

2009

## I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws

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### Recommended Citation

William C. Vandivort, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 Brook. L. Rev. (2009).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol75/iss2/10>

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# I See London, I See France

## THE CONSTITUTIONAL CHALLENGE TO “SAGGY” PANTS LAWS

In recent years, a number of communities across the United States have passed laws against what can only be described as a new low: saggy pants. “Saggy” or “baggy” pants, the wearing of which is commonly called “sagging,”<sup>1</sup> is a style of dress characterized by the wearing of pants well below the waist, thus exposing underwear and/or flesh to public view.<sup>2</sup> While the style has been around since at least the early 1990s,<sup>3</sup> previous efforts to prohibit saggy pants have focused on banning them in the public schools context because of their association with urban street gangs.<sup>4</sup> Now, however, outraged communities have extended the battle to the public streets by enacting indecent exposure laws intended to criminalize the wearing of saggy pants.<sup>5</sup>

However, these ordinances have not been without controversy.<sup>6</sup> Free speech and civil rights advocates have heavily criticized these laws as an infringement upon freedom of expression, and potentially motivated by racial bias.<sup>7</sup> At least

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<sup>1</sup> *Saggy-Pants Laws No Longer Butt of Jokes: Va. Delegate’s Proposal in 2004 Drew Ridicule, but He Might Have Last Laugh*, RICHMOND TIMES-DISPATCH, Sept. 12, 2008, at A4 [hereinafter *Saggy-Pants Laws No Longer Butt of Jokes*].

<sup>2</sup> See, e.g., Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES, Aug. 30, 2007, at G1; Laura Parker, *Cities Snapping Over Baggy Pants*, USA TODAY, Oct. 15, 2007, at A3.

<sup>3</sup> Elizabeth Wellington, *A Fashion Firestorm over Pants That Sag; New Jersey Proposals Target Hip-Hop Style*, PHILADELPHIA INQUIRER, Oct. 4, 2007, at A1.

<sup>4</sup> See, e.g., *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 664 (S.D.Tex. 1997) (challenged school dress code prohibited “gang-related apparel” such as “[o]versized apparel, including baggy pants which are worn low on the waist”); *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 558 (D.N.M. 1995) (challenged dress code prohibited the wearing of sagging pants); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1463 (C.D. Cal. 1993) (challenged school dress code provided that “[c]lothes shall be sufficient to conceal undergarments at all times”).

<sup>5</sup> See *infra* Part I.B.

<sup>6</sup> See, e.g., *infra* notes 67-74 and accompanying text.

<sup>7</sup> E.g., Koppel, *supra* note 2, at G1; Greg Lacour, *Measure Fails 6-1: ‘Saggy Pants’ Proposal Voted Down; Style Won’t Be Banned as Indecent Exposure*, CHARLOTTE OBSERVER (N.C.), Oct. 17, 2007, at B1 (noting that the main proponent of a proposed saggy pants ordinance in Charlotte, N.C., County Commissioner Bill James, had

one court has already held a saggy pants ordinance unconstitutional,<sup>8</sup> although this has not deterred other communities from enforcing their own saggy pants laws.<sup>9</sup> Even President Obama weighed in on the issue during the 2008 campaign.<sup>10</sup>

This Note will explore the constitutional issues raised by saggy pants laws, focusing on the two principal constitutional rights implicated: the freedom of expression protected by the First Amendment<sup>11</sup> and the liberty in personal appearance protected by the Due Process Clause of the Fourteenth Amendment.<sup>12</sup> Part I describes the origins of the saggy pants style and the rise of saggy pants ordinances. Part II surveys the First Amendment legal landscape in the context of expressive conduct, and concludes that despite the stringent nature of the Supreme Court's current governing test for distinguishing conduct from speech, saggy pants laws impermissibly burden the right to free speech. Part III discusses the Due Process Clause jurisprudence regarding personal appearance and its application to saggy pants laws, arguing that the public's right to determine matters of personal appearance is unconstitutionally infringed by saggy pants ordinances. This Note concludes that because of the potential difficulty in establishing that wearing saggy pants is expressive conduct protected by the First Amendment, the more promising avenue for potential litigants may be under the Due Process Clause's protection of individual liberty.

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previously expressed a belief that urban blacks live in a "moral sewer," and quoting an opponent of the law who believed the ordinance was motivated by James' "dislike and hate for the African American community").

<sup>8</sup> Eliot Kleinberg, *Judge Releases Teen, Criticizes Riviera Beach's Saggy Pants Law*, PALM BEACH POST, Sept. 16, 2008, at B1.

<sup>9</sup> Steve Neavling, *Flint's Police Chief Shrugs at Fla. Saggy Pants Ruling; Law is Unconstitutional, Judge Decides*, DETROIT FREE PRESS, Sept. 18, 2008, at 5; see also *infra* notes 61-66 and accompanying text.

<sup>10</sup> *Ask Obama* (MTV television broadcast Nov. 3, 2008) ("I think passing a law about people wearing sagging pants is a waste of time. . . . Having said that, brothers should pull up their pants."); see also Geoff Earle, *Kick in Pants from O—'Brothers, Stop Sagging'*, N.Y. POST, Nov. 4, 2008, at 9.

<sup>11</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>12</sup> The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

A few words are necessary to delineate what this Note is not: the constitutional analysis herein is of saggy pants laws as they apply to a wearer of saggy pants who is not showing any flesh whatsoever, but merely has visible undergarments above the waistband. The constitutionality of indecent exposure laws in the context of actual nudity or visible flesh above the saggy pants is beyond the scope of this Note.<sup>13</sup> Furthermore, this Note does not discuss the potential Equal Protection Clause<sup>14</sup> issues raised by the enactment of saggy pants laws with a racially discriminatory purpose,<sup>15</sup> or the enforcement of such laws in a racially discriminatory manner,<sup>16</sup> as such claims are fact-sensitive to the context of each particular community.

## I. SAGGY PANTS AND SAGGY PANTS ORDINANCES

### A. *Emergence of Saggy Pants*

The practice of sagging began in prisons, which issued baggy uniforms without belts in order to deter suicide attempts and the use of belts as weapons.<sup>17</sup> As prisoners were released, the style migrated from the prison population to urban ghettos, where it was adopted by street gangs as a means of self-

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<sup>13</sup> For discussion of these issues, see *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (constitutionality of a municipal nudity ban as applied to a nude dancing establishment); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, (1991) (challenge to a public indecency statute applied to nude dancing); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987) (male successfully challenged municipal ordinance banning shirtless jogging); *S. Fla. Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984) (upholding public indecency statute from First Amendment challenge by nude sunbathers).

<sup>14</sup> The Fourteenth Amendment provides, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

<sup>15</sup> For examples of facially neutral laws invalidated because they were enacted with a racially discriminatory purpose, see *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) (holding that facially neutral plan to close all public schools had racially discriminatory purpose of preventing desegregation) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that facially neutral law redefining city boundaries had racially discriminatory purpose of disenfranchising African-Americans).

<sup>16</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

<sup>17</sup> Koppel, *supra* note 2.

identification with gang and prison culture.<sup>18</sup> Saggy pants were in turn adopted by hip-hop artists and rappers,<sup>19</sup> many of whom were former gang members.<sup>20</sup> The ascendancy of hip-hop in the popular culture spread sagging into the suburbs and around the world.<sup>21</sup> Whether characterized as “incarceration chic”<sup>22</sup> or a “badge of delinquency,”<sup>23</sup> saggy pants have clearly been embraced by a large subsection of America’s youth.<sup>24</sup> This result is perhaps unsurprising, given the size and demographics of the prison population in the United States,<sup>25</sup> the prevalence of gang membership and gang violence,<sup>26</sup> and the tremendous popularity of hip-hop music.<sup>27</sup>

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<sup>18</sup> Guy Trebay, *In Jailhouse Chic, an Anti-Style Turns Into a Style Itself*, N.Y. TIMES, June 13, 2000, at B8 [hereinafter Trebay, *In Jailhouse*] (discussing the influence of prison uniforms on street style).

<sup>19</sup> Koppel, *supra* note 2.

<sup>20</sup> David L. Shabazz, Editorial, *Rap Artists’ Thug Images Became Too Real*, LEXINGTON HERALD-LEADER, Aug. 18, 2005, at A13.

<sup>21</sup> Guy Trebay, *Taking Hip-Hop Seriously. Seriously.*, N.Y. TIMES, May 20, 2003, at B11 [hereinafter Trebay, *Taking Hip-Hop*] (noting that “[t]he history of style in the late 20<sup>th</sup> century . . . is substantially the history of hip-hop,” and any survey of fashion in the last two decades could not omit the importance of “track suits, sweat clothes, wrestling, boxing or soccer shoes, designer sneakers, *outsize denims*, prison-style jumpsuits, *underwear worn above the trouser waistband*, do-rags, cargo pants, messenger bags, dreadlocks, cornrows, athletic jerseys, Kangol caps” (emphasis added)).

<sup>22</sup> Trebay, *In Jailhouse*, *supra* note 18.

<sup>23</sup> Koppel, *supra* note 2 (commenting that “[n]ot since the zoot suit has a style been greeted with such strong disapproval,” referring to the outsized suits favored by young urban minorities in the 1930’s and 1940’s, which were seen as unpatriotically mocking fabric conservation efforts during World War II).

<sup>24</sup> See, e.g., Koppel, *supra* note 2; Trebay, *Taking Hip-Hop*, *supra* note 21; Trebay, *In Jailhouse*, *supra* note 18.

<sup>25</sup> See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS PUBLICATION NCJ 217675, PRISONERS AND JAIL INMATES AT MIDYEAR 2006, at 1, 8-9 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>. The Bureau of Justice Statistics reports that at midyear 2006 there were 2,245,189 prisoners in custody nationwide, including approximately 836,800 black men. Relative to the general population, 1 in every 133 U.S. residents is in prison or jail; 4.8% of all black men were in custody, compared to about 0.7% of white men and 1.9% of Hispanic men. About 11.7% of all black males age 25 to 29 were incarcerated at midyear 2006.

<sup>26</sup> There are an estimated 21,500 youth gangs in the United States, with 731,500 gang members. All cities with populations of 250,000 or more reported gang problems. NATIONAL ALLIANCE OF GANG INVESTIGATORS ASSOCIATIONS, 2005 NATIONAL GANG THREAT ASSESSMENT, at ix (2005), available at [http://www.ojp.usdoj.gov/BJA/what/2005\\_threat\\_assesment.pdf](http://www.ojp.usdoj.gov/BJA/what/2005_threat_assesment.pdf). Between 1993 and 2003, perpetrators were identified as gang members in about 12% of all aggravated assaults, 4% of rapes, 10% of robberies, and 6% of simple assaults. ERIKA HARRELL, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS PUBLICATION NCJ 208875, VIOLENCE BY GANG MEMBERS, 1993-2003, at 2 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vgm03.pdf>.

<sup>27</sup> In 2004, four of the five nominees for the Grammy Award for Record of the Year were hip-hop songs. Sarah Rodman, *Rap Hip-Hops to Head of the Grammy Class*, BOSTON HERALD, Feb. 6, 2004, at E4. In October 2003, the top ten songs in the

In response to the problem of gang-related school violence, many school districts throughout the United States have adopted dress codes that ban the wearing of gang-related apparel.<sup>28</sup> Some states have even granted authority to local school boards to mandate school uniforms.<sup>29</sup> Dress codes have generally withstood constitutional challenge because of the important governmental interest in safeguarding the educational process and courts' reluctance to second-guess educational policy decisions.<sup>30</sup> Perhaps drawing on the success of some local communities in banning saggy pants in schools,<sup>31</sup> some state lawmakers attempted to extend these bans to the streets.

### B. *Saggy Pants Ordinances*

The movement to outlaw saggy pants in public began in the state legislatures of Louisiana and Virginia. In 2004, the Louisiana legislature voted down a bill that would have made it "unlawful for any person to wear clothing in any public place or place open to public view which either: (1) Intentionally exposes undergarments; or (2) Intentionally exposes any portion of the pubic hair, cleft of the buttocks, or genitals," with

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Billboard Hot 100 were all by African-American artists, a first in the history of the Billboard charts, "signaling the culmination of hip-hop's ascent as the dominant force in popular music and culture." Joan Anderman, *Hip-Hop Setting the Beat in First, Black Artists Hold Billboard's Top 10*, BOSTON GLOBE, Oct. 4, 2003, at A1.

<sup>28</sup> See generally Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 BYU EDUC. & L.J. 147 (examining the constitutionality of school dress codes); Wendy Mahling, Note, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715 (1996). For an in-depth analysis of the problems of vagueness and comprehensibility in student codes of conduct and suggested guidelines for designing effective and legally defensible student discipline rules, see Peter Sansom & Frank Kemerer, *It's All About Rules*, 166 EDUC. LAW REP. 395 (West 2002).

<sup>29</sup> See, e.g., CAL. EDUC. CODE § 35183(b) (West 2004) ("The governing board of any school district may adopt or rescind a reasonable dress code policy that requires pupils to wear a schoolwide uniform or prohibits pupils from wearing 'gang-related apparel' . . .").

<sup>30</sup> See, e.g., *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001). *But see* *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308-11 (8th Cir. 1997) (striking down school regulation prohibiting gang symbols without providing any definition of gang); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 667-69 (S.D. Tex. 1997) (striking down a dress code provision which banned "gang-related apparel" as overly vague). For a discussion of the constitutional rights of students, see *infra* notes 116-122 and accompanying text.

<sup>31</sup> See *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 559-61 (D.N.M. 1995).

certain exceptions such as “[c]lothing worn in a private residence” or “[s]wimming attire worn at a swimming pool or beach.”<sup>32</sup> Violators would have been subject to three days of community service and a maximum fine of \$175.<sup>33</sup> In 2005, the Virginia state legislature considered a bill to outlaw saggy pants in public that would have imposed a maximum fine of \$50 on any person who “intentionally wears and displays his below-waist undergarments, intended to cover a person’s intimate parts, in a lewd or indecent manner.”<sup>34</sup> The bill passed the Virginia House, but died in a Senate committee.<sup>35</sup> Although these bills did not pass, both proposals drew widespread media coverage,<sup>36</sup> and in the ensuing years several localities have enacted their own saggy pants ordinances.

Louisiana has been at the forefront of the movement to outlaw saggy pants, with at least six cities passing such laws in recent years.<sup>37</sup> For example, the ordinance in Gonzales, Louisiana, provides:

It shall be unlawful for any person in any public place or in view of the public, to intentionally expose his or her genitalia or undergarments, or be guilty of any indecent or lewd behavior.

(1) Any person convicted of violating the provisions of this section shall be punished by a fine not to exceed fifty dollars (\$50.00).

(2) Any person convicted of a second offense of violating the provisions of this section shall be punished by a fine not to exceed one hundred fifty dollars (\$150.00).

(3) Any person convicted of a third offense of violating the provisions shall be punished by a fine not to exceed five hundred dollars (\$500.00) and up to two (2) eight-hour days of community service or trash abatement.<sup>38</sup>

Other Louisiana cities even provide for the possibility of jail time for violators of their saggy pants ordinances.<sup>39</sup> For

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<sup>32</sup> H.B. 1703, 2004 Leg., Reg. Sess. (La. 2004). The legislative history and voting results can be found at <http://legis.state.la.us>.

<sup>33</sup> *Id.*

<sup>34</sup> H.B. 1981, 2005 Leg., Reg. Sess. (Va. 2005).

<sup>35</sup> Christina Bellantoni, *Senators Drop “Droopy Drawers”; Bill Had Made State a Global Joke*, WASHINGTON TIMES, Feb. 11, 2005, at B1.

<sup>36</sup> See, e.g., *Saggy-Pants Laws No Longer Butt of Jokes*, *supra* note 1 (noting that “[m]edia outlets from around the world descended on Richmond”); Bellantoni, *supra* note 35, at B1 (noting that the Virginia legislation made headlines “in newspapers as far away as Australia,” and that the Louisiana bill was the subject of a parody on *The Daily Show with Jon Stewart*).

<sup>37</sup> *Saggy-Pants Laws No Longer Butt of Jokes*, *supra* note 1.

<sup>38</sup> GONZALES, LA., CODE OF ORDINANCES § 8-145 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=10845&sid=18>.

example, the law in Abbeville, Louisiana, allows for up to six months' imprisonment:

It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in such a manner as to expose their underlying garments.

Any person violating this section shall, upon conviction thereof, be fined not more than three hundred dollars (\$300.00) or imprisoned for not more than six (6) months, or both.<sup>40</sup>

The movement to outlaw saggy pants has spread well beyond Louisiana.<sup>41</sup> Similar laws have been enacted in Pine Lawn, Missouri;<sup>42</sup> Hawkinsville, Georgia;<sup>43</sup> Lynwood, Illinois;<sup>44</sup> and Riviera Beach, Florida.<sup>45</sup> In Flint, Michigan, the police chief has announced his intention to apply existing disorderly conduct laws against those who wear saggy pants.<sup>46</sup> Other cities

<sup>39</sup> See, e.g., ABBEVILLE, LA., CODE OF ORDINANCES § 13-25 (2008), available at <http://www.municode.com/Resources/gateway.asp?pid=10339&sid=18>; Koppel, *supra* note 2 (discussing ordinance in Mansfield, Louisiana, which allows for up to fifteen days' imprisonment); *Saggy-Pants Laws No Longer Butt of Jokes*, *supra* note 1 (discussing ordinance in Delcambre, Louisiana, providing for up to six months of jail time).

<sup>40</sup> ABBEVILLE, LA., CODE OF ORDINANCES § 13-25 (2007).

<sup>41</sup> Other Louisiana cities enacting such laws include Shreveport, Port Allen, Alexandria, Donaldsonville, and Baker. SHREVEPORT, LA., CODE OF ORDINANCES § 50-167 (2007), available at <http://www.municode.com/resources/gateway.asp?pid=10151&sid=18> (maximum fine of \$250 and four days of community service); PORT ALLEN, LA., CODE OF ORDINANCES § 54-13 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=10009&sid=18> (maximum fine of \$500); ALEXANDRIA, LA., CODE OF ORDINANCES § 15-128 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=11767&sid=18> (penalizing the parent or legal guardian of any juvenile cited for a violation with fines of up to \$200, up to forty hours community service, and even mandatory attendance by both parent and child at a family counseling program; adults subject to same penalties for their own violations); Samuel Irwin, *Deputies to Begin 'Saggy' Warnings*, BATON ROUGE ADVOCATE, March 13, 2008, at B4, available at <http://www.2theadvocate.com/news/16632621.html> (describing Donaldsonville ordinance); Marilyn Goff, *Baker Council Votes to Ban Sagging Pants*, BATON ROUGE ADVOCATE, Oct. 29, 2008, at B2, available at <http://www.2theadvocate.com/news/33486334.html> (describing Baker ordinance; maximum fine of \$250 and four days of community service).

<sup>42</sup> Denise Hollinshed, *Baggy Pants Ban Is Working*, ST. LOUIS POST-DISPATCH, Sept. 5, 2008 [hereinafter Hollinshed, *Baggy Pants*].

<sup>43</sup> Jennifer Burk, *No One Yet Tagged for Too Much Sag in Hawkinsville*, MACON TELEGRAPH (Macon, Ga.), Nov. 27, 2007, at B.

<sup>44</sup> William Lee, *Village Cracks Down on Exposed Undies*, CHICAGO SUN-TIMES, Aug. 14, 2008, at 18.

<sup>45</sup> Dianna Cahn, *Riviera Beach Police Enforcing Fashion Law; Constitutionality of the Saggy Pants Law is Being Questioned*, SOUTH FLORIDA SUN-SENTINEL, Sept. 8, 2008, at B1. This law was later held unconstitutional "based on the limited facts of this case" by Palm Beach County Circuit Judge Paul Moyle in one of the first lawsuits challenging such laws. Kleinberg, *supra* note 8.

<sup>46</sup> Bryn Mickle, *ACLU: Fla. Ruling Cuts Holes in Flint's Low-Pants Ban*, FLINT J. (Mich.), Sept. 18, 2008, at A1.



considering the adoption of their own saggy pants ordinances include: Baltimore, Maryland;<sup>47</sup> Trenton and Pleasantville, New Jersey;<sup>48</sup> Bel-Ridge and Moline Acres, Missouri;<sup>49</sup> Duncan, Oklahoma;<sup>50</sup> Yonkers, New York;<sup>51</sup> Gardena, California;<sup>52</sup> and Atlanta,<sup>53</sup> Rome, Brunswick and Plains, Georgia.<sup>54</sup> Proposals for such ordinances have been defeated or withdrawn in Charlotte, North Carolina;<sup>55</sup> Dallas, Texas;<sup>56</sup> Natchitoches, Louisiana;<sup>57</sup> Stratford, Connecticut;<sup>58</sup> Midlothian, Illinois;<sup>59</sup> and Pine Bluff, Arkansas.<sup>60</sup>

Local police enforcement of these laws has varied so far. Some municipalities have stringently enforced their ordinances. For example, in Pine Lawn, Missouri, the police have issued at least seventeen citations since their saggy pants ordinance went into effect.<sup>61</sup> In Riviera Beach, Florida, one teen spent a night in jail after being spotted riding a bicycle with exposed boxers,<sup>62</sup> while at least four other violators have been arrested under the law.<sup>63</sup> Other cities have taken a more conservative approach, issuing only verbal warnings to violators. Law enforcement officials in Donaldsonville, Louisiana, told the city council that enforcement of the new ordinance would begin with “verbal and written warnings.”<sup>64</sup> Similarly, the police in Hawkinsville, Georgia, have merely

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<sup>47</sup> Tanika White, *Pants Proposition: The City Council Is Urged to Take a Stand Against Trousers That Expose Underwear*, BALTIMORE SUN, Sept. 19, 2007, at A1.

<sup>48</sup> Wellington, *supra* note 3.

<sup>49</sup> Hollinshed, *Baggy Pants*, *supra* note 42.

<sup>50</sup> Parker, *supra* note 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Gardena Council Considers Ban on Saggy Pants*, ASSOCIATED PRESS, Sept. 24, 2008.

<sup>53</sup> David Pendered, *Atlanta Bill Would Outlaw Public Show of Underwear*, ATLANTA J.-CONST., Aug. 23, 2007, at A1.

<sup>54</sup> Parker, *supra* note 2.

<sup>55</sup> Lacour, *supra* note 7.

<sup>56</sup> Mike Lee, *Fort Worth Officials Look to Join Pants-Raising Effort*, FORT WORTH STAR-TELEGRAM (Tex.), Sept. 24, 2008.

<sup>57</sup> Parker, *supra* note 2.

<sup>58</sup> Thomas Kaplan, *A Connecticut Town Debates the Need for a Kind of Belt-Tightening*, N.Y. TIMES, Aug. 28, 2007, at B5.

<sup>59</sup> William Lee, *Midlothian Won't Prohibit Baggy Pants*, SOUTHTOWN STAR (Chicago, Ill.), Oct. 9, 2008, at 10.

<sup>60</sup> *Pine Bluff Councilman Withdraws Proposed Ban on Saggy Pants*, ASSOCIATED PRESS, Oct. 2, 2007.

<sup>61</sup> Hollinshed, *Baggy Pants*, *supra* note 42.

<sup>62</sup> Kleinberg, *supra* note 8.

<sup>63</sup> Cahn, *supra* note 45.

<sup>64</sup> *Deputies to Begin 'Saggy' Warnings*, ASSOCIATED PRESS, March 13, 2008.

warned violators as part of a public information campaign to create awareness of the new law.<sup>65</sup> In Flint, Michigan, police are attempting to introduce offenders to diversionary programs such as the Police Activities League or community groups like neighborhood block associations instead of making arrests.<sup>66</sup>

The American Civil Liberties Union (“ACLU”) has fought back against such laws, speaking out against their constitutionality and threatening legal action against cities with saggy pants ordinances. An organizer with the ACLU of Georgia said the group would “certainly challenge” any saggy pants ordinance approved by the city of Atlanta.<sup>67</sup> In July 2008, the ACLU of Michigan submitted a letter to the police chief of Flint, Michigan, calling the city’s practice of classifying sagging as disorderly conduct “a blatant violation of the United States Constitution” and asking him to “halt this practice immediately.”<sup>68</sup> In addition, the ACLU of Michigan has offered legal assistance to anyone charged under the Flint ordinance.<sup>69</sup> While the Flint police have yet to arrest anyone for sagging, the Flint police chief has ignored the ACLU’s request to change his policy.<sup>70</sup>

Such threats of legal action appear to have been taken seriously in at least a few cities. In Pine Bluff, Arkansas, the mayor persuaded the city council to reject a saggy pants ordinance, citing the potential expense of defending lawsuits challenging the law.<sup>71</sup> The Arkansas chapter of the ACLU had expressed opposition to the proposed ordinance.<sup>72</sup> After the ACLU of Eastern Missouri achieved the dismissal of a Pine Lawn, Missouri resident’s ticket for violating the saggy pants ordinance, city officials met with ACLU representatives and are now considering scrapping their ordinance.<sup>73</sup> Pine Lawn’s police chief said the ACLU “want[s] to have an extensive law

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<sup>65</sup> Burk, *supra* note 43.

<sup>66</sup> Mickle, *supra* note 46.

<sup>67</sup> Eric Sturgis, *Critics Say Ban on Saggy Pants a Racial Trigger*, ATLANTA J.-CONST., Jan. 17, 2008, at B5.

<sup>68</sup> Ben Schmitt & Michele Munz, *Saggy-Pants Suit? Chief Will Press on Pants*, ST. LOUIS POST-DISPATCH, July 21, 2008, at A3.

<sup>69</sup> Ben Schmitt, *ACLU Prepares to Take Cops to Court over Saggy Pants*, DETROIT FREE PRESS, July 21, 2008, available at 2008 WL 13617585.

<sup>70</sup> Mickle, *supra* note 46.

<sup>71</sup> Parker, *supra* note 2.

<sup>72</sup> *Pine Bluff Councilman Withdraws Proposed Ban on Saggy Pants*, ASSOCIATED PRESS, Oct. 2, 2007.

<sup>73</sup> Denise Hollinshed, *Pine Lawn May Scrap Prohibition on Wearing Droopy Pants*, ST. LOUIS POST-DISPATCH, Sept. 20, 2008 [hereinafter Hollinshed, *Pine Lawn*].

battle, and the mayor called a meeting saying we are not going to spend that kind of money fighting it unless we get a pool of money from some other people to help us fight it.”<sup>74</sup> Such a fight would implicate two constitutional rights, and is the subject of Parts II and III.

## II. THE FIRST AMENDMENT AND FASHION

Because the wearing of saggy pants may be considered a form of speech, saggy pants laws implicate the First Amendment’s protection of an individual’s right to free speech.<sup>75</sup> Part II discusses the case law pertinent to the application of free speech rights in the context of laws banning saggy pants, and concludes that these laws impermissibly infringe upon the citizenry’s right to free expression.

### A. *Freedom of Speech and Expressive Conduct*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>76</sup> Although sagging is undoubtedly conduct, the Supreme Court has long established that the First Amendment protects symbolic speech and expressive conduct, as well as written and spoken speech.<sup>77</sup> Thus, the threshold inquiry in any expressive conduct claim is whether the conduct at issue is speech entitled to protection by the First Amendment.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>76</sup> *Id.*

<sup>77</sup> *See, e.g.,* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 568 (1995) (recognizing a parade as “a form of expression”); Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that the burning of an American flag outside the Republican National Convention was expressive conduct protected by the First Amendment); Spence v. Washington, 418 U.S. 405, 410 (1974) (holding that an American flag displayed outside a window with a peace symbol affixed to it was protected expression); Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (recognizing that the wearing of black armbands to protest the Vietnam War was protected speech); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (holding a state prohibition on displaying a red flag as a “sign, symbol or emblem of opposition to organized government” unconstitutional).

<sup>78</sup> *Spence*, 418 U.S. at 409 (“To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . .”).

In *Spence v. Washington*, a college student was arrested for hanging an American flag upside down outside his window with a large peace sign made out of black removable tape affixed to both sides.<sup>79</sup> Spence was charged with violating Washington's law against improper flag use, which criminalized affixing words or symbols to the American flag.<sup>80</sup> The Supreme Court reversed his conviction, holding that Spence's act was protected symbolic speech.<sup>81</sup> In so doing, the Court delineated a two-part test for determining whether speech or conduct is expressive: whether "[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."<sup>82</sup>

Simply overcoming the *Spence* test and establishing that the conduct at issue is protected speech does not mean that the conduct is immune from government regulation. First Amendment rights are not absolute, and the government may regulate speech provided it has a sufficient subordinating justification.<sup>83</sup> For example, the Supreme Court has long upheld reasonable time, place, and manner restrictions on speech in public forums such as streets and parks.<sup>84</sup> However, such restrictions cannot be based on the content of the speech. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>85</sup>

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<sup>79</sup> *Id.* at 406.

<sup>80</sup> *Id.* at 406-07.

<sup>81</sup> *Id.* at 406.

<sup>82</sup> *Id.* at 410-11. The *Spence* Court did not expressly pronounce this language as a two-part test, but the Supreme Court has since cited *Spence* for this proposition. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'").

<sup>83</sup> See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes'" (citation omitted)); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic.").

<sup>84</sup> See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place and manner restrictions.").

<sup>85</sup> *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1971); see also *Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

This distinction between content-based<sup>86</sup> and content-neutral<sup>87</sup> restrictions on speech is a crucial one in First Amendment jurisprudence. Content-based regulations are “presumptively invalid”<sup>88</sup> because “[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right [of free speech].”<sup>89</sup> Content-based regulations are met with strict scrutiny by the courts, meaning that they will be upheld only if the government can show that the regulation is necessary to serve a compelling state interest and is narrowly tailored to serve that interest.<sup>90</sup> In contrast, content-neutral laws of general applicability to speakers regardless of the viewpoint expressed or the subject matter of the speech are given intermediate scrutiny when challenged.<sup>91</sup>

Where protected expressive conduct is prohibited by a content-neutral law regulating conduct, courts use the intermediate scrutiny test announced by the Supreme Court in *United States v. O'Brien*.<sup>92</sup> In *O'Brien*, four individuals burned their draft cards on the steps of a courthouse to protest the Vietnam War.<sup>93</sup> David Paul O'Brien was convicted of violating a federal law that made it a crime to “knowingly destroy” or “knowingly mutilate” draft registration certificates.<sup>94</sup> The Court said that “when ‘speech’ and ‘nonspeech’ elements are

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<sup>86</sup> For examples of content-based laws, see *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2001) (code of judicial conduct barred judges and candidates for judicial office from “announc[ing] his or her views on disputed legal or political issues”); *Boos v. Barry*, 485 U.S. 312, 315 (1988) (District of Columbia ordinance prohibited the display of signs outside foreign embassies which would tend to bring that foreign government into “public odium” or “public disrepute”); and *Mosley*, 408 U.S. at 92-93 (disorderly conduct ordinance barred picketing outside schools but exempted “peaceful picketing of any school involved in a labor dispute”).

<sup>87</sup> For examples of content-neutral laws, see *Clark v. Community for Creative Non-Violence*, 468 U.S. at 290 (National Park Service regulation permitted camping in national parks only if there was a campground designated for that purpose); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 791-92 (1984) (municipal code prohibited the posting of signs on public property); and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 643-44 (1981) (state fair rules prohibited the sale or distribution of merchandise or literature except from booths rented “in a nondiscriminatory fashion on a first-come, first-served basis”).

<sup>88</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>89</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>90</sup> See, e.g., *Boos v. Barry*, 485 U.S. at 321-22; *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 461 (1980).

<sup>91</sup> *Turner Broad. Sys.*, 512 U.S. at 642.

<sup>92</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>93</sup> *Id.* at 369-70.

<sup>94</sup> *Id.*

combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>95</sup> The Court then articulated the test for evaluating cases where expressive conduct is outlawed by a government regulation:

[A] government regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>96</sup>

Using this standard, the Court upheld O’Brien’s conviction, finding that the government’s interest in preserving draft cards had justifications unrelated to suppression of speech, such as expediting military mobilization in a national emergency.<sup>97</sup>

The third prong of the *O’Brien* test performs what has been called a “critical switching function” at the outset of any review of a purportedly content-neutral law regulating expressive conduct.<sup>98</sup> A law will be deemed content-neutral and thus subject to *O’Brien*’s more lenient intermediate scrutiny only if the asserted government interest behind the law is “unrelated to the suppression of free expression.”<sup>99</sup> Where the state interest *is* related to the suppression of free expression, the court will apply strict scrutiny, and not the *O’Brien* test. As a result, such laws will only be upheld if they are necessary to serve a compelling state interest and are narrowly tailored to serve that interest.<sup>100</sup>

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<sup>95</sup> *Id.* at 376.

<sup>96</sup> *Id.* at 377. The Court later clarified that while a content-neutral law “must be narrowly tailored to serve the government’s legitimate, content-neutral interests[,] . . . it need not be the least restrictive or least intrusive means of doing so.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

<sup>97</sup> *O’Brien*, 391 U.S. at 378-80.

<sup>98</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 952 (16th ed. 2007).

<sup>99</sup> *See, e.g.*, *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 567-72 (1991) (plurality opinion) (applying *O’Brien* test and upholding content-neutral public indecency statute as applied to nude dancing).

<sup>100</sup> *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (stating that “we have limited the applicability of *O’Brien*’s relatively lenient standard to those cases in which ‘the governmental interest is unrelated to the suppression of free expression’”).

B. *Applying the First Amendment to Saggy Pants Ordinances*

In light of the foregoing, whether a saggy pants ordinance violates protected free speech rights under the First Amendment will depend upon: 1) whether the practice of sagging is deemed to be expressive conduct;<sup>101</sup> 2) whether the asserted government interest in outlawing saggy pants is related to the suppression of free expression;<sup>102</sup> and 3) the importance of the governmental interests set forth as justification for the ordinance.<sup>103</sup> If sagging is not expressive conduct, the First Amendment is wholly inapplicable and offers no protection to the violator. If the wearing of saggy pants is deemed expressive conduct, the court must determine whether the ordinance is content-based, thus requiring the government to satisfy strict scrutiny, or content-neutral, thereby requiring the ordinance to satisfy intermediate scrutiny under the *O'Brien* test. Because the wearing of clothes communicates aspects of the wearer's identity and the government interest in regulating the citizenry's fashion choices is negligible, saggy pants ordinances unconstitutionally infringe upon First Amendment rights.

1. The Problems of Particularity

In *Bivens v. Albuquerque Public Schools*, a federal court in the District of New Mexico considered a free speech challenge to a school dress code that prohibited sagging.<sup>104</sup> A student was suspended for repeatedly violating the dress code, which was adopted in response to a gang problem at the high school.<sup>105</sup> The *Bivens* court determined that the student intended to convey a particularized message, thus satisfying the first prong of the *Spence* test<sup>106</sup> to establish non-verbal conduct as protected symbolic speech.<sup>107</sup> The message was that "sagging pants are a way for him to identify and express his link with his black identity, the black culture and the styles of

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<sup>101</sup> See *supra* notes 77-82 and accompanying text.

<sup>102</sup> See *supra* notes 98-100 and accompanying text.

<sup>103</sup> See *supra* notes 92-97 and accompanying text.

<sup>104</sup> *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556 (D.N.M. 1995).

<sup>105</sup> *Id.* at 558.

<sup>106</sup> *Spence v. Washington*, 418 U.S. 405, 409-11 (1974).

<sup>107</sup> *Bivens*, 899 F. Supp. at 560-61 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). *Johnson*, in turn, cites *Spence*. See *supra* note 82.

urban black youth.”<sup>108</sup> However, the court rejected the First Amendment claim because of a failure to establish that “there is a great likelihood that those who observe this expressive conduct will understand the message.”<sup>109</sup> The student had made only conclusory assertions that others would understand the message, while the school had submitted evidence in the form of affidavits that any message conveyed by wearing saggy pants was not apparent to viewers.<sup>110</sup> The court noted that sagging was understood by some as demonstrating gang affiliation, by others as showing a desire to become gang members, and by still others as a fashion trend followed by many adolescents.<sup>111</sup> Because the student had failed to introduce exhibits or affidavits to carry his burden of demonstrating a genuine issue of fact for trial, the school’s motion for summary judgment was granted.<sup>112</sup>

*Bivens*, while illustrative of the perils of summary judgment for a plaintiff with no evidence in support of factual allegations, does not provide a conclusive answer to the question of whether sagging is expressive conduct.<sup>113</sup> Moreover, the *Bivens* court had no incentive to find a triable issue of fact on the question, as it indicated it would likely find for the school even if sagging was speech.<sup>114</sup> The court noted:

Even if the wearing of sagging pants could be construed as protected speech, I would have grave doubts about the merits of Plaintiff’s claim. . . . Defendants have made a strong showing . . . that the dress code adopted at [the school] was a reasonable response to the perceived problem of gangs within the school. . . . [T]he dress code may have been responsible for the perception of an improved climate and learning environment at the school.<sup>115</sup>

Thus, the outcome in *Bivens* can be explained by the fact that the dispute arose in the public schools, a context where great deference is given to the government’s interest in maintaining the orderly administration of an inculcative

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<sup>108</sup> *Bivens*, 899 F. Supp. at 560-61.

<sup>109</sup> *Id.* at 561.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Under Federal Rule of Civil Procedure 56, the moving party is entitled to summary judgment if “there is no genuine issue as to any material fact” and “the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(C). See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986).

<sup>113</sup> See *infra* notes 125-168 and accompanying text.

<sup>114</sup> *Bivens*, 899 F. Supp. at 561 n.9.

<sup>115</sup> *Id.*



education.<sup>116</sup> In a series of cases, the Supreme Court has held that while students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>117</sup> the “special characteristics of the school environment” allow for restrictions on student expression that would be unconstitutional if the government were to make similar restrictions on society at large.<sup>118</sup> Accordingly, a school may prohibit speech that is “inconsistent with its basic educational mission” if the speech would “substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>119</sup> For example, the Supreme Court has upheld disciplining a student for giving a lewd speech at a school assembly<sup>120</sup> or displaying a banner reading “BONG HiTS 4 JESUS” at a school-sponsored trip to watch the Olympic torch pass through Juneau, Alaska.<sup>121</sup> However, the Court has guarded against suppression of unpopular or controversial student speech out of the mere fear of a disturbance, such as the wearing of black armbands by students to express opposition to the Vietnam War.<sup>122</sup> Because the *Bivens* court dealt with a school dress code targeting the school’s gang problem,<sup>123</sup> and gang violence interferes with the work of a school, the school’s eventual victory was inevitable.

Furthermore, *Spence’s* dual requirements of a “particularized message” and understandability<sup>124</sup> are themselves fluid concepts in the case law.<sup>125</sup> The Supreme Court has on several occasions found expressive conduct to be protected speech without conducting any searching inquiry into the particular message intended by conduct, or requiring the message to be clearly understandable. For example, in *Barnes v. Glen Theatre, Inc.*, a case upholding a local ordinance proscribing public nudity from First Amendment challenge, the court held that nude dancing behind a glass panel in a coin-operated booth in an adult bookstore “is expressive conduct

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<sup>116</sup> *Bethel v. Fraser*, 478 U.S. 675, 681-86 (1986).

<sup>117</sup> *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>118</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

<sup>119</sup> *Kuhlmeier*, 484 U.S. at 266 (internal quotation marks and citations omitted).

<sup>120</sup> *Bethel*, 478 U.S. at 685.

<sup>121</sup> *Morse v. Frederick*, 551 U.S. 393, 401-03 (2007).

<sup>122</sup> *Tinker*, 393 U.S. at 508-10.

<sup>123</sup> *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 558 (D.N.M. 1995).

<sup>124</sup> *Spence v. Washington*, 418 U.S. 405, 411 (1974).

<sup>125</sup> See *infra* notes 126-148 and accompanying text.

within the outer perimeters of the First Amendment.”<sup>126</sup> The only “message” the Court referred to was “the erotic message conveyed by the dancers,” and noted that “the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.”<sup>127</sup> Such a vague “erotic message” would hardly seem to be “particularized.”

More recently, the Court cast doubt upon the requirements of particularity and understandability in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, a case upholding the right of private parade organizers to exclude a group expressing a message contrary to the parade organizers’ choosing.<sup>128</sup> A unanimous Supreme Court explicitly disclaimed any requirement that expression be susceptible to a particularized understanding for it to be protected speech: “[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ [citing *Spence*<sup>129</sup>] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”<sup>130</sup> This language is unarguably in tension with *Spence* and calls into question the *Spence* test’s<sup>131</sup> continuing validity. The Court went on to note that “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”<sup>132</sup> In addition to these examples, the Supreme Court has on many occasions proclaimed art as protected speech, even though, as *Hurley* recognizes, art is not always susceptible to a “particularized message” analysis.<sup>133</sup>

The problems of the “particularized message” approach to determining First Amendment protections in the context of clothing regulations are illustrated by *Chalifoux v. New Caney*

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<sup>126</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion).

<sup>127</sup> *Barnes*, 501 U.S. at 570-71 (plurality opinion).

<sup>128</sup> 515 U.S. 557, 568-69 (1995).

<sup>129</sup> 418 U.S. at 410-11.

<sup>130</sup> *Hurley*, 515 U.S. at 569.

<sup>131</sup> *Spence*, 418 U.S. at 410-11.

<sup>132</sup> *Hurley*, 515 U.S. at 569-70.

<sup>133</sup> *See, e.g.*, *Miller v. California*, 413 U.S. 15, 22-23 (1973) (“[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.”).

*Independent School District*.<sup>134</sup> In *Chalifoux*, school officials enforcing the school's ban on "gang-related" apparel prevented two students from wearing rosaries as necklaces.<sup>135</sup> The students brought a free speech suit, claiming that they wore the rosary "with the intent to communicate their Catholic faith to others."<sup>136</sup> The school district's defense was similar to that of the Albuquerque schools in *Bivens*:<sup>137</sup> even if the students sincerely intended to communicate a message, their conduct failed the *Spence* test<sup>138</sup> because many non-Catholics are unfamiliar with the rosary and even those familiar with a rosary would not understand the message because the rosary is commonly used as an aid to prayer, rather than as a necklace.<sup>139</sup> The district court rejected that argument in finding for the students:

Defendants read Plaintiffs' religious message too narrowly. Even assuming that some persons are not familiar with the rosary, undoubtedly they are familiar with the crucifix attached to the center of the rosary, which is recognized universally as a symbol of Christianity. Accordingly, there is a great likelihood that those persons unable to associate Plaintiffs' rosaries with Catholicism nevertheless, will understand that Plaintiffs are Christians. Moreover, the evidence at trial showed that wearing a rosary as a necklace is not so abnormal that persons familiar with the rosary would be unlikely to understand Plaintiffs' religious message. Therefore, the Court finds that the symbolic speech at issue in this case is a form of religious expression protected under the First Amendment.<sup>140</sup>

Thus, the *Chalifoux* court hews toward *Hurley* in refusing to adopt a strict requirement of understandability,<sup>141</sup> thereby implicitly rejecting the *Spence*<sup>142</sup> test. The *Chalifoux* court conceptualized the "particular message" as "I am a Christian," not "I am a proud Catholic," and said the message was understandable even though the rosary was being worn as

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<sup>134</sup> 976 F. Supp. 659, 665 (S.D. Tex. 1997). For an in-depth treatment of *Chalifoux* and the problems of school dress codes targeted at gang apparel, see Christopher M. LaVigne, Comment, *Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment?*, 51 BAYLOR L. REV. 389 (1999).

<sup>135</sup> *Chalifoux*, 976 F. Supp. at 663.

<sup>136</sup> *Id.* at 659, 665.

<sup>137</sup> *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 560-61 (D.N.M. 1995).

<sup>138</sup> *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

<sup>139</sup> *Chalifoux*, 976 F. Supp. at 665.

<sup>140</sup> *Id.* at 665.

<sup>141</sup> *Id.*

<sup>142</sup> *Spence*, 418 U.S. at 410-11.

a necklace, a somewhat unconventional way of using a prayer aid.<sup>143</sup> By adopting a broad reading of the “particular message” in the speech at issue, the court imported an expansive, inclusive generality into a test<sup>144</sup> looking for a “particular message.”

This broad conception of understandability is an entirely correct result, since by its very nature symbolic conduct frequently does not lend itself to a “particularized message.”<sup>145</sup> For example, the burning of an American flag outside the 1984 Republican National Convention was held by the Supreme Court to be protected expressive conduct,<sup>146</sup> but there was not necessarily a great likelihood that a “particular” message would be understood by those who viewed it, as the *Spence* test<sup>147</sup> requires. A bystander might easily have viewed the message as “Down with Reagan,” “Down with Republicans,” or even “Down with America.” In *Spence* itself, where displaying an upside-down American flag with a peace sign affixed to it was protected expressive conduct,<sup>148</sup> the casual viewer might discern a meaning differing from the intended message. *Spence* “wanted people to know that [he] thought America stood for peace,” and meant to protest the recent invasion of Cambodia and the student deaths at Kent State University.<sup>149</sup> However, the distinction between such varying messages as “For Peace in Vietnam” and “America Should Generally Pursue a Pacifist Foreign Policy” isn’t readily apparent from the mere viewing of *Spence*’s flag. These examples underscore that a strict requirement of a readily understandable “particularized message” would fail to protect even inarguably expressive conduct.

Expressive conduct is not truly protected by the First Amendment if it is only protected to the extent that it conveys a particularized message easily understood by the population at large. The symbolic conduct cases stand for the recognition that

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<sup>143</sup> *Chalifoux*, 976 F. Supp. at 665.

<sup>144</sup> *Spence*, 418 U.S. at 410-11.

<sup>145</sup> *Cf. Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1135 (2009) (rejecting the idea that a city’s display of the Ten Commandments necessarily imparts a religious message: “Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. . . . [I]t frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure . . .”).

<sup>146</sup> *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

<sup>147</sup> *Spence*, 418 U.S. at 410-11.

<sup>148</sup> *Id.* at 410.

<sup>149</sup> *Id.* at 408.

some conduct is protected free speech, despite the fact that conduct, by its very nature, cannot have the particularity and understandability made possible by the written and spoken word.

## 2. Is Sagging Expressive Conduct?

If expressive conduct proclaiming “I am a Christian”<sup>150</sup> and “For Peace in Vietnam”<sup>151</sup> is to be given protected status under the First Amendment, there is no principled way to distinguish clothing imparting a similar message. In other words, the particular type of conduct at issue should not matter, as long as the conduct communicates a message. If Spence’s peace-sign-on-American-flag symbol were instead printed on a t-shirt, the result should be the same. So the question is whether the conduct of wearing clothing such as saggy pants is expressive.

Despite the potential hazards of a strictly applied *Spence* test,<sup>152</sup> potential litigants can make a straightforward case that wearing saggy pants is expressive conduct. Among the most common forms of communication utilized by humanity on a daily basis is the medium of clothing and personal appearance. As Gowri Ramachandran has noted in an influential article, our personal appearance imparts a message to the great majority of silent passersby: it is a means by which we define and communicate aspects of our identity.<sup>153</sup> Personal appearance is a kind of performance,<sup>154</sup> and fashion is a kind of language.<sup>155</sup> Through our clothes, we communicate such things as our race, gender, sexual orientation, class, occupation, and membership in other identity categories and subcultures.<sup>156</sup> Thus, the UPS deliveryman’s uniform imparts a message concerning his place of employment and reason for ringing the

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<sup>150</sup> See *supra* notes 140-143 and accompanying text (discussing *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997)).

<sup>151</sup> See *supra* notes 146-147 and accompanying text (discussing *Spence v. Washington*, 418 U.S. 405, 408 (1974)).

<sup>152</sup> *Spence*, 418 U.S. at 410-11.

<sup>153</sup> 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).

<sup>154</sup> *Id.* at 18-26.

<sup>155</sup> *Id.* at 46.

<sup>156</sup> *Id.* at 19, 41. But see *City of Dallas v. Stanglin*, 490 US 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

doorbell. This is understood by the intended recipient, who opens the door. The police officer's uniform identifies her to the public as a police officer and may deter crime. In turn, the public may seek out the officer's help, all without the need for a redundant sign declaring "I am a police officer." The conservative suit of a lawyer or politician is intended to communicate professionalism, trustworthiness, and seriousness of purpose. Peyton Manning's receivers need no sign advertising their employment with the Indianapolis Colts football franchise. The homeless person's poverty is usually heartbreakingly obvious without a spoken word. The upper-class fashionista may easily convey her class and interest in high fashion through Manolo Blahnik shoes and an Hermès handbag.

Appearances matter. To deny that fashion is speech and argue that clothes are purchased and worn based on mere comfort and price considerations is to ignore human experience. The fashion, advertising, and other industries ranging from hairdressing to image consulting are predicated upon the notion that personal appearance imparts a message. It is self-evident that stiletto heels and neckties are not the most comfortable clothing options; if speech were not part of personal appearance, we would wear sweat suits or jeans to all occasions. If all fashion is speech, it follows a priori that the wearing of saggy pants is also speech.

Furthermore, sagging indeed expresses a particularized message. As previously noted,<sup>157</sup> the style was originally adopted by inner city African-Americans to express identification with urban gang and prison culture.<sup>158</sup> The style subsequently was adopted by hip-hop music artists.<sup>159</sup> The broad popularity of hip-hop has spread the style to the genre's adherents.<sup>160</sup> Thus, the wearing of sagging pants communicates identification with the hip-hop music subculture or an

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<sup>157</sup> See *supra* notes 17-18.

<sup>158</sup> Trebay, *In Jailhouse*, *supra* note 18 (discussing the influence of prison uniforms on street style).

<sup>159</sup> Neil Strauss, *For Every Beat There Is a Fashion*, N.Y. TIMES, Feb. 26, 1995, at 39.

<sup>160</sup> Trebay, *Taking Hip-Hop*, *supra* note 21 (noting that "[t]he history of style in the late 20<sup>th</sup> century ... is substantially the history of hip-hop," and any survey of fashion in the last two decades could not omit the importance of "track suits, sweat clothes, wrestling, boxing or soccer shoes, designer sneakers, *outsized denims*, prison-style jumpsuits, *underwear worn above the trouser waistband*, do-rags, cargo pants, messenger bags, dreadlocks, cornrows, athletic jerseys, Kangol caps") (emphasis added).

affiliation with urban gang culture, or both. As the *Bivens* court put it, saggy pants express a “link with [one’s] black identity, the black culture and the styles of black urban youth.”<sup>161</sup> As discussed in Part II.B.1., *supra*, the *Spence* test has proved to be an elastic concept and is in tension with other Supreme Court cases protecting speech with no readily understandable “particularized message,” if not the facts of *Spence* itself. As the Supreme Court said in *Hurley*, “a narrow, succinctly articulable message is not a condition of constitutional protection.”<sup>162</sup> If “I am for peace in Vietnam”<sup>163</sup> or “I am a Christian”<sup>164</sup> is particular enough for First Amendment protection, “I am a hip-hop fan” or “I am an African-American youth” should also suffice.

Moreover, any government defense that saggy pants are not expressive conduct is at odds with the government approach to preventing gang violence. Many school districts ban “gang-related” apparel, which may include saggy pants, under dress codes designed to reduce gang violence.<sup>165</sup> At least one city has enacted a local ordinance prohibiting the wearing of “known gang colors, emblems, or other insignia.”<sup>166</sup> One county in New Mexico authorized the police to exclude members of the public wearing backwards hats under a “zero tolerance” approach to gang activity at the county fair.<sup>167</sup> In the law of criminal procedure, saggy pants are part of the totality of the circumstances which may arouse a reasonable suspicion that a member of the public may pose a safety threat, thus

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<sup>161</sup> *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 560-61 (D.N.M. 1995).

<sup>162</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557, 569 (1995).

<sup>163</sup> See *supra* notes 146-147 and accompanying text (discussing *Spence v. Washington*, 418 U.S. 405, 408 (1974)); see also *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (recognizing that the wearing of black armbands to protest the Vietnam War was protected speech).

<sup>164</sup> See *supra* notes 140-143 and accompanying text (discussing *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997)).

<sup>165</sup> See, e.g., *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1305 (8th Cir. 1997) (challenged dress code stated that “[g]ang related activities such as display of ‘colors’, symbols, signals, signs, etc., will not be tolerated on school grounds”); *Chalifoux*, 976 F. Supp. at 664 (challenged school dress code prohibited “gang-related apparel” such as “[o]versized apparel, including baggy pants which are worn low on the waist”); *Bivens*, 899 F. Supp. at 558 (challenged dress code prohibited the wearing of sagging pants); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1463 (C.D. Cal. 1993) (challenged school dress code provided that “[c]lothes shall be sufficient to conceal undergarments at all times”).

<sup>166</sup> *City of Harvard v. Gaut*, 660 N.E.2d 259, 260 (Ill. App. Ct. 1996).

<sup>167</sup> *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1236-37 (D.N.M. 2000). For a discussion of the First Amendment claim in this case, see *infra* note 188 and accompanying text.

justifying a patdown search.<sup>168</sup> As these examples illustrate, the government clearly finds that the dress of gang members has a communicative element, or there would be no inference of gang membership from the wearing of clothes. Christopher M. LaVigne makes the same point in his analysis of the *Chalifoux* decision:

School boards have justified prohibitions on gang-related apparel because of the threat of violence between rival gangs. For this threat of violence truly to exist, the [gang] symbols must be understood by those who view them. If individuals cannot comprehend the message of these symbols, or if one gang member cannot ascertain the affiliation of another gang member based upon what they are wearing, why bother regulating the symbols? *It stretches credibility for the state to argue that this form of symbolic speech needs to be suppressed because of the danger the message presents, and then to turn around and argue that these symbols are not even speech because there is no identifiable message.*<sup>169</sup>

### 3. The Government Interest in Prohibiting Saggy Pants

A detailed evaluation of the governmental interest justifying a saggy pants ordinance is difficult in the context of this Note's generalized treatment of the issue across jurisdictions. However, a few interests emerge as likely justifications based on local officials' statements. It bears repeating that this Note's scope is confined to the constitutionality of saggy pants laws as they apply to a person who is not revealing any flesh whatsoever, but merely has visible undergarments above the waistband of the wearer's pants or shorts.

The most common justification for outlawing saggy pants is combating indecency and immorality, i.e., that society should be shielded from the sight of exposed underwear.<sup>170</sup>

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<sup>168</sup> State of Oregon v. Miglavs, 90 P.3d 607, 612-13 (Or. 2004) (“[A] particular style of attire may be a circumstance that, when considered in the overall context or totality of the circumstances of a police-citizen contact, contributes to the reasonableness of an officer’s safety assessment.”). For a broader treatment of the problems of racial profiling by police, see Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004) and Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265 (1996).

<sup>169</sup> Christopher M. LaVigne, Comment, *Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment*, 51 BAYLOR L. REV. 389, 409-10 (1999) (emphasis added).

<sup>170</sup> See, e.g., Parker, *supra* note 2 (quoting the sponsor of a proposed ordinance in Opa-locka, Fla., referring to sagging as “not decent”); Lacour, *supra* note 7 (reporting that the sponsor of the defeated ordinance in Charlotte, NC, said its purpose was to



Other asserted interests include economic development,<sup>171</sup> improving the job prospects and character of local youth,<sup>172</sup> and discouraging criminality.<sup>173</sup>

At first blush, saggy pants laws might seem to be content-neutral regulations of conduct, thus making the *O'Brien* test's intermediate scrutiny apply.<sup>174</sup> In *Barnes v. Playtime Theaters, Inc.*, a plurality opinion of the Supreme Court said that indecent exposure laws are content-neutral, as they are justified by society's interest in order and morality, rather than the suppression of free expression.<sup>175</sup> However, a majority of the Court has never held that morality alone was an interest that justified the suppression of speech.<sup>176</sup> Along these lines, the Court has deemed a facially content-based zoning law that regulated only the location of adult movie theaters to be content-neutral because it was justified by the content-neutral desire to control the "secondary effects" of such theaters, such as crime and reductions in property values and quality of life.<sup>177</sup> Thus, cities with saggy pants ordinances might

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make sure "clothing didn't [violate] standards of decency"); Mickle, *supra* note 46, at 1 (quoting the Flint, Mich., police chief as referring to saggy pants as "immoral self-expression").

<sup>171</sup> Editorial, *Saggy Pants Shouldn't Throw Village for a Loop*, CHICAGO SUN-TIMES, July 22, 2008, at 21 (noting that Lynwood, Ill., village officials hope that a saggy pants ordinance "will help attract major retailers and boost economic development" by discouraging saggies); Hollinshed, *Baggy Pants*, *supra* note 42 ("Officials said one reason for the ordinance was that saggy pants gave potential developers a bad impression of the city.").

<sup>172</sup> Hollinshed, *supra* note 42 (noting that the police force of Pine Lawn, Missouri, is explaining to the public that "saggy pants could hurt someone's chances of getting a job"); Bellantoni, *supra* note 35 (noting that the sponsor of the defeated saggy pants bill in Virginia said he wanted to improve the character of young persons wearing saggy pants); Parker, *supra* note 2 (characterizing the saggy pants laws movement as "fueled by growing worries among lawmakers that sloppy dress by America's youth could be related, no matter how indirectly, to delinquency, poor learning, and crime.").

<sup>173</sup> See, e.g., William Lee, *Village Cracks Down on Exposed Undies*, CHICAGO SUN-TIMES, Aug. 14, 2008, at 18 (stating that the proposal for a saggy pants ordinance in Midlothian, Ill., was "fueled by residents' concerns that sagging pants is indicative of a gang problem in the village"); Ben Schmitt, *ACLU Prepares to Take Cops to Court over Saggy Pants*, DETROIT FREE PRESS, July 21, 2008 (reporting that the police chief in Flint, Mich., said enforcing the city's disorderly conduct ordinance against saggies can give police probable cause to search for evidence of other crimes such as weapon or drug possession).

<sup>174</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>175</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569-70 (1991) (plurality opinion).

<sup>176</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 970 (16th ed. 2007).

<sup>177</sup> *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986); see also *City of Erie v. PAP's A.M.*, 529 U.S. 277, 294 (2000) (plurality opinion) (using "secondary effects" analysis).

claim that prohibiting sagging is justified by combating the evils of indecency, as well as alleged secondary effects like criminality and reduced retail trade. However, a closer analysis reveals that such laws are content-based because they subject only one type of message to penalty: visible underwear is illegal, but visible swim trunks or shorts covering the same area are legal.

Under the *O'Brien* test's intermediate scrutiny, in order for the restriction on speech to be upheld, the asserted governmental interest must be substantial or important and the means chosen to promote that interest must be "narrowly tailored to serve the government's legitimate, content-neutral interests."<sup>178</sup> While the governmental interest in preventing public nudity is undoubtedly substantial,<sup>179</sup> the same argument does not carry over to the mere sight of underwear. Underwear which obscures all flesh is no different than shorts or swim trunks, which cover the same area. In reality, the government interest in prohibiting saggy pants is in combating the "idea" of underwear, not the sight of flesh. The "important" government interest behind saggy pants laws is in dictating the fashion choices of the citizenry, not in prohibiting public nudity. Hence, the government interest *is* related to the suppression of expression. Even if a court found such laws to be content-neutral, the under-inclusive nature of saggy pants laws, which prohibit underwear but not shorts or swimwear, indicates that such laws are not closely tailored to the government interest, thus failing the *O'Brien* test.

With regard to the secondary effects argument, the shortcomings of "narrow tailoring" are magnified. A city would be hard-pressed to find evidentiary support<sup>180</sup> for *any* secondary effects of saggy pants, much less a link between visible

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<sup>178</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

<sup>179</sup> *Barnes*, 501 U.S. at 568-72 (plurality opinion).

<sup>180</sup> Under the secondary effects analysis of *Renton* and *City of Erie*, some modicum of evidentiary support is needed to tie the harmful secondary effects to the expressive conduct. See *City of Erie*, 529 U.S. at 296 (plurality opinion) ("In terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'" (quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986))); see *also id.* at 310-16 (Souter, J., concurring in part and dissenting in part) (criticizing the plurality for upholding the ban on nude dancing when "the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy").

underwear and a lack of economic development. It strains credulity to imagine a relationship between visible underwear and criminality.<sup>181</sup> Prohibiting sagging in public would not seem a closely tailored mechanism to improve the citizenry's performance at job interviews.

As anti-sagging laws can only be truly justified by a government interest in suppressing the indecent and offensive message that displaying one's underwear expresses, strict scrutiny should apply. Strict scrutiny by the courts will mean that the saggy pants ordinance will survive only if it is necessary to serve a compelling state interest and is narrowly tailored to serve that interest.<sup>182</sup> As just discussed, even under the more relaxed intermediate scrutiny of the *O'Brien* test, it is doubtful whether a city could establish an "important" government interest justifying a ban on saggy pants, much less show that such laws are closely tailored to the interest. Therefore, it is hard to see how a saggy pants ordinance would pass the "most exacting scrutiny"<sup>183</sup> given to content-based regulations of speech.

Under strict scrutiny, saggy pants ordinances should be easily invalidated, as the Supreme Court has made abundantly clear that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>184</sup> The First Amendment places the burden on the offended public, rather than the offensive speaker.<sup>185</sup> More concretely, as between ignoring the offense

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<sup>181</sup> Note that mere membership in a gang or otherwise being a gangster is not a crime, absent a violation of some other substantive law. *See Lanzetta v. New Jersey*, 306 U.S. 451, 457 (1939).

<sup>182</sup> *See, e.g., Boos v. Barry*, 485 U.S. 312, 321-22 (1988); *Perry Ed. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 461 (1980).

<sup>183</sup> *Boos*, 485 U.S. at 321.

<sup>184</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

<sup>185</sup> *See Cohen v. California*, 403 U.S. 15, 21 (1971) (reversing the conviction of a man arrested for wearing a jacket in a courthouse bearing the words "Fuck the Draft": "[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that we are often 'captives' outside the sanctuary of the home and subject to

received by some viewers of saggy pants and affirmatively prohibiting sagging, the Framers of the Constitution have foreclosed the public's choice in the matter.<sup>186</sup> Accordingly, saggy pants ordinances should be found to violate the First Amendment's protection of free speech.

The outcome of a First Amendment claim, however, is by no means certain. The potential hazards of a strictly applied *Spence* test<sup>187</sup> could leave litigants wholly outside the protections of the First Amendment if a court finds sagging not to be expressive conduct.<sup>188</sup> Indeed, several courts have held that restrictions on clothing choices do not implicate the First Amendment. For example, in *Zalewska v. County of Sullivan, New York*, the Second Circuit Court of Appeals denied a claim that a uniform policy prohibiting a government employee from wearing a skirt to work violated the First Amendment.<sup>189</sup> The *Zalewska* court said that while wearing a skirt is "expressive," "it does not constitute the type of expressive conduct which would allow her to invoke the First Amendment in challenging the county's regulation because the ordinary viewer would glean no particularized message from . . . wearing a skirt rather than pants as part of her uniform."<sup>190</sup> Similarly, in *Hodge v. Lynd*, a federal district court in New Mexico found that the police did not implicate the free speech rights of a county fair patron who was excluded from the fair for wearing a backwards-facing baseball cap with no words or symbols.<sup>191</sup>

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objectionable speech. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections" (internal citations omitted) (internal quotation marks omitted).

<sup>186</sup> *Cf. id.* (referring to the offended viewers of Cohen's jacket: "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

<sup>187</sup> *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *see supra* Part II.B.1.

<sup>188</sup> There is certainly language in the Supreme Court's jurisprudence to support such a finding. *See, e.g.*, *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

<sup>189</sup> *Zalewska v. County of Sullivan, New York*, 316 F.3d 314, 319-21 (2d Cir. 2003). For a discussion of the due process claim brought in this case, *see infra* notes 228-229 and accompanying text.

<sup>190</sup> *Zalewska*, 316 F.3d at 320.

<sup>191</sup> *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1237-38 (D.N.M. 2000).

Even passing this initial hurdle of establishing sagging as symbolic conduct will still require demonstrating that the regulation fails either the *O'Brien* test or strict scrutiny.<sup>192</sup> Thus, the potential difficulties of a First Amendment challenge to saggy pants ordinances means that challengers should also assert violations of the Due Process Clause's protections of individual liberty.

### III. DUE PROCESS AND PERSONAL APPEARANCE

Saggy pants laws also implicate the Fourteenth Amendment's protection of an individual's liberty. Because they regulate what citizens may or may not wear, saggy pants ordinances may violate a liberty interest in personal appearance protected by the Due Process Clause of the Fourteenth Amendment.<sup>193</sup> Part III surveys the case law pertinent to the application of this constitutional right in the context of laws banning saggy pants, and concludes that prohibiting saggy pants is not rationally related to a legitimate government interest.

#### A. *The Due Process Liberty Interest Legal Landscape*

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."<sup>194</sup> Due process entails two separate limitations on government power: procedural due process and substantive due process.<sup>195</sup> Procedural due process refers to the procedures to be used before a person may be deprived of life, liberty, or property.<sup>196</sup> In addition, the Supreme Court has long held that the Fourteenth Amendment's Due Process Clause also restricts the substance of governmental

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<sup>192</sup> See *supra* Part II.B.3.

<sup>193</sup> The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

<sup>194</sup> U.S. CONST. amend. XIV, § 1.

<sup>195</sup> See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring); see generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 545-48 (3d ed. 2006).

<sup>196</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (holding that the government must conduct a hearing before termination of welfare benefits); see generally CHEMERINSKY, *supra* note 195, at 545-604.

regulation, and requires the government to have an adequate reason for taking away a person's life, liberty, or property.<sup>197</sup>

Substantive due process refers to the notion that some individual liberties are so important to the concept of freedom that, although not mentioned in the text of the Constitution, they are deemed to be "fundamental rights" which the government cannot infringe unless strict scrutiny is met.<sup>198</sup> For example, the Supreme Court has recognized that parents have a fundamental liberty interest in the care and custody of their children, and termination of custody rights requires a compelling government purpose, such as preventing child abuse.<sup>199</sup> If a court recognizes a liberty interest, but finds that the right is not fundamental, generally the government must only have some rational basis for passing the law which infringes upon the right, i.e. the law or regulation must have a rational relationship to a legitimate government interest.<sup>200</sup>

There is no bright-line rule for determining what substantive rights are protected by the Due Process Clause,<sup>201</sup>

<sup>197</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding a state ban on abortions unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding a ban on interracial marriages unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding a state ban on the teaching of foreign languages to children unconstitutional). Aside from the analysis of substantive due process rights in the context of individual civil rights contained herein, there is an earlier line of cases concerning substantive due process in the context of economic liberties. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a law which limited the number of hours bakers could work as violating liberty of contract). This "economic liberties" line of cases was later abandoned. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>198</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 746, 753 (1982) (recognizing that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," and specifically finding that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child" was implicated by the case); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing the right to marry as a fundamental right protected under the Due Process Clause).

<sup>199</sup> See, e.g., *Santosky*, 455 U.S. at 753; *Stanley v. Illinois*, 405 U.S. 645, 651-58 (1972).

<sup>200</sup> See, e.g., *Lee Optical*, 348 U.S. at 488 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *Meyer*, 262 U.S. at 399-400 ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.").

<sup>201</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code.").

but the Supreme Court has emphasized that fundamental rights are those which are “deeply rooted in this Nation’s history and tradition.”<sup>202</sup> For example, in *Meyer v. Nebraska*, the Court set forth its conception:

Without doubt, [due process] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>203</sup>

The liberty interest in controlling one’s personal appearance has been repeatedly invoked by litigants in due process challenges to dress codes, with varying success. In the 1960s and 1970s, numerous students and teachers challenged hair length and beard restrictions in the public schools,<sup>204</sup> and courts took widely divergent positions on the issue. For example, in *Richards v. Thurston*, the First Circuit Court of Appeals held that the suspension of a student for refusing to cut his hair violated the student’s personal liberty as protected by the Due Process Clause of the Fourteenth Amendment, and was unjustified absent unclean hair.<sup>205</sup> In *Breen v. Kahl*, the Seventh Circuit Court of Appeals found that “[t]he right to wear one’s hair at any length or in any desired manner” was a “fundamental right” protected by either the First or Ninth

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<sup>202</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

<sup>203</sup> *Meyer*, 262 U.S. at 399. To the extent the casual reader might literally construe “freedom from bodily restraint” to protect the wearer of saggy pants from being forced to apply a belt, this language refers to the fact that prisoners and those involuntarily committed to mental institutions are by definition deprived of liberty and are thus accorded procedural due process protections. See generally CHEMERINSKY, *supra* note 195, at 566-67.

<sup>204</sup> See, e.g., *Stevenson v. Bd. of Educ. of Wheeler County, Ga.*, 426 F.2d 1154, 1158 (5th Cir. 1970) (affirming suspension of students for refusal to shave based on evidence that “a failure to shave is a departure from the norm which has a diverting influence on the student body”); *Richards v. Thurston*, 424 F.2d 1281, 1286 (1st Cir. 1970) (holding that suspension of a high school student for refusing to cut his hair violated due process); *Jackson v. Dorrier*, 424 F.2d 213, 217-18 (6th Cir. 1970) (affirming suspension of long-haired students from due process and First Amendment challenges); *Breen v. Kahl*, 419 F.2d 1034, 1036-37 (7th Cir. 1969) (holding that students’ right to wear long hair is fundamental and could only be abridged by showing long hair disrupted the educational process). For an in-depth treatment of the long hair and grooming cases, see *Recent Cases*, 84 HARV. L. REV. 1702, 1702-04 & n.4 (1971).

<sup>205</sup> *Thurston*, 424 F.2d at 1285-86.

Amendments,<sup>206</sup> which could not be abridged without a showing of a “substantial justification.”<sup>207</sup> On the other end of the spectrum, the Fifth Circuit Court of Appeals in *Ferrell v. Dallas Independent School District* upheld a school regulation banning long hair from First Amendment and due process challenges, due to the “compelling” state interest in “maintaining an effective and efficient school system.”<sup>208</sup> The Supreme Court never took up the issue of whether schools may restrict the personal appearance of students and teachers, despite the circuit split.<sup>209</sup>

The only time the Supreme Court has decided a case in which a litigant asserted a due process liberty interest in personal appearance, the Court assumed without deciding that such a right did in fact exist.<sup>210</sup> In *Kelley v. Johnson*, a policeman challenged the validity of a hair grooming regulation for the male members of the Suffolk County, New York police force on both free speech and due process grounds.<sup>211</sup> The regulation contained restrictions on the style and length of hair, sideburns, and moustaches, and banned beards and goatees unless medically necessary.<sup>212</sup> The Court assumed, for the purposes of deciding the case against the policeman, that

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<sup>206</sup> The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

<sup>207</sup> *Breen*, 419 F.2d at 1036.

<sup>208</sup> *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 702-03 (5th Cir. 1968). In *Domico v. Rapides Parish School Board*, 675 F.2d 100, 101-02 (5th Cir. 1982), the Fifth Circuit Court of Appeals later held that there was a due process liberty interest in the freedom to choose one’s hairstyle.

<sup>209</sup> At least twice, Justice Douglas dissented from the denial of certiorari of a long-hair case. In *Ferrell v. Dallas Independent School District*, 393 U.S. 856, 856 (1968), he noted:

[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.

In *Oloff v. East Side Union High School District*, 404 U.S. 1042, 1042-46 (1972), Justice Douglas characterized the situation as one where “[t]he federal courts are in conflict and the decisions in disarray,” and found it “incredible that under our federalism a State can deny a student education in its public school system unless his hair style comports with the standards of the school board.”

<sup>210</sup> *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

<sup>211</sup> *Id.* at 239-41.

<sup>212</sup> *Id.* at 239-40.



“the citizenry at large has some sort of ‘liberty’ interest within the Fourteenth Amendment in matters of personal appearance.”<sup>213</sup> The Court used a rational basis standard of review, explaining that “the constitutional issue to be decided . . . is whether [the county’s] determination that such regulations should be enacted is so irrational that it may be branded ‘arbitrary,’ and therefore a deprivation of [the policeman’s] ‘liberty’ interest in freedom to choose his own hairstyle.”<sup>214</sup> The Court found that there was a rational connection between the grooming regulations and promoting public safety, as the regulations fostered similarity in appearance of police officers, which made officers more easily recognized by the public and helped inculcate an *esprit de corps* in the police force.<sup>215</sup>

However, the *Kelley* ruling explicitly noted the significance of Johnson’s status as a police officer and government employee.<sup>216</sup> The Court explained that the regulation “cannot be viewed in isolation, but rather must be considered in the context of the county’s chosen mode of organization for its police force.”<sup>217</sup> The Court distinguished claims by “the citizenry at large” from employees of the police department, calling the distinction “highly significant.”<sup>218</sup> It analogized to a case dealing with the free speech rights of government employees, and said that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>219</sup> The Court discounted any suggestion that a claim by a government employee asserting a liberty interest under the Fourteenth Amendment “must necessarily be treated . . . the same as a similar claim by a member of the general public.”<sup>220</sup>

In addition, Justice Thurgood Marshall strongly dissented from the majority opinion in *Kelley*, and was joined

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<sup>213</sup> *Id.* at 244.

<sup>214</sup> *Id.* at 247-48.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 244-45.

<sup>217</sup> *Id.* at 247.

<sup>218</sup> *Id.* at 244-45.

<sup>219</sup> *Id.* at 245 (internal quotation marks omitted) (quoting *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)).

<sup>220</sup> *Id.* at 248-49.

by Justice William Brennan.<sup>221</sup> They believed “it [is] clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear,” and found the county’s justifications lacking.<sup>222</sup> Marshall said to deny a liberty interest in matters of personal appearance “would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that . . . the Constitution was designed to protect.”<sup>223</sup> Justice Marshall referenced historical instances of authoritarian governments regulating the personal appearance of their citizens, such as Peter the Great’s “beard tax” in Russia and Libya’s threat to draft long-haired youths into the army, saying, “It is inconceivable to me that the Constitution would offer no protection whatsoever against the carrying out of similar actions by either our Federal or State Governments.”<sup>224</sup>

Since *Kelley*, courts adjudicating challenges to regulations of personal appearance have followed its rationale, giving deference to the government’s interest in regulating the appearance of government employees.<sup>225</sup> Courts have held that teachers may be fired for wearing skirts too short,<sup>226</sup> or reprimanded for refusing to wear neckties,<sup>227</sup> because of the schools’ rational interest in “promoting respect for authority and traditional values, as well as discipline in the classroom, by requiring teachers to dress in a professional manner.”<sup>228</sup> Police officers may constitutionally be reprimanded for wearing

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<sup>221</sup> *Id.* at 249-56 (Marshall, J., dissenting). In addition, Justice Lewis Powell wrote a concurring opinion to stress that the majority opinion did not hold that there was no liberty interest in personal appearance, and noted that the regulation at issue was justifiably applied to a police force, but “would be an impermissible intrusion upon liberty in a different context.” *Id.* at 249 (Powell, J., concurring).

<sup>222</sup> *Id.* at 250 (Marshall, J., dissenting).

<sup>223</sup> *Id.* at 251 (Marshall, J., dissenting).

<sup>224</sup> *Id.* at 253-54 n.4 (Marshall, J., dissenting).

<sup>225</sup> See *infra* notes 226-232 and accompanying text.

<sup>226</sup> *Tardif v. Quinn*, 545 F.2d 761, 763-64 (1st Cir. 1976). In *Tardif*, the First Circuit noted:

[W]e are not dealing with personal appearance in what might be termed an individual sense, but in a bilateral sense a contractual relationship. Whatever constitutional aspect there may be to one’s choice of apparel generally, it is hardly a matter which falls totally beyond the scope of the demands which an employer, public or private, can legitimately make upon its employees.

*Id.* at 763.

<sup>227</sup> *East Hartford Educ. Ass’n v. Bd. of Educ. of East Hartford*, 562 F.2d 838, 863 (2d Cir. 1977) (en banc).

<sup>228</sup> *Id.* at 859.

earrings, regardless of whether the ear studs are worn on or off duty.<sup>229</sup> A uniform policy requiring county-employed “Meals on Wheels” van drivers to wear pants was upheld when an employee was suspended for insisting on wearing a skirt.<sup>230</sup> The court found a rational basis for the regulation in the “safety problem” that skirts may pose to employees operating wheelchair lifts.<sup>231</sup>

On the other hand, courts have conducted a more searching inquiry into the purported rationales for dress regulations affecting the general public. The Supreme Court of Illinois held that a Chicago ordinance prohibiting a person from wearing clothing of the opposite sex with intent to conceal his or her sex was unconstitutional as applied to two transsexuals adopting a female lifestyle in anticipation of sexual reassignment operations.<sup>232</sup> The Illinois Supreme Court found the city’s twin justifications of discouraging crime and protecting public morals unsupported by any evidence linking cross-dressing with criminality or harm to society.<sup>233</sup>

In *DeWeese v. Town of Palm Beach*, the Eleventh Circuit Court of Appeals struck down a Palm Beach, Florida ordinance that prohibited appearing in public without a covering on the upper part of the body, after a male jogger who preferred to jog shirtless sued on due process grounds.<sup>234</sup> The town’s two justifications, stabilizing property values and maintaining Palm Beach’s history, tradition, identity, and quality of life, were found to be not rationally related to shirtless jogging by males.<sup>235</sup> The *DeWeese* Court suggested that regulation of the dress of citizens at large “is simply not a legitimate governmental interest,” and that the jogger’s case was indistinguishable from hypothetical laws requiring all citizens to wear brown shirts or prohibiting women from appearing in public in slacks or with bare calves—“[w]e are satisfied that such intrusions on the liberty interests of citizens at large

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<sup>229</sup> *Rathert v. Vill. of Peotone*, 903 F.2d 510, 516 (7th Cir. 1990).

<sup>230</sup> *Zalewska v. County of Sullivan, N.Y.*, 316 F.3d 314, 322-23 (2d Cir. 2003). For a discussion of the First Amendment claim brought in this case, see *supra* notes 187-188 and accompanying text.

<sup>231</sup> *Id.*

<sup>232</sup> *City of Chicago v. Wilson*, 389 N.E.2d 522, 524-25 (Ill. 1978).

<sup>233</sup> *Id.* For a general discussion of the history of sumptuary laws banning cross-dressing and the role of dress and appearance in criminal law, see Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1 (2008).

<sup>234</sup> *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1365-66 (11th Cir. 1987).

<sup>235</sup> *Id.* at 1367-68.

would not pass constitutional muster, absent identification of some rational basis which has not yet been brought to our attention and which is beyond our present imagination.”<sup>236</sup>

However, on at least one occasion, the liberty interest in personal appearance by the public at large has been subordinated to a state interest.<sup>237</sup> In *Williams v. Kleppe*, decided shortly after the Supreme Court’s decision in *Kelley v. Johnson*, the First Circuit Court of Appeals upheld a National Park Service regulation prohibiting nude sunbathing at a remote beach in Cape Cod Seashore National Park.<sup>238</sup> Brush Hollow beach, at which skinny-dipping had been tolerated for nearly fifty years, eventually grew so popular that it attracted up to 1200 sunbathers a day.<sup>239</sup> According to the court, the government’s interest in preventing environmental damage to the beach resulting from Brush Hollow’s increased popularity justified the regulation.<sup>240</sup>

#### B. *Due Process and Saggy Pants Ordinances*

As a preliminary matter, the freedom to make decisions regarding one’s personal appearance would seem to be “deeply rooted within this Nation’s history and tradition.”<sup>241</sup> Indeed, during the 1789 congressional debates over the Bill of Rights, it was assumed to exist.<sup>242</sup> When debating whether the right of assembly should be included in the First Amendment, some Framers argued that it was superfluous to expressly mention a right of assembly because it was so clear that such a right could not be restricted by the government.<sup>243</sup> Congressman Egbert Benson of New York argued for expressly mentioning the right in order to assure that it would never be infringed.<sup>244</sup> Congressman Theodore Sedgwick of Massachusetts replied:

If the committee were governed by that general principle . . . they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed

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<sup>236</sup> *Id.* at 1369-70.

<sup>237</sup> *See, e.g., Williams v. Kleppe*, 539 F.2d 803, 807 (1st Cir. 1976).

<sup>238</sup> *Id.* at 805-07.

<sup>239</sup> *Id.* at 805.

<sup>240</sup> *Id.* at 805-07.

<sup>241</sup> The quoted language is from *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

<sup>242</sup> IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 54-55 (1965).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 54.

when he thought proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.<sup>245</sup>

As Justice Thurgood Marshall later explained:

Thus, while they did not include it in the Bill of Rights, Sedgwick and his colleagues clearly believed there to be a right in one's personal appearance. And, while they may have regarded the right as a trifle as long as it was honored, they clearly would not have so regarded it if it were infringed.<sup>246</sup>

Given this history, the *Kelley* Court's assumption that the citizenry has a liberty interest in personal appearance,<sup>247</sup> and the fact that several Circuit Courts of Appeal have affirmed such a right,<sup>248</sup> litigants challenging saggy pants ordinances should be able to establish the right (thus clearing the first hurdle in a substantive due process claim). However, no court has gone so far as to declare such a right to be "fundamental." Accordingly, saggy pants laws will likely be given rational basis review, which means the laws must have a rational relationship to a legitimate government interest.<sup>249</sup> Local government has a legitimate purpose if it advances a traditional police power such as protecting safety, public health, or public morals.<sup>250</sup> However, the Supreme Court has indicated that a simple moral justification for a law may not always satisfy the requirement of a legitimate purpose.<sup>251</sup> The

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<sup>245</sup> 1 ANNALS OF CONG. 732 (Joseph Gales ed., 1834). The discussion took place in the House of Representatives on August 15, 1789.

<sup>246</sup> *Kelley v. Johnson*, 425 U.S. 238, 252 (1976) (Marshall, J., dissenting).

<sup>247</sup> *Id.* at 244 (majority opinion).

<sup>248</sup> See *Rathert v. Vill. of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990) (noting that "this circuit has held that choice of appearance is an element of liberty") (internal quotation marks omitted); *Deweese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (declaring that whether such a right exists "is not an open question in this circuit"); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982) (stating that "there is a constitutional liberty interest in choosing how to wear one's hair"); *Richards v. Thurston*, 424 F.2d 1281, 1284-86 (1st Cir. 1970) (invalidating a school's hair length regulation on due process grounds).

<sup>249</sup> See *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (explaining that "[i]f a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'" (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996))).

<sup>250</sup> See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (declaring that "[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.").

<sup>251</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating a Colorado Constitutional amendment that repealed all laws protecting gays and lesbians from discrimination).

Court has said that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,” as when Congress passed a law with the express purpose of denying food stamps to residents of hippie communes.<sup>252</sup> Obviously, a purpose of infringing upon a constitutional right such as freedom of religion or the right to vote would not be legitimate.

As noted above, while courts have generally deferred to the government’s rationale in regulating the appearance of students and government employees, no such deference has been given to equivalent restrictions on the general public.<sup>253</sup> As the Supreme Court noted in *Kelley*, this distinction is “highly significant.”<sup>254</sup>

Communities defending saggy pants ordinances will likely put forth rationales similar to those mentioned in the earlier discussion of the First Amendment issues surrounding saggy pants ordinances, namely combating indecency, discouraging criminality, improving the job prospects and character of local youth, and boosting economic development.<sup>255</sup> To these may be added rationales asserted by other cities regulating the general public dress, such as Palm Beach’s justifications for banning shirtless jogging in the *DeWeese* case: stabilizing property values and preserving the city’s history, tradition, identity, and quality of life.<sup>256</sup>

None of these justifications appear to be rationally related to prohibiting saggy pants. The Supreme Court in *Kelley* explained that the issue is whether the law’s justification “is so irrational that it may be branded ‘arbitrary.’”<sup>257</sup> Regarding indecency, it may be irrational to ban the sight of an item of clothing whose purpose is to *cover up* the reproductive organs and buttocks. It is certainly arbitrary to

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<sup>252</sup> U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973); *see also Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (invalidating a law which had no purpose other than favoring residents of Vermont over nonresidents as not furthering a legitimate state interest); *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982) (declaring that a bare interest in favoring long-time Alaska residents over new residents was not a legitimate state interest).

<sup>253</sup> *See supra* notes 232-236 and accompanying text.

<sup>254</sup> *Kelley v. Johnson*, 425 U.S. 238, 244-45 (1976); *see also Richards v. Thurston*, 424 F.2d 1281, 1286 (1st Cir. 1970) (“Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown.”).

<sup>255</sup> *See supra* Part II.B.3.

<sup>256</sup> *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367-68 (11th Cir. 1987).

<sup>257</sup> *Kelley*, 425 U.S. at 248; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government’ . . .”).

ban underwear, but not shorts or swimwear, which cover the very same area.<sup>258</sup> Similarly, there seems to be no relationship between wearing saggy pants and crime, other than the fact that some gangsters wear saggy pants. However, absent participation in an unlawful activity, being a gang member in and of itself is not a crime.<sup>259</sup>

The other justifications for sagging ordinances also lack a rational relationship to outlawing saggy pants, apart from mere conclusory assertions that they do. Prohibiting saggy pants does not appear rationally related to improving the character and morality of local youth, much less improving their job prospects.<sup>260</sup> It is hard to conceive of evidentiary support for a relationship between property values or a lack of economic development and saggy pants.<sup>261</sup> Likewise, a local history or tradition of requiring citizens to maintain their pants at waist level would be hard to substantiate.<sup>262</sup>

At bottom, it would appear the only justification for saggy pants ordinances is the city's interest in regulating the personal appearance of its citizens to conform to the city's taste. This, as the Eleventh Circuit Court of Appeals suggested in *DeWeese*, "is simply not a legitimate governmental interest."<sup>263</sup> As the Supreme Court stated over a hundred years ago, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."<sup>264</sup> More recently, in his *Kelley*

<sup>258</sup> Cf. *supra* Part II.B.3.

<sup>259</sup> See *Lanzetta v. New Jersey*, 306 U.S. 451, 457 (1939) (striking down a New Jersey statute making it a crime to be a gangster); see also Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 281-82 (1996); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 918-20 (1982) ("The First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another.").

<sup>260</sup> Cf. *Richards v. Thurston*, 424 F.2d 1281, 1286 (1st Cir. 1970) (declaring that the court "see[s] no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior.").

<sup>261</sup> Cf. *DeWeese*, 812 F.2d 1365, 1367 (11th Cir. 1987) (finding that property values were not rationally related to presence of shirtless joggers).

<sup>262</sup> Cf. *id.* at 1367-68 (noting the lack of evidentiary support for a city's "history or tradition requiring men to wear a shirt when toplessness is appropriate").

<sup>263</sup> Cf. *id.* at 1369.

<sup>264</sup> *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891); see also *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived . . . [i]t may be as close to the heart of the individual as the choice of what he eats, or wears, or reads.").

dissent, Justice Thurgood Marshall observed that “[i]f little can be found in past cases of this Court or indeed in the Nation’s history on the specific issue of a citizen’s right to choose his own personal appearance, it is only because the right has been so clear as to be beyond question.”<sup>265</sup>

Thus, saggy pants laws violate due process, as they strike at the very heart of each citizen’s liberty.<sup>266</sup> A constitution which protects freedoms exercised only infrequently, such as voting or speaking out in dissent, surely should protect a citizen’s choice in daily attire. There is no self-evident justification for such laws aside from furthering a government interest in regulating the fashion choices of the public, which is not a legitimate, much less rational, use of the government’s power. It is an illegitimate use of the state’s police power if the only purpose for a law is to deny a right so “deeply rooted in this Nation’s history and tradition” that the Framers of the Constitution thought it self-evident that government could not infringe.<sup>267</sup> If saggy pants laws do not violate due process, there would seem to be no principled distinction between anti-sagging laws and hypothetical laws further down the slippery slope toward compelled national conformity in dress and hairstyle.<sup>268</sup>

#### IV. CONCLUSION

Saggy pants laws impinge upon two important constitutional rights, the First Amendment’s protection of free speech and the Fourteenth Amendment’s protection of individual liberties.<sup>269</sup> Sagging, like all fashion choices, is expressive conduct intended to communicate aspects of our identity to passersby.<sup>270</sup> An individual’s right to free speech should not be limited to easily understandable or conventional speech, as human expression is

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<sup>265</sup> *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting).

<sup>266</sup> *Cf. Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” (internal quotation marks omitted) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) )).

<sup>267</sup> The quoted language is from *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

<sup>268</sup> *See Kelley*, 425 U.S. at 253 & n.4 (“[I]t would be distressing, to say the least, if the government could regulate our personal appearance unconfined by any constitutional strictures whatsoever.”); *see also supra* note 234 and accompanying text.

<sup>269</sup> *See supra* Parts II and III, respectively.

<sup>270</sup> *See supra* Part II.B.2.



not similarly limited.<sup>271</sup> The nature of the governmental interests asserted in defense of saggy pants laws are not substantial or narrowly-tailored enough to justify the intrusion upon the public's self-autonomy and rights of expression.<sup>272</sup> However, the potential shortcomings of the Supreme Court's principal First Amendment test for defining expressive conduct suggest that the more promising avenue for potential litigants is under the Due Process Clause's protections of individual liberty.

Saggy pants ordinances impermissibly encroach upon the citizen's right to liberty in matters of personal appearance.<sup>273</sup> Whatever may be the rationale for government restrictions on the dress of students and government employees, similar restrictions on the general public are an entirely different matter.<sup>274</sup> There is no rational justification for saggy pants laws aside from a raw assertion that government has an interest in dictating the fashion choices of the citizenry.<sup>275</sup> Such a bold intrusion on the very heart of personal freedom should not be countenanced in a system of government based on individual liberty.

*William C. Vandivort*<sup>†</sup>

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<sup>271</sup> See *supra* Part II.B.1.

<sup>272</sup> See *supra* Part II.B.3.

<sup>273</sup> See *supra* Part III.B.

<sup>274</sup> See *supra* Part III.B.

<sup>275</sup> See *supra* Part III.B.

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