"No Saggy Pants": A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets

Angelica M. Sinopole*

* J.D. Candidate 2009, The Dickinson School of Law of the Pennsylvania State University; B.A. 2005, Washington University in St. Louis. I would like to thank the individuals who contributed their time to edit this Comment. I would also like to thank my family for the love and support that they have given to me over the years.

I. INTRODUCTION

"It's freedom of speech. They can't tell nobody how to dress."[1]

The saggy-pants fashion, which involves the wearing of pants below the waistline, is believed to have originated in prison.[2] Supposedly, prison inmates were denied belts to hold up their loose prison clothing because of the belt's potential use as a means to commit suicide or as a weapon against others.[3] In the late 1980s and early 1990s, hip-hop and R&B music artists promoted the baggy style through their music videos and CD covers.[4] From there, the fashion spread through neighborhoods across the nation and was later adopted by skateboarders.[5]

In response to the growing popularity of this fashion, city councils are passing a new type of public indecency ordinance.[6] These "anti-sag ordinance[s]"[7] prohibit individuals from wearing their pants so as to reveal their undergarments in public.[8] In some instances, violators of the ordinances may be imprisoned.[9]

1. Jennifer Brett & Jeffry Scott, *Saggy-pants wearers chafe at all the attention*, THE ATLANTA J.-CONST., Aug. 24, 2007, at D1 (quoting Antonio Simmons, Atlanta resident).

2. *See Baggy Pants Crackdown Goes National*, CNN.COM, Sept. 17, 2007, http://www.cnn.com/2007/US/09/17/baggy.pants.ap/index.html; Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*., N.Y. TIMES, Aug. 30, 2007, at G1 [hereinafter *Jeans Sagging*].

3. *See* Koppel, *Jeans Sagging*, *supra* note 2.

4. *See* Dahleen Glanton, *Hackles Rise as Jeans Droop: In some cities, officials are cracking down on saggy pants with fines and even jail time*, CHICAGO TRIBUNE, Sept. 5, 2007, at C4.

5. *See Baggy Pants Crackdown Goes National*, *supra* note 2; Koppel, *Jeans Sagging*, *supra* note 2.

6. *See* Littice Bacon-Blood, Editorial, *Censorship dresses up as a decency law*, TIMES-PICAYUNE (New Orleans), Sept. 1, 2007, at 7; Brett & Scott, *supra* note 1; Thomas Korosec, *Dallas wants to hike up saggy pants: Councilman says he wants to help improve young adults' self-image*, HOUSTON CHRONICLE, Oct. 5, 2007, at 3.

7. Clarence Page, Op-Ed., *Belt Pulled Too Tight on Baggy Pants Bans*, SOUTH FLORIDA SUN, Sept. 11, 2007, at 21A.

8. *See* Delcambre, La., Ordinance 2007-04 (June 11, 2007); Mansfield, La., Ordinance 10 (Aug. 13, 2007); Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007). The language of many of the anti-sag ordinances also prohibits women from displaying their underwear or thongs above their waistbands and from wearing a shirt that reveals a bra strap. *See* Brett & Scott, *supra* note 1. However, this Comment will primarily focus on the saggy pants fashion, which these ordinances seem to generally target. *See id.*

9. *See* Delcambre, La., Ordinance 2007-04 (June 11, 2007), which reads as follows:

> Indecent Exposure
>
> (a) It shall be unlawful for any person in any public place or in view of the public, to be found in a state of nudity, or partial nudity, or in dress not becoming to his or her sex, or in an indecent exposure of his or her person or undergarments, or be guilty of any indecent or lewd behavior.

Critics of these ordinances claim that the ordinances violate First Amendment rights by targeting a particular mode of expression—clothing choice or appearance.[10] The critics rely on the idea that the First Amendment guarantees citizens the right to freely express themselves:[11] Individuals' choice of clothing, as well as other decisions relating to their personal appearance, is a form of expressing individuals' values, beliefs, identity and personality.[12] According to the critics of these ordinances, by criminalizing the wearing of saggy pants, a municipality impermissibly regulates an individual's freedom of expression.[13] Thus, the critics conclude that the anti-sag ordinances violate one's constitutional right to freedom of speech and expression.[14]

However, a constitutional challenge to the anti-sag ordinances under current First Amendment law is likely to fail, leaving the ordinances in place. This Comment sets out the First Amendment legal framework as it relates to anti-sag ordinances and considers the potential First Amendment issues faced by challengers of the ordinances. Specifically, the analysis will reference the proposed ordinance in Atlanta, Georgia[15]

(b) Any person violating any provision of this section shall, upon conviction thereof, be fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six (6) months, or both.

See also Mansfield, La., Ordinance 10 (Aug. 13, 2007), which reads as follows:

Indecent Exposure/Sagging

(a) It shall be unlawful for any person in any public place or in view of the public, to be found in a state of nudity, or partial nudity, or in any indecent exposure of his or her person or undergarments, or be guilty of any indecent or lewd behavior.

(b) Any person violating any provision of this section shall, upon conviction thereof, be fined not more than one hundred fifty ($150) dollars and court cost and/or imprisoned for no more than 15 days.

10. *See* Bacon-Blood, *supra* note 6; Brett & Scott, *supra* note 1.

11. *See* Bacon-Blood, *supra* note 6; Brett & Scott, *supra* note 1.

12. *See* Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2.

13. *See* Niko Koppel, *Fashion Police*, N.Y. TIMES UPFRONT, Oct. 1, 2007, Vol. 140, Issue 3, at 8.

14. *See* Bacon-Blood, *supra* note 6; Brett & Scott, *supra* note 1.

15. Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007), reads as follows:

(a) It shall be unlawful for any person to appear in public wearing pants below the waist which expose the skin or undergarments.

(b) Any person convicted of violating the provisions of this section shall be punished by a fine not to exceed $100.00 plus up to eight hours of work on the public streets of the city.

See also Proposed Amendment to § 106-129:

Section 1: That Section 106-129 is hereby amended by inserting a new subparagraph (4) which reads as follows:

It shall be unlawful for any person to perform any of the following acts in a public place:

(1) An act, or simulated act, of sexual intercourse;

(2) An exposure of one's genitals, or of one's breasts, if female; or

and, for ease of discussion, will treat the proposed ordinance as though it has been passed.[16] Importantly, Atlanta's proposed ordinance contains two parts: first, it seeks to add a new section to the code that specifically targets saggy pants; and second, it proposes to amend an existing section of the code to address public exposure of undergarments.

Because wearing saggy pants in a manner that exposes the wearer's undergarments is an action, it must be evaluated under First Amendment jurisprudence concerning expressive conduct.[17] Accordingly, a court must answer the following questions: (1) does the action for which the party claims First Amendment protection satisfy the threshold test for expressive conduct; and (2) if so, is the regulation a constitutional restriction on one's right to freedom of speech and expression?[18]

The First Amendment does not grant protection to all conduct merely because the speaker-actor intends for that conduct to express something.[19] The messages for which saggy-pants wearers may attempt to claim First Amendment protection are discussed *infra* Part II. Part III.A lays out the threshold test for expressive conduct, which must be satisfied in order for an action to be protected by the First Amendment.[20] Part III.B considers whether the wearing of saggy pants in a manner that

(3) The touching, caressing or fondling of the genitals, or the breast of a female.

(4) The indecent exposure of his or her undergarments.

16. Although other cities and towns have passed anti-sag ordinances, Atlanta provides an example of an ordinance in a major city. Also, more information on legislative purposes and objectives is available for Atlanta's ordinance, making for a richer discussion of its constitutionality.

Currently, the anti-sag ordinance is under consideration by the Atlanta City Council. *See* Atlanta City Council, Public Safety and Legal Administration Committee Agenda (July 1, 2008) at 11, *available at* http://apps.atlantaga.gov/citycouncil/2008/Images/Proposed/ps.pdf. After the Council introduced the legislation in August, it created a citizens' task force to study the saggy-pants ban and to make a recommendation to the Council as to whether Atlanta should or could enact the prohibition on saggy-pants. *See* Cameron McWhirter, *How Low Can They Go?*, THE ATLANTA J.-CONST., Oct. 21, 2007, at D3. In March 2008, the task force returned to the Council with a recommendation that Atlanta decline to pass the proposed ban on saggy pants and, instead, address the issues through different means. *See* Eric Stirgus, *Task Force Against Saggy Pants Ban*, THE ATLANTA J.-CONST., Mar. 2y, 2008, at D4. Since March, the ban has been tabled before the Public Safety Committee, but the Council refuses to comment on whether it will follow the task force's recommendation and table the ordinance indefinitely or whether it will choose to pass the ordinance against the advice of the task force. *See id*.

17. Eagon v. City of Elk City Oklahoma, 72 F.3d 1480, 1485 (1996) (finding that where printed and spoken words are used to communicate, the court need not engage in expressive conduct "perception and intent analysis" laid out in *Spence v. Washington*).

18. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989).

19. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968); s*ee also* Spence v. Washington, 418 U.S. 405, 409 (1974).

20. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989); Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319 (2d Cir. 2003).

reveals one's undergarments constitutes expressive conduct by evaluating the messages discussed in Part II. Part III concludes that a speaker-actor is unlikely to satisfy the threshold test for First Amendment expressive conduct.

Because saggy-pants wearing probably fails to garner First Amendment protection as expressive conduct, a court may not reach the second question—whether the anti-sag ordinance is constitutional. Without a specific set of case facts to consider, however, this Comment cannot claim that saggy pants absolutely fail to garner First Amendment protection in all circumstances.

If a court does label saggy-pants wearing as expressive conduct, thereby satisfying the threshold test, then the court will consider the constitutionality of the anti-sag ordinance.[21] The standard of review employed by the courts when examining an ordinance that allegedly infringes on First Amendment conduct depends on whether the court finds that the government enacted the regulation out of agreement or disagreement with the messages expressed by the conduct.[22] In other words, the courts consider whether the government is regulating the expressive conduct because of the content of its message.[23] Part IV discusses how the courts distinguish a content-neutral regulation from a content-based regulation. Also, Part IV sets out the standard of review courts employ when addressing each type of regulation. A content-neutral regulation is evaluated under the intermediate standard of review,[24] while a content-based ordinance is evaluated under the strict scrutiny standard.[25] Because Atlanta's ordinance could be deemed either content-neutral or content-based, Part V discusses the constitutionality of the ordinance under both standards of review. Ultimately, the Comment concludes that, should a court find saggy-pants to be protected First Amendment conduct, the ordinance cannot be sustained under either the intermediate or strict-scrutiny standard of review.

21. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989); Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319 (2d Cir. 2003).

22. *See Johnson*, 491 U.S. at 406; Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

23. *See Johnson*, 491 U.S. at 406; *Grayned*, 408 U.S. at 115.

24. *See* Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984); *Johnson*, 491 U.S. at 403.

25. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion); *Johnson*, 491 U.S. at 403.

II. BACKGROUND

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."[26] On September 25, 1789, Congress submitted twelve amendments to the states for ratification.[27] As of December 15, 1791, the states ratified ten of the original twelve amendments, and the First Amendment officially became a part of the Federal Constitution.[28] The First Amendment's prohibition against infringement on an individual's freedom of speech is directed at Congress,[29] but its protections are applicable to states through the operation of the Due Process Clause of the Fourteenth Amendment.[30]

Since its enactment, the precise meaning of the freedoms guaranteed by the First Amendment has remained unclear.[31] Moreover, the legislative history surrounding the First Amendment's enactment did not shed light on its original meaning.[32] However, one principle that is now recognized as underlying freedom of speech is the prevention of governmental interference with the "marketplace of ideas."[33] The First Amendment "prohibits government from interfering with the individual's right to receive and disseminate ideas and information, and to form and hold opinions or beliefs based upon that free exchange."[34]

Because the communication of ideas can occur through means other than the spoken or written word,[35] the First Amendment also protects certain actions that express ideas—"expressive conduct."[36] For example, the Supreme Court has found expressive conduct protected by the First

26. U.S. CONST. AMEND. I. The full text of the amendment reads as follows: "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 of the people peaceably to assemble, and to petition the Government for a redress of grievances."

27. FREEDOM OF EXPRESSION IN THE SUPREME COURT: THE DEFINING CASES, at xvii (Terry Eastland ed., Rowman & Littlefield Publishers, Inc. 2000) [hereinafter FREEDOM OF EXPRESSION].

28. FREEDOM OF EXPRESSION, *supra* note 27.

29. FREEDOM OF EXPRESSION, *supra* note 27; GEORGE ANASTAPLO, REFLECTIONS ON FREEDOM OF SPEECH AND THE FIRST AMENDMENT 64 (The University Press of Kentucky 2007).

30. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1268 (11th Cir. 2004).

31. *See* FREEDOM OF EXPRESSION, *supra* note 27, at xix. In fact, courts did not address the substantive meaning of the freedoms protected by the amendment until after Congress passed the Sedition Act of 1798, which criminalized speech against the government and public officials. *Id.*

32. FREEDOM OF EXPRESSION, *supra* note 27, at xvii.

33. FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY 18 (Sheila Suess Kennedy ed., Greenwood Press 1999).

34. *Id.* at 29-30. Freedom of speech remains a critical part of the people's right to self-government. FREEDOM OF EXPRESSION, *supra* note 27, at xix-xx.

35. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989).

36. *See* Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 158 (3d Cir. 2002).

Amendment where an individual displayed an altered American flag to indicate disagreement with his government,[37] a Vietnam-war protestor burned his draft card,[38] and where a person burned an American flag to express his political discontentment.[39] As these examples demonstrate, "expressive conduct" can potentially cover a broad range of human actions and activities; therefore, the next level of First Amendment analysis must address the kinds of conduct protected by the First Amendment.

In extending First Amendment protection to actions or conduct, the Court has recognized that actions often convey ideas just as well as actual words.[40] As discussed earlier, freedom of speech is protected in order to foster the free exchange of ideas. Accordingly, the determination of whether an action is protected by the First Amendment depends on whether the action is sufficiently communicative; in other words, does the actor intend to convey a message of some sort through the action and would others understand the message conveyed.[41] Saggy-pants wearers claim First Amendment protections for a variety of messages they believe are expressed by their saggy pants. These messages are introduced below.

First, wearers of saggy pants claim that the fashion is an "expression of who [young people] are," or a personal reflection of their identity and uniqueness as individuals.[42] Similarly, wearing saggy pants may indicate one's personal *preference* for a looser, more comfortable style of clothing.[43]

Second, some individuals wear baggy pants that sag below their waistline as a means of identifying themselves with their neighborhood roots or socio-economic background.[44] This particular style of clothing is often viewed as a "'hood tradition [or] a ghetto tradition,"[45] mostly worn by young black males, but also seen on Hispanics, Asians, and white males.[46] Along these lines, saggy pants represent the social conditions of those neighborhoods in which these young men grew up.

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

38. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

39. *See Johnson*, 491 U.S. For additional examples, see cases cited *infra* note 102.

40. *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("[Expression] conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.").

41. *See Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 409. These cases provide the test for expressive conduct discussed *infra* Part III.

42. Glanton, *supra* note 4 (quoting Adrian Bustamante, a twenty-one year-old construction worker from Georgia).

43. Brett & Scott, *supra* note 1.

44. *Id.*

45. *Id.*

46. Glanton, *supra* note 4.

As one individual commented, "[t]hat they wear their pants the way they do is a statement of the reality that they're struggling with on a day-to-day basis."[47] This reality may be marked by run-ins with the law, high numbers of unemployed and high-school dropouts,[48] low self-esteem,[49] and racial profiling.[50] Thus, the speaker-actor intends to communicate, through the wearing of saggy pants, that the wearer hails from a certain neighborhood with particular socio-economic characteristics.[51]

A third message expressed by saggy pants is identification with the black popular culture or hip-hop style.[52] This style is exhibited by the hip-hop music community in music videos.[53]

Fourth, saggy pants may communicate the wearer's rebellion against conformity with expected societal standards and rebellion against authority figures.[54] In his book, *Is Bill Cosby Right? Or Has the Black Middle Class Lost Its Mind?*,[55] Michael Eric Dyson discusses, in particular, the rebellious attitude behind the fashion of black urban youth.[56] Dyson notes that black urban youth, especially those from the working class, use style and appearance to communicate "rebellion against social convention . . . outrage, alienation and distrust of the sartorial and moral standards of adult society . . . [as well as] antiestablishment attitudes."[57] Through their appearances, black youth rebel against a society that imposes its attitudes upon black youth.[58]

Finally, for some individuals, saggy pants signify a form of civil disobedience or represent one's protest against the anti-sag ordinance itself. For example, in one newspaper interview with a hip-hop artist from Atlanta, the singer expressed outrage over Atlanta's proposed anti-sag ordinance.[59] He stated his intent to wear saggy pants during his upcoming performance in Atlanta to indicate his opposition to the

47. Koppel, *Jeans Sagging*, *supra* note 2 (quoting Dr. Benjamin Chavis, former director of the N.A.A.C.P.).

48. Glanton, *supra* note 4.

49. Korosec, *supra* note 6.

50. Brett & Scott, *supra* note 1.

51. *See* Brett & Scott, *supra* note 1; Koppel, *Jeans Sagging*, *supra* note 2 (quoting Dr. Benjamin Chavis, former director of the N.A.A.C.P.).

52. Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2 (("I think what you have here is people who don't understand the language of hip-hop") (quoting Larry Harris, Jr.)).

53. Glanton, *supra* note 4.

54. *Id.*; Brett & Scott, *supra* note 1.

55. MICHAEL ERIC DYSON, IS BILL COSBY RIGHT? OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND? 103-118 (Basic Civitas Books 2005).

56. *Id.*

57. *Id.* at 113.

58. *Id.*

59. Brett & Scott, *supra* note 1 (quoting hip-hop artist Young Joc).

proposed law.[60] Had the ordinance been in effect at the time of the concert, the artist's action of wearing saggy pants would have violated the ordinance if the pants revealed his undergarments or skin below his waist.[61] Through his conduct of wearing saggy pants, he intends to communicate his disagreement with Atlanta's anti-sag ordinance.[62]

However, despite the numerous messages that individuals believe their saggy pants express, these messages may not warrant First Amendment protection for their clothing choice. The next section of this Comment discusses why most of these messages are likely to fail the threshold test for expressive conduct, and therefore, do not implicate the First Amendment.

III. EXPRESSIVE CONDUCT ANALYSIS

When examining an ordinance that regulates expressive conduct, a court conducts a two-step inquiry: (1) whether the actions constitute expressive conduct protected by the First Amendment; and (2) whether the ordinance denies the individual the First Amendment protections afforded to the conduct.[63] The first step of the inquiry, whether the actions constitute expressive conduct, is taken up in this section; the second step, which evaluates the constitutionality of the ordinance, will be discussed *infra* Part IV.

To invoke one's rights to First Amendment freedom of expression for an action not involving the spoken or written word, the individual likely must show that the activity is protected under the First Amendment as expressive conduct.[64] In order to be protected by the First Amendment, the expressive conduct must be "'sufficiently imbued with the elements of communication to fall within the scope of the [First Amendment].'"[65] Taking a narrow view of expressive conduct, the Court consistently has rejected "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[66] Therefore, conduct may be expressive in that the person engaging in the conduct intends to communicate something; yet, that conduct may not qualify as "expressive conduct" deserving of First Amendment protection.

60. *Id.*

61. *See* Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007).

62. Brett & Scott, *supra* note 1 (quoting hip-hop artist Young Joc).

63. Texas v. Johnson, 491 U.S. 397, 403 (1989); Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319 (2d Cir. 2003).

64. *See Johnson*, 491 U.S. at 403; *Zalewska*, 316 F.3d at 319.

65. *Zalewska*, 316 F.3d at 319 (citing *Johnson*, 491 U.S. at 404).

66. United States v. O'Brien, 391 U.S. 367, 376 (1968); *see also* Spence v. Washington, 418 U.S. 405, 409 (1974).

According to the Supreme Court's test for expressive conduct, known as the *Spence-Johnson* test, an action is protected by the First Amendment if: (1) the speaker-actor intends for the conduct to express a particularized message; and (2) that message would be understood by others.[67] Part III.A discusses the general development and evolution of this test through its application by the Supreme Court and lower courts; the section also includes the debate among lower courts concerning the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[68] and the effect of this decision on the particularized message prong of the expressive conduct test. Part III.A.1 discusses the application by the various courts that have applied prong one, the particularized message requirement, to certain clothing choices and the messages for which parties have claimed First Amendment protection. Part III.A.2 provides a more in-depth discussion of the approach by these courts to the second prong of the *Spence-Johnson* test, the viewers' perceptions. Then, in Part III.B, these principles are applied to the action of wearing saggy pants and the messages for which wearers may claim First Amendment protection.

A. The Spence-Johnson *Test for Expressive Conduct*

In two notable cases, *Spence v. Washington*[69] and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court delineated the contours of the test for expressive conduct.[70] Under this test, an individual claiming an activity protected by the First Amendment as expressive conduct must show that the activity is intended to express a particularized message that would likely be understood by others.[71]

In 1974, the Court decided *Spence v. Washington*, a case in which police charged Harold Spence with violating Washington's improper-use statute.[72] Spence had displayed, outside of his apartment window, an upside down American flag with a peace symbol attached to both sides.[73] Harold Spence claimed that his actions protested the Cambodian

67. *See* discussion Part III.A.
68. 515 U.S. 557 (1995).
69. 418 U.S. at 405.
70. Neither the Supreme Court nor lower courts have uniformly applied the Spence-Johnson test. *See* Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525, 1539. However, the elements set forth in the case provide the clearest test for expressive conduct. For a short review on various academic approaches to expressive conduct and alternative tests that could be adopted by the court, *see id*. at 1539-69.
71. *See Hurley*, 515 U.S. at 569-71; *Spence*, 418 U.S. at 409.
72. *Spence*, 418 U.S. at 406-08.
73. *Id.* at 406.

invasion and the Kent State University killings, while also demonstrating his belief that America "stood for peace."[74] The Court found that Spence's display of the American flag constituted a protected activity under the First Amendment.[75]

The Court recognized the symbolic and communicative nature of the American flag as well as the context in which Spence's display took place.[76] The Court stated that in order to constitute expressive conduct, the individual must display "[a]n intent to convey a particularized message [through his actions] . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it."[77] Harold Spence intended to express his disagreement with the U.S. government's actions in Cambodia and at Kent State; because of the controversial political situation, other citizens were likely to understand that message.[78] Therefore, his conduct was protected by the First Amendment.

Then, in 1995, the Supreme Court seemed to alter the particularized message requirement set forth in *Spence* when it decided *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[79] In *Hurley*, gay, lesbian and bisexual descendents of Irish immigrants in Boston formed the group called GLIB.[80] GLIB submitted an application to march in Boston's 1992 St. Patrick's Day Parade.[81] However, the South Boston Allied War Veterans Council, a private organization with the authority to organize the parade, denied GLIB's 1992 application.[82] A state court order permitted GLIB to march in 1992.[83] When GLIB submitted an

74. *Id.* at 408.
75. *Id.* at 409-10.
76. *Id.* at 410.
77. *Id.* at 410-11; *see also* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1268 (11th Cir. 2004); Conward v. Cambridge Sch. Comm. 171 F.3d 12, 22 (1st Cir. 1999).

The Court reaffirmed this two-prong test in Texas v. Johnson, 491 U.S. 397 (1989). In *Johnson*, the appellant protested the Reagan administration and its policies by burning an American flag during a demonstration outside the 1984 Republican National Convention. *Id.* at 399. He was convicted under a Texas law that prohibited desecration of the national flag. *Id.* at 399-400. Applying the *Spence* test, the Court found that Johnson intended his action in burning the flag to express his political discontent and that the context in which the flag-burning took place rendered the message "overwhelmingly apparent" to its audience. *Id.* at 405-06. Thus, the test is sometimes referred as the *Spence-Johnson* test for expressive conduct. *See* Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 159 (3d Cir. 2002).

78. *Spence*, 418 U.S. at 410-11.
79. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569-71 (1995).
80. *Id.* at 561.
81. *Id.*
82. *Id.*
83. *Id.* at 560-61.

application to march in the 1993 St. Patrick's Day parade, the Council denied GLIB's 1993 application.[84] GLIB filed a suit against the Council and the City of Boston claiming, among other things, that by excluding GLIB from the parade, the Council impermissibly abridged GLIB members' freedom of expression and also violated the public accommodations law, which prohibited sexual orientation discrimination in places of public accommodation.[85]

On appeal before the Supreme Court, the Council challenged the state court's application of the Massachusetts' public accommodations law.[86] The Council claimed that the law required the private organization to alter the message conveyed by its parade.[87] Agreeing with the Council's position, the Court held that applying the public accommodations law would essentially require the private organization to allow GLIB to march in the parade (and thereby express its ideas concerning sexual orientation) despite the Council's own desired message.[88] By mandating GLIB's inclusion in the parade, the public accommodations law effectively altered the message that the Council intended to express through its parade.[89]

The Court reasoned that parades possess an inherently expressive element—through both the act of marching in the parade and the selection of the groups permitted to participate.[90] Most importantly, the Court noted that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold

84. *Id.*

85. *See* Irish-American Gay v. City of Boston, 1 Mass. L. Rep. 370, 377-84 (Mass. Super. Ct. 1993) (citing MASS. GEN. LAWS ch. 272, § 98 (1992)); *see also Hurley*, 515 U.S. at 561. The Council argued that its parade was a private event and, therefore, the public accommodations law did not apply. *Hurley*, 515 U.S. at 562. The court rejected this argument, finding instead that the parade met the definition of a "public accommodation" and that the Council had denied GLIB's application because of the sexual orientation of GLIB's members. *Id.* The Council then argued that the state court's application of the public accommodations law to the parade infringed on the Council's First Amendment rights to expressive association. *Id.* at 563. The court, however, rejected this argument finding that the parade did not express any particular message and also that the law prohibited discrimination so it only incidentally affected the Council's First Amendment rights. *Id.* Consequently, the state trial court determined that GLIB had the same rights as other groups to participate in the parade. *Id.* The Supreme Judicial Court of Massachusetts affirmed the lower court decision. *Id.* at 563-64.

86. *Hurley*, 515 U.S. at 561.

87. *Id.* at 572-73.

88. *Id.*

89. *Id.* (applying MASS. GEN. LAWS ch. 272, § 98 (1992)).

90. *Id.*

Schöenberg, or Jabberwocky verse of Lewis Carroll."[91] Merely because the parade included multiple groups, with a variety of messages, did not place the Council's actions—denying GLIB access—outside the scope of protected expressive conduct.[92]

Some courts have interpreted the *Hurley* decision as altering or relaxing the stringent particularized-message requirement established in *Spence*.[93] The Third Circuit found that while the *Hurley* Court eliminated the "particularized message" prong of the test, it failed to replace that requirement or provide guidance regarding a replacement test.[94] Thus, the Third Circuit determined that the *Spence* two-prong test offered guidance, but did not provide the only criteria by which to judge expressive conduct.[95] Rather, a finding of expressive conduct involves a factual inquiry into the "nature of [the] activity, . . . the factual context and environment in which it was undertaken."[96] In making this factual inquiry into the expressiveness of the conduct, however, third circuit courts continue to evaluate whether the speaker-actor subjectively intends to communicate a message.[97]

The Eleventh Circuit also reads *Hurley* as liberalizing the particularized message requirement.[98] This court found that a court must determine "whether the reasonable person would interpret the communication as *some* sort of message, not whether an observer would necessarily infer a *specific* message [from the action]."[99]

However, other courts have continued to apply the *Spence-Johnson* "particularized message" requirement,[100] and the Supreme Court has never clarified whether it intended for *Hurley* to relax the "particularized message" requirement. Therefore, parties claiming First Amendment

91. *Hurley*, 515 U.S. at 569.

92. *Id.* at 569-70 ("[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. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.").

93. *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 159-60 (3d Cir. 2002); Cunningham v. New Jersey, 452 F.Supp.2d 591, 595 (D.N.J. 2006).

94. *Tenafly*, 309 F.3d at 160.

95. *Id.*

96. *Id.* at 161.

97. *See id.* at 162-64; Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1091-92 (3d Cir. 1995).

98. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004).

99. *Id.*

100. *See* Church of Am. Knights of the KKK v. Kerik, 356 F.3d 197, 205 n.6 (2d Cir. 2004) (finding that Hurley did not alter the *Spence-Johnson* standards, but also recognizing that a "narrow, succinctly articulable message" was not required); Hennessy v. City of Melrose, 194 F.3d 237, 246 (1st Cir. 1999); *see also Tenafly*, 309 F.3d at 161 n.18 (listing cases in which the courts applied *Spence-Johnson* test).

protection for messages expressed via their clothing must be prepared to satisfy both the relaxed standard and the more stringent particularized message requirement. The following section discusses the court's treatment of certain messages that parties have claimed to express through their clothing and reflects the degree of specificity in the message that a court may require when considering whether the clothing choice communicates a particularized message.[101]

1. The Particularized Message Requirement Applied in the Context of Clothing and Appearance

The Supreme Court has not granted a definitive right to express oneself through one's appearance or clothing. Rather, applying the *Spence-Johnson* test, courts resolve the issue of appearance as expressive conduct on a case-by-case basis,[102] occasionally finding certain articles of clothing protected.[103] Clothing may be protected by the First Amendment "if truly representative of a philosophy, an idealism, or a point of view."[104] Courts have recognized the communicative nature of clothing, yet have demanded some degree of specificity in the clothing's message for the clothing to be protected by the First Amendment.[105] The burden of proving First Amendment protection for one's dress lies with the one asserting that his/her action constitutes expressive conduct.[106] That individual must show more than a "plausible contention" that the activity is protected.[107]

101. The general principles explored in Part III.1 will be applied *infra* Part III.2 to the messages that saggy-pants wearers have claimed are expressed through their conduct.

102. *See*, *e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289-90 (2000) (plurality opinion) ("Being "in a state of nudity" is not an inherently expressive condition . . . however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."); Schacht v. United States, 398 U.S. 58, 62-63 (1970) (finding that a statute which prohibited unauthorized wearing of an army uniform violated an actor's freedom of speech and expression); Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319-21 (2d Cir. 2003) (holding that a woman's choice to wear a skirt due to her cultural values did not constitute expressive conduct); *Troster*, 65 F.3d at 1089-97 (finding that corrections officer's refusal to wear an American flag patch on his uniform did not constitute expressive conduct); Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 702 (5th Cir. 1968) (assuming, but not deciding, that hairstyle is a mode of expression).

103. *See*, *e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-14 (1969) (finding that the wearing of black armbands constituted expressive conduct); *Kerik*, 356 F.3d at 205-08 (impliedly holding that the hood and robe of the KKK costume were protected under the First Amendment).

104. City of Cincinnati v. Adams, 42 Ohio Misc. 48, 49-50 (Ohio Mun. 1974) (citing Schneider v. Ohio Youth Comm., 287 N.E.2d 633, 637 (1972)).

105. *See Zalewska*, 316 F.3d at 319-21.

106. Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984).

107. *Id.* (internal quotations omitted).

Wearing clothing which expresses vague cultural values is not protected under the First Amendment as expressive conduct.[108] In *Zalewska v. County of Sullivan*,[109] the Second Circuit rejected the plaintiff's contention that the County's dress code, which prohibited van drivers from wearing skirts, violated her First Amendment rights.[110] Zalewska claimed that wearing a skirt represented "an expression of a deeply held cultural value."[111] The court recognized the importance of clothing and appearance as a means of self-expression. The court noted,

> [C]lothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles, flamboyancy, gender identity, and social status. . . .[112]

Despite the communicative nature of clothing, Zalewska's decision to wear skirts conveyed an ambiguous message of cultural values and tradition.[113] Thus, she failed to satisfy the particularized message requirement, removing her actions from the realm of protected expressive conduct.

Similarly, the subjective intent to communicate the individual's personal style or self-expression through one's clothing choice does not satisfy the particularized message requirement.[114] In *Blau v. Fort*

108. *Zalewska*, 316 F.3d at 319-21.

109. *Id.* at 314.

110. *Id.* at 319-21.

111. *Id.* at 319 (quotations omitted). Zalewska did not claim that wearing a skirt was part of her religious culture, so the court did not consider the First Amendment issues in light of their religious implications. *Id.* at 319-21. It may be that where clothing is worn due to one's religious beliefs, the conduct would be protected on other grounds. *See* Tiersma, *supra* note 70, 1580 n.193, 1581 n.194.

112. *Zalewska*, 316 F.3d at 319.

113. *Id.* at 319-20; *see also* East Hartford Educ. Ass'n v. Bd. Of Educ., 562 F.2d 838 (2d Cir.), *rev'd en banc* 562 F.2d 838 (2d Cir. 1977). In *East Hartford*, a teacher claimed that the school district's teacher-dress code violated his right to freedom of expression by forcing him to wear a tie. 562 F.2d at 857. The teacher claimed that his appearance and clothing style conveyed his nonconformity, as well as his identity with the student generation. *Id.* However, the court found that "the claims of symbolic speech . . . are vague and unfocused . . . [reflecting] a comprehensive view of life and society." *Id.* at 858. Therefore, the First Amendment did not protect the teacher's clothing choice. *Id. But see* Bivens v. Albuquerque Pub. Sch., 899 F.Supp. 556, 560-61 (finding a particularized message where student contended that his saggy pants were his manner of identifying and expressing a connection to "his black identity, the black culture and styles of black urban youth," but denying First Amendment protection because failure to show that others would understand the message thereby conveyed).

114. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389-90 (6th Cir. 2005); *see also* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997) (tattoo was a form of self-expression not protected by the First Amendment).

Thomas Public School District,[115] Highlands Middle School adopted a dress code for its students.[116] Robert Blau filed suit on behalf of himself and his daughter, Amanda Blau.[117] Although Amanda admitted that her clothing did not express any particular message, the court applied the expressive conduct test to her clothing choice.[118] Amanda opposed the school uniform policy because she wanted the option to "wear clothes that 'look[] nice on [her],' that she 'feel[s] good in' and that express her individuality."[119] The Sixth Circuit found that these reasons did not satisfy the particularized message requirement.[120]

Like the court in *Zalewska*, the Sixth Circuit recognized the expressive nature of clothing, as well as the importance of clothing to a person's identity.[121] The court found that style and taste in clothing, however, "amounts to nothing more than a generalized and vague desire to express . . . individuality."[122] Because the court did not deem individuality to be a specific message, it found that the conduct (or clothing) did not communicate anything.[123] The First Amendment, therefore, did not protect Amanda's clothing choice.[124]

Unlike the expressions of cultural values, identity, style or taste discussed above, the courts have extended First Amendment protection to messages of disagreement with government laws or policies, and therefore, may extend such protection to these messages when communicated through clothing.[125] Recall the earlier discussion of *Texas v. Johnson*, in which Johnson was convicted of violating the flag-desecration statute after he burned an American flag.[126] Although *Johnson* did not consider the expressive nature of clothing or the messages that clothing may communicate, the principles discussed in the

115. *Blau*, 401 F.3d at 381.
116. *Id.* at 385-86.
117. *Id.* at 386.
118. *Id.*
119. *Id.*
120. *Id.* at 388-90.
121. *Blau*, 401 F.3d at 389-90.
122. *Id.* at 389.
123. *Id.* at 389-90.
124. *Id.*
125. *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397, 405 (1989) (finding that burning a flag during a Republican convention conveyed a message of disapproval of Republican policies); Spence v. Washington, 418 U.S. 405, 410 (1974); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-14 (1969) (finding that wearing black armbands to express disapproval of the Vietnam War was "closely akin to 'pure speech'" protected by the First Amendment); United States v. O'Brien, 391 U.S. 367, 376 (1968) (assuming an expressive element in the burning of O'Brien's selective service card to protest the Vietnam War and the draft).
126. *Johnson*, 491 U.S. at 399-400; *see also* discussion *supra* note 77.

case also may be applied in the context of clothing.[127] Where an individual's conduct expresses a message of discontent or disagreement with a law or with the government's actions, that message constitutes a particularized message deserving of First Amendment protection.[128]

In *Johnson*, although Texas conceded that Johnson's conduct was expressive conduct, the Court went on to discuss the message expressed by Johnson's flag-burning. Relying on the inherently expressive nature of the flag,[129] along with the politically-charged atmosphere in which Johnson's conduct took place,[130] the Court found that Johnson's conduct expressed his intended political message of disagreement with the Reagan administration.[131] Thus, the act of civil disobedience communicated the speaker-actor's protest against the government, and therefore, was protected by the First Amendment as expressive conduct.

Messages of disagreement with the Government, expressed through acts of civil disobedience, communicate exactly the type of message the First Amendment has long been held to protect. One of the purposes underlying the First Amendment is the protection of messages that may foster political discussion or dispute.[132] Speaking out against the political conditions of the time or the choices of the State fosters free and open political discourse, thereby creating a more informed populace.[133] Because of the frequency and persistence with which the courts protect

127. Cohen v. California, 403 U.S. 15 (1971), may be viewed as a situation in which the Court granted First Amendment protection to a message of disagreement with Government action expressed through clothing. However, because the clothing expressed the message via written word, the Court considered the case as one involving pure speech, not expressive conduct. *Id.* at 18.

128. *See Johnson*, 491 U.S. at 405; *Spence*, 418 U.S. at 410; *Tinker*, 393 U.S. at 505-14; *O'Brien*, 391 U.S. at 376.

129. *Johnson*, 491 U.S. at 405-06 (recognizing the flag's symbolic representation of our Nation).

130. *Id.* at 406 (noting that flag-burning occurred during a political protest outside of a Republican convention for the renomination of President Reagan).

131. *Id.* at 405-06.

132. In *Cohen v. California*, the Court stated,

> [t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

403 U.S. at 24.

133. "[A] principal '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.'" *Johnson*, 491 U.S. at 408-09 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

messages of civil disobedience, courts may protect such a message when expressed through clothing choices.

2. Message is Likely to be Understood by Others

In addition to a particularized message requirement, the *Spence-Johnson* test for expressive conduct requires the speaker-actor to demonstrate that other people would have understood the actor's conduct as expressing that message.[134] Whether others would comprehend the intended message depends on the factual context in which the alleged expressive conduct occurs.[135]

This element of the *Spence-Johnson* test focuses on how the viewer perceives the speaker's conduct.[136] One important factor in determining whether the viewer is likely to understand the speaker's message is the context in which the speaker's conduct occurs. As the Supreme Court stated, the "context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."[137] For example, an action, such as wearing a black armband, may seem like "bizarre behavior" to viewers when the conduct occurs on an ordinary day.[138] However, when the same conduct takes place during the heavily-protested Vietnam War, a viewer understands the conduct to be an expression of condemnation of the War.[139] Factors that influence the viewer's perceptions include the timing of the conduct, the political or social conditions surrounding the conduct,[140] the viewer's personal knowledge,[141] and, perhaps, the social position of the speaker-actor.[142]

134. *See Johnson*, 491 U.S. at 405-06; Spence v. Washington, 418 U.S. 405, 410-11 (1974).

135. *See Johnson*, 491 U.S. at 405; *see also Spence*, 418 U.S. at 410 (recognizing that a flag with an upside down peace symbol may not be viewed as conveying a message, but the flag's display concurrent to the political controversy rendered the message unmistakable); Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319-21 (2d Cir. 2003).

136. *See* Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 294 (1984).

137. *Spence*, 418 U.S. at 410.

138. *See id.; see also supra* note 135.

139. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504-14 (1969).

140. *See Johnson*, 491 U.S. at 405; *Spence*, 418 U.S. at 410.

141. *See* Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 162 (3d Cir. 2002) (finding that because most Jewish individuals do not know what an *eruv* is or how to make one, they are unlikely to understand any message being communicated through the use of the *eruv*, a marking that indicates an area in which some otherwise forbidden activities may take place on the Sabbath).

142. *See Spence*, 418 U.S. at 410. The speaker-actor hung the flag outside of his window around the time of the American invasion of Cambodia and the killings of student-protestors at Kent State University. *Id.* Although the Court did not specifically mention its reliance on the speaker-actor's position as a student, it seems likely that this factored into their analysis as he was a student protesting student-killings. Additionally,

Therefore, a court should consider these factors when evaluating whether the viewer is likely to understand the speaker-actor's message.

Courts also take into account how closely related the conduct is to the message that the speaker-actor is attempting to convey.[143] A court may consider how strong of an inference the viewer can make based on the particular manner of the speaker's conduct. The stronger the connection between the speaker-actor's conduct and the message the speaker-actor intends to communicate, the more likely it is that the viewer will deduce the message. Courts grant First Amendment protection to conduct that acts as a "proxy for [pure] speech."[144] Accordingly, the courts are more likely to find First Amendment protection where the conduct gives rise to a strong inference of the message being conveyed.

Once a court determines whether the particularized message could have been understood by the viewer, then the court must address whether the message understood is similar to the message that the speaker-actor intended to convey.[145] The inquiry into the actor's intentions is necessary because the second prong of the *Spence-Johnson* test is two-sided: The test for expressive conduct focuses on both the speaker-actor's intent to communicate a message *and* the viewer's ability to understand the message communicated. If this test did not demand a connection between the message understood and the one conveyed, then expressive conduct would be based upon only the viewer's perceptions.[146] The message understood by the viewer need not be identical to the message communicated, yet, it must bear some relation to the speaker-actor's intended message.[147] Therefore, a court will find the test for expressive conduct satisfied if the message intended by the

he presumably lived near his college campus. These factors would strengthen the connection between his conduct and the message he intended to communicate.

143. *See* Church of the Am. Knights of the KKK v. Kerik, 356 F.3d 197, 206 (2d Cir. 2004).

144. Zalewska v. County of Sullivan, New York, 316 F.3d 314, 320 (2d Cir. 2003).

145. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004); *Tenafly*, 309 F.3d at 164; Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1092 (3d Cir. 1995).

146. *See Tenafly*, 309 F.3d at 164. The First Amendment was designed to protect communication of ideas and the requirement that the message received by the viewer resemble the message conveyed by the actor recognizes the two-sided nature of communication. For an idea to be communicated, the speaker-actor must intend to convey that idea and the viewer (listener) must receive that idea. If, however, the speaker-actor either does not intend to communicate or intends to communicate a different message than the one perceived, then there has been no true communication of ideas. *See id.* (citing Tiersma, *supra* note 70).

147. *See Holloman*, 370 F.3d at 1270 ("Even if students were not aware of the specific message [of protest over teacher's treatment of fellow student, Holloman's] fist clearly expressed a generalized message of disagreement or protest. . . .").

speaker-actor resembles the message likely to be perceived by the viewer.

B. Saggy Pants as Expressive Conduct

In order to successfully challenge the anti-sag ordinances on First Amendment grounds, a saggy-pants wearer first must satisfy the two-prong *Spence-Johnson* threshold test for expressive conduct.[148] Accordingly, the party must show that wearing saggy pants, which expose the wearer's undergarments or skin, (1) expresses a particularized message and (2) that the particularized message would likely be understood by those who viewed the action.[149] Critics of the anti-sag ordinances advance a number of reasons why the fashion must be protected as free expression.[150] These reasons reflect the messages that the individuals believe are conveyed through the act of wearing their pants below their waistline in a manner that reveals their undergarments.[151]

In this section, the messages individuals believe are expressed through their saggy-pants style are assessed under both prongs of the *Spence-Johnson* test. Part (1) of this section concludes that it is unlikely a court will find that any of these alleged messages satisfy the test for a particularized message. Even if a court does find that saggy pants convey a particularized message, the analysis in Part (2) demonstrates that the court will likely find that a viewer could not perceive that message. Accordingly, the action of wearing saggy pants seems to fail the test for expressive conduct, and therefore, does not garner First Amendment protection.

148. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989); *Zalewska*, 316 F.3d at 319. Recall that these two elements must be satisfied even where courts have applied the more relaxed test. *See* discussion *supra* Part III.A.

149. *See* Spence v. Washington, 418 U.S. 405, 410-11 (1995).

150. *See* discussion *supra* Part II.

151. This Comment does not consider all of the possible messages that individuals intend to express by wearing saggy pants. Rather, this Comment is meant to provide the reader with a framework for analyzing the First Amendment issues implicated by the anti-sag ordinances and to apply that framework to some of the messages expressed by critics of the anti-sag ordinances.

1. Evaluation of Possible Messages Conveyed by Saggy Pants Under the *Spence-Johnson* Test for Particularized Message

a. Identity

Saggy pants can be used as a means of self-expression—the communication of personal identity and uniqueness—or may signify personal preferences for a particular style of clothing.[152] According to the court in *Blau*, however, notions of comfort, personal style, and individuality do not assert a specific message deserving of First Amendment protection.[153]

On the surface, communicating individuality and personal style appears to be "some sort of message" that, at the least, will satisfy a more liberalized message requirement.[154] However, "a generalized and vague desire to express . . . individuality" or wearing clothing for reasons of comfort does not satisfy the particularized message requirement.[155] In fact, choosing clothing because it is comfortable does not seem to communicate anything at all. Self-expression alone is a "vague and attenuated notion[]" which is not an "identifiable message."[156] Individuals often intend to express their individuality through their clothing choices and overall appearance.[157] As a result, if courts were to accept style and individuality as a message, every item of one's clothing or appearance would always be granted First Amendment protection. However, courts have already cautioned against accepting "an apparently limitless variety of conduct . . . [as] 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[158] Thus, in order to satisfy the particularized message requirement, a challenger must show more than the subjective intent to communicate individual style or self-expression through saggy pants.

152. *See* Brett & Scott, *supra* note 1; Glanton, *supra* note 4.

153. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389-90 (6th Cir. 2005); *see also supra* notes 114-124 and accompanying text.

154. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004).

155. *Blau*, 401 F.3d at 389-90.

156. *Id.* at 390; Zalewska v. County of Sullivan, New York, 316 F.3d 314, 320 (2d Cir. 2003) ("[*Tinker v. Des Moines Independent Community School District*] suggests that a person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection.").

157. *See Blau*, 401 F.3d at 389 ("Style and taste in clothing, it also is true, may be one of the first ways in which children learn to express their individuality and engage in self-expression.").

158. United States v. O'Brien, 391 U.S. 367, 376 (1968).

b. Identification with Background

Baggy pants that sag below the waistline express the wearers' identification with their neighborhood roots or socio-economic background.[159] However, identification with a particular neighborhood or social group likely will not be considered an "identifiable"[160] message that satisfies the particularized message requirement for expressive conduct. Although saggy pants may reflect this message, the speaker-actor must show more than communication of a "broad statement" regarding that individual's background.[161]

Identification with a lower-income upbringing or with an individual's "ghetto tradition"[162] resembles identification with a cultural group. A neighborhood has certain characteristics which make up its identity, just as a cultural group has certain values or traditions that make up the culture. One characteristic of the neighborhood or cultural group might be the style of clothing worn by the members.[163] But, the *Zalewska* court has considered and rejected clothing as an expression of cultural values because the message communicated is an ambiguous representation of culture.[164] Similarly, clothing as an expression of neighborhood identity is too vague a notion to satisfy the particularized message requirement. At best, saggy pants seem to communicate a "vague, overarching"[165] view of life and society, influenced by the environment in which an individual was raised. This message, therefore, probably would not satisfy the *Spence-Johnson* particularized message requirement.

Furthermore, if a court were to recognize identification with one's neighborhood or socio-economic background as a particularized message communicated by saggy pants, then all styles of clothing could potentially be protected as symbolic expressions of neighborhood connections. Courts likely would see no reason to protect identification

159. Brett & Scott, *supra* note 1.

160. *See Blau*, 401 F.3d at 390. *But see* Bivens v. Albuquerque Pub. Sch., 899 F.Supp. 556, 560-61 (finding a particularized message where student contended that his saggy pants were his manner of identifying and expressing a connection to "his black identity, the black culture and styles of black urban youth," but denying First Amendment protection because failure to show that others would understand the message thereby conveyed).

161. *See Zalewska*, 316 F.3d at 320; *see also supra* notes 108-114 and accompanying text.

162. Brett & Scott, *supra* note 1 (quoting Antonio Simmons, Atlanta resident).

163. *See, e.g.*, *Zalewska*, 316 F.3d at 317-18 (wearing a skirt was part of Ms. Zalewska's cultural values and traditions).

164. *Id*. at 319-21.

165. *Id.* at 330; *see also* East Hartford Educ. Ass'n v. Bd. Of Educ., 562 F.2d 838 (2d Cir.), *rev'd en banc* 562 F.2d 838, 858 (2d Cir. 1977).

with one neighborhood's tradition over identification with a different neighborhood's tradition. To protect saggy pants as a message of the "ghetto tradition," while not protecting another clothing style as a message of a different neighborhood's tradition would lead to the untenable position of the courts choosing one message over another based on its content. On the other hand, to protect both messages would result in the equally untenable position of protecting all clothing as expressing a particularized message. Such a rule would directly contradict the *O'Brien* Court's admonition that not all expressive conduct should be protected merely because someone intends to communicate something.[166] Thus, courts should not find that saggy pants as an expression of identification with neighborhood roots or "ghetto tradition" satisfies the particularized message requirement.

c. Identification with Popular Culture

Saggy pants express identification with the black popular culture or hip-hop style.[167] Yet, this message, even more than the last, closely resembles the *Zalewska* court's rejection of clothing as expressive conduct on the grounds that cultural identification did not meet the specificity requirement of the *Spence-Johnson* test. Although saggy pants may signify the hip-hop culture and what that culture stands for, saggy pants do not provide an identifiable statement of that culture. Black popular or hip-hop culture encompasses various, perhaps conflicting, ideas.[168] Therefore, to say that one's saggy pants reflect that culture could mean anything. Wearing saggy pants is simply a broad statement of the culture, not a specific reflection of an identifiable aspect or belief of the hip-hop culture. A court, therefore, should not find that this message of identity expresses a particularized message because this message lacks a specific communication.

d. Rebellion

Saggy pants may communicate the wearer's rebellion against conformity with expected societal standards and rebellion against authority figures.[169] The *Blau* court noted that clothing is one method of

166. United States v. O'Brien, 391 U.S. 367, 376 (1968).

167. *See* Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2.

168. *See* MICHAEL ERIC DYSON, BETWEEN GOD AND GANGSTA RAP: BEARING WITNESS TO BLACK CULTURE, at xii-xiii, 178 (Oxford Univ. Press 1996) (discussing hip-hop as a means of cultural debate and the multitude of views on certain topics within black culture, such as gender).

169. Brett & Scott, *supra* note 1; Glanton, *supra* note 4.

rebelling against society or authority figures.[170] Though the *Blau* court did not directly decide on the issue, it seemed to reject the idea of general rebellion against authority as a specific message communicated through clothing.[171]

Communicating rebellion against conformity or rebellion against authority begs the question: Against which standards or authority is the individual rebelling? Society may have many standards regarding appropriate conduct. As the speaker-actor's clothing choice is the issue, the message would necessarily be one regarding societal standards concerning appropriate attire. However, what constitutes appropriate attire changes according to the circumstances. The ambiguity surrounding which types of attire or which circumstances the speaker-actor may be rebelling against suggests that the message communicated does not meet the particularized message requirement. Thus, rebellion against conformity or authority figures likely does not convey a particularized message.

e. Protest Against Anti-Sag Ordinance

In contrast to a message of rebellion, a communication of protest, through civil disobedience, against the anti-sag ordinance itself may be a specific message of rebellion that satisfies the particularized message requirement. Recall the example cited earlier[172] of an Atlanta-based hip-hop artist who expressed outrage over Atlanta's proposed anti-sag ordinance.[173] The artist stated his intent to wear saggy pants during an upcoming concert in Atlanta to protest the proposed law.[174] Expressions of disagreement with accepted ideas have been recognized as particularized messages, [175] but whether or not the message in this instance garners First Amendment protection depends on the context of the asserted message.[176]

170. *See* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389-90 (6th Cir. 2005) ("[A]s every parent knows (or will soon learn), it is often through choices in clothing that children first learn how to challenge authority. . . .").

171. *Id.* at 389-90.

172. *See supra* text accompanying notes 59-60.

173. Brett & Scott, *supra* note 1 (quoting hip-hop artist Young Joc).

174. *Id.*

175. *See* Texas v. Johnson, 491 U.S. 397, 405 (1989); Spence v. Washington, 418 U.S. 405, 410 (1974); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-14 (1969); United States v. O'Brien, 391 U.S. 367, 376 (1968).

176. *See Johnson*, 491 U.S. at 405; *Spence*, 418 U.S. at 410; *Tinker*, 393 U.S. at 505-14; *O'Brien*, 391 U.S. at 376. Although context also plays a role in the second prong of the test, viewer perception, it is necessary to consider it when determining the speaker-actor's subjective intent.

Expanding upon the above example, assume that Atlanta adopted the anti-sag ordinance prior to the hip-hop artist's concert. At the concert, the artist wears pants that sag below his waistline, exposing a quarter-inch[177] of his undergarments. By wearing saggy pants, the artist subjectively intends to relate his opposition to the anti-sag ordinance. His conduct will occur at a public concert attended by, one can guess, hundreds if not thousands of people. Furthermore, his conduct will occur in the wake of public outcry over the Atlanta anti-sag ordinance.[178] Thus, the context in which his communication occurs suggests not only that he is communicating a message but also that the message is one of disagreement with the anti-sag ordinance. Therefore, his actions in wearing saggy pants to protest the ordinance likely satisfies the first element of the *Spence-Johnson* test. Accordingly, depending on the circumstances in which the saggy-pants are worn, a message of civil disobedience directed toward the anti-sag ordinances likely will be deemed a particularized message.[179]

Except as a protest against the anti-sag ordinance, other purposes for wearing, or messages of, saggy pants probably do not satisfy the first prong of the test for expressive conduct. Most of the messages of saggy pants involve vague assertions of identity, neighborhood affiliation, or cultural values, but these messages simply do not communicate an unambiguous, identifiable idea, as is required in order to satisfy the particularized message prong.[180] Thus, in order to satisfy the first prong of the test for expressive conduct a successful challenger must show more than these vague notions of identity, neighborhood affiliation, and culture.

2. A Viewer's Understanding of the Possible Messages Conveyed by Saggy Pants

In addition to the difficult task of establishing that wearing saggy pants expresses a particularized message, the speaker-actor must demonstrate that viewers of the conduct would likely understand the

177. Note that if the Atlanta anti-sag ordinance is adopted as proposed, the hip-hop artist would be in violation if he exposes any amount of his undergarments. *See* Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007).

178. *See, e.g.*, *Atlantans stand up for low-pants ban; 'Clothes not a crime,' opponents argue in rapping proposed city ordinance*, GRAND RAPIDS PRESS, Aug. 30, 2007, at A13 [hereinafter *Clothes not a crime*].

179. *But see* Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1093-94 (3d Cir. 1995) (discussing the court's concern that the First Amendment is often used as a means to violate laws and later claim that the action was done as a means of protesting the law).

180. *See* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389-90 (6th Cir. 2005); Zalewska v. County of Sullivan, N.Y., 316 F.3d 314, 330 (2d Cir. 2003).

message expressed.[181] This element of the threshold inquiry into expressive conduct focuses on what the viewer understands saggy pants to express or symbolize.[182] Because the expression at issue is not words, but the action of wearing clothing, a viewer derives the meaning of the saggy pants from the context in which the alleged expressive action occurs. Context includes such factors as the timing of the action, political or social conditions of the time, the viewer's personal knowledge and the social position of the speaker-actor.[183] Whether a court protects the messages expressed through the wearing of saggy pants depends on how closely related the conduct is to the message conveyed.[184] Moreover, the message understood by the viewer must be the one intended by the saggy-pants wearer.[185]

The fact-sensitive nature of this inquiry does not lend itself to adequate discussion within the confines of this Comment. Moreover, because the majority of the messages discussed *supra* Part III.B.1 likely do not satisfy the first requirement for expressive conduct under *Spence-Johnson*—particularized message—[186] a court probably will not consider the second element—the viewer's perceptions of those messages. However, in the interests of providing a complete analysis, and assuming that saggy pants may communicate a particularized message in some circumstances, this Comment considers the likelihood that others understand the message conveyed by saggy pants.

One difficulty for saggy-pants wearers concerns the number of different messages[187] that their pants could be perceived to communicate. With so many messages, a party will have difficulty establishing that the specific message communicated is also the specific message understood. Thus, the context in which the action occurs becomes even more important to the analysis of this prong of the expressive conduct test.

For example, take the hip-hop artist wearing the pants as a sign of his disagreement with Atlanta's anti-sag ordinance.[188] He wears the pants at a concert in violation of the law. If he normally wears such attire to a concert, then viewers may have difficulty distinguishing this

181. *See Spence*, 418 U.S. at 410-11; *Johnson*, 491 U.S. at 405-06.

182. *See* Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 294 (1984).

183. *See Johnson*, 491 U.S. at 405; *Spence*, 418 U.S. at 410; Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 162 (3d Cir. 2002).

184. *See* Church of the Am. Knights of the KKK v. Kerik, 356 F.3d 197, 206 (2d Cir. 2004).

185. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004); *Tenafly*, 309 F.3d at 164; Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1092 (3d Cir. 1995).

186. *See* discussion *supra* Part III.B.1.

187. *Id.*

188. *Id.*

specific instance of wearing saggy pants from the multiple other times that the artist has engaged in similar conduct. Viewers may understand his saggy pants to express the artist's identity, style, or level of comfort but not a message of disagreement with the anti-sag ordinance. However, if he never wears saggy pants to his concerts but does so on this occasion, in the wake of a public outcry over the Atlanta ordinance, then the concert attendees are more likely to connect his action to the contemporaneous social conditions. Under the latter circumstances, a court is likely to find that the artist's intended message of disagreement with the anti-sag ordinance is likely to be the message understood by those who view the conduct.

Not only does the number of messages affect the viewer's ability to perceive the intended message, but it also affects the viewer's ability to discern *any* message at all from the conduct. If the viewer does not derive meaning from the action, then regardless of the speaker-actor's intent to communicate an idea through the conduct, the action fails to express anything, thereby, failing the test for expressive conduct.[189] Many individuals from various social or cultural groups wear saggy pants, limiting a viewer's ability to discern any specific message from the speaker-actor's conduct. Individuals from low-income areas, Blacks, Hispanics, Caucasians, skateboarders, and hip-hop supporters may all be seen wearing saggy-pants that reveal their undergarments. If a Hispanic individual walking down a public street in Atlanta is wearing saggy pants, he may be doing so because he intends to communicate to others that he is poor, he enjoys hip-hop, he skateboards, he is identifying with other Hispanics, or all of the above. With so many groups using this fashion as a means of communication, saggy pants seem to lose their value as a communicative tool.[190] If the viewer derives no meaning, then the action is not expressive conduct.

In sum, most anti-sag challengers will be unable to satisfy the two-part test for expressive conduct. Because the challengers would be claiming First Amendment protection for the action of wearing saggy pants, the speaker-actors must show the following: (1) an intent to convey a particularized message and (2) that the message is likely to be understood by others. Both of these elements present a problem for potential challengers of the anti-sag ordinances.

Many of the messages claimed by saggy-pants wearers relate only vague notions of identity or self-expression, which do not satisfy the

189. *See supra* note 146.

190. The argument that saggy pants communicate a particularized message is also undermined by the fact that so many groups utilize saggy pants as a form of identification or expression. With so many potential messages, it becomes difficult to establish a specific message.

particularized message requirement. Moreover, identification with various social or cultural groups does not convey a clearly identifiable message that closely approximates speech.[191] Although the speaker-actor may intend to express something through the action of wearing saggy pants, the First Amendment does not grant protection to every "message" that a person may intend to communicate. Rather, courts afford First Amendment protection only where the action communicates some specific or identifiable idea. As discussed earlier, undefined generalities cannot be granted protection.

These problems of proof in demonstrating a particularized message suggest that a court will not reach the second element of the test for expressive conduct, which requires the speaker-actor to demonstrate that viewers are likely to understand the message conveyed. If, however, the court does reach the second element, then the context in which the saggy-pants wearing occurred will affect whether a viewer could have perceived the wearer's actions as communicating a message. That the viewer could perceive *a* message does not mean the element is satisfied; rather, the viewer must understand *the* message intended to be conveyed. Based on the abundance and variety of messages that saggy-pants wearers intend to communicate, this connection may be difficult for the speaker-actor to prove.

Although the author believes it unlikely that a court will find the threshold test satisfied, it is possible that a specific fact pattern may satisfy the test for expressive conduct. As such, and for the sake of completeness, the remainder of this Comment assumes that wearing saggy pants is protected First Amendment conduct and assesses the constitutionality of the anti-sag ordinance.

IV. CONSTITUTIONALITY OF REGULATIONS ON FIRST AMENDMENT CONDUCT

If the speaker-actors can satisfy the threshold test for expressive conduct, then they must show that the government regulation impermissibly denies the speaker-actors First Amendment protection.[192] The First Amendment prevents the government from prohibiting speech or expressive conduct on the basis of the speaker-actor's message.[193] However, freedom of speech and freedom of expression are not absolute

191. *But see Kerik*, 356 F.3d at 205 n.6 (finding that the white hood and gown worn by Ku Klux Klan members satisfies the *Spence-Johnson* test because it clearly conveys the wearer's identification with the KKK and its identifiable beliefs in white supremacy).

192. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989); Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319 (2d Cir. 2003).

193. *See Johnson*, 491 U.S. at 406; Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

freedoms.[194] The government may regulate expressive conduct under certain circumstances. First, the government may enact content-neutral[195] regulations directed at the non-expressive elements of conduct.[196] Courts uphold this type of regulation even if it imposes "incidental limitations" on the expressive elements of conduct.[197] Second, the government may regulate First Amendment expression on the basis of the message communicated if the government shows a compelling interest.[198]

The standard of analysis employed by the court depends on the type of regulation at issue. Content-neutral ordinances are evaluated under the *O'Brien* standard,[199] explained below. If the government regulates First Amendment conduct because of the content of the speaker-actor's message, however, then the regulation must survive the strict scrutiny test.[200] Therefore, the first step in a First Amendment constitutional analysis is to determine whether the regulation is content-neutral or content-based.

A. Content-Neutrality

This inquiry focuses on the government's purposes or reasons for enacting a regulation,[201] and specifically, content-neutrality analysis considers whether the government enacted the regulation because it disagrees with the message conveyed by the speech or conduct.[202] A content-neutral ordinance can be "justified without reference to the content of the regulated speech."[203] Thus, a regulation that prohibits a type of conduct without allusion to any expressive aspects of that conduct will be deemed a content-neutral law of general application.[204] In other words, to be content-neutral, an ordinance must be directed at

194. *See, e.g.*, Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984); Cohen v. California, 403 U.S. 15, 19 (1971).

195. Content-neutral ordinances will be defined in Part IV.A.

196. *Johnson*, 491 U.S. at 407.

197. *Id.*

198. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion). The government may also enact time, place, or manner restrictions on expressive conduct or symbolic speech. *Clark*, 468 U.S. at 293. Time, place, and manner restrictions must also satisfy the *O'Brien* standard. *See id.*; *Johnson*, 491 U.S. at 403. However, this Comment does not discuss these kinds of regulations.

199. *See Clark*, 468 U.S. at 293; *Johnson*, 491 U.S. at 403.

200. *Erie*, 529 U.S. at 289; *Johnson*, 491 U.S. at 403.

201. *See id.*; *see also Clark*, 468 U.S. at 293.

202. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

203. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

204. Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1304-06 (11th Cir. 2003).

the non-expressive elements of the conduct.[205] Regulations of the non-expressive elements of conduct can minimally affect the expressive content of protected speech without rendering the regulation content-based.[206] However, where an ordinance "so interferes with the message that it essentially bans the message," the ordinance will be deemed content-based.[207]

In *City of Erie v. Pap's A.M.*,[208] the city council passed a public indecency ordinance prohibiting the act of intentionally appearing nude in public.[209] Pap's A.M. ("Pap's") operated an establishment that provided nude entertainment.[210] Pap's sought a permanent injunction to prevent enforcement of the ordinance.[211] The Court found that Erie's ordinance was a law of general application that regulated all public nudity, not just public nudity conveying an erotic message.[212] Therefore, the ordinance reflected a content-neutral purpose because it regulated the non-expressive elements of conduct.[213] Although the ordinance limited the erotic message of nude dancing by requiring minimal coverage, this slight effect on expressive conduct did not make the regulation content-based.[214]

Furthermore, the Court accepted the ordinance's purported purpose of eliminating the "negative secondary effects" of nude dancing as content-neutral.[215] The preamble to the ordinance suggested that the

205. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570-71 (1991) (plurality opinion); United States v. O'Brien, 391 U.S. 367, 376 (1968); *see also Fly Fish, Inc.*, 337 F.3d at 1304-06 (discussing the content-neutrality of laws of general application, which prohibit conduct without reference to content).

206. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000) (plurality opinion) ("If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression . . . cannot be sufficient to render the ordinance content based.").

207. *See id.* at 293.

208. *Id.* at 277.

209. *Id*. at 284 (citation omitted).

210. *Id.*

211. *Id.*

212. *Id*. at 290.

213. *Id*. at 294.

214. *Id.* at 290-94; *id.* at 310 (Souter, J., concurring in part and dissenting in part) (agreeing with the plurality opinion that the interest in eliminating secondary effects is a content-neutral purpose); *see also* United States v. O'Brien, 391 U.S. 367, 370 (1968). In *O'Brien*, a federal statute prohibited the destruction of selective service cards. 391 U.S. at 370. To protest the Vietnam War, O'Brien publicly destroyed his draft registration card. *Id.* at 369. Because the federal statute was directed at the conduct of destroying a registration card and not at the message of opposition to the War conveyed through that act, the Court found that the statute was justified without reference to the content of the message. *Id.* at 376, 381-82.

215. *Erie*, 529 U.S. at 290; *id.* at 310 (Souter, J., concurring in part and dissenting in part); *see also* Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 716 (2003) ("[I]f an ordinance is aimed not at the content of the films shown at adult theaters, but rather at combating the secondary effects of such theaters on the surrounding community . . . it

council intended to eliminate the problems associated with erotic dancing by prohibiting nudity.[216] As such, the Court determined that "the ordinance does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare."[217] Accordingly, regulating these secondary effects constituted a content-neutral purpose.[218]

Courts will determine the purposes of a regulation by construing the text of the regulation itself as well as by considering the state court's interpretations of that language.[219] However, courts typically have been unwilling to invalidate "an otherwise constitutional statute on the basis of an alleged illicit motive."[220] The court will not declare the ordinance unconstitutional if the government possessed the authority to enact the law according to a valid government interest.[221]

Courts generally reject attempts by parties to establish a content-based purpose through the use of statements made by interested individuals.[222] The courts refuse to void legislation "on the basis of what fewer than a handful of Congressmen said about it."[223] In other words, while one legislator may have a content-based purpose in supporting the ordinance, the court is unwilling to accept the reasons of a single legislator as evidence of the purposes of the remaining legislators. Therefore, a party claiming a content-based purpose behind legislation cannot rely only on the statements of a few legislators as proof that the government is regulating conduct out of disagreement with the messages thereby expressed.

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will be treated as a content-neutral regulation." (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986))).

216. *Erie*, 529 U.S. at 293 (plurality opinion).

217. *Id.* at 291 (quotations omitted).

218. *Id.* at 289-90.

219. *See id.*

220. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 382-83 (1968)).

221. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582-83 (1991) (Souter, J., concurring) ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.").

222. *See O'Brien*, 391 U.S. at 383-84 ("Inquiries into congressional motives or purposes are a hazardous matter . . . what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ."); *Erie*, 529 U.S. at 289-90 (rejecting content-based argument when party relied on statements of City Attorney to show that public nudity ban was directed to suppressing expression); Arizona v. California, 283 U.S. 423, 456-57 (1931) (refusing to assume the existence of other purposes, when the purpose stated in the legislation is a valid reason for upholding the statute). *But see Erie*, 529 U.S. at 329 (Stevens, J., dissenting) (using the statements of the councilmembers who voted for an ordinance as supporting evidence of the ordinance's purpose).

223. *O'Brien*, 391 U.S. at 384.

If a court determines that the regulation of expressive conduct was enacted for a content-neutral purpose, then the court will apply *United States v. O'Brien*[224] and the more lenient intermediate standard of review discussed *infra* Part (1). If, on the other hand, the court finds that the government enacted the regulation because of the message conveyed by the conduct, then it will apply the strict scrutiny standard of review discussed *infra* Part (2).

1. *O'Brien* and the Intermediate Standard of Review Applied to Content-Neutral Regulations

In *United States v. O'Brien*, the Court developed a four-part test for determining the constitutionality of a government regulation. Courts apply this test in cases where parties challenge, on First Amendment grounds, the constitutionality of a regulation on speech or conduct. The regulation will be upheld if:

> [the regulation] is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[225]

The remainder of Part (1) addresses these elements in-depth. Because Atlanta City Councilmembers enacted the anti-sag ordinance in order to protect citizens from indecent exposure of undergarments and skin, as well as to address the social problems that they believe are furthered by the saggy-pants style,[226] the courts' treatment of First Amendment attacks on public indecency regulations proves instructive on how the courts should consider the constitutionality of the anti-sag ordinance. Accordingly, these cases infuse the discussion of the *O'Brien* standard.

a. Regulation is Within Constitutional Authority

The first element of the *O'Brien* standard requires that the government possess the constitutional authority to enact the regulation at issue. One source of government authority to enact regulations is the State's police power.[227] A state's police power consists of the "authority to provide for the public health, safety, and morals" of the State's

224. *See* discussion of case *supra* note 214.
225. *Id.* at 377.
226. *See* further discussion of these reasons *infra* Part V.A.
227. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion).

citizens.[228] From the police power, a State derives its authority to regulate societal morality and order, thereby "protect[ing] public health and safety."[229] By extension of the State's police powers, a municipality also has the ability to regulate conduct.[230] A State promotes order and morality by using its police powers to produce public indecency statutes.[231] Thus, these principles prompt the courts to recognize a municipality's authority to regulate the morality of its citizens through public indecency statutes.

b. In Furtherance of an Important or Substantial State Interest

The government's interest in regulating morality and order also satisfies the second *O'Brien* factor,[232] which requires that the regulation further an important or substantial governmental interest.[233] Public indecency statutes further the government's interest in order and morality.[234] These statutes are based on the state's police power and reflect society's "moral disapproval" of certain conduct.[235] State regulation of indecent conduct originated at common law, where public indecency and public nudity resulted in criminal punishment.[236] The long history of public indecency statutes is evidence of the State's long-standing interest in protecting societal morality and order.[237]

In addition, a State may have an important or substantial interest in regulating the secondary effects of conduct.[238] This interest usually arises in cases concerning public nudity regulations. In *Barnes v. Glen Theatre, Inc.*,[239] respondent Glen Theatre challenged the constitutionality of a public nudity statute, which required erotic dancers to wear g-strings and "pasties."[240] The State of Indiana justified the statute by arguing that nude dancing promotes criminal activity, including sexual assault and

228. *See id.*
229. City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (plurality opinion).
230. *See id.*
231. *Barnes*, 501 U.S. at 568 (1991).
232. *See, e.g.*, *id.* at 569-70.
233. *See* United States v. O'Brien, 391 U.S. 367, 372 (1968).
234. *Id.* at 569.
235. *Id.* at 568.
236. *Id.* at 569.
237. *See id.*; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).
238. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986); *Barnes*, 501 U.S. at 582 (Souter, J., concurring); Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 716 (2003). *But see Erie*, 529 U.S. at 319-22 (Stevens, J., dissenting) (limiting the secondary effects argument to regulations on the time, place, and manner of speech).
239. 501 U.S. 560 (1991).
240. *Id.* at 564 (plurality opinion).

prostitution.[241] Justice Souter, in a concurring opinion, accepted Indiana's justification.[242] He voted to uphold the ordinance because of "the State's substantial interest in combating [these] secondary effects of adult entertainment establishments."[243] Later, in *City of Erie v. Pap's A.M.*, a majority of the Court affirmed that an interest in "combating the harmful secondary effects associated with nude dancing [is] undeniably important."[244] Thus, a city may justify regulations of expressive conduct by demonstrating an interest in eliminating secondary effects of that conduct.

To demonstrate an important governmental interest in eliminating the secondary effects of conduct, the city must introduce evidence of the existence of these effects.[245] This type of evidence consists of relevant studies or surveys conducted by either the party to the suit or another city with similar issues.[246] This evidence may be the result of studies conducted by other cities "'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'"[247] Key to the court's acceptance of such evidence is whether the evidence "is reasonably believed to be relevant." A court also may rely on the informed opinions of the legislative members who enacted the ordinance.[248] As long as the court finds a reasonable evidentiary basis for believing in the existence of detrimental effects of the regulated conduct, it will usually respect the decisions of the legislative body.[249]

In addition to producing evidence of secondary effects, in order to satisfy the second *O'Brien* requirement, the city must show that the

241. *Id.* at 582 (Souter, J., concurring) (quoting Petr.'s Br. 37).

242. *Id.*

243. *Id. But see id.* at 569 (plurality opinion) (upholding the ban on public nudity under the *O'Brien* test, recognizing the State's substantial interest in furthering morality).

244. City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (plurality opinion); *see id.* at 310 (Souter, J., concurring in part and dissenting in part) (agreeing with the plurality that the City of Erie had a substantial interest in regulating the secondary effects of nude dancing).

245. *See id.* at 296-97 (plurality opinion) (requiring a showing that the targeted conduct was likely to produce harmful secondary effects); *Barnes*, 501 U.S. at 583-84 (Souter, J., concurring); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986).

246. *See Erie*, 529 U.S. at 296-98.

247. *Id.* at 296 (quoting *Renton*, 475 U.S. at 51-52).

248. *See id.* at 297-98 ("The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the harmful secondary effects.").

249. *See id. But see id.* at 314-15 (Souter, J., concurring in part and dissenting in part) (a statement within the statute's preamble, which asserts that the council has made findings that nude dancing promotes certain harmful effects, is not enough to demonstrate furtherance of an interest).

regulation *furthers* the asserted governmental interest.[250] To meet the second requirement, the ordinance need not significantly or even greatly further the government's interest.[251] Rather, the ordinance need only assist the government slightly in fulfilling its responsibilities. [252] As such, this requirement is minimal.[253]

c. State Interest is Unrelated to the Suppression of Free Expression

The third *O'Brien* element requires that the governmental interest be unrelated to the suppression of free expression.[254] This element merely emphasizes that the *O'Brien* test applies only to content-neutral regulations.[255] Therefore, once a court determines that the ordinance is content-neutral and should be evaluated according to the *O'Brien* standards,[256] it will find the third element satisfied.[257]

d. Restriction is No Greater than Necessary

Finally, *O'Brien* requires that the restriction be no greater than that necessary to further the government's interest.[258] Courts sometimes state this element as requiring the regulation to be narrowly tailored.[259] In evaluating whether an ordinance meets this condition, a court looks at the end to which the ordinance is directed, or what the city is trying to achieve through adoption of the ordinance.[260] This government goal

250. United States v. O'Brien, 391 U.S. 367, 377 (1968).

251. *See Erie*, 529 U.S. at 296-97 (plurality opinion).

252. *See id.* (finding the ordinance furthered an important government interest in combating secondary effects, even though the ordinance would not significantly reduce these effects).

253. *See id.* at 300-01.

254. *O'Brien*, 391 U.S. at 377.

255. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989) ("[W]e 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.'" (citation omitted)).

256. *See* discussion *supra* Part IV.A.

257. *See, e.g.*, *Erie*, 529 U.S. at 301; *id.* at 310 (Souter, J., concurring in part and dissenting in part); Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 294-95, 299 (1984).

258. *O'Brien*, 391 U.S. at 377.

259. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). The "narrowly tailored" language is also used to describe the strict scrutiny standard, but the meanings differ under each standard. The primary difference between the two is that intermediate scrutiny does not require the least restrictive means, while strict scrutiny does. *See, e.g.*, Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991); *see also* discussion *infra* Part IV.A.2.

260. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (plurality opinion) ("[T]he governmental interest served . . . is societal disapproval of nudity in public

must be closely connected to the means with which the government intends to accomplish that interest.[261] The means and ends are sufficiently connected if the government interest would be "achieved less effectively absent the regulation."[262]

O'Brien, however, does not require the government to adopt the least restrictive means necessary to carry out its interests.[263] Where a legislative body has a choice between two similar methods of fulfilling an important or substantial government interest, the Court respects the policy decision made by the legislature in selecting one method over another.[264] But, a regulation on expressive conduct must "leav[e] the quantity and accessibility of speech substantially intact."[265] In other words, a regulation on the expressive element of conduct meets the fourth requirement if it still allows speaker-actors sufficient opportunities to communicate their message.[266] As long as a regulation permits other avenues of communicating the same message and the government interest would be "achieved less effectively absent the regulation," the ordinance is narrowly tailored, and will satisfy the fourth prong of the *O'Brien* test.

In sum, if the content-neutral ordinance satisfies the four *O'Brien* elements, it will be upheld as a constitutional restriction on expressive conduct.

places . . . [t]he statutory prohibition is not a means to some greater end, but an end in itself.").

261. *See id.*; *see also O'Brien*, 391 U.S. at 381-82 (finding that Congress limited the statute's scope to the noncommunicative element of O'Brien's conduct and also that it was limited to what was necessary to serve the government's substantial interest in preserving the availability of Selective Service registration cards).

262. *See Ward*, 491 U.S. at 798, 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

263. *See Clark*, 468 U.S. at 299; *Erie*, 529 U.S. at 301-02 (citing *Ward*, 491 U.S. at 798-99, 798 n.6).

264. *See Clark*, 468 U.S. at 299 ("We do not believe . . . [that *O'Brien*] assign[s] to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.").

265. *See* Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 725 (7th Cir. 2003).

266. *See Erie*, 529 U.S. at 301; Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 287 (5th Cir. 2001) (finding that because school's uniform policy restricted student attire during the day, while allowing freedom of clothing choice after school hours, policy was limited to what was necessary to achieve school's interest in the "health, safety, and order" of the school); *see also Ward*, 491 U.S. at 797-98 (holding that valid time, place, and manner restrictions do not require the State to show that it enacted the least restrictive means of furthering its interest).

2. Strict Scrutiny Standard of Review Applied to Content-Based Regulations

Where the government enacts a content-based regulation, the more lenient standard established in *O'Brien* does not apply.[267] Rather, the court presumes the ordinance to be invalid and, therefore, must apply a strict scrutiny standard of review.[268] The strict scrutiny test requires the State to demonstrate that the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[269] These two requirements ensure that the government restricts speech only for sufficiently important reasons and only as much as is necessary to promote those reasons.

A government interest cannot be "compelling" unless the regulation restricts both protected expressive conduct and unprotected conduct that produces the same harm to the government's interest.[270] "It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"[271] Sources for finding a compelling state interest include the common law, state statutes, or the Federal Constitution.[272]

Once a court finds that a content-based regulation furthers a compelling state interest, the court may only uphold the regulation if it is narrowly tailored to serve that interest.[273] This element presents a high hurdle for a state to overcome in order to justify its content-based regulation.[274] To be narrowly tailored, the ordinance must be the least restrictive means available to further the State's interest.[275] An over-inclusive regulation prohibits more speech than is necessary to effectuate

267. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989).

268. *See Ben's Bar, Inc.*, 316 F.3d at 723; *see also Johnson*, 491 U.S. at 403.

269. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Arkansas Writers' Project, Inc. v. Raglund, 481 U.S. 221, 231 (1991)).

270. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

271. *Id.* at 546 (quoting Fla. Star v. B.J.F., 491 U.S.524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment)).

272. *See Simon & Schuster, Inc.*, 502 U.S. at 118-19 (finding that asserted compelling state interests were supported by State's body of tort law, Sixth Amendment to Federal Constitution, and various State statutes).

273. *Id.* at 118.

274. *See* Burson v. Freeman, 504 U.S. 191, 199-200 (1992).

275. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) ("[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."); United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." (citing Reno v. ACLU, 521 U.S. 844, 874 (1987))).

the State's asserted interests; as such, an over-inclusive regulation is not narrowly tailored.[276] "Narrow tailoring of remedies requires that '[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.'"[277] If a challenger of a regulation presents less restrictive means of addressing the harm, then the Government has the burden to prove that these alternatives are less effective than the challenged regulation.[278] If the Government fails to carry its burden of proof, then the challenged regulation fails the strict scrutiny test, and the court must declare the law unconstitutional.[279]

V. CONSTITUTIONALITY OF ATLANTA'S PROPOSED ANTI-SAG ORDINANCE

Assuming that a court finds that wearing saggy pants in a manner that reveals the speaker-actor's undergarments constitutes First Amendment expressive conduct,[280] which the author does not believe is likely, the court may then evaluate the constitutionality of Atlanta's anti-sag ordinance.[281] As discussed above, there are two types of government regulations on First Amendment expressive conduct—content-neutral ordinances and content-based ordinances.[282] Because persuasive arguments for both a content-neutral and a content-based purpose exist for an anti-sag ordinance, this section will analyze the validity of Atlanta's ordinance under both standards. The section will conclude that the ordinance impermissibly denies constitutional protection to the expressive conduct of wearing saggy pants. Note, however, that this part of the analysis likely depends on court recognition of saggy-pants wearing as First Amendment expressive conduct.

276. *See Simon & Schuster, Inc.*, 502 U.S. at 121, 122 n.* (holding that New York's Son of Sam law was not narrowly tailored because it prohibited more speech than necessary to serve the State's interest in compensating crime victims from the profits of the crime).

277. XXL of Ohio, Inc. v. City of Broadview Heights, 341 F.Supp.2d 765, 782 (N.D. Ohio 2004) (citing *Playboy Entm't Group*, 529 U.S. at 813).

278. *Ashcroft*, 542 U.S. at 665-66.

279. *Id.*

280. *See* discussion *supra* Part III.B.

281. This Comment evaluates the constitutionality of the ordinance as though Atlanta had already adopted the regulation. However, as of the time of this writing, the ordinance was still under active consideration. *See* discussion *supra* note 16.

282. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 301-02 (2000) (plurality opinion); Texas v. Johnson, 491 U.S. 397, 407 (1989); Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984).

A. Atlanta's Proposed Anti-Sag Ordinance as a Content-Neutral Restriction[283]

1. Content-Neutral Purposes of Anti-Sag Ordinance

Atlanta's ordinance proscribes an entire class of conduct—the action of wearing pants so as to reveal the wearer's undergarments.[284] In doing so, the City of Atlanta did not prohibit the wearing of saggy pants because saggy pants express a certain message. Nowhere in the text of the ordinance does the City cite any messages that it is targeting.[285] Rather, the ordinance regulates only the general action of wearing clothing in a manner that reveals the wearer's undergarments.

In this way, Atlanta's anti-sag ordinance resembles the public nudity statute considered in *Erie*.[286] As in *Erie*, the ordinance applies a blanket ban on conduct, regardless of any messages that may be conveyed by that conduct.[287] Even if the Atlanta ordinance incidentally infringes on some expressive conduct, the infringement does not render Atlanta's purpose content-based.[288]

The ordinance also reflects a content-neutral purpose of eliminating the problems associated with saggy-pants wearing. Within the preamble to the ordinance, the City states that "the dress fad . . . is becoming a major concern for communities, cities and states."[289] In statements to the press, Councilmember C.T. Martin, the "force behind the proposed ban,"[290] expressed a hope that the ordinance would instigate discussions regarding the side effects of saggy pants-wearing.[291] For Martin, saggy pants represent the "prison mentality" and signify the poor social conditions and problems associated with young black persons.[292] Martin

283. As discussed *supra* Part IV.A, a content-neutral ordinance is one that can be "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

284. Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007).

285. *See id.*

286. *See Erie*, 529 U.S. at 290; *see also* discussion *supra* Part IV.A.

287. *See id.*

288. *See id.* at 294; *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968) (finding that the statute was content-neutral despite its minimal effect on the expressive nature of the conduct).

289. Section 106-13.

290. Koppel, *Jeans Sagging*, *supra* note 2.

291. *Clothes not a crime*, *supra* note 178.

292. *See* Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2.

proposed the law in an effort to resolve these social problems and improve "community standards."[293]

The language in the preamble, coupled with the statements of the Councilmember[294] responsible for this ordinance, suggests that the purpose of the law is merely to "combat negative secondary effects"[295] of the expressive conduct. The City of Atlanta's concern is with cleaning up the social conditions associated with saggy pants, rather than regulating the messages communicated by the fashion. Because its ordinance targets the secondary effects of conduct, it is a content-neutral ordinance.

Although Atlanta's ordinance may limit the effectiveness of the message conveyed by the wearer, minimal effects on expression do not make the ordinance content-based.[296] The ordinance prohibits the action of revealing undergarments, but does not completely prohibit the saggy pants fashion. The City's content-neutral purpose of eliminating secondary effects is therefore not altered, because the ordinance has a *de minimis* effect on expression.[297]

2. The *O'Brien* Standard Applied to Atlanta's Proposed Anti-Sag Ordinance

If a court finds that the Atlanta ordinance is a content-neutral regulation of expressive conduct, then it will apply the *O'Brien* standard.[298] A regulation will be upheld if (1) the government had the constitutional authority to enact the regulation; (2) the regulation furthers an important or substantial government interest; (3) the interest is unrelated to the suppression of free expression; and (4) the restriction is no greater than is essential to effectuate the government's purposes.[299] This section evaluates the constitutionality of Atlanta's anti-sag

293. *Clothes not a crime*, *supra* note 178.

294. It is unclear whether these facts alone would be sufficient proof of the Council's purpose. When the Court considered the secondary effects argument in other cases, the record presented much clearer evidence of this legislative purpose. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 290-91 (2000) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986). For a discussion of why Atlanta may be unable to prove an interest in combating the secondary effects of saggy-pants wearing, see *infra* Part V.A.1.

295. *Erie*, 529 U.S. at 290 (citing Pap's A.M. v. City of Erie, 719 A.2d 273, 279 (Pa. 1998)).

296. *Id.* at 294 (citing Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 299 (1984)).

297. *Id.*

298. *See* discussion *supra* Part IV.A.1. Recall that under the *O'Brien* test, courts apply a lesser standard of scrutiny than is applied to a content-based regulation, which is evaluated under the strict scrutiny test.

299. *Id.*

ordinance under the *O'Brien* test. The section concludes that the ordinance fails the second and fourth elements of the test, and therefore, a court should find that the anti-sag ordinance constitutes an unconstitutional restriction on First Amendment freedom of expression.

a. City of Atlanta Has the Constitutional Authority to Enact the Anti-Sag Ordinance.

Under the first prong of the *O'Brien* test, a court must determine whether the government has the authority to enact the regulation at issue.[300] In proposing the anti-sag ordinance, the City of Atlanta relies on its responsibility and authority to regulate conduct where necessary to assure the preservation of "the health, peace, order and good government of [Atlanta]."[301] Moreover, the proposed ban, if passed by the Council, will be codified within the City's indecent exposure laws.[302] Public indecency statutes are based on the state's police powers.[303] These powers permit States to regulate the morality and order within State borders.[304] Therefore, Atlanta's police powers extend to the introduction of legislation designed to protect the health, safety, and welfare of its citizens. This authority includes the ability to pass regulations of public indecency. As such, Atlanta satisfies the first prong of the *O'Brien* test.

b. Atlanta's Ordinance Does Not Further a Substantial or Important State Interest.

The second O'Brien factor requires the anti-sag ordinance to further a substantial or important government interest.[305] Atlanta may assert two interests in support of its anti-sag ordinance. First, Atlanta has an interest in promoting morality and order.[306] Second, the City Council has an interest in eliminating the secondary effects related to the wearing of pants below the waist.[307] Both of these interests will be discussed below.

300. *Id.*

301. Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007). For the text of the ordinance, see *supra* note 15.

302. *Id.* § 106-129, Indecency.

303. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) ("[The State has] authority to provide for the public health, safety, and morals.").

304. *See id.*

305. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

306. *See Barnes*, 501 U.S. at 569-70; *see also id.* at 582 (Souter, J., concurring) (impliedly recognizing an interest in protecting order and morality, yet concurring with majority opinion on other grounds).

307. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (citing Young v. Am. Mini Theatres, 427 U.S. 50, 71 (1976) (plurality opinion))); *see also Barnes*, 501 U.S. at 582-83 (Souter, J., concurring).

i. Interest in public morality

Atlanta may assert an interest in regulating the morality of its city and protecting its citizens from lewd and offensive behavior. Within the preamble to the ordinance, the City acknowledges its authority to enact regulations, as necessary, to promote "the security, welfare, convenience and interest of the City . . . and for preserving the health, peace, order and good government of the City."[308] In addition to this statement, within the preamble Atlanta explicitly recognizes its authority to enact legislation pursuant to its police powers.[309] If passed, the ordinance will be placed within the public indecency section of the Code. The statements within the preamble and the potential placement of the ordinance evince the City's reliance on the governmental interest in regulating public morality and its use of its police powers to enact the anti-sag ordinance.

For centuries, cities have exercised their police power by enacting public indecency statutes that promote societal morality and order.[310] The Court has defined the police power "as the authority to provide for the public health, safety, and morals."[311] Public indecency statutes reflect society's "moral disapproval" of certain conduct.[312] While courts tend to accept the protection of morality and order as important or substantial interests furthered through appropriate legislation,[313] perhaps the courts should be hesitant to accept such an interest here.

The cases in which a court has found a substantial government interest in regulating morality usually involve obscenity or public nudity.[314] Although Atlanta's ordinance outlaws pants that expose skin below the waist (i.e., partial nudity), it also seeks to regulate indecency by eliminating the exposure of undergarments. Thus, unlike the public nudity laws that ban the exposure of skin, this ordinance bans the exposure of *other clothing*. In doing so, the City essentially labels some undergarments themselves as offensive or indecent. Undergarments are traditionally thought of as clothing items that a person does not reveal;[315] they are not a form of outerwear. However, many undergarments

308. Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007).

309. *Id.*

310. *Barnes*, 501 U.S. at 567 (plurality opinion).

311. *Id.* at 569.

312. *See id.* at 568.

313. *See*, *e.g.*, *id.* at 569-70.

314. *See id.* at 568; Paris Adult Theatre I v. Slaton 413 U.S. 49, 57-59 (1973).

315. *See* MERRIAM-WEBSTER DICTIONARY 1366 (11th ed. 2003) ("[U]nderwear: clothing or an article of clothing worn next to the skin and under other clothing."); *id.* at 1363 ("[U]ndergarment: a garment to be worn under another.").

provide coverage approximate to that of a swimsuit, adequately concealing key anatomical parts. Yet, the City would prohibit the exposure of undergarments, while allowing a person to wear a swimsuit in public. The proposed amendment to section 106-129 also equates exposure of one's undergarments with public exposure of genitals and public intercourse, which demonstrates the City's attempt to expand what has been traditionally thought of as indecent—nudity and public sex acts—to include what has never been labeled indecent in a piece of legislation—certain items of clothing.

Furthermore, Atlanta's claim to protect its citizens from a display that some individuals find offensive (the saggy pants fashion) cannot justify the government's action in labeling as indecent saggy pants that expose undergarments. According to *Spence v. Washington*, the government cannot prohibit expressive conduct because it "desire[s] to protect the sensibilities of passersby."[316] The speaker-actors' conduct of wearing their pants so as to expose their undergarments occurs on a public street. If other citizens are offended by the display of the wearer's undergarments, those citizens may simply look the other way.[317] A court, therefore, should not accept an interest in regulating morality and order as a substantial or important interest that justifies prohibition of a particular fashion on a public street.

ii. Interest in combating secondary effects

Atlanta could also argue that its anti-sag ordinance targets the secondary effects of saggy pants.[318] As such, the City has an important or substantial government interest in cleaning up its town and maintaining a positive atmosphere for its citizens.

This interest is not supported by the text of the ordinance, but has been expressed by at least one of the ordinance's proponents. Within the preamble to the ordinance, Atlanta lists no specific side effects or problems that the Council believes are caused by or associated with saggy pants. The City states only that the saggy-pants fashion has

316. Spence v. Washington, 418 U.S. 405, 412 (1974) ("We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. . . . Anyone who might have been offended could easily have avoided the display.") (internal citations omitted).

317. *See id.* (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

318. Whether the court will expand the secondary effects argument to include conduct other than nude dancing remains to be seen. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 317, 322-23 (2000) (Stevens, J., dissenting).

become a "major concern."[319] However, Councilmember Martin, author of the ordinance, asserts the belief that saggy pants signify the problems of black youth, reflected in a "prison mentality."[320] Presumably, Councilmember Martin includes among those problems involvement in criminal activity, high numbers of unemployed individuals and high-school dropouts,[321] low self-esteem[322] and racial profiling.[323]

The ordinance's vague reference to a "concern," as well as Martin's statements, is hardly conclusive proof that Atlanta acted out of concern over the negative effects of saggy-pants wearing. In previous cases that found a substantial interest in eliminating the secondary effects of conduct, the Court relied on clear statements of legislative intent, contained within the text of the regulations.[324] In addition, the state courts had interpreted that language as establishing a state interest in eliminating secondary effects.[325] Because Atlanta's proposed ordinance does not contain a statement of legislative intent to target the secondary effects of saggy-pants wearing, the court may not find the interest is implicated by the record. If, however, the City amended the proposed ordinance prior to passage to include language that indicates intent to target the specified effects of the saggy pants fashion, then a court may evaluate it according to the secondary effects jurisprudence. Nonetheless, as discussed below, the author does not believe that that ordinance should be upheld on such grounds.

The factor requiring the ordinance to *further* the State's asserted interest poses another problem for Atlanta. In order to claim an interest in combating secondary effects, Atlanta must produce evidence that problems exist and establish a connection between those negative effects and the act of wearing saggy pants.[326] Otherwise, a ban on saggy pants that expose undergarments does not further an interest in preventing secondary effects. Atlanta may attempt to locate or develop reliable

319. Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007).

320. *See* Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2.

321. Glanton, *supra* note 4.

322. Korosec, *supra* note 6.

323. Brett & Scott, *supra* note 1.

324. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).

325. *See Erie*, 529 U.S. at 290; *Renton*, 475 U.S. at 48. *But see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582-83 (1991) (Souter, J., concurring) (suggesting that the Court need not limit itself to consideration of the legislature's actual intent but could consider any interest, as long as the interest may be used to support the constitutionality of the regulation).

326. *See Erie*, 529 U.S. at 296-97 (requiring a showing that the targeted conduct "was likely to produce . . . the secondary effects"); *Barnes*, 501 U.S. at 583-84; *Renton*, 475 U.S. at 51.

studies demonstrating problems concerning crime, unemployment, and lack of education or other alleged effects.[327] However, the unsupported assertions of a few councilmembers do not provide adequate evidence of the existence of secondary effects.[328]

Additionally, while the government may prove the existence of negative social conditions within the city limits of Atlanta, the government is unlikely to establish that these problems are related to the action of wearing saggy pants. Presumably, exposing one's undergarments on a public street does not directly contribute to more crime. Moreover, the presence of saggy-pants wearers in areas that suffer from social problems provides only a tenuous connection between those problems and the conduct targeted by the ordinance. Therefore, an ordinance eliminating the exposure of underwear does not reduce these effects. Despite the fact that the City may have a legitimate interest in eliminating any problems, a court should not find an important or substantial governmental interest without evidence that problems exist and evidence connecting those problems to saggy-pants wearing.[329]

c. Atlanta's Interests are Unrelated to the Suppression of Free Expression.

In addition to requiring that the ordinance further an important government interest, *O'Brien* requires the interest to be unrelated to the suppression of free expression.[330] This element of the *O'Brien* test merely repeats the content-neutral inquiry that determines the level of scrutiny to be applied to the ordinance by the courts.[331] For *O'Brien* to apply, the ordinance must reflect a content-neutral purpose, unrelated to any agreement or disagreement with the messages expressed by the regulated conduct.[332]

Atlanta may argue that its ordinance targets the non-expressive action of wearing pants that expose the wearer's undergarments. As such, the ordinance does not distinguish between certain messages that may be expressed by saggy-pants wearing but rather prohibits the action as a whole. Moreover, by regulating the saggy-pants fashion, Atlanta hopes to eliminate the secondary effects associated with this fashion.

327. These studies may be the result of their own investigations or those of another city with similar problems. *See Erie*, 529 U.S. at 296-98.

328. *See id.* at 296-97; *Barnes*, 501 U.S. at 583-84; *Renton*, 475 U.S. at 51.

329. *See Erie*, 529 U.S. at 296-97; *Barnes*, 501 U.S. at 583-84; *Renton*, 475 U.S. at 51.

330. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

331. *See* discussion *supra* Part V.A.

332. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989).

The ordinance, therefore, is likely unrelated to the suppression of free expression and satisfies the third *O'Brien* factor.[333]

d. Atlanta's Ordinance Restricts More Expression than is Necessary to Further a State Interest

In order to meet *O'Brien*'s final element, the anti-sag ordinance can restrict expressive conduct no greater than what is necessary to further the City's interests.[334] This element draws a connection between the asserted government interest and the means of achieving that interest. The government does not need to enact the least restrictive means of furthering its interest, as long as it can show that the interest would be "achieved less effectively absent the regulation."[335] Additionally, the regulation must allow for sufficient alternative means of communicating the same message.[336]

Atlanta may assert an interest in protecting the morality and order of its citizens by using its police powers to enact the anti-sag ordinance as part of its public indecency statutes. The anti-sag ordinance protects public decency by prohibiting pants that reveal undergarments, or the indecent exposure of undergarments.[337] As such, Atlanta's ordinance regulates a particular fashion style on public streets. In contrast, in order to violate other types of public indecency statutes in other jurisdictions—statutes which the courts have upheld—a person must appear in public completely nude or engage in public displays of sexual conduct, such as sexual intercourse or fondling of a person's genitals.[338] Atlanta's ordinance goes much further than these statutes; an individual violates the anti-sag ordinance by revealing *clothing* in public. Arguably, public nudity and public displays of sexual behavior are overtly indecent. Even if one believes that revealing undergarments is suggestive, or has some sexual connotations, it hardly seems appropriate to classify the saggy pants fashion with public acts of sex. For many years, cities have more or less effectively regulated decency without expanding the definition of indecent behavior to include the display of clothing. As such, it seems improbable that an interest in order and morality would be "achieved less

333. *See supra* Part V.A for greater discussion on these content-neutral purposes.

334. *See O'Brien*, 391 U.S. at 377.

335. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798, 798-99 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

336. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 301 (2000) (plurality opinion); *Ward*, 491 U.S. at 797-98; Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 287 (5th Cir. 2001).

337. Atlanta, Ga., Proposed Ordinance 07-O-1800, §§ 106-13, 106-129 (2007).

338. *See Erie*, 529 U.S. at 283 (citation omitted); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 n.2 (1991) (plurality opinion) (citation omitted).

effectively" without regulating the expressive conduct of saggy-pants wearing.

The ordinance also fails to leave the speaker-actor with alternative avenues of communication. Atlanta may argue that a saggy-pants wearer need only pull up his pants to avoid a violation. Yet, the saggy pants fashion for which a speaker-actor claims protection involves not just the action of wearing looser clothing, but wearing it in a manner that reveals the wearer's undergarments. It is this factor, not just the bagginess of the clothing, but the whole style that communicates the speaker-actor's message of identification or rebellion. By prohibiting this exposure, the ordinance seriously inhibits the full value of the message expressed. The ordinance thereby forces the speaker-actor to choose a completely different mode of expression because the speaker-actor's chosen method of expression might offend some Atlanta residents. But, the First Amendment does not allow the government to eliminate speech merely because some individuals think it is offensive.[339] Therefore, Atlanta's means of accomplishing its stated purpose regulates significantly more expressive conduct than is necessary to further its interests. Because Atlanta fails to satisfy all four elements of *O'Brien*, the ordinance must be struck down as an unconstitutional restriction on First Amendment expressive conduct.

B. Atlanta's Proposed Anti-Sag Ordinance as a Content-Based Restriction

1. Content-Based Purposes of Anti-Sag Ordinance

Although a court will likely find Atlanta's ordinance to be content-neutral, there are several arguments in support of a content-based purpose for the regulation. The text of the regulation, as well as the statements of one of the Atlanta City Councilmembers, indicate the Council's disagreement with the saggy-pants fashion.

The text of Atlanta's ordinance provides insight into the government's asserted interests in an anti-sag ordinance. The City entitled its ordinance "Wearing of Pants Below the Waist in Public,

339. *See*, *e.g.*, Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." (citation omitted)); Cohen v. California, 403 U.S. 15, 21-26 (1971) (holding that the government cannot completely eliminate the word "fuck" merely because some people find its use offensive).

Unlawful."[340] Within the preamble to the proposed ordinance, the City notes that "the dress fad of wearing low hanging/saggy pants which exposes one's underwear is becoming a major concern for communities."[341] Atlanta recognizes that cities have responded to this concern by enacting bans on sagging pants that expose undergarments.[342] Those bans, in turn, have caused Atlanta to consider "the compatibility of such style of dress with standards acceptable to that of the general community as a whole."[343] Moreover, the ordinance states that the intent behind this legislation and similar legislation in other towns is to "curtail this cultural phenomenon."[344]

These statements indicate that the Atlanta City Council's purpose in enacting this indecency ordinance is to eliminate a specific fashion, wearing pants below the waist. Within the preamble, as well as the title of the new ordinance, the Council indicates its intent to eliminate a particular fashion. Although Atlanta prohibits the conduct in all places, at all times, it only prohibits one type of clothing choice—wearing saggy pants. Assuming that wearing pants so as to expose underwear constitutes protected expressive conduct,[345] the explicitly-stated purpose of this ordinance is to eliminate that conduct.

The language of the ordinance itself further supports an argument that the ordinance is content-based. Section 106-13 states, "[i]t shall be unlawful for any person to appear in public wearing pants below the waist which expose the skin or undergarments."[346] Again, the language directly targets a specific fashion which exposes undergarments—saggy pants.[347] In specifically targeting a single fashion, the council expresses a desire to eliminate that fashion and all of the style's accompanying messages. Therefore, the ordinance seems to be content-based.

In addition to the text of the proposed ordinance, statements of Councilmember C.T. Martin, the "force behind the proposed ban,"[348] support a content-based purpose. For Martin, saggy pants represent the "prison mentality" and signify the poor social conditions and problems associated with young black persons.[349] Martin proposed the law in an effort to resolve these social problems and improve "community

340. § 106-13.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* § 106-129.
345. *See* analysis *supra* Part III.
346. *Id.* § 106-13.
347. *But cf. id.* § 106-29 (prohibiting all indecent exposure of undergarments).
348. Koppel, *Jeans Sagging*, *supra* note 2.
349. *See* Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2.

standards."[350] As his statements explain, through the anti-sag ordinance the government dictates which forms of clothing are acceptable fashions on a public street. This purpose clearly targets the messages or image projected by saggy pants wearing, and therefore, it is arguable that the proposed ordinance is content-based and should be evaluated under a strict scrutiny standard of review.

The court, however, may not accept Martin's statements as evidence that the government interests or purposes are related to the suppression of free expression. The *O'Brien* Court cautioned against invalidating "an otherwise constitutional statute on the basis of an alleged illicit motive."[351] *O'Brien*'s admonition suggests that Councilmember Martin's statements to the press cannot be relied upon as evidence that Atlanta enacted its anti-sag ordinance because of disagreement with the messages expressed by saggy pants.[352] However, Martin's statements merely affirm the content-based purpose implicit in the actual language of the statute. By identifying a single fashion, the Atlanta Council clearly conveys its disagreement with saggy pants and all messages expressed by saggy pants. Thus, even if the court refuses to attribute a purpose to the Council on the basis of a single Councilmember's statements, ample evidence of the content-based purpose still exists within the ordinance itself.

2. Strict Scrutiny Test Applied to Atlanta's Proposed Anti-Sag Ordinance

If a court finds the anti-sag ordinance cannot be justified on grounds other than disagreement with the content of the message, then it must apply the strict scrutiny standard for content-based regulations.[353] Under strict scrutiny, the court presumes the Atlanta ordinance to be an invalid restriction on First Amendment expression.[354] In order for the ordinance to be upheld, the State must demonstrate that the anti-sag ordinance "is necessary to serve a compelling state interest and is narrowly drawn to

350. *Clothes not a crime*, *supra* note 178.

351. United States v. O'Brien, 391 U.S. 367, 383 (1968).

352. *But see* City of Erie v. Pap's A.M., 529 U.S. 277, 329, 330 n.16 (2000) (Stevens, J., dissenting) (arguing that the statements of four of the six legislators who voted to adopt the regulation reflect a content-based purpose).

353. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989).

354. *See id.* at 403; Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 723 (7th Cir. 2003).

achieve that end."[355] To satisfy this test, the anti-sag ordinance must be the least restrictive means of achieving Atlanta's purposes.[356]

Because this Comment concludes that Atlanta's anti-sag ordinance fails the second and fourth elements of *O'Brien*'s "less stringent standard,"[357] it presumes that it fails the more exacting strict scrutiny standard.

VI. CONCLUSION

Saggy-pants wearers, dismayed by recent legislative enactments to regulate fashion on public streets, may soon appear before the courts in an attempt to challenge the constitutionality of anti-sag ordinances, such as Atlanta's proposed law. Many critics of these regulations believe that the government's regulation denies the saggy-pants wearers First Amendment protection by infringing on their rights to free expression.[358] The challengers, however, are likely to fail under current First Amendment jurisprudence.

The biggest obstacle for saggy-pants wearers will be establishing that their clothing choices should be protected as First Amendment expressive conduct. To be deemed expressive conduct, the wearers must demonstrate that (1) they intend for their conduct to communicate a particularized message, and (2) that their message is likely to be understood by others.[359] Yet, many of the wearer's asserted messages do not communicate a clearly identifiable message that satisfies the particularized message requirement. Moreover, the popularity of the saggy-pants style impedes a viewer's ability to discern the message intended by the wearer. Accordingly, the action of wearing saggy pants that expose the wearer's undergarments is unlikely to be deemed expressive conduct protected by the First Amendment. Although there may be factual circumstances in which the wearer could satisfy the test for expressive conduct, most First Amendment challenges will fail before the court even considers the validity of the ordinance.

However, if a court finds that wearing saggy pants constitutes expressive conduct, then the court should invalidate the ordinance because it impermissibly denies First Amendment protection. In order to determine which standard of review to apply to the Atlanta anti-sag

355. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Arkansas Writers' Project, Inc. v. Raglund, 481 U.S. 221, 231 (1991)).

356. Ashcroft v. ACLU, 542 U.S. 656, 666 (2004); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

357. *Johnson*, 491 U.S. at 403.

358. *See* Brett & Scott, *supra* note 1; Bacon-Blood, *supra* note 6.

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

ordinance, the court must first decide whether the ordinance is content-neutral or content-based. This determination rests on whether Atlanta is regulating saggy pants out of disagreement with the messages they communicate.[360]

There are valid arguments in support of either side of this issue. On the one hand, the City of Atlanta may argue that its ordinance is content-neutral because it prohibits the action of exposing one's undergarments without reference to any messages that they express. Additionally, the ordinance forms part of the City's public indecency statutes, which are usually found to have a content-neutral purpose.[361] On the other hand, the ordinance's title, preamble, and text[362] clearly point to the Council's disagreement with the fashion—both the image that the fashion creates and the messages that its wearers intend to convey. Moreover, press statements by the ordinance's author indicate the Council's intent to target a single fashion for eradication.[363] A court may therefore find that the statute is either content-neutral or content-based.

Regardless of the court's determination as to legislative purpose, the ordinance fails to satisfy the applicable standard of review. Although Atlanta has the constitutional authority to enact a public indecency ordinance such as the anti-sag ordinance,[364] it does not have a sufficiently important interest to justify a regulation of First Amendment expressive conduct. Moreover, by prohibiting an entire class of expressive conduct, without leaving adequate alternative means of communicating the same message, Atlanta's ordinance regulates more First Amendment conduct than necessary to effectuate any government interests. Atlanta's anti-sag ordinance thereby fails to satisfy even the less exacting standard for a content-neutral ordinance. As such, if the action of wearing saggy-pants constitutes expressive conduct under the First Amendment, then the court must invalidate Atlanta's ordinance.

360. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

361. *See*, *e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289-90 (2000) (plurality opinion).

362. Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007).

363. *See Clothes not a crime*, *supra* note 178; Glanton, *supra* note 4; Koppel, *Jeans Sagging*, *supra* note 2.

364. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion).