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A Dilemma in Public High Schools: School Board Authority v. The Constitutional Right of Students to Wear Long Hair

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NOTES

A Dilemma in Public High Schools: School Board Authority v. The Constitutional Right of Students to Wear Long Hair

Whether public high school authorities are within the bounds of the Constitution in promulgating regulations governing the length of hair worn by male students[1] is a question which has given rise to a multitude of lawsuits in federal courts.[2] At first glance, one might label this a trivial problem; however, a closer examination will reveal that it is indeed one of considerable magnitude.[3] Not only does it have broad constitutional ramifications,[4] but the federal appellate courts have become sharply divided on the issue.[5] Due to this conflict, it seems inevitable that the Supreme Court will eventually grant certiorari[6] and rule on the constitutionality[7] of such restrictions on the personal

1. "Although the regulations differ in language, they essentially require that the hair should not hang below the collar line in the back, the ears on the side, or the eyebrows in front." Freeman v. Flake, 448 F.2d 258, 259 (10th Cir. 1971).

2. "Regulations of hair styles of male students in state public schools is becoming a matter of concern to federal courts if one is to judge by the ever increasing litigation on the subject or by the days of court time expended, and the lengthy briefs presented. . . ." *Id.*

3. Justice Douglas, dissenting from a denial of certiorari in *Freeman v. Flake*, 405 U.S. 72 (1972), stated that: "I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights."

4. This problem may not only produce resounding repercussions in the area of school discipline itself, but should cause a re-evaluation of state authority and actions which encroach upon personal liberties and invade the private lives of our citizens.

5. Hair regulations have been invalid in the following circuits: First Circuit, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Third Circuit, Stull v. School Board, 459 F.2d 339 (3d Cir. 1972); Fourth Circuit, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Seventh Circuit, Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Eighth Circuit, Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

Those circuits ruling in favor of the regulations include: Fifth Circuit, Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); Sixth Circuit, Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); Ninth Circuit, King v. Saddleback Jr. College School Dist., 445 F.2d 932 (9th Cir. 1971); Tenth Circuit, Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971).

6. Thus far the Supreme Court has denied certiorari in six cases: Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 71 (1972); Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972); Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Ferrell v. Dallas I.S.D., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

7. Judge Wisdom, dissenting in *Karr v. Schmidt*, 460 F.2d 609, 619 n.1 (5th Cir. 1972), stated that " 'the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. . . .' United States v.

liberties of students. Therefore, it becomes important to analyze the decisions of the federal circuits in order to gain an insight into future litigation.

It is evident from the opinions of the federal circuits that the controversy can be reduced to one basic issue—whether there is a "fundamental"[8] right to wear one's hair at the length he chooses while attending public high school. To decide whether the court has the power to hear these cases, or, having asserted jurisdiction, to determine whether such a regulation is arbitrary or reasonable, the answer to this question is of primary importance.

The initial inquiry in the hair length cases concerns the power of the federal courts to adjudicate this issue. The Tenth Circuit has ruled that it does not "directly and sharply implicate basic constitutional values . . . ,"[9] and thus is "not cognizable in the federal courts. . . ."[10] Taking a similar position, the Fifth Circuit has concluded that such complaints can be immediately dismissed "for failure to state a claim for which relief can be granted."[11] Finding no "fundamental" right involved, these courts

Carver, [260 U.S. 482, 490 (1923)]. . . . It is particularly fitting to recall this maxim when '[t]he federal courts are in conduct [*sic*] and the decisions in disarray,' as they are in their treatment of the problem before us today. The Supreme Court is responsible for ensuring that constitutional rights are uniform throughout this nation; it is hard to believe that the Court will close its eyes eternally to the disparate recognition now being given the constitutional rights of students who quite fortuitously inhabit different judicial circuits."

8. The Supreme Court has traditionally stated that the fourteenth amendment incorporates "the principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamentally." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). In dissenting from the majority's ruling in *Karr*, 460 F.2d 609, 619 (5th Cir. 1972), Judge Wisdom stated that his "differences with the Court's understanding of 'fundamental' rights are differences of legal attitude and philosophy"; quoting Judge Learned Hand who defined "fundamental" as a word "whose office usually, though quite innocently is to disguise what [judges] are doing and impute to it a derivation far more impressive than their personal references, which are all that in fact lie behind the decision." L. Hand, *The Bill of Rights 70* (1958). From this language it becomes apparent that what is a "fundamental" right defies precise definition.

9. Freeman v. Flake, 448 F.2d 258, 262 (10th Cir. 1971), *quoting from* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

10. 448 F.2d at 262.

11. Karr v. Schmidt, 460 F.2d 609, 618 (5th Cir. 1972). In this case, the Fifth Circuit adopted a per se rule that hair regulations are constitutional. The court, however, noted that if the regulations are "wholly arbitrary" or enforced in a discriminatory manner, the rule of per se validity would not apply. This language makes it unclear exactly what the effect of the Court's decision will be. In light of the fact that the court's rule will be applied *without evidentiary hearings*, it is submitted that it will be impos-

have decided that this matter is best left to the wisdom and discretion of public school authorities,[12] rather than the federal judiciary.[13]

The majority of the federal circuits have not denied petitioners a forum for such litigation and have determined that hair regulations are properly reviewable in the federal courts.[14] However, while asserting jurisdiction in such cases, the Sixth and Ninth Circuits[15] have joined the Fifth and Tenth[16] in ruling that there is no "fundamental" right to wear one's hair at the length he chooses while attending public high school. On the

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sible to determine if a given regulation under the circumstances is "wholly arbitrary" or discriminatory. Thus the rule would appear both confusing in terms of future litigation and contradictory to the court's position that the federal courts are not faced with a justiciable issue giving them jurisdiction. These pleadings do raise questions of constitutional dimension and the determination of whether a given regulation is "arbitrary" can only be made by a consideration of the facts and circumstances of each case. The court's adoption of a per se rule of validity would appear to be "arbitrary" in itself.

12. Justice Black, acting as Circuit Justice for the Fifth Circuit, denied the petition to vacate a stay of injunction pending appeal of the decision in *Karr v. Schmidt* and stated that: "[t]here is no direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the States of their traditionally recognized power to run their school system in accordance with their own best judgment as to the appropriate length of hair for students. . . . There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities. . . ." Karr v. Schmidt, 401 U.S. 1201, 1202 (1972).

13. "We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem if it exists, is one for the states and should be handled through state procedures." Freeman v. Flake, 448 F.2d 258, 259 (10th Cir. 1971).

14. Judge Lay, concurring in *Bishop v. Colaw*, 450 F.2d 1069, 1078 (8th Cir. 1971) said: "[O]ne can be somewhat troubled with the fact that overloaded federal dockets are further burdened with cases which center their controversies on the length of a school boy's hair. It may well seem appropriate that this issue does not involve a question of substantial constitutional dimension . . . or that such problems should be left to school authorities. [Citation omitted.] Nevertheless, a state's invasion into the personal rights and liberty of an individual, of whatever age or description, should present a justiciable issue worthy of federal review. There is little doubt that this regulation seeks to restrict a young person's personal liberty to mold his own lifestyle through his personal appearance. To say that the issue is not 'substantial' turns a deaf ear to the basic values of individual privacy and the freedom to caricature one's own image. Our institutions do not rely on submerging individual personality in order to create an 'idealized' citizen."

15. *See* note 5 *supra*.

16. *Id.*

other hand, the First, Third, Fourth, Seventh, and Eighth Circuits[17] hold that hair regulations do implicate, and in some cases infringe on a constitutionally protected right of students; however the various analyses differ as to the nature and source of this right.

Of the different bases presented for the existence of such a constitutional right, the one most frequently asserted stems from the first amendment. The issue is whether the length of one's hair is a form of "symbolic speech" protected by that amendment. "It is argued that the wearing of long hair is symbolic speech by which the wearer conveys his individuality, his rejection of conventional values, and the like."[18] Generally, however, this argument has been refuted by reliance on *Tinker v. Des Moines Independent School District*,[19] wherein the Supreme Court seemed to distinguish the wearing of long hair from other more explicit expressions of symbolic speech.[20] Some courts feel that this distinction in *Tinker* "was intended to delimit the outer reach of the Court's holding,"[21] and, therefore, the first amendment does not guarantee such a right.[22] Probably the most prevalent view was stated in the First Circuit's conclusion that while recognizing "that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression of disdain for conventionality, . . . we reject the notion that . . . hair length is of sufficiently com-

17. *Id.*

18. Karr v. Schmidt, 460 F.2d 609, 613 (5th Cir. 1972).

19. *Tinker v. Des Moines, I.S.D.*, 393 U.S. 503 (1969), involved a regulation which prohibited the wearing of black armbands by students to protest the Vietnam war. The Supreme Court found that this was a form of "symbolic speech" protected by the first amendment.

20. In *Tinker*, the Court said that "[t]he problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair styles, or deportment. . . . Our problem involves direct, primary First Amendment rights akin to 'pure speech.'" *Id.* at 507. *See also* United States v. O'Brien, 391 U.S. 367, 376 (1968), wherein another strong argument for distinguishing the wearing of long hair from symbolic speech was expressed by the Supreme Court's statement that: "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."

21. Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir. 1972).

22. The Tenth Circuit has stated that "[t]he wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas." Freeman v. Flake, 448 F.2d 258, 260 (10th Cir. 1971).

municative character to warrant the full protection of the First Amendment."[23]

A second constitutional basis arises from an expansion of the analyses in *Griswold v. Connecticut*[24] to include the right to wear long hair within a constitutionally protected zone of privacy.[25] The "penumbras"[26] analysis of Justice Douglas' majority opinion as well as the ninth amendment[27] viewpoint of Justice Goldberg have been advanced in the long hair cases. However, while recognizing that certain additional rights do exist aside from those specified in the Bill of Rights, the federal appellate courts have not placed much emphasis on either of these approaches, rejecting "the logic of expanding the right of marital privacy identified in Griswold v. Connecticut . . . into a 'right to go public as one pleases.' "[28]

"Perhaps the strongest constitutional argument which can be made on behalf of the students is based on the 'liberty'[29] assurance of the Due Process Clause of the Fourteenth Amendment." This approach follows the theory that there exist substantive constitutional rights aside from those specifically set out in the Bill of Rights.[30] These rights are said to be so "funda-

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23. Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970). (Citations omitted.)

24. 381 U.S. 479 (1965).

25. "Much of the present divergence of opinion as to the source of the right asserted can be traced to the different approaches adopted by the Justices in *Griswold*. . . . [U]nder any one of them, the conclusion follows that certain additional rights exist." Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).

26. "[The] specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [Citations omitted.] Various guarantees create zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

27. The ninth amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," but the Third Circuit has concluded that "in the absence of further guidance from the Supreme Court, we ought not to expand the Ninth Amendment beyond the notions applied to the right of (martial) privacy as expressed in *Griswold*." Stull v. School Board, 459 F.2d 339, 347 (3d Cir. 1972).

28. Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970). [Footnote omitted.]

29. Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971).

30. "[I]t is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the Court to preclude the existence of other substantive rights implicit in the 'liberty' assurance of the Due Process Clause." Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970).

mental" as to fall within the "concept of ordered liberty"[31] applicable to the states through the due process clause of the fourteenth amendment. The First Circuit, in adopting this theory, stated that " 'liberty' seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty."[32] The court concluded that "within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes."[33] The Third Circuit[34] has also expressed its confidence that the "liberty" assurance of the fourteenth amendment offers the most convincing constitutional source for such a right.

While finding that a "fundamental" right to choose one's hair length does exist, the Fourth, Seventh, and Eighth Circuits[35] have found it unnecessary to specifically state its constitutional origin. The Seventh Circuit concluded that "whether this right is designated as within the 'penumbras' of the first amendment freedom of speech, . . . or as encompassed within the ninth amendment as an 'additional fundamental right[s] . . . which exists alongside those fundamental rights specifically mentioned in the first eight constitutional amendments,' . . . it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment."[36] Using similar reasoning, the Eighth Circuit stated that "[a] close reading of these cases reveals . . . that the differences in approach are more semantic than real. The common theme underlying decisions striking down hair-style regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed rights."[37]

Whatever constitutional basis has been advanced for this

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31. The fourteenth amendment incorporates those principles "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

32. Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

33. *Id.* at 1285.

34. Stull v. School Board, 459 F.2d 339 (3d Cir. 1972).

35. *See* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

36. Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969). [Citations omitted.]

37. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).

right, the Fifth, Sixth, Ninth, and Tenth Circuits[38] have denied that it is of "fundamental" significance. Since "[n]o apparent consensus exists among the lawyers for the students as to what constitutional provision affords the protection sought,"[39] they conclude that there is no constitutionally protected right to wear long hair while attending public high school.[40]

Merely deciding if there does exist such a "fundamental" right does not end the inquiry into the constitutionality of hair-length regulations. This determination becomes important because the characterization of this right weighs heavily on the evidentiary burden required to satisfy the due process and equal protection clauses of the fourteenth amendment.

In regard to the burden of proof, it appears that the equal protection clause has generally not been relied upon to strike down hair length regulations. However, the Seventh Circuit[41] has ruled that such regulations are violative of the equal protection clause because they are arbitrarily applied only to male students.[42] Those circuits finding no constitutionally protected right to wear long hair in public high school have generally followed the Fifth Circuit's ruling that "the classification is invalid under the Equal Protection clause only if this court can perceive no rational basis on which it is founded."[43] Under this minimum test of equal protection,[44] if the stated objectives of health, safety, and the prevention of disruptions in the educa-

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38. *See* note 5 *supra.*

39. Freeman v. Flake, 448 F.2d 258, 260 (10th Cir. 1971).

40. Judge Boreman, dissenting in *Massie v. Henry*, 455 F.2d 779, 784 n.1 (4th Cir. 1972), stated: "The general confusion, noted by the majority, as to precisely which constitutional right, if any, is involved when a student is prohibited from letting his hair grow to a desired length, perhaps is, in itself, indicative that there is none. Such confusion surely indicates to me that a specific constitutional right is not 'directly and sharply' implicated."

41. Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970).

42. School authorities "admitted that health and safety objectives allegedly threatened by students' long hair could be achieved through narrower rules directed specifically at problems created by long hair." They "offered no reasons why health and safety objectives were not equally applicable to high school girls" who engaged in "substantially the same activities" as boys, although "only boys had been required to cut their hair in order to attend classes." *Id.* at 1266.

43. Karr v. Schmidt, 460 F.2d 609, 616 (5th Cir. 1972).

44. The rational basis test is met if, under any possible set of circumstances, a constitutionally permissible objective will be accomplished by reasonable means. Therefore, it becomes a formidable task for a challenger to prove there is no rational basis for a given regulation.

tional process are shown to be rationally related to the hair regulations, then such regulations will be upheld.

Considering the due process clause, those circuits finding no "fundamental" right involved in these cases take a position similar to the Fifth Circuit's that "the appropriate standard of review is simply one of whether the regulation is reasonably intended to accomplish a constitutionally permissible stated objective" leaving the "challenger to show that the restriction is wholly arbitrary."[45] This seems to be in line with the Supreme Court's statement that "[l]iberty under the Constitution is necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[46]

In those cases in which a "fundamental" right is implicated, the requirements of due process and equal protection are not so easily satisfied. The Supreme Court recently stated that in such a case "the statutory classifications would have to be, not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest."[47] This higher test seems to overlap both the equal protection and due process clauses and involves a more stringent burden of proof. In the hair length cases, this entails a weighing process by the court to balance the interests of the state in its educational process against the student's right to personal liberty, *i.e.*, the right to govern the length of his hair. Looking to the Supreme Court for guidance, one finds the Court stating in *Tinker* that

> "it can hardly be argued either students or teachers shed their constitutional rights . . . at the schoolhouse gate. . . . In our system, State operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect,

45. Karr v. Schmidt, 460 F.2d 609, 616 (5th Cir. 1972).
46. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).
47. Eisenstadt v. Baird, 92 S. Ct. 1029, 1035 (1972). *See also*, Bates v. Little Rock, 361 U.S. 516, 524 (1960), in which the Supreme Court emphasized that "where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."

just as they themselves must respect their obligations to the State."[48]

Therefore, to justify infringement of student rights, school officials bear a heavy procedural burden. To demonstrate a "compelling interest" they must do more than declare the necessity of a hair length regulation. *Tinker* explains that "undifferentiated fear or apprehension of disturbance is not enough"[49] to overcome "fundamental" rights.[50] School boards would have to show that long hair would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[51] Thus, the First, Third, Fourth, Seventh, and Eighth Circuits[52] have held hair regulations invalid, finding no compelling state interest[53] to justify the intrusion on students' personal liberties.[54] Finding that the school board failed to meet its burden of proof, the Eighth Circuit stated that "the connection between long hair and the immemorial problems of misdirected student activism and negativism, whether in behavior or in learning, is difficult to see. No evidence has been presented that hair is a cause, as distinguished from a possible peripheral consequence, of undesir-

48. Tinker v. Des Moines I.S.D., 393 U.S. 503, 506-07, 511 (1969).

49. *Id.* at 508.

50. Those circuits finding that there is a "fundamental" right to wear long hair recognized that personal freedoms are not absolute. However, they have found that "to limit or curtail this or any other fundamental right, the state has a 'substantial burden of justification.'" Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969).

51. *Id.* at 509. This language was taken from the Fifth Circuit's decision in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). A school regulation forbade students to wear "freedom buttons," and the Fifth Circuit held the regulation to be invalid since there was no actual disturbance other than a "mild curiosity" on the part of the students. However, on the same day the court decided *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), wherein such a regulation was held invalid because the school officials demonstrated that the commotion was tied to "wearing, distributing, discussing and promoting the wearing" of the buttons. In the latter case, the court presumably found that such expression did "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

52. *See* note 5 *supra*.

53. "A school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year." Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970).

54. "Since the impact of hair regulation extends beyond the schoolhouse gate, the degree of state infringement on personal rights is significantly greater than in many areas of school discipline." Crews v. Cloncs, 432 F.2d 1259, 1264 (7th Cir. 1969).

able traits, or that the school board, Delilah-like, can lop off these characteristics with the locks."[55]

If school authorities can produce evidence demonstrating a connection between long hair and "actual disruptions" in the education process, this may well be considered a "compelling interest." However, the Seventh Circuit has ruled that even if disruptions are shown, long-haired students should be protected "unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct."[56] In those circuits finding a "fundamental" right to wear long hair, the requirements of due process and equal protection have yet to be met.[57]

Until the Supreme Court settles this issue, one may only speculate as to whether there exists a constitutionally protected right to wear long hair while attending public high school. There is strong interest in relieving the federal courts of the burden of this litigation and leaving such matters to the local school boards. At the same time, there is an equal desire to protect the personal liberty of students to govern their own personal appearance. At present, five circuits[58] have held that an individual does have such a "fundamental" right to govern his personal appearance,[59] which necessarily includes the right to wear one's hair at the length he chooses. Four other circuits have concluded that no such right exists.[60]

In evaluating the bases set forth for such a constitutional guarantee, one cannot say that a student's contention that such a right arises from the first amendment's protection of "symbolic speech" is without merit. While many students may wear their hair merely to keep abreast of current hairstyles, one must recognize that others undoubtedly intend long hair to be an expression of their ideas as well as their individuality. Thus far, however, the federal circuits have been reluctant to follow

55. Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971).
56. Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1969).
57. *See* note 5 *supra.*
58. *Id.*
59. "No 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." Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).
60. *See* note 5 *supra.*

this view in light of the limiting language in *Tinker* as well as the fact that most students have not asserted such intentions in their petitions. Likewise, the courts have failed to give any effect to the "forgotten" ninth amendment or to place much emphasis on the "penumbras" analysis with its various zones of privacy. To find the existence of such a "fundamental" right, the proper analysis, and surely the most consistent one, seems to lie in the traditional theory of substantive due process. Utilizing this approach it is submitted that the "liberty" concept of the due process clause of the fourteenth amendment provides the source of a "fundamental" right to wear one's hair in the length he chooses, even while attending public high school. Recognizing that such a right is not absolute, public high school authorities must demonstrate that hair regulations further a "compelling interest"[61] since they infringe the personal liberties of the students and invade into their private lives as their effect extends beyond the schoolhouse gate. Few school boards can meet this burden of proof. Thus, denying a person the benefit of a public education because of the length of his hair becomes an arbitrary discrimination violative of the equal protection[62] and due process clauses of the fourteenth amendment.[63]

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61. "[W]hat is disturbing is the inescapable feeling that long hair is simply not a source of significant distraction, and that school officials are often acting on the basis of personal distaste amplified by an overzealous belief in the needs for regulation." Comment, 84 HARV. L. REV. 1702, 1715 (1971).

62. "It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied an education in a public school because of the length of his hair." Ferrell v. Dallas I.S.D., 393 U.S. 856 (1969) (Douglas, J., dissenting). *See also* the specially concurring opinion of Judge Tuttle in Sherling v. Townley, 464 F.2d 587, 588 (5th Cir. 1972). He takes the position that the issue is not whether one has a constitutionally protected right to wear long hair, but whether a local school board has the right *"to deny to such a boy what has become a fundamental right of every American child*—a . . . high school education at public expense." Although he concurs in this per curiam due to the Fifth Circuit's en banc decision in *Karr*, Judge Tuttle states that had he been an active member of the court he would have joined the dissent in *Karr* and "would favor the court having adopted a per se rule that no such regulation can stand under the equal protection provisions of the Fourteenth Amendment on the ground that such regulations create a classification of citizens totally unrelated to the obectives of the operation of high schools."

63. Although this Note deals with hair regulations in the public high schools, it is appropriate to mention the recent Fifth Circuit decision in *Lansdale v. Tyler Jr. College*, 470 F.2d 659 (5th Cir. 1972). While purportedly reaffirming their earlier decision in *Karr*, the court found that "in the absence of a showing that unusual conditions exist, the regulation of the