addition, the guidelines reminded schools of their due process obligations before suspending or expelling students for dress code or other violations, advocated community engagement in the planning of dress policies, and encouraged consideration of—though not necessarily adoption of—opt-out provisions.<sup>50</sup>

The Clinton administration’s parsing of these issues was both a crucial step in the reconsideration of the constitutionality of student dress restrictions and a classic example of the tendency of modern bureaucracies to treat constitutional objections as design problems that need to be managed and massaged rather than as conflicts of values that need to be resolved.<sup>51</sup> The

<sup>47</sup> See generally *infra* Part II.

<sup>48</sup> See *infra* Part II.E; U.S. DEP’T OF EDUC., MANUAL ON SCHOOL UNIFORMS (1996), available at <http://files.eric.ed.gov/fulltext/ED387947.pdf>, archived at <https://perma.cc/MD6J-74CQ> [hereinafter “MANUAL”].

<sup>49</sup> See MANUAL, *supra* note 48, at 2.

<sup>50</sup> See *id.* at 1–3.

<sup>51</sup> See *id.* Cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1323–25 (2006) (discussing how rules for implementing constitutional meaning inevitably lead to under-enforcement by bureaucracies justifiably worried about over-enforcement); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (chronicling and advocating for embrace of new mechanisms of constitutional decision-making that allow for experimentation around implementation of rights even if the creation of such democratic space at times results in the protection of fewer or narrower rights); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (explaining and critiquing the dominant role balancing tests have come to play in constitutional law and degree to which they blind us to fact that value choices are at heart of constitutional decision-making). Jamal Greene recently offered a provocative case for an approach to constitutional rights that is focused more expressly on balancing individual freedoms and collective policy goals. See Jamal Greene, *Foreword: Rights as Trumps*, 132 HARV. L. REV. 28 (2018). Among many other virtues, his analysis reminds us that students challenging dress restrictions might in the end receive more protection in a vital system premised on balancing than in our current system that treats rights as trumps but then, of necessity, sharply limits the universe of recognized rights.

guidelines instructed school officials on how to avoid real but ancillary constitutional objections,<sup>52</sup> how to develop a record most likely to withstand legal challenge,<sup>53</sup> and how to build the kind of popular support that would decrease the likelihood of legal challenge and raise the political and institutional cost for courts inclined to strike down governmental action.<sup>54</sup>

With regard to the more central constitutional objection—that conditioning receipt of a crucial public good on adherence to governmental dress and grooming standards violates basic principles of autonomy and self-expression—the guidelines adopted several avoidance strategies. First, they purported to protect expressive rights by insisting on freedom to wear religious garb and political buttons while defining out of the realm of expression most of the decisions school-aged children make about their appearance and dress,<sup>55</sup> notwithstanding the careful communications implicit in those choices.<sup>56</sup> Second, they built layers of ambiguity into their analysis of the ultimate question of whether public schools could shut their doors to students unwilling to let the state dictate their appearance, by (1) encouraging schools to consider optional uniforms in addition to mandatory ones; (2) encouraging them to consider “opt-out provisions” if they did adopt mandatory uniforms; (3) encouraging them to build a record of the need for drastic measures if they chose mandatory uniforms without an opt-out provision; and (4) noting that in the absence of such a record, such a program “might be vulnerable to legal challenge.”<sup>57</sup>

In the two decades since the Clinton administration encouraged American public schools to experiment with school uniforms and strict dress codes, such restrictions have become a common—though not quite omnipresent—feature of American public education. The best estimates suggest that approximately a quarter of American public school students now go to schools with uniform policies and another 50–60% attend schools with strict dress codes.<sup>58</sup> These dress restrictive policies have faced a substantial, though not enormous, number of legal challenges. Many of those challenges have involved the kind of peripheral issues the Clinton administration identified; much as they predicted, the courts have, on occasion, struck down dress restrictions that did not provide space for religious expression,<sup>59</sup> prohibited

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<sup>52</sup> See MANUAL, *supra* note 48, at 2.

<sup>53</sup> See *id.* at 3.

<sup>54</sup> See *id.* at 1.

<sup>55</sup> See *id.* at 2.

<sup>56</sup> See *infra* notes 182–183 and accompanying text (discussing communicative content of young adult fashion decisions).

<sup>57</sup> MANUAL, *supra* note 48, at 2.

<sup>58</sup> See, e.g., NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2015, at 105 (2016) (determining that in 2013-2014 approximately twenty percent of public schools required school uniforms and another fifty-eight percent imposed “strict” dress codes that drastically limit what students can wear).

<sup>59</sup> See, e.g., A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 701 F. Supp. 2d 863 (S.D. Tex. 2009) (invalidating plaintiff dress and appearance restrictions prohibiting him from wearing his hair in style meant to convey connection to traditional Native American religious

or required the wearing of particular messages,<sup>60</sup> were excessively vague,<sup>61</sup> or arbitrarily reinforced inequitable gender norms.<sup>62</sup> Fewer cases have raised broad liberty-, autonomy-, or expression-based challenges to student dress restrictions.<sup>63</sup> When such cases have been brought, they have run into a wall of judicial skepticism and have been rejected nearly uniformly, often without thorough consideration.<sup>64</sup> As a result, we find ourselves in almost entirely the opposite position from where we were in 1975: our case law and legal zeitgeist assume that broad student dress restrictions are wholly constitutional, but those norms and assumptions are neither cemented by a definitive Supreme Court ruling nor sufficiently theorized.

Less than a dozen reported court cases over the last quarter-century deal directly with broad expression- or autonomy-based objections to student dress codes or school uniforms, and students have yet to win a significant victory.<sup>65</sup> Many of the cases are under-theorized and each applies a slightly

practice); *Chalfoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (striking down provisions of school dress code that prohibited wearing of rosaries).

<sup>60</sup> See, e.g., *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014) (striking down mandatory school uniform policy that required students to wear clothing displaying school slogan); *Sypeniewski v. Warren Hills Reg'l Bd. Of Educ.*, 307 F.3d 243 (3rd Cir. 2003) (enjoining school district from punishing student under harassment provisions of school dress code for wearing t-shirt quoting Jeff Foxworthy comedy routine "You Might Be a Redneck If . . ."); *Castornia v. Madison Cty. Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) (reversing grant of summary judgment for school that disciplined students for wearing clothing containing Confederate flag imagery and remanding for further proceedings on whether record established need for such a ban and on whether selective enforcement had occurred). *But see, e.g., Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009) (rejecting challenge to school district policy barring shirts with words on them brought by student who wanted to make express political statement even after concession by district that the words were not lewd, inappropriate, or disruptive).

<sup>61</sup> See, e.g., *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997) (striking down as void for vagueness a school district regulation barring "gang symbols" on clothing and tattoos without providing definitions or guidance); *Melerine v. Jefferson Parrish Sch. Bd.*, 210 So. 3d 929 (La. Ct. App. 2017) (reversing grant of summary judgment to school district in case challenging dress code for school prom, finding genuine issue of material fact exists as to arbitrary enforcement); *cf. Pyle ex rel. Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1994) (enjoining provision of dress code prohibiting clothing items that "harass" others on grounds that such a general prohibition cannot be enforced consistent with First Amendment).

<sup>62</sup> See, e.g., *Hayden ex rel. A.H. v. Greenburg Comm. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014) (granting injunction against school rule prohibiting boys from playing basketball with long hair but not regulating grooming choices of female players); *Peltier v. Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460 (E.D.N.C. Mar. 30, 2017) (denying motion to dismiss equal protection challenge to rule prohibiting girls from wearing shorts or pants but allowing boys to do so).

<sup>63</sup> For the major exceptions, see cases cited *infra* note 60.

<sup>64</sup> See cases cited *infra* note 60 and cases discussed *infra* notes 60–115.

<sup>65</sup> The most thoroughly litigated, cited, or discussed challenges include *Bar-Navon v. Brevard Cty. Sch. Bd.*, 290 Fed. App'x 273 (11th Cir. 2008); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001); *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001); *Long v. Bd. of Educ. of Jefferson Cty.*, 121 F. Supp. 2d 621 (W.D. Ky. 2000); *Dempsey v. Alston*, 966 A.2d 1 (N.J. App. Div. 2009); *Phoenix Elem. Sch. Dist. No. 1 v. Green*, 943 P.2d 836 (Ariz. Ct. App. 1997); *Byars v. City of Waterbury*, 795 A.2d 630 (Conn. Super. Ct. 2001).

different analysis, but a few key themes run through the cases. First, courts are largely—though not uniformly—unwilling to acknowledge that student dress has any significant expressive component,<sup>66</sup> often noting that neither the courts nor the student plaintiffs can identify the students' message with any degree of precision<sup>67</sup> and treating with skepticism the more particularized messages offered in the course of litigation by more sophisticated or tactical plaintiffs.<sup>68</sup> Second, even those courts willing to entertain free expression claims are reluctant to seriously interrogate schools' proffered justifications for their dress policies. These courts treat such policies as content-neutral decorum rules requiring little justification,<sup>69</sup> deem the state's proposed justifications as self-evidently weighty,<sup>70</sup> or expressly defer to school officials on questions of order, discipline, and pedagogy.<sup>71</sup> Third, almost every court to address substantive due process or other liberty- and autonomy-based challenges has treated the proposed challenge as a broader libertarian assault on the state's ability to regulate in the realms of education and child-rearing, rather than a targeted claim about a particular liberty interest, and dismissed it after cursory analysis.<sup>72</sup>

These thematically similar cases align along a spectrum, well-illustrated by the contrasting jurisprudence of the Sixth and Ninth Circuits. Many recent cases take their cue from an oft-cited Sixth Circuit opinion by Judge Sutton, which goes out of its way to trivialize and even mock the constitu-

<sup>66</sup> See, e.g., *Blau*, 401 F.3d at 388–90; *Bar-Navon*, 290 Fed. App'x. at 273 (arguing rule against piercings does not even “implicate” First Amendment and reaffirming circuit precedent that high school “grooming” restrictions are “*per se* valid”); *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007) (concluding that students enjoy no protected speech right to wear T-shirt of their own design because “clothing as such is not—not normally at any rate—constitutionally protected expression”).

<sup>67</sup> See, e.g., *Blau*, 401 F.3d at 388–90; *Littlefield*, 268 F.3d at 283–86; *Long*, 121 F. Supp. 2d at 624 (“Plaintiffs do not seek to express a particular message either directly or indirectly. They merely want the right to wear clothes of their own choosing.”).

<sup>68</sup> See, e.g., *Bar-Navon*, 290 Fed. App'x. at 273 (rejecting on its face well-articulated claim that wearing of non-traditional jewelry articulates an intentional and broadly understood claim of “individuality”); *Dempsey*, 966 A.2d 1 at 10 (rejecting student's assertion that he was attempting to articulate message “I have rights”).

<sup>69</sup> See, e.g., *Jacobs*, 526 F.3d at 432 (emphasizing safety and behavioral aspects of rule in explaining why it is content-neutral); see also *Palmer*, 579 F.3d at 507–08 (treating strict dress code barring any clothing with words as “content neutral” rule designed to maintain order and enrich learning environment).

<sup>70</sup> See, e.g., *Blau*, 401 F.3d at 391–93 (listing policy arguments advocates use to support student dress restrictions and treating them as largely self-evident); *Littlefield*, 268 F.3d at 286 (“[I]mproving the educational process is undoubtedly an important and substantial interest of Forney and the school board.”); accord *Canady*, 240 F.3d at 443.

<sup>71</sup> See, e.g., *Littlefield*, 268 F.3d at 287 (“As has been well recognized, federal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools.”); accord *Canady*, 240 F.3d at 443–44.

<sup>72</sup> See, e.g., *Blau*, 401 F.3d at 393–96 (rejecting parent's substantive due process claim as anarchic and student's because encroachments on liberty were trivial in comparison with most fundamental rights cases); *Long*, 121 F. Supp. 2d at 627–28 (concluding based on precedent that there is no fundamental right to make clothing choices and stopping analysis at that point); *Byars*, 795 A.2d at 641–43 (holding that dress and grooming restrictions that do not implicate bodily integrity are standard-order school rules that implicate no serious liberty concerns).

tional challenges raised by the plaintiffs.<sup>73</sup> In that case, *Blau v. Fort Thomas Public School District*,<sup>74</sup> a Kentucky middle school adopted a strict dress code that effectively limited students to several colors of solid tops in a handful of styles and imposed substantial restrictions on other clothes, shoes, and hairstyles.<sup>75</sup> A female student—who had unsuccessfully fought the adoption of the dress code—and her father sued, alleging violations of her First Amendment right to freedom of expression, her substantive due process right to make autonomous choices about her clothing, and his substantive due process right to control the upbringing of his child.<sup>76</sup>

After reciting the facts, the court turns to the student's First Amendment claim, immediately adopting a tone that is pithy and brazenly unsympathetic. The court begins its analysis by stating that "the difficult question is not one of outcome" but "whether the First Amendment covers this kind of claim at all."<sup>77</sup> In parsing cases from the Sixth Circuit on student dress, the court then argues *ipse dixit* that narrow decisions upholding rules prohibiting students from wearing particularly violent and offensive images "surely" meant that schools could impose a broad ban on "the types of pants and tops students may wear," without acknowledging that broader bans would limit substantially more expression and do so without the kind of particularized justifications provided in earlier cases.<sup>78</sup> Similarly, in analyzing the Supreme Court's cases on "expressive-conduct," the court accurately quotes a series of tangled and occasionally contradictory Supreme Court precedents that, with one hand, offer broad protection to conduct that is intended to be communicative irrespective of the message's clarity and, with the other hand, claw back a substantial portion of that protection when the expression is not sufficiently particularized.<sup>79</sup> But then the opinion does nothing to untie the knot, relying on conclusory statements and rhetorical attacks to reject Blau's claims.<sup>80</sup>

At its heart, the court's First Amendment analysis is premised on a trivialization—indeed a mischaracterization—of the expressive communication for which Blau sought protection. The opinion is quick to attack Blau for burdening the federal courts with litigation to vindicate a right to wear clothes that "look nice,"<sup>81</sup> that she "feels good in,"<sup>82</sup> or that express her

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<sup>73</sup> See *Blau*, 401 F.3d 381. For significant discussions of *Blau* by other courts, see, e.g., *Bar-Navon v. Brevard Cty. Sch. Bd.*, 290 Fed.Appx. 273, 276–77 (11th Cir. 2008); *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 717 (E.D. Ark. 2007); *Dempsey v. Alston*, 966 A.2d 1, 10–11 (N.J. App. Div. 2009).

<sup>74</sup> 401 F.3d 381.

<sup>75</sup> See *id.* at 385–87.

<sup>76</sup> See *id.*

<sup>77</sup> *Id.* at 388.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 388–90.

<sup>80</sup> See, e.g., *Blau*, 401 F.3d at 388 (Supreme Court cases "offer poor analogies"); *id.* at 389 (her argument "gives the invocation of precedent a bad name"); *id.* at 390 (to rule for plaintiff would "risk deprecating the First Amendment").

<sup>81</sup> *Id.* at 389.

<sup>82</sup> *Id.* at 388.

“sense of individuality.”<sup>83</sup> But those formulations are either bland explanations of how an individual chooses his or her clothing on a daily basis or generalized explanations of why expressive rights are implicated in clothing choices, not an accurate parsing of the messages Blau would have been conveying on a daily basis if the regulations had been struck down. Blau might have offered a series of experts on fashion and teen culture to provide testimony on the dense semiotics of particular styles, colors, and garments in the adolescent world (and it might behoove future litigants to do so); however, the Supreme Court precedents cited by the Sixth Circuit do not require expressive painters or writers of nonsense verse to make such expert showings in order to enjoy First Amendment protection.<sup>84</sup> One could plausibly argue that the school context,<sup>85</sup> the nature of the speech, or the countervailing justifications offered by the state<sup>86</sup> ultimately distinguish those examples. But such analysis ought to begin both with an accurate characterization of the reasons why a teenager seeks expressive freedom in the realm of dress and a recognition of the centrality of appearance in the creation and projection of self in adolescent communities.

The *Blau* court is even more dismissive and trivializing toward the plaintiffs’ substantive due process claims.<sup>87</sup> With regard to the father’s claim, the court presents public schooling as an either/or choice and suggests that parents have no constitutional right to object to particular public school policies that interfere with their childrearing beliefs.<sup>88</sup> This is a plausible, if blunt, reading of the limited existing precedent,<sup>89</sup> albeit one that perhaps prematurely closes the door on challenges to school policies that expand the scope of public authority into areas traditionally regulated within the family.<sup>90</sup> With regard to the daughter’s claim, the court relies heavily on the distinction between fundamental rights and mere liberty interests<sup>91</sup> before unflatteringly contrasting the interest she seeks to protect (which it consist-

<sup>83</sup> *Id.* at 389.

<sup>84</sup> *See* *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (noting that “a narrow, succinctly articulable message is not a condition of constitutional protection”; otherwise, the First Amendment “would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”).

<sup>85</sup> *See, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 656 (1995) (“While children [ ] do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.” (quoting *Tinker*, 393 U.S. at 506)).

<sup>86</sup> *See, e.g., Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 428–32 (9th Cir. 2008) (treating free speech claim with respect but rejecting it, allegedly, because of strength of district’s interests).

<sup>87</sup> *See Blau*, 401 F.3d at 394–96.

<sup>88</sup> *See id.* at 395–96.

<sup>89</sup> *See id.* (collecting Courts of Appeals cases rejecting parents’ piecemeal objections to particular school programming).

<sup>90</sup> After all, at its heart, the Supreme Court’s modern substantive due process jurisprudence focuses on preventing state interference in the kinds of decisions that historically have been—or as a matter of first principle ought to be—made by individuals, couples, and families without significant governmental interference.

<sup>91</sup> *See Blau*, 401 F.3d at 393–95.

ently refers to as the right to wear “blue jeans,”<sup>92</sup> “jeans,”<sup>93</sup> or “dungarees”<sup>94</sup>) with the fundamental rights acknowledged in the existing jurisprudence. In so doing, the Sixth Circuit distorts the question presented, shifting our attention away from whether the state has sufficient reason to impose broad restrictions on the day-to-day liberty of public school students and onto the stereotypical temerity of a caricatured teenager who egotistically believes that her desire to wear a particular garment is on par with the questions of life, death, and family that adults must navigate and on occasion litigate.

The Ninth Circuit’s two leading school uniform cases share many similarities with *Blau*<sup>95</sup> and indeed cite *Blau* positively on one particular point.<sup>96</sup> However, those decisions adopt a noticeably different tone and methodology that treats the students’ claims more respectfully, leading to results that are more balanced and provisional than those reached by the Sixth Circuit. In *Jacobs v. Clark County School District*, a divided panel largely upheld a Nevada school district’s uniform policies against free speech, free exercise, and procedural due process challenges brought by student plaintiffs.<sup>97</sup> Writing for the majority, an obviously-conflicted<sup>98</sup> Judge Hawkins introduces the case by noting that “many students, as well as their parents, find [such restrictions] offensive to their understanding of core First Amendment values.”<sup>99</sup> Throughout the opinion, the court goes out of its way to identify and grapple with multiple variations of the plaintiffs’ arguments, and to point out deficiencies in the district court’s analysis.<sup>100</sup> The opinion refers to the plaintiffs’ arguments as “appealing,” or a similar term, several times<sup>101</sup> (though sometimes adding a modifier such as “superficially”<sup>102</sup>). At several points, the court suggests that some of the details of the district’s dress restrictions

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<sup>92</sup> *Id.* at 386, 393–95.

<sup>93</sup> *Id.* at 394.

<sup>94</sup> *Id.* at 393–94.

<sup>95</sup> *See, e.g., Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 434–35 (2008) (agreeing that student dress restrictions at issue ultimately must pass intermediate scrutiny and that the kinds of interests offered by school districts in dress restriction cases are “important”).

<sup>96</sup> *See id.* at 435 (quoting *Blau*’s list of important government interests implicated by student dress restrictions).

<sup>97</sup> *See id.* at 423–24. The plaintiffs in this case did not bring a substantive due process challenge.

<sup>98</sup> For interesting speculation by a former clerk about how Judge Hawkins’s own experiences and views of the proper role of a judge likely resolved the case for him, see Thomas Healy, *The Hard Case and the Good Judge*, 43 ARIZ. ST. L.J. 39, 45–47 (2011).

<sup>99</sup> *Id.* at 422.

<sup>100</sup> *See, e.g., Jacobs*, 526 F.3d at 427–30 (differentiating between three different kinds of free speech claims implicit in plaintiffs’ arguments and substantively discussing each); *id.* at 427–28 (spending several paragraphs seriously grappling with a claim the district court did not at all address).

<sup>101</sup> *See, e.g., id.* at 429 (“appealing”); *id.* at 432 (“viable”); *id.* (“colorable”).

<sup>102</sup> *Id.* at 429.

might indeed be constitutionally problematic, though declining to provide relief for reasons specific to the record of the case.<sup>103</sup>

Ultimately, the majority rejects the plaintiffs' challenges for reasons that are unsatisfying but not insensitive. According to the court's analysis, the best reading of the record is that the kinds of dress restrictions adopted by the school district were viewpoint- and subject-matter-neutral and therefore subject to intermediate scrutiny.<sup>104</sup> Though it acknowledges some ambiguity on the point, the court concludes that *Tinker's* fairly stringent tests for restrictions on student speech do not displace the Supreme Court's general framework for dealing with content-neutral restrictions.<sup>105</sup> Applying that framework, the court concludes that the restrictions at issue serve important governmental interests, that those interests are unrelated to the suppression of expression, and that the restrictions left sufficient alternative mechanisms for expression.<sup>106</sup>

In several subtle ways, the majority bends over backwards to make its decision narrow. First, by employing intermediate scrutiny analysis, it emphasizes the fact that, in this particular case, the plaintiffs made no significant effort to challenge the school district's arguments or evidence as to the importance and utility of the dress restrictions or to build a record indicating that the district was actually motivated by a desire to suppress expression.<sup>107</sup> Second, it drops several breadcrumbs in the opinion hinting at modest challenges that might succeed against particular uniform provisions or dress restrictions.<sup>108</sup> Finally, the majority (with one small exception)<sup>109</sup> leaves unanswered the powerful dissent of Judge Sidney Thomas, who criticizes the majority's lack of fidelity to the first principles of the First Amendment, its reading of *Tinker's* scope, and its willingness to accept conclusory allegations about the importance of student dress codes unsupported by empirical evidence.<sup>110</sup>

The relative flexibility and sensitivity of the Ninth Circuit's jurisprudence on school uniforms led to a peripheral victory for students challenging

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<sup>103</sup> See *id.* at 432–33 (noting that school districts start getting close to “the First Amendment’s boundaries” when they permit or require particular visual or written content on clothing while banning all other content, though ultimately concluding that the deviation from content-neutral is *de minimis* where, as here, the only required content is a school logo); *id.* at 439–40 (agreeing with plaintiff and district court that school’s policy of inquiring into validity and orthodoxy of religious beliefs before granting religious exemption was prohibited by the Free Exercise Clause but denying relief because school had abandoned policy and because dress restrictions were likely constitutional without any religious exemption provision).

<sup>104</sup> See *id.* at 432–34.

<sup>105</sup> See *Jacobs*, 526 F.3d at 429–32.

<sup>106</sup> See *id.* at 435–37.

<sup>107</sup> See *id.* at 436 (emphasizing absence of “any evidence” that policies did not achieve district objectives); *id.* (emphasizing absence of “any evidence” that stated reasons were pretextual).

<sup>108</sup> One such challenge would succeed six years later in *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014), discussed extensively below.

<sup>109</sup> See *Jacobs*, 526 F.3d at 435 n.37 (disputing one of dissent’s factual assertions).

<sup>110</sup> See *id.* at 442–45 (Thomas, J., dissenting).

a school uniform policy in *Frudden v. Pilling*.<sup>111</sup> In that case, several students from one family challenged a mandatory school uniform policy that required students to purchase and wear, among other things, a shirt with the school logo and motto, “Tomorrow’s Leaders.”<sup>112</sup> The only significant exception to the policy was that students could wear the uniforms of the Girl Scouts, Boy Scouts, or other “nationally recognized youth organizations” on days where they had meetings or other events.<sup>113</sup> Picking up on hints from earlier cases,<sup>114</sup> a unanimous court concluded that requiring students to wear clothing containing particular, substantive slogans and offering exemptions to students who participated in some favored activities presented independent problems with the uniform policies, each requiring the application of strict scrutiny.<sup>115</sup> Nothing in the opinion—or in *Jacobs*—offers doctrinal support for the kind of broad autonomy- or expression-based claims that one might have expected in the late 1960s or early 1970s. However, in contrast with the Sixth Circuit’s opinion in *Blau*, both *Frudden* and *Jacobs* reflect a respect for and a willingness to listen to students that in some small measure keeps faith with those earlier understandings.

## II. CHANGING THE PUBLIC MIND ON STUDENT DRESS RESTRICTIONS: CONTEXTS AND INFLUENCES

In the twenty or so years following the Vietnam War, public attitudes and the institutions designed in response to those attitudes shifted in myriad ways that ultimately worked together to facilitate a new set of norms and understandings about the policy wisdom and constitutional permissibility of significant student dress restrictions. Though the cultural discourse in each of these areas touched only marginally (if at all) upon student dress, and though most of the individual attitudinal shifts would likely have been insufficient to reorient popular attitudes about student dress freedoms, they collectively produced a new zeitgeist that permitted—indeed, embraced—the exercise of pervasive state authority over the dress and appearance of public school students. This Part traces some of the most significant cultural, political, and legal developments that led to the emergence of this new zeitgeist.

### A. Trends in Policing

The early 1970s through the early 1990s were the crucial years in the emergence of the much-chronicled and increasingly lamented phenomenon

<sup>111</sup> 742 F.3d 1199 (9th Cir. 2014).

<sup>112</sup> See *id.* at 1201–02.

<sup>113</sup> *Id.* at 1206–07.

<sup>114</sup> See *supra* notes 103 and 108 and accompanying text (regarding mottos and logos); *Frudden*, 742 F.3d. at 1207 n.4 (noting that district court in *Jacobs* expressed concern about similar scouting exception provision and district withdrew provision before case reached Ninth Circuit).

<sup>115</sup> See *Frudden*, 742 F.3d at 1206–07.

of mass incarceration.<sup>116</sup> As many scholars have forcefully argued, in the immediate aftermath of both the civil rights milestones of the 1950s and 1960s and the high profile challenges to public order that characterized the late 1960s, the United States committed itself to a heavily racialized “law and order” policy course that involved creating new crimes, imposing substantially harsher prison sentences for existing ones, and investing staggering amounts of resources into policing crimes and imprisoning those apprehended.<sup>117</sup> As a result of these changes, the number of Americans in jail or prison rose from 196,000 in 1972 to 1,159,000 in 1997.<sup>118</sup>

As Professor Jonathan Simon has persuasively argued, the rise of mass incarceration did not just affect those arrested and imprisoned, but also spawned an entire culture oriented around the values and technologies of policing.<sup>119</sup> This trend manifested itself in many ways. On the simplest level, other institutions adopted the specific tools of policing, such as surveillance, searches, and the use of uniformed and often armed enforcement personnel. On a deeper level, however, policing and criminal law enforcement became the paradigm through which American society identified problems and conceptualized solutions. In arenas as diverse as education, social welfare, and health care, we became wont to blame problems on the bad behavior of particular individuals, developing increasingly punitive measures of social control, and eroding privacy norms in order to monitor and enforce such policies.<sup>120</sup> The language and policies of policing have become for much of the nation, the signal that we are taking a problem seriously; new (real or imagined) threats to order and prosperity now require tough language, punitive sanctions, and, often, a new criminal statute.<sup>121</sup>

<sup>116</sup> For two outstanding introductions to the subject, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) and MARC MAUER, *RACE TO INCARCERATE* (1999).

<sup>117</sup> For a sampling of the scholarship on this issue, see generally ALEXANDER, *supra* note 116; TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); MAUER, *supra* note 116; *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (Mary Pattillo et al. eds., 2004); Ian F. Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. LAW 133 (2011). For an important heterodox take on the dominant narrative, see JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

<sup>118</sup> MAUER, *supra* note 116, at 114.

<sup>119</sup> See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3–5 (2007) (“Americans have built a new civil and political order structured around the problem of violent crime.”).

<sup>120</sup> See Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice, A Colloquium on Community Policing*, 90 CALIF. L. REV. 1415, 1417 (2002).

<sup>121</sup> See Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1697, 1701 (2012) (explaining how the use of criminal law and policing strategies more generally transmitted the message that schools were taking cyber-bullying “seriously”).

Children—and in particular, children of color—were most affected by this change in policy and culture. As the criminal justice system trended towards more aggressive law enforcement and less leniency to youth offenders, it drew in many more young people.<sup>122</sup> Once in contact with the system, children faced increasingly hostile institutions. U.S. society largely abandoned its century-old experiment with a distinctive juvenile justice system, reshaped its juvenile courts and correctional institutions to be more punitive, and adopted laws that tried tens of thousands of juveniles in adult courts—often incarcerating them in adult prisons.<sup>123</sup> These trends produced a feedback loop: as the number of children charged with crimes and subjected to serious sanctions increased, public fear of juvenile crime increased. Ultimately, the public became desensitized to the notion that young people were proper subjects for aggressive policing and punitive sanctions.<sup>124</sup>

Two decades of punitive policies, often aimed at juveniles, and the broad embrace of policing and surveillance as mechanisms of social control were instrumental in reshaping popular attitudes about student dress restrictions. Though the connections were rarely explicitly drawn, the points of contact were everywhere: a society that had chosen to prioritize order over liberty had little sympathy for the abstract autonomy claims of teenagers; a nation that had committed to the project of punishment and surveillance was willing to embrace the high enforcement costs of student dress restrictions; a country that saw young people as potential subjects of carceral discipline saw little danger in imposing lesser sanctions such as school suspensions for trivial offenses; and a people who equated the use of policing techniques with a commitment to taking a problem seriously were affirmatively looking for opportunities to demonstrate their commitment to education.

### B. Trends in Schooling

The above trends in policing led directly to public schools becoming sites for aggressive policing, a major shift in policy. As one of this Article's authors has extensively chronicled elsewhere, over the last half century (and

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<sup>122</sup> For one estimate suggesting approximately 250,000–300,000 juveniles are tried in adult court each year, see NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 7 (2011). There are, in addition, approximately 1,000,000 juvenile court cases filed each year (down from almost 2,000,000 per year filed during the late 1990s). See OFFICE OF JUVENILE JUSTICE, STATISTICAL BRIEFING BOOK, <https://www.ojjdp.gov/ojstatbb/>, archived at <https://perma.cc/T3AM-CFM2>.

<sup>123</sup> See Ahrens, *supra* note 121, at 1676–77 and accompanying notes.

<sup>124</sup> This phenomenon was most famously illustrated by the panic over an allegedly impending generation of juvenile “super-predators” that began with conservative criminologists like John Dilulio, Jr. but was quickly embraced by President Clinton and other leading Democrats at about the same time they embraced school uniforms. For an excellent, brief summary of the phenomenon that quotes some of the most incendiary rhetoric and demonstrates its destructiveness, see Robert J. Smith & Zoe Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 425 (2017).

in particular the last quarter century) both the criminal justice system specifically and the language and technologies of policing more generally have embedded themselves into the fundamental character of the public school experience.<sup>125</sup>

Students are now quite likely to find uniformed police officers on their school campuses. A collection of factors, including the perceived prevalence of drugs and gangs, and the tragic shooting at Columbine High School, pushed districts to station police officers within schools. By 2009, around 17,000 uniformed police officers were formally assigned to schools.<sup>126</sup> By 2017, the Los Angeles Public School District actually had enough officers to maintain its own police department.<sup>127</sup> Police officers stationed in schools (often dubbed “resource officers”) are usually trained specifically to police educational environments, and, like police officers not stationed in schools, they often engage in community caretaking activities. Because police officers are trained to enforce criminal law, however, they are more likely to perceive conflict or misbehavior as meriting criminal law intervention, which may partly explain why the number of students arrested at school has increased<sup>128</sup> and why some situations that clearly do not warrant law enforcement involvement, such as food fights, now may end in arrest.<sup>129</sup> The aphorism that when you have a hammer, everything looks like a nail is applicable

<sup>125</sup> See Ahrens, *supra* note 121, at 1677–84.

<sup>126</sup> See Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978 (2009-2010).

<sup>127</sup> See *What Is the LASPD About . . .*, LOS ANGELES SCHOOL POLICE DEPARTMENT, <http://laspd.com/about.html> (last visited Oct. 29, 2018), *archived at* <https://perma.cc/VQF3-8LBL> (noting that the district employs around 350 sworn police officers).

<sup>128</sup> See, e.g., Radley Balko, *Putting More Cops in Schools Won't Make Schools Safer, and It Will Likely Inflict a Lot of Harm*, WASH. POST: THE WATCH, Feb. 22, 2018, [https://www.washingtonpost.com/news/the-watch/wp/2018/02/22/putting-more-cops-in-schools-wont-make-schools-safer-and-it-will-likely-inflict-a-lot-of-harm/?noredirect=on&utm\\_term=.388a4820c4cc](https://www.washingtonpost.com/news/the-watch/wp/2018/02/22/putting-more-cops-in-schools-wont-make-schools-safer-and-it-will-likely-inflict-a-lot-of-harm/?noredirect=on&utm_term=.388a4820c4cc), *archived at* <https://perma.cc/A5F9-6SPU> (explaining the increase in the number of students arrested at school, discussing modern history of expanded police presence in schools, and quoting and citing emerging literature on these issues). The federal government has, controversially, declined to track the number of arrests occurring in public schools, making the annual figure elusive. Anecdotal evidence suggests that nearly every large school district saw a major increase in the number of arrests between the late 1990s and the mid-2000s and currently facilitates the on-campus arrest of several thousand students each year. Some small and mid-sized districts, particularly in the South, arrest proportionally even more students. See generally Balko, *Putting More Cops in Schools*, *supra*; Radley Balko, *School Police Have Uncertain Impacts on Student Arrests*, *Crime Prevention*, HUFFINGTON POST, Dec. 21, 2011, [http://www.huffingtonpost.com/2011/12/19/school-police-student-arrests\\_n\\_1159124.html](http://www.huffingtonpost.com/2011/12/19/school-police-student-arrests_n_1159124.html), *archived at* <https://perma.cc/YK95-VFT9> (summarizing data and its limits); Tex. Appleseed, *Texas' School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Schools* (2010), [http://www.njcn.org/uploads/digital-library/Texas-School-Prison-Pipeline\\_Ticketing\\_Booklet\\_Texas-Appleseed\\_Dec2010.pdf](http://www.njcn.org/uploads/digital-library/Texas-School-Prison-Pipeline_Ticketing_Booklet_Texas-Appleseed_Dec2010.pdf), *archived at* <https://perma.cc/H5G7-JRX5> (over 100,000 students issued misdemeanor tickets in Texas schools every year).

<sup>129</sup> See, e.g., Susan Saulny, *25 Chicago Students Arrested for a Middle-School Food Fight*, N.Y. TIMES, Nov. 10, 2009, <https://www.nytimes.com/2009/11/11/us/11foodfight.html>, *archived at* <https://perma.cc/8GR3-HU9Z>; Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns about Zero Tolerance*, CNN, Feb. 18, 2010, <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html?hpt=C1>, *archived at* <https://perma.cc/NV9D-TN6U>.

here. While the presence of officers on school campuses has generally been justified by safety considerations, most campus arrests involve non-violent, non-assaultive behavior.<sup>130</sup>

Campuses increasingly subject students to police-style surveillance techniques, including drug-sniffing dogs,<sup>131</sup> metal detectors,<sup>132</sup> surveillance cameras,<sup>133</sup> bag searches,<sup>134</sup> and drug tests.<sup>135</sup> Some of that surveillance extends to the home, as administrators monitor off-campus behavior through social media and school-issued electronic devices.<sup>136</sup>

These surveillance tools are embedded in a broader disciplinary system geared toward inflexible and punitive policy goals. Students who break an expanding body of school rules often face zero-tolerance policies that mandate automatic suspensions and expulsions.<sup>137</sup> Experts who have studied the frequency with which youth of color move quickly from the school system to the prison system (the “school-to-prison pipeline”) consistently cite the rigidity of zero tolerance and similar policies, the adversarial relationships they create between young people and authority figures, and the dehumanizing consequences of repeatedly viewing classes of students primarily as disciplinary subjects as major causes of that public policy catastrophe.<sup>138</sup>

<sup>130</sup> For a breakdown of the offenses that cause arrests and ticketing, see *Tex. Appleseed, supra* note 128. Even when official police officers are absent, students are likely to encounter other security officers who often mimic the appearance and mindset of the police.

<sup>131</sup> In the 2013-2014 school year, 24.1% of public schools (and 57% of high schools) reported that they used drug-sniffing dogs on campus. See Nat’l Ctr. For Educ. Statistics, *supra* note 6, at 103–05.

<sup>132</sup> In the 2013-2014 school year, about 6% of public schools (and 13% of high schools) performed either daily or random metal detector checks on their students. *Id.* at 181–82.

<sup>133</sup> In the 2013-2014 school year, 75.1% of public schools (and 89% of high schools) reported that they used surveillance cameras. *Id.* at 103–05.

<sup>134</sup> In the 2013-2014 school year, 11.4% of public schools (and 26% of high schools) reported that they conducted random sweeps for contraband such as drugs and weapons. *Id.* at 181–82.

<sup>135</sup> See *Board of Educ. of Independent Sch. Dist. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1997).

<sup>136</sup> Schools often monitor social media activity that students engage in off campus and use that monitoring to discipline students. See Ahrens, *supra* note 121, at 1707–10 (discussing and collecting cases dealing with school district punishment of students for off-campus social media activity); see also Catherine Smith & Bianca Bosker, *School Administrator Boasts About Spying On Students Using Laptop Webcams*, HUFFINGTON POST, Apr. 28, 2010 (quoting a school administrator who says he uses for displaying purposes the webcams on school-issued laptop computers to record and photograph students in their homes).

<sup>137</sup> On the history of zero tolerance policies, see Ahrens, *supra* note 121, at 1678–80; Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1043–48 (2001); cf. DEP’T OF EDUC. & DEP’T OF JUST., ANNUAL REPORT ON SCHOOL SAFETY, 1998, at 6 (1998) (finding that most states adopted zero-tolerance policies in and around 1995). While “zero tolerance” is now a familiar phrase and program, it did not exist as a popular policy until the mid-1990s, and was, like school uniforms, an educational shift for which President Bill Clinton advocated.

<sup>138</sup> See, e.g., *Tex. Appleseed, supra* note 128; Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL’Y 585 (2009).

Several other significant trends in public schooling function symbiotically with the reconceptualization of students as proper subjects for policing. As many scholars, including one of the authors of this Article, have explained, many modern public schools have reconfigured the traditional doctrine of *in loco parentis* (the idea that schools are acting in the shoes of a parent), re-embracing the disciplinary powers implicit in the analogy while eschewing the nurturing and developmental responsibilities that traditionally accompanied those powers.<sup>139</sup> Where educators and administrators once saw themselves as part of a community effort to develop emotionally healthy, independent, and resourceful citizens, cultural changes and resource limitations have made such engagement more difficult and triggered a shift in aspirations that rejects such holistic aims as naïve or quixotic.<sup>140</sup> Put pointedly, many educators, administrators, and policy makers have concluded that public schools lack the capacity to guide the emotional and behavioral development of students and must instead rely on blunt sanctioning tools to maintain order and facilitate learning.

Concomitant reforms have restructured the learning process itself, as education activists across the political spectrum have pushed for greater standardization of curricular materials and pedagogical method and for the adoption of extensive standardized testing to monitor learning and evaluate school performance.<sup>141</sup> While the wisdom of these changes is extensively debated and beyond the scope of this Article,<sup>142</sup> their consequences for the culture of public schooling are well established. Facing mandates to teach particular materials by certain deadlines or suffer their own punitive sanctions, schools across the country alter their calendars and schedules, eliminate activities aimed at social and emotional development, and focus their attention on pushing particular segments of the academic talent distribution

<sup>139</sup> See, e.g., Ahrens, *supra* note 121, at 1683–84; Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 970 (2010).

<sup>140</sup> See Stuart, *supra* note 139, at 970 (noting that, while “the doctrine would ordinarily be understood to require the guardianship qualities of a parent, as being supportive, protective, and perhaps disciplinary,” modern schools and courts “have focused almost solely on the disciplinary aspect of the principle”).

<sup>141</sup> The major federal legislation to implement curricular standards, impose high-stakes testing, and hold schools accountable was the No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2001) (codified in scattered sections of 20 U.S.C.). The most significant movement towards standardized curriculum and curricular materials is the highly controversial Common Core Standards Initiative, a collaboration between the vast majority of states organized by the National Governors Association. See *Development Process*, COMMON CORE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/development-process/>, archived at <https://perma.cc/3RCZ-8SMW>.

<sup>142</sup> From the beginning, legal scholars joined the debate about the Act’s consequences and priorities. See, e.g., James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004); Michael Heise, *The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119 (2007). For pointed recent criticisms of high-stakes testing by a leading education policy expert (and a one-time supporter), see generally DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* (2010).

over arbitrary bars.<sup>143</sup> This classroom culture creates an impersonal and regimented dynamic along with the sense that there is little time to waste, militating in favor of dress restrictions and other disciplinary rules aimed at limiting distraction and ensuring conformity.

### C. Trends in Parenting

The widespread acceptance of student dress codes and uniforms has been facilitated by changes in parenting attitudes and strategies. Many parents are more willing to engage in—or authorize surveillance of—their children, to micro-manage decisions that prior generations left to adolescents, and to go to herculean lengths to protect their children’s educational opportunities and physical safety against threats real and imagined. These trends have variously been described as “intensive parenting,” “over-parenting,” and “helicopter parenting,” and have been well chronicled by a variety of academic and popular authors, including one of the authors of this Article.<sup>144</sup>

The causes of this phenomenon are complicated—almost certainly involving the increasing age of parents (particularly middle- and upper-class parents), the narrowing of economic opportunity and the concomitant increase in the resources families must dedicate to status replication, and the saturation media coverage of high-profile tragedies including the school shootings at Columbine High School, Sandy Hook Elementary School, and Parkland High School.<sup>145</sup> But its effects on the law are significant and its effects on the culture profound. While we must be cautious about ascribing too much motive power to a disproportionately middle-class parenting trend<sup>146</sup> when analyzing a student dress regime that disproportionately affects lower-income students,<sup>147</sup> devotees of intensive parenting have been opinion leaders on this issue—dominating PTAs and community organiza-

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<sup>143</sup> See generally RAVITCH, *supra* note 142; see also Christine Hong Cullen, *High Stakes Testing: Not Just an “Upper Middle Class Problem,”* HOUST. CHRON., May 13, 2015, <https://www.houstonchronicle.com/local/gray-matters/article/Seeing-STAARs-6258208.php>, archived at <https://perma.cc/A2M7-YKTT> (providing a vivid and detailed explanation of consequences of high-stakes testing for learning environment in one school).

<sup>144</sup> The leading academic treatment of this trend is Gaia Bernstein & Zvi Triger, *Overparenting*, 44 U.C. DAVIS L. REV. 1221 (2011); see also Ahrens, *supra* note 121, at 1715–19; Joan Acocella, *The Child Trap: The Rise of Overparenting*, THE NEW YORKER, Nov. 17, 2008, at 100 (reviewing “[t]he literature on overparenting”); Victoria Clayton, *Overparenting: When Good Intentions Go Too Far, Kids Can Suffer*, MSNBC, Dec. 7, 2004, [http://www.msnbc.msn.com/id/6620793/ns/health-kids\\_and\\_parenting/t/overparenting/](http://www.msnbc.msn.com/id/6620793/ns/health-kids_and_parenting/t/overparenting/), archived at <https://perma.cc/7KYR-7EFG>; Nancy Gibbs, *The Growing Backlash Against Overparenting*, TIME, Nov. 20, 2009.

<sup>145</sup> Compare Acocella, *supra* note 144 (emphasizing necessity and willingness of parents to invest resources in setting children up for success), with Gibbs, *supra* note 144 (emphasizing increased anxiety spurred by school shootings, terrorism, and other such crises).

<sup>146</sup> See Bernstein & Triger, *supra* note 144, at 1269–71 (explaining that the intensive parenting model is a norm created and practiced primarily by “middle-class parents,” by which they appear to mean middle- and upper-incomes families).

<sup>147</sup> School uniforms are required at only 4% of public schools with under a quarter of their students eligible for the free and reduced lunch program, but at 53% of those schools with over

tions, drafting op-eds, and voting overwhelmingly for student dress restrictions in polls and referenda.

Parents who support intrusive surveillance of their children by schools (such as drug testing and cell phone searches) or rules that drastically limit their children's appearance and fashion choices appear to be motivated by a set of interrelated factors. First, these parents are more likely to impose similar restrictions at home and to justify them as expressions of care, predisposing them to treat school-based restrictions as similarly proper and similarly motivated.<sup>148</sup> Second, parents welcome the assistance of school officials in setting boundaries for their children, since shifting the responsibility for intensive parenting to outsiders allows for a best-of-both-worlds situation in which students are surveilled or restricted in ways that parents desire, without forcing parents to bear the emotional and relationship costs of imposing such restrictions themselves.<sup>149</sup> Hence, parents who support school uniforms often suggest that the main virtue of such policies is that they eliminate the constant bickering over clothing that pervaded their relationships with their children before such policies.<sup>150</sup> Third, parents are more likely to perceive their children as potential victims or influencees rather than as potential rule-breakers or "bad" influences and are, therefore, more likely to embrace policies that surveil, punish, and provide backstops against extreme forms of limit testing.<sup>151</sup> Finally, anecdotal information suggests that some middle-class and even affluent parents perceive strict dress codes and school uniforms as opportunities to opt out of expensive fashion competitions that they do not want to fund and fear they cannot win.<sup>152</sup>

#### D. Trends in Sexuality and Gender Relations

Particularly in recent years, supporters of strict public school dress restrictions have deployed a rhetoric that focuses heavily on the sexualization

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three-quarters of the students so eligible. See NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 6, at 197.

<sup>148</sup> See Ahrens, *supra* note 121, at 1714.

<sup>149</sup> See *id.* at 1714–15.

<sup>150</sup> See, e.g., Greg Toppo, *What to Wear? Schools Increasingly Making That Decision*, USA TODAY, Aug. 18, 2013, <https://www.usatoday.com/story/news/nation/2013/08/18/more-school-uniforms/2662387/>, archived at <https://perma.cc/6QFA-ZLJT> (quoting a school safety consultant on why parents embrace school uniforms: "A couple of months down the road, the parents absolutely love it because they spend a whole lot less time fighting with their children over what they're going to wear.").

<sup>151</sup> See Ahrens, *supra* note 121, at 1715.

<sup>152</sup> Paradoxically, there is substantial evidence that school uniforms actually increase the cost of clothing and impose hardship on parents struggling to make ends meet. See, e.g., Adam Clark, *Thousands Say They Can't Afford Uniforms*, THE MORNING CALL, Aug. 31, 2013, [http://articles.mcall.com/2013-08-31/news/mc-allentown-school-uniform-implementation-20130831\\_1\\_uniform-bank-northampton-area-school-district-school-uniform-policies](http://articles.mcall.com/2013-08-31/news/mc-allentown-school-uniform-implementation-20130831_1_uniform-bank-northampton-area-school-district-school-uniform-policies), archived at <https://perma.cc/K59W-XZ4Y> (reporting that thousands of families could not afford new mandatory uniforms in one district and would have to either receive public vouchers or send their kids to school out of uniform).

of the adolescent female body. This rhetoric likely derives from complicated trends in sexuality and gender relations that have sexualized young women and girls of an ever-decreasing age and then punished those same young people for the power and dangers supposedly implicit in that imputed sexuality.

In a recent essay, Professor Meredith Johnson Harbach elegantly summarizes the interplay between student dress restrictions and the increased sexualization of young women.<sup>153</sup> Relying on both social science and cultural criticism, she explains that media, advertising, and other influences have pressed upon both young women and men of all ages an inherently sexualized account of female adolescence.<sup>154</sup> After recounting some of the many negative consequences of this worldview for young women and for our culture more broadly, she posits that the inclination towards imposing modesty-based dress restrictions on female students might, in some instances, be a well-intended but ultimately ineffective attempt to dampen this trend.<sup>155</sup> Drawing upon powerful emerging literature from young female critics, she catalogs several ways in which this approach is deeply counterproductive. These include (1) the adverse learning consequences for girls facing a disproportionate number of dress code sanctions and punishments; (2) the message that female bodies are “inherently. . . dangerous” or problematic;<sup>156</sup> (3) the concomitant message that responsibility for avoiding harassment and assault rests with females rather than males;<sup>157</sup> and (4) the degree to which the promulgation and enforcement of dress restrictions focused on the female body orient young women and girls who are not already so conditioned to adopt heavily sexualized identities.<sup>158</sup>

We concur with the cultural analysis provided by Professor Harbach and the critics she relies upon, but also wish to emphasize a related cultural trend regarding young female sexuality that has paved the way for strict female dress restrictions, a trend that is in some ways the proverbial other side of the coin. Though it is absolutely true that the last three or four decades have seen the increased sexualization of adolescents and even pre-adolescents, it is important to understand the nature of that sexualization. While there are some innocuous and even potentially healthy narratives threaded into the complex cultural dialogue,<sup>159</sup> the dominant strand in the

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<sup>153</sup> See Harbach, *supra* note 13.

<sup>154</sup> *Id.* at 1041–43.

<sup>155</sup> *Id.* at 1042–43 (suggesting that some educators might instinctively believe that obscuring the female body works to diffuse sexual tension).

<sup>156</sup> See *id.* at 1043–45.

<sup>157</sup> *Cf. id.* at 1044.

<sup>158</sup> *Id.* at 1056–57.

<sup>159</sup> On the more innocuous (though not completely benign) end of the scale, one might count the increased integration of (almost always heterosexual) romantic relationships into television shows and movies aimed at pre-adolescents. On the healthier side of the ledger, many might count the work of cultural groups that have encouraged young women to embrace their sexuality as a means of self-empowerment and self-fulfillment. *Cf.* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89 (2014).

cultural conversation about young female sexuality has almost certainly been overtly misogynistic. While a full exploration of these trends is beyond the scope of this Article, the cultural mileposts in the relevant decades are striking, including a war on a perceived epidemic of teen pregnancies that derided young mothers, not fathers;<sup>160</sup> the development of abstinence-only sexual education designed to inculcate lessons of shame rather than best practices for sexual health and empowerment;<sup>161</sup> and an avalanche of popular entertainment portraying young women (and women generally) as temptresses bent on the destruction of order and decency.<sup>162</sup> This punitive and misogynistic cast to the overall theme of adolescent sexualization has further facilitated the development of strict female-oriented dress restrictions. For those influenced consciously or unconsciously by this trend, imposing disproportionate consequences and disciplinary resources on young women is not an unfortunate side effect of an effort to counteract their hyper-sexualization, but instead an intentional and targeted response to it.

### E. Trends in Politics

Perhaps the single biggest factor paving the way for the reconsideration of student dress restrictions during the last quarter of the twentieth century was a shift in the values, coalitions, and strategies of the two major political parties that left defenders of broad student freedoms without a base of support. To a small extent, this was due to shifts within the Republican Party that increasingly jettisoned moderate and culturally liberal voters in the Midwest and Northeast for evangelical voters and law-and-order conservatives primarily, but not exclusively, in the South.<sup>163</sup> But the vast majority of the blame for this cultural transformation goes to the Democratic Party, and in particular to the Clinton administration.

During the late 1980s and early 1990s, a growing faction of the Democratic Party, despondent over two decades of disastrous election results, con-

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<sup>160</sup> See, e.g., KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996) (discussing, with significant skepticism, the rhetoric, politics, and policy debates involving teen pregnancy, particularly since the 1970s).

<sup>161</sup> For a history of the federal legislative requirement that schools utilize such a model, see generally John E. Taylor, *Family Values, Courts, and Culture Wars: The Case of Abstinence-Only Sex Education*, 18 WM. & MARY BILL RTS. J. 1053, 1062–64 (2010). For one of many blistering critiques of such policies, this one by a law professor, see James McGrath, *Abstinence-Only Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665 (2004).

<sup>162</sup> For classic portrayals from this era of women as destructive sexual temptresses, see *BASIC INSTINCT* (Canal 1992); *FATAL ATTRACTION* (Paramount Pictures 1987). On the treatment of women generally and young women in particular in Hollywood film, see generally STACY L. SMITH, et al., *Gender Inequality in 500 Films*, ANNENBERG CENTER (2012), available at [http://annenbergenberg.usc.edu/pages/~media/MDSCI/Gender\\_Inequality\\_in\\_500\\_Popular\\_Films\\_-\\_Smith\\_2013.ashx](http://annenbergenberg.usc.edu/pages/~media/MDSCI/Gender_Inequality_in_500_Popular_Films_-_Smith_2013.ashx), archived at <https://perma.cc/4QG3-DNP4>.

<sup>163</sup> See, e.g., GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY*, 339 (2012).

sciously sought to revise the Party's substantive policy positions and messaging to appeal to a broader cross-section of moderate and conservative voters.<sup>164</sup> To that end, the Democratic Leadership Council ("DLC") and other affiliated groups proposed that the Party adopt a variety of "tough on crime" strategies; distance themselves from segments of the Party's coalition that were unpopular with swing voters (such as Black Americans and teachers' unions); support reforms of government benefit programs to limit eligibility and impose work and surveillance requirements for recipients; eschew costly new government programs for small-bore, "common-sense" initiatives; and, more generally, embrace a political rhetoric that resonated with religious and cultural conservatives.<sup>165</sup>

President Clinton, elected in 1992, was a former Chairman of the DLC whose campaign rhetoric and governing philosophy broadly resonated with its manifesto.<sup>166</sup> During his successful campaign, President Clinton made headlines by attacking popular Black entertainers for their coarse lyrics<sup>167</sup> and by rushing home to Arkansas to sign off on the execution of a profoundly incompetent death row prisoner.<sup>168</sup> Once in office, his administration supported and enacted major legislation reforming public benefits programs to eliminate entitlements and impose work restrictions;<sup>169</sup> imposing stricter prison sentences for federal crimes and stricter procedural requirements on state prisoners seeking federal habeas review;<sup>170</sup> and "defending" traditional notions of marriage against the first stirrings of the same-sex marriage

<sup>164</sup> On the rise of the "New Democrats," see generally KENNETH S. BAER, *REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON* (2000); Jon F. Hale, *The Making of the New Democrats*, 110 POL. SCI. Q. 207 (1995).

<sup>165</sup> For an early discussion of the rise of the DLC and its policy positions, see Hale, *supra* note 164, at 208–28. For an insider memoir focusing on the DLC's successes, see generally AL FROM, *THE NEW DEMOCRATS AND THE RETURN TO POWER* (2013). For a story reflecting on the DLC's rise and decline, see Ben Smith, *The End of the DLC Era*, POLITICO, Feb. 7, 2011, <http://www.politico.com/story/2011/02/the-end-of-the-dlc-era-049041>, archived at <https://perma.cc/2T85-EHG8>.

<sup>166</sup> On Clinton's connections to the DLC and their policy agenda, see FROM, *supra* note 164, at 161–62; Paul J. Quirk & William Cunion, *Clinton's Domestic Policy: The Lessons of a New Democrat*, in *THE CLINTON LEGACY* 200, 200–04 (Colin Campbell & Bert A. Rockman eds., 2000).

<sup>167</sup> See Ronald A. Taylor, *Clinton Raps Sister Souljah's Remarks*, WASH. TIMES, June 14, 1992, at A4.

<sup>168</sup> See Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 23, 1993, at 105 (discussing Governor Clinton's decision to allow execution of Ricky Ray Rector, an individual so profoundly intellectually disabled that he asked that dessert from last meal be saved "to finish later").

<sup>169</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>170</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796 (1994); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). For an insightful early discussion of the Clinton Administration's use of the crime issue, see Harry A. Chernoff *et al.*, *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 542–76 (1996). See generally Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67 (1997).

movement.<sup>171</sup> His most trusted advisors famously urged him to maintain popularity by “triangulating” in a manner that presented his positions as an alternative to both the Republican Party and more traditional Democrats.<sup>172</sup>

As President Clinton prepared to seek reelection in 1996, he embraced mandatory school uniforms as the kind of small-bore, low-cost, common-sense policy initiative that might appeal to a broad cross-section of voters. President Clinton mentioned uniforms in his 1996 State of the Union address,<sup>173</sup> gave a full-throated endorsement of them in a famous speech in Long Beach, California,<sup>174</sup> and issued federal guidelines to encourage and support schools transitioning to uniforms.<sup>175</sup> While a few schools had begun experimenting with uniforms in the late 1980s and early 1990s, the modern enthusiasm for uniforms can be traced fairly directly to the 1996 Clinton administration initiative.<sup>176</sup>

School uniforms presented a perfect opportunity for President Clinton to “triangulate” and demonstrate his bona fides as a new kind of Democrat. On the one hand, the imposition of additional restrictions and greater surveillance on predominantly poor and minority students,<sup>177</sup> combined with the emphasis on diminishing violence and disorder, was a culturally conservative endeavor designed to resonate with the swing voters the Democratic Party hoped to win back from the Republicans.<sup>178</sup> On the other hand, President Clinton carefully threaded genuine concern for the physical safety and learning environments of disadvantaged students, as well as arguments premised on “equality” and “opportunity,” into his case for student dress restrictions, in a manner that has proven durable.<sup>179</sup> The Clinton administration wanted to seem committed to a world where order was a priority, where

<sup>171</sup> See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (ruled unconstitutional in *U.S. v. Windsor*, 570 U.S. 774 (2013)).

<sup>172</sup> For the nearly contemporaneous account that publicized the “triangulation” strategy, see BOB WOODWARD, *THE CHOICE* 25–26 (1996).

<sup>173</sup> See Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 90, 93 (Jan. 23, 1996) (“I challenge all our schools to teach character education, to teach good values and good citizenship. And if it means that teenagers will stop killing each other over designer jackets, then our public schools should be able to require their students to wear school uniforms.”).

<sup>174</sup> Remarks Prior to a Roundtable Discussion on School Uniforms in Long Beach, California, 32 WEEKLY COMP. PRES. DOC. 368 (Feb. 24, 1996).

<sup>175</sup> See generally MANUAL, *supra* note 48.

<sup>176</sup> See NAT’L CTR. FOR EDUC. STATS., *supra* note 6, at 196 (charting rise of uniforms and dress codes over the years since Clinton’s public support).

<sup>177</sup> See *id.* at 197 (breaking down use of uniforms and strict dress codes by racial and class profiles of schools’ students).

<sup>178</sup> Cf. James Gerstenzang, *Clinton Praises School Uniform Pacesetter*, L.A. TIMES, Feb. 25, 1996, [http://articles.latimes.com/1996-02-25/news/mn-39873\\_1\\_school-districts](http://articles.latimes.com/1996-02-25/news/mn-39873_1_school-districts), archived at <https://perma.cc/JBB4-H85D> (“The entire United States of America is in your debt because you took the first step to show that elementary and middle school students could wear uniforms to class, reduce violence, reduce truancy, reduce disorder and increase learning[.]”).

<sup>179</sup> For an excellent summary on the complexities of President Clinton’s New Democrat rhetoric and its implications for law reform, see Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992-2012 and Beyond*, 2013 MICH. ST. L. REV. 1621, 1627–32 (2013).

rights and benefits came with responsibilities and obligations, where new tools were used to fight old problems, and where the cultural priorities and folk wisdom of “mainstream Americans” were treated with respect. To that end, it aggressively embraced—and substantially changed the discourse on—student dress restrictions.

### F. Trends in Race Relations

To underscore a point that should already be apparent, the trends in policing, schooling, and politics discussed above are deeply embedded in the complicated—and in many ways dispiriting—developments in race relations and racial control that occurred during that era. As Professor Michelle Alexander and many others have persuasively argued,<sup>180</sup> the racist anxieties and concerns unleashed by the dismantling of legal and political restrictions on Black Americans during the 1950s and 1960s resulted directly in the development of a mass incarceration state post-1970; in Alexander’s evocative phrase, the decline of the old Jim Crow regime led to the development of a “New Jim Crow.”<sup>181</sup> The racialized narratives that fueled the Jim Crow regime also fueled the embrace by both major political parties of law-and-order rhetoric, “tough on crime” policies, and normalized surveillance. These racist narratives dubbed young Black boys as “super predators,”<sup>182</sup> used stereotypes and slurs to blame Black crack dealers and users for an uptick in crime rates more likely attributable to shifting age patterns and poverty rates,<sup>183</sup> and attempted to disqualify Democratic electoral aspirants from office by tying them to menacing, doctored photos of incarcerated Black Americans.<sup>184</sup> Similarly, the successful efforts to limit once popular social safety net programs drew their inspiration from a racialized narrative that characterized benefit recipients as moochers and ne’er-do-wells or, in the rhetoric of President Ronald Reagan, “welfare queens” driving around in Cadillacs.<sup>185</sup> In the context of these racialized narratives and attendant policies, the adoption of harsh student dress restrictions (especially uniforms),

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<sup>180</sup> See, e.g., ALEXANDER, *supra* note 116; Haney-Lopez, *supra* note 117, at 1029.

<sup>181</sup> ALEXANDER, *supra* note 116.

<sup>182</sup> See Smith & Robinson, *supra* note 124, at 425; see also *supra* note 124 and accompanying text.

<sup>183</sup> On the rhetoric and reality of the crack panic, see Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 852–59 (2010) and sources cited therein.

<sup>184</sup> On the most famous such episode, involving Presidential aspirant Michael Dukakis and convicted criminal Willie Horton, see Smith & Robinson, *supra* note 124, at 423–24.

<sup>185</sup> On the importance of President Reagan’s use of this imagery, which started during the New Hampshire Presidential primary in 1976, see Kathryn J. Edin & H. Luke Shaefer, *Ronald Reagan’s “Welfare Queen” Myth: How the Gipper Kickstarted the War on the Working Poor*, SALON, Sept. 27, 2015, [http://www.salon.com/2015/09/27/ronald\\_reagans\\_welfare\\_queen\\_myth\\_how\\_the\\_gipper\\_kickstarted\\_the\\_war\\_on\\_the\\_working\\_poor](http://www.salon.com/2015/09/27/ronald_reagans_welfare_queen_myth_how_the_gipper_kickstarted_the_war_on_the_working_poor), archived at <https://perma.cc/NWZ4-AB4H>; see also Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 235–37 (2014).

and additional surveillance and disciplinary powers in lower income and majority non-white schools seemed comfortable and familiar for a wide swath of politicians and opinion leaders.

### G. Trends in Market Organization and Economic Incentives

The school uniform movement received an additional boost from some of the nation's largest clothing manufacturers and retailers, including Walmart, Lands' End, JC Penney, Amazon, Target, French Toast, and The Gap. School uniforms (and uniform-like solid polos, khakis, skirts, and dresses) have developed into a billion-dollar-per-year market, providing a stable base of profits for retailers in the otherwise unpredictable and trend-driven adolescent clothing market.<sup>186</sup> Uniform products fit well into the manufacturing and distribution structures of the modern clothing industry, as they can be mass-produced at low cost (often through the use of foreign labor<sup>187</sup>), are sufficiently standard to be sold at retail outlets throughout the nation, and require comparatively little advertising or sales assistance. Transmogrifying a significant segment of the adolescent clothing market into a school uniform market effectively turns that segment of sales from clothing purchases into the kind of standardized consumer goods that are the bread and butter of modern retailers.

Though it is unclear whether clothing companies played any role in the rebirth of student dress restrictions in the late 1980s and 1990s, they have unequivocally embraced that movement since the beginning of this century. Store and brand advertisements not only solicit business, but also tout the value of uniform policies.<sup>188</sup> Indeed, the most prominent publicly available summary of the case for school uniforms is produced by, and bears the insignia of, uniform manufacturer French Toast.<sup>189</sup> At least one major retailer has bankrolled studies meant to marshal evidence in favor of expanding uniform policies.<sup>190</sup> Predictably, companies have launched special lines of uniform-

<sup>186</sup> Current estimates of the school uniform market are usually hidden behind expensive pay walls. One widely disseminated statistic has the industry passing the \$1 billion per year mark by 2015. See Robin Goldwyn Blumenthal, *Dress for Uniform School Success*, BARRONS.COM (Sept. 19, 2015), <https://www.barrons.com/articles/dress-for-uniform-school-success-1442637846>, archived at <https://perma.cc/A3MD-M9QD>.

<sup>187</sup> As much as 98% of the clothing sold in the United States is manufactured abroad. See Bradley Blackburn, *Clothing "Made in America:" Should U.S. Manufacture More Clothes?*, ABC NEWS, Mar. 10, 2011, <https://abcnews.go.com/Business/MadeInAmerica/made-america-clothes-clothing-made-usa/story?id=13108258>, archived at <https://perma.cc/88E2-W24Y>.

<sup>188</sup> See, e.g., *infra* notes 189–190.

<sup>189</sup> The advocacy documents are available in several pages intermingled with ads. See *School Info*, FRENCHTOAST.COM, <https://www.frenchtoast.com/category/schoolinfo.do> (last visited Oct. 29, 2018), archived at <https://perma.cc/2RXT-GEE7>. For the oft-quoted summary of arguments, see *Benefits of School Uniforms*, FRENCHTOAST.COM, <https://www.frenchtoast.com/category/school+info/more+about+school+uniforms/benefits+of+school+uniforms.do> (last visited Oct. 29, 2018), archived at <https://perma.cc/QEM8-PKZX>.

<sup>190</sup> See, e.g., *National Survey of School Leaders Reveals 2013 School Uniform Trends*, NAT'L ASSOC. OF ELEM. SCH. PRINCIPALS (July 30, 2013), <https://www.naesp.org/national-sur>

wear, opened uniform “shops” in their stores, and promoted these new business ventures with excited press releases meant to enhance investor confidence.<sup>191</sup> Perhaps nothing better reflects the increased prominence and projected permanence of the uniform market as the recent development of secondary analytical products that—for a substantial fee—provide investors with information about micro-trends in the economic data related to that market.<sup>192</sup>

#### H. Trends in Law

As the rest of this Part has emphasized, many—indeed, most—of the pressures and forces that redirected the discourse surrounding public school dress codes and uniform policies have been external to (even if, by necessity, interconnected with) legal doctrine.<sup>193</sup> However, developments within the law have also made it easier to elide serious analysis of expression- and autonomy-oriented objections to such codes and policies. To take the most direct example, the promise of broad student-speech protection briefly offered by *Tinker*<sup>194</sup> has been eroded by a series of cases limiting that case’s application beyond its own sympathetic facts. Those cases re-empowered schools to limit and punish student speech based on vague and conclusory concerns about decorum or paternalistic assumptions about students’ ability to process complicated issues or handle crude language.<sup>195</sup> Those decisions

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vey-school-leaders-reveals-2013-school-uniform-trends, archived at <https://perma.cc/MQF7-LA2F> (detailing annual survey funded by Lands’ End that consistently promulgates evidence in favor of uniforms).

<sup>191</sup> Walmart both has a physically distinct uniform “shop” in its stores and delineates a virtual uniform “shop” on its website. See *School Uniform Shop*, WALMART, [https://www.walmart.com/browse/5438\\_1086304](https://www.walmart.com/browse/5438_1086304) (last visited Aug. 10, 2017), archived at <https://perma.cc/2GSY-75WS>. Lands’ End has offered slightly different names for its products and services every year, but has made a point of issuing annual press releases trumpeting the importance and profitability of its uniforms (and other clothing designed to meet strict dress codes). See, e.g., *Growing School Uniform Market Demands Best in Class Service Products*, PRNEWswire (Aug. 21, 2012), <http://www.prnewswire.com/news-releases/growing-school-uniform-market-demands-best-in-class-service-products-166929746.html>, archived at <https://perma.cc/A898-Q2BR>.

<sup>192</sup> See, e.g., RESEARCH CORRIDOR, *School Uniform Market—School Uniform Market—Global Trends, Market Share, Industry Size, Growth, Opportunities and Market Forecast - 2018–2026* (2018), <https://www.researchcorridor.com/school-uniform-market/>, archived at <https://perma.cc/VD2D-H9CA> (costing \$4,000); QY RESEARCH, *Global School Uniform Market Research Report* (Jan. 2017), <http://www.researchmoz.us/global-school-uniform-market-research-report-2017-report.html>, archived at <https://perma.cc/E2PJ-NLQM> (costing \$2,900).

<sup>193</sup> See *supra* Parts II. B–G.

<sup>194</sup> See *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students have First Amendment right to wear armbands protesting Vietnam War in public schools and setting up speech protective framework for future public school claimants).

<sup>195</sup> See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 676 (1986) (allowing school district to punish student for political speech that used crude imagery); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260–61 (1988) (allowing school to block publication of student newspaper articles dealing with sensitive subjects such as divorce); *Morse v. Frederick*, 551 U.S. 393, 393–95 (2007) (allowing school to discipline student for holding up banner at school-sponsored event with cryptic but arguably pro-drug meaning).

both reflect and rely upon deeper trends in the regulation of student speech and behavior that have allowed school districts greater latitude to surveil and search students and their belongings<sup>196</sup> in deference to claims of order and discipline and in response to a perception that student freedoms are more provisional than those of adults.<sup>197</sup>

Doctrinal changes not directly related to schools and children also contributed to the erosion of constitutional space within which to articulate broad objections to dress codes and uniform policies. Analysis of First Amendment challenges has become increasingly categorical. Hierarchical tests define some communicative conduct out of the First Amendment entirely,<sup>198</sup> treat protected communicative conduct differently than pure speech,<sup>199</sup> and apply vastly different levels of scrutiny to restrictions on expression depending on whether a restriction is content-neutral or -specific and whether, assuming it is content-specific, it is viewpoint-specific or -neutral.<sup>200</sup> Such sorting mechanisms allow for the expeditious and consistent processing of a high volume of litigation and generally do a good job of reflecting the First Amendment's normative commitments. However, these tests can be unduly rigid, make the outcome of cases turn on arbitrary distinctions,<sup>201</sup> and, most relevant here, tolerate large scale stifling of expression if the ban is backed by superficially plausible reasons and evenhandedly enforced.<sup>202</sup>

Changes in substantive due process jurisprudence in recent decades have also made it increasingly difficult to formulate autonomy-based challenges to student dress and grooming restrictions. During the late 1960s and

<sup>196</sup> See, e.g., *Board of Educ. v. Earls*, 536 U.S. 822, 822–25 (2002) (allowing mandatory suspicionless drug testing of students participating in extra-curricular activities); *New Jersey v. T.L.O.*, 469 U.S. 325, 325–36 (1985) (allowing warrantless searches of student lockers on showing of “reasonable suspicion” rather than showing of “probable cause” required in most other settings).

<sup>197</sup> See generally Ahrens, *supra* note 121, at 1677–84.

<sup>198</sup> See, e.g., *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (introducing test that imposes significant requirements as to the precision of the intended message and its intelligibility to its intended audience in order for conduct to be treated as “communicative” and protected under the First Amendment).

<sup>199</sup> See, e.g., *id.* at 408–09 (adopting what is essentially an intermediate scrutiny test even for clearly communicative conduct).

<sup>200</sup> See, e.g., *Reed v. Town of Gilbert*, Ariz. 135 S. Ct. 2218, 2222–23 (2015); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 622–24 (1994); *Boos v. Barry*, 485 U.S. 312 (1988). For one leading expert's take on the increased use of tiered reasoning in free speech cases (and its limits), see Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499 (2013).

<sup>201</sup> Cf. Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2342–47 (2006) (sorting through similar normative and practical arguments about the use of tiers in equal protection analysis).

<sup>202</sup> According to some commentators, that is in effect what has happened in school uniform and dress code cases. See Miller, *supra* note 10, 646–49; Ronald D. Wenkart, *School Uniform Policies, School Dress Codes and the First Amendment: A Fourth Category of Student Speech?*, 238 EDUC. LAW REP. 17 (2008).

the early to mid-1970s, as the courts worked to develop and justify modern substantive due process doctrines that required governments to articulate sufficient reasons for intruding into personal liberties,<sup>203</sup> school districts struggled to explain why preferences for traditional clothing and hairstyles were sufficient to trump the inherent right human beings have to shape the way they look and control how they present themselves to the world.<sup>204</sup> Over the next several decades, however, the Supreme Court, and by extension the American constitutional system, gradually adopted a grand bargain in the arena of substantive due process: the more conservative justices have grudgingly accepted the existence of the category of substantive due process<sup>205</sup> while the more liberal justices have acquiesced to limiting doctrines that import tiered levels of scrutiny from equal protection analysis,<sup>206</sup> accord little if any protection to rights not deemed fundamental,<sup>207</sup> and adopt narrow tests (and a rapidly shutting window) for the identification of fundamental rights.<sup>208</sup> Rather than asking the government to provide proportionate justification for restrictions on individual autonomy that are acutely felt by those affected, substantive due process law now requires citizens to demonstrate that the particular liberty in question has always been historically respected<sup>209</sup> or is on par in terms of ultimate life significance with decisions such as whether to have children or who to marry<sup>210</sup> in order to receive more than trivial constitutional protection.

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<sup>203</sup> See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>204</sup> See cases discussed *supra* Part I.B.

<sup>205</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65, 77, 80, 86, 92, 95 (2000) (including opinions by all nine Justices accepting that substantive due process exists and protects certain conduct from government regulation); *Washington v. Glucksberg*, 521 U.S. 702, 719, 736, 756, 789 (1997) (including similar opinions signed by all Justices).

<sup>206</sup> For a theoretically rich discussion of the Court's transition to an analytically troubling tiered vision of substantive due process, see Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2006).

<sup>207</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (applying rigidly the rule that "fundamental rights" trigger strict scrutiny under substantive due process, but mere liberty interests trigger only rational basis scrutiny).

<sup>208</sup> See, e.g., *Washington*, 521 U.S. 702 (attempting to limit recognition of "fundamental rights" to a handful of rights continuously protected in our history and tradition).

<sup>209</sup> See *id.*

<sup>210</sup> For recent cases emphasizing the centrality of the life decision in assessing challenges to law restricting individual liberty, see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). It should be noted that only some of the Court's members have even embraced this alternative and that those who would jettison this prong of the Court's current approach may soon form a majority. See, e.g., *Dahlia Lithwick & Mark Joseph Stern, Brett Kavanaugh is Cherry-Picking the Cases He Says Count as Precedent*, SLATE, Sept. 6, 2018, <https://slate.com/news-and-politics/2018/09/kavanaugh-confirmation-hearings-on-abortion-and-same-sex-marriage-hes-cherry-picking-precedent.html>, archived at <https://perma.cc/2Z6P-VNRJ> (quoting Supreme Court Justice Brett Kavanaugh as saying that when it comes to substantive due process "all roads lead to *Glucksberg*.").

### III. LESSONS FOR UNDERSTANDING OUR CONSTITUTIONAL CULTURE

In recent years, many legal scholars, including one of this Article's authors, have written extensively about the complicated, extrajudicial process through which different constituencies collaborate and compete to give specific content to our constitutional law.<sup>211</sup> When theorists discuss this process—what one of this Article's authors has called the operation of “constitutional culture”<sup>212</sup>—in the abstract, it can seem a bit obscure or even bloodless. When, however, scholars embed their analysis in the concrete language and characters of particular historical disputes, we get simultaneously empowering and frightening glimpses of the messy, contingent, and fundamentally contested arena of constitutional decisionmaking.<sup>213</sup> The preceding Parts of this Article have engaged in such a demonstration, detailing the process through which public, academic, and judicial attitudes and assumptions about the constitutionality of student dress codes and school uniforms fundamentally shifted over three or four decades without any significant judicial decisions on the subject.<sup>214</sup> This Part takes the analysis one step further, teasing broader lessons about how constitutional law evolves in the contemporary United States from this rich episode in our constitutional culture.

#### A. Indeterminacy in Theory and Practice

The starting point of this analysis is the familiar, if contested, observation that indeterminacy is the defining characteristic of constitutional law.<sup>215</sup>

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<sup>211</sup> See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014) (exploring the social and cultural factors that increased the salience of the controversy surrounding *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)); Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 128–29 (2013); Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, (2006); Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 U. PA. J. CONST. L. 1067 (2016).

<sup>212</sup> Andrew M. Siegel, *Constitutional Theory*, *supra* note 211, at 1.

<sup>213</sup> See, e.g., Horwitz, *supra* note 211; Klarman, *supra* note 211; Andrew M. Siegel, *Constitutional Theory*, *supra* note 211.

<sup>214</sup> See generally *supra* Parts I and II. For a discussion of why cultural attitudes about the policy wisdom or moral legitimacy of particular government intrusions tend to merge with popular attitudes about constitutional meaning, see *infra* Part III.B.

<sup>215</sup> See, e.g., MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5–6 (2004) (referring to constitutional law as “generally quite indeterminate”); Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEX. L. REV. 133, 156 (2013) (reviewing ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (2013)) (“[A]t least within the Supreme Court itself, constitutional law is sufficiently indeterminate to permit

When an important new issue arises, the familiar linchpins of text, history, and precedent rarely (if ever) resolve the issue and usually leave open many potential doctrinal paths. The lingering dispute about the constitutionality of student dress and appearance restrictions underscores this observation with particular ferocity. Nearly every aspect of the constitutional analysis of the issue is contestable and fraught with the potential for oversimplification. Certainly, some of this indeterminacy comes from the particular doctrinal structures currently in force. *Tinker*<sup>216</sup> and its progeny are ambiguous about many issues, including the degree to which their protections extend beyond the realm of political speech,<sup>217</sup> the responsibility if any of school officials or listeners to accept expression that makes them uncomfortable rather than limit the rights of the speaker,<sup>218</sup> and the showing necessary to justify anticipatory limitations on expression.<sup>219</sup> More generally, the courts have done little to resolve the inherent tension between *Tinker*'s focus on a concrete and specific showing of educational disruption and later cases that give broad deference to school officials to intrude on student freedoms based on conclusory concerns about law, order, and discipline.<sup>220</sup> Nor have the courts done much, either in the *Tinker* context or more generally, to ascertain the amount of constitutional protection enjoyed by conduct such as dress and appearance that is intentionally expressive and performative but whose message is necessarily subjective and ephemeral.<sup>221</sup>

Further indeterminacy arrives because the claimed right to attend public school dressed and groomed as one chooses draws upon multiple constitutional provisions and, thus, has the potential to fall between the stools of

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room for effective advocates to argue for nearly any position that falls within the broad mainstream of public opinion.”); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 603 (1985) (“While some of the provisions in the Constitution have relatively unambiguous, specific, and noncontroversial meanings, the language of a great many is so vague, ambiguous, and open-textured that they might be understood to mean almost anything.”).

<sup>216</sup> See *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>217</sup> On the ambiguities in *Tinker* and its progeny (which he calls the “*Tinker/Morse* mudle”), see Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions—for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1432–49 (2011). The *Tinker* Court emphasized the quintessentially political nature of the speech in that case. See *Tinker*, 393 U.S. at 505.

<sup>218</sup> For an excellent examination of the degree to which recent lower court opinions have strained *Tinker* by allowing for the equivalent of a “heckler’s veto” in the public school context, see generally Julien M. Armstrong, Note, *Discarding Dariano: The Heckler’s Veto and a New School Speech Doctrine*, 26 CORNELL J.L. & PUB. POL’Y 389 (2016).

<sup>219</sup> Professor Moss does an excellent job of explaining the tension in the case law between *Tinker*’s promise of a serious *Brandenburg*-style inquiry into whether student speech actually poses a significant risk to the educational environment and later cases slide backwards towards the kind of deferential language that has traditionally appeared in school cases. See Moss, *supra* note 217, at 1436–38; see also Jamie B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U. L. REV. 1193, 1195 (2009).

<sup>220</sup> See *Board of Educ. v. Earls*, 536 U.S. 822 (2002) (suspicionless drug testing); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (warrantless searches of student lockers).

<sup>221</sup> See generally Ramachandran, *supra* note 13.

constitutional doctrines. While the impropriety of the government conditioning vital public services on one's willingness to meet official dress and appearance norms obviously reflects self-expression concerns, it also resounds in broader autonomy concerns that are normally protected through substantive due process.<sup>222</sup> While a perfect constitutional system might view the fact that government action threatens multiple normative constitutional concerns as a point in a claimant's favor, our constitutional history is largely to the contrary. With a few notable exceptions,<sup>223</sup> plaintiffs have been forced to choose between existing doctrinal paths, shaping and simplifying their allegations to shoehorn them into existing frameworks.<sup>224</sup> When new issues arise that require such maneuvers, the path of constitutional law becomes even less predictable.

Even if there were agreement on the relevant doctrinal categories and their implementation, however, resolution of complicated new constitutional questions like the legitimacy of strict student dress codes and school uniform policies would remain indeterminate. This is because existing doctrine and jurisprudential norms in each of those legal categories require judgments about history, psychology, and human nature that are contestable and, for all practical purposes, unresolvable. For example, if substantive due process doctrine governed, the decisive question would be whether the current regime of strict dress codes and school uniforms reflected traditional state authority or was instead a newfangled modern intrusion on choices historically assumed to belong to students and their families.<sup>225</sup> Under those circumstances, it would be child's play to write learned opinions reaching opposite conclusions. On the one hand, a rights-recognizing opinion would emphasize that before the 1960s or even the 1990s, uniforms and written dress codes were almost totally absent from American public schools, and disciplinary actions related to dress were ad hoc and infrequent.<sup>226</sup> On the other hand, a

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<sup>222</sup> For a brief summary of this argument, see *infra* notes 257–260 and accompanying text.

<sup>223</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (weaving together equal protection and due process claims in striking down state laws limiting marriage to opposite-sex couples); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (weaving together equal protection and due process claims in striking down provisions of Defense of Marriage Act); *Emp't Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (holding that “hybrid” claims that combine free exercise claims with other constitutional rights claims receive heightened scrutiny under the Free Exercise Clause).

<sup>224</sup> The difficulty of encompassing all of the constitutional concerns raised by a novel set of facts into one particular doctrinal objection, where doctrine by definition has not yet adapted to accommodate the particular constitutional problem raised by that set of facts, is ubiquitous in constitutional law. For one of the author's exploration of its implications in a very different context, see Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 375–79.

<sup>225</sup> See generally *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997) (making such a question a central inquiry in due process analysis); cf. *Lawrence v. Texas*, 539 U.S. 558, 568–79 (2003) (affirming importance of such history and tradition-based inquiries while emphasizing that modern assessments of importance of restricted liberty also count in constitutional calculation).

<sup>226</sup> See generally *supra* Part I.A.

rights-rejecting opinion might emphasize the relative conformity of dress in public schools throughout American history, the largely unchallenged authority of schools to send students home or impose disciplinary sanctions for failing to meet unwritten dress norms, and the complete absence of legal challenges to such attempts before the 1960s.<sup>227</sup> Further research into the frequency of dress-related discipline in the pre-1960 United States might alter the strength of the case in one direction or another, but even that would not resolve the issue in any objective way, as the question of whether contemporary dress codes and uniforms are a new form of state intrusion or a characteristically modern manifestation of a preexisting species of regulation is ultimately one of characterization rather than objective fact.

As another example, assume *Tinker* and its progeny were interpreted fairly broadly, requiring the state to produce significant and particularized evidence of classroom disruption before limiting significant student expression. Under those circumstances, the outcome of litigation might well turn on whether choices of student attire and appearance constitute meaningful “expression.” Once again, one can imagine divergent judicial opinions on this question (indeed, one need not imagine them).<sup>228</sup> Dress code-affirming opinions would emphasize the multiplicity of reasons why students might make decisions about their appearance, the lack of specific and concrete messaging involved in most such decisions, and the indeterminacy and ancillary nature of any communication that might occur. Dress code-rejecting opinions would emphasize the developmental importance of taking control of one’s own appearance and the way one presents herself to the world, the many subtle yet specific messages that are conveyed by particular clothing and styling choices within particular communities, and the expansive information about individuals’ politics, values, and identities communicated to others by these choices. In this context, the dispute over whether student clothing and styling choices constitute meaningful expression lacks not only a determinate answer but also methodologies through which the judiciary might work towards the answer using traditional legal materials.

### B. *The Influence of Cultural and Ideological Factors*

The second lesson from this episode in constitutional culture should again be familiar: how we ultimately resolve constitutional indeterminacy owes much more to cultural factors and popular sentiment than to any strictly legal factor. Part II demonstrates with striking particularity the wide variety of cultural and political trends that contributed to the minimization of sentiment and arguments favoring constitutional protections against strict public school dress requirements and to the corollary entrenchment of gov-

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<sup>227</sup> See generally *id.*

<sup>228</sup> See the various opinions discussed *supra* Parts I.B & I.C.

ernmental authority to enact such restrictions.<sup>229</sup> Individuals who engage these questions of individual freedom and state authority in 2018 do so through a very different matrix of attitudes, instincts, and assumptions about the role of schools,<sup>230</sup> the relationship between parent and child,<sup>231</sup> the universe of sanctions appropriate to the enforcement of public order,<sup>232</sup> and other similar issues. In a different project, one might fruitfully work to disentangle the various strands of this shifting worldview, in order to evaluate their relative importance or to map their complicated interdependence. However, for this Article, the sheer volume and complexity of these forces only underscores both our descriptive assertion—that an overdetermined and overlapping set of cultural and political forces have led to a largely unexamined shift in our underlying constitutional assumptions about the legitimacy of strict public school dress restrictions—and our theoretical takeaway—that this is part of the fundamental way in which constitutional law is made in our contemporary constitutional culture.

While it is hard to imagine a constitutional universe in which major shifts in cultural attitudes about liberty, equality, justice, and order did not substantially influence popular (and ultimately judicial) views about essential constitutional questions, our particular constitutional culture tends to maximize the overlap between popular morality and popular constitutionalism.<sup>233</sup> As many scholars have emphasized, our national political culture has produced a Supreme Court that has adopted a particularly imperial role, reserving for itself the functional last word on many, perhaps most, contentious political issues of the day.<sup>234</sup> Over the last two decades alone, the Court has decided issues from the legitimacy of same-sex marriage<sup>235</sup> to the validity of particular policy tradeoffs in national health care legislation<sup>236</sup> and even the selection of the President.<sup>237</sup> Particularly in the realm of individual rights, those judicial decisions are made through a process in which the jus-

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<sup>229</sup> As noted above, some significant changes in the structure of constitutional doctrine have also played a role in shifting our assumptions about the constitutional issues implicated by student dress restrictions. See *supra* Part II.H. These changes arguably complicate the narrative of constitutional change here, but don't fundamentally alter it, as those doctrinal changes are (1) relatively minor in comparison with the cavalcade of cultural and political developments documented above and (2) themselves, in part, the product of similar cultural and political factors.

<sup>230</sup> See *supra* Part II.B.

<sup>231</sup> See *supra* Part II.C.

<sup>232</sup> See *supra* Part II.A.

<sup>233</sup> This point is a central theme in most of the works cited *supra* note 211, particularly Horwitz, *supra* note 211 (discussing cultural and doctrinal overlap in the Hobby Lobby religious liberty case) and Klarman, *supra* note 211 (discussing the cultural and doctrinal overlap in recent marriage equality cases).

<sup>234</sup> See, e.g., ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012); Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 32 (2005).

<sup>235</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

<sup>236</sup> See *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

<sup>237</sup> See *Bush v. Gore*, 531 U.S. 98 (2000).

tices seek to reflect on broad textual commitments to generic values such as equal protection and freedom of speech. In fighting about the contours of those individual rights, the justices inexorably ponder the contours of those generic values, frequently cleaving on their meaning into predictable camps that mirror existing social and political divides. Even when the justices try to anchor their arguments in traditional legal materials, those materials often require them to balance competing interests or assess whether an amorphous standard is met. Those juridical tasks depend for their result on ad hoc assessments of the importance of particular policies or the strength of particular liberty, dignity, and equality norms.<sup>238</sup>

Cultural factors outside the courts contribute to the overlap between popular cultural and political views and popular constitutional thinking. We live in a sharply partisan political universe in which different cultural communities hold to diametrically opposed visions of both our constitutional order and of the good faith of particular office holders.<sup>239</sup> The communities and coalitions that lose in the political arena often feel fundamentally aggrieved as a matter of principle and have every incentive to take their grievances to court.<sup>240</sup> In seeking legal redress, they often are aided by highly skilled lawyers with legal practices defined by a desire to move the polity and its principles in particular directions.<sup>241</sup> Their cases are then adjudicated by judges increasingly identified as affiliated with a particular political party and chosen through a contentious and partisan confirmation process.<sup>242</sup>

### C. *The Role of Narrative Entrepreneurs*

Furthermore, it is worth emphasizing that the cultural factors and popular sentiments that determine the direction of constitutional law do not emerge in a vacuum, but are instead sharply influenced by politicians, media entities, interest groups, and other narrative entrepreneurs.<sup>243</sup> The cultural change and attitudinal adjustments that facilitated a shift in the underlying assumptions about the constitutionality of student dress restrictions sit at the

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<sup>238</sup> On the ubiquity of balancing tests in constitutional law, see Aleinikoff, *supra* note 51. On the limits and possibilities of accessing constitutional norms directly in the context of equality claims, see Siegel, *supra* note 201.

<sup>239</sup> For a discussion of how these trends influenced one high profile constitutional case, see Andrew M. Siegel, *Constitutional Theory*, *supra* note 211, at 1100–06.

<sup>240</sup> *See id.*

<sup>241</sup> *See id.* at 1104

<sup>242</sup> *See id.* at 1102–04.

<sup>243</sup> The term “narrative entrepreneurs” is borrowed with appreciation from John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 Nw. U. L. REV. 303, 306 (2003). The concept is familiar, not only because its evocative framing taps into our existing understandings of how ideas develop but also because it draws explicitly on other classic works on language, ideas, and politics. *See, e.g.*, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (coining “norm entrepreneur”); *see also* PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 3–71 (Richard Nice trans., 1977); DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 8–11 (1987).

intersection of several areas where politicians and commentators have forcefully advanced controversial narratives over the last few decades. These areas include the debate over the lessons of the 1960s,<sup>244</sup> concerns about an alleged decline in law and order and respect for authority,<sup>245</sup> the birth of an entire industry dedicated to competitive criticisms of others' parenting,<sup>246</sup> the emergence of a dialogue about teenage sexuality that simultaneously sexualizes and shames teenage girls,<sup>247</sup> and the development of a modern carceral state dependent on the rhetoric and assumptions of Jim Crow.<sup>248</sup> Student dress codes and school uniforms also directly implicate many of the more specific stories about modern education, juvenile justice, and race and gender relations that particular educators, politicians, and reformers have relied upon to forward their policy agendas. Their narratives have become familiar tropes that dot and ultimately dominate modern discussion of the wisdom and constitutionality of student dress restrictions: "students killing each other over shoes,"<sup>249</sup> "judge students by the content of their character rather than the labels on their clothes,"<sup>250</sup> "school is a job and [students] need to be trained to behave professionally,"<sup>251</sup> "adolescent girls dress immodestly and adolescent boys are too easily distracted."<sup>252</sup>

The role of narrative entrepreneurs in shaping our constitutional law is made particularly explicit in this episode by the behavior of the Clinton administration, which found in this issue a perfect policy proposal for forwarding images of themselves, their Party, and the nation that facilitated their electoral agenda. The administration's support for school uniforms was an explicit part of a triangulation strategy that sought to win reelection and build an enduring Democratic majority by portraying itself as an exemplar of

<sup>244</sup> The debate over what went wrong (and, to a much lesser extent, what went right) in the 1960s has been a staple topic for politicians and commentators of all stripes for decades and is the subject of hundreds of books. For a smattering of the more academic ones, see *supra* note 26.

<sup>245</sup> On the early use of the "law and order" trope by figures such as Richard Nixon and Ronald Reagan to encapsulate the conservative message, see MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s* 10–11 (2005).

<sup>246</sup> See Ahrens, *supra* note 121, at 1715–21; see generally Bernstein & Trigar, *supra* note 144.

<sup>247</sup> See *supra* Part II.D.

<sup>248</sup> See generally ALEXANDER, *supra* note 116.

<sup>249</sup> The President's Radio Address, 32 WEEKLY COMP. PRES. DOC. 366 (Feb. 24, 1996).

<sup>250</sup> See, e.g., *id.* ("School uniforms are one step that may be able to help . . . young students to understand that what really counts is what kind of people they are, what's on the inside.").

<sup>251</sup> *Cf. id.* (uniforms remind students that "what they're doing at school is working"); Andrew Hay, *School's Strict Dress Code Nets 200 Detentions and a Rebellion*, N.Y. POST, Nov. 14, 2014, <https://nypost.com/2014/09/14/schools-new-strict-dress-code-leads-to-200-detentions/>, archived at <https://perma.cc/K95R-M9NQ> (discussing massive rebellion after strict dress code named "Dress for Success" was implemented at one New York High School).

<sup>252</sup> For one of many blunt and forceful responses to this trope that marvels at its ubiquity, see Laura Bates, *How School Dress Codes Shame Girls and Perpetuate Rape Culture*, TIME, May 25, 2015, <http://time.com/3892965/everydaysexism-school-dress-codes-rape-culture/>, archived at <https://perma.cc/PV9V-LKNN>.

a new kind of Democrat who recognizes the breakdown of law and order and community standards, is willing to criticize traditional Democratic constituencies like Black Americans and public school personnel, and prefers to deal with problems through tough love and common sense solutions rather than expensive social programs.<sup>253</sup> In service to those ends, the administration embraced and amplified many of the tropes mentioned above, wedding them to thick policy documents that transformed the very terms in which parents, district officials, and ultimately the courts discussed and evaluated public school uniform policies.<sup>254</sup>

#### D. *Of Timing, Path Dependency, and Missed Opportunities*

In reshaping the legal landscape regarding student dress codes and school uniforms, the Clinton administration and other post-1980 narrative entrepreneurs took advantage of another important characteristic of our constitutional culture: when it comes to the evolution of constitutional doctrine, timing is often everything.<sup>255</sup> While shifting cultural and political forces have a profound effect on the shape of constitutional law, most observers agree that law does not always or predictably move in lockstep with shifting norms and values.<sup>256</sup> To the contrary, legal doctrine is often “sticky,” refusing to budge for some time or in some places or to some degree even after popular sentiments and habits of thought have shifted.<sup>257</sup> While many different variables determine the extent to which particular doctrine and modes of constitutional analysis are resistant to cultural change, one of the most straightforward and crucial of those variables is how thoroughly and formally prior generations embedded their constitutional instincts and decisions into formal doctrine.

Part I.A chronicled the failure of the legal culture of the late 1960s and early 1970s to embed its constitutional conclusions about student dress re-

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<sup>253</sup> This story is recounted *supra* Part II.E.

<sup>254</sup> See MANUAL, *supra* note 48; Clinton, *supra* note 249; *supra* Part II.E.

<sup>255</sup> For a thorough treatment of the role of timing in directing and limiting legal change, see Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001). For the classic argument that constitutional law effectively operates as a system of common law decision-making, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 677 (1996).

<sup>256</sup> See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 18 (2d ed. 1985) (explaining that while the most important ingredient in law is change, “part of the law is . . . layer on layer of geological formations, the new pressing down on the old, displacing, changing, altering, but not necessarily wiping out what has gone before . . . [s]ome of the old is preserved among the mass of the new.”); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (cataloging and theorizing about ways in which critical legal scholars have problematized and complicated relationship between legal and social change); Hathaway, *supra* note 255 (discussing path dependence).

<sup>257</sup> For a recent article that theorizes in depth about the causes and consequences of constitutional “stickiness,” see Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899 (2016).

strictions into legal doctrine.<sup>258</sup> Emboldened by the very ideas that shaped those constitutional conclusions, many educators enthusiastically embraced student dress freedom,<sup>259</sup> while others voluntarily acceded to the new norms rather than engage in quixotic political and legal battles. For reasons in part predictable and in part nominal, no case made its way to the Supreme Court and very few were decided even by the federal courts of appeals.<sup>260</sup> To the extent that the courts struck down student dress restrictions during this era, their decisions tended to be fact-bound and focused on the particular legal norms and constitutional provisions most closely associated with those particular facts.<sup>261</sup> While the cases shared a coherent set of background assumptions about citizens, the state, autonomy, and expressive freedom, they were not litigated by one team of lawyers as part of a cohesive national litigation campaign, and no major scholar or commentator came along to draw the connections and smooth out the edges.<sup>262</sup>

To be fair, the failure of the legal actors who resisted and overcame student dress restrictions in the 1960s and 1970s to consolidate their successes into enduring doctrine owed a great deal to doctrinal developments beyond their control, in particular the Supreme Court's timid handling of the first round of significant modern substantive due process cases, beginning with *Griswold v. Connecticut*.<sup>263</sup> While contemporary substantive due process law is grounded in a constitutionalized respect for autonomy,<sup>264</sup> the Supreme Court took a circuitous route to get there. Worried about repeating the mistakes of the *Lochner* era,<sup>265</sup> the *Griswold* Court declined even to admit that it was invoking substantive due process and grounded its decision in a free-floating "right of privacy."<sup>266</sup> Moreover, in part to ground this new "right" in the rights enumerated by the Bill of Rights, the content of that right to "privacy" focused on spatial—rather than decisional—privacy.<sup>267</sup> While the Supreme Court began to turn its doctrinal ship in 1972 in *Eisen-*

<sup>258</sup> See *supra* Part I.A.

<sup>259</sup> See, e.g., Scriven & Harrison, Jr., *supra* note 42.

<sup>260</sup> Note that all the federal courts of appeals cases from that era involved the distinct problem of hair length restrictions.

<sup>261</sup> See *supra* notes 42–44 and accompanying text.

<sup>262</sup> The ad hoc advocacy in this area runs counter to the trend of coordinating public interest litigation campaigns that began with Thurgood Marshall and the NAACP's campaign against school segregation, see MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATION, 1925–50* (1987), and has only gained steam in recent decades on both sides of the political spectrum.

<sup>263</sup> See 381 U.S. 479 (1965).

<sup>264</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Planned Parenthood v. Casey*, 505 U.S. 833, 852–53 (1992).

<sup>265</sup> See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating after aggressively scrutinizing New York maximum hour and minimum wage legislation for bakers on grounds that it violated substantive rights implicit in Due Process Clause, in decision that came to be representative of the excesses of an era).

<sup>266</sup> *Griswold*, 381 U.S. at 481–86.

<sup>267</sup> *Id.* at 485 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?").

*stadt v. Baird*,<sup>268</sup> that decision was subtle and its ramifications for the emerging law of substantive due process were not fully appreciated until long after the first round of litigation over student dress and appearance restrictions had petered out. It was not until the 1990s that a majority of the Court fully embraced a substantive due process jurisprudence that graduates the state's burden based on the importance of the decision at issue for individual self-definition.<sup>269</sup>

#### IV. RECONSIDERING THE RECONSIDERATION: STUDENT DRESS FREEDOMS AND CONSTITUTIONAL LIBERTIES

Thus far, we have narrated, explained, and drawn lessons from a curious recent episode in the history of American schooling and civil liberties. In this Part, we return to the present and confront—on their merits—the underlying constitutional issues that make the subject of the prior sections poignant and important. After immersing ourselves in these issues for several years, we remain convinced that a persuasive brief can be written arguing that public school students have a broad substantive due process and/or freedom of expression right to make decisions about their own attire and appearance. Given the dominant contemporary assumption to the contrary, that conclusion is noteworthy and crafting the arguments for such a brief would be a worthy use of scholarly time.

Still, after much consideration, we will offer no such exercise in this Part. In the end, it would simply be inconsistent with the methods and conclusions of this Article to suggest that there is a single right answer to the question of whether the Constitution affords public schools the authority to condition the receipt of public education on a willingness to conform to official uniform or dress code policies, let alone that we might have privileged access to that answer.<sup>270</sup> Instead, this Part explains why the central normative concerns raised by students challenging such dress policies resonate with the values the Constitution's individual rights provisions are designed to protect,

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<sup>268</sup> See 405 U.S. 438 (1972) (locating fundamental right to access contraception in the individual rather than in the couple and in concepts of decisional privacy and autonomy rather than spatial privacy).

<sup>269</sup> See *Casey*, 505 U.S. at 851 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

<sup>270</sup> To be clear, we are not arguing that there is never a constitutional case with a “right answer” or that we cannot rationally assess some constitutional arguments as “better” or “worse.” Rather, we are suggesting that when a complicated new issue arises that raises plausible constitutional claims, (1) there are often a variety of constitutional resolutions that “fit” with our existing doctrine and traditions, and (2) the ultimate decision of which path to choose is not made by the judiciary in a vacuum but instead reflects myriad political, cultural, social, and intellectual developments that influence the courts’ ability to see—and comfort level with—different doctrinal narratives. See generally *supra* Part III.

and draws sustenance from principles the Supreme Court has articulated in a wide variety of individual rights cases. It is not so much that the Constitution requires us to protect student dress freedoms, but instead that it leaves us room to do so.<sup>271</sup>

### A. *Why School Uniforms and Strict Student Dress Codes are Normatively Problematic*

At various points, we have described, and occasionally endorsed, some of the core normative criticisms of school uniforms and strict public school dress restrictions.<sup>272</sup> This section summarizes the central arguments with an eye towards identifying how these arguments resonate with the text and doctrinal history of the Constitution's individual rights provisions.

The first—indeed, the core—objection to school uniforms and strict student dress codes is that such policies interfere with the basic human right to define oneself and to develop one's own identity at the moment in human development where the need to create and assert self-identity is most acute and developmentally important.<sup>273</sup> While, of course, no civil society can exist if every individual has an unfettered right to behave as she wishes in pursuit of a self-defined identity, modern liberal democracies strive to create space for individuals to make autonomous choices about their values, priorities, and affiliations.<sup>274</sup> Our textbooks measure our progress as a nation by charting our respect for this principle and our political vocabulary christens other nations as “totalitarian” for their failure to acknowledge its sway.<sup>275</sup>

<sup>271</sup> This Part intentionally seeks to use rational argument and values-driven reflection to modify the background assumptions that shape constitutional discourse about student dress restrictions. In so doing, it relies upon one of the most intriguing characteristics of constitutional culture: the fact that the beliefs and assumptions that shape our constitutional path “reflect deep commitments, guttural instincts, and inchoate understandings” but are also “responsive to rational argument and intentional modification.” Andrew M. Siegel, *Constitutional Theory*, *supra* note 211, at 1071.

<sup>272</sup> See, e.g., *supra* notes 73–94 and accompanying text (sharply critiquing leading appellate decision); *supra* Part I.D (endorsing feminist critique of gender implications of most strict dress codes).

<sup>273</sup> For one of the many core psychological texts that make this point explicitly, see ERIC H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

<sup>274</sup> See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“The 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.”); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 73 (1973) (Douglas, J., dissenting) (“But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas.”); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.”) (internal quotation marks omitted) (citations omitted).

<sup>275</sup> On the absence of autonomy and the lack of trust in the people to manage their own affairs as the trigger of “totalitarianism,” see, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS*

Attire and appearance are arenas in which young people have historically had significant space to work through complicated questions about who they are, what they value, and what messages about themselves and the world they want to present, and to do so on a canvas free of significant long-term consequences. School uniforms and strict student dress codes short circuit this development, with both immediate and long-term consequences to students' autonomy and to society's democratic health.

An expression-based critique is often subsumed within this autonomy-based objection but deserves independent explication. The right to make autonomous decisions has value in and of itself, but, in many areas, including notably dress and appearance, individuals seek autonomy not to escape public notice but instead to articulate a message, to identify themselves to others, and to facilitate the formation of both individual relationships and affinity groups. Clothing and appearance are central, not superficial or trivial, aspects of autonomy because of their critical role in facilitating the communication of complicated and sometimes inchoate ideas, emotions, and affinities.<sup>276</sup> How we dress and style our appearance often signals political affiliation, religious belief, sexual orientation, or some other core aspect of identity, either expressly or through relatively straightforward iconography. Even when it doesn't, however, it still encodes a complex set of ideas and attitudes about standards of beauty, commercial culture, gender performativity, and myriad other issues of paramount public and personal concern. The very density of our ideas on these subjects precludes us from reducing them to a slogan on a t-shirt; instead, we deploy the rich semiotics of appearance and clothing to present a personalized manifesto to the world.<sup>277</sup> These expressive interests peak during the secondary school years where, through an iterative process, young people are discovering both the content of the ideas they hope to convey to the world and the semiotic vocabulary necessary to make themselves heard.<sup>278</sup>

Student dress restrictions also face normative criticism for their limited utility and self-defeating aspects. This criticism serves both as an independent argument against such restrictions and as an explanation for why the state has not even come close to meeting the burden it faces when limiting

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CRITICS 262 (1989); CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chi. Press 2007) (1932); DAVID SPITZ, *PATTERNS OF ANTI-DEMOCRATIC THOUGHT* 127 (1965); MICHAEL WALZER, *SPHERES OF JUSTICE* 285 (1983); see also Raskin, *supra* note 219 (emphasizing anti-totalitarianism language at heart of *Tinker*).

<sup>276</sup> See, e.g., Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 465, 491 (2009) (stating that messages sent by transgender students through gender expression may be very complex); Ramachandran, *supra* note 13, at 13.

<sup>277</sup> For some of the classic sources on the dense semiotics of fashion and appearance, see generally ROLAND BARTHES, *THE FASHION SYSTEM* (Matthew Ward & Richard Howard trans., Univ. of Cal. Press 1990) (1967); UMBERTO ECO, *Lumbar Thought, in TRAVELS IN HYPERREALITY* 191 (William Weaver trans., Harcourt Brace Jovanovich 1986) (1967); CHARLOTTE PERKINS GILMAN, *THE DRESS OF WOMEN* (Michael R. Hill & Mary Jo Deegan eds., 2002).

<sup>278</sup> See ERIKSON, *supra* note 273.

important autonomy and expression interests.<sup>279</sup> Nearly a quarter-century into our modern experiment with student dress restrictions, there is very little empirical evidence that such rules improve student performance, increase school safety, or create more inclusive communities.<sup>280</sup> One of the prime justifications offered for these restrictions is that they remove distractions and allow teachers and students to focus on academics. But the evidence instead suggests that interpretation and enforcement of dress restrictions have themselves become a major distraction, siphoning teacher and administrative resources from core educational issues and creating an unnecessarily adversarial relationship between students and educators.<sup>281</sup> Teachers and administrators are forced to devote time and attention to tasks like measuring hem lengths and evaluating cleavage exposure, leaving them less time to teach or to monitor genuinely problematic behavior. In fact, teachers and administrators may be tempted to focus on dress code violations at the expense of less visible issues because dress code rules are fairly straightforward compared to many other areas in which students may require cultivation or intervention. From an administrator's perspective, a uniform requirement may be both easier to implement and simpler to point to as a tangible accomplishment than improving graduation rates or college placements. Furthermore, students disciplined for noncompliance with restrictive dress policies may sacrifice educational instruction time to change clothes or to serve a suspension.<sup>282</sup> Students who know that adults are scrutinizing their

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<sup>279</sup> This argument is made in detail and with empirical precision in BRUNSMAN, *supra* note 1, at 107–97. It has also been made repeatedly by students subjected to such restrictions. See, e.g., M. Alex Johnson, *Students, Parents Bare Claws Over Dress Codes*, MSNBC, Oct. 18, 2008, [http://www.nbcnews.com/id/26875980/ns/us\\_news-education/t/students-parents-bare-claws-over-dress-codes/](http://www.nbcnews.com/id/26875980/ns/us_news-education/t/students-parents-bare-claws-over-dress-codes/), archived at <https://perma.cc/KS93-PURM> (quoting a sophomore high school student who stated that dress codes don't "fix the disease" of gang violence but instead "[j]ust cover[] the symptoms"); Joel Stonington, Letter to the Editor, *School Dress Codes—Young People Need the Chance to Reflect Identity in Clothes*, SEATTLE TIMES, Sep. 3, 1994, <http://community.seattletimes.nwsource.com/archive/?date=19940903&slug=1928587>, archived at <https://perma.cc/VHK6-ZA89> (incoming high school student emphasizes the cost to identity versus the limited utility of dress restrictions); Li Zho, *The Sexism of School Dress Codes*, THE ATLANTIC, Oct. 20, 2015, available at <https://www.theatlantic.com/education/archive/2015/10/school-dress-codes-are-problematic/410962/>, archived at <https://perma.cc/Z2WG-CJ5M> (weighing sexist dress codes for girls against their marginal benefits).

<sup>280</sup> For a summary of the evidence, see BRUNSMAN, *supra* note 1, at 107–97.

<sup>281</sup> As discussed *supra* Part II, the enforcement of student dress restrictions has merged with a broader trend in which American public schools have increasingly reconceptualized themselves as sites for the policing of young people. Schools deploy surveillance and disciplining techniques developed in the criminal justice arena to maintain order and to de-emphasize other educational objectives, such as nurturing emotional and social development or encouraging independent academic initiative and critical thought.

<sup>282</sup> In one nationally reported incident, a principal disciplined a seventh-grade student for sporting an untucked shirttail in violation of her school's dress code provision, sending her to in-school suspension to hand-copy the school's multi-page dress code. When confronted about her decision, the principal commented, "[s]he's a good kid, but my job is to make sure students follow our school's Code of Conduct, which includes the dress code." Danielle O'Neal, *North Carolina Middle School Student Suspended for Untucked Shirt*, HUFFINGTON POST, Oct. 19, 2012, [http://www.huffingtonpost.com/2012/10/19/danielle-oneal-north-caro\\_n\\_1987890.html](http://www.huffingtonpost.com/2012/10/19/danielle-oneal-north-caro_n_1987890.html), archived at <https://perma.cc/THP5-JBVW>.

clothing choices to see if those choices are provocative or revealing are made uncomfortable by the administrative gaze.<sup>283</sup>

School uniforms and strict dress codes are also normatively problematic from an equality perspective, as they condition receipt of governmental benefits on adherence to a state-imposed orthodoxy of taste and aesthetic values, without respecting the degree to which norms of dress and styling reflect religious affiliation, cultural and ethnic background, and class norms. Almost by definition, a dress code or uniform will include items that some people find objectionable and exclude things that some people will find reasonable. Public school dress policies, particularly uniforms, impose a majoritarian mandate on a pluralistic society. In doing so, the state fails to recognize or accommodate the disparate cultural consequences of imposing a particular subculture's vision of proper attire on students and families with different backgrounds and values. While Americans go to work in a wide variety of outfits,<sup>284</sup> the school uniform movement attempts to attire children for a trip to the yacht club.<sup>285</sup>

More concretely, such uniform policies exclude and punish on axes of race, religion, and, often explicitly, gender. In terms of both written policies and enforcement, the brunt of student dress codes often fall most heavily on racial minorities. For example, many dress codes prohibit head gear or low-hanging pants, clothing choices administrators more commonly associate with Black students.<sup>286</sup> Black students are more likely than white students to be called out by officials for violating such provisions, are more likely to

<sup>283</sup> See, e.g., S. Parker, *The "Inappropriate Outfit" That Got My Daughter in Trouble at School*, HUFFINGTON POST, May 23, 2012 (updated Oct. 20, 2013), [http://www.huffingtonpost.com/sparker/daughter-inappropriate-outfit-school\\_b\\_1539939.html](http://www.huffingtonpost.com/sparker/daughter-inappropriate-outfit-school_b_1539939.html), archived at <https://perma.cc/T6UC-3KSH> ("Imagine sitting in a class where you knew the teacher was literally looking through your clothing to see you as a provocateur? . . . It turns out that the principal himself had personally identified her as inappropriately dressed. He had walked up to her during lunchtime and identified her crime where nobody else could. I can't help but think that the principal's action creates an unhealthy atmosphere in his school.").

<sup>284</sup> To the extent that the orthodoxy of taste is intended to mirror workplace clothing expectations, that reasoning is problematic. Schools are not workplaces for children, and analogies between the two generally end up being circular. Those comparisons also do not recognize that "workplaces" vary widely. Some people wear uniforms to work, although uniforms rarely include navy blazers or plaid skirts. Some workplaces are business casual, which itself is a capacious category. Some brick-and-mortar workplaces are comfortable with jeans, and some "workplaces" involve a chair at a computer in the employee's home office. If yoga pants are unacceptable work attire, that information will come as a surprise to a nation of suburban stay-at-home mothers ferrying children to school and picking up groceries in bulk at Costco while wearing them. Arguing that students need to dress as if they are going to work is problematic with a workplace (and a culture in general) that is increasingly informally dressed.

<sup>285</sup> School uniforms, of course, vary from school to school, but more often than not require solid-colored or striped polo shirts and pants or skirts in neutral colors. For a visual gallery of some of the more common uniform styles, see *French Toast: School Uniforms for Girls and Boys*, FRENCHTOAST.COM, <https://www.frenchtoast.com> (last visited Sep. 16, 2018), archived at <https://perma.cc/RFX4-3XXR>.

<sup>286</sup> It should be emphasized that the Article is not arguing that Black students are more likely to engage in inappropriate clothing choices but rather that our judgments about what clothing choices are inappropriate are shaped by racial bias and stereotypes.

have their innocent choices of clothing color treated as indicia of gang affiliation, and consistently report being cited for exposing amounts of skin for which their white counterparts are not punished.<sup>287</sup> Such restrictions also impose substantial burdens on students whose religion requires or prohibits wearing particular clothing; they are, at minimum, required to consistently invoke exceptions to broad policies and are often denied such accommodation unless or until they seek judicial intervention.<sup>288</sup>

In recent years, a new generation of feminist activists has articulated a profound gender-based critique of student dress codes, drawing public attention both to the fact that most of the restrictions in public school dress codes apply exclusively or disproportionately to female attire and to the retrograde gender assumptions used to justify this detailed policing of the female body.<sup>289</sup> While it is impossible to do justice to their arguments in a few sentences, a short list of their concerns underscores both the normative power of their critique and its connection to our constitutional tradition: Young women are subject to more specific limitations on their expression than young men. They are required to spend more time and emotional energy on ensuring compliance with state appearance standards than young men. They are asked to curtail their self-expression not for their own benefit but for the benefit of young men who are allegedly distracted by sharing public space with women. Their permission to enter public space is conditioned on acquiescence to a state-sanctioned gaze that draws attention to their bodies and conceptualizes them as potential sex objects rather than equal members of a learning community. These norms and assumptions are enforced through the literal gaze of adult school officials (mostly male) who

<sup>287</sup> See, e.g., DANIEL J. LOSEN, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 7 (Kevin Welner ed., Nat'l Educ. Pol'y Ctr., 2001) (finding that Black students in North Carolina school districts were suspended on dress code violations almost six times the rate of white students); see also Rebecca Klein, *Ohio School Apologizes After Attempting to Ban "Afro-Puffs" and "Twisted Braids,"* HUFFINGTON POST, June 25, 2013, [http://www.huffingtonpost.com/2013/06/25/ohio-school-afro-puff-horizon-science-academy\\_n\\_3498954.html](http://www.huffingtonpost.com/2013/06/25/ohio-school-afro-puff-horizon-science-academy_n_3498954.html), archived at <https://perma.cc/99LL-TPJ9>; Rebecca Klein, *Tiana Parker, 7, Switches Schools After Being Forbidden From Wearing Dreadlocks,* HUFFINGTON POST, Sep. 5, 2013, [http://www.huffingtonpost.com/2013/09/05/tiana-parker-dreads\\_n\\_3873868.html](http://www.huffingtonpost.com/2013/09/05/tiana-parker-dreads_n_3873868.html), archived at <https://perma.cc/B8MU-2K28>.

<sup>288</sup> See, e.g., *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 671 (S.D. Tex.1997) (granting relief to student denied permission to wear rosaries to school based on strict interpretation of school dress code).

<sup>289</sup> See, e.g., Harbach, *supra* note 13; Shannon McMahon, *How Dress Codes Makes Things Worse for High School Girls*, BOSTON.COM, May 14, 2015, <https://www.boston.com/news/national-news/2015/05/14/how-dress-codes-make-things-worse-for-high-school-girls>, archived at <https://perma.cc/B8MU-2K28>. Female students and their parents have increasingly resisted the implementation of sexist dress codes. See Donna St. George, *Are Leggings Too Distracting? A Mom Takes on a "Sexist" School Dress Code*, WASH. POST, Nov. 5, 2016, [https://www.washingtonpost.com/local/education/are-leggings-too-distracting-a-mom-takes-on-sexist-school-dress-code/2016/11/05/2c677b00-960e-11e6-bc79-af1cd3d2984b\\_story.html?utm\\_term=.c7d717b0f61f](https://www.washingtonpost.com/local/education/are-leggings-too-distracting-a-mom-takes-on-sexist-school-dress-code/2016/11/05/2c677b00-960e-11e6-bc79-af1cd3d2984b_story.html?utm_term=.c7d717b0f61f), archived at <https://perma.cc/W7AP-U7U7>; Cecilia D'Anastasio & Student Nation, *Girls Speak Out Against Sexist School Dress Codes*, THE NATION, Aug. 27, 2014, <https://www.thenation.com/article/girls-speak-out-against-sexist-school-dress-codes/>, archived at <https://perma.cc/9WU4-AX5Q>.

are required to view young women sexually in order to assess their compliance with dress restrictions. And this entire narrative reinforces scripts and assumptions about gender and sexuality that misplace responsibility for sexual violence on its victims.<sup>290</sup>

One final strand of normative critique of strict student dress codes focuses on the potential for arbitrary enforcement of such codes by state actors.<sup>291</sup> When busy state actors, such as teachers or administrators, are required to apply vague, complicated, or ill-defined standards to large numbers of students moving quickly through the hallways of public buildings, they are set up to fail at the basic democratic objective of fairly and consistently applying governmental authority. Teachers will interpret ambiguous terms differently or make different judgments as to what battles are worth fighting. Administrators will focus their limited enforcement resources on students who are already on their radar. Students who, because of their age, development, or race are perceived as more sexualized will draw discipline for rule-violating attire that will be ignored when worn by other students. And all of this taken together will create among students both a perception and a reality that they are at constant risk of arbitrary and unpredictable confrontation with state actors carrying punitive powers.

### *B. Why These Normative Concerns Resonate with Existing Constitutional Doctrine*

The normative concerns expressed by critics of strict student dress restrictions do not simply reflect the values and policy preferences of those critics; instead, they draw explicitly on the values and policy choices embedded in our constitutional rights tradition. While it would be a stretch to argue that existing case law requires courts to strike down public school uniforms and strict student dress codes, this section argues that such a holding would be broadly consistent with prevailing law and would fit better with our fundamental constitutional values than the alternative approach we appear to be drifting towards. To provide public school students with significant constitutional protection for their dress and appearance choices requires little more than taking seriously ideas the courts have already articulated when explicating the structure and content of our constitutional rights.

#### *1. Substantive Due Process and Decisions that Define Autonomy*

Under modern doctrine, substantive due process distinguishes between the decisions that belong to the state as a matter of normal social ordering and those that are reserved to the individual absent overriding state justifica-

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<sup>290</sup> See generally *supra* Part II.D and sources cited *supra* note 279.

<sup>291</sup> This concern is largely, though not entirely, absent from school uniform policies, whose more specific terms leave less room for ambiguity and arbitrary enforcement.

tion.<sup>292</sup> History and tradition provide crucial guidance in differentiating between these two categories,<sup>293</sup> but, at its heart, the key inquiry involves the nature of the decision at issue.<sup>294</sup> As the decisions become more personal, more important, and more central to the development of individual identity, the likelihood that the decision belongs to the individual increases; as Justices Kennedy, O'Connor, and Souter famously argued, autonomy demands that some decisions are made free from "the compulsion of the State."<sup>295</sup> While it is true that these words—and the principles behind them—have largely been deployed in the context of delineating a small subset of "fundamental rights," they also portend a broader approach to calibrating the relationship between citizen and state. As many scholars have argued, the very logic of modern substantive due process suggests that all restrictions that impose on essential aspects of autonomy are subject to genuine constitutional scrutiny requiring the state to justify incursions with meaningful evidence of proportionate harm.<sup>296</sup>

Governmental rules that condition access to public education on adherence to strict dress and appearance codes are an ideal arena in which to prick out a deeper understanding of the constitutional significance of these autonomy principles. Schooling is an area in which the state has a profound cultural—and legal—obligation to provide services to its citizens on equal terms.<sup>297</sup> Perhaps for that reason, it is an area in which the state has not traditionally imposed broad dress or appearance restrictions, instead relying on private ordering or subtle pressure to maintain norms.<sup>298</sup> The subject of such restrictions is deeply personal, involving the presentation of the corporeal form. It is also deeply important to the individual and crucial to the process of self-definition and identity-formation. On the other side of the ledger, the state can present little if any justification for a code of regulation in this area beyond generalized appeals to abstractions like "order." Indeed,

<sup>292</sup> See generally *Planned Parenthood v. Casey*, 505 U.S. 833, 849–50 (1992) (discussing that the decision whether to continue a pregnancy to term is reserved to individual absent overriding state interest) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (discussing the decision of consenting adults to engage in sexual intimacy is reserved to the individual).

<sup>293</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721–22, (1997); *Lawrence*, 539 U.S. at 578; *United States v. Windsor*, 570 U.S. 744, 762–65 (2013).

<sup>294</sup> See, e.g., *Lawrence*, 539 U.S. at 578; *Windsor*, 570 U.S. at 794.

<sup>295</sup> *Casey*, 505 U.S. at 851; see also *id.* at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). But see *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (stating that this language, which he derides as the "famed sweet-mystery-of-life passage," "ate the rule of law").

<sup>296</sup> See, e.g., Roosevelt, *supra* note 206 (arguing for such an approach).

<sup>297</sup> See *NASAW*, *supra* note 16; JAMES RAPP, *EDUCATION LAW*, Ch. 1, § 1.01, Lexis (Matthew Bender & Co. 2018). Some states make an express commitment to public education as being a "paramount duty" of the state, see, e.g., FLA. CONST. art. IX, § 1; WASH. CONST. art. IX, § 1, or being "essential." See, e.g., CAL. CONST. art. IX, § 1; see also *Plyler v. Doe*, 457 U.S. 202, 229–30 (1982) (suggesting that groups of students cannot be categorically excluded from provision of public education for superficial or punitive reasons).

<sup>298</sup> See *supra* Part I.A.

given the historic function of public schools as a venue for the development of autonomous citizens and moral agents,<sup>299</sup> the new restrictions appear both ironic and counterproductive.

## 2. *Communicative Conduct and Identity*

First Amendment law recognizes that the freedom of expression encompasses a wide variety of conduct intended to communicate political and social ideas, even when the underlying conduct—such as the destruction of a draft card or spending money—is not inherently expressive.<sup>300</sup> Here, the conduct in question—styling one’s appearance and determining how to present oneself for public consumption in a public school setting is inherently richly communicative.<sup>301</sup> The case for accordng this particular form of expression serious constitutional protection is enriched by the Court’s own discussion of the central purposes of the First Amendment: student decisions regarding their dress and appearance frequently encapsulate commentary on particular social, cultural, and even political issues;<sup>302</sup> play essential roles in cementing associations;<sup>303</sup> and inherently involve the development of an autonomous voice and individualized identity.<sup>304</sup> Taking dress and appearance seriously as an axis of communication underscores the fundamental tension between strict public school dress restrictions and core free speech principles. Mere majoritarian preferences are a problematic justification for limiting students’ ability to convey their own message and an even more deeply problematic justification for compelling students to wear clothing or styles that convey state-sanctioned messages.<sup>305</sup>

<sup>299</sup> See *Keyishian v. Bd. of Regents Univ. of New York*, 385 U.S. 589, 603 (1967) (stating that American schools are integral to the functioning of democracy); CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people . . .”).

<sup>300</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 419–20 (1989) (flag burning); *Buckley v. Valeo*, 424 U.S. 1, 75–76 (1976) (campaign spending); *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (draft cards).

<sup>301</sup> See *supra* Part IV.A.

<sup>302</sup> See *Tinker*, 393 U.S. 503, 512–13; see also *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964) (stating that criticizing the government is “the central meaning of the First Amendment”); *Whitney v. California*, 274 U.S. 357, 373–79 (1927) (Brandeis, J., concurring) (stating that the purpose of the First Amendment was to allow for political, social, and cultural discussion despite possibly disturbing the status quo).

<sup>303</sup> See *NAACP v. Alabama*, 377 U.S. 288, 315 (1964).

<sup>304</sup> See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1203 (4th ed. 2011) (stating that protecting speech emphasizes the “instrumental values of expression” and is “intrinsically important”); see also *Proconier v. Martinez*, 416 U.S. 396, 422–29 (1974) (Marshall, J., concurring); Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

<sup>305</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); cf. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 70 (2006). Taking the communicative content of student dress and styling choices seriously, as this Article advocates, would not only enable challenges to the policies on grounds that they unconstitutionally limit students’ chosen speech, but also challenges arguing that they compel student speech in violation of the First Amendment. Given the Supreme

As other scholars have observed,<sup>306</sup> the courts have not fully worked out the implications of existing freedom of expression law for dress and styling restrictions.<sup>307</sup> As discussed above, lower courts have largely elided these claims (except in the context of student desires to wear or refrain from wearing particular words or slogans<sup>308</sup>) by dismissing the notion that students' clothing choices are communicative or by classifying the communication at issue as insufficiently "particularized" or unlikely to be understood by others.<sup>309</sup> However, this preemptive, ad hoc dismissal of the communicative content of student dress choices is neither required by existing Supreme Court precedent nor consistent with the realities of teen life and communication. Again, the conclusion is not that one could not write a reasoned, well-cited legal opinion rejecting a free expression challenge to student dress restrictions, but instead that proper explication of underlying constitutional values and doctrine and of the real world consequences of such restrictions highlights the shallowness of the attempts thus far to do so.

### 3. *Dress Codes and Gender Hierarchy*

The vast majority of school dress codes regulate the appearance of female students much more than male students.<sup>310</sup> There are more rules specifi-

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Court's recent fascination with such claims when they benefit conservative political aims, there might be political, rhetorical, and legal value in emphasizing compelled speech arguments in future challenges. *See generally* Janus v. Am. Fed. Of State, Cty., & Mun. Emp., 138 S. Ct. 2448, 2486 (2018) (overturning precedent and declaring that it violates compelled speech principles to allow public unions to charge mandatory fees to non-members who they represent); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376 (2018) (holding that California laws requiring disclosures to pregnant women by anti-abortion counseling and health care providers unconstitutionally compel speech); Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (treating as serious constitutional issue argument that applying anti-discrimination laws to bakers who provide custom wedding cakes unconstitutionally compels speech, though deciding case on other grounds).

<sup>306</sup> *See, e.g.*, Ramachandran, *supra* note 13.

<sup>307</sup> One of the persistent sources of confusion in this area of First Amendment law is the conflation of two separate arguments that might be made to accord significant protection under the Free Speech Clause. On the one hand, courts might recognize that dress and self-styling convey particularized messaging that—while dense, nuanced, and imperfect—is sufficiently communicative to count as the explicit articulation of ideas and values. Alternatively, courts might conclude that dress and styling are not directly representational but, because of their deep connection to other First Amendment values, ought to receive the same strong protection courts have accorded non-representational art, nonsense poetry, and other similar categories of speech. These latter categories of speech receive rich treatment in an important new book, MARK TUSHNET, ALAN K. CHEN, & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017).

<sup>308</sup> *Compare* Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419, 433 (9th Cir. 2008) (concluding that a content-neutral blanket ban on clothes with words was constitutional), *with* Frudden v. Pilling, 742 F.3d 1199, 1208 (9th Cir. 2014) (striking down school uniform requirement when students objected to specific message written on uniform).

<sup>309</sup> *See* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 283 (5th Cir. 2001); Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 (8th Cir. 1997); *see also* Spence v. Washington, 418 U.S. 405 (1974).

<sup>310</sup> *See supra* Part II.D and *supra* notes 287–289 and accompanying text.

cally directed towards young women; more rules that as a practical matter apply only or mostly to women; and more effort exerted enforcing allegedly gender neutral rules against women.<sup>311</sup> These lopsided codes not only impose more restraints on the ability of female students to express themselves and to pursue their autonomous choices but also focus a disproportionate amount of female students' attention on policing their own appearance and sexuality. This imposition of differential restraints and burdens on the basis of gender is in deep tension with the commitment to gender equality the courts have strongly, if imperfectly, pursued in their modern equal protection rulings.<sup>312</sup> Indeed, many school dress codes are so poorly drafted and facially discriminatory that they would fail to pass muster under a straightforward application of existing precedent.<sup>313</sup>

As young feminist activists have convincingly argued, even school dress codes that are superficially neutral run afoul of the Constitution's commitment to gender equality. They are grounded in patriarchal assumptions about the dangers of the female body; the primacy of male claims to public space and services; the responsibility of women to alter their self-presentation in ways that serve male interests in order to access those spaces and services; and the state's unwillingness to take responsibility for protecting women from physical and sexual assault.<sup>314</sup> When so unmasked, modern dress codes defy—indeed mock—the state's responsibility to provide “equal protection of the laws.”<sup>315</sup> As the Supreme Court demonstrated at many crucial moments in modern history, the Equal Protection Clause is aggressively pragmatic, with little patience for regulatory regimes that impose broad, differential burdens on the civic participation of women, racial minorities, or other marginalized groups or for the ad hoc justifications states use to rationalize such regimes.<sup>316</sup>

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<sup>311</sup> See St. George, *supra* note 288; D'Anastasio, *supra* note 289.

<sup>312</sup> See *Nguyen v. INS*, 533 U.S. 53, 60 (2001) (restating that the standard is that the gender classification (1) serve “important government objectives” and (2) must be “substantially related to those important objectives” while applying standard somewhat laxly); *United States v. Virginia*, 518 U.S. 515, 524 (1996) (holding that government actions that facially classify on gender violate the Equal Protection Clause unless the government can provide an “exceedingly persuasive justification” for gender-specific action); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that classifications based on gender must serve “important government objectives” and the government action must be “substantially related to the achievement of those objectives”).

<sup>313</sup> See *Virginia*, 518 U.S. at 524 (holding that rules that facially impose different rules on men and women are constitutionally suspect and must be supported by an “exceedingly persuasive justification”).

<sup>314</sup> See *supra* notes 287–289.

<sup>315</sup> Cf. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (striking down on first principles law that made it impossible for gays and lesbians to seek protection from discrimination on the local level because “it is not within our constitutional tradition to enact laws of this sort”).

<sup>316</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (concluding that Virginia's miscegenation law was “obviously an endorsement of the doctrine of White Supremacy”); *Virginia*, 518 U.S. at 557 (“Virginia . . . has closed [VMI] to its daughters, and, instead, has devised for them a ‘parallel program’ with faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specializa-

#### 4. *Excessive Enforcement Discretion*

As discussed above, enforcement of dress codes in large public schools presents immense and perhaps insurmountable difficulties.<sup>317</sup> A small number of teachers and administrators with many other responsibilities are tasked with applying rules that are usually complicated, often vague or ambiguous, and at times require a measurement or a maneuver (for example, “raise your arms”) upon a sea of constantly moving students with strong incentives to avoid detection. Unpredictable and inequitable enforcement is the inevitable result, with discipline often seeming arbitrary or vindictive. These dynamics create conditions in tension with independent constitutional norms that transcend more particularized concerns about the ability of schools to impose strict dress restrictions. In a wide variety of contexts, ranging from parade permitting<sup>318</sup> to vehicular roadblocks,<sup>319</sup> our constitutional law precludes the use of rules or procedures that vest excessive discretionary authority in enforcement officials or otherwise insufficiently protect against arbitrary enforcement; this is true even in contexts where the state is entitled to impose limits on expression or autonomy.<sup>320</sup> Taking students seriously as constitutional rights holders<sup>321</sup> requires us not only to evaluate whether the substance of student dress restrictions violates their rights but also whether the implementation and enforcement of such a regime does so.

#### CONCLUSION

The episode chronicled in this Article reinforces some important lessons about how we make and understand constitutional law in the early twenty-first century United States. First, and most importantly, constitutional law is a slippery beast, difficult to capture, master, or anticipate even on stable terrain. When old structures erode or new winds blow, those tasks shade from challenge to folly. What looks like an emerging or even a stable constitutional understanding at one moment might be passé within a genera-

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tion.”); *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013) (“The Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”); *Romer*, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”).

<sup>317</sup> See *supra* notes 262–266, 270 and accompanying text.

<sup>318</sup> See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

<sup>319</sup> See *Del. v. Prouse*, 440 U.S. 648 (1979).

<sup>320</sup> See, e.g., *Shuttlesworth*, 394 U.S. at 147 (discussing time, place, and manner restriction for use of public highways and sidewalks); *Prouse*, 440 U.S. at 648 (discussing safety-related regulatory stops of vehicles).

<sup>321</sup> Cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

tion. It behooves us, therefore, to approach the tasks of constitutional prognostication and advocacy with humility and caution.

On the other hand, the very fact that constitutional law is highly contestable creates opportunities and responsibilities. If, as this Article posits, the raw materials of our constitutional tradition permit a variety of different outcomes in most new and complicated arenas of constitutional dispute, and if the outcomes we select are in the end the product of political and cultural contestation, it becomes incumbent on people who care deeply about those outcomes to engage in forceful organizing and advocacy for a constitutional world that best reflects their values and their vision.

Our constitutional vision treats public schooling as a public responsibility that cannot be conditioned on arbitrary restrictions of student liberties. We take seriously the idea that students are autonomous individuals who maintain both an inherent human right to control their appearance absent a compelling justification for limiting their autonomy, and a natural and important interest in using their dress and appearance to communicate crucial information about their affinities, beliefs, and identities. We also remain profoundly skeptical about the ability of a state organized, at least in part, around complicated race, class, and gender assumptions, to articulate and enforce evenhanded appearance and dress restrictions.

Our values and concerns once dominated the conversation about the constitutional status of student dress restrictions. It is our hope that they will one day do so again. In the meantime, it behooves us to understand how we got where we are.